DEFENDING CLAIMS IN DIFFERENT FORA: THE COMPETING JURISDICTION OF ARBITRATORS AND TRIBUNALS IN BRITISH COLUMBIA

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> "It has long been recognized that an essential element in protecting human rights was a widespread knowledge among the population of what their rights are and how they can be defended."
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> Boutros Boutros-Ghali, Sixth UN Secretary-General, 1992–1996

I. INTRODUCTION

Human rights claims arise in a number of situations, not the least of which are those defining the relationships between employers and employees. Section 13 of the British Columbia *Human Rights Code*,[1] *inter alia*, prohibits discrimination in employment on the grounds of "race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age".[2] Accordingly, the modern workplace can be a virtual minefield of potential claims by employees, both in the context of allegations of specific incidents of discrimination or systemic discrimination generally. However, the significant number of judicial, arbitral and tribunal decisions in Canada that address jurisdictional disputes over human rights claims arising in the workplace demonstrates a lack of clarity in terms of where a potential claim can, and should, be addressed.

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1 R.S.B.C. 1996., c. 210.

2 *Ibid.*, s. 13(1).

As stated by Nancy Holmes, "[a]lthough universally embraced in principle, the concept of 'human rights' evades a precise definition and is subject to a general lack of consensus on how it should be approached."[3] This statement rings particularly true in the context of a collective agreement. Subsection 84(2) of the British Columbia *Labour Relations Code* states:

> Every collective agreement must contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable.[4]

Despite a labour arbitrator's apparent power under that statute to "interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement,"[5] the question of whether that power under the *Labour Relations Code* as regards human rights claims must necessarily be shared with the British Columbia Human Rights Tribunal in all circumstances may be open.

In 2003, the British Columbia Court of Appeal considered the jurisdiction of labour arbitrators in *Canpar Industries v. International Union of Operating Engineers, Local 115*.[6] In this decision, a five-member court commented that, after the Supreme Court of Canada decision in *Weber*,[7] the *Human Rights Code* had been amended to "provide for a 'concurrent jurisdiction model' between labour arbitrators and the Human Rights Tribunal".[8] However, *Canpar* was decided in the context of arguments that an arbitrator

3 Canada Depository Services Program, Law and Government Division, *Human Rights and the Courts in Canada* by Nancy Holmes (October 2001), online: <http://dsp-psd.tpsgc.gc.ca/Collection-R/LoPBdP/BP/bp279-e.htm>.

4 R.S.B.C. 1996, c. 244, s. 84(2).

5 *Labour Relations Code*, *supra* note 4, s. 89(g).

6 2003 BCCA 609, 234 D.L.R. (4th) 221, 20 B.C.L.R. (4th) 301 [*Canpar*].

7 *Infra* note 26.

8 *Canpar*, *supra* note 6 at para. 48. See also para. 53: "Sections 25 and 27 of the *Human Rights Code* specifically contemplate the possibility that a complaint made to the Tribunal will have already been dealt with, or may be dealt with, by a labour arbitrator."

had *no* jurisdiction until a human rights matter was referred to it by the Human Rights Tribunal. That is, this case essentially turned on a holding that the Supreme Court of Canada decision in *Parry Sound*[9] was applicable in British Columbia. However, the Court expressly declined to determine the jurisdictional question that might arise where a human rights claim is brought concurrently to both an arbitrator and the Human Rights Tribunal.[10] In other words, while it started from the general proposition that the *Human Rights Code* contemplated concurrent jurisdiction, *Canpar* did not directly address the question of whether an arbitrator should or even could have exclusive jurisdiction *in a particular instance*. More recently, in *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*,[11] the British Columbia Court of Appeal took the broad position that, as a starting point, the British Columbia Human Rights Tribunal had the jurisdiction to adjudicate a human rights complaint when the same issue had been previously raised at an even dealt with by another statutory body. The question then was whether it should decline to exercise that jurisdiction or defer the exercise of that jurisdiction in certain circumstances.

Canpar was decided before many of the subsequent decisions of the Supreme Court of Canada that have refined the *Weber*[12] test (which will be discussed in detail in Part II of this paper) in the context of jurisdictional competitions between statutory bodies. Moreover, *WCB* was decided in the context of a jurisdictional dispute between the Human Rights Tribunal and the Workers' Compensation Board (and in particular, the Review Division)—two administrative bodies with very different mandates and adjudicative processes and procedures. Arguably, Labour Arbitrators and the Tribunal share more similarities in form and function than the Tribunal and the

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9 *Infra* note 13.

10 See *Canpar*, *supra* note 6 at para. 55: "Having said this, I leave open the possibility that a party to this dispute might also wish to bring it to the attention of the Human Rights Tribunal at some point. It would not be appropriate to comment on jurisdictional questions that might arise in such event."

11 2010 BCCA 77, 316 D.L.R. (4th) 648, 2 B.C.L.R. (5th) 274 [*WCB*].

12 *Infra* note 26.

Board's officers of the Review Division. Thus, there may yet be room in British Columbia to argue that in some circumstances, human rights issues are best suited to the sole purview of a labour arbitrator.

In 2003, the Supreme Court of Canada, in *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, declared that labour arbitrators have not only the "power" but also the "responsibility" to enforce human rights legislation in the context of disputes arising out of a collective agreement.[13] However, in this decision Mr. Justice Iacobucci expressly refrained from deciding whether due to this "power and responsibility", the jurisdiction of the Ontario Human Rights Commission was ousted in that particular case.[14] That said, in support of arbitral jurisdiction (concurrent or otherwise), the Court held:

> [G]ranting arbitrators the authority to enforce the substantive rights and obligations of human rights and other employment-related statutes advances the stated purposes of the [*Labour Relations Act*], which include promoting the expeditious resolution of workplace disputes. As this Court has repeatedly recognized, the prompt, final and binding resolution of workplace disputes is of fundamental importance, both to the parties and to society as a whole. It is essential that there exist a means of providing speedy decisions by experts in the field who are sensitive to the workplace environment, and which can be considered by both sides to be final and binding.
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> The grievance arbitration process is the means by which provincial governments have chosen to achieve this objective. ...
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> Granting arbitrators the authority to enforce the substantive rights and obligations of human rights and other employment-related statutes has the additional advantage of bolstering human rights protection. ... [G]rievance arbitration has the advantage of both accessibility and expertise. It is a reasonable assumption that the availability of an accessible and inexpensive forum for the resolution of human rights disputes will increase the ability of aggrieved

13 2003 SCC 42, [2003] 2 S.C.R. 157 at para. 15, 230 D.L.R. (4th) 257 [*Parry Sound*]. In *Canpar*, *supra* note 6, the B.C. Court of Appeal held that *Parry Sound* applied in B.C.

14 *Parry Sound*, *supra* note 13 at para. 15.

> employees to assert their right to equal treatment without discrimination, and that this ... will encourage compliance with the *Human Rights Code*.[15]

Furthermore, while the semantics of this 2003 decision have been the subject of discussion in British Columbia,[16] there is at least some argument that the decision suggests that human rights legislation is implied as a term into the collective agreement[17] (a contention which in turn could strengthen an argument in favour of exclusive arbitral jurisdiction in some circumstances). However, as stated, the British Columbia Court of Appeal in *Canpar* indicated that, at least generally speaking, arbitrators and the Human Rights Tribunal share jurisdiction in this province. And further, the impact of recent decisions of the Supreme Court of Canada and, in particular, the British Columbia Court of Appeal,[18] as well as relatively recent amendments to the *Administrative Tribunals Act* on arguments in favour of a form of exclusive arbitral jurisdiction has yet to be finally determined.

For example, on 27 June 2008 the Supreme Court of Canada released its decision in *Honda v. Keays*.[19] While the decision focused on damages resulting from wrongful dismissal of a non-unionized employee, the Court, discussing its earlier decisions, including, *Seneca College of Applied Arts and Technology v. Bhadauria*,[20] held that the courts have no place adjudicating claims based on breaches of human rights legislation where that legislation provides a comprehensive scheme for redress. Mr. Justice Bastarche, writing for the majority, held that:

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15 *Ibid.* at paras. 50–52 [citations omitted].

16 See e.g. *Teachers' Federation*, *infra* note 103; *Macaraeg*, *infra* note 22.

17 See *Parry Sound*, *supra* note 13 at para. 1: "As I discuss in these reasons, I conclude that a grievance arbitrator has the power and responsibility to enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement."

18 See *WCB*, *supra* note 11.

19 2008 SCC 39, [2008] 2 S.C.R. 362, 294 D.L.R. (4th) 577 [*Honda*].

20 [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193 [*Bhadauria*].

> [T]he purpose of the Ontario *Human Rights Code* is to remedy the effects of discrimination; if breaches to the Code were actionable in common law courts, it would encourage litigants to use the Code for a purpose the legislature did not intend—namely, to punish employers who discriminate against their employees. ...
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> It is my view that the Code provides a comprehensive scheme for the treatment of claims of discrimination and *Bhadauria* established that a breach of the Code cannot constitute an actionable wrong ... .[21]

The British Columbia Court of Appeal echoed a similar sentiment in *Macaraeg v. E Care Contact Centres Ltd.*[22] with respect to the provisions of the British Columbia *Employment Standards Act*.[23] However, what, if anything, these decisions mean for arbitral jurisdiction is unclear. Both decisions evinced a clear deference for statutory regimes created by the legislature. Nevertheless, as will be discussed, both the Supreme Court of Canada and provincial appellate courts have historically shown a willingness to abandon such deference where the jurisdictional competition is not between a court and statutory body but is between competing statutory regimes. Adding to this, section 115.1 of the *Labour Relations Code* states that section 46.1 of the *Administrative Tribunals Act*[24] gives the British Columbia Labour Relations Board—an avenue for the appeal of the decisions of labour arbitrators—the discretion to decline to apply the *Human Rights Code* where, among other things, in the Board's opinion there is a more appropriate forum for the determination of human rights issues arising in the workplace. All of this could undermine arguments in favour of any form of exclusive arbitral jurisdiction at all.

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[21] *Honda*, *supra* note 19 at paras. 63–64.

[22] 2008 BCCA 182, 295 D.L.R. (4th) 358, 77 B.C.L.R. (4th) 205, leave to appeal to S.C.C. refused, 2008 CanLII 53790 [*Macaraeg*]. Editor's note: See generally Shafik Bhalloo, "Enforcement of Benefits Under the *Employment Standards Act*: A Single Jurisdiction for Enforcement Affirmed," Case Comment, (2010) 43 U.B.C. L. Rev. 145.

[23] R.S.B.C. 1996, c. 113.

[24] S.B.C. 2004, c. 45.

Accordingly, and in sum, there is a need to clarify the law defining the jurisdiction of arbitrators and tribunals in the human rights realm. While such clarification can only be offered by the British Columbia Court of Appeal or the Supreme Court of Canada when the appropriate set of facts presents itself, this paper will attempt to address some of the issues arising out of the current state of the law in hopes of providing some guidance to those in British Columbia who are faced with situations of competing jurisdiction.

This paper will discuss those decisions of both the Supreme Court of Canada and the provincial appellate courts that grapple with choosing the correct forum for the adjudication of workplace human rights claims. First, this paper will discuss the Supreme Court of Canada's seminal decision in *Weber*[25] and some of its other decisions flowing therefrom. Second, this paper will discuss the treatment of labour arbitrator jurisdiction in the appellate courts of other Canadian provinces, as well as the British Columbia Court of Appeal's application of the *Weber* principle. Third, this paper will address the concept of jurisdiction as applied by human rights tribunals themselves, and finally, will posit the success and consider merits of an argument that human rights matters arising out of the application, interpretation, operation or alleged violation of a collective agreement belong, in British Columbia, within the sole purview of the labour arbitrator.

II. DECISIONS OF THE SUPREME COURT OF CANADA

A. THE *WEBER* PRINCIPLE

In June 1995, the Supreme Court of Canada handed down its decision in *Weber v. Ontario Hydro*.[26] In that case, the Court addressed a situation where the plaintiff, an employee who had been on an extended leave of absence due to back problems, argued that, among other things, his right to privacy had been breached by his employer who had hired investigators to watch him in his home because they suspected that he was malingering. Specifically, the plaintiff argued that the defendant employer had committed a number of

25 *Infra* note 26.

26 [1995] 2 S.C.R. 929, 125 D.L.R. (4th) 583 [*Weber* cited to D.L.R.].

torts, including trespass, nuisance, deceit and invasion of privacy. The employer and employee were parties to a collective agreement, and the situation had previously been the subject of an arbitration which had ultimately been settled. The question for the Supreme Court, as stated by McLachlin J. (as she then was) was: "When may parties who have agreed to settle their differences by arbitration under a collective agreement sue in tort?"[27]

Ultimately, the majority held that, save for matters clearly *outside* of a collective agreement, the court's jurisdiction was ousted where parties to a collective agreement were involved in an issue whose essential character dealt with the interpretation, application or violation thereof.

Citing the earlier decision of *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*,[28] the Court described collective agreements as establishing "the broad parameters of the relationship between the employer and his employees."[29] Furthermore, in discussing the substance of provincial and federal labour statutes, McLachlin J. ostensibly endorsed the comments of Estey J. in *St. Anne* which indicated that to allow the courts and labour arbitrators concurrent jurisdiction in matters arising out of a collective agreement would do "violence ... to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting."[30] McLachlin J. held that "[w]here 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."[31]

In coming to this conclusion, the majority discussed three jurisdictional models: concurrent jurisdiction, overlapping jurisdiction and exclusive jurisdiction. With respect to the concurrent model, the Court noted, in keeping with the overall tone of the decision, that concurrent jurisdiction between the courts and labour arbitrators undercuts the purposes of the labour rela-

27 *Ibid.* at 596.

28 [1986] 1 S.C.R. 704, 28 D.L.R. (4th) 1 [*St. Anne* cited to D.L.R.].

29 *Ibid.* at 12.

30 *Ibid.* at 14. Accord *Weber*, *supra* note 26 at 599.

31 *Weber*, *ibid.* at 600.

tions scheme. Particularly, the Court held that labour relations statutes are geared, in part, to the quick and economical resolution of labour disputes. To allow matters covered by a collective agreement to be heard by both court and arbitrator would undermine these and other policy goals.

As for overlapping jurisdiction (i.e. where the court would have jurisdiction over those issues not falling within the traditional purview of labour law), the majority stated:

> [T]he overlapping spheres model also presents difficulties. In so far as it is based on characterizing a cause of action which lies outside the arbitrator's power or expertise, it violates the intention of the Act and [*St. Anne*] that one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute.[32]

As stated above, in the end, the Court determined that the focus should be not on the legal characterization of the dispute, but rather on its "essential character"—that is, whether, upon consideration of both the dispute and the ambit of the collective agreement, it arises from the "interpretation, application, administration or violation of the collective agreement."[33] If so, the arbitrator had exclusive jurisdiction.

The majority of the Court also held that because assessments under the *Weber* principle will be context-specific, it "is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator."[34] Accordingly, *Weber* does not necessarily stand for the proposition that *all* matters having a genesis in the workplace automatically fall within the exclusive purview of arbitration. That said, McLachlin J. did indicate a preference for the "exclusive jurisdiction" model, summarizing it thus:

> [T]he exclusive jurisdiction model gives full credit to the language of s. 45(1) of the [Ontario] *Labour Relations Act*. It accords with this court's approach in [*St. Anne*]. It satisfies the concern that the dispute resolution process which the various labour statutes of this country have established should not be duplicated and undermined by concurrent actions. It conforms to a

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32 *Ibid.* at 601.

33 *Ibid.* at 602.

34 *Ibid.* at 602.

pattern of growing judicial deference for the arbitration and grievance process and correlative restrictions on the rights of parties to proceed with parallel or overlapping litigation in the courts.[35]

The *Weber* principle has been applied numerous times since the decision was handed down in 1995.[36] For example, in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*,[37] Bastarache J., writing for the Supreme Court of Canada, described the ratio in *Weber* as follows:

> While McLachlin J. embraced the exclusive jurisdiction model, she emphasized that the existence of an employment relationship, *per se*, does not grant an arbitrator the jurisdiction to hear or decide a dispute. Only those disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts. ...
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> In considering the nature of the dispute, the goal is to determine its essential character. This determination must proceed on the basis of the facts surrounding the dispute between the parties, and not on the basis of how the legal issues may be framed. Simply, the decision-maker must determine whether, having examined the factual context of the dispute, its essential character concerns a subject matter that is covered by the collective agreement. Upon determining the essential character of the dispute, the decision-maker must examine the provisions of the collective agreement to determine whether it contemplates such factual situations. It is clear that the collective agreement need not provide for the subject matter of the dispute explicitly. If the essential character of the dispute arises either explicitly or implicitly, from the interpretation, application, administration or violation of the collective

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[35] *Ibid.* at 604 [citations omitted].

[36] See e.g. *Connolly v. Canada Post Corp.*, 2005 NSCA 55, 232 N.S.R. (2d) 5, 737 A.P.R. 5; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, 266 D.L.R. (4th) 542 [*Bisaillon*]; *K.A. v. Ottawa (City)* (2006), 80 O.R. (3d) 161, 269 D.L.R. (4th) 116 (C.A.); *Ferreira*, *infra* note 106; *Haynes v. British Columbia Teachers' Federation*, 2007 BCCA 457, 246 B.C.A.C. 222; *Andrews v. Air Canada*, 2008 ONCA 37, 88 O.R. (3d) 561; *Giesbrecht v. McNeilly*, 2008 MBCA 22, 225 Man. R. (2d) 223, 291 D.L.R. (4th) 88; *DiCienzo v. Quillan*, 2008 ONCA 472, 66 C.C.E.L. (3d) 132.

[37] 2000 SCC 14, [2000] 1 S.C.R. 360, 183 D.L.R. (4th) 14 [*Regina*].

agreement, the dispute is within the sole jurisdiction of the arbitrator to decide.[38]

That said, while the *Weber* ratio has remained largely intact in the context of the jurisdictional competition between labour arbitrators and the courts, its application, at least, has been adapted in situations where the competition is between two statutory bodies.

Although it adhered to the *Weber* ratio, the re-tooling of the *Weber* decision first became apparent in *Regina*. *Regina* was a decision involving the allocation of jurisdiction between an arbitrator under a collective agreement and a commission empowered by the Saskatchewan *Police Act*,[39] and was not a competition between labour arbitration and the courts. And, while the Supreme Court of Canada in *Regina* did not modify the application of *Weber per se*, (rather, the Court expressly extended the application of the principle to competing statutory bodies)[40] Mr. Justice Bastarache alluded to the reformulations that would ultimately come when he noted that:

> In determining whether the dispute is arbitral, we cannot interpret the collective agreement in a manner that would offend the legislative scheme set out in [the competing statutory regime, i.e. the *Police Act*]. The provisions of the collective agreement, therefore, must be interpreted in light of the scheme set out in [the competing legislation].[41]

This balancing of apparent legislative intents introduced by the Court in *Regina*, has, in subsequent decisions, bloomed into a reshaping of the *Weber*

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[38] *Ibid.* at paras. 24–25 [citations omitted].

[39] *Police Act, 1990*, S.S. 1990–91, c. P-15.01 [*Police Act*].

[40] See *Regina, supra* note 37 at para. 39:

> To summarize, the underlying rationale of the decision in *Weber* ... is to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties. The analysis applies whether the choice of forums is between the courts and a statutorily created adjudicative body, or between two statutorily created bodies. The key question in each case is whether the essential character of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question, 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.

[41] *Ibid.* at para. 30.

test in circumstances of competing jurisdiction between statutory bodies. While the "essential character" criterion remains intact, compared to the discussion found in the *Weber* decision itself, later decisions of the Supreme Court applying *Weber*-type criteria in the context of competing statutory tribunals indicate less judicial deference to the legislature's decision to regulate labour relations through the creation of arbitration tribunals, and more attempts to weigh the relative importance of the policies and interests represented by the competing regimes. In particular, in the later decisions, the strong arguments in favour of arbitral jurisdiction found in *Weber*, *Parry Sound* and even to some extent *Regina*, disappear somewhat.

This reshaping of the *Weber* approach has considerable implications where the competition is between a labour arbitrator and a human rights tribunal. According to the Supreme Court of Canada, where an enabling statute clearly indicates legislative intent to direct a dispute to one particular forum, exclusive jurisdiction will generally follow. This was the result in *Regina*, discussed above.[42] In contrast, where the relevant statutes do not clearly evince an intention for exclusivity, many courts, even upon application of the *Weber* principle, have found a concurrent jurisdiction between competing statutory bodies—which appears largely to result from an analysis of the relative importance of the policies underlying the competing regimes. While a finding of concurrent jurisdiction, on its face, appears to contradict the position of the Supreme Court of Canada in *Weber*, in *Morin*[43] (and its companion case, both of which will be discussed in the following paragraphs), the Supreme Court of Canada made clear that the *Weber* principles did not foreclose such a possibility.

The implications of the foregoing for the argument in favour of exclusive arbitral jurisdiction in British Columbia are significant; while the *Human Rights Code* does not give the British Columbia Human Rights Tribunal exclusive jurisdiction over each and every human rights claim arising in the province, neither does the *Labour Relations Code* clearly and unequivocally

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[42] The Supreme Court of Canada found that the *Police Act*, *supra* note 39, made clear that the commission in question was to have exclusive jurisdiction over the dispute.

[43] *Infra* note 44.

state that an arbitration board is the *only* forum for *any type* of workplace dispute. It is likely, therefore, that the British Columbia courts, when assessing the jurisdiction issue, will engage in a policy analysis with respect to each regime. And, as will be discussed, both the Supreme Court of Canada and provincial appellate courts have shown a tendency to place greater importance upon human rights policy than on the underpinning labour relations law and regulation, with the result that at present, the notion of any sort of exclusive arbitral jurisdiction has been very much foreclosed elsewhere in the nation.

B. MORIN ET AL.

After *Regina* opened the door to a modified approach, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (A.G.)*,[44] the Supreme Court of Canada clearly stated that the application of the *Weber* principle differed somewhat where the jurisdictional competition was between two statutorily created bodies. Specifically, Chief Justice McLachlin, writing for the majority, explained how the decision in *Weber* accommodated such an approach:

> *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. In *Weber*, the concurrent and overlapping jurisdiction approaches were ruled out because the provisions of the Ontario *Labour Relations Act*, when applied to the facts of the dispute, dictated that the labour arbitrator had exclusive jurisdiction over the dispute. 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.[45]

In *Morin*, the competition was between a labour arbitrator and the Quebec Human Rights Tribunal. Working from the *Weber* principles, the Court

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44 2004 SCC 39, [2004] 2 S.C.R. 185, 240 D.L.R. (4th) 577 [*Morin*].

45 See *ibid.* at para. 11 [emphasis added] [citations omitted].

determined that establishing whether jurisdiction lay in either one or the other statutory body required a consideration of two steps. First, the Court looked at the relevant legislation to see what it said about jurisdiction. The second step was to "look at the nature of the dispute, and see whether the legislation suggests it falls exclusively to the arbitrator."[46]

In *Morin*, an examination of both the Quebec *Charter of Human Rights and Freedoms*[47] and the Quebec *Labour Code*[48] revealed that neither evinced a clear intention on the part of the legislature that one or the other was to have exclusive jurisdiction. For example, the *Quebec Charter* contained a number of exemptions and discretionary provisions that indicated the Legislature of that province did not intend human rights be within the exclusive domain of the Human Rights Tribunal in all circumstances. Moreover, a review of the *Labour Code* indicated that a labour arbitrator could neither assert exclusive jurisdiction over human rights claims arising in the workplace in the circumstances.

Section 100 of the *Labour Code* stated 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". Further, the definition of "grievance" indicated that an arbitrator had jurisdiction to determine any disagreement involving the interpretation or application of the collective agreement. Compared to the enabling provision in *Weber*,[49] the Quebec labour statute is arguably weaker, and might be the basis for distinguishing the *Morin* decision from other human rights tribunal—labour arbitrator jurisdictional competitions. This being said, while McLachlin C.J. noted the comparative "weakness" of the Quebec legislation, she dis-

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46 *Ibid.* at para. 15.

47 R.S.Q. c. C-12 [*Quebec Charter*].

48 R.S.Q. c. C-27.

49 See *Morin*, *supra* note 44 at para. 21, citing the *Labour Relations Act*, R.S.O. 1990, c. L.2, s. 45(1):

> Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitral.

missed the importance of this characteristic in light of the differences in factual context giving rise to the disputes in the *Weber* and *Morin* decisions:

> Taking the dispute in its factual context, as *Weber* instructs, the main fact that animates the dispute between the parties is that the collective agreement contains a term that treats the complainants and members of their group ... less favourably than [others]. ...
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> [T]his is not a dispute over which the arbitrator has exclusive jurisdiction. It does not arise out of the operation of the collective agreement, so much as out of the pre-contractual negotiation of that agreement. ...
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> [T]he dispute, viewed not formalistically but in its essential nature, engages matters which pertain more to alleged discrimination in the formation and validity of the agreement, than to its "interpretation or application", which is the source of the arbitrator's jurisdiction under the *Labour Code*, s. 1(f). The Human Rights Commission and the Human Rights Tribunal were created by the legislature to resolve precisely these sorts of issues.[50]

Morin may also be distinguished from those disputes which result from the interpretation or application of the collective agreement, rather than its negotiation.[51] However, and regardless, to bolster the argument in favour of what would ultimately be determined as concurrent jurisdiction, the Court pointed to some of the possibly negative consequences to a finding of exclusive arbitral jurisdiction. These included concerns of access to justice—for example, the Union participated in negotiating the collective agreement containing the discriminatory term. According to the Court, the Union may therefore not have an interest in pursuing a grievance against the impugned

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[50] *Ibid.* at paras. 23–25.

[51] See Peter A. Gall, Andrea L. Zwack & Kate Bayne, "Determining Human Rights Issues in the Unionized Workplace: The Case for Exclusive Arbitral Jurisdiction" (2005) 12 C.L.E.L.J. 381 at 388–89:

> The impact of *Morin* may be restricted, however, by the fact that the Court characterized the dispute before it as one involving pre-contract negotiations rather than contract interpretation or application, as had been the case in *Weber*. On this basis, the Court held that the dispute did not fall within the exclusive jurisdiction of a labour arbitrator. Most cases arising in a unionized workplace, including most cases involving human rights issues, involve questions of collective agreement interpretation or application, not contract formation or negotiation.

provision, and the employees "would be left with no legal recourse".[52] Further, the Court raised concerns that the arbitrator would not have jurisdiction over all parties to the dispute, as negotiations were not restricted to the unions and school boards. Finally, the majority considered the Human Rights Tribunal a "better fit" for the dispute, as the resolution of the dispute had implications for all employees and was not restricted to the more typical single grievance contemplated under the labour statutes.[53]

Morin was not a unanimous decision of the Supreme Court of Canada, however (Bastarache J. dissented, primarily on the basis of the characterization of the dispute, which the Justice considered to be within the scope of the collective agreement), and, further, in the companion decision, *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*,[54] the Court was particularly split: Justices Binnie and Fish and Bastarache and Arbour wrote two concurring judgments, while Chief Justice McLachlin voiced a dissent, supported by Iacobucci and Major JJ.

In *Quebec AG*, the competition was between the Human Rights Tribunal and the Quebec *Commission des affaires sociales*. According to Justice Bastarache (supported by Arbour J.), an application of the *Weber/Morin* principle indicated that exclusive jurisdiction should lie with the *Commission* in that instance:

> [T]he key issue in each case is whether the essential character of the dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In the case at bar, the legislature explicitly provided that the [*Commission des affaires sociales*] has exclusive jurisdiction to hear disputes involving the payment of benefits under the *Income Security Act*.[55]

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[52] *Morin*, *supra* note 44 at para. 28.

[53] This concern does not address the privity to some decisions, particularly those that argue that the term of the applicable collective agreement or employer application thereof violates the *Human Rights Code*, that may arise among employees bound by a collective agreement. Neither does it address the situation of policy grievances which necessarily implicate all employees in a bargaining unit.

[54] 2004 SCC 40, [2004] 2 S.C.R. 223, 240 D.L.R. (4th) 609 [*Quebec AG*].

[55] *Ibid.* at para. 31.

Furthermore, in contrast to the Chief Justice's decision in *Morin*, Mr. Justice Bastarache held that the fact that the issue in *Quebec AG* might apply to more than one person (the claimant argued that the provisions of the *Commission*'s supporting legislation were discriminatory) should not "have any bearing on the dispute's essential character."[56]

> Jurisdictional issues must be decided in accordance with the legislative scheme governing the parties. In the case at bar, the Quebec legislature did not give the Tribunal exclusive jurisdiction to decide human rights issues. The legislature's intention to give the CAS exclusive jurisdiction is, however, explicit. I am therefore of the opinion that where there is a comprehensive administrative scheme, such as the one established by the *CAS Act* and the *Income Security Act*, that gives a specialized administrative body and that body alone the jurisdiction to apply and interpret that scheme, this administrative body will not lose its exclusive jurisdiction simply because a case raises a human rights issue or involves declaring a legislative provision to be of no force or effect.[57]

Like Mr. Justice Bastarache, Binnie J. (supported by Fish J.) also found that the *Commission* had exclusive jurisdiction in the circumstances. Also similarly, Mr. Justice Binnie held that an evaluation of the "essential nature" of a dispute could not trump "a clear legislative direction"[58] that a particular statutory body was to have exclusive jurisdiction. "To hold otherwise, with respect, is simply to substitute the Court's procedural review preference for that laid down by the legislature."[59] That said, he nevertheless did characterize the dispute as falling squarely within the confines of the *Commission*'s scheme in the circumstances.

To summarize, in the decisions of *Morin* and *Quebec AG*, the Supreme Court of Canada manipulated the *Weber* principle somewhat in circumstances where the jurisdictional competition was between two statutorily created schemes, rather than between one of those schemes and the courts. In

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[56] *Ibid.* at para. 32.

[57] *Ibid.* at para. 33.

[58] *Ibid.* at para. 35.

[59] *Ibid.*

the former situation, deference to legislative intention or public policy, as a means towards ousting the jurisdiction of the courts, is ostensibly sidelined in favour of a comparison of the apparent legislative intent behind each statutory scheme, and according to *Quebec AG*, to a lesser extent, how the essential character of the dispute fits within one or both of the competing schemes.

What all this means then, is that where the jurisdictional competition is between a human rights tribunal and labour arbitrator, many of the policy arguments that could be made—in *Weber* fashion—in favour of arbitral exclusivity may have little purchase. That this is likely the case is illustrated by the appellate decisions discussed below.

III. APPELLATE DECISIONS SINCE *WEBER* AND *MORIN*

Despite its fairly unequivocal comments in *WCB*,[60] the British Columbia Court of Appeal has not yet expressly considered whether a labour arbitrator can or should have a type of *de facto* exclusive jurisdiction over a human rights claim in certain circumstances. However, the appellate courts of many other Canadian provinces have had an opportunity to rule on this issue. And, almost without exception, these other appellate courts have found that human rights tribunals and labour arbitrators share concurrent jurisdiction with respect to human rights claims. Moreover, as will be seen, the policies in favour of the inexpensive, speedy and efficient resolution of labour disputes, which were so strongly supported in the pre-*Morin* decisions of the Supreme Court of Canada, have apparently been subordinated to the polices supporting human rights legislation and administration.

A. ONTARIO

In 2001, Abella J.A. (as she then was), writing for the Ontario Court of Appeal, determined in *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)*[61] that the Ontario Human Rights Tribunal held concurrent

[60] *Supra* note 11.

[61] (2001), 209 D.L.R. (4th) 465, 158 O.A.C. 380 [*Ford* cited to D.L.R.].

jurisdiction with labour arbitrators over workplace human rights claims. In this decision, the employee grieved his termination by Ford, arguing that he was discharged because of racial discrimination. The matter ultimately went to arbitration in 1986, and the arbitrator found that the termination of employment was justified. The employee had also filed a complaint with the Ontario Human Rights Commission, and by 1993, a Board of Inquiry was appointed, where the opposite conclusion was reached; the Board found the termination was *not* justified, and ordered the employee's reinstatement. It was that particular remedy that was contested in the courts.

In the course of rendering its decision overturning the reinstatement, Abella J. applied *Weber* (*Ford* was decided three years prior to *Morin*) but noted that that decision was not particularly helpful in the circumstances of the *Ford* case—i.e. where the courts were not competing for jurisdiction over the matter.[62] Furthermore, and perhaps foreshadowing the later decisions in *Morin* and *Quebec AG*, the Court noted that determining jurisdiction between competing statutory bodies involved not only a consideration of the essential nature of the dispute, but also a consideration of "where the legislature intended that it be resolved."[63] After engaging in a review of both the applicable legislation and the policies behind it, the Court held that the Ontario Human Rights Tribunal and labour arbitrators shared jurisdiction under their respective statutory schemes.

Underlying much of this decision was Abella J.'s acknowledgement that human rights legislation holds a special status under Canadian law, and has a *quasi*-constitutional nature. Madam Justice Abella also noted similar concerns to those expressed by McLachlin C.J. in *Morin*—for example, she considered that individuals do not have party status in arbitration under a collective agreement, and do not have control over whether a grievance will be pursued. In sum, the Court's understanding of human rights law and policy, coupled with an assessment that both legislative schemes contemplated non-exclusive jurisdiction, led to the determination of concurrent jurisdiction in

[62] See *ibid.* at para. 58: "*Weber* is of limited assistance in determining which forum prevails, other than providing conceptual guidance that, to the extent possible, disputes should be resolved in a single proceeding."

[63] *Ibid.* at para. 46.

the circumstances. However, as the Court ultimately found that the Board's reinstatement of the employee was inappropriate, it expressly declined to address this issue of the possibility of conflicting results arising out of this concurrent jurisdiction.

B. ALBERTA

In 2007, the Alberta Court of Appeal released two decisions indicating that, like Ontario, the Alberta Human Rights Tribunal and Alberta labour arbitrators share concurrent jurisdiction over human rights issues arising out of the workplace.

In *Amalgamated Transit Union, Local 583 v. Calgary (City)*,[64] the Court held that the decisions of the Supreme Court of Canada directed it to consider, "first, the relevant legislation conferring jurisdiction on the competing tribunals; and second, the nature of the dispute, taken in its full factual context."[65] Further, the Court drew a clear distinction between those cases of competing jurisdiction between courts and tribunals, and those of competing jurisdiction between statutory bodies:

> [I]t 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.[66]

Furthermore, the Court offered the following guidance where the decision is between competing statutory tribunals:

> Where there are two or more legislative schemes creating two or more tribunals that could potentially govern the dispute, the court must consider to which of the governing regimes the legislature intended to grant jurisdiction.

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64 2007 ABCA 121, 404 A.R. 102, 281 D.L.R. (4th) 222 [*Amalgamated*].

65 *Ibid.* at para. 2.

66 *Ibid.* at para. 23.

> One does not start from the premise that the arbitrator is the preferred forum. ...
>
> In *Morin*, which, like the case before us, concerned a choice between the jurisdiction of a labour arbitrator and a human rights tribunal, McLachlin C.J.C. made it clear that exclusive jurisdiction is not the invariable rule. ...
>
> [S]he expressly rejected the idea that there is an "established principle" of arbitral exclusivity, noting that "there is no legal presumption of exclusivity". Rather, the relevant legislative schemes must be examined and applied to the dispute at issue to determine which of the three jurisdictional models outlined above was intended by the legislature to apply.[67]

Applying the above principles in this case, the Court examined both the Alberta *Labour Relations Code*[68] and the *Human Rights, Citizenship and Multiculturalism Act*,[69] and determined that neither statute contained a clear exclusivity clause.

Further, Madam Justice Paperny, writing for the majority, noted that the Alberta labour statute was "weaker" than the Ontario and Quebec statutes examined by the Supreme Court of Canada in *Weber* and *Morin*, respectively, which further indicated that exclusivity was not intended. The relevant portion of the Alberta statute reads:

> 135. Every collective agreement shall contain a method for the settlement of differences arising
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> > (a) as to the interpretation, application or operation of the collective agreement,
> >
> > (b) with respect to a contravention or alleged contravention of the collective agreement, and
> >
> > (c) as to whether a difference referred to in clause (a) or (b) can be the subject of arbitration

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[67] *Ibid.* at paras. 32, 38–39 [citations omitted].

[68] R.S.A. 2000, c. L-1.

[69] R.S.A. 1996, c. H-14.

between the parties to or persons bound by the collective agreement.[70]

The Court held that "clearer and more explicit language would be needed to oust the jurisdiction of the Commission over all human rights issues that arise in a unionized workplace."[71]

Moreover, when examining the human rights statute, the Court referred to the policies underlying such law, and further, the place human rights legislation has in the Canadian legal scheme:

> The Supreme Court has recently stated that it is essential to recognize that human rights codes are not only fundamental, *quasi*-constitutional law, but also that, like the *Canadian Charter of Rights and Freedoms*, they are the "law of the people". As such, they must be given expansive meaning and offered accessible application.[72]

These policies behind human rights legislation clearly informed the Court's decision in this instance. However, the wording of this statute itself also appeared to support the finding of concurrent jurisdiction:

> [U]nlike the Quebec legislation at issue in *Morin*, the Alberta *Human Rights Act* does not contain a deferral clause that would allow the Commission to stop acting on behalf of a complainant in the circumstances where the complainant has sought a remedy elsewhere. I agree with the chambers judge that the legislative scheme suggests that the Commission has jurisdiction over human rights complaints arising in the workplace, and retains jurisdiction even when the complainant's union has filed a grievance arising out of the same set of facts. ...
>
> The wording of the exclusivity clause in the Alberta *Labour Relations Code*, the clear legislative intent that all persons should have access to the complaints procedure under the *Human Rights Act*, and the lack of a deferral clause in that *Act*, all lead to the conclusion that it was not the intent of the Alberta legislature that either labour arbitration boards or the Commission

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70 *Labour Relations Code*, *supra* note 68, s. 135, cited in *Amalgamated*, *supra* note 64 at para. 55.

71 *Amalgamated*, *ibid.* at para. 57.

72 *Ibid.* at para. 59.

should have jurisdiction over all human rights issues that arise in the unionized workplace to the exclusion of the other tribunal.[73]

Finally, in proceeding to step two of the *Weber/Morin* analysis, the Court looked at the nature of the dispute and held that it also did not lend itself to the exclusive jurisdiction model. Primarily, the Court focused on the way the grievance was framed by the union. In this case, the employee was terminated following a number of outbursts against her superiors. The union grieved the termination based on insufficient warning and lack of notice prior to termination, and did not pursue the employee's allegations of discrimination (which was, incidentally, prohibited by the collective agreement). Shortly after the union filed the grievance, the employee filed a complaint with the Alberta Human Rights Commission, claiming discrimination on the grounds of gender, sexual orientation and mental disability. At arbitration, the employer asked the arbitrator to deal with both the termination and discrimination issues, and the arbitration board determined that as "the employee's allegations of discrimination ... could not be meaningfully nor conveniently separated from the termination of her employment"[74] it accordingly had exclusive jurisdiction to consider the matter.

However, the Court of Appeal considered that the arbitration board was in error in its taking of *exclusive* jurisdiction in the circumstances. Noting that the Union did not pursue the human rights aspect to the employee's complaints (i.e. it did not present arguments on the matter, and focused only on the issues of just cause and lack of notice), the Court held that arbitral exclusive jurisdiction was not appropriate because it would "effectively leave the unionized employee without a forum in which to air her discrimination allegations."[75] Essentially, the Court's concern was that in the grievance context, it was the union, and not the employee, who decided what would, and would not, be argued.

In *Amalgamated*, the employee had apparently agreed to the union's approach in the circumstances, and further, the union's motivations for omit-

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[73] *Ibid.* at paras. 60–61.

[74] *Ibid.* at para. 10.

[75] *Ibid.* at para. 67.

ting the discrimination complaint were unknown. Nevertheless, the Court held that the union's right (subject to its duty to the employee) not to take a particular grievance forward "does not remove the employee's right to access the human rights regime, unless the legislature clearly states otherwise."[76] Ultimately, the Court held that while the source of the dispute in question was the workplace, its essential character did not fall within the scope of the "interpretation, application or operation of the collective agreement".[77] And, regardless, the legislature did not intend that *only* the dispute-resolution mechanisms provided for in that agreement were to rule.

As for concerns of inconsistent decisions by the competing statutory bodies, the Court quickly dismissed them, citing *res judicata* and issue estoppel as safeguards, and stating that "[a]s a practical matter, only matters not fully addressed by the arbitration board are likely to proceed before the Commission."[78]

This analysis of the pitfalls of concurrent jurisdiction is not entirely satisfactory. As will be discussed, the decisions of many human rights tribunals indicate that *res judicata* and issue estoppel are not necessarily the safeguards Madam Justice Paperny would have them be. Furthermore, at least federally and in British Columbia, matters that have been fully decided by labour arbitrators are still pursued to human rights tribunals, which then often hear the issues and, on occasion, make determinations that are inconsistent with the previous arbitration.[79] While the superior courts have overturned some of these inconsistent decisions,[80] the fact remains that the availability of this entire process of multiple hearings on the same issue very much undermines

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76 *Ibid.* at para. 68.

77 *Ibid.* at para. 63–65.

78 *Ibid.* at para. 69. With respect, as regards this last comment, the Court perhaps underestimated the utilization of tribunal processes by unionized employees. See also *WCB*, in which the B.C. Court of Appeal cited the B.C. Human Rights Tribunal's discretion to decline to exercise its jurisdiction where a matter had been dealt with by another statutory body, and, in particular, noted that "not every unsuccessful complainant will be given a second opportunity by the Tribunal" (*WCB*, *supra* note 11 at para. 31).

79 See e.g. *MacRae*, *infra* note 127. See also the Ontario decision of *Parisien*, *infra* note 123.

80 See e.g. *Matuszewski*, *infra* note 138.

the purpose of labour legislation in the first place: the speedy, inexpensive and efficient resolution of workplace disputes with minimum work stoppage. It appears then, that although neither arbitration boards nor human rights tribunals are to have exclusive jurisdiction over human rights claims arising out of the workplace, in Alberta (and arguably elsewhere) the policy underpinnings of one statutory regime clearly trump those of the other. As stated by the Court in *Amalgamated*, "until the legislature says otherwise, efficiency alone is not a reason to restrict access to the human rights complaints process."[81]

In the companion decision of *Calgary Health Region v. Alberta (Human Rights and Citizenship Commission)*[82] Paperny J.A. once again delivered a judgment stating that labour arbitrators and human rights tribunals generally shared concurrent jurisdiction in that province. However, unlike the decision in *Amalgamated*, in *Health Region*, the Alberta Court of Appeal determined that *in the particular circumstances of that case*, the arbitration board should hear the entire grievance—including allegations of discrimination. That said, the Court was clear that the arbitrator's ability to address the human rights issues arose out of a concurrent, not an exclusive jurisdiction *vis-à-vis* the human rights tribunal.

In *Health Region*, the Court addressed a situation where an employee was terminated during her probationary period. The union grieved the termination, alleging, *inter alia*, that the employer had breached a number of provisions in the collective agreement, including the provision prohibiting discrimination on grounds including physical and mental disability. Ten days after the grievance was filed, the employee filed a complaint with the Alberta Human Rights Commission, alleging discrimination on the basis of physical and mental disability.

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81 *Amalgamated, supra* note 64 at para. 69. Note that in a concurring judgment, Ritter J.A. noted that while the parallel process allowed by this decision are awkward and more costly, parallel proceedings are the only possibility in light of the legislation and jurisprudence to date. However, the Justice did note that "[t]his may be an issue the legislature will want to address" (*ibid.* at para. 81).

82 2007 ABCA 120, 404 A.R. 201, 281 D.L.R. (4th) 252, leave to appeal to S.C.C. refused, 2007 CanLII 45671 [*Health Region*].

When the grievance proceeded to arbitration, the arbitration board determined that while it shared concurrent jurisdiction over the human rights issues with the applicable statutory body, in the circumstances, it was best equipped to deal with the matter and would do so. This taking of jurisdiction was reviewed, and further appealed. Upon review of the chambers decision to allocate *exclusive* jurisdiction of the matter to the arbitration board, the Court of Appeal had the following to say:

> Where the choice of forum is between arbitration and the courts, the jurisprudence directs that we should guard against undermining the purpose of the legislature in enacting labour relations legislation. ...
>
> When the choice of forum is between two competing statutory regimes, the intent of the legislature remains the paramount consideration. However, in such situations there are two, not one, legislative mandates that must be respected. Even if it may be said that the exclusivity of arbitrators' jurisdiction is an overriding principle in jurisdictional contests with the courts ..., it is not the overriding principle when the jurisdiction of another statutory tribunal is also at issue.[83]

These comments make clear the reasoning behind the ratio in *Amalgamated*. In this companion case, the application of step one of the two-part *Morin* test unsurprisingly resulted in the same finding of concurrent jurisdiction. As for step two, an analysis of the nature of the dispute, in disagreement with the chambers judge, the Court of Appeal stated that an analysis of "best fit" *cannot* lead to a finding of *exclusive* jurisdiction:

> The intent to grant exclusive jurisdiction must be found in the legislation. The interplay of the two legislative schemes at issue here indicates that neither body was intended to have exclusive jurisdiction over all human rights issues that arise in a unionized workplace environment. As was confirmed in *Morin*, there is no presumption of arbitral exclusivity in the absence of a clear indication from the legislature. The grievance and the human rights complaint are within the respective mandates of the arbitration board and the Commission. There is nothing in the nature of this dispute that would re-

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[83] *Ibid.* at paras. 24–25.

> move it from the jurisdiction of one of those tribunals and place it exclusively within the jurisdiction of the other. This is case of concurrent jurisdiction.[84]

All this said, however, the Court did allow a type of *de facto* exclusivity in the circumstances. While being careful to stick to its concurrent jurisdiction mantra, the Court stated that the arbitration board should hear the entire grievance, including the human rights claims. Particularly, the Court noted that unlike the situation in *Amalgamated*, the employee's human rights issues were being pursued by the union and, accordingly, there were no concerns that the employee would be without redress.[85] Furthermore, and of note considering its comments in *Amalgamated*, the Court stated that:

> Although the provisions of the *Labour Relations Code* that establish the grievance procedure do not clearly grant the arbitration board jurisdiction to the exclusion of the Commission, they do indicate a legislative preference to have arbitrators hear employer-union disputes in the interest of expeditious resolution of workplace differences. Permitting the arbitration board to address all issues arising from the termination of employment advances the purposes of labour relations legislation, including promoting the prompt, final and binding resolution of disputes with minimal disruption to the employer-employee relationship.[86]

This statement was not necessarily an endorsement of arbitral exclusivity. However, it does indicate the dynamic nature of the balancing exercise where competing policies are involved. In *Amalgamated*, human rights policy clearly trumped that of labour relations where there was a concern that the employee's human rights complaints might not be heard in the arbitration forum. However, in *Health Region*, the same Court of Appeal, while not backing off from its decision in *Amalgamated*, ostensibly gave more weight to labour policy where the access to justice issues were not the same.

In sum however, regardless of the path to the decision, like Ontario, the Alberta courts have applied the *Weber/Morin* principles with the result that

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[84] *Ibid.* at para. 37.

[85] As arbitrators have jurisdiction to adjudicate and remedy human rights claims according to *Parry Sound*, *supra* note 13.

[86] *Health Region*, *supra* note 82 at para. 38.

labour arbitrators and human rights tribunals share jurisdiction over human rights claims arising out of the workplace in that province.

C. NOVA SCOTIA

The Nova Scotia Court of Appeal has also had opportunity to consider the interplay between human rights and labour arbitration legislation. In *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*[87] the Court dealt with a situation where an employee's co-worker had used a number of racial slurs, workers told racial jokes to supervisors who laughed, and where there were allegations that promotions were only given to non-minorities. The employee made a complaint to the Nova Scotia Human Rights Commission. The employer opposed the Commission's jurisdiction, and claimed that the matter should be dealt with through the grievance and arbitration provisions of the collective agreement. No grievance was ever initiated, and the matter ultimately went to the courts where the chambers judge determined that the Commission and labour arbitrators held concurrent jurisdiction over the matter, and that accordingly, the former could proceed to adjudicate the complaint.

Upon appeal, Saunders J.A., writing for the Court of Appeal, undertook an analysis similar to those discussed in Ontario and Alberta, above. However, unlike the courts in those cases, this Nova Scotia court acknowledged that the jurisdictional allocation between human rights tribunals/commissions and arbitrators is far from conclusively settled, and that it has "stirred considerable academic commentary and debate."[88] That said, the Court still applied the two-part *Morin* test: What does the relevant legislation say about jurisdiction? And, does the nature of the dispute suggest that it falls exclusively to one statutory body or the other?

The Nova Scotia *Trade Union Act*[89] states that every collective agreement should have provision for resolution of disputes by arbitration "concerning

87 2008 NSCA 21, 264 N.S.R. (2d) 61, 290 D.L.R. (4th) 577 [*Halifax*].

88 *Ibid.* at para. 20.

89 R.S.N.S. 1989, c. 475.

its meaning or violation."[90] Further, in the absence of such a provision, the statute implies a term requiring arbitration of differences "relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitral, or where an allegation is made that this agreement has been violated ... ."[91] The Court further found that the Nova Scotia *Human Rights Act*[92] was broad in scope, and did not explicitly defer to other tribunals. Looking at each of the statutes, the Court of Appeal determined that neither evinced a clear intention on the part of the legislature to grant exclusive jurisdiction to one or the other.

With respect to step two of the *Morin* test, the Court distilled previous jurisprudence into the following statement:

> Jurisdictional issues are to be decided in a manner that is consistent with the statutory schemes governing the parties, and that deciding whether the "essential character of a dispute, in its factual context" arises either expressly or inferentially from a statutory scheme, requires "a liberal interpretation of the legislation" in order to ensure that the legislative scheme is not offended by conferring jurisdiction upon a forum not intended by the legislature.[93]

And, upon consideration of the essential character of the dispute in this case, the Court held that while the incidents of discrimination arose out of the workplace, the nature of the dispute raised issues that were much broader than those contemplated by the collective agreement:

> All of the incidents and discriminatory treatment complained of by [the employee] occurred, he says, because he is an African-Canadian. The dispute he identifies does not arise explicitly or implicitly from the interpretation, application or administration of the Collective Agreement.[94]

The result, then, was that the decision of the chambers judge was affirmed, and the bodies shared concurrent jurisdiction in the circumstances.

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[90] *Ibid.*, s. 42(1).

[91] *Ibid.*, s. 42(2).

[92] R.S.N.S. 1989, c. 214.

[93] *Halifax*, *supra* note 87 at para. 48.

[94] *Ibid.* at para. 52.

In the course of its discussion, this court appears to have failed to acknowledge the provision in the Nova Scotia labour statute that gave arbitrators jurisdiction to hear matters pertaining to *violations* of the collective agreement. Additionally, this apparent failure extended to a lack of attention to the provision in the collective agreement *prohibiting discrimination*. If the employee in that case was discriminated against in the workplace, such acts should have fallen within the ambit of the provision of the collective agreement prohibiting discrimination. Arguably then, a complaint of workplace discrimination amounts to a complaint that the collective agreement is violated. The Court's comments above do not address this, and it is not clear why it referenced "interpretation, application or administration" of the collective agreement, but not the "violation" also referred to in the Nova Scotia *Trade Union Act*.

Regardless, even if the essence of the dispute could be characterized to fall within the ambit of the collective agreement, the Court of Appeal cited further policy reasons militating against arbitral exclusivity. Primarily, the Court held that to allow labour arbitrators exclusive jurisdiction over human rights claims arising in the workplace would undermine the *quasi*-constitutional status accorded to human rights legislation in Canada. Similar to the decisions previously discussed, Saunders J.A. discussed the importance of human rights legislation and of access to its remedial processes, and held that access to such "fundamental law" cannot be restricted save for by clear unequivocal legislative expression.[95] Note also that the Court clearly dismissed the employer's concerns regarding inconsistency and expediency:

> [The employer] has also raised concerns about potential inconsistent decisions, or expediency, or better use of resources as favouring exclusive arbitral jurisdiction. I do not see those concerns as forming part of the two step analysis in *Morin*.[96]

The Nova Scotia Court of Appeal's comments track those of both the courts and (as will be discussed below) human rights tribunals grappling with the jurisdictional tug between labour arbitrators and human rights tribunals.

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95 See *ibid.* at paras. 60–64.

96 *Ibid.* at para. 77.

However, and particularly with respect to the Courts' comments regarding access to fundamental law, these arguments against exclusive arbitral jurisdiction fail to acknowledge those comments of the Supreme Court of Canada which suggest that arbitrators are equipped to deal with the legal and policy issues flowing from the application of human rights statutes. As will be discussed later in this paper, not only were arbitrators declared to have the power and responsibility to apply *quasi*-constitutional statutes such as human rights legislation by the Supreme Court of Canada in *Parry Sound*, as early as *Weber* the Supreme Court held that the broad policy concerns raised by *Charter*[97] issues are a component of the labour dispute and cannot preclude a labour arbitrator from deciding all the facets thereof. Thus, like its counterparts elsewhere, the Nova Scotia Court of Appeal's treatment of the pitfalls or concerns that may be associated with exclusive arbitral jurisdiction is not entirely satisfactory.

D. BRITISH COLUMBIA

Unlike the courts discussed above, the British Columbia Court of Appeal has not yet directly considered the competing jurisdiction between the British Columbia Human Rights Tribunal and labour arbitrators where concurrent claims are brought to both statutory bodies.

That said, as discussed in the introduction to this paper, the British Columbia Court of Appeal did indicate in *Canpar* that it considers labour arbitrators and the Human Rights Tribunal to share concurrent jurisdiction generally. And further, in *WCB*, the Court of Appeal went so far as to say that "it is clear ... that the Legislature has conferred on the Tribunal jurisdiction to adjudicate a human rights complaint even though the same issue is being raised before, or has been dealt with by, another body."[98] This understanding was ostensibly based on both an analysis of the discussion related to the post-*Weber* amendments to the *Human Rights Code*—primarily, the discretion granted to the Tribunal pursuant to sections 25 and 27 of the *Human Rights*

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

[98] *WCB*, *supra* note 11 at para. 29.

Code to defer or dismiss a claim where it has already been dealt with in another forum (and in *Canpar*, a ruling that the decision in *Parry Sound*[99] applied to British Columbia). However, in *Canpar* the Court expressly refrained from determining which statutory body should have jurisdiction where claims are concurrently brought to both the Tribunal and a labour arbitrator—the focus of this paper.[100] And, although in *WCB* the Court of Appeal clearly felt that concurrent jurisdiction must mean jurisdiction in any event (which would seem to foreclose the possibility of any sort of exclusive arbitral jurisdiction), the comments of Madam Justice Newbury in *Canpar*, as they relate to the jurisdictional tug between the Tribunal and Labour arbitrators remain relevant:

> How then is the matter of initial jurisdiction to be decided in individual cases? Again, it seems to me that the arbitral jurisprudence has gone a long way towards answering that question: the essential nature of the dispute as it arises on the facts of each particular case must be determined. To adapt the words of Bastarache J. for the Court in [*Regina*] at para. 39, "[t]he key question in each case is whether the essential character of the dispute, in its factual context, arises either expressly or inferentially, [from the human rights scheme or from the labour arbitration scheme]". To this question, the remedy sought will obviously be important: certain remedies lie within the particular purview of a labour arbitrator, and others within that of the Tribunal. Generally, the complainant or grievor will chose one route or the other based on his or her objective and the nature of the case, although a complainant cannot, simply by choosing to pursue his or her grievance in the labour arbitration field, give jurisdiction to an arbitrator that he or she would not otherwise have.[101]

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[99] *Supra* note 13.

[100] See *Canpar*, *supra* note 6 at para. 55.

[101] *Ibid*. at para. 54 [emphasis added].

The question is, do these final comments of Newbury J. (as emphasized above) have equal application to human rights tribunals? Arguably, under the *Weber/Morin* analysis, they do.[102]

While, outside of *Canpar*, the British Columbia Court of Appeal has not directed its express attention directly to the matter of concurrent claims to arbitrators and the Tribunal, the Court has had occasion to consider *Weber* and the principles articulated by the Supreme Court of Canada in other contexts.

For example, in *British Colubmbia Teachers' Federation v. British Columbia Public School Employers' Assn.*,[103] the Court of Appeal considered an application by a union appealing the decision of an arbitrator that he lacked jurisdiction to hear a grievance alleging that certain provisions of collective agreements in the province breached a number of provincial statutes.

In assessing the jurisdictional question, the Court discussed the *Weber* principle, namely, the direction that the Courts must take a flexible and contextual approach towards the determination of the essential nature of the dispute to see whether it falls within the ambit of the collective agreement, and therefore arbitral jurisdiction. Upon analysis of the particular circumstances of that case, the Court determined that breach of the class size provisions of the *School Act* and regulations could be viewed as an "improper application of the management rights clauses in the collective agreement"[104] and that "such a violation is closely connected in a contextual way to the interpretation, operation and application of the collective agreement and directly affects it".[105] Accordingly, the arbitrator, and not the court, was found to have jurisdiction to deal with the complaint in this instance.

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[102] See *Health Region*, *supra* note 82 at para. 25:

> When the choice of forum is between two competing statutory regimes, the intent of the legislature remains the paramount consideration. However, in such situations there are two, not one, legislative mandates that must be respected ... .

[103] 2005 BCCA 92, 251 D.L.R. (4th) 497, 209 B.C.A.C. 120 [*Teachers' Federation*].

[104] *Ibid.* at para. 37.

[105] *Ibid.*

In the course of coming to this decision, the Court discussed the Supreme Court of Canada decision in *Parry Sound*. Namely, the Court discussed the varying views on whether *Parry Sound* resulted in the incorporation of human rights legislation *into* collective agreements—something which may impact arguments regarding arbitral jurisdiction in that realm. Lambert J.A. did acknowledge that much of the controversy surrounding this part of *Parry Sound* centred largely around semantics—what "implied" and "incorporate", did, or did not, mean, for example—and did not come to a firm conclusion (unlike the Court in *Macaraeg*, as will be discussed) as to what the Supreme Court intended in that case. However, Mr. Justice Lambert did apparently appreciate that the substance of the decision in *Parry Sound* was to give labour arbitrators the power to apply and interpret human rights legislation, but did not discuss, in *obiter* or otherwise, whether that power implied any sort of "case by case" exclusive jurisdiction to do so.

In the 2007 decision of *Ferreira v. Richmond (City)*,[106] the Court of Appeal again had opportunity to discuss and apply the *Weber* criteria. In this case the jurisdictional contest was between a labour arbitrator and the court. The employee alleged that after he had disclosed a number of improper practices occurring at his workplace, he was subject to retaliation in the form of harassment that on occasion had discriminatory overtones. The collective agreement to which the employee was subject did not specifically prohibit harassment other than sexual harassment. However, the employer did have a general "anti-harassment policy" that provided a procedure for the voicing of concerns.

The employee sued the employer in court for the retaliation, arguing that the collective agreement did not apply because it did not comprehend his position as a "whistleblower." The chambers judge agreed, holding that as the anti-harassment policy was not incorporated into the collective agreement, and it was therefore outside of the jurisdiction of an arbitrator in the circumstances.

The Court of Appeal disagreed. Applying *Weber*, it stated that the focus was not on the legal framing, but on the factual characterization. And, find-

[106] 2007 BCCA 131, 280 D.L.R. (4th) 330, 238 B.C.A.C. 64 [*Ferreira*].

ing that "at a basic level, [the] dispute is about how [the employee] has been treated at work and, in turn how this treatment has escalated to claims of tortious and perhaps criminal behaviour" the Court found that, *vis-à-vis* the courts, an arbitrator had exclusive jurisdiction in the circumstances.

Important to this paper's discussion of the competition between arbitrators and human rights tribunals, the Court also noted that the fact that the employee's claims arose out of "whistle blowing"—a matter of some public interest—did not change the character of the dispute or militate in favour of the courts as a forum:

> This public character, however, does not remove whistle blowing from the factual matrix of the employee-employer relationship. ... [I]n spite of the important concerns his whistle blowing claim raises, the nature of [the employee's] dispute still falls within the employment relationship.[107]

This discussion may have implications where a British Columbian court is presented with many of the public interest arguments associated with human rights claims discussed above.[108]

Furthermore, and most importantly, the Court commented to some extent on the difficulties inherent to jurisdictional overlap. This case did not revolve around a competition between arbitrators and human rights tribunals—the question was whether the issues were within the jurisdiction of the courts. However, it was clear that the employee had also made a claim to the British Columbia Human Rights Tribunal. Ryan J.A. stated:

> [T]he alleged harassment of Mr. Ferreira at the workplace, if proved, would constitute a human rights violation. ... [I]t is common ground that *Parry Sound* has made it clear that human rights legislation is inferentially incorporated into every collective agreement in this Province. This is particularly true where, as with the *Human Rights Code*, the norm is compatible and supplements fundamental legislative protections. ...
>
> [I]t does not matter that every instance of abuse did not include a reference to Mr. Ferreira's ethnicity or sexuality, since such statements were part and

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107 *Ibid.* at paras. 59, 62.

108 That said, human rights law still brings to the fore *quasi*-constitutional concerns that are admittedly absent in whistleblower cases.

> parcel of the whole of the harassment. All of the conduct directed toward Mr. Ferreira could be dealt with as a human rights violation and cannot be parsed in the manner suggested by the Chambers judge. To parse the conduct in this manner might have the effect of striking at the heart of the exclusive arbitration by permitting concurrent or overlapping fields of jurisdiction between courts, the human rights commission and arbitrators when the dispute, fundamentally, arises out of a similar transaction.[109]

Granted, the Court was not adjudicating on the jurisdictional tension between arbitrators and human rights tribunals. Further, it made no comment on the appropriateness of the employee's complaint to the British Columbia Human Rights Tribunal in the circumstances. However, the comments cited above could be used to bolster an argument in favour of exclusive arbitral jurisdiction over some human rights claims in the workplace in British Columbia.

Another decision that might have bearing on the question of whether arbitrators can have exclusive jurisdiction over some human rights claims arising out of the British Columbian workplace is *Macaraeg*, briefly mentioned at the beginning of this paper. This decision of the Court of Appeal was not concerned with either human rights legislation or the role of labour arbitrators. However, it did discuss legislative intention and clearly favoured the utilization of statutorily created bodies.

In *Macaraeg*, the Court determined that in the non-union context, employees could not enforce their rights under the *Employment Standards Act* outside of the mechanisms created by that Act. That is, the statute provided for a comprehensive scheme of redress, accordingly, such rights could not be enforced in the courts. It is not yet certain what impact this might have on the arbitrator versus tribunal question, if any. However, the Court of Appeal's willingness to reserve the enforcement of employment standards rights to the purview of the applicable statutory body *may* indicate willingness in some situations to restrict human rights issues arising out of the workplace to the forum specified by the labour statutes: arbitrators. Furthermore, the Court's comments in *Ferreira*, as discussed, may also support such a view.

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109 *Ferreira*, *supra* note 106 at paras. 67, 69 [citations omitted].

All this said, the Court of Appeal has not yet expressly decided on the issue. Although recent decisions of both the British Columbia Supreme Court and Court of Appeal considered the Human Rights Tribunal's jurisdiction to be concurrent,[110] neither of these decisions engaged in a discussion of any of the principles discussed in this paper. This could be because both proceedings were complete by the time the matter reached the Court in the case of *Matuszewski*, or merely because of the statements regarding concurrency in *Canpar*.[111] Regardless, in *WCB*, the Court of Appeal was fairly unequivocal in its discussion of the jurisdiction of the British Columbia Human Rights Tribunal:

> Having regard to these provisions, it is clear to me that the Legislature has conferred on the Tribunal jurisdiction to adjudicate a human rights complaint even though the same issue is being raised before, or has been dealt with by, another body. For example, if a complaint is filed with both the Tribunal and another body then, by virtue of s. 25(2), the Tribunal has the discretion to defer dealing with it until the outcome of the other proceeding is known. Such a deferral amounts to no more than a voluntary suspension of the Tribunal's jurisdiction. Once the other body has dealt with the matter, the Tribunal has the authority, by virtue of s. 27(1)(f), to either exercise or not exercise its jurisdiction. Whether the Tribunal proceeds in any given case is a matter within its discretion. In other words, the legislative scheme specifically recognizes that the Tribunal can adjudicate a complaint notwithstanding that another body has already dealt with the substance of the same matter. There is no automatic loss of jurisdiction.[112]

At first glance, this decision may appear to sound the death knell for any form of arbitral exclusive jurisdiction over human rights claims in the province. However, *WCB* was decided in the context of the competing jurisdiction of the Human Rights Tribunal and the Workers' Compensation Board

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[110] See e.g. *Matuszewski, infra* note 138. See also *WCB, supra* note 11.

[111] Although in *Matuszewski* this could be because of the circumstances of that case: the arbitration decision had already been handed down, and the Court was able to take a portion of the claim out of the Tribunal's purview through issue estoppel and mootness as comprehended by s. 27 of the *Human Rights Code*.

[112] *WCB, supra* note 11 at para. 29.

of British Columbia, and may be distinguished on that basis. There are significant differences between the functions and adjudicative processes of the Workers' Compensation Board and an arbitral panel, and these differences may be the basis for distinguishing this decision from the tug of war that exists between labour arbitrators and tribunals. While this Court's statements regarding concurrent jurisdiction at least as a starting point are not that surprising given the decision in *Canpar*, the Court's comments regarding parallel processes should, perhaps, be taken within the context in which they arose.

In *WCB*, the Court of Appeal noted some of the reasons identified by the original tribunal member as militating away from the exercise of the Tribunal's discretion to dismiss or defer the complaint, including factors such as: the adjudicator's perceived lack of independence in the circumstances (officers of the Review Division are officers of the Board) which was compounded by amendments to the *Workers' Compensation Act* which removed a right of appeal to the Workers' Compensation Appeal Tribunal in the circumstances; the fact that it was not clear which evidentiary standard the officer had applied to find the impugned policy justified; and the fact that the officers of the Review Division do not have expertise interpreting and applying the *Human Rights Code*.[113] Such factors are not at issue in arbitral panels—labour arbitrators are not delegates of either the employer or employee/union and do not have even a peripheral interest in the outcome of the proceedings. Further, it is clear that labour arbitrators have a long history and experience in dealing with human rights and other *quasi*-constitutional statues, a power and constitutional responsibility that has been recognized by the Supreme Court of Canada for some years.[114] With respect to evidentiary burdens and assessments, arbitrators do typically have a flexibility that the courts do not, however, the same can certainly be said for the British Columbia Human Rights Tribunal.[115] Furthermore, and importantly, although not

[113] *Ibid.* at para. 17.

[114] See e.g. *Weber*, *supra* note 26; *Parry Sound*, *supra* note 13.

[115] See *Human Rights Code*, *supra* note 4, s. 27.2(1): "A member or panel may receive and accept on oath, by affidavit or otherwise, evidence and information that the member or

expressly addressed by the Court of Appeal, the functioning of the Workers' Compensation Board is such that Review officers are generally required by subsection 99(2) of the *Workers' Compensation Act*,[116] to apply the policies of the Board applicable in the case.[117] This was expressly acknowledged by the Review Officer in *No. R0064456* (the Review in question in *WCB*) who rejected the worker's submissions that the Review Division could elect to *not* apply a policy of the Board if it accepted that it was patently unreasonable in the circumstances.[118]

In short, it is not difficult to see why the Court of Appeal felt compelled to retain jurisdiction with the Human Rights Tribunal in the circumstances. However, in a different factual matrix, it may be that despite the comments in *WCB*, concurrent jurisdiction is not jurisdiction in any event. As will be discussed later in this paper, like the discussion of Alberta Court of Appeal in *Amalgamated*, this Court's reliance on tribunal discretion and doctrines such as *res judicata* or issue estoppel is not entirely satisfactory. Application for leave to appeal *WCB* was filed 13 April 2010.[119]

However, despite the foregoing, and *WCB* notwithstanding, even if the question of arbitral exclusivity is open in British Columbia—at least on a

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panel considers necessary and appropriate, whether or not the evidence or information would be admissible in a court of law."

[116] R.S.B.C. 1996, c. 492.

[117] Note also that the Workers' Compensation Appeal Tribunal is also compelled to apply the policies of the Board when coming to a decision, save where those policies are "so patently unreasonable that it is not capable of being supported by the Act and its regulations." (see *ibid.*, s. 251(1)).

[118] See *No. R0064456* (30 November 2006), WCB Review Decision, online: WorkSafeBC <http://www.worksafebc.com/review_search/decisions/compensation_decisions/r0064456_decision_letter.pdf> at 8:

> I am unable to accept that the Review Division has a general jurisdiction to find a policy of the Board invalid on the basis argued by the lawyer. Section 99 of the *Act* states
>
> > The Board must make its decision based upon the merits and justice of the case, but in so doing the Board must apply a policy of the board of directors that is applicable in that case.
>
> Section 251 of the *Act* gives WCAT specific authority to consider the validity of a policy, but there is no equivalent section for the Review Division.

[119] [2010] S.C.C.A. No. 180 (QL).

case by case basis—the bulk of the jurisprudence canvassed outside of British Columbia indicates that any assertion of exclusive arbitral jurisdiction will come up against a virtual wall of policy favouring broad access to human rights redress. Nevertheless, the courts have been clear that each case turns on its own facts, and it may be that the British Columbian courts are willing to track a different course than their counterparts elsewhere.

IV. JURISDICTION FROM THE PERSPECTIVE OF HUMAN RIGHTS TRIBUNALS

A review of some recent decisions indicates that some human rights tribunals appear to have little trouble taking jurisdiction over human rights claims arising out of the workplace. Bolstered substantially by the policy arguments supporting broad access to human rights redress, many tribunals have considered that absent an express and unambiguous statutory provision ousting their jurisdiction, they have the power, if not the obligation, to hear the human rights claims of unionized employees.[120]

In coming to such a conclusion, some human rights tribunals have discussed a perception that arbitrators may not have jurisdiction to consider human rights claims where the collective agreement does not expressly contemplate such claims. However, this contention is no longer tenable in light of the Supreme Court of Canada decision in *Parry Sound*.[121] That said, it is difficult to see how this argument was even justifiable prior to *Parry Sound* in light of *Weber* which focuses on those matters lying both expressly *and inferentially* within the scope of the collective agreement, as well as labour relations legislation that gives arbitrators the power to interpret and apply those statutes pertaining to employment. The somewhat dubious nature of such pre-*Parry Sound* arguments was implied by Madam Justice Newbury in *Canpar* when she wrote "an express 'nexus' is no longer necessary, <u>if it ever was</u>, before an arbitrator has the right and the responsibility to apply human

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[120] See e.g. *Axton v. B.C. Transit* (1996), 28 C.H.R.R. D/337, 96 C.L.L.C. 230-027 (BCHRC) [*Axton*]. Note that many portions of this decision are called into question by later decisions of the Supreme Court of Canada, including *Parry Sound*, *supra* note 13.

[121] See *Axton*, *supra* note 120.

rights principles".[122] Regardless, other, more recent decisions have based jurisdiction on a framing of the dispute—i.e. on a distinction between an assessment of whether there was just cause for the termination of employment, for example, and an assessment of whether an employee suffered discrimination.

For example, in *Parisien v. Ottawa-Carleton Regional Transit Commission*,[123] the Canadian Human Rights Tribunal took jurisdiction in a situation where a termination grievance had already been dismissed by an arbitrator. The employee in question had been terminated for chronic absenteeism, and approximately two months prior to the arbitration, had filed a complaint with the Canadian Human Rights Commission alleging that his employer had refused to accommodate his disability. After the arbitration concluded in favour of the employer, the employer responded to the human rights claim by arguing that the Commission lacked jurisdiction in the circumstances.

In rendering its decision, the Tribunal held that *Weber* did not stand for the proposition that arbitrators and tribunals could not have concurrent jurisdiction. Further, the Tribunal considered that the "essential nature" of the employee's complaint did not arise out of the collective agreement, but was rather based upon an alleged breach of statutory obligations by the employer. In particular, the Tribunal drew a distinction between the assessment of whether there was just cause for dismissal and whether the employee had been discriminated against. However, it is not clear that this distinction is wholly in line with the *Weber* analysis, and particularly the Supreme Court of Canada's holding that the dispute should be distilled down to its essential character as determined from the facts, not from the legal framing of the issues.

Additionally, this case was decided before the 2003 decision of *Parry Sound*, and the Canadian Human Rights Tribunal did not have the benefit of the Supreme Court's guidance in this regard. The fact that this Tribunal differed from *Parry Sound* somewhat with respect to what does and does not relate to the collective agreement therefore casts some doubt on its findings in this instance. In any event, ultimately holding that it shared concurrent

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122 *Canpar, supra* note 6 at para. 48 [emphasis added].

123 (2002), 44 C.H.R.R. D/94, 27 C.C.E.L. (3d) 226 (CHRT) [*Parisien*].

jurisdiction with labour arbitrators over human rights issues, the Tribunal held that this jurisdiction was not further ousted by either issue or cause of action estoppel, the matter was heard on its merits, and in contrast to the findings of the arbitrator, the employee was ordered reinstated (seven years after his dismissal), and paid damages for lost income and hurt feelings.

In *McKnight v. Insurance Corp. of British Columbia*[124] the British Columbia Human Rights Tribunal considered a similar situation to its counterpart in *Parisien*: the employee had been terminated, the termination of employment was grieved, and pending the outcome of arbitration, the employee filed a claim with the British Columbia Human Rights Tribunal. The grievance was then resolved in favour of the employer, who subsequently applied to the Tribunal to have the matter dismissed. Important to this decision, when the employee's union originally filed the grievance, it was on the basis that dismissal had occurred without just cause; the human rights complaint pursuant to section 13 of the *Human Rights Code* was not pursued until after the grievance process had commenced.

The bulk of the Tribunal's decision revolved around the application of issue estoppel (the *Weber* principles were not expressly discussed at all—perhaps because arbitration was no longer on-going) in the context of its discretion to dismiss the employee's claim under section 27. And, unlike some of the earlier decisions of human rights tribunals, Member K. Neuenfeldt acknowledged that arbitrators are capable of disposing of the substance of a human rights complaint: "In my view, the [*Human Rights*] *Code* and the *Labour Relations Code* establish a legislative construct that clearly contemplates the final disposition by an arbitrator of a human rights complaint that arises as part of a grievance."[125] Accordingly, finding the elements of issue estoppel made out, the Tribunal declined to hear the matter in the circumstances. However, this decision did not address the jurisdictional competition between arbitrators and tribunals *per se* (i.e. whether or not the claim would be considered appropriate for arbitration regardless of whether arbitration has been concluded or not). Rather, it appeared to assume con-

[124] 2003 BCHRT 89, 48 C.H.R.R. D/216 [*McKnight*].

[125] *Ibid.* at para. 67.

current jurisdiction yet dismissed the complaint under section 27 of the *Human Rights Code* on the basis that it had been adequately resolved in another forum.

That said, the Tribunal in *McKnight* did discuss some of the issues that have historically supported findings of concurrent jurisdiction by the courts. And, while this discussion was in the context of privity for the purposes of making-out issue estoppel, these statements likely also have some purchase in the context of jurisdictional arguments. For example, with respect to the concern that the individual whose human rights have been infringed is not a party to the grievance proceeding, the Tribunal supported comments that in instances where there have been no allegations of unfair representation there is no basis for the claim that a union will not act in an employee's interests—human rights or otherwise. Furthermore, the Tribunal noted that employees can actively participate in grievance proceedings and give evidence at such proceedings. Concerns regarding access to justice have, as discussed, often trumped the concerns associated with labour relations policy. However, if the access to individual justice issues are lessened, so is their "trumping" ability.

Also noteworthy from this decision are the Tribunal's comments regarding proper appeal process. The Member wrote:

> If the Complainant thought the decision ... was incorrect, the proper course would have been for him to ask the Union to seek a review of the decision under the provisions of the *Labour Code*. Again, there is no suggestion in the materials that this was done, or that the Union declined to do so.[126]

This supports an argument that the Human Rights Tribunal is not necessarily intended to be the only and ultimate guardian of human rights in the province—i.e. despite the existence of such a practice, it should not be utilized as an avenue for appeal by employees dissatisfied with the outcome of a particular grievance.

Somewhat less satisfactory, at least from an employer's standpoint, is the British Columbia Human Rights Tribunal decision of *MacRae v. International Forest Products Ltd.*[127] In this case, the employee complained to the

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126 *Ibid.* at para. 79.

127 2005 BCHRT 462, 54 C.H.R.R. D/223 [*MacRae*].

Tribunal that he had been terminated because of his physical disability contrary to section 13 of the *Human Rights Code*.

In the background to this complaint were the operations of a mill in Squamish, British Columbia that had been closed on and off over the years, and that had, at the time, been closed for an extended period. Before the employer made the decision to close the mill permanently (which would have attracted severance liability) it terminated the employment of a number of workers who had been on long-term disability. This initial group did not include Mr. RacRae, although he had been on disability at the time. This particular group termination was grieved pursuant to the collective agreement. The grievance went to arbitration and the arbitrator found that while termination of the employees on long term disability was *prima facie* discriminatory, the employer was exonerated as the doctrine of innocent absenteeism[128] was a *bona fide* occupational requirement. The grievance was accordingly dismissed. Subsequent to that arbitration, Mr. MacRae's employment was terminated along with some other employees on long term disability. Mr. MacRae grieved this termination, but in light of the previous arbitration award in favour of the employer, the union did not pursue it beyond step four of the grievance process. When Mr. MacRae's complaint was brought to the Tribunal, the employer argued that issue estoppel barred the Tribunal from hearing the complaint on the basis that the issue had already been determined.

The Tribunal declined to exercise its discretion under section 27 of the *Human Rights Code*, however, and found for Mr. MacRae, ultimately ordering his reinstatement. Primarily, the Tribunal found that the test for issue estoppel had not been made out—in its view, Mr. MacRae was not represented at or party to the previous arbitration at all, and his employment had

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[128] The doctrine of "innocent absenteeism" refers to the employer's legitimate and lawful right to terminate employment when an employee is unable to work for reasons that ore outside his or her control (i.e. the employee is not culpable). Generally, when considering whether a decision to terminate employment was reasonable, arbitrators will consider whether an extended period of absence is excessive in the circumstances and then whether the evidence shows that the employee is capable of regular attendance in the future.

not been terminated at the time the initial terminations were grieved. The Tribunal held:

> While the arbitration award was binding on Interfor, the IWA and the grievors on whose behalf the IWA preceded, it cannot be held to have prevented Mr. MacRae from filing his own, individual human rights complaint. To accede to Interfor's submission in this regard would mean that any time a union grieved a matter raising a human rights issue, all employees in the bargaining unit would be forever barred from filing a subsequent human rights complaint raising the same issue. I see no warrant in the language of either the *Labour Relations Code* or the *Human Rights Code* for this unprecedented conclusion.[129]

The Tribunal further held that even if issue estoppel was made out in the circumstances, it would exercise its discretion to not apply it in any event. In particular, the Tribunal focused on the issue that the employee was not party to the first arbitration and that the union had declined to carry his grievance to a conclusion. The Tribunal stated: "It would be fundamentally unfair to not allow Mr. MacRae even a single opportunity to legally challenge a decision of his employer which had such significant consequences for him."[130] However, this statement of the Tribunal arguably fails to address both the employee's avenues of redress pursuant to labour relations statutes—particularly, a complaint about the union's failure to act in contravention of section 12 of the British Columbia *Labour Relations Code* (which sets out a union's duty of fair representation), recognized by the Tribunal in *McKnight* and the Tribunal's own discretion under the *Human Rights Code* to dismiss a complaint before a complainant has the opportunity for a hearing on the merits. Regardless of the forum in which a claim is advanced, complainants or greivors do not always have the ability to compel a matter to completion.

Furthermore, the Tribunal held that the complaint was not an abuse of process because there was no attempt to re-litigate a similar claim. As stated, the Tribunal found that Mr. MacRae had not been a party to the initial arbitration; and held that there had been significant "water under the bridge"

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[129] *Supra* note 127 at para. 79.

[130] *Ibid.* at para. 82.

since the first arbitration and the termination of his employment (i.e. the Tribunal found that at the time of the termination of Mr. MacRae's employment, a final decision to close the mill had been made). The merits of such an argument aside (Mr. MacRae's grievance would have been very similar to that determined beforehand), the more interesting parts of the *MacRae* decision are the Member's comments regarding the administration of justice:

> [T]he administration of justice is not brought into disrepute by two different adjudicators, under different statutory mandates, reaching different conclusions on the law, should that be the result of the present case. Such differences are not uncommon, and the legal system has adequate mechanisms in place to address them where they occur.[131]

These comments, with respect, show little appreciation on the part of the Tribunal for the role of labour arbitrators or that of labour relations policy, and they certainty call into question the British Columbia Court of Appeal's reliance on the discretion of the Tribunal to prevent duplication of processes and protracted disputes in *WCB*.[132] Regardless of the express wording of the respective statutes,[133] since at least the Supreme Court of Canada decision in *Parry Sound* the mandates of labour arbitrators and human rights tribunals are not so disparate. In that decision, the Supreme Court held that arbitrators have both a power and a *responsibility* to apply human rights legislation in the employment context. Further, the courts have held that arbitrators have the necessary remedial powers to address contraventions of the *Human Rights Code*, and in fact, in *Alberta Union of Provincial Employees v. Lethbridge*

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[131] *Ibid.* at para. 93.

[132] *Supra* note 11 at para. 31.

[133] In *Canpar*, *supra* note 6 at para. 17, Newbury J.A., for the majority of the B.C. Court of Appeal, noted that "[t]he *Labour Relations Code* and the *Human Rights Code* create very different schemes for the resolution of differences", noting differences in purpose as expressed by those statutes. However, by acknowledging *Parry Sound*'s applicability in B.C. and imposing a responsibility on arbitrators to apply the *Human Rights Code*, the Court of Appeal arguably widened the scope of the arbitrator's mandate to a consideration of the *Human Rights Code* and the broader policy issues that are part and parcel of its operation. See *Canpar*, *ibid.* at para. 48.

Community College,[134] Mr. Justice Iacobucci, writing for the Supreme Court of Canada, held that arbitrators have a broad and remedial jurisdictional authority and can fashion a remedy appropriate to the particular circumstances of a situation. Notably, in the course of fashioning an appropriate remedy, arbitrators have been known to award general damages to successful grievors, something akin to the jurisdiction of human rights tribunals to award damages for humiliation and hurt feelings. To diminish the impact of inconsistent decisions arguably undercuts the importance that both the legislature and the courts have placed on both labour relations and the arbitrators' role in managing such relations.[135]

Furthermore, the Tribunal's statement that it "should not hesitate to come to different conclusions [from arbitrators], if the *Human Rights Code* dictates that result"[136] also indicates something of a low regard for both the labour relations process, and the judgment of arbitrators when applying the *Human Rights Code*, and is not in line with the Supreme Court of Canada, which made it clear in *Parry Sound* that relative expertise was not a factor that should weigh against arbitral capacity to determine human rights claims.[137]

Overall, the Tribunal decisions discussed primarily turn on the application of issue estoppel rather than on the *Weber* or *Morin* criteria. With the

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134 2004 SCC 28, [2004] 1 S.C.R. 727, 238 D.L.R. (4th) 385.

135 Note however, that some recent decisions of the Tribunal appear to have recognized these difficulties. See e.g. *Sharrock v. Nanaimo Forest Products*, 2009 BCHRT 339; *Kelly v. Providence Health Care Society*, 2010 BCHRT 126; *Alexander v. University of British Columbia (Faculty of Law)*, 2010 BCHRT 124. Nevertheless, reliance on Tribunal discretion still leaves open the possibility of Members substituting their own decision for that of a labour arbitrator on the same facts as a type of *de facto* appeal process. Clearly this leaves the *Human Rights Code* vulnerable to misuse and mischief, and undermines the policies and principles of labour relations. See the discussion at the conclusion of this paper.

136 *MacRae*, *supra* note 127 at para. 97.

137 See *Parry Sound*, *supra* note 13 at para. 53:

> The fact that the Human Rights Commission currently has greater expertise than the Board in respect of human rights violations is an insufficient basis on which to conclude that a grievance arbitrator ought not to have the power to enforce the ... *Human Rights Code*.

exception of the cursory treatment given to *Weber* in the *Parisien* decision, the decisions reviewed indicate that some tribunals appear to consider their jurisdiction over human rights issues arising out of the workplace to be a given. However, when the general tone of the decisions discussed is considered, it is arguable that the human rights tribunals have a misapprehension of the *Weber* and *Morin* principles. The Supreme Court of Canada and the provincial appellate courts have made clear that the legal framing of the issues is not determinative, but that it is the dispute, distilled down to its very essence in the context of the factual matrix from which it arose, that determines whether something is within the scope of a collective agreement or not. Arguably, a formalistic distinction between considerations of "just cause" and "discrimination", for example (see *Parisien*) ignores the genesis of both of those assessments—the interactions among and between employees and employers as governed by the collective agreement.

In *British Columbia (Ministry of Competition, Science and Enterprise) (c.o.b. Liquor Distribution Branch) v. Matuszewski*,[138] the British Columbia Supreme Court had an opportunity to review a decision by the British Columbia Human Rights Tribunal that was contrary to the previous decision of a labour arbitrator. Again, this case turned primarily on the application of issue estoppel. However, the discussion of Mr. Justice I.H. Pitfield illustrates some of the concerns with the tribunal decisions discussed in the previous paragraphs.

In *Matuszewski*, the Court faced a situation where the employee argued that the collective agreement discriminated against him because it barred accrual of seniority while on long-term disability. Both a grievance and human rights complaint were filed within three days of each other, and on an earlier date, the same grievance had been filed on behalf of another employee. The earlier grievance was decided in favour of the employer by arbitration in 2002, and the employee's later grievance was accordingly withdrawn. Further, prior to the hearing of the human rights claim, the employee was granted worker's compensation benefits that replaced his long-term disability and allowed him to accrue seniority under the collective agreement. Regardless,

[138] 2008 BCSC 915, 82 Admin. L.R. (4th) 308, 64 C.H.R.R. D/293 [*Matuszewski*].

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[138] 2008 BCSC 915, 82 Admin. L.R. (4th) 308, 64 C.H.R.R. D/293 [*Matuszewski*].

the employee continued with his complaint to the Tribunal. In 2007, the Tribunal released its decision on the matter. Of importance to this paper, it found that neither issue estoppel, abuse of process nor mootness applied in the circumstances, and ultimately held that the provision of the collective agreement preventing accrual of seniority was discriminatory.

In quashing part of this decision, the British Columbia Supreme Court discussed the statutory schemes governing labour relations and human rights in the province. The Court held, without discussing the *Weber* or *Morin* criteria, that arbitrators and the Tribunal share concurrent jurisdiction with respect to human rights issues arising out of the workplace. Furthermore, it noted that issue estoppel, abuse of process and mootness do not go to the heart of jurisdiction, and rather operate to guide the Tribunal's exercise of discretion under section 27 of the *Human Rights Code* "to proceed, or to refrain from proceeding, with the hearing of a complaint".[139] However, in holding that the Tribunal's exercise of discretion to hear the complaint was incorrect in the circumstances, the Court noted:

> [W]here an arbitration proceeds in accordance with the requirements of the *Labour Relations Code* and a collective agreement, and the issue is the interpretation of a clause in the collective agreement and its compliance with human rights principles rather than the resolution of a fact-dependant dispute pertaining to the unique circumstances of any particular employee—a member of the bargaining unit is a privy to the parties to the arbitration because of s. 95 of the *Labour Relations Code*. The section directs that the decision of the arbitrator is binding upon each and every employee affected by the collective agreement. ...
>
> The fact that Mr. Matuszewski was not represented by counsel, not in attendance at the Sheshka grievance and not called to give evidence at the proceeding, and the fact that he had not agreed to be bound by the outcome of the arbitration are not relevant factors in assessing whether or not he was privy to a party to the arbitration.[140]

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[139] *Ibid.* at para. 31.

[140] *Ibid.* at paras. 48–49.

These comments were directed towards the Tribunal's application of issue estoppel, and again, while this decision did not centre on an application of *Weber*, this discussion of the Tribunal's difficulties with privity in the context of issue estoppel calls into question those arguments that human rights tribunals are better equipped to deal with matters that, although in the public interest, arise out of labour relations.

The comments of the Court may also have utility in dispelling concerns regarding representation, which consistently appear at the fore of decisions concerning the allocation of arbitrator-tribunal jurisdiction. In *Matuszewski*, the Court held that even where a particular grievance was confined to one employee, where the claim itself had broader application (i.e. to all or a number of bargaining unit employees who did not participate in the grievance), issue estoppel could operate to prevent a subsequent employee from making a claim on the same grounds to the Human Rights Tribunal. This may weaken arguments that without an individual hearing at the Tribunal in which he or she could voice their particular claims an employee's human rights issue would never be adequately heard or resolved.

V. CONCLUSIONS: IS A TYPE OF ARBITRAL EXCLUSIVE JURISDICTION POSSIBLE AND PREFERABLE?

As stated at the beginning of this paper, the issue of whether labour arbitrators can have any sort of exclusive jurisdiction over human rights claims arising out of the workplace may be open in British Columbia. Unlike the Supreme Court of Canada in *Morin*, and the appellate courts in Ontario, Alberta, and Nova Scotia, the British Columbia Court of Appeal has not yet specifically determined the jurisdiction issue in the context of labour relations, and the decision in *WCB* may be distinguished on its contextual underpinning. The closest this court has come to a ruling on the jurisdiction of labour arbitrators *vis-à-vis* the Tribunal was its decision in *Canpar*,[141] where, as discussed, the Court of Appeal declined to rule on whether concurrent claims to both a labour arbitrator and the British Columbia Human Rights Tribunal would be appropriate in a particular instance. Furthermore, the fact

[141] *Supra* note 6.

that *Canpar* was decided prior to the seminal decision in *Morin* indicates that there may still be room for arbitral exclusivity in some circumstances.

However, in *Canpar* the British Columbia Court of Appeal understood the enactment of sections 25 and 27 of the *Human Rights Code* to generally lead to a concurrent, rather than exclusive, jurisdiction for labour arbitrators. This reasoning was echoed by the appellate court's unequivocal statements in *WCB*. Furthermore, the many decisions discussed in this paper, by their similarity of reasoning, provide considerable support to the position that tribunals and arbitrators share concurrent jurisdiction over human rights claims in all circumstances. However, regardless of its reshaping over the years, the Supreme Court of Canada decision in *Weber* makes clear that each case turns on its own facts. Before the question of any sort of arbitral exclusivity in British Columbia is answered, the courts will have to consider the British Columbia labour relations experience—that is, the *Human Rights Code*, *Labour Relations Code* and other relevant statutes require examination in the context of a particular dispute arising out of a unionized environment.

Accordingly, it is not necessarily possible to posit the success or failure of an argument in support of arbitral exclusivity in wholesale terms. Particularly given the starting point of concurrency considered by the Court in *Canpar* and *WCB*, each case will depend on its own factual genesis. All this said, however, a review of the decisions discussed in this paper indicates that should the appropriate situation present itself, there are some arguments that could be made in favour of a form of exclusive arbitral jurisdiction in British Columbia

First, there are some differences between British Columbian legislation and that of other jurisdictions examined in the cases discussed above. For example, the *Labour Relations Code* states that every collective agreement "must contain a provision for final and conclusive settlement" of disputes with respect to the "interpretation, application, operation or alleged violation" of a collective agreement.[142] Compared to the Quebec statute in *Morin* this statement is considerably stronger. The Quebec statute states only that

[142] See *Labour Relations Code*, *supra* note 4, s. 84(2).

"[e]very grievance shall be submitted to arbitration".[143] Furthermore, with respect to the Alberta statute—described by that province's Court of Appeal as a weaker version of its Quebec and Ontario counterparts—it states only that "every collective agreement shall contain a method for the settlement of differences ... ."[144] Finally, while the Ontario provision is perhaps the most similar to section 84(2) of the *Labour Relations Code*, it requires "the final and binding settlement by arbitration",[145] which could be construed as less definitive than "final and conclusive".[146]

Moreover, the *Human Rights Code*, unlike human rights legislation in Alberta, grants the British Columbia Human Rights Tribunal the discretion to defer a complaint under subsection 25(2):

> If at any time after a complaint is filed a member or panel determines that another proceeding is capable of appropriately dealing with the substance of a complaint, the member or panel may defer further consideration of the complaint until the outcome of the other proceeding.[147]

Recall that in *Amalgamated* the Alberta Court of Appeal cited the lack of a deferral clause in support of the decision that it was the intent of the Alberta legislature that either labour arbitration boards or (in that province) the Human Rights Commission should have concurrent jurisdiction over all human rights issues that arise in the unionized workplace.[148] Furthermore, under section 27, the Tribunal can dismiss a complaint for a number of reasons, including the fact that its substance has already been resolved in another forum.

Both of these factors could operate to distinguish the decisions discussed in Parts II and III of this paper, above, and might nudge a court into the territory of arbitral exclusivity. Moreover, the British Columbia Court of Ap-

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143 *Labour Code*, *supra* note 48, s. 100.

144 *Labour Relations Code*, *supra* note 68, s. 135.

145 *Labour Relations Act*, S.O. 1995, c. 1, Sch. A, s. 48(1).

146 *Labour Relations Code*, *supra* note 4, s. 84(2).

147 *Human Rights Code*, *supra* note 1, s. 25(2).

148 See *Amalgamated*, *supra* note 64 at para. 59.

peal, and recently the Supreme Court of Canada, in *Macaraeg* and *Honda*, respectively, have indicated a judicial preference for honouring the allocations of responsibility made by the legislature.[149]

Despite these differences however, any argument in favour of arbitral exclusivity in British Columbia will likely come up against the formidable policy arguments in favour of retaining jurisdiction with the Human Rights Tribunal. Since *Weber*, the Supreme Court of Canada has made clear that when the competition is between two statutory bodies, there is no presumption of arbitral exclusivity, and as a result ostensibly less deference to the policy and principles underlying labour relations legislation. This has been consistently echoed by the appellate courts in other provinces (and the British Columbia Court of Appeal in *WCB* in particular), and further, many of these Courts appear to have engaged in policy-balancing with the result that the scales are more often than not tipped in favour of those arguments that human rights tribunals and labour arbitrators have concurrent jurisdiction in all cases. Arguably, the decisions show that the courts have been unable to accord the same importance to both *quasi*-constitutional human rights legislation and those policies underpinning labour relations schemes. Furthermore, section 46.1 of the *Administrative Tribunals Act*, which applies to the Labour Relations Board,[150] one of the avenues to which an arbitrator's decision can be appealed, states that:

> 46.1 (1) The tribunal may decline jurisdiction to apply the *Human Rights Code* in any matter before it.
>
> (2) Without limiting the matters the tribunal may consider when determining whether to decline jurisdiction under subsection (1), the tribunal may

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[149] Even *WCB, supra* note 11, arguably followed this tack; unlike the British Columbia labour relations regime (from which many important decisions on the *Human Rights Code* and human rights principles have stemmed), the Workers' Compensation Board's mandate does not necessarily include a focus on human rights claims. Accordingly, the Court of Appeal's determination that the jurisdiction of the Tribunal was not ousted may not be all that extraordinary, and one could argue that this decision tracks these other judicial decisions favouring allocation of jurisdiction as determined by the Legislature.

[150] See *Labour Relations Code, supra* note 4, s. 115.1.

consider whether, in the circumstances, there is a more appropriate forum in which the *Human Rights Code* may be applied.[151]

On its face, this provision appears to contemplate concurrent jurisdiction much like sections 25 and 27 of the *Human Rights Code* pointed to concurrent jurisdiction for the court in *Canpar*. However, it is not clear how these provisions interact with the responsibility imposed on labour arbitrators by the Supreme Court of Canada decision in *Parry Sound*, and to what extent.

Finally, despite the impact the decisions and policy discourse discussed in this paper may have on arbitral exclusivity, the decision of the Supreme Court of Canada in *Bisaillon v. Concordia University*[152] may offer some support to the exclusivity argument. In this case the Supreme Court of Canada was split five to four, illustrating the diverging views on the jurisdiction question. *Bisaillon* was a decision involving a competition between a labour arbitrator and the courts in the province of Quebec. An employee had applied to the Quebec courts for authorization to institute a class action against the employer with respect to the administration of a pension fund. The administration measures had been agreed to by one of the unions active in the workplace in the course of negotiations with the employer. This union applied to have the motion to the court dismissed in favour of arbitral jurisdiction over the matter. The superior court determined that the matter was within the exclusive jurisdiction of a labour arbitrator as the administration of the pension plan was an application of the collective agreement. The Court of Appeal overturned this finding, holding that the plan existed outside of the collective agreement and therefore was independent of its application, and further, that an arbitrator could not have jurisdiction over all the parties involved in a class action because they were represented by approximately nine different unions.

Five justices of the Supreme Court of Canada held that the chambers judge had made the correct decision, and that the court had no jurisdiction in the circumstances. The other four justices agreed with the Court of Appeal. However, both the majority and dissent made comments on the labour

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[151] *Administrative Tribunals Act*, *supra* note 24, ss. 46.1(1)–(2).

[152] *Supra* note 36.

relations process that go beyond the efficiency-based policy arguments discussed to date. For example, Lebel J. for the majority wrote:

> [O]nce a collective agreement is signed, it becomes the regulatory framework governing relations between the union and the employer, as well as the individual relationships between the employer and employees.
>
> The system of collective representation thus takes certain individual rights away from employees. In particular, employees are denied the possibility of negotiating their conditions of employment directly with their employer and also lose control over the application of those conditions. In return, by negotiating with the employer with one voice through their union, employees improve their positioning the balance of power with the employer. Moreover, the individual interests of each member of the bargaining unit are protected in a system of collective representation. ...
>
> It is worth noting that the monopoly on collective representation is not limited to the context of the collective agreement but extends to all aspects of employer-employee relations.[153]

Furthermore, Mr. Justice Bastarache, in dissent, noted that "employees cannot sidestep the exclusive representation of their bargaining agents."[154] Arguably, stronger than the efficiency argument, all of these statements could be used to counter arguments raised in favour of concurrent jurisdiction in all circumstances.

However, all of the foregoing discussion begs the question: Regardless of whether it is possible in the context of the current labour relations and human rights regimes, is a type of arbitral exclusivity preferable? The preferability of arbitration as the exclusive forum for the adjudication of human rights claims arising out of the workplace has been the subject of considerable discourse outside of the jurisprudence, as noted by the Nova Scotia Court of Appeal in *Halifax*.[155]

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153 *Ibid.* at paras. 25–26, 28 [citations ommitted].

154 *Ibid.* at para. 66.

155 *Supra* note 87.

In "The New Economy and the New Legality: Industrial Citizenship and the Future of Labour Arbitration,"[156] H.W. Arthurs comments on the "over legalization" of the arbitral process. In particular, the author considered that the forum of labour arbitration today "looks, thinks, talks and acts more and more like courts of general jurisdiction",[157] and as a result, the concept of industrial citizenship as governed by the "law of the shop," has been compromised.[158] In particular, Arthurs comments that development of arbitration from an adjudication of "the indigenous, idiosyncratic and distinctive 'law of the shop'" to one that involves the application of "real" or "judges' law"[159] has altered the intended essence of arbitration into a process of increasing formalism, length, delay and cost. Although Arthurs does not focus on the adjudication of human rights claims by arbitrators in particular, his criticisms of the formalization and legalization of labour arbitration are certainly relevant to any discussion of whether arbitrators should have a type of exclusive jurisdiction over human rights claims in the unionized workplace: human rights doctrines are more than mere workplace rules reflective of the bargains between employers and employees. The principles underlying human rights law are very much a result of public policy and collective values, and the decisions made under human rights statutes, although very fact dependant, cannot be made in a vacuum and their precedential value ignored. Thus, the injection of human rights discourse into labour arbitration necessarily moves the process from "mere" workplace problem-solving and into a decision-making practice in which adjudicators must have an eye to the larger societal issues.

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[156] H.W. Arthurs, "The New Economy and the New Legality: Industrial Citizenship and the Future of Labour Arbitration," Commentary, (1999) 7 C.L.E.L.J. 45.

[157] *Ibid.* at 46–47.

[158] Compare Michel Coutu, "Industrial Citizenship, Human Rights and the Transformation of Labour Law: A Critical Assessment of Harry Arthur's Legalization Thesis" (2004) 19:2 Cad. J. Law & Soc. 73. There, Coutu argues that a study of labour arbitration decisions in Quebec from 1992 to 1999 indicates that Arthurs' "legalization theory" is not firmly supported on an empirical level in the Quebec context. However, the author does note that the decision of *Parry Sound* may reflect a change going forward.

[159] *Supra* note 156 at 55.

With respect to Arthurs' legitimate concerns outlined above, his paper was written prior to the decision in *Parry Sound* which, as discussed, stands for the proposition that arbitrators have the power and the duty to apply human rights statutes. In other words, exclusive or not, the jurisdiction is there; a return to the core values of industrial citizenship and the "law of the shop" may be incompatible with the modern realities of Canadian society—in the workplace or elsewhere.

Even Arthurs, in his paper, admits that the process and concept of labour arbitration, although existing upon the same doctrinal underpinnings, is changing, and alludes to a possible "reinvention of labour arbitration in a new form, more suited to the times in which we live."[160] For example, the deep-rooted machinery of "labour relations" that was designed to protect employees from the arbitrary acts of their employers developed prior to the relatively recent entrenchment of the *Charter* (and importantly, *Charter* values) and comprehensive human rights statutes. As noted by Coutu, the principle of industrial citizenship traditionally remained autonomous of the "State apparatus" and tried to "remedy for the non-interventionist policies of the State in the labour field".[161] However, with the onset of the *Charter* and human rights statutes, the constitutional and *quasi*-constitutional doctrines and principles enshrined therein have come apply to all aspects of Canadian society—including the unionized workplace.[162] This necessarily means that labour arbitrators are now obliged to navigate workplace disputes in a manner that is, at the very least, informed by the values that have been adopted by Canadian legislatures and society at large. Moreover, the duty and power to adjudicate workplace disputes in accordance with legislation such as the *Human Rights Code* was clearly articulated by the Supreme Court of Canada in *Parry Sound*, and despite Arthurs' concerns of over-legalization, the *Hu-*

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[160] Athurs, *supra* note 156 at 60.

[161] Coutu, *supra* note 158 at 75.

[162] See Arthurs, *supra* note 156 at 46: "They [the rights of workers] originate not in a unique regime of employment law but more and more in the general law of the land, especially the *Canadian Charter of Rights and Freedoms*."

man Rights Code and other constitutional and *quasi*-constitutional principles are now part of labour relations law.[163] Putting it simply, times have changed:

> [T]he grievance arbitration process may be construed as being a "coupling mechanism" between the legal and industrial relations systems. This process cannot but adapt to the complex discourse of human rights which now assumes such a capital role in the legal system as a whole.[164]

Some have even argued that between 1995 and 2005, the majority of important judicial decisions on substantive human rights law stemmed from the decisions of labour arbitrators, and not human rights tribunals,[165] citing *British Columbia (Public Service Relations Commission) v. B.C.G.E.U.*[166] as an example. Clearly, arbitrators are tackling, and are equipped to tackle, policies of public import. The reality is that "labour arbitration is no longer strictly about the parties rights and obligations as contained in their collective agreement".[167] The Supreme Court of Canada's focus on the "essential character" of the dispute, which had its genesis in *Weber* and which rejects formalistic assessments of arbitral jurisdiction, clearly acknowledges this.

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[163] See also the comments of McLachlin J. in *Weber*, *supra* note 26 at para. 60:

> While the 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. 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 ... .

[164] Coutu, *supra* note 156 at 88 [citations omitted]. Note that in Coutu's apparent view, the result is that human rights concepts are translated so as to be reconciled with labour relations principles. In the author of this paper's view this does not necessarily mean that claimant rights are somehow compromised, or lessened, in the context of labour arbitration, however. Arguably, as long as the principles underlying labour relations exist and are supported by legislation, the principles underlying industrial citizenship and human rights must be reconciled. Otherwise, the remedy offered may be wholly incompatible with the realities of the workplace and applicable collective agreement, and may ignore the other rights and parties implicated by, even peripherally, by a dispute—something arbitrators traditionally are better versed in than human rights tribunals.

[165] See Gall, Zwack & Bayne, *supra* note 51 at 399.

[166] [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1.

[167] Gall, Zwack & Bayne, *supra* note 51 at 400.

Arbitrators may have moved beyond their original mandate of adjudicating workplace disputes according to the law of the shop, but the point, as discussed above, is that regardless of what can be said about the changes to labour arbitration over the years, in order not to disrupt the labour relations scheme (which, despite being informed more and more by principles developed in other forums, still exists to a great extent for the purpose of achieving workplace dispute resolution with minimal disruption), employers and employees need to be able to rely on labour arbitrators as being empowered to fully, and finally, resolve *any* workplace dispute. Thus, in most circumstances, arbitrators should be the primary method for recourse by employees in order to facilitate the goals underpinning the established labour-relations process, a process which cannot be divorced from the modern context in which it exists and which is still supported by policy and legislation. Accordingly, arbitrators should, at least in some circumstances, have exclusive jurisdiction over human rights claims. The very legalization criticized by Arthurs supports this.

Therefore, Arthurs' concerns about "over legalization," although valid, are not necessarily fatal to a position that human rights claims arising out of the unionized workplace should, at least in some circumstances, be restricted to the jurisdiction of labour arbitrators. Although Arthurs may lament an arbitral panel's increasingly "judical" behaviour, the very fact of this evolution supports the contention that, so long as the policies and legislation underpinning the labour relations regime exist, labour arbitrators should be granted some form of exclusive jurisdiction to adjudicate workplace disputes in the modern era. The Human Rights Tribunal's concurrent jurisdiction cannot mean jurisdiction in every case merely because the Tribunal purportedly has an expertise and operates within the context of larger and broader principles than those found in "the grubby little enterprise of solving problems in the workplace."[168] The more sophisticated and informed by policy and precedent arbitrators become, the more equipped they will be to deal with to finally and conclusively determine the important issues that arise in human rights claims. This sophistication of arbitral panels was expressly recognized by the Supreme Court of Canada in *Parry Sound.*

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[168] Arthurs, *supra* note 156 at 56.

Support for exclusivity can also be found in a 2005 article by Gall, Zwack, and Bayne,[169] where the authors cite the "full panoply of remedies" standard to the labour arbitrator's "arsenal" in support of arguments that "labour arbitrators are *best* able to apply human rights principles in ways that are consistent with the competing interests in workplaces."[170] That the British Columbia Human Rights Tribunal has the power to dismiss or defer a complaint is not enough—the decisions of the Tribunal discussed in previous sections of this paper make clear that even where an arbitrator has rendered a final decision, there may be no final resolution of the workplace dispute. The discretion exercised by the Tribunal, although reduced in scope following legislative amendments of 2002, arguably still continues to "reflect hesitancy to defer to the arbitration process, based on its concern that arbitration might not be an appropriate forum for the adjudication of human rights claims."[171] However, as emphasized in this paper and by Arthurs, arbitration is not the forum it once was; it has evolved into a sophisticated regime more than capable of addressing the arbitrator's broad mandated as set out in paragraph 89(g) of the *Labour Relations Code*. Concurrent jurisdiction in every case undermines this mandate. Where a complaint to the Tribunal is lodged contemporaneously or concurrently to a grievance, the parties will have to take steps with respect to both processes, and in particular, will have to wait for the Tribunal to either exercise its discretion to dismiss the claim or render a possibly inconsistent decision. Even if an inconsistent decision is quashed through judicial review, treating concurrent jurisdiction as jurisdiction to the Tribunal in any case gives rise to the real possibility that workplace disputes will only be resolved after protracted litigation. This was just the case in *Marc v. Fletcher Challenge Canada Ltd.*,[172] which took "almost nine years from the filing of complaint to the Tribunal's decision on the merits."[173] Such a process is not only antithetical to one of the very purposes behind the la-

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[169] Gall, Zwack & Bayne, *supra* note 51.

[170] *Ibid.* at 382 [emphasis in original].

[171] *Ibid.* at 391.

[172] [1996] B.C.C.H.R.D. No. 24 (HRC) (QL).

[173] Gall, Zwack & Bayne, *supra* note 51 at 396.

bour relations scheme in the province, the speedy and efficient attainment of workplace harmony, it is also incompatible with the notion of industrial citizenship espoused by Arthurs. The Tribunal may offer direct access to employees who consider they have been discriminated against in contravention of the *Human Rights Code*, however, it has been long established that by organizing in collective bargaining units, employees necessarily give up individual recourse against their employer.[174] Allowing a parallel forum for the adjudication of workplace disputes disrupts this core aspect of labour relations and "undermin[es] the statutory role of the union as exclusive bargaining agent."[175]

> Arming the arbitrator with the authority to decide all matters arising, expressly or otherwise, out of the collective agreement facilitates the efficient and final dispensation of disputes .... More importantly, it gives full recognition to the nuances of the unionized workplace, and the labour arbitrators unique appreciation of them. Labour arbitrators have a specialized understanding of labour relations issues, which is invaluable when adjudicating disputes arising in the workplace. While this expertise originally may have been acquired through the more limited exercise of interpreting and applying collective agreement language, it nevertheless gives arbitrators a sizeable advantage over the courts and other tribunals in resolving workplace disputes of any kind.[176]

Further, parallel processes may promote duplication of processes and unnecessary expense to both private parties and public bodies, as well as forum-shopping.[177]

Finally, although access to justice concerns are often at the fore of those decisions declining to give any sort of exclusive jurisdiction to arbitrators, there is a fair argument that access to justice is actually enhanced by arbitral jurisdiction. Arbitration does not merely exist to facilitate the *efficient* resolution of workplace disputes; the machinery of labour relations gives employees

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174 See *Bisaillon*, *supra* note 36.

175 Gall, Zwack & Bayne, *supra* note 51 at 394.

176 *Ibid.* at 387.

177 See *ibid.* at 390.

access to justice in a timely fashion, and provides them with representation they may otherwise not have (or be able to afford) in other forums. Moreover, where the human rights issues are complex and deal with the intersection of private rights and public policy, unions may have resources that may be unavailable to individual complainants who can access the Tribunal without representation to advance and fully argue complex issues.[178] Moreover, through the grievance process, disputes are heard and ultimately resolved (either by negotiation or arbitration) relatively quickly compared to other dispute resolution mechanisms, "because of fixed grievance procedure timelines and provisions for expedited arbitration."[179] The result is that employees, in the labour relations forum, may be provided with a more meaningful and relevant resolution—at the very least from a temporal perspective—than they would from a remedy meted out years later when circumstances are such that the employment relationship may be altered or may be no longer viable. Furthermore, and from the perspective of the Tribunal, its declaratory powers may be undermined where an order that an employer cease discriminating or implement policy or practice changes comes years after the fact, and where such changes may no longer carry the same meaning or impact. Collective agreements are regularly renegotiated, workplace policies change, as do individual and collective attitudes. Years-long tribunal decision-making rarely reflects this dynamic.

To conclude what has been very much an exploration of the possibility of any sort of arbitral exclusivity over human rights claims in British Columbia, whether or not any of the arguments and issues posited above will be of assistance or fatal to the argument in favour of arbitral exclusivity remains to be seen. Much will depend on the situation that ultimately presents itself to the British Columbia courts for analysis. Therefore, all that can be said at this point is that the jurisprudential current flows against arbitral exclusivity and that although the argument is possible, the *quasi*-constitutional nature of human rights legislation is likely to be a significant hurdle to arbitrators being granted exclusive jurisdiction over human rights disputes in the unionized workplace.

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[178] See *ibid.* at 399.

[179] *Ibid.* at 396.