



SUPREME COURT OF CANADA

CITATION: Northern Regional
Health Authority v. Horrocks,
2021 SCC 42

APPEAL HEARD: April 15, 2021
JUDGMENT RENDERED:
October 22, 2021
DOCKET: 37878

BETWEEN:

Northern Regional Health Authority
Appellant

and

Linda Horrocks and Manitoba Human Rights Commission
Respondents

- and -

**Attorney General of British Columbia, Don Valley Community Legal
Services, Canadian Association of Counsel to Employers, Canadian Human
Rights Commission, British Columbia Council of Administrative Tribunals
and Empowerment Council, Systemic Advocates in Addictions and Mental
Health**
Interveners

CORAM: Wagner C.J. and Abella, Karakatsanis, Côté, Brown, Rowe and Kasirer
JJ.

**REASONS FOR
JUDGMENT:**
(paras. 1 to 61)

Brown J. (Wagner C.J. and Abella, Côté, Rowe and
Kasirer JJ. concurring)

DISSENTING Karakatsanis J.

REASONS:
(paras. 62 to 131)

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Northern Regional Health Authority

Appellant

v.

**Linda Horrocks and
Manitoba Human Rights Commission**

Respondents

and

**Attorney General of British Columbia,
Don Valley Community Legal Services,
Canadian Association of Counsel to Employers,
Canadian Human Rights Commission,
British Columbia Council of Administrative Tribunals and
Empowerment Council, Systemic Advocates in
Addictions and Mental Health**

Interveners

Indexed as: Northern Regional Health Authority v. Horrocks

2021 SCC 42

File No.: 37878.

2021: April 15; 2021: October 22.

Present: Wagner C.J. and Abella, Karakatsanis, Côté, Brown, Rowe and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Labour relations — Jurisdiction of arbitrator — Human rights dispute arising from collective agreement — Unionized employee suspended after attending work under influence of alcohol and later terminated for breaching abstinence agreement — Employee filing human rights complaint alleging that employer failed to adequately accommodate disability — Whether exclusive jurisdiction of labour arbitrator appointed under collective agreement and empowered by provincial labour legislation extends to adjudicating human rights disputes arising from collective agreement — The Labour Relations Act, C.C.S.M., c. L10, s. 78 — The Human Rights Code, C.C.S.M., c. H175, ss. 22, 26, 29(3).

H was suspended for attending work under the influence of alcohol. After H disclosed her alcohol addiction and refused to enter into an agreement requiring that she abstain from alcohol and engage in addiction treatment, her employment was terminated. H's union filed a grievance and her employment was reinstated on substantially the same terms as the agreement H had refused to sign. Shortly thereafter, H's employment was terminated for an alleged breach of those terms. H filed a discrimination complaint with the Manitoba Human Rights Commission, which was heard by an adjudicator appointed under *The Human Rights Code*. The employer contested the adjudicator's jurisdiction, arguing that *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, recognizes exclusive jurisdiction in an arbitrator appointed under a collective agreement, and that this extends to human rights complaints arising from a unionized workplace. The adjudicator disagreed, finding that she had jurisdiction because the essential character of the dispute was an alleged human rights violation.

She went on to consider the merits of the complaint and found that the employer had discriminated against H.

On judicial review, the reviewing judge found error in the adjudicator's characterization of the essential character of the dispute, and set aside her decision on the issue of jurisdiction. The Court of Appeal allowed H's appeal. It agreed that disputes concerning the termination of a unionized worker lie within the exclusive jurisdiction of a labour arbitrator, including alleged human rights violations. Nevertheless, it held that the adjudicator had jurisdiction in this case and remitted the matter to the reviewing judge to determine whether the adjudicator's decision on the merits of the complaint was reasonable.

Held (Karakatsanis J. dissenting): The appeal should be allowed and the reviewing judge's order reinstated in part.

Per Wagner C.J. and Abella, Côté, **Brown**, Rowe and Kasirer JJ.: The adjudicator did not have jurisdiction over H's complaint. Where labour legislation provides for the final settlement of disputes arising from a collective agreement, the jurisdiction of the decision-maker empowered by that legislation — generally, a labour arbitrator — is exclusive. Competing statutory tribunals may carve into that sphere of exclusivity, but only where such legislative intent is clearly expressed. In the instant case, the essential character of H's complaint falls squarely within the labour arbitrator's mandate, and there is no clear express legislative intent to grant concurrent

jurisdiction to the human rights adjudicator over such disputes. The reviewing judge's order setting aside the adjudicator's decision should be reinstated.

Exclusive arbitral jurisdiction, as explained by the Court in *Weber*, captures disputes that are factually related to the rights and obligations under the collective agreement, even where those same facts give rise to other legal claims based in statute or the common law. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. However, not all actions in the courts between a unionized employer and employee are precluded, because an arbitrator's exclusive jurisdiction extends only to disputes that expressly or inferentially arise out of the collective agreement, and not every workplace dispute will fall within this scope. In addition, the exclusive jurisdiction of a labour arbitrator is subject to the residual curial jurisdiction to grant remedies that lie outside the remedial authority of a labour arbitrator.

When it has considered the relationship between the respective spheres of jurisdiction held by labour arbitrators and statutory tribunals, the Court has affirmed that *Weber's* exclusive jurisdiction model applies — where matters arise from the interpretation, application, administration or violation of the collective agreement, the claimant must proceed by arbitration and no other forum has the power to entertain an action in respect of that dispute. *Weber* does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes; rather, depending on the legislation and the nature of the dispute, other tribunals may possess

overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction.

However, exclusive arbitral jurisdiction is not a mere preference that should be disregarded whenever a competing statutory scheme is present, but an interpretation of the mandate given to arbitrators by statute. The unavoidable conclusion to be drawn from the Court's jurisprudence is that mandatory dispute resolution clauses signal a legislative intention to confer exclusive jurisdiction on the labour arbitrator or other dispute resolution forum provided for under the agreement. The text and purpose of a mandatory dispute resolution clause remains unchanged, irrespective of the existence or nature of competing regimes, and its interpretation must therefore remain consistent. Conditioning the effect of a mandatory dispute resolution clause on the nature of the competing forum would result in persistent jurisdictional confusion, leaving members of the public unsure where to turn to resolve a dispute.

It is therefore necessary to consider whether a competing statutory scheme demonstrates an intention to displace the arbitrator's exclusive jurisdiction. In some cases, it may enact a complete code that confers exclusive jurisdiction over certain kinds of disputes on a competing tribunal; in other cases, the legislation may endow a competing tribunal with concurrent jurisdiction over disputes that would otherwise fall solely to the labour arbitrator for decision. However, the mere existence of a competing tribunal is insufficient to displace labour arbitration as the sole forum for disputes arising from a collective agreement; some positive expression of the legislature's will

is necessary. Where a legislature intends concurrent jurisdiction, it will specifically so state in the competing tribunal's enabling statute. But even absent specific language, the statutory scheme may disclose that intention: in some statutes, certain provisions necessarily imply that the tribunal has concurrent jurisdiction over disputes that are also subject to the grievance process, or the legislative history will show that the legislature contemplated concurrency. In these circumstances, an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.

Accordingly, resolving jurisdictional contests between labour arbitrators and competing statutory tribunals entails a two-step analysis. First, the relevant legislation must be examined to determine whether it grants the arbitrator exclusive jurisdiction and, if so, over what matters. Where the legislation includes a mandatory dispute resolution clause, an arbitrator empowered under that clause has the exclusive jurisdiction to decide all disputes arising from the collective agreement, subject to clearly expressed legislative intent to the contrary. Secondly, if it is determined that the arbitrator has exclusive jurisdiction, the next step is to determine whether the dispute falls within the scope of that jurisdiction. The scope will depend on the precise language of the statute but, in general, it will extend to all disputes that arise, in their essential character, from the interpretation, application, or alleged violation of the collective agreement. This requires analysing the ambit of the collective agreement and accounting for the factual circumstances underpinning the dispute. The relevant inquiry is into the facts alleged, and not the legal characterization of the matter.

In the present case, two statutes are relevant. First, *The Labour Relations Act* contains, in s. 78, a mandatory dispute resolution clause that discloses a legislative intent to grant exclusive jurisdiction to the labour arbitrator over all disputes arising from the collective agreement. Secondly, s. 22(1) of *The Human Rights Code* provides that any person may file a complaint alleging that another person has contravened the *Code*, and ss. 26 and 29(3) direct the Commission to investigate complaints and, where appropriate, to request the designation of an adjudicator to hear the complaint. While such provisions vest broad jurisdiction in the Commission over *Code* violations, they are — absent express displacement of the exclusive jurisdiction of a labour arbitrator — insufficient to support a finding that the Commission holds concurrent jurisdiction. Thus, the arbitrator’s jurisdiction under *The Labour Relations Act* over disputes that arise, in their essential character, from the interpretation, application, or alleged violation of the collective agreement is exclusive and, more particularly, exclusive of the Commission. The essential character of H’s complaint, which arises from the employer’s exercise of its rights under, and from its alleged violation of, the collective agreement, represents such a dispute. The claim therefore falls solely to an arbitrator to adjudicate. While H alleges a human rights violation, this is not sufficient to displace the exclusive jurisdiction of the labour arbitrator.

Per Karakatsanis J. (dissenting): The appeal should be dismissed. The statutory schemes under *The Labour Relations Act* and *The Human Rights Code* point to concurrent jurisdiction. Although labour arbitration may well have been the more

appropriate forum, the adjudicator was not wrong to conclude that she had jurisdiction, nor was she wrong to rule on the merits.

Deciding jurisdictional issues between two tribunals involves a two-step analysis. The first step is to consider both statutory schemes to determine whether the legislature intended for exclusive or concurrent jurisdiction. A liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature, or by ousting the jurisdiction of the intended forum. The second step is to consider the essential character of the dispute to determine whether it falls within one or both of the statutory schemes. This inquiry turns on the facts of the dispute rather than the legal characterization of the claim.

Apart from establishing this framework, the Court's jurisprudence does not provide a rule that, absent express legislative intent to the contrary, arbitral jurisdiction is exclusive over disputes that fall within the scope of a collective agreement, nor a rebuttable rule that the exclusive jurisdiction model, followed in *Weber*, applies in every case involving two statutory tribunals. Generally, when statutory tribunals are established, courts should give way to the special grant of jurisdiction given to such tribunals so as not to undermine the benefits intended by the legislature, including the provision of speedy and affordable dispute resolution. However, the reasoning from *Weber* favouring exclusive labour arbitration over civil litigation in the courts does not readily apply to jurisdictional issues between different statutory tribunals. When two tribunals are created with overlapping mandates and areas of expertise, the legislative

schemes must be viewed as a whole. The legislature may very well have assigned the same tasks to two forums and may have intended for more than one adjudicative body to have jurisdiction over a dispute.

Turning to the first step of the analysis in the instant case, *The Labour Relations Act* confers broad jurisdiction to arbitrators to deal with matters related to a collective agreement. However, the Act does not specifically oust the Commission's jurisdiction under *The Human Rights Code*. Nor does anything in the *Code* oust the Commission's jurisdiction over a unionized employee, or oust the jurisdiction of the arbitrator under the Act. Nothing in either scheme suggests the legislature meant for one scheme to prevail over the other. There is no doubt that the labour scheme is designed to rely heavily upon arbitration for matters within the scope of a collective agreement. But so too does the human rights scheme rely heavily upon the Commission to address discrimination. In the jurisprudence, the jurisdiction of human rights tribunals has only been ousted when the statutory text of the other tribunal has specifically excluded all other decision-making bodies, thereby indicating that jurisdiction was meant to be exclusive. No such express or strong language exists in *The Labour Relations Act*. The Act does not clearly confer exclusive jurisdiction on labour arbitrators, and *The Human Rights Code* does not remove human rights complaints of unionized employees from the Commission's jurisdiction.

Under the second step of the analysis, the Court must consider the essential nature of H's dispute to determine whether it falls within the jurisdiction of a labour

arbitrator, or that of the Commission, or both. The claim is about whether H's employer discriminated against her on the basis of mental or physical disability — and therefore violated the collective agreement and *The Human Rights Code* — when it terminated her employment for allegedly violating her undertaking to abstain from alcohol. This dispute falls within the scope of the collective agreement, which specifically prohibits the employer from discriminating on the basis of disability and provides a grievance and arbitration procedure for any dispute arising out of the agreement's interpretation, application, or alleged violation. Given this context, H's discrimination claim can easily be characterized as arising out of an alleged violation of the collective agreement. A labour arbitrator accordingly has jurisdiction over it. However, the dispute also falls within the Commission's jurisdiction and within the mandate of the *Code*, as does the processing of H's complaint. There is no exception for a complaint made by a unionized employee who may be subject to a collective agreement. H's claim thus falls within both a labour arbitrator's mandate under *The Labour Relations Act* and the Commission's mandate under *The Human Rights Code*.

There is agreement with the majority that where two tribunals have concurrent jurisdiction over a dispute, the decision-maker must consider whether to exercise its jurisdiction in the circumstances of a particular case. When the Commission shares jurisdiction with a labour arbitrator over a human rights dispute, a number of factors may guide the Commission's discretion to hear the complaint of a unionized employee, including: whether the claim is about the collective agreement itself rather than a violation of it; whether the union involved is opposed in interest to the

complainant such that they could be left without legal recourse; whether a labour arbitrator would not have jurisdiction over every party possibly affected; and whether the Commission is a better fit.

These factors have different implications for the exercise of discretion. If the union is adverse in interest or is unwilling to pursue a grievance, unionized employees should still have legal recourse to adjudicate their human rights complaints before the Commission. Conversely, if the claim is about the violation of the collective agreement, if the union is supportive, and if the arbitrator has jurisdiction over the necessary parties, there will be a compelling case for a human rights forum to defer to the labour arbitration regime. Additionally, an inquiry into which forum is a better fit permits a broad consideration of the circumstances of the complaint. The remedy sought by the complainant may be highly relevant. If a complainant seeks a declaration, damages, or systemic changes, a human rights tribunal may be the better fit. On the other hand, if a complainant seeks reinstatement, there is a strong case for labour arbitration to have primary responsibility. Finally, access to justice and efficiency favour deferring to labour arbitration. As a general rule, the Commission should decline jurisdiction unless labour arbitration is not a realistic alternative.

In the present case, there was no clear evidence before the human rights adjudicator that the union would not assist or support H. And there are good reasons why the Commission or the adjudicator could have exercised their discretion to defer to the labour arbitration scheme: the dispute was about discrimination arising under the

collective agreement, and the remedy sought — reinstatement — was squarely within the powers of a labour arbitrator. However, because the human rights adjudicator in this case clearly had jurisdiction, it cannot be said that she was wrong to proceed. In any event, it would not be appropriate, nearly a decade after the events giving rise to the dispute and over six years after the adjudicator’s decision on the merits, to set aside the adjudicator’s decision on jurisdiction. The remedies available on judicial review are discretionary and reflect a public interest in the orderly administration of affairs, including the need for finality and certainty.

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By Brown J.

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97 B.C.L.R. (5th) 296; *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 38, 253 N.S.R. (2d) 144; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160, 398 D.L.R. (4th) 91; *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967; *Allen v. Alberta*, 2003 SCC 13, [2003] 1 S.C.R. 128; *Goudie v. Ottawa (City)*, 2003 SCC 14, [2003] 1 S.C.R. 141; *Bisailon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *Wainwright v. Vancouver Shipyards Co.* (1987), 14 B.C.L.R. (2d) 247; *Johnston v. Dresser Industries Canada Ltd.* (1990), 75 O.R. (2d) 609; *Côté v. Saiano*, [1998] R.J.Q. 1965; *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495; *A.T.U., Local 583 v. Calgary (City)*, 2007 ABCA 121, 75 Alta. L.R. (4th) 75; *Calgary Health Region v. Alberta (Human Rights & Citizenship Commission)*, 2007 ABCA 120, 74 Alta. L.R. (4th) 23; *Human Rights Commission (N.S.) v. Halifax (Regional Municipality)*, 2008 NSCA 21, 264 N.S.R. (2d) 61; *Canpar Industries v. I.U.O.E., Local 115*, 2003 BCCA 609, 20 B.C.L.R. (4th) 301; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145; *Cadillac Fairview Corp. v. Human Rights Commission (Sask.)* (1999), 177 Sask. R. 126; *Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission)* (2001), 209 D.L.R. (4th) 465; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970; *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207; *McLeod v. Egan*, [1975] 1 S.C.R. 517.

By Karakatsanis J. (dissenting)

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SCC 28, [2018] 2 S.C.R. 3; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364; *Blatz v. 4L Communications Inc.*, 2012 CanLII 42311; *Qumsieh v. Brandon School Division*, 2019 MBHR 3; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422; *Zulkoskey v. Canada (Minister of Employment and Social Development)*, 2016 FCA 268; *Dick v. Pepsi Bottling Group (Canada), Co.*, 2014 CanLII 16055; *A.T.U., Local 583 v. Calgary (City)*, 2007 ABCA 121, 75 Alta. L.R. (4th) 75; *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Fingland v. Ontario (Ministry of Transportation)*, 2008 ONCA 812, 93 O.R. (3d) 268; *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641.

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No. 127 (QL), 2016 CarswellMan 155 (WL Can.). Appeal allowed, Karakatsanis J. dissenting.

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The judgment of Wagner C.J. and Abella, Côté, Brown, Rowe and Kasirer JJ. was delivered by

BROWN J. —

I. Introduction

[1] Labour relations legislation across Canada requires every collective agreement to include a clause providing for the final settlement of all differences concerning the interpretation, application or alleged violation of the agreement, by arbitration or otherwise. The precedents of this Court have maintained that the jurisdiction conferred upon the decision-maker appointed thereunder is *exclusive*. At issue in this case, principally, is whether that exclusive jurisdiction held by labour arbitrators in Manitoba extends to adjudicating claims of discrimination that, while falling within the scope of the collective agreement, might also support a human rights complaint.

[2] The respondent Linda Horrocks says that her employer, the appellant, the Northern Regional Health Authority (“NRHA”), failed to adequately accommodate her disability. In 2011, she was suspended for attending work under the influence of

alcohol. After she disclosed her alcohol addiction and refused to enter into a “last chance agreement” requiring that she abstain from alcohol and engage in addiction treatment, the NRHA terminated her employment. Ms. Horrocks’ union filed a grievance, which was settled by an agreement reinstating her employment on substantially the same terms as the last chance agreement. Shortly thereafter, the NRHA terminated her employment for an alleged breach of those terms.

[3] Ms. Horrocks filed a complaint with the respondent, the Manitoba Human Rights Commission, which was heard by an adjudicator appointed under *The Human Rights Code*, C.C.S.M., c. H175. The NRHA contested the adjudicator’s jurisdiction to hear the complaint, arguing that this Court’s judgment in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 recognizes exclusive jurisdiction in an arbitrator appointed under a collective agreement, and that this jurisdiction extends to human rights complaints arising from a unionized workplace. Chief Adjudicator Walsh disagreed, finding that she had jurisdiction. While *Weber* does recognize exclusive jurisdiction in labour arbitrators over disputes that arise from the interpretation, application, administration, or violation of a collective agreement, the essential character of *this* dispute, she held, was an alleged *human rights violation* (2015 MBHR 3, 83 C.H.R.R. D/45). Chief Adjudicator Walsh went on to consider the merits of the complaint and found that the NRHA had discriminated against Ms. Horrocks.

[4] On judicial review, Edmond J. found error in the adjudicator’s characterization of the essential character of the dispute, and set aside the adjudicator’s

decision on the issue of jurisdiction. As he saw it, the essential character of the dispute was whether the NRHA had just cause to terminate Ms. Horrocks' employment (2016 MBQB 89, 327 Man. R. (2d) 284). "[A]ny [such] dispute", he held (at para. 57), "including any human rights violation associated with the termination, is within the exclusive jurisdiction of labour arbitration". As such, Edmond J. found it unnecessary to decide whether the adjudicator's decision on the merits of the complaint was reasonable. The Court of Appeal agreed with Edmond J.'s conclusion that disputes concerning the termination of a unionized worker lie within the exclusive jurisdiction of a labour arbitrator, *including* where the dispute alleges human rights violations (2017 MBCA 98, 416 D.L.R. (4th) 385). Nevertheless, it held that the adjudicator had jurisdiction for several reasons:

- (a) Ms. Horrocks "made a choice to sever" the employment and human rights aspects of her claim by not grieving her second termination (para. 80);
- (b) The discrimination claim raised issues that "transcend[ed]" the specific employment context, because an employer's accommodation of an employee's alcohol dependency is "larger than the specifics of what occurred in the employment relationship" (para. 85); and

- (c) The union was not interested in pursuing arbitration, thus precluding Ms. Horrocks from bringing her claim to any forum if a labour arbitrator were to hold exclusive jurisdiction (para. 87).

In the result, the Court of Appeal allowed the appeal and remitted the matter to the Court of Queen's Bench to determine whether the adjudicator's decision on the merits of the discrimination complaint was reasonable.

[5] For the reasons that follow, I find myself in respectful disagreement with the adjudicator and the Court of Appeal. Properly understood, this Court's jurisprudence has consistently affirmed that, where labour legislation provides for the final settlement of disputes arising from a collective agreement, the jurisdiction of the decision-maker empowered by that legislation — generally, a labour arbitrator — is exclusive. Competing statutory tribunals may carve into that sphere of exclusivity, but only where that legislative intent is clearly expressed. Here, the combined effect of the collective agreement and *The Labour Relations Act*, C.C.S.M., c. L10 is to mandate arbitration of “all differences” concerning the “meaning, application, or alleged violation” of the collective agreement (s. 78(1)). In its essential character, Ms. Horrocks' complaint alleges a violation of the collective agreement, and thus falls squarely within the arbitrator's mandate. *The Human Rights Code* does not clearly express legislative intent to grant concurrent jurisdiction to the adjudicator over such disputes. It follows that the adjudicator did not have jurisdiction over the complaint, and the appeal should be allowed.

II. Issues

[6] As noted, the principal issue arising is whether the exclusive jurisdiction of a labour arbitrator appointed under a collective agreement extends to human rights disputes that arise therefrom. But two preliminary issues were also put to us by the parties: first, the standard of review applicable to an administrative decision concerning the jurisdictional lines between two tribunals; and secondly, the standard of review applicable on appeal from a judicial review of an administrative decision.

III. Analysis

A. *Standard of Review*

(1) Administrative Standard of Review

[7] Decisions concerning the jurisdictional lines between two or more administrative bodies must be correct (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 53). This standard safeguards the rule of law, which “requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another” (para. 64). It also fosters predictability, finality and certainty in the law (*ibid.*).

[8] Here, the reviewing judge and the Court of Appeal applied the correctness standard to the adjudicator's decision. The Commission acknowledges that this is faithful to *Vavilov*, but argues that the determination of jurisdictional lines involves a fact-specific inquiry into the "essential character" of a dispute, which ought to attract deference (R.F., at paras. 75-84). It therefore invites the Court to reconsider the established standard.

[9] I am not persuaded that such reconsideration is necessary or desirable. As I will explain below, correctly determining the jurisdictional lines between two administrative bodies requires that a decision-maker correctly identify the essential character of the dispute. Applying a reasonableness standard to this component of the analysis would undermine the objective of ensuring that one adjudicative body does not trespass on the jurisdiction of the other. I note as well that appellate authority concerning the jurisdictional lines between courts and tribunals has generally held that the essential character determination is reviewed for correctness (*Stene v. Telus Communications Company*, 2019 BCCA 215, 24 B.C.L.R. (6th) 74, at para. 38; *Bruce v. Cohon*, 2017 BCCA 186, 97 B.C.L.R. (5th) 296, at para. 80; *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 38, 253 N.S.R. (2d) 144, at para. 12). These authorities explain that this is so notwithstanding the fact-specific nature of the essential character inquiry, because it grounds a determination of jurisdiction.

(2) Appellate Standard of Review

[10] A reviewing judge's selection and application of the standard of review is reviewable for correctness. This standard traces back to *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, where LeBel J. explained:

The proper approach to this issue was set out by the Federal Court of Appeal in *Telfer v. Canada Revenue Agency*, 2009 FCA 23, 386 N.R. 212, at para. 18:

Despite some earlier confusion, there is now ample authority for the proposition that, on an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard.

In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247, Deschamps J. aptly described this process as “step[ping] into the shoes’ of the lower court” such that the “appellate court’s focus is, in effect, on the administrative decision” (emphasis deleted).

The issue for our consideration can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it properly? [Text in brackets in original; paras. 45-47.]

This approach accords no deference to the reviewing judge's application of the standard of review. Rather, the appellate court performs a *de novo* review of the administrative decision (D. J. M. Brown, with the assistance of D. Fairlie, *Civil Appeals* (loose-leaf), at §14:45).

[11] The approach to appellate review prescribed in *Agraira* is different than that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Where *Housen*

applies, the degree of deference accorded to the original decision-maker depends on the type of error at issue: errors of law are reviewed on the correctness standard, while errors of fact and mixed fact and law attract the palpable and overriding error standard. The NRHA invites the Court to reconsider *Agraira*, saying that a *de novo* review of administrative decisions renders the first level of review a “necessary but feckless step in the judicial review of an administrative decision” (A.F., at para. 6). In its submission, no principled reason precludes applying the standards of review stated in *Housen* to an appeal from a judicial review decision.

[12] I would decline the invitation to reconsider *Agraira*, which is a recent decision of the Court and remains good law. Of course, there may be good reason to apply the *Housen* standard where a reviewing judge acts as a decision-maker of first instance (the Hon. J. M. Evans, “The Role of Appellate Courts in Administrative Law” (2007), 20 *C.J.A.L.P.* 1, at pp. 30-34; Brown, at §14:46; *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160, 398 D.L.R. (4th) 91, at para. 29), but this does not provide a reason for applying *Housen* to the selection and application of the standard of review. In any event, however, this point makes no difference to NRHA’s appeal. As indicated, the adjudicator’s finding that she had jurisdiction is reviewable for correctness. And if the adjudicator was bound to correctly determine her own jurisdiction, it follows that the reviewing judge was also bound to apply the same standard in reviewing the adjudicator’s decision. Concluding otherwise would allow an incorrect determination of jurisdictional lines to stand, which would undermine the values of certainty and predictability that justified the application of the correctness

standard in the first instance. Even under *Housen*, no deference would have been owed to the reviewing judge's analysis.

B. *The Adjudicator's Jurisdiction*

[13] It is settled law that the scope of a labour arbitrator's jurisdiction precludes curial recourse in disputes that arise from a collective agreement, even where such disputes also give rise to common law or statutory claims (*St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, at p. 721; *Weber*, at para. 54; *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967; *Allen v. Alberta*, 2003 SCC 13, [2003] 1 S.C.R. 128, at paras. 12-17; *Goudie v. Ottawa (City)*, 2003 SCC 14, [2003] 1 S.C.R. 141, at paras. 22-23; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 30). It is similarly beyond dispute that labour arbitrators may apply human rights legislation to disputes arising from the collective agreement (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at paras. 1 and 28-29; *Weber*, at para. 56). Indeed, it has been observed that labour arbitration is *the primary forum* for the enforcement of human rights in unionized workplaces (E. Shilton, "‘Everybody's Business’: Human Rights Enforcement and the Union's Duty To Accommodate" (2014), 18 *C.L.E.L.J.* 209, at p. 235; P. A. Gall, A. L. Zwack and K. Bayne, "Determining Human Rights Issues in the Unionized Workplace: The Case for Exclusive Arbitral Jurisdiction" (2005), 12 *C.L.E.L.J.* 381, at p. 397).

[14] At stake, however — in this appeal and more generally — is whether that observation understates the case: Is labour arbitration merely the *primary*, as opposed to the *exclusive* forum for enforcing human rights issues arising from the collective agreement? Ms. Horrocks and the Commission contend that a labour arbitrator’s jurisdiction to apply human rights legislation to such disputes is *not* exclusive. In their view, arbitral exclusivity applies only to decide jurisdictional contests between labour arbitrators and *the courts*. Where the competing forum is a statutory tribunal, they say the arbitrator’s jurisdiction is concurrent unless the legislation expressly mandates exclusivity. This applies with particular force to human rights adjudication schemes, given the quasi-constitutional nature of their enabling legislation. In their view, concluding otherwise would jeopardize access to justice in unionized workplaces.

[15] This argument is unsustainable in light of this Court’s jurisprudence. Properly understood, the decided cases indicate that, where labour legislation provides for the final settlement of disputes arising from a collective agreement, the jurisdiction of the arbitrator or other decision-maker empowered by this legislation is exclusive. This applies irrespective of the nature of the competing forum, but is always subject to clearly expressed legislative intent to the contrary.

(1) Exclusive Arbitral Jurisdiction

[16] Labour relations statutes in Canada generally require that collective agreements include a method for the final settlement of differences concerning the interpretation, application, and alleged violation of the agreement. Some statutes

specifically require arbitration of such differences, while others permit the parties to select a different method of dispute resolution. Where a collective agreement does not include a dispute resolution procedure that complies with the statute, it is deemed to include an arbitration clause in prescribed terms. See G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at pp. 12-51 to 12-55; *The Labour Relations Act*, s. 78; *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 84(2) and (3); *Labour Relations Code*, R.S.A. 2000, c. L-1, ss. 135 and 136; *The Trade Union Act*, R.S.S. 1978, c. T-17, s. 26; *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 48; *Labour Code*, CQLR, c. C-27, s. 100; *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 42; *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 55; *Labour Relations Act*, R.S.N.L. 1990, c. L-1, s. 86; *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 37; *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 57(1).

[17] This Court has interpreted such mandatory dispute resolution provisions as conferring exclusive jurisdiction on the decision-maker appointed thereunder — typically, a labour arbitrator. That understanding originates in *St. Anne Nackawic*, which concerned an employer’s civil action against a union for damages following an illegal strike. The union raised a preliminary objection to the court’s jurisdiction, arguing that, under s. 55(1) of New Brunswick’s *Industrial Relations Act*, only a labour arbitrator could adjudicate disputes arising from the collective agreement. That section read as follows:

55(1) Every collective agreement shall provide for the final and binding settlement by arbitration or otherwise, without stoppage of work, of all differences between the parties to, or persons bound by, the agreement or on whose behalf it was entered into, concerning its interpretation,

application, administration or an alleged violation of the agreement, including any question as to whether a matter is arbitrable.

[18] The Court found that this section left no room for curial jurisdiction over the claim. Allowing the parties such recourse to enforce the collective agreement would, he explained, undermine the integrity of the labour arbitration scheme and the labour relations system as a whole:

The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law. . . . The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.

. . .

. . . if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration, when adopted by the parties as was done here in the collective agreement, is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of a collective agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement. [Emphasis added; pp. 718-19 and 721.]

[19] In *Weber*, the Court elaborated upon the scope of exclusive arbitral jurisdiction identified in *St. Anne Nackawic*, holding that it also ousted curial jurisdiction over tort and *Charter* claims arising from a collective agreement. There, an employer had hired private investigators to determine whether an employee was abusing his sick leave benefits. The investigators gained entry to the employee's home by assuming a false identity, and obtained information that led to the employee's termination. The employee filed a grievance seeking damages for mental anguish caused by the surveillance, which was settled. Further, he commenced a civil action alleging trespass, nuisance, deceit, invasion of privacy, and breach of his *Charter* rights. The employer objected, arguing that the dispute related to the sick leave provisions in the collective agreement and thus fell to be decided exclusively by a labour arbitrator.

[20] The Court agreed that the matter fell within exclusive arbitral jurisdiction. That jurisdiction, it explained, captures disputes that are *factually* related to the rights and obligations under the collective agreement, even where those same facts give rise to other *legal* claims based in statute or the common law:

The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one "arising under [the] collective agreement". Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it. [Emphasis in original; text in brackets in original; para. 43.]

[21] This analysis reflected the language of the applicable labour relations statute at issue in *Weber*, which required arbitration of "all differences between the

parties arising from the interpretation, application, administration or alleged violation of the agreement” (*Labour Relations Act*, R.S.O. 1990, c. L.2, s. 45(1)). As the Court explained, the term “differences” revealed a legislative concern not for the *form* of legal actions that might be advanced, but for the *dispute* between the parties (para. 45). Such concern made sense, being consistent with the objectives of the legislation, including the resolution of disputes “quickly and economically, with a minimum of disruption to the parties and the economy” — an objective that “lies at the heart of all Canadian labour statutes” (para. 46 (emphasis added)). In short, and as the Court summarized (at para. 67 (emphasis added)), “[t]he question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement.”

[22] A word of caution is in order here. The Court was careful to note that “[t]his approach does not preclude all actions in the courts between [a unionized] employer and employee” (para. 54 (emphasis added)). This is because an arbitrator’s exclusive jurisdiction extends only to “disputes which expressly or inferentially arise out of the collective agreement” (*ibid.*; see also *Bisailon*, at paras. 30-33). Not every workplace dispute will fall within this scope. For example, in *Goudie*, employees claimed damages under a pre-employment contract. The Court found that this claim arose from the pre-employment contract, and not from the collective agreement (at para. 4), and therefore fell outside the arbitrator’s exclusive jurisdiction. (See, similarly, *Wainwright v. Vancouver Shipyards Co.* (1987), 14 B.C.L.R. (2d) 247 (C.A.); *Johnston v. Dresser Industries Canada Ltd.* (1990), 75 O.R. (2d) 609 (C.A.); *Côté v. Saiano*, [1998] R.J.Q. 1965 (C.A.).)

[23] A further caveat: the exclusive jurisdiction of a labour arbitrator is subject to the residual curial jurisdiction to grant remedies that lie outside the remedial authority of a labour arbitrator, including interlocutory injunctions (*Weber*, at para. 67; see also *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495; *Bisaillon*, at para. 42). This ensures that there is no “deprivation of ultimate remedy” (*Weber*, at para. 57, quoting *St. Anne Nackawic*, at p. 723).

(a) *Exclusive Arbitral Jurisdiction and Statutory Tribunals*

[24] This Court has twice considered the relationship between the respective spheres of jurisdiction held by labour arbitrators and statutory tribunals. In each case, it affirmed the exclusivity of arbitral jurisdiction recognized in *St. Anne Nackawic* and *Weber*.

[25] In *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, the issue was whether an arbitrator could hear the grievance of a police officer who resigned after he was informed that he would be charged with discreditable conduct by his employer police service and could be subject to dismissal under *The Police Act, 1990*, S.S. 1990-91, c. P-15.01. The Court found that *The Police Act* gave police boards exclusive responsibility to resolve disciplinary matters. Because the essential character of the dispute concerned police discipline, it fell exclusively to the board, and not to the arbitrator. Of significance, however, the Court affirmed that, as to matters that *do* arise from “the interpretation,

application, administration or violation of [the] collective agreement”, *Weber*’s “exclusive jurisdiction model” applies — meaning, “the claimant must proceed by arbitration [and] [n]o other forum has the power to entertain an action in respect of that dispute” (para. 22 (emphasis added)).

[26] This view was consistently maintained in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185 (“*Morin*”). The case concerned a term in the collective agreement between teachers’ unions and the province stipulating that experience acquired during the 1996-1997 school year would not be credited for the purposes of calculating seniority and salary increments. This affected young teachers particularly, some of whom filed a complaint with the provincial human rights commission, alleging discrimination on the basis of age contrary to the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12; the commission then brought the matter before the Quebec Human Rights Tribunal. The Attorney General of Quebec challenged the tribunal’s jurisdiction over the matter, asserting that it fell instead within the exclusive jurisdiction of a labour arbitrator.

[27] The Court explained that it is necessary to examine the relevant legislation in order to determine whether it confers exclusive jurisdiction on the arbitrator and, if so, whether the essential character of the dispute falls within the scope of that jurisdiction. *Weber*, it explained (at para. 11), “does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes.

Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction”. In the case before it, the Court accepted that the mandatory dispute resolution clause in Quebec’s *Labour Code* did grant an arbitrator exclusive jurisdiction over disputes arising from the operation of the collective agreement (at paras. 16 and 20-24), but also determined that the dispute in *Morin* did not fall within that jurisdictional scope; rather than arising from the *operation* of the collective agreement, it arose out of its *negotiation* (paras. 24 and 26). McLachlin C.J. explained, for the majority:

Everyone agrees on how the agreement, if valid, should be interpreted and applied. The only question is whether the process leading to the adoption of the alleged discriminatory clause and the inclusion of that clause in the agreement violates the Quebec *Charter*, rendering it unenforceable. [para. 24]

While, therefore, an arbitrator might have had concurrent jurisdiction over the dispute if it arose “incidentally to a different dispute under the collective agreement”, the dispute in *Morin* nevertheless fell outside the scope of the arbitrator’s exclusive jurisdiction (para. 27). By contrast, it fell squarely within the mandate of the human rights tribunal, which had generous (but not exclusive) jurisdiction over human rights violations.

[28] To be clear, *Morin* was decided by applying the analytical framework stated in *Weber*, which led to the conclusion that the dispute in question fell outside of the ambit of the arbitrator’s exclusive jurisdiction. Significantly, *Morin* was *not* decided

on the basis that the legislation conferred concurrent jurisdiction on the human rights tribunal over all human rights disputes in unionized workplaces. Such a conclusion would be at odds with the Court's recognition that the *Labour Code* conferred exclusive jurisdiction on labour arbitrators over disputes that arise from the operation of collective agreements. It would also be at odds with the Court's direction that the dispute's essential character be identified in order to determine whether jurisdiction over its resolution falls exclusively to the arbitrator (E. Shilton, "Choice, but No Choice: Adjudicating Human Rights Claims in Unionized Workplaces in Canada" (2013), 38 *Queen's L.J.* 461, at p. 480).

[29] I am aware of several appellate courts having resisted recognizing a labour arbitrator's jurisdiction in human rights disputes as exclusive, on the basis that the exclusivity model developed in *Weber* has no application where the competing tribunal is a statutory body. In *A.T.U., Local 583 v. Calgary (City)*, 2007 ABCA 121, 75 Alta. L.R. (4th) 75, for example, the Court of Appeal of Alberta reasoned:

The legislative intent in enacting labour relations regimes and creating arbitration procedures must be respected. In my view, however, it is unwise simply to import the principles developed in cases involving a contest between the courts and arbitration, including the inherent preference for the exclusive jurisdiction of arbitrators often apparent in those cases, into a situation where the court must consider two statutory regimes. In the latter situation there are two legislative intents to consider, not one. If we were to accept exclusive jurisdiction as a starting point, we would run the risk of giving the jurisdictional advantage to one statutory tribunal over another and thereby reducing the efficacy of the second statutory regime. [para. 23]

(See also *Calgary Health Region v. Alberta (Human Rights & Citizenship Commission)*, 2007 ABCA 120, 74 Alta. L.R. (4th) 23, at paras. 25-30; *Human Rights Commission (N.S.) v. Halifax (Regional Municipality)*, 2008 NSCA 21, 264 N.S.R. (2d) 61, at paras. 45-46.)

[30] To the extent this passage from *A.T.U.* suggests that exclusive arbitral jurisdiction is a mere “preference” that should be disregarded wherever a competing statutory scheme is present, I see the matter differently. As I read this Court’s jurisprudence, the unavoidable conclusion to be drawn is that mandatory dispute resolution clauses like those considered in *St. Anne Nackawic*, *Weber* and *Morin* signal a legislative intention to confer exclusive jurisdiction on the labour arbitrator (or other dispute resolution forum provided for under the agreement). This is not a judicial *preference*, but an *interpretation* of the mandate given to arbitrators by statute. The text and purpose of a mandatory dispute resolution clause remains unchanged, irrespective of the existence or nature of competing regimes, and its interpretation must therefore also remain consistent.

[31] This conclusion is consistent with the concern expressed in *Vavilov* for predictability, finality and certainty in respect of jurisdictional lines between competing tribunals. Conditioning the effect of a mandatory dispute resolution clause on the nature of the competing forum would result in persistent jurisdictional confusion, leaving members of the public unsure “where to turn in order to resolve a dispute” (para. 64). Affirming that the same principles apply in every context avoids this state of affairs.

[32] That said, it remains necessary to consider whether the competing statutory scheme demonstrates an intention to displace the arbitrator's exclusive jurisdiction. In some cases, it may enact a "complete code" that confers exclusive jurisdiction over certain kinds of disputes on a competing tribunal, as it did in *Regina Police* (see also J.-A. Pickel, "Statutory Tribunals and the Challenges of Managing Parallel Claims", in E. Shilton and K. Schucher, eds., *One Law for All? Weber v Ontario Hydro and Canadian Labour Law: Essays in Memory of Bernie Adell* (2017), 175, at pp. 184-87). In other cases, the legislation may endow a competing tribunal with concurrent jurisdiction over disputes that would otherwise fall solely to the labour arbitrator for decision. And where the legislature so provides, courts must respect that intention.

[33] What *Morin* indicates, however, is that the mere existence of a competing tribunal is insufficient to displace labour arbitration as the sole forum *for disputes arising from a collective agreement*. Consequently, some positive expression of the legislature's will is necessary to achieve that effect. Ideally, where a legislature intends concurrent jurisdiction, it will specifically so state in the tribunal's enabling statute. But even absent specific language, the statutory scheme may disclose that intention. For example, some statutes specifically empower a decision-maker to defer consideration of a complaint if it is capable of being dealt with through the grievance process (see, e.g., *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 25; *Canada Labour Code*, ss. 16(1.1) and 98(3); *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 41 and 42). Such provisions necessarily imply that the tribunal has concurrent jurisdiction over disputes that are also subject to the grievance process. In other cases, the

provisions of a statute may be more ambiguous, but the legislative history will plainly show that the legislature contemplated concurrency (see, e.g., *Canpar Industries v. I.U.O.E., Local 115*, 2003 BCCA 609, 20 B.C.L.R. (4th) 301). In these circumstances, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.

[34] In saying this, I acknowledge that, absent “express and unequivocal language” to the contrary, human rights legislation prevails over all other enactments in the event of a conflict (*Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at p. 158). In some cases, appellate courts have concluded that by virtue of this paramount status, express language is required to oust the jurisdiction of a human rights tribunal (*Halifax*, at paras. 63-73; *Cadillac Fairview Corp. v. Human Rights Commission (Sask.)* (1999), 177 Sask. R. 126 (C.A.); *Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission)* (2001), 209 D.L.R. (4th) 465 (Ont. C.A.) (“*Naraine*”), at para. 47). Whether that is so I need not decide here. But in light of the jurisprudence of this Court which I have recounted, I am of the view that the inclusion of a mandatory dispute resolution clause in a labour relations statute must qualify as an explicit indication of legislative intent to oust the operation of human rights legislation.

[35] Even were it otherwise, the human rights legislation that applies in this case merely provides that “the substantive rights and obligations in this Code are paramount over the substantive rights and obligations in every other Act of the Legislature” (*The Human Rights Code*, s. 58). This indicates that while the *obligations* are “paramount”,

the *procedures* established by *The Human Rights Code* for enforcing them are *not*. This is entirely consistent with exclusive arbitral jurisdiction.

(b) *Individual Rights, Collective Representation, and Access to Justice*

[36] The respondents argue that interpreting the arbitrator's jurisdiction as exclusive with respect to human rights issues raises access to justice concerns. This is because employees' access to labour arbitration is controlled by their union. If a union declines to advance a claim to arbitration, the employee is left without recourse (*Naraine*, at para. 62; *A.T.U.*, at paras. 66-67). This is said to be particularly undesirable since human rights are "quintessentially individual rights, and their enforcement should lie within the control of the rights holder" (Shilton, "Choice, but No Choice", at p. 502). The answer to this concern is, however, governed by *Weber*, inasmuch as this Court placed control over unionized workers' ability to advance workplace-related *Charter* claims — most of which relate no less to "quintessentially individual rights" — in the hands of labour unions.

[37] Furthermore, this concern is mitigated by the union's duty of fair representation — codified in Manitoba in s. 20 of *The Labour Relations Act* — which "acts as a check on the principle of exclusivity" (C. Mummé, "Questions, Questions: Has *Weber* Had an Impact on Unions' Representational Responsibilities in Workplace Human Rights Disputes?", in Shilton and Schucher, *One Law for All?*, 229, at p. 237). Unions themselves are also subject to human rights obligations and may be held directly liable under human rights legislation for engaging in discriminatory conduct,

including entering into a discriminatory agreement (*The Human Rights Code*, s. 14; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, at pp. 989-94).

[38] Of course, there will be instances of a union declining to advance a grievance to arbitration without breaching its duty of fair representation or engaging in discrimination. And, in such cases, the employee will indeed be left without a forum for resolution. But this state of affairs — which, it bears restating, can be undone by clearly expressed legislative intent to the contrary — is a product of the union's statutorily granted monopoly on representation (*Bisaillon*, at paras. 24-28; *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207, at para. 41). In other words, it is a product of legislative choice, to which we are bound to give effect.

(c) *Summary*

[39] To summarize, resolving jurisdictional contests between labour arbitrators and competing statutory tribunals entails a two-step analysis. First, the relevant legislation must be examined to determine whether it grants the arbitrator exclusive jurisdiction and, if so, over what matters (*Morin*, at para. 15). Where the legislation includes a mandatory dispute resolution clause, an arbitrator empowered under that clause has the exclusive jurisdiction to decide all disputes arising from the collective agreement, subject to clearly expressed legislative intent to the contrary.

[40] If at the first step it is determined that the legislation grants the labour arbitrator exclusive jurisdiction, the next step is to determine whether the dispute falls within the scope of that jurisdiction (*Morin*, at paras. 15 and 20; *Regina Police*, at para. 27). The scope of an arbitrator’s exclusive jurisdiction will depend on the precise language of the statute but, in general, it will extend to all disputes that arise, in their essential character, from the interpretation, application, or alleged violation of the collective agreement. This requires analysing the ambit of the collective agreement and accounting for the factual circumstances underpinning the dispute (*Weber*, at para. 51). The relevant inquiry is into the *facts* alleged, not the *legal* characterization of the matter (*Weber*, at para. 43; *Regina Police*, at para. 25; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223 (“*Charette*”), at para. 23).

[41] Where two tribunals have concurrent jurisdiction over a dispute, the decision-maker must consider whether to exercise its jurisdiction in the circumstances of a particular case. For the reasons given below, concurrency does not arise in this case. I would therefore decline to elaborate here on the factors that should guide the determination of the appropriate forum.

[42] Bearing these general principles in mind, I turn to the facts of this case.

(2) Application

(a) *The Statutory Scheme*

[43] Two statutes are relevant here. First, as already noted, *The Labour Relations Act* contains a mandatory dispute resolution clause, which states:

78(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties thereto, or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning, application, or alleged violation.

In this case, the parties chose grievance arbitration as the sole dispute resolution mechanism (“Collective Agreement between: Canadian Union of Public Employees, Local 8600 and Nor-Man Regional Health Authority Inc.”, April 1, 2008, to March 31, 2012, arts. 10 and 11, reproduced in A.R., vol. II, at pp. 19-22). That method is binding on the parties (s. 78(4)).

[44] Like the mandatory dispute resolution clauses at issue in *St. Anne Nackawic*, *Weber*, *Regina Police*, and *Morin*, the purpose of s. 78 is to channel all disputes arising from the collective agreement into a single forum for resolution. Like those clauses, it discloses a legislative intent to grant exclusive jurisdiction to the labour arbitrator (or other decision-maker chosen by the parties) over all disputes arising from the collective agreement.

[45] The second relevant statute here, *The Human Rights Code*, provides that “[a]ny person may file . . . a complaint alleging that another person has contravened this Code” (s. 22(1)), and directs the Commission to investigate such complaints (s. 26). Where such investigation leads the Commission to conclude that “additional

proceedings in respect of the complaint would further the objectives of this Code or assist the Commission in discharging its responsibilities under this Code”, it must either request the designation of an adjudicator to hear the complaint or recommend that the minister commence a prosecution for an alleged contravention of the *Code* (s. 29(3)). While such provisions vest broad jurisdiction in the Commission over *Code* violations, they are — absent express displacement of the exclusive jurisdiction of a labour arbitrator established by the mandatory arbitration clause — insufficient to support a finding that the Commission holds concurrent jurisdiction here.

[46] I would therefore conclude that the arbitrator’s jurisdiction under *The Labour Relations Act* over claims that arise, in their essential character, from the interpretation, application, or alleged violation of the collective agreement is *exclusive* and, more particularly, *exclusive of the Commission*.

(b) *The Essential Character of the Dispute*

[47] Having recognized the arbitrator’s exclusive jurisdiction over disputes whose essential character arises from the interpretation, application or alleged violation of the collective agreement between the NRHA and Ms. Horrocks’ union, it remains for me to consider whether the essential character of Ms. Horrocks’ complaint filed with the Commission represents such a dispute. In my view, it does.

[48] This dispute concerns the NRHA’s response to Ms. Horrocks’ attendance at work under the influence of alcohol, which response included requiring that she sign

an abstinence agreement and, after she breached that agreement, terminating her employment. The NRHA says that these steps were necessary to protect its patients. Ms. Horrocks says that other options were available to accomplish the NRHA's objective.

[49] The collective agreement includes a management rights clause, which entitles the employer to maintain quality patient care; to discipline, suspend, or discharge employees for just cause; and to make, alter, and enforce rules and regulations in a manner that is fair and consistent with the terms of the agreement (art. 301). These rights are expressly limited by a prohibition on discrimination under art. 6 of the collective agreement. They are also implicitly limited by the terms of employment-related statutes (*Parry Sound*, at para. 26; *McLeod v. Egan*, [1975] 1 S.C.R. 517, at p. 523), including the prohibition on discrimination under s. 7 of *The Labour Relations Act*.

[50] In its essential character, then, Ms. Horrocks' complaint is that her employer exercised its management rights in a way that was inconsistent with their express and implicit limits. This complaint arises foursquare from the NRHA's exercise of its rights under, and from its alleged violation of, the collective agreement. While the claim invokes Ms. Horrocks' statutory rights, those rights are "too closely intertwined with collectively bargained rights to be sensibly separated" and cannot be "meaningfully adjudicated . . . except as part of a public/private package that only a labour arbitrator can deal with" (E. Shilton, "Labour Arbitration and Public Rights

Claims: Forcing Square Pegs into Round Holes” (2016), 41 *Queen’s L.J.* 275, at p. 309). On the authority of this Court’s precedents, the inescapable conclusion is that Ms. Horrock’s claim therefore falls solely to the arbitrator to adjudicate.

[51] The adjudicator, I observe, sought to escape the inescapable by describing the essential character of the dispute as “aris[ing] from an alleged violation of the complainant’s human rights and not out of the ‘interpretation, application, administration or violation of the collective agreement’” (MBHR reasons, at para. 110; see also *Weber*, at para. 52). Respectfully, the adjudicator’s error here was to do what *Weber* directs not to do, by focussing on the *legal* characterization of Ms. Horrocks’ claim instead of on “whether the facts of the dispute fall within the ambit of the collective agreement” (para. 44). It is of course true that Ms. Horrocks alleges a human rights violation. But were that sufficient to displace the exclusive jurisdiction of the labour arbitrator, exclusive arbitral jurisdiction would be significantly undermined, because *every* human rights complaint would automatically fall within the jurisdiction of the human rights adjudication system. Again, what matters are the *facts* of the complaint, not the legal form in which the complaint is advanced.

[52] Moreover, our jurisprudence makes clear that the mere allegation of a human rights violation does not bring a dispute within the jurisdiction of a human rights tribunal. In *Charette*, for example, the complainant, having been denied social assistance benefits while on maternity leave, alleged that the benefits scheme discriminated against her on the basis of pregnancy. Under the relevant legislation, the

Commission des affaires sociales (“CAS”) held exclusive jurisdiction to apply and interpret the benefits scheme. This Court found that, notwithstanding the allegation of discrimination, the essential character of the dispute was Ms. Charette’s entitlement to benefits, which fell within the CAS’s exclusive jurisdiction. In concurring reasons, Binnie J. cited to *Weber*, cautioning that “one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute” (para. 37, quoting *Weber*, at para. 49). In the context of the case, he found that the “wrong” was legally characterizable as “the subject matter of a *Charter* complaint”, while the “facts giving rise to the dispute” were “the Minister’s discontinuance of an income security benefit, and Ms. Charette’s claim to get it back under an administrative scheme that the legislature in plain words has channelled directly to the CAS” (para. 37).

[53] Similarly, in *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, a House of Commons employee argued that he was constructively dismissed as a result of workplace harassment and discrimination. The Court held that the allegation of a human rights violation “does not automatically steer the case to the Canadian Human Rights Commission” (para. 93). Looking at the facts underpinning the complaint, the Court found nothing “to lift these complaints out of their specific employment context” (para. 94). It confirmed: “A grievance that raises a human rights issue is nevertheless a grievance for purposes of employment or labour relations . . .” (para. 95).

[54] In my respectful view, the Court of Appeal similarly fell into error in describing the essential character of the dispute. Ms. Horrocks, it said, “sever[ed]” her claim relating to discipline and discharge from her claim relating to discrimination:

The essential character of the dispute raised in the complaint to the Commission must be examined in light of the factual context, particularly the absence of a grievance of the second termination. This was not a case of forum shopping. Rather than hedging her bets, by not grieving her second termination, the complainant made a choice to sever her claims relating to discipline and discharge from her claim relating to discrimination on the basis of alcohol dependency. By doing so, she abandoned her rights under the collective agreement to just cause protection, the grievance procedure and union representation (see *Paterno v. Salvation Army, Centre of Hope*, 2011 HRTO 2298 (Ont. Human Rights Trib.), at para. 33). She also gave up any right to challenge the second termination in terms of her discipline and dismissal, given that in Manitoba only a labour arbitrator can decide issues of whether there was just cause to dismiss an employee who was subject to a collective agreement. [para. 80]

This reveals a misunderstanding of what constitutes the “factual context” of a claim. The relevant facts are only those leading to the dispute. The *procedures* chosen by a claimant to *resolve* the dispute have no relevance. Much like the analysis of the adjudicator, the Court of Appeal’s understanding would allow a claimant to circumvent the arbitrator’s exclusive jurisdiction by opting to proceed in a different forum.

[55] The Court of Appeal also found that Ms. Horrocks’ complaint “transcends” the collective agreement and is, therefore, “not in the exclusive jurisdiction of a labour arbitrator to decide” (para. 85). It explained:

. . . the expected standards of accommodating workers with an alcohol or drug dependence should not depend on the nature of a particular collective agreement or the prudence of a particular employer where a workplace is not subject to a collective agreement. A degree of consistency in methodology in designing individualized accommodation for disabled workers is in the overall public interest. These are issues in which the Commission properly plays an important role in defining. [para. 85]

Again, this stands in opposition to *Weber*. There, the Court (at para. 60) *rejected* the suggestion that claims involving important policy questions fall outside the arbitrator's exclusive jurisdiction, stating that, even where a *Charter* issue may raise "broad policy concerns", it is "nonetheless a component of the labour dispute, and hence within the jurisdiction of the labour arbitrator." Continuing, the Court removed all room for doubt on this point: "The existence of broad policy concerns with respect to a given issue cannot preclude the labour arbitrator from deciding all facets of the labour dispute" (*ibid.*). In short, such concerns do not "transcend" the collective agreement; rather, they form part of the arbitrator's remit in adjudicating disputes thereunder.

IV. The Possibility of the Commission Declining Jurisdiction

[56] The suggestion is made that, "[a]s a general rule, the Commission should decline jurisdiction unless labour arbitration is not a realistic alternative" (Karakatsanis J.'s reasons, at para. 128). Experience suggests that this statement would prove to be more aspirational than directional. "[D]espite the *Weber* line of cases and despite the authority of [labour] arbitrators to apply human rights . . . statutes" (Pickel, at p. 199), human rights tribunals have not only regularly held that they have concurrent jurisdiction, but have exercised it, even where there exists or has existed a parallel

labour arbitration proceeding dealing with the substance of the complaint (pp. 187-200).

[57] This posture was evident in the submissions before us from counsel for the Commission who, upon being questioned from the bench about whether the Commission's position was that "whether or not the Commission chooses to act upon its authority or declines to do so depends on whether the complaint has been 'fully and fairly' . . . dealt with under the grievance procedure" (transcript, at p. 85), responded:

No, Justice, and I don't think the Commission would suggest for a moment that that is what it is there for.

The words I meant to convey is, there is an opportunity on the part of the Executive Director under section 26, or the Commission itself under section 29, to look at whether any given complaint — and perhaps better words would have been "adjudicated", "adequately adjudicated", "fairly adjudicated" would fall into the equation as well. I mean, if there were abuses there, yes, I submit it would be open to the Commission to consider that. [pp. 85-86]

[58] Leaving room for the Commission to exercise jurisdiction where it subjectively views labour arbitration as not "realistic" (Karakatsanis J.'s reasons, at para. 128), coupled with the Commission's understanding that it may review the parallel process for "adequacy" or "fairness", will inevitably come at the expense of finality and judicial economy. Further, and as I have explained, it is an option foreclosed by the jurisprudence of this Court, as I understand it.

V. Conclusion

[59] I would allow the appeal, set aside the judgment of the Court of Appeal and, subject to one caveat I add below, reinstate Edmond J.'s order setting aside the adjudicator's decision. As Ms. Horrocks neither participated in the judicial review or appeal proceedings in the courts below nor opposed the NRHA's application for leave to appeal to this Court, I would not make an order as to costs against her. The NRHA will have its costs from the Commission in this Court and in the courts below.

[60] The caveat arises from para. 2 of Edmond J.'s order, which states that Ms. Horrocks "shall be entitled to file a grievance . . . and that if the grievance is not resolved, to proceed to arbitration" (A.R., vol. I, at p. 76). This order appears to reflect the judge's finding that the NRHA is not entitled to object to Ms. Horrocks' grievance on the basis of timeliness because it had advised the court that it would not do so (see MBQB reasons, at paras. 62 and 65(8)). I note that counsel for the NRHA made similar representations before this Court.

[61] In my view, Ms. Horrocks' entitlement to file a grievance and proceed to arbitration was not before the Court of Queen's Bench on the judicial review. Nor was the NRHA's ability to object to her grievance on the basis of timeliness. Both issues involve the interpretation and application of the collective agreement, and must therefore be decided in the first instance by the labour arbitrator. I would not restore para. 2 of Edmond J.'s order.

The following are the reasons delivered by

KARAKATSANIS J. —

I. Overview

[62] What forum is available in Manitoba for adjudicating the workplace human rights claim of a unionized employee — does an arbitrator appointed under *The Labour Relations Act*, C.C.S.M., c. L10, have exclusive jurisdiction? Or does a labour arbitrator have concurrent jurisdiction with an adjudicator appointed under *The Human Rights Code*, C.C.S.M., c. H175? That is the issue in this appeal.

[63] My colleague Brown J. concludes that a labour arbitrator has exclusive jurisdiction over Ms. Horrocks' discrimination claim. He interprets this Court's jurisprudence as providing a rule that "where labour legislation provides for the final settlement of disputes arising from a collective agreement, the jurisdiction of the decision-maker empowered by that legislation — generally, a labour arbitrator — is exclusive" (para. 5). As this is the rule, "[c]ompeting statutory tribunals may carve into that sphere of exclusivity, but only where that legislative intent is clearly expressed" (*ibid.*). My colleague concludes that the jurisdiction of the Manitoba Human Rights Commission (Commission) is ousted in favour of exclusive labour arbitration because he finds that: (i) there is no express legislative intent conferring concurrent jurisdiction on the Commission (at paras. 45-46); and (ii) the essential nature of Ms. Horrocks' claim arises under the collective agreement (para. 47).

[64] While I agree that Ms. Horrocks' discrimination claim arises under the collective agreement and a labour arbitrator accordingly has jurisdiction over it, I disagree that the Commission's jurisdiction is therefore ousted. There is no rule that the exclusive jurisdiction model from *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, applies in all cases involving a jurisdictional issue between labour arbitration and another statutory tribunal. Such a rule was squarely rejected by the majority in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185 (*Morin*), where McLachlin C.J. recognized that there cannot be any jurisprudentially created presumption about legislative intent. Even when a dispute arises under a collective agreement, a human rights tribunal may nevertheless have concurrent jurisdiction over the dispute depending on the legislation.

[65] I proceed in three parts. First, I explain my view of this Court's jurisprudence. Second, I explain why the statutory schemes point to concurrent jurisdiction in this case. Third, I describe the factors the Commission or the human rights adjudicator in this case could have considered in determining whether to exercise their discretion to defer to labour arbitration. Although labour arbitration may well have been the more appropriate forum for Ms. Horrocks' claim, I do not find that the adjudicator was wrong to conclude that she had jurisdiction and to rule on the merits of the complaint (2015 MBHR 3, 83 C.H.R.R. D/45). In these circumstances, I would not remit the substantive discrimination claim to a labour arbitrator nearly a decade

after the events giving rise to it and over six years after the adjudicator's decision on the merits. I would accordingly dismiss the appeal.

II. Analysis

A. *This Court's Jurisprudence*

[66] My colleague interprets the decisions in *Weber, Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, and *Morin* as having effectively decided this appeal. He writes that these “cases indicate that, where labour legislation provides for the final settlement of disputes arising from a collective agreement, the jurisdiction of the arbitrator or other decision-maker empowered by this legislation is exclusive. This applies irrespective of the nature of the competing forum, but is always subject to clearly expressed legislative intent to the contrary” (para. 15).

[67] I disagree. Below, I explain why these cases do not provide a rule that, absent express legislative intent to the contrary, arbitral jurisdiction is exclusive over disputes that fall within the scope of the collective agreement.

[68] In *Weber*, this Court considered the jurisdictional divide between labour arbitration and the superior courts. It held that the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2, ousted a superior court's jurisdiction to hear the claimant's tort

and constitutional claims, thus concluding that labour arbitration was the only forum, as between labour arbitration and the courts, for adjudicating disputes arising under the collective agreement. The Court in *Weber* provided a framework for resolving jurisdictional issues between labour arbitration and the courts, which was refined in *Regina Police Assn., Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223 (*Charette*), and *Morin* to apply to jurisdictional issues between two statutory tribunals.

[69] Those cases set out the appropriate approach to the analysis. The first step is to consider both statutory schemes to determine whether the legislature intended for exclusive or concurrent jurisdiction over certain spheres: “Jurisdictional issues must be decided in accordance with the legislative scheme governing the parties” (*Charette*, at para. 33; see also *Weber*, at paras. 38-58, and *Morin*, at para. 15). In conducting this exercise, “a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature” (*Regina Police Assn.*, at para. 39), or by ousting the jurisdiction of a forum intended by the legislature.

[70] The second step is to consider the essential character of the dispute to determine whether it falls within one or both of those statutory schemes (*Morin*, at paras. 15 and 20; *Regina Police Assn.*, at para. 27). As McLachlin C.J. stated in *Morin*, at para. 15: “The second step is logically necessary since the question is whether the legislative mandate applies to the particular dispute at issue.” This inquiry turns on the

facts of the dispute rather than the legal characterization of the claim (*Weber*, at paras. 43-45). The analysis “must . . . take into account all the facts surrounding the dispute between the parties” (*Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 31; see also *Regina Police Assn.*, at para. 25). When the statutory schemes provide for concurrent jurisdiction, the essential character of the dispute may fall within both.

[71] I agree with my colleague, at para. 41, that “[w]here two tribunals have concurrent jurisdiction over a dispute, the decision-maker must consider whether to exercise its jurisdiction in the circumstances of a particular case.” In other words, the decision-maker must consider which tribunal is the “better fit” (*Morin*, at para. 30). As I find that there is concurrent jurisdiction here, I expand on the factors that should guide the determination of the more appropriate forum below.

[72] Apart from establishing the framework, the cases do not provide a rebuttable rule that the exclusive jurisdiction model, followed in *Weber*, applies in every case involving two statutory tribunals. In *Weber*, the exclusive jurisdiction model respected the legislature’s intent to create a specialized forum for certain disputes: “. . . it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks” (*Weber*, at para. 41, quoting *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, at pp. 718-19

(emphasis added)). Exclusive jurisdiction also promoted efficiency — i.e., permitting court actions to proceed whenever framing a cause of action as independent of the collective agreement would undermine the quick and economical resolution of disputes (*Weber*, at para. 46).

[73] Statutory tribunals are established by legislatures to carry out certain statutory mandates. They are given specialized jurisdiction and “assigned . . . tasks” for efficiency, access to justice, or other reasons (*St. Anne Nackawic*, at p. 719; see also J.-A. Pickel, “Statutory Tribunals and the Challenges of Managing Parallel Claims”, in E. Shilton and K. Schucher, eds., *One Law for All? Weber v Ontario Hydro and Canadian Labour Law: Essays in Memory of Bernie Adell* (2017), 175, at p. 178). When statutory tribunals are established, *courts* should give way to this special grant of jurisdiction so as not to undermine the benefits intended by the legislature — one such benefit is the provision of speedy and affordable dispute resolution with “a minimum of disruption to the parties and the economy” (*Weber*, at para. 46). While courts of course retain residual jurisdiction to hear matters not conferred on other bodies (*Regina Police Assn.*, at para. 26), statutory tribunals require jurisdictional space, so to speak, to do their jobs.

[74] This reasoning from *Weber* favouring exclusive labour arbitration over civil litigation in the courts does not readily apply to jurisdictional issues between different statutory tribunals. Statutory tribunals are “set up at different times, as part of different policy initiatives which themselves overlap” (A. K. Lokan and M. Yachnin, “From

Weber to Parry Sound: The Expanded Scope of Arbitration” (2004), 11 *C.L.E.L.J.* 1, at p. 27). When two tribunals are created with overlapping mandates and areas of expertise, the legislative schemes must be viewed as a whole. The legislature may very well have “assigned” the same “tasks” to two forums. While “the rationale for adopting the exclusive jurisdiction model [is] to ensure that the legislative scheme in issue [is] not frustrated by the conferral of jurisdiction upon an adjudicative body that was not intended by the legislature” (*Regina Police Assn.*, at para. 26 (emphasis added)), the legislature may have intended for more than one adjudicative body to have jurisdiction over a dispute.

[75] Indeed, legislatures sometimes expressly recognize that statutory tribunals have overlapping jurisdiction. The human rights statutes in Ontario and certain other jurisdictions, for example, explicitly allow the relevant statutory bodies to decline to deal with complaints in appropriate circumstances, including if the complaint could be more appropriately dealt with in a different forum (see *Human Rights Code*, R.S.O. 1990, c. H.19, s. 45.1; B. Etherington, “*Weber*, and Almost Everything After, Twenty Years Later: Its Impact on Individual *Charter*, Common Law, and Statutory Rights Claims”, in Shilton and Schucher, *One Law for All?*, 25, at p. 77; *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 25; *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*), s. 41).

[76] In *Regina Police Assn.*, the Court considered a jurisdictional issue between two statutory regimes: labour arbitration and police boards created under *The Police*

Act, 1990, S.S. 1990-91, c. P-15.01. Interpreting *The Police Act* “liberally” (para. 36), the Court concluded that the Act set out a complete code for disciplinary matters involving police officers and that the essential character of the dispute in that case fell within its statutory scheme. On the other hand, the collective agreement specifically provided that matters falling within the Act and regulations were not arbitrable (para. 27). It was clear from this scheme that concurrent jurisdiction was not contemplated: “The question, therefore, is whether the legislature intended this dispute to be governed by the collective agreement or *The Police Act* and Regulations” (para. 26 (emphasis added)).

[77] Thus, to the extent the Court in *Regina Police Assn.* explained that “the approach described in *Weber* applies when it is necessary to decide which of the two competing statutory regimes should govern a dispute” (para. 26), it did so in the context of *competing*, not *concurrent* jurisdiction. In those circumstances, it was necessary to determine within whose exclusive jurisdiction the essential nature of the dispute fell. I therefore disagree with my colleague’s reading of *Regina Police Assn.*, which suggests that the Court affirmed that matters falling within the ambit of a collective agreement fall exclusively within the jurisdiction of a labour arbitrator.

[78] Similarly, the decision in *Morin* does not prescribe a rule that all disputes arising under a collective agreement fall exclusively within a labour arbitrator’s jurisdiction even when another statutory tribunal is in play. *Morin* concerned a collective agreement covering teachers in Quebec. A group of young teachers

challenged amendments to the agreement's seniority credit scheme, for discriminating against them on the basis of age, contrary to the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. The issue was whether their discrimination claim, which they took to the Quebec Human Rights Commission and which was later brought to the Quebec Human Rights Tribunal, instead fell within the exclusive jurisdiction of a labour arbitrator.

[79] McLachlin C.J. clarified that, in resolving the issue, the *first* step is to look at the legislative scheme respecting labour arbitration and the other statutory tribunal to determine whether the legislature intended to confer areas of exclusive jurisdiction to either forum (paras. 16-19).

[80] Under the first step, s. 100 of the *Labour Code*, R.S.Q., c. C-27, required that “[e]very grievance shall be submitted to arbitration in the manner provided in the collective agreement if it so provides and the certified association and the employer abide by it.” This meant that a labour arbitrator was competent to resolve all grievances under the collective agreement (*Morin*, at para. 16). In the Quebec *Charter*, s. 111 granted the Human Rights Tribunal broad jurisdiction over human rights matters in Quebec. That jurisdiction was not exclusive because some provisions of the Quebec *Charter* removed the Human Rights Tribunal's jurisdiction in certain situations or gave the Commission discretion to stop acting on behalf of a complainant (paras. 18-19).

[81] While McLachlin C.J. observed that s. 100 of the *Labour Code* was similar to the clause examined in *Weber* and that, in *Weber*, the Court gave the arbitrator

exclusive jurisdiction over disputes arising under the collective agreement, she noted that the language was arguably weaker in the Quebec legislation (para. 21). In the end, however, she did not conclusively decide whether s. 100 conferred exclusive jurisdiction on a labour arbitrator for disputes arising under the collective agreement because, in any event, the nature of the dispute was outside of any potential area of exclusivity: “This clause [at issue in *Weber*] is arguably stronger than the clause conferring jurisdiction on the arbitrator in the case at bar. However, the critical difference between *Weber* and this case lies in the factual context that gave rise to the dispute” (para. 21). In other words, *Morin* turned on the *second* step of the test: the nature of the dispute was such that it would not have fallen within the exclusive jurisdiction of a labour arbitrator *even if* the scheme provided for exclusive jurisdiction.

[82] I therefore agree with Brown J. that, ultimately, McLachlin C.J. held in *Morin* that the arbitrator did not have exclusive jurisdiction over the young teachers’ dispute because of the dispute’s nature — the claim was more about “the process of the negotiation and the inclusion of [the impugned] term in the collective agreement” rather than a violation of the collective agreement (para. 23; see also para. 24). There was agreement among the parties on how the provisions, if valid, applied, and the young teachers’ dispute did not therefore “arise out of the operation of the collective agreement, so much as out of the pre-contractual negotiation of that agreement” (para. 24).

[83] I do not agree, however, that *Morin* decided that the labour arbitrator's jurisdiction would have been exclusive had the nature of the young teachers' dispute fallen within the collective agreement's ambit. That is precisely the question McLachlin C.J. left undecided.

[84] Moreover, McLachlin C.J.'s analysis in *Morin* is consistent with the proposition that falling under a labour arbitrator's jurisdiction is insufficient to ground arbitral exclusivity in all cases. McLachlin C.J. went on to provide four distinct reasons to refute the argument that the Tribunal "should not have taken jurisdiction" over the young teachers' dispute: (1) the claim was about the collective agreement itself rather than a violation of it; (2) the union involved was opposed in interest to the complainants so they could have been left without legal recourse; (3) the labour arbitrator would not have jurisdiction over every party possibly affected by the dispute; and (4) the Tribunal was a "better fit" to challenge the collective agreement (*Morin*, at para. 27 (emphasis added)); see also paras. 28-30, citing *Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission)* (2001), 209 D.L.R. (4th) 465 (Ont. C.A.) (*Naraine*); Etherington, at p. 74).

[85] As I will explain below, these factors provide useful guidance to human rights tribunals on when to exercise jurisdiction or when to defer in favor of labour arbitration.

[86] For these reasons, I do not accept that *Morin* mandates a particular result in this appeal. McLachlin C.J.'s analysis in *Morin* was limited to deciding that arbitral

jurisdiction was not exclusive in the circumstances of that case. She did not decide whether it would have been exclusive had the dispute arisen under the collective agreement. Her reasons can also be taken as implying that a labour arbitrator could have had jurisdiction over a similar dispute (see para. 25).

[87] Importantly, this Court’s jurisprudence does not establish a judicially created presumption for interpreting arbitration clauses in legislation. In *Morin*, McLachlin C.J. was careful not to provide concrete rules, emphasizing how much each case depends on the legislative scheme. She also expressly rejected the dissenting opinion’s suggestion that the starting point is arbitral exclusivity (at paras. 11 and 14):

Weber holds that the model that applies in a given situation depends on the governing legislation, as applied to the dispute viewed in its factual matrix. . . . However, *Weber* does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction

. . .

The case thus turns on whether the legislation confers exclusive jurisdiction on the arbitrator over this dispute. At this point, I diverge, with respect, from my colleague Bastarache J. who starts from the assumption that there is an “established principle” of arbitral exclusivity in Quebec. He formulates the principal question as whether “the principle of exclusive arbitral jurisdiction, a well-established principle in Quebec law, [should] be abandoned in favour of the jurisdiction of the Human Rights Tribunal in cases where a dispute between unionized workers and their employer raises a human rights issue” (para. 32). Thus framed, the question presupposes exclusivity. But, as we have seen, there is no legal presumption of exclusivity *in abstracto*. [Text in brackets in original.]

[88] McLachlin C.J. recognized that legislation across different jurisdictions will differ and this Court cannot presume, on the basis of previous decisions like *Regina Police Assn.* decided in different contexts, that the legislature will use express language to indicate concurrent jurisdiction. If anything, even though *Regina Police Assn.* did not involve a human rights claim, the Court interpreted *The Police Act* “liberally” when labour arbitration was the competing forum. My colleague’s suggestion that mandatory arbitration clauses should be presumed to confer exclusive jurisdiction will have problematic implications for other contexts where labour arbitration has overlapping or concurrent jurisdiction with other statutory bodies (see, e.g., *Greater Essex District School Board and OSSTF (OMERS Pension Plan), Re* (2015), 256 L.A.C. (4th) 1 (Ont.)).

[89] For the same reasons, the ruling of this Court in *Parry Sound* — which held that human rights codes are substantively incorporated in all collective agreements — also does not provide an answer to the jurisdictional issue in this appeal (see also Lokan and Yachnin, at p. 27). A human rights complaint from a unionized employee, even if it falls within the ambit of the collective agreement, does not automatically entail exclusive arbitral jurisdiction. Indeed, “[i]n the years since *Morin* was decided, concurrency has clearly been accepted across Canada as the general approach to be followed in dealing with human rights issues” (Etherington, at p. 76; see also C. Mummé, “Questions, Questions: Has *Weber* Had an Impact on Unions’ Representational Responsibilities in Workplace Human Rights Disputes?”, in Shilton and Schucher, *One Law for All?*, 229, at p. 235). Most Canadian jurisdictions have thus

interpreted *Morin* in a manner consistent with the analysis offered in these reasons (Pickel, at p. 176). Appellate courts have generally ruled in favor of concurrent jurisdiction between an arbitrator and another statutory tribunal (see *Human Rights Commission (N.S.) v. Halifax (Regional Municipality)*, 2008 NSCA 21, 264 N.S.R. (2d) 61, at para. 44; *Naraine*; *Calgary Health Region v. Alberta (Human Rights & Citizenship Commission)*, 2007 ABCA 120, 74 Alta. L.R. (4th) 23, at paras. 25 and 34; J. D. Gagnon, “Les droits de la personne dans un contexte de rapports collectifs de travail. Compétence de l’arbitre et d’autres tribunaux. Quand l’incertitude devient la règle” (2006), 66 *R. du B.* 1, at p. 31; *contra*, *Université de Sherbrooke v. Commission des droits de la personne et des droits de la jeunesse*, 2015 QCCA 1397, at para. 27 (CanLII)).

[90] To conclude, the jurisprudence does not provide a rule of arbitral exclusivity when another statutory regime is in issue. There is no presumption of exclusivity when a legislature uses a mandatory arbitration clause such that concurrent jurisdiction can only be found if there is express language to that effect. I now turn to the statutory schemes in this case.

B. *The Statutory Schemes*

[91] Since the jurisdiction of two specialized tribunals is at issue, I consider the legislative regime in both the Manitoba *Labour Relations Act* and the Manitoba *Human Rights Code*: “. . . there are two, not one, legislative mandates that must be respected” (*Calgary Health Region*, at para. 25; see also *Regina Police Assn.*, at para. 23).

[92] First, the Manitoba *Labour Relations Act* requires that every collective agreement contain a method for the settlement of all differences between the parties (the union and the employer) concerning the meaning, application, or alleged violation of the collective agreement:

78(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties thereto, or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning, application, or alleged violation.

[93] If the parties fail to include a provision as required under s. 78(1), the collective agreement is deemed to contain a clause providing for arbitration after the exhaustion of any grievance procedure established in the collective agreement (s. 78(2)).

[94] The Act also grants labour arbitrators broad remedial powers. They can order damages for contraventions of the collective agreement with interest (s. 121(2)(a) and (b)), order the reinstatement of an employee (s. 121(2)(c)), order an employer to rescind or rectify disciplinary action taken against an employee (s. 121(2)(d)), “relieve, on just and equitable terms, against breaches of time limits or other procedural requirements set out in the collective agreement” (s. 121(2)(e)), or do two or more of these things (s. 121(2)(f)). The arbitrator’s ruling is also described as “a final and conclusive settlement of the matter” (s. 121(2)).

[95] There is thus broad arbitral jurisdiction to deal with matters related to the collective agreement. However, the *Labour Relations Act* does not specifically oust the Commission's jurisdiction under the *Human Rights Code*.

[96] Turning to the *Code*, the preamble provides that "Manitobans recognize the individual worth and dignity of every member of the human family" and that the human rights protections enshrined in the *Code* are "of such fundamental importance that they merit paramount status over all other laws of the province". Under s. 4, the Commission has several key responsibilities, including to:

(a) promote the principle that all members of the human family are free and equal in dignity and rights and entitled to be treated on the basis of their personal merits, regardless of their actual or presumed association with any group;

(b) further the principle of equality of opportunity and equality in the exercise of civil and legal rights regardless of status;

...

(e) promote understanding and acceptance of, and compliance with, this Code and the regulations.

[97] Section 22(1) provides that "[a]ny person may file, at an office of the Commission, a complaint alleging that another person has contravened this Code." Once a complaint is filed, s. 26 requires that "[a]s soon as is reasonably possible . . . , the executive director shall cause the complaint to be investigated to the extent the Commission regards as sufficient for fairly and properly disposing of it".

[98] Section 34 of the *Code* identifies the parties to a complaint referred for adjudication. The Commission is one of the parties, and “shall have carriage of the complaint”. Section 29(3) requires the Commission to request that an adjudicator be designated to adjudicate a complaint if the Commission is satisfied that additional proceedings would further the objectives of the *Code* or if it would assist the Commission in discharging its responsibilities.

[99] For violations of the *Code*, adjudicators have broad remedial powers. They can make a party do or refrain from doing anything to secure compliance with the *Code*, order compensation, order damages, or adopt and implement affirmative action programs (see s. 43(2)). Finally, s. 42 provides that adjudicators have exclusive jurisdiction over any questions “that must be decided in completing the adjudication and in rendering a final decision respecting the complaint”, and s. 58 provides that the substantive rights and obligations in the *Human Rights Code* are “paramount”.

[100] Nothing in the *Human Rights Code* ousts the Commission’s jurisdiction over a unionized employee. Nor does it oust the jurisdiction of the arbitrator under the *Labour Relations Act*.

[101] I turn next to consider the essential nature of Ms. Horrocks’ dispute to determine whether it falls within one or both of these jurisdictions. Ms. Horrocks’ claim is about whether her employer discriminated against her on the basis of mental or physical disability — and therefore violated the collective agreement and the *Human*

Rights Code — when it terminated her employment for allegedly violating her undertaking to totally abstain from alcohol. She seeks reinstatement.

[102] I agree with Brown J. that the essential nature of Ms. Horrocks' claim falls within the scope of the collective agreement. The collective agreement in this case specifically prohibits the employer from discriminating on the basis of mental or physical disability ("Collective Agreement between: Canadian Union of Public Employees, Local 8600 and Nor-Man Regional Health Authority Inc.", April 1, 2008, to March 31, 2012, art. 6, reproduced in A.R., vol. II, at p. 12). In *Parry Sound*, this Court confirmed that the substantive rights and obligations of human rights codes are incorporated into each collective agreement over which an arbitrator has jurisdiction. The collective agreement in the present case also provides a grievance and arbitration procedure for any dispute arising out of the interpretation, application, or alleged violation of the collective agreement (arts. 10 and 11). Given this context, Ms. Horrocks' discrimination claim can easily be characterized as arising out of an alleged violation of the collective agreement. A labour arbitrator accordingly has jurisdiction over it.

[103] In my view, however, the dispute also falls within the Commission's jurisdiction even though Ms. Horrocks is a unionized employee. Her complaint of discrimination falls squarely within the mandate of the *Code*. Section 22(1) expressly provides that "[a]ny person" can file a complaint with the Commission. The processing of her complaint is also within the Commission's mandate under ss. 4, 7(2)(a), 29(3)

and 34 of the *Code*. Once a complaint is made to the Commission, it must be dealt with in accordance with the *Code*. There is no exception for a complaint made by a unionized employee who may be subject to a collective agreement.

[104] Although the Court of Appeal in this case concluded that the human rights adjudicator had jurisdiction over Ms. Horrocks' dispute, it also held that the adjudicator lacked jurisdiction to decide "questions of discipline or dismissal or to grant any related remedy" (2017 MBCA 98, 416 D.L.R. (4th) 385, at para. 92). I disagree with this bifurcated conclusion. Section 43(2) of the *Code* gives adjudicators broad powers to remedy human rights violations, including ordering an employer to "do or refrain from doing anything in order to secure compliance with this Code, to rectify any circumstance caused by the contravention, or to make just amends for the contravention". If a dispute falls within the adjudicator's jurisdiction, then the adjudicator's remedial powers are delimited by the *Code*.

[105] Given the mandate and provisions of the *Code*, including s. 22(1)'s use of "[a]ny person", I find it unacceptable that some unionized employees, whose unions refuse to grieve their members' discrimination claims without breaching the duty of fair representation, would be left without legal recourse. Nothing in the *Code* suggests that this result was intended; on the contrary, such a result might violate the responsibilities of the Commission under s. 4.

[106] Although it is true that the duty of fair representation "acts as a check on the principle of exclusivity", it is not a sufficient check given the importance of the

human rights involved (Mummé, at p. 237). Despite the tendency of labour arbitrators to interpret the duty in an expansive way where discrimination is involved, the content of the duty has not evolved since this Court's decision in *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, which preceded *Parry Sound*:

In a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by any . . . improper motives . . . , and as long as it turns its mind to all the relevant considerations. . . . [I]t is the underlying motivation and method used to make this choice that may be objectionable. [pp. 1328-29]

Thus, in cases involving discrimination against a unionized employee, unions can decide not to grieve without breaching their duty of fair representation, "so long as their decisions are reasoned, not arbitrary, in bad faith or discriminatory" (Mummé, at p. 238; see also *Mason v. Gen-Auto Shippers and Teamsters Local Union 938*, [1999] OLRB Rep. 242, at paras. 17 and 20; *Creed v. International Brotherhood of Electrical Workers, Local Union 339*, [1999] O.L.R.D. No. 3422 (QL)). They have the right to make errors, and they must also, at times, balance competing interests.

[107] To conclude, I find that both a labour arbitrator under the *Labour Relations Act* and the Commission under the *Human Rights Code* have jurisdiction, on the face of the legislation, over Ms. Horrocks' claim of discrimination against her employer. Nothing in either scheme suggests the legislature meant either scheme to prevail. There is no doubt that the labour scheme is designed to rely heavily upon arbitration for

matters within the scope of the collective agreement. But so too does the human rights scheme rely heavily upon the Commission and human rights adjudicators to address discrimination, given the paramount and fundamental importance of human rights legislation (*Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513, at para. 33).

[108] This Court has only ousted the jurisdiction of human rights tribunals when the statutory text of the other tribunal has specifically excluded all other decision-making bodies, thereby indicating that jurisdiction was meant to be exclusive. In *Charette*, the Court considered a jurisdictional issue between the Quebec Human Rights Tribunal and the *Commission des affaires sociales*, Quebec's social assistance review board (CAS). The complainant participated in a social assistance program for low-income families with children. The program required that at least one adult receive income from employment. When the complainant went on maternity leave, she lost access to the program because maternity benefits were not considered income from employment. She filed a claim with the Human Rights Tribunal alleging discrimination on the basis of sex and pregnancy contrary to the Quebec *Charter*. The Quebec government contested the Tribunal's jurisdiction, arguing that the CAS had exclusive jurisdiction.

[109] A majority of the Court concluded that the CAS had exclusive jurisdiction to hear the matter. Section 23 of the *Act respecting the Commission des affaires sociales*, R.S.Q., c. C-34, gave the CAS authority to interpret and apply the Quebec

Charter. Section 21 provided that the administrative appeal route for dissatisfied claimants was not overlapping or concurrent with courts or other tribunals, but was exclusive to the CAS:

The object of the [CAS] is to hear, to the exclusion of every other commission, tribunal, board or body, except as regards the requests contemplated in paragraph d of this section:

(a) the appeals brought under section 78 or section 81 of the Act respecting income security

[110] Similarly, in *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, the Court again addressed a contest between a human rights tribunal and a labour arbitrator. Mr. Vaid worked at the House of Commons and alleged that he had been constructively dismissed. He brought a complaint before the Canada Human Rights Tribunal alleging racial discrimination contrary to the *CHRA*. As a federal employee, Mr. Vaid's employment was governed by the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.) (*PESRA*), which had a labour arbitration regime. One of the issues was whether Mr. Vaid's complaint fell exclusively within *PESRA*'s labour arbitration regime or whether the Tribunal had concurrent jurisdiction over it.

[111] The Court unanimously held that Mr. Vaid's complaint fell exclusively within *PESRA*'s labour arbitration regime. Section 5(1) provided that one of *PESRA*'s purposes was to "provide to certain persons employed in Parliamentary service collective bargaining and other rights in respect of their employment".

Section 62(1)(a)(i) permitted any employee who felt aggrieved by the interpretation or application of “a provision of a statute” to present a grievance. Finally, s. 2 of *PESRA* provided that, where other federal legislation dealt with “matters similar to those provided for under” *PESRA*, *PESRA* prevailed:

. . . except as provided in this Act, nothing in any other Act of Parliament that provides for matters similar to those provided for under this Act . . . shall apply

[112] In *Charette and Vaid*, then, the legislation clearly provided for exclusive jurisdiction of a body that was not the human rights tribunal. If the dispute fell within the jurisdiction of that other body (the CAS and *PESRA* arbitration regimes, respectively), the legislative intent was to oust the jurisdiction of the human rights tribunal.

[113] No such express or strong language exists in the Manitoba *Labour Relations Act*. The text of s. 78(1) states that “[e]very collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise”. Where the Manitoba legislature intends to oust the jurisdiction of other tribunals, it uses the words “exclusive jurisdiction” (see, e.g., *The Manitoba Public Insurance Corporation Act*, C.C.S.M., c. P215, s. 65(13); *The Workers Compensation Act*, C.C.S.M., c. W200, ss. 60(1) and 60.8(1); *The Manitoba Hydro Act*, C.C.S.M., c. H190, s. 22; and see “exclusive authority” in *The Residential Tenancies Act*, C.C.S.M., c. R119, ss. 152(1) and 158(1)). Rather than using the words “exclusive jurisdiction”, s. 78(1) of the Act even contemplates the parties specifying a different

forum — “or otherwise”. While the words “or otherwise” in s. 78(1) do not necessarily suggest that the *Labour Relations Act* contemplates concurrent jurisdiction with the Commission, they certainly indicate that the legislature is comfortable with parties bargaining for forums other than labour arbitration to have jurisdiction over disputes arising from a collective agreement.

[114] The conclusion to be drawn is that when the Manitoba legislature intends to confer exclusive jurisdiction, it uses clear words to that effect. The *Labour Relations Act* does not clearly confer exclusive jurisdiction on labour arbitrators, and the *Human Rights Code* does not remove from the Commission’s jurisdiction human rights complaints of unionized employees. Neither statute ousts the other’s jurisdiction, and Ms. Horrocks’ claim falls within both a labour arbitrator’s mandate under the *Labour Relations Act* and the Commission’s mandate under the *Human Rights Code*. In these circumstances, I would agree with the comments of Lokan and Yachnin, at p. 27:

... it is difficult to make a credible case that the legislature intended arbitration to supplant other tribunals completely in the unionized sector. . . . Rather than look for jurisdictional clarity that does not exist, it would seem to be more profitable for tribunals and courts to develop pragmatic doctrines on how to treat each other’s processes and decisions.

[115] I now turn to the remaining issue — whether the Commission or adjudicator should have exercised their jurisdiction to hear the complaint in this case.

C. *Which Forum Is More Appropriate?*

[116] My conclusion that both a human rights adjudicator and a labour arbitrator have jurisdiction over Ms. Horrocks' dispute does not answer the question of whether the Commission or adjudicator should have deferred in favour of a different forum. The analysis of whether a forum has jurisdiction is distinct from whether it should exercise that jurisdiction. Dealing with both jurisdiction and *forum non conveniens* in the private international law context, Côté J. has explained: "The importance of maintaining this distinction flows from the discrete concerns underlying each analysis and the nature of the relevant factors at each stage" (*Haaretz.com v. Goldhar*, 2018 SCC 28, [2018] 2 S.C.R. 3, at para. 28).

(1) Discretion to Defer

[117] In their submissions, both Ms. Horrocks and the Commission suggested that the Commission may not have discretion under the *Human Rights Code* to decline to pursue adjudication if a complaint falls within its jurisdiction (transcript, at p. 75). As Ms. Horrocks notes in her factum, however, it might be "reasonable to assume that the Manitoba Human Rights Commission may not be 'satisfied' that adjudication is required where a complainant has or could pursue a grievance", thus allowing for a form of deferral (R.F. Linda Horrocks, at para. 92). The employer argued that, in the event this Court finds jurisdiction to be concurrent, it should decide that arbitration is the most appropriate forum. Failure to give proper guidance would lead to forum shopping and collateral attacks, ultimately undermining the rule of law.

[118] Under s. 29 of the *Code*, the Commission plays a gatekeeper function in screening complaints:

29(3) If a complaint is not settled, terminated or dismissed and the Commission is satisfied that additional proceedings in respect of the complaint would further the objectives of this Code or assist the Commission in discharging its responsibilities under this Code, the Commission shall

- (a) request the chief adjudicator to designate a member of the adjudication panel to adjudicate the complaint; or
- (b) recommend that the minister commence a prosecution for an alleged contravention of the Code.

(See also *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, at para. 21.)

[119] Although s. 29(3) is less explicit than the deferral clauses found in Ontario, British Columbia, and the *CHRA* (see Ontario's *Human Rights Code*, s. 45.1; British Columbia's *Human Rights Code*, s. 25(1) and (2); *CHRA*, s. 41(1)), the provision does not require the Commission to forward a case to an adjudicator unless it is satisfied that it would further the objectives of the *Code*. The availability of a more appropriate, efficient, and timely forum that addresses workplace discrimination may well satisfy the Commission that additional proceedings before a human rights adjudicator would not assist the Commission in discharging its duties. Further, the Commission may choose to defer any decision in this regard, pending pursuit of other accessible adjudication addressing the complaint of discrimination.

[120] Indeed, this interpretation of the *Code* accords with the Commission’s practice of deferring the adjudication of complaints in favour of other forums. For example, in a policy statement, the Commission explains that where a dispute falls under the concurrent jurisdiction of another body which is considering the matter, the Commission may seek the consent of the parties to “put the complaint on hold” or do so on its own initiative (*Policy # P-3: Jurisdiction — Concurrent Jurisdiction*, revised October 8, 2014 (online), at p. 2).

[121] Similarly, the Manitoba Human Rights Tribunal has concluded that it can defer hearing complaints in appropriate circumstances, including so that the dispute can be adjudicated by a labour arbitrator (*Blatz v. 4L Communications Inc.*, 2012 CanLII 42311, at paras. 11-12; *Qumsieh v. Brandon School Division*, 2019 MBHR 3, at paras. 10-11 (CanLII)).

[122] Different considerations may apply, and a complaint may be dismissed, where there are concerns about a duplication of proceedings (see *Code*, ss. 29(1)(a) and 42; *British Columbia (Workers’ Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at paras. 25-34; *Zulkoskey v. Canada (Minister of Employment and Social Development)*, 2016 FCA 268, at paras. 23-24 (CanLII); *Dick v. Pepsi Bottling Group (Canada), Co.*, 2014 CanLII 16055 (Man. H.R.)).

(2) Factors Guiding the Exercise of Discretion

[123] When the Commission shares jurisdiction with a labour arbitrator over a human rights dispute, a number of factors can guide its discretion in deciding whether or not to proceed with a complaint of a unionized employee.

[124] As mentioned, McLachlin C.J. provided four factors in *Morin* that favoured the human rights forum's exercise of jurisdiction in that case: (1) the claim was about the collective agreement itself rather than a violation of it; (2) the union involved was opposed in interest to the complainants so they could have been left without legal recourse; (3) the labour arbitrator would not have jurisdiction over every party possibly affected by the dispute; and (4) the Tribunal was a "better fit" to challenge the collective agreement (paras. 27-30).

[125] If the union is adverse in interest or is unwilling to pursue a grievance, this weighs heavily in favour of access to justice in respect of human rights claims (*Morin*, at para. 28; *Naraine*, at paras. 60-61; *A.T.U., Local 583 v. Calgary (City)*, 2007 ABCA 121, 75 Alta. L.R. (4th) 75, at paras. 64-66). Where a union declines to grieve the human rights complaint of a unionized employee, unionized employees should have legal recourse to adjudicate their human rights complaints.

[126] Conversely, if the claim is about the violation of the collective agreement, the union is supportive, the arbitrator has jurisdiction over the necessary parties, and the remedy seeks re-establishment of the employment relationship, there will be a compelling case for the human rights forum to defer to the labour arbitration regime.

[127] Finally, determining which forum is a “better fit” permits a broad consideration of the circumstances of the complaint. It seems to me that the remedy sought by the complainant may be highly relevant to the better fit analysis. For example, if a complainant seeks reinstatement, labour arbitration through union representation may be the better fit. On the other hand, if a complainant seeks a declaration, damages, or systemic changes — rather than the re-establishment of the employment relationship — a human rights tribunal may be the better fit.

[128] Thus, there is a strong case for labour arbitration to have primary responsibility over the human rights complaints of unionized employees, particularly if the remedy sought is reinstatement. Access to justice and efficiency in resolving issues in an ongoing relationship will militate in favour of deferring to labour arbitration. As a general rule, the Commission should decline jurisdiction unless labour arbitration is not a realistic alternative.

[129] In this case, the human rights adjudicator was not presented with any evidence that other proceedings had been or could be commenced; the limited evidence she had suggested that Ms. Horrocks did not feel confident that the union would support her (para. 87). Nevertheless, there was no clear evidence that the union would not assist. And there are good reasons why the Commission or the adjudicator could have exercised their discretion to defer to the labour arbitration scheme. The dispute was about discrimination arising under the collective agreement, and the remedy sought,

reinstatement, was squarely within the powers of a labour arbitrator and concerned the re-establishment of the working relationship.

[130] With that said, it has always been recognized that remedies in judicial review are discretionary in nature, such that “even if the applicant makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief” (*Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713, at para. 37; see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 36). The discretionary nature of the remedies available in a judicial review reflects an orientation not only towards individual rights but also towards the public interest in the orderly administration of affairs, including the need for finality and certainty (*Fingland v. Ontario (Ministry of Transportation)*, 2008 ONCA 812, 93 O.R. (3d) 268, at para. 30, quoting *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.), at para. 258; D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at § 3:1). The human rights adjudicator in this case was asked to decide whether or not she had jurisdiction, which she answered affirmatively. Because she clearly had jurisdiction to hear the case, I cannot conclude that the adjudicator was wrong to proceed in these circumstances. In any event, it would not be appropriate, nearly a decade after the events giving rise to the dispute and over six years after the adjudicator’s decision on the merits, to set the adjudicator’s decision aside.

III. Conclusion

[131] In my view, the Court of Appeal was correct in deciding that the human rights adjudicator in this case had jurisdiction to hear the dispute. Accordingly, I would dismiss the appeal.

Appeal allowed, KARAKATSANIS J. dissenting.

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