CITATION: London District Catholic School Board v. Weilgosh 2023 ONSC 3857
DIVISIONAL COURT FILE NO.: 610/22
DATE: 20240313

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Backhouse, King, Krawchenko JJ.

B E T W E E N:	
LONDON DISTRICT CATHOLIC SCHOOL BOARD and A.P. FERNANDES Applicants	*Christopher A. Sinal* and *Elizabeth M. Traynor*, for the Applicant
- and -	
KAREN WEILGOSH Respondent	*Toby Young* and *Marisa Scotto di Luzio*, for Karen Weilgosh
- and -	
HUMAN RIGHTS TRIBUNAL OF ONTARIO Respondent	*Brian Blumenthal* and *Valerie Crystal*, for Human Rights Tribunal of Ontario
- and -	
ONTARIO HUMAN RIGHTS COMMISSION Respondent	*Matthew Horner*, for Ontario Human Rights Commission
- and -	
ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION (OECTA) Intervenor	*Christopher Perri* and *Kylie Sier*, for Ontario English Catholic Teachers' Association (OECTA)
- and -	
CANADIAN UNION OF PUBLIC EMPLOYEES (CUPE) Intervenor	*Devon Paul* and *Alex Hunsberger*, for Canadian Union of Public Employees (CUPE)
- and -	
EMPOWERMENT COUNCIL, SYSTEMIC ADVOCATES IN ADDICTIONS AND MENTAL HEALTH Intervenor	*Karen Spector*, for Empowerment Council, Systemic Advocates in Addictions and Mental Health

- and -	)	
	)	
PEEL REGIONAL POLICE ASSOCIATION OF ONTARIO	)	*Katie Rowen* and *Emily Home*, for Peel Regional Police Association of Ontario
Intervenor	)	
- and -	)	
	)	
G. MCNULTY	)	*Gary Bennett* and *Sharon Yeboah*, for G. McNulty
Intervenor	)	
- and -	)	
	)	
REGIONAL MUNICIPALITY OF PEEL POLICE SERVICES BOARD	)	*Sonia Regenbogen*, for Regional Municipality of Peel Police Services Board
Intervenor	)	
	)	
	)	
	)	
	)	**HEARD:** June 22, 2023, by videoconference in Toronto

BACKHOUSE J.

REASONS FOR DECISION

Overview

[1] The London District Catholic School Board (the "Applicant") has brought an application for judicial review of an interim decision by the Human Rights Tribunal of Ontario (the "HRTO"), dated October 4, 2022, reported at 2922 HRTO 1194 (the "Decision"). In the Decision, the HRTO held that it has concurrent jurisdiction to adjudicate an application commenced by Karen Weilgosh ("Weilgosh" or "the Respondent"). The Applicant seeks an order quashing the Decision on the grounds that the HRTO lacks jurisdiction. The Applicant asks for a declaration that labour arbitrators appointed under the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A (the "*LRA*") have exclusive jurisdiction to decide human rights complaints arising from disputes under a collective agreement. The Respondents asks the court to dismiss the application.

[2] For the reasons set out below, the application is dismissed.

Background

[3] Karen Weilgosh filed an application with the HRTO against her employer, the Applicant, alleging discrimination and a failure to accommodate. Subsequently, the Supreme Court of Canada issued *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, 462 D.L.R. (4th) 585 [*Horrocks*]. There, the court held that labour arbitrators appointed under labour legislation in Manitoba have exclusive jurisdiction over human rights claims arising from disputes under a collective agreement. Following *Horrocks*, the Applicant raised a preliminary objection before the

HRTO. It argued that the HRTO lacked jurisdiction to hear the application given that Ms. Weilgosh's union had filed grievances on her behalf relating to the same or similar allegations. The HRTO proceeded to a hearing on the interim issue, joining together another proceeding raising the same preliminary objection, *McNulty v. Regional Municipality of Peel Police Service Board* (the "*McNulty* application").

[4] The Supreme Court established a two-part test in *Horrocks* to resolve jurisdictional issues between labour arbitrators and competing statutory tribunals. Under Step 1, the relevant labour legislation should be examined to determine whether it grants a labour arbitrator exclusive jurisdiction, and if so, over what matters arising from a collective agreement. Legislation with a mandatory dispute resolution clause establishes exclusive jurisdiction, subject to clearly expressed legislative intent to the contrary. Under Step 2, the question is whether the dispute falls within the scope of the labour arbitrator's jurisdiction.[1]

Decision under Review

[5] In the Decision, the HRTO resolved the preliminary issue under Step 1 of the test. It determined that labour arbitrators appointed under both the *LRA* and the *Police Services Act*, R.S.O. 1990, c. P.15 (the "*PSA*") have exclusive jurisdiction to decide claims of discrimination and harassment falling within the scope of a collective agreement. It reached this conclusion based on the mandatory dispute resolution clause under s. 48 of the *LRA* and, in the absence of an analogous provision under the *PSA*, appellate case law.[2]

[6] The HRTO went on to find, as the Supreme Court indicated in *Horrocks*, that this exclusive jurisdiction under both statutes was displaced by a positive expression of legislative intent to establish a regime of concurrent jurisdiction over human rights claims.[3] Applying the Supreme Court's guidance at para. 33 of *Horrocks*, it pointed first to the broad provisions in s. 45 and 45.1 of the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*Ontario Code*" or "*Code*") empowering the HRTO to defer or dismiss complaints if another proceeding has appropriately dealt with it. The HRTO did note that these provisions were more ambiguous than federal human rights legislation and B.C.'s *Human Rights Code*, which the Supreme Court cited in *Horrocks* as examples of statutory schemes disclosing an intent to establish concurrent jurisdiction. Those statutes specifically provide for deferrals where complaints are capable of being dealt with by the grievance process.[4]

[7] The analysis did not end there. *Horrocks* then instructs that where the provisions of a statute may be more ambiguous, but the legislative history plainly shows that the legislature contemplated concurrency, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.[5] The HRTO determined that the "unique legislative history" of the

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[1] *Horrocks*, at para. 39.
[2] Decision, at paras. 10-11 and 19-23.
[3] Decision, at para. 24. See *Horrocks*, at paras. 32 and 39.
[4] Decision, at paras. 35-36. See *Horrocks*, at para. 33, citing *Human Rights Code*, R.S.B.C. 1996, c. 210, at s. 25(1) [*B.C. Code*]; *Canada Labour Code*, R.S.C. 1985, c. L-2, at s. 16(l.1) and s. 98(3); *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, at s. 41(1)(a).
[5] *Horrocks* at para.33 cited in the Decision at para.34.

LRA and the *Ontario Code* more clearly indicated a legislative intent to establish concurrent jurisdiction.

[8] In 2001, the Court of Appeal determined in *Ontario (Human Rights Commission) v. Naraine,* 2001 CanLII 21234 (Ont. C.A.) [*Naraine*] that, following amendments to the *LRA* empowering labour arbitrators to apply the *Ontario Code*, the OHRC's deferral power under the *Ontario Code* signaled an intention to shift from exclusive to concurrent jurisdiction.[6]

[9] The legislature passed major amending legislation to the *Ontario Code* ("Bill 107") that came into effect in 2008. Among other things, Bill 107 removed the gatekeeper role of the OHRC and instead permitted individuals to apply directly to the HRTO. The direct access model remains in place today. Applying the interpretive presumption that the legislature is aware of existing law when it enacts new laws, the HRTO reasoned in the Decision that the legislature knew of *Naraine* when it passed Bill 107. Therefore, it found that the lack of constraints on the HRTO's broad powers under ss. 45 and 45.1 to defer or dismiss complaints appropriately dealt with in other proceedings demonstrates an intent to maintain concurrent jurisdiction.[7]

[10] In the Decision, the HRTO dismissed the requests of the Applicant and the Regional Municipality of Peel Police Services Board to dismiss the applications for lack of jurisdiction.

[11] The Regional Municipality of Peel Police Services Board did not seek judicial review of the Decision in respect of the McNulty application. It is participating as an intervenor.

Issues

[12] The application raises the following issues:

1. Is the application premature, and if so, should the court hear it?
2. What is the standard of review?
3. Was the HRTO's finding that it has concurrent jurisdiction correct or reasonable, as the case may be?

Court's Jurisdiction

[13] The Court has jurisdiction to hear this application pursuant to ss. 2(1) and 6(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

Analysis

Issue #1: Is the application premature, and if so, should the court hear it?

[14] The Applicant concedes the Decision is interlocutory in nature and that courts generally do not exercise their discretion to hear an application until the administrative proceeding is complete,

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[6] Decision, at para. 37, citing *Naraine*, at paras. 59-60.
[7] Decision, at paras. 36-41.

absent exceptional circumstances.[8] The parties submit that there are exceptional circumstances in this case.

Appropriate for court to exercise its discretion to hear this judicial review application

[15] In *Ontario (Community Safety and Correctional Services) v. De Lottinville*,[9] this court exercised its discretion to judicially review an interim decision of the HRTO, finding that the HRTO treated the matter as a "test case" dealing with a significant legal issue, constituted a three-person tribunal and joined applications that raised the same issue.

[16] Similar circumstances arise here. The HRTO treated the preliminary issue as exceptional by:

(a) joining Weilgosh's Application with the McNulty Application for the purposes only of the preliminary issue;

(b) assigning case management of the preliminary issue to the HRTO's Chair; and,

(c) granting intervenor status to four organizations, in addition to the OHRC being added as a party.

[17] The Decision has broad implications for human rights disputes arising between unionized employers and employees throughout the province. Delaying this application until the conclusion of the hearing on the merits, which does not depend on any evidence or law relevant to the jurisdictional issue, will result in uncertainty for employers, employees and unions. This is an appropriate case for this court to exercise its discretion to hear this judicial review.

Issue #2: What is the standard of review?

[18] The Applicant submits the presumptive standard of reasonableness is rebutted for two reasons. First, the application concerns a question of the jurisdictional boundaries between two administrative bodies. The Supreme Court applied a correctness standard in *Horrocks* for a virtually identical question. Second, the question raised is of central importance to a legal system as a whole, given its broad implications for any future applications to the HRTO brought by unionized employees.

[19] The Respondents Weilgosh and OHRC agree with the Applicant on the first point and submit that the presumption of reasonableness is rebutted. However, they disagree that the question raised is one of central importance to the legal system as a whole. They submit that while involving a dispute that is of "wider public concern, it does not rise to the level of having an impact on the administration of justice as a whole that requires safeguarding consistency in the fundamental legal order of Canada.[10]

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[8] See e.g., *Briggs v. Toronto Police Services Board*, 2017 ONSC 1591 (Div. Ct.), at para. 19.

[9] *Ontario (Community Safety and Correctional Services) v. De Lottinville,* 2015 ONSC 3085 (Div. Ct.), at paras. 65-66.

[10] *McLean v. British Columbia (Securities Commission)* 2013 SCC 67; *Canada Human Rights Commission v. Canada (AG)*, 2018 SCC 31, paras.42-43; *Canada (Canadian Human Rights Commission) v. Canada (AG)*, 2011 SCC 53,

[20] The HRTO submits that the standard of review is reasonableness. It argues that the presumption of reasonableness is not always rebutted for questions of jurisdiction between two or more administrative bodies unless there is an operational conflict. The HRTO argues that there is no conflict or incompatibility in this case since we are dealing with concurrent jurisdiction. It points out that in *Horrocks*, there was no legislated standard of review and therefore the Supreme Court's finding on standard of review is not dispositive on the issue for this application. The HRTO agrees with Weilgosh and OHRC that the question raised is not one of central importance to the legal system as a whole either since it is statute- and province-specific. Finally, the HRTO argues that something more is required than just the three rule of law questions in order to rebut a legislated (as opposed to a presumptive) standard of review, like the one under s. 45.8 of the *Ontario Code* ("patently unreasonable" which has been interpreted by the courts post-*Vavilov* as "reasonable"). It argues that to rule otherwise conflicts with *Vavilov*'s strong endorsement of respect for legislative intent.

Correctness is the appropriate standard of review

[21] In *Horrocks*, at paragraph 7 of the Majority Decision, the Court stated:

> Decisions concerning the jurisdictional lines between two or more administrative bodies must be correct (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 53). This standard safeguards the rule of law, which "requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another" (para. 64). It also fosters predictability, finality and certainty in the law (*ibid.*).

[22] The Court in *Horrocks* gave no consideration to and did not rely on there being no legislated standard of review in Manitoba's *Human Rights Code*[11]. Instead, it determined that correctness was the appropriate standard of review based on the matter concerning the jurisdictional boundaries between two administrative bodies. In view of the Supreme Court's application of the correctness standard in *Horrocks* for a virtually identical question[12], the correctness standard is the appropriate standard of review.

Issue #3: Is the HRTO's finding that it has concurrent jurisdiction incorrect?

Applicant's Position

[23] The Applicant submits that the HRTO erred in finding that it has concurrent jurisdiction. Given the mandatory dispute resolution clause of the *LRA*, the only way for labour arbitrators' exclusive jurisdiction to have been displaced by concurrent jurisdiction is where there is an "express displacement" in one of the three ways set out by the Supreme Court at para. 33 of *Horrocks*. The Applicant argues that the deferral and dismissal powers under s. 45 do not explicitly refer to the grievance process, unlike the *B.C. Code* and federal human rights legislation cited in *Horrocks*. Therefore, these provisions cannot be taken to be a statutory scheme disclosing an

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paras.23-27;*Canada (Minister of Citizenship and Immigration) v. Vavilov ("Vavilov")*, 2019 SCC 65, paras. 17, 58-62.

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

[12] *Horrocks*, at paras.8-9.

intention to displace labour arbitrators' exclusive jurisdiction. Neither does the legislative history of the *Code* plainly reveal a legislative intent to displace exclusive jurisdiction.

[24] The Applicant further submits that the HRTO's reliance on *Naraine* is misplaced as *Horrocks* undermines its reasoning with respect to the quasi-constitutional status of the *Ontario Code* and access to justice as a policy rationale for concurrent jurisdiction.

[25] The Applicant also argues that the HRTO inverted the test from *Horrocks*. Once the HRTO determined there was a mandatory dispute resolution clause, the labour arbitrator's exclusive jurisdiction was established, absent clear legislative intent to the contrary. Instead of looking for evidence of legislative intent to displace exclusive jurisdiction, the Applicant submits that the HRTO incorrectly treated its task as looking for evidence of an intent to displace concurrent jurisdiction.

Respondent Karen Weilgosh's Position

[26] Weilgosh submits that the Decision is both correct and reasonable. *Horrocks* only requires "some positive expression of the legislature's will"[13] to find concurrent jurisdiction where labour legislation provides for a mandatory dispute resolution clause. The Supreme Court cited the deferral provisions in the *B.C. Code* and federal legislation as examples of statutory schemes disclosing an intent to displace exclusive jurisdiction. It did not, however, establish a rule that such provisions must specifically reference grievance proceedings or arbitrations. The Applicant's interpretation is thus unduly narrow.

[27] Weilgosh submits that in any case, the HRTO's rules, its past decisions and the modern principle of statutory interpretation dictate that the reference to "proceedings" under s. 45.1 of the *Code* includes grievance and arbitration proceedings. The HRTO's interpretation of the *Code*'s legislative history is sufficient on its own to demonstrate a legislative intent to displace exclusive jurisdiction. The continuity the HRTO highlighted in the human rights adjudication regime before and after Bill 107 was used to support its reasoning that the legislature deliberately chose not to remove concurrent jurisdiction.

[28] Weilgosh argues that the HRTO's reliance on *Naraine* as an intrinsic part of this analysis is not misplaced. Even if *Horrocks* requires abandoning certain indicia of concurrent jurisdiction examined in *Naraine*, the Court of Appeal's interpretation of the deferral powers under the *Ontario Code* as it existed at the time, in light of the amendments to the *LRA*, remains good law.

Position of the Respondent OHRC

[29] The OHRC submits that nothing in Bill 107 or the extrinsic evidence relating to it suggests a departure from the existing regime of concurrent jurisdiction identified in *Naraine*, which remains good law.

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[13] *Horrocks* at para. 33.

Position of the Intervenors

[30] The Intervenors, other than Regional Municipality of Peel Police Services Board, support the Decision for the reasons articulated by the Respondents. They submit that the HRTO's finding that it has concurrent jurisdiction is correct.

[31] The Regional Municipality of Peel Police Services Board supports the Applicant's position seeking to have the Decision quashed.

The HRTO's finding that it has concurrent jurisdiction is correct

[32] In *Horrocks*, the Supreme Court held that Manitoba's *Human Rights Code*[14] *(*the *"Manitoba Code")* did not carve out concurrent jurisdiction for human rights adjudicators appointed under that statute and that only labour arbitrators have jurisdiction to adjudicate claims of discrimination falling within the scope of a collective agreement in Manitoba. The relevant sections of the *Manitoba Code* considered in *Horrocks* were s.22(1) and ss.26 and 29(3). Section 22(1) provides that any person may file a complaint alleging that another person has contravened the *Code* and ss.26 and 29(3) direct the Commission to investigate complaints and where appropriate, to request the designation of an adjudicator to hear the complaint. The *Manitoba Code* did not contain similar provisions to the *Ontario Code*'s ss. 45 and 45.1 to defer or dismiss complaints appropriately dealt with in other proceedings.

The *Horrocks* Legal Framework

[33] *Horrocks* requires that, first, the relevant legislation must be examined to determine whether it grants the arbitrator exclusive jurisdiction and, if so, over what matters. Here, there is no dispute that i) the *LRA* has a mandatory dispute resolution clause;[15] ii) that an arbitrator empowered under that clause has exclusive jurisdiction to decide all disputes arising from the collective agreement;[16] and iii) that the Weilgosh Application is a human rights claim of discrimination that arises from the collective agreement.

[34] *Horrocks* then instructs, and the Decision noted, that an arbitrator therefore has exclusive jurisdiction to decide all disputes arising from the collective agreement, subject to clearly expressed legislative intent to the contrary[17]. At paragraph 34 of its Decision, the HRTO quotes *Horrocks* at paragraph 33:

> [33] .... [T]he 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

[14] The *Human Rights Code*, C.C.S.M., c.H175.
[15] *LRA 1995*, s. 48(1).
[16] HRTO Record of Proceedings, OECTA Collective Agreement.
[17] Decision, para. 33 (emphasis added in the Decision).

> 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.

[35] *Horrocks* is clear that concurrent jurisdiction over human rights matters between labour arbitrators and human rights adjudicators requires "some positive expression of the legislature's will". *Horrocks* is also clear that the use of the specific language of "concurrent jurisdiction" is not required and that a competing "statutory scheme may disclose that intention."[18]

[36] Regarding "some positive expression of the legislature's will", the *Horrocks* majority provided examples of legislative schemes – including the *B.C. Code* and the *Canadian Human Rights Act* - that reflected a legislative intent for concurrent jurisdiction. In these two examples the statutory schemes explicitly contemplate that the deferral powers extend to disputes that could be subject to a grievance under a collective agreement.[19]

Ontario Code Legislative Framework

[37] The deferral and dismissal powers in the case of the *Ontario Code,* are in ss. 45 and 45.1:

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

[38] The applicable Tribunal rules are:

Rule 14:

> 14.1 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.

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[18] *Horrocks*, para.34.

[19] *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 25; *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 41 and 42.

> 14.2 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....
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> 14.3 Where an Application was deferred pending the outcome of another legal proceeding, a request to proceed under Rule 14.3 must be filed no later than 60 days after the conclusion of the other proceeding, must set out the date the other legal proceeding concluded and include a copy of the decision or order in the other proceeding, if any. [Emphasis added]

In addition, Rule 8.2.1, which relates to a response to an application, provides:

> Where a Respondent alleges the issues in dispute are the subject of an ongoing grievance or arbitration brought pursuant to a collective agreement, the Respondent need not respond to the allegations in the Application but must provide its contact information, attach a copy of the document which commenced the grievance, confirm that the grievance or arbitration is ongoing and include argument in support of its position that the Application should be deferred pending the conclusion of the grievance or arbitration. The Tribunal may direct a Respondent to file a complete Response where the Tribunal considers it appropriate. [emphasis added]

Finally, Rule 11 deals with requests to intervene in HRTO applications and sets out specific subrules to address interventions by bargaining agents:

> 11.14 The bargaining agent for an applicant who has filed an Application about his or her employment may intervene in the Application by filing a Notice of Intervention by Bargaining Agent in Form 28.
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> 11.15 A request to remove a bargaining agent as an intervenor shall be made as a Request for Order During Proceedings in accordance with Rule 19.

Recent Decisions in other jurisdictions

[39] Two recent decisions in other jurisdictions interpreted their respective provincial human rights legislation with statutory language in their deferral and dismissal powers virtually identical to that in the *Ontario Code.* Both decisions found the requisite legislative intent for concurrent jurisdiction.

[40] In *Blackie v Chief of Police, Calgary Police Service*,[20] the Alberta Human Rights Commission (the "AHRC") held that the *Alberta Human Rights Act* signalled legislative intent for concurrent jurisdiction with labour arbitrators based exclusively on the AHRC's authority to defer a human rights complaint pending another process:

> [21] The Act demonstrates legislative intent for concurrent jurisdiction. Under the new sections 21(1)(a)(iv) and 21(2)(a)(iii), the Director may dismiss a complaint that "is being, has been, will be or should be more appropriately dealt with in another forum or under another Act". If the Director can accept a complaint that may be addressed through a grievance process and then use her discretion to dismiss it, she must have concurrent jurisdiction. Similarly, in ss. 21(2)(b) the Director may accept a complaint pending the outcome of the matter in another forum. This is the deferral authority referenced in *Horrocks*. All three of these subsections suggest that there is concurrent jurisdiction. The deferral authority existed prior to the changes in the *Act* as well.

[41] In *Robson v University of New Brunswick*,[21] the New Brunswick Human Rights Commission ("NBHRC") argued that the *New Brunswick Human Rights Act* ("*NBHRA*") expressed a legislative intent to confer concurrent jurisdiction over human rights matters. Paragraph 19(2)(d) of the *NBHRA*, stated:

> 19(2) The Commission may dismiss a complaint at any stage of the proceedings, in whole or in part, if the Commission in its discretion determines
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> > (d) the complaint has already been dealt with in another proceeding, . . .

[42] The New Brunswick Labour and Employment Board ("NBLEB") agreed with the NBHRC:

> 101. The Board agrees. Subsection 55(1) of the *Industrial Relations Act* expressly gives arbitrators jurisdiction over human rights "disputes which expressly or inferentially arise out of the collective agreement" (*Horrocks*, paragraph 21).
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> 102. In the Board's view, this language is sufficiently similar with the language in the British Columbia and federal human rights statutes to come within paragraph 33 of *Horrocks*. Although paragraph 19(2)(d) does not expressly refer to grievances or collective agreements, the *Human Rights Act* does include definitions of "employers' association" and "trade union" (section 2) which are entities also recognized under the *Industrial Relations Act*. Also, paragraph 4(3)(c) of the *Human Rights Act* prohibits a

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[20] *Blackie v Chief of Police, Calgary Police Service*, 2022 AHRC 52, [*Blackie*], paras. 18-25 (May 6, 2022).
[21] *Robson v. University of New Brunswick*, 2022 CanLII 40804 (NB LEB), paras. 101-103 (April 25, 2022).

> trade union or employer's organization from discriminating "against any person in respect of his or her employment by an employer". This would, in the Board's view, encompass an allegation that a trade union negotiated with an employer to include a discriminatory term of employment in a collective agreement.

[43] Neither the AHRC nor the NBLEB substantively relied on the legislative history or evolution of their respective human rights statutes. Both of the interpretive exercises were exclusively anchored on their respective statutes' deferral and dismissal powers, powers also contained in sections 45 and 45.1 of the *Ontario Code*.

[44] *Horrocks* requires a jurisdiction-specific interpretation of human rights legislation. The Court in *Horrocks* did not hold that a particular legislative phrase or wording was necessary to establish a human rights adjudicator's concurrent jurisdiction, but found that in some cases, the provisions of a statute may be "more ambiguous", but the legislative history will plainly show that the legislature contemplated concurrency."[22]

[45] The Decision did not go so far as the *Blackie* and *Robson* decisions. It correctly found that the provisions of the *Ontario Code* are less clear than the examples given in *Horrocks* of British Columbia and federal statutes but then went on to consider the legislative history and found that it plainly shows that the Legislature contemplated concurrence.

[46] In reaching its conclusion that the Legislature contemplated concurrence, the HRTO relied on a number of principles of statutory interpretation. It is not argued that it was incorrect in any way in doing so. It went on to consider "Ontario's scheme [which] has a unique legislative history which the Supreme Court signalled is important in discerning legislative intent with respect to concurrent versus exclusive arbitral jurisdiction."[23]

[47] The Decision noted that concurrent jurisdiction has been upheld by the Ontario Court of Appeal. It referenced the leading such case, *Ontario (Human Rights Commission) v. Naraine,* 2001 CanLII 21234 (ON CA) [*Naraine*], citing the following paragraphs in relation to the *Ontario Code* as it read at the time:

> [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 in the Decision).

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[22] *Horrocks* at paragraph 33.
[23]Decision at para. 36.

> [60] The underlying goal of these symmetrical amendments is to avoid the gratuitous bifurcation or proliferation of proceedings, especially when the arbitrable grievance and the human rights complaint emerge seamlessly from the same factual matrix. That goal was also, I think, at the heart of *Weber*. In my view, *Weber* stands for the proposition that when several related issues emanate from a workplace dispute, they should all be heard by one adjudicator to the extent jurisdictionally possible, so that inconsistent results and remedies, such as those in Mr. Naraine's case, may be avoided.

[48] In reaching its decision the Court in *Naraine* analyzed the legislative intent and history of the *LRA* and the *Ontario Code*. In setting out the legislative history of the *Ontario Code*, the Court highlighted the fact that prior to 1992, the law in Ontario conferred exclusive jurisdiction on human rights organizations (the OHRC and adjudicators named under the *Ontario Code*) to consider discrimination claims arising out of a collective agreement.[24] As the Court held, 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.[25]

[49] The Court in *Naraine*, went on to consider the Ontario Legislature's "symmetrical" amendments to the *LRA* and the *Ontario Code*.[26] Those amendments extended the jurisdiction of labour arbitrators to interpret and apply the *Ontario Code* and amended it to provide the OHRC with the power to not deal with complaints if they were more appropriately dealt with in another venue.[27]

[50] After analyzing the history and wording of those amendments, the Court in *Naraine* concluded that they reflected a legislative intention to create concurrent "synchronized" jurisdiction between the OHRC and labour arbitrators. The Court specifically linked its finding of this intent to the OHRC's power to defer or not deal with complaints in certain circumstances.

[51] In reaching this conclusion, the Court in *Naraine* did not ground the OHRC's concurrent jurisdiction in any specific *Ontario Code* language referring to labour arbitrators or the grievance process. S.34(a) (a) of the *Code* did not contain that specific language[28]. Instead, as later contemplated by the Supreme Court in *Horrocks*, the Court in *Naraine* relied on the specific legislative history of the *Ontario Code* including the history of OHRC jurisdiction over such

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[24] *Naraine*, at para.55.
[25] *Naraine*, at para.52.
[26] *Naraine*, at para.60.
[27] *Labour Relations and Employment Statute Law Amendment Act*, 1992, SO 1992, c.21 ("Bill 40"), *An Act to Revise and Extend Protection of Human Rights in Ontario*, 1981, SO 1981, c.53 ("Bill 7").
[28] The OHRC had authority under then existing S.34(1)(a) 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.)

matters and the "symmetrical amendments to the *LRA* and the *Code* conferring "synchronized" powers on the two statutory decision makers.[29]

No error in relying on the Court of Appeal's decision in Naraine

[52] In support of its argument that the Decision was incorrect the Applicant alleges that the HRTO erred in relying on the Court of Appeal's decision in *Naraine* in assessing the legislative intent of the *Code* because its reasoning was undermined with respect to the quasi-constitutional status of the *Code* and access to justice as a policy rationale for concurrent jurisdiction.

[53] The *Horrocks* majority made two substantive references to *Naraine*. First the *Horrocks* majority held that a primacy provision in a human rights statute[30] was ousted by the inclusion of a mandatory dispute resolution clause in a labour relations statute (e.g., section 48(1) of the *LRA*).[31]

[54] Second, the *Horrocks* majority addressed an argument from the MHRC that an arbitrator's exclusive jurisdiction with respect to human rights issues raised a public policy access to justice concern - namely, that because access to labour arbitration is union controlled, an employee may be left without recourse to either arbitration or the MHRC. The *Horrocks* majority acknowledged that employees could be left without a forum for resolution. However, this state of affairs could be "...undone by clearly expressed legislative intent to the contrary."[32] The question remains in this case whether the statutory scheme of the *Ontario Code* displaces the exclusive jurisdiction of a labour arbitrator under the *LRA*.

[55] To the extent that the Court of Appeal in *Naraine* may have relied on the primacy clause of the *Ontario Code* or access to justice concerns in its analysis, the fact remains that *Naraine* is legally anchored in its consideration of the section 34(1)(a) deferral power in the *Ontario Code* and the 1992 *LRA* amendments. The Court in *Naraine* found that the legislative history of the pre-Bill 107 *Ontario Code* demonstrates legislative intent for the OHRC to have concurrent jurisdiction with labour arbitrators over human right claims arising out of a collective agreement.

[56] At paragraphs 41 and 42 of its Decision, the HRTO found:

> [41] In our view, the broad language used in the *Code* signals a legislative intent that the Tribunal maintains concurrent jurisdiction. Despite being presumptively aware of the decisions in *Weber* and *Naraine*, and the fact that the Tribunal had continued to hear cases arising from collective agreements, the Legislature did not take steps to limit or narrow the deferral and dismissal powers in sections 45 and 45.1. This signals a clear intent to permit Tribunal decision-makers the power to decide whether to defer applications that could be decided elsewhere, including by arbitration, by grievance, by review or otherwise. The broad discretion provided to Tribunal decision-makers indicates a positive expression of the Legislature to

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[29] *Naraine*, at para.60.
[30] For example, *Ontario Code*, section 47(2).
[31] *Horrocks*, para.34; *Naraine* at para.47, noted that human rights legislation could only be overridden by express and unequivocal legislative language.
[32] *Horrocks*, at paras.36-38.

> maintain concurrent jurisdiction, thereby displacing labour arbitration as the sole forum for disputes arising from a collective agreement.
>
> [42] By way of contrast, where the Legislature chose to limit the scope of the Tribunal's jurisdiction with respect to other decision-makers, it did so expressly. For example, section 34(11) of the *Code* was enacted in order to expressly remove the jurisdiction of the Tribunal where a person has brought civil proceedings seeking an order under section 46.1. No such express removal of jurisdiction was enacted with respect to proceedings that could be heard by labour arbitrators.

[57] The Decision correctly placed no emphasis on access to justice considerations or the primacy clause in its reliance on *Naraine* as good law. Rather, the Decision referred to *Naraine* to find that the law in Ontario established concurrent jurisdiction prior to Bill 107 and in the context of determining the legislative intent of the 1992 amendments to the *LRA* and the section 34(1)(a) deferral power of the pre-Bill 107 *Ontario Code*.[33] I find no error in the HRTO's reliance on *Naraine*.

No error in finding concurrent jurisdiction despite s.45 and 45.1 of the Ontario Code not specifically referencing grievance arbitrations

[58] The Applicant asserts that the HRTO erred in finding that concurrency existed notwithstanding the lack of any specific reference to grievance or arbitration proceedings in its deferral (s.45) and dismissal (s.45.1) powers.

[59] The *Horrocks* decision cannot be properly understood to preclude a finding of concurrent jurisdiction because the *Ontario Code* makes no specific reference to grievance or arbitration proceedings in its deferral (s.45) and dismissal (s.45.1) powers. This argument ignores the express direction of the Court in *Horrocks* that legislative intent to confer jurisdiction can be inferred from language that is more ambiguous than an express reference to grievance arbitrations.[34]

[60] The Applicant provides no argument to suggest that the word "proceeding" should or could be interpreted to exclude a grievance arbitration. Referring to a grievance arbitration as a "proceeding" is common before human rights tribunals labour arbitrators, and this court.

[61] HRTO Rules 8.2.1, 11 and 14 all support an interpretation that the HRTO, in exercising its powers to make its *Rules of Procedure* under Rule 43(1) of the *Code*, itself understood that the law in Ontario included grievances and arbitrations as proceedings within the scope of its broad deferral and other procedural powers. There is nothing in section 45, Rule 14 or elsewhere that manifests any indication that grievance or arbitration proceedings are not subject to the HRTO's deferral powers. There are no express exceptions to the HRTO's deferral powers.

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[33] HRTO Decision, at paras.37,41.
[34] *Horrocks*, at para.33.

[62] Rule 14.4 refers to "other legal proceedings". The HRTO has consistently interpreted section 45 to apply to many types of legal proceedings, including various administrative bodies,[35] and criminal proceedings.[36] The Divisional Court has also confirmed that a "proceeding" may apply to a wide range of administrative decision-making fora.[37]

[63] The HRTO has also consistently recognized its concurrent jurisdiction over unionized applicants.[38] As a general rule, the HRTO defers applications where there are ongoing grievance or arbitration proceedings. The HRTO jurisprudence confirms that various factors may apply in the exercise of its discretion to defer, including the nature of the other proceeding.[39] The HRTO typically exercises its discretion to defer in light of arbitration proceedings in recognition of the well-established law that a grievance arbitrator has 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.[40]

The Decision did not invert the test under Horrocks

[64] The Applicant submits that instead of looking for evidence of legislative intent to displace the exclusive jurisdiction of labour arbitrators, the HRTO incorrectly treated its task as looking for evidence of an intent to displace concurrent jurisdiction.

[65] I am not persuaded by this argument. The continuity the HRTO highlighted in the human rights adjudication regime before and after Bill 107 supports its reasoning that the legislature deliberately chose not to remove concurrent jurisdiction. The *Code*'s legislative history demonstrates a legislative intent to displace exclusive jurisdiction.

[66] In considering the broad language used in the *Ontario Code*, its statutory scheme and the broader legal context of the legislative and jurisprudential history of the *Ontario Code,* the HRTO correctly applied *Horrocks* to find concurrent jurisdiction. In the words of *Horrocks*, in these circumstances, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.[41]

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[35] *Shakir v. Kidron Valley Rehab*, 2010 HRTO 1310 (professional discipline proceeding); *Nagy v. University of Ottawa,* 2020 HRTO 544 (University senate committee proceeding); *Flanagan v. Workplace Safety and Insurance Board,* 2018 HRTO 154 (WSIB proceeding); *Khan v. 1742248 Ontario Inc.,* 2014 HRTO 1008 (*Employment Insurance Act* proceeding); *Ufoegbune v. Manza et al.,* 2019 HRTO 796 (Landlord and Tenant Board proceeding); *Freidin v. Ministry of Community and Social Services*, 2018 HRTO 29 (Social Benefits Tribunal proceeding); and *Howden v. Ontario (Transportation)*, 2010 HRTO 515 (License Appeal Tribunal proceeding).

[36] *Miller v. Bernard*, 2010 HRTO 1488, at paras. 9-11; *MT v. Sohail Aslam Pharmacy Ltd.*, 2020 HRTO 419 (criminal court proceedings).

[37] *De Lottinville*, 2015 ONSC 3085, at para. 71 (including labour arbitrators).

[38] *Baghdasserians*, para. 20; *Blackman v. Ontario*, 2009 HRTO 970, paras.5-7; *Solcan v. Kitchener (City)*, 2011 HRTO 2205, para. 44; *Amorim v. Toronto Transit Commission*, 2023 HRTO 677, para. 7.

[39] *Baghdasserians*, at para. 19; *SS v. Durham District School Board*, 2023 HRTO 404, at para. 12.

[40] *McKenzie v. Hamilton (City)*, 2020 HRTO 397, at para. 5; *Elefteratos v. Toronto District School Board*, 2020 HRTO 313, at para 19, *Risen v. Maple Leaf Sports and Entertainment Partnership*, 2020 HRTO 120, at para. 7; *Melville*, 2012 HRTO 22, at para. 11. See also *Tessier v. North Bay (City),* 2018 HRTO 1097, at para. 13, *Clark-Lernout v. St. Mary's General Hospital*, 2018 HRTO 1030, at para. 9.

[41] *Horrocks* at para 33.

Conclusion

[67] The application is dismissed.

Costs

[68] The Applicant submits that given the public interest in this matter, there should be no costs or alternatively, costs in the range of $2,000 to $5,000.

[69] Counsel for Karen Weilgosh requests costs of $5,000.

[70] The HRTO and OHRC do not request costs and ask that none be awarded against them.

[71] As the successful party, Karen Weilgosh is entitled to costs fixed in the amount of $5,000.

Backhouse J.

I agree

King J.

I agree

Krawchenko J.

Released: March 13, 2024

CITATION: London District Catholic School Board v. Weilgosh, 2023 ONSC 3857
DIVISIONAL COURT FILE NO.: 610/22
DATE: 20240313

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Backhouse, King, Krawchenko JJ.

B E T W E E N:

LONDON DISTRICT CATHOLIC SCHOOL BOARD AND A.P. FERNANDES

and -

KAREN WEILGOSH

- and –

HUMAN RIGHTS TRIBUNAL OF ONTARIO

- and -

ONTARIO HUMAN RIGHTS COMMISSION

- and -

ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION (OECTA)

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES (CUPE)

- and -

EMPOWERMENT COUNCIL, SYSTEMIC ADVOCATES IN ADDICTIONS AND MENTAL HEALTH

- and -

PEEL REGIONAL POLICE ASSOCIATION OF ONTARIO

- and -

G. MCNULTY

- and -

REGIONAL MUNICIPALITY OF PEEL POLICE SERVICES BOARD

REASONS FOR DECISION

Backhouse J.

Released: March 13,2024