Three Essays on Legal Issues Impacting the Employment Relationship In Canada

by

Bruce John Curran

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Centre for Industrial Relations and Human Resources, School of Graduate Studies
University of Toronto

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Abstract

The first of three papers helps resolve the substantial debate about the impact of *Honda v. Keays*, a 2008 Supreme Court of Canada decision modifying the principles for compensating employees for improper employer conduct during dismissal (called "moral damages"). I performed content analysis on all relevant Canadian cases in the four years after Honda and an equivalent period before *Honda* and then used a tobit model to test legal scholars' and lawyers' predictions. I find that moral damages are less probable after *Honda*. Furthermore, the size of awards is smaller in those cases where moral damages are granted, partly because certain levels of employer misconduct now produce lower damages. However, I also find that, since *Honda*, high levels of mental distress are compensated more richly.

The second paper is motivated by the absence of recent studies that investigate delay in grievance arbitration, despite increasing concerns being voiced about the issue. I performed content analysis on a random sample of about 400 Ontario arbitration awards, and then used a proportional hazards model to examine the extent of delay and its determinants. Consistent with common perception, the results suggest that delay has become a worse problem over the past two decades. I find that certain legalistic factors and the expanded jurisdiction of arbitrators over specific types of issues are associated with delay. The results also show that certain dispute resolution procedures are related to decreased delay, and this suggests some practical solutions.

Prompted by a recent series of Supreme Court of Canada (SCC) decisions on freedom of association (FOA) in the labour context, the third paper critically examines the Canadian jurisprudence. The state of this law in Canada has been roundly criticized by various prominent labour law academics. This paper relies on Sheldon Leader's theory of FOA to argue that the SCC should have interpreted s. 2(d) of the *Charter* as protecting collective bargaining and striking as independent rights, rather than as rights necessary for the realization of the FOA. Having done so would have yielded jurisprudence that was more consistent and coherent.

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Chapter 1
Introduction[1]

In this thesis, I explore three important yet heretofore unresolved legal issues that impact the employment relationship. In doing so, I span a broad range of levels of analysis, and draw on a variety of different disciplines and research methods.

The first two papers are empirical in nature, and use content analysis combined with statistical models. My first paper examines the impact of *Honda* v. *Keays*, a 2008 Supreme Court of Canada decision dealing with important employment law principles. *Honda* modified the principles relating to "moral damages", which are meant to compensate for psychological injury that an employee experiences due to improper employer conduct in the dismissal process. Some commentators claim that the *Honda* case will be used by employers as a shield. They argue that the new principles will make it harder for employees to get moral damages, and that furthermore such damages will be smaller when awarded due to a decreased legal emphasis on employer misconduct. Other scholars predict that the *Honda* case can be used to employees' advantage in lawsuits against employers (i.e., as an employee sword). They assert that *Honda* will enable employees to obtain larger moral damages in certain circumstances, due to an increased legal emphasis on employee harm suffered. In order to resolve this debate, I compared all 111 Canadian cases involving claims for moral damages in the four years post-*Honda*, to all 173 cases in the equivalent period of the pre-*Honda* era. I created data by coding the cases, and then used a tobit model to test the legal scholars' and lawyers' predictions.

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[1] Note that APA style (from the Publication Manual of the American Psychological Association, 6th ed.) will be used for the formatting and references of this thesis, except for Chapter 4. In that Chapter, the Canadian Guide to Uniform Legal Citation (also known as the "McGill Guide") will be used.

My second paper examines delay and its determinants in Ontario from 1994 to the present. There is evidence that delay in Canadian grievance arbitration increased substantially from the early 1970s to the mid-1990s. Delay in grievance arbitration has been found to be problematic because it can threaten the fairness of a particular hearing while substantially increasing the costs, and it is also corrosive to labour relations generally. While a number of empirical studies during that timeframe examined delay and its causes, there are no recent studies that investigate these issues despite the fact that academics and practitioners have recently voiced renewed concerns about the threat that delay poses to the viability of grievance arbitration. To address this gap in the labour relations literature, I coded a random sample of almost 400 Ontario arbitration awards over the past two decades. I then performed event history analysis on the data to determine the various factors that were associated with delay in the grievance arbitration system.

The third paper draws more heavily on traditional legal analysis, adopts a macro perspective, and critiques the Supreme Court of Canada's freedom of association jurisprudence in the labour context. This jurisprudence has important implications for the ability of unions and less formal employee associations to collectively bargain and to strike, and ultimately influences the degree to which employees can exercise collective action in order to act as a countervailing force in what is typically a relationship of unequal power with the employer. Although some increased clarity may have been provided by the series of Supreme Court of Canada (SCC) decisions delivered in early 2015, the general state of the Canadian law on workers' right to freedom of association (RFOA) has been roundly criticized by various prominent labour law academics and practitioners. This paper summarizes the key elements of Sheldon Leader's theory of the RFOA, which he developed using first principles from philosophy, political theory,

and law. I then use this theory to analyze the jurisprudence of the SCC, and argue that it would have been more consistent and coherent had this theory been relied on.

In the concluding chapter of this thesis, I will attempt to put all three papers in perspective using John Budd's and Alexander Colvin's work on equity, efficiency and voice.

Chapter 2
Honda v. Keays–Employer Shield Or Employee Sword? An Empirical Analysis

1 Introduction

In June of 2008, the Supreme Court of Canada decided *Honda* v. *Keays* ("*Honda*"), a case that has critical implications for terminations of employment in Canada. It has implications for how judges decide legal cases arising out of difficult dismissals. For individual employers, the decision affects the legal and financial risks inherent in dismissals, and the extent to which they can relax their human resource policies and practices related to terminations. For employees, the decision may affect their ability to recover damages arising from difficult terminations. The case also has great significance for legal counsel to employers and employees in terms of the advice provided during the termination process, and in the conduct of any litigation arising from this process. And, the *Honda* decision also has important public policy implications, as it likely impacts the generalized level of sensitivity with which employers approach dismissals.

Honda modifies the legal principles regarding the award of "moral damages". Moral damages are meant to compensate for psychological distress and likely other types of losses that an employee experiences due to dishonest, callous, or vindictive employer conduct in the dismissal process ("bad faith conduct") (MacDonald, 2010). Examples of bad faith conduct include asserting baseless allegations of theft against the employee during the dismissal process or defaming the terminated employee to prospective future employers. Before *Honda*, employment law principles permitted a judge who found bad faith conduct to assume that an employee had experienced injury as a result, and to award moral damages by extending the employee's reasonable notice period. As a result of *Honda*, moral damages can now only be

awarded if an employee proves that he or she experiences a loss as a direct result of the employer conduct, and the damages awarded are to be a specific dollar sum to compensate for this loss, rather than an arbitrary extension of the notice period.

Legal scholars and lawyers are divided about the potential impact of these revised principles. Some argue that *Honda* favours employer interests by making it harder for employees to obtain moral damages and by reducing the risks of bad faith conduct (e.g., Edmonds, 2011; Fitzgibbon, 2009; and Lublin, 2009) (the "employer shield" hypothesis). Others argue that the impact will not be uniformly positive for employers in all situations. While they acknowledge the increased evidentiary burden to employees in obtaining moral damages, they argue that, for those employees who meet this burden, such damages are likely to be larger than before *Honda* (Doorey, 2008; England, 2008) (the "employee sword" hypothesis). Shortly after *Honda* was decided, this possibility was highlighted when an Alberta trial judge awarded a terminated financial advisor $1.6 million in moral damages (*Soost* v. *Merrill Lynch Canada Inc.*, 2009). However, this large award in *Soost* was overturned by the Alberta Court of Appeal (*Merrill Lynch Canada Inc*. v. *Soost*, 2010), lending support to the employer shield hypothesis.

This difference of opinion motivates the current empirical study. I have performed a statistical analysis of moral damage awards in Canada to determine whether these awards have changed since *Honda*, and if so, the factors driving these changes. I will outline the methodology and results of my study, followed by a discussion of the implications. However, before that, I will conduct a brief review of the relevant legal principles, outline the debate among legal scholars and lawyers that the case has generated, and develop several testable hypotheses.

2 Legal Background

In this section, I will provide a brief overview of the principles related to "bad faith" dismissals, and how they have changed over the years. It is important to keep in mind that these principles apply to employment relationships that are not covered by collective agreements (i.e., they do not apply to unionized workforces). In very general terms, these principles can be divided into three historical phases: from the mid-1800s to 1997, from 1997-2008, and from 2008 onwards. In the earliest phase, the courts did not generally recognize the duty of an employer to dismiss an employee in good faith. The second phase began with the Supreme Court of Canada's decision in *Wallace* v. *United Grain Growers Ltd.* (1997), which established that employers are liable for engaging in bad faith conduct in the context of a dismissal. The third phase started with the advent of the *Honda* decision, which modified the principles established in *Wallace*.

It is useful to think of each of these historical phases as being influenced by two competing "paradigms". One of the "paradigms" is an "employee rights" approach, where the law strives to provide employees being terminated with a bundle of rights to protect their interests. On the other hand, a conflicting paradigm is the "efficiency" approach, whereby the law strives to give employers latitude to terminate the employment relationship in an efficient manner for the optimal structuring of their business operations (England, 1995). The first phase of bad faith dismissal damages was dominated by the efficiency paradigm; the second phase represented a decisive shift towards the rights paradigm; and the third phase may have entailed a shift back towards the efficiency paradigm.

2.1 Phase 1: No Duty of Good Faith in the Manner of Dismissal (Mid-Nineteenth Century to 1997)

In general terms, Canadian employers in common law jurisdictions[1] are legally entitled to terminate non-union employment relationships of indefinite term at any time, as long as their reasons are not discriminatory under applicable human rights legislation. Where the employer does not have a legally recognized "cause" for dismissal (an example of cause would be theft by the employee), it has an obligation to provide the employee with either "reasonable notice" that the employment relationship is ending, or pay in lieu of reasonable notice.[2] This obligation to provide reasonable notice only extends to employment contracts of indefinite term—there is not generally an obligation to provide reasonable notice in an employment contract of fixed length (Ball, 2011). The contemporary rationale for this reasonable notice requirement is to give the employee time to look for another job.[3] Where the employer does have "cause" for dismissal, the employer is not obliged to provide reasonable notice or pay in lieu (Ball, 2011; England, 2007).

Although the law generally required (and still requires) the employer to provide reasonable notice to the employee in the absence of "cause", the law did not generally require the employer to compensate the employee for the psychological trauma associated with being terminated (*Honda*, 2008). This principle originates from the English case of *Hadley v. Baxendale* (1854). In that case, the delivery company for a milling company was late in the

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[1] I.e., outside Quebec, which is a civil code jurisdiction.

[2] The obligation on employers to give reasonable notice developed over a number of centuries in England, but is now a cornerstone of Canadian employment law. This obligation originated in the agricultural sector, but by the mid-1850s, it started to be applied in industrial settings. For a summary of the history of the obligation to provide reasonable notice, see Etherington (1990). Note that the obligation to provide reasonable notice can be overridden by a specific term in a written employment contract.

[3] Although some of the historical reasons are less benevolent, such as the prevention of collective action by workers. For a discussion of these historical reasons, see Etherington (1990).

delivery of a broken mill shaft to the masons who were supposed to fashion a new shaft. Unbeknownst to the delivery company, the late delivery meant that the mill, which was without a spare shaft, sat idle and lost profit. Lord Alderson, of the English Court of Exchequer, ruled that any contract-breaker ought only be liable for such damages as "may fairly and reasonably be considered either arising naturally, i.e. according to usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." (para 3). In the case at bar, the Court ruled that the delivery company was not liable for the miller's consequent loss of profits. This became known as the "foreseeability principle". Even though the case was not one involving an employment relationship, it was ultimately extended to the employment relationship. In the employment law context, the principle has been applied to mean that, at the time the employment relationship was formed, it is not in the contemplation of the parties that the employer would be liable for the hurt feelings of the employee caused by termination—generally, what is in the contemplation of the parties is that the contract may end at any time, provided notice is given (*Honda*, 2008, para 56).

The next relevant case on the issue of damages related to the manner of dismissal is another English one by the House of Lords, *Addis v. Grammophone* (1909). In that case, a manager experienced mental distress and claimed loss of reputation as a result of suddenly and harshly being relieved of his position, and not being permitted to work out his notice period. At issue was whether the employee could recover losses for harm occasioned by the manner of termination. The court relied on *Hadley* and ruled that, generally, mental distress damages and

damages for loss of reputation were not available unless there was a "separate actionable wrong,"[4] which did not exist in the case at bar.

The next case of importance is the Supreme Court of Canada's decision in *Peso Silver Mines v. Cropper* (1966). In that case, Cropper was the Managing Director of Peso Silver Mines, but also owned a part interest in two other mining companies, Cross Bow and Mayo. These other mining companies were pursuing opportunities that Peso Silver Mines had earlier declined. A controlling interest in Peso Silver Mines was acquired by a company called Charter, and Cropper was asked to sell his interests in Cross Bow and Mayo to Peso Silver Mines at cost. The employee refused, and was forced by Peso Silver Mines to resign. At trial, the judge awarded Cropper $10,000 which represented the balance of his salary for the year ending December 16, 1964. He indicated, however, that he would have "fixed the damages at $6,500 were it not for the circumstances of the respondent's dismissal, namely that the unsubstantiated allegations of impropriety made against him and the fact of his dismissal so shortly after Charter had taken control of the appellant could not fail to damage his reputation among mining men" (p. 684). Justice Cartwright for the Supreme Court ruled that "the claim being founded on breach of contract, the damages cannot be increased by reason of the circumstances of dismissal whether in respect of the [employee's] wounded feelings or the prejudicial effect upon his reputation and *chances of finding other employment*" (p. 684, emphasis added). So, the Supreme Court applied the principle from *Addis v. Grammophone* (1909) that damages in a wrongful dismissal action cannot be increased by reason of the circumstances of the dismissal, either to acknowledge injuries to reputation or for mental distress. Furthermore, Justice Cartwright's inclusion of the phrase "chances of finding other employment" in his statement of the principle suggested that

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[4] An example of a separate actionable wrong is the tort of defamation.

economic injuries related to the manner of dismissal are also foreclosed from recovery. This represents an extension, albeit a logical one, to the application of the principle in *Addis* (1909), which related only to less tangible injuries like mental distress or loss of reputation.

The last case of interest is the Supreme Court of Canada decision of *Vorvis v. ICBC* (1989). The case dealt with the issue of aggravated damages for mental distress.[5] The employee, Mr. Vorvis, was a lawyer with the Insurance Corporation of British Columbia. He was conscientious to a fault—he had a penchant "to produce a Cadillac when a Ford would do" (*Vorvis v. ICBC*, 1989, p. 1111). This caused him to fall behind on his work projects. He was subjected to belittling and humiliating work-load meetings, which caused him to require medical attention. He was then terminated for incompetence.

Justice McIntyre, for a majority of the Supreme Court, rejected Vorvis' claim for aggravated damages for mental distress, stating, "…I would conclude that while aggravated damages may be awarded in actions for breach of contract in appropriate cases, this is not a case where they should be given… I would not wish to be taken as saying that aggravated damages could never be awarded in a case of wrongful dismissal, particularly where the acts complained of were also independently actionable, a factor not present here" (*Vorvis v. ICBC*, 1989, p. 1103). In other words, the employer's behaviour in the case at bar was not serious enough to warrant aggravated damages for mental distress.

The fact that damages were not awarded for the manner of dismissal (and that only reasonable notice damages for the fact of dismissal were awarded) during this phase is evidence that the law favoured the efficiency paradigm over the rights paradigm. Nevertheless, the Supreme Court's ruling in *Vorvis* (1989) that aggravated damages for mental distress could be

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[5] The case also dealt with punitive damages, but these damages are not the focus of the present study, and therefore the issue of punitive damages in the *Vorvis* case will not be discussed here.

awarded in an appropriate case in the future left open the possibility of a move towards the rights paradigm. In 1997, a Supreme Court of Canada decision signaled a decisive shift towards the rights paradigm.

2.2 Phase 2: *Wallace* v. *United Grain Growers* (1997-2008)

Wallace v. *United Grain Growers Ltd.* ("*Wallace*") was a 1997 landmark decision of the Supreme Court of Canada that introduced the concept of damages for "bad faith" employer conduct. The facts of the case were as follows. In 1972 a printing company decided to update its operations and seek a larger volume of commercial printing work. Wallace met with the marketing manager of the company's publishing and printing divisions, to discuss the possibility of employment. Wallace had the type of experience the manager sought, having worked approximately 25 years for a competitor that used a particular type of press. Wallace explained to the manager that as he was 45 years of age, if he were to leave his current employer he would require a guarantee of job security. He also sought several assurances from the manager regarding fair treatment and remuneration. He received such assurances and was told by the manager that if he performed as expected, he could continue to work for the company until retirement.

Wallace was hired and enjoyed great success at the company; he was the top salesperson for each of the years he spent in its employ. In 1986 he was summarily discharged without explanation. Wallace commenced a lawsuit alleging wrongful dismissal, and United Grain Growers defended the action by asserting that Wallace had been dismissed for cause. This allegation was maintained until the trial commenced. The termination of Wallace's employment and the allegations of cause created emotional difficulties for him and he was forced to seek psychiatric treatment. His attempts to find similar employment were largely unsuccessful.

At trial, Wallace was awarded damages for wrongful dismissal based on a 24-month notice period and $15,000 in aggravated damages resulting from mental distress in both tort and contract. The trial judge refused to award punitive damages. The Manitoba Court of Appeal reduced the reasonable notice period to 15 months, on the basis that the trial judge may have allowed an element of aggravated damages to creep into his assessment and that recent awards in such cases had been getting too high, and overturned the award of aggravated damages.

When the case came before the Supreme Court, it returned the reasonable notice period to 24 months as assessed by the trial judge, but did not award aggravated or punitive damages for the employer conduct. The court ruled that bad faith conduct in the manner of dismissal is another factor that is properly compensated for by an addition to the notice period (the 24 month period including an addition to the notice period in this case). According to the court, the point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence most in need of protection. In recognition of this need, the Supreme Court reasoned that the law ought to encourage employer conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. To ensure that employees receive adequate protection, the court ruled that employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which ought to be compensated for by adding to the length of the period of reasonable notice. The court defined this duty of good faith as follows:

> The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. (*Wallace*, 1997, para 98)

The following table (Table 2.1) provides examples of employer conduct that judges have found to constitute "bad faith" pursuant to the *Wallace* case (England, 2007). Readers will find these examples useful illustrations of the kind of behaviour that meets the "bad faith" threshold.

In summary, the Supreme Court in *Wallace* established a legal duty on the part of the employer to engage in good faith in the context of a dismissal. Where the employer engaged in bad faith in the manner of dismissal, a court was able to use this as a factor in extending the employee's reasonable notice period. This increase in the notice period became known as the "*Wallace* bump" or "*Wallace* damages". It is important to note that, under *Wallace*, there was not a requirement for the employee to specifically prove his or her loss—such loss was assumed (Edmonds, 2011). The Supreme Court was not entirely clear about which employee losses should be compensated by *Wallace* damages. In *Wallace*, the main driver appeared to be the Wallace's mental distress. However, it seems as though the majority believed that a wide range of employee injuries could be compensated by *Wallace* damages. These injuries included tangible losses, such as the increased difficulties in obtaining comparable employment as a result of the bad faith conduct, and intangible losses such as mental distress and loss of reputation.[6] The principles established in *Wallace* were applied by lower courts without modification until the Supreme Court's decision in *Honda*, which ushered in the third phase.

[6] Note that the minority opinion, written by Justice McLachlin, was that these kinds of intangible losses should not be compensated for by an increase in notice period. According to the minority, only injuries to the ability to find comparable employment should go to increasing the notice period.

TABLE 2.1: Examples of Bad Faith Following *Wallace*	
Example of Bad Faith	**Case**
Attempting to justify dismissal on grounds that the employer knows, or ought reasonably to know are unfounded, especially where the allegations damage the employee's personal integrity or professional capabilities, and especially where the unfounded grounds are maintained up to the date of trial in order to pressure the employee into dropping the case.	*DiCarlo* v. *L.I.U.N.A. Local 1089* (2002)
Handling dismissal in a procedurally unfair manner, for example, by failing to give the employee an opportunity to explain alleged wrongdoings.	*Silvester* v. *Lloyds Register North America* (2004); *Baughn* v. *Offierski* (2001)
Attempting to force the employee into resigning by deliberately making life unpleasant.	*Keays* v. *Honda Canada Inc*. (2006, Ont. C.A.)
Attempting to force the employee into failure by deliberately sabotaging his or her work, or by setting unattainable performance goals so as to justify dismissing the employee.	*Mark* v. *Westend Development Corp.* (2002)
Responding in a callous and brutal way to an employee who is encountering performance difficulties due to personal or work-related problems.	*Lavinskas* v. *Jacques Whitford and Associates Ltd.* (2005); *Rinaldo v. R.O.M.* (2004)
Terminating an employee in a callous and brutal manner, for example, by marching the employee out the door in the presence of coworkers, or by giving the employee notice of termination while the employee is having medical problems and there is no compelling business reason for handling the termination in that manner.	*Geluch* v. *Rosedale Golf Association* (2004); *Kaiser* v. *Duval* (2002)
Utilizing hardball tactics, such as withholding vested entitlements, cajoling the employee into signing a settlement offer on the spur of the moment and without legal advice, or purposely prolonging the litigation so as to "bleed the employee white".	*English* v. *Alcatel Networks Corp.* (2002); *McGeady* v. *Sask. Wheat Pool* (1998)
Refusing to give the employee a reference or providing an unfair one out of revenge or spite.	*Barakett* v. *Levesque Beaubien Geoffrion Inc.* (2001)
Badmouthing the employee's personal integrity or professional competence to potential employers out of revenge or spite.	*Silvester* v. *Lloyds Register North America* (2004); *Geluch* v. *Rosedale Golf Association* (2004)

2.3 Phase 3: *Honda* v. *Keays* (2008-Present)

The Supreme Court's decision in *Honda* substantially modified the "bad faith" damage principles enunciated in *Wallace*. However, before turning to the Supreme Court's decision, some background on the case is necessary. At trial, the judge found the following facts. Mr. Keays was a management employee in the quality control department at the Honda plant in Alliston, Ontario. Shortly after starting at the plant, he developed chronic fatigue syndrome (CFS) and missed a substantial amount of work. Honda placed the employee on an attendance management plan, but the plan was not particularly well suited to someone with CFS, because it required each absence to be medically validated before a return to work. Eventually, Honda required Mr. Keays to see a company physician. When the first examination occurred, the physician threatened to move the employee to a more physically demanding job on the production line. Honda then insisted that Mr. Keays meet with its company physicians again, and told him these doctors believed that his absences were unjustified. Mr. Keays asked for clarification of the purpose and scope of the meeting, which Honda refused to provide. When Keays refused to meet with Honda's physicians until the purpose of the meeting was clarified, a stand-off ensued which resulted in Mr. Keays' dismissal.

At trial, the judge was extremely critical of the way Honda managed Keays' disability and the termination. He ruled that Honda's behaviour was driven by an attempt to avoid its duty to accommodate Mr. Keays, and that the termination was in bad faith. In the result, he awarded nine months in *Wallace* damages, and a sizeable punitive damage award on top of the *Wallace* damages. On appeal, the Ontario Court of Appeal upheld the decision, but reduced the punitive damage award. Honda then appealed to the Supreme Court.

In its decision, the Supreme Court reiterated that damages for the manner of dismissal will be available if they result from the circumstances described in *Wallace*. In other words, the

test for "bad faith" remains the same. However, unlike the methodology established in *Wallace*, these damages should be awarded through a dollar award that compensates the employee for the loss actually suffered, rather than by arbitrarily extending the notice period. The Supreme Court's discussion of the kinds of losses which are compensable as a result of "bad faith" conduct were focused mainly on psychological injury, but the principles would appear to be broad enough to encompass the other losses discussed by the majority in *Wallace*. These other losses would include the loss of reputation, and the injuries to future employment prospects.

Applying these revised principles to the case at bar, the Supreme Court ruled that no moral damages should have been awarded by the lower courts, for two reasons. First, the Supreme Court overruled the findings of the trial judge that Honda's conduct in dismissing Keays met the threshold of bad faith. On these findings, the trial judge made "overriding and palpable errors of fact" (*Honda*, 2008, para 61). The Supreme Court overturned the trial judge's finding that Honda misrepresented the positions of its doctors, and that Honda took a "hardball" approach to managing Keays' absences. Instead, a majority of the Supreme Court found that Honda relied in good faith on the advice of its medical experts, and was simply seeking to confirm Keays' disability. It is important to realize that on this aspect of the case, the Supreme Court was not increasing the threshold, established in *Wallace*, for determining employer bad faith. Rather, it was taking the unusual step of reversing findings of fact made by the trial judge. Presumably, if the facts were left undisturbed, the Supreme Court would have found that Honda's conduct met the test for bad faith. Given the Supreme Court's ruling that there was no bad faith, it also struck down the punitive damage award.

Even if Honda's conduct would have amounted to bad faith, the Supreme Court gave a second reason why the plaintiff was not entitled to moral damages: There was no evidence that his disability subsequent to termination was *caused* by the manner of termination. The court

accepted the fact that the plaintiff was struggling with chronic fatigue syndrome before being terminated, and that his condition became worse after the termination. However, the court ruled that the plaintiff had not adduced any evidence to establish that Honda's conduct during the termination had *caused* his condition to deteriorate.

In the aftermath of *Honda*, there was a great deal of legal commentary, which I will now outline, on how the revised principles might impact future moral damage awards.

3 Legal Commentary and Hypotheses

3.1 Legal Commentary on the Impact of *Honda*

After the Supreme Court of Canada decision was released in June of 2008, many lawyers and legal scholars made predictions about how *Honda* will impact moral damage awards. There was consensus that the legal test for what constitutes employer bad faith, set out in *Wallace*, was not changed in *Honda*. In other words, the commentators asserted that the same types of employer misconduct that constituted bad faith under *Wallace* still constitute bad faith under *Honda* (Edmonds, 2011; England, 2008; Fitzgibbon, 2009; Lublin, 2009).

Despite this common ground, there were two main areas of disagreement. The first related to whether the likelihood of a plaintiff being awarded *any* moral damages changed as a result of *Honda*. The second related to whether, in those cases where some amount of moral damages is awarded, the size of moral damage awards will be bigger or smaller as a result of the revised principles in *Honda*.

As for the disagreement about the likelihood of moral damages, some legal commentators predicted that *Honda* will cause a shift back towards the efficiency paradigm. Specifically, these commentators argued that moral damages will be less likely than under the *Wallace* era, because of the higher evidentiary burden on employees established in *Honda* (e.g., Edmonds, 2011; Fitzgibbon, 2009; Lublin, 2009; Veel, 2009). They predicted that, under the *Wallace* era, courts

presumed that an employee suffered injuries if bad faith conduct was established, and awarded a "*Wallace* bump" to the period of reasonable notice. According to them, following *Honda*, employees will only be awarded moral damages if they prove a) that they suffered actual harm, and b) that the harm suffered was a direct result of the employer misconduct (Edmonds, 2011). For example, an employee who was struggling with depression before being dismissed, and had her depression worsen after being terminated in an insensitive manner, would probably now have to call a psychologist/psychiatrist as an expert witness to establish the extent to which this depression worsened as a result of the employer misconduct. Calling expert testimony will be an expensive proposition for the employee, perhaps prohibitively so. Additionally, the employee will be faced with the potentially difficult evidentiary task of refuting the employer's argument that the increase in severity of the depression was due to other life events, and was not related to the employer's conduct. All of this, these commentators argue, will likely make it more difficult for employees to prove moral damages in wrongful dismissal cases. To summarize, many legal scholars and lawyers believed that this additional evidentiary burden will result in a lower probability of there being a moral damages award for a given case (Edmonds, 2011; England, 2008; Doorey, 2008; Fitzgibbon, 2009; Lublin, 2009; Veel, 2009). This prediction can be called an "employer shield" hypothesis, because it posits that *Honda* provides employers with additional defenses in bad faith dismissal actions.

However, not all authors agree that *Honda* established an additional evidentiary burden with an associated lower probability of damages. For example, MacDonald (2010) pointed out that there was no express requirement in the *Honda* decision for the employee to adduce medical or other expert evidence in support of a claim for moral damages. She argued that courts are still permitted to presume that employee injury flows from employer misconduct, just as they did

during the *Wallace* era, without the need for specific proof. Based on MacDonald's reasoning, one would not expect the probability of moral damages to change in the *Honda* era.

As previously mentioned, the second source of disagreement among commentators related to the size of award. Some lawyers argued that now even for those cases that have met the putative higher evidentiary burden, the average size of the damage awards will be smaller than in the *Wallace* era (Lublin, 2009). This is another employer shield hypothesis. They have two main reasons for this prediction. The first relates to the forseeability principle, which was originally set out in *Hadley* v. *Baxendale*, and reiterated most recently by the Supreme Court of Canada in the decision of *Fidler* v. *Sun Life* (2006), a case outside the employment context. As discussed above (see section 2.1, Phase 1), based on this principle, a plaintiff is only awarded damages for breach of contract to the extent that these damages were foreseeable by the contracting parties at the time a contract was formed. The *Honda* decision made specific reference to this principle, which may serve to limit the amount of moral damages, as extensive moral damages in the event of a bad faith termination were likely not in the contemplation of the parties at the time the employment relationship was formed. The other reason why damage awards may be smaller is that, to the extent that *Honda* encourages a focus on compensation for psychological injury, rather than economic injury, this will lead Canadian courts to continue what has been a historically conservative trend in mental distress awards (Edmonds, 2011). Edmonds (2011) notes that the damages for mental distress in the Canadian courts have been "consistently modest", being between $20,000 and $75,000 (p. 41).

Conversely, there is another branch of commentators, mainly comprised of legal scholars, who believe that *Honda* will actually lead to larger moral damage awards on average for those plaintiffs who are successful in meeting the putative higher evidentiary burden (Doorey, 2008; England, 2008). According to England (2008), "compensating economic and psychological

losses in accordance with the *Hadley* principle will likely further the employees' right to decency by resulting in substantially larger damages awards than under the *Wallace* doctrine, because the employee will be compensated for his or her actual losses" (p. 349). England (2008) appears to be anticipating that the largest damages will arise when employees are compensated for substantial economic losses resulting from an employer's bad faith termination. These losses are most likely to occur when the employee's future earning potential is significantly reduced or eliminated altogether, either due to debilitating mental distress or injury to reputation. Before the *Honda* decision, Doorey (2005) argued that arbitrary caps on wrongful dismissal damages served to limit moral damages under the *Wallace* era (12 months' notice for non-managerial employees, 24 months' notice for managerial employees). After the *Honda* decision was released, Doorey predicted that moral damages would increase, as they were now not impacted by the cap. These are "employee sword" hypotheses, in that they predict that employees will be able to use *Honda* to their advantage to obtain larger moral damages than were previously possible.

Some lawyers and scholars have been even more specific in their predictions and stated that *Honda* will create a change in the way judges determine moral damage awards, such that the amount will be driven less by employer misconduct and more by employee injury (Edmonds, 2011; England, 2008; and Veel, 2009). If this is true, the crux of the sword/shield debate may be resolved on the basis of whether any gains employees receive for the increased judicial focus on their injuries will exceed the concomitant losses related to the decreased emphasis of the decision-maker on employer misconduct.

The various predictions outlined above are summarized in the following table (Table 2.2).

TABLE 2.2: Summary of Predictions of Various Scholars and Lawyers on *Honda*'s Impact	
Prediction For Moral Damages (For *Honda* Era, Relative To *Wallace* Era)	**Scholar/Lawyer**
Awards will be less probable	Edmonds, 2011 England, 2008 Doorey, 2008 Fitzgibbon, 2009 Lublin, 2009 Veel, 2009
No change in the probability of awards	MacDonald, 2010
Where awarded, damages will be smaller	Edmonds, 2011 Lublin, 2009
Where awarded, damages will be larger	England, 2008 Doorey, 2008
Relationship between employer misconduct and damages will be weaker	Edmonds, 2011 Veel, 2009
Relationship between employee losses and damages will be stronger	Edmonds, 2011 Veel, 2009 England, 2009

These predictions are capable of being formulated into hypotheses, and then empirically tested. Such empirical testing will go a long way to resolving some of the contradictory predictions. To date, there has been no attempt to empirically resolve these contradictions, and the present study is intended to fill this gap in the literature.

3.2 Hypotheses

As indicated in the last section, most legal commentators predict that as a result of *Honda*, awards for moral damages will be less likely. This seems like a reasonable prediction, given the fact employees are now required to prove the actual damages they have suffered, and that these damages resulted from the employer's bad faith conduct. Therefore, the first hypothesis of the study is as follows:

H1: Since *Honda*, court awards of moral damages will be less probable.

Although there is general agreement regarding the decreased likelihood of moral damages, lawyers and legal scholars appear to be very divided about the impact of *Honda* on the size of moral damage awards, in those cases where they are awarded. Some believe it will increase, and some believe that it will decrease. Both groups can justify their predictions. However, I tend to side with those commentators who argue that the courts will apply the foreseeability principle to limit moral damages, especially economic losses, and that when awarding for psychological injury courts will rely on the conservative precedents that have been previously set by Canadian law. Based on this, the second hypothesis of the study is as follows:

H2: After *Honda*, the size of moral damage awards, in those cases where they are awarded, will be smaller.

Some legal commentators have predicted that the principles of *Honda* require judges to emphasize employee injury when determining moral damages while at the same time de-emphasizing employer misconduct. This makes sense, in light of the fact that *Honda* states that moral damages are supposed to be compensatory for the employee, rather than punitive against the employer. To put these predictions into more testable, scientific terms, I hypothesize that era (*Honda* era versus *Wallace* era) will act as a moderator in the relationship between employer misconduct and moral damage awards, such that employer misconduct will become a weaker determinant of the size of moral damage awards following *Honda*; at the same time, era will act as a moderator in the relationship between employee injury and moral damages, such that employee injury will now be a stronger determinant of the magnitude of such awards. These hypotheses can be formally stated as follows:

H3: The relationship between employer misconduct and moral damages will be weaker after *Honda*.

H4: The relationship between employee injury and moral damages will be stronger after *Honda*.

Next, I will describe the research design for testing these hypotheses.

4 Research Design

4.1 Content Analysis

For this study, a technique called "content analysis" was used to generate data from written legal decisions involving moral damages. Content analysis is an approach to the analysis of documents and texts that seeks to quantify content in terms of predetermined categories and in a systematic and replicable manner (Bryman, 2008). Content analysis has been used in many different contexts, the most common being the study of mass media communications. It is becoming an increasing popular way to do legal analysis, due to its systematic and objective nature (Hall & Wright, 2008). For example, Hall and Wright (2008) identified 134 studies in the past 50 years that have used content analysis to answer legal questions, with the vast majority being done in the past two decades. There have been a number of studies where content analysis was used to determine the impact of a U.S. Supreme Court case on the decisions of lower courts (examples include Gruhl, 1980; Cross & Tiller, 1998; and Richards, Smith, & Kritzer, 2006), and my study is analogous to these.

The cases in my study were content analyzed by two coders, who each hold multiple university arts degrees. In order to avoid biasing the results, these coders were blind to the study's hypotheses. The typical case ran about 25 pages: the length ranged from 3 to about 150 pages. A number of recommended steps were taken to maximize inter-rater reliability between the coders (Krippendorff, 2013; Neuendorf, 2002). First, the researcher developed and provided a codebook to the coders (available upon request). Second, the coders analyzed 30 pilot cases, and the codebook was modified in response to issues identified in this pilot phase. Third, the

two coders underwent a training program before the pilot phase, and were given additional training to correct the issues identified in the pilot phase. The literature suggests that an inter-rater reliability of at least .85 is desirable (Neuendorf, 2002). Inter-rater reliability exceeded .85 for every variable, on a sample of 100 cases. The values for inter-rater reliability are provided in Table 2.3. After the coding was completed, the researcher reviewed it extensively, and was satisfied it was completed to a high standard by both coders.

TABLE 2.3
INTER-RATER RELIABILITY (CODER A VERSUS CODER B)

VARIABLE	INTER-RATER RELIABILITY	VARIABLE	INTER-RATER RELIABILITY
Moral Damages (Cdn. $)	.993	Employee Income (Cdn. $)	0.990
Employer Misconduct (5 point scale)	.939	Employee Service (Years)	1.000
Employee Impact (4 point scale)	.935	Position (Executive, Managerial, Professional, Skilled/Supervisory, Salespeople, Non-skilled/clerical)	0.965
Era (*Honda* or *Wallace*)	1.000	Sector (Private For Profit, Private Not-For-Profit, Public)	0.910
Level of Decision (Trial or Appellate)	.987	Visible Minority (Dichotomous)	1.000
Region (Provinces and Territories)	1.000	Disability (Dichotomous)	0.963
Sex (Male or Female)	.967	Employee Wrongdoing (Dichotomous)	0.853
Age (Years)	1.000		

Notes:
N=100
Pearson product-moment correlation coefficients are given for the following variables: moral damages, employer misconduct, employee impact, age, employee income, and employee service.
Cohen's kappa coefficients are provided for the following variables: era, level of decision, region, sex, position, sector, visible minority, disability, and employee wrongdoing.

4.2 Data

The unit of analysis for this study is a decided legal case. Using Quicklaw, a comprehensive and searchable legal database of all Canadian court decisions, I identified wrongful dismissal cases involving employee allegations of "bad faith" dismissals.[7] The *Honda* decision was released on June 27th, 2008. I collected data on all decided cases falling in the following two periods of four years each: a "*Honda* era" and a "*Wallace* era". The *Honda* era ran from the release of the *Honda* decision (i.e., June 28, 2008-June 27, 2012). The *Wallace* era, which acted as a comparison period, was from June 28, 2004 to June 27, 2008. In order for a case to count for inclusion in the study, the decision must have been released within the defined *Honda* era or the *Wallace* era. In other words, a case that was released on July 1st, 2012 would be excluded from the study, as would a case released on June 1st, 2004. Additionally, any appeal of the case must also have been concluded and decided within the two defined eras of the study. If a trial level decision was released on June 1st, 2012, but an appeal of this decision was released by an appellate court on September 15th, 2013, the case was excluded. Lastly, in the event that a trial level decision was appealed, only the final decision was coded for the purposes of the study. For example, if a case was tried before the Ontario Superior Court of Justice and the decision was appealed to the Ontario Court of Appeal, the case would only be coded once in the study, and the decision of the Court of Appeal would be the one coded.

I performed analysis on the entire population of cases in the *Wallace* and *Honda* eras, not just a sample. There were 173 cases from the *Wallace* era, and 111 cases from the *Honda* era, for a total of 284 cases.

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[7] To ensure that no cases were missed, I also searched the database for related terms, like "mental distress" and its synonyms, "aggravated damages", "Honda" and "Wallace".

4.3 Dependent Variable

As indicated by the hypotheses above, the sole dependent variable in the study was the amount of moral damages awarded, if any, in a given case. I adjusted the dependent variable, moral damage awards, for inflation. More specifically, I used Statistics Canada's "total" Consumer Price Index (CPI) to convert moral damage awards into constant June 2008 Canadian dollars. This month was chosen as the reference point, as it was when the Supreme Court of Canada's *Honda* decision was released, and marked the boundary between the two eras in this study.

As can be seen from Figure 2.1, below, the distribution of moral damages in both eras was highly skewed to the right. In both eras, moral damages were only awarded in a small percentage of cases. In the *Wallace* era, about 71% of all cases resulted in no moral damage award. In the *Honda* era, the frequency of cases with no moral damages was even higher (76%). Although the distribution of this variable indicated a heavy clustering around $0 value, this was indicative of the actual value of moral damages in the cases, rather than the result of exogenous censoring or missing data (Frondel & Vance, 2012). Such a distribution is often called a "corner solution" or a "limited dependent variable". This suggests that, in either era, plaintiff employees had a very high threshold to meet in persuading a judge to award moral damages. As will be discussed below, this distribution has implications for the empirical model used in this study.

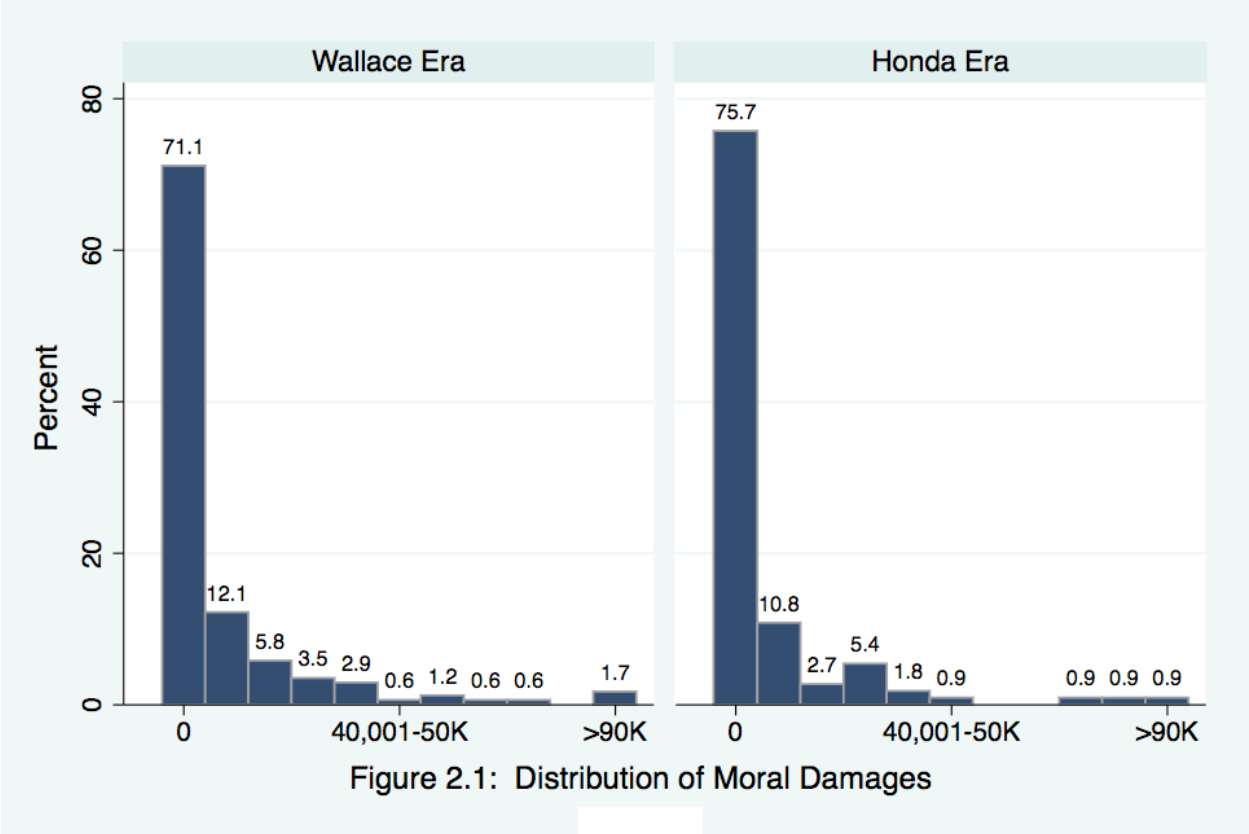

Figure 2.1: Distribution of Moral Damages

4.4 Focal Independent Variables

The two focal independent variables are employer misconduct and employee injury. Employer misconduct was measured on a five-point scale, and is outlined in Table 2.4, below. The gradations of this scale are based on the level of moral culpability on the part of the employer. As one progresses up the scale, the employer goes from simply neglecting the employee's interests to actively trying to cause the employee harm. A value of 1 corresponds to no or minimal employer misconduct in the termination process, whereas a value of 5 corresponds to vindictive, spiteful, or vengeful behaviour on the part of the employer (e.g., where the employer spreads false rumours about the employee to prospective future employers). Coders were permitted to use a value of x.5 if they believed that a particular instance of employer misconduct straddled two consecutive points on the scale. Each case had a good description of the level of employer misconduct, so missing data was not an issue.

Table 2.4: Employer Misconduct Scale		
Value	**Meaning**	**Examples**
1 [Least]	No employer misconduct. Or, some minor misconduct, but outweighed by instances of good employer conduct.	○ Employer tried very hard to accommodate an employee's disability, but was ultimately forced to terminate the employee because a suitable position did not exist at the organization.
2	Minor neglect of employee's interests and/or minor violation(s) of employee's rights in the termination process.	○ Employer provided a Record of Employment a couple of weeks after the deadline. ○ Employer did not return employee's personal effects.
3	Employer aggressively pursues it's own interests, and in the process… • breaches employee rights, or • substantially harms employee interests.	○ Employer did not pay statutory entitlements. ○ Employer never provided Record of Employment. ○ Employer terminated employee in an insensitive manner while he/she was in a vulnerable position (e.g., on sick leave getting cancer treatment).
4	Employer uses unethical means to pursue own rights/interests.	○ Employer alleged cause which it knew or ought to have known was false
5 [Worst]	Employer goes out of its way in an attempt to deliberately harm employee.	○ Employer pursued baseless criminal allegations (e.g., theft/fraud) against employee.

The other key independent variable was the loss or injury the employee experiences as a result of the employer's bad faith conduct. As indicated above, there are various types of injuries the employee might experience, including the loss of future ability to work, damage to reputation, and mental distress. Unfortunately, there is not enough information in the cases to measure the loss of future ability to work, or the damage to reputation. This is so particularly in the *Wallace* era, where the principles did not require the specific proof of loss in the manner required in the *Honda* era. This has been noted by a number of scholars (see, in particular, England (2008) at p. 338). By far the best descriptions of the employee injury from the cases were for psychological impact, and therefore this variable will be the one used to measure employee injury. Even for this variable, though, there is likely a degree of measurement error,

particularly in the *Wallace* era, due to the failure of judges to fully discuss employee psychological distress in their written decisions.

In this study, employee psychological impact was measured on a four point scale, with "1" being no impact and "4" being severe (intense and long-lasting) impact. As with employer misconduct, coders were permitted to use a value of x.5 if they believed that a particular psychological impact straddled two consecutive points on the scale. This scale is summarized in Table 2.5.

Table 2.5: Employee Psychological Impact Scale

Value	Meaning	Additional Detail
1	No psychological impact on employee.	The case does not contain any mention of psychological impact on employee. Or, the judge does not accept the allegations that employee experienced psychological distress.
2	Mild psychological impact on employee	Employee experienced minor psychological distress as a result of employer conduct, but distress was short-lived (less than a month). No signs of depression.
3	Moderate psychological impact on employee	Employee experienced initial significant distress initially at the employer misconduct (e.g., "shock"), but distress was not long lasting (employee recovered within about 1 month). Possibly some signs of depression.
4	Severe psychological impact on employee	Employer misconduct caused employee significant (e.g., clinical depression at some point) and long-lasting (e.g., longer than 1 month) psychological distress. Cases will often use the term "devastating" to describe the employee's experience. In some situations, the misconduct will cause a pre-existing chronic condition (e.g., depression, chronic fatigue syndrome) to worsen.

4.5 Control Variables

It is important to control for a number of variables that might have an effect on the amount of moral damages awarded, particularly because of the way moral damages were calculated in the *Wallace* era. As previously discussed, under the *Wallace* era, moral damages

were awarded as an extension to the period of reasonable notice. Pursuant to *Bardal v. Globe & Mail* (1960), courts are directed to determine the length of reasonable notice using the employee's age, position, and length of service (these have come to be known as the "Bardal factors"). These factors should not directly impact the length of reasonable notice in the *Wallace* period, as the reasonable notice period is supposed to be determined before any extension is awarded, but they might indirectly impact the *Wallace* bump to the period of reasonable notice. Judges might give less generous *Wallace* damages to employees who are already receiving a generous period of reasonable notice, particularly if they are approaching or hitting the cap of one year for non-management employees or of two years for management employees (Doorey, 2005). Given all of this, age, position, and length of service were included as control variables. Age and length of service were measured as continuous variables. Position was a categorical variable, with the categories being executive, managerial, professional, skilled/supervisory, salespeople, and non-skilled/clerical.

Employee income might also impact the amount of moral damages in a number of ways. In the *Wallace* era, it had a direct impact, because the employee received damages for the number of months of the *Wallace* bump at her or his rate of monthly income, regardless of whether the employee's injuries were psychological distress or an inability to work. Even in the *Honda* era, employee income might affect the amount of moral damages if they are being awarded for an inability to work. Income was measured as a continuous variable, and was adjusted for inflation in the same manner as moral damages.

A number of other control variables were included as precautions, even though they were not expected to impact moral damages on the basis of legal theory. A dummy variable for appellate level decision was included as a control. A series of dummy variables were used to control for potential regional variation in moral damages (Note that Quebec cases were not

included in this study, as different legal principles regarding moral damages under the *Civil Code* were applicable there). Additional control variables related to demographics were employed to account for any potential systemic bias on the part of judges, given the fact that they have a substantial amount of discretion in awarding moral damages. These additional variables included sex (female/male), sector (private-for-profit, private-not-for-profit, and public), visible minority status (visible minority or not), disability status (disabled or not at the time of dismissal). Lastly, a variable was included as to whether the employee was guilty of any wrongdoing, in case this influenced the judge in the assessment of moral damages.

4.6 Summary Statistics

Tables 2.6 (Descriptive Statistics of Pooled Population) and 2.7 (Comparison of Means Between Eras) and 2.8 (Correlation Matrix) provide some summary statistics to give the reader a better sense of the data. First, a closer examination of the dependent variable, moral damages, is warranted. Recall that moral damages have been adjusted for inflation, using the Consumer Price Index. As indicated in the first row of Table 2.6, the unconditional moral damages for all 284 observations ranged from $0 to $262,132, with a mean value of $7,764. The use of the terms "conditional" and "unconditional" are important to understand, as they have a specific meaning for the purposes of this paper. Unconditional moral damages refer to moral damages for the entire population, including those cases where no damages were awarded (e.g., E(Y)). Conditional moral damages refers to moral damages, conditional upon receiving them (e.g., E(Y|Y>0)—the expected value of Y for the subpopulation where Y is positive).[8] In this study, Table 2.6 indicates that the conditional moral damages ranged from a low of $105 to a high of $262,132, with a mean value of $28,637.

[8] The use of the term "conditional" is potentially confusing, as it may also suggest values of moral damages conditional on the value of the independent variables. However, the use of the term "conditional" to refer to positive values of the dependent variable is entrenched in the literature (Wooldridge, 2010), so I use it in this paper.

TABLE 2.6: DESCRIPTIVE STATISTICS OF POOLED POPULATION				
	Min	Max	Mean	Standard Deviation
DEPENDENT VARIABLE				
Moral Damages ($ '000s)	0	262.132	7.764	28.195
Moral Damages | >0 ($ '000s) (N=77)	.105	262.132	28.637	48.525
FOCAL INDEPENDENT VARIABLES				
Employer Misconduct (5 point scale)	1	5	2.787	1.046
Employee Impact (4 point scale)	1	4	1.627	1.055
Honda Era	0	1	.391	.489
CONTROL VARIABLES				
Appellate Level Decision	0	1	.187	.390
Region				
Ontario	0	1	.409	.492
British Columbia	0	1	.271	.445
Alberta	0	1	.130	.337
Saskatchewan	0	1	.046	.209
Manitoba	0	1	.011	.102
New Brunswick	0	1	.039	.193
Nova Scotia	0	1	.039	.193
Newfoundland	0	1	.004	.059
Federal Jurisdiction	0	1	.039	.193
Territories	0	1	.014	.118
Female	0	1	.426	.495
Age (years)	22	67	46.874	9.488
Employee Income ($ '000s)	11.473	1,409.191	104.898	152.081
Employee Service (years)	0.10	39.00	10.249	9.001
Position				
Executive	0	1	.070	.256
Managerial	0	1	.373	.485
Professional	0	1	.074	.262
Skilled/Supervisory	0	1	.243	.430
Salespeople	0	1	.099	.299
Non-skilled/clerical	0	1	.141	.348
Sector				
Private-For-Profit	0	1	.842	.366
Private Not-For-Profit	0	1	.063	.244
Public	0	1	.095	.294
Visible Minority	0	1	.116	.321
Disability	0	1	.102	.303
Employee Wrongdoing	0	1	.144	.352
"Moral Damages" and "Income" have been adjusted for inflation using CPI so that all amounts are presented in constant Canadian dollars as of June, 2008.				

TABLE 2.7: COMPARISON OF MEANS BETWEEN ERAS			
	***Wallace* Era** (N=173)	***Honda* Era** (N=111)	**Difference**
DEPENDENT VARIABLE			
Moral Damages ($ '000s)	8.285	6.953	-1.332
Moral Damages | >0 ($ '000s)	28.666 (N=50)	28.584 (N=27)	-.082
FOCAL INDEPENDENT VARIABLES			
Employer Misconduct (5 point scale)	2.740	2.861	.121
Employee Impact (4 point scale)	1.445	1.910	.465***
CONTROL VARIABLES			
Appellate Level Decision	.150	.243	.095**
Region			
Ontario	.416	.396	-.020
British Columbia	.260	.288	.028
Alberta	.127	.135	.008
Saskatchewan	.058	.027	-.031
Manitoba	.012	.009	-.003
New Brunswick	.017	.072	.055**
Nova Scotia	.035	.045	.010
Newfoundland	.006	.000	-.006
Federal Jurisdiction	.046	.027	-.019
Territories	.023	.000	-.023
Female	.416	.441	.025
Age (years)	46.735	47.091	.356
Employee Income ($ '000s)	100.814	111.264	10.450
Employee Service (years)	10.258	10.235	-.023
Position			
Executive	.052	.099	.047
Managerial	.393	.342	-.051
Professional	.081	.063	-.018
Skilled/Supervisory	.237	.252	.015
Salespeople	.116	.072	-.044
Non-skilled/clerical	.121	.171	.050
Sector			
Private-For-Profit	.844	.838	-.006
Private Not-For-Profit	.069	.054	-.015
Public	.087	.108	.021
Visible Minority	.075	.180	.105***
Disability	.075	.144	.069*
Employee Wrongdoing	.092	.225	.133***

*, **, *** denote significance at the .10 level, the .05 level, and the .01 level, respectively.

TABLE 2.8: CORRELATION MATRIX OF MORAL DAMAGES, EMPLOYER MISCONDUCT, AND EMPLOYEE IMPACT			
	Moral Damages	**Employer Misconduct**	**Employee Impact**
WALLACE ERA (N=173)			
Moral Damages	1.000***		
Employer Misconduct	0.234***	1.000***	
Employee Impact	0.084	0.206***	1.000***
HONDA ERA (N=111)			
Moral Damages	1.000***		
Employer Misconduct	0.253***	1.000***	
Employee Impact	0.370***	0.410***	1.000***
*, **, *** denote significance at the .10, .05, and .01 levels, respectively.			

Table 2.7 provides some useful information allowing a comparison of moral damages in the *Honda* and *Wallace* eras. First, the difference between the two eras in the unconditional mean moral damage awards was quite small—in the *Wallace* era it was $8,285 and in the *Honda* era it was $6,952, for a non-significant difference of $1,332. Second, the difference in the conditional means was even smaller ($82), and also non-significant—the conditional mean in the *Wallace* era was $28,666, whereas in the *Honda* era it was $28,584. Table 2.7 indicates that 50 of the 173 *Wallace* era cases (28.9%) had an award of moral damages, whereas only 27 out of 111 (24.3%) *Honda* era cases have such an award.

More information about the distribution of moral damages was provided in Figure 2.1, which has already been briefly discussed. This histogram suggests that, in addition to being rare, moral damage awards tended to be small. For example, in both eras the greatest frequency of cases with positive moral damage awards fell in the $1-$10,000 band (12.14% in the *Wallace* Era, and 10.81% in the *Honda* era). Moreover, only a small percentage of cases had moral damage awards greater than $90,000: 1.73% in the *Wallace* era, and .90% in the *Honda* era).

These results suggest some very preliminary conclusions regarding *H1* and *H2*. *H1* is that since Honda, court awards of moral damages will be less probable. The probability of obtaining moral damage awards decreased by 4.6 percentage points (28.9%-23.3%) in the *Honda*

era, relative to the *Wallace* era. This provides some tentative support for *H1* which will obviously have to be investigated further using the results of the multivariate model. However, *H2*, which is that the conditional moral damage awards will be smaller in the *Honda* era, versus the *Wallace* era, was not supported, given the very small and non-significant difference in conditional means between the two eras. This will also need to be checked further using the multivariate model.

Tables 2.6 and 2.7 also provide some summary statistics for the focal independent variables, employer misconduct and employee impact. From Table 2.6, values for employer misconduct were observed over the full range of the scale, from 1 to 5, with a mean value of 2.787. From Table 2.7, the mean value of employer misconduct is 2.740 during the *Wallace* era, and slightly higher during the *Honda* era at 2.861, although this difference is not significant.

Table 2.6 indicates that observations for employee impact varied from 1 to 4, the entire range of the scale, with a mean of 1.627. The mean value for employee impact in the *Wallace* era was 1.445, a value almost halfway between no impact (1) and mild impact (2). The mean value of the *Honda* era was almost half a point higher at 1.910, and this difference was significant at the .01 level. This difference was likely due to two factors. First, the higher level of misconduct in the *Honda* era might have caused employees more psychological distress (although, this explanation must be viewed with a degree of skepticism, as the difference in level of misconduct between eras was not statistically significant). Second, employees' lawyers may have been marshalling better evidence of psychological distress in response to the increased evidentiary requirements under *Honda*, and judges may have been describing this distress more carefully in their decisions.

Tables 2.6 and 2.7 also contain summary statistics for various control variables. A dummy variable for appellate level decisions was included as a control. This was coded as "1"

for those cases that were appealed or judicially reviewed. For the population of cases, 18.7% required an appeal for resolution. There was a significant difference of 9.5 percentage points between the proportion of appellate decisions in the *Honda* Era (24%), relative to the *Wallace* Era (15%). This was due to the fact that the legal principles regarding moral damages were more unsettled during the *Honda* Era, leading to more cases being appealed.

A series of dummy variables were used to control for potential regional variation in moral damages. Table 2.6 indicates that there were very few cases from Manitoba, Newfoundland, and the territories (1.1%, .04%, and 1.4%, respectively), and so in the multivariate analysis, I grouped these three regions together. There were no moral damage cases from Prince Edward Island over the period of this study. Quebec cases were not included in this study, as different legal principles regarding moral damages under the *Civil Code* were applicable there.

Table 2.7 indicates that some of the demographic control variables were significantly different in the two eras. For example, there was an increase of about 10 percentage points in the proportion of visible minority plaintiffs in the *Honda* era (18.0%), versus the *Wallace* era (7.5%). There is no obvious explanation for this phenomenon. In the *Honda* era, there was also an increase of 13.3 percentage points in the proportion of employers making allegations of employee wrongdoing. One likely explanation for this is that employers believed that it was less risky, relative to the *Honda* era, to bring allegations of cause in questionable situations.

Table 2.8 provides a correlation matrix for the key variables in this study. The correlation between moral damages and employer misconduct is highly significant, and roughly similar, in both eras (.234 in the *Wallace* era and .253 in the *Honda* era). This finding does not support *H3*, which predicted that the correlation would have become weaker in the *Honda* era. Interestingly, Table 2.8 suggests that the relationship between employee impact and moral damages has become stronger in the *Honda* era, supporting *H4*. In the *Wallace* era, there was no

significant relationship. However, in the *Honda* era, there was a significant "medium" sized correlation (.370). These findings bear further investigation using the multivariate model, which will be discussed next.

5 Empirical Procedures

As previously indicated, the dependent variable of this study is moral damages. As was seen in Figure 2.1, above, the distribution of moral damages was clustered around $0. A linear regression model for a dependent variable with this distribution would be inappropriate, either for the complete sample or for those cases with moral damages greater than 0, as it would yield coefficient estimates that are biased and inconsistent (Maddala, 1983). As appropriate for such a clustered or limited dependent variable, I used a non-linear tobit model (Wooldridge, 2010). The simplest empirical specification of tobit model is as follows:

$$E(y|\mathbf{x})=P(y>0|\mathbf{x})*E(y|y>0,\mathbf{x})$$

Where:

y=moral damages

x=a vector of independent variables, including employer misconduct, employer conduct, employee impact, and era.

This equation can be divided into two parts. The first part ($P(y>0|\mathbf{x})$) models the probability of receiving any moral damages whatsoever using a probit function, and the second part ($E(y|y>0,\mathbf{x})$) models the conditional magnitude of moral damages (in other words, the magnitude of the moral damages, conditional on their being some amount awarded).

The tobit model is explicitly designed to model corner solution dependent variables (Wooldridge, 2009) and to model a choice with a high threshold (Maddala, 1983). Corner solutions occur when there is a pile-up of actual, observed responses (i.e., not due to censoring, truncation, or missing data) on one or several values of the dependent variable (Wooldridge,

2010). The distribution in Figure 2.1 is illustrative of a "corner solution", as there is a substantial portion of the distribution of the moral damages at 0. In the present study, the high threshold is a judge's decision as to whether the employer's conduct constitutes bad faith.

The tobit model imposes a major constraint. Because it solves the equation as a single system, it does not allow for the differential effects of the independent variables at each of the two stages (Feinstein & Thomas, 2002). The appropriateness of the tobit model for this study was confirmed using two different yet related methods. In the first, recommended by Wooldridge (2009, p. 595), I compared the tobit estimates to estimates generated using a probit model, and found them to be similar.[9] In the second, I generated estimates from a logit model and an ordinary least squares (OLS) conditional magnitude model, and found that the independent variables had similar effects at the logit and OLS conditional magnitude stages.

Upon determining that the tobit model was justified, I estimated three nested specifications of the tobit model. In the first specification, I estimated only the direct effects of the three focal independent variables (misconduct, impact, and era). In the second specification, I estimated the direct effects, plus I added interaction terms to see whether era moderates the effect of misconduct and impact. In the final specification, I kept the focal independent variables and the interaction terms, and added numerous control variables. The likelihood ratio tests performed indicate that the third specification is the best fit of the three, on a statistically significant basis.

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[9] More specifically, I converted the dependent variable into a dummy variable, w, and used the probit model. I estimated the probit model were the binary outcome, w, equals one if y>0 (i.e., if moral damages are greater than zero), and w=0 if y=0 (i.e., if moral damages are zero). Then, w follows the probit model, where the coefficient on x_j is $\gamma_j = \beta_j/\sigma$. I estimated the ratio of β_j to σ by probit, for each *j*. The probit estimates, $\hat{\gamma}_j$, were close to $\hat{\beta}_j/\hat{\sigma}$ where $\hat{\beta}$ and $\hat{\sigma}$ are the tobit estimates.

The third specification of the model, which included the interaction terms and controls, was used to generate the marginal effects of the independent variables. The marginal effect of each of the continuous explanatory variables in this model was not constant over its entire range, due to the fact that the tobit model is non-linear (Karaca-Mandic, Norton, & Dowd, 2012). Therefore, the results were averaged across all observations to obtain the *average* marginal effect of each independent variable for the probability of receiving and for the conditional magnitude, using the "margins" command in Stata 11. The marginal effect for each discrete explanatory variable was calculated as the discrete change for the factor levels. The standard errors of the marginal effects were calculated using the delta method (Karaca-Mandic, Norton, & Dowd, 2012). The estimated marginal effects included direct effects and any indirect effects through the interaction terms.

When one speaks about marginal effects, one is talking about the effects of one variable. When one talks about interaction effects for non-linear models, one is taking about cross partial derivatives or differences (Karaca-Mandic et al., 2012). If the moderating variable is dichotomous, the interaction effect is the cross difference of the expected value of y. The standard error of the estimated interaction effect can be found by applying the delta method. For the present study, Stata 11 was used to generate the cross partial effect of the *Honda* era, relative to the *Wallace* era, on the employer misconduct and employee injury scales. The cross partial effects were estimated at specific points along the scales, and the average cross partial effect was also calculated by averaging the cross partial effects across the population (Wooldridge, 2009). These effects will be used to assess *H3* and *H4*.

6 Results

The results of the three specifications of the tobit model are presented in Table 2.9. The first specification includes only the focal independent variables, employer misconduct and employee impact. The second specification adds interaction terms between era and misconduct, and between era and impact. The third specification adds the control variables to the variables included in the second specification. The likelihood ratio tests performed indicate that the third specification is the best fit of the three, on a statistically significant basis (at the .01 level).

Unfortunately, the coefficient estimates in Table 2.9, like all coefficient estimates generated from tobit models, are not easy to interpret. This is due to the fact that the tobit model is not linear (Wooldridge, 2009). The tobit estimates provided in Table 2.9 were used to estimate the independent variables' average marginal effects on the probability of receiving any moral damages, $P(Y>0)$, and on the conditional magnitude of moral damages conditional upon receiving them, $E(Y|Y>0)$, and these effects are provided in Table 2.10. Average marginal effects were generated by averaging the individual marginal effects across the entire population (Wooldridge, 2010). For the variables misconduct, impact, and era, the average marginal effects provided include the indirect effects of those variables through the interaction terms.

TABLE 2.9
TOBIT ESTIMATES OF MISCONDUCT AND IMPACT ON MORAL DAMAGES

Dependent Variable (Moral Damages): unconditional mean = $7.764 (000's, CPI adjusted)
conditional mean = $28.637 (000's, CPI adjusted)

	(1)	(2)	(3)
Intercept	-172.539***	-170.583***	-123.031***
	(23.921)	(28.689)	(42.863)
FOCAL INDEPENDENT VARIABLES			
Employer Misconduct (5 point scale)	36.326***	40.810***	34.794***
	(6.433)	(8.223)	(6.938))
Employee Impact (4 point scale)	16.062***	6.650	7.625
	(4.526)	(5.699)	(5.300)
Honda Era	-27.866**	-34.555	-45.938
	(11.140)	(42.951)	(39.603)
Era*Misconduct		-12.858	-4.106
		(11.989)	(11.027)
Era*Impact		23.097**	17.572**
		(9.127)	(8.207)
CONTROL VARIABLES			
Appellate Level Decision			-1.406
			(10.980)
Region *[versus Ontario]*			
British Columbia			-36.260***
			(12.299)
Alberta			0.414
			(13.066)
Saskatchewan			-61.984**
			(31.305)
New Brunswick			-32.249
			(25.820)
Nova Scotia			-13.156
			(23.929)
Federal Jurisdiction			38.027*
			(20.280)
Other (Manitoba, Newfoundland, Territorites)			-35.991 (28.281)
Female			8.609
			(9.688)
Age (Years)			0.120
			(0.541)
Employee Income ($ '000s, adjusted for CPI)			0.033
			(0.033)
Employee Service (Years)			-0.499
			(0.512)

TABLE 2.9 (Cont'd)
TOBIT ESTIMATES OF MISCONDUCT AND IMPACT ON MORAL DAMAGES

Dependent Variable (Moral Damages): unconditional mean = $7.764 (000's, CPI adjusted)
conditional mean = $28.637 (000's, CPI adjusted)

	(1)	(2)	(3)
CONTROL VARIABLES (Cont'd)			
Position *[versus Executive]*			
Managerial			-19.248 (17.876)
Professional			28.548 (21.726)
Skilled/Supervisory			-41.417** (20.164)
Salespeople			-15.720 (20.482)
Non-skilled/clerical			-31.447 (20.997)
Sector *[versus Private For Profit]*			
Private Not-For-Profit			0.081 (18.364)
Public			20.889 (15.472)
Visible Minority			-29.171 (19.401)
Disability			-9.149 (15.326)
Employee Wrongdoing			-10.384 (15.790)
Pseudo R^2	0.075	0.081	0.128
$\sum$	58.542 (5.042)	57.295 (4.912)	46.820 (3.951)
Log Likelihood	-481.855	-478.417	-454.132
N	284	284	284
LR X^2	77.74***	84.62***	133.18***

Reference groups for polytomous categorical variables are indicated in square brackets.
*,**,*** denote significance at the 0.10 level, the 0.05 level, and the 0.01 level, respectively.
Non-standardized coefficient estimates are reported and standard errors are provided in parentheses.

The middle column of Table 2.10 indicates the average marginal effect of a one unit increase in the relevant independent variable on the probability of receiving *any* moral damages. For each discrete explanatory variable, the estimate indicates the effect of moving from the baseline (i.e., the reference category) to the stated level of the variable. For employer misconduct, the average marginal effect of .139 indicates that, on average, a one unit increase on the five point scale will increase the probability of receiving a moral damage award by 13.9 percentage points, all else being equal. It is important to realize that this increase in probability is only an average, and will be smaller for a one unit increase at the lower end of the scale (e.g., a move from 1 to 2), and larger for a similar increase at the upper end of the scale (e.g., a move from 4 to 5). The employee psychological impact has a smaller average marginal effect. On average, a one unit increase on the four point scale will increase the probability of receiving a moral damage award by 5.4 percentage points, when other factors are held constant. As with employer misconduct, the effect of employee impact will be smaller for a one unit increase at the lower end of this scale, and larger for a one unit increase at the higher end of the scale. For era, the estimate indicates that the probability of receiving moral damages in the *Honda* era is 9.9 percentage points smaller than it was in the *Wallace* era, controlling for all other variables. This decrease is substantial when one considers that moral damages were only awarded in 28.9% of cases in the *Wallace* era. The estimates for all three of these marginal effects are highly significant (.01 level). From the standpoint of this study, the most important estimate is the one for the era variable. This provides strong evidence in support of the first hypothesis, which is that in the *Honda* era, court awards of moral damages are less probable than in the *Wallace* era.

TABLE 2.10
AVERAGE MARGINAL EFFECTS ON MORAL DAMAGES

	PROBABILITY RECEIVING (Mean = .27)	CONDITIONAL MAGNITUDE (in '000s) (Mean = 28.637)
FOCAL INDEPENDENT VARIABLES		
Employer Misconduct (5 point scale)	.139*** (.019)	7.695*** (1.304)
Employee Impact (4 point scale)	.054*** (.017)	3.197*** (1.003)
Honda Era	-.099*** (.037)	-5.096** (2.116)
CONTROL VARIABLES		
Appellate Level Decision	-.006 (.045)	-.325 (2.534)
Region *[versus Ontario]*		
British Columbia	-.150*** .048	-8.369*** (2.834)
Alberta	.002 (.054)	.096 (3.016)
Saskatchewan	-.256** .127	-14.306** (7.178)
New Brunswick	-.133 (.106)	-7.443 (5.959)
Nova Scotia	-.055 (.099)	-3.036 (5.520)
Federal Jurisdiction	.157* (.084)	8.777* (4.710)
Other (Manitoba, Newfoundland, Territories)	-.149 (.117)	-8.307 (6.534)
Female	.036 (.040)	1.987 (2.234)
Age (Years)	.000 (.002)	.028 (.125)
Employee Income ($ '000s, adjusted for CPI)	.000 (.000)	.008 (.008)
Employee Service (Years)	-.002 (.002)	-.115 (.117)
Position *[versus Executive]*		
Managerial	-.080 (.074)	-4.442 (4.135)
Professional	.118 (.088)	6.589 (5.016)
Skilled/Supervisory	-.171** .083	-9.559** (4.662)
Salespeople	-.065 (.085)	-3.628 (4.737)
Non-skilled/clerical	-.130 (.087)	-7.258 (4.867)

TABLE 2.10 (Cont'd)
AVERAGE MARGINAL EFFECTS ON MORAL DAMAGES

	PROBABILITY RECEIVING (Mean = .27)	CONDITIONAL MAGNITUDE (in '000s) (Mean = 28.637)
Sector *[versus Private For Profit]*		
Private Not-For-Profit	.000 (.076)	.019 (4.238)
Public	.086 (.064)	4.821 (3.571)
Visible Minority	-.121 (.079)	-6.733 (4.465)
Disability	-.038 (.063)	-2.112 (3.537)
Employee Wrongdoing	-.043 (.065)	-2.397 (3.645)

Marginal effects derived from full model using delta method. Each reported coefficient includes both direct and indirect effects.
Reference groups for polytomous categorical variables are indicated in square brackets.
*,**,*** denote significance at the 0.10 level, the 0.05 level, and the 0.01 level, respectively.
Non-standardized coefficient estimates are reported and standard errors are reported in parentheses.

Next, I will discuss the estimates for the "Conditional Magnitude" column of Table 2.10 for these focal independent variables. For employer misconduct and employee impact, this column provides the average marginal effects on moral damages conditional on receiving such an award (e.g., on E(Y|Y>0)). For employer misconduct, a one unit increase on the five point scale will increase the amount of moral damages received by $7,695, calculated by averaging the marginal effects across the entire population (all else being equal). For employee impact, an increase of one point on the four point scale will, on average, increase the amount of moral damages received by $3,197 (holding the other variables constant). Both of these estimates are significant at the 0.01 level. The estimate for era is -$5,096. This means that an identical case in the *Honda* era that receives some amount of moral damages received $5,096 less than in the *Wallace* era ($p<.05$).

The reader should note two things in interpreting these estimates. First, the estimates for employer misconduct and employee impact are based on the entire population of cases in the

study, where the cases from both eras are pooled. Below, we will examine the different effects of employer misconduct and employee impact in the *Honda* era, relative to the *Wallace* era. Second, employee impact only measured the impact of psychological distress, and did not capture economic losses due to decreased employment prospects, nor did it measure damage to reputation. However, this variable likely indirectly measured these other types of losses, to the extent that they were correlated with psychological distress (e.g., where an employee experiences serve, long-term psychological distress, it may impact her employability and increase her economic losses).

With these things in mind, the most important estimate in the conditional magnitude column was the value for era. This provides strong support for *H2*, which was that the size of conditional moral damage awards will be smaller in the *Honda* era than in the *Wallace* era. The conditional magnitude estimate of era represents the different between the two eras, after controlling for the studies other variables. The $5,096 decrease is suggestive of the possibility that in the *Honda* era, those employee losses which are unrelated to psychological injury may receive less compensation. The size of this decrease is moderate when assessed against the study's conditional mean of moral damages of $28,637.

Interestingly, some of the control variables had significant marginal effects. Both British Columbia and Saskatchewan courts had significantly lower probabilities, relative to Ontario, of awarding moral damages, while federal courts had a higher probability. Similarly, both British Columbia and Saskatchewan had significantly lower awards of conditional moral damages (again, using Ontario as the reference group), whereas the federal jurisdiction had significantly higher awards. For the two western provinces, there was no substantive difference in the jurisprudence of these regions to explain this result. Perhaps it reflected systemic aversion of judges in these regions to award moral damages. For British Columbia, it was possible that the

Supreme Court's decision not to award aggravated damages in the *Vorvis* case, which wended its way through the British Columbia court system beforehand, might have made judges in that province adverse to awarding moral damages in the future, but this is merely speculative. The converse results in the federal jurisdiction were likely due in part to the fact that employers in this jurisdiction, like airlines and banks, tended to be larger and more sophisticated, and as a result may have been held to a higher standard.

Another intriguing finding is that employees with skilled or supervisory positions were significantly less likely to receive moral damages than executives, and received smaller conditional moral damage awards. One possible explanation for this is that judges were less able to identify with this worker group than they were with higher ranking employees, including managerial and professional employees.

In order to isolate the moderating effects of era on employer misconduct and employee impact (Hypotheses 3 and 4), I used the third specification of the tobit model (which includes the control variables) to generate cross partial effects. The results are presented in Table 2.11. These estimates were generated for conditional moral damage awards. The cross partial effects for employer misconduct measured the different effect of that variable on moral damages in the *Honda* era, relative to the *Wallace* era; similarly, the cross partial effects for the employee psychological impact measured its different effect on moral damages in the *Honda* era, relative to the *Wallace* era. For each of these two variables, the average cross partial effect and the cross partial effects at various points along the scale were estimated.

For misconduct, the average cross partial effect was not significant. This suggests that the average effect of employer misconduct in the *Honda* era was not significantly different than the average effect in the *Wallace* era. However, due to the non-linearity of the tobit model, it is important to examine the moderating effect of era at specific points along the range. It is not

unusual for the *average* cross partial effect to be non-significant, but for the cross partial effects at specific points along the scale to still be significant (Ai & Norton, 2003). This phenomenon was actually observed in this study. Although the average cross partial effect was not significant, the cross partial effects at the lower end of the misconduct scale were. Specifically, for a misconduct score of one, the marginal effect of misconduct was $968 lower in the *Honda* era, relative to the *Wallace* era, significant at the .05 level. Additionally, the marginal effect for a misconduct score equal to two was $1,706 lower after *Honda* ($p<.1$). These findings are only partially supportive of *H3*, which was that the relationship between employer misconduct and moral damages will be weaker after *Honda*. On average, and at the higher end of the misconduct scale, there is not enough evidence to accept *H3*, but we accept *H3* for the lower range of the misconduct scale.

TABLE 2.11
CROSS PARTIAL EFFECTS OF ERA ON IMPACT AND MISCONDUCT
(CONDITIONAL ON RECEIVING MORAL DAMAGES)
DEPENDENT VARIABLE: MORAL DAMAGES (MEAN=$28.637, 000's, CPI ADJUSTED)

	EMPLOYER MISCONDUCT	EMPLOYEE IMPACT
Average	-2.916 (2.381)	2.828 (1.723)
1 (Low)	-0.968** (0.391)	1.796 (1.271)
2	-1.706* (0.923)	2.872 (1.745)
3	-3.006 (2.138)	4.390* (2.551)
4	-5.059 (4.426)	6.413* (3.720)
5 (High)	-7.654 (7.818)	N/A

Cross partial effects derived from full model using delta method.
*,**,*** denote significance at the 0.10 level, the 0.05 level, and the 0.01 level, respectively.
Non-standardized coefficient estimates are reported and standard errors are reported in parentheses.

Estimates for the cross partial effects of employee psychological impact are also provided in Table 2.11. The average cross partial effect was not significant, although it approached significance at the .1 level—p=.11. As with misconduct, it is possible to estimate the

effect of era at specific points of the four-point impact scale. The cross partial effects did reach statistical significance at the highest two values of the scale (scores of three and four). For example, when the employee experiences psychological impact of four, the moral damages were $6,413 higher in the *Honda* era, relative to the *Wallace* era, significant at the .1 level. As with *H3*, we can only partially accept *H4*, which is that the relationship between employee impact and moral damages will be stronger after *Honda*. The relationship is stronger after *Honda* at the higher end of the employee impact scale, but is not stronger on average (at any conventional level of significance, anyway), and is not stronger at the lower half of the scale.

7 Discussion

This study is one in a growing number that uses content analysis to empirically investigate the direction that case law is heading. The findings indicate how the judicial decision-making process of lower court justices has changed in the wake of the *Honda* decision and go a long way to resolving the debate about the case's impact on moral damage awards. I found that court awards of moral damages have become less probable following the *Honda* decision, strongly suggesting that there is indeed now a higher evidentiary burden on plaintiffs. The finding of lower conditional moral damage awards in the *Honda* era, relative to the *Wallace* era, is also consistent with the prediction that judges will be conservative in their application of the forseeabilty principle and in their compensation of psychological injury. Furthermore, the study results indicate that, after *Honda*, employer misconduct is a weaker driver of conditional moral damages while employee psychological injury now has a stronger effect on these damages. The most reasonable explanation for these results is that lower court judges are heeding the guidance of the Supreme Court to make employment law damages be more consistent with general contract principles by placing relatively more emphasis on employee injury and relatively less emphasis on employer misconduct.

As a whole, the results of the study strongly support the employer shield hypothesis. After *Honda*, moral damages are about 10 percentage points less likely, a very substantial decrease considering that such damages were only awarded in about 29 percent of cases under the *Wallace* era. Additionally, the size of moral damage awards, in those cases where they are awarded, is about $5,000 less following the *Honda* decision, even though they were relatively modest in the *Wallace* era (about $28,500). However, it would appear that there are some circumstances where the employee sword hypothesis does bear out—the results of this study indicate that plaintiff employees may receive slightly higher moral damage awards in certain instances where they can prove severe psychological injury.

Generally, these findings have implications for various stakeholders in the termination process (e.g., employees, employers, and the legal counsel representing both groups), and also for public policy. The results suggest to employers that aggressive behaviour in the termination process is less risky after *Honda*. This has direct implications for certain human resource policies and procedures regarding termination that many employers implemented in the wake of *Wallace*. For example, employers were well advised following *Wallace* to have face-to-face meetings with employees who they were terminating, in an attempt to demonstrate good faith. Additionally, during the *Wallace* era, many employers deliberately refrained from "playing hardball" in wrongful dismissal litigation, for fear that this would attract a ruling of bad faith. While these kinder, gentler human resource practices might still be the right thing to do for other reasons, employers can consider relaxing them if their underlying rationale is risk mitigation (Edmonds, 2011). If an employer is faced with a suit for moral damages, legal counsel should now defend claims by insisting on strict proof of psychological impact from employees, and by questioning whether the employer's conduct was the cause of any psychological distress.

As for employees, these results should make them think twice about litigating moral damage claims. The higher evidentiary burden now means that employees will often have to hire expert witnesses in order to prove their damages, and the decreased probability of any moral damages, coupled with smaller conditional awards, might not justify the expense. Where an employee does decide to sue for moral damages, it is now more important for her/his lawyer to focus on proving the level of psychological distress experienced, and that this distress was a direct result of the employer misconduct.

From a public policy stand-point, *Honda* might not be the best result. There is now less of a deterrent for employer bad faith conduct in the dismissal process. The results of the study suggest that the risk of employer misconduct in the termination process has shifted somewhat from the employer to the employee. One should question whether this is a desirable outcome, given the fact employers can typically avoid misconduct in the termination process relatively easily and inexpensively, and that many employees are not particularly well suited to bear this risk at a vulnerable moment in their lives. This is a suboptimal result under the economic analysis of contract law promoted by Posner and Rosenfield (1977): the loss should be allocated to the party who can most efficiently prevent or predict the loss.

There are a number of possible extensions to the work of this study. The present study only measures the impact of *Honda v. Keays* in a limited, albeit very important, set of circumstances—in bad faith dismissal cases that proceed all the way to a judicially determined outcome. Data was not readily available to measure the impact of *Honda* on the settlements reached by employers and employees in cases involving allegations of bad faith, and future studies should try and assess this. Additionally, future studies should assess whether employers have changed their human resource practices and policies regarding termination in response to the *Honda* case.

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Chapter 3
Event History Analysis of Grievance Arbitration in Ontario: Labour Justice Delayed?

> My thesis is that labour arbitration as we know it, that institution that we are all so dependent on in the field of labour relations, has lost its course, has lost its trajectory, has lost its vision. It is at risk of becoming dysfunctional and irrelevant.
>
> Warren Winkler (2010, para. 2), then Chief Justice of Ontario[1]

1 Introduction

Grievance arbitration is a cornerstone of the Canadian labour relations system (Winkler, 2011). All collective agreements must have a clause requiring the arbitration of unresolved grievances (Rose, 1986).[2] Grievance arbitration is an important "voice" mechanism for unionized workers, allowing them to challenge management practices they view to be unjust (Freeman & Medoff, 1984; Budd & Colvin, 2008). It is supposed to be a quicker, less expensive, and less legalistic way to provide labour justice than the court system (Thornicroft, 2009).

There is evidence that delay in Canadian grievance arbitration increased at an alarming rate from the early 1970s to the mid-1990s. Studies on arbitrations in the early 1970s suggested that the duration of grievances (from the filing of the grievance to the delivery of an award) was between 200-250 days (Goldblatt, 1974; Fricke, 1976; Stanton, 1983). By the mid-1990s, this figure had increased to over 500 days (Foisy, 2002). If one annualizes the rate of increase from available studies, it suggests that the average duration of grievances increased at a rate of 11.88

[1] Justice Winkler has since retired, as of December 13, 2013.

[2] See, for example, Ontario's *Labour Relations Act*, s. 48 (1) and (2).

days per year. In other words, the average duration of grievances increased at a rate of 118.8 days per decade.

The literature has identified at least six reasons why grievance delay might be a problem. First, delay might actually impact the result of the case. For instance, Adams (1978) found that the likelihood of the grievor being reinstated in dismissal cases decreased with the passage of time. Second, certain remedies may become moot (e.g., reinstatement might be a hollow victory if the grievor has already found another job) (Thornicroft, 1993). Third, delay is potentially harmful to labour relations. Unresolved grievances cause uncertainty and tension for management and workers (Lewin, 1999; Ross, 1958). Related to this, outstanding grievances can spill over into collective bargaining, and can cause dysfunctional labour negotiations (Ponak, Zerbe, Rose, & Olson, 1996). Robert Hedbon's work suggests that unresolved grievances can lead to festering conflict that is funneled into other areas of the labour relations system, with harmful consequences such as increased strikes (for a good summary of this work, see Hebdon & Noh, 2013). Fourth, the liability of the employer increases with time (Sloane & Whitney, 1985). Fifth, the availability of evidence fades (Prasow & Peters, 1983). Sixth, delay is associated with increased costs (Ponak & Olson, 1992; Thornicroft, 2009).

In the first half of the 1990s, two sets of researchers used advanced statistical techniques to examine the causes of delay in Canadian grievance arbitration: Thornicroft; and Ponak and Olson (Thornicroft, 1993, 1994, & 1995; Ponak & Olson, 1992; Ponak, Zerbe, Rose, & Olson, 1996). Since these studies, there has been no further attempt to scientifically study the issue of delay and its causes in Canada, despite mounting anecdotal evidence that the problem of delay has continued to become worse since then and despite legal developments that are thought to exacerbate delay.

To address this gap in the scientific literature, the present study examines delay and its determinants in Ontario from 1994 to the present. After reviewing previous research and legal developments, I develop a series of testable hypotheses. These hypotheses are tested by coding approximately 400 Ontario arbitration awards, and then performing event history analysis on the data.

2 Previous Research & Legal Developments

2.1 Delay

There is abundant evidence from the Canadian literature that delay is becoming a worse problem with time. In these studies, grievance duration was measured from the filing of the grievance (the grievance date) until the time an arbitration award was released to the parties. Over 1971-1973, the average grievance duration for a dispute that went to arbitration in Ontario was 256 days (Goldblatt, 1974). A similar average (214 days) was found in Alberta for a similar timeframe (1973-1975) (Fricke, 1976). Ponak and Olson (1992) studied 564 arbitration awards in 1975 from across Canada, reported in *Labour Arbitration Cases*, and calculated an average of 283 days. Over the period of 1966-1981 in British Columbia, the average duration was found to be 240 days (Stanton, 1983). To summarize these studies, estimates of the average grievance duration in the first half of the 1970s ranged from 214-283 days, depending on the study. Next, two Ontario studies were done on grievance duration in the early 1980s. Winter (1983) found that the average figure for 1980 was 301 days, while Rose (1986) calculated a mean duration of 342 days for arbitrations in 1983. These findings are suggestive of an upward trend in grievance duration in the early 1980s, relative to the duration in the early 1970s. For a period later in the 1980s (1985-1988) in Alberta, the average grievance duration was determined to be even higher at 345 days (Olson, 1990). Using a period of the 1980s that was later still (1987-1988), Ponak and Olson (1992) used arbitration awards from across Canada reported in *Labour Arbitration*

Cases and found a longer mean duration of 428 days. In the latest study available, mean duration was estimated to be 517 days in Quebec for awards released between 1993-1996 (Foisy, 2002). Note that this last study dealt only with the decisions of sole arbitrators, and did not include awards released by three-member arbitration panels. The duration would have almost definitely been even longer if panel awards were included, because it is more difficult to coordinate the schedules of the members of the panel (Ponak & Olson, 1992). Surprisingly, there is no good Canadian data on grievance durations beyond the mid-1990s.

The results of these studies can be summarized in Figure 3.1, which plots the duration by the year—for those studies in which data was collected over multiple years, the mid-point was taken—along with the line of best fit. This graph clearly shows the troubling upward trend in the duration of grievance arbitration with the passage of time. The slope of the line suggests an annualized increase of 11.89 days in grievance duration, which amounts to an increase of 118.9 days over a decade!

2.2 Determinants of Delay

The evidence cited in the last section unambiguously indicates that delay has increased. The question then becomes why delay is going up—what are its determinants? Possible determinants can be divided into three different constructs: legalism, expanded jurisdiction, and procedure.

2.2.1 Legalism

Over the years, many authors have argued that the positive aspects of the grievance arbitration system are eroding, in large part due to something that has evocatively been described as "creeping legalism" (Rubin & Rubin, 2003; Weiler, 1980). "Legalism" is the emphasis of procedural rules and legal principles over considerations that would foster the parties' long-term

relationship. A number of different indicia of legalism have been put forward by both labour relations researchers and legal scholars, but only some have been scientifically studied.

Figure 3.1. Graph of results of previous studies, average total duration of grievance by year of study. Studies plotted by year of data, not year of publication. Where a study covered multiple years, the mid-point was taken. Line of best fit also shown. Slope of line is 11.89 days per year.

Not surprisingly, some researchers have hypothesized that the presence of lawyers is a legalism variable that causes delay in grievance arbitration. Lawyers are trained to make complicated and technical legal arguments with a view to helping their clients win the case. Two groups of researchers have studied the effect of lawyers on arbitration delay in Canada. The first researcher, Thornicroft, conducted a series of three studies (1993, 1994, and 1995) on the duration of discipline and discharge grievances in Newfoundland. He used multiple regression to study the factors that caused delay. He studied total disposition time, and the duration of the pre-hearing phase, and the post-hearing phase. His results indicated that legal representation was positively related to total disposition time and the length of the post-hearing phase. In other words, the presence of lawyers at arbitrations was associated with increased delay. However, he

did not find that the presence of lawyers was associated with the length of the pre-hearing phase. His findings that the presence of lawyers (and other factors) had different impacts on the lengths of different stages of the grievance process highlighted the need for future researchers to study each stage separately.

The second group of scholars to hypothesize that legal representation was a cause of delay was Ponak et al. (1996). They used event history analysis on an Alberta dataset. As Thornicroft did in his studies, Ponak et al. divided delay into a number of stages, and replicated his finding that different factors impacted delay at different stages. However, their results on the impact of the use of legal counsel were somewhat different than Thornicroft's. They found that lawyers did not impact the total length of grievance arbitration. Interestingly, they found that lawyers increased the length of some of the pre-hearing phases, while *decreasing* others, and that the presence of lawyers actually *hastened* the post-hearing phase. Unlike Thornicroft, they found no significant impact of the presence of lawyers on total disposition time.

Another "legalism" variable that might cause delay is the use of preliminary objections. Preliminary objections are raised by one of the parties at the beginning of the arbitration hearing, and typically relate to the arbitrator's jurisdiction to hear the case (Winkler, 2010 & 2011; Thornicroft, 2009). These might delay the hearing because time is spent for the parties to make technical legal arguments, and often the remainder of the hearing is postponed until the arbitrator makes a ruling on the preliminary objection. Preliminary objections as a cause of delay were studied by Ponak et al. (1996); however, these researchers did not find that they had a significant effect on either the total duration time, or on the length of any of the stages of the arbitration.

Length of the arbitration award has also been studied by Ponak et al. (1996) as a "legalistic" determinant of delay. Their rationale was that arbitrators must write longer decisions the more complicated and technical a case is. Curiously, these researchers found that award

length had a significant negative effect at the pre-hearing stage (i.e., longer awards were associated with shorter pre-hearing stages) and no impact on total duration of the arbitration, but that, more in keeping with expectations, award length did have a significant positive effect for the post-hearing stage.

There have been a number of other legalistic factors that have been posited by some legal scholars as being causes of delay in arbitration, but these have not been subject to scientific investigation. Justice Winkler (2011) states that he has observed a culture change in grievance arbitration from being industrial relations based to being litigation based. According to Justice Winkler, there is now an increased focus on legal process and legal rules, and an increased focus on due process rather than on an outcome that makes labour relations sense. Specific factors cited by Justice Winkler as indicia of this increased legalism are as follows: evidentiary disputes, estoppel arguments, number of cases cited in an award, the number of witnesses called, the use of expert testimony, the use of legal briefs/written submissions, credibility challenges, and the number of arbitral awards issued on a given grievance before the dispute is finally resolved. The impact of these legal factors on grievance duration is capable of empirical examination, despite the fact it has not been investigated to date.

Related to Justice Winkler's comments about a culture change in grievance arbitration are two contrasting perceptions that stakeholders hold of the appropriate role that arbitrators ought to play. Some believe that an arbitrator should merely play the role of a judge, and take into account "legalistic" considerations. Others believe that it is also appropriate for arbitrators to use their labour relations expertise and experience to make decisions based at least partially on non-legal criteria that may serve to enhance the labour-management relationship. This later role has been likened to that of a "labour-relations physician" (see Brown, Beatty, & Deacon, 2006, para 1:2000). Consistent with this culture change in arbitration, Brown et al. (2006) asserted that in

Canada both the parties and arbitrators now place far greater emphasis on the judicial role. The extent to which arbitrators reference considerations related to their role as a "labour-relations physician" and whether these considerations have had an impact on grievance duration is also capable of scientific examination.

2.2.2 Expanded Jurisdiction

In addition to the issue of creeping legalism, many court cases decided since the empirical studies conducted in the early 1990s have expanded the jurisdiction of labour arbitrators, and this might also be a cause of delay.

Traditionally, the jurisdiction of the arbitrator has been derived from applicable labour legislation and from the collective agreement itself. Historically, legal issues that did not arise out of the collective agreement were often litigated in the courts, or before tribunals. However, there have been a series of court decisions starting in 1995 that have substantially expanded the jurisdiction of arbitrators. In 1995, the Supreme Court of Canada decided *Weber v. Ontario Hydro* and rejected the prevailing notion that arbitrators and the Courts had concurrent jurisdiction, in favour of a model of "exclusive jurisdiction" for arbitrators. The court ruled that an employee who was trying to litigate alleged breaches of the *Charter of Rights and Freedoms* and tortuous wrongs on the part of his employer had to proceed via grievance arbitration. In 2003, the Supreme Court further held that an alleged violation of the *Human Rights Code* constitutes an alleged violation of the collective agreement (even in the absence of specific language in the collective agreement referencing the *Human Rights Code*), and a grievance arbitrator has jurisdiction to enforce rights under the *Code* (*Parry Sound v. OPSEU*). As a result of the *Parry Sound* decision, arbitrators have jurisdiction to enforce not only the *Code*, but other important employment-related statutes such as the *Employment Standards Act*, the *Occupational Health and Safety Act*, and privacy legislation. The expansive jurisdiction of grievance

arbitrators was broadened further by *Bisaillon v. Concordia University*, a Supreme Court of Canada decision in 2006. In *Bisaillon*, the court ruled that a challenge to the university's administration of a multi-bargaining unit pension fund must be brought to arbitration, rather than to court as a class action. Lastly, an Ontario Court of Appeal decision that same year further reinforced the broad range of remedies that an arbitrator has jurisdiction to award. In *OPSEU v. Seneca College* (2006), that court ruled that an arbitrator has jurisdiction to determine whether he or she can award aggravated and punitive damages from torts. Aggravated and punitive damages go beyond the typical compensatory damages that arbitrators have traditionally ordered.[3] To summarize, the expanded scope of complicated legal issues that labour arbitrators now have jurisdiction over may serve to increase delay in the arbitration system (Nadeau, 2012).

2.2.3 Procedure

Although there are factors such as creeping legalism and expanded jurisdiction that appear to be increasing delay in grievance arbitration, there are also factors that may be working in the opposite direction. These factors typically relate to procedures the parties can use to try and decrease delay. One of these procedures is statutory expedited arbitration. Rose (1986) conducted a study of this procedure in Ontario. Statutory expedited arbitration is a procedure that the parties to a grievance can access under the Ontario *Labour Relations Act*. In very general terms, within 30 days after the grievance has been filed, one of the parties can access this process by requesting that the Ministry of Labour appoint a sole arbitrator. This arbitrator must commence the arbitration hearing within 21 days. Either party can apply for this procedure to be used for a particular grievance—it is not necessary for the other party to consent. In his study,

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[3] It is important to note, though, that the *OPSEU v. Seneca College* case is just one in a line of arbitral awards and judicial decisions confirming a relatively broad range of arbitral jurisdiction to award appropriate remedies. The genesis of this broad range of arbitral jurisdiction can be traced to Professor (as he then was) Bora Laskin's award in *Re Oil, Chemical and Atomic Workers International Union, Local 16-14 and Polymer Corporation Ltd.* (1959).

Rose compared the unadjusted means of grievance duration for the approximately 5,500 Ontario grievances between 1979 and 1985, both those that used expedited arbitration, and those that did not. He obtained the data from reports of the Ontario Ministry of Labour. He found that the mean duration for grievances using expedited arbitration was 119 days, as compared to 342 days for those that did not, and that this difference was statistically significant. His results also indicated that expedited arbitration was increasing in popularity (i.e., the use increased over the time of the study).

Quite apart from statutory expedited arbitration, the parties can themselves agree to take steps to expedite the arbitration. Such steps might include a relaxing of the legal rules of evidence during a hearing, an elimination of the need for a written award, or an agreement that neither side will be represented by legal counsel (Dassios, 2010; Kauffman, 1992). There have been no scientific studies of the impact of such agreed expedited arbitration on grievance duration.

In addition to expedited arbitration, in an attempt to have the matter dealt with more quickly, parties can choose whether to have the grievance arbitrated by a sole arbitrator, rather than by the more traditional three-person panel. Grievances decided by a sole arbitrator are expected to be faster, because it is much easier to coordinate schedules with one busy person, rather than three, and because a dissenting opinion from one of the nominees will slow down the release of the award (Ponak et al., 1996). The scientific studies do suggest that grievance durations are faster with sole arbitrators. Ponak et al. (1996) found that the pre-hearing and posting-hearing phases and total duration were all longer when three-member panels were used. Thornicroft (1994; 1995) found that only the delay phase was longer in such cases, but the results of Thornicroft (1993) indicate that the delay phase and the total duration were longer.

There is also some evidence that the procedure of mediation-arbitration (med-arb) is becoming increasingly popular as a means of combating delay (Picher, 2012; Whitaker, 2009). Med-arb is a procedure whereby the appointed arbitrator tries, with the parties' agreement, to mediate the dispute (i.e, assist the parties voluntarily reach resolution) before proceeding to the more formal arbitration phase where a resolution will be imposed on the parties. If the parties are able to negotiate a resolution to their dispute with the assistance of the arbitrator, this will obviate the need for an arbitral hearing and a decision with lengthy reasons (Bartel, 1991; Marcotte, 1998; Nelson & Uddin, 1998; Newman, 2000; Whitaker, 2009). There have been no scientific studies on the efficacy of med-arb in combating the issue of delay.

3 Hypotheses

It is possible to use the previous research and legal developments to formulate a series of hypotheses regarding delay and its causes over the past two decades in Ontario. It is reasonable to expect the trend observed from the mid-1970s to the mid-1990s of steadily increasing grievance times to have continued. On this basis, the following hypothesis can be advanced:

H1: Grievance arbitration disposition times have continued to increase over the last two decades.

There is some evidence from the scientific literature that legalism is one of the determinants of grievance durations. Hence, the following hypothesis is reasonable:

H2: Legalism is associated with increased disposition time of grievances.

In the present study, the construct of legalism will be measured using a number of variables which have been the subject of previous study or commentary, outlined above. Examples include representation by lawyers; preliminary objections; evidentiary disputes; estoppel arguments; number of cases cited in the award; number of witnesses; filing of legal briefs; credibility attacks; total length of awards; and number of awards.

The second hypothesis (*H2*) measures the direct effect of legalism on arbitration delay, without predicting whether the impact is changing with the passage of decades (in other words, it does not predict whether there is an interaction effect between legalism and decade). According to Justice Winkler (2010; 2011), the delays caused by the culture of legalism appear to be getting worse with time. This study will therefore test the following hypothesis, regarding an interaction between time period (i.e., decade) and legalism, to determine whether he is correct:

H3: Year is moderating the association of legalism and disposition time, such that a given level of legalism is producing longer disposition times in later decades.

Although they do not have evidence to back up their claims, legal commentators have credibly argued that court decisions expanding the jurisdiction of arbitrators will increase the complexity of arbitrations and lead to delay in the system. On this basis, I predict the following:

H4: The expanded jurisdiction of arbitrators is associated with increased disposition time of grievances.

The construct of expanded jurisdiction will be measured using the following variables: whether the arbitrator was asked to apply the *Charter of Rights and Freedoms*, the Ontario *Employment Standards Act*, the Ontario *Human Rights Act*, the Ontario *Occupational Health and Safety Act*, privacy law, some other statute, and an atypical remedy.

There may be a lag effect of the expanded jurisdiction, such that it might take some time before the parties feel comfortable arbitrating issues that were formerly litigated in the courts or before tribunals. On this basis, I predict the following interaction effect:

H5: Year is moderating the association of expanded jurisdiction and disposition time, such that this broader jurisdiction is producing longer disposition times with each passing decade.

There is evidence that at least some dispute resolution procedures are useful in combating the problem of delay. Therefore, the following hypothesis was formulated for this study.

H6: Certain dispute resolution procedures used by the parties are associated with decreased disposition time of grievances.

The following dispute resolution procedures will be measured: sole arbitrator (versus a three person arbitration board); the use of statutory expedited arbitration; the use of contractually expedited arbitration; the use of mediation-arbitration; and the use of settlement. It is predicted that these variables will be associated with faster dispute resolution times. However, there are counter-veiling forces at work with mediation-arbitration and settlement. Generally, mediation-arbitration is expected to lead to faster resolution times for the entire universe of grievances that use this procedure. This is due, in part, to the fact that the majority of these grievances are expected to be resolved at the mediation phase. However, the med-arb grievances that are the subject of the present study are only those that proceed all the way to arbitration. These grievances might be expected to have substantially faster arbitration stages after mediation, because many things that happen in mediation may serve to focus the arbitration hearing. For example, parties might narrow the issues that need to be arbitrated, or reach agreement on certain facts of the case (obviating the need for particular witnesses to be called). Acting against the enhanced focus provided in the arbitration phase, the use of mediation-arbitration does add a step (the mediation step), which might serve to lengthen disposition times. The question is ultimately which one of these countervailing forces dominates.

A similar dynamic is at play with settlements. On the one hand, the fact that the parties have reached a settlement on their own (without the intervention of a third party) at some point in the history of the dispute might serve to narrow the issues that are litigated in an arbitration hearing. On the other hand, a settlement that does not completely resolve all the issues adds a

step in the process, and might serve to make subsequent litigation of the dispute particularly bitter and protracted if one party believes that a dispute was settled, only to have the other side allegedly breach that settlement.

A related hypothesis involving an interaction is that there is a learning effect with these dispute resolution procedures, such that the participants in the arbitration system are getting better at utilizing them over time. On this basis, the following result is expected:

> *H7:* Year is moderating the association of dispute resolution procedures and disposition time, such that a given procedure is producing shorter disposition times with each passing decade.

4 Research Design

4.1 Content Analysis

For this study, a technique called "content analysis" was used to generate data from written arbitration awards. Content analysis is an approach to the analysis of documents and texts that seeks to quantify content in terms of predetermined categories and in a systematic and replicable manner (Bryman, 2008). Content analysis has been used in many different contexts, the most common being the study of mass media communications. Content analysis was used by Ponak and Olson (1992), Ponak et al. (1996) and Thornicroft (1993, 1994, and 1995), in the studies discussed above.

The arbitration awards in my study were content analyzed by two coders, who each hold multiple university arts degrees. In order to avoid biasing the results, these coders were blind to the study's hypotheses. The average award ran about 37 paragraphs; the length ranged from 1 to 246 paragraphs. A number of recommended steps were taken to maximize inter-rater reliability (Krippendorff, 2013; Neuendorf, 2002). First, I developed a codebook and provided it to the coders (this codebook is available upon request). Second, the coders analyzed 30 pilot cases, and

the codebook was modified in response to issues identified in this pilot phase. Third, the two coders underwent a training program before the pilot phase, and were given additional training to correct the issues identified in the pilot phase.

The literature suggests that an inter-rater reliability of at least .85 is desirable (Neuendorf, 2002). For this study, this threshold was meet for every variable, on a sample of 100 cases. Pearson product-moment correlation coefficients were calculated for the continuous variables, which ranged from .902 to 1.000. Cohen's kappa coefficients were generated for the categorical variables, which ranged from .846 to .964. When interpreting the Cohen's kappa (κ) figures, it is important to bear in mind that κ takes into account the probability that agreement occurred by chance, and hence is often considered an overly conservative measure of agreement. Inter-rater reliability statistics are provided in Table 3.1.

After the coding was completed, the researcher checked the work of both coders, and was satisfied that it was performed to a high standard. Where there was disagreement between the coders on a continuous variable, the coding results were averaged; where the coders disagreed on a particular categorical variable for a specific award, the researcher broke the tie.

4.2 Data

To test the hypotheses, the present study was conducted using Ontario arbitration awards from 1994, 2004, and 2012. These years were chosen for specific reasons. The year 1994 was chosen because it was the last full year before the *Weber* (1995) decision, which substantially expanded arbitral jurisdiction. That year also coincided roughly with when the last statistical studies on arbitral delay were conducted. The year 2004 was selected because it was the first full year after the *Parry Sound* (2003) decision, and because it was a decade after the original reference year. The year 2012 was chosen because it is the most recent full year for which data was available. As will be explained in the next paragraph, in order to be included in this study

the final grievance award had to be delivered in the year in question (1994, 2004, or 2012), so arbitration awards in 2012 needed to be monitored for a period of time after the end of 2012, to ensure that a supplementary award was not issued later. In cases where a supplementary award was necessary to dispose of the grievance, and the supplementary award was issued after the end of the reference year, the grievance was not included in the study (If the supplementary award was issued in the reference year, the grievance was used in the study).

TABLE 3.1: INTER-RATER RELIABILITY STATISTICS (CODER A VERSUS CODER B)			
DURATION VARIABLES			
Grievance Date	.953	Last Hearing Date	1.000
First Hearing Date	1.000	Decision Date	1.000
LEGALISM VARIABLES			
Lawyers	.953	Experts	.914
Preliminary Objection	.873	Labour Relations Considerations	.848
Evidentiary Dispute	.884	Legal Briefs	.859
Estoppel	.865	Credibility	.870
Cases Cited	.952	Length of Decision (Paragraphs)	.960
Witnesses (excluding experts)	.902	Awards	.985
EXPANDED JURISDICTION			
Charter of Rights and Freedoms	.932	Privacy	.872
Employment Standards Act	.863	Other Statute	.894
Human Rights Code	.889	Atypical Remedy	.862
Occupational Health and Safety Act	.853		
PROCEDURE			
Panel	.964	Med-Arb	.865
Statutory Expedited	.953	Settlement	.902
Contractually Expedited	.884		
CONTROL VARIABLES			
Arbitrator Workload	.932	Grievance Classification	.846
Union	.896	Parallel Criminal Proceeding	.895
Sector	.871	Parallel Human Rights Proceeding	.904
Grievance Type	.853	Parallel Other Proceeding	.864
N=100 Pearson product-moment correlation coefficients are given for the continuous variables. Cohen's kappa coefficients are provided for the categorical variables.			

The unit of analysis was a grievance. A sampling frame was complied of all relevant grievances in each of the three reference years. As indicated in the last paragraph, in order for a grievance to be included in the study, it had to end in an arbitration award that was released in the reference year. Some grievances have more than one arbitration award (for example, the arbitrator may have to issue an award on a preliminary objection, before ultimately issuing an award on the substantive matters, or the arbitrator might be required to issue a supplementary award to clarify certain issues that arise from a putative final award). These grievances were included only if the last arbitration award was released in the reference year.

Arbitration awards were obtained from three legal databases: Quicklaw, Labour Spectrum, and CanLII. The first two were paid-subscription databases, while the third was publicly available for free. Arbitrators are under a legal obligation to provide the Ministry of Labour with copies of all awards they render, and the Ministry of Labour is supposed to, in turn, provide these awards to these three legal databases. While there is a high degree of overlap among the databases in terms of the cases they provide, particularly for the most recent reference year, there are also many awards that are not common across databases. Therefore, the sampling frame needed to be compiled using all three databases.

There were 1,153 eligible grievances in the year 1994, 803 eligible grievances from 2004, and 753 eligible grievances for 2012. After the sampling frame was compiled, a random sample of 15% of grievances was obtained from each reference year. Nine grievances with total disposition times more than three standard deviations from the mean were dropped, after statistical analysis suggesting it was appropriate to do so.[4] This yielded a total of 397 observations: 172 from the year 1994; 120 from 2004; and 105 from 2012.

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[4] The hazard ratios generated from the dataset with the outliers removed were compared to the hazard ratios generated with the outliers included, and they were very similar.

4.3 Time and Focal Explanatory Variables

The dependent variable is the hazard rate, based on time. The hazard rate will be discussed in more detail below, on the section on the empirical procedure. Time in this study was measured in three different phases, plus a total of the phases. The phases were pre-hearing, hearing, and decision preparation. The length of each of these phases, measured in days, was generated using information from the arbitration award. Almost all arbitration awards in the study listed the dates of arbitration hearings.[5] All awards provided the date the arbitration award was released. Awards generally listed the date the grievance was filed, but in those rare cases that did not, I was able to obtain this missing data from the parties. For each of the grievances in this study, the length of the pre-hearing phase was therefore calculated as the number of days between the filing of the grievance and the date of first hearing. The hearing phase was computed as the days between the first hearing date and the last hearing date (in the many cases where there was just one hearing date, the length of this phase was one day). The length of the decision preparation phase was determined as the period between the last day of hearing, and the release of the award (or, in cases where more than one award was issued, the date of the last award in the sequence). The length of the total disposition time was simply the sum of these three phases. Summary statistics of the various phases are provided in Table 3.2.

[5] Sixteen out of the 397 cases in this study did not provide the hearing dates.

Table 3.2. Descriptive Statistics

VARIABLES	N	Mean	Standard Deviation	Median	Min	Max
DEPENDENT VARIABLES						
Pre-Hearing (Days)	381	315.74	306.18	215.00	12	1851
Hearing (Days)	381	91.49	159.61	1.00	1	944
Decision Preparation (Days)	381	61.82	106.64	28.00	1	1186
Total Disposition Time (Days)	397	471.97	381.93	351.00	44	1867
INDEPENDENT VARIABLES (Continuous)						
Number of Lawyers	397	1.39	0.73	2.00	0	3
Number of Cases Cited in Decision	397	5.81	8.43	3.00	0	76
Number of Witnesses (Excluding Experts)	397	2.06	2.66	1.00	0	21
Number of Experts Testified	397	0.05	0.26	0.00	0	2
Length of Decision (# of Paragraphs)	397	37.37	34.37	28.00	1	246
Number of Arbitral Awards Issued	397	1.17	0.54	1.00	1	6
Arbitrator Workload (Control)	397	18.95	15.28	15.00	1	109

Frequencies (Categorical Independent Variables)

Year	1994	172
	2004	120
	2012	105
Preliminary Objections	Objections	80
	No Objections	317
Evidentiary Dispute	At least one evidentiary objection raised	45
	No evidentiary objection raised	352
Estoppel	Either party raises the issue or estoppel/waiver	51
	Neither party raises issue or estoppel/waiver	346
Labour Relations	References to labour relations considerations in award	36
	Award does not reference l.r. considerations	361
Legal Briefs	Parties submitted legal briefs (written arguments)	58
	No legal brief or written argument was submitted	339
Credibility	Credibility of at least one witness challenged	83
	Credibility not challenged	314
Charter of Rights and Freedoms	Arbitrator considered *Charter*	5
	Arbitrator did not consider *Charter*	392
Employment Standards Act	Arbitrator considered *Employment Standards Act*	25
	Arbitrator did not consider *Employment Standards Act*	372
Human Rights Act	Arbitrator considered *Human Rights Act*	38
	Arbitrator did not consider *Human Rights Act*	359
Occupational Health & Safety Act	Arbitrator considered *Occupational Health & Safety Act*	21
	Arbitrator did not consider *OHSA*	376
Privacy Law	Arbitrator considered Privacy Law	5
	Arbitrator did not consider Privacy Law	392
Other Statute	Arbitrator considered statute other than those listed above.	27
	Arbitrator did not consider other statute	370
Atypical Remedy	Either party requested an atypical remedy (e.g., punitive damages)	42
	No atypical remedy requested	355

Table 3.2. (Continued) Descriptive Statistics

Frequencies (Categorical Independent Variables)

Arbitration Panel	Sole Arbitrator	345
	Three-Person Board	52
Statutory Expedited Procedure	Expedited procedure in labour legislation used.	53
	Statutory expedited procedure not used.	344
Contractually Expedited Procedure	Parties used another, agreed-upon expedited procedure.	35
	No agreed-upon expedited procedure was used	362
Mediation-Arbitration (Med-Arb)	Arbitrator attempted to mediate the dispute at some point	40
	No med-arb procedure used.	357
Settlement	Parties entered into a minutes of settlement at some point	23
	No settlement	374
CONTROL VARIABLES (Categorical)		
Union		
	Pilots	1
	ATU	8
	Bakery, Confectionary, TWGM International Union	2
	CAUT	2
	CAW	37
	ONA	13
	CUPE	66
	CLAC	5
	CEP	16
	ETFO	2
	IAFF	2
	IAM	10
	IBEW	1
	Boilermakers	2
	IFPTE	2
	IUOE	2
	OPSEU	65
	OECTA	3
	OSSTF	4
	SEIU	11
	Teamsters	20
	UAW	1
	Carpenters	1
	UFCW	37
	USW	45
	UNITE HERE	6
	Police Association	3
	Liquor Employees	4
	IWA	5
	Other	21

Table 3.2. (Continued) Descriptive Statistics

Frequencies (Categorical Independent Variables)

CONTROL VARIABLES (Categorical) Cont'd

Sector	Agriculture and Forestry	1
	Mining, and Oil and Gas Extract'n	12
	Utilities	9
	Construction	2
	Manufacturing	116
	Wholesale Trade	7
	Retail Trade	20
	Trans and Warehousing	19
	Info and cultural industries	6
	Finance and Insurance	1
	Real Estate	1
	Admin and Waste Mgmt.	6
	Education	32
	Health Care and Soc. Assistance	63
	Arts, Entertainment, and Recreation	3
	Accommodation and Food Services	12
	Other Services	10
	Municipal Government	42
	Provincial Government	35
Grievance Type	Individual	252
	Group	54
	Policy	91
Grievance Classification	Discharge	110
	Discipline	39
	Org. of Workplace	71
	Seniority	26
	Job Competition	33
	Compensation	62
	Benefits	36
	Other	20
Related Criminal Proceeding	There was a criminal proceeding related in some way to the grievance	7
	No related criminal proceedings	390
Related Human Rights Proceeding	There was a human rights proceeding related in some way to the grievance	7
	No related human rights proceeding	390
Other Legal Proceeding	There was some other legal proceeding related in some way to the grievance	3
	No related other legal proceeding	394

The explanatory variables were measured using three constructs of interest: legalism, expanded jurisdiction, and procedure. The construct of legalism was measured using the following variables: the number of parties represented by lawyers; preliminary objections; evidentiary disputes; estoppel arguments; number of cases cited; number of witnesses; number of

experts; labour relations considerations; filing of legal briefs; credibility attacks; total length of awards; and number of awards. It is important to note that the 'labour relations considerations' variable is of a different nature than the others. While these variables are generally taken to measure a higher level of legalism, the taking into account of labour relations considerations indicates a lower level of legalism, and is expected to be associated with decreased disposition times. Descriptive statistics and additional detail related to these explanatory variables and the other ones used in this study are presented in Table 3.2.

The construct of expanded jurisdiction of the arbitrator was measured using a series of dichotomous variables. These variables measured whether arbitrators were asked to apply legislation and caselaw outside of their traditional jurisdiction. This traditional jurisdiction was over grievances arising directly out of the terms of the collective agreement. The variables included whether the arbitrators considered the following legislation in their awards: *Charter of Rights and Freedoms*, the Ontario *Employment Standards Act*, the Ontario *Human Rights Act*, the Ontario *Occupational Health and Safety Act*, privacy law, or some other statute. Additionally, one variable measured whether the arbitrator was asked to award a remedy that was not typical in the arbitration context, such as aggravated damages, punitive damages, and tort damages.

The use of various dispute resolution procedures was also measured, to determine their impact on the time function. The following dichotomous variables were measured: arbitration panel (sole arbitrator versus a three person arbitration board); the use of statutory expedited arbitration; the use of contractually expedited arbitration; the use of mediation-arbitration; and the use of settlement. The arbitration panel variable is self-explanatory. The use of statutory expedited arbitration means the use of the optional expedited procedure outlined in the Ontario *Labour Relations Act* (Additional information about this procedure was discussed above, in

Section 2.2.3, Procedure). As indicated above, independent of the expedited procedure contained in the *Labour Relations Act,* the parties can themselves agree to take steps to expedite the arbitration, and this variable will be called contractually expedited arbitration. The parties have substantial flexibility in agreeing how to expedite the process, but common areas include a relaxing of the legal rules of evidence during a hearing, specified timeframes for the various phases, or an understanding that neither side will be represented by legal counsel. In this study, it was not possible to measure the contractually expedited arbitration variable more precisely than by the use of a dichotomous variable, as the award often did not give details of the parties' agreement to expedite. The mediation-arbitration variable measures whether the arbitrator attempted to act as a mediator at some point, in an effort to resolve the dispute. The reader might find the variable of "settlement" puzzling. Why would there be a settlement if the parties arbitrated the grievance? Grievances that were completely settled by the parties without the later intervention of an arbitrator were not included in this study. However, a number of cases included in this study either settled some issues, but required an award to resolve the rest, or a settlement was reached by the parties, but they subsequently disagreed about the terms or the implementation of the settlement, and ultimately needed an arbitrator to resolve this disagreement.

In addition to my key explanatory variables, I also included variables to control for other factors that might impact grievance duration:

- the union involved (e.g., CAW, CUPE);
- the grievance type (i.e., individual, group, or policy);
- the grievance classification by subject matter (e.g., dismissal, seniority);
- the applicable sector, classified using the North American Industry Classification System (NAICS) Canada 2012;
- whether there was a parallel criminal proceeding related to the grievance;

- whether there was a parallel human rights proceeding related to the grievance;
- whether there was some other parallel legal proceeding related to the grievance;
- the arbitrator workload (How many other cases did the arbitrator arbitrate that year?).

5 Empirical Procedures

As previously indicated, this study examined the duration of four periods, measured in days, for grievances that went to arbitration: the pre-hearing phase; the hearing phase; the decision preparation phase; and the total disposition time (which is a sum of all three phases). The study employed a form of event history analysis. Estimates for the four time periods were obtained using a hazard model. A hazard model allows one to see the impact of various explanatory variables on time functions (Ponak et al., 1996). The hazard model assesses the risk—at a particular moment—that a subject who has not yet done so will experience the target event. More specifically, this model is concerned with estimating the conditional probability of an event occurring—for example, the probability that a grievance will have a final arbitration award released in day 365, given that 364 days have passed without a final award. It is important to understand that a continuous time hazard, such as the one used in this study, is not a probability. Rather, it is a rate, assessing the conditional probability of event occurrence per unit of time (Singer & Willett, 2003, chapter 13).

Hazard models are used to estimate the duration of events because they have a number of benefits over regression-based methods. First, as a result of hazard models estimating the conditional probability of an event occurring, they are especially well-suited to analysis of arbitration delay, because these models suggest that the conditional probability of a grievance transitioning to the next phase (or concluding) can vary over time. Second, these models are able to deal with censored or incomplete spells. Third, they can easily accommodate explanatory variables that vary with time (Ponak et al., 1996; Campolieti, Riddell, & Slinn; 2007). The first

advantage is the one most applicable to this study. There are no censored or incomplete spells in this study, nor did the values of the explanatory variables in this study vary with time.

This study employs a form of hazard model called a proportional hazard model. This model assumes that the ratio of the hazard rates of any two subjects at any point in time is constant. An analysis of Schoenfeld residuals was conducted, which confirmed that the proportional hazards assumption was satisfied for this data (Singer & Willett, 2003, chapter 15). The proportional hazards model I used is specified as follows:

$$h(t) = \exp(x_i'\beta)h_0(t),$$

Where:

h(t) is the hazard rate at time *t*,

x_i is a vector of explanatory variables,

β is a vector of parameters for the controls for individual characteristics, and

$h_0(t)$ is the baseline hazard.

I employed a Cox proportional hazard model, which treated the baseline hazard function *$h_0(t)$* as a nuisance parameter. This approach conditioned the baseline hazard out of the model (Singer & Willett, 2003, p. 503-542). Since the coefficient estimates from a hazard model are difficult to interpret, I will present hazard rate ratios, which are the exponentiated coefficient estimates from the hazard model ($HR_j = \exp(\hat{\beta}_j)$).[6] Like odds ratios, hazard rate ratios greater than 1 correspond to positive coefficient estimates and indicate that they are associated with increases in the hazard

[6] Let the hazard rate at time t for a covariate x be written as $h(t) = h_0(t)\exp(x\beta)$. Assume x is a dummy variable such that if $x = 1$, then $x(1) = 1$, and if $x = 0$, then $x(0) = 0$. Then the hazard rate ratio can be written as $HR(t,x(1),x(0)) = \frac{h_0(t)\exp(x(1)\beta)}{h_0(t)\exp(x(0)\beta)} = \frac{\exp(x(1)\beta)}{\exp(x(0)\beta)} = \exp(\beta(x(1) - x(0))) = \exp(\beta(1-0))$ $= \exp(\beta)$. If the covariate is continuous, then the hazard rate ratio can be interpreted as the effect of a one-unit change in x on the hazard $HR(t,x_1,x_0) = \frac{h_0(t)\exp(x_1\beta)}{h_0(t)\exp(x_0\beta)} = \frac{\exp(x_1\beta)}{\exp(x_0\beta)} = \exp(\beta(x_1 - x_0)) = \exp(\beta)$, if the difference between $x_1 - x_0$ equals 1, and we would have the exponentiated coefficient estimate.

or, equivalently, shorter duration times. Conversely, hazard rate ratios less than 1 correspond to negative coefficient estimates and are associated with lower hazard rates or longer duration times (Singer & Willett, 2003).

For each of the four time periods, I ran a specification of the main effects (without any interaction terms). Additionally, in order to test my hypotheses involving moderation (*H3*, *H5*, and *H7*), I also ran a specification using interaction terms for the four time periods. Likelihood ratio tests were used to decide which interaction terms to include. Therefore, there were eight sets of hazard ratio estimates produced (a specification with main effects only and a specification including interaction terms for each of the four time periods).

When interpreting the hazard ratios, it is important not to automatically infer causation from the explanatory variables on time. While there is no doubt a heavy causal effect of some explanatory variables on the duration of various grievance stages (e.g. number of witnesses causing delay at the hearing stage), the causal component of other hazard ratios is more tenuous. This is especially so with the variables related to the "procedure" hypothesis (e.g., three member panel, statutory expedited arbitration, contractually expedited arbitration, med-arb, and agreed statement of fact). For these variables, there might be issues with simultaneity and self-selection. In other words, a party might opt for the statutory expedited arbitration of a simple grievance precisely because it is simple. Such a grievance would perhaps still have been resolved roughly as quickly even without the use of statutory expedited arbitration. Therefore, particularly for the hazard ratio estimates for these variables, it is best to think of the relationship with the dependent variable based on time as being associational. That said, I did check for endogeneity among the procedure variables and the other explanatory variables, and did not find any.[7]

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[7] The estimates for the other explanatory variables were not changed by the presence or absence of the procedural variables in the model.

I conducted a number of robustness checks to assess the results of the proportional hazard model. One of these checks involved an ordinary least squares (OLS) regression model. First, I performed a natural logarithm transformation of the lengths of the various phases. Then, I used the natural log values as the dependent variable, and kept the same explanatory variables as used in the proportional hazards model. The results of the OLS regression model were similar to those of the hazards model. Another check I performed was whether removing the grievances subjected to expedited arbitration procedures made a difference in the results of the proportional hazard model—Expedited grievances may have been different than other grievances in some fundamental way. Again, the results of the hazard model with and without expedited grievances were comparable.

6 Results

6.1 Comparison of Means

Before examining the hazard rate ratios for the model, I conducted between-era comparisons of the raw means for variables of interest, using the Student-Newman-Keuls Test. The results of this comparison are provided in Table 3.3. The values for the dependent variables (the lengths of the phases and total disposition time) provide some support for *H1*, which postulates that grievance disposition times are increasing with each successive decade. The average total disposition time in 1994 was 419.91 days, increasing to 444.12 days in 2004, and increasing to 589.08 in 2012. These differences were statistically significant. Out of the three different phases in grievance arbitration, the pre-hearing phase was the longest, and it increased from decade to decade on a significant basis. In 1994, the average pre-hearing phase lasted 273 days; in 2004 it lasted 302 days; and in 2012 it lasted 397 days. The hearing phase was the next longest. In 1994, this phase had a mean of 68 days, growing to 84 days in 2004, and growing longer still to 137 days in 2012. The decision preparation phase was the shortest of the three

phases, and, contrary to the trend in the other two phases, actually seemed to be getting shorter (although, the difference between 1994 and 2012 was not statistically significant at any commonly used level). The factors driving this trend of increased grievance duration times across decades warranted further investigation using the hazard model.

Although many of the legalism variables were not significantly different between eras, some trends emerged. The average number of cases cited in each arbitration award appears to have increased across eras, with 5.06 cases cited in 1994, but with 7.31 cases being cited in 2012. The use of legal briefs also increased significantly, with briefs being filed in about 8% of 1994 grievances, but with them filed in approximately 23% of 2012 grievances. The average length of the written decision became longer, with an award being 35 paragraphs in 1994 and 43 paragraphs in 2012. While all of this suggests that there is more "legalism" in grievances in 2012 versus 1994, the results of the "labour relations considerations" variable may counterbalance this somewhat. Surprisingly, there is an increase in the proportion of cases in which arbitrators are citing labour relations considerations in 2012 (21%) versus 1994 (5%).

On the basis of Table 3.3, there was no statistically significant increase in the number of arbitrations involving legal matters outside an arbitrator's typical jurisdiction. This is contrary to what one might expect based on the jurisprudence over the past two decades expanding arbitral jurisdiction.

TABLE 3.3: COMPARISON OF MEANS			
	Year 1994 (N=172)	**Year 2004** (N=120)	**Year 2012** (N=105)
DEPENDENT VARIABLES			
Pre-Hearing Phase (Days)	272.96[4] (N=164)	302.08[7] (N=112)	397.13[4,7] (N=105)
Hearing Phase (Days)	67.82[4] (N=164)	83.77[8] (N=112)	136.68[4,8] (N=105)
Decision Preparation Phase (Days)	76.87[2] (N=164)	44.04[2] (N=112)	57.27 (N=105)
Total Disposition Time (Sum of all 3 Phases) (Days)	419.91[4]	444.12[7]	589.08[4,7]
INDEPENDENT VARIABLES MEASURING LEGALISM			
Lawyers	1.38	1.32	1.47
Preliminary Objection	.198	.225	.181
Evidentiary Dispute	.087	.117	.152
Estoppel	.145	.108	.124
Cases Cited	5.06[6]	5.58	7.31[6]
Witnesses (excluding experts)	2.31	1.86	1.89
Experts	.08[5]	.05	.00[5]
Labour Relations Considerations	.052[4]	.041[7]	.210[4,7]
Legal Briefs	.081[2,4]	.167[2]	.229[4]
Credibility	.209	.244	.175
Length of Decision (Paragraphs)	35.48[6]	35.16	42.99[6]
Awards	1.10[1]	1.32[1,7]	1.12[7]
INDEPENDENT VARIABLES MEASURING EXPANDED JURISDICTION			
Charter of Rights and Freedoms	.006	.008	.029
Employment Standards Act	.047	.092	.057
Human Rights Code	.070	.133	.095
Occupational Health and Safety Act	.035	.075	.057
Privacy	.006	.008	.029
Other Statute	.052	.075	.086
Atypical Remedy	.122[3]	.058[3]	.133
INDEPENDENT VARIABLES MEASURING PROCEDURE USED			
Panel	.250[1,4]	.058[1]	.019[4]
Statutory Expedited	.250[1,4]	.075[1]	.010[4]
Contractually Expedited	.006[1,4]	.092[1,7]	.219[4,7]
Med-Arb	.012[1,4]	.150[1]	.191[4]
Settlement	.058	.076	.067
CONTROL VARIABLES (CATEGORICAL OMITTED)			
Arbitrator Workload	16.66[4]	19.16	22.47[4]
Parallel Criminal Proceeding	.012	.033	0.010
Parallel Human Rights Proceeding	.012	.017	0.029
Parallel Other Proceeding	.000[2]	.025[2,9]	.000[9]

[1]Significant Difference Between Means for 1994 and 2004 (.01 level)
[2]Significant Difference Between Means for 1994 and 2004 (.05 level)
[3]Significant Difference Between Means for 1994 and 2004 (.10 level)
[4]Significant Difference Between Means for 1994 and 2012 (.01 level)
[5]Significant Difference Between Means for 1994 and 2012 (.05 level)
[6]Significant Difference Between Means for 1994 and 2012 (.10 level)
[7]Significant Difference Between Means for 2004 and 2012 (.01 level)
[8]Significant Difference Between Means for 2004 and 2012 (.05 level)
[9]Significant Difference Between Means for 2004 and 2012 (.10 level)
Means were compared using the Student-Newman-Keuls (SNK) test.

Table 3.3 also suggests some decade-over-decade trends related to dispute resolution procedures used. The use of a three-person arbitration panel decreased dramatically. In 1994, one in four arbitrations used these panels, whereas in 2012, only 2% still used panels. This was likely due to the higher costs associated with such panels, and to the greater scheduling difficulties presented by coordinating the availability of three panel members. Interestingly, the use of statutory expedited arbitration fell dramatically from 1994 to 2012 (from 25% of arbitrations to 1%, respectively) while the use of contractually expedited arbitration increased substantially over the same period (from 1% to 21%). This probably indicates that contractually expedited arbitration was acting as a substitute to some extent for the less flexible statutory expedition procedure. Note that the dramatic fall in the use of statutory expedited arbitration should be interpreted with a degree of caution, though. The statistics indicate a decrease in *written* decisions. However, between 1994 and 2012, the statutory expedition procedures in the Ontario *Labour Relations Act* were amended to permit an arbitrator to render an oral decision, without reasons, if both parties agree. The extent of the use of oral decisions, which may account for a substantial part of the decrease in written decisions, could not be measured in this study.

The difference in means across decades for one of the control variables is worth noting. The "arbitrator workload" variable, measured by the number of cases an arbitrator adjudicated in the given year, indicated an increasing trend that was statistically significant. In 1994, the average workload was 16.7 cases over that year, whereas in 2012, the figure was 22.5 cases. There were a number of possible ways that busier arbitrators may have impacted grievance duration. Arbitrators who were busier may be more difficult to schedule, leading to delay at the pre-hearing stage. These arbitrators may have sped up the hearing phase, because their experience enabled them to streamline the proceedings, or they may have slowed it down, due to

difficulty scheduling subsequent dates needed for the continuation of the hearing. Similar competing factors may have been at work for the post-hearing stage: busier arbitrators might have been able to render a decision quickly, due to their vast experience, or they may have rendered it more slowly, given all the other decisions they have to write. To explore all of these trends noted in this section in more detail, I examined the hazard ratio estimates from the multivariate model, and I now turn to a discussion of these estimates.

6.2 Hazard Rate Ratios

Table 3.4 provides the hazard rate ratios. The hazard rates for each stage (i.e., pre-hearing, hearing, and decision preparation) indicate the impact of a particular explanatory variable on the rate at which the grievance transitions to the subsequent stage (for example, from pre-hearing to hearing), or, in the case of decision preparation, the transition rate between that stage and the release of the final arbitration award. Hazard rates for the total disposition time indicate the impact of a particular variable on the rate at which the grievance transitions from being unresolved to final award. I will discuss each of the grievance time periods in turn, starting with pre-hearing phase, and ending with total disposition time.

Table 3.4 provides the hazard rate ratios for the direct effects (in specification one), which allow us to evaluate *H1*, *H2*, *H4*, and *H6*. Table 3.4 also displays the interactions terms (in the second specification). In order to assess *H3*, *H5*, and *H7*, the hazard ratio for the relevant interaction term needs to be multiplied by the hazard ratio for the relevant year, and Table 3.5 provides these products.[8]

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[8] An example might help to illustrate why multiplication of the year and the relevant interaction term is needed. Imagine that we want to compare arbitrations involving evidentiary disputes in 2012 against arbitrations involving evidentiary disputes in 1994, to see whether disposition times have become longer (this will help us to assess *H3*). In order to calculate the hazard ratio that will enable us to do this, we want to take the hazard function for evidentiary disputes in 2012, and divide it by the hazard function for evidentiary disputes in 1994. The evidentiary disputes variable is present in both functions, and therefore cancels out, and we are left with the following

6.2.1 Pre-Hearing Phase

I will first analyze the results from the first specification, before turning to those from second specification. The hazard ratio for the year 2012 was significant at the .01 level, while the hazard ratio for 2004 was not. The year 2012 hazard ratio of less than 1.0 (0.567) suggests that, controlling for all other variables, the pre-hearing phase in 2012 was longer than in 1994. More technically, the rate of 0.567 indicates that the transition rate from the pre-hearing to the hearing phase for a grievance in 2012 was 43% slower than it was in 1994, all else being equal. This supports *H1*.

Turning to the legalism variables, only two were significant in the first specification for the pre-hearing phase: lawyers and length of decision. Consistent with *H2*, the presence of lawyers tended to lengthen the pre-hearing phase. The hazard ratio of .76 suggests that for every additional party represented by a lawyer, the transition rate to the next phase (the hearing) was 24% slower. The hazard ratio of 1.007 for length of decision was contrary to expectations. This estimate suggests that the pre-hearing phase was quicker for those grievances that ultimately had longer written arbitration awards, relative to those cases with shorter arbitration awards. One would expect that the length of the decision was some measure of the complexity and legalism inherent in the case, and that simpler, less legalistic cases would have had shorter pre-hearing phases. There are a number of possible explanations for the estimated hazard ratio, including the fact that parties with cases raising novel legal issues (and hence requiring longer awards) were keen to have such these cases heard quickly. Also, rushed pre-hearing phases that did not provide the parties with enough time to discover each other's cases and agree on non-contentious facts

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multiplication term: the hazard ratio for the year 2012 times the hazard ratio for the interaction term (year 2012 x evidentiary dispute). For a further discussion of this point, see Vittinghoff, Glidden, Shiboski, and McCulloch (2012) pages 220-222.

might have ultimately necessitated longer decisions. The effect size for length of decision is relatively small. It suggests that for every additional paragraph, the transition rate was about one percent faster. Viewed in another way, if the length of the written award increases by one standard deviation, or 34.37 paragraphs, the transition rate for the pre-hearing phase is 1.26 times faster.

Two variables measuring expanded jurisdiction were significant in the first specification of the model: the *Charter* and the *Human Rights Code*. A hazard ratio of .27 for *Charter* issues suggests that grievances with such issues transitioned at a rate 73% slower than cases without such issues. This is evidence in support of *H4*, and speaks to the lengthy amount of time the parties needed to prepare for complicated *Charter* litigation. The hazard ratio of 1.7 for *Human Rights Code* issues indicates that grievances involving human rights issues transitioned to the hearing phase at a rate 1.7 times faster than grievances not involving such issues. This may have indicated a desire on both sides to have human rights issues dealt with quickly, given their often sensitive and emotional nature.

Table 3.4: Hazard Rate Ratios for Cox Proportional Hazard Model Estimates for Duration of Various Stages of Arbitration Process

	Pre-Hearing		Hearing		Decision Preparation		Total Disposition Time	
VARIABLE	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
YEAR ***[1994]***								
2004	0.977	1.800	0.970	0.678	1.124	0.592	0.881	1.078
	(0.181)	(0.846)	(0.165)	(0.302)	(0.205)	(0.294)	(0.153)	(0.476)
2012	0.567***	1.021	0.679**	3.453**	1.020	0.622	0.511***	1.302
	(0.117)	(0.640)	(0.133)	(2.131)	(0.196)	(0.390)	(0.105)	(0.764)
LEGALISM								
Lawyers	0.764**	0.792*	0.674***	0.670***	0.988	0.957	0.718***	0.711***
	(0.094)	(0.106)	(0.079)	(0.080)	(0.118)	(0.121)	(0.084)	(0.088)
Preliminary Objection	0.880	0.666	0.758	0.676	0.981	0.549**	0.708**	0.478***
	(0.150)	(0.169)	(0.129)	(0.168)	(0.180)	(0.159)	(0.119)	(0.115)
Evidentiary Dispute	1.013	0.488**	0.803	0.496*	0.727	0.960	0.867	0.478**
	(0.222)	(0.175)	(0.172)	(0.187)	(0.168)	(0.353)	(0.189)	(0.172)
Estoppel	1.185	0.847	0.847	1.175	0.802	0.667	0.886	0.675
	(0.250)	(0.256)	(0.167)	(0.358)	(0.165)	(0.207)	(0.185)	(0.207)
Cases Cited	0.989	1.015	0.994	1.016	0.989	0.968	0.988	0.998
	(0.008)	(0.020)	(0.009)	(0.019)	(0.010)	(0.019)	(0.008)	(0.020)
Witnesses	0.964	0.992	0.868***	0.867***	0.964	0.956	0.892***	0.907**
	(0.032)	(0.037)	(0.031)	(0.034)	(0.034)	(0.039)	(0.030)	(0.035)
Experts	1.013	0.862	0.466***	0.392***	0.966	1.002	0.62	0.583*
	(0.275)	(0.264)	(0.128)	(0.113)	(0.307)	(0.351)	(0.181)	(0.176)
Labour Relations	0.910	0.489	0.934	0.895	1.160	1.017	1.010	0.947
	(0.225)	(0.227)	(0.218)	(0.374)	(0.323)	(0.461)	(0.253)	(0.426)
Legal Briefs	0.931	0.941	1.002	0.990	0.426***	0.429***	0.789	0.868
	(0.201)	(0.228)	(0.206)	(0.225)	(0.094)	(0.104)	(0.165)	(0.198)
Credibility	0.767	0.770	0.884	0.873	0.570***	0.441***	0.609**	0.594**
	(0.154)	(0.157)	(0.173)	(0.184)	(0.122)	(0.102)	(0.125)	(0.125)
Length of Decision (Paragraphs)	1.007**	1.006*	0.996	0.995	0.995	0.994	1.001	1.000
	(0.003)	(0.003)	(0.003)	(0.003)	(0.003)	(0.004)	(0.003)	(0.003)
Awards	0.976	1.668	0.524***	0.461**	1.038	0.764	0.812	1.031
	(0.130)	(0.596)	(0.090)	(0.152)	(0.177)	(0.252)	(0.119)	(0.326)

Table 3.4 (Cont'd): Hazard Rate Ratios for Cox Proportional Hazard Model Estimates for Duration of Various Stages of Arbitration Process

	Pre-Hearing		Hearing		Decision Preparation		Total Disposition Time	
VARIABLE	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
EXPANDED JURISDICTION								
Charter	0.271**	0.167***	1.185	1.465	1.981	2.876*	0.905	0.838
	(0.167)	(0.115)	(0.707)	(0.912)	(1.123)	(1.818)	(0.535)	(0.576)
Employment Standards Act	0.932	3.278***	0.875	1.375	0.714	0.636	0.861	3.097***
	(0.254)	(1.393)	(0.247)	(0.574)	(0.196)	(0.280)	(0.225)	(1.301)
Human Rights Code	1.696**	0.871	0.790	1.513	0.605**	0.837	1.040	0.827
	(0.420)	(0.381)	(0.193)	(0.623)	(0.153)	(0.374)	(0.256)	(0.342)
Occupat'l Health and Safety Act	1.485	1.385	0.912	0.964	0.712	0.595	1.143	1.23
	(0.504)	(0.489)	(0.296)	(0.315)	(0.242)	(0.217)	(0.343)	(0.380)
Privacy	1.349	0.98	0.781	0.703	2.521*	3.482**	1.496	1.255
	(0.717)	(0.554)	(0.397)	(0.374)	(1.332)	(1.979)	(0.762)	(0.680)
Other Statute	0.931	0.929	1.167	0.983	0.957	0.94	1.265	1.154
	(0.239)	(0.267)	(0.281)	(0.256)	(0.246)	(0.270)	(0.308)	(0.313)
Atypical Remedy	0.960	1.355	0.833	0.935	1.897***	1.601	1.024	1.866*
	(0.237)	(0.447)	(0.192)	(0.315)	(0.451)	(0.538)	(0.241)	(0.611)
PROCEDURE								
Three Member Panel	0.385***	0.392***	0.930	0.898	0.454***	0.463***	0.377***	0.420***
	(0.0921)	(0.102)	(0.201)	(0.207)	(0.105)	(0.115)	(0.088)	(0.104)
Statutory Expedited	3.501***	4.238***	0.875	0.813	1.088	1.270	2.573***	2.903***
	(0.736)	(1.069)	(0.171)	(0.186)	(0.225)	(0.301)	(0.543)	(0.718)
Contractually Expedited	1.624	2.180**	0.668	1.258	1.473	1.413	1.794*	2.463**
	(0.519)	(0.776)	(0.230)	(0.457)	(0.495)	(0.493)	(0.595)	(0.891)
Med-Arb	0.611*	2.126	0.765	1.109	1.606	1.479	0.574**	4.320
	(0.168)	(1.986)	(0.184)	(0.979)	(0.481)	(1.466)	(0.157)	(4.065)
Settle	0.872	0.770	0.689	0.899	0.743	1.753	0.512**	0.548
	(0.256)	(0.326)	(0.211)	(0.379)	(0.249)	(0.862)	(0.155)	(0.222)

Table 3.4 (Cont'd): Hazard Rate Ratios for Cox Proportional Hazard Model Estimates for Duration of Various Stages of Arbitration Process

	Pre-Hearing		Hearing		Decision Preparation		Total Disposition Time	
VARIABLE	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
INTERACTION TERMS								
2004 x Preliminary Objection		1.875		1.197		2.925**		3.130***
		(0.830)		(0.506)		(1.265)		(1.315)
2012 x Preliminary Objection		1.978		1.871		1.939		2.223*
		(0.963)		(0.843)		(0.986)		(1.016)
2004 x Evidentary Dispute		2.058		2.643*		0.461		2.302
		(1.282)		(1.501)		(0.281)		(1.378)
2012 x Evidentary Dispute		3.586**		1.860		0.741		2.471*
		(1.928)		(1.027)		(0.411)		(1.320)
2004 x Estoppel		2.043		0.388*		1.460		1.919
		(1.051)		(0.198)		(0.758)		(0.927)
2012 x Estoppel		1.629		0.907		1.249		1.654
		(0.831)		(0.437)		(0.605)		(0.833)
2004 x Cases		0.981		0.963		1.032		0.988
		(0.026)		(0.025)		(0.029)		(0.027)
2012 x Cases		0.948**		0.962*		1.040		0.976
		(0.022)		(0.023)		(0.026)		(0.023)
2004 x Labour Relations Considerations		2.991		0.609		1.345		1.015
		(2.411)		(0.459)		(1.189)		(0.813)
2012 x Labour Relations Considerations		4.336**		1.621		0.859		1.508
		(2.729)		(0.848)		(0.480)		(0.871)
2004 x Awards		0.449**		1.643		1.199		0.660
		(0.183)		(0.605)		(0.495)		(0.249)
2012 x Awards		0.488		0.231**		1.440		0.422
		(0.297)		(0.133)		(0.914)		(0.236)
2004 x ESA		0.250**		0.819		0.700		0.225**
		(0.160)		(0.525)		(0.455)		(0.135)
2012 x ESA		0.097***		0.368		2.002		0.222**
		(0.069)		(0.258)		(1.384)		(0.152)
2004 x *Human Rights Code*		3.013*		0.340*		1.248		1.089
		(1.773)		(0.190)		(0.743)		(0.603)
2012 x *Human Rights Code*		4.980**		0.533		0.249**		2.331
		(3.370)		(0.372)		(0.175)		(1.602)

Table 3.4 (Cont'd): Hazard Rate Ratios for Cox Proportional Hazard Model Estimates for Duration of Various Stages of Arbitration Process

	Pre-Hearing		Hearing		Decision Preparation		Total Disposition Time	
VARIABLE	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
INTERACTION TERMS (Cont'd)								
2004 x Atypical Remedy		1.618		1.010		1.976		1.208
		(1.073)		(0.679)		(1.465)		(0.777)
2012 x Atypical Remedy		0.721		0.789		2.254		0.508
		(0.427)		(0.442)		(1.200)		(0.284)
2004 x Statutory Expedited		0.499		1.931		0.961		0.972
		(0.309)		(0.959)		(0.524)		(0.588)
2012 x Statutory Expedited		0.926		0.414		0.651		0.169
		(1.251)		(0.555)		(0.894)		(0.227)
2004 x Med-Arb		0.404		0.638		2.490		0.204
		(0.387)		(0.590)		(2.586)		(0.197)
2012 x Med-Arb		0.318		0.676		0.849		0.116**
		(0.323)		(0.644)		(0.893)		(0.116)
2004 x Settle		1.527		0.760		0.350		2.066
		(0.953)		(0.467)		(0.261)		(1.241)
2012 x Settle		1.412		0.542		0.160		0.283
		(1.565)		(0.633)		(0.196)		(0.306)
CONTROLS								
Arbitrator Workload	0.997	0.993	1.000	0.996	0.998	0.996	0.999	0.998
	(0.005)	(0.005)	(0.004)	(0.004)	(0.004)	(0.005)	(0.005)	(0.005)
Others	Included	Included	Included	Included	Included	Included	Included	Included
Mean Disposition Time	315.74	315.75	91.49	91.49	61.82	61.82	471.97	471.97
Log Likelihood	-1,737.04	-1,713.23	-1,864.20	-1,841.27	-1,782.96	-1,763.08	-1,839.19	-1,816.28
Chi-squared Statistic (All Coefficients=0)	301.39***	349.02***	183.19***	229.07***	215.44***	255.19***	287.41***	333.22***
Number of Observations	381	381	381	381	381	381	397	397

Notes: Estimates are reported as hazard ratios. Standard errors are in parentheses. The dependent variables (DVs) are measured in number of days. For Pre-Hearing, the DV is measured from the filing of the grievance to the first day of hearing. For Hearing, the DV is measured from the first day of hearing until the last day of hearing. For Decision Preparation, the DV is measured from the last day of hearing until the final arbitration award was released. For Total Disposition Time, the DV is measured as the total time for all three stages of the arbitration process (e.g., the combined times of the pre-hearing, hearing, and decision preparation stages). In addition to Arbitrator Workload, the control variables are as follows: Union, Sector, Grievance Type, Grievance Classification, , Related Criminal Proceedings, Related Human Rights Proceedings, and Related Other Proceedings.
*** p<0.01, ** p<0.05, * p<0.1

TABLE 3.5
INTERACTION EFFECTS FOR HYPOTHESES THREE, FIVE, AND SEVEN (*H3*, *H5*, & *H7*)

CALCULATION	HAZARD RATIO PRODUCT
Pre-Hearing Phase	
Hazard Ratio (2012) x Hazard Ratio (2012 x Evidentiary Dispute)	3.661 (3.316)
Hazard Ratio (2012) x Hazard Ratio (2012 x Cases)	.968 (.609)
Hazard Ratio (2012) x Hazard Ratio (2012 x Labour Relations)	4.425* (3.820)
Hazard Ratio (2004) x Hazard Ratio (2004 x Awards)	.808 (.211)
Hazard Ratio (2004) x Hazard Ratio (2004 x *Employment Standards Act*)	0.450 (0.344)
Hazard Ratio (2012) x Hazard Ratio (2012 x *Employment Standards Act*)	0.099** (0.095)
Hazard Ratio (2004) x Hazard Ratio (2004 x *Human Rights Code*)	5.422** (3.803)
Hazard Ratio (2012) x Hazard Ratio (2012 x *Human Rights Code*)	5.083* (4.499)
Hearing Phase	
Hazard Ratio (2004) x Hazard Ratio (2004 x Evidentiary Dispute)	1.793 (1.289)
Hazard Ratio (2004) x Hazard Ratio (2004 x Estoppel)	0.263** (0.169)
Hazard Ratio (2012) x Hazard Ratio (2012 x Cases)	3.321* (2.049)
Hazard Ratio (2012) x Hazard Ratio (2012 x Awards)	0.797 (0.215)
Hazard Ratio (2004) x Hazard Ratio (2004 x *Human Rights Code*)	0.230** (0.151)
Decision Phase	
Hazard Ratio (2004) x Hazard Ratio (2004 x Preliminary Objection)	1.730 (1.180)
Hazard Ratio (2012) x Hazard Ratio (2012 x *Human Rights Code*)	0.155* (0.156)
Total Disposition Time	
Hazard Ratio (2004) x Hazard Ratio (2004 x Preliminary Objection)	3.373* (2.233)
Hazard Ratio (2012) x Hazard Ratio (2012 x Preliminary Objection)	2.893 (2.318)
Hazard Ratio (2012) x Hazard Ratio (2012 x Evidentiary Dispute)	3.216 (2.866)
Hazard Ratio (2004) x Hazard Ratio (2004 x *Employment Standards Act*)	0.242** (0.175)
Hazard Ratio (2012) x Hazard Ratio (2012 x *Employment Standards Act*)	0.288 (0.256)
Hazard Ratio (2004) x Hazard Ratio (2004 x *Human Rights Code*)	1.174 (0.775)
Hazard Ratio (2012) x Hazard Ratio (2012 x *Human Rights Code*)	3.034 (2.690)
Hazard Ratio (2012) x Hazard Ratio (2012 x Mediation-Arbitration)	0.150* (0.164)

Notes: Standard errors are in parentheses. *** p<0.01, **p<0.05, *p<0.1

Three variables measuring the use of dispute resolution procedures were significant: three member panel; statutory expedited arbitration; and med-arb. The hazard ratio for three-member panel was 0.39. This indicated that the transition rate to the hearing phase was 61% slower when a three-member panel was used, relative to a sole arbitrator. Undoubtedly, this was partly due to the increased difficulty for the panel members in finding available hearing dates. The ratio of 3.5 for statutory expedited arbitration suggests that grievances that used this procedure transitioned 3.5 times faster than those that did not. These results provide some support for *H6*. The med-arb estimate of .61 indicated that those grievances using med-arb transitioned to the next phase 40% slower than grievances that did not use med-arb. This contradicts *H6*, but there are at least two possible explanations for this. One is that parties who believed that a particular case was well suited to mediation-arbitration might have been more selective in finding the right individual to be the mediator-arbitrator, due to the specialized skill-set necessary for a successful use of the procedure. This increased selectivity might have translated into a longer pre-hearing phase. The second possible explanation is that parties who delayed bringing a case to the hearing phase might have felt pressure at the hearing phase to try to resolve the case quickly, and may as a result have turned to med-arb.

The results for one of the control variables warrants mention. The hazard ratio for arbitrator workload was not significant. This suggests that busier arbitrators are not associated with longer pre-hearing phases.

The results of the first (direct effects) specification are useful in assessing hypotheses *H1*, *H2*, *H4*, and *H6*. As indicated in the introduction to this sub-section (6.2: Hazard Rate Ratios), in order to assess *H3*, *H5*, and *H7*, the hazard ratio for the relevant interaction term needs to be multiplied by the hazard ratio for the relevant year, and Table 3.5 provides these products (for the balance of this paper, these will sometimes be referred to as the "inter-decade comparison

hazard ratios", the "multiplicative hazard ratios", and the "hazard ratio products"). Hypothesis three is that given levels of legalism are leading to longer delays with the passage of decades. For this hypothesis, the only significant inter-decade comparison hazard ratio was for labour relations considerations in the year 2012. The hazard ratio product of 4.4 (taken from Table 3.5) suggests that the presence of such considerations in 2012 made the transition to the next phase 4.4 times faster than it was when compared with the presence of such considerations in 1994. This result is supportive of *H3*—If legalism is expected to lead to more delay over time, the effect of a variable measuring the opposite of legalism (labour relations considerations) would be expected to be associated with less delay over time.

The hazard ratio products for the pre-hearing phase provided mixed support for *H5*, which predicted that expanded jurisdiction produces longer grievance times with each passing decade. With regards to *Employment Standards Act* issues, the hypothesis is strongly supported for 2012. The multiplicative hazard ratio of .099 indicates that the transition rate for a grievance with an *ESA* issue in 2012 is about 90% slower than the transition rate for such a grievance in 1994. However, with regards to the *Human Rights Code*, there is substantial evidence to contradict the hypothesis. Grievances with human rights issues in 2012 and 2004 are likely to transfer to the hearing phase five times *faster* than 1994 grievances involving similar issues.

With regard to *H7*, there is insufficient evidence to reject the null hypothesis.

6.2.2 Hearing Phase

Again, we will begin by focusing on the first specification, without interactions (the referenced figures are found in Table 3.4). The hazard ratio for 2012 indicates that for that year, all else equal, the transition rate between the hearing phase and the decision phase was 32% slower than for 1994, lending support to *H1*.

With regard to the legalism variables, four were significant and lend support to *H2*: lawyers, witnesses, experts, and awards. For each additional party at the hearing with legal representation, the transition rate to the next phase was 33% slower. Lawyers may have made technical legal arguments at the hearing, thus drawing it out. The presence of lawyers might also have delayed the continuation of a particular hearing, given the fact that their busy schedules probably needed to be accommodated for any new hearing dates. Not surprisingly, witnesses tended to lengthen the hearing phase. Each additional witness decreased the transition rate at the hearing by 13%. The addition of an expert witness decreased the transition rate at the hearing phase by 53%. An expert witness was likely to have given more complicated testimony than a regular witness, and their schedules were probably more restrictive. Each additional award also decreased the transition rate of the hearing phase by 48%. It is not surprising that interim awards, which are typically argued and rendered during the hearing phase, would tend to lengthen it.

The results for the expanded jurisdiction and procedure variables were not significant, which means that we fail to reject the null hypothesis for *H4* and *H6* for the hearing phase. Additionally, the results for arbitrator workload (one of the control variables) was not significant. This suggests that busier arbitrators are not associated with longer hearing phases.

When we examine the inter-decade comparison hazard ratios for the hearing phase (from Table 3.5), there is mixed support for *H3*. The hazard ratio product for estoppel in 2004 was .26, indicating that arbitrations in 2004 with estoppel issues transitioned to the decision phase 74% slower than arbitrations with these issues in 1994. This is consistent with *H3*. However, the multiplicative hazard ratio for cases in 2012 was 3.3, indicating that the transition rate for an equivalent number of cases cited (all else being equal) was 3.3 times faster in 2012 than in 1994.

This suggests that the arbitration system is becoming more efficient, not less efficient, at dealing with case citations at the hearing phase.

For the expanded jurisdiction variables, only one hazard ratio product was significant, and was in the direction predicted by *H5*. Arbitrations with human rights issues in 2004 transitioned at a rate 77% slower than hearings with such issues in 1994.

With regard to *H7* (given procedures are producing shorter disposition times with each passing decade), the absence of significant multiplicative hazard ratios means that there is insufficient evidence to reject the null hypothesis.

6.2.3 Decision Preparation Phase

Again, we will start by focusing on the hazard ratios for the first specification. The direct effects for the years 2004 and 2012 were not significant. This means that we fail to reject the null hypothesis for *H1*. There appears to be little change in the speed with which arbitrators rendered decisions over the past two decades. This is so despite the fact that arbitrator workload increased over this time.

With regard to the legalism variables, only two were statistically significant: legal briefs and credibility. Where legal briefs were filed, the rate at which the decision phase transitioned to a fully resolved grievance decreased by 57%, providing support for *H2*. There are at least two ways that legal briefs might have lengthened the decision phase. First, arbitrators might have had to wait during the decision phase for the parties to file their briefs. Second, arbitrators had to read the briefs and take the time to draft awards that were responsive to the issues raised therein. As for credibility challenges, the rate at which the decision phase transitions was 43% slower than in the absence of such challenges. This finding also provides support for *H2*. Credibility challenges probably lengthened the decision phase by requiring an arbitrator to carefully

consider the evidence, and justify her or his findings on a sensitive issue—whether a witness told the truth.

As for the expanded jurisdiction variables, human rights, privacy, and atypical remedy were significant, and these estimates provide mixed results for *H4*. The hazard ratio for *Human Rights Code* issues suggests that the presence of such issues, relative to their absence, decreased the transition rate by about 40%. This supports *H4*, which predicts that expanded jurisdiction will be associated with more delay. However, the hazard ratios for privacy and atypical remedy actually provide evidence towards refuting *H4*. For privacy issues, the transition rate *increased* by 2.5 times; and for atypical remedy, the transition rate *increased* by 1.9 times. One possible explanation for the effect of privacy issues was that privacy law was still relatively young, meaning that arbitrators did not have to wade through vast jurisprudence in rendering their decisions. One of the potential reasons why requests for atypical remedies sped up the decision phase was that often these remedies involve some form of injunctive relief, where time was of the essence.

In terms of the results for the procedure variables, only three-member panel was significant, with a hazard ratio of .454. This indicates that the transition rate was approximately 55% slower when such a panel is used, versus a sole arbitrator. This provides support for *H6*.

As for the hazard ratio for arbitrator workload, it was not significant. This suggests that busier arbitrators are *not* taking longer to render their awards, contrary to what one might expect.

Turning now to the inter-decade comparison hazard ratios, only one was significant: *Human Rights Code* issues in 2012. The hazard ratio product of .16 indicates that the decision phase for grievances with human rights issues transitioned to final award at a rate 84% slower in 2012, relative to 1994, and this supports *H5* (expanded jurisdiction is associated with more delay over time).

With regard to *H7* (given procedures are producing shorter disposition times with each passing decade), the absence of significant interaction terms for procedural variables means that there is insufficient evidence to reject the null hypothesis.

6.2.4 Total Disposition Time

Again, we will start by examining the hazard ratios for specification 1. The hazard ratio of .51 for 2012 indicates that the transition rate from unresolved to resolved grievance was 49% slower in 2012, relative to 1994. This provides strong support for *H1*.

In terms of legalism, the following four variables were significant: lawyers, preliminary objection, witnesses, and credibility. Each additional side represented by a lawyer decreased the transition rate by about 30%. The transition rate for grievances with preliminary objections was 30% slower that those without such objections. Each additional witness decreased the transition rate by about 11%. And, credibility challenges were associated with an almost 40% decrease in the transition rate. All of this provides strong support for *H2*.

The expanded jurisdiction variables are a different story. None of them were significant, leading us to fail to reject the null hypothesis for *H4*.

With the regards to the procedure variables, generally the results were consistent with *H6*. Three member panels were associated with longer disposition times, whereas statutory and contractually expedited arbitration were both related to shorter disposition times. However, both the med-arb and settlement variables were associated with longer disposition times, meaning that the additional steps entailed by these two procedures outweighed their possible potential expediency benefits.

In terms of the control variable measuring arbitrator workload, it was not significant. This indicates that busier arbitrators are not leading to longer total disposition times. This is not

a surprising result, given the fact that the hazard ratio for arbitrator workload was not significant for any of the three phases.

With regard to the inter-decade comparisons (Table 3.5), only one legalism hazard ratio product was significant. The transition rate from unresolved to resolved grievance for disputes involving preliminary objections was more than three times faster in 2004, relative to arbitrations with these objections in 1994. The direction of this effect was the opposite of what was predicted by *H3*.

With regard to expanded jurisdiction variables, the multiplicative hazard ratio for *ESA* issues in 2004 is significant. The value of .242 indicates that arbitrations with *ESA* issues in 2004 had a transition rate about 76% slower than grievances with the same issues in 1994 (all else equal). This provides evidence in support of *H5*.

Only one hazard ratio product was significant for the procedural variables: med-arb in 2012. The hazard ratio of .150 indicates that grievances involving mediation-arbitration in 2012 had a transition rate that was 85% slower than grievances involving mediation-arbitration in 1994. This is contrary to what was predicted by *H7*.

7 Discussion

This study has a number of limitations that must be kept in mind. Firstly, as previously noted under Section 5 (Empirical Procedures), it is safer to interpret the relationships between the explanatory variables and disposition times as associational, rather than causal, due to issues of simultaneity and self-selection. For example, the parties might opt to use an expedited procedure for a particular grievance because they believe the dispute to be straightforward and thus capable of quick resolution. Secondly, some parameter estimates likely have a degree of measurement error related to missing information in the award. Arbitrators may have omitted certain details from their written awards, and it was these awards that formed the basis of the

coding and statistical analysis. For example, the awards typically had a discussion of the witnesses who gave testimony at the arbitration, but the arbitrator of a particular grievance might have failed to mention a witness whose testimony was not ultimately relevant to the award, leading to inaccuracies in this study's coding of the actual number of witnesses in the specific case. Thirdly, this study only deals with delay in a small subset, albeit a very important one, of grievances processed by the grievance system in Ontario. It only deals with those cases that proceeded all the way to an arbitrated award, which is estimated to be about 2-3% of all grievances filed (Thornicroft, 2009). It does not deal with the vast majority of cases that settle either at the internal stages of the grievance procedure, or after the parties get part way through the arbitration process.

Despite these limitations, the present study helps to provide a picture of arbitration delay since the last studies were conducted about 20 years ago. The results from the model provide evidence in favour of certain hypotheses involving arbitration delay but that impugn other hypotheses. The first hypothesis (*H1*) was, "Grievance arbitration disposition times are increasing with each passing decade." The hypothesis was supported for the pre-hearing phase, the hearing phase, and for total disposition time. This finding is consistent with a long line of previous studies that have documented the trend towards longer dispositions times as the years go by. On the other hand, for the decision preparation phase, there does not appear to be an increase over the course of the study. If anything, the evidence seems to suggest that this phase is getting somewhat shorter (although the results were not significant). This is remarkable given that arbitrations have become more complex as the decades go by.

One very logical potential explanation for this delay can be ruled out: the increased volume of arbitrations handled by a smaller cadre of arbitrators. Arbitrator busyness was not an explanatory factor for the duration of any of the four time periods of this study. This is largely

consistent with the work of Ponak and colleagues (1996), who found that arbitrators with a high caseload generally did not impact duration times. Although, contrary to the present study, they did find that busy arbitrators were associated with longer decision phases. I also tested the data for the possibility that any impact of arbitrator volume was getting worse with the passage of the decades, and did not find any interaction effect. These null results could be explained by the fact that there has been a contraction in both the supply and demand of arbitrator services, to the point where inefficient or part-time arbitrators have been culled.

There was widespread support for *H2*, that legalism is associated with increased disposition time of grievances. However, as the findings of other studies suggest, different factors impact different phases. In the pre-hearing and hearing phases, and for total disposition time, the addition of lawyers increased the durations. There were some similarities and differences between this study's findings on lawyers and those of Thornicroft (1993, 1994, and 1995) and Ponak et al. (1996). Consistent with the current study, Thornicroft found that lawyers lengthened total disposition time, but he also found that the decision preparation phase was longer. Similar to the results of the present study, Ponak and colleagues found that lawyers increased the length of parts of the pre-hearing phase, however inconsistent with the current findings, these previous researchers also discovered that lawyers *decreased* the length of the decision preparation phase, and that they had no effect on total disposition time.

There was further evidence to support *H2* in the current study. Preliminary objections lengthened total disposition time (a finding not replicated in the Ponak et al. (1996) research). The addition of each witness lengthened both the hearing phase and the total disposition time, and the use of expert evidence increased the hearing phase. The filing of legal briefs slowed down the decision preparation phase. Credibility attacks caused delay in the decision preparation phase and in total disposition time. And, interim awards lengthened the hearing phase.

Interestingly, some of the results of this study supported *H3*, that legalism was associated with more delay with each passing decade, while others contradicted this hypothesis. At the pre-hearing phase, the beneficial effect of labour relations considerations in reducing delay is getting stronger with the passage of recent decades (In other words, consistent with *H3*, the opposite of legalism is leading to less delay as time goes on). Also supportive of *H3* is the effect of estoppel issues at the hearing phase, which are associated with more delay with the passage of decades. However, for the same phase, the arbitration system actually seems to be getting more efficient at processing case citations. Another result that contradicts *H3* is that total disposition times seem to be getting shorter over the years for arbitrations involving preliminary objections.

H4 was that the broadened jurisdiction of arbitrators is associated with increased disposition time, and the relevant findings are quite mixed. For total disposition time, none of the expanded issues appear to be leading to longer durations. If one looks at each of the three phases, some variables are associated with delay. Examples include *Charter* issues lengthening the pre-hearing phase, and human rights issues lengthening the decision preparation phase. However, other issues outside an arbitrator's typical jurisdiction are actually associated with shorter duration times, such as atypical remedies speeding up the decision preparation phase, and human rights issues speeding up the pre-hearing phase.

Also on the subject of expanded jurisdiction, *H5* posited that the delay caused by this development is getting worse with the passage of decades. For issues involving the *Employment Standards Act*, this hypothesis is certainly supported, as grievances involving the *ESA* have significantly longer pre-hearing phases and total disposition time in later decades. One likely explanation for this finding is that many *ESA* issues require complicated factual and legal determinations, and have high stakes for the parties (examples include overtime and mass terminations). Also, grievances involving human rights issues are significantly longer in

subsequent decades at the hearing and decision preparation phases. Overall then, critics of *Weber* and *Parry Sound* will find some support for their argument that the arbitration system will become bogged down with matters traditionally litigated in other forums. However, it's important to note that grievances raising human rights issues after *Parry Sound*, which were likely the most impacted by the case, have not experienced any increase in total disposition times, and in fact were shorter at the pre-hearing phase. Also, the results of this study suggest that any delay caused by expanded jurisdiction needs to be examined on an issue by issue basis, as there are many issues (such as occupational health and safety, privacy, and atypical remedies) that are not causing delay in the arbitration system.

H6, that particular dispute resolution procedures are associated with decreased disposition time, is generally supported by the results. Single arbitrators, the statutory expedited procedure, and the expedited procedures which the parties agree to themselves all serve to decrease total disposition time, as well as the length of some of the phases. The use of single arbitrators has become near total, but the parties may be able to do more to exploit the promise of expedited procedures.

However, contrary to expectations at the outset of the study, med-arb and previous settlement lengthen, rather than shorten, total disposition time. These results mean that the time associated with the additional, unsuccessful step that is added by these procedures outweighs the potential expediency benefits, such as narrowing the issues and focusing the hearing. It is important to note that this finding only applies to grievances ultimately requiring an arbitration award, as grievances that are resolved at mediation or permanently settled by the parties themselves were not part of the present study.

The study also hypothesized that specific procedures are producing shorter disposition times with each passing decade (*H7*). The available evidence does not support this hypothesis. In fact, it appears that the lengthier total disposition times associated with med-arb are getting worse with each passing decade.

8 Conclusion

This study makes a number of substantial contributions to our knowledge of the arbitration system in Ontario. It is largely exploratory in nature by necessity, given the paucity of empirical studies on the subject. It attempts to both replicate and extend past research, and to examine developments that have occurred since the last studies were conducted. This study uses a broader range of legalism and dispute resolution variables than previous studies did. Additionally, it is the first attempt to study expanded jurisdiction. My results suggest that the constructs of legalism, expanded jurisdiction, and dispute resolution procedures are useful in thinking about the determinants of arbitration duration. Another contribution of this work is that it is the first to examine the hearing phase in depth. This is understandable, given the fact that when previous studies were conducted, a one day hearing was far more common.

A number of recommendations for labour and management flow from the study's findings. First, they both need to understand that the problem of delay is growing. Second, they need to be motivated to address delay by understanding the negative consequences (outlined in the introduction). Third, they should understand the key determinants of delay, and take steps where possible to eliminate them. While some delay is either inevitable or strategic, the parties need to understand that much of it is avoidable.

Parties who are motivated to reduce arbitration delay in their grievance procedure would do well to focus on the pre-hearing and hearing phases. These phases are much longer than the decision phase, and they are the ones that are growing over time. The parties should consider

agreeing to modify their arbitration procedure to better meet their needs and to reduce delay. They should make enhanced use of dispute resolution procedures that reduce delay, such as contractually expedited arbitrations. Additionally, as recommended by Justice Winkler (2011), the parties should strive for proportionality. In other words, the grievance ought to be resolved "in a manner that reflects the complexity, monetary value, and importance of the dispute" (Winkler, 2011, in 'Conclusion' section). For the majority of grievances where a fast resolution is more important than establishing some important legal principle, the parties would be well-advised to agree to proceed without lawyers and to reduce or eliminate the use of preliminary objections, witnesses and experts, and credibility attacks.

A number of possibilities for future research flow from this research. An ideal future study will follow grievances longitudinally from the filing of the grievance, and will have grievances randomly assigned to various dispute resolution procedures. This design would deal with simultaneity, self-selection, and other endogeneity issues, to better establish the causal effects of these procedures. Additionally, this design will enable tests of whether the net effect of procedures like settlement and mediation-arbitration is to speed resolution. It would seem reasonable to expect that the net effect (if one includes the many grievances that are completely settled by negotiation or are resolved at the mediation stage of mediation-arbitration) would be a substantial gain in efficiency, but this should be empirically verified. Also, more research needs to be done on the myriad of varieties of contractually expedited arbitration procedures, to determine which are most effective in reducing delay. Lastly, additional research should be conducted on the overall impact of expanded jurisdiction on efficiency. The results of this study suggest that currently, arbitrations involving certain non-traditional issues, like *ESA* complaints, are leading to longer disposition times. However, even if speed alone is the sole consideration, this isn't necessarily a bad result. This study's sole focus was the arbitration system.

Comparative work should be done to see whether arbitration is resolving these expanded issues more quickly than they would have otherwise been resolved in their "home" forum (like the Ontario Labour Relations Board, in the case of the *ESA* complaints). If arbitration is resolving non-traditional issues more quickly than they could elsewhere, then the parties benefit even if the arbitration system itself suffers a minor loss in efficiency.

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Chapter 4
Follow the Leader: A Critique of Canadian Jurisprudence on Freedom of Association For Workers

Note: In this chapter, the Canadian Guide to Uniform Legal Citation (also known as the "McGill Guide") will be used. This is different from the other chapters, where APA style was used.

1 Introduction

Although some increased clarity was provided by the series of Supreme Court of Canada (SCC) decisions delivered in early 2015, the state of Canada's jurisprudence on the right to freedom of association (RFOA) for workers has been described by prominent labour law academic Brian Langille as a "mess"[1] and has been roundly criticized by many other scholars and practitioners.[2] One reason for this is that Canadian courts and legislatures often subscribe to a number of fundamentally incompatible theories regarding the RFOA. These theories are often unstated, and the judges, politicians, and policy-makers holding them may be operating on them only implicitly, without having developed them fully using foundational principles. When the theories are stated, the proponent may be citing them as an *ex post facto* justification for their conclusions.

Sheldon Leader has developed a coherent, logical theory of workers' RFOA using first principles from philosophy, political theory, and law. He argues that the RFOA should be viewed as an individual right that can be exercised in a group, with the guiding principle being that an individual ought to be free to do anything with a group that she or he can legally do

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[1] Brian Langille, "Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009) 54:1 McGill LJ 177 [Mess].

[2] See, for example, Roy J Adams, "Bewilderment and Beyond: A Comment on the Fraser Case" (2011/2012) 16:2 C.L.E.L.J. 313; and Steven Barrett, "The Supreme Court of Canada's Decision in Fraser: Stepping Forward, Backward or Sideways?" (2011/2012) 16:2 C.L.E.L.J. 331.

alone. Furthermore, the right to collective bargaining (RCB) and the right to strike (RTS) should generally be viewed as independent species of rights under the genus RFOA, and therefore should be protected by s. 2(d) of the *Charter*. In other words, an individual is free to negotiate the terms and conditions of employment individually, so the individual should be permitted to engage in collective bargaining with her or his fellow employees. Additionally, an individual is free to cease work if she or he is unhappy with the working conditions, and individuals should be permitted to do this in a group, with co-workers.

In the first part of this paper, I will summarize Leader's theory of FOA. In the second part, I will then use Leader's theory to analyze the jurisprudence of the Supreme Court of Canada (SCC). This analysis will demonstrate that this jurisprudence would have been more consistent and coherent if Leader's theory were used.

2 Sheldon Leader's Theory Of The Right To Freedom Of Association

Over the course of several publications, Sheldon Leader developed his theory of freedom of association for workers.[3] It is logically developed and meticulously researched, drawing on sources from philosophy and political theory in addition to using international law and the domestic law of many countries to illustrate his points. I will rely heavily on his theory for the purposes of this paper, and will therefore spend considerable time setting it out. I believe that his theory is of great assistance in examining the Canadian jurisprudence.

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[3] Sheldon Leader, *Freedom of Association* (New Haven: Yale University, 1992) [Leader book]; Sheldon Leader, "Can You Derive a Right to Strike from the Right to Freedom of Association?" (2009/2010) 15:2 CLELJ 271 [Leader article]; S. Leader, "Choosing an Interpretation of the Right to Freedom of Association" (2002) 40:1 British Journal of Industrial Relations 128.

2.1 Freedom of Association Elements

I begin by examining the elements or components of "freedom of association". In setting out the FOA elements, Leader relied on the work of Wesley Newcomb Hohfeld, who created a very precise analysis that distinguished between fundamental legal concepts such as rights and liberties and then identified the framework of relationships between them.[4] Leader, relying on Hohfeld, posited that individuals possess the freedom to join together in groups. In the more specific language of Hohfeld, individuals possess a "privilege" to join groups.[5] A privilege is defined as one's freedom from the right or claim of another.[6] Moreover, the government has a "disability" from enacting legislation that infringes on this privilege, and the individual has a corresponding immunity from the state enacting such legislation.[7] This is a "weak" version of the RFOA, because there are no duties on third parties to refrain from activities that would interfere with the individual's RFOA or to engage in activities that would facilitate that person's RFOA.

A "strong" version of freedom of association can also be conceptualized. In this version, individuals have a right against interferences with the RFOA. In the language of Hohfeld, the individual possesses a claim-right to exercise freedom of association, and there is a corresponding duty on the government, as well as private citizens, to respect the individual's FOA.[8] For the purposes of this paper, I will call this version "strong RFOA".[9]

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[4] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23:1 Yale Law Journal 16 [Hohfeld 1913]; Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26:8 Yale Law Journal 710.

[5] Leader book, *supra* note 3 at 12.

[6] Hohfeld 1913, *supra* note 4 at 55.

[7] Leader book, *supra* note 3 at 13-14, summarizing Hohfeld 1917.

[8] Leader book, *supra* note 3 at 14.

There are other elements of Leader's RFOA which are not relevant to the jurisprudence I will examine, and consequently will not be developed here. These elements relate to the freedom of an individual *not* to associate, also known as the freedom to *dis*sociate or negative freedom of association. This freedom not to associate often becomes an issue for organized labour. Examples include situations where a union member objects to dues going to support political causes that she or he disagrees with, and where an employee insists on returning to work before a strike being conducted by her or his fellow employees has been resolved.[10]

2.2 Source and Nature of Right To Freedom of Association

In debates about the RFOA, much revolves around questions related to the source and nature of the relevant rights.[11]

2.2.1 Explicit or Implicit Right?; Derivative or Independent Right?

The RFOA is sometimes explicitly guaranteed in a legal text, such as a constitution, legislation, or convention.[12] This is the case in Canada, where the *Canadian Charter of Rights*

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[9] The use of the terms "weak RFOA" and "strong RFOA" in this paper bear some resemblance to the terms used by David J Doorey in "Graduated Freedom of Association: Worker Voice Beyond the Wagner Model" (2013) 38:2 Queen's LJ 511 [GFOA]. Doorey uses the terms "Thin Rights", "Thicker Rights", and "Even Thicker Rights" to describe rights that could be provided under what he calls "graduated freedom of association". "Thin rights" refer to certain basic rights that have been ruled to be constitutionally protected under s. 2(d) of the *Charter*, such as the freedom to establish, join and maintain employee associations. "Thicker rights" refers to some additional rights that have been ruled to be constitutionally under s. 2(d) of the Charter, and include the right to make collective representations and the obligation of the employer to receive and consider those representations. He uses the term "even thicker rights" to refer to a bundle of rights contained under the Wagner-Style labour legislation, such as a right to full collective bargaining with the inclusion of duties on the parties to bargain in good faith. While there is some relationship between the "thin rights" and "even thicker" rights under Doorey's model and the terms "weak RFOA" and "strong RFOA" as used in this paper, it is best to keep the terms used in this paper conceptually separate from Doorey's model. Doorey's model is specifically designed to discuss the Canadian legal landscape in a very practical fashion, whereas the terms in this model are being developed from first principles.

[10] The Supreme Court of Canada dealt with the right to dissociate in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 SCR 211 and in *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 SCR 209, 2001 SCC 70.

[11] Leader book, *supra* note 3 at 21.

[12] Leader book, *supra* note 3 at 22.

and Freedoms[13] explicitly guarantees the right to freedom of association in section 2(d): "Everyone has the following fundamental freedoms: … (d) freedom of association." However, an explicit mention is not necessary to create the RFOA: In some cases, the right is implicit. For example, there is no specific mention of the RFOA in the *Constitution of the United States*, but the American courts have nevertheless decided that it forms an implicit part of the United States legal system.[14]

According to Leader, the RFOA can also be conceptualized as either a derivative or an independent right. The United States jurisprudence is a good example of the RFOA being viewed as derivative. There, the RFOA is thought to arise to protect other constitutional rights, primarily those in the First Amendment, such as freedom of speech and the right to petition the government for a redress of grievances. In a derivative conceptualization, the RFOA is viewed as "instrumental", and is only protected insofar as necessary to respect the other right.[15]

By contrast, when conceptualized as independent, the RFOA is not attached to any subject matter of another basic right; instead it functions autonomously. This independent conceptualization is much broader than the derivative right approach. Under Leader's theory, the guiding principle is that an individual should not be prevented from doing with others that which she or he could legally do alone.[16] Activities in question range from the trivial (e.g.,

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[13] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Charter*].

[14] Leader book, *supra* note 3 at 22. For a leading case on this point, see *NAACP v. Alabama ex rel. Patterson* 357 U.S. 449 (1958).

[15] Leader book, *supra* note 3 at 22-23.

[16] As will be discussed later in the paper, this guiding principle was first considered by the Supreme Court of Canada in "the Trilogy" of cases released in 1987.

playing cards or golf) to matters of life and death (petitioning a political leader for a stay of execution).[17]

For the independent conceptualization, Leader argues that the source of the right is found in a very different place than the derivative one. Someone asserting a derivative right to freedom of association must first look to see if there is a core protected right or freedom at stake in a specific situation (e.g., the right to free speech or to petition the government) before arguing that an ability to form a group and act together is necessary for protecting that right. In contrast, the focus of inquiry invited by an independent RFOA is on whether or not individuals are prohibited from performing a certain activity. If they are not, then there must be a right to associate in order to engage in that activity as well.[18]

The essence of the independent conceptualization in Leader's theory is its insistence on symmetry between individual and collective entitlements, such that whatever individuals are entitled to do alone they should, *prima facie*, be entitled to do collectively.[19] However, even under an independent conceptualization, the RFOA is not absolute. The *prima facie* case may be rebutted when serious damage can be shown to flow from collective action that does not stem from individual action.[20]

According to Leader, in a competition between the derivative and independent RFOA, the independent view is preferable. The independent conception allows us to see the unique work done by the RFOA and to see the important principle of justice inherent in it. This conception goes to the essence of a complaint against arbitrary state action that no other right

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[17] Leader book, *supra* note 3 at 23. See also Harry Arthurs, "The Right to Golf: Reflections on the Future of Workers, Unions and the Rest of Us Under the Charter" (1989) 13:2 Queen's Law Journal 17.
[18] *Ibid* at 23.
[19] Brian Langille has also argued that the guiding principle of the RFOA is the right to do in groups that which one is free to do alone. See, for example, Mess, *supra* note 1 at 183.
[20] Leader book, *supra* note 3 at 23.

captures and that guards against the real potential for state abuse: the wrong of singling out and condemning the sole fact that people have combined to do certain things.[21]

2.2.2 Dynamic or Static Right?

Leader also discusses another way to conceptualize the RFOA: static or dynamic. When the right is conceptualized as static, it is satisfied once the individual joins the group. Nothing more is part of the right, and there is no right to pursue the goals or objectives of the group. By contrast, conceptualization as a dynamic right goes further. The individual has not only the freedom to join the group, but also the opportunity to attempt to achieve something by virtue of the association. In other words, the right is to try to achieve goals or objectives against something or someone external to the group, against the outside world.[22] As will be explained below, Leader ultimately concludes that the nature of the RFOA should be determined on other grounds, and that the static versus dynamic dichotomy is, in effect, a red herring.

2.3 Right To Collectively Bargain and Right To Strike

2.3.1 General Principles

According to Leader, there are many potential examples of specific rights under the general rubric "right to freedom of association". Two potential candidates in the labour context are a right to collective bargaining (RCB) and a right to strike (RTS). Leader theorizes that there are two ways to conceptualize how these more specific rights relate to the RFOA. As the RFOA can be viewed as instrumental (derivative) or independent in relation to other rights, so too can the RCB and the RTS either be viewed as "instrumental" for workers' RFOA, or as "independent" species of rights under the genus RFOA. In an instrumental conceptualization, the RCB and the RTS are viewed as fundamental rights because they are essential in some way

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[21] *Ibid* at 25.
[22] *Ibid* at 27.

to the basic functioning of employee associations (e.g., unions).[23] Without the RCB and RTS, the argument goes, a union or employee association is not able to provide its members with any useful means of exercising their RFOA to improve the terms and conditions of employment. In such a case, the employee association will sooner or later be disbanded, and each employee will be again left to her or his own devices—the RFOA would provide workers with no benefit, and would in effect be hollow. To use concepts introduced above, without RCB and the RTS, the RFOA would be static in the labour context, not dynamic—a union or employee association will not have any means to realize the goals of its members.[24]

Under the independent conception, the justification for fundamental RCB and RTS is different. These two rights are fundamental because they are specific species of the RFOA, derived from a foundational principle, rather than because they are necessary to the essential functioning of the RFOA. As previously mentioned, this foundational principle is the symmetry between individual and collective action. Under the independent view of the RCB, a worker should be free to band together with fellow employees to negotiate collectively with her or his employer for improved working conditions, because she or he is at liberty to negotiate alone for better working conditions. Under the independent view of the RTS, a worker should be free to cease work in a concerted fashion with other employees, because she or he is entitled to cease work alone.[25]

Leader argues that the independent conceptualization of the RCB and the RTS is generally preferable to the instrumental conceptualization.[26] One key difference between these

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[23] *Ibid* at 182-184.
[24] *Ibid* at 195-199.
[25] *Ibid* at 182-184. Similar points were also made by Langille in Mess, *supra* note 1 at 183-184.
[26] Although, Leader recognizes that some auxiliary or peripheral aspects of these rights may be justified under the instrumental conceptualization in certain circumstances.

two conceptualizations is the amount of deference given to legislatures in their shaping of the various components of the applicable jurisdiction's labour relations system. The room for disagreement about the basic constitutional protections that accord to an independent right (i.e., the independent conceptualization) is much narrower than the debate about the range of tools that is available to further a basic right (i.e., the instrumental conceptualization). In order for a judge to accept the instrumental view of the RTS and RCB, she or he must accept the argument that it is necessary for workers to exercise their RFOA in order to balance the power between unions and management, and that the RCB and RTS are effective policy tools to do this. Leader argues that the foundational principle of symmetry under the independent conceptualization of rights like RCB and the RTS leads to coherence and consistency in legislative choices and judicial decisions in a way that the instrumental conceptualization does not.[27]

As well, if rights are viewed as being instrumental, another issue arises related to the fact that labour law provides a bundle of rights that form a system. In an instrumental conceptualization, it may be permissible to weaken or remove the RTS or RCB as long as certain other elements are present that enable the employee association to function. For example, the legislature may be allowed to ban strikes entirely if they introduce a reasonable alternative in its stead, e.g., interest arbitration. [28]

Leader points out that an instrumental conceptualization of the RCB and the RTS will often be coupled with a dynamic view of the RFOA. This is a tempting pairing to make. Someone sympathetic to trade unions will argue that they are entitled to pursue their goals against the outside world (dynamic conceptualization of the RFOA), and that a necessary requirement to enable them to do that is to give them the RTS and the RCB (instrumental

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[27] Leader article, *supra* note 3.

[28] Leader book, *supra* note 3 at 198-199.

conceptualization of RTS and RCB). However, the dynamic view will not generally be enough to secure fundamental status for the right to collectively bargain or the right to strike. Leader points out the vulnerability of resting the fundamental status of a RCB or a RTS on a dynamic conceptualization of the RFOA by arguing that some judges will subscribe to a view that trade unions have the right to pursue their goals, but will disagree that the RCB or the RTS are *necessary* to enable them to do that (even though the same judges might agree that the RCB and the RTS would be *helpful* to the pursuit of goals).[29]

Next, I will attempt to elaborate further on the potential scope of the RCB and the RTS under an independent conceptualization. In his works, Leader deals much more fulsomely with the RTS under his theory of the RFOA than he does with the RCB, and therefore the discussion of the RCB represents more of an extrapolation of Leader's theory than a summary.

2.3.2 Right to Collective Bargaining

As just indicated, the RCB will generally be better conceived as independent. For the independent conceptualization of the RCB, the starting point should be the rights and freedoms possessed by a lone worker. In the employment sphere, an individual is entitled to try and negotiate with the employer regarding the terms and conditions of work, both at the onset of the employment relationship, and during the continuation of that relationship. Generally speaking, however, the employee does not have a right to insist that the employer enter into the negotiations, nor is the employer under a duty to act in good faith during the course of any such negotiations, or to bargain at all. Given the principle of symmetry, a worker should have the right to associate with fellow workers for the purposes of collectively bargaining with the employer. The rights of the lone worker should inform the scope of the RCB. The RCB should

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[29] Leader book, *supra* note 3 at 196.

involve the freedom of workers to gather together to determine their demands, to designate representatives who will do the negotiating, and to present their collective proposals to the employer. Under this conception, there is not a *prima facie* duty on the employer to enter into negotiations with the employee representatives, nor is there a duty to act in good faith during any negotiations that are entered into.[30] This independent conception leaves room for employers to thwart the bargaining process, and therefore must be viewed as a weak version of the RCB.

2.3.3 Right To Strike

In assessing the nature and scope of the right to strike, it is wise to try and define "strike". Although there is not a universally agreed-upon definition, a widely accepted one is a "simultaneous and coordinated withdrawal of labour by workers".[31] Strikes are usually, though not always, designed to apply pressure on the employer to improve the terms and conditions of employment. These three features (coordinated action, application of pressure, to improve working conditions) are common to most strikes.[32] In addition to these common ones, there are also features that vary from strike to strike. Examples include whether the strike originates from inside or outside a union, whether the strike has been planned in advance or is *ad hoc*, and whether the purpose of the strike relates to broader political concerns.[33] In his theory of the RFOA, Leader focuses on the three common features of strikes, not the variable ones, as he asserts that the arguments are the strongest for these common features being part of an independent RTS.

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[30] As I mentioned in the last section, these ideas represent an extrapolation of the Leader's theory of RFOA. The ideas in this paragraph were largely informed by Langille, Mess, *supra* note 1. Alan Bogg and Cynthia Estlund make a similar point in "Freedom of Association and the Right to Contest: Getting Back to Basics" in T. Novitz & A. Bogg, eds, *Voices at Work* (Oxford: Oxford University Press, 2014) at pp. 144-145.

[31] T. Novitz, *International and European Protection of the Right to Strike* (Oxford: Oxford University Press, 2003), at 6.

[32] *Ibid*.

[33] Leader article, *supra* note 3.

Can the RTS be conceptualized as an independent right under the RFOA? In order to do so, there must be symmetry between individual rights and group action. A lone employee is legally entitled to cease or refuse to work in order to put pressure on her or his employer to improve working conditions,[34] so there is an argument that the symmetry requirement is met.

However, Leader presents (and ultimately refutes) two arguments why symmetry does not exist between a cessation of work by a lone employee and by a worker striking with a collective. Firstly, there is a difference in the job security enjoyed by the two different types of individuals. A lone employee's act of ceasing work will generally enable the employer to take the position that the employee has terminated the contract of employment, and the employer may even try and hold the employee liable for its breach (i.e., for the failure to give notice). In contrast, the employment relationship between the striker and the employer in many instances continues for the duration of the work cessation, with the mutual expectation that the striker is entitled to immediately resume work after the strike ends.[35] Secondly, there is a difference in the amount of economic harm a lone worker can inflict on the employer by a work stoppage versus that done when a group of employees ceases work at the same time. The economic harm done during a strike, and therefore its coercive power, is often greater than the sum of the economic harm each individual striker could inflict alone. These differences have been used to support the assertion that there is no symmetry between strikes and individual work stoppages because strikes are qualitatively, as well as quantitatively, different.

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[34] Although, an individual may be under an obligation to provide the employer with a short period of notice. For a discussion of the obligation of an employee to give notice of cessation of work, and the origins of this obligation, see David J. Doorey, "Employer Bullying: Implied Duties of Fair Dealing in Canadian Employment Contracts." (2005) 30 Queen's Law Journal 500.

[35] See, for example, s. 80 of the Ontario *Labour Relations Act*, 1995, S.O. 1995, c. 1, which provides that where an employee participates in a lawful strike for six months or less, the employer is to reinstate the employee without discrimination.

Leader posits two responses to these counterarguments, suggesting that the independent conceptualization is still valid. The first relates to what he calls "equal treatment". Historically, tort and criminal law imposed heavy liabilities on strikers.[36] This liability was often based in conspiracy, where individuals were prohibited from inflicting economic losses on a third party (for our purposes, the employer) through actions performed as a group that would have been lawful if performed by an individual. Legislation was eventually enacted that exempted some strike activity from tort damages and criminal penalties. The purpose of these laws was to provide space for individuals to engage in industrial disputes collectively.[37] Out of a principle of equal treatment (between tort and contract law), labour relations statutes have also sought to protect workers from *contractual* liability during the strike—prohibitions on employers terminating employees who strike lawfully. The rationale is that the employer should not be entitled to extract a contractual penalty from the striking worker where he cannot extract a penalty under tort or criminal law. A by-product of this protection from contractual liability means that the employment relationship continues during the strike, and is not breached.[38]

The second objection to the symmetry argument is that the economic pressure of a strike is too great, far greater than the pressure that individual employees could exert through a work stoppage. In effect, employees who use their liberty to strike are often derogating the liberty of employers and those who do business with employers. Leader's response to this is that the RTS is not absolute, but should be viewed as qualified.[39] There are restrictions that may ultimately

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[36] For a discussion of this point, see Judy Fudge and Eric Tucker. *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948*. Oxford: Oxford University Press, 2001; and see Eric Tucker, "'That Indefinite Area of Toleration': Criminal Conspiracy and Trade Unions in Ontario, 1837-77" (1991), 27 Labour 15.

[37] Leader article, *supra* note 3 at 280-281.

[38] *Ibid* at 282-284.

[39] *Ibid* at 284.

be shown to be justified because of the special damage that a strike may cause in a particular case, such as harm to public order or the cessation of essential services.[40]

There are two justifications for endorsing a qualified right to strike for workers proposed by Leader. First, it is generally legitimate for the freedom of workers to be used to limit the freedom of employers in order to cope with an imbalance of power and thereby to give a fair chance for some demands to be satisfied. Second, even in those rare cases where there is no imbalance of power the pressure exerted is an inevitable by-product of permitting the coordination of workers' individual choices to try to bring about certain terms and conditions of work. An independent, constitutionally protected RTS should be limited to action taken for legitimate reasons (i.e., for concerns related to conditions of employment), while beyond those concerns the restrictions on an unqualified right often apply. [41]

In summary, although it is necessary for a claim to collective action to be originally grounded in symmetry, the principle of equal treatment and the qualified nature of the right to strike mean that perfect analogies between individual and collective action are not necessary. Given this, the common features of strikes—collective activity, the exertion of pressure, and the improvement of working conditions—are entitled to the constitutional protection of RFOA on the basis of the independent conceptualization.

2.3.4 Summary of Leader's Theory

At this stage, it is useful to summarize Leader's RFOA theory, before proceeding to apply it to the Canadian jurisprudence. Leader describes two versions of the RFOA. One is "weak", which provides individuals with the privilege to join in groups, and a corresponding disability on the part of the government to enact legislation that interferes with this privilege.

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[40] Leader book, *supra* note 3 at 203.
[41] Leader article, *supra* note 3 at 285.

The other is "strong", which places certain duties on governments or perhaps private parties to respect the RFOA of an individual. At the same time, the individual trying to exercise his or her RFOA under the strong version has correlative claim-rights against others to facilitate the exercise of this right. Under either version, the guiding principle of this right is that an individual should not be prevented from doing with others that which she or he could legally do alone.

The guiding principle can also be used to give coherence to the right to strike and the right to collectively bargain, and on the basis of this principle, these two rights are best viewed as being independent examples of the RFOA (the independent conceptualization), rather than as necessary means of furthering the RFOA (the instrumental conceptualization). Under an independent conceptualization of the RCB and the RTS, the issue of whether the RFOA ought generally to be perceived as static or dynamic is irrelevant. Leader's theory of the RFOA will facilitate consistency and coherence in the law of freedom of association. Consistency and coherence are two desirable traits of the common law. Leader's theory will produce results that are consistent over time, and a normative coherence among the constellation of rules under the RFOA.[42]

3 Canadian Jurisprudence On Freedom Of Association

I will now proceed to critique the Canadian jurisprudence of the Supreme Court of Canada using Leader's theory of RFOA just reviewed. Firstly, I will discuss the extent to which the Court has used a guiding principle to make the jurisprudence coherent. Secondly, I will examine how the Court has conceptualized the RCB, and lastly, I will analyse how the Court conceptualized the RTS. In particular, we are interested in whether the Court has adopted an instrumental or an independent conceptualization of the RCB and the RTS. In each of the three

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[42] The idea that consistency and coherence are desirable properties of legal systems was discussed by Melvin Eisenberg in *The Nature of the Common Law* (Cambridge, MA: Harvard University Press, 1991).

sections, I will summarize the key Canadian decisions, compare them to Leader's theory on the RFOA, and examine whether the consistency and coherence of the Canadian jurisprudence would have been improved by Leader's theory.

3.1 Guiding Principle of RFOA

In the first court challenges based on the RFOA under the *Charter*, known as "The Trilogy", the Supreme Court justices strove to find a guiding principle. The "Trilogy" was a set of three labour law cases decided in 1987 and released simultaneously.[43] The central issue before the Supreme Court of Canada (SCC) in each of these cases was whether s. 2(d) of the *Charter* guaranteed a RTS. The main reasons were delivered in *Alberta Reference*, wherein the Alberta government submitted a reference to the SCC to determine whether legislation depriving public service employees, firefighters, hospital employees, and police officers of their RTS, violated the RFOA guaranteed by s. 2(d) of the *Charter*. In *Alberta Reference*, Justice McIntyre endorsed the symmetry principle. He ruled,

> …I interpret freedom of association in s. 2(d) of the *Charter* to mean that *Charter* protection will attach to the exercise in association of such rights as have *Charter* protection when exercised by the individual. Furthermore, freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone.[44]

However, he held that the RTS was not protected by s. 2(d) of the *Charter*, because there was no analogue between an individual cessation of work and a strike. In the same case, Chief Justice Dickson (in dissent) canvassed a number of different conceptions of the RFOA. He endorsed the utility of the symmetry principle as a useful guide in the RFOA.[45] However, he

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[43] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 [*Alberta Reference*]; *Public Service Alliance of Canada v. Canada*, [1987] 1 SCR 424, 38 DLR (4th) 249; *Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] 1 SCR 460, 38 DLR (4th) 277.

[44] *Alberta Reference*, *ibid* at 409.

[45] *Ibid* at 366.

rejected that as being the sole foundational principle. He believed that symmetry alone could not justify an independent RTS, because there was no analogy between individual withdrawal of labour and a strike.[46] Dickson C.J.C. ruled that there was a RTS based on instrumental grounds.[47]

Generally, the majority opinion of the SCC, starting with *Dunmore v. Ontario (A.G.)*,[48] moved away from the symmetry principle, and instead adopted an instrumental justification for the protection of certain collective activities. In *Dunmore*, Bastarache J. rejected the notion that freedom of association applies only to activities capable of performance by individuals. He ruled, "To limit s. 2(d) to activities that are performable by individuals would, in my view, render futile these fundamental initiatives."[49] He went on to hold that "certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning."[50] Thus, according to Justice Bastarache, certain collective activities that were instrumental to an association ought to be protected by the RFOA.

However, Justice Rothstein continued to apply the symmetry principle in his minority decisions. *Ontario (AG) v Fraser*[51] involved the issue of whether the Ontario government's *Agricultural Employees Protection Act*,[52] which created an entirely separate statutory labour relations regime for agricultural employees, violated s. 2(d) of the *Charter* by failing to provide farm workers with an adequate regime of collective bargaining. Justice Rothstein used the

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[46] *Ibid* at 367.
[47] *Ibid* at 367-371.
[48] *Dunmore v. Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016 [*Dunmore*].
[49] *Ibid* at para 16.
[50] *Ibid* at para 17.
[51] *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*].
[52] 2002, S.O. 2002, c. 16 [*AEPA*].

principle of symmetry to rule that the farm workers did not have a RCB (as conceptualized by the majority) under s. 2(d) of the *Charter*. He was deeply troubled by the fact that the majority's conceptualization of the RCB conferred the right to good faith bargaining to union members, a right that non-unionized employees do not enjoy.[53]

He used the principle of symmetry to ground what he viewed to be the appropriate scope of the RCB under the *Charter*. He stated that s. 2(d) does protect a voluntary association of workers who wish to use their associational freedoms to come together and attempt to improve their wages and working conditions. He reasoned that a lone worker is generally free to bargain over the terms and conditions of employment. On this basis, individuals should be allowed to band together, to form a bargaining position and to present a common and united front to an employer.[54]

Justice Rothstein again relied on the principle of symmetry in his dissent in the recent *Saskatchewan Federation of Labour v. Saskatchewan* case.[55] In that case, the SCC revisited the issue of whether the right to strike was protected under s. 2(d) of the *Charter* for the first time since the *Alberta Reference*. Rothstein J. found that there was no RTS contained in the RFOA. Similar to Justice McIntrye in the *Alberta Reference*, he relied on the principle of symmetry, and held that there was no analogue between a cessation of work by a lone worker and a strike.

The SCC's jurisprudence on the RFOA would have been more coherent and consistent if symmetry would have been the guiding principle and applied properly. Under Leader's theory, the principle of symmetry enables an independent, not instrumental, conceptualization of the RCB and the RTS. The right to collective bargaining ought really to simply entail an extension

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[53] *Fraser*, *supra* note 51 at para 187.
[54] *Ibid* at para 270-274.
[55] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 [*SFL*].

of the negotiations an individual can conduct with her or his employer, as Justice Rothstein held in *Fraser*. We will see in the next section that the Supreme Court's adoption of an instrumental conception of the RCB lead to ongoing debates among the justices about the scope of the RCB, and the amount of deference the legislature was entitled to.

The Canadian jurisprudence on the RTS would also have been improved if the principle of symmetry was adopted and properly applied, and this will be discussed in the third part of this section (after the discussion on the RCB). It is argued that the Court in *Alberta Reference* should have found a RTS under s. 2(d) of the *Charter* based on symmetry. Justice McIntryre should have ruled that the principle of symmetry was applicable to strikes, based on Leader's concepts of equal treatment between tort and contract and on the notion of the qualified nature of the RTS. If this were the case, the Supreme Court would not have been forced to reverse itself in the *SFL* case.

3.2 Conceptualization of RCB

Generally, the Justices of the Supreme Court have conceptualized the right to collectively bargain in instrumental terms. As previously mentioned, conceptualizing the RCB in instrumental terms means that the RCB is viewed as an essential right because it is necessary to the basic functioning of employee associations. In the SCC's three most important cases dealing with the RCB—*B.C. Health Services*, *Fraser*, and *MPAO*—the Court often couples the dynamic conceptualization with the instrumental one. This is understandable, as in order to function, an employee association tries to achieve certain goals vis-à-vis the employer, and this struggle can be viewed as necessary for the continued survival of the particular association.

3.2.1 *B.C. Health Services*

In *Health Services and Support—Facilities Subsector Bargaining Association v British Columbia*, the British Columbia government failed to consult a number of health sector unions,

and passed legislation which did the following: ignored job security provisions in the relevant collective agreements; outsourced numerous jobs; rewrote existing collective agreements; and specifically stated that any future collective agreements that tried to ensure specific kinds of security would be null and void.[56] The unions argued before the SCC that this legislation violated their RCB under s. 2(d) of the *Charter*. They were challenging the legislation, not the government's activity in its capacity as employer.[57]

In *B.C. Health Services*, the Justices conceptualized the RCB as an instrumental and dynamic right, rather than an independent one. The Court ruled that Section 2(d) of the *Charter* protects the capacity of workers to engage in association through collective bargaining on fundamental workplace issues. The Justices explained that employees have the right to unite, to present demands to employers collectively, and to engage in discussions in an attempt to achieve work-place goals.[58] The majority was clear that the protection does not cover all aspects of the collective bargaining process laid out in labour statutes, and there was no right to a particular model of labour relations.[59] The Court also justified a RCB as being consistent with "*Charter* values". These included human dignity, equality, liberty, representation for autonomy and the enhancement of democracy.[60] The judges' explanation of "*Charter* values" emphasized the

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[56] *Health Services and Support—Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*B.C. Health Services*].

[57] The unions also filed a complaint with the ILO Committee on Freedom of Association. The Committee relied on an instrumental conceptualization of the RCB to uphold the complaint. It stated that the unilateral cancellation of collective agreements "may have a detrimental effect on workers' interests in unionization, since members and potential members could consider it useless to join an organization the main objective of which is to represent its members in collective bargaining, if the results of bargaining are constantly cancelled by law". See: Report No. 330 (2003), vol. LXXXVI, Series B, No. 1, at ¶ 304.

[58] *B.C. Health Services*, *supra* note 56 at paras 62-65.

[59] *Ibid* at para 19; 87-90.

[60] *Ibid* at paras 80-86.

important role that unions play in protecting the interests of workers, which is consistent with an instrumental conceptualization.

The Court held that the RCB imbued employees with claim-rights that place correlative duties on employers. Employers are under a duty to meet and discuss employees' demands with them. Also, the RCB imposes a duty on the employer to bargain in good faith. The Court was clear that the right is to a process, and not a certain substantive or economic outcome. As well, the court ruled that employees do not have a right to a particular model of labour relations.[61] The Court found that the legislation, and the process of enacting the legislation, resulted in a "substantial interference" by the government in the workers' RCB. The legislation's removal of important rights under existing collective agreements, its foreclosure of the negotiation of certain important issues in future collective agreements, and the lack of consultation, when combined, all amounted to substantive interference.[62]

Langille has argued that the Court's imposition of a constitutional duty on employers to bargain in good faith is problematic, for a number of reasons.[63] First, it created a strong form of the RFOA, where constitutional duties are imposed on private parties to respect the freedoms of workers, and workers have claim-rights against these private parties. Second, the reading in of the employer duty to bargain in good faith has the effect of constitutionalizing portions of the Wagner Act model.[64] Despite the fact that the judges are claiming that the RCB does not

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[61] *Ibid* at paras 87-90.

[62] *Ibid* at paras 110-136.

[63] See Mess, *supra* note 1; and "Why Are Canadian Judges Drafting Labour Codes - And Constitutionalizing the Wagner Act Model?" (2009-2010) 15 CLELJ 101.

[64] The Wagner model has four legislative hallmarks: explicit recognition of the right of employees to belong to a trade union of their choice; protections against employer coercion or interference with organizing activities, known as unfair labour practices provisions; a duty upon employers to bargain in good faith with their employees' unions; and a dispute resolution mechanism for resolving impasses: see G. W. Adams, *Canadian Labour Law,* 2nd ed, loose-leaf (consulted on 1 September, 2014) (Aurora: Canada Law Book, 1993) at p. 1-11.

guarantee a particular model of labour relations, the ruling that employers have a duty of good faith essentially requires that certain additional components of the Wager Act model be provided with the constitutional RCB. This is undesirable, because it is giving judges the authority to legislate a labour code, and is binding Canada to one of many labour relations models used across the world.

This creation of a duty to bargain in good faith was not necessary under Leader's theory. The better way to conceptualize the RCB is as an independent right. According to Leader's theory of the RFOA, workers have immunity from the state enacting legislation which interferes with their RCB, and the state has a correlative disability to enact such legislation. The Supreme Court should have decided that the constitutional protection of the RCB extends not only to the collective bargaining process, but also the outcome of that bargaining (i.e., the collective agreement). This is because, based on the principle of symmetry, just as an individual has the freedom to negotiate with the employer for the terms and conditions of employment and to *conclude a contract with the employer*, an employee association has the freedom to negotiate with the employer for the terms and conditions of employment and to *conclude a collective agreement with the employer*. The B.C. government was under a disability from passing legislation that disregards already negotiated collective agreements. It was governmental disregard of its legal disability to infringe on worker freedoms, rather than an employer's failure to bargain in good faith, that was at issue.

One objection to this approach is that it has the effect of constitutionalizing a contractual arrangement, and in fact gives the terms and conditions of government workers superior protection than other kinds of contracts, including employment contracts between individual

workers and a private employer.[65] The best response to this objection is that the disability is not absolute, but rather is qualified, such that the government could justify the modification of midterm collective agreements for public sector workers in certain circumstances under s. 1 of the *Charter*, perhaps in situations of extreme financial crisis provided there was a measure of consultation.

3.2.2 *Fraser*

Fraser was essentially a continuation of the legal dispute started in *Dunmore*. In *Dunmore*, the Ontario government was ordered to put in place a meaningful system to enable agricultural workers to organize. The government's response to the SCC's decision in *Dunmore* was to pass the *Agricultural Employees Protection Act*,[66] which created a separate statutory labour relations regime for agricultural employees. Under the *AEPA*, employees were granted rights to form and join an employees' association, to participate in its activities, to assemble, to make representations to their employer through their association on the terms and conditions of employment, and to be protected against interference, coercion and discrimination in the exercise of their rights. The employer must have given an association the opportunity to make representations respecting terms and conditions of employment, and it must have listened to those representations or read them. The *AEPA* also assigned a pre-existing tribunal, one without labour relations expertise, to deal with disputes arising out of the Act. There were no successfully concluded collective agreements under this regime, nor had there even been negotiations, and no complaints under the *AEPA* had been heard or decided by the tribunal at the

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[65] For a discussion of this point, see Peter W. Hogg. *Constitutional Law of Canada*, 5th ed., loose-leaf (consulted on 15 June, 2015), (Scarborough, Ont.: Thomson/Carswell, 2007) at page 44-9.

[66] *AEPA*, *supra* note 52.

time the *Charter* challenge was launched.[67] The farm workers alleged that this new regime violated, among other things, their s. 2(d) *Charter* right to collectively bargain.

In *Fraser*, the majority adopted an instrumental conceptualization of the RCB. Chief Justice McLachlin and Justice LeBel, for the majority, summarized the combined effect of *Dunmore* and *B.C. Health Services* as placing a duty on government to protect workers from interference with the RCB that would render workers' RFOA pointless.[68] It called this aspect of the RCB "derivative", in that it only extended as far as necessary for the meaningful exercise of the RFOA.[69] The "derivative" concept made it obvious that the justices were conceptualizing the RCB as instrumental. They continued to use instrumental language when they stated that collective bargaining is among those "collective activities [that] must be recognized if the freedom to form and maintain an association is to have any meaning",[70] and when they explained that the "protection for collective bargaining in the sense affirmed in *Health Services* is quite simply **a necessary condition** of meaningful association in the workplace context."[71] [emphasis added]

Having settled on an instrumental conceptualization, McLachlin, C.J., and LeBel, J., then explored the scope of the RCB. They framed the issue in the case as being whether the RCB under s. 2(d) of the *Charter* placed a duty on the Ontario government to provide a particular form of collective bargaining to agricultural workers. They explained that *B.C. Health Services* did not support the proposition that legislatures are constitutionally required to enact laws that set up a uniform model of labour relations imposing the hallmark characteristics of the Wagner Act

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[67] See GFOA, *supra* note 9 for a detailed discussion of the *AEPA*, and its implications for freedom of association.
[68] *Fraser, supra* note 51 at para 46.
[69] *Ibid* at paras 46, 99.
[70] *Ibid* at para 42, summarizing principles from *Dunmore*, *supra* note 48.
[71] *Ibid* at para 43.

model, such as the following: a statutory duty to bargain in good faith, a statutory recognition of the principles of exclusive majoritarianism, and a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation and administration of collective agreements.[72]

After ruling that the constitutional RCB is not identical to the statutory right to good faith bargaining under Canadian labour relations legislation, they explained what the constitutional variety of collective bargaining did entail. In *Fraser*, the majority's ruling on the requirements of the constitutional duty to bargain in good faith were less onerous than those the Court had set out in *B.C. Health Services*. In *B.C. Health Services*, the majority ruled that the RCB "requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation".[73] In *Fraser*, the majority judges described the RCB as "a process of engagement that permits employee associations to make representations to employers, which employers must consider and discuss in good faith".[74] Under *B.C. Health Services*, the RCB required meetings, bargaining, and mutual accommodation. Under *Fraser*, employers merely had to consider and discuss employee representations "in good faith". Furthermore, the threshold of tolerance for interference with the RCB significantly increased in *Fraser*. Under *B.C. Health Services*, government legislation/actions which "substantially interfered"[75] with the RCB were prohibited, whereas under *Fraser*, only government

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[72] *Ibid* at para 47.

[73] *B.C. Health Services*, *supra* note 56 at para 90.

[74] *Fraser*, *supra* note 51 at para 2.

[75] The majority in *B.C. Health Services* ruled, "It is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals." [emphasis in the original]. *Supra* note 56 at para 90.

legislation/actions that made the resolution of workplace issues "effective impossibility" were proscribed.[76]

The judges applied these principles to the situation of agricultural workers in Ontario. The majority read into the *AEPA* a duty on agricultural employers to consider employee representations in good faith.[77] The Justices held that there was insufficient evidence that the agricultural employers were not considering worker representations in good faith, and that the tribunal lacked the ability to enforce this obligation. In light of all of this, the majority ruled that the workers had failed to establish a breach of their RCB.

As noted above, the majority took an instrumental view of the RCB in *Fraser*. It viewed collective bargaining as protected only insofar as is necessary to facilitate the achievement of an employee association's goals. This led the Justices to give substantial deference to a labour relations regime which had no evidence to support its effectiveness.[78] Judy Fudge argues that the *AEPA* regime was a calculated attempt by the Ontario government to give agricultural workers the bare minimum entitlements to satisfy the constitutional requirements of the RFOA.[79] Under the *AEPA*, there was no way for a group of employees to determine whether any particular employer actually considered their representations, and there was no ability for agricultural

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[76] For example, the majority in *Fraser* stated, "If the *AEPA* process, viewed in terms of its effect, makes good faith resolution of workplace issues between employees and their employer **effectively impossible**, then the exercise of the right to meaningful association guaranteed by s. 2(d) of the *Charter* will have been limited." [emphasis added] *Supra* note 51 at para 98.

[77] *Ibid* at paras 102-107.

[78] For a discussion of the evidence before the SCC in both *Dunmore* and *Fraser*, see Fay Faraday, "Envisioning Equality : Analogous Grounds and Farm Workers' Experience Of Discrimination" in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada : Farm Workers and the Fraser case* (Toronto: Irwin Law, 2012).

[79] Judy Fudge, "Introduction: Farm Workers, Collective Bargaining Rights, and the Meaning of Constitutional Protection" in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada : Farm Workers and the Fraser case* (Toronto: Irwin Law, 2012).

workers to pursue meaningful remedies if they believed that the employer was exercising bad faith.

Justice Rothstein, for the minority, found that there was no violation of s. 2(d) of the *Charter*. He adopted a weak form of the RCB. It comprises freedom of workers, but does not give them any claim-rights against governments or employers.[80] The judge deferred to the legislature as to whether it was appropriate to attempt to balance the power of organized labour vis-à-vis employers. Any attempt to improve the power of organized labour was a policy decision requiring a balancing of interests rather than an application of legal principles. According to Justice Rothstein, the decision to impose a duty to collectively bargain should be made by the legislature, not the court.[81]

Justice Rothstein took a static view of the RCB. He criticized *B.C. Health Services* as breaking with the jurisprudence on the RFOA previously established by the SCC. He stated that the Court was wrong to put an obligation on the government to legislate provisions that facilitated the collective goals which an association was formed to pursue, rather than protecting the freedom of association itself. He criticized the majority judgement in *B.C. Health Services* for being instrumental ("the decision in *Health Services* centred on the purported need to constitutionalize collective bargaining in order for the association to be 'meaningful'")[82] and dynamic ("the majority in *Health Services* focused on the goals of an association and the enhancement of those goals, rather than the ability of the claimants to associate").[83] Rothstein J. also criticised the lack of symmetry between non-union and union employees. He was deeply

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[80] *Fraser*, *supra* note 51 at para 125.
[81] *Ibid* at para 126.
[82] *Ibid* at para 154.
[83] *Ibid* at para 155.

troubled by the fact that the majority's conceptualization of the RCB conferred the right to good faith bargaining on union members, a right that non-unionized employees do not enjoy.[84] He also expresses concern about the strong aspect of RCB as conceptualized by the majority, which moved from simply protecting a freedom enjoyed by individual workers to imposing duties on employers.[85]

He outlined what he viewed to be the appropriate scope of the RCB under the *Charter*. He stated that s. 2(d) protects a voluntary association of workers who wish to use their associational freedoms to come together and attempt to improve their wages and working conditions. He grounded this right in the principle of symmetry—a lone worker is generally free to bargain over the terms and conditions of employment. On this basis, individuals should be allowed to band together, to form a bargaining position and to present a common and united front to an employer.[86]

The problems with an instrumental conceptualization of the RCB predicted by Leader's theory were evidenced in *Fraser*. We see that the failure to use a guiding principle like symmetry leads to a lack of consistency in decisions. These inconsistencies exist in the reasons of the same Justices over time, and between the Justices. The decision of Chief Justice McLachlin and Justice LeBel in *B.C. Health Services* was not consistent with their decision in *Fraser*. The onerousness of the duty of good faith bargaining decreased from *B.C. Health Services* to *Fraser* (full duty of good faith bargaining versus obligation to consider representations), and the threshold of tolerance for government interference with the RCB

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[84] *Ibid* at para 187.
[85] *Ibid* at para 188-202.
[86] *Ibid* at para 270-274.

increased between the decisions (substantial interference to effective impossibility).[87] There was also serious disagreement between the majority and the minority in *Fraser*, which ultimately boiled down to a difference of opinion about the appropriate policy decisions necessary for the functioning of employee associations. The majority ruled that the government must enact RCB legislation which facilitates the efforts of employee associations, particularly groups of vulnerable employees, to fulfill their goals in a meaningful way. This entailed a strong conceptualization of the RCB which gave employees claim-rights against employers and the government. On the other hand, the minority held that the RCB was static and that a "strong" variety of the RCB was not necessary to protect the RFOA of workers. In the minority's opinion, any attempt to balance the bargaining power between farm workers and their employers could not be justified on instrumental grounds. Overall, in *Fraser* we see the common attack to which the instrumental conceptualization is open: the need to defer to the legislature.

Under the Leader theory of the RFOA, the better way to approach the *Fraser* case would have been to focus on the RTS. The farm workers in *Fraser* did not pursue the RTS issue in the case,[88] presumably in large part due to the fact that, at the time the case was heard, the Supreme Court had ruled in the *Alberta Reference* that there was no constitutional RTS under s. 2 of the *Charter*. It is submitted that if the farm workers had a collective ability to refuse to work, then in all likelihood they would have had the means to force employers into serious negotiations over the terms and conditions of work.

If we accept that the RTS was the appropriate focus of this case, the next issue to determine is the extent to which the RTS should be strong or weak. In other words, is the RTS

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[87] For a discussion of this point, see Alison Braley, "I Will Not Give You a Penny More than You Deserve: *Ontario v Fraser* and the (Uncertain) Right to Collectively Bargain in Canada", Case Comment, (2011) 57:2 McGill LJ 351.
[88] *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760 (CanLII) at para 82.

merely the freedom to strike, without more, or is it of the strong variety, such that the government has a duty to introduce rules related to agricultural employees work refusal? This is an important matter to determine, because the *AEPA* did not deal at all with a collective cessation of work. It did not set out rules for the timing of any collective work stoppage, nor did it set out job protection for those employees involved in such a stoppage. The *AEPA* was silent on the issue of any possible collective job action by agricultural workers. According to the Leader theory, workers would generally not be entitled to special protections, to allow them to exercise their RTS (other than any that would flow from the principle of equal treatment).[89] In other words, the starting point for the RTS would be a weak, rather than a strong, conceptualization. This would potentially make a collective refusal to work more risky, but the protections cannot usually be justified without compromising the consistent and coherent nature of the theory of RFOA.[90]

3.2.3 *Mounted Police Association of Ontario v. Canada*

Mounted Police Association of Ontario[91] is another very recent decision of the SCC dealing with the scope of the RCB. Independent associations of Royal Canadian Mounted Police (RCMP) members were not formally recognized by management, nor were RCMP members permitted to engage in collective bargaining. RCMP members were excluded from the labour relations regime applicable to the federal public service since collective bargaining was

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[89] For a further discussion about the extent to which the principle of equal treatment might apply in this situation, see Leader book, *supra* note 3 at 204-205.

[90] However, Leader does leave open the possibility that enhanced protections could be justified on instrumental grounds under the right circumstances. See Leader article, *supra* note 3 at 294.

[91] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 [*MPAO*].

introduced for federal public servants.[92] Instead, members of the RCMP were subject to a labour relations regime without unions.[93]

The core component of the current RCMP labour relations system is the Staff Relations Representative Program ("SRRP"). The SRRP is the primary vehicle through which RCMP members can raise labour relations issues (not including compensation), and the only form of employee representation recognized by management. The SRRP is governed by a National Executive Committee and is staffed by representatives from various RCMP divisions and regions elected by members of the RCMP. Two of its representatives act as the formal point of contact with the national management of the RCMP. The goal of the SRRP is that, at each level of the hierarchy, members' representatives and management consult on human resources initiatives and policies, but the final word rests with management.[94]

A constitutional challenge was initiated by two private associations of RCMP members whose goal was to represent RCMP members in Ontario and British Columbia on work-related issues. These associations had never been recognized for the purpose of collective bargaining or consultation on workplace issues by RCMP management or the federal government. The associations claimed that the labour relations system violated RCMP members s. 2(d) *Charter* rights. The RCMP associations won at trial, but the federal government was successful in its appeal to the Ontario Court of Appeal.[95]

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[92] Originally, this was under the *Public Service Staff Relations Act*, S.C. 1966-67, c. 72 [*PSSRA*], and later this exclusion was maintained under the *Public Service Labour Relations Act*, S.C. 2003, c. 22 [*PSLRA*].

[93] At the time of the hearing of this appeal before the SCC, that regime was imposed upon RCMP members by s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361, since repealed and replaced by the substantially similar s. 56 of the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281.

[94] *MPAO*, *supra* note 91 at paras 6-25.

[95] *Ibid* at paras 26-28.

Chief Justice McLachlin and LeBel, J. reviewed past SCC jurisprudence regarding the constitutional protections under s. 2(d) of the *Charter*. They ruled that the jurisprudence had evolved to the point where a purposive, generous, contextual approach is now supported.[96] As they did in *B.C. Health Services* and *Fraser*, the majority cast the RCB as very much an instrumental and dynamic right. According to them, the RFOA guarantees the right of employees to meaningfully associate (instrumental conceptualization) in the pursuit of collective workplace goals (dynamic conceptualization). This guarantee includes a right to collective bargaining.[97] The RFOA will be violated when a labour relations process substantially interferes with the possibility of having meaningful collective negotiations on workplace matters.[98] According to the majority, "The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way."[99] Whenever the government introduces restrictions on the RCB, the ultimate question to be determined is whether the measures substantially interfere with meaningful collective bargaining.[100] The Justices provided additional guidance regarding the substance of the RCB. They wrote: "[W]e conclude that a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them."[101] They upheld the appeal in this case because the SRRP lacked these qualities of choice and independence.

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[96] *Ibid*, paras 62-65.
[97] *Ibid* at para 67.
[98] *Ibid* at para 68.
[99] *Ibid* at para 71.
[100] *Ibid* at para 72.
[101] *Ibid* at para 81.

Like the majority, Justice Rothstein ruled that the RCB is instrumental to the RFOA. However, he disagreed with the majority on the content of the RCB. He ruled that "representativeness" was all that was required to make the RCB meaningful, and that choice and independence were not required as indicated by the majority.[102] The judge found that the RCMP labour relations regime provided an adequate degree of representativeness sufficient to make the RCB meaningful in this case.[103] Justice Rothstein also stressed the need to defer to the legislature regarding the labour relations regime for the RCMP.[104]

The difference in result reached by Justice Rothstein and the majority again highlights the inconsistency that occurs when an instrumental conceptualization of RCB is applied. The Justices disagreed over how far the government needs to go to make collective bargaining meaningful. The decision-making would have been more consistent and coherent if the guiding principle of symmetry was applied. A sole employee is entitled to be at arms length in his or her negotiations with the employer. On the basis of this, so too should the association representing the RCMP officers. It would appear that the body responsible for negotiating on behalf of members was not at arms length. The majority found that RCMP members cannot genuinely advance their own interests through the SRRP, as it is squarely under the control of management.[105]

3.2.4 Summary of RCB Jurisprudence

The SCC's ultimate conceptualization of the RCB has been dynamic and instrumental. Additionally, it is a "strong" variety, as it places duties on the government and private

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[102] *Ibid* at paras 172, 176-204.
[103] *Ibid* at para 238.
[104] *Ibid* at paras 254-256.
[105] *Ibid* at paras 111-121.

employers. This has created a lack of consistency and coherence in the jurisprudence, which is sure to lead to additional litigation in the future in order to clarify the scope of the RCB. This does not conform to Leader's theory, which argues for an independent RCB of the weak variety. With the Canadian jurisprudence on the RCB analyzed, we now turn to the right to strike.

3.3 Conceptualization of RTS

3.3.1 *Alberta Reference*

In the *Alberta Reference* decision, referenced earlier, Justice McIntrye rejected dynamic[106] and instrumental views of the RTS,[107] which would give a union the right to strike on the basis it was necessary to pursue its goals and objectives. He then explored whether there was an independent RTS under the RFOA, and concluded that there was not. He relied on the principle of symmetry, and stated that the guiding principle of the RFOA is the right to do collectively what it is legal to do individually. He advanced two main reasons why there was not an independent RTS. First, according to Justice McIntrye, an individual worker does not have the legal right to cease work during the employment contract. Second, he claimed that there was no analogy between an individual cessation of work and a strike (in other words, strikes were qualitatively different). His main explanation for this second point is that individual employees are forced to quit, while strikers retain job security for the duration of the strike.[108] After rejecting the independent conceptualization of RTS, he explained that the legislature is entitled to deference.[109]

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[106] *Alberta Reference*, *supra* note 43 at 399.
[107] *Ibid* at 404.
[108] *Ibid* at 409-412.
[109] *Ibid* at 414-419.

In dissent, Chief Justice Dickson ruled that the RTS was constitutionally protected under s. 2(d) of the *Charter*. He decided that the main thrust of the section was the protection of freedom (in other words, a weak version of the RFOA). However, he left open the possibility that the government was under a duty to intervene when a lack of action on the part of the government may, in effect, substantially impede the ability of workers to enjoy the FOA.[110]

Dickson, C.J.C., explored a number of different conceptualizations of the RFOA. He first considered a "constitutive" conceptualization of the RFOA (corresponding to the static view, described above), but rejected it. He called such a conceptualization "legalistic, ungenerous, indeed vapid".[111] He endorsed the utility of the symmetry principle as a useful guide in RFOA.[112] However, he rejected that as being the sole foundational principle. He believed that symmetry alone could not justify an independent RTS, because there was no analogy between individual withdrawal of labour and a strike. The strike, as Chief Justice Dickson explained, is qualitatively different, rather than quantitatively different.[113] Ultimately, he concluded that the RTS was justified on instrumental grounds, given the fact that it was such an integral part of collective bargaining, and given the fact that he viewed a RTS as being necessary to enable unions to achieve their objectives.[114] He ruled that the RTS was constitutionally guaranteed by s. 2(d) of the *Charter*.

According to Leader's theory, neither the majority nor the dissent in *Alberta Reference* were correct to reject the independent conceptualization of the RTS. It is not appropriate to insist on absolute symmetry, in light of the principle of equal treatment and the qualified nature

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[110] *Ibid* at 361.
[111] *Ibid* at 363.
[112] *Ibid* at 366.
[113] *Ibid* at 367.
[114] *Ibid* at 367-371.

of the RTS, as discussed above (see section 2.3.3 Right to Strike). Under a principle of equal treatment (between tort and contract law), labour relations statutes have sought to protect workers not only from certain tort liabilities (based on the tort of conspiracy) but also from *contractual* liability during the strike—prohibitions on employers terminating employees who strike lawfully. As explained above, Leader believes that the RTS should be qualified, rather than unqualified, meaning that there are restrictions on the RTS that may ultimately be shown to be justified because of the special damage that a strike may cause in a particular case, such as harm to public order or the cessation of essential services.

It is submitted that in this decision, the Court placed the trajectory of the RFOA jurisprudence on an unsound path. The SCC should have adopted Leader's approach and recognized the RTS on independent grounds under the guiding principle of symmetry. This would have made the later decisions of the Court more coherent and consistent. The Supreme Court's rejection of an independent RTS in *Alberta Reference* ultimately forced the court to adopt an instrumental conceptualization of the RCB in subsequent jurisprudence. This instrumental orientation created inconsistencies in *B.C. Health Services* and *Fraser* on the scope of the RCB and the threshold for permissible government interference with the RCB. Much of the problems in the later caselaw can trace their origins to the *Alberta Reference* decision.

3.3.2 *Saskatchewan Federation of Labour v. Saskatchewan*

At issue in the *Saskatchewan Federation of Labour v. Saskatchewan* case[115] was the extent to which a constitutionally protected RTS is included within the RFOA. In December, 2007, the newly elected Saskatchewan Party introduced the *Public Service Essential Services*

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[115] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 [*SFL*].

Act[116] without any consultation with organized labour in the province of Saskatchewan. The *PSESA* was Saskatchewan's first statutory scheme to limit the ability of public sector employees who perform essential services to strike.[117] The Saskatchewan Federation of Labour launched a court challenge to the constitutionality of the *PSESA*, alleging that the statute violated workers' right to strike under s. 2 of the *Charter*. The trial judge relied on *B.C. Health Services*, *Fraser*, and International Labour Organization jurisprudence, and found in favour of the labour federation.[118] However, on appeal, the Saskatchewan Court of Appeal overturned the trial judge's decision, ruling that the original trilogy was still binding.[119] The Saskatchewan Federation of Labour then appealed to the Supreme Court of Canada.

Justice Abella, for the majority, upheld the Saskatchewan Federation of Labour's appeal. She ruled that the right to strike is an "indispensible component" of the RCB.[120] She found that "the right of employees to strike is vital to protecting the meaningful process of collective bargaining within s. 2(d)."[121] She went on to rule as follows:

> Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations. Where essential services legislation provides such an alternative mechanism, it would more likely be justified under s. 1 of the *Charter*. In my view, the failure of any such mechanism in the *PSESA* is what ultimately renders its limitations constitutionally impermissible.[122]

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[116] S.S. 2008, c. P-42.2 [*PSESA*].
[117] *SFL*, *supra* note 115 at para 7.
[118] *Saskatchewan v. Saskatchewan Federation of Labour*, 2012 SKQB 62.
[119] *Saskatchewan v. Saskatchewan Federation of Labour*, 2013 SKCA 43.
[120] *SFL*, *supra* note 115 at para 3.
[121] *Ibid* at para 24.
[122] *Ibid* at para 25.

She further explained that the ability of workers to strike[123] is an essential component of the process through which workers pursue collective workplace goals. In the result, she ruled that the legislation in question created a suppression of the right to strike that amounts to a substantial interference with the right to a meaningful process of collective bargaining.

Justices Rothstein and Wagner would have rejected the appeal, and wrote a dissenting decision. The minority objected to recognizing a RTS for essentially three reasons. The first is a requirement for symmetry (similar to the argument made by Justice McIntyre in the *Alberta Reference*).[124] The second is that courts must defer to the legislature.[125] The third is that the RTS is not instrumental to the RCB, because the recently enunciated constitutional duty on employers to bargain in good faith obviates the need for a strike to ensure meaningful bargaining.[126]

It is important to note that Justice Abella defined the RTS as an instrumental right *under the RCB*. In other words, the RTS is only recognized insofar as it furthers collective bargaining. She did not cast the RTS as an independent species of right under the genus RFOA. Nor did she cast the RTS as an instrumental right *that directly furthers the RFOA*. This means that, in situations where the RTS is not necessary to achieve meaningful collective bargaining, it would not be recognized even if it were critical for workers to realize other aspects of their RFOA. Take, for example, a small group of unionized employees who are part of a much larger

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[123] She defined "strike" in a manner similar to the definition used for the purposes of this paper: the ability to collectively withdraw services for the purposes of negotiating the terms and conditions of employment. See *ibid* at para 46.

[124] *Ibid* at para 110-113.

[125] *Ibid* at para 114-124.

[126] *Ibid* at para 128-136.

bargaining unit who work at a remote mining location.[127] Early in the term of a collective agreement, this small group of workers start experiencing very hazardous conditions at the mining location, which are capable of fairly easy remedy by the employer. But, the employer refuses for whatever reason to remediate the safety hazards, and the union refuses to raise the issue with the employer. So, the workers cease working, as a means of pressuring the employer to address their concerns. The workers' actions would not be protected under the constitutional RTS because their actions do not relate to "collective bargaining" in the way that term is used in the Wagner Act model. This also brings up another, related point. The majority's conceptualization of the RTS as being instrumental to the RCB goes a step further in constitutionalizing the Wagner Act model. Under the majority's conceptualization, the RTS would only triggered in the context of collective bargaining, whereas other labour relations systems allow strikes at times other than a bargaining impasse.

The dissent of Justices Rothstein and Wagner served to highlight a very important weakness in the majority's instrumental conceptualization of the RTS under the RCB. We see that the RTS is vulnerable to a difference of opinion about whether striking is necessary to achieve meaningful collective bargaining. The majority ruled, in the circumstances of the case at bar, that a RTS was necessary. Nevertheless, the minority found that it was not necessary, as it opined that the presence of the duty to bargain in good faith was strong enough to compensate for the absence of a right to strike, and is good enough to make collective bargaining meaningful. In other words, the RTS may evaporate when the decision-maker views meaningful collective bargaining as being possible without a RTS. Disagreements about whether the RTS is instrumental to the RCB in specific scenarios are sure to be fertile ground for litigation long into

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[127] Assume, also, for the purposes of this scenario, that there is no health & safety legislation that the workers could rely on.

the future. This uncertainty would have been eliminated if Leader's theory was used, and the RTS was conceptualized as independent.

4 Conclusion

This paper has demonstrated using Leader's theory of the RFOA that it is usually preferable to conceptualize the right to strike and the right to collective bargaining as independent species of the genus "right to freedom of association".[128] Doing this would have yielded Canadian jurisprudence that was more coherent and consistent. For example, one could be forgiven for being confused as to why the SCC found that the RCB was violated for the relatively powerful RCMP officers who have been able to exert collective influence to improve relatively favourable working conditions but found that the RCB was not violated for the relatively powerless agricultural workers who have not been able to exert any collective influence to improve extremely poor working conditions.

While the ultimate rulings of the Supreme Court of Canada, that the RCB and the RTS are constitutionally protected under the *Charter* s. 2(b), are good news for unions and other employee associations, it's not all sunny skies and clear sailing for them. The fact that these rights have been cast as instrumental will mean that a great deal of litigation is sure to follow regarding the nature and scope of these rights and the "substantial interference" threshold. To what extent are these rights subjective, accounting for the actual circumstances of the particular union or employee association? To what extent do the rights go to guarding against the potential violations in the future, rather than remedying violations which have already occurred? The RTS

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[128] I do not mean to suggest that certain strong forms of the RCB and RTS can never be justified on instrumental grounds. However, as this paper has demonstrated, instrumental justifications will often be unnecessary if the independent conceptualization is properly applied. Therefore, the independent conceptualization should be the starting point, and the instrumental conceptualization of these rights should be applied only where necessary, at the stage in the analysis when the independent conceptualization has proved inadequate to protect workers' RFOA.

seems particularly vulnerable, in light of the fact that it has been cast as an instrumental right used to protect the RCB, rather than as an independent right under the RFOA.

Perhaps the next focus for employees, employee associations, and unions should be on lobbying legislators to change labour and employment legislation in Canada to more fully instantiate the RCB and RTS constitutional protections, but in a way that more closely follows the first principles outlined in this paper. However, this will not be an easy sell to governments that are striving to make their labour laws more business-friendly in a world of globalized trade and mobile capital. The time for workers and worker associations to act is now, though, as a number of jurisdictions are just beginning to undertake formal reviews of their legislation.[129]

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[129] For example, Ontario has recently announced a review of its employment standards and labour relations legislation: Sara Mojtehedzadeh, "Ontario to review labour laws for 'gaping holes' when it comes to precarious work", *The Toronto Star* (February 17, 2015) online: http://www.thestar.com/news/gta/2015/02/17/ontario-to-review-labour-laws-for-gaping-holes-when-it-comes-to-precarious-work.html.

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Chapter 5
Conclusion

The results of the three studies can be summarized using the metrics of efficiency, equity, and voice, from John W. Budd's influential work "Employment with a Human Face: Balancing Efficiency, Equity, and Voice" (2004) and from John W. Budd's and Alexander J.S. Colvin's (2008) important extension of this work to the field of workplace dispute resolution. This work theorizes that inherent in the employment relationship, there are three conflicting objectives that must be balanced: efficiency, equity, and voice. Efficiency is the "common economic standard of the effective use of scarce resources" (Budd, 2004, p. 7), and is typically thought be the main objective of employers. Equity covers both material outcomes and personal treatment. Voice is the ability to have meaningful input into decisions which affect oneself. Equity and voice are usually more important to employees.

The findings of the first study, on the impact of the Supreme Court of Canada's *Honda v. Keays* decision on moral damages, are suggestive of a move from equity towards efficiency in Canadian employment law. Relative to the *Wallace* era, it is now less risky for employers to terminate workers in an untruthful, misleading, or unduly insensitive manner, as the probability of any moral damages being awarded against them has decreased, and the size of conditional awards are also smaller. The risk of bad faith terminations (or, to use the language of the Budd framework, the risk of poor personal treatment) has been shifted more towards the employees. At the same time, though, there is an argument (although a contentious one) that bad faith dismissal awards are now being determined in a more equitable fashion for employers. While equity is usually more important to employees, employers have an interest in being treated fairly in the litigation process. The revised principles are arguably more fair to employers, as their liability is now both more predictable and more consistent with general contract principles.

The Ontario arbitration system involves a balance of the three metrics of voice, efficiency, and equity (Budd & Colvin, 2008, p. 476), and my second study suggests that there has been decreases over the past two decades in aspects of all three. The increase in delay is a loss of efficiency in resolving disputes in a quick and cost-effective manner. The determinants of this delay are also negatively impacting equity and voice. There is a loss of equity, because the emphasis on legalism means that the focus is not on solutions that the parties need and that will improve their relationship. There is also a loss in voice, because the period of time from grievance filing to award is inordinately long. Remedies, when they are eventually awarded, will often be moot. The long durations for arbitrations will likely encourage the parties to enter into suboptimal settlements rather than wait an agonizingly long time, to abandon their grievances out of frustration, or to never bother filing grievances in the first place out of a sense of futility.

Nevertheless, some findings from the arbitration study suggest improvements in other aspects of voice, equity, and efficiency. Voice may be improved in some instances by the trend to lengthier hearings, as this may give the parties an opportunity to tell their stories. Also, the increased use of mediation-arbitration might give employees a chance to express themselves and have input at the mediation phase without the need for a full-blown hearing. With regards to efficiency, while the expanded jurisdiction on some issues (like *Employment Standards Act* matters) has contributed to longer durations for the *arbitration* system, this does not necessarily mean a loss of overall efficiency for the parties in dealing with these issues, if arbitration is providing a more efficient solution for resolving the issues than does other forums. The present study does not address this issue. Moreover, the expanded jurisdiction might lead to more equity if issues can be dealt with through arbitration that would have otherwise not been pursued.

The third paper deals with the right to freedom of association. The Supreme Court of Canada's (SCC's) recognition of an instrumental right to collectively bargain and an

instrumental right to strike will lead to an increase in voice and equity for worker collectives in some situations, and a correlative decrease in efficiency for employers. However, it might also lead to a decrease in efficiency for the Canadian labour relations system as a whole in the future. This is because this system is now less adaptable, as the SCC has embedded two key components of the Wagner Act model into the constitution: the duty to bargain in good faith and striking as the primary means of resolving bargaining impasses. Additionally, the legal system itself might be less predictable (and hence less efficient) in the future than it would have otherwise been at processing freedom of association challenges, given the fact that the body of jurisprudence would have been more coherent and consistent had Sheldon Leader's theory of the RFOA been used.

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