IN THE MATTER OF: The Nova Scotia *Human Rights Act* (the "Act")

- and –

IN THE MATTER OF: Board File No. H17-1471

BETWEEN:

Deborah Carleton
(Complainant)
- and –

Halifax Regional Municipality
(Halifax Regional Police) and/or
Halifax Regional Police Association
(Respondent)

- and –

The Nova Scotia Human Rights Commission
(NSHRC)

Decision of the Two-Member Board of Inquiry on Deborah Carleton's Jurisdiction Application

Introduction

1. During the spring of 2018, three police officers, Det. Cst. Deborah Carleton, Cst. Kevin Johnson and Cst. Mark Long, all filed complaints under the *Human Rights Act* against Halifax Regional Municipality (Halifax Regional Police Service) ("Halifax"). In essence, the Complainants alleged that Halifax has treated them, as officers whose on-the-job injury is post traumatic stress disorder (PTSD), differently than other officers who had suffered other on-the-job injuries of a physical nature.

2. We were appointed to hear all three complaints.

3. In September, 2021, we, at last, began an actual hearing of Det. Cst. Carleton's case. We had heard a number of witnesses, and scheduled dates to hear others.

4. We had earlier diverted Cst. Johnson's case, at Cst. Johnson's request, to an arbitrator to determine, under a collective agreement, whether Cst. Johnson's PTSD was indeed an on-the-job injury. We are informed, albeit informally, that Cst. Johnson, has received a decision from the arbitrator sustaining his claim that his injury occurred on the job. Again informally, Cst. Johnson has advised that he now intends to pursue his previously diverted complaint against Halifax.

5. Cst. Long, his counsel has for some time advised, is so disabled by his PTSD that he cannot instruct counsel or face a hearing in any form. His complaint has fallen into abeyance.

6. Halifax has now moved to dismiss the complaint brought by Det. Cst. Carleton submitting that this Board of Inquiry is without jurisdiction to hear her complaint under the *Human Rights Act.* That motion is premised upon the Supreme Court of Canada's decision in discrimination (*Northern Regional Health Authority v. Horrocks 2021 SCC 42*).

7. On October 22, 2021, the Supreme Court of Canada ruled that, in general, if a collective agreement exists between the parties to a human rights complaint, then, under legislation prevailing in the Province of Manitoba, an arbitrator appointed further to the agreement, has exclusive jurisdiction over the issues. Halifax submits that *Horrocks* applied to Nova Scotian legislation as well and that we, as a Board of Inquiry under the Nova Scotia *Human Rights Act*, have no jurisdiction.

8. Halifax, Det. Cst. Carleton and the Commission made written submissions and, through teleconference, oral argument on January 11, 2022.

9. While we remain seized of all three complaints (Carleton, Johnson and Long), the motion to dismiss is made in the course of the Carleton hearing only. The complaints of Cst. Johnson and Cst. Long are not before us on Halifax's motion and in our opinion. While obviously of relevance to their complaints, our ruling on the motion does not specifically apply to them. Counsel for Cst. Long was apprised of Halifax's motion to dismiss the complaint against Det. Cst. Carleton. Cst. Johnson has also been apprised through the Commission. Neither Cst. Long nor Cst. Johnson appeared in person or though counsel, nor did they file submissions.

10. We have not been briefed on the circumstances which caused Det. Cst. Carleton's PTSD. Indeed, for the purposes of this motion at least, we need not know them. Suffice it to say that for the purposes of this motion, we shall presume, but not decide, that Det. Cst. Carleton suffers from PTSD incurred as a result of an incident or incidents which occurred when she was on the job. Det. Cst. Carleton, having suffered an on-the-job injury, receives under the collective agreement, salary and benefit continuation as if she were actually in day-to-day service and will continue to do so, barring sufficient recovery from the PTSD, until retirement. In essence, Det. Cst. Carleton's complaint under the *Human Rights Act* arose from HRM's denial of payment for a second course of in-patient treatment out of Province for her OJI, a benefit she may have been entitled to under the collective agreement.

11. Halifax and the Halifax Regional Police Association ("Police Association") entered into a collective agreement dated November 15, 2017 covering the period April 1, 2015 to March 31, 2020. The parties agree that this collective agreement exists and applies to Det. Cst. Carleton as a member of it.

Horrocks

12. This Motion comes to us as a direct result of the *Northern Regional Health Authority v. Linda Horrocks and Manitoba Human Rights Commission* decision.

13. In most important ways *Horrocks* is a direct response to the Court's decision in *Weber v. Ontario Hydro*, [1995] 2. S.C.R. 929. The Supreme Court took a similar approach in *Vavilov* (citation) in using that case to respond to criticisms of the Court's decision in *Dunsmuir* (citation).

14. The facts in *Horrocks* are sufficiently similar to the facts in Det. Cst. Carleton's case, as we understand those facts, to make the cases indistinguishable in terms of the legal analysis required.

15. In *Horrocks*, the Claimant, Ms. Horrocks, brought a human rights complaint against her employer, Northern Regional Health Authority. However, she did so after having first filed a grievance against the same employer relating to the same factual circumstances. Specifically:

> [2] The respondent Linda Horrocks says that her employer, the appellant, the Northern Regional Health Authority ("NRHA"), failed to adequately accommodate her disability. In 2011, she was suspended for attending work under the influence of alcohol. After she disclosed her alcohol addiction and refused to enter into a "last chance agreement" requiring that she abstain from alcohol and engage in addiction treatment, the NRHA terminated her employment. Ms. Horrocks' union filed a grievance, which was settled by an agreement reinstating her employment on substantially the same terms as the last chance agreement. Shortly thereafter, the NRHA terminated her employment for an alleged breach of those terms.
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> [3] Ms. Horrocks filed a complaint with the respondent, the Manitoba Human Rights Commission, which was heard by an adjudicator appointed under The Human Rights Code, C.C.S.M., c. H175. The NRHA contested the adjudicator's jurisdiction to hear the complaint, arguing that this Court's judgment in Weber v. Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929 recognizes exclusive jurisdiction in an arbitrator appointed under a collective agreement, and that this jurisdiction extends to human rights complaints arising from a unionized workplace. Chief Adjudicator Walsh disagreed, finding that she had jurisdiction. While Weber does recognize exclusive jurisdiction in labour arbitrators over disputes that arise from the interpretation, application, administration, or violation of a collective agreement, the essential character of this dispute, she held, was an alleged human rights violation (2015 MBHR 3, 83 C.H.R.R. D/45). Chief Adjudicator Walsh went on to consider the merits of

the complaint and found that the NRHA had discriminated against Ms. Horrocks.

16. In Det. Cst. Carleton's case, like in *Horrocks*, a grievance pre-dated a human rights complaint. Both the grievance and the human rights complaints dealt with similar behaviour on the part of the employer in that both contained allegations that HRM had treated the Complainants differently than it had others who had suffered from the job injuries, albeit of a physical nature.

17. The Supreme Court of Canada summarized its approach to the question of the jurisdiction of the Manitoba Human Rights Commission in paragraph 5, where it stated:

> [5] For the reasons that follow, I find myself in respectful disagreement with the adjudicator and the Court of Appeal. 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

18. The decision in *Horrocks* is premised upon the wording in the Manitoba trade union legislation and an ever-lengthening list of decisions from the Court on the nature and extent of the "exclusive" jurisdiction of dispute resolution mechanisms provided for in legislation. The Supreme Court, at paragraph 17, stated:

> [17] This Court has interpreted such mandatory dispute resolution provisions as conferring exclusive jurisdiction on the decision-maker appointed thereunder — typically, a labour arbitrator. That understanding originates in St. Anne Nackawic, which concerned an employer's civil action against a union for damages following an illegal strike. The union raised a preliminary objection to the court's jurisdiction, arguing that, under s. 55(1) of New Brunswick's Industrial Relations Act, only a labour arbitrator could adjudicate disputes arising from the collective agreement. That section read as follows:

> 55(1) Every collective agreement shall provide for the final and binding settlement by arbitration or otherwise, without stoppage of work, of all differences between the parties to, or persons bound by, the agreement or on whose behalf it was entered into, concerning its interpretation, application, administration or an alleged violation of the agreement, including any question as to whether a matter is arbitrable

[18] The Court found that this section left no room for curial jurisdiction over the claim. Allowing the parties such recourse to enforce the collective agreement would, he explained, undermine the integrity of the labour arbitration scheme and the labour relations system as a whole:

> The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law... The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.
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> . . . if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration, when adopted by the parties as was done here in the collective agreement, is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of a collective agreement provide the exclusive recourse open to

parties to the collective agreement for its enforcement. [Emphasis added; pp. 718-19 and 721.]

19. The Supreme Court then stated:

> [24] This Court has twice considered the relationship between the respective spheres of jurisdiction held by labour arbitrators and statutory tribunals. In each case, it affirmed the exclusivity of arbitral jurisdiction recognized in St. Anne Nackawic and Weber.
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> *
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> [27] The Court explained that it is necessary to examine the relevant legislation in order to determine whether it confers exclusive jurisdiction on the arbitrator and, if so, whether the essential character of the dispute falls within the scope of that jurisdiction. Weber, it explained (at para. 11), "does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction".
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> [29] I am aware of several appellate courts having resisted recognizing a labour arbitrator's jurisdiction in human rights disputes as exclusive, on the basis that the exclusivity model developed in Weber has no application where the competing tribunal is a statutory body. In A.T.U., Local 583 v. Calgary (City), 2007 ABCA 121, 75 Alta. L.R. (4th) 75, for example, the Court of Appeal of Alberta reasoned:
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> > The legislative intent in enacting labour relations regimes and creating arbitration procedures must be respected. In my view, however, it is unwise simply to import the principles developed in cases involving a contest between the courts and arbitration, including the inherent preference for the exclusive jurisdiction of arbitrators often apparent in those cases, into a situation where the court must consider two statutory regimes. In the latter situation there are two legislative intents to consider, not one. If we were to accept exclusive jurisdiction as a starting point, we would run the risk of giving the jurisdictional advantage to one statutory

> tribunal over another and thereby reducing the efficacy of the second statutory regime. [para. 23]

(See also *Calgary Health Region v. Alberta (Human Rights & Citizenship Commission)*, 2007 ABCA 120, 74 Alta. L.R. (4th) 23, at paras. 25-30; *Human Rights Commission (N.S.) v. Halifax (Regional Municipality)*, 2008 NSCA 21, 264 N.S.R. (2d) 61, at paras. 45-46.)

[30] To the extent this passage from A.T.U. suggests that exclusive arbitral jurisdiction is a mere "preference" that should be disregarded wherever a competing statutory scheme is present, I see the matter differently. As I read this Court's jurisprudence, the unavoidable conclusion to be drawn is that mandatory dispute resolution clauses like those considered in St. Anne Nackawic, Weber and Morin signal a legislative intention to confer exclusive jurisdiction on the labour arbitrator (or other dispute resolution forum provided for under the agreement). This is not a judicial preference, but an interpretation of the mandate given to arbitrators by statute. The text and purpose of a mandatory dispute resolution clause remains unchanged, irrespective of the existence or nature of competing regimes, and its interpretation must therefore also remain consistent.

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[32] That said, it remains necessary to consider whether the competing statutory scheme demonstrates an intention to displace the arbitrator's exclusive jurisdiction. In some cases, it may enact a "complete code" that confers exclusive jurisdiction over certain kinds of disputes on a competing tribunal, as it did in Regina Police (see also J.-A. Pickel, "Statutory Tribunals and the Challenges of Managing Parallel Claims", in E. Shilton and K. Schucher, eds., One Law for All? Weber v Ontario Hydro and Canadian Labour Law: Essays in Memory of Bernie Adell (2017), 175, at pp. 184-87). In other cases, the legislation may endow a competing tribunal with concurrent jurisdiction over disputes that would otherwise fall solely to the labour arbitrator for decision. And where the legislature so provides, courts must respect that intention.

[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.

[34] In saying this, I acknowledge that, absent "express and unequivocal language" to the contrary, human rights legislation prevails over all other enactments in the event of a conflict (Insurance Corp. of British Columbia v. Heerspink, 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145, at p. 158). In some cases, appellate courts have concluded that by virtue of this paramount status, express language is required to oust the jurisdiction of a human rights tribunal (Halifax, at paras. 63-73; Cadillac Fairview Corp. v. Human Rights Commission (Sask.) (1999), 1999 CanLII 12358 (SK CA), 177 Sask. R. 126 (C.A.); Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission) (2001), 2001 CanLII 21234 (ON CA), 209 D.L.R. (4th) 465 (Ont. C.A.) ("Naraine"), at para. 47). Whether that is so I need not decide here. But in light of the jurisprudence of this Court which I have recounted, I am of the view that the inclusion of a mandatory dispute resolution clause in a labour relations statute must qualify as an explicit indication of legislative intent to oust the operation of human rights legislation.

[35] Even were it otherwise, the human rights legislation that applies in this case merely provides that "the substantive rights and obligations in this Code are paramount over the substantive rights and obligations in every other Act of the Legislature" (The Human Rights Code, s. 58). This indicates that while the obligations are "paramount", the procedures established by The Human Rights Code for enforcing them are not. This is entirely consistent with exclusive arbitral jurisdiction.

20. The Supreme Court provided as a conceptual framework, a two-step process, for the consideration of issues of the nature now before this Board. First, one must establish whether the collective agreement grants the arbitrator exclusive jurisdiction and, if so, over what matters (para 39). Second, if the arbitrator does have exclusive jurisdiction, then it must be determined whether the matter in question falls within its exclusive jurisdiction.

21. As explained in *Horrocks*, one of the key indicators of exclusive jurisdiction is the presence of a mandatory dispute resolution clause. Indeed, "mandatory dispute resolution clauses ... signal a legislative intention to confer exclusive jurisdiction on the labour arbitrator (or other dispute resolution forum provided for under the agreement)" (para 30).

22. While a competing statutory tribunal such as the Human Rights Tribunal may share concurrent jurisdiction, this is only "where that legislative intent is clearly expressed" (para 5). Concurrent jurisdiction can be expressed through specific language, through provisions that imply that intention, or if there is a history of both tribunals sharing concurrent jurisdiction over such disputes (para 33).

23. The issue of how (and when) to apply this new approach is substantially resolved by *Horrocks* at paragraph 33. There, to repeat, the Supreme Court stated:

> [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.

24. The Supreme Court also provided direction on how to address the issue of "the essential character of the dispute". In paragraphs 50 and 51 the Court stated:

> [50] In its essential character, then, Ms. Horrocks' complaint is that her employer exercised its management rights in a way that was inconsistent with their express and implicit limits. This complaint arises foursquare from the NRHA's exercise of its rights under, and from its alleged violation of, the collective agreement. While the claim invokes Ms. Horrocks' statutory rights, those rights are "too closely intertwined with collectively bargained rights to be sensibly separated" and cannot be "meaningfully

> adjudicated . . . except as part of a public/private package that only a labour arbitrator can deal with" (E. Shilton, "Labour Arbitration and Public Rights Claims: Forcing Square Pegs into Round Holes" (2016), 41 Queen's L.J. 275, at p. 309). On the authority of this Court's precedents, the inescapable conclusion is that Ms. Horrock's claim therefore falls solely to the arbitrator to adjudicate.
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> [51] The adjudicator, I observe, sought to escape the inescapable by describing the essential character of the dispute as "aris[ing] from an alleged violation of the complainant's human rights and not out of the 'interpretation, application, administration or violation of the collective agreement'" (MBHR reasons, at para. 110; see also Weber, at para. 52). Respectfully, the adjudicator's error here was to do what Weber directs not to do, by focussing on the legal characterization of Ms. Horrocks' claim instead of on "whether the facts of the dispute fall within the ambit of the collective agreement" (para. 44). It is of course true that Ms. Horrocks alleges a human rights violation. But were that sufficient to displace the exclusive jurisdiction of the labour arbitrator, exclusive arbitral jurisdiction would be significantly undermined, because every human rights complaint would automatically fall within the jurisdiction of the human rights adjudication system. Again, what matters are the facts of the complaint, not the legal form in which the complaint is advanced.

25. The Supreme Court added further caution to this direction to focus on the "facts" and not the "legal characterization" of the complaint by noting:

> [20] The Court agreed that the matter fell within exclusive arbitral jurisdiction. That jurisdiction, it explained, captures disputes that are factually related to the rights and obligations under the collective agreement, even where those same facts give rise to other legal claims based in statute or the common law:
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> > The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one "arising under [the] collective agreement". Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it. [Emphasis in original; text in brackets in original; para. 43.]

POSITIONS OF THE PARTIES

26. We have had the benefit of both oral and written submissions by all of the parties to this Motion. Each of the positions has merit. Some positions, as this decision will subsequently indicate have, in our opinion, greater merit than do others.

POSITION OF HRM

27. HRM takes the position that *Horrocks* clearly applies to Det. Cst. Carleton's complaint. HRM directs this Board to Article 29 of the collective agreement between HRM and the HRPA. According to Article 29(6)(d):

> 6. Arbitration:
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> a. ...
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> b. The Region and the Union shall agree on a single arbitrator within ten (10) days of the notice of intention to proceed to arbitration, unless either party exercises the option in Article 29 (6)(g);
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> c. ...
>
> d. The decision of the arbitrator shall be final and binding upon the Region and the Union, provided however that the arbitrator shall not have the power to alter, add to, delete from, modify or amend the terms of this Agreement in any respect whatsoever;

28. HRM also directs us to section 42 of the *Trade Union Act.* According to section 42:

> Final settlement provision
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> 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.
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> (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.

29. It is noteworthy that neither Article 29 nor section 42 of the *Trade Union Act* refers to "exclusivity". "Exclusivity" is a core consideration when considering the application of *Horrocks* to a particular factual matrix.

30. To the extent that HRM argues that the wording of Article 29 and of s. 42 of the *Trade Union Act,* either individually or collectively, constitute a functional equivalent of "exclusivity", this Board does not accept that conclusion.

31. However, HRM also argues "exclusivity" does not come from the legislation, but, instead, comes from presumptions imposed at common law or reference to the words "all differences" in the *Trade Union Act*.

32. The common law element of this analysis flows, rather directly, from para. 1 of *Horrocks* where the Court stated:

> [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.

33. While the omission of references within the collective agreement and, indeed, the *Trade Union Act* are less than ideal for the purposes of this analysis, HRM notes that the *Trade Union Act* contains a deeming provision. That deeming provision is found at s. 42(2), of the *Trade Union Act*, supra; by legislation all collective agreements contain "a provision for final and binding settlement".

34. HRM argues that there is no "positive expression of the legislature's will" to "displace labour arbitration as the sole forum for disputes arising from a collective

agreement" (*Horrocks*, para. 33) HRM argues that while the provincial and federal legislation referred to in *Horrocks* (para. 33) specifically refer to grievances and arbitrations, human rights legislation in Nova Scotia does not. HRM specifically refers to s. 29(4)(d) of the *Human Rights Act* which states:

35. Section 29 states, in part:

> Procedure on complaint
>
> (4) The Commission or the Director may dismiss a complaint at any time if
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> ...
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> (d) the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding;

36. In so doing HRM concentrates its attention on the absence of "specific" wording to allow a decision maker, other than an arbitrator, to consider the substance of the grievance in another context. To this observation this Board would offer additional reference to *Horrocks* where, also at para. 33, the Supreme Court referred to the authority, under some legislation, to allow a decision maker to "defer" consideration of a complaint. Although not argued by HRM this "power to defer" is noted to better inform this Board's conclusion on the position taken by the Commission and to be discussed subsequently.

POSITION OF DET. CST. CARLETON

37. Det. Cst Carleton ("Carleton") takes the position that *Horrocks* does not apply in the circumstances now before this Board. Carleton argues that the analytical approach demanded by *Horrocks* does not apply because it is premised upon a legislative underpinning that is either not present or is misunderstood.

38. According to Carleton the question should not be: "Does the Human Rights Commission have concurrent or even secondary jurisdiction to hear a complaint of discrimination of the nature made by Det. Cst. Carleton?". Instead, Carleton argues that the Human Rights Commission does not have concurrent jurisdiction but, instead, has primary jurisdiction. The difference, according to Carleton, is legislative intent.

39. Carleton then refers this Board to the preamble of the *Trade Union Act* and to other provisions which indicate or tend to indicate, according to Carleton, that the *Trade Union Act* is intended to reflect collective rights while the *Human Rights Act* is intended to reflect individual rights. As a result, Carleton concludes, that the *Trade Union Act* and labour arbitrations empowered both by it and by the fact of collective bargaining involving an individual complainant should not and do not have primary jurisdiction to hear complaints involving individuals and their employers.

40. Carleton also argues that the *Trade Union Act*, to some extent, acknowledges this by using language that is permissive and not mandatory to describe the authority of arbitrators. Specific reference is made to s. 43(B)(2) of the *Trade Union Act.* That section of the *Trade Union Act* permits but does not obligate an arbitrator to consider matters beyond the *Trade Union Act* and collective agreement in resolving a grievance. It is the position of Carleton that because this approach, if correct, allows an arbitrator to decline jurisdiction the jurisdiction of arbitrators, generally, cannot be seen to be "exclusive". According to Carleton, at paragraph 20 of her Brief for this Motion:

> Thus, until an arbitrator willingly takes the jurisdiction to treat the *Human Rights Act* as part of the collective agreement it is not part of that collective agreement

41. Carleton also notes that the *Human Rights Act* contains a number of exclusions. The exclusions constitute circumstances in which the *Act* does not apply. Carleton observes that the exclusion list does not make any one or more references to unionized workplaces or employee-employer disputes. As a result, according to Carleton, a circumstance that is not specifically excluded is impliedly included.

42. This, then, brings us to the issue mentioned, albeit in passing, in our review of HRM position; the issue of "defer" versus "dismiss". At para. 29 of Carleton's Brief to this Board Carleton effectively equates the two words. It does so by referring in argument to "deferring" while the text of the legislation quoted refers to "dismiss". As will be discussed below, this Board is of the belief that the two words and, indeed, the two concepts, cannot be equated.

POSITION OF THE COMMISSION

43. The Nova Scotia Human Rights Commission ("the Commission") has approached this issue in a purposive manner; seeking to give full life to its enabling legislation.

44. The Commission argues that although *Horrocks* is broad in its application, *Horrocks* does not purport to "preclude all actions in the courts between [a unionized] employer and employee".

45. The Supreme Court in *Horrocks* explains limitation by noting (at para. 22):

> This is because an arbitrator's exclusive jurisdiction extends only to "disputes which expressly or inferentially arise out of collective agreement" ... Not every workplace dispute will fall within this scope.

46. In support of this conclusion the Commission argues that the collective agreement between HRM and the HRPA is not sufficiently broad to allow matters like the dispute

before this Board to be brought under the collective agreement because, in the position of the Commission, the collective agreement has as its focus disciplinary matters.

47. The Commission then raises the central issue of the "essential character of the dispute" and implies that the "essential character" of the dispute between Det. Cst. Carleton and HRM is not one covered by *Horrocks*.

48. Finally, the Commission argues that wording of the *Human Rights Act* is sufficiently clear for it to constitute "clearly expressed legislative intent" to oust or limit the otherwise presumptive exclusivity of the labour arbitrator.

DISCUSSION

49. The Supreme Court of Canada in *Horrocks*, at para .33, lays out a fairly straightforward process of determining if exclusive arbitral authority exists in any particular case. There the Court stated:

> [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 ... 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

50. From this fairly straightforward analytical process a number of issues necessarily flow. They are:

1. Does a labour arbitrator appointed under the *Trade Union Act* to hear disputes arising from the collective agreement between HRM and HRPA have exclusive jurisdiction to hear 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 *Human Rights Act* or within other legislation, "a positive expression of the legislature's will" to displace the labour arbitrator 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"?

EXCLUSIVE JURISDICTION

51. Section 42 of the *Trade Union Act* states:

> Final settlement provision
>
> 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.

52. Section 42(1) of the *Trade Union Act* refers to "all differences" being subject to "final and binding settlement", "including whether a matter is arbitrable.

53. In addition s. 42(2) of the *Trade Union Act* contains a deeming provision such that should the collective agreement not contain a clause compliant with s. 42(1) of the *Act* the substance of s. 42(2) will be deemed to be included within the collective agreement.

54. Section 42(2) is noteworthy for its reference to "any question" and to its mandatory clause obligating an arbitrator to "hear and determine" and to make a decision that is "final and binding upon the parties and upon any employee or employer affected by it".

55. Section 42(1) of the *Trade Union Act* bears a striking resemblance to s.78(1) of the Labour Relations Act of Manitoba as quoted at para. 43 of *Horrocks*.

56. We would remind the parties of para. 1 of the *Horrocks* wherein the Court stated:

> [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 ...

57. Many of the arguments made by the parties with respect to earlier jurisprudence were addressed by the Supreme Court when at paras 29 and 30, it wrote

> [29] I am aware of several appellate courts having resisted recognizing a labour arbitrator's jurisdiction in human rights disputes as exclusive, on the basis that the exclusivity model developed in *Weber* has no application where the competing tribunal is a statutory body. In *A.T.U., Local 583 v. Calgary (City), 2007 ABCA 121,* 75 Alta. L.R. (4th) 75, *for example, the Court of Appeal of Alberta reasoned:*
>
> > The legislative intent in enacting labour relations regimes and creating arbitration procedures must be respected. In my view, however, it is unwise simply to import the principles developed in cases involving a contest between the courts and arbitration, including the inherent preference for the exclusive jurisdiction of arbitrators often apparent in those cases, into a situation where the court must consider two statutory regimes. In the latter situation there are two legislative intents to consider, not one. If we were to accept exclusive jurisdiction as a starting point, we would run the risk of giving the jurisdictional advantage to one statutory tribunal over another and thereby reducing the efficacy of the second statutory regime. [para. 23]
>
> *(See also Calgary Health Region v. Alberta (Human Rights & Citizenship Commission), 2007 ABCA 120,* 74 Alta. L.R. (4th) 23, *at paras.* 25-30*; Human Rights Commission (N.S.) v. Halifax (Regional Municipality), 2008 NSCA 21,* 264 N.S.R. (2d) 61, *at paras.* 45-46.*)*
>
> [30] To the extent this passage from A.T.U. suggests that exclusive arbitral jurisdiction is a mere "preference" that should be disregarded wherever a competing statutory scheme is present, I see the matter differently. As I read this Court's jurisprudence, the unavoidable conclusion to be drawn is that mandatory dispute resolution clauses like those considered in *St. Anne Nackawic*, *Weber* and *Morin* signal a legislative intention to confer exclusive jurisdiction on the labour arbitrator (or other dispute resolution forum provided for under the agreement). This is not a judicial *preference*, but an *interpretation* of the

mandate given to arbitrators by statute. The text and purpose of a mandatory dispute resolution clause remains unchanged, irrespective of the existence or nature of competing regimes, and its interpretation must therefore also remain consistent.

58. We would also remind the parties of the Court's clear conclusion in paragraph 34 where it states:

> [34] But in light of the jurisprudence of this Court which I have recounted, I am of the view that the inclusion of a mandatory dispute resolution clause in a labour relations statute must qualify as an explicit indication of legislative intent to oust the operation of human rights legislation.

59. We, therefore, find that notwithstanding the able and intellectually challenging arguments made to the contrary by Det. Cst. Carleton, that a labour arbitrator appointed under the *Trade Union Act* has or would have exclusive jurisdiction to hear Det. Cst. Carleton's complaint.

ESENTIAL CHARACTER OF THE DISPUTE

60. Having found that the labour arbitrator has or would have had exclusive jurisdiction to hear complaints generally, it remains for this Board to determine if the "essential character" of the complaint is such that it should fall with the specific jurisdiction of a labour arbitrator.

61. In this case only the Commission has suggested that the collective agreement is not sufficiently broad to cover allegations of the nature made by Det. Cst. Carleton.

62. The Supreme Court in *Horrocks*, at para. 51, provided substantial direction as the manner in which the "essential character" should be determined. The Court specifically warned against *de juris* approaches to the issue and specifically advocated for *de facto* approaches.

63. The Court at paras. 51 and 52 wrote:

> [51] The adjudicator, I observe, sought to escape the inescapable by describing the essential character of the dispute as "aris[ing] from an alleged violation of the complainant's human rights and not out of the 'interpretation, application, administration or violation of the collective agreement'" (MBHR reasons, at para. 110; see also Weber, at para. 52). Respectfully, the adjudicator's error here was to do what Weber directs not to do, by focusing on the legal characterization of Ms..Horrocks' claim instead of on "whether the facts of the dispute fall within the ambit of the collective agreement" (p ara. 44). It is of course true that Ms. Horrocks alleges a human rights violation. But were that sufficient to displace the exclusive jurisdiction of the labour arbitrator, exclusive arbitral jurisdiction would be significantly undermined, because every human rights complaint would automatically fall within the jurisdiction of the human rights adjudication system. Again, what matters are the facts of the complaint, not the legal form in which the complaint is advanced.

> [52] Moreover, our jurisprudence makes clear that the mere allegation of a human rights violation does not bring a dispute within the jurisdiction of a human rights tribunal. In Charette, for example, the complainant, having been denied social assistance benefits while on maternity leave, alleged that the benefits scheme discriminated against her on the basis of pregnancy. Under the relevant legislation, the Commission des affaires sociales ("CAS") held exclusive jurisdiction to apply and interpret the benefits scheme. This Court found that, notwithstanding the allegation of discrimination, the essential character of the dispute was Ms. Charette's entitlement to benefits, which fell within the CAS's exclusive jurisdiction. In concurring reasons, Binnie J. cited to Weber, cautioning that "one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute" (para. 37, quoting Weber, at para. 49). In the context of the case, he found that the "wrong" was legally characterizable as "the subject matter of a Charter complaint", while the "facts giving rise to the dispute "were "the Minister's discontinuance of an income security benefit, and Ms. Charette's claim to get it back under an administrative scheme that the legislature in plain words has channelled directly to the CAS" (para. 37)

64. The Supreme Court also cautioned against the use of "policy" issues to circumvent the presumptive exclusive jurisdiction of labour arbitrators. The Court, at para. 55, stated:

> . . .
>
> Again, this stands in opposition to *Weber*. There, the Court (at para. 60) *rejected* the suggestion that claims involving important policy questions fall outside the arbitrator's exclusive jurisdiction, stating that, even where a *Charter* issue may raise "broad policy concerns", it is "nonetheless a component of the labour dispute, and hence within the jurisdiction of the labour arbitrator." Continuing, the Court removed all room for doubt on this point: "The existence of broad policy concerns with respect to a given issue cannot preclude the labour arbitrator from deciding all facets of the labour dispute" (*ibid.*). In short, such concerns do not "transcend" the collective agreement; rather, they form part of the arbitrator's remit in adjudicating disputes thereunder.

65. As a result, we are directed to distinguish "facts" from the "legal characterization" of those facts. The facts in this case, as alleged by Det. Cst. Carleton, are:

1. Det Cst. Carleton was the member of a union;
2. The union which represented Det. Cst. Carleton and others had entered into a collective agreement with an employer, Halifax;
3. The collective agreement was current at the time the cause of action, as alleged, arose;
4. Det. Cst. Carleton suffered an on the job injury (an "OJI");

5. The OJI from which she suffered was not of a physical variety;

6. Det. Cst. Carleton, as a result of the nature of the OJI from which she suffered, was treated differently than she would have been had the OJI from which she suffered been physical in nature;

7. The collective agreement precludes discriminatory treatment.

66. In this case, on a purely factual level, the allegations brought by Det. Cst. Carleton clearly fall within the scope of the collective agreement. Article 44 of the collective agreement addresses the issue of the handling of claims made for the "on the job" injuries and Article 4 specifically address discriminatory or allegedly discriminatory behaviour.

67. Article 4 states:

> Article 4 No Discrimination
>
> 1. The Region and Union agree that there will be no discrimination, restriction or coercion exercised or practised by it with respect to any employee, regardless of bargaining unit or non-bargaining unit status, by reason of their membership in the Union, or by reason of any prohibited grounds of discrimination as outlined in the Human Rights Act, R.S.N.S. 1990, c. 214 (bona fide occupational requirements do not constitute prohibited grounds of discrimination).
>
> 2. The Union and the members of the Halifax Regional Police Association (HRPA) agree that there will be no intimidation, interference, restraint or coercion exercised or practice with respect to any employee of the Region by any of its members or representatives.
>
> 3. The Region shall accommodate injured employees to the extent required under the laws of Nova Scotia. If such employees are accommodated within the Regional Police Services or the Integrated Emergency Services, they shall remain members of the Union. If employees are accommodated to other positions in the Region, they shall not remain members of the HRPA Union.
>
> 4. Notwithstanding 4(3), an employee may be accommodated within the Police Service provided such accommodation does not cause the Region undue hardship, and if a physician appointed by the Region is of the opinion that the member will likely be capable of full operational duties within three months from the date of the duty assignment.

68. This Board can only conclude that on a factual level the substance of Det. Cst. Carleton's complaint to the Human Rights Commission has as its essential character matters involving the collective agreement.

POSITIVE EXPRESSION

69. The Supreme Court directs that there must be a "positive expression of the legislature's will" to oust the presumptive exclusive jurisdiction of a labour arbitrator.

70. Unfortunately, what might, at first glance, be considered to be a "positive expression" is somewhat diluted by the Court's subsequent acknowledgement that a "positive expression" may apparently not be express but may be implied (*Horrocks*, para. 33)

71. It is on this issue that a substantial portion of the parties' argument has been concentrated.

72. While the parties' arguments are summarized above it is worth repeating that HRM, as the Motioner, finds nothing in the *Human Rights Act* or other legislation to indicate an intention that the Human Rights Commission should have concurrent jurisdiction with the labour arbitrator. Det. Cst. Carleton, as Respondent, argues that the Commission has primary jurisdiction (over the labour arbitrator) to hear complaints of this nature. The Commission, also as a Respondent, argues that it has concurrent jurisdiction.

73. While the position of Det. Cst. Carleton has considerable emotional appeal, this Board is not able to accept that the Commission has primary jurisdiction. To do so would, quite simply, be to deny the direction provided in *Horrocks*.

74. This Board believes that the argument that primary jurisdiction for the hearing of human rights complaints rests with Boards of Inquiry under the *Human Rights Act* and with labour arbitrators acting pursuant to a grievance procedure is flawed for at least two reasons. First, the argument relies entirely on a subjective and literal interpretation of the preamble to the *Human Rights Act* and is not responsive to the similar methods in which the *Human Rights Act* and labour arbitrations, generally, are employed. Second, the argument provides nothing to juxtapose both application and legislation in Nova Scotia with that in Manitoba, the jurisdiction from which *Horrocks* originates.

75. This Board does not accept that the *Human Rights Act* reflects a method of collective justice while labour arbitrations reflect individual justice, each to the exclusion of the other. While the preamble of the *Human Rights Act* may be used to assist in any interpretive process, it should not be the entire interpretive process. Similarly, in seeking to define the limits or parameters of the application of both the grievance process and the process of adjudication of human rights complaints attention must be paid both to application and interpretation. In this case there is nothing to indicate that the human rights process reflects a collective justice in a manner that excludes operation or application of labour arbitrations. To this Board both labour arbitrations and adjudications under the *Human Rights Act* have applications both to groups (or communities) and to individuals. We have adjudicated complaints that have no obvious application beyond the individuals directly involved and we have adjudicated complaints that

have obvious application well beyond the individuals directly involved. The basic premise of Det. Cst. Carleton's argument is one that we, simply, cannot accept.

76. In addition, although we have not immersed ourselves deeply in the law of the Province of Manitoba, nothing has been presented to us that allows us to distinguish the law of each or application of the Manitoba *Labour Relations Act* and the Manitoba *Human Rights Code* from their equivalents in this Province. To do so is, in our opinion, a near imperative for any party wishing to argue that *Horrocks* does not apply in this Province. In the absence of such a meaningful juxtaposition it is nearly impossible to imagine a course that such an argument may take.

77. Det. Cst. Carleton argues that in the absence of a specific inclusion within the exemption section of the *Human Rights Act* it can safely be presumed that the legislature intended some jurisdiction to continue to reside in the Commission. The logic of this approach cannot be denied. Emotionally, it is quite compelling. Unfortunately, this Board cannot premise its decision upon such a conclusion. We do not believe that the mere fact that unionized workplaces are not excluded from application of the *Human Rights Act* necessarily means that the exclusive jurisdiction of a labour arbitrator is or can be ousted. There are a number of reasons for this. First, unionized workplaces are multi-faceted. It is easy to imagine a number of different ways in which discrimination might occur in manners which do not engage a grievance procedure. Second, as the Commission explained in oral argument, its jurisdiction extends well beyond complaints and in that regard access to unionized workplaces must be carefully protected if the Commission is to fulfill its mandate. Third, the Supreme Court of Canada warned against this approach when at para. 45, it noted:

> [45] The second relevant statute here, The Human Rights Code, provides that "[a]ny person may file . . . a complaint alleging that another person has contravened this Code" (s. 22(1)), and directs the Commission to investigate such complaints (s. 26). Where such investigation leads the Commission to conclude that "additional proceedings in respect of the complaint would further the objectives of this Code or assist the Commission in discharging its responsibilities under this Code", it must either request the designation of an adjudicator to hear the complaint or recommend that the minister commence a prosecution for an alleged contravention of the Code (s. 29(3)). While such provisions vest broad jurisdiction in the Commission over Code violations, they are — absent express displacement of the exclusive jurisdiction of a labour arbitrator established by the mandatory arbitration clause — insufficient to support a finding that the Commission holds concurrent jurisdiction here.

78. Even in this excerpt, this Board notes the uncertain standard of expression juxtaposing "positive expression", "imply" and, now in para. 45, "express displacement".

79. Irrespective of this uncertainty, this Board cannot imply a jurisdiction from the absence of an exemption. Earlier in this decision we alluded to an interest in the distinction between "defer" and "dismiss". Section 29(4) of the *Human Rights Act* permits a dismissal. It does not, at least

not specifically, permit a deferral. To this Board, the difference is substantial. Had the legislation permitted a complaint then within the jurisdiction of another properly constituted quasi-judicial body to be "deferred" it would, necessarily, have implied concurrent jurisdiction. However, the legislation does not permit "deferrals". It permits "dismissal". While acknowledging the unease that necessarily results from the permissive "may", this Board is satisfied that the reference only to "dismissal" and not to "deferral" does not permit an argument of concurrent jurisdiction to be sustained.

80. To this we would add that in considering the clear and meaningful differences between the notions of "dismiss" and "defer" consideration of the totality of s. 29(4) of the *Human Rights Act* is helpful. Section 29(4) states:

> (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.

81. It is difficult for this Board to imagine a case in which most, if not all, of these circumstances could be present and yet the Commission would maintain the complaint. This is especially true with respect to sub-clauses (b) and (g). While the dismissal of a complaint "without merit" is easily imagined, a deferral of a similar complaint is difficult to fathom. The same logic, to slightly lesser extents, applies to each sub-section of s. 29(4) of the *Human Rights Act.*

CONCLUSION

82. It is neither the role nor the privilege of this Board to pursue a path contrary to that directed by the Supreme Court.

83. This Board has substantial misgivings with respect to the wisdom of the approach taken by the Supreme Court. We cannot, however, quibble with the reliance upon existing common law and legislation.

84. Our decision in this matter has been a fairly straightforward job of applying current and comprehensive direction from the Supreme Court of Canada. The Court indicated that it was following the direction set out by legislation in a number of provinces. We can find no complaint with this. If it is the will of the legislature to insert language in the *Trade Union Act* or the *Human Rights Act* that provides a "positive expression" of an intention that there be concurrent jurisdiction there would, similarly, be no reason for this Board to quibble.

85. In losing access to the wisdom, insight, experience and resources that the Human Rights Commission has there is, in our opinion, a very real possibility that unionized employees will receive a different, and possibly lesser or less nuanced, justice than employees in other settings. While neither member of this Board would presume any particular wisdom or insight that experience alone cannot provide, the same cannot be said for the Human Rights Commission. The perspective of the Human Rights Commission, together with its resources, cannot readily be duplicated within the context of labour arbitrations. Labour arbitrators will have to adjust their thinking and their approaches if they are to give full effect to the substance and sprit of the *Human Rights Act*. We presume that labour arbitrators will do so. Unfortunately, they will do so without all of the benefits that the Human Rights Commission brings. Individual complainants will also be subject to the uncertainties of the grievance processes in a manner in which they were not subject in the human rights complaint context. Unions, too, will be challenged to find way to protect the vulnerable within the unionized context of employment especially when both the aggrieved and the accused are union members. We are hopeful that matters that might otherwise have been brought to the attention of the Human Rights Commission and which may have been pursued by the Human Rights Commission will not otherwise be lost in the "to and fro" that is the dynamic that is the unionized workplace.

86. Notwithstanding the foregoing, this Board has no choice but to dismiss the complaint of Det. Cst Carleton on the basis this Board has no jurisdiction to hear it.

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.

ADDENDUM

88. Mr. Ron Stockton and Ms. Nancy Elliot, counsel for Det. Cst. Carleton, raised on her behalf the New Brunswick and Alberta human rights decisions in *Blackie v. Chief of Police, Calgary Police Service, 2022 AHRC 52* decided May 6, 2022 and *Robson v. University of New Brunswick 2022 CanLII 40804 (NB LEB).* Both opinions held that *Horrocks* did not apply to the legislation of Alberta and New Brunswick and that the respective human rights tribunals retained jurisdiction. Counsel for Halifax, Mr. Marty Ward, requested the opportunity for the parties all to make written submissions. We agreed. We received the last submission on June 17, 2022.

89. Det. Cst. Carleton's submissions raise the issue whether the use of the word "dismiss" in section 29 of the Nova Scotia *Human Rights Act* in the context of the phrase "the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding" is tantamount to the use of the word "defer" in the legislation which *Horrocks* distinguished as sustaining the jurisdiction of human rights tribunals. The Supreme Court of Canada distinguished British Columbia legislation and held that its human rights authorities retained jurisdiction because the legislation provided that the human rights tribunal could "defer" *Horrocks* par. 33. The same rationale applied to distinguish Ontario and Canada legislation.

90. The Nova Scotia *Human Rights Act* 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. R.S., c. 214, s. 29; 2007, c. 41, s. 6.
>
> (emphasis added)

91. With respect, we agree with the submissions made on behalf of Halifax and confirm our opinion. To the extent that it is necessary to do so, we disagree with *Blackie* and *Robson.* We are not persuaded that the Nova Scotia legislation, or more simply the use of the word "dismiss", provides a clear expression of a legislative intent to grant Boards of Inquiry such as we are concurrent jurisdiction to hear a complaint such as Det. Cst. Carleton's. The Supreme Court of

Canada in *Horrocks,* in the context of Manitoba law, confirmed its long-standing opinion that arbitrators under standard clauses in labour legislation will generally have exclusive jurisdiction to hear complaints encompassed by the collective agreement. The Court could not make a Canada-wide pronouncement because the question is one of statutory interpretation and each province has its own legislation. So does the Federal government. There is still room for argument, but in our view, the word "dismiss" does not provide a clear expression of a legislative intention to provide concurrent jurisdiction. Dismiss means terminate or end. That is the effect of this opinion on Det. Cst. Carleton's complaint. Any tribunal must be said to have the power to say a matter is beyond its powers and the legislation simply confirms that essential. "Defer", on the other hand, clearly infers a power to put off a matter for later consideration.

92. It is understandable that people employed under a collective agreement may be disappointed because they may no longer have an alternate forum to address their grievances. Human Rights Commissions themselves may feel diminished by their loss of jurisdiction. It is understandable that their counsel may be instructed to attempt to narrow *Horrocks* perhaps to application only in Manitoba under the legislation that existed at the time of the complaint. *Horrocks*, in the Supreme Court of Canada, however, must mean something for other provinces as well. Unless we disregard its fundamental thrust altogether, then we must apply what the Supreme Court has decided.

93. In our view, Section 29 of our Act intended to vest a screening function in "The Commission or the Director" and provides the grounds for the exercise of the discretion to dismiss rather than refer a complaint to a board of inquiry. That one of these grounds permits the executive director to dismiss a complaint if the director is satisfied, among other things, the subject matter is being or has been dealt with appropriately through another legislation does not, in our view, imply an intention to exempt the Act from the clear intent of s. 42 of our *Trade Union Act* to establish "final and binding settlement...of all differences...by arbitration or otherwise".

94. "Jurisdiction" is not specifically a ground under the screening process. If post-*Horrocks* the Director and the Commission are faced with a complaint from someone subject to a collective agreement, they may not have the power to dismiss. The legislature granted the administration the power to dismiss to enable the screening of complaints, but not specifically for jurisdictional issues. Implicitly, the power to determine jurisdiction lies with the Board of Inquiry. So, "dismiss" in context of an administrative decision, says nothing about jurisdiction and specifically, for our purposes, any concurrent jurisdiction in the Board.

95. The power to dismiss in the *Human Rights Act* applies to all forums. One cannot, in our opinion view only the final settlement provisions of *Trade Union Act* only through the lens of the *Human Rights Act.* The *Trade Union Act*, in its specific provisions, prevails over the very general power to dismiss. The distinction with other forums , of course, is that the Supreme Court of Canada has said the *Trade Union Act* confers jurisdiction exclusively. That may not necessarily be said of other forums.

96. Section 25(1) of the British Columbia *Human Rights Code* specifically refers to "a grievance under a collective agreement" in providing a discretion to "defer further consideration". The

section of the Nova Scotia *Human Rights Act* makes no specific reference to the *Trade Union Act*, collective agreements or grievances.

97. It is a stretch, in our view, to take the word "dismiss" as it is used in this general sense in the *Human Rights Act* and view it as, by implication, conferring a jurisdiction concurrent with the *Trade Union Act*.

> 3 In this Act,
>
> (a) "business or trade association" includes an organization of persons that by an enactment, agreement or custom has power to admit, suspend, expel or direct persons in relation to any business or trade;
>
> (b) "Commission" means the Nova Scotia Human Rights Commission;
>
> (c) "Director" means the Director of Human Rights appointed pursuant to this Act;
>
> (d) "employees' organization" includes an organization of employees formed for purposes that include the regulation of relations between employees and employers;
>
> (e) "employer" includes a person who contracts with a person for services to be performed by that person or wholly or partly by another person;
>
> (f) "employers' organization" includes an organization of employers formed for purposes that include the regulation of relations between employers and employees;
>
> (g) "employment agency" includes a person who undertakes, with or without payment, to procure employees for employers and a person who undertakes, with or without payment, to procure employment for persons;
>
> (h) "family status" means the status of being in a parent-child relationship;
>
> (ha) "harass" means to engage in a course of vexatious conduct or comment that is known or ought reasonably to be known to be unwelcome;
>
> (i) "marital status" means the status of being single, engaged to be married, married, separated, divorced, widowed or two people living in the same household as if they were married;
>
> (j) "Minister" means the member of the Executive Council who is charged with the administration of this Act by the Governor in Council;
>
> (k) "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;

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.

99. The majority in *Horrocks* does not mention "dismiss". The Manitoba *Human Rights Code* provisions before the Supreme Court included:

> 29(3) If a complaint is not settled, terminated or dismissed and the Commission is satisfied that additional proceedings in respect of the complaint...

100. The Manitoba Commission then did have power to dismiss. Justice Karakatsanis in her dissent quotes this provision. She concludes that the Commission "may choose to defer any decision..." (at par. 119) and then later says "Different considerations may apply, and a complaint may be dismissed, where there are concerns about a duplication of proceedings" (par. 122). The majority, however, must be said not to have agreed and, specifically for our purposes, did not say that the power to dismiss a complaint implied an intention to confer jurisdiction.

101. The central dispute in *Blackie* was whether the Calgary Police Service met its duty to accommodate. When the complaint was filed, the human rights legislation empowered the dismissal of a complaint only if the complaint was without merit, but that was sufficient in the Alberta tribunal's view to sustain jurisdiction. *Blackie* (at par. 22) also depends on s. 67 (1) of the Alberta *Labour Relations Code* enabling the "marshalling" of proceedings to avoid duplication of proceedings. The tribunal points out that the *Code* specifically refers to the human rights proceedings as being subject to being marshalled (161.1 (c)(i). That, we acknowledge, implies a concurrent jurisdiction and may distinguish *Blackie.* Our *Trade Union Act* has no such provision. The tribunal, in any event, dismissed the *Blackie* complaint on its merits.

102. The tribunal in *Robson* sustained jurisdiction on two grounds. The first question in *Robson* was whether the collective agreement itself was discriminatory in its retirement clauses. The tribunal in *Robson* found that it retained jurisdiction because it was the agreement itself which was engaged and was arguably discriminatory. We do not now have before us an allegation that the collective agreement itself is discriminatory. We make no comment on that part of the *Robson* opinion, but it is sufficient to distinguish *Robson* from *Carleton.*

103. *Robson* in this sense diverges from *Horrocks* and *Carleton.* Robson arises from an allegation that the mandatory retirement provision in the collective agreement was discriminatory in and of itself. The wording used in the final settlement provision was, "relating to the interpretation, application, or administration of this agreement" whereas the dispute in *Robson* relates to the actual validity of the provision on human rights grounds. The Supreme Court acknowledged the difference between disputes which arise from the operation of a collective agreement rather than from the negotiation of one. (*Horrocks* at paragraphs 27 and 28). The facts in *Robson* bear more similarity to the circumstances outlined in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)* ("Morin") than to *Horrocks.* In *Morin*, the Supreme Court of Canada found that the Human Rights Commission had jurisdiction to

hear a discrimination complaint made by members of a teachers' union. Their complaint involved discrimination that occurred during the negotiation and formation of the collective agreement which provided for more advantageous treatment of the older staff than for the younger staff. At paragraph 24 of the *Morin* decision it states:

> This is not a dispute over which the arbitrator has exclusive jurisdiction. It does not arise out of the operation of the collective agreement, so much as out of the pre-contractual negotiation of that agreement.

104. The court also acknowledged that the jurisprudence supports a finding that disputes arising from the formation of a collective agreement do not fall within the scope of arbitration. Based on these findings, the court in *Morin* found that the Human Rights Tribunal did have jurisdiction to handle the matter.

105. The New Brunswick decision is sustainable given the similarities between *Morin* and *Robson*. The facts in *Carleton* are distinguishable from those in Robson by virtue of the essential character of the disputes. *Carleton* arises from a claim of discrimination by her employer in violation of the collective agreement, whereas Robson arises from discrimination in the negotiation and formation of the collective agreement itself. For these reasons, *Robson* is distinguishable from *Carleton*.

106. The second ground, that "dismiss" like "defer" implies is more relevant. *Robson*, at paragraphs 101-104, invokes both the word "dismiss" and the New Brunswick Act's reference to "employer's associations" and "trade unions". The latter reference extends itself to speak of complaints which may be about the agreement itself as discriminatory, but in any event, we refer to our reasons above in disagreement.

Dated: August 12, 2022

J. Walter Thompson, Q.C.

Peter D. Nathanson

Two-Member Board of Inquiry