S.C.C. File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA)

B E T W E E N:

NORTHERN REGIONAL HEALTH AUTHORITY

APPLICANT
(Respondent)

A N D:

MANITOBA HUMAN RIGHTS COMMISSION and LINDA HORROCKS

RESPONDENTS
(Appellants)

APPLICATION FOR LEAVE TO APPEAL
(NORTHERN REGIONAL HEALTH AUTHORITY, APPLICANT)
(Pursuant to Sections 40(1), 43(1), 58(1)(a), 58(2) and 65.1(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and Rule 25 of the *Rules of the Supreme Court of Canada)*

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PART I - OVERVIEW AND STATEMENT OF FACTS

Overview

1. The law of judicial review in Canada has yet to fully mature in two fundamental respects, by failing to provide:

(a) a comprehensive standard of appellate review as between levels of Court sitting in review of administrative decisions;[1] and

(b) the proper methodology for drawing lines of jurisdiction between competing specialized tribunals.[2]

2. Difference of opinion continues, resulting in uncertainty and a lack of respect and deference as between levels of Court sitting in review and as between competing administrative tribunals.

3. The judgment appealed from epitomizes this lack of certainty and raises these two substantive issues of public importance in the context of the determination and enforcement of human rights within the administrative scheme of labour relations, underscoring the pressing need for clarification and refinement by this Honourable Court.

Background

4. The Applicant and the Canadian Union of Public Employees, Local 8600 ("**Union**") are parties to a Collective Bargaining Agreement ("**CBA**").

5. The Respondent Linda Horrocks ("**Complainant**") was employed by the Applicant as a health care aide at a personal care home operated by the Applicant in Flin Flon, Manitoba. She was a member of the Union and her employment was governed by the CBA.

6. On June 3, 2011, the Complainant was observed intoxicated at work. In the course of the Applicant's investigation into the incident, the Complainant disclosed an addiction to alcohol.

7. The Applicant prepared a memorandum of agreement on June 21, 2011 ("**Draft MOA**"), the terms of which included, *inter alia*, that the Complainant abstain completely from consuming

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[1] Evans, John, JA . "The Role of Appellate Courts in Administrative Law", (2007) 20 Can J Admin L & Prac 1 at **TAB 7**; Stratas, David, JA. "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42 Queen's LJ 27 at **TAB 9**.

[2] Shilton, Elizabeth. "Choice, but No Choice: Adjudicating Human Rights Claims in Unionized Workplaces in Canada" (2013) 38 Queen's LJ 461 at **TAB 8.**

alcohol both inside and outside of work and that any breach "shall conclusively be deemed to constitute just cause for the termination" of the Complainant's employment.

8. The Complainant refused to sign the Draft MOA. As such, the Applicant terminated the Complainant's employment. The Union grieved under the CBA on behalf of the Complainant.

9. Prior to the scheduled arbitration, the Complainant and the Union negotiated a revised memorandum of agreement ("**MOA**"), which like the Draft MOA, required the Complainant to abstain from alcohol. However, the MOA contained other revisions, including that any breach "shall be **considered by the Employer** to constitute just cause for the termination of" the Complainant's employment, subject to the right of the Union **and the Complainant** to challenge any decision of the Applicant under the CBA's grievance and arbitration provisions, and that the Applicant had met its duty to accommodate the Complainant's human rights (emphasis added).

10. The Applicant subsequently received reports the Complainant was intoxicated outside work. At a meeting held to investigate the issue, the Complainant denied being intoxicated. The Applicant then terminated the Complainant's employment, effective April 30, 2012, for breaching the MOA and her failure to be truthful when confronted with these allegations. No grievance was filed by the Complainant or the Union.

11. On November 14, 2012, the Complainant filed a complaint of discrimination ("**Complaint**") with the Respondent Manitoba Human Rights Commission. The Complaint alleged contraventions of Section 14 of *The Human Rights Code*[3] ("**Code**"), which prohibits discrimination in employment.

12. An adjudicator ("**Adjudicator**") appointed pursuant to the Code issued a decision ("**Adjudicator's Decision**"), communicated to the parties on September 9, 2015, which determined that she had jurisdiction to hear and decide the Complaint under the Code and that the Complainant was treated adversely by the Applicant which had failed to make reasonable efforts to accommodate the Complainant to the point of undue hardship.[4]

13. The Applicant applied to the Court of Queen's Bench for judicial review of the Adjudicator's

[3] *The Human Rights Code*, CSSM, c H175.
[4] Adjudicator's Decision, *Leave Application*, page **TAB 2** at paras 106, 141 and 245.

Decision, which application was granted with reasons issued by Edmond J. ("**QB Decision**"). Edmond J. found that the essential character of the dispute is "whether there was just cause to terminate the employment of the [C]omplainant" and that the Adjudicator erred in determining lines of jurisdiction, by focusing "on the legal characterization of the dispute as opposed to the essential character of the dispute in its factual context". The reviewing judge concluded that the Adjudicator's decision should be set aside and the dispute should be "determined in accordance with the grievance procedure and arbitration procedure in the [CBA]"[5].

14. The Respondents appealed the QB Decision to the Court of Appeal, which allowed the appeal ("**CA Decision**"). The Court of Appeal found that the interplay of *The Labour Relations Act*[6] ("**LRA**") and the Code leads to the conclusion that an alleged breach of the Code, giving rise to the termination of the employment of a unionized worker, is a matter within the exclusive jurisdiction of a labour arbitrator appointed pursuant to the relevant collective agreement to hear and decide.[7]

15. However, the Court of Appeal also found that, aspects of human rights may "transcend" that exclusive jurisdiction giving rise to some "modest" role for human rights adjudication.[8]

16. Consequently, the Court of Appeal held that the reviewing judge erred in overturning the Adjudicator's determination that she had jurisdiction, but also found that "the [A]djudicator also erred by taking too sweeping a view of her jurisdiction, given the circumstances of the case."[9]

17. In the result, the Court of Appeal allowed the appeal and remitted the matter back to the reviewing judge, to determine whether the Adjudicator's Decision on the merits of Complaint and the remedies she ordered were reasonable in fact and law.

PART II - STATEMENT OF QUESTIONS IN ISSUE

ISSUE #1: Is the matter in dispute one of such public importance that it ought to be decided by this Honourable Court?

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[5] QB Decision, *Leave Application*, **TAB 3** at para. 65.
[6] *The Labour Relations Act*, CSSM, c L10.
[7] CA Decision, *Leave Application*, **TAB 5**at para 66
[8] CA Decision, *Leave Application*, **TAB 5** at para. 85.
[9] CA Decision, *Leave Application* **TAB 5** at para. 5.

ISSUE #2: What is the comprehensive and appropriate standard of appellate review, as between levels of Court sitting in review of a decision of an administrative tribunal? What aspects of the reviewing judge's decision are subject to a standard of palpable and overriding error?

ISSUE #3: What is the comprehensive methodology for determining jurisdictional lines between competing specialized tribunals? If jurisdiction over a dispute is exclusive, can any jurisdiction transcend it? How should the test be formulated in a manner which provides certainty and consistency in decision making?

PART III - STATEMENT OF ARGUMENT

ISSUE #1: Is the matter in dispute one of such public importance that it ought to be decided by this Honourable Court?

18. Over the past thirty years, the principles of judicial review of administrative decisions have evolved substantially,[10] principally to reflect deference for legislative intent and the increasing role and jurisdiction of administrative tribunals within the Canadian system of justice:

> . . . administrative bodies empowered to decide questions of law "may presumptively go beyond the bounds of their enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them, subject to judicial review on the appropriate standard". [11]

19. Hand in hand with this expanding responsibility was increasing deference shown by the Courts in favour of administrative tribunals, culminating in *Dunsmuir*.[12] As a result, administrative tribunals have an increasingly significant role in determining individual rights and responsibilities, as well as in interpreting the law. While more deference is being granted to their decisions, they are in many cases called upon to apply laws outside their home statute in areas of jurisdiction which compete with other tribunals.

20. In the context of human rights and labour relations, this evolution has resulted in deference by the Courts in favour of labour arbitration,[13] the incorporation of the substantive rights and

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[10] McLachlin, Beverley, CJC. "Administrative Tribunals and the Courts: An Evolutionary Relationship" (May 27, 2013), online: Supreme Court of Canada <http://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>.

[11] *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14, **[*Tranchemontagne*]**, at para 24; *NS (WCB) v Martin*, 2003 SCC 54, **[*Martin*]** at para 45.

[12] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 **[*Dunsmuir*]**.

[13] *St. Anne Nackawic Pulp & Paper v CPU*, [1986] 1 SCR 704 **[*St. Anne Nackawic*]**; *Weber v. Ontario Hydro*, [1995] 2 SCR 929, **[*Weber*]**

obligations established by human rights legislation into every collective agreement,[14] and the requirement of administrative tribunals to apply those substantive rights to,[15] and within the context of,[16] their respective legislative schemes.

21. As spheres of jurisdiction grow, however, so too does the opportunity for competition and intersecting lines of jurisdiction creating uncertainty, inconsistency and conflict. The problem is particularly acute in the labour relations context, in which legislatures have indicated their intent for grievance arbitration to provide full and final settlement of all issues in the workplace.[17]

22. Permitting other forums to take jurisdiction over workplace issues is disruptive to the important policy objective of promoting harmonious labour relations, through a uniform and compulsory grievance arbitration procedure.

23. With expanding administrative jurisdiction comes the corresponding responsibility to avoid turf wars.[18] In this regard, administrative law in Canada has matured such that it is no longer appropriate for a decision-maker to simply ask whether it has jurisdiction; rather, the decision-maker must go further, and ask if there is another more appropriate, or even exclusive, forum to decide the matter, in view of the underlying legislative intent.

24. Notwithstanding admonition from the Courts, as the present case exemplifies, turf wars persist, particularly in the context of human rights administration.[19]

25. This Honourable Court has repeatedly held that public policy is better served by providing for the application of human rights within a comprehensive administrative scheme through the administrative decision-maker established by that scheme. Doing so not only provides "accessible application"[20] of human rights throughout the entire administrative law system, but

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[14] *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324,* 2003 SCC 42, **[*Parry Sound*]**.
[15] *Tranchemontange, supra* note 11, at para 33, 39.
[16] *Council of Canadians with Disabilities v Via Rail,* 2007 SCC 15 **[*Via Rail*]** at para 98,127.
[17] *The Labour Relations Act, supra* note 6, section 78(1).
[18] *St John's (City) v Human Rights Commission,* 2011 NLTD 83 **[*St John's*]**.
[19] *BC (WCB) v Figliola,* 2011 SCC 52, **[*Figliola*]***; CHRC v Air Canada ,* 2011 FCA 332, **[*Morten*]**.
[20] *Parry Sound, supra* note 14; *Tranchemontange, supra* note 11, at para 33, 39.

also provides for the proper application thereof within the specialized "context"[21] of each comprehensive administrative scheme.

26. As the present case demonstrates, both the Courts and administrative tribunals continue to struggle with these issues. Judicial commentary is complex and in need of simplification, both to ensure these objectives are achieved and also to provide consistency and predictability in decision making.

27. Administrative tribunals must understand and apply the correct legal test to determine the essential character of the dispute, so that the proper forum can be determined. Appellate courts may have to make the same determination, while showing the appropriate deference to the reviewing judge's decision. Confusion abounds on both fronts.

ISSUE #2: What is the comprehensive and appropriate standard of appellate review, as between levels of Court sitting in review of a decision of an administrative tribunal? What aspects of the reviewing judge's decision are subject to a standard of palpable and overriding error?

28. In *Dr. Q.*[22], this Honourable Court confirmed that:

> The role of the Court of Appeal was to determine whether the reviewing judge had chosen and applied the correct standard of review, and in the event she had not, to assess the administrative body's decision in light of the correct standard of review, reasonableness. At this stage in the analysis, the Court of Appeal is dealing with appellate review of a subordinate court, not judicial review of an administrative decision. As such, the normal rules of appellate review of lower courts as articulated in *Housen*, *supra*, apply. The question of the right standard to select and apply is one of law and, therefore, must be answered correctly by a reviewing judge. .(emphasis added)

29. Subsequently, in *Agraira*, this Honourable Court adopted a more invasive approach that had been assumed by the Federal Court of Appeal in *Telfer*:

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

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[21] *Via Rail, supra* note 16, at para 98, 127.
[22] *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 **[*Dr Q*]**, at para 43.

error in its application of the appropriate standard. [23] (emphasis added)

30. In doing so, according to *Agraira,* the focus on appeal becomes the administrative decision and the appellate court's task, involves: "step[ping] into the shoes of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision" …[24](emphasis added)

31. Effectively, this approach invites *de novo* review by the appellate court without any rationale or explanation from this Honourable Court[25] for the departure from the usual appellate standard of review of palpable and overriding error as to questions of fact confirmed in *Housen*. [26]

32. The lack of a comprehensive standard of appellate review meant that courts of appeal had to attempt to fill in the gaps, as "the Supreme Court has not been very forthcoming in explaining to what extent the *Housen* principles apply to administrative law cases."[27]

33. Over time, courts of appeal began to recognize that "stepping into the shoes" of the reviewing judge proves to be a bad analogy in two key respects: 1) when taken as licence to afford no deference to the reviewing judge's factual findings and inferences; and 2) when the appropriate standard of judicial review is correctness.

Deference to Findings of Fact

34. Notwithstanding objections to the contrary,[28] many courts of appeal adapted the principles in *Housen* to judicial review of administrative decisions and the role of appellate courts to provide deference to findings of fact by the reviewing judge. [29]

35. In *Hupacasath,* the Federal Court of Appeal tempered the Court's comments in *Telfer,* previously adopted by this Honourable Court, stating:

Agraira . . . at paragraph 46 stands for the proposition that we are to stand in the shoes

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[23] *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 **[*Agraira*]** at paras 45; **quoting** *Telfer v Canada Revenue Agency,* 2009 FCA 23, [2009] FCJ No 71**[*Telfer*]** at para 18; **and see** *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans),* 2006 FCA 31, [2006] 3 FCR 610.
[24] *Agraira*, *supra* note 23 at para 46.
[25] Stratas, *supra* note 1, **TAB 9** at 6.
[26] *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 **[*Housen*]** at para 23.
[27] Evans, *supra* note 1, **TAB 7** at 8.
[28] *Ibid*.
[29] *Housen*, supra note 26 at para 23.

> and consider whether the Federal Court properly applied the standard of review. I do not believe that this allows us to substitute our factual findings for those made by the Federal Court.
>
> In my view, as is the case in all areas of appellate review, absent some extricable legal principle, we are to defer to findings that are heavily suffused by the first instance court's appreciation of the evidence, not second-guess them. Only palpable and overriding error can vitiate such findings . . . [30]

36. The combined application of *Dr. Q.*, *Agraira* and *Housen* became a three step analysis:

(a) did the reviewing judge identify the correct standard of review (which attracts a correctness standard of review)?

(b) did the reviewing judge apply the standard correctly (which also attracts a correctness standard of review)?

(c) were any of the reviewing judge's findings of fact or inferences from facts made in error (which attracts a palpable and overriding error standard of review)?

37.The Manitoba Court of Appeal has both accepted[31] this approach and opposed it.[32] Exacerbating this confusion, in the present case, the Court of Appeal has now determined that the recent decision of this Honourable Court in *Stewart*[33] provides for a new, more generalized approach, permitting a Court of Appeal to interfere and substitute its opinion simply if it feels that the reviewing judge's determinations do not deserve any deference:

> If one returns to the basic question discussed in *Stewart* (see para 19) as to whether there is a principled reason to afford deference here, I am satisfied that there is not. [34]

38. As a result, the Court of Appeal established a new and unique standard of appellate review which allowed it to substitute its opinion in respect of two material findings of fact made by the

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[30] *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 DLR (4th) 737 at paras 75-76. **And see;** *Prophet River First Nation v British Columbia (Environment)*, 2017 BCCA 58, 94 BCLR (5th) 232 at para 48; *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160, 398 DLR (4th) 91 at para 29; *Meeches v Assiniboine*, 2017 FCA 123, 281 ACWS (3d) 2 at para 22.

[31] **See:** *CBC v Manitoba*, 2009 MBCA 122, 251 Man R (2d) 55 at para 22; *R v Henderson (WE)*, 2012 MBCA 93, 284 Man R (2d) 164 at paras 70-72;

[32] **See:** *National Automobile, Aerospace, Transportation and General Workers Union of Canada v Bristol Aerospace Ltd*, 2008 MBCA 62; *The Armstrong's Point Association Inc. v The City of Winnipeg et al*, 2013 MBCA 110, 303 Man R (2d) 56 at paras 3-4; *Loewen v Manitoba Teachers' Society*, 2015 MBCA 13, 315 Man R (2d) 123 at para 24.

[33] *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 **[Stewart]**.

[34] CA Decision, *Leave Application*, **TAB 5** at para 49.

reviewing judge (the essential character of the dispute in its full factual context[35] (as discussed further below) and whether the Union would refuse to grieve second termination[36]) without determining that the reviewing judge had committed any palpable and overriding error.

Role of Appellate Court when Standard of Administrative Review is Correctness

39. The typical case invoking the standard of appellate review occurs when the appropriate standard of judicial review is reasonableness but the reviewing judge incorrectly applies a correctness standard, i.e. a disguised correctness review.[37] In such a case, the appellate court must step into the shoes of the reviewing judge because, as indicated in *Agraira* as quoted above, the focus is on the decision of the administrative tribunal, not that of the reviewing judge.

40. However, if the appropriate standard of administrative judicial review is correctness and the reviewing judge applied that standard, the appellate court's role is to search for legal errors or a palpable and overriding error of fact or mixed fact and law by the reviewing judge.[38]

41. The inappropriateness of applying the concept of 'stepping into the shoes' of the reviewing judge when the standard of administrative review is correctness, was recognized by the the Federal Court of Appeal in *Long Plain First Nation.*[39]

42. Contrary to *Long Plain*, in the present case, the Court of Appeal again adopted the analogy of stepping into the shoes of the reviewing judge, allowing it to substitute its opinion in respect of findings of fact, notwithstanding the clear declaration that the reviewing judge had correctly identified the appropriate standard of administrative review as that of correctness.[40]

43. Further, the Court of Appeal explicitly recognized that the reviewing judge "dealt with factual context in arriving at his determination as to the essential character of the dispute."[41]

44. Yet, as indicated above, the Court of Appeal referred to this Honourable Court's recent

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[35] CA Decision, *Leave Application*, **TAB 5** at paras 77-78.
[36] CA Decision, *Leave Application*, **TAB 5** at paras 86-87.
[37] *Winnipeg Airports Authority Inc v Public Service*, 2015 MBCA 94; leave to appeal to SCC refused, 36750 (April 7. 2016).
[38] *Housen*, *supra* note 26.
[39] *Canada v Long Plain First Nation*, 2015 FCA 177, **[*Long Plain*]** at paras 92-93.
[40] CA Decision, *Leave Application*, **TAB 5** at para 48.
[41] CA Decision, *Leave Application*, **TAB 5** at para 77.

decision in *Stewart*[42] and concluded that no deference was to be afforded as to reviewing judge's characterization of the essential character of the dispute, which the Court of Appeal itself acknowledged involved an inference drawn from fact.[43]

45. The effect of the Court of Appeal's decision is to overturn the principles of appellate review as discussed above, and to create a new standard, on the apparent basis of *Stewart,*[44] a case in which standard of appellate review was never at issue.

46. The Manitoba Court of Appeal's decision also highlights the continuing debate as to what exactly is meant by "applying" the appropriate standard of administrative judicial review:

> First, the Court may have meant that, once satisfied that the reviewing court selected the correct standard of review, which it then "applied", an appellate court may only interfere with the result of that application if it was vitiated by palpable and overriding error. However, if some more general question of law can be readily extricated from the reviewing court's reasons, the standard of correctness applies to that question. If this is what the Court meant, then *Housen* would apply to a reviewing court's application of the law, including the standard of review appropriate for the administrative action in dispute.
>
> Second, the Court may have meant that an appellate court must ensure that the reviewing court was correct, not only in its selection of the standard of review, but also in its application of the standard to the facts of the case. In other words, when determining whether the administrative decision under review was correct, or patently or simply unreasonable (as the case may be), the appellate court puts itself in the same position as the reviewing judge, to whom no deference is owed. Thus, unlike cases to which *Housen* applies, the question before the appellate court is the same as that before the reviewing judge: does the impugned administrative decision satisfy the relevant standard of review when it is applied to the facts found by the administrative agency?[45]

47. If the former, which appears to be the current prevailing view, the Court of Appeal erred when it determined that the reviewing judge's determination of the essential character of the dispute in its full factual context attracted a correctness standard of review. Applying the administrative standard of correctness simply meant that the reviewing judge must find that the administrative decision-maker was incorrect. It did not give the Court of Appeal licence to set aside the reviewing judge's decision and substitute its own views.

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[42] *Stewart*, *supra* note 36.
[43] CA Decision, *Leave Application*, **TAB 5** at paras 36, 48 and 49
[44] *Stewart*, *supra* note 37.
[45] Evans, *supra* note 1, **TAB 7** at 4.

48. In the present case, the Adjudicator failed to carry out the *Weber* analysis correctly, which error was fatal. Leaving aside for the moment the question as to the essential character of the dispute, the Adjudicator failed to carry out any analysis whatsoever of the competing jurisdiction, i.e. labour arbitration. Such an error is independently fatal, even if the standard of judicial review is reasonableness, as it "evacuates" any debate as to that competing jurisdiction.[46]

49. As a result, the reviewing judge was required to carry out the correct application of the *Weber* test. In doing so, he was required to determine the essence of the dispute in its "full factual context" as the first step and, therefore, his decision was subject to a standard of palpable and overriding error. The Court of Appeal's reference to "stepping into the shoes" of the reviewing judge presupposed, according to *Long Plain*, the reviewing judge was to apply a reasonableness standard to his review of the Adjudicator's Decision.

50. The Court of Appeal's reference to "applying" the correctness standard is also unhelpful, insofar as it conflates the second step of the Appellate Court's role (was the appropriate standard of review correctly applied) with the third step of the Appellate Court's role (having identified and applied the appropriate standard of review, did the reviewing judge commit a palpable and overriding error in his application of the legal principles to the factual context before him).

51. The need for clarity on this issue is pressing in instances of competing lines of authority among specialized tribunals, insofar as the decision-maker is to determine the essential character of the dispute, which necessarily involves both jurisdictional questions and a careful weighing and application of the full factual context.

ISSUE #3: What is the correct methodology for drawing lines of jurisdiction between two or more competing specialized tribunals? If jurisdiction over a dispute is exclusive, can any jurisdiction transcend it? How should that test be formulated in a manner which provides consistency and predictability in decision making?

52. As stated above, with expanding jurisdiction comes the corresponding responsibility of administrative tribunals to avoid turf wars.[47] As a result, the issue of drawing and respecting

[46] *Eadie v MTS Inc*, 2015 FCA 173, 475 NR 174 at para 93.
[47] *St John's, supra* note 18; *Quebec (AG) v Quebec (HRT)*, 2004 SCC 40 **[*Charette*]** at para 42.

jurisdictional lines of authority as between specialized tribunals has taken on heightened significance given the maturation of the administrative law process.[48]

53. This Honourable Court has repeatedly stated that where there appear to be two administrative bodies (or even a court and an administrative tribunal) that could claim jurisdiction over a matter in dispute, the potential conflict of jurisdictions must be resolved by examining, first, the essential character of the dispute and, second, the two competing legislative or legal schemes to determine which of the potential adjudicative bodies was intended by the applicable legislative authority to resolve a dispute of that character. [49]

54. Although it is clear that the *Weber* test should have universal application to questions of competing jurisdiction regardless of whether the competition is between two tribunals or between a court and a tribunal[50], and regardless of whether one of the potential forums is labour arbitration, (i.e. *Charette; Vaid*), regrettably, uncertainty and disagreement continues.

55. In a number of cases involving a collective agreement, tribunals (and even the courts) have conflated the factual and legal context in determining the essence of the dispute in the first step, as the second step was seen as simply determining whether the dispute falls within the ambit of the collective agreement, rather than recognizing that underlying legislative intent is at the core of the second step. This is the exact, erroneous approach the Court of Appeal took here.

56. Furthermore, varying application of the two-step approach has resulted in the coexistence of both exclusivity and concurrency (and in some jurisdictions unrestricted concurrency) between human rights adjudication and labour arbitration throughout Canadian jurisdictions:

> . . . *Morin* and other decisions of the Supreme Court of Canada and provincial appellate courts that have left Canadian law with a much misunderstood hybrid model, wherein there is concurrent jurisdiction over some employment discrimination claims, while others can only be addressed in arbitration.[51]

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[48] *Figliola, supra* note 19; *Morten, supra* note 19.
[49] *Weber, supra* note 13; *Regina Police Assn Inc v Regina (City) Board of Police Commissioners*, 2000 SCC 14, **[*Regina Police*]**; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (AG)*, 2004 SCC 39, **[*Morin*]**; *Charette, supra* note 47; *Bisaillon v Concordia University*, 2006 SCC 19, **[*Bisaillon*]**; *Canada (House of Commons) v Vaid*, 2005 SCC 30, **[*Vaid*]**.
[50] *Regina Police, supra* note 49 at para 39.
[51] Shilton, *supra* note 2, **TAB 8** at 2.

57. Whereas the Ontario Court of Appeal[52] accepts that the determination of the essential character of the dispute is "largely factual", the British Columbia Court of Appeal[53] believes that, in light of this Honourable Court's decision in *Sattva,* [54] "characterizing the 'essential character' or 'substance' of a dispute involves determining the legal crux of the action".

58. As can be readily seen, this difference in approach also further confounds the question as to whether (or which aspects of) a reviewing judge's decision is to be reviewed by an appellate court on the standard established by *Housen* or the standard established by *Agraira*.

59. Rather, it is respectfully submitted that the leading authorities intended to establish a universal two-step approach for drawing jurisdictional lines between competing administrative tribunals:

(a) first, the decision-maker is to identify the essential character of the dispute in its full factual context only (including the existence of any contract between the parties); and

(b) second, the decision-maker must examine the competing statutory schemes to determine legislative intent as to which forum should resolve the dispute.

60. Consistent with this approach, in cases involving labour arbitration, the existence and terms of a collective agreement form part of the factual matrix in determining the nature of the dispute in step-one. In step-two, the determination is to whether that dispute arises expressly or inferentially out of the collective agreement because that is what triggers the applicable statutory arbitration provision and thereby identifies legislative intent.

Step One - Ascertain the "Essential Character" of the Dispute

61. It is respectfully submitted that clarification is required such that the "essential character" of the dispute is first ascertained in its factual context *only*.

62. The majority of the decisions of this Honourable Court have made it clear that the first step in the process is to examine the essence character of the dispute in its full factual context *only*, without reference to its legal characterization:

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[52] *Ontario Public Service Employees Union v Seneca College of Applied Arts & Technology*, [2006] OJ No 1756, 267 DLR (4th) 509 at paras 59-60.
[53] *Bruce v Cohon*, 2017 BCCA 186, 412 DLR (4th) 191 **[*Bruce*]** at para 80.
[54] *Sattva Capital Corp v Creston Moly Corp,* 2014 SCC 53, [2014] 2 SCR 633.

> In considering the nature of the dispute, the goal is to determine its essential character. This determination must proceed on the basis of the facts surrounding the dispute between the parties, and not on the basis of how the legal issues may be framed. . .[55]

63. Notwithstanding, confusion has arisen on two fronts. First, in *Morin*, the majority of the Court adopted an approach in which the legal context was determined first and the factual context second:

> The second step is to look at the dispute in issue to determine whether it falls within the ambit of the arbitrator's exclusive jurisdiction. We must look at the dispute in its full factual context.[56](emphasis added)

64. Secondly, inexplicably, in *Bisaillon*,[57] this Honourable Court stated:

> The first stage of this approach consists in identifying the essential character of the dispute. On this point, the Court has stressed that what must be done is not limited to determining the legal nature of the dispute. On the contrary, the analysis must also take into account all the facts surrounding the dispute between the parties . . . (emphasis added)

65. This passage introduced uncertainty as to whether the first step conflated the factual and legal context of the dispute and was the basis, in the present case, for overturning the reviewing judge:

> First, the "essential character" of the dispute must be identified, taking into account the entire factual and legal context . . . Second, the decision-maker must determine whether the nature of the identified dispute implicitly or explicitly falls within the ambit of the collective agreement, in the case of an arbitrator, or a statutory tribunal's governing legislation, in the case of an administrative tribunal . . . [58](emphasis added)

66. The Applicant submits that the Court of Appeal's injection of a legal characterization into the determination of the essential character of the dispute is not supported.

67. Following the caution in *Weber*, this Honourable Court revisited the issue in *Charette*:[59]

> We must avoid taking an overly formalistic approach if we are to uncover the essential character of the dispute … As mentioned in *Regina Police*, supra, the key issue in each case is whether the essential character of the dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. . . . Both this case and *Morin* raise

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[55] *Regina Police*, *supra* note 49 at para 25. **And see:** *Weber*, *supra* note 13 at para 43; *Morin*, *supra* note 49 at para 20; *Charette*, *supra* note 47 at para 12.
[56] *Morin*, *supra* note 49 at para 20.
[57] *Bisaillon*, *supra* note 49 at para 31.
[58] CA Decision, *Leave Application*, **TAB 5** at para 51. **And see:** *Bruce*, *supra* note 52 at para 80.
[59] *Charette*, supra note 47 at paras 23, 31, 37.

> important [Quebec] *Charter* issues, but they do so in entirely different factual and legislative contexts, and it is that context, not the legal character of the alleged wrong, that is crucial to the allocation of jurisdiction. . .

68. Despite this Honourable Court's guidance, there remains confusion about how the essential character of a dispute arising in the context of a collective agreement is to be identified.

Step Two - Which Forum Did the Legislature Intend?

69. Legislative intent is determinative as to which administrative scheme ought to be adopted in order to resolve the dispute.

> To me, this would best reflect the legislature's intent not to limit the effect of the exclusivity clause on the grounds that the refusal to grant benefits is motivated by discrimination forbidden under the [Quebec] *Charter* .[60]

70. Given the broadening role of tribunals, it is not enough for a decision-maker to simply seize upon jurisdiction, as in the present case. Rather, a more comprehensive consideration as to whether the legislature **intended** the decision-maker to hear the dispute is required.

71. Even if it is determined that the two tribunals have overlapping or concurrent jurisdiction, it must then be determined which forum is more appropriate for resolving the dispute.[61] Failure to do so promotes forum shopping, collateral attack and "lateral adjudicative poaching".[62]

Can Anything "Transcend" Exclusive Jurisdiction

72. The Court of Appeal concluded:

> … [T]he substance of the discrimination complaint here is larger than the specifics of what occurred in the employment relationship between the NRHA and the complainant. As in the case of *Morin*, the discrimination complaint here transcends the particular collective agreement and is not in the exclusive jurisdiction of a labour arbitrator to decide.[63] (emphasis added)

73. The Court of Appeal also referenced "the unresolved human rights issues that fell outside the

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[60] *Charettte*, *supra* note 47 at paras 26, 39. **And see:** *Regina Police*, *supra* note 49 at para 34; *Vaid*, *supra* note 49 at para 83.
[61] *Via Rail*, *supra* note 16; *Tranchemontangne*, *supra* note 11.
[62] *Figliola*, *supra* note 19 at para 38; *Morten supra* note 19 at para 28.
[63] CA Decision, *Leave Application*, **TAB 5** at para 85.

operation of the collective agreement."[64] (emphasis added)

Why Clarification and Refinement of the Law on this Point is Necessary

74. First, and with respect, this is an unhelpful distinction which introduces uncertainty and inconsistency into labour relations, contrary to the legislative intent for full and final settlement of workplace disputes which underpins labour relations statutes (and which can be contrasted with the Code, which contains no statement of exclusivity).

75. Such a determination undermines the finding of legislative intent as to exclusivity:

> I am of the opinion that such an approach, which would set aside the exclusivity clause because the refusal to grant the benefits claimed is an infringement of Ms. Charette's human rights, is tantamount to saying that the legal characterization of the claim should prevail over the facts giving rise to the dispute. The factual context was held to be the only applicable criterion in *Weber* . . . and *Regina Police* . . .[65]

76. *Weber* makes clear that labour relations statutes (the arbitration provision in Manitoba is virtually the same as that in Ontario which was under consideration in *Weber*) may create a model of exclusive jurisdiction for arbitrators in respect of issues arising from a collective agreement. [66] The CA Decision leaves open the possibility that, even though a dispute is rooted in an employment relationship governed by a collective agreement under which labour arbitration is exclusive, it might nonetheless be heard in a different forum.

77. If the CA Decision is allowed to stand, a dispute leaves the arbitrator's sphere of exclusive jurisdiction if the issue is "larger than the specifics of what occurred in the employment relationship between the NRHA and the complainant",[67] which again violates the principle that the essential character of the dispute is determinative.

78. This is contrary to the commentary of Bastarache J., writing for the dissent in *Morin*[68] (and note that while he was in dissent in *Morin*, Bastarache J. went on to form the majority in the companion case of *Charette* (*supra*)):

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[64] CA Decision, *Leave Application*, **TAB 5** at para 103.
[65] *Charette*, *supra* note 47 at para 23.
[66] *Weber*, *supra* note 13.
[67] CA Decision, *Leave Application*, **TAB 5** at para 85.
[68] *Morin*, *supra* note 49 at para 71.

> Under the current legislative framework, we must determine the essential character of the issue and find one single entity to handle it. If the parties had several fora available to them, violence would be done to the comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting and the foundation upon which the arbitrator's exclusive jurisdiction is built would be undermined: *St. Anne Nackawic, supra*, at p. 721. This would also be a source of uncertainty in a number of cases in which the dominant aspect of a dispute or the required degree of dissociation between the incident event, on the one hand, and the collective agreement and its application, on the other, must be addressed. The same problem could arise in cases where the grievance includes several grounds, with only one of those grounds involving an infringement of [Quebec] *Charter* rights.

79. Although the Court of Appeal states:[69]

> A degree of consistency in methodology in designing individualized accommodation for disabled workers is in the overall public interest. These are issues in which the Commission properly plays an important role in defining.

the Court of Appeal's finding has exactly the opposite effect. If the CA Decision is allowed to stand, parties to a collective agreement will lack certainty as to the proper forum for any given dispute, insofar as something which might facially fall within the ambit of grievance arbitration could be found by a Court to "transcend" the collective agreement and therefore stand to be determined by another forum. This does not provide the desired consistency and certainty.

80. Second, in *Charette* this Honourable Court categorically rejected this notion; the mere fact that a dispute might affect more people than the parties to the immediate dispute does not take it out of its context as a dispute that arises from a collective agreement:

> I do not think that the fact that the reasons for the refusal may apply to more than one person should have any bearing on the dispute's essential character. For example, in *Weber*, *supra*, more than one employee could have been placed under surveillance. Similarly, in *Parry Sound*, *supra*, the incorporation of human rights provisions could have affected an entire class of employees.[70] (**Bastarache, J.)**

> … [W]hile the dispute here potentially affects many individuals other than Ms. Charette, as was the case in *Morin* and is a characteristic of [Quebec] *Charter* claims generally, this factor will always favour the Commission or a Human Rights Tribunal in turf wars with other branches of the provincial government. It is a factor which the Quebec legislature inevitably took into account when it gave exclusive jurisdiction

[69] CA Decision, *Leave Application*, **TAB 5** at para 85.
[70] *Charette*, *supra* note 51 at para 32.

> over income security benefits to the CAS including the power to adjudicate Charter arguments (subject to judicial review by the ordinary courts).[71](**Binnie, J.**)

81. The consequence of the CA Decision is that the determination of the parties' rights in a labour relations context will be tied to decisions made by a stranger to that relationship, and which involve broader rights and responsibilities of third parties to that relationship. The labour relations statutes do not include this as a criterion for consideration in the full and final settlement of workplace issues.

82. Third, the Court of Appeal's reasoning is further flawed because, on that logic all human rights issues would transcend the immediate employment relationship and therefore the exclusive jurisdiction model put forward in *Weber* would be eroded, contrary to legislative intent. The Court of Appeal dismisses out of hand, this Honourable Court's decision in *Vaid*[72] in which Justice Binnie held that allegations of harassment and discrimination on the basis of race, colour and ethnic origin by a House of Commons employee were not sufficient to lift it out of the specific employment context so as to overcome parliamentary intent and provide human rights jurisdiction.

83. Fourth, this Honourable Court has rejected the notion that arbitrators are unqualified to hear and properly apply the substantive human rights laws. On the contrary; grievance arbitration is an appropriate forum for human rights laws because its ease of accessibility for aggrieved parties ensures human rights will be given the full remedial interpretation the legislature has intended.[73]

84. Fifth, the CA Decision encourages "multiple proceedings" and "the practice of forum shopping", which the Court of Appeal acknowledged the law should attempt to discourage.[74] Moreover, the encouragement of unnecessary litigation contradicts the new litigation culture encouraged by this Honourable Court in *Hryniak*.[75]

85. The CA Decision indicates that "There were issues for a labour arbitrator and others for a

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[71] *Ibid*, at para 42.
[72] *Vaid*, *supra* note 49.
[73] *Parry Sound*, *supra* note 14 at paras 52 and 53.
[74] CA Decision, *Leave Application*, **TAB 5** at para 54.
[75] Stratas, David, JA. "The Canadian Law of Judicial Review: Some Doctrine and Cases," (21 October 2017), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924049>; *Hryniak v Mauldin*, 2014 SCC 7 **[*Hryniak*]**.

human rights tribunal."[76] But given the connectivity between the labour relations and human rights aspects of the dispute, one forum cannot decide any issues without infringing on matters that were to be decided by the other forum. The result is a serious risk for conflicting decisions; exactly the "lateral adjudicative poaching" the Court of Appeal warned against.[77]

86. As this Honourable Court noted in *Tranchemontagne:* "The intersection of the ODSPA regime with human rights law in the present dispute only accentuates the importance of the SBT deciding the entire dispute in front of it." [78] (emphasis added)

87. In *Bisaillon,*[79] this Honourable Court explicitly recognized the importance of allowing an employer to rely on compliance with collectively bargained solutions. Permitting parties to a collective agreement to send discrete issues to other decision makers undermines this objective.

88. This Honourable Court has indicated that a forum cannot take jurisdiction over a dispute simply because a party did not avail itself of an available remedy. In *Allen,*[80] the Court held that a claim of inherent unfairness was no answer to a party's failure to "at least explore before the proper arbitral forum whether they had rights under the collective agreements."

89. Previous Manitoba Court of Appeal decisions[81] were to similar effect, however, the present decision contradicts and overturns this jurisprudence without rationale or explanation.

90. As this Honourable Court held in *St. Anne Nackawic,*[82] a "real deprivation of ultimate remedy" is required to take a dispute out of the grievance arbitration forum. Even if an arbitrator was unable to grant the Complainant the remedies that might be awarded by a human rights tribunal (insofar as those remedies were determined by a Court to be procedural, and thus outside the substantive human rights laws which a grievance arbitrator is empowered and required to enforce), the difference between what might be awarded by an arbitrator and what might be awarded by a human rights tribunal would not amount to a "real deprivation of ultimate remedy".

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[76] CA Decision, *Leave Application,* **TAB 5** at para. 93.
[77] CA Decision, *Leave Application,* **TAB 5** at para 92.
[78] *Tranchemontagne, supra* note 11 at para 49.
[79] *Bisaillon, supra* note 49 at para 27.
[80] *Allen v Alberta*, 2003 SCC 13, [2003] 1 SCR 128 at para 17.
[81] *Giesbrecht v McNeilly et al*, 2008 MBCA 22, 225 Man R (2d) 223 at para 62; *Millen et al v Hydro Electric Board (Man)*, 2016 MBCA 56, 330 Man R (2d) 84 at paras 29-30.
[82] *St Anne Nackawic, supra* note 13 at para 22.

91. Once the essential character of a dispute is determined to raise a disagreement as to the meaning, application or alleged violation of a collective agreement (including the discipline or dismissal of an employee),[83] there is no room for human rights issues to "transcend" an arbitrator's exclusive jurisdiction. The issues which are engaged by the interplay between competing lines of authority between specialized tribunals are broader than then the parties to the instant case.

92. Although leave has been sought to provide clarification by this Honourable Court on at least three previous occasions,[84] those requests have been denied and so the problems persist.

93. Based on all of the foregoing, the Applicant respectfully requests that leave be granted for an oral hearing of this matter.

PART IV - SUBMISSIONS CONCERNING COSTS

94. The Applicant respectfully submits that an order for costs should be granted in the cause.

PART V - ORDERS SOUGHT

95. The Applicant respectfully requests that an order allowing the application for leave to appeal with costs based on the tariff in the cause.

96. The Applicant further requests that the judgment of the Manitoba Court of Appeal in this matter be stayed until such time as this Application is determined.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 4th day of December 2017.

Robert Watchman
Counsel for the Applicant

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[83] *The Labour Relations Act,supra* note 6, section 78 (2).
[84] **See:** *ATU, Local 583 v Calgary (City)*, 2007 ABCA 121; leave to appeal to SCC refused, 32077 (October 25, 2007); *Calgary Health Region v. Alberta (Human Rights & Citizenship Commission)*, 2007 ABCA 120; leave to appeal to SCC refused, 32076 (October 25, 2007); *Nova Scotia (Human Rights Commission) v Halifax (Regional Municipality)*, 2008 NSCA 21; leave to appeal to SCC refused, 32643 (September 18, 2008).

PART VI - TABLE OF AUTHORITIES

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92	*ATU, Local 583 v Calgary (City)*, 2007 ABCA 121, 295 DLR (4th) 66; leave to appeal to SCC refused, 32077 (October 25, 2007).
37	*The Armstrong's Point Association Inc v The City of Winnipeg et al*, 2013 MBCA 110, 303 Man R (2d) 56.
53, 64, 87	*Bisaillon v Concordia University*, 2006 SCC 19, [2006] 1 SCR 666.
24, 52, 71	*British Columbia (Workers Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422.
57, 65	*Bruce v Cohon*, 2017 BCCA 186, 412 DLR (4th) 191.

92	Calgary Health Region v Alberta (Human Rights & Citizenship Commission), 2007 ABCA 120, 281 DLR (4th) 252; leave to appeal to SCC refused, 32076 (October 25, 2007).
53, 54, 69, 82	*Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667.
41, 42, 49	*Canada v Long Plain First Nation*, 2015 FCA 177, 388 DLR (4th) 209.
24, 52, 71	*Canadian Human Rights Commission v Air Canada* , 2011 FCA 332, [2011] FCJ No 1685 **[*Morten*]**.
37	*CBC v Manitoba*, 2009 MBCA 122, 251 Man R (2d) 55.
20, 25, 71	*Council of Canadians with Disabilities v Via Rail*, 2007 SCC 15, [2007] 1 SCR 650.
28, 36	*Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 SCR 226.
19	*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.
48	*Eadie v MTS Inc*, 2015 FCA 173, 475 NR 174.

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31, 34, 36, 40, 58	*Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.
35	*Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 DLR (4th) 737.
84	*Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87.
37	*Loewen v Manitoba Teachers' Society*, 2015 MBCA 13, 315 Man R (2d) 123.
35	*Meeches v Assiniboine*, 2017 FCA 123, 281 ACWS (3d) 2.
89	*Millen et al v Hydro Electric Board (Man)*, 2016 MBCA 56, 330 Man R (2d) 84.
37	*National Automobile, Aerospace, Transportation and General Workers Union of Canada v Bristol Aerospace Ltd*, 2008 MBCA 62, 228 Man R (2d) 125.
92	Nova Scotia (Human Rights Commission) v Halifax (Regional Municipality), 2008 NSCA 21, 290 DLR (4th) 577; leave to appeal to SCC refused, 32643 (September 18, 2008).
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57	Ontario Public Service Employees Union v Seneca College of Applied Arts & Technology, [2006] OJ No 1756, 267 DLR (4th) 509.
20, 25, 73, 83	*Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42, [2003] 2 SCR 157.
29	*Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 FCR 610.
35	*Prophet River First Nation v British Columbia (Environment)*, 2017 BCCA 58, 94 BCLR (5th) 232.
52, 53, 54, 62, 67, 69, 75, 78, 80	*Quebec (Attorney General) v Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 SCR 223 **[*Charette*]**.
53, 56, 62, 63, 71, 78	*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 SCR 185 **[*Morin*]**.
37	*R v Henderson (WE)*, 2012 MBCA 93, 284 Man R (2d) 164.
53, 54, 62, 69	*Regina Police Assn Inc v Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 SCR 360.

57	*Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, [2014] 2 SCR 633.
20, 90	*St. Anne Nackawic Pulp & Paper v CPU*, [1986] 1 SCR 704, 28 DLR (4th) 1.
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18, 20, 25, 86	*Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513.
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SECONDARY MATERIAL: ARTICLES

Paragraph	**Reference**
1, 32, 34, 46	Evans, John, JA . "The Role of Appellate Courts in Administrative Law", (2007) 20 Can J Admin L & Prac 1.
18	McLachlin, Beverley, CJC. "Administrative Tribunals and the Courts: An Evolutionary Relationship" (May 27, 2013), online: Supreme Court of Canada <http://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>.
1, 56	Shilton, Elizabeth. "Choice, but No Choice: Adjudicating Human Rights Claims in Unionized Workplaces in Canada" (2013) 38 Queen's LJ 461.
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84	Stratas, David, JA. “The Canadian Law of JudicialReview: Some Doctrine and Cases” (21 October 2017), online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924049>.

PART VII - LEGISLATIVE PROVISIONS

***The Labour Relations Act,* RSM 1987, c L10, CCSM c L10.**

Provision for final settlement

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

Deemed arbitration provisions

78(2) Where a collective agreement does not contain a provision as required under subsection (1), it shall be deemed to contain the following provisions, which shall be numbered or lettered as may be required in the collective agreement:

(a) Where a violation of this agreement is alleged, or a difference arises between the parties to this agreement relating to the dismissal or discipline of an employee, or to the meaning, interpretation, application or operation of this agreement (including a difference as to whether or not a matter is arbitrable), either party, without stoppage of

Clause de règlement définitif

78(1) La convention collective contient une clause prévoyant le règlement définitif, sans arrêt de travail, par voie d'arbitrage ou autrement, de tous les conflits entre les parties à la convention ou les personnes liées par elle ou au nom desquelles la convention a été conclue, relativement à son interprétation, à son application ou à une prétendue violation d'une de ses dispositions.

Absence de clause de règlement dans la convention

78(2) Lorsqu'une convention collective ne contient pas de clause comme celle qu'exige le paragraphe (1), elle est réputée contenir les clauses suivantes :

a) lorsqu'il est allégué qu'il y a eu violation de la présente convention ou lorsque survient un conflit entre les parties, relativement au congédiement d'un employé, aux mesures disciplinaires prises contre un employé ou à l'interprétation ou à l'application de la convention (y compris un conflit portant sur le fait de savoir si une question peut faire l'objet d'un arbitrage),

work and after exhausting any grievance procedure established by this agreement, may notify the other party in writing of its desire to submit the alleged violation or difference to arbitration; and thereafter the parties shall, subject to clause (b), agree on an arbitrator to hear and determine the matter and issue a decision, which decision is final and binding on the parties and any person affected thereby.

(b) Where the parties agree that an arbitration board rather than an arbitrator should determine a matter, the parties shall appoint an arbitration board to hear and determine the matter and issue a decision, which decision is final and binding on the parties and any person affected thereby.

(c) The provisions of The Labour Relations Act respecting the appointment, powers, duties and decisions of arbitrators and arbitration boards apply hereto.

une partie à la convention peut, sans arrêt de travail et après avoir épuisé la procédure de règlement des griefs établie par la présente convention, aviser par écrit l'autre partie de son désir de soumettre à l'arbitrage la violation qui aurait été commise ou le conflit. Par la suite, les parties doivent, sous réserve de l'alinéa b), s'entendre sur le choix d'un arbitre chargé d'entendre et de trancher l'affaire et de rendre une décision, laquelle décision est définitive et lie les parties et toute personne qu'elle vise;

b) les parties nomment un conseil d'arbitrage, lorsqu'elles conviennent qu'un conseil d'arbitrage plutôt qu'un arbitre devrait trancher une affaire; le conseil d'arbitrage est chargé d'entendre et de trancher l'affaire et de rendre une décision, laquelle décision est définitive et lie les parties ainsi que toute personne qu'elle vise;

c) les dispositions de la Loi sur les relations du travail relatives à la nomination, aux pouvoirs, aux fonctions et aux décisions des arbitres et des conseils d'arbitrage s'appliquent aux présentes.

***The Human Rights Code*, RSM 1987 c H175, CCSM c H175.**

Discrimination in employment	**Discrimination au travail**
14(1) No person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation.	14(1) Nul ne peut agir de façon discriminatoire à l'égard de circonstances reliées à un emploi, sauf si la discrimination est fondée sur des exigences ou des compétences véritables et raisonnables et requises par l'emploi.