NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Human Rights Commission) v. Nova Scotia (Attorney General)*, 2023 NSCA 66

Date: 20230920
Docket: CA 517639
Registry: Halifax

Between:

Nova Scotia Human Rights Commission

Appellant

v.

The Attorney General of Nova Scotia, Halifax Regional Municipality, Deborah Carleton, J. Walter Thompson and Peter Nathanson

Respondents

v.

Nova Scotia Government and General Employees Union, Halifax Regional Police Association, Amalgamated Transit Union, Local 508, Canadian Union of Public Employees, the International Brotherhood of Teamsters, Local 927, the Halifax Professional Firefighters Association, International Association of Firefighters, Local 268, Nova Scotia Federation of Labour, and the Canadian Association of Counsel to Employers

Intervenors

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: March 29, 2023, in Halifax, Nova Scotia

Subject: Jurisdiction of the Nova Scotia Human Rights Commission and Board of Inquiry

Summary: Deborah Carleton is a police officer employed with the Halifax Regional Police Service. There is a collective agreement, entered into between the Halifax Regional Police

Summary (cont'd): Association and the Halifax Regional Municipality, which governs her employment.

Ms. Carleton suffers from post traumatic stress disorder which she says is an injury she sustained while in the course of her duties. In 2017, she filed a complaint with the Nova Scotia Human Rights Commission, the crux of which asserted that her employer, Halifax, was treating her differently than other police officers who had sustained work injuries of a physical nature.

A two-member Board of Inquiry was appointed to hear the complaint, and in September, 2021, the proceedings commenced with the calling of evidence. Shortly thereafter, the Supreme Court of Canada released its reasons in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42. At issue in that case was whether a board of inquiry appointed pursuant to the Manitoba *Human Rights Act*, has jurisdiction to hear a complaint of discrimination brought by a worker whose employment was governed by a collective agreement.

In *Horrocks*, the Court confirmed labour legislation across the country requires that the dispute mechanisms provided for in a collective agreement, usually a labour arbitrator, be the exclusive means of resolving such complaints. The Court recognized however, that in some instances, a concurrent jurisdiction could lie with another decision-maker, such as a human rights tribunal. This would only be the case, however, if the statutory scheme of the competing decision-maker demonstrated a clear legislative intent for concurrency, or the legislative history of the statute supported same.

Relying on *Horrocks*, the Board of Inquiry found that the *Human Rights Act* did not demonstrate a clear legislative intent to displace the exclusive jurisdiction of a labour arbitrator appointed pursuant to the collective agreement. Ms. Carleton's complaint was dismissed.

Issues: Did the Board of Inquiry err in concluding it lacked jurisdiction to hear a complaint brought under the *Human Rights Act* where the substance of the complaint arose in a unionized setting?

Result: Writing for the majority, Justice Bourgeois found based upon the statutory scheme of the *Human Rights Act*, and its legislative history, there was a clear legislative intent for the Nova Scotia Human Rights Commission and boards of inquiry to exercise concurrent jurisdiction over discrimination complaints arising in unionized workplaces.

Chief Justice Wood, in dissenting reasons, found that neither the statutory scheme nor the legislative history demonstrated a clear legislative intention sufficient to displace the exclusive jurisdiction for such complaints to be resolved as contemplated by the collective agreement.

Appeal allowed, and the complaint remitted back to the Board of Inquiry.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 36 pages.

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Nova Scotia Government and General Employees Union, Halifax Regional Police Association, Amalgamated Transit Union, Local 508, Canadian Union of Public Employees, the International Brotherhood of Teamsters, Local 927, the Halifax Professional Firefighters Association, International Association of Firefighters, Local 268, Nova Scotia Federation of Labour, and the Canadian Association of Counsel to Employers

Intervenors

Judges: Wood, C.J.N.S., Bourgeois and Van den Eynden, JJ.A.

Appeal Heard: March 29, 2023, in Halifax, Nova Scotia

Held: Appeal allowed, per reasons for judgment of Bourgeois, J.A.; Van den Eynden, J.A. concurring, and Wood, C.J.N.S. dissenting

Counsel: Kendrick Douglas, for the appellant
Edward A. Gores, K.C., for the respondent, The Attorney General of Nova Scotia (not participating)

Counsel (cont'd): Martin C. Ward, K.C. and Justin Luddington, for the respondent, Halifax Regional Municipality
Ronald Stockton and Nancy Elliott, for the respondent, Deborah Carleton
J. Walter Thompson, K.C., respondent (not participating)
Peter Nathanson, respondent (not participating)
George R. H. Franklin and Annalise Benoit, for the intervenors, collectively, The Unions
Richard M. Dunlop and Richard Jordan, for the intervenor, Canadian Association of Counsel to Employers

Reasons for judgment:

[1] The focus of this appeal is a narrow one. What happens jurisdictionally when a unionized employee makes a complaint arising from their employment under the *Human Rights Act*, R.S.N.S. 1989, c. 214, as amended, (the "*HRA*") against their employer? In 2008 this Court confirmed the Nova Scotia Human Rights Commission (the "Commission") and a labour arbitrator share concurrent jurisdiction to hear such complaints.[1] In 2021, the Supreme Court of Canada found the Manitoba Human Rights Commission did not have jurisdiction over a complaint of discrimination made by a unionized employee. Rather, the exclusive jurisdiction to hear such complaints, falling under the collective agreement, rested with a labour arbitrator.[2]

[2] The Supreme Court's decision in *Horrocks* has re-ignited a previously resolved debate about what role, if any, does the Commission have in complaints arising from unionized workplaces. For the reasons to follow, I am satisfied the Commission and a Board of Inquiry ("BOI") appointed under the *HRA* can investigate, manage and hear such complaints, sharing concurrent jurisdiction with an arbitrator appointed under a collective agreement.

Background

[3] The respondent, Deborah Carleton, is a police officer employed with the Halifax Regional Police Service. There is a collective agreement, entered into between the Halifax Regional Police Association and Halifax, which governs her employment.

[4] Ms. Carleton suffers from post traumatic stress disorder which she says is an injury she sustained while in the course of her duties. In 2017, she filed a complaint with the Commission, the crux of which asserted that her employer, Halifax, was treating her differently than other police officers who had sustained work injuries of a physical nature.

[5] A two-member BOI was appointed to hear the complaint, and in September, 2021, the proceedings commenced with the calling of evidence. Shortly thereafter, the Supreme Court of Canada released *Horrocks*, the opening paragraph of which framed the dispute as follows:

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[1] *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2008 NSCA 21 ("*Hellesoe*").

[2] *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 ("*Horrocks*").

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

[6] Writing for a majority of the Court, Justice Brown determined an adjudicator appointed under Manitoba's *The Human Rights Code*[3] lacked jurisdiction to hear a complaint of discrimination brought by a unionized employee. Rather, exclusive jurisdiction to hear such a complaint rested solely with a labour arbitrator appointed under the relevant collective agreement. He wrote:

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

[7] Relying on *Horrocks*, Halifax brought a motion seeking to have Ms. Carleton's complaint dismissed. It argued the essential character of the complaint fell within the scope of the collective agreement. As such, by virtue of the collective agreement and the *Trade Union Act*, R.S.N.S. 1989, c. 475, as amended, (the "*TUA*") the exclusive jurisdiction to determine the complaint rested with a labour arbitrator. Halifax further submitted there was nothing in the *HRA* which established a clear legislative intent to grant concurrent jurisdiction to the Commission to address such complaints.

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[3] *The Human Rights Code*, C.C.S.M., c. H175.

[8] The motion was heard in January, 2022, and further written submissions were provided at the BOI's request. On August 12, 2022, the BOI released its decision on the motion. Relying on the analytical framework in *Horrocks*, the BOI found it did not have jurisdiction to hear Ms. Carleton's complaint:

> 87. It is clear to this Board that a labour arbitrator appointed under the *Trade Union Act* to interpret and apply the collective agreement between HRM and the HRPA has exclusive jurisdiction to hear Det. Cst. Carleton's complaint and that the language in the *Human Rights Act* is insufficient to oust that jurisdiction or to grant the Commission concurrent jurisdiction.

[9] The Commission appeals the dismissal of Ms. Carleton's complaint and disputes the BOI's determination that it lacks jurisdiction. Ms. Carleton filed a Notice of Participation, and her views aligned closely with that of the Commission.

[10] The Halifax Regional Municipality filed a Notice of Participation on behalf of the Halifax Regional Policy Service ("Halifax") and seeks to uphold the BOI's decision.

[11] Two motions to intervene in the appeal were brought and granted. A group of seven parties representing the interests of unionized employees in Nova Scotia[4] jointly argue in support of allowing the appeal. The Unions' position was succinctly explained in its Notice of Motion to intervene:

> The intended joint intervenors have had members who have alleged workplace violations of the *Human Rights Act*. The intended joint intervenors submit that their members are entitled in law, under the current statutory scheme, to have access to the complaint process of the Nova Scotia Human Rights Commission in relation to discrimination in their employment, regardless of the fact that their employment is governed by a collective agreement.

[12] The Canadian Association of Counsel to Employers (the "CACE") has intervened, and advances a position aligning with that of Halifax. It argues the BOI was correct in determining the exclusive jurisdiction to hear complaints of discrimination arising in a unionized setting rests with a labour arbitrator.

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[4] The Nova Scotia Government and General Employees Union; the Halifax Regional Police Association; the Amalgamated Transit Union, Local 508; the Canadian Union of Public Employees; the International Brotherhood of Teamsters, Local 927; the Halifax Professional Firefighters Association, International Association of Firefighters, Local 268, and the Nova Scotia Federation of Labour (the "Unions").

Issues

[13] In its Notice of Appeal, the Commission sets out the following grounds of appeal:

> 1. The Two-Member Board of Inquiry erred in law in finding that it didn't have jurisdiction to hear the Complaint of Det. Cst. Carleton.
>
> 2. The Two-Member Board of Inquiry erred in law in finding there was no concurrent jurisdiction between the grievance/arbitration mechanisms found in the *Trade Union Act* and the dispute resolution procedure of the Human Rights Commission provided for in the *Human Rights Act*.
>
> 3. The Two-Member Board of Inquiry erred in law in finding the legislative intent of the *Human Rights Act* does not provide concurrent jurisdiction where allegations of human rights violations may also be addressed by a labor arbitrator.
>
> 4. The Two-Member Board of Inquiry erred in law by applying a strict interpretation to the *Human Rights Act*.

[14] In their respective written submissions, the parties utilized different wording to express the issue this Court must determine. In my view, the issue can be simply expressed as follows: Did the BOI err in concluding it lacked jurisdiction to hear a complaint brought under the *HRA* where the substance of the complaint arose in a unionized setting?

Standard of Review

[15] There appears to be almost complete consensus among the parties regarding the appropriate standard of review.[5] In accordance with *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, normal appellate standards apply to statutory appeals.

[16] This appeal is brought pursuant to s. 36(1) of the *HRA*, which confines this Court's review to questions of law:

> **36 (1)** Any party to a hearing before a board of inquiry may appeal from the decision or order of the board to the Nova Scotia Court of Appeal on a question of law in accordance with the rules of court.

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[5] The CACE did not put forward a position respecting the standard of review.

[17] The BOI's determination of whether it had jurisdiction to hear Ms. Carleton's complaint is a question of law, and therefore attracts a standard of correctness.

Legal Principles

[18] The BOI relied upon the legal principles drawn from *Horrocks*. Much of the argument before this Court was focused on the principles arising from that decision and whether the BOI correctly applied them. It is useful to examine the decision in greater detail.

Horrocks

[19] Ms. Horrocks, a unionized employee, was suspended for attending work while under the influence of alcohol. Through a grievance brought by her union, Ms. Horrocks was reinstated but her continuing employment would be subject to the terms of a return-to-work agreement. She agreed to abstain from alcohol and to engage in addiction treatment. Ms. Horrocks was subsequently terminated by her employer for breaching these terms.

[20] Ms. Horrocks filed a complaint with the Manitoba Human Rights Commission alleging she was discriminated against under that province's *The Human Rights Code*. Both at the hearing of the complaint, and at each level of court thereafter, the employer argued the adjudicator appointed under the *Code* had no jurisdiction to hear the complaint. The employer persistently advanced that exclusive jurisdiction to hear the complaint rested with a labour arbitrator appointed under the collective agreement.

[21] A majority of the Supreme Court of Canada agreed with the employer. The following principles are extracted from Justice Brown's reasons:

- Where labour legislation provides for the final settlement of disputes arising from a collective agreement, the jurisdiction of the arbitrator (or other decision-maker empowered by the legislation) is exclusive.[6] This applies irrespective of the nature of the competing forum (paras. 15 and 30);

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[6] Labour legislation in all Canadian jurisdictions provide for the final settlement of disputes arising from collective agreements.

- The exclusive jurisdiction of the arbitrator extends only to disputes which arise expressly or inferentially from the collective agreement. Not all workplace disputes fall within this scope (para. 22);

- It is "beyond dispute" that labour arbitrators may apply human rights legislation to disputes arising from a collective agreement (para. 13);

- Labour arbitration is the forum for enforcement of human rights in unionized workplaces (para. 22);

- The exclusive jurisdiction enjoyed by labour arbitrators is subject to clearly expressed legislative intent to the contrary (paras. 15, 32 and 33);

- The mere existence of a competing tribunal is insufficient to displace labour arbitration as the sole forum for disputes arising from a collective agreement (para. 33);

- To displace a labour arbitrator's sole jurisdiction, some positive expression of the legislature's will is required. This may be by an explicit statement in a competing tribunal's enabling statute that it enjoys concurrent jurisdiction (para. 33);

- Explicit language granting concurrent jurisdiction to a competing tribunal is not necessary to displace a labour arbitrator's exclusive jurisdiction. A consideration of the statutory scheme may disclose a legislative intent for concurrent jurisdiction (para. 33);

- Legislative intent for concurrent jurisdiction can also be found in the legislative history of the competing tribunal's enabling statute (para. 33).

[22] From the above, it is clear that although *Horrocks* sets out guiding principles, the outcome in that instance was dependent upon whether the scheme or history of Manitoba's *The Human Rights Code* demonstrated a clear legislative intent for concurrent jurisdiction of complaints arising in unionized workplaces. It did not. This Court's task is to look at whether legislative intent for concurrent jurisdiction exists within the Nova Scotian context.

Legislative intent

[23] As noted above, the exclusive jurisdiction of labour arbitrators to hear disputes arising from a collective agreement can be displaced by clear legislative intent. The answer to whether a legislature intended to displace the sole jurisdiction of a labour arbitrator may be found in the statutory scheme and history of the competing tribunal's enabling statute.

[24] There are a number of principles that assist a court in assessing whether a legislative intent exists. An examination of the statutory scheme of the enabling legislation engages well-known principles of statutory interpretation.

[25] The Supreme Court of Canada has regularly stated that a pragmatic approach to statutory interpretation is to be applied. The approach must be both purposive and contextual. In *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 Justice Iacobucci describes this "modern approach":

> [26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17*; Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 , which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[26] See also *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47; *R. v. Alex*, 2017 SCC 37, per Moldaver, J. at para. 24; *B.C. Freedom*

of Information and Privacy Association v. British Columbia (Attorney General), 2017 SCC 6.

[27] As it is in the federal context, the modern approach to statutory interpretation is buttressed in Nova Scotia by the *Interpretation Act*, R.S.N.S. 1989, c. 235. In particular, s. 9(5) provides:

> **9** **(5)** Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

[28] It has also been long recognized that human rights legislation, being quasi-constitutional and remedial in nature, attracts a liberal approach to its interpretation. In *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, Justice Rowe explained:

> [30] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, this Court endorsed the modern principle of statutory interpretation, which must guide our interpretation of the Code in this appeal:
>
>> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> [31] Added to the modern principle are the particular rules that apply to the interpretation of human rights legislation. The protections afforded by human rights legislation are fundamental to our society. For this reason, human rights laws are given broad and liberal interpretations so as better to achieve their goals

(*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at pp. 546-47; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at pp. 1133-36; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-90). As this Court has affirmed, "[t]he *Code* is quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes" (*McCormick*, at para. 17). In light of this, courts must favour interpretations that align with the purposes of human rights laws like the Code rather than adopt narrow or technical constructions that would frustrate those purposes (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at ss.19.3-19.7).

> [32] That said, "[t]his interpretive approach does not give a board or court license to ignore the words of the Act in order to prevent discrimination wherever it is found" (*University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 371). It is for this reason that our interpretation of s. 13(1)(b) must be grounded in the text and scheme of the statute *and* reflect its broad purposes.

[29] The search for legislative intent is informed by legislative knowledge. In *The Construction of Statutes, 7th Ed.*, online (Markham: LexisNexis Canada, 2022) Ruth Sullivan explains at § 8.02:

> The legislature is presumed to know all that is necessary to produce rational and effective legislation. This presumption is very far-reaching. It credits the legislature with the vast body of knowledge referred to as legislative facts and with mastery of existing law, common law and the *Civil Code of Québec* as well as ordinary statute law, and the case law interpreting statutes. The legislature is also presumed to have knowledge of practical affairs. It understands commercial practices and the functioning of public institutions, for example, and is familiar with the problems its legislation is meant to address. In short, the legislature is presumed to know whatever facts are relevant to the conception and operation of its legislation.
>
> (Footnotes omitted)

Analysis

[30] It is helpful to commence the analysis with a review of the BOI's conclusions. After reviewing *Horrocks* and the position of the parties, the BOI identified the following issues for determination:

1. Does a labour arbitrator appointed under the *TUA* to hear disputes arising from the collective agreement between HRM and HRPA have

exclusive jurisdiction to hear [disputes] of the nature of Det. Cst. Carleton's complaint?

2. If so, does the dispute fall within that presumptive exclusive jurisdiction?

3. If so, does there exist, whether with the *HRA*, or within other legislation, "a positive expression of the legislature's will" to displace the labour arbitration as the sole forum for disputes arising from the collective agreement?

4. If no "positive expression of the legislature's will" exists, is there something in a legislative scheme to "necessarily imply" an intention on the part of the legislature to displace the labour arbitrator as the sole forum for resolving disputes arising from a collective agreement or which by reference to legislative history "plainly show that the legislature contemplated concurrency"?

[31] With respect to the first question, the BOI considered s. 42 of the *TUA* which provides:

> **42** **(1)** Every collective agreement shall contain a provision for final and binding settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation, including any question as to whether a matter is arbitrable.
>
> **(2)** Where a collective agreement does not contain a provision as required by this Section, it shall be deemed to contain the following provision:
>
>> Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration. If the parties fail to agree upon an arbitrator, the appointment shall be made by the Minister of Labour and Workforce Development for

> Nova Scotia upon the request of either party. The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it.

[32] The BOI was satisfied the above provision was, in accordance with *Horrocks*, a mandatory dispute resolution clause which granted an arbitrator exclusive jurisdiction to hear complaints arising from unionized workplaces. This finding has not been challenged on appeal and will not be discussed further.

[33] Turning next to the "essential character of the dispute", the BOI concluded "on a purely factual level, the allegations brought by Det. Cst. Carleton clearly fall within the scope of the collective agreement". This finding has also not been challenged on appeal and requires no commentary.

[34] The BOI then addressed the third and fourth issues together. It found that there was no positive expression of the legislature's will, which would serve to oust the jurisdiction of a labour arbitrator in favour of a board of inquiry appointed under the *HRA*. The BOI then addressed whether the *HRA*'s statutory scheme demonstrated a legislative intent for concurrent jurisdiction. The Commission had argued s. 29(4) of the *HRA* demonstrated such an intent. The BOI rejected this argument, and found that the provision, which will be discussed in detail later, did not establish a legislative intent for concurrent jurisdiction. On this basis, the BOI found it lacked jurisdiction, and dismissed Ms. Carleton's complaint. This conclusion is at the crux of this appeal.

[35] After considering the arguments of the parties, the direction provided in *Horrocks* and the materials before the Court, I am satisfied the BOI erred in law in concluding it did not have jurisdiction to hear Ms. Carleton's complaint. For the reasons I will set out, the statutory scheme of the *HRA* demonstrates a clear legislative intent for concurrent jurisdiction. This finding is further supported by an examination of relevant legislative history, which was not considered by the BOI.

Statutory scheme

[36] Both before the BOI and this Court, the bulk of the arguments respecting the assessment of the statutory scheme are anchored in the following passage from *Horrocks*:

> [33] What *Morin* indicates, however, is that the mere existence of a competing tribunal is insufficient to displace labour arbitration as the sole forum *for disputes arising from a collective agreement*. Consequently, some positive expression of the legislature's will is necessary to achieve that effect. Ideally, where a legislature intends concurrent jurisdiction, it will specifically so state in the tribunal's enabling statute. But even absent specific language, the statutory scheme may disclose that intention. **For example, some statutes specifically empower a decision-maker to defer consideration of a complaint if it is capable of being dealt with through the grievance process (see, e.g., *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 25; *Canada Labour Code*, ss. 16(l.1) and 98(3); *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 41 and 42). Such provisions necessarily imply that the tribunal has concurrent jurisdiction over disputes that are also subject to the grievance process.** In other cases, the provisions of a statute may be more ambiguous, but the legislative history will plainly show that the legislature contemplated concurrency (see, e.g., *Canpar Industries v. I.U.O.E., Local 115*, 2003 BCCA 609, 20 B.C.L.R. (4th) 301). In these circumstances, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.
>
> (Bolded emphasis added)

[37] The significance of the example provided by Justice Brown, and its applicability to the *HRA*, was a source of considerable debate amongst the parties. It is important to note at this juncture that the search for legislative intent is not limited to provisions akin to the example highlighted; rather, the entire statutory scheme is relevant.

i) Section 29(4)

[38] The parties and the BOI focused on s. 29(4) of the *HRA* in particular. It provides:

> **29** **(4)** The Commission or the Director may dismiss a complaint at any time if
>
> (a) the best interests of the individual or class of individuals on whose behalf the complaint was made will not be served by continuing with the complaint;
>
> (b) the complaint is without merit;
>
> (c) the complaint raises no significant issues of discrimination;

> (d) the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding;
>
> (e) the complaint is made in bad faith or for improper motives or is frivolous or vexatious;
>
> (f) there is no reasonable likelihood that an investigation will reveal evidence of a contravention of this Act; or
>
> (g) the complaint arises out of circumstances for which an exemption order has been made pursuant to Section 9.

[39] The Commission, Ms. Carleton and the Unions all assert the substance of s. 29(4)(d) shows a clear legislative intent for concurrent jurisdiction. They say that it is, in practical effect, a deferral.

[40] Halifax and the CACE submit that the use of "dismiss" in the above provision cannot be seen as being the same as "defer", and as such it does not imply concurrency. In particular, Halifax argues this Court should not view "dismiss" as used in s. 29(4) as being the same as "defer" because such a meaning cannot be applied to each of the scenarios listed in the section. For example, Halifax asserts it would be nonsensical to read the section as permitting the Commission to defer a complaint if it was without merit (s.29(4)(b)), or if it raised no significant issue of discrimination (s.29(4)(c)), or if it was made in bad faith or for improper motives or is frivolous or vexatious (s. 29(4)(e)).

[41] The BOI found that "dismiss" as used in s. 29(4) could not be equated with "defer", and was therefore, not akin to the examples of implied concurrency identified by Justice Brown.

[42] In my view, the BOI and Halifax take an overly restrictive and rigid approach to the interpretation of s. 29(4)(d). They place too much reliance on the specific word used, as opposed to the intended effect of the provision.

[43] The use or absence of the word "defer" is not determinative of a legislative intent for concurrency, rather it is the intended functioning of the provision which is relevant. This is best seen in the example provided by Justice Brown of the statutory wording in s. 41 and 42 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, which he identified as constituting an implied grant of concurrent jurisdiction. Those provisions do not utilize "defer" or "deferral", and read:

Commission to deal with complaint
41 **(1)** Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

Commission may decline to deal with complaint
(2) The Commission may decline to deal with a complaint referred to in paragraph 10(a) in respect of an employer where it is of the opinion that the matter has been adequately dealt with in the employer's employment equity plan prepared pursuant to section 10 of the *Employment Equity Act*.

…

Notice
42 **(1)** Subject to subsection (2), when the Commission decides not to deal with a complaint, it shall send a written notice of its decision to the complainant setting out the reason for its decision.

Attributing fault for delay
(2) Before deciding that a complaint will not be dealt with because a procedure referred to in paragraph 41(a) has not been exhausted, the Commission shall satisfy itself that the failure to exhaust the procedure was attributable to the complainant and not to another.

[44] The above sections empower the Canadian Human Rights Commission ("CHRC") to assess in the circumstances before it, whether a complaint "ought to" be determined by grievance or by another "appropriate" statutory process. Depending on the circumstances, the CHRC may decide the complaint ought not to

be resolved by grievance, or addressing the complaint through another process is not appropriate. In such situations, the Commission will maintain responsibility to "deal with" the complaint. It is apparent why these provisions reflect Parliament's intent that the CHRC maintain a concurrent jurisdiction to hear complaints that may also be the subject of other dispute resolution proceedings. The practical effect of these provisions is that the CHRC can defer the hearing of a complaint until it is satisfied that it is appropriate to proceed with a complaint or not. This, as identified by Justice Brown, constitutes a clear legislative indicator the CHRC has concurrent jurisdiction.

[45] I will now return to s. 29(4)(d) of the *HRA*. Comparing it to the above provisions of the *Canadian Human Rights Code* demonstrates that the practical effect of the provisions are aligned. Nova Scotia's legislation provides:

> **29** **(4)** The Commission or the Director **may** dismiss a complaint **at any time** if
>
> …
>
> (d) the substance of the complaint has been **appropriately** dealt with pursuant to **another Act or proceeding**;
>
> (Bolded emphasis added)

[46] In assessing the above provision, I note:

- The word "may" is permissive.[7] Although a Commission can dismiss a complaint in the circumstances described, the permissive nature of "may" means it can also choose not to do so;

- "It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose."[8] Therefore, the choice to use "at any time" in legislative drafting is meaningful;

[7] *Interpretation Act*, s. 9(3).

[8] *The Construction of Statutes*, §8.03.

- Similarly, the legislative choice to add "appropriately" must convey specific meaning. It is there for a reason. It necessarily implies the Commission can undertake an evaluative function;

- The phrase "another Act or proceeding" is to be read liberally. The *TUA* is an Act passed by the Legislature. There is no interpretative justification for excluding it as an "Act" for the purposes of s. 29(4)(d). Further, there is nothing in the wording of the statute which would preclude a labour arbitration from constituting a "proceeding"; and

- The corresponding provision in Manitoba's *The Human Rights Code* is significantly different. It states:

> **29** **(1)** The Commission shall dismiss a complaint if it is satisfied that
>
> (a) the complaint is frivolous or vexatious; or
>
> (b) the acts or omissions described in the complaint do not contravene this Code; or
>
> (c) the evidence in support of the complaint is insufficient to substantiate the alleged contravention of this Code.

[47] Section 29(4)(d) of the *HRA* provides the Commission with the ability to dismiss a complaint, if in its assessment the substance of the complaint has been dealt with appropriately by arbitration. The wording of the section necessarily implies the Commission may decide <u>not</u> to dismiss a complaint if it is of the view arbitration has not dealt with it in an appropriate fashion. This clearly also contemplates the Commission assessing whether a complaint has been "appropriately" dealt with through arbitration, and if it has not been, choosing not to dismiss it.

[48] Timing is also an important consideration in assessing s. 29(4)(d) for legislative intent. The Commission may, <u>at any time</u>, decide to dismiss a complaint which has been appropriately dealt with in another proceeding. This contemplates a complaint being dismissed immediately after receipt if the Commission is satisfied it has already been "appropriately" dealt with. However,

it also contemplates a scenario where the Commission upon receipt of a complaint, may wait for the outcome of arbitration to determine whether the complaint has been satisfactorily resolved. In other words, the Commission may defer consideration of whether the complaint ought to be dismissed until the conclusion of the other proceeding.

[49] The above demonstrates clear legislative intent for the Commission to possess concurrent jurisdiction to entertain complaints which could also be the subject of labour arbitration. However, this is not the only aspect of the legislative scheme that supports such a conclusion.

ii) "Employers" included under the HRA – s. 3(e)

[50] In an Addendum to its reasons, the BOI referenced s. 3(a) through (k) of the *HRA*, which sets out various statutory definitions. It summarily concluded these provisions were not indicative of a legislative intention for concurrency:

> 98. While these provisions include trade unions and employers who are parties to a collective agreement, again, the provisions are more broad and, in our view, have the intention of incorporating other forms of employer-employee relations as well. Again, the phrases are broad and generic. One cannot, in our view, so read the provisions as indicating a particular intention to circumvent the *Trade Union Act* as providing for a final settlement.

[51] In my view, the BOI failed to recognize the significance of the statutory definitions of "person" and "employer", which serve to illuminate the types of employment disputes the *HRA*, the Commission and a board of inquiry, are intended to address, and further supports the interpretation of s. 29(4)(d) as set out above. I will explain.

[52] An "employer" under the *HRA* is defined in s. 3(e) as including "a person who contracts with a person for services to be performed by that person or wholly or partly by another person".

[53] Who is a "person"? The definition contained in s. 3(k) says a "person" includes "employer, employers' organization, employees' organization, professional association, business or trade association, whether acting directly or indirectly, alone or with another, or by the interposition of another".

[54] An "employees' organization" is defined in s. 3(d) as including "an organization of employees formed for purposes that include the regulation of relations between employees and employers". A trade union falls within this definition.

[55] Based on the above, "employer" can be read as including "an employer who contracts with an employees' organization for services to be performed by that employees' organization or wholly or partly by another person".

[56] A collective agreement is a contract entered into between an employees' organization and an employer for work to be performed by other persons. I am satisfied that in defining what type of employers are subject to the processes contained in the *HRA*, the Legislature intended to include those that are parties to collective agreements. Indeed, the inclusion of the phrase "wholly or partly by another party" demonstrates the drafters were attuned to the reality that often those who perform services are subject to contracts negotiated by others, and sought to afford them the protection of the *HRA*.

iii) Enforcement of the HRA – s. 24(1)

[57] The Commission submits that s. 24(1) of the *HRA* also contains a clear indicator of legislative intent that it enjoys concurrent jurisdiction with labour arbitrators. I agree. That section states:

> **24** **(1)** The Commission **shall**
>
> (a) administer and **enforce** the provisions of this Act;
>
> (Bolded emphasis added)

[58] In finding the requisite legislative intent in the above provision, I note:

- The use of "shall" is imperative.[9] The Commission must undertake the activities identified in the legislation. It must enforce the *HRA*;

- As noted in *Horrocks*, labour arbitrators are tasked with applying human rights legislation and further, labour arbitration is the forum for the enforcement of human rights in unionized workplaces.

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[9] *Interpretation ct*, s. 9(3).

However, the Commission has also been legislatively mandated to enforce the *HRA*. This necessarily implies, both on its own, and in conjunction with s. 29(4)(d), that the Commission shares concurrent jurisdiction with labour arbitrators;

- I reject the argument advanced by Halifax and the CACE that s. 24(1) is merely administrative in nature and should not be used as an indicator of legislative intent. *Horrocks* directs that it is the statutory scheme to be assessed, not particular sections of the legislation. Consequently, there is no restriction on which sections of the *HRA* can be considered in the assessment of legislative intent – all are potentially relevant; and

- Manitoba's *The Human Rights Code* does not contain a comparable enforcement provision.

[59] For the reasons above, I am satisfied the statutory scheme of the *HRA* demonstrates a clear legislative intent for the Commission to share concurrent jurisdiction with labour arbitrators. I could end my analysis at this point. However, in my view, there are important aspects of the legislative history, which further support this conclusion.

Legislative history

[60] As referenced earlier, *Horrocks* did not confine the search for legislative intent for concurrency to the words of the statute:

> 19 [33] . . .In other cases, the provisions of a statute may be more ambiguous, but the legislative history will plainly show that the legislature contemplated concurrency (see, e.g., *Canpar Industries v. I.U.O.E., Local 115*, 2003 BCCA 609, 20 B.C.L.R. (4th) 301). In these circumstances, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.

[61] I am satisfied that applying an exclusive arbitral jurisdiction model in the Nova Scotian context would ignore the longstanding functioning of the Commission, and would serve to defeat the Legislature's intent.

i) Early statutory beginnings

[62] The prohibition of discrimination in the Nova Scotian employment context found its statutory genesis in two pieces of legislation passed in 1955 (the *Fair Employment Practices Act*, S.N.S. 1955, c. 5) and 1956 (the *Equal Pay Act*, S.N.S. 1956, c. 5) respectively. It is relevant to note that in 1947, the original *Trade Union Act*, S.N.S. 1947, c. 3 was passed, which included a "final settlement" provision akin to the present s. 42. Notwithstanding that fact, human rights legislation developed in a manner that contemplated complaints of discrimination in unionized settings being determined by mechanisms outside the *TUA*.

[63] The provisions of the *Fair Employment Practices Act* are particularly insightful, familiar, and demonstrate unionized workplaces were alive in the minds of legislative drafters. I note:

- Section 3(1) provided that "No employer shall refuse to employ or to continue to employ, or otherwise discriminate against any person in regard to employment or any term or condition of employment because of his race, national origin, colour or religion";

- An "employer" was defined as "a person who employs five or more employees, and includes any person acting on behalf of an employer, but does not include an exclusively charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated primarily to foster the welfare of a religious or racial group and is not operated for private profit;

- A "person" was defined as including an employment agency, a trade union and an employers' organization (s. 2(h));

- A "trade union" meant "any organization of employees formed for purposes that include the regulation of relations between employers and employees" (s. 2(i));

- Section 4(1) permitted "Any person claiming to be aggrieved because of an alleged violation of any of the provisions of this Act" to "make a complaint in writing to the Director . . ." Because "person" was defined as including a trade union, the Act necessarily contemplated

> an individual or a trade union making a complaint of discrimination against an employer.

[64] Both statutes were repealed in 1963 when "*An Act to Amend and Consolidate the Statute Law Relating to Human Rights*"[10] was passed, becoming the first named *Human Rights Act*. That legislation continued the definition of "person" and "trade union" as described in the *Fair Employment Practices Act*, however, the statute no longer provided a definition for "employer". This statute was short-lived, being repealed in 1969 upon the introduction of a new *Human Rights Act*, S.N.S. 1969, c. 11. It is this legislation that, through successive amendments, has become the modern day *HRA*.

ii) Reports

[65] The Intervenor Unions refers this Court to a series of related reports which it says forms part of the legislative history of the *HRA* and are directly relevant to whether concurrent jurisdiction was contemplated by the Legislature. Halifax argues these reports were not before the BOI, and therefore should not be considered on appeal. Alternately, Halifax says the contents of the reports do not constitute legislative history as contemplated in *Horrocks.*

[66] I am satisfied the reports should be considered on appeal. All are public documents, published and readily available on the Commission's website. Halifax was aware in advance of the hearing that the Intervenor Unions intended to rely on the reports as they were discussed in their factum and included in their book of authorities. The content of the reports is clearly relevant to the issues on appeal. Finally, reports to government, or as here, a governmental agency, have been found to constitute legislative history (*Canpar Industries v. I.U.O.E., Local 115*, 2003 BCCA 609).

[67] In 2000, the Commission commenced a three-phased organizational review. The first phase of activities was described as follows:

> In preparing this report the consultants reviewed the academic and policy literature, examined developments in human rights services across the country, and met senior managers, human rights officers and support staff in Halifax and in the three NSHRC regional offices. They also interviewed informed observers in the legal profession, in universities, in organizations representing visible

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[10] S.N.S 1963, c. 5.

minorities, disabled persons and women, and in key government departments, agencies, boards and commissions.

The purpose of the paper is to encourage and support informed discussion among direct stakeholders in Nova Scotia about the mandate and activities of the NSHRC. The paper will summarise findings from the consultations to date on case management and adjudication of complaints, and on possibilities for realigning responsibilities among administrative tribunals and agencies involved in social equality and citizens' rights issues (including the Ombudsman's Office).[11]

[68] One of the concerns highlighted in Phase I was the Commission's workload, it being noted that "the NSHRC is carrying a substantial backlog of cases – approximately 200 – and formal complaints typically take 2 to 3 years to reach resolution."[12] The writers identified a shifting away from the Commission of certain complaints as a potential solution:

2.3.3 Using other Agencies to Adjudicate Human Rights Complaints

Some legal experts consulted for this paper suggested that many current workplace-based complaints could be directed to the Labour Standards Tribunal or to the Labour Relations Board. Cases that come before the Labour Relations Board often have human rights aspects, and increasingly collective agreements include prohibitions against discrimination and harassment as defined by the Human Rights Act. [13]

[69] It was further highlighted that in other provinces, the Labour Relations Board had a broader role than in Nova Scotia:

The Labour Relations Board and the Construction Industry Panel are responsible for handling complaints and adjudicating matters arising under the Trade Union Act. . . Many cases that come before the Labour Relations Board have human rights aspects, and many collective agreements include some prohibitions against discrimination and harassment as defined by the Human Rights Act. **In some Provinces the Labour Relations Board rather than the Human Rights Commission handles human rights complaints arising from workplace settings where there are collective agreements in place.**

(Bolded emphasis added)

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[11] "*Moving Forward with Human Rights in Nova Scotia*" A discussion paper presenting issues and options identified in Phase I of the Organizational Review of the Nova Scotia Human Rights Commission, Praxis Research & Consulting Inc., February 9, 2001 at pg. 2.
[12] *Supra*, p. 4.
[13] *Supra*, p. 9.

[70] The second phase of the review involved a series of public consultations in relation to nine specific issues. Participants were asked: "Are there alternative models for the handling of human rights complaints that need to be considered in Nova Scotia to reduce caseload pressures and improve service to the public?"[14]

[71] The public consultation did not favour the transfer of certain types of complaints to other administrative bodies:

> **Processing employment-related complaints through the Labour Standards Tribunal and/or the Labour Relations Board.** We noted above that there is opposition to the idea of pooling resources with these bodies, and this extends as well to the idea of having employment-related human rights cases heard by bodies other than the NSHRC. For some, this was seen as amounting to a failure on the part of the NSHRC to enforce the Nova Scotia Human Rights Act and would, therefore, be subject to a court challenge.
>
> (Emphasis in original)

[72] In November 2002, the Commission released the third phase report "*Moving Forward with Human Rights in Nova Scotia: The Path for the Future*" in which it identified key changes for implementation resulting from the review process. There was no specific mention of the transfer of certain types of complaints to other adjudicative bodies however, the Commission resolved that its mandate would remain unaltered and it would "also retain its priority on the investigation and adjudication of complaints received from complainants throughout the province of Nova Scotia." (p. 10)

[73] What these reports demonstrate is that notwithstanding the existence of a "final settlement" provision in the *TUA*, the Commission historically received complaints from unionized workplaces and dealt with them as part of its mandate. The reports further identify that all those consulted, including in other government departments and agencies, viewed the Commission as being responsible for these types of discrimination claims.

[74] The Legislature has knowledge of the functioning of its departments and agencies, and aware of the contents of such reports. It was aware the Commission was receiving, managing and resolving, including through the appointment of

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[14] "*Final Report on the Public Consultations Organizational Review of the Nova Scotia Human Rights Commission*", Dr. Wanda Thomas Bernard, Dr. Viola Robinson and Dr. Fred Wien on behalf of Praxis Research, July 12, 2001, p.24.

boards of inquiry, discrimination claims which arose in settings governed by collective agreements. This was not short-lived, but rather a mandate exercised by the Commission for decades. In light of this, the only reasonable conclusion is that the Legislature intended the Commission to exercise such jurisdiction.

iii) The significance of Hellesoe

[75] As indicated at the outset of these reasons, the question of whether the Commission had concurrent jurisdiction in relation to human rights complaints brought within unionized settings has previously been adjudicated by this Court. In *Hellesoe*, this Court concluded that it did.

[76] The relevant background of that matter was set out by Justice Saunders on behalf of the Court, as follows:

> [3] This case comes to us as an appeal from the decision of Justice Arthur J. LeBlanc ordering the appellant Halifax Regional Municipality ("HRM") to produce certain information within its custody and control, pursuant to s. 31 of the **Human Rights Act**, R.S.N.S. 1989, c. 214, as amended. This section authorizes the Nova Scotia Human Rights Commission ("NSHRC") to apply to the Supreme Court for such an order when production has been refused.
>
> [4] The issue before the Chambers Judge was not whether the Commission met the statutory preconditions for a s. 31 order. Rather, the hearing was limited to whether the NSHRC had jurisdiction to investigate the human rights complaint of Mr. Royce Hellesoe.
>
> [5] Mr. Hellesoe was a unionized employee of HRM at all times material to his human rights complaint.
>
> [6] Mr. Hellesoe alleged that a co-worker referred to him using a racial slur on one occasion. He said that on other occasions co-workers told racially offensive jokes and that supervisors laughed and participated in those jokes.
>
> [7] Mr. Hellesoe also claimed that, on two separate occasions, positions he had applied for went to white employees with less seniority. One was said to be a seasonal employee who should not have been given preference under the Collective Agreement.
>
> [8] As well, Mr. Hellesoe said he was denied compassionate leave following the death of a relative, when white employees had been granted such leave in similar circumstances.

> [9] The complainant expressed his belief that such discriminatory treatment was racially motivated because he is an African-Canadian.
>
> [10] In a letter dated August 2, 2006, a human rights officer with the NSHRC asked HRM to provide information regarding the job descriptions of the positions for which Mr. Hellesoe had applied; documentation regarding the qualifications of the successful applicants; any letters of reprimand concerning Mr. Hellesoe or the successful applicants; and a copy of the relevant Collective Agreement. The human rights officer advised that the requests were part of an ongoing investigation into the complaint filed by Mr. Hellesoe.
>
> [11] In a letter dated August 3, 2006, the solicitor for HRM responded "HRM disputes that the Commission has the jurisdiction to deal with the allegations contained in the complaint as these allegations relate to matters which must be dealt with through the grievance/arbitration provisions of the Collective Agreement that governs Mr. Hellesoe's employment".
>
> [12] The parties could not resolve their differences surrounding this issue of the NSHRC's jurisdiction. In a letter dated August 10, 2006, counsel for HRM proposed that, in order to resolve this matter the Commission should initiate an application under the *Human Rights Act* ("*HRA*").
>
> [13] The NSHRC brought an interlocutory application, pursuant to section 31 of the *HRA*, to compel HRM to produce the requested documents and information.
>
> [14] Following Chambers appearances on February 15, 2007 and March 19, 2007, LeBlanc, J. granted the application. He found that the NSHRC had concurrent jurisdiction, and ordered that the requested documents and information be produced by HRM.
>
> [15] The appellants ask that the appeal be allowed and that the order of the Chambers judge "be rescinded as the subject matter of the human rights complaint is within the exclusive jurisdiction of the grievance/arbitration provisions of the subject Collective Agreement".

[77] Justice Saunders found:

> [78] In conclusion, a review of the relevant legislation, the provisions of this Collective Agreement, and the applicable case law, together with the full factual context of this dispute all support the correctness of Justice LeBlanc's finding that an arbitrator does not have exclusive jurisdiction to hear the complaint filed by Mr. Hellesoe. I would uphold his decision that the Commission retains jurisdiction and is entitled to the documents and information described in the order.

[78] Halifax unsuccessfully sought leave to appeal the decision to the Supreme Court of Canada ([2008] S.C.C.A. No. 245).

[79] This Court's determination that the Commission has concurrent jurisdiction over human rights complaints arising in the context of a unionized workplace has remained undisturbed since 2008. Since that time, as it had prior thereto, the Commission has received, investigated, and where it deemed appropriate, appointed boards of inquiry to hear such complaints.

[80] The Legislature is presumed to be aware of case law interpreting the statutes it has passed, as well as the practical affairs and the functioning of public institutions such as the Commission. Despite this knowledge, it has not acted to remove the Commission's judicially recognized concurrent jurisdiction – it has remained silent. Can legislative silence be an indicator of legislative intent, specifically a tacit concurrence with the interpretation found in *Hellesoe*? I find it can.

[81] The decision in *Bank of Montreal v. Li*, 2020 FCA 22 (leave to appeal refused, [2020] S.C.C.A. 75) supports that legislative inaction can inform legislative intent. Ms. Li had worked for the Bank of Montreal for almost 6 years. She was terminated and given the choice between staying on the payroll for a period of time, or accepting a lump sum payment. Ms. Li selected the lump sum option. She subsequently signed a settlement agreement which released the Bank from any and all claims arising from her termination.

[82] Shortly after signing the settlement agreement, Ms. Li filed an unjust dismissal complaint under the *Canada Labour Code*. The Bank brought a preliminary motion arguing an adjudicator appointed to hear the complaint lacked jurisdiction. It relied on the release contained in the settlement agreement as a bar to advancing the complaint.

[83] In dismissing the motion, the adjudicator referred to a longstanding decision which had interpreted the *Canada Labour Code* as permitting a complaint to proceed notwithstanding the existence of a settlement agreement.[15] Relying on this precedent, the arbitrator concluded the settlement agreement did not prohibit her from exercising jurisdiction. This finding was upheld on judicial review.

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[15] *National Bank of Canada v. Canada (Minister of Labour)*, [1997] 3 F.C. 727, aff'd 151 F.T.R. 302, 229 N.R.J. (C.A.) ("*National Bank*").

[84] The Bank appealed. It submitted that *National Bank* should no longer be followed for a number of reasons, including that it had been based on a flawed statutory interpretation. The Federal Court of Appeal rejected that proposition for several reasons, one of which was as follows:

> [44] Second, it is also to be noted that Parliament has amended the Code on a number of occasions since *National Bank* was released, most recently in 2017 when it repealed subsections 242(1) and (2). **Had Parliament been of the view that *National Bank* was wrongly decided, it could easily have intervened and amended subsection 168(1) to allow explicitly for the interpretation put forward by BMO. It did not.**
>
> (Bolded emphasis added)

[85] Legislative inaction following judicial pronouncements has also been found to be a relevant factor in determining legislative intent in other instances. See *Gary L. Redhead Holdings Ltd. v. Swift Current (Rural Municipality)*, 2017 SKCA 47 at para. 73, and *Ouellette v. Saint-André*, 2013 NBCA 21 at para. 16.

[86] As a final observation, Halifax argues that s. 25(2) of the *Interpretation Act* precludes this Court from placing interpretative reliance on the Legislature's lack of statutory response to *Hellesoe*. That section reads:

> **25** **(2)** A re-enactment, revision, consolidation or amendment of an enactment is not to be construed as an adoption of the construction that has by judicial decision or otherwise been placed upon the language used in the enactment or upon similar language.

[87] With respect, I disagree with Halifax's proposition. As the above authorities indicate, legislative inaction can be a relevant consideration in determining legislative intent. Notably, s. 25(2) applies to positive actions undertaken to alter legislation: re-enactment, revision, consolidation or amendment. Legislative inaction is not included, and I remain of the view there is no statutory bar preventing this Court from taking account of the Legislature's inaction.

[88] In the present instance, the legislative history demonstrates that since this Court's finding of concurrent jurisdiction in 2008, the Legislature has not sought to clarify the Commission's jurisdiction – it has remained silent in the face of *Hellesoe*. In my view, this plainly demonstrates the Legislature intended the Commission to continue to exercise concurrent jurisdiction over complaints arising in a unionized workplace.

Conclusion

[89] In summary, after applying the analytical framework in *Horrocks*, I am satisfied the statutory scheme of the *HRA* demonstrates a clear legislative intent to derogate from the exclusive jurisdiction of labour arbitrators, and for concurrent jurisdiction to rest with the Commission. The BOI erred in concluding otherwise.

[90] This conclusion is buttressed by the legislative history of the *HRA*, the Commission's longstanding and well-known mandate of addressing discrimination complaints in unionized settings, and the Legislature's inaction in the face of this Court's earlier finding in *Hellesoe*.

[91] I would allow the appeal and remit the matter back to the BOI to complete the hearing of Ms. Carleton's complaint.

Bourgeois, J.A.

Concurred in:

Van den Eynden, J.A.

Dissenting Reasons:

[92] I have had the opportunity to review the majority reasons written by my colleague, Justice Cindy Bourgeois, in which she explains why she would allow the appeal. I agree with her summary of the applicable principles of statutory interpretation as well as her explanation of the decision of the Supreme Court of Canada in *Horrocks*. However, with respect, I do not agree with her conclusion that the statutory scheme and legislative history of the Nova Scotia *Human Rights Act* demonstrates the legislature intended to displace the presumption of exclusive jurisdiction over workplace discrimination complaints for arbitrators under the *Trade Union Act*.

[93] The majority's reasons interpret general provisions in the *Human Rights Act* as demonstrating a specific legislative intention. In my view, clearer statutory language is required to support a finding of concurrent jurisdiction over workplace complaints.

[94] The applicable principles from *Horrocks* are found in para. 33 which provides:

> [33] What *Morin* indicates, however, is that the mere existence of a competing tribunal is insufficient to displace labour arbitration as the sole forum *for disputes arising from a collective agreement*. Consequently, some positive expression of the legislature's will is necessary to achieve that effect. Ideally, where a legislature intends concurrent jurisdiction, it will specifically so state in the tribunal's enabling statute. But even absent specific language, the statutory scheme may disclose that intention. For example, some statutes specifically empower a decision-maker to defer consideration of a complaint if it is capable of being dealt with through the grievance process (see, e.g., *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 25; *Canada Labour Code*, ss. 16(l.1) and 98(3); *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 41 and 42). Such provisions necessarily imply that the tribunal has concurrent jurisdiction over disputes that are also subject to the grievance process. In other cases, the provisions of a statute may be more ambiguous, but the legislative history will plainly show that the legislature contemplated concurrency (see, e.g., *Canpar Industries v. I.U.O.E., Local 115*, 2003 BCCA 609, 20 B.C.L.R. (4th) 301). In these circumstances, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.

[95] The Supreme Court emphasized the clarity required before the presumptive exclusive jurisdiction of a labour arbitrator is displaced:

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

[96] As the Supreme Court indicates, there are three possible ways a legislature can demonstrate its intent to displace exclusive arbitral jurisdiction:

1. By expressly stating so in the competing tribunal's enabling statute.
2. By enacting a statutory scheme which discloses this intention by implication.
3. Where the legislative history plainly shows the legislature intended concurrency.

[97] The *Human Rights Act* does not include an express statement of concurrent jurisdiction and, therefore, the first option is not applicable.

[98] With respect to the second possibility, concurrent jurisdiction by necessary implication, the Supreme Court cites three statutes as examples. They are the *British Columbia Human Rights Code*, the *Canada Labour Code*, and the *Canada Human Rights Act*. In each of these statutes, the tribunal was given the authority to defer or refuse complaints which were potentially subject to arbitration. The statutory provisions referenced by the Supreme Court are as follows:

Human Rights Code, RSBC 1996, c. 210

Deferral of a complaint

25 (1) In this section and in section 27, '**proceeding'** includes a proceeding authorized by another Act and a **grievance under a collective agreement**.

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

Canada Labour Code, RSC 1985, c. L-2

Powers of Board

16 The Board has, in relation to any proceeding before it, power

…

(l.1) to defer deciding any matter, where the Board considers that the matter could be resolved by **arbitration** or an alternate method of resolution;

…

Board may refuse to determine complaint involving collective agreement

98 **(3)** The Board may refuse to determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be **referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board**.

Canadian Human Rights Act, RSC 1985, c. H-6

Commission to deal with complaint

41 **(1)** Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust **grievance or review procedures** otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

> **(e)** the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.
>
> [Emphasis added re: references to arbitration and grievance]

[99] The majority reasons rely on s. 29 (4)(d) of the Nova Scotia *Human Rights Act* as being analogous to the legislation used by the Supreme Court to imply concurrent jurisdiction. I disagree because, unlike the statutes cited in *Horrocks*, there is no mention of grievance or arbitration as a potential alternative procedure for discrimination complaints. The reference in s. 29(4)(d) to "another Act or proceeding" is, in my opinion, insufficient to clearly demonstrate legislative intention that there be concurrent jurisdiction for a Board of Inquiry and labour arbitrator.

[100] Contrary to the views of my colleagues, I do not believe the obligation on the Human Rights Commission to administer and enforce the *Act* (s. 24(1)) assists in the search for implied concurrent jurisdiction. It is of general application and not a clear indication the legislature intended to reject the exclusive jurisdiction of an arbitrator in favour of a parallel mechanism for unionized complainants to pursue grievances through the human rights regime.

[101] The third circumstance where the Supreme Court says concurrent jurisdiction may be found is where such an intention is plainly shown by the legislative history. As an example, the Court cites *Canpar Industries v. I.U.O.E., Local 115*, 2003 BCCA 609 where the legislative history included a detailed report to the government with recommendations concerning how to address the overlap between grievance arbitration and human rights complaints. The court used this information as follows:

> [25] This statutory recognition of the 'overlap' between human rights complaints and labour grievances originated in 1995 with the enactment of the *Human Rights Amendment Act, 1995,* S.B.C. 1995, c. 42, following the filing of a 'Report on Human Rights in British Columbia' to the government of British Columbia by Professor Bill Black in December 1994. In that report, following a general discussion of the interaction of labour grievances and human rights claims, Professor Black noted four possible ways in which the 'overlap' could be dealt with, namely (at p. 145):

(1) Allow both a grievance and a human rights claim to proceed simultaneously, as at present.

(2) Require an election of one remedy or the other at the beginning of the process.

(3) Allow a person to file both a grievance and a human rights claim, but deal with one process before the other, and continue with the second proceeding only if the first has not properly dealt with the issue.

(4) Combine the two processes into one.

[26] The first alternative, which was essentially the 'status quo', was found to have serious disadvantages, and the fourth alternative lay at least partly outside the mandate of the report. The second alternative, which 'in its pure form' would require that a claimant elect at the outset either to file a grievance or a human rights claim, was found to place too heavy an onus on the complainant, who might not be fully informed as to the consequences of his or her decision, and could end up with a process that 'might go in directions that the employee neither desired nor anticipated' (at 148).

[27] This left the third option — deferring one process until the other has been completed. Professor Black observed (at pp. 148–49):

> The third option ... has greater potential to provide an acceptable solution. In general terms, a claimant would be allowed to file both a grievance and a human rights claim. However, one process would be suspended until the other had been completed. If the first process resulted in a solution satisfactory to the claimant, the second process would be terminated. If the claimant wished to proceed with the second process, it would be reopened, but it would be limited to matters not adequately dealt with in the first proceeding.
>
> One aspect of this proposal was discussed earlier in this Report. If a human rights claim were filed while a labour grievance was pending, the Director of Investigation and Mediation would have the obligation to consider whether the grievance appeared capable of fully and adequately dealing with the substance of the human rights claim. If it did, the Director would suspend the human rights claim pending the outcome of the grievance process. At the conclusion of the grievance process, the Director would consider whether the grievance had fully and adequately dealt with the human rights claim. If it had, the claim would be dismissed or

> would be restricted to those aspects not fully and adequately considered during the grievance process.
>
> ...
>
> [T]he Human Rights Tribunal should have the power to dismiss a claim, to defer a hearing or to limit the scope of a claim to matters not fully and expertly dealt with in the grievance. The Tribunal should use the same criteria that applied to the decision of the Director. It would assess whether the process used to deal with the grievance was suitable for dealing with the human right issues. If it was, the Tribunal would not reassess the ultimate result. Normally, this decision would be made at the pre-hearing conference. The Tribunal would only dismiss a claim if the grievance process had been completed. As a result, the Tribunal could examine the entire grievance process in determining whether it had dealt with all matters raised in the human rights claim in a manner reflecting expertise about human rights.
>
> ...
>
> Instead of deferring the human rights claim, it would, of course, be possible to solve the duplication by deferring the grievance. If the union and the employer decide to defer the grievance, the human rights claim would proceed, since it would be obvious that the grievance would not adequately deal with the human rights aspects of the dispute within the specified time limits.

> [28] Accordingly, Professor Black recommended that the *Human Rights Code* be amended to authorize the Human Rights Tribunal to dismiss a claim which had been adequately dealt with in other 'proceedings' or to defer a complaint pending the outcome of such other proceeding. It appears from *Hansard* and from the legislation that this recommendation was generally intended to be implemented by the 1995 amending statute. (Ontario had enacted a somewhat similar provision, which now appears at s. 34(1)(a) of the Human Rights Code, RS.O. 1990, c. H-19.)

[102] There is nothing in the record before us setting out a similar legislative history which would demonstrate an intention there be concurrent jurisdiction in Nova Scotia.

[103] The majority relies on the legislature's inaction in the face of this Court's decision in *Hellesoe* as an additional basis for finding an intention there be concurrent jurisdiction. I agree that legislative inaction can be a factor taken into

account in statutory interpretation, however, it should not be determinative. The focus should be on the statutory language and scheme. Circumstances will be important in determining how much weight to give to legislative inaction. For example, where parties have engaged in concerted lobbying, the refusal to enact the requested amendments may be of significance. This was the situation in *Reference Re: Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68:

> [73] Notwithstanding successive amendments to the *Copyright Act*, Parliament has not amended s. 21 in the fashion requested by the broadcasters. Parliament's silence is not necessarily determinative of legislative intention. **However, in the context of repeated urging from the broadcasters, Parliament's silence strongly suggests that it is Parliament's intention to maintain the balance struck by s. 21** (see *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, at para. 42, *per* Abella J.).
>
> [Bolded emphasis added]

[104] In my view, the legislature's failure to amend the *Human Rights Act* following *Hellesoe* is not sufficient to establish a clear legislative intent that a Human Rights Board of Inquiry have concurrent jurisdiction with an arbitrator on matters falling within the scope of a collective agreement. I adopt the sentiment expressed by the Newfoundland and Labrador Court of Appeal in *Morgan Estate (Re),* 1992 CanLII 7111 (NLCA):

> [23] Addressing firstly this latter argument, it is acknowledged that courts are entitled to assume that the legislator is aware of judicial decisions prior to a statutory enactment and such decisions become part of the legislative context and are relevant to its interpretation. Indeed, a legislative modification has long been capable of being considered as an expression of intent to set aside a judicial interpretation. (See: *The Interpretation of Legislation:* Pierre A. Côté, Les Editions Yvon Blais, 1984; *Clarkson v. McMaster & Co.* (1896), 1895 CanLII 34 (SCC), 25 S.C.R. 96).
>
> [24] However, one may not impute as a necessary corollary that legislative silence evinces approval that a particular judicial interpretation accurately expresses a statute's intent. Such silence may merely result from the Parliament not directing its mind to the judicial pronouncement; or, that it does not feel the case's impact, however contrary to its intent, would receive such general application as to warrant its modification. Whatever may be the reason for legislative silence, it cannot be employed, as appellant's counsel would have it, in the circumstances of this case, as approval of the finding in *Morris* that the estate

> of a deceased spouse has a general unqualified right to maintain an action for division of matrimonial assets.

[105] For the above reasons, I disagree with my colleagues and would dismiss the appeal.

Wood, C.J.N.S.