

One Law For All: Perspectives from a Statutory Tribunal

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[t]here is not one law for arbitrators and another for the court, but one law for all.

Lord Denning L.J., *David Taylor & Son, Ltd. v. Barnett*, [1953] 1 All E.R. 843 (C.A.) quoted by majority in *Weber v. Ontario Hydro*²

It has now been 20 years since the Supreme Court of Canada rendered its decisions in *Weber v. Ontario Hydro* and its companion case *New Brunswick v. O'Leary*.³ In those decisions, the Supreme Court adopted an exclusive jurisdiction model to find that arbitrators have exclusive jurisdiction to deal with tort and constitutional claims where the essential character of a dispute arises from the interpretation, application or administration or violation of a collective agreement. According to the Court, this exclusive jurisdiction model was based, at least in part, on “the power and duty of arbitrators to apply the law of the land to the disputes before them.”⁴

Shortly after the release of these two decisions, numerous articles were published predominantly dealing with what this exclusive jurisdiction model would mean for labour arbitration, unions, employers, and individual employees. In the decade following *Weber*'s release, many articles continued to appear, focusing on the impact of *Weber* and associated cases on labour arbitration in the intervening years.⁵ The perspective that remains remarkably absent from these analyses of

¹ Vice-chair, Human Rights Tribunal of Ontario. Any opinions expressed in this paper are those of the author and should not be taken to reflect the views of the HRTO or of its Vice-chairs.

² *Weber v. Ontario Hydro*, [1995] 2 SCR 929 (“*Weber*”) at para. 56.

³ *New Brunswick v. O'Leary*, [1995] 2 SCR 967 (“*O'Leary*”).

⁴ *Weber*, *supra* note 2 at para. 56.

⁵ See Adell, Bernard. “Jurisdictional Overlap Between Arbitration and Other Forums: An Update” (2000) 8 CLELJ 179; Brown, Ray & Brian Etherington. “*Weber v Ontario Hydro*: A Denial of Access to Justice for the Organized Employee” (1996) 4 CLELJ 183; Carter, Donald. “Looking at *Weber* Five Years Later: is it Time for a New Approach?” (2000) 8 CLELJ 231; Donald Carter, “An Arbitrator as Human Rights Adjudicator” (1999-2000) 1 Lab Arb YB 55-66; Durnford, Eric, Q.C. “Defining the Scope of Arbitration: The Impact of *Weber*: a Management Perspective” (1999-2000) 1 Lab Arb YB 149-156; Gall, Peter A., Andrea L. Zwack & Kate Bayne. “Determining Human Rights Issues in the Unionized Workplace: The Case for Exclusive Arbitrator Jurisdiction” (2005) 12 CLELJ 381; Gottheil, Lewis N. “Defining the Scope of Arbitration: The Impact of *Weber*: a Union Perspective” (1999-2000) 1 Lab Arb YB 157-180; Kaplan, William, Andrew Lokan, Carol S. Neilsen and Ian J Roland, “The Scope of Rights Arbitration after *Weber v Ontario Hydro* (1999), 7 CLELJ 249; Lokan, Andrew & Maryth Yachmin. “From *Weber* to Parry Sound: the Expanded Scope of Arbitration” (2004) 11 CLELJ 1; MacDowell,

Weber, and associated cases, is the perspective of statutory tribunals. There is little doubt that one of the reasons for this is the reality that adjudicators are limited in the nature and scope of the comments that they can make in relation to issues that may come before them for decision.⁶ I would suggest that it is also because there has been a greater focus in the scholarship on cases, such as *Weber* and *O’Leary*, involving the appropriate delineation of jurisdiction as between courts and grievance arbitrators. There has been comparatively less scholarship on the delineation of jurisdiction between grievance arbitrators and statutory tribunals.⁷

In this paper, I examine the impact that *Weber* has had on the work of statutory tribunals. I argue that this impact has been relatively minor as compared to the decision’s impact with respect to civil claims filed by unionized employees. A review of the case law suggests that statutory tribunals have been much less likely than courts to decline jurisdiction on the basis of exclusive arbitral jurisdiction. In Part I, I review the approach taken to *Weber* by different statutory tribunals. I focus in particular on human rights tribunals in different Canadian jurisdictions because the most frequent area of overlap between arbitrators and statutory tribunals has been in relation to human rights. As I discuss, with the exception of the Quebec, human rights tribunals (and reviewing courts) in Canada have found that human rights tribunals have concurrent jurisdiction over human rights claims made by unionized employees. In addition to reviewing how human rights tribunals have approached *Weber*, I also review the approach to *Weber* taken by other statutory tribunals in Ontario. I discuss how two other statutory tribunals have distinguished *Weber* to find that they have exclusive jurisdiction over claims that have come before them.

Richard. “Labour Arbitration: the New Labour Court?” (2000) 8 CLELJ 121; and Picher, Michel G. “Defining the Scope of Arbitration: The Impact of *Weber*: an Arbitrator’s Perspective” (1999-2000), Vol. 1 Lab Arb YB 99;

⁶ That is my situation. As a vice chair of the HRTO, I am limited in the comments I can make about any issues that arise, or may arise, before me at the Tribunal.

⁷ Some exceptions are the following articles which deal in whole or in part with the delineation of jurisdiction between arbitrators and statutory tribunals, especially human rights tribunals: Elizabeth Shilton, “Choice But No Choice: Adjudicating Human Rights Claims in Unionized Workplaces in Canada” (2013) 38 Queen’s Law Journal 461 (“Choice but No Choice”); Hooker, Dana & Carman Overholt, “Defending Claims In Different Fora: The Competing Jurisdiction of Arbitrators And Tribunals In British Columbia” (2010) 43 UBC L Rev 47; Flood, Craig. “Efficiency v Fairness: Multiple Litigation and Adjudication in Labour and Employment Law” (2000) 8 CLELJ 383; Lokan, Andrew & Maryth Yachmin. “From *Weber* to: the Expanded Scope of Arbitration” (2004) 11 CLELJ 1 (“From *Weber* to *Parry Sound*”) and Regenbogen Luciw, Sonia. “*Parry Sound* and its Successors in the Supreme Court of Canada: Implications for the Scope of Arbitral Authority” (2004) 11 CLELJ 36 (“*Parry Sound* and its Successors”).

In Part II of this paper, I focus more specifically on the Human Rights Tribunal of Ontario (“HRTO” or “Tribunal”). As I discuss, the main issue that arises at the HRTO is not whether the Tribunal has jurisdiction over applications filed by unionized employees, but how it deals with situations where unionized employees file both applications with the Tribunal and grievances under their collective agreement. I review how the Tribunal puts into practice some of the more general principles underlying *Weber* – that is, the avoidance and/or effective management of multiple overlapping proceedings dealing with substantially the same facts and issues. I discuss two of the main features of the *Human Rights Code* (“Code”) that assist the HRTO in dealing with parallel proceedings: the power to defer consideration of applications and the power to dismiss an application where another proceeding has appropriately dealt with the substance of the application. In Part III, I discuss some of issues that have arisen in cases where employees have filed both applications before the HRTO and grievances under their collective agreement. In Part IV, I provide concluding remarks on the impact of the *Weber* line of cases on the work of statutory tribunals.

PART I - APPROACH TAKEN BY STATUTORY TRIBUNALS TO *WEBER*

A full review of how all statutory tribunals in Canada have applied *Weber* falls beyond the scope of this paper. Instead, in this Part, I focus on human rights tribunals in different Canadian jurisdictions as well as on other statutory tribunals in Ontario. The caselaw reviewed below suggests that statutory tribunals have been much less likely than courts to decline jurisdiction over claims filed by unionized employees. In general, in spite of *Weber*, statutory tribunals have been much more likely than courts to find that they have either concurrent or exclusive jurisdiction over the claims of unionized employees.

One reason for this may be the fact that, when making jurisdictional determinations, statutory tribunals must analyze, not only the provisions relating to arbitral jurisdiction in the *Labour Relations Act*, but also the provisions of their own governing statutes. Most governing statutes do not expressly address whether a tribunal has concurrent, exclusive or overlapping jurisdiction with labour arbitrators over the claims of unionized employees. However, statutory tribunals have been established by the legislature to carry out a certain statutory mandate which may be

regulatory in character or may involve enforcing certain basic rights. When examining their statutory mandate, many tribunals have determined that the legislature intended them to have either concurrent or exclusive jurisdiction over all claims that fall within their statutory mandate, even if these claims are filed by unionized employees.

A. Human Rights Tribunals in Different Canadian Jurisdictions

No human rights statutes specifically address whether the tribunals/commissions covered by them have concurrent, exclusive or overlapping with labour arbitrators over the claims of unionized employees. Human rights tribunals and reviewing courts have been called upon to make jurisdictional determinations by examining the statutory mandate of tribunals in light of applicable caselaw, including *Weber* and associated cases.⁸

(a) Supreme Court’s Decisions in *Morin* and *Vaid*

The Supreme Court has been called upon to consider the jurisdiction of different human rights tribunals over claims filed by unionized employees in at least two decisions. These cases have been thoroughly reviewed elsewhere;⁹ therefore, I will not repeat that analysis here.

I think it is fair to say that these decisions call for the application of a contextual approach to determining jurisdiction over human rights claims. In *Morin*,¹⁰ Chief Justice McLachlin (writing for the majority) held that the legal characterization of a claim is not determinative. She also found that there is no legal presumption of arbitral exclusivity. She found that adjudicators must determine “whether the relevant legislation applied to the dispute at issue, taken in its full factual

⁸ At least one province (British Columbia) has adopted legislative provisions that expressly address whether statutory tribunals have the jurisdiction to apply human rights legislation. See *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ss. 46.1, 46.2 and 46.3. However, this statute does not directly address the delineation of jurisdiction as between statutory tribunals and labour arbitrators. Interestingly, however, section 115.1 of the British Columbia *Labour Relations Code* provides that section 46.1 of the *Administrative Tribunals Act* applies to the British Columbia Labour Relations Board which is an avenue of appeal of the decisions of grievance arbitrators in British Columbia. Section 46.1 provides a tribunal with the discretion to decline to apply the *Human Rights Code* if it considers that there is a more appropriate forum in which the *Human Rights Code* may be applied.

⁹ See the very thorough review in Elizabeth Shilton’s article “Choice but No Choice”, *supra* note 7 at pp. 471-83.

¹⁰ *Quebec (CDPDJ) v. Quebec (PG)*, [2004] 2 S.C.R. 185 (“*Morin*”).

context, establishes that [a] labour arbitrator has exclusive jurisdiction over the dispute.¹¹ On the facts of *Morin*, Chief Justice McLachlin found that the Quebec Human Rights Commission/Tribunal had concurrent jurisdiction over a human rights claim filed by a group of teachers who were covered by a collective agreement. Chief Justice McLachlin did not accept the respondents' submission that the dispute fell within exclusive arbitral jurisdiction on the basis of *Weber*. She gave a number of reasons for her finding including her view that the claim did not lend itself to characterization as a grievance since it was a challenge to certain provisions in the collective agreement rather than a challenge to the application of these provisions.¹²

(b) Human Rights Tribunals in Most Canadian Jurisdictions

Human rights tribunals in most Canadian jurisdictions have found that they have concurrent jurisdiction over human rights claims made by unionized employees who are covered by a collective agreement. In so doing, they have not always applied the contextual analysis set out in *Morin* but have instead assumed blanket concurrent jurisdiction over all claims filed by unionized employees.¹³

The jurisdictional issue was addressed for the first time in Ontario after *Weber* in *Naraine v. Ford Motor Company of Canada*.¹⁴ In that case, a Board of Inquiry (the precursor to the Human Rights Tribunal) found that it had jurisdiction over an application challenging an employee's discharge as discriminatory on the basis of race. The employee had filed grievances under his collective agreement. The arbitrator appointed to hear the grievances dismissed the discharge grievance, finding the grievor's discharge was justified. Although the arbitrator heard some evidence relating to discrimination, he held that the evidence was irrelevant to the altercation that had resulted in the discharge. The Board of Inquiry distinguished *Weber* to find that it had

¹¹ *Morin*, *ibid.* at paras. 14 and 20.

¹² For a critique of this distinction see Bastarache J.'s dissent in *Morin* as well as "Choice but no Choice", *supra* note 7 at p. 481 and "Parry Sound and its Successors" *supra* note 7.

¹³ Elizabeth Shilton has argued that a blanket finding of concurrent jurisdiction by human rights tribunals is inconsistent with the Supreme Court's more detailed analysis in *Morin*. I do not wish join issue with this view here. Instead, my objective is to examine the challenging practical issues that arise from this finding of concurrent jurisdiction.

¹⁴ (2001), 209 DLR (4th) 465 (Ont. C.A.) ("*Naraine*") upholding 1999 CanLII 18727 (ON SCDC) and *Naraine v. Ford Motor Company of Canada et al. (No. 1)* (1994), 24 C.H.R.R. D/457 (Ont. Bd. Inq.) and *Naraine v. Ford Motor Company of Canada et al. (No. 2)* (1995), 24 C.H.R.R. D/466 (Ont. Bd. Inq.)

jurisdiction over a parallel application that the employee had filed with the Ontario Human Rights Commission (“OHRC”). A key to the Board of Inquiry’s analysis was its finding that it was not clear at the time of the arbitration (in 1986) that the arbitrator had the jurisdiction to apply the *Code*.¹⁵ The arbitration occurred prior to the inclusion of s. 48(12)(j) in the *Labour Relations Act*, a section which specifically grants arbitrators the power to interpret and apply human rights and other employment-related statutes.

Both the Ontario Divisional Court and the Court of Appeal upheld the Board of Inquiry’s decision. The Court of Appeal relied upon the same reasoning as the Board of Inquiry to distinguish *Weber*. The Court held that, at the time Mr. Naraine filed his grievance, the OHRC in fact had exclusive jurisdiction over his human rights claims since, according to the Court, the arbitrator did not have jurisdiction to deal with the *Code* allegations. The Court of Appeal went on to refer to the “symmetrical amendments” to the *Labour Relations Act* and the *Code* that provided for concurrent jurisdiction over human rights claims arising in the unionized context. Section 48(12)(j) of the *Labour Relations Act* provides arbitrators with clear authority to apply the *Code*. Meanwhile, the former s. 34(1)(a) of the *Code* provided the OHRC with the statutory authority to decline to deal with complaints where, in its opinion, the complaint could or should be more appropriately dealt with under another Act. The OHRC regularly applied this provision to decline to deal with complaints filed by employees who had access to grievance arbitration conducted under the umbrella of the *Labour Relations Act*.

The Court of Appeal found that the goal of these provisions was consistent with the goal at the heart of *Weber*: to avoid the proliferation of proceedings to the greatest extent possible:

The underlying goal of these symmetrical amendments is to avoid the gratuitous bifurcation or proliferation of proceedings, especially when the arbitrable grievance and the human rights complaint emerge seamlessly from the same factual matrix. That goal was also, I think, at the heart of *Weber*. In my view, *Weber* stands for the proposition that when several related issues emanate from a

¹⁵ I note that the *Naraine* decision was rendered before the amendments made to the *Code* that came into force in 2005 which added s. 45.1 to the *Code*. If *Naraine* were decided today, the Tribunal likely would be called upon to consider whether the application should be dismissed on the basis that the arbitrator’s decision had appropriately dealt with the substance of the application. For a more detailed discussion of s. 45.1 of the *Code*, see Part II of this paper.

workplace dispute, they should all be heard by one adjudicator to the extent jurisdictionally possible, so that inconsistent results and remedies, such as those in Mr. Naraine's case, may be avoided.¹⁶

I note that, although the Court of Appeal, referred to symmetrical "amendments", s. 48(12)(j) was not added to the *Labour Relations Act* at the same time as s. 34(1)(a) was added to the *Code*. Section 48(12)(j) appears to have been added to the *Labour Relations Act* in the early or mid-1990s. Section 34(1)(a) was included in the *Code* from the early 1980s up until the substantial revisions to the *Code* that came into force in 2008. Therefore, it would be more appropriate to speak of symmetrical or complementary "provisions" rather than "symmetrical amendments".

The HRTO has relied upon the Court of Appeal's decision in *Naraine* in subsequent decisions to find that it has concurrent jurisdiction over human rights claims filed by unionized employees.¹⁷ The underlying assumption in the Tribunal's caselaw is that it has a blanket concurrent jurisdiction over all human rights claims filed by unionized employees, regardless of the degree of connection between the claim and the collective agreement.

Human rights tribunals and reviewing courts in most other Canadian jurisdictions have made the same finding of blanket concurrent jurisdiction over human rights claims. For example, the Canadian Human Rights Tribunal ("CHRT") and the Federal Court have found that the CHRT has concurrent jurisdiction over human rights claims filed by unionized employees.¹⁸ A key factor relied upon by the Federal Court and the CHRT is s. 41 of the *Canadian Human Rights Act* ("CHRA"). The equivalent of the former s. 34(1)(a) of the Ontario *Code*, s. 41 of the *CHRA* provides the Canadian Human Rights Commission ("CHRC") with the discretion to decline to deal with complaints where it appears to it that the complainant ought to exhaust the grievance process. The courts and the CHRT have found that this provision clearly gives the CHRC, and

¹⁶ See the Court of Appeal's decision in *Naraine*, *supra* note 14 at para. 60

¹⁷ See *Monck v. Ford Motor Company of Canada*, 2009 HRTO 861 at para. 8 ("*Monck*") and *Snow v. Honda*, 2007 HRTO 45 at para. 14 ("*Snow*"). The Tribunal has also found that it has concurrent jurisdiction when an applicant has filed a parallel claim under other statutory schemes such as the *Workplace Safety and Insurance Act*: see, *Snow*, *ibid* and *Frankson v. Workplace Safety and Insurance Board*, 2011 HRTO 2107. It should be noted that the one situation in which the Tribunal does not have concurrent jurisdiction is where an employee commences a parallel civil proceeding in court in which the person is seeking a remedy with respect to an alleged *Code* infringement.

¹⁸ See for e.g. *Canadian Broadcasting Corp. v. Paul*, [1999] 2 F.C. 3 (Fed. Ct. T.D.) and *Eyerley v. Seaspán International Limited*, 2000 CanLII 28898 (CHRT).

implicitly the CHRT, jurisdiction to deal with any complaint arising from a collective agreement unless the CHRC decides that the grievance procedure ought to be exhausted.

Human rights tribunals (and reviewing courts) in other jurisdictions have used a similar analysis to find that they have concurrent jurisdiction over claims filed by unionized employees.¹⁹

(c) Quebec’s Human Rights Tribunal

Interestingly, the Quebec Human Rights Tribunal (“QHRT”), and reviewing courts in Quebec, have taken a different approach to analyzing the impact of *Weber* and *Morin* on the QHRT’s jurisdiction. Unlike human rights tribunals in other jurisdictions, the QHRT and courts in Quebec have more strictly applied the contextual analysis set out in *Morin*. In a number of decisions, the QHRT and courts have distinguished between disputes that arise from the insertion of a particular clause in a collective agreement and disputes over the application of the collective agreement.²⁰ They have found that the latter category of cases fall within the exclusive jurisdiction of arbitrators whereas the QHRT shares concurrent jurisdiction with arbitrators over the former category of cases.

Since *Morin* dealt specifically with the jurisdiction of the QHRT, courts and the QHRT are bound to apply the analysis set out in the decision. By contrast, courts and human rights tribunals in other jurisdictions have either distinguished *Morin* based on the wording of their statutes or glossed over it altogether. There is no obvious reason why the jurisdiction of the QHRT should differ from that of human rights tribunals in other jurisdictions. Therefore, we are left with a somewhat paradoxical situation in which human rights tribunals in the rest of Canada have taken jurisdiction over types of claims over which the QHRT has declined jurisdiction in Quebec.

¹⁹ *Bannister v. Best Facilities*, 2008 BCHRT 438; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2008 NSCA 21 (N.S.C.A.), leave to appeal refused [2008] S.C.C.A. No. 245; *Calgary Health Region v. Alberta (Human Rights and Citizenship Commission)*, 2007 ABCA 120, leave to appeal refused [2007] S.C.C.A. No. 280; *Price v. Fredericton (City) Police*, [2003] N.B.H.R.B.I.D. No. 2; *Cadillac Fairview Corp. Ltd. v. Saskatchewan (Human Rights Commission)* (1999), 173 DLR (4th) 609 (Sask. C.A.).

²⁰ See for example: *Université de Sherbrooke c. Commission des droits de la personne et des droits de la jeunesse*, 2015 QCCA 1397 at para. 27; *Université de Montréal c. Commission des droits de la personne et des droits de la jeunesse*, 2006 QCCA 508 at para. 67; *Université Laval c. Commission des droits de la personne et des droits de la jeunesse*, 2005 QCCA 27 at paras. 42-46.

B. Other Statutory Tribunals in Ontario

Only two other statutory Tribunals in Ontario appear to have addressed the impact of *Weber* on their jurisdiction to deal with claims filed by unionized employees: the Financial Services Tribunal (“FST”) and the Ontario Information and Privacy Commissioner (“OIPC”).

(a) Financial Services Tribunal

The FST was called upon to address a preliminary objection to its jurisdiction based on *Weber* in *PPG Canada Inc. v. Ontario (Superintendent Financial Services)*.²¹ The case dealt with the question of whether two wind-up reports filed by PPG Canada Inc. (“company”) complied with the provisions of the *Pension Benefits Act* (“PBA”). The wind-up reports were filed in connection with the partial wind-ups of the company’s pension plan due to the closure of two of its plants. The reports did not take into account certain early retirement benefits provided under the pension plan. The Superintendent of Financial Services took the position that members became entitled to the benefit upon the wind-ups due to a “deemed consent” provision in the *PBA*. The company argued that the benefits were not triggered by the wind-ups. It also argued that the dispute over the benefits fell within the exclusive jurisdiction of an arbitrator since the pension plan formed part of the collective agreement covering the company’s employees.

The FST remarked upon the irony that the company was challenging the very jurisdiction it invoked in seeking approval of its wind-up reports. The FST Vice-Chair noted that, unlike the Court in *Weber*, the FST was required to consider the legislative intent behind both the *Labour Relations Act* and the *PBA*. Applying this approach, the Vice-chair had no doubt that the legislature intended the Superintendent, and by extension the FST, to have exclusive authority to determine whether to approve wind-up reports for all pensions plans registered under the *PBA*, regardless of whether these plans are incorporated into collective agreements. Among other things, the Vice-chair emphasized the Superintendent’s broad institutional expertise in interpreting the complex statutory requirements found in the *PBA*. She also stressed the FST’s

²¹ 2015 ONFST 10 (“*PPG*”)

authority to protect the best interests of pension plan members, former members, retired members and other persons entitled to benefits under a pension plan. The Vice-chair noted that not all of these individuals will be members of the bargaining unit covered by the collective agreement. For all of the above reasons, the Vice-chair held that an arbitrator was not institutionally equipped to “stand in the statutory shoes of the Superintendent”.²² She held that the *PBA* sets out a clear and comprehensive scheme that assigns exclusive jurisdiction to the Superintendent to determine whether to approve a wind-up report and to address any issues that it is necessary to resolve in order to carry out that mandate.²³

The company in *PPG* argued in the alternative that the FST should defer to an arbitrator. The Vice-chair held that the *PBA* did not permit it to defer its statutory duties to another body. However, she did note that an arbitrator may have a role to play in certain cases that come before the FST. According to the Vice-chair, where interpretive issues relevant to a wind-up report have already been arbitrated, the Superintendent and FST may have to apply doctrines such as *res judicata*, abuse of process and issue estoppel. As well, the Vice Chair noted that, in some cases, it may be appropriate for the Superintendent and FST to suspend its proceedings to await the outcome of an ongoing grievance arbitration. However, she held that a full scale deferral to arbitration was not appropriate.

(b) Ontario Information and Privacy Commissioner

Similarly, the Ontario Information and Privacy Commissioner of Ontario (“OIPC”) has distinguished *Weber* to assume exclusive jurisdiction over two claims filed by unionized employees.

(i) Order OI-2917: Ontario (Ministry of Community and Social Services)

²² *PPG, ibid.* at para. 46.

²³ The company in *PPG* argued in the alternative that the FST should defer to an arbitrator. The Vice-chair held that the *PBA* did not permit it to defer its statutory duties to another body. However, she did note that an arbitrator may have a role to play in certain cases that come before the FST. According to the Vice-chair, where interpretive issues relevant to a wind-up report have already been arbitrated, the Superintendent and FST may have to apply doctrines such as *res judicata*, abuse of process and issue estoppel. As well, the Vice Chair noted that, in some cases, it may be appropriate for the Superintendent and FST to suspend its proceedings to await the outcome of an ongoing grievance arbitration. However, she held that a full scale deferral to arbitration was not appropriate.

Order OI-2917 involved an appeal relating to an access to information request for certain records kept by the Family Responsibility Office (“FRO”).²⁴ The Ministry of Community and Social Services granted access to many of the requested records but refused to disclose the full names of the FRO employees contained in the records. It refused the disclosure due to a consent order issued by the Grievance Settlement Board (“GSB”). The GSB consent order related to a series of grievances filed by employees who claimed that the Ministry’s disclosure of their full names violated their right to health and safety. The GSB order required the FRO to develop a policy that permitted employees to identify themselves by their first names and identification number only.

When the appeal came before the OIPC, the Ministry and the union representing Ministry employees submitted that the issue in the appeal fell within the exclusive jurisdiction of the GSB. The OIPC disagreed. It framed the essential character of the dispute as whether the *Freedom of Information and Protection of Privacy Act* (“*FIPPA*”) provides a right of access to the government-held information at issue, or whether, on the basis of certain statutory exemptions, the government was entitled to withhold the information. The OIPC stressed that *FIPPA* provides a detailed code for establishing and determining public rights of access to information. It noted that *FIPPA* establishes the OIPC as an independent arbiter of those rights, and an essential part of the legislative scheme, as expressed in the purposes of the Act. Based on this reasoning, the OIPC found that it had jurisdiction over the issues arising in the appeal and that this jurisdiction was unaffected by the GSB consent order.

(ii) Order PO-3009-F: University of Ottawa

Likewise, the OIPC also asserted exclusive jurisdiction over a complaint filed by a unionized employee in Order PO-3009-F.²⁵ The case involved a freedom of information request for certain records that would be in the possession of professors at the university who were members of the faculty association. When the university asked professors to turn over potentially responsive records, the association filed a grievance. In his decision, the arbitrator used certain collective

²⁴ *Ontario (Ministry of Community and Social Services)*, [2010] OIPC No. 125.

²⁵ *University of Ottawa*, 2011 CanLII 74312 (ON IPC).

agreement provisions, notably provisions relating to academic freedom, to interpret exemptions contained in *FIPPA*. He found that many of the potentially responsive records were personal to the professors and not under the “custody and control” of the university within the meaning of *FIPPA*.

In the OIPC proceeding, the university and faculty association submitted that, based on *Weber*, the issue of whether certain records held by professors were within the custody and control of the university fell within the exclusive jurisdiction of an arbitrator under the collective agreement. The OIPC did not agree. It characterized the essential character of the dispute as one of access to information which it found that the legislature intended the OIPC to have exclusive jurisdiction to address. Among other things, the OIPC noted that the collective agreement did not purport to oust the OIPC’s jurisdiction and that it would be contrary to public policy if it did. The OIPC also stressed the strong public accountability purposes served by *FIPPA* in ensuring that citizens have access to information by public institutions. It noted that the OIPC is invested with wide-ranging powers under the Act to deal with access to information requests which an arbitrator lacks. As well, the OIPC noted that there is no provision in the *Labour Relations Act* for a requester to participate in an arbitration. For all these reasons, the OIPC found that it had exclusive jurisdiction over the claim in question.

While the OIPC does not assume a blanket exclusive jurisdiction over all access to information requests filed by unionized employees in these decisions, such a finding may well be implicit in them. In light of the OIPC’s reference to the “complete code” provided under *FIPPA* as well as its public accountability mandate, one would be hard pressed to imagine an access to information claim that it would not take exclusive jurisdiction over.

In examining the jurisdiction of arbitrators and other statutory tribunals, Lokan and Yachnin have argued that it is difficult to make a credible case that legislatures intended arbitration to completely supplant the jurisdiction of other tribunals established specifically to carry out different policy initiatives or to enforce certain rights. A review of the caselaw above suggests

that the tribunals in question took the same view as Lokan and Yachnin when determining the scope of their jurisdiction over claims filed by unionized employees.

C. Legislation Granting/Leaving Exclusive Jurisdiction to Arbitrators

As noted above, most governing statutes do not specifically address whether a tribunal has concurrent or exclusive jurisdiction with labour arbitrators over the claims of unionized employees. The statutes discussed below are exceptions, as they expressly leave jurisdiction over certain claims to be dealt with through the grievance process.

(a) Ontario *Employment Standards Act*

Some employment standards statutes, expressly address the jurisdiction of their tribunals over claims filed by unionized employees. For example, the Ontario *Employment Standards Act* (“*ESA*”) contains a section with detailed provisions that specifically address the enforcement of the *ESA* under a collective agreement. These provisions operate to leave the jurisdiction over the application of the *ESA* in the unionized context to labour arbitrators. The *ESA* provides that, in situations where an employer is or has been bound by a collective agreement, the *ESA* is enforceable against it as if it were part of the collective agreement.²⁶ Unless permitted by the Director of Employment Standards, an employee who is covered by a collective agreement may not file a complaint alleging a contravention of the *ESA* that is enforceable under a collective agreement.²⁷ Employees are bound by any decision their union takes with respect to the enforcement of the *ESA*, including a decision not to seek enforcement.²⁸ Employees are also bound by settlements regarding the enforcement of the *ESA* that are made by their union on their behalf.²⁹

²⁶ *ESA* s. 99(1).

²⁷ *ESA*, s. 99(2).

²⁸ *ESA* s. 99(3).

²⁹ *ESA*, s. 6.

The British Columbia *Employment Standards Act* contains similar provisions which leave certain matters to be determined through the grievance procedure.³⁰

(b) Statutes Governing Federal Public Service Employees

The 2013 federal budget legislation included amendments to various labour relations statutes.³¹ Some of the amendments have not yet come into force as they require proclamation by the Governor in Council. Among other things, the legislation included amendments that would prevent the Canadian Human Rights Commission from dealing with complaints filed by federal public service employees against their employer. Instead, employees of the federal public service will have to file a grievance if they believe they are experiencing employment-related discrimination. Individual employees will have the right to refer discrimination-related grievances for adjudication to the newly created Public Service Labour Relations and Employment Board. This Board replaced the Public Service Labour Relations Board and the Public Service Staffing Tribunal. These statutory amendments appear to be unique. If and/or when they come into force, the CHRA will be the only human rights statute that expressly prohibits a human rights commission/tribunal from dealing with complaints filed by certain unionized employees.

PART II –HRTO’S GENERAL APPROACH TO PARALLEL CLAIMS

In light of the HRTO’s assumption of concurrent jurisdiction discussed above, the main issue that arises at the HRTO is not whether the Tribunal has jurisdiction over applications filed by unionized employees, but how it deals with situations where an applicant has filed parallel claims. Situations involving multiple claims raise various issues for the Tribunal (and, no doubt, also for the parties involved). Two main issues arise in HRTO cases: (1) whether it is appropriate for the Tribunal to proceed with a consideration of an application if there exists an ongoing parallel proceeding and (2) whether it is appropriate for the Tribunal to proceed with a

³⁰ R.S.B.C. 1996, c. 113, s. 3(7)

³¹ *Economic Action Plan 2013 Act, No. 2*, S.C. 2013, c. 4, Division 17.

consideration of an application if a parallel proceeding has already dealt with the substance of an application.

The *Code* and the HRTO's Rules of Procedure contain provisions that apply to each of these two issues. First, the *Code* provides the Tribunal with the power to defer an application (s. 45, Rule 14 of the Tribunal's Rules). Second, the *Code* provides the Tribunal with the power to dismiss an application if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of an application (s. 45.1, Rule 22 of the Tribunal's Rules).

A. Power of Deferral

Deferral is a discretionary measure that the Tribunal exercises on the basis of the circumstances in each case. Some factors the Tribunal has identified as relevant to deciding whether it is appropriate to defer consideration of an application are: the subject matter of the other proceeding, the nature of the other proceeding, the types of remedies available in the other proceeding, and whether it would be fair overall to the parties to defer, having regard to the status of each proceeding and the steps that have been taken to pursue them.³² Deferral does not affect a party's substantive rights. Instead, it suspends the Tribunal's process pending the outcome of another proceeding. Deferral is aimed at avoiding duplication of legal processes. It results from the recognition that a variety of tribunals have the jurisdiction to deal with human rights matters³³ and that the facts underlying Tribunal applications may also form the basis of other proceedings.

The Tribunal has stated that it will typically defer an application when there is an ongoing grievance under a collective agreement based on the same facts and/or issues. In doing so, the Tribunal generally has not relied on the reasoning in *Weber* as a factor for granting deferral requests. Instead, the Tribunal relies upon the following factors: the fact that labour arbitrators have jurisdiction to apply the *Code* and to award *Code* remedies; the desire to avoid the potential for inconsistent decisions that might occur if claims proceeded in parallel; and a recognition of

³² See *Baghdassarians v. 674469 Ontario*, 2008 HRTO 404.

³³ *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14.

the unfairness that may arise if parties are required to pursue more than one proceeding dealing with substantially the same issues in two different forums at the same time.

The Tribunal has also relied upon another set of factors which it set out most fully in *Melville v. Toronto (City)*.³⁴ In that case, the applicant was an employee of a long term care home operated by the City of Toronto. She filed an application with the HRTO alleging systemic discrimination by her employer against Black employees. She also made various allegations of discrimination against her personally, including in improper discipline. In addition to naming her employer as a respondent, the applicant also named her union as a respondent alleging that it had failed to pursue her grievances vigorously enough.

The applicant had filed at least two grievances that related to the issues in her application: a grievance alleging harassment and another alleging unjust discipline for a certain workplace incident. Both respondents requested that the Tribunal defer the Application pending the conclusion of the grievance and arbitration process. The two grievances were scheduled for mediation. In the event that mediation was unsuccessful, the union would make a decision about whether to refer the grievances to arbitration if mediation was unsuccessful.

The Tribunal held a preliminary hearing to deal with the deferral issue. At the hearing, the applicant argued that it was unjust and unconstitutional for the HRTO to defer her application pending a possible arbitration because the applicant herself would not be a party to the arbitration. The applicant's counsel argued that, since unions and employers make the ultimate decisions about the conduct of the arbitration, grievors are vulnerable to delays caused by their union. The applicant noted that a union may make decisions that the grievor does not agree with and cannot control. The applicant also argued that deferral was not appropriate since there was no formal "proceeding" with a third party neutral at the time of the preliminary hearing since her grievances had not yet been referred to arbitration and, moreover, it was uncertain whether they would be.

³⁴ 2012 HRTO 22.

The Tribunal granted the respondents' deferral request and dismissed the applicant's claims that deferral was unjust or unconstitutional in the circumstances. The Tribunal's then Associate Chair addressed the reasons why deferral was appropriate in that case. In doing so, he articulated an analysis that implicitly underlies many other deferral cases. The Vice-chair stated as follows:

An individual working under a collective agreement has a choice – he or she can choose not to file or proceed with a grievance and to pursue the application at the Tribunal instead. If the applicant chooses the grievance process and what comes with it, including representation by the union and the enforcement of particular rights under the collective agreement, he or she cannot also proceed with a Tribunal application at the same time. Deferral avoids two simultaneous proceedings that may result in conflicting determinations, ensures that the respondent need not be actively defending the same matter in two legal proceedings at the same time, and focuses the Tribunal's limited resources on cases where it is the only process being pursued. In my view, it is consistent with the Tribunal's mandate to interpret its rules in a fair, just and expeditious manner to defer a case when a grievance is ongoing, whether or not that grievance has yet been referred to arbitration. The grievance process is a stage in dispute resolution before the matter is referred to an independent third party, but that does not mean that there is no proceeding ongoing. Fairness supports avoiding the duplication of proceedings.³⁵

In support of his finding, the Vice Chair cited *Weber* and stated that, in general, the law gives exclusive jurisdiction to labour arbitrators where a matter arises expressly or inferentially from the collective agreement. He then noted that the *Code* "departs from those principles by allowing a unionized applicant to file a Tribunal application."³⁶ However, he found that it was not unjust that an applicant only be permitted to pursue one avenue at a time.

The Tribunal has deferred consideration of applications even when an employee has filed grievances after filing their application. The Tribunal has also deferred applications where there is substantial or significant, but not complete, overlap between the issues raised in the application and an employee's grievance(s).

Despite its general practice of deferring applications where there exist parallel grievances, the Tribunal has refused to defer consideration of an application where the grievance process was

³⁵ *Ibid.* at para. 8.

³⁶ *Ibid.* at para. 11.

not moving forward in a timely manner.³⁷ Therefore, it is open to an applicant whose case has been deferred to request reactivation of their application on the basis that a grievance process has been unreasonably slow. As the Tribunal noted in *Melville*, it is also always open to an employee to withdraw his or her grievance entirely and proceed before the Tribunal.³⁸

As noted above, deferral does not affect the substance of any party's rights. It is a procedural step, holding the matter in abeyance while another overlapping process takes place. An applicant may seek to proceed with his or her application before the Tribunal once the other proceeding is complete. However, the applicant's right to proceed with their application is subject to s. 45.1 of the *Code* which I turn to in the next section.

B. Power to Dismiss Applications Under s. 45.1 of the *Code*

The other *Code* provision that comes into play in situations involving multiple proceedings is s. 45.1 of the *Code*. That provision provides the Tribunal with the power to “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.” The Tribunal does not consider the procedural or substantive correctness of the other proceeding or decision when deciding whether the application can proceed.³⁹ Instead, s. 45.1 is the statutory reflection of the collective principles underlying the doctrines of issue estoppel, collateral attack, and abuse of process.⁴⁰ As stated by the Divisional Court, in applying s. 45.1, the Tribunal seeks to strike a balance between finality/ judicial economy/ consistency and the need to ensure that justice is done in a particular case.⁴¹ The Tribunal does so by applying the analysis found in two Supreme Court of Canada decisions: *British Columbia (Workers' Compensation Board) v. Figliola*⁴² and *Penner v. Niagara (Regional Police Services Board)*.⁴³

³⁷ See for e.g. *Monck v. Ford Motor Company of Canada*, 2009 HRTO 861 and *Gomez v. Grand River Foods*, 2011 HRTO 2106.

³⁸ See Section 3 of Part III of this paper on issues that may arise in such situations.

³⁹ *Gomez v. Sobeys Milton Retail Support Centre*, 2011 HRTO 2297 at para. 4.

⁴⁰ See *Figliola*, *infra*, note 42 at para. 25 and *Gomez*, *ibid*.

⁴¹ For the Tribunal's general approach to the application of s. 45.1, see *Claybourn v. Toronto Police Services Board*, 2013 HRTO 1298 (“*Claybourn*”) and *K.M. v. Kodama*, 2014 HRTO 526 (“*Kodama*”) both upheld by the Ontario Divisional Court in *Ontario (Community Safety and Correctional Services) v De Lottinville*, 2015 ONSC 3085.

⁴² 2011 SCC 52 (“*Figliola*”).

⁴³ 2013 SCC 19 (“*Penner*”).

In applying s. 45.1, the Tribunal considers whether that has been another proceeding within the meaning of s. 45.1. The Tribunal has stated that a “proceeding” implies that an impartial third person has applied an objective legal standard to a certain set of facts and reached a conclusion.⁴⁴ Therefore, the Tribunal has ruled that the decision of an employer to deny a grievance at Step 2 of a grievance procedure is not a proceeding within the meaning of s. 45.1.⁴⁵ Likewise, a union’s mere withdrawal of a grievance is not a proceeding under s. 45.1.⁴⁶ It should be noted that the Tribunal has found that a settlement may amount to a proceeding under s. 45.1 of the *Code*.⁴⁷

If the Tribunal finds that there has been another proceeding, it goes on to consider whether, in its opinion, the other proceeding appropriately dealt with the substance of the application. In determining this question, the Tribunal has applied the following factors set out in *Figliola*: (i) whether there was concurrent jurisdiction in the other proceeding to decide human rights issues; (ii) whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and (iii) 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.⁴⁸

Since the release of the Supreme Court’s decision in *Penner*, the Tribunal is also required to consider whether it would be unfair to use the results of the other proceeding to dismiss the application.⁴⁹ In *Penner*, the majority of the Supreme Court dealt with a situation where an individual filed a complaint of misconduct against a police officer under the *Police Services Act*. Following the exhaustion of that procedure, the individual filed a civil action claiming compensation arising out of the same incident and allegations. The Court had to determine whether the doctrine of issue estoppel applied to bar the civil action. The Court found that the

⁴⁴ *Maxwell v. Cooper-Standard Automotive Canada Limited*, 2013 HRTO 1482 at paras. 37-38.

⁴⁵ *Wang v. Hilton Toronto*, 2015 HRTO 1131 at para. 19-32.

⁴⁶ See for e.g. *Soni v. Hilton Suites Toronto/Markham Conference Centre and Spa*, 2015 HRTO 713 at para. 6 and *Jean v. Résidence St. Louis*, 2011 HRTO 1800 at para. 19.

⁴⁷ *Dunn v. Sault Ste. Marie (City)*, 2008 HRTO 149 at para. 37. For a discussion of the HRTO’s approach to settlements entered into in prior proceedings, see section A of Part III below.

⁴⁸ *Figliola*, *supra* note 42 at para. 47.

⁴⁹ For the Tribunal’s analysis reconciling *Penner* and *Figliola*, see *Claybourn*, *supra* note 41 at para. 65-85 and *Kodama*, *supra* note 41 at para. 58-65.

doctrine should not be applied if its application would be unfair in the circumstances of the case. The majority found that unfairness in applying the doctrine of issue estoppel may arise in one of two main ways: first, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings; and second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

In *Penner*, the majority concluded that it would be unfair to prevent the plaintiff to proceed with his civil action for a number of reasons. These included the reasonable expectations of the parties; the plaintiff had no stake in the disciplinary proceeding; the application of issue estoppel against Mr. Penner would have the effect of permitting the chief of police to become the judge of his own case. The Tribunal has applied the *Penner* analysis in determining whether it would be unfair to use the results of another proceeding, including a grievance proceeding, to dismiss an Application.

Notably, *Penner* involved a case where the previous proceeding was one involving professional discipline in which the applicant had no stake and could receive no remedy. The Tribunal has noted the distinction between that fact situation and cases involving a previous arbitral proceeding.⁵⁰ Nevertheless, the Tribunal has factored *Penner*'s requirement of fairness into its application of s. 45.1 in situations where the previous proceeding took the form of a grievance arbitration. A review of the Tribunal's caselaw since *Penner* shows that the Tribunal has only once found that it would be unfair to use the results of a previous arbitral proceeding to dismiss an application. The case in question, *Beausoleil*, involved unique factual circumstances which are discussed in Section B of Part III below. In *Beausoleil*, the Tribunal held that it would be unfair to use the results of a previous mediation-arbitration to dismiss an application since it was not clear that the process had dealt with the substance of the application. However, it is difficult to imagine many circumstances in which the Tribunal would apply *Penner*'s fairness analysis to refuse to use the results of a previous arbitration to dismiss an application. Such an analysis is most readily applied in situations where an applicant did not have a stake in the outcome of a

⁵⁰ *Hussain v. Ontario (Community and Social Services)*, 2014 HRTO 1788.

previous proceeding or, as in *Penner*, an individual against whom a claim is made was in effect “a judge of his own case”.⁵¹

C. Does this Amount to *De Facto* Exclusive Arbitral Jurisdiction?

After having read the previous sections, some readers might be tempted to wonder whether the Tribunal’s approach leads to a *de facto* system of exclusive arbitral jurisdiction over human rights issues in Ontario. From what I have said above, it becomes clear that in a great many cases where an employee files both an application with the HRTO and a grievance in relation to the same facts, they are likely to have their application deferred by the HRTO and then face the possibility of having their application dismissed if an arbitrator has appropriately dealt with the substance of their application. From this, some readers may conclude that this amounts to a *de facto* system of exclusive arbitral jurisdiction over human rights claims in the province.

However, this is not the case since unionized employees who wish to proceed before the Tribunal are always free to do so if they have not filed a grievance under their collective agreement or if their union has decided not to act upon their grievance (e.g. by referring it to arbitration). Even employees who have filed grievances have a right to proceed before the Tribunal if they withdraw their grievances or in situations where their union is not processing their grievance in a timely way. Therefore, the system is one of concurrent jurisdiction, albeit one which in practice may see most claims being decided in the arbitral forum.

In light of the HRTO’s approach described above, some may question why a unionized employee would file an application with the HRTO instead of, or in addition to, filing a grievance under their collective agreement where they also enjoy non-*Code* protections. This is especially the case given the greater basket of protections contained in collective agreements. I would suggest that there appear to be at least three main reasons why unionized employees file applications with the HRTO.

⁵¹ *Penner*, *supra* note 43 at para. 66.

First, many if not most of the unionized employees who file applications with the HRTO (whether or not they have filed parallel grievances) appear to do so because they believe their union has not done enough to respond to their concerns or to advance their grievance.⁵² Employees may file applications after their union has declined to refer their grievance to arbitration or as safeguard in case their union does not refer their grievance or otherwise deal appropriately with their grievance.

Second, as commented upon by the CHRT, many employees appear to file applications with various tribunals in an attempt to take a “shot gun approach” rather than “put all their eggs in one basket”.⁵³ Most applicants before the HRTO, including unionized employees, are self-represented and have not necessarily had the benefit of legal advice. Most employees appear to want to avail themselves of any and all recourses available to them which may include, not only filing a grievance as well as an application, but also filing other claims such as claims before the Ontario Labour Relations Board (“OLRB”), or claims with other administrative tribunals or professional bodies.

Third, many employees may file applications with the HRTO because they believe the HRTO is more likely to award them their desired remedy. This is often the case if an employee is most interested in a monetary remedy rather than some other type of remedy, such as reinstatement, which has been more commonly awarded by arbitrators than the HRTO.⁵⁴ Employees may also file parallel claims on the mistaken assumption that they might have access to different remedies in each forum (for example reinstatement at arbitration and a monetary remedy at the HRTO).

While it true that a unionized employee may enjoy a greater basket of protections under their collective agreement, generally employees file claims with the HRTO out of a concern that their union may fail to facilitate their access to this basket. Alternatively, some may find the basket of

⁵² In many cases, employees file applications against both their employer and their union claiming that their employer breached the *Code* due to certain actions in the workplace and that their union breached the *Code* by not dealing appropriately with their concerns or grievances. In many cases, the Tribunal has dismissed the applications as against the unions on the basis that they stand no reasonable prospect of success in terms of making out a violation of the *Code*.

⁵³ *Sherman v. Revenue Canada*, 2005 CHRT 38 at para. 47.

⁵⁴ Michelle Flaherty, “Reinstatement as a Human Rights Remedy: When Jurisdictions Collide”, unpublished paper presented at Ontario Bar Association conference, Annual Update on Human Rights, May 29, 2015.

remedies commonly awarded under the *Code* more appealing or else they mistakenly believe that they can gain access to two different baskets of remedies, one in each forum.

The HRTO's power of deferral and its power to dismiss applications under s. 45.1 of the *Code* are important tools to appropriately deal with situations where employees file multiple parallel claims. The use of these tools to manage and deal with parallel claims does require time and resources on the part of the Tribunal. However, the time and resources dedicated to deferrals or preliminary s. 45.1 hearings is likely significantly less than the time and resources that would be wasted if duplicative legislation were permitted. It is also quite possible that the Tribunal would be required to spend even greater resources making jurisdictional determinations if it were to apply the *Morin* contextual approach to determining jurisdiction on a case by case basis. While the powers of deferral and the power to dismiss under s. 45.1 assist in dealing with parallel proceedings, various issues and situations arise that complicate the management of parallel claims. I discuss some of these complicating issues/situations below.

PART III – ISSUES ARISING AT THE HRTO IN RELATION TO PARALLEL PROCEEDINGS

The Tribunal's concurrent jurisdiction over human rights claims gives rise to various issues in situations where employees file two or more claims with different tribunals. In this section, I discuss various issues that have arisen in cases where unionized employees filed both an application with the HRTO and a grievance under their collective agreement.

A. Settlements of Grievances

Interestingly, Mr. Weber, who sought to bring the civil claims in *Weber v. Ontario Hydro*, had filed a grievance under his collective agreement which was settled at arbitration. This scenario arises with some frequency at the HRTO. The Tribunal is fairly frequently called upon to address situations where an applicant's grievance has been settled by their union and employer but they nevertheless wish to proceed with their application before the Tribunal. In such cases, the

Tribunal must consider whether an application should be dismissed under s. 45.1 of the Code and/or pursuant to one of the principles animating s. 45.1 such as abuse of process.

As a matter of labour law, unions have the authority to settle grievances on behalf of their members. However, the Tribunal does not automatically dismiss applications if an applicant's union has entered into a settlement on their behalf. The Tribunal has not fully fleshed out the reasons for this in its caselaw but one reason would be that *Code* rights are individual rights and therefore individuals have a right to enforce these rights before the Tribunal unless they themselves have explicitly or implicitly agreed to settle their *Code*-related claims.

The Tribunal has recognized the public interest in enforcing settlements that were freely arrived at by the parties in other forums, especially in the area of labour relations. The Tribunal has found that a settlement may constitute a "proceeding" for the purposes of s. 45.1. In *Dunn v. Sault Ste. Marie (City)*, a case that has been consistently followed, the Tribunal's former Associate Chair stated as follows:

There is a strong public interest in ensuring that when parties freely choose to resolve the substance of a human rights dispute, in whatever forum it is brought, the matter is at an end. This is a fundamental principle that should guide the Tribunal in the interpretation of s. 45.1, because to do otherwise could make the finality of settlements highly uncertain.

[...]

Most litigation ends in settlement. To be effective, settlements must be final, since otherwise the parties would have no incentive to make an agreement to end litigation. An interpretation of s. 45.1 that did not cover settlements would discourage parties from working to resolve human rights proceeding without recourse to litigation.

The Tribunal has held that it would be an abuse of process for parties to seek to litigate settled matters unless there are compelling reasons to continue to process the application despite the settlement. In general, the Tribunal examines the circumstances of a settlement to determine whether the applicant explicitly or implicitly consented to and accepted its terms and whether their consent was vitiated in any way.

HRTO cases involving settlements can be divided into two general categories: (i) cases in which an employee signed a settlement agreement (which may also contain a full and final release) and (ii) cases in which the employee did not.

(a) Grievor signed settlements

The Tribunal generally dismisses applications as an abuse of process where an applicant has already entered into a settlement that covers the allegations in the application and contains a full and final release. The Tribunal has also dismissed applications as an abuse of process in the absence of a release where it is apparent that the parties intended to resolve all outstanding issues between them through the settlement.⁵⁵ This is the case unless there are compelling reasons to proceed despite the existence of the settlement. Cases where the Tribunal has proceeded with an application despite the existence of a signed settlement have been exceedingly rare. They have generally involved a finding that the applicant's consent was vitiated due to the presence of a mental disability.⁵⁶ The Tribunal has also stated that it may be appropriate to proceed with an application if an applicant's consent to a previous settlement was vitiated by duress.⁵⁷ Although applicants who seek to proceed with applications despite having signed a settlement frequently allege duress, no applicant at the HRTO has yet succeeded in making out the very high threshold for a finding of duress.

(b) Situations where grievor has not signed settlement

In situations where a grievor/applicant has not signed a settlement agreement, the Tribunal generally considers whether other factors establish that an applicant implicitly accepted the terms of settlement. The Tribunal has generally found that it is not an abuse of process to proceed with an application if an applicant has not signed a settlement agreement and there are no other signs

⁵⁵ *Dickson v. General Motors of Canada Limited*, 2013 HRTO 1347 at para. 18; *Solcan v. Kitchener (City)*, 2011 HRTO 2205 at paras. 41 and 42 and the cases cited therein.

⁵⁶ See *Anamguya v. Intercon Security*, 2010 HRTO 2464 and *Walkinshaw v. Complex Services Inc.*, 2011 HRTO 1977.

⁵⁷ See for e.g. *Nolan v. Royal Ottawa Health Care Group*, 2014 HRTO 1604 and *Perricone v. Fabco Plastics WholESale*, 2010 HRTO 1655.

that the applicant has accepted the agreement. This would be the case for example if the applicant's union and employer arrived at a settlement without the applicant's knowledge.

The Tribunal has adopted somewhat different approaches in cases where an applicant has some involvement in the settlement negotiations but refused to sign the settlement. In some cases, it has held that section 45.1 and/or the doctrine of abuse of process will not apply unless the applicant is a party to the settlement between the union and the employer.⁵⁸ In other cases, the Tribunal has held that the fact that an applicant refused to sign a settlement agreement is not conclusive. In these cases, the Tribunal has found that it is appropriate to consider other factors to determine whether the applicant implicitly accepted the terms of the settlement. In at least one case, the Tribunal has found that an applicant had implicitly accepted a settlement because he accepted a substantial amount of money paid to him under the settlement.⁵⁹ However, in at least two other cases, the Tribunal has stated that an applicant's acceptance of settlement funds may not be determinative of the issue.⁶⁰ While the details of the Tribunal's analysis may vary, the overriding question is whether factors exist which establish that the applicant implicitly accepted the terms of the settlement even if he or she refused to sign the settlement agreement.

As the above discussion makes clear, the HRTO must deal with a variety of issues in cases where an applicant seeks to proceed with an application when their grievance has been the subject of a settlement. There is no doubt that such situations not only raise issues for the HRTO but also for unions as well as employers who may face the risk that an employee will seek to proceed with an application despite the settlement of their grievance. The situation likely also raises issues for individual employees who must decide whether to accept a settlement negotiated by their union or proceed with their application before the Tribunal.

B. Alternative forms of dispute resolution

⁵⁸ *Lumley v. Trillium Lakelands District School Board*, 2010 HRTO 1117 and *Lemieux v. Guelph General Hospital*, 2010 HRTO 1267.

⁵⁹ See for e.g. *Bhandari v. Ontario (Education)*, 2010 HRTO 1676.

⁶⁰ In those cases, vice chairs have expressed a concern that to view this factor as determinative would signal that only those people in the position of being able to reject, for example, the ongoing payment of their wages at termination would be able to pursue their human rights complaints. See *Melendez v. City of Toronto*, 2012 HRTO 403 ("*Melendez*") at para. 19; *Healey v. McMaster University*, 2010 HRTO 1874 at para. 33.

Another type of issue may arise in situations where parties have agreed to employ alternative forms of dispute resolution. This may especially arise in situations where a union and employer are in a mature bargaining relationship and the collective agreement allows the parties to use less conventional expedited forms of dispute resolution to process grievances. The following decisions provide examples of situations in which the Tribunal has had to determine whether an application should be dismissed after a parallel grievance covering the same facts and issues has been dealt with through a form of dispute resolution that differed from a standard arbitration.

(a) ***Georgievska v. Kingdom Hotels Limited; Clarke v. Kingdom Hotels Ltd.***

Both of these cases shared the same set of background facts. The respondent employer, a chain of hotels, closed one of its hotels and opened a new one in a nearby location several months later. The employer and the union had entered into a Memorandum of Agreement which included a dispute resolution process for disputes with respect to the hiring of employees at the new hotel. Under the process, the employer and union would agree to the selection of an independent person to act as a reviewer to address situations where an employee was not hired at the new hotel. The reviewer had the authority to ensure that the hotel applied the criteria “equally” as against the person who was applying for a position at the new hotel. The employee had the right to make written submissions to the reviewer through their union.

The applicants in *Georgievska* and *Clarke* alleged that the respondent breached the *Code* when it did not select them for employment at the new hotel. They had also engaged in the process described above.⁶¹ In each case, the reviewer had found that the criteria were applied equally and that there was no evidence of discrimination as alleged by the employees. The employer requested that the Tribunal dismiss both applications on the basis that the process before the reviewer had appropriately dealt with the substance of the applications.

⁶¹ *Clarke* involved two applicants – one had taken part in the process described above and the other had not. The application by the one who had not proceeded before the Tribunal.

The Vice-chairs hearing both cases accepted that the process before the reviewer constituted a “proceeding” for the purposes of s. 45.1. The cases turned on whether the prior proceedings had appropriately dealt with the substance of the applications. In *Georgievska*, the Tribunal noted that it does not expect other proceedings to mirror proceedings at the HRTO either in terms of process or the substance of the analysis. In *Clarke*, the Vice-chair found that it was not his role to parse the process used in the other proceeding to determine whether the reviewer had adequately considered the evidence or undertaken the appropriate legal analysis under the *Code*. Both vice-chairs noted that the reviewer had specifically considered the applicant’s discrimination claims and found that there was no evidence of discrimination. Therefore, both Vice-Chairs dismissed the applications on the basis that the substance of the applications had been appropriately dealt with by the reviewer.

(b) ***Beausoleil v. Ontario (Community Safety and Correctional Services); Marshall-Wilkinson v. Ontario (Community Safety and Correctional Services)***

The Tribunal has also been called upon to apply s. 45.1 in at least two cases where the prior proceeding took the form of an expedited mediation-arbitration leading to a short bottom line decision. In one of the cases, the Tribunal declined to dismiss the application under s. 45.1 and in the other it did dismiss the application as having been appropriately dealt with by the mediation-arbitration proceeding.

The Tribunal refused to dismiss the application in *Beausoleil v. Ontario (Community Safety and Correctional Services)*.⁶² The applicant in the case had filed a grievance that raised the same issues as her application. Her union and employer agreed to deal with her grievance, along with 10 others she had filed, through a form of mediation-arbitration provided for under the collective agreement. At the end of the process, a GSB Vice-chair issued a short decision which stated “some of the grievances have no merit and should be dismissed, others are (sic) questionable merit and others may have some merit.” He ordered four remedies including an order that the employer remove letters of counsel in the grievor’s file relating to the grievances.

⁶² 2013 HRTO 1553.

The Tribunal held a preliminary hearing to determine whether the Tribunal should dismiss the applicant's application under s. 45.1 of the *Code*. Only the applicant and the employer/respondent participated in the preliminary hearing. Ultimately, the Vice-chair who conducted the preliminary hearing denied the request to dismiss under s. 45.1. She stated as follows:

I do not know what the Vice-Chair decided with respect to the applicable grievance, nor do his reasons make clear whether he considered the applicant's allegation that she had been the subject of gender discrimination.

Based on the materials before her, the Vice-chair was not prepared to infer that the GSB Vice-chair had dealt with the substance of the application on the basis that he ordered the letters of counsel removed from her file.

The Vice-chair recognized that the mediation-arbitration process at issue was designed to be an expeditious and efficient manner of resolving workplace disputes between the parties. However, she found that, in the absence of evidence concerning what was put before the GSB Vice-chair coupled with the brief reasons of the Vice-Chair, it would be unfair to use the results of the mediation-arbitration process to bar the applicant from proceeding with her application.⁶³

The Tribunal distinguished *Beausoleil* in *Marshall Wilkinson v. Ontario (Community Safety and Correctional Services)* and dismissed the application before it under s. 45.1. The applicant's grievance in that case was dealt with through a similar, or the same, mediation-arbitration process. The GSB Vice-chair issued a bottom line decision with no reasons that said:

Having carefully considered the submissions of the parties, as well as the jurisprudence of the Board, I hereby deny this grievance.

The HRTO Vice-chair in *Wilkinson* commented on the challenge of applying s. 45.1 when no reasons are provided to explain the outcome of a previous proceeding. He noted that reasons

⁶³ The respondent filed a request for reconsideration in which the union intervened and made submissions. In her reconsideration decision, the Vice-chair noted that it was regrettable that the union had not chosen to intervene at an earlier stage to supplement the factual record and make full legal argument on the application of s. 45.1. However, notwithstanding the more comprehensive submissions made on the reconsideration request, the Vice-chair dismissed the request: *Beausoleil v. Ontario (Community Safety and Correctional Services)*, 2014 HRTO 123.

would normally explain the issues that were adjudicated and the evidence that was considered. However, the Vice-chair found that the absence of reasons for decision did not, of itself, lead to a conclusion that it would be unfair to rely on the results of a prior proceeding.

He found that it was clear that the issues raised in the grievance were essentially the same as those raised in the application and those were the only issues raised before the GSB. Therefore, he had no doubt that the GSB did consider and decide the issues raised in the application. He distinguished *Beausoleil* on the basis that *Beausoleil* involved multiple grievances which made it impossible for the Tribunal to discern from the GSB Vice-chair's brief reasons whether a decision had been made on the grievance that overlapped with the application. The Vice-chair in *Wilkinson* held that there was no such ambiguity in the case before him and therefore he dismissed the application under s. 45.1 of the *Code*.

These decisions provide examples of the Tribunal's approach in cases where parties have used alternative forms of dispute resolution in a previous proceeding. The decisions show that the Tribunal does not require that prior proceedings mirror the Tribunal's process or traditional litigation processes. The Tribunal has also been prepared to apply s.45.1 to dismiss applications where a prior mediation-arbitration resulted in a decision with no reasons. However, there is a risk that the Tribunal will not dismiss an application if it is not satisfied that a prior proceeding has dealt with the substance of an application. In all cases involving a request to dismiss under s. 45.1, it is important for parties to provide a full evidentiary record and legal submissions regarding the nature of the prior proceeding, the issues dealt with, and the conclusions reached. A complete record and submissions may be especially important in cases involving less conventional forms of dispute resolution if it is unclear from a prior decision whether the proceeding has dealt with the issues raised in the application before the HRTO.

C. Employees who withdraw grievances during the arbitration process

Yet another type of issue that arises is how to deal with a situation where an employee who has filed both a grievance and an application decides to withdraw their grievance during the arbitration process. This scenario has arisen in at two recent cases: *Nash v. Ottawa-Carleton District School Board* (“*Nash*”)⁶⁴ and *Hicks v. Hamilton- Wentworth District Catholic School Board*.⁶⁵

In *Nash*, the applicant had filed both an application with the HRTO and a grievance under her collective agreement in relation to alleged discrimination because of disability. The Tribunal deferred consideration of her application pending the outcome of the grievance arbitration process. The applicant’s union referred her grievance to arbitration. The union and employer engaged in a discussion of the grievance on the first day of the arbitration but this discussion did not result in a settlement. As a result, the arbitration reconvened several months later. The union and employer engaged in mediation-arbitration on the continuation date and arrived at an agreement in principle that would have resolved certain issues and allowed the grievor to pursue any other aspects of her claim that lay outside the grievance in any other tribunal. The mediation-arbitration continued the next day at which time the grievor instructed her union that she did not wish to settle the case on the terms offered the day before. She instructed her union to withdraw her grievance.

The employer objected to the withdrawal. It argued that the withdrawal should be on a “with prejudice basis” and that the withdrawal should be considered an abuse of process. The arbitrator dismissed the grievance on a with prejudice basis. She found this was necessary because any attempt by the grievor to re-file the grievance would lead to an abuse of process. However, the arbitrator refused to find that the applicant’s withdrawal of her grievance amounted to an abuse of process. She found that the parties had engaged in the mediation-arbitration process in good faith and there was no evidence that the applicant intended to waste time or engage in fruitless litigation.

⁶⁴ 2012 HRTO 2299.

⁶⁵ 2015 HRTO 1285 (“*Hicks*”).

When the application was re-activated before the HRTO, the employer/respondent brought a request to dismiss the application under s. 45.1 of the *Code* and as an abuse of process. It argued that the applicant had a full opportunity to argue all of the issues in the application before an arbitrator who had full jurisdiction to deal with those issues.

The Tribunal denied the respondent's request. The Vice-chair noted that the arbitration process consisted of one day of settlement negotiations followed by a second day during which the arbitrator heard opening statements and admitted documents into evidence followed by further settlement discussions. He noted that the arbitrator did not make a finding on the merits nor was there a settlement agreed to by all parties.

The Vice-chair did agree with the employer that there could be circumstances where abandonment of a grievance proceeding before an arbitrator could result in an abuse of process at the HRTO. However, he was not satisfied that the case before him was such a case.

He concluded as follows:

There was clearly no finality in the arbitration process and no concerns could arise about inconsistency or misuse of tribunal resources. While the events have understandably resulted in some frustration on the part of the respondent, I cannot conclude that permitting the applicant to reactivate the Application that she filed with the Tribunal would undermine the integrity of the administration of justice or bring the administration of justice into disrepute.

As noted above, one of the factors highlighted by the Vice-chair in *Nash* for why he declined to find that it would be an abuse of process to proceed with the application was the fact that the arbitrator declined to make an abuse of process finding in the arbitration. In *Hicks*, the Tribunal was faced with a situation where an arbitrator did dismiss a previous grievance as an abuse of process. The grievor in the case refused to comply with the arbitrator's order to produce certain documents. As a consequence of the grievor/applicant's repeated refusal to produce the ordered material, his union sought to withdraw the grievance midway through the arbitration. The

employer objected and sought the dismissal of the grievance as an abuse of process. The arbitrator granted the employer's request.⁶⁶

The applicant then requested, and was granted, reactivation of his HRTO application without objection from the employer/respondent. The employer/respondent subsequently made a request for the production of the same materials it had sought in the grievance arbitration. The applicant refused and indicated that he would not do so under any circumstances. The Vice-chair ordered the applicant to produce the material sought by the employer/respondent. The applicant did not comply with the Vice-chair's order and indicated that he would never do so.

The employer/respondent then filed a request to dismiss the application as an abuse of process because of the applicant's refusal to comply with the Vice-chair's order. The Vice-chair directed that a preliminary hearing be held to hear submissions on the question of whether or not the application should be dismissed as an abuse of process because the applicant would not comply with the Tribunal's directions. The Vice-chair also sought the parties' submissions on whether or not the application should be dismissed as an abuse of process and/or pursuant to section 45.1 of the *Code* as a consequence of the arbitrator's decision.

The Vice-chair dismissed the application as an abuse of process because of the applicant's refusal to comply with his order to produce documents. Although it was not necessary to go further, the Vice-chair also concluded that the application should be dismissed because it was an abuse of process in the circumstances to attempt to proceed with the application after the arbitrator had dismissed the grievance as an abuse of process. The Vice-chair stated as follows:

In addition, I find that it is an abuse of process for the applicant to seek to re-engage the Tribunal's process where by his own conduct the grievance filed on

⁶⁶ Interestingly, in a portion of her decision, the arbitrator seemed to be writing directly to the Tribunal. She stated that the HRTO's caselaw demonstrated that the circumstances in the arbitration are relevant to the outcome of a request to dismiss before the Tribunal. The arbitrator then went on to say that it was "critical for the Tribunal to understand the circumstances in the instant case". She then set out the various factors that led her to dismiss the grievance as an abuse of the arbitration process including the numerous e-mails the applicant had sent to her directly, his use of intemperate language and his outright refusal to disclose the materials she had directed him to disclose. However, the arbitrator did recognize that the Tribunal had the right and obligation to come to its own conclusions as to how to exercise its statutory authority. See *Hamilton Wentworth Catholic District School Board and OECTA* (unpublished decision of Arbitrator Susan Tacon, July 22, 2014).

his behalf was dismissed as an abuse of process. This is forum shopping of the most obvious kind. As discussed above, a grievance was filed to which this Application was deferred. That grievance was dismissed as an abuse of the arbitration process because of the applicant's conduct in that proceeding. In my view, it would be inappropriate and an abuse of the Tribunal's process to entertain this Application further in these circumstances. The abuse of process is made more stark given that the grievance was dismissed in significant part because of the identical issue bringing this proceeding to a halt – the applicant's refusal to produce documents when ordered to do so.⁶⁷

Finally, the Vice-chair also held that, in the circumstances, the application should be dismissed pursuant to section 45.1 of the *Code* because the substance of the application had been appropriately dealt with in the grievance proceeding. He made this decision despite the fact that the human rights claim had not been determined by the other adjudicator. The Vice Chair stated as follows:

In my view, there is no dispute that the applicant had a full and fair opportunity to know and present his case before an adjudicator with the authority to determine the issues raised in this case and provide him a fulsome and appropriate remedy if he made out his case. In the end, the arbitrator was prevented from determining these issues because of the applicant's conduct in the case, not because the issues were not before the arbitrator or because she lacked jurisdiction. In my view, such circumstances justify the dismissal of the Application pursuant to section 45.1.

The *Nash* and *Hicks* decisions would suggest that the Tribunal will consider all the surrounding circumstances in determining whether to dismiss an application for abuse of process or under s. 45.1 of the *Code* after an applicant/grievor has withdrawn a previous grievance. The factors considered by the Tribunal include the following: the stage of the grievance process at which the grievance was withdrawn, whether the arbitrator made an abuse of process finding at arbitration, and whether any other factors exist that would make it an abuse of the Tribunal's process to proceed with consideration of the application.

D. Case Splitting

⁶⁷ *Hicks, ibid.* at para. 21.

An issue arises when applicants seek to split their cases by seeking to advance certain non-human rights claims relating to a certain incident or incidents in one forum and also file an application to make a discrimination claim in relation to the same set of facts before the Tribunal.

In a number of cases, the Tribunal has dismissed applications under s. 45.1 if the prior proceeding raised the same facts and the applicant should have, but failed to, advance their human rights claims in the prior proceeding. The Tribunal has found that an applicant should not be permitted to try and restrict the *Code* arguments made in the grievance so he or she can pursue them later before the HRTO. It has also found that it would be an abuse of process for the Tribunal to permit an applicant to re-litigate a same case based on a different legal theory.⁶⁸ However, not all Vice-chairs might take such a broad approach to the application of s. 45.1 of the *Code*.

In addition, cases arise that are more complicated in that the grievance and the application overlap partially but not completely. An employee's grievance and application may raise certain allegations that overlap but the application may raise incidents that were not raised in the grievance. In such a case, the issue before the Tribunal is whether the "substance" of the application was appropriately dealt with in a grievance arbitration. Where the allegations raised in a grievance and application overlap partially but not completely, the Tribunal may determine that it is appropriate to proceed with any allegations that have not been dealt with in the previous arbitration.

E. Competing Rights

Cases involving conflicts between human rights and collectively bargained rights may prove to be some of the most complicated cases. For example, this may arise where there is a conflict between the duty to accommodate an applicant and the seniority rights of other bargaining unit

⁶⁸ See *Paterno v. Salvation Army*, 2011 HRTO 2298; *Manhas v. A.O. Smith Enterprises*, 2010 HRTO 659; *Cunningham v. CUPE 4400*, 2011 HRTO 658; *Sutton v. United Food and Commercial Workers Canada, Local 175*, 2010 HRTO 935.

employees. Such cases are no doubt challenging even when they arise in the arbitral context. They may be especially challenging when they arise before the HRTO for a few different reasons.

First, the applicant's union is not always involved in the HRTO proceeding. Although the Tribunal always provides notice of an application to an applicant's union if the applicant is unionized, unions often choose not to intervene in HRTO proceedings. Second, especially if the union is not intervening, the Tribunal likely would not have the benefit of the type of evidence that an arbitrator may have in cases that proceed to arbitration. As a result, the Tribunal may be called upon to make decisions in the context of a less than complete record and without the kind of thorough submissions that might be made in the arbitral context. This is especially true if the applicant is self-represented, which is most often the case in Tribunal proceedings.

The Tribunal has acknowledged that cases involving a conflict between *Code* rights and seniority rights can pose significant challenges.⁶⁹ Although the Tribunal has had occasion to comment upon the challenges posed by such cases, the Tribunal does not appear to have been called upon to decide a case in which there was a direct conflict between rights under the *Code* and rights, such as seniority rights, under the collective agreement. Nevertheless, given the very high number of cases that raise the duty to accommodate disabilities under the *Code*, it is reasonable to expect that such a case will arise at some point.

F. Interpretation of a Collective Agreement

A final issue that may raise concerns is the potential that the Tribunal may be called upon to interpret collective agreement provisions in the course of its consideration of an application. This could raise concerns, as the interpretation of collective agreements falls within the expertise of arbitrators and it is not an issue on which the Tribunal has any particular expertise. While it is possible that the Tribunal could be required to interpret a collective agreement provision in the

⁶⁹ *Carter v. Chrysler Canada Inc.*, 2014 HRTO 845 at paras 79-83; *Ellis v. General Motors of Canada Ltd.*, 2011 HRTO 1453 at para. 31.

course of determining an application, such a scenario does not appear to arise with any frequency.

Situations may well arise where an employee challenges a collective agreement provision that they allege discriminates against them. However, generally in such cases the meaning of the provision is not at issue. All parties generally agree on the meaning or interpretation of the provision. Typically, the issue is whether the application of the provision has a discriminatory effect on the applicant.

One case in which the issue of collective agreement interpretation arose was *Akash v. Toronto Transit Commission* (“*Ákash*”).⁷⁰ In that case, the applicant alleged that he was entitled to a certain allowance under his collective agreement and that the employer had denied him the allowance due to his disability. Both the employer and the union disputed the applicant’s interpretation of the relevant collective agreement provision. The Vice-chair noted that there was a dispute between the parties as to whether employees working in the applicant’s position were entitled to the allowance under the collective agreement. The Vice-chair stated that it is not the Tribunal’s role to adjudicate disputes regarding the interpretation of a collective agreement. In the end, the Vice-chair did not have to interpret the collective agreement provision at issue. She found that, even if she assumed that the collective agreement provided an allowance for the applicant’s position, he had not provided any basis to conclude that his disability was a factor in the respondents’ allegedly incorrect interpretation of the collective agreement in denying him the allowance.

The Tribunal’s comments in cases such as *Akash* would suggest that the Tribunal would be reluctant to engage in the interpretation of any collective agreement provisions unless it was absolutely necessary to do so in. It remains to be seen how the Tribunal would decide a case that called for a determination of whether the employer had violated the collective agreement. For example, it is unclear how the Tribunal would approach a case where an applicant claimed that their employer discriminated or reprised against them by violating the collective agreement.

⁷⁰ 2012 HRTO 2373.

PART IV – CONCLUDING REMARKS

In this paper, I have explored the impact of *Weber* on statutory tribunals, with a particular focus on human rights tribunals and on other statutory tribunals in Ontario. I have argued that this impact has been relatively minor, as compared to the decision's impact with respect to civil claims filed by unionized employees. Statutory tribunals have found that they have concurrent, or even exclusive, jurisdiction over claims even if they are filed by unionized employees in spite of *Weber* and despite the authority of arbitrators to apply human rights and other employment-related statutes. While there may be one law (or set of laws) for all, there continue to be different fora in which that law (set of laws) may be applied. An issue faced by tribunals that have asserted exclusive jurisdiction over claims, even if they are filed by unionized employees, is whether there is any role for labour arbitrators to play in respect of these claims. The ongoing issue faced by tribunals that have concurrent jurisdiction over claims filed by unionized employees is how best to deal with multiple parallel claims in a manner that balances judicial finality and economy with considerations of fairness to the parties.