From: Noleen Nicoll Luisi <NNicollLuisi@HRLSC.on.ca>
Sent: Monday, January 10, 2022 11:00 AM
To: HRTO-Registrar (MAG) <hrto.registrar@ontario.ca>
Cc: 'beth.traynor@siskinds.com' <beth.traynor@siskinds.com>; j.raso@catholicteachers.ca <j.raso@catholicteachers.ca>; Rachel Harmsworth <RHarmsworth@HRLSC.on.ca>; myriammichail@hotmail.com <myriammichail@hotmail.com>
Subject: HRTO File No.: 2015-22435-I - Myriam Michail v London District Catholic School Board et al - Form 11 and Submissions

Dear Registrar:

Attached please find the following documents filed by our Centre with respect to the above-noted matter. They are as follows:

1. Form 11- Response to a Request for an Order;
2. Schedule A to the Form 11; and
3. Schedules B and C

Please note that the HRLSC has been retained for a limited service retainer for the purpose of filing this Form 11. Send any directions with respect to the next steps regarding this motion to us.

Trusting the above is satisfactory. If you have any questions, please do not hesitate to contact us. We have copied Respondent counsel and the Union on this email.

Thank you.

Coordinator for Rachel Harmsworth

Noleen Nicoll Luisi
Legal Case Coordinator
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File No.: 2015-22435-I

Human Rights Tribunal of Ontario

B E T W E E N:

MYRIAM MICHAIL

Applicant

- and -

LONDON DISTRICT CATHOLIC SCHOOL BOARD, Jan Mallender, Mary Liz Chen, Rodd Lucier, Colette McNally, Barb Mahon, Rita Haill, Linda Thomas, John Marinelli, Jim Sefeldas, Mark Priamo, Nick Vecchio, Rick Sheardown, Barb Reder, Shannon Askew, Maureen Bedek, Karin Kristoferson, and Edward DeDecker

Respondents

-and-

ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION

Intervenor

SCHEDULE A
SUBMISSIONS IN RESPONSE TO REQUEST TO DISMISS

I. POSITON AND ORDER SOUGHT

1. The Applicant, Myriam Michail makes these submissions in response to the Respondents' Form 10: Request for Order During Proceedings ('RODP') dated November 12, 2021. The Respondent seeks dismissal of the Application.

2. The issue in dispute is: Does the Human Rights Tribunal of Ontario ('HRTO') have concurrent jurisdiction over employment-related human rights matters in a unionized environment?

3. The Applicant submits that the HRTO has jurisdiction over her Application. The statutory scheme of the Ontario *Human Rights Code*, R.S.O. 1990, c. H. 19, as

amended (the "*Code*") and its legislative history points to the conclusion that HRTO has concurrent jurisdiction over her Application. Therefore, the Application must not be dismissed against any Respondents, including the named Personal Respondents, due to lack of jurisdiction.

II. OVERVIEW

a) Procedural Background

4. The Applicant began teaching for the London District Catholic School Board ("LDCSB") and was a member of Ontario English Catholic Teachers Association ("OECTA") since 1990. The Applicant was a dedicated teacher with an unblemished 24-year employment record.

5. In the fall of 2010, Ms. Michail provided medical information requesting accommodations. Shortly after that, Ms. Michail started experiencing hostilities at the workplace. Since 2011, multiple grievances have been filed on the Applicant's behalf resulting in two arbitration hearings and awards issued August 2, 2013 and July 23, 2015 respectively. Findings were made of repeated breaches of the *Human Rights Code*, failure to accommodate, reprisal, harassment, discrimination, bias, deceit and the tort of intentional infliction of mental suffering by directing minds of the LDCSB (See July 2015 Arbitration Award).

6. The Honourable Grace J. in *Myriam Michail v Ontario English Catholic Teachers' Association ('OECTA') et al, London District Catholic School Board ('LDCSB'), Ontario Labour Relations Board ('OLRB'),* 2017 ONSC 3986 stated:

> [5] … In a July 23, 2015 award, the Arbitrator concluded that the elements of the tort of intentional infliction of mental suffering had been established, and awarded $20,000 in damages and compensation (really reimbursement) for certain expenses Ms. Michail had incurred on account of an airline ticket and psychological services. The Arbitrator declined to award punitive damages but did direct the LDCSB to remove a February 19, 2013 letter from Ms. Michail's personnel file.

7. While the second human rights grievance was still in adjudication, the LDCSB took the position in an October 29, 2014 letter that Ms. Michail's employment contract had been frustrated and the Applicant's employment was terminated without just cause.

8. On November 14, 2014, OECTA filed another grievance with respect to the termination but later refused to proceed with the Arbitration of that termination grievance. That and two other unresolved grievances were deferred pending a Duty of fair Representation regarding OECTA's refusal to seek a judicial review of the second Arbitration Award and intention to accept a settlement offer for the remaining grievances that Ms. Michail did not agree with or believe was remotely adequate.

9. The Applicant's relationship with her former union is accurately described by the Honourable Grace J. in *Myriam Michail v Ontario English Catholic Teachers'*

Association ('OECTA') et al, London District Catholic School Board ('LDCSB'), Ontario Labour Relations Board ('OLRB'), 2017 ONSC 3986.

10. The Applicant filed this Application with the Human Rights Tribunal of Ontario on October 28, 2015 with respect to the outstanding allegations of discrimination, harassment, and reprisal in employment including her termination, naming the LDCSB and several personal respondents that contributed directly to the harassment and poisoned work environment she experienced.

11. On February 2, 2016, the Respondents filed their Form 2 Response and Request for an Order During Proceedings, namely the removal of Personal Respondents, dismissal of any allegations substantially dealt with by the first two arbitration decisions pursuant to s.45.1, and that the Application be deferred pending the concurrent litigation. The Application was deferred.

12. On May 28, 2020, the OECTA sent a letter to the HRTO confirming the withdrawal of the three outstanding Grievances and as such, the human rights-related substance of her application was never dealt with through a grievance arbitration. The Application was reactivated on August 18, 2020.

13. On September 8, 2020, the Applicant filed a previous Form 11 Response to the Respondent's request to remove the Personal Respondents.

14. The Applicant retained the Human Rights Legal Support Centre for the purpose of filing this Form 11 Response to the Respondents' Form 10: Request for Order During Proceedings ('RODP') dated November 12, 2021.

b) The Respondents' position

15. In its most recent Form 10: RODP, the Respondents submit that the HRTO does not have jurisdiction to deal with human rights matters arising in unionized workplaces as that is within the exclusive jurisdiction of labour arbitrators pursuant to the *Labour Relations Act 1995,* S.O. 1995, c. 1. The Respondents rely on the recent Supreme Court of Canada ("SCC") decision *Northern Regional Heath Authority v Horrocks,* 2021 SCC 42 ("*Northern Regional*") in arguing the Application should be dismissed on the basis that the allegations of discrimination, harassment and reprisal under the *Code* contained in it fall under the exclusive jurisdiction of a labour arbitrator because these allegations arise out of the operation of a collective agreement. It is argued that in such cases no other forum has the power to entertain an action in respect of such disputes.

c) The Applicant's Position

16. The Applicant submits that the HRTO has jurisdiction over her Application. Applying *Northern Regional* and the relevant principles of statutory interpretation, the *Code*'s statutory scheme and legislative history reveal the legislative intent for concurrent jurisdiction with labour arbitrators on human rights matters in employment. In addition,

Northern Regional does not alter the previous jurisprudence of the Ontario Court of Appeal and the HRTO that clearly recognizes the concurrent jurisdiction of the HRTO with labour arbitrators.

17. The Applicant further submits that the LDCSB's longstanding request to dismiss the Application against the named Individual Respondents continues to be unwarranted as it is also not affected by *Northern Regional*. As previously outlined in the Applicant's Form 11 filed on this issue on September 29, 2020, the allegations against the Individual Respondents are central to the dispute and if proven, may not be deemed to be the actions of the organizational respondent under s. 46.3(1) of the *Code* and as such, the claims against the Individual Respondents ought to continue irrespective of the outcome of the present request.

III. THE SCC's *NORTHERN REGIONAL* DECISION

a) The Majority Decision

18. In *Northern Regional,* the Supreme Court of Canada found that the grievance and arbitration process in the Manitoba labour relations regime had exclusive jurisdiction to decide human rights matters in a unionized environment because they are disputes that arise under a collective agreement. The complainant in *Northern Regional*, Ms. Horrocks, filed a complaint with the Manitoba Human Rights Commission after she had been suspended from her employment because she attended work under the influence of alcohol. Prior to her complaint, her union had filed a grievance which resulted in her reinstatement pursuant to terms Ms. Horrocks was expected to comply with. When she subsequently breached those terms, her employment was terminated again.

19. The employer asserted that the Commission had no jurisdiction to determine the complaint. It argued that *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929 recognized that an arbitrator appointed under a collective agreement had exclusive jurisdiction, including exclusive jurisdiction over human rights complaints, and that the Commission had no jurisdiction in the face of such exclusive jurisdiction. The Commission adjudicator rejected that argument, holding that she had jurisdiction because the essential character of the dispute was an alleged human rights violation. She found that the employer had discriminated against Ms. Horrocks.

20. This decision was set aside on judicial review but subsequently reinstated by the Manitoba Court of Appeal. It agreed that disputes concerning the termination of a unionized worker fell within the exclusive jurisdiction of a labour arbitrator, but held that the adjudicator still had jurisdiction in this particular case, and it remitted the matter to the reviewing judge.

21. In a 6/1 decision, the Supreme Court granted the employer's appeal. The majority held that "where labour legislation provides for the final settlement of disputes arising from a collective agreement, the jurisdiction of the arbitrator or other decision-maker

empowered by this legislation is exclusive" and ousts the jurisdiction of other decision-makers, whether courts or statutory tribunals (para 15). It rejected – as unsustainable in light of the Court's jurisprudence about the scope of labour arbitrators' jurisdiction – Ms. Horrocks' argument that arbitral exclusivity should not apply to the competing forum of a statutory tribunal that adjudicates quasi-constitutional rights (paras. 14-15).

22. However, the majority qualified this holding. The exclusive jurisdiction arising from this type of provision can always be rebutted by "clearly expressed legislative intent to the contrary" (para 15).

    i) The court stated that, even absent specific language, the statutory scheme may disclose this intention (para 33). As an example, the majority stated: "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" (para 33) [Emphasis added]

    ii) The court also stated that even where statutory provisions are "more ambiguous", legislative history may "plainly show that the legislature contemplated concurrency … In these circumstances, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent" (at para 33). [Emphasis added]

23. The majority also affirmed previous jurisprudence that established a two-step analysis for resolving jurisdictional contests between labour arbitrators and competing statutory tribunals: *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185 [*Morin*]; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223 [*Charette*]:

    i) First, the relevant legislation must be examined to determine whether it grants the arbitrator exclusive jurisdiction and, if so, over what matters. Some positive expression of legislative will is required (para 39).

    ii) Second, and if the legislation does grant exclusive jurisdiction, it is necessary to determine whether the dispute falls within the scope of that jurisdiction based on its "essential character" (para 40). The "essential character" of a dispute is determined based on the facts alleged, not the legal characterization of the matter (para 40). Where two tribunals have concurrent jurisdiction over a dispute, the decision-maker must consider whether to exercise its jurisdiction in the circumstances of a particular case (para 41).

24. The essential character in *Northern Regional* was a complaint that the employer had exercised its management rights under the collective agreement in a way that was inconsistent with their express and implicit limits. It arose "foursquare" from the

employer's exercise of its rights under, and from its alleged violation of, the collective agreement (para. 50). The adjudicator had erred by characterizing the essential character as arising from the violation of the complainant's human rights. She had focused on the legal characterization of the claim rather than on "whether the facts of the dispute fall within the ambit of the collective agreement" (para 51).

25. In holding that the exclusive jurisdiction of the labour arbitrator prevented the Manitoba Human Rights Commission from considering discrimination in the context of the collective agreement, the majority acknowledged that "absent 'express and unequivocal language' to the contrary, human rights legislation prevails over all other enactments in the event of a conflict". However, it held that the inclusion of a mandatory dispute resolution clause in a labour relations statute was an explicit indication of legislative intent to oust the operation of human rights legislation (para 34).

b) The Minority Decision

26. In the dissenting judgement, Karakatsanis J. would have allowed the appeal on the basis that the Commission had concurrent jurisdiction to determine the complaint alongside the labour arbitrator. In her view, the reasoning from *Weber* favouring exclusive labour arbitration over civil litigation in the courts did not readily apply to jurisdictional issues between different statutory tribunals. Statutory tribunals were set up at different times, as part of different policy initiatives which themselves overlapped. When two tribunals were created with overlapping mandates and areas of expertise, the legislative schemes must be viewed as a whole (para 74). She emphasized that legislatures sometimes expressly recognized that statutory tribunals had overlapping jurisdiction, and she held up s. 45.1 of the Ontario *Code* and s. 41 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 as examples of such recognition because these "explicitly allow the relevant statutory bodies to decline to deal with complaints in appropriate circumstances, including if the complaint could be more appropriately dealt with in a different forum" (para. 75).

IV. STATUTORY INTERPRETATION AND THE HUMAN RIGHTS CODE

27. The issue raised in this RODP is fundamentally about statutory interpretation of the *Code*. As such, these submissions will review the guidance provided by the Supreme Court of Canada and Ontario Court of Appeal in interpretating legislation and, in particular, in interpreting human rights legislation such as the *Code.*

a) The Modern Principle of Statutory Interpretation

28. The goal of statutory interpretation is to interpret the intent of the legislators. Currently, the way to determine this intent is to follow the “Modern Principle” of statutory

interpretation. The Supreme Court of Canada has adopted and explained the Modern Principle in numerous decisions involving statutory interpretation.

29. The Modern Principle was first formulated by Professor Elmer A. Driedger. Referring to Driedger in *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC), Iacobucci J. confirmed this approach as follows:

> He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (para 21)

30. Professor Driedger's modern approach has been repeatedly cited by the Supreme Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42 at para 26 and *Vavilov v. Canada (Minister of Citizenship and Immigration)* at para 117.

b) Statutory Interpretation Principles Applicable to the *Code*

i. The *Code* is Remedial

31. As an Ontario statute, the *Code* must be interpreted as being remedial and be given such fair, large and liberal interpretation. Section 64(1) of *the Legislation Act*, 2006, SO 2006, c 21, Sch F states:

> 64 (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

32. As Professor Ruth Sullivan explains in her authoritative text on statutory interpretation, *Sullivan on the Construction of Statutes, 6th Ed.* (Lexis Nexis, 2014), liberal construction favours and facilitates the application of legislation to advance the remedial goal. The language of the statute is applied as fully as the conventions of meaning permit. Technicalities and formalism are avoided. If reasonable doubts or ambiguities arise, they are resolved in favour of those seeking the benefit of the statute (*Sullivan*, para 15.18).

ii. The *Code* is Quasi-Constitutional Legislation

33. The Supreme Court of Canada has also consistently held that the *Code*, as human rights legislation, has a unique quasi-constitutional nature and ought to be interpreted in a liberal and purposive manner: *B v. Ontario (Human Rights Commission)*, 2002 SCC 66 at para 44. The purpose of the *Code* is to remove and prevent discrimination. It is meant to be remedial, with a focus on providing relief for the victims of

discrimination: *Ont. Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC) at para 12.

34. In *British Columbia Human Rights Tribunal v. Schrenk,* 2017 SCC 62 (CANLII), the Supreme Court stated at para 33 that:

> The protections afforded by human rights legislation are fundamental to our society. For this reason, human rights laws are given broad and liberal interpretations so as better to achieve their goals (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, at pp. 546-47; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114, at pp. 1133-36; *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84, at pp. 89-90). As this Court has affirmed, "[t]he *Code* is quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes" (*McCormick*, at para. 17). In light of this, courts must favour interpretations that align with the purposes of human rights laws like the Code rather than adopt narrow or technical constructions that would frustrate those purposes (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §§19.3-19.7).

35. In *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3d) 387, [1994] O.J. No. 1732 (QL) (Ont. C.A.) (*sub nom*. *Roberts v. Ontario (Min of Health)*), the majority of the Ontario Court of Appeal held, at paras. 14-16, that:

> A human rights code is remedial legislation and is to be given such interpretation as will best ensure its objects are attained….An approach which emphasizes the role of individual provisions as expressions of the overall dominant purpose of the legislation as a whole must be taken. . .
>
> Clearly, the first stage in any analysis of the meaning of a particular provision of the Code must be a determination of its objects or purpose. One of the general objects of human rights legislation "is to secure, as far as is reasonably possible, equality, that is to say, fairness". . .

c) The Ontario *Labour Relations Act*

36. Section 48(1) of Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A states that:

> 48 (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

37. The Supreme Court of Canada has affirmed that grievance arbitrators have not only the power but also the responsibility to implement and enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were

part of the collective agreement (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (CanLII)).

V. THE CONCURRENT JURISDICTION OF THE HRTO

38. Viewing the *Code* in its entire context, with the scheme of the Act and the object of the Act, it is evident that the *Code* contemplates multiple venues of concurrent jurisdiction for human rights matters.

a) Concurrent Jurisdiction of the HRTO with the Courts: Section 46.1

39. Section 46.1 permits limited concurrent jurisdiction of the courts over human rights matters where there is an independent actionable wrong that does not arise out of a collective agreement. This was affirmed by the Ontario Court of Appeal in *Rivers v. Waterloo Regional Police Services Board*, 2019 ONCA 267 and *Rivers* and *Nelson v. Ontario*, 2020 ONCA 751. Section 46.1 states:

> 46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:
>
> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
>
> 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
>
> (2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I. .

40. In contrast, the Court of Appeal has recognized that the HRTO has concurrent jurisdiction to decide human rights matters related to workers subject to a collective agreement. In *Rivers (supra),* the Court upheld a motion judge's conclusion that the Superior Court lacked jurisdiction over a claim of *Code*-based discrimination and harassment because the legislative scheme and case law requires that the appellants' claims be adjudicated before a labour arbitrator or at the HRTO (at paras. 3-4).

41. In *Nelson (supra),* the Court of Appeal applied *Rivers* and *Naraine v. Ford Motor Co of Canada*, 2001 CanLII 21234 (ON CA) (discussed below) to confirm that the Superior Courts lacked concurrent jurisdiction over the appellant's claims of harassment and discrimination in her employment. The Court concluded that

concurrent jurisdiction over these claims lies with a labour arbitrator and the HRTO (at paras. 38 and 41).

b) Concurrent Jurisdiction of the HRTO with Labour Arbitrators: Sections 45 and 45.1

42. In its Form 10, the Respondents argue that Ontario's statutory scheme does not support a finding of concurrent jurisdiction because the examples cited by the SCC as a "positive expression of the legislature's will" for concurrent jurisdiction expressly refer to a "grievance" while the Ontario *Code* does not.

43. The Applicant submits that this passage in *Northern Regional* should not be narrowly read as requiring express mention of a 'grievance' or 'arbitration' in a statute in order to establish concurrent jurisdiction. Paragraph 33 of *Northern Regional* states that "a positive expression of the legislature's will is required for concurrent jurisdiction." The Court notes first that express mention of concurrency with a grievance process in the competing tribunal's enabling statute would be ideal. However, concurrent jurisdiction can be found "even absent specific language", through the statutory scheme, which may disclose legislative intention for concurrent jurisdiction through provisions that necessarily imply that the tribunal has concurrent jurisdiction over disputes that are also subject to the grievance process.

44. The reference to the B.C. and Federal statutes in paragraph 33 of *Northern Regional*, and their express mention of grievances and arbitrations, are used as an example of such a scheme**.** The sentence starts with the phrase "For example,…". However, this is not a requirement in order to meet the *Northern Regional* test for concurrent jurisdiction– it just an illustration of where a statutory scheme could show intent for concurrent jurisdiction.

45. Requiring the *Code* to contain an explicit reference to a grievance as a proceeding where it has concurrent jurisdiction is a technical and literal approach to the *Code* that is inconsistent with the application of the Modern Principle of statutory interpretation. It is also an approach that is inconsistent with the broad and liberal interpretation that must be applied to human rights legislation. If one applies a contextual approach that considers the scheme of the Act and provides for a large and liberal interpretation, the *Code* provides this "positive expression of the legislature's will" for concurrent jurisdiction through both Section 45 and 45.1.

46. It is important to note that *Northern Regional* was decided in relation to the Manitoba *Human Rights Code*, C.C.S.M., c. H175 ('Manitoba Code'). The Ontario *Code* contains these two provisions that are absent from the Manitoba Code. These provisions express legislative intent that the HRTO has concurrent jurisdiction alongside other statutory decision-makers. Specifically, these provisions provide implied legislative intent to give the HRTO concurrent jurisdiction over human rights matters in employment and thereby carve an exception into the labour regime's "sphere of exclusivity" under Ontario's *Labour Relations Act.*

c) Section 45: Deferral Power of the HRTO

47. As noted above, the legislative intent for the Tribunal's concurrent jurisdiction is expressed through section 45 of the Code. Section 45 of the Code permits the Tribunal to defer an application in accordance with the Tribunal rules:

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

48. Rule 14 of the HRTO's *Rules of Procedure* addresses the Tribunal's deferral powers. Rule 14.1 states that the Tribunal may defer consideration of an Application on such terms as it may determine, on its own initiative or at the request of any party. Rule 14.2 states that where the Tribunal intends to defer consideration of an Application under Rule 14.1, it will first give the parties, any identified trade union or occupational or professional organization and any identified affected persons, notice of its intention to consider deferral of the Application and an opportunity to make submissions.

49. In *Northern Regional,* the SCC states that a tribunal's deferral power can be evidence of a legislative intent for concurrent jurisdiction with labour arbitration. As an 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.

50. In contrast to the Ontario *Code*, the Manitoba Code does not have any provisions indicating that its tribunal had any power to defer a proceeding due to a concurrent proceeding in another forum.

i. The Jurisprudence interpretating concurrent jurisdiction under section 45

51. The Ontario *Code* has no legislated exceptions to the HRTO's deferral power under section 45. If the legislature had intended to exclude labour arbitration from the application of this deferral power, it would have done so. Indeed, the Tribunal itself has interpreted section 45 broadly to allow deferral of a proceeding due to concurrent jurisdiction. Section 45 has been routinely applied by the HRTO to defer cases where there is a grievance under a collective agreement based on the same facts and human rights issues. The Tribunal explains this approach in *Gulma v. Toronto Transit Commissio*n, 2015 HRTO 268 at paras. 10-11:

> [10] The Tribunal has generally deferred applications where there is an ongoing grievance under a collective agreement based on the same facts and human rights issues. In explaining this approach, the Tribunal has referred to the fact that the Supreme Court of Canada has affirmed that grievance arbitrators have not only the power but also the responsibility to

> implement and enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement (*Parry Sound (District) Social Services Administration Board* v. *O.P.S.E.U., Local 324*, 2003 SCC 42).
>
> [11] The Supreme Court thus confirmed that human rights tribunals are not the only decision-makers that can decide human rights claims. Where the parties are engaged in a concurrent legal proceeding in which they are raising the same human rights issues before a decision-making body with the authority to make determinations about those issues, the orderly administration of justice favours deferral to the other proceeding. In such a scenario, the Tribunal's normal approach is to defer to the other proceeding. The purpose of the Tribunal's deferral power is to avoid duplication of legal processes. It results from the recognition that a variety of tribunals have jurisdiction to deal with human rights matters (*Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14) and that the facts underlying them may also arise in other proceedings.

52. In exercising this deferral power, the Tribunal has recognized that, although the law generally gives exclusive jurisdiction to labour arbitrators where a matter arises expressly or inferentially from the collective agreement, the *Code* departs from those principles by allowing a unionized applicant to file a Tribunal application: *Melville v. Toronto* (City), 2012 HRTO 22.

53. The Tribunal also recognizes that under the current *Code*, a unionized applicant has the option of deciding whether to utilize the grievance arbitration procedure, if available, or to file an application with this Tribunal or do both: *Crowley v. Liquor Control Board of Ontario,* 2010 HRTO 2407 at para 22.

d) Section 45.1: Dismissal Power of the HRTO

54. Legislative intent for concurrent jurisdiction with other tribunals, including labour arbitration, is also expressed through section 45.1 of the *Code*. This section permits the Tribunal to dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application. This section states:

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

55. A "proceeding" under section 45.1 is not defined in the *Code*. Similar to section 45, the Ontario *Code* has no legislated exceptions to the HRTO's dismissal power under section 45.1. Again, if the legislative intention was that a grievance or labour arbitration is not a 'proceeding', the *Code* would have carved out a clear exception for these matters as not being proceedings for the purposes of section 45.1.

i. The Jurisprudence interpretating concurrent jurisdiction under section 45.1

56. Instead, it is well established in the Tribunal's case law that both a grievance and a labour arbitration are a "proceeding" for the purposes of section 45.1: *Weber v. Simcoe County District School Board*, 2016 HRTO 1530 (CanLII)**;** *Gan v. District School Board of Niagara*, 2017 HRTO 1092 (CanLII).

57. It is also well-established that an arbitrator has concurrent jurisdiction to consider and determine human rights issues: *France v. Regional Municipality of York Police Services Board*, 2017 HRTO 705 (CanLII).

58. Section 45.1 is an explicit indication of legislative intent for concurrent jurisdiction – between the HRTO and other decision-makers upon whom "exclusive" jurisdiction has been conferred – over human rights issues. Karakatsanis J. in the Dissent of *Northern Regional* also pointed specifically to section 45.1 of the Ontario *Code* as an example of a provision evincing legislative intent for concurrent administrative proceedings. At para 75 of *Northern Regional*:

> Indeed, legislatures sometimes expressly recognize that statutory tribunals have overlapping jurisdiction. The human rights statutes in Ontario and certain other jurisdictions, for example, explicitly allow the relevant statutory bodies to decline to deal with complaints in appropriate circumstances, including if the complaint could be more appropriately dealt with in a different forum (see *Human Rights Code*, R.S.O. 1990, c. H.19, s. …)

59. The Ontario Court of Appeal has also recognized the concurrent jurisdiction of the HRTO with labour arbitrators. In *Naraine v. Ford Motor Co of Canada*, 2001 CanLII 21234 (ON CA), the Court of Appeal held that adjudicators under the *Code* have jurisdiction to deal with human rights claims filed by unionized employees. The Court interpreted the former version of s. 45.1 (s. 34(1)(a) of the former *Code*) as demonstrating legislative intent for concurrent jurisdiction between the former Commission and labour arbitrators with respect to human rights issues arising within the scope of a collective agreement. The Court stated:

> [48] There is jurisprudential and academic support for the conclusion that the legislature did not intend labour arbitrators to have exclusive jurisdiction over human rights issues. In *Gendron v. Supply and Services Union, P.S.A.C.*, 1990 CanLII 110 (SCC), [1990]1 S.C.R. 1298 at 1320, for example, the Supreme Court of Canada held, in *obiter*, that:
>
> > 61. . . . In other instances, such as in the context of human rights violations, while the statute may apply, the breach may not be properly characterized exclusively as a labour relations matter. In these circumstances jurisdiction may be grounded elsewhere.
>
> [49] In Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed. (2001), at pp. 1-21-22, the authors write:
>
> > 62. In Ontario, it would appear that the proceedings contemplated by the *Labour Relations Act, 1995* and by the other pieces of related legislation are concurrent, and that neither ousts the jurisdiction of the

> other. … [S]imply because the subject-matter of a grievance might be the subject-matter of a complaint under the Ontario *Human Rights Code* does not preclude its determination by arbitration, and vice versa.
>
> …
>
> [52] Prior to 1992, there was no legislative language providing labour arbitrators with *any* jurisdiction over violations of the *Code*. And the 1992 amendment, which permitted arbitrators to interpret and apply "human rights and other employment-related statutes", did not provide that the arbitrator's jurisdiction was exclusive or that the Commission's jurisdiction was in any way limited.
>
> …
>
> [59] The Commission now has authority under s. 34(1)(a) of the *Code* to decide, in its discretion, not to deal with a complaint where it is of the view that the complaint "could or should be more appropriately dealt with" under another Act. Labour arbitrators now have statutory authority under the *Labour Relations Act* to apply the *Code*. Since the Commission has statutory authority under the *Code* to defer to another forum, the legislative intent has clearly shifted from according exclusive jurisdiction to the Commission for *Code* violations to offering concurrent jurisdiction to labour arbitrators when complaints arise from disputes under a collective agreement. [Emphasis added]

60. The HRTO has consistently followed the Court of Appeal's decision in *Naraine* to find that it has concurrent jurisdiction over human rights claims filed by unionized employees: *Meade v. National Steel Car Limited* 2016 HRTO 1383 *('Meade')*, *Monck v. Ford Motor Company of Canada*, 2009 HRTO 861 at para 8, and *Snow v. Honda of Canada Manufacturing*, 2007 HRTO 45 at para 14.

61. In *Meade*, the HRTO considered the issue of whether subsequent SCC decisions on the jurisdiction of human rights tribunals to deal with complaints filed by unionized employees were inconsistent with *Naraine*. These SCC decisions included *Canada (House of Commons) v. Vaid*, 2005 SCC 30 and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39 at para 14 ("*Morin*"). The Tribunal concluded that the Court of Appeal's finding of concurrent jurisdiction in *Naraine* is consistent with the reasoning in those SCC decisions.

62. In *Meade*, the HRTO explained that in *Morin* the SCC stated there is no presumption of arbitral exclusivity over all claims filed by unionized employees. The question in each case is whether the relevant legislation applied to the dispute at issue, taken in its full factual context, establishes that the labour arbitrator has exclusive jurisdiction over the dispute. See *Morin* at para. 14.

63. The two-step process in determining whether the legislature intended for concurrent jurisdiction that was described in *Northern Regional* is essentially the same as that set out in *Morin.* At paragraphs 10 to 12 of *Meade*, the HRTO states:

> [10] ….First, a decision-maker must examine the relevant statutes and what they say about the jurisdiction of the two statutory decision-makers in question. Second, the decision-maker must look at the nature of the dispute, to see whether the legislation suggests it falls exclusively to either statutory decision-maker.
> [11] In applying the first step in cases involving a jurisdictional determination as between two statutory decision-makers, it is necessary to consider the legislation governing both decision-makers. See *Morin*, paras. 16-19. In *Naraine*, the Court of Appeal reviewed the historical development of the statutory context governing the jurisdiction of human rights adjudicators and labour arbitrators in Ontario. As noted by the Court, s. 48(12)(j) of the *Labour Relations Act* provides arbitrators with the power to interpret and apply the *Code*. However, it does not provide arbitrators with exclusive jurisdiction to do so. See *Naraine* at para. 52.
> [12] In *Naraine*, the Court of Appeal noted that, under s. 34(1)(a) of the *Code*, then in existence, the Ontario Human Rights Commission had the authority to decide, in its discretion, not to deal with a complaint where it was of the view that the complaint "could or should be more appropriately dealt with" under another Act. The Court held that the former s. 34(1)(a) of the *Code* and s. 48(12)(j) of the *Labour Relations Act* clearly demonstrated the Legislature's intention that human rights adjudicators and labour arbitrators have concurrent jurisdiction over claims that arise from disputes under a collective agreement.

64. The HRTO commented at para 13 of *Meade* on how section 45.1 of the *Code* further reinforced concurrent jurisdiction by the Tribunal over human rights claims filed by unionized employees:

> [13] In my view, the 2008 amendments to the *Code* reinforce the Court of Appeal's conclusion that the Legislature intended that the Tribunal and labour arbitrators have concurrent jurisdiction over human rights claims filed by unionized employees. In 2008, s. 34(1)(a) was repealed and s. 45.1 was added to the *Code*. Under s. 45.1, the Tribunal has the power to dismiss applications only if, in its opinion, the substance of the application "has been" appropriately dealt with in another proceeding. These amendments reinforce the conclusion in *Naraine* that the Legislature intended the Tribunal to have concurrent jurisdiction over human rights claims, even if an employee "could or should have" raised them in another forum such as the arbitral forum.

65. In sum, the Applicant submits that the SCC's *Northern Regional* decision does not change the reasoning and conclusion in *Naraine*. The Ontario Court of Appeal's decision continues to be binding on this Tribunal and should be applied to confirm the Tribunal's jurisdiction in this matter.

e) The Legislative History of the *Code*

66. The legislative history of the *Code* also demonstrates the legislature's intention for concurrent jurisdiction with labour arbitrators. In *Northern Regional,* the SCC

confirmed that legislative history can also provide evidence of legislative intention of this concurrent jurisdiction (at para 33).

67. Professor Ruth Sullivan explains in *Sullivan on the Construction of Statutes, 6th Ed.* (Lexis Nexis, 2014), that legislative history continues to be relied on by courts as evidence of the external context in which legislation was made and as direct evidence of its purpose. The term "legislative history" is widely used to refer both to the legislative evolution of a provision as defined and to the range of extrinsic materials relating to the conception, preparation and passage of a provision, from the earliest proposals for legislative change to royal assent. Legislative history in the latter sense include remarks recorded in *Hansard: Sullivan*, d, para 23.19.

i) Legislative Evolution

68. It is well-established that the legislative evolution of provisions may be relied on by courts to assist interpretation. As Pigeon J. wrote in *Gravel v. St. Léonard (City)*, 1977 CanLII 9 (SCC) at page 666:

> Legislative history may be used to interpret a statute because prior enactments may throw some light on the intention of the legislature in repealing, amending, replacing or adding to it.

69. In *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers* 2005 SCC 70 (CanLII), Binnie J. at para 38 noted that legislative evolution of an enactment forms part of Driedger's 'entire context' set out in the Modern Principle of statutory interpretation.
70. There is a general presumption that a change in the wording of legislation is purposeful. At para 23.22 of *Sullivan*, *supra*:

> It is presumed that amendments to the wording of a legislative provision are made for some intelligible purpose: to clarify the meaning, to correct a mistake, to change the law. A legislature would not go to the trouble and expense of amending a provision without any reason. As Lord MacMillan wrote in *D.R. Fraser and Co. v. Canada (Minister of National Revenue — M.N.R.)*:
>
> > When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately.

71. In *Northern Regional*, the Supreme Court cites *Canpar Industries v. I.U.O.E., Local 115*, 2003 BCCA 609 (CanLII), ('*Canpar*') as a case that demonstrates that legislative history plainly shows that the legislature contemplated concurrency, such that applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.

72. In *Canpar*, the British Columbia Court of Appeal described how the statutory recognition of overlap between human rights complaints and labour grievances

originated with the enactment of the *Human Rights Amendment Act, 1995,* S.B.C. 1995, c. 42, following the filing of a "Report on Human Rights in British Columbia" to the government of British Columbia by Professor Bill Black in December 1994. Professor Black recommended that the *Human Rights Code* be amended to authorize the Human Rights Tribunal to dismiss a claim which had been adequately dealt with in other "proceedings" or to defer a complaint pending the outcome of such other proceeding. The Court notes that it appears from *Hansard* and from the legislation that this recommendation was generally intended to be implemented by the 1995 amending statute. Referring to this dismissal power, the Court states at para 28 that:

> (Ontario had enacted a somewhat similar provision, which now appears at s. 34(1)(a) of the *Human Rights Code,* R.S.O. 1990, c. H.19.)

73. A review of the legislative history of the Ontario *Code* reveals a purposeful change in affirming concurrent jurisdiction for the Tribunal. Section 45 and 45.1 were enacted under Bill 107, the *Human Rights Code Amendment Act, 2006,* S.O. 2006, c. 30. Prior to Bill 107, the Ontario Human Rights Commission ('OHRC') acted as a "gatekeeper" to the HRTO in the sense that it investigated complaints and permitted only some complaints to proceed to determination by the HRTO. Section 34(1)(a) of the previous *Code* gave the OHRC the power to dismiss a complaint without investigation in certain circumstances:

> **Decision to not deal with complaint**
>
> 34. (1) Where it appears to the Commission that,
>
> (a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;
>
> (b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;
>
> (c) the complaint is not within the jurisdiction of the Commission; or
>
> (d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,
>
> the Commission may, in its discretion, decide to not deal with the complaint.

74. Section 34(1)(a) of the previous *Code* gave the OHRC the power to dismiss a complaint without investigation if "the complaint [was] one that could or should be more appropriately dealt with under an Act other than this Act". That reason for not dealing with a complaint of discrimination was deliberately excluded from the *Code* as a result of the 2006 amendments and replaced with the current section 45.1, which requires that the substance of an Application must actually have been appropriately dealt with in another proceeding, not could have been or should have been appropriately dealt with: *Husain v. Centre for Addiction and Mental Health,* 2018 HRTO 179, *Crowley v. Liquor Control Board of Ontario*, 2010 HRTO 2407, and *Wang*

v. Hilton Toronto, 2015 HRTO 1131, *Hoberg v. National Hockey League*, 2010 HRTO 1805.

75. Section 45.1 significantly narrowed the circumstances where an application can be dismissed due to overlapping jurisdiction. Section 45.1 therefore demonstrates a legislative intention that it is insufficient for another tribunal to have jurisdiction, exclusive or not, to deal with a matter. The other tribunal must actually have dealt with the substance of an application in an appropriate manner for the HRTO to dismiss an application.

76. In *Claybourn v. Toronto Police Services Board*, 2013 HRTO 1298 (upheld in *Ontario (Community Safety and Correctional Services) v De Lottinville*, 2015 ONSC 3085 (CanLII),) the concurring reasons of J. Keene provided a summary of the legislative history of the current *Code*, with an emphasis on determining the legislative intent of the 2006 *Code* amendments. The *Code* was amended to provide a direct access model and right to a hearing for complainants with a jurisdictionally-sound Application (at paras 108 to 109):

> [108] The 2006 Ontario *Code* amendments made fundamental changes to the procedure governing the enforcement of *Code* rights. The amendments created an entirely new system in which individuals have direct access to the Tribunal and in which the Ontario Human Rights Commission ("the Commission") has been relieved of its gatekeeping function.
>
> [109] The general rule in Ontario is that a person who files a jurisdictionally-sound application with the HRTO within the applicable limitation period has the right to have the merits of that application determined by the HRTO. This right is a key feature of the removal of the "gatekeeper" role previously played by the Ontario Human Rights Commission, and can fairly be said to lie at the core of the legislative intention behind the creation of the current human rights system in Ontario.

77. Further, as J. Keene notes in *Claybourn,* the issue of HRTO's concurrent jurisdiction with other tribunals was raised during the legislative process. The 2006 amendments affirmed this concurrent jurisdiction and broadened the Tribunal's discretion to dismiss an Application in whole or in part if another decision-maker has dealt with the substance of the Application (at paras. 111 - 112, 115):

> [111] The specific issue of the right of an applicant to a determination by the HRTO where a determination by another tribunal might address the same issues was also addressed during the legislative process. As first introduced, Bill 107 advanced access to a tribunal hearing by removing the power to refuse to deal with a matter that could have been, but had not been, dealt with in another forum. Instead, it required that the other proceeding be concluded, and that it had dealt with the human rights issues "appropriately".
>
> [112] When the matter was considered at the Standing Committee, some witnesses before Committee, including the Police Association of Ontario, sought to roll back this change (see Committee Transcripts: Standing

> Committee on Justice Policy - August 08, 2006 - Bill 107, Human Rights Code Amendment Act, 2006, at 1100-1120). This proposal was not accepted. Instead, as other witnesses had urged (Standing Committee on Justice Policy - August 9 (1340-1350) and 10 (1200-1210), and November 15 (1010-1030), 2006), not only was the original amendment maintained, but the right of an applicant to a hearing by the HRTO was enhanced by amendments introduced after the public hearings into the Bill. While the First Reading version of the Bill only gave the HRTO the discretion to dismiss or deal with the entirety of an application that had been dealt with in another proceeding, the amendments enlarged this discretion by allowing the HRTO to dismiss the application "in whole or in part". This allows the applicant the right to a hearing in respect of particular claims of discrimination that have not been appropriately dealt with, while allowing HRTO to operate more surgically, strategically and economically. Overall, the amendments to the original Bill reinforced the clear intention to eliminate a broad gatekeeping role and to emphasize the importance of a determination on the merits.
>
> …
>
> [115] All of this is consistent with and gives effect to the view that the Legislature wanted to ensure that once an intra-jurisdictional application has been filed before the HRTO, it remains the responsibility of the HRTO to deal with the application and ensure that the human rights issues raised in the application are appropriately resolved and that the applicant has the opportunity to be heard on the merits of the application.

ii) The *Hansard*

78. The legislature's intention for the HRTO to have concurrent jurisdiction with labour arbitrators is also confirmed by statements by then Attorney General Michael Bryant during the second and third reading of Bill 107. Bryant indicated that Bill 107 was a legislative attempt to implement the Cornish Task Force Recommendations. The Cornish Task Force had specifically recommended that the "equality rights tribunal" must have jurisdiction to determine human rights issues alongside labour arbitrators. It warned that the jurisdiction of labour arbitrators should not be exclusive.

79. Bryant described Bill 107 as a belated implementation of recommendations made by the Ontario Human Rights Code Review Task Force, led by Mary Cornish, in 1991-92, and set out in the report *Achieving Equality: A Report on Human Rights Reform.* During second reading, on 8 May 2006, Bryant stated (at pages 3649 and 3651, *Schedule B* attached):

> Ms. Cornish chaired a task force that was commissioned by the NDP government. The report came out in 1992. Basically, silence was the response to that report by that government then and by the subsequent government. <u>That report and its recommendation is in many ways the inspiration for the reforms here today.</u>
>
> …

> The opportunity to make these changes obviously does not come along very often. The NDP government established a task force: the Cornish report. The recommendations were entirely ignored. The previous government chose not to embark on any human rights reform that I am aware of at any time in the eight years in which they were in office. The budgetary decisions made by the previous two governments also speak for themselves.
>
> But this is an opportunity, which does not come along very often, to have that debate about a new model and a new system -- a new system that will see access to justice for Ontarians where now there is none; a new model that will seek to remove the duplication that takes place and increase the transparency in not only what happens when the decision comes out but what happens during the hearing itself. [Emphasis added]

80. During third reading, on 4 December 2006, Bryant stated (at pages 6660 – 6661, *Schedule C* attached):

> We've heard from a wide variety of advocates in our human rights system. We've heard from women's organizations, human rights groups, community activists, cultural organizations, disability groups. We've heard from the academy, from legal clinics, from former human rights commissioners. We've heard from the people who work in the system every day and have been working in the system every day. We've heard from labour organizations. We've heard from individual citizens. We've heard from complainants past and their experiences. Their testimony speaks to the real injustices that come from justice delayed and justice denied that was flowing from the process gridlock that has been in place for so long and so clearly needed change in 1991, as was acknowledged by the NDP government of the day and is being recognized and accepted. We're moving forward with those Cornish task force recommendations in this bill. [Emphasis added]

81. The Cornish Task Force had specifically recommended that the "equality rights tribunal" must have jurisdiction to determine human rights issues alongside labour arbitrators. It warned that the jurisdiction of labour arbitrators should not be exclusive. The issue formed the focus of s. XV of the Report, beginning at p. 98. The report stated at page 102:

> [T]he Task Force is loathe to confine employees and unions exclusively to the grievance and arbitration procedure. They should have the choice of filing a claim of such a fundamental nature at the Equality Rights Tribunal. Effective enforcement of human rights demands no less.

82. The Task Force's 22nd recommendation, at page 103 was that "The union and the employee should be able to file a claim either as a grievance or with the Tribunal."

83. The Task Force went on to discuss the issue of concurrent jurisdiction between labour arbitrators and the "equality rights tribunal" using language similar to what ultimately became s. 45.1 of the *Code*. At page 103, the Task Force stated:

> Where an arbitrator has issued a decision on a human rights claim, the Tribunal, faced with a similar claim filed by an unsuccessful grievor or union,

would determine at the initial hearing whether a hearing into the claim should take place.

…

Such an approach should allow speedy decisions when inappropriate duplication is involved, but allow cases that were not fully or properly dealt with elsewhere to go forward.

Furthermore, such an approach is an incentive to make sure that grievances involving human rights are handled only by individuals having the necessary human rights expertise so that the result is satisfactory to everyone.

…

Recommendation (23):

If a human rights claim under the Code has already been fully dealt with under the Labour Relations process by a certified arbitrator and in accordance with the equality guarantees and remedial relief provided under the Code, a Vice-Chair of the Equality Rights Tribunal may dismiss the claim.

…

84. The Applicant submits that if sections 45 and 45.1 of the *Code* are a legislative attempt to implement the recommendations of the Cornish Task Force, they must be read as requiring concurrent jurisdiction where other decision-makers have been granted exclusive jurisdiction, such as labour arbitrators.

VI. REQUEST FOR AN ORAL HEARING

85. The Applicant submits that the jurisdictional issue in the RODP should be dealt with by oral hearing. The HRTO has discretion under the *Code* and its *Rules of Procedure* to hold an oral hearing on jurisdictional issues. This case warrants a full oral hearing.

86. This is an appropriate case for the HRTO to exercise its wide discretion under section 40 and 41 to do what is fair, just and expeditious in this proceeding. These sections state:

> 40. The Tribunal shall dispose of applications made under this Part by adopting the procedures and practices provided for in its rules or otherwise available to the Tribunal which, in its opinion, offer the best opportunity for a fair, just and expeditious resolution of the merits of the applications.
>
> 41. This Part and the Tribunal rules shall be liberally construed to permit the Tribunal to adopt practices and procedures, including alternatives to traditional adjudicative or adversarial procedures that, in the opinion of the Tribunal, will facilitate fair, just and expeditious resolutions of the merits of the matters before it.

87. The HRTO also has discretion under Rule 1.7 (w) and Rules A.3.1 and A4.1 and A4.2 and 3.5 of the *Rules of Procedure* to depart from or waive Rule 13 and order oral hearing where appropriate:

> **A3 INTERPRETATION**
>
> A3.1 The rules and procedures of the tribunal shall be liberally and purposively interpreted and applied to:
>
> ….
>
> (c) ensure that procedures, orders and directions are proportionate to the importance and complexity of the issues in the proceeding.
>
> **A4 TRIBUNAL POWERS**
>
> A4.1 The tribunal may exercise any of its powers at the request of a party, or on its own initiative, except where otherwise provided.
>
> A4.2 The tribunal may vary or waive the application of any rule or procedure, on its own initiative or on the request of a party, except where to do so is prohibited by legislation or a specific rule.
>
> …
>
> **II) HUMAN RIGHTS TRIBUNAL OF ONTARIO SPECIFIC RULES**
>
> **Powers of the Tribunal**
>
> 1.7 In order to provide for the fair, just and expeditious resolution of any matter before it the Tribunal may:
>
> …
>
> w. take any other action that the Tribunal determines is appropriate.
>
> **Form of Proceeding**
>
> 3.5 The Tribunal may conduct hearings in person, in writing, by telephone, or by other electronic means, as it considers appropriate. However, no Application that is within the jurisdiction of the Tribunal will be finally disposed of without affording the parties an opportunity to make oral submissions in accordance with these Rules.

88. This is an appropriate case for the HRTO to exercise its discretion to hold an oral hearing. This is a case of first instance raising important and complex legal issues.

89. This case has profound potential impacts on the rights of unionized employees to access Ontario's human rights tribunal and enforce their rights under the quasi-constitutional *Code.* An oral hearing will allow counsel the best opportunity to make their submissions and address any questions and comments the HRTO may have with respect to their written submissions and other documents.

VII. CONCLUSION

90. The Applicant submits that her Application is within the HRTO's jurisdiction and should not be dismissed. This Tribunal should not misapply the findings of *Northern Regional*, which were based on a statute that is markedly different from the *Code*, to erase the concurrent jurisdiction it has long held with labour arbitrators over human rights matters. This concurrent jurisdiction is established by a wealth of jurisprudence and supported by both the statutory scheme and legislative history of the *Code*, all of which is consistent with the analysis set out by the SCC in *Northern Regional.*

91. The arbitral process for the Applicant in the case at bar is foreclosed since the union decided not to proceed with the last three grievances and matter did not settle. Only the employer and the union have party status in an arbitration under a collective agreement. Exclusive jurisdiction to labour arbitrators in Ontario could "*render chimerical the rights of individual unionized employees*" as reiterated in *Ontario Human Rights Commission v. Naraine*, 2001 CanLII 21234 (ON CA):

> [61] On the other hand, there may be circumstances where an individual unionized employee finds the arbitral process foreclosed, since the decision whether to proceed with a grievance is the union's and not the employee's. …
>
> [62] In an arbitration under a collective agreement, only the employer and union have party status. The unionized employee's interests are advanced by and through the union, which necessarily decides how the allegations should be represented or defended. Applying *Weber* so as to assign exclusive jurisdiction to labour arbitrators could therefore render chimerical the rights of individual unionized employees. This does not mean, however, that the availability of jurisdictional concurrency should be seen as encouraging 'forum' shopping. The jurisdictional outcome will depend upon the circumstances of each case, including the reasonableness of the union's conduct, the nature of the dispute, and the desirability of finality and consistency of result. [Emphasis added]

92. The Applicant submits that if the Tribunal declines Jurisdiction, the Applicant will be left with the "real deprivation of ultimate remedy" of her outstanding human rights allegations.

93. The Applicant further submits that this matter should not be determined based on written submissions alone. The complexity and importance of the issues at stake in this matter, as well as the extensive scope of the impact that any resulting decision could have on unionized employees in this province, all point to the need for this request to dismiss to proceed by way of an oral hearing.

All of which is respectfully submitted.