Examining the Delineation of Jurisdiction Between Human Rights and Labour Arbitration After *Figliola* and *Penner*

by

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Abstract

There has been a long-time debate over whether issues conclusively decided at labour arbitration should be subject to a subsequent proceeding before a human rights tribunal. The author examines Supreme Court of Canada decisions dealing with re-litigation of issues before multiple decision-makers, and demonstrates how they are interpreted by the human rights tribunal. This paper identifies principles from cases before other decision-makers that can be applied to the problem of shared jurisdiction between labour arbitration and human rights.
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Introduction

There has been a trend towards compartmentalizing or assigning certain types of cases to specific judicial venues. However, labour arbitration cases that involve a human rights element deviate from this trend. This paper will examine the reasons why that relationship differs from the general trend, and review other relationships between courts and administrative actors to determine whether they reveal any principles that can be applied to assist in apportioning jurisdiction between human rights tribunals and labour arbitration.

Chapter 1 will examine the delineation of jurisdiction between human rights tribunals and labour arbitration. Statutory provisions and cases will be used to demonstrate that the two regimes share concurrent jurisdiction over human rights. Ontario’s *Human Rights Code* allows the human rights tribunal to dismiss all or part of a complaint if it has been “appropriately dealt with” in another proceeding.¹ This term has been subject to inconsistent interpretations, and has resulted in the use of doctrines such as issue estoppel – which must be applied on a case-by-case basis – to determine whether a claim can be heard.

The chapter will then examine the Supreme Court of Canada decisions in *Danyluk*,² *Figliola*³ and *Penner*⁴ dealing with issue estoppel, and specifically the use of discretion to hear claims where the elements of the issue estoppel test have been established. These cases attempt to strike an appropriate balance between fairness in decision-making and respect for the finality of decisions.

Chapter 1 will conclude by examining how human rights tribunals have applied the *Danyluk*, *Figliola* and *Penner* cases when determining whether to hear a matter previously addressed in another forum. These decisions reveal that the tribunal readily dismissed cases under section 45.1 of the Human Rights Code following the *Figliola* majority’s emphasis on finality, and that

³ *British Columbia (Workers’ Compensation Board) v British Columbia (Human Rights Tribunal)*, 2011 SCC 52, [2011] 3 SCR 422 [*Figliola*].
⁴ *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 SCR 125.
the pendulum swung in the opposite direction following the Penner majority decision stressing the importance of fairness.

Chapter 2 will demonstrate how jurisdiction is clearly delineated between courts and administrative bodies in other areas of law that touch on labour and employment. It will examine court cases that set out the appropriate forum and statutory provisions that provide for the orderly apportionment of cases between venues.

Chapter 3 will examine why cases involving a human rights aspect don’t fit within the general trend of clear delineation of jurisdiction. Reasons include the quasi-constitutional status of human rights, the tendency to err on the side of re-litigating human rights complaints to ensure that those rights are protected, and the fact that human rights issues can arise in a wide variety of contexts rather than in specific instances that can be easily compartmentalized. It will conclude by reviewing principles from the cases that can be used to help guide an administrative decision-maker in determining whether to hear a matter previously addressed in another forum.
Chapter 1
The Delineation of Jurisdiction Over Human Rights

The Supreme Court of Canada declared in Parry Sound (District) Social Services Administration Board v OPSEU, Local 324 that all employment-related statutes are implicitly incorporated into collective agreements. This means that labour arbitrators are required to apply human rights legislation. Labour arbitrators also have jurisdiction to address the human rights claims of unionized employees by virtue of their enabling statutes, for example in Ontario, under section 48(12)(j) of the Labour Relations Act, 1995. Human rights tribunals are also empowered to deal with human rights complaints arising out of the employment relationship. This concurrent jurisdiction creates the potential that an aggrieved unionized employee could seek redress for the same issue before multiple forums.

This chapter will examine the division of jurisdiction between human rights tribunals and other administrative decision-makers, with a particular focus on labour arbitration. It will first examine Ontario legislative provisions relating to jurisdiction in human rights and labour arbitration, followed by a review of court and tribunal decisions dealing with the overlapping jurisdiction in matters involving a human rights component.

The absence of clearly defined jurisdictional boundaries has caused courts and tribunals to employ mechanisms such as issue estoppel to prevent duplicative litigation. This chapter will review the Danyluk, Figliola and Penner line of cases where the Supreme Court of Canada was tasked with deciding whether claims that had previously been addressed should be re-heard in another judicial forum. This chapter concludes by examining human rights tribunal decisions that responded to the Figliola and Penner cases and their varied views of their supervisory powers over other administrative arbiters.

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5 Parry Sound (District) Social Services Administration Board v OPSEU, Local 324, 2003 SCC 42 at para 1, [2003] 2 SCR 157 [Parry Sound].
6 Ibid at para 23.
1.1 Statutory Assignment of Jurisdiction Over Human Rights in Ontario

Legislation provides the starting place for determining jurisdiction. In Ontario both the *Labour Relations Act, 1995* and the *Human Rights Code* (the “Code”) contain provisions that confer jurisdiction over human rights matters.

The general jurisdiction of a labour arbitrator or board of arbitration is set out in section 48(1) of the *Labour Relations Act, 1995*.

48. (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 arbitrable.\(^8\)

Labour arbitrators must also consider and apply the *Human Rights Code* and other employment-related legislation.

48. (12) An arbitrator or the chair of an arbitration board, as the case may be, has power,

[...]

(j) to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.\(^9\)

The *Labour Relations Act, 1995* also explicitly prohibits discriminatory provisions in collective agreements. While this provision doesn’t specifically provide jurisdiction, it reinforces the notion that labour arbitrators must be familiar with and apply the *Code*.

54. A collective agreement must not discriminate against any person if the discrimination is contrary to the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*.\(^10\)

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\(^8\) *Ibid* at s 48(1).

\(^9\) *Ibid* at s 48(12)(j).

\(^10\) *Ibid* at s 54.
Human rights are deemed to be quasi-constitutional, and thus deserve special protection under the law. The *Human Rights Code* prevails over other provincial legislation unless the legislature provides an explicit exemption from the *Code*.

47. (1) This Act binds the Crown and every agency of the Crown.

   (2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.  

Provincial human rights tribunals obviously have jurisdiction to hear claims alleging one or more violations of the *Human Rights Code*. The *Code* specifically protects an employee from workplace harassment or discrimination.

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

   (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Provisions in the *Human Rights Code* recognize that some cases could be heard before more than one venue, and provides the Human Rights Tribunal of Ontario (the “HRTO”) with the ability to defer an application or dismiss all or part of a claim where it has previously been addressed by another decision-maker.

45. The Tribunal may defer an application in accordance with the Tribunal rules.

45.1 The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

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11 *Human Rights Code, supra* note 1 at s 47 [Code].
12 *Ibid* at s 5.
13 *Ibid* at s 45.
14 *Ibid* at s 45.1.
The interpretation of section 45.1 of the Code, and specifically the term “appropriate dealt with” has been the subject of much debate.

1.2 Cases Addressing the Competing Jurisdiction Over Human Rights

The expansion of administrative law has allowed parties to bring some claims before administrative tribunals instead of the courts. This results in better access to justice as the tribunals are intended to be faster, cheaper and more user-friendly than the traditional court system. The proliferation of administrative tribunals has increased the likelihood that a party could advance a claim before more than one venue that is properly seized with jurisdiction. This creates the problem of determining the proper forum to bring the claim and whether a claim has been conclusively decided.

In Morin, the Supreme Court of Canada majority examined the concurrent, overlapping and exclusive jurisdiction models, and confirmed that labour arbitrators and human rights tribunals share jurisdiction over human rights issues.⁵ Provincial appellate courts have also reached the same conclusion.⁶

There is some debate within the labour community as to whether arbitrators should be provided with exclusive jurisdiction to address the human rights claims of unionized employees. There are also dangers associated with conferring exclusive jurisdiction to labour arbitration. The Parry Sound decision noted that “[…] overloading the grievance and arbitration procedure with issues the parties neither intended nor contemplated channelling there, may make labour arbitration anything but expeditious and cost-effective.”⁷ On the other hand, problems can also occur when matters are relitigated:

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⁵ Québec (Commission des droits de la personne & des droits de la jeunesse) c Québec (Procureure générale), 2004 SCC 39 at para 1, [2004] 2 SCR 185 [Morin].


⁷ Parry Sound, supra note 5 at para 100.
Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature’s intent in setting up the administrative scheme.  

1.3 Issue Estoppel as a Tool to Guard Against Multiple Proceedings

In the absence of a clear rule that would assign a dispute involving a human rights component to a specific venue in cases where multiple administrative decision-makers share jurisdiction over the matter, other techniques have been utilized (with varying degrees of success) in an attempt to reduce duplicative proceedings.

Tribunals can guard against multiple proceedings by deferring cases where that power is set out in legislation, and by the use of common law doctrines such as res judicata, abuse of process, issue estoppel, and the rule against collateral attack to prevent a party from raising the same claim in multiple venues. Issue estoppel “prevents a party from relitigating an issue already decided in an earlier proceeding, even if the causes of action in the two proceedings differ.” The three preconditions for the application of issue estoppel were set out in Angle v Minister of National Revenue:

[...] (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

In the aftermath of Angle there was confusion over whether there was discretion (and if so, the breadth of discretion) to bar the application of issue estoppel where the three-part test had been satisfied. The answer to this question was provided in Danyluk.

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18 Penner, supra note 4 at para 28.
1.3.1 *Danyluk* and Discretion in Applying Issue Estoppel

The 2001 Supreme Court of Canada decision in *Danyluk v Ainsworth Technologies Inc.* is a seminal case on issue estoppel. It confirmed that there is discretion to not apply issue estoppel even where the three preconditions of the *Angle* test had been satisfied, and provided guidance on how to exercise that discretion. “[E]stoppel is a doctrine of public policy that is designed to advance the interests of justice.” In order to ensure justice, the Court added an additional element to the *Angle* test – the consideration of whether issue estoppel ought to be applied in the given case. This means, even where the conditions of the issue estoppel test set out in *Angle* are met, a court still has discretion to determine whether it ought to be applied to the given case. The Court set out a (non-exhaustive) list of factors that should be considered in exercising this discretion.

*Danyluk* involved a concurrent employment standards complaint and a civil action. Ms. Danyluk alleged that her employer owed her approximately $300,000 in unpaid commissions at the time of her dismissal and filed an employment standards complaint seeking unpaid wages and commissions. The employment standards officer determined that she was owed two weeks’ pay in lieu of notice, but that she was not entitled to the unpaid commissions. The employee chose not to request that the Director of Employment Standards review the decision. While awaiting the employment standards decision, Ms. Danyluk commenced a civil action for wrongful dismissal, including claims for unpaid wages and commissions. The employer moved to strike these claims, arguing that they had already been addressed in the employment standards proceeding and thus were barred by issue estoppel. The motions judge found that the three required elements of issue estoppel were established, and the claims were struck from the Statement of Claim.

The Supreme Court of Canada held that the claims for unpaid wages and commissions should not be struck from the civil pleading. Justice Binnie, writing for a unanimous court, found that,

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23 *Danyluk*, supra note 2.
24 Ibid at para 19.
25 Ibid at paras 33, 63 and 66.
26 Ibid at para 33.
although the preconditions for issue estoppel were satisfied, the doctrine should not be applied in this particular case.

The Court recognized the importance of finality in decision-making.

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.27

Although finality is important, it should not come at the expense of fairness. As Justice Binnie noted, “[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice.”28

Once the preconditions of issue estoppel were established, the Court then had to determine whether estoppel ought to be applied in the circumstances of the particular case. The discretion is broader in cases involving a prior administrative decision (as opposed to a court decision), in order to account for the wide variety of “structures, mandates and procedures of administrative decision-makers.”29 Justice Binnie reviewed a non-exhaustive list of factors that should be considered in exercising the discretion. (a) The employment standards process was not intended to be the sole forum for such disputes, as at that time a provision of the Employment Standards Act provided that “no civil remedy of an employee against his or her employer is suspended or affected by this Act.”30 (b) The employment standards regime is intended to provide employees with a simplified, inexpensive and relatively quick access to compensation in cases where the employer does not fulfill the requirements of the Employment Standards Act. This purpose would be defeated if the parties treated it like an adversarial trial in order to avoid a negative decision that would estop them in other forums. (c) The employee had the option to request a review by the Director of Employment Standards. The fact that she failed to do so counted

27 Ibid at para 18.
28 Ibid at para 1.
29 Ibid at para 62.
30 Ibid at para 68.
against her. (d) The streamlined employment standards process was not well suited “to deal with complex issues of facts and law.”

(e) The employment standards officer did not have legal training, and therefore did not have the expertise to determine complex legal issues. (f) Facing imminent dismissal, the employee was in a vulnerable position at the time she filed the Employment Standards Act complaint. “It is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims.” However, the fact that the employee chose the simplified employment standards regime when seeking a significant payment of $300,000 in commissions counted against her. (g) The most important factor is whether, as a whole, the “application of issue estoppel in the particular case would work an injustice.”

The Court held that, given the facts, issue estoppel should not be applied to bar the civil claim. “Whatever the appellant’s various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.” The outcome in Danyluk essentially boiled down to the fact that the employment standards process had not properly addressed the lion’s share of Ms. Danyluk’s claim and lacked sufficient procedural protections to conclusively decide a claim involving such a significant amount of money.

### 1.3.2Figliola and the Emphasis on Finality

In October 2011, the Supreme Court of Canada released its decision in British Columbia (Workers’ Compensation Board) v British Columbia (Human Rights Tribunal) [“Figliola”] that examined the use of issue estoppel in cases where tribunals have concurrent jurisdiction. The decision also provided guidance to human rights adjudicators in exercising their statutory discretion to dismiss a complaint where the issue has already been conclusively decided by another statutory decision-maker. The split decision demonstrates the tension between finality

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31 Ibid at para 75.
32 Ibid at para 78.
33 Ibid at para 80.
34 Ibid at para 80.
35 Figliola, supra note 3.
and fairness. While the majority decision did not attempt to specifically assign the case to a particular forum, it advocated for the case to be tried before a single venue.

The three complainants were injured workers who received benefits for chronic pain from the British Columbia Workers’ Compensation Board (WCB). The WCB’s policy was to provide a fixed award for chronic pain in the amount of 2.5% of total disability. The complainants appealed to the WCB’s Review Division on the basis that the policy “was patently unreasonable, unconstitutional under section 15 of the Canadian Charter of Rights and Freedoms, and discriminatory on the grounds of disability under section 8 of the Human Rights Code […].”

The Review Officer found that he did not have jurisdiction to review the policy for patent unreasonableness, and held that the chronic pain policy was not discriminatory, as it did not violate section 8 of the Human Rights Code. After the complainants appealed to the Workers’ Compensation Appeal Tribunal (WCAT), but before their appeals were heard, the British Columbia legislature removed the WCAT’s authority to apply the Human Rights Code. As a result of the amendments, the WCAT could not review the Review Officer’s human rights determination. The complainants did not apply for judicial review.

Although judicial review was available, the complainants instead sought redress from the Human Rights Tribunal, alleging the same violation of section 8 of the Human Rights Code. The Workers’ Compensation Board sought to dismiss the human rights complaints arguing that the Human Rights Tribunal lacked jurisdiction and that the complaints had already been “appropriately dealt with” in accordance with section 27(1)(f) of the Human Rights Code.

27 (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

[...]

36 Ibid at para 6.
37 Ibid at para 7.
38 Ibid at paras 9-10.
39 Ibid at para 11.
40 Ibid at para 12.
41 Ibid at para 12.
42 Ibid at para 13.
The Human Rights Tribunal rejected both of the WCB’s arguments for dismissal and held that a full hearing was warranted. This decision was set-aside on judicial review, on the basis that the Tribunal “failed to take into proper account the principles of res judicata, collateral attack, and abuse of process.” The British Columbia Court of Appeal restored the Tribunal’s decision, finding that the language of section 27(1)(f) demonstrated the intent that the Tribunal hear human rights complaints despite the fact that they might have already been adjudicated in a different venue.

The Supreme Court of Canada split 5-4 and revealed a deeply divided court. Both factions allowed the appeal and quashed the Human Rights Tribunal’s decision to hear the complaint. However, the majority outright dismissed the Tribunal proceedings, while the dissent would have remitted the matter back to the Tribunal for reconsideration.

The majority decision authored by Justice Abella emphasized the importance of finality in decision-making. It examined the guiding principles underlying section 27(1)(f) that should be used when considering whether to dismiss all or part of a complaint where another tribunal has made a decision involving the same issue or subject-matter. Section 27(1)(f) is the “statutory reflection” of the common law doctrines of issue estoppel, collateral attack and abuse of process. The doctrines should not be strictly applied; rather a tribunal should be guided by their underlying principles in order to promote “principles of finality, the avoidance of multiplicity of proceedings, and the protection of the integrity of the administration of justice, all in the name of fairness.”

Justice Abella noted that access to justice does not involve “serial access to multiple forums”, but rather “justice is enhanced by protecting the expectation that parties will not be subjected to

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43 Human Rights Code, RSBC 1996, c 210 at s 27(1)(f).
44 Figliola, supra note 3 at para 15.
46 Ibid at para 22.
48 Ibid at para 25.
49 Ibid at para 35.
relitigation in a different forum of matters they thought had been conclusively resolved.” In balancing the competing interests of finality and fairness of judicial decisions, the *Figliola* majority clearly advocated for finality. This emphasis on finality does not mean that a complainant would be without redress. The statute’s internal appeal process remains available, along with judicial review.

Justice Abella set out three questions that a tribunal should ask when analyzing whether the substance of a complaint has been “appropriately dealt with” in the other forum:

1. Whether there was concurrent jurisdiction to decide human rights issues;
2. Whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal;
3. Whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself.

If the answer to all three questions is “yes”, the complaint should be dismissed. “At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.”

The majority decision also sent a strong message to tribunals that a provision such as section 45.1 in the Ontario *Human Rights Code* is not “a statutory invitation either to ‘judicially review’ another tribunal’s decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome”. This is an important admonishment to adjudicators who at times very strictly applied the issue estoppel test or found that another decision-maker did not adequately address an issue because a different approach was employed.

### 1.3.3 Penner and the Importance of Fairness

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50 *Ibid* at para 36.
51 *Ibid* at para 37.
52 *Ibid* at para 37.
Seventeen months after the *Figliola* decision was released, the Court revisited the discretionary element of issue estoppel in *Penner v Niagara (Regional Police Services Board)*.\(^{54}\) In that case, the Court had to examine whether it was appropriate to strike several claims in the plaintiff’s civil action on the basis that they had been conclusively determined at a police disciplinary hearing. In a 4-3 decision the majority concluded that applying issue estoppel to bar the civil claims would be unjust.

Mr. Penner was arrested for disruptive behaviour during a court hearing.\(^{55}\) He filed a complaint under the *Police Services Act* alleging “unlawful arrest and unnecessary use of force” by two officers and commenced a civil action against them and others seeking damages stemming from the incident.\(^{56}\) The officers were the subjects of a disciplinary hearing pursuant to the *Police Services Act*. Mr. Penner was a party to the disciplinary proceeding and actively participated by testifying, cross-examining witnesses and making legal submissions.\(^{57}\) The hearing officer found no evidence that the police officers used excessive force during Mr. Penner’s arrest or while he was detained at the police station, and that “the force that was used during Mr. Penner’s arrest was totally justified” given his increasingly hostile behaviour.\(^{58}\) The officers were found not guilty of misconduct and the complaint was dismissed.\(^{59}\)

The motion judge in the civil action applied estoppel to strike many of Mr. Penner’s claims, finding that the police disciplinary hearing had conclusively determined that the arrest was lawful and that the officers did not use excessive force.\(^{60}\) The Court of Appeal dismissed the appeal, but criticized the motion judge for failing to explain why he did not exercise his discretion to refuse to apply issue estoppel.\(^{61}\)

The Supreme Court of Canada majority concluded that it would be unfair to apply issue estoppel to bar Mr. Penner’s civil claims and held that *Danyluk*’s legal framework guiding the exercise of

\(^{54}\) *Penner*, supra note 4.
\(^{55}\) *Ibid* at para 2.
\(^{56}\) *Ibid* at para 79.
\(^{57}\) *Ibid* at para 80.
\(^{58}\) *Ibid* at para 82.
\(^{60}\) *Ibid* at para 19.
\(^{61}\) *Ibid* at paras 23 and 25.
discretion still prevailed. The *Danyluk* factors guiding the exercise of discretion reveal that unfairness in applying issue estoppel can arise in two ways. First, unfairness may result where the prior process was unfair. Second, even if the prior proceeding was fair, it might nonetheless be unfair to use those results to bar the subsequent claim. Given the differing nature of administrative and court proceedings it is to be expected that their purposes, processes and stakes will differ. However, the use of issue estoppel might be unjust where this difference is significant. Two important factors in assessing fairness in this second sense are “the wording of the statute from which the power to issue the administrative order derives” and “the purpose of the legislation […] including the degree of financial stakes involved”. These “shape the reasonable expectation of the parties about the scope and effect of the proceedings and their impact on the parties’ broader legal rights”. If issue estoppel is applied too strictly, there is a risk that parties could place excessive importance in the outcome and over-participate in the administrative proceedings, or entirely forgo the administrative process to avoid an unfavourable result. This consideration must be balanced against the importance of finality in administrative proceedings.

The Court of Appeal erred in failing to consider the second aspect of fairness (specifically whether it would be fair to use the results of the police disciplinary process to bar Mr. Penner’s civil claim). The majority conducted this assessment by applying the framework set out in *Danyluk*. The statutory text clearly contemplated parallel disciplinary and civil proceedings, and demonstrates that the legislature did not intend for a complainant to seek recourse in only one forum. Furthermore, the two processes have vastly different objectives. One examines whether disciplinary action should be taken against a police officer (and does not provide a remedy to the complainant), while the other provides the complainant with a remedy in the form

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64 *Ibid* at para 39.
65 *Ibid* at para 42.
66 *Ibid* at para 42.
67 *Ibid* at para 43, quoting *Danyluk*, *supra* note 2 at paras 68-71 and 73.
69 *Ibid* at para 46.
70 *Ibid* at para 42.
72 *Ibid* at paras 50-51.
73 *Ibid* at para 53.
of compensation for damages arising from a police officer’s unwarranted conduct.\textsuperscript{74} Taken together, the parties would not have reasonably expected that the police disciplinary proceeding would bar a subsequent civil action.

The majority did not reference \textit{Figliola}, nor did it address the “fairness of finality” approach endorsed by Justice Abella in that decision. It simply indicated that the \textit{Danyluk} framework guiding the exercise of residual discretion “[…] has not been overtaken by this Court’s subsequent jurisprudence.”\textsuperscript{75} This is unfortunate, as it leaves open the question of whether \textit{Figliola} has been overruled or whether it still has relevance and, if so, where it should be used. The dissent, on the other hand, indicated that \textit{Figliola} had overtaken the analytical approach espoused by \textit{Danyluk}, and that the \textit{Figliola} approach now governed.\textsuperscript{76}

With \textit{Penner}, the Court shifted from \textit{Figliola}’s emphasis on finality of litigation and returned to the unpredictability of \textit{Danyluk}.

\subsection*{1.4 Human Rights Tribunal Response to the Cases}

The Human Rights Tribunal of Ontario has applied the guidance provided by the courts to its jurisprudence. Consequentially, its decisions reflect and respond to the changing priorities espoused by the Supreme Court.

\subsubsection*{1.4.1 Human Rights Decisions Prior to \textit{Figliola}}

The 2007 HRTO decision in \textit{Snow v Honda of Canada Manufacturing} examines the doctrines of issue estoppel and abuse of process as it applies to administrative tribunals, and explains why human rights tribunals are reluctant to use these equitable tools to dismiss applications.\textsuperscript{77} The complainant alleged that his employer failed to accommodate his disability and that his

\begin{itemize}
  \item \textsuperscript{74} \textit{Ibid} at para 54.
  \item \textsuperscript{75} \textit{Ibid} at para 31.
  \item \textsuperscript{76} \textit{Ibid} at paras 75-76.
  \item \textsuperscript{77} \textit{Snow v Honda of Canada Manufacturing}, 2007 HRTO 45, [2007] OHRTD No 45 [\textit{Snow}].
\end{itemize}
termination from employment was tainted by discrimination. 78 The respondents sought to dismiss the human rights claim, arguing that the Workplace Safety and Insurance Board (WSIB) had already addressed many of the issues raised in the application. 79 The Vice-Chair determined that none of the three requirements for issue estoppel were met. On the issue of privity in the issue estoppel test, it found that the Ontario Human Rights Commission (which was not involved in the WSIB process but appeared as a party before the tribunal) was not a privy of the complainant because it had the role of protecting the public interest. 80 However, such a reading would likely bar the application of issue estoppel in almost every prior administrative decision, as the Human Rights Commission likely would not have participated in the prior process. The Vice-Chair urged that caution and restraint be used when considering issue estoppel, noting that “[o]ne of the primary concerns is that the dismissal of a complaint deprives the parties of the opportunity to have the merits of the case determined by a tribunal that specializes in the adjudication of human rights disputes.” 81

The HTRO analyzed section 45.1 of the Code for the first time in Campbell (Litigation Guardian of) v Toronto District School Board and dismissed a discrimination complaint by an autistic student who alleged that the school board failed to accommodate his disabilities. 82 It refused to re-litigate an issue (his placement in a special education class) that had already been decided by a Special Education Tribunal under the Education Act and held that the claim was barred on the grounds of abuse of process and under section 45.1 of the Code. 83 In doing so, the tribunal set out the guiding principles underlying section 45.1. Since the provision had only recently been added to the Code, the HRTO had yet to flesh out its meaning, however, the panel noted that the discretion to dismiss a complaint under section 45.1 is at least as broad as the doctrines of issue estoppel and abuse of process. 84 The Tribunal applied a two-step analysis when looking at cases under section 45.1. First, it examined whether there was another proceeding, and, if so, whether the other proceeding appropriately dealt with the substance of the application. 85 The term

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78 Ibid at para 1.
79 Ibid at para 2.
80 Ibid at para 50.
81 Ibid at para 38.
82 Campbell (Litigation Guardian of) v Toronto District School Board, 2008 HRTO 62, [2008] OHRTD No 60 [Campbell].
83 Ibid at para 35.
84 Ibid at para 62.
85 Ibid at para 65.
“proceeding” in this case “includes an adjudicative process established under a statutory regime.”\textsuperscript{86} The Tribunal took pains to note that it is not an appellate court, and that it can find that a matter was “appropriately” addressed even if it would have reached a different conclusion.\textsuperscript{87}

\textit{Dunbar v Haley Industries Ltd.} also involved an analysis of “appropriately dealt with” in another proceeding, and the HRTO dismissed the human rights complaint where an arbitrator had already dealt with same subject matter.\textsuperscript{88}

In \textit{Barker v Service Employees International Union, Local 1 Ontario}, a labour arbitrator dismissed a termination grievance, finding it unlikely that the employee would return to work with or without accommodations.\textsuperscript{89} The employer sought to dismiss the subsequent human rights application under section 45.1 of the \textit{Code}. The HRTO refused to dismiss the complaint, concluding that the arbitrator did not “appropriately deal with” the human rights components.\textsuperscript{90}

Thus it is clear that while the Tribunal does not exercise review power over the decisions of others, from a practical standpoint, it is necessary at times to scrutinize the human rights analysis of other decision makers. The purpose is to determine whether the kind of analysis contemplated by the \textit{Code}, and central to the Tribunal's expertise, has been undertaken where a \textit{Code} issue has been raised.\textsuperscript{91}

Such an approach is consistent with elementary principles of statutory interpretation. In the language of section 45.1, “appropriately” qualifies “having dealt with”. Thus, it is not sufficient that the human rights claims have been addressed or considered by a decision maker with the requisite authority. The inclusion of “appropriately” in the statutory language signals a mandate to probe the relevant aspects of the other proceeding. […]\textsuperscript{92}

The Vice-Chair indicated that, since quasi-constitutional rights are at stake, human rights tribunals should be reluctant to dismiss complaints “where it is not manifestly clear that the

\textsuperscript{86} \textit{Ibid} at para 67.
\textsuperscript{87} \textit{Ibid} at para 69.
\textsuperscript{88} \textit{Dunbar v Haley Industries Ltd.}, 2010 HRTO 272.
\textsuperscript{89} \textit{Barker v Service Employees International Union, Local 1 Ontario}, 2010 HRTO 1921 at para 20, [2010] OHRTD No 1968 [\textit{Barker}].
\textsuperscript{90} \textit{Ibid} at para 44.
\textsuperscript{91} \textit{Ibid} at para 39.
\textsuperscript{92} \textit{Ibid} at para 40.
human rights issues have been fully and properly addressed”. Such reasoning would soon be criticized by the courts.

The first Ontario court decision interpreting the term “appropriately dealt with” under section 45.1 of the Code was released one week prior to the Figliola decision in College of Nurses (Ontario) v Trozzi. The Ontario Divisional Court examined the provision in a judicial review of an HRTO decision to hear a complaint that had been previously addressed by another tribunal. The court examined the extent of any residual supervisory jurisdiction of the human rights tribunal under section 45.1 of the Code. The human rights complaints were dismissed, with the court disagreeing with the HRTO’s expansive view of the definition of “appropriately”.

The College of Nurses Registration Committee imposed 13 conditions on Ms. Trozzi’s certificates of registration as a Registered Nurse and Registered Practical Nurse because she suffered from medical disorders that affected her concentration. She appealed to the Health Professions Appeal and Review Board (HPARB), alleging that the conditions were discriminatory. The HPARB found that the conditions were appropriate, and Ms. Trozzi did not appeal the decision. While awaiting the HPARB decision, she filed a human rights complaint alleging discrimination due to disability. The HRTO denied the College’s request to dismiss the human rights application under section 45.1 of the Code.

On judicial review, the Divisional Court held that the HRTO erred in not dismissing the complaint because, rather than considering whether the claim was appropriately addressed by the HPARB, the HRTO had actually looked at whether HBARB adequately addressed the human rights claims. Both the majority and concurring decisions admonished the HRTO for reviewing the HPARB decision in order to determine whether it was satisfied with HPARB’s

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93 Ibid at para 42.
94 The employer brought an application for judicial review of the decision, but the human rights application was withdrawn with leave, see Barker v. Service Employees International Union, Local 1 Ontario, 2011 HRTO 2010, [2011] OHRTD No 1974.
95 College of Nurses (Ontario) v Trozzi, 2011 ONSC 4614 (Ont Div Ct) [Trozzi].
96 Ibid at para 8.
97 Ibid at para 9.
98 Ibid at para 11.
99 Ibid at para 10.
100 Ibid at para 13.
101 Ibid at paras 30, 49.
analysis and determination. The court pointed out that the HRTO is not an appellate court for other tribunals, and rejected the assertion that section 45.1 of the Code gave it supervisory jurisdiction over other tribunals. The Divisional Court quashed the HRTO’s decision to hear the human rights claims and dismissed the human rights application.

1.4.2 Human Rights Decisions After Figliola

The majority decision in Figliola prompted the Human Rights Tribunal of Ontario to re-examine its approach to dismissing complaints under section 45.1 of the Code where the subject matter had previously been addressed by another tribunal. The decisions demonstrated greater respect for neighbouring tribunals.

In Gilinsky v Peel District School Board, the HRTO applied section 45.1 of the Code to dismiss a human rights complaint where a labour arbitrator had previously found that a teacher had a medical condition that prevented him from carrying out his duties and that accommodation was not warranted. Figliola guided the Tribunal’s interpretation of “appropriately dealt with” under section 45.1. In doing so, it should look at whether the applicant had the opportunity “to have the human rights claim considered by an adjudicator who had the jurisdiction to interpret and apply the Code.” The Vice-Chair noted that the Tribunal should not be used as a vehicle to collaterally attack another decision and that it was “not to stand in appeal of other decision-makers in their determination of human rights issues.”

Paterno v Salvation Army, Centre of Hope can be viewed as the high water mark for the HRTO’s deference to another decision-maker and significantly contrasts with the Barker v SEIU decision. A unionized employee attempted to split his discipline and dismissal grievance,

102 Ibid at paras 30, 55.
103 Ibid at paras 33, 65.
104 Ibid at paras 28, 33.
105 Ibid at paras 45, 77.
107 Ibid at para 31.
108 Ibid at para 32.
109 Ibid at para 31.
arguing that he didn’t want the labour arbitrator to address the alleged *Code* violations.\textsuperscript{111} Instead, he wanted to pursue his discrimination claims separately before the Human Rights Tribunal.\textsuperscript{112} The arbitrator found that the employer had just cause for dismissal and did not violate the *Code*.\textsuperscript{113} The Human Rights Tribunal dismissed most of the human rights complaint, save for a couple of allegations that were not raised at arbitration.\textsuperscript{114} The decision signalled that the HRTO would adopt a new approach in reviewing the prior decisions of other administrative arbiters. “Previous jurisprudence that suggested that the Tribunal should consider whether the other proceeding applied proper human rights principles is no longer applicable in light of *Figliola*.”\textsuperscript{115}

One incredible aspect of the *Paterno* decision was the acknowledgement that, by virtue of section 48(12)(j) of the Ontario *Labour Relations Act*, a labour arbitrator has the obligation to interpret and apply the *Human Rights Code*, and is presumed to have done so when analyzing whether there is just cause for a termination.\textsuperscript{116} Human rights issues cannot be parsed out of arbitration – the *Code* is infused in the just cause determination, and “an arbitrator's decision finding just cause for discipline implicitly incorporates a legal finding that the discipline was not tainted by a violation of the Code.”\textsuperscript{117} After *Paterno*, it became clear that a unionized employee has to make a choice between the two venues.

The applicant had a choice. He could have foregone the benefits that he had as an employee under a collective agreement - including just cause protection, the grievance procedure and representation by union counsel - by not pursuing a grievance or arbitration. He then could have proceeded at the Tribunal with his human rights Applications without them being affected by the arbitrator's determination. Having chosen to take the benefits of the collective agreement and the grievance process, however, an applicant must accept the consequences of that choice for a subsequent human rights proceeding, which is that the issues may be dealt with in the grievance and arbitration process that she or he has commenced. An applicant has a choice about where to proceed, but does not have the option to require an employer to litigate the same issues twice.\textsuperscript{118}

\textsuperscript{111} *Ibid* at para 2.
\textsuperscript{112} *Ibid* at para 2.
\textsuperscript{113} *Ibid* at para 1.
\textsuperscript{114} *Ibid* at para 37.
\textsuperscript{115} *Ibid* at para 24.
\textsuperscript{116} *Ibid* at para 24.
\textsuperscript{117} *Ibid* at para 1.
\textsuperscript{118} *Ibid* at para 33.
In *Gomez v Sobeys Milton Retail Support Centre*, a unionized employee was terminated following unsuccessful attempts to accommodate his disability, with the employer contending that he could not be accommodated without undue hardship.¹¹⁹ A labour arbitrator dismissed the grievance and found no violations of the *Code* or the collective agreement.¹²⁰ The Human Rights Tribunal found that the Supreme Court of Canada’s reasoning in *Figliola* applied to the interpretation of section 45.1 of the *Code*.¹²¹

*Figliola* instructs this Tribunal not to consider the procedural or substantive correctness of the other proceeding or decision when deciding whether the application or part of the application can proceed. If the reasons in the other decision dispose of the human rights issues before the Tribunal, the application or part of the application must be dismissed on the basis that it was appropriately dealt with in the other proceeding.¹²²

The human rights application was dismissed because the same issue had already been addressed at arbitration in a process where the parties had the opportunity to know and meet the case.¹²³

The *Okoduwa v Husky Injection Molding Systems Ltd.* decision indicated that the Tribunal’s principle focus in applying section 45.1 of the *Code* is “whether the applicant has already had an opportunity to have the human rights claim considered by an adjudicator who had jurisdiction to interpret and apply the *Code*”.¹²⁴

*Figliola* ushered in an era of finality and predictability for parties. The HRTO embraced *Figliola*¹²⁵ and consistently applied the approaches in *Gomez* and *Okoduwa* to cases involving section 45.1.¹²⁶ It adopted a restrictive view of its discretion to rehear a complaint and recognized that, in some cases, section 45.1 of the *Code* required that applicants make a choice of which forum to bring their complaints.¹²⁷ This meant that unionized employees with human

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¹²² *Ibid* at para 27.
¹²³ *Okoduwa v Husky Injection Molding Systems Ltd.*, 2012 HRTO 443 at para 26 [*Okoduwa*].
¹²⁵ *Claybourn v Toronto (City) Police Services Board*, 2013 HRTO 1298 at para 56, [2013] OHRTD No 1310 [*Claybourn*].
rights complaints had virtually no other practical or sensible option than to proceed through grievance and arbitration since pursuing a human rights complaint would mean abandoning rights under a collective agreement. This approach was revisited after the Supreme Court of Canada released the Penner decision.

1.4.3 Human Rights Decisions After Penner

In Claybourn v Toronto (City) Police Services Board, the Human Rights Tribunal of Ontario re-examined its approach to applying section 45.1 of the Human Rights Code in light of the Penner decision. Claybourn was an interim decision that considered whether to dismiss a human rights complaint in three cases where a previous decision has been made following a public complaint made under the Police Services Act. The three-member HRTO panel held that the human rights complaints were not barred by section 45.1 of the Code.

The majority decision attempted to reconcile Figliola and Penner through an analysis of the reasonable expectation of the parties, particularly on the expectation relating to the availability of a remedy to the complainant. In Figliola, the applicants would have received remedies in the workers’ compensation process, since the policy fixing chronic pain awards at 2.5% of total disability would have been set aside and they would have been awarded benefits without regard to the policy. This would lead the parties to believe that the issue had been conclusively decided. Having already received a remedy in the workers’ compensation process, the applicants would not have needed to seek relief before a second forum, nor would it have been expected that they would bring their claims before a second forum. The parties in Penner would not have reasonably believed that a public complaint under the Police Services Act would have barred a civil action, because the statute contemplated a parallel civil claim, the complainant would not have received a remedy in the police disciplinary proceeding, and based on broader

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128 Shilton, supra note 19 at 500 and 502.
129 Claybourn, supra note 126.
130 The complaints were not the subject of a hearing because an investigation determined that they were either unsubstantiated or not of a serious nature. See paras 28, 33 and 36.
131 Ibid at para 9.
132 Ibid at para 78.
policy implications (i.e. parties not filing a police complaint, over-litigating complaint, etc.). Although *Penner* involved a subsequent civil action (rather than a human rights complaint), these same considerations apply in the human rights context. Just as the civil action in *Penner* could provide a successful plaintiff with a remedy, the human rights process could provide a remedy to the applicants if a *Code* violation is established.

The “Tribunal is obliged to consider the principles underlying the doctrine of issue estoppel as articulated by the majority in *Penner* when interpreting and applying section 45.1 of the *Code* in the context of the disciplinary process under the *PSA*.” The tribunal applied the two-part test set in out *Campbell* to determine whether a claim should be barred under section 45.1 of the *Code*. It considered first, whether the other process constituted a “proceeding” under section 45.1, and second, whether it appropriately dealt with the substance of the human rights complaint. The principles from *Penner* relating to the reasonable expectations of the parties must be considered when examining the second part of the test and when exercising any residual discretion under section 45.1. The HRTO concluded that the proceedings under the *Police Services Act* had not appropriately dealt with the substance of the human rights complaints, and allowed the applications to proceed. (The concurring decision found that the police disciplinary investigation did not appropriately deal with the substance of the complaints and distinguished *Figliola* on several grounds, including the different legislative context of section 45.1 of the Ontario *Code* and because the allegations of police misconduct did not proceed beyond the investigative stage to a full hearing).

The *Claybourn* decision represents a shift away from the more restricted exercise of discretion ushered in by *Figliola*. However, it is not surprising that the HRTO arrived at the same result as the Supreme Court of Canada majority in *Penner* as *Claybourn* involved a similar police disciplinary process and because the police complaints in *Claybourn* did not proceed beyond the investigative stage.

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133 *Ibid* at para 79.
134 *Ibid* at para 70.
135 *Ibid* at para 81.
137 *Ibid* at para 86.
139 *Ibid* at para 89.
140 *Ibid* at paras 96-98.
1.5 Conclusion

Human rights tribunals and labour arbitrators share concurrent jurisdiction over human rights issues. This concurrent jurisdiction has created confusion in determining whether particular cases should be litigated before both forums. The Supreme Court of Canada’s jurisprudence demonstrates a divide within the Court over the extent to which matters should be re-heard. Whether Penner overrules Figliola in the context of statutory discretion to dismiss a complaint remains an open question.
Chapter 2
Lessons from Other Relationships

The lack of clear rules for delineating jurisdiction in cases involving a human rights tribunal and another administrative decision-maker stands in stark contrast to other relationships between judicial decision-makers where the trend has been to assign certain types of cases to specific venues.

This chapter will examine how jurisdiction is apportioned in other relationships involving multiple judicial decision-makers. It will review statutes and cases that assist in delineating jurisdiction between courts and human rights tribunals, labour arbitrators, and employment standards tribunals, as well as between labour arbitration and the employment standards regime in order to determine whether they contain any principles that could assist in assigning jurisdiction between labour arbitration and human rights tribunals.

2.1 Common Law and Human Rights

The *Human Rights Code* provides that a person may bring an application to the human rights tribunal unless there is an ongoing civil proceeding relating to the same infringement.

34. (1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2, (a) within one year after the incident to which the application relates; or (b) if there was a series of incidents, within one year after the last incident in the series.

[...]

(11) A person who believes that one of his or her rights under Part I has been infringed may not make an application under subsection (1) with respect to that right if, (a) a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or (b) a court has finally determined the issue of whether the right has been infringed or the matter has been settled.
For the purpose of subsection (11), a proceeding or issue has not been finally determined if a right of appeal exists and the time for appealing has not expired.\textsuperscript{141}

In \textit{Seneca College of Applied Arts & Technology v Bhadauria}, the Supreme Court of Canada unanimously held that a plaintiff could not bring a tort action for discrimination, but rather must apply the \textit{Human Rights Code} and advance her claim before a human rights tribunal.\textsuperscript{142} The plaintiff, a woman of East-Indian origin who held a Ph.D. in mathematics and a valid teaching certificate, had applied for advertised teaching positions at the College on ten separate occasions over a four-year period but never received an interview.\textsuperscript{143} The Court found that the thoroughness of the \textit{Human Rights Code} indicated the legislative intention to refer all human rights matters to that system. The \textit{Code} contains an extensive enforcement mechanism, which at that time included proceedings before a board of inquiry, a right of appeal to the court, and summary conviction penalties for \textit{Code} violations.\textsuperscript{144} Furthermore, the text of the legislation then in force (which has since been removed) provided the board of inquiry with “exclusive jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision”.\textsuperscript{145} This language granting exclusive jurisdiction to the board of inquiry, coupled with the scheme’s comprehensive enforcement mechanism and broad remedial authority, indicate that human rights must be enforced by use of the statutory mechanism.\textsuperscript{146} Claimants must avail themselves to the statutory process and are foreclosed from bringing a civil cause of action based on a violation of the \textit{Code} or its underlying public policy.\textsuperscript{147}

The Ontario \textit{Human Rights Code} now contains amendments designed to prevent the confusion that existed prior to \textit{Bhadauria}. While an individual cannot commence an action before the courts based only on a violation of the \textit{Code}, a remedy for a \textit{Code} violation remains available through the courts so long as it is sought as part of a larger claim.

\textsuperscript{141} \textit{Human Rights Code}, \textit{supra} note 1 at ss 34(1), (11) and (12).
\textsuperscript{143} \textit{Ibid} at para 4.
\textsuperscript{144} \textit{Ibid} at para 11.
\textsuperscript{145} \textit{Ibid} at para 9.
\textsuperscript{146} \textit{Ibid} at para 25.
\textsuperscript{147} \textit{Ibid} at para 12, 27.
46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:

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

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

(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I.\textsuperscript{148}

\section*{2.2 Common Law and Arbitration}

The Supreme Court of Canada has clearly indicated, on multiple occasions, that disputes arising out of a collective agreement must be brought to labour arbitration. A review of the cases stretching back several decades demonstrates that court involvement in such disputes diminished as the scope of labour arbitration progressively expanded.

For instance, in \textit{McGavin Toastmaster Ltd v Ainscough}, employees sought severance pay due under a collective agreement.\textsuperscript{149} The majority decision noted in \textit{obiter} that there was an issue of whether the dispute should have been brought before a labour arbitrator in accordance with the grievance and arbitration procedures set out in the collective agreement, but decided not to address the question since it was not an issue raised by the parties.\textsuperscript{150} The employees walked off the job after learning that the employer planned to close the plant.\textsuperscript{151} The plant closed several days later.\textsuperscript{152} The employer argued that by virtue of the common law doctrine of fundamental breach, the employees had forfeited any rights to employer-provided benefits under the collective agreement (including severance pay) when they engaged in an illegal strike.\textsuperscript{153} The majority rejected this argument, stating that the statutory labour relations framework has

\begin{thebibliography}{9}
\bibitem{148} Human Rights Code, supra note 1 at s 46.1.
\bibitem{149} McGavin Toastmaster Ltd v Ainscough, [1976] 1 SCR 718, 54 DLR (3d) 1.
\bibitem{150} \textit{Ibid} at para 2.
\bibitem{151} \textit{Ibid} at para 3.
\bibitem{152} \textit{Ibid} at para 1.
\bibitem{153} \textit{Ibid} at para 1.
\end{thebibliography}
displaced the common law employment relationship.\textsuperscript{154} “The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement […].”\textsuperscript{155}

In \textit{Winnipeg Teachers’ Association v Winnipeg School Division No. 1}, the school division brought a court action against the Teachers’ Association seeking damages to compensate for the expense of providing noon-hour supervision while teachers engaged in a work to rule campaign.\textsuperscript{156} The collective agreement did not expressly state that teachers had to provide lunchtime supervision, but it did require them to take orders from the principal who was obliged to ensure that students were supervised during the noon-hour.\textsuperscript{157} The majority decision followed \textit{McGavin Toastmaster} and held that the school division could recover damages despite the fact that it should have utilized the grievance and arbitration procedures set out in the collective agreement since the jurisdictional issue had not been raised before the lower courts and because the teachers’ association had indicated to its members that it hoped the school division would bring the dispute to court.\textsuperscript{158} Justice Laskin, in dissent, indicated that under the terms of the collective agreement the dispute should have been submitted to arbitration, and that the parties’ “consent or choice to go to the courts cannot of itself command the courts’ intercession by way of original adjudication.”\textsuperscript{159}

In \textit{General Motors of Canada Ltd v Brunet}, an employee brought a civil action after he was laid off, seeking lost wages and reinstatement into a job with suitable accommodations for his injured wrist.\textsuperscript{160} The union had declined to bring his claim to arbitration.\textsuperscript{161} The Court held that it did not have jurisdiction to hear the claim, and noted that allowing such a claim to proceed before a court would offend the requirement to submit such disputes to mandatory arbitration under the statutory labour relations regime.\textsuperscript{162}

\textsuperscript{154} \textit{Ibid} at paras 12-13.
\textsuperscript{155} \textit{Ibid} at para 10.
\textsuperscript{157} \textit{Ibid} at paras 15 and 44.
\textsuperscript{158} \textit{Ibid} at paras 25-26.
\textsuperscript{159} \textit{Ibid} at para 50.
\textsuperscript{160} \textit{General Motors of Canada Ltd v Brunet}, [1977] 2 SCR 537 at para 2.
\textsuperscript{161} \textit{Ibid} at para 4.
\textsuperscript{162} \textit{Ibid} at para 8.
The Supreme Court of Canada declared in *St. Anne Nackawic* that courts were out of the business of enforcing collective agreements and that they could not award damages for violations of collective agreements. The employer brought a court action seeking an injunction and damages for losses suffered when a unit of mill workers, who were governed by a collective agreement that was in force at the time, walked off the job in solidarity with office workers engaged in a lawful strike. At issue was the court’s ability to award damages for violations of the collective agreement. The Court held that damages were only available through the arbitration process established in the collective agreement.

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

The Court recognized the central role that arbitration plays in labour relations, and that interference from the courts would undermine the legislative scheme designed to comprehensively address all aspects of the union-employer relationship.

What is left is an attitude of judicial deference to the arbitration process. This deference is present whether the board in question is a ‘statutory’ or a private tribunal [...]. It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration, when adopted by the parties as was done here in the collective agreement, is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of a collective agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement.


164 *Ibid* at para 3.

165 *Ibid* at para 37.

166 *Ibid* at para 16.

The Court then addressed the question of its ability to issue injunctions in case of an illegal strike. Injunctions are viewed as the means of enforcing the law set out in the statute (specifically the provisions prohibiting illegal strikes and lockouts) to protect the whole statutory scheme rather than enforcing the terms of a collective agreement. After reviewing the relevant legislation the Court concluded that the legislative scheme did not completely oust the jurisdiction of the courts to issue injunctions.

The St. Anne Nackawic decision recognizes the important role of labour arbitration in the legislative labour relations scheme, and demonstrated a reluctance to undermine the legislative goals by allowing parties to invoke a different process. It barred the use of two exemptions that had previously allowed a court to take jurisdiction, and essentially sent all cases to labour arbitration. One interesting aspect of the case is that the notion that a court has superior expertise to a labour arbitrator and thus could make a “better” decision never arose.

The Supreme Court of Canada’s majority decision in Weber v Ontario Hydro built upon the principles from St. Anne Nackawic. In Weber, the Supreme Court of Canada reviewed the delineation of jurisdiction between courts and labour arbitration, and struck out an employee’s civil action seeking remedies for breaches of tort law and Charter violations.

The employee, Mr. Weber, collected sick leave benefits while off work due to a back injury. His employer, suspecting that he was malingering, commenced a private investigation. The investigators entered Weber’s home and obtained information that prompted the employer to suspend him for misusing his sick leave benefits. The union filed grievances on his behalf, which were eventually settled at arbitration. While awaiting arbitration, Mr. Weber brought a civil action seeking damages based in tort and for violations of his Charter rights. The Supreme Court of Canada unanimously dismissed the tort actions and determined that the labour

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168 Ibid at para 21.
169 Ibid at paras 30 and 33.
170 Ibid at para 34.
172 Ibid at para 33.
173 Ibid at para 33.
174 Ibid at para 33.
175 Ibid at para 34.
176 Ibid at para 35.
arbitrator had exclusive jurisdiction to deal with the claims.\textsuperscript{177} There was a direct link to the collective agreement, as the dispute revolved around the entitlement to benefits and the manner in which the employer administered the benefit plan (which are both subject to the grievance process).\textsuperscript{178}

The majority decision reviewed three potential jurisdictional models (concurrent, overlapping and exclusive jurisdiction) that could potentially govern the relationship between the courts and labour arbitration, and held that the labour arbitrator had exclusive jurisdiction in this case.\textsuperscript{179}

The courts and labour arbitration could not share concurrent jurisdiction for three reasons.\textsuperscript{180} First, the case law (specifically \textit{St. Anne Nackawic}) held that “mandatory arbitration clauses in labour statutes deprive the courts of concurrent jurisdiction.”\textsuperscript{181}

The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one “arising under [the] collective agreement.” Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal, and the courts cannot try it.\textsuperscript{182}

Second, the statutory wording of section 48(1) of the \textit{Labour Relations Act} requires that “all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement” be settled at arbitration.\textsuperscript{183} By virtue of this language, recourse is only available through arbitration.\textsuperscript{184} Finally, concurrent jurisdiction with courts would undermine the statutory labour relations scheme built around arbitration, which attempts to provide a faster, cheaper resolution of disputes without disruption of work.\textsuperscript{185}

\textsuperscript{177} \textit{Ibid} at paras 36 and 81.
\textsuperscript{178} \textit{Ibid} at para 77.
\textsuperscript{179} \textit{Ibid} at para 81.
\textsuperscript{180} \textit{Ibid} at para 45.
\textsuperscript{181} \textit{Ibid} at para 46.
\textsuperscript{182} \textit{Ibid} at para 48.
\textsuperscript{183} \textit{Ibid} at para 50.
\textsuperscript{184} \textit{Ibid} at para 50.
\textsuperscript{185} \textit{Ibid} at para 51.
The overlapping jurisdictional model would provide a court with jurisdiction to hear matters “which go beyond the traditional subject matter of labour law.” The difficulty with this model is that it “violates the injunction of the Act and St. Anne Nackawic that one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute.”

Under the exclusive jurisdiction model a court would not have jurisdiction where a “dispute or difference between the parties arises from the collective agreement.” In order to make this determination, the decision-maker would have to consider the nature of the dispute and the ambit of the collective agreement. A labour arbitrator would have exclusive jurisdiction if the matter arises either expressly or inferentially from the collective agreement.

I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario Labour Relations Act generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to Charter remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed. The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal.

The Weber majority held that administrative tribunals could be considered a court of competent jurisdiction for Charter purposes if they “have jurisdiction over the parties and the subject matter of the dispute and are empowered to make the orders sought.” In this case, the majority found that the three requirements were met and that the arbitrator had the power to decide the Charter claims.

In response to the concern that labour arbitrators may lack a court’s expertise in dealing with tort law and Charter claims, the majority noted that any errors could be remedied through judicial review. “The procedural inconvenience of an occasional application for judicial review is outweighed by the advantages of having a single tribunal deciding all issues arising from the

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186 Ibid at para 52.
187 Ibid at para 54.
188 Ibid at para 55.
189 Ibid at paras 56-57.
190 Ibid at para 59.
191 Ibid at para 72.
192 Ibid at para 71.
193 Ibid at para 80.
194 Ibid at para 60.
dispute in the first instance.” Furthermore, the courts could invoke their residual inherent jurisdiction and grant remedies (such as injunctions) that would fall outside the scope of an arbitrator’s powers. Clear statutory language assigned jurisdiction to labour arbitration, and the Court did not want to undermine this process, particularly where the arbitrator had the power to grant the remedies that were sought.

The cases above demonstrate that there is an orderly apportionment of cases between the courts and labour arbitration. Courts recognize that labour arbitration is an integral part of a comprehensive statutory scheme that governs all aspects of the collective bargaining relationship. They also acknowledge that providing recourse to parties governed by a collective agreement would undermine the purpose of the statutory labour relations scheme designed to provide for the quick resolution of disputes without stoppage of work.

### 2.3 Common Law and Employment Standards

The Employment Standards Act, 2000 (the “ESA”) clearly indicates that an employee must either commence a civil action or file an employment standards complaint in order to enforce his or her rights under the legislation.

8. (1) Subject to section 97, no civil remedy of an employee against his or her employer is affected by this Act.

(2) Where an employee commences a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director on a form approved by the Director on or before the date the civil proceeding is set down for trial.

Section 97 of the ESA prohibits an employee from commencing a civil action where there is an existing employment standards complaint for failing to pay wages or benefits, termination pay or severance pay.

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195 Ibid at para 60.
196 Ibid at para 62.
197 Employment Standards Act, 2000, SO 2000, c 41, s 8(1) and (2) [“ESA”].
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97. (1) An employee who files a complaint under this Act with respect to an alleged failure to pay wages or comply with Part XIII (Benefit Plans) may not commence a civil proceeding with respect to the same matter.

(2) An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.

(3) Subsections (1) and (2) apply even if,
(a) the amount alleged to be owing to the employee is greater than the amount for which an order can be issued under this Act; or
(b) in the civil proceeding, the employee is claiming only that part of the amount alleged to be owing that is in excess of the amount for which an order can be issued under this Act.

(4) Despite subsections (1) and (2), an employee who has filed a complaint may commence a civil proceeding with respect to a matter described in those subsections if he or she withdraws the complaint within two weeks after it is filed.198

Section 98 of the ESA provides that a person cannot bring an employment standards complaint seeking unpaid wages, benefits, termination pay or severance pay where there is an existing civil action.

98. (1) An employee who commences a civil proceeding with respect to an alleged failure to pay wages or to comply with Part XIII (Benefit Plans) may not file a complaint with respect to the same matter or have such a complaint investigated.

(2) An employee who commences a civil proceeding for wrongful dismissal may not file a complaint alleging an entitlement to termination pay or severance pay or have such a complaint investigated if the proceeding and the complaint relate to the same termination or severance of employment.199

Taken together, sections 97 and 98 of the ESA require that an employee seeking unpaid wages, compliance with a benefit plan, termination pay or severance pay must choose between filing an employment standards complaint with the Ministry of Labour or commencing a civil action.

2.4 Labour Arbitration and Employment Standards

The ESA essentially establishes the basic level or floor of entitlements, and an employer and union cannot contract below that level. Section 5(2) of the ESA is the mechanism that allows a

198 Ibid at s 97.
199 Ibid at s 98.
contract such as a collective agreement to provide a greater right or benefit than what is available under the ESA.

5. (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.\(^{200}\)

Section 99 of the ESA clearly provides that a violation must be addressed at labour arbitration when the parties are governed by a collective agreement.

99. (1) If an employer is or has been bound by a collective agreement, this Act is enforceable against the employer as if it were part of the collective agreement with respect to an alleged contravention of this Act that occurs,
(a) when the collective agreement is or was in force;
(b) when its operation is or was continued under subsection 58 (2) of the \textit{Labour Relations Act, 1995}; or
(c) during the period that the parties to the collective agreement are or were prohibited by subsection 86 (1) of the \textit{Labour Relations Act, 1995} from unilaterally changing the terms and conditions of employment.

(2) An employee who is represented by a trade union that is or was a party to a collective agreement may not file a complaint alleging a contravention of this Act that is enforceable under subsection (1) or have such a complaint investigated.

(3) An employee who is represented by a trade union that is or was a party to a collective agreement is bound by any decision of the trade union with respect to the enforcement of this Act under the collective agreement, including a decision not to seek that enforcement.

(4) Subsections (2) and (3) apply even if the employee is not a member of the trade union.

(5) Nothing in subsection (3) or (4) prevents an employee from filing a complaint with the Board alleging that a decision of the trade union with respect to the enforcement of this Act contravenes section 74 of the \textit{Labour Relations Act, 1995}.

(6) Despite subsection (2), the Director may permit an employee to file a complaint and may direct an employment standards officer to investigate it if the Director considers it appropriate in the circumstances.\(^{201}\)

\(^{200}\) \textit{Ibid} at s 5.
\(^{201}\) \textit{Ibid} at s 99.
The Director of Employment Standards retains a limited discretion to investigate a complaint by a unionized employee under section 99(6) of the ESA, however this discretion seems to be rarely used.

Section 100 sets out a labour arbitrator’s powers where an ESA contravention occurred.

100. (1) If an arbitrator finds that an employer has contravened this Act, the arbitrator may make any order against the employer that an employment standards officer could have made with respect to that contravention but the arbitrator may not issue a notice of contravention.

(2) If an arbitrator finds that an employer has contravened Part XIII (Benefit Plans), the arbitrator may make any order that the Board could make under section 121.

(3) An arbitrator shall not require a director to pay an amount, take an action or refrain from taking an action under a collective agreement that the director could not be ordered to pay, take or refrain from taking in the absence of the collective agreement.

(4) The following conditions apply with respect to an arbitrator’s order under this section:
   1. In an order requiring the payment of wages or compensation, the arbitrator may require that the amount of the wages or compensation be paid,
      i. to the trade union that represents the employee or employees concerned, or
      ii. directly to the employee or employees.
   2. If the order requires the payment of wages, the order may be made for an amount greater than is permitted under subsection 103 (4).
   3. The order is not subject to review under section 116.

(5) When an arbitrator makes a decision with respect to an alleged contravention of this Act, the arbitrator shall provide a copy of it to the Director.\textsuperscript{202}

Section 100(3) is a mechanism that limits an arbitrator’s remedial powers to those traditionally available at arbitration. An arbitrator does not gain the enhanced power to make an order against a director that would not otherwise be available through labour arbitration.

The ESA specifically limits an arbitrator’s powers in determining whether separate persons or businesses should be considered to be a common employer under section 4. The statute prevents a labour arbitrator from making such a determination, and instead requires that this particular issue be brought to the Ontario Labour Relations Board.

\textsuperscript{202} \textit{Ibid} at s 100.
101. (1) This section applies if, during a proceeding before an arbitrator, other than the Board, concerning an alleged contravention of this Act, an issue is raised concerning whether the employer to whom the collective agreement applies or applied and another person are to be treated as one employer under section 4.

(2) The arbitrator shall not decide the question of whether the employer and the other person are to be treated as one employer under section 4.

(3) If the arbitrator finds it is necessary to make a finding concerning the application of section 4, the arbitrator shall refer that question to the Board by giving written notice to the Board.

(4) The notice to the Board shall,
(a) state that an issue has arisen in an arbitration proceeding with respect to whether the employer and another person are to be treated as one employer under section 4; and
(b) set out the decisions made by the arbitrator on the other matters in dispute.

(5) The Board shall decide whether the employer and the other person are one employer under section 4, but shall not vary any decision of the arbitrator concerning the other matters in dispute.

(6) Subject to subsection (7), the Board may make an order against the employer and, if it finds that the employer and the other person are one employer under section 4, it may make an order against the other person.

(7) The Board shall not require the other person to pay an amount or take or refrain from taking an action under a collective agreement that the other person could not be ordered to pay, take or refrain from taking in the absence of the collective agreement.

(8) Section 100 applies, with necessary modifications, with respect to an order under this section.

In *McLeod v Egan*, an employee was disciplined for refusing to work more than the 48 hours per week maximum allowed under the *Employment Standards Act*. The Court stated that an arbitrator must look beyond the four corners of the collective agreement to determine the extent of management rights. The decision placed limits on management rights by requiring that they be exercised in accordance with the employee’s statutory rights, such as rights under the ESA.

The Supreme Court of Canada’s majority decision in *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324* held that employment-related statutes are implicitly incorporated into collective agreements, meaning that a collective agreement cannot provide less

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203 Ibid at s 101.
205 Ibid.
than the minimum entitlement that would be available under the ESA. In that case, a probationary employee was discharged within a few days after returning from maternity leave. The collective agreement permitted the employer to dismiss probationary employees at its sole discretion, and indicated that such a decision was not subject to the grievance and arbitration provisions and would not be considered a difference among the parties. Although the employer’s actions did not violate the expressed terms of the collective agreement, the union argued that the *Human Rights Code* is implicitly included in the agreement and that the dismissal violated the *Code*. The Court was tasked with deciding whether the discharge grievance was arbitrable. The majority held that the grievance was arbitrable on the basis 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.” Although the language of the collective agreement granted the employer broad discretion to terminate a probationary employee, it must nonetheless comply with the *Human Rights Code*.

Under a collective agreement, the broad rights of an employer to manage the enterprise and direct the workforce are subject not only to the express provisions of the collective agreement, but also to statutory provisions of the *Human Rights Code* and other employment-related statutes. This confirmed that these statutes are implicitly incorporated into every collective agreement and that labour arbitrators have to the power to award remedies for violations.

*Parry Sound* is an important decision because it helps set out how the various employment-related statutory schemes mesh together. It also demonstrates that the scope of labour arbitration has expanded beyond disputes arising out of a collective agreement to include violations of human rights and employment-related statutes.

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206 *Parry Sound, supra* note 5.
208 *Ibid* at para 3.
211 *Ibid* at para 23.
Rather than assigning cases based on the nature of the dispute, the employee’s status of being
represented by a union determines whether a case will be heard before a labour arbitrator or an
employment standards officer. Section 99(2) of the ESA demonstrates a clear legislative intent
to provide jurisdiction to labour arbitrators where the employee is represented by a union, with a
limited exception to file an ESA complaint subject to the discretion of the Director of
Employment Standards under section 99(6).

The interplay between employment standards and labour arbitration demonstrate a very clear
division of jurisdiction between the two regimes. Unionized employees must go to labour
arbitration and are effectively barred from advancing a claim through the employment standards
regime. It is easy to see how such a clear apportionment can be made between the two regimes
in this instance. A collective agreement sets out the various entitlements available to bargaining
unit members who are subject to its terms. These same entitlements (concerning things such as
payment of wages, hours of work, overtime pay, holidays, vacation time, benefit plans, leaves of
absence, termination of employment, etc.) are squarely covered in the ESA.

2.5 Conclusion

The statutes and cases reviewed above demonstrate an orderly division of cases between venues
and provide the applicant with clear instructions as to the proper forum to advance his or her
claim. This stands in contrast to the cases from Chapter 1, where there was uncertainty as to
whether a claim would be estopped on the ground that it had been previously determined before
another forum.
Chapter 3
Applying Lessons to the Human Rights Context

Labour arbitration has become the venue to enforce a range of statutory rights. However, this increased jurisdiction has blurred the jurisdictional lines of demarcation between administrative bodies. This chapter will apply principles distilled from the cases covered in Chapter 2 to the problem of overlapping jurisdiction between labour arbitration and human rights tribunals.

3.1 How Human Rights Are Different

Human rights are fundamental, quasi-constitutional rights. “Human rights legislation has consistently been found to occupy a uniquely protected sphere in the legal orbit. It enjoys quasi-constitutional status and can only be overridden by express and unequivocal legislative language.” The pervasiveness of human rights makes it difficult to confine cases within specific jurisdictional boundaries. Violations do not occur in a vacuum. Human rights are infused into every area of the law.

The essence of the problem is summed up in the Human Rights Tribunal of Ontario’s decision in Trozzi:

The Code is an important public policy statute protecting rights that are quasi-constitutional in nature. These rights are meaningless without access to a mechanism for their enforcement. The Tribunal provides the opportunity for persons to pursue their rights under the Code. The Tribunal provides leadership in the interpretation and application of the Code. At the same time, responsibility for the administration of justice and the enforcement of legal rights is spread across a range of courts and tribunals and these other adjudicative bodies have the responsibility and jurisdiction to apply the Code in the context of their own statutory mandates [...].

Human rights legislation can be used as a means to challenge legislation or the rules or policies adopted by administrative bodies. For instance, in Tranchemontagne, the claimants alleged that legislation denying income support benefits to persons suffering from alcohol dependency

214 Naraine, supra note 16 at para 47.
215 Trozzi, supra note 95 at para 23.
constituted discrimination. Another example is *Figliola*, where the complainants used British Columbia’s *Human Rights Code* as a ground to challenge the Workers’ Compensation Board’s chronic pain policy.

There could be a tendency to err on the side of over-litigating these rights since they are so fundamentally important. An example of this is found in *Snow v Honda of Canada Manufacturing*, which demonstrated a reluctance to dismiss a complaint due to the fundamental importance of human rights. However, as was stated in *Trozzi*, “[t]he Human Rights Tribunal does not have a monopoly on the consideration of claims of discrimination. On the other hand, the obligation of all statutory decision makers to take such claims into account does not oust the Human Rights Tribunal's jurisdiction.”

There are several reasons why labour arbitration should not be the sole venue for addressing human rights complaints of unionized employees.

There is the question of whether the use of a private model of dispute resolution undermines the human rights goals of behaviour modification and public awareness. Arbitration is a private system that involves the private enforcement of rights. The human rights system is a public system, and it has the power to grant public interest remedies. Human rights tribunal decisions have binding precedential effect and are publicly released, which is instructive for the general public.

There is also a concern that labour arbitrators do not have the power to award the same extensive public interest remedies as a human rights tribunal or court. Arbitration typically adopted a “make whole” approach, designed to put the grievor in the same place he would have been had

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217 *Figliola*, supra note 3 at paras 6-7.
218 *Snow*, supra note 77.
219 *Trozzi, supra* note 95 at para 34.
222 *Ibid* at 366.
the breach not occurred, resulting in remedies that were more reactionary and compensatory in nature.\textsuperscript{224}

Another factor that militates against exclusive jurisdiction is the recognition that placing an undue emphasis on one legislative scheme can have the effect of undermining others. All statutory regimes are backed by legislative intent-so the use of an exclusive jurisdiction model would effectively undermine one scheme in favour of another.\textsuperscript{225} This was noted in the \textit{Penner} decision. Courts are unlikely to award exclusive jurisdiction in the absence of express legislative language as a result.

There is also a concern that we are asking too much of labour arbitration and overburdening the system. Labour arbitration’s primary aim was to maintain industrial peace.\textsuperscript{226}

\[\ldots\] The primary advantage of the grievance arbitration process is that it provides for the prompt, informal and inexpensive resolution of workplace disputes by a tribunal that has substantial expertise in the resolution of such disputes. It has the advantage of both accessibility and expertise, each of which increases the likelihood that a just result will be obtained with minimal disruption to the employer-employee relationship. Recognizing the authority of arbitrators to enforce an employee’s statutory rights substantially advances the dual objectives of (i) ensuring peace in industrial relations and (ii) protecting employees from the misuse of managerial power.\textsuperscript{227}

However, arbitration hearings are becoming increasingly complex, with pre-trial motions, longer hearings, and parties are increasingly obtaining legal representation to deal with procedures that resemble a court hearing. Major J.’s dissent in \textit{Parry Sound} was concerned that “[\ldots] overloading the grievance and arbitration procedure with issues the parties neither intended nor contemplated channelling there, may make labour arbitration anything but expeditious and cost-effective.”\textsuperscript{228} He was reluctant to incorporate statutory law into collective agreements because it would be difficult for parties to set boundaries or limits to their agreements.\textsuperscript{229}

\begin{itemize}
  \item \textsuperscript{224} \textit{Ibid} at 365.
  \item \textsuperscript{225} Andrew K Lokan & Maryth Yachnin, “From \textit{Weber} to \textit{Parry Sound}: The Expanded Scope of Arbitration” (2004) 11 CLELJ 1 at 19.
  \item \textsuperscript{226} Payne and Rootham, \textit{supra} note 220 at 81.
  \item \textsuperscript{227} \textit{Parry Sound}, \textit{supra} note 5 at para 51.
  \item \textsuperscript{228} \textit{Ibid} at para 100.
  \item \textsuperscript{229} \textit{Ibid} at para 94.
\end{itemize}
The increased emphasis on arbitration as the venue of choice places an increased burden on unions.\textsuperscript{230} A union has discretion on whether to bring a case to arbitration, and has to consider its obligation to the entire bargaining unit in making that decision.\textsuperscript{231} It could also be faced with a situation where it is named as a respondent in a human rights claim causing its interests to be at odds with the grievor’s. Such a situation arose in \textit{Morin}, where a negotiated freeze in a collective agreement prevented the accumulation of seniority and salary increases that disproportionately affected young, inexperienced teachers who were not at the top of the salary grid. There is a risk that the union could block such a claim and, if labour arbitration had exclusive jurisdiction, would preclude the employee from being able to advance the complaint.\textsuperscript{232} Too much emphasis on labour arbitration could result in some human rights protections being unenforced for reasons such as the expense involved in bringing a claim to arbitration.\textsuperscript{233}

Furthermore, depending on the facts of the particular case, the employer and union could be asked to participate in a process that will not advance their relationship and in which neither of them have any real interest.\textsuperscript{234} They will have to devote resources for such a case, both financially and in terms of time devoted to preparing for and attending hearings and diverting of staff to deal with disputes rather than fulfill other business functions.

3.2 Themes that Emerge from Other Relationships

Although it is impossible to compartmentalize cases into either forum, the decisions reviewed in the previous chapter demonstrate recurring themes that should be taken into account when a human rights tribunal has to decide whether to hear a case that had been the subject of an earlier arbitration.

Provisions such as section 45.1 of the Ontario \textit{Human Rights Code} and section 27(1)(f) of the British Columbia \textit{Human Rights Code}–are relatively new. It takes time for human rights

\textsuperscript{230} Faraday, \textit{supra} note 221 at 375-376.
\textsuperscript{231} \textit{Ibid} at 375.
\textsuperscript{232} The employee’s only recourse would be to file a duty of fair representation complaint with the Ontario Labour Relations Board under section 74 of the \textit{Labour Relations Act}. See also MacDowell, \textit{supra} note 213 at 153.
\textsuperscript{233} Faraday, \textit{supra} note 221 at 376.
\textsuperscript{234} See MacDowell, \textit{supra} note 213 at 162-163, and \textit{Parry Sound} dissent, \textit{supra} note 5 at para 100.
tribunals to develop their analyses of how to apply the new provisions, and to receive feedback from the courts on whether they are properly interpreting the provision. While this analysis is still evolving, there are lessons that can be applied to the relationship between labour arbitration and human rights tribunals.

The Specialized Expertise of Human Rights Tribunals Is Not Determinative of Jurisdiction

There is a trade-off that has to be made between the specialized expertise of human rights tribunals and accessibility to a forum that will enforce human rights. If human rights are to be vindicated across a wide variety of administrative tribunals, then not every case will be capable of being heard by a decision-maker with specialized human rights expertise.

Courts recognize that human rights must be accessible, and that allowing those rights to be enforced by statutory bodies other than human rights tribunals makes them more accessible. The majority decision in *Parry Sound* recognizes that human rights tribunals have specialized expertise, but when determining jurisdiction that factor does not outweigh the benefit of having an accessible forum for the quick resolution of workplace disputes. The Court also noted in *Weber* that the superior expertise of human rights tribunals is not determinative of jurisdiction.

The *Tranchemontagne* majority decision noted that revisions to the Code removed the OHRC’s exclusive jurisdiction over human rights. “In its present form, the Code can be interpreted and applied by a myriad of administrative actors. Nothing in the current legislative scheme suggests that the OHRC is the guardian or the gatekeeper for human rights law in Ontario.” Since it was inevitable that the applicants in that case would have to appear before the Social Benefits Tribunal to appeal their denial of benefits, any human rights issues should be determined by that tribunal so that the entire case could be resolved.

Where a tribunal is properly seized of an issue pursuant to a statutory appeal, and especially where a vulnerable appellant is advancing arguments in defence of his or her human rights, I would think it extremely rare for this tribunal to not

235 See *Parry Sound*, supra note 5 at para 52.
236 Ibid at para 53.
238 *Tranchemontagne*, supra note 216 at para 39.
239 Ibid at paras 48-50.
be the one most appropriate to hear the entirety of the dispute. I am unable to think of any situation where such a tribunal would be justified in ignoring the human rights argument, applying a potentially discriminatory provision, referring the legislative challenge to another forum, and leaving the appellant without benefits in the meantime.

The Figliola majority decision indicated that a tribunal’s superior expertise is not a relevant consideration where two bodies exercise concurrent jurisdiction.

Labour arbitrators also offer specialized expertise, specifically their unique perspective on workplace disputes and their better understanding of the workplace context within which such disputes arise. For instance, they recognize that factors such as seniority and bumping rights might come into play and can influence an employer’s actions. Moreover, as noted in Parry Sound, their expertise with human rights will increase as the arbitrators gain more experience dealing with human rights issues.

*Human Rights Tribunals Do Not Have Supervisory Jurisdiction Over Other Administrative Decision-Makers*

Courts have repeatedly noted that human rights tribunals do not exercise supervisory jurisdiction over human rights determinations made by other administrative bodies.

The Ontario Human Rights Commission argued in Trozzi that section 45.1 of the Code provided the HRTO with supervisory jurisdiction because it had to determine whether the prior administrative decision “appropriately dealt with” the human rights aspect of the claim. The Divisional Court disagreed, stating that the HRTO does not have a supervisory mandate over other tribunals and that it is not an appellate body for other tribunals. The Tranchemontagne majority decision rejected the notion that human rights bodies exercise supervisory jurisdiction over other statutory bodies by virtue of the quasi-constitutional status of human rights.

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240 *Ibid* at para 50.
241 *Figliola*, *supra* note 3 at para 53.
242 Payne and Rootham, *supra* note 220 at 82.
243 *Parry Sound*, *supra* note 5 at para 53.
244 *Trozzi*, *supra* note 95 at para 28.
245 *Ibid* at para 33.
246 *Tranchemontagne*, *supra* note 216 at para 39.
The *Figliola* majority held that a provision similar to section 45.1 of the Ontario *Human Rights Code* does not provide human rights tribunals with supervisory jurisdiction over other administrative bodies.

What I do not see s. 27(1)(f) as representing, is a statutory invitation either to "judicially review" another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only be final, it will be treated as such by other adjudicative bodies. The procedural or substantive correctness of the previous proceeding is not meant to be bait for another tribunal with a concurrent mandate.  

The fact that an administrative decision-maker did not follow the same analytical framework, ask the same questions, or use the same test as a human rights tribunal, does not, on its own, entitle a human rights tribunal to re-hear a case.

**Errors by Labour Arbitrators Can Be Corrected Through Judicial Review**

The courts recognize that administrative adjudicators have varying levels of expertise and that they do not share the same expertise as a human rights tribunal in dealing with human rights.

Justice McLachlin’s majority decision in *Weber* recognized that “[t]he procedural inconvenience of an occasional application for judicial review is outweighed by the advantages of having a single tribunal deciding all issues arising from the dispute in the first instance.”

The *Figliola* majority decision noted that one of the principles underlying the common law finality doctrines was that decisions should be challenged through the legislated appeal or review mechanisms, not by way of a collateral attack.

Claimants are not left without recourse if an administrative decision-maker fails to correctly address the human rights aspects of their case. Many statutes contain administrative appeal

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247 *Figliola, supra* note 3 at para 38.
248 *Weber, supra* note 171 at para 60.
249 *Figliola, supra* note 3 at para 34.
mechanisms, and an application for judicial review can be brought before the courts. Human rights tribunals can rest assured that they are not the last resort for enforcement of quasi-constitutional human rights.

**Courts Have Repeatedly Emphasized the Importance of Respect for the Legislative Scheme and Reluctance to Undermine Legislative Intent**

One of the guiding principles that courts return to is the importance of upholding the legislative intent underlying statutory schemes. Administrative bodies are created for a reason. Courts are very reluctant to undermine that intent.

In *Bhadauria*, the Supreme Court recognized the broad powers of the statutory human rights regime coupled with an exclusive jurisdiction clause in the legislation reflected a clear intent that human rights issues be brought to that forum rather than the courts.\(^{250}\) The Court noted in *Weber* that allowing a concurrent tort action would undermine the legislative labour relations scheme that provides for final and binding arbitration.\(^{251}\) It may be easier for a court (which has residual jurisdiction and is not created solely to enforce a specific legislative scheme) to defer to an administrative arbiter because there is obviously legislative intent underlying the administrative regime to divert cases towards that system. However, in the case of two tribunals with concurrent jurisdiction, favouring one venue could result in the other being undermined.

The *Penner* majority decision noted a drawback to placing too much importance on an administrative decision – the risk of adding to the complexity and length of administrative proceedings if undue weight is placed on their results.\(^{252}\) Or, parties might simply avoid the administrative process altogether rather than risk being held to an unfavourable decision, which would effectively undermine the intent of the legislature.\(^{253}\)

All administrative regimes and statutory enforcement mechanisms are backed by legislative intent – their very existence is evidence of this. Adopting a rule that funnels all cases towards

\(^{250}\) *Bhadauria*, supra note 142 at paras 25-27.
\(^{251}\) *Weber*, supra note 171 at para 63.
\(^{252}\) *Penner*, supra note 4 at para 62.
\(^{253}\) *Ibid* at para 62.
one particular body where concurrent jurisdiction is shared would, in effect, undermine the legislative intent behind the other administrative body.

**The Availability of a Remedy Can Assist in Determining Whether an Issue Should be Addressed Before a Second Venue**

One possible solution is to examine whether the complainant can obtain a sufficient remedy from the first venue. If a remedy is available that would make the applicant whole (such as is generally the case with labour arbitration) then the case should not be re-heard by the human rights tribunal. This would also reconcile the outcomes in the Supreme Court of Canada. In *Danyluk* and *Penner*, a sufficient remedy was not available at the first venue. On the other hand, the complainants in *Figliola* could have been made whole had they succeeded before the Workers’ Compensation Board.

The remedies available at labour arbitration are designed to make the grievor whole once it is found that there has been a violation of the collective agreement. Therefore, there is arguably less reason for a human rights tribunal to review a decision by a labour arbitrator than in other contexts where the first proceeding isn’t aimed at providing the complainant with a remedy for the violation.

### 3.3 Conclusion

Unfortunately, there are no easy answers in how to apportion cases between administrative tribunals that share concurrent jurisdiction. The myriad different ways that workplace human rights issues can arise makes it impossible to create guidelines that allow for a clean delineation in cases involving unionized employees. It is difficult to strike a perfect balance between finality in litigation while at the same time ensuring that an issue has been adequately addressed.

Human rights tribunals could increase their use of statutory mechanisms to defer or dismiss complaints (under sections 45 and 45.1 of the *Code* respectively). They can also adopt a more relaxed approach in applying doctrines of *res judicata* such as issue estoppel and abuse of process, particularly where the prior decision-maker has a duty of procedural fairness and where
there are statutory rights of appeal and judicial review. Recognizing and respecting the expertise of labour arbitrators and other administrative decision-makers can help to reduce the amount of cases that are heard because of uncertainty that the prior venue may not have

Labour arbitrators can assist by writing decisions that clearly indicate their findings underlying any human rights determinations. This will signal that they have addressed the human rights aspects of a case. In instances where multiple violations are alleged, it can help the human rights tribunal to narrow the case to the issues that remain unaddressed.

One class of cases that could be sent to the human rights tribunal is where the union is named as a respondent. In such a situation the union and employee would have conflicting interests, so it would be best to allow the employee to control the process rather than be excluded on the basis of non-party status before an arbitrator.

The language used to frame a complaint should not determine jurisdiction – the same underlying facts can be used to argue that a complaint is a human rights issue or a tort breach. Instead, decision-makers must look at the underlying essence of the complaint. One way to determine whether a complaint has been addressed is by looking at the available remedies, such as in Penner. If a remedy is available to the complaint at the first venue (such as in Figliola), the case should not be re-tried. Since remedies are available to the grievor at labour arbitration, there should be fewer cases heard by human rights tribunals in those instances compared to cases such as Penner where the first proceeding was not aimed at compensating the individual.

Unlike the relationships reviewed in Chapter 2, there are no easy solutions that can be used to delineate claims between human rights tribunals and labour arbitration. Each case is based on unique facts and is not easily divided between the two venues. Although the principles reviewed above can assist in determining whether a matter should proceed before multiple venues, there is no clear and predictable solution at this time.
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