

Are there any specificities to Weber's application in Quebec?

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Note: This is a preliminary version of a paper still in progress. It has not been copy edited yet. My apologies for all remaining mistakes.

INTRODUCTION

In the landmark case *Weber v. Ontario Hydro*,¹ the Supreme Court of Canada held that labour arbitration was generally the exclusive jurisdiction to resolve disputes arising from the implementation and interpretation of a collective agreement. Having to decide whether an employee could sue its employer in court on the ground of tort rules and alleged violations of Charter rights, the majority relied on its previous ruling in *St. Anne Nackawick*² – in which it had held that mandatory arbitration clauses in labour statutes deprive the courts of concurrent jurisdiction – to discard both the concurrent model³ and the model of overlapping jurisdictions,⁴ and conclude that the action could not be tried, since it arose under the collective agreement. For the majority of the Court, the question of jurisdiction could not depend on the way the parties had legally framed their dispute. Instead, the central question was “whether the dispute or difference between the parties arises out of the collective agreement.”⁵ In rendering this decision, the Court clearly favoured a one-stop shop to decide all aspects of a single dispute arising in the unionised workplace, thereby avoiding the multiplication of recourses and the possibility of conflicting rulings.

In Quebec, as in other Canadian provinces, delineating the frontiers of arbitral jurisdiction after *Weber* has proved to be a challenge in many instances. The exclusive jurisdiction model for labour arbitration put forward in *Weber* came out from a case where the competing jurisdictions

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¹ [1995] 2 S.C.R. 929. Hereinafter : *Weber*.

² *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704.

³ Under such a model, « [w]here an action is recognized by the common law or by statute, it may proceed, notwithstanding that it arises in the employment context.” *Weber*, par. 39

⁴ « On this approach, notwithstanding that the facts of the dispute arise out of the collective agreement, a court action may be brought if it raises issues which go beyond the traditional subject matter of labour law.” *Weber*, par. 47

⁵ *Weber*, para. 51.

at play where the arbitrator on the one hand and the general courts on the other hand. Still, nowadays, as a result of the intervention of the legislatures in the field of labour law, statutory rights are the source of working conditions for unionised workers in as much as the collective bargaining agreement itself and many specialized tribunals have jurisdiction in matters relating to labour relations. Hence, the binary divide between labour arbitration and general courts does not fully grasp the complex architecture of modern labour law and *Weber* left many questions somewhat unanswered.

One problem for arbitral jurisdiction lies in the need for a proper articulation between different sources of labour law, primarily the collective agreement and statutory rights. In *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*,⁶ the Supreme Court tackled this issue when it determined that human rights and employment related statutory rights were implicitly incorporated into every collective agreement. In Quebec, in part because of the civil law tradition applicable in the province for matters of private law, the ruling of the Court raised specific questions that were addressed in two subsequent judgments of the Canadian highest tribunal: *Isidore Garon*⁷ and *SFPQ*.⁸ While these have been seminal cases in Quebec, they did not have significant repercussions in the rest of Canada. Yet, the end result of these cases is considerable since it is generally considered in the province that the “implicit incorporation theory” put forward in *Parry Sound* has been discarded in favour of the “hierarchy of relevant sources of labour law approach” established in *SFPQ*. This evolution and its implications will be analysed in the first part of this paper.

A second important issue for arbitral jurisdiction is the identification of the appropriate forum to adjudicate an employment related complaint arising in a unionized workplace when the possible alternative to arbitration is a specialized statutory tribunal. In *Morin*,⁹ C.J. McLachlin, writing for the majority of the Court, revisited her ruling in *Weber* and stressed that there was no *a priori* exclusive arbitral jurisdiction in cases of apparent conflicts of jurisdiction between two

⁶ [2003] 2 S.C.R. 157. Hereinafter: *Parry Sound*.

⁷ *Isidore Garon ltée v. Tremblay; Fillion et Frères (1976) inc. v. Syndicat national des employés de garage du Québec inc.*, [2006] 2 S.C.R. 27. Hereinafter : *Isidore Garon*.

⁸ *Syndicat de la fonction publique du Québec v. Québec (Attorney General)*, [2010] 2 S.C.R. 261. Hereinafter : *SFPQ*.

⁹ *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Québec (Procureur général)*, [2004] 2 S.C.R. 185 (hereinafter : *Morin*).

specialized tribunals. Following the Supreme Court judgment in this case, tribunals and review courts in Canada have generally recognised a concurring jurisdiction for labour arbitration and human rights tribunals when it comes to adjudicating the human rights claims of unionized employees. In Quebec, however, a more restrictive approach has been adopted and the jurisdiction of the arbitrator is still the privilege and exclusive one when the dispute is related to the interpretation and application of a collective agreement. The second part of this paper analyses the possible reasons underlying Quebec's peculiarity in this regard.

I. From the implicit content of the collective agreement to the hierarchy of relevant sources of labour law

The boundaries of labour arbitration are intrinsically linked with the content of the collective agreement. Indeed, the arbitrators' usual jurisdiction is to solve disputes falling from the implementation or interpretation of the latter. Still, as mentioned in the introduction, several employment standards applicable to unionized employees are established by statutes and are not the product of the collective bargaining process. How "permeable" is the collective agreement to these outside norms?¹⁰ To which extent does a labour arbitrator have jurisdiction over cases contesting the apparent violation of such standards? In the last decade, the Supreme Court has been profoundly divided on these issues in a number of cases, of which the most important in the Quebec context are *Parry Sound*, *Isidore Garon* and *SFPQ*. The split decisions of the Court in all these cases can be regarded as a conflict between two visions of the collective labour relations regime.¹¹ One that aims to preserve a traditional vision of the collective autonomy of the parties, that favours the respect for the parties' will as expressed in the collective agreement. The other one that recognizes the plurality of labour law sources and tries to find ways to articulate the relationship between these different sources within the collective labour relations schemes, including labour arbitration.

¹⁰ This expression is taken from Denis Nadeau, « La perméabilité du droit au sein des rapports collectifs du travail et la compétence arbitrale : nouveau regard sur la valse-hésitation de la Cour suprême du Canada », (2010) 69 *Revue du Barreau* 221.

¹¹ *Ibid.*, p. 223.

A) Parry Sound and the implicit incorporation of human rights and employment-related statutory rights into the collective agreement

The decision of the Supreme Court in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*,¹² in which the majority held that “substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction”,¹³ may have had a similar effect on the extension of arbitral jurisdiction than the one in *Weber*. Since *McLeod v. Egan*¹⁴ in 1975, it was clear that an arbitrator had the power to apply statutes not only in the course of the interpretation of the collective agreement, but also to ensure respect for employees’ statutory rights.¹⁵ In *Parry Sound*, the majority went further than it had ever done before in affirming the “implicit incorporation” of these rights into collective agreements.

The main question in this case originating from Ontario was to determine whether the grievance of a probationary employee who had been discharged soon after her return from a maternity leave was arbitrable considering the provision of the applicable collective agreement excluding the discharge of a probationary employee from the issues that could be submitted to the grievance and arbitration procedures. Since the agreement did not expressly prohibit discrimination and gave the employer “sole discretion” to terminate the employment of workers on probation, the union was relying on s. 5 (1) of the Ontario Human Rights Code to challenge the employee’s dismissal. This raised the question whether the grievance was within the ambit of the collective agreement and fell under the arbitration board’s jurisdiction.¹⁶

In giving a positive answer to this question, Iacobucci J., writing for the majority, stated that the management rights of an employer were not only constrained by the explicit provisions of the collective agreement, but also by the employee’s statutory rights:

¹² [2003] 2 S.C.R. 157. Hereinafter: *Parry Sound*.

¹³ *Idem*, para. 28.

¹⁴ [1975] 1 S.C.R. 517.

¹⁵ In Quebec, this is expressly stated in s. 62 of the Labour Code.

¹⁶ Or, as expressed in the majority judgment : “whether or not the substantive rights and obligations of the Human Rights Code are incorporated into each collective agreement over which the Board has jurisdiction”. *Parry Sound*, para. 21.

“A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but his right is circumscribed by the employee’s statutory rights. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract.”¹⁷

As the court underlined, “there are certain rights and obligations that arise irrespective of the parties’ subjective intentions”.¹⁸ In turn, a grievance arbitrator has the power and duty to enforce employment-related statutory rights.

This decision seems in sharp contradiction with the traditional vision of the collective autonomy of the parties on a number of points. First, it limits the ability of the parties to freely determine the terms of their relations as they see fit, since they can no longer exclude human rights or other employment-related statutory norms from their agreement. It also changes the traditional view that a collective bargaining agreement is to be seen as a purely private contract. As affirmed in the majority judgment, the collective agreement has both a private and a public function, which is to ensure “the peaceful resolution of labour disputes.”¹⁹ Most importantly, the implicit incorporation theory changes the *power* of labour arbitrators to apply statutory rights into a *responsibility* to do so.²⁰

The minority judges were inclined to leave greater autonomy to the parties in the definition of the terms of their collective agreement. While they recognised that the collective agreement could not contain a provision contrary to mandatory norms, they considered that the parties had the right to exclude certain categories of employees from the arbitral procedure. In the minority motives, to which LeBel J. concurred, Major J. wrote :

“explicit statutory directions override conflicting provisions of collective agreements, but they do not affect the parties ability to define the limits of their agreement. Parties remain free to exclude certain classes of employees, such as probationary, part-time or temporary employees, from some of the provisions of the agreement, just as they remain free to exclude certain kinds of disputes from the jurisdiction of the arbitrator. They do this by limiting the scope of the grievance procedure on some

¹⁷ *Parry Sound*, para. 28. See also para. 23.

¹⁸ *Parry Sound*, para. 36.

¹⁹ *Parry Sound*, para. 30.

²⁰ *Parry Sound*, para. 40.

matters or acknowledging that a party retains the right to make a unilateral final decision on certain questions.”²¹

For the minority of the court, the arbitral board had no jurisdiction over the grievance, and the Human Rights Commission was the appropriate forum to hear the dispute. As an author noted, this approach restricts the exclusive jurisdiction of the arbitrator to the application and interpretation of the collective agreement as negotiated by the parties and excludes from the arbitral sphere working conditions or work-related protections that originates from statutes.²²

Because of the relatively broad number of statutory standards in Quebec, the decision in *Parry Sound* raised questions about the exact scope of the implicit content of the collective agreement. In the civil law context, the general law in the *Civil Code of Quebec*²³ (*C.C.Q.*) can be viewed as codified statutory law, in the sense that it is established through statutory action, which expresses the explicit will of the legislature. An entire chapter of the *C.C.Q.* is dedicated to the contract of employment. It goes beyond merely establishing a contractual framework, and sets out a number of substantive standards concerning the employment relationship.²⁴ As a result, the parties’ obligations in relation to the contract of employment are in part imposed by the legislature through the general law, rather than being entirely subject to the parties’ private will. Moreover, the preliminary provision of the *C.C.Q.* indicates the nature of the relationship between the codified general law and other laws. While it mentions that the *C.C.Q.* lays down the *jus commune*, the preliminary provision also asserts that the *C.C.Q.* is “the foundation of all other laws, although other laws may complement the Code or make exceptions to it.” Therefore, there is an essential connection between the terms of statutory labour law and those of the *C.C.Q.*” which makes their harmonization necessary: “A conceptual harmonization between the Code and other laws is necessary subject to any particular aims of the latter, which must otherwise show a clear intention to depart from the Code, in order to ensure coherence and stability in the legal

²¹ *Parry Sound*, para. 94

²² Denis Nadeau, « La perméabilité du droit au sein des rapports collectifs du travail et la compétence arbitrale : nouveau regard sur la valse-hésitation de la Cour suprême du Canada », (2010) 69 *Revue du Barreau* 221, 228.

²³ S.Q. 1991, c. 64.

²⁴ For instance, the employer’s obligation to protect the health, safety and dignity of the employee (article 2087 *C.C.Q.*) ; the employee’s obligation to act faithfully and honestly (article 2088 *C.C.Q.*) ; the right to notice of termination (articles 2091 and 2092 *C.C.Q.*) ; the imposition of restrictions on non-competition clauses (articles 2090 and 2095 *C.C.Q.*) ; and the affirmation that a contract of employment is not terminated by alienation of the enterprise (article 2097).

order.”²⁵ Thus, general law principles should be used to complement and interpret statutory labour laws and collective agreements, unless there is a clear legislative intention to disregard them.

The majority judgment in *Parry Sound* led many to believe that the “public order” provisions of the *C.C.Q.* were an implicit part of a collective agreement. But not all adhered to this position and this led to contradicting decisions from labour arbitrators and conflicting judgments from the superior court. The confusion about the new contours of arbitral jurisdiction also came from sharp disagreements on whether some provisions of the *Act Respecting Labour Standards*²⁶ (*ALS*) should be incorporated into the collective agreement. In this case, only a few provisions of the Act are expressly integrated into collective agreement. However, like most employment-related statutes in Quebec, the *ALS* states that its content is a matter of public order, and that any contrary provisions in an individual contract or a collective agreement are void.²⁷

The Supreme Court case in *Isidore Garon* took on the issue of the implicit incorporation of the *C.C.Q.* into collective agreements. The majority answered the question by enunciating a “compatibility test”: if a statutory provision is compatible with the regime of collective labour relations and it is a supplementary or mandatory norm, an arbitrator has the power to apply it. However, the decision did not dissipate the confusion, but added to it: the jurisdiction of the arbitrator seemed even more blurry afterwards since it was not clear what the compatibility test really meant and whether it was relevant only insofar as the *C.C.Q.* was concerned.

*B) Isidore Garon and the compatibility test*²⁸

In *Isidore Garon*, the Supreme Court had to decide whether article 2091 of the *Civil Code of Quebec* requiring reasonable notice on termination of employment was implicitly incorporated

²⁵ P. Verge, « Les lois du travail sous le prisme du nouveau code civil, », in *Le Code civil et les relations de travail* (Québec : Université Laval, Département des relations industrielles, 1993, 79, at p. 13 (our translation).

²⁶ R.S.Q., c. N-1.1.

²⁷ See s. 93 and 94 of the *ALS*. A similar provision can be found in the *Act Respecting Occupational Health and Safety*, R.S.Q., c. S-2.1, s. 4, and in the *Act Respecting Industrial Accidents and Occupational Diseases*, R.S.Q., c. A-3.001, s. 4.

²⁸ This section draws from Renée-Claude Drouin & Gilles Trudeau, « What Does Isidore Garon Mean for Arbitral Jurisdiction in Quebec ? » (2007) 13 *Canadian Labour & Employment Law Journal* 348.

into a collective agreement.²⁹ The case stemmed from the decision of two unrelated employers, Isidore Garon Itée and Fillion et Frères, to close their businesses and dismiss their employees. Both employers gave the notice of termination required by the *A.L.S.*, but the union in each case filed a grievance claiming additional compensation pursuant to the requirement set out in art. 2091 *C.C.Q.* The collective agreement covering the employees of Isidore Garon Itée provided that s. 82 of the *A.L.S.* would apply in the event of a layoff of six month or more. The collective agreement establishing the conditions of employment of employees working for Fillion et Frères was silent on the subject. In both cases the employer brought a preliminary objection to the jurisdiction of an arbitrator to hear grievances alleging violations of the *C.C.Q.* While in both cases, the arbitrators decided they had jurisdiction to hear the case, on judicial review, the Superior Court affirmed the arbitrator's jurisdiction in one of them and quashed the award on the basis that the dispute did not arise from the interpretation or application of the collective agreement in the other. These judgments were rendered before the Supreme Court decision in *Parry Sound*.

The Quebec Court of Appeal heard the Isidore Garon and Fillion appeals at the same time. Relying on *Parry Sound* and on s. 62 of the *Labour Code*,³⁰ which states that a collective agreement “may contain any provision respecting conditions of employment which is not contrary to public order or prohibited by law”, the Court of Appeal held that arts. 2091 and 2092 *C.C.Q.* because of their public order character, were implicitly incorporated into the collective agreements. Thus, the Court of Appeal concluded that the arbitrators had jurisdiction to deal with the grievances.

The Supreme Court of Canada granted the employers' appeal by a 4-3 majority, holding that arts. 2091 and 2092 *C.C.Q.* did not apply to the collective labour law regime. In the majority judgment, Deschamps J. identified two different trends in the case law relevant to the question. The first line of cases, embodied in the *Paquet-MacGavin Toastmaster* judgments, pertains to the

²⁹ Arts. 2091 and 2092, which are relevant for the analysis, read as follow : « 2091. Either party to a contract for an indeterminate term may terminate it by giving notice of termination to the other party.

The notice of termination shall be given in reasonable time, taking into account, in particular, the nature of the employment, the specific circumstances in which it is carried on and the duration of the period of work. »

« 2092. The employee may not renounce his right to obtain an indemnity for any injury he suffers where insufficient notice of termination is given or where the manner of resiliation is abusive. »

³⁰ R.S.Q., c. C-27.

relationship between the collective labour law regime and the individual contract of employment, an issue that has been a subject of debate in Quebec for many years. It “recognizes the autonomy of labour law, which is statute law of a social nature and which, as a result, supplants the general law.”³¹ For the majority, this line of cases makes clear that individual freedom of contract between the employer and an employee, and the related law of general application, does not survive the coming into play of the collective labour relations scheme. The second line of cases, referred to by Deschamps J. as the *Weber-Parry Sound* line, recognizes the jurisdiction of arbitrators to apply the substantive rights and obligations provided for in employment-related statutes and human rights legislation, which are implicitly incorporated into collective agreements.

Deschamps J. tried to reconcile the apparently inconsistent principles put forward in the two lines of cases by enunciating a compatibility test:

“[I]f a rule is incompatible with the collective labour relations scheme, it cannot be incorporated [into the collective agreement] and must be disregarded. (...) If the rule is found to be compatible and if it is a supplementary or mandatory norm... the arbitrator will have jurisdiction to apply it.”³²

However, Deschamps J. did not lay down a concrete and pragmatic test to determine whether or not a legal norm is compatible with the regime of collective labour relations, nor did she identify which categories of legal norms had to be assessed for their compatibility. She limited herself to giving three reasons, based on the nature of notice of termination, why art. 2091 C.C.Q. is not compatible with the regime of collective labour relations:

- (1) “Notice of termination is essentially agreed to on an individual basis when employment is terminated, whereas collective conditions of employment are necessarily agreed to in advance by the union and the employer.”³³
- (2) Notice of termination is a *quid pro quo* for the employer’s right to sever the employment relationship at any time and without cause, whereas the collective agreement “seeks to

³¹ *Isidore Garon*, para. 10.

³² *Ibid.*, para. 24.

³³ *Ibid.*, at para. 32.

preserve the continuity of the employment relationship,”³⁴ and limits the employer’s right accordingly.

- (3) The legislative history of art. 2091 C.C.Q. highlights the legislature’s intent not to require notice of termination in the context of collective labour relations.

For these reasons, Deschamps J. held that the arbitrators did not have jurisdiction to hear either the Isidore Garon or the Fillion grievances.

In the dissenting judgment, LeBel J. agreed with the majority that the *Paquet-McGavin* Toastmaster line of cases precludes individual contracts of employment from contradicting the provisions of a collective agreement in a way that would undermine the collective labour relations scheme and the union’s exclusive representation rights. However, he also stressed that “the parties’ ability to freely negotiate the substantive standards that will govern them is limited by the obligation to respect or incorporate into the agreement, the rights and values protected by the charters and the legal rules imposed by the legislature, including certain general principles of law, particularly those that are of public order.”³⁵

LeBel J. further underlined the fact that s. 62 of the Quebec Labour Code already provided for the implicit integration of substantive employment-related rights into a collective agreement, as enunciated in *Parry Sound*.³⁶ Without discarding the implicit incorporation theory and its usefulness, he stressed that in the context of the *C.C.Q.*, “the use of the term “incorporate”” might not be “entirely accurate”.³⁷ For the first time, he put forward the “harmonization concept” and emphasized the need to harmonize the various sources of labour law by establishing a hierarchy among them. Pointing out that a collective agreement cannot be contrary to public order, he held that arts. 2091 and 2092 C.C.Q. were provisions of public order. However, despite his conclusion on the public order character of arts. 2091 and 2092 C.C.Q., LeBel J. went on to weigh the compatibility of those provisions with the collective labour relations scheme:

“The C.C.Q. contains provisions of public order that apply directly to labour relations. Under arts. 2091 and 2091 C.C.Q., an employee is entitled to reasonable

³⁴ *Ibid.*, at para. 48.

³⁵ *Ibid.*, at para. 141.

³⁶ *Ibid.*, at para. 152.

³⁷ *Ibid.*, at para. 168.

notice of termination and may not renounce that right. *It must therefore be determined whether the right is incompatible with the collective labour relations scheme, in which case the union could not assert the right for the benefit of the employees it represents.*”³⁸

It was on the compatibility of arts. 2091 and 2092 C.C.Q. with the collective labour law regime that the two sets of reasons really parted company. Unlike Deschamps J., LeBel J. did not consider arts. 2091 and 2092 to be incompatible with the collective labour relations scheme. In his words:

“There is nothing to prevent employees governed by a collective agreement from being entitled to reasonable notice under the C.C.Q. Far from being incompatible with the collective labour law scheme, arts. 2091 and 2092 C.C.Q. supplement it and provide a remedy to employees who lose their jobs without being adequately compensated by their employer.”³⁹

LeBel J. concluded by upholding the jurisdiction of the arbitrator to entertain the grievances in the cases at hand.

In relation with the first line of cases mentioned by Deschamps J. in the majority opinion, the decision in *Isidore Garon* settles the doctrinal disagreement over the residual right of individual negotiation on matters not covered by a collective agreement. It is clear from both the majority and the dissenting reasons that, under the collective labour relations scheme, there is no room left for employees to directly negotiate any condition of employment with the employer, whether or not the condition in question is set out in the collective agreement. Second, the Court explicitly spells out that individual contracts of employment are not abolished in the collective labour law context, but *simply suspended*.⁴⁰ Finally, the entire Court recognized that the general law can be used to interpret the terms of a collective agreement. Since the *Labour Code* and the collective agreement do not contain all of the rules that govern collective labour relations, reliance on some provisions of the *C.C.Q.* may be essential in order to establish the parties’ rights and obligations.⁴¹

³⁸ *Ibid.*, para. 177 [emphasis added].

³⁹ *Ibid.*, para. 189.

⁴⁰ *Ibid.*, para. 27. On this issue, the dissenting judgment said that « there remains, at the very least, an individual act under which the employee is hired, and its effect, in any case, survives should the certification and the collective agreement cease to have effect. ». See para. 133.

⁴¹ For instance, the employee’s duty of loyalty, and the employer’s obligation to pay the remuneration agreed upon can only be explained by reference to notions of general law. See Gilles Trudeau, « Synthèse des délibérations », in

Although the majority and minority judgments both recognized the role of the *C.C.Q.* as a supplement to the collective agreement, they partly disagreed on how to determine which takes precedence over the other. For the majority, Deschamps J. held that only those provisions of the *C.C.Q.* that are compatible with the collective labour relations scheme can be implicitly incorporated into collective agreements. She therefore rejected the view that the collective agreement is superimposed onto the individual contract of employment.⁴² Rather, in her opinion, “the collective agreement provides a framework into which mandatory norms are incorporated.”⁴³ LeBel J. took a different view of the interplay between the rules arising from the collective agreement and the principles of general law. He pointed to the preliminary provision of the *C.C.Q.* establishing the nature of the Code as the *jus commune* of Quebec and as the foundation of other laws. To determine which rule must prevail, he looked to the hierarchy of sources of law. Both the *C.C.Q.*⁴⁴ and the *Labour Code*⁴⁵ give precedence to rules of public order over negotiated norms. Accordingly, he concluded that “a juridical act, such as a collective agreement, cannot derogate from the rules of the *C.C.Q.* that are of public order.”⁴⁶ LeBel J. nevertheless seemed in the end to recognize, without explanation, the need to determine whether a rule is compatible with the collective labour law regime. The test of compatibility then became the central element in the analysis of the interplay between the general law and the collective labour relations scheme.

The approach of the majority was largely met with disapproval in Quebec,⁴⁷ especially because it goes against the principle of legislative supremacy that requires the courts to fully apply any valid legislation. It seems inadmissible for the courts to second-guess the legislature by submitting a statute to a test – other than one of constitutional validity – before applying it. In Quebec, the relationship between the *Labour Code*, a collective agreement negotiated pursuant to the *Code*, and the statutory law has always been governed by the principle of public order and

Le Code civil et les relations de travail (Québec : Université Laval, Département des relations industrielles, 1993) 79, at p. 85.

⁴² This position based on the preliminary provision of the *C.C.Q.* was well explained by Professor Fernand Morin in « Effets combinatoires de deux codes : Code du travail et Code civil du Québec » (1994) , 49 R.I. 227.

⁴³ *Isidore Garon*, para. 29.

⁴⁴ Articles 9 and 1373.

⁴⁵ Section 62.

⁴⁶ *Isidore Garon*, para. 170.

⁴⁷ Citer Morin ? Voir note 51 du commentaire sur *Isidore Garon*.

the underlying hierarchy of sources of law. According to s. 62 of the *Labour Code* referred to earlier, the regime of collective labour relations must give way to any legislated rule that is explicitly or implicitly a matter of public order. The majority in *Isidore Garon* seemed to ignore this basic principle, or at least to set it aside in an effort to protect the integrity of the regime of collective labour relations. Still, it is difficult to explain why a court should require arbitrators to disregard an employment standard that the legislature has made mandatory through the enactment of a specific employment statute.

Instead of clarifying the theory of the implicit incorporation established by *Parry Sound*, the new approach adopted in *Isidore Garon* raised even more questions. What was the meaning of the compatibility test? What type of legal norms were subject to the test? On the first question, the test was sometimes misread by labour arbitrators as one of compatibility between a particular provision of an employment-related statute and the specific term of the collective agreement rather than asking the broad question of whether it was compatible with the regime of collective labour relations. On the second question, the fact that the issue raised before the Court in *Isidore Garon* related specifically to the interplay between the collective agreement and the *C.C.Q.* – an issue that could not have been discussed in *Parry Sound* since this case originated in Ontario – advocated for a narrow application of the compatibility test. But some statements in the majority judgment seemed to imply that the Court had in fact revisited *Parry Sound*: “The principle that emerges from [*Parry Sound*] is that, if a rule is incompatible with the collective labour relations scheme, it cannot be incorporated and must be disregarded...”⁴⁸ This broader application of the compatibility test generally prevailed amongst labour arbitrators after the ruling in *Isidore Garon*. Although it appeared early on that the compatibility test did not apply to the Quebec *Charter of human rights and freedoms*,⁴⁹ other employment-related statutes were generally subjected to it by labour arbitrators and Superior Court judges alike, until the Quebec Court of appeal stepped in to limit the relevance of *Isidore Garon* to the *C.C.Q.*⁵⁰

⁴⁸ *Isidore Garon*, para 24.

⁴⁹ R.S.Q., c. C-12.

⁵⁰ *Syndicat canadien de la fonction publique (section locale 4296) SCFP-FTQ v. Commission scolaire de la Seigneurie-des-Milles-Îles*, 2006 QCCA 1646 (C.A.).

At a practical level, arbitrators have applied the test set out in *Isidore Garon* to other provisions of the *Civil Code*. Article 2094 *C.C.Q.* provides that “[o]ne of the parties may, for a serious reason, unilaterally resiliate the contract of employment without prior notice.” Not surprisingly, this provision has been assimilated to arts. 2091 and 2092 *C.C.Q.* and thus declared incompatible with the collective relations regime. This means that an employee cannot rely on art 2094 *C.C.Q.* to challenge his or her dismissal before a grievance arbitrator.⁵¹ Interestingly enough, most collective agreements contain a provision prohibiting the employer from dismissing an employee without just cause, a test very close to that set out in art. 2094 *C.C.Q.* On the other hand, arts. 6 and 7 *C.C.Q.*, which state that any right must be exercised in good faith, have been uniformly deemed to be implicitly incorporated into collective agreements. Arbitrators have ruled that these provisions impose a general standard of behaviour that applies to everyone and constitute matters of public order and this was confirmed by the Quebec Court of Appeal.⁵² This means for instance, that a probationary employee whose collective agreement precludes the right to grieve dismissal could nevertheless do so by claiming that the dismissal was in bad faith.⁵³

Before the clarification of the Court of Appeal on the breadth of the compatibility test in *Syndicat canadien de la fonction publique (section locale 4296) SCFP-FTQ v. Commission scolaire de la Seigneurie-des-Milles-Îles*,⁵⁴ the test had been applied to provisions of the *Act Respecting Labour Standards*. The possible incorporation into collective agreements of section 124 of the *A.L.S.*, which provides protection against unjust dismissal for employees with two or more years of continuous service in the same enterprise, gave rise to sharp debates and contradicting decisions. The Supreme Court was eventually ceased with the question and while solving the issue, the majority parted from the implicit incorporation theory and adopted yet a new approach to the interplay between the collective agreement and employment-related statutory norms: the hierarchy of relevant source of labour law.

⁵¹ *Ibid.* See also : *Commission scolaire Marguerite Bourgeoys v. Choquette*, D.T.E. 2006T-611. *Syndicat de la fonction publique du Québec v. Québec (Gouvernement)*, [2006] R.J.D.T. 329. (Véifier ces références).

⁵² *Syndicat de l'enseignement de la région de Québec v. Ménard*, 2005 QCCA 430. (Véifier référence)

⁵³ *Ibid.* For an analysis of the application of the good faith principle in relation with the dismissal of probationary employees, see : Sophie Cloutier et Jacques Provencher, « L'arrêt *SFPQ* : une mise à jour s'impose ! », in *Débats d'actualité*, Les cahiers de la Conférence des arbitres du Québec, volume 2, Montréal, Wilson et Lafleur, 2014, p. 147, at p. 161-168.

⁵⁴ *Supra*, note.

C) SFPQ and the hierarchy of relevant sources of labour law

The *Act Respecting Labour Standards* adopted by the Quebec legislature in 1979 is one of the cornerstones of Quebec's labour and employment law. It establishes minimal working conditions that cannot be set aside, for both unionized and non-unionized employees. The minimal standards it sets relate to several aspects of work: wages, hours of work, holidays, family or parental leave, psychological harassment, termination of employment... The *A.L.S.* also provides different kind of recourses to ensure its proper implementation.⁵⁵ The Commission des normes du travail is the public body in charge of overseeing the implementation of the *A.L.S.*⁵⁶ It notably receives complaints related to the violation of the Act and may represent employees in disputes against their employer.⁵⁷ Recourses are heard in front of the Commission des relations du travail, an administrative tribunal created under the *Labour Code*, which also has jurisdiction to solve disputes arising from the implementation of the latter. As mentioned before, unlike the Ontario legislation considered in *Parry Sound*, the *A.L.S.* does not contain a general provision integrating the minimal standards it sets into every collective agreement. Instead, the mandatory character of these standards flows from s. 93 *A.L.S.* :

Subject to any exception allowed by this Act, the labour standards contained in this Act and the regulations are of public order.

In an agreement or decree, any provision that contravenes a labour standard or that is inferior thereto is absolutely null.

Only a few provisions of the *A.L.S.* are expressly integrated into collective agreements.

The protection against unfair dismissals provided for by s. 124 of the act is one of the specificities of Quebec's labour and employment law. It parts from the liberal approach to the termination of the employment contract embodied in articles 2091 and 2092 of the *C.C.Q.*⁵⁸ and provides employees who justify two years of uninterrupted service in an enterprise with a relative job security:

⁵⁵ These are found in Chapter V of the Act.

⁵⁶ S. 4 and 5 *A.L.S.*

⁵⁷ See for instance s. 39, 98 and 99 of the *A.L.S.*

⁵⁸ *Supra*, note.

124. An employee credited with two years of uninterrupted service in the same enterprise who believes that he has not been dismissed for a good and sufficient cause may present his complaint in writing to the Commission des normes du travail or mail it to the address of the Commission des normes du travail within 45 days of his dismissal, except where a remedial procedure, other than a recourse in damages, is provided elsewhere in this Act, in another Act or in an agreement.

If the complaint is filed with the Commission des relations du travail within this period, failure to have presented it to the Commission des normes du travail cannot be set up against the complainant.

Although section 124 *A.L.S.* is found in Chapter V. of the act referring to recourses, it has long been recognised as both a substantive and a procedural standard. This normative duality was affirmed by the Quebec Court of Appeal in *Produits Pétro-Canada v. Moalli*, almost 30 years ago.⁵⁹ On the substantive level, s. 124 *A.L.S.* forbids the dismissal of an employee without just cause after the required two years of uninterrupted service. On the procedural level, it sets up a recourse for employees to contest an unfair dismissal – i.e. a dismissal that do not respect the substantive norm – and obtain a reinstatement in the workplace or a monetary compensation. The recourse provided for in s. 124 *A.L.S.* is alternative in nature. If there is an equivalent remedial procedure elsewhere in the *A.L.S.*, in another statute, or in an agreement, including a collective agreement, the recourse will not be accessible to the dismissed employee who will have to avail himself of the alternative procedure.

In *SFPQ v. Quebec (Attorney General)*, the Supreme Court had to determine whether an arbitrator could hear an unlawful dismissal complaint based on art. 124 *A.L.S.* In two separate grievances, the union challenged the termination of a casual employee and a probationary employee of the Quebec government, pleading they had been dismissed without good and sufficient cause. The collective agreement governing the parties expressly prevented seasonal and casual employees hired for less than 12 months, as well as probationary employees, from grieving their employment termination, thus denying them any job security. Both employees, however, had completed the two years of uninterrupted service required by s. 124 *A.L.S.* While the parties recognized that the employees could benefit from the protection granted by this provision, they disagreed on the appropriate forum to hear the unlawful dismissal complaints.

⁵⁹ [1987] R.J.Q. 261.

The union submitted that the arbitrator had jurisdiction over the matter since art. 124 *A.L.S.* was implicitly incorporated into the collective agreement. The employer argued that it was the jurisdiction of the C.R.T. to hear the cases.

After split decisions from the labour arbitrators who heard the two grievances, the Superior Court, on judicial review, adopted the position that s. 124 *A.L.S.* was implicitly incorporated into the collective agreement and held that the arbitrators had exclusive jurisdiction over the dismissal grievance. The Court of Appeal, however, rejected this approach. In its judgment, the Court stressed the importance of determining the legislature's intention when issues of jurisdiction were concerned. For the Court of Appeal, it appeared clearly from the text of the *A.L.S.* that the legislature had chosen a specialized tribunal, the C.R.T., and not the grievance arbitrator, to hear the complaints under s. 124.

Once again, the Supreme Court was strongly divided on the issue of arbitral jurisdiction, the majority judges (5) granting the appeal, while the minority judges (4) would have rejected it. LeBel J., writing this time for the majority, set the background of his analysis by pointing out, from the start of his motives, that the collective agreement at play had to be considered in light of the overall legislative regime put in place in the province to oversee workplace relations.⁶⁰

Surprisingly enough for the parties who had centred their arguments on the question of the implicit incorporation of s. 124 *A.L.S.* into the collective agreement, LeBel J. in his analysis questioned the relevance of this approach for the cases under review:

“The parties are asking this Court to determine whether the substantive standard of public order set out in s. 124 *A.L.S.* which prohibits the dismissal without good and sufficient cause of an employee who has two years of uninterrupted service, is implicitly included in every collective agreement. In my view, the issue is framed incorrectly and does not reflect the true question raised by the appeals. To me, the issue is not whether the provision of the *A.L.S.* are incorporated into the collective agreement or how jurisdiction is formally conferred on the C.R.T. Rather, these appeals raise a question about the hierarchy of sources of Quebec labour law and more specifically about how the *A.L.S.* as a statute of public order, affects the content of the collective agreement and thus the jurisdiction conferred on the grievance arbitrators responsible for interpreting and applying such agreements.”

⁶⁰ *SFPQ*, para. 5.

After reviewing in detail the respective positions of the parties, LeBel J. rejected the implicit incorporation argument on the ground that it was inconsistent with the drafting techniques used by the Quebec legislature to integrate certain provisions of the A.L.S. into collective agreements. Since certain provisions of the A.L.S. expressly mention that they were “deemed to be an integral part of every collective agreement”, it seemed to run against the legislature’s intention to consider that some provisions were implicitly integrated into it. If the legislature had wanted to integrate s. 124 into all collective agreements, it would have used the same drafting technique that is used in other provisions of the act to do so.

In LeBel J.’s view, the issue had to be considered through the lens of the hierarchy of relevant sources of labour law:

“In my opinion, the perspective from which the status of the A.L.S. as a statute of public order must be considered here is not really that of whether the provisions of the A.L.S. are implicitly incorporated into collective agreements, but that of how the hierarchy of relevant sources of labour law affects the content and implementation of such agreements. Only by examining the agreement from the perspective of the adaptations flowing from this public order status can it be determined whether the grievance arbitrator or the C.R.T. has jurisdiction to rule on the challenges of the employees and their union against the employee’s dismissal.”

Since s. 124 A.L.S. is a public order provision, the clauses of a collective agreement that deprives an employee who has accumulated two years of relevant service with an employer from his protection against unfair dismissal must be considered unwritten. It is the content of the collective agreement as modified by the effect of public order provisions that must be analysed to decide if there is an equivalent recourse in the collective agreement for the purpose of s. 124.

LeBel J. went on to say that when the clauses prohibiting seasonal and probationary employees to contest their dismissals are considered as unwritten, the general clause that provides for the right to file a grievance, as a consequence, remains intact. The arbitration procedure is therefore open for employees who have completed two years of uninterrupted service with the employer. LeBel J. concludes that this procedure must be considered equivalent to the complaint before the C.R.T. since both decision-makers have “similar powers of intervention and similar guarantees of independence and impartiality.” From this, he concludes that the arbitrators had jurisdiction to hear the complaints.

In her dissenting opinion, Deschamps J. also rejected the argument put forward by the union on the implicit incorporation of s. 124 A.L.S. into the collective agreement. Relying on the majority judgment of the Supreme Court in *Morin*, she framed the issue as a question of legislative intention. In her view, since *Morin* had established that there was no exclusive arbitral jurisdiction “*in abstracto*”, the relevant statutes had to be analysed to determine which was the appropriate forum: the arbitrator or the C.R.T. She concluded from her analysis that in the case at hand, the legislature had chosen to entrust the dispute to a specialised tribunal: the C.R.T. Although Deschamps J. recognised that the parties could not deny an employee the protection against unfair dismissal granted by s. 124 A.L.S., she held they could ascertain some limitations on access to a grievance procedure under the collective agreement: “[t]hey cannot of course agree that an employee will not be protected. But there is no obligation to make a forum available to all employees under the agreement.” Deschamps J. relied on art. 81.20 A.L.S. to show that the legislature had envisaged the possibility to part a substantive protection from the access to a remedial process:

81.20 The provisions of sections 81.18, 81.19, 123.7, 123.15 and 123.16, with the necessary modifications, are deemed to be an integral part of every collective agreement. An employee covered by such an agreement must exercise the recourses provide for in the agreement, insofar as any such recourse is available to employees under the agreement.

For her, there was no alternative recourse available in the cases under review since the parties had chosen in the collective agreement not to give jurisdiction to a labour arbitrator on the matter. She concluded:

“An analysis of the legislature’s intention shows that s. 124 A.L.S. cannot be incorporated implicitly into collective agreements. Reading words in is neither required nor even authorized by the A.L.S., the L.C. or the collective agreement. Reading words out is no more appropriate. Restrictions on the arbitration procedure are not contrary to public order, since they do not deprive employees of the protection afforded by the standard and recourse provided for in the A.L.S. To rewrite the collective agreement, it would have to be assumed that the legislature drafted the A.L.S. incoherently. It would also have to be assumed that the Quebec legislature adopted the model of exclusive arbitral jurisdiction for all disputes relating to the application of mandatory legislative standards. These assumptions are unfounded. Parties to a collective agreement can choose to incorporate an adequate protection, and if they do so, the alternative forum provided for in s. 124

A.L.S. will not be available. However, the parties did not choose to do so in respect of the employees concerned in these appeals.”

Deschamps J., therefore would have protected the autonomy of the parties to negotiate access to the grievance procedure for certain categories of employees.

The *SFPQ* judgment, as its predecessors, illustrates how profoundly divided the Court can be on the arbitrators’ jurisdiction to hear grievances based on employment-related statutory norms that cannot strictly be based upon provisions of the collective agreement as negotiated by the parties. Deschamps J. surely was the advocate of an autonomist approach to the interplay between the collective agreement and the plurality of norms applicable to the employment relationship. Her opinions, for the majority in *Isidore Garon* and the minority in *SFPQ*, manifest a deep respect for the parties’ will and the working conditions they have actually negotiated in a collective agreement. They also display a certain caution, if not wariness, towards the incorporation or foreign norms – statutory norms that have not been negotiated by the parties – into the collective agreement. As already mentioned, this approach can lead to incongruous decisions, such as the exclusion of public order norms from the legal framework relevant to collective labour relations and arbitral jurisdiction. In *SFPQ*, Deschamps J. distinguished the case under review from *McLeod, Parry Sound* and *Isidore Garon* on the ground that “the forum responsible for enforcing the rights in question was not in issue in any of those cases. Rather, what was in issue was the application of the substantive protection.”⁶¹ While this reasoning is partly right in the *McLeod* and *Isidore Garon* cases, it is much less convincing with regard to the judgment in *Parry Sound*, where not only the substantive protection was discussed, but also the choice of the appropriate forum: that is, whether it was the arbitration board or the human rights commission. In fact, Deschamps J.’s motives in *SFPQ* are really close to those of Major J. in *Parry Sound*: both have the effect of placing the implementation of human rights or employment-related statutory norms outside the realm of arbitral jurisdiction in light of the parties’ intention to do so.

Curiously enough, while LeBel J. had concurred to Major J.’s dissenting motives in *Parry Sound*, his position evolved starting with *Isidore Garon*, followed by *SFPQ*, towards an approach that is much more akin to the majority judgment in the former case. In retrospect,

⁶¹ *SFPQ*, para. 105.

LeBel J. concurring in the dissenting opinion in *Parry Sound* might have been partly caused by his difficulty to adhere to the implicit integration theory. This uneasiness with the implicit content of the collective agreement, already alluded to in *Isidore Garon*, appeared clearly in *SFPQ*, in which he favoured the hierarchy of different sources of labour law as his analytical approach. This conceptual framework is an interesting combination of legal pluralism and industrial pluralism since it recognizes the necessity to take into account the multiple sources of labour law – private as well as public – while placing the responsibility to articulate the interactions between these different sources in the hands of collective labour relations actors, including labour arbitrators. While this approach seems to have replaced the implicit incorporation theory in Quebec, the practical implications of this shift may be limited as will be explained in the following section.

D) The Demise of the Implicit Incorporation Theory?

Not long after the Supreme Court's ruling in *SFPQ*, the Quebec Court of Appeal had to hear another case concerning the interplay between the collective agreement and the *A.L.S.*⁶² This time, the issue was centred around the jurisdiction of the arbitrator to hear a grievance based on s. 82 and 83 *A.L.S.* The collective agreement between the parties provided for one week of notice in the case the company had to lay off one or several employees. Section 82 *A.L.S.* provides for a period of notice in case of a lay off for more than six months that varies in accordance with the number of years of uninterrupted service inside the enterprise credited to each employee inside the enterprise. Since the plaintiffs had accumulated more than ten years of service, they were entitled to eight weeks of paid notice under the *A.L.S.*⁶³ While the arbitrator designated by the parties to hear the case decided he had jurisdiction to hear the grievance on the basis that s. 82 and 83 were implicitly incorporated in the collective agreement, the Superior Court took the opposite view and granted the judicial review of the arbitral award. In her own analysis, the Court of Appeal stressed that the arbitrator and the Superior Court had heard the case before the Supreme Court judgment in *SFPQ*, “which rejected unanimously the theory of the implicit

⁶² *Syndicat des métallos, section locale 2843 (Métallurgistes unis d'Amérique section locale 2843) v. 3539491 Canada inc.*, 2011 QCCA 264. See also : *AGC Flat Glass North America Ltd. c. Syndicat national de l'automobile, de l'aérospatiale, du transport et des autres travailleuses et travailleurs du Canada (TCA-Canada)* 2013 QCCA 381.

⁶³ Section 82 *A.L.S.*

integration to favour in majority an approach “of how the hierarchy of relevant sources of labour law affects the content and implementation of such agreements.”⁶⁴

Both parties modified their pretensions in front of the Court of appeal in light of the new approach established in *SFPQ*. The union argued that the majority judgment in the latter had consecrated the arbitral jurisdiction to apply s. 82 and 83 A.L.S. The employer pleaded that if a clause in a collective agreement is considered null, then the issue is not within the ambit of the collective agreement and there is no ground for arbitral jurisdiction. In its motives, the Court of Appeal recalled that in accordance with *SFPQ*, the collective agreement had to be examined as modified by public order provisions. Relying on *Weber* and *Bisaillon*,⁶⁵ it stressed that to determine the arbitrator jurisdiction, it had to ask whether the issue, in its essence, derived from the collective agreement. Since the parties had established provisions related to paid notice in the case of a lay-off, the matter was related to the interpretation and application of the collective agreement. The collective agreement deprived the employees from the protection afforded by a minimal standard of the A.L.S. Hence, the arbitrator had jurisdiction to apply s. 82 and 83 and read the relevant clause of collective agreement in accordance with these public order provisions.

In a subsequent case based on similar facts and arguments, the Quebec Court of Appeal reaffirmed its conclusion that the Supreme Court had dismissed the implicit incorporation theory in *SFPQ*.⁶⁶ Still, are there any conceptual or concrete implications to this shift of approach? At first sight, the difference between the implicit incorporation theory and the hierarchy of different sources of law is thin since both approaches lead to the nullity of provisions that are deemed contrary to human rights or employment-related norms that are of public order. Nevertheless, as Denis Nadeau clearly demonstrates,⁶⁷ there are, at a conceptual level, important differences between the two. In a thoughtful piece on the subject, Professor Nadeau argues that the hierarchy or sources is more in line with the “ordering” of different sources or law in the legal system. While the implicit incorporation theory implies a certain form of “collage” between the explicit

⁶⁴ *Ibid*, para. 11, our translation ; emphasis added.

⁶⁵ *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666.

⁶⁶ *AGC Flat Glass North America Ltd. c. Syndicat national de l'automobile, de l'aérospatiale, du transport et des autres travailleuses et travailleurs du Canada (TCA-Canada)* 2013 QCCA 381.

⁶⁷ Denis Nadeau, « La perméabilité du droit au sein des rapports collectifs du travail et la compétence arbitrale : nouveau regard sur la valse-hésitation de la Cour suprême du Canada », (2010) 69 *Revue du Barreau* 222, at p. 236.

and implicit content of the collective agreement through the migration of exterior norms into the collective agreement, the hierarchy of sources is more compatible with the collective autonomy of the parties. According to this latter approach, the intention of the parties will be respected as long as it is not contrary to “superior norms”, i.e. those that have been prioritised by the legislature. Therefore, the content of the collective agreement will be modified, only when it is necessary to ensure the harmonisation of different sources of law.

Before *SFPQ*, this approach had also been advocated by Guylaine Vallée, and her views on the matter were endorsed by Lebel J. in the majority judgment:

As Professor Guylaine Vallée correctly point out, [TRANSLATION] “[i]n the collective labour relations context, it is up to the parties to give effect to the hierarchy of sources under the collective agreement or during the grievance process. The interplay among the rules deriving from those sources in a unionized environment must be determined by collective labour relations authorities and not outside such authorities”.⁶⁸

As pointed out before, this approach preserves the collective autonomy of the parties, while taking into account the plurality of labour law sources.

In light of this change in the way to envision the interplay between the collective agreement and public order norms, some earlier findings concerning arbitral jurisdiction were put into question. For instance, the arbitrator’s jurisdiction to hear the grievance of a probationary employee contesting his or her dismissal on the basis of good faith requirements, which had been recognised by the Quebec Court of Appeal prior to *SFPQ*,⁶⁹ was challenged on the ground that art. 6 and 7 *C.C.Q.* were no longer implicitly incorporated into the collective agreement. The Superior Court and later on the Quebec Court of Appeal rejected this point of view.⁷⁰ For the Courts, whether they are incorporated into the collective agreement or not, public order provisions overrule the collective agreement when the latter deprives an employee from his right

⁶⁸ *SFPQ*, para. 44, citing Guylaine Vallée, « Les lois de l’emploi et la convention collective », in D. Roux and A.-M. Laflamme, eds., *Rapports hiérarchiques ou anarchiques des règles en droit du travail : Chartes, normes d’ordre public, convention collective, contrat de travail, etc.* : Actes du colloque tenu à l’Université Laval / 8 novembre 2007 (2008), 81 at p. 88.

⁶⁹ See *supra*.

⁷⁰ *Société de transport de l’Outaouais c. Dumoulin*, 2011 QCCS 6025 ; *Syndicat unifié du Littoral-Sud FSSS-CSN c. Centre de santé et de services sociaux de Bécancour-Nicolet-Yamaska*, 2013 QCCA 233.

to grieve his dismissal on the ground of abuse or bad faith from the employer. Therefore, the shift from the implicit incorporation theory to the hierarchy of different sources of labour law theory does not apparently lead to contradictory solutions in practice. In fact, as one author suggested, they might be regarded as “functionally equivalent”.⁷¹

II. A Concurring Jurisdiction for Human Rights Tribunals and Labour Arbitrators over Human Rights Issues?

Arbitral jurisdiction over human rights claims is largely recognized since *Weber* and the subsequent judgment of the Supreme Court in *Parry Sound*. In the latter case, although the majority of the court held that the arbitration board had jurisdiction to hear the employee’s grievance based on her equality rights, it considered “unnecessary” to determine at this point in time whether this jurisdiction was concurrent with that of the Ontario Human Rights Commission.⁷² As mentioned in the introduction, with the exception of Quebec, human rights tribunals and review courts in Canada have generally considered that there was a concurring jurisdiction of these two types of forums over human rights issues pertaining to workplace relations.⁷³ Quebec stands virtually alone in applying a more restrictive approach to the provincial human rights tribunal’s jurisdiction. Only cases that are deemed to raise questions of “negotiation” of the collective agreement, as opposed to questions of “application and interpretation” of the collective agreement fall under the concurring jurisdiction scope. This situation seems to be the result of discrepancies in the application of the two-step approach outlined by the Supreme Court in *Morin*⁷⁴ to solve conflicts of jurisdiction between two specialized tribunals.

A) *Morin* and the two-step approach

⁷¹ Michel Coutu, « Les décisions récentes de la Cour suprême du Canada sur l’article 124 de la Loi sur les normes du travail : la quadrature du Cercle? » in *Arbitrage de griefs*, Cowansville, Éditions Yvon Blais, La Collection Blais, volume 8-2011, p. 223, at p. 246.

⁷² *Parry Sound*, para. 15.

⁷³ Elizabeth Shilton, « Choice, but No Choice : Adjudicating Human Rights Claims in Unionized Workplace in Canada », (2013) 38 *Queen’s Law Journal* 461.

⁷⁴ *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Québec (Procureur général)*, [2004] 2 S.C.R. 185 (hereinafter : *Morin*).

Morin concerned the identification of the proper forum to hear a discrimination complaint arising from modifications brought to the teachers' collective agreement in Quebec in 1997. At that time, to reach its zero deficit target, the government had planned a broad range of cost-saving measures. As part of these measures, it had negotiated with the teachers' union a one-year freeze on the accumulation of experience for teachers who had not reached the highest end of the salary grid. A group of younger teachers who were impacted by this amendment filed an age discrimination complaint with the human rights commission, arguing that their right to equality had been violated since they were treated less favourably than older teachers. In front of the Human Rights Tribunal, the responding parties, who had negotiated the contested modifications, asked the court to decline jurisdiction on the basis that the issue fell within the exclusive jurisdiction of grievance arbitration. The Tribunal rejected the respondents' motion to dismiss. This decision was initially reversed by the Quebec Court of Appeal, but finally upheld by the Supreme Court.

Writing for the majority, Chief Justice McLachlin framed the issue in light of the earlier judgment of the Court in *Weber*.

“Weber does not stand for the proposition that labour arbitrators always have jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction.”⁷⁵

Having established that there was “no legal presumption of exclusivity *in abstracto*”⁷⁶ for arbitral jurisdiction, she outlined a two-step approach to determine whether the arbitral jurisdiction over a specific type of dispute was exclusive: “The first step is to look at the relevant legislation and what it says about the arbitrator’s jurisdiction. The second step is to look at the nature of the dispute, and see whether the legislation suggests it falls exclusively to the arbitrator.”⁷⁷ Applying the first step, the Chief Justice looked at the relevant provisions of the *Labour Code* and established that the arbitrator’s jurisdiction over issues pertaining to the interpretation and application of the collective agreement was exclusive. She then analysed the

⁷⁵ *Morin*, para. 11.

⁷⁶ *Ibid*, para. 14.

⁷⁷ *Ibid*, para. 15.

Quebec *Charter of Human Rights and Freedoms*⁷⁸ and stressed that while the Quebec Human Rights Tribunal had a large mandate “for interpreting and applying the *Charter* in a wide range or circumstances”,⁷⁹ its jurisdiction was not exclusive.

Turning to the second step, McLachlin C.J. recalled the instructions given by the majority of the Court in *Weber* to determine whether a dispute is one over which the arbitrator has exclusive jurisdiction: “We must look at the dispute in its full factual context. Its legal characterization – whether it is a tort claim, a human rights claim, or a claim under the labour contract – is not determinative”.⁸⁰ Examining the case under review, she characterised the conflict between the protagonists as a problem related to the inclusion of a discriminatory clause into the text of the collective agreement. The “essence of the dispute” therefore lied in “the process of the negotiation”⁸¹ of the collective agreement and not in its operation. Since the issue could not strictly be regarded as a matter of interpretation and application of the collective agreement, the arbitral jurisdiction could not be exclusive. Therefore, the Human Rights Tribunal could exercise its jurisdiction over the complaint.

Chief Justice McLachlin recognised that the claim could have been brought before an arbitrator but that his jurisdiction on the matter would only have been a concurring one. She gave four reasons to justify this finding. First, “the nature of the question does not lend itself to characterization as a grievance under the collective agreement, since the claim is not that the agreement has been violated, but that it is itself discriminatory.”⁸² Second, in the case the union would have refused to grieve the dispute because it had conflicting interests with the plaintiffs, they would have been left without recourse.⁸³ Third, if a grievance had been lodged, “the arbitrator would not have jurisdiction over all the parties to the dispute” since the arbitral process provided for in the collective agreement is directed at the local parties, and the amendment had been negotiated at the provincial level between the Centrale des syndicats du Québec and the

⁷⁸ R.S.Q., c. C-12.

⁷⁹ *Morin*, para. 18.

⁸⁰ *Ibid*, para. 20.

⁸¹ *Ibid*, para. 23.

⁸² *Ibid*, para. 27.

⁸³ *Ibid*, para. 28.

Minister.⁸⁴ Finally, because of the breath of the dispute and the number of teachers involved, the Human Rights Tribunal seemed a “better fit”.⁸⁵

In his dissenting motives, Bastarache J. also stressed the necessity to “identify the essential character of the dispute in its factual context and ignore the possible legal characterization of that dispute.”⁸⁶ He outlined two relevant factors for the analysis of the arbitrators’ jurisdiction: “the nature of the dispute and the ambit of the collective agreement”⁸⁷ For Bastarache J., the issue, in its essence, concerned the reimbursement of lost salary and experience.⁸⁸ These subjects “form the very foundation of a contract and working conditions”⁸⁹ and therefore fall within the ambit of the collective agreement. Thus, the arbitrator had exclusive jurisdiction over the claim.

In their respective motives, Chief Justice McLachlin and Major J. strongly disagree on what constitutes the “essential character” of the dispute. In *Weber*, relying on *St. Anne Nackawic*, the majority had underlined the factual context as the central element in determining whether an arbitrator had exclusive jurisdiction: “one *must not look* at the legal characterization of the wrong, but to the facts giving rise to the dispute”.⁹⁰ While Major J. strictly followed this approach, McLachlin C.J. subtly opened the door to the consideration of the legal characterization of the issue as an element of the analysis. As some authors noted, the qualification of the dispute as one pertaining more to the negotiation of the collective agreement than to its interpretation is not simply a matter of factual context, but also of legal characterization.⁹¹ This slight shift in the approach to the determination of the essential character of the dispute is noticeable in the judgments of the Saskatchewan and Nova Scotia Court of Appeal that concluded to the concurring jurisdiction of labour arbitration board and human rights tribunal over human rights claims arising in unionised workplaces. Conversely, the analysis of the Quebec Court of Appeal’s judgments following *Morin* shows that the Court applied the two-

⁸⁴ *Morin*, para. 29.

⁸⁵ *Morin*, para. 30.

⁸⁶ *Morin*, para. 33.

⁸⁷ *Morin*, para. 46.

⁸⁸ *Morin*, para. 57.

⁸⁹ *Morin*, para. 57.

⁹⁰ *Weber*, para. 49 (emphasis added).

⁹¹ Christian Brunelle et Mélanie Samson, « Les conflits de compétence entre tribunaux spécialisés : une question de textes ou de contextes ? », (2008-2009) 39 *Revue de droit de l'Université de Sherbrooke* 223, at p. 246.

step approach in a manner much more consistent with the previous ruling of the Supreme Court in *Weber* than its two provincial counterparts.

B) The Follow-up to *Morin* in Quebec

Since the decision of the Supreme Court in *Morin* more than a decade ago, the Quebec Court of Appeal had to intervene on a number of occasions to solve conflicts of jurisdiction in cases concerning allegations of discrimination in unionised workplaces. In these cases, the Court respectfully followed the majority ruling in *Morin* and, in assessing the factual context of discrimination claims, made a clear distinction between issues concerning the negotiation process and those related to the operation of the collective agreement. Two of the first cases rendered on the topic by the Court of Appeal not long after the judgment in *Morin* concerned the validity of agreements reached by unions and employers to fulfill the requirements of the *Pay Equity Act*.⁹² As other similar legislations in Canada, this statute aims to “redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes”.⁹³ Differences in compensation must be evaluated and pay equity plans must be put in place in the enterprise to remedy wage inequalities. In *Université Laval v. Commission des droits de la personne et des droits de la jeunesse*⁹⁴, the Court of Appeal concluded that the Human Rights Tribunal was the appropriate forum to hear a systemic discrimination complaint lodged by several office workers who alleged that the pay equity agreement reached by their representing union and their employer according to the provisions of the *Pay Equity Act* violated their equality rights under the Quebec’s *Charter of Human Rights and Freedoms*. The court concluded that in its factual context, the dispute related to allegations of systemic wage discrimination ensuing from the negotiation of the pay equity agreement between the union and the employer.⁹⁵ Hence, in direct line with *Morin*, the Court of Appeal found that the question was one pertaining to the process of negotiation leading to the adoption of the pay equity agreement, considered as discriminatory by the plaintiffs, and its

⁹² E.12-001

⁹³ *Ibid.*, s. 1.

⁹⁴ 2005 QCCA 27.

⁹⁵ *Ibid.*, para. 41.

insertion into the collective agreement.⁹⁶ These facts supported the recognition of the Human Rights Tribunal's jurisdiction.⁹⁷

In a subsequent similar case,⁹⁸ the Court of Appeal had to decide whether the Human Rights Tribunal still had jurisdiction to hear a complaint from employees challenging the validity of a pay equity agreement when the union had submitted a grievance to a labour arbitrator on the same ground. The case revolved around the application of s. 77 and s. 49⁹⁹ of the *Quebec's Charter* and the question of whether the plaintiffs had exercised another recourse giving way to the remedies provided for in the *Charter*. The Court concluded that the Tribunal did not have to dismiss the case since the arbitral jurisdiction was not exclusive, like in *Morin*. Moreover, the Court declared that the Tribunal was a more appropriate jurisdiction in this context since it could grant some remedies that were not within the powers of the arbitrator to ensure respect for the *Pay Equity Act* provisions, including an order to elaborate and put in place a new pay equity plan.¹⁰⁰

In *Résidences Laurendeau, Légaré, Louvain v. Tribunal des droits de la personne*, the employer, a health centre for persons facing a loss of autonomy, had established a gender-oriented job allocation policy, to which the union had concurred, whereby positions and duties were

⁹⁶ Ibid, para. 42.

⁹⁷ Ibid, para. 45.

⁹⁸ *Université de Montréal c. Commission des droits de la personne et des droits de la jeunesse*

⁹⁹ Section 49 and 77 read as follows : « 49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages. »

« 77. The commission shall refuse or cease to act in favour of the victim where

(1) the victim or the complainant so requests, subject to the commission's ascertaining that such request is made freely and voluntarily;

(2) the victim or the complainant has, on the basis of the same facts, personally pursued one of the remedies provided for in sections 49 and 80.

The commission may refuse or cease to act in favour of the victim where

(1) the complaint is based on acts or omissions the last of which occurred more than two years before the filing of the complaint;

(2) the victim or the complainant does not have a sufficient interest;

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

(4) the victim or the complainant has, on the basis of the same facts, personally pursued a remedy other than those provided for in sections 49 and 80.

The decision of the commission shall state in writing the reasons on which it is based and indicate any remedy which the commission may consider appropriate; it shall be notified to the victim and the complainant. »

¹⁰⁰ Ibid, para. 69 and 72.

attributed to employees in light of the beneficiaries' preferences with regards to the sex of the person who would provide intimate care for them. After a number of employees filed a sexual discrimination complaint in front of the Human Rights Commission, the issue arose to determine whether the Human Rights Tribunal or the arbitrator was the appropriate forum to settle the dispute. In this case, the Court of Appeal concluded that while the Human Rights Tribunal and the labour arbitrator initially had concurring jurisdiction to hear the case, the grievance procedure could hardly be exercised by the employees since the union had agreed to the policy, and that the Human Rights Tribunal was therefore the "better fit" to solve the issue.¹⁰¹ In her examination of the essential character of the dispute, Rayle J., writing for the Court, stressed that the factual context had to be analysed in its entirety. In this specific instance, it meant considering not only the equality rights raised by the employees, but also the beneficiaries' fundamental rights to dignity and privacy.¹⁰² On the basis of all these elements, the Court concluded that the Human Rights Tribunal was the appropriate forum.

In Quebec, the enforcement system for human rights established by the Charter is a gatekeeper model. Complaints of statutory violations are filed with the Human Rights Commission who filters the cases, offer mediation services and makes decisions about which disputes will go in front of the Human Rights Tribunal for adjudication. However, as mentioned before, the jurisdiction of the commission and the tribunal are not exclusive and a civil recourse based on human rights violations can be brought in front of the general courts. This explains why the Court of Appeal was asked to determine whether the Cour du Québec had jurisdiction to hear a claim of damages based on the insertion of a discriminatory clause into a collective agreement.

In *Audigé*, the impugned provision of the collective agreement had not been negotiated between the union and the employer, but imposed by way of dispute arbitration. It provided that when "two employees had the same general seniority date, the determining factor was the birth date." Because of this provision, the plaintiff in this case had lost three seniority ranks in favour of colleagues who were older than him but had been hired after him. The union refused to file a grievance in light of the strict application of the provision by the employer. After some

¹⁰¹ *Ibid*, para. 19.

¹⁰² *Ibid*, para. 37.

procedures in front of the Human rights commission, the plaintiff eventually filed a procedure with the Cour du Québec. The employer filed a motion to dismiss, alleging that since the issue was one of application of the collective agreement, the only recourse available to the employee was a complaint in front of the C.R.T. against the union for failing to represent him in accordance with s. 47.2 L.C. He also contended that *Morin* was an isolated case, which findings had been discarded by the majority ruling in *SFPQ*. The Quebec Court rejected the employer's motion and the Court of Appeal confirmed the judgment. For the Court of Appeal, the allegations raised by the plaintiff were related to the inclusion of a discriminatory clause into the collective agreement, a situation for which the arbitral jurisdiction is not exclusive, as stated in *Morin*. The Court of Appeal also considered that a complaint under s. 47.2 L.C. would most likely be illusory¹⁰³ since the employee would have to prove the union had acted « in bad faith or in an arbitrary or discriminatory manner or show[ed] serious negligence ». ¹⁰⁴ The Court of Appeal further distinguished the matter under review from the case in *SFPQ*. According to the court, in *SFPQ*, the issue was to determine what was the ambit of the collective agreement and how it should be interpreted according to the hierarchy of relevant labour law sources. For the Court of Appeal, the problem under review was about the existence of the discriminatory clause and not its operation. Therefore, the Quebec Court had jurisdiction to hear the plaintiff's claim in damages.¹⁰⁵

Cases of discrimination in the workplace that are related to the application and interpretation of the collective agreement will fall under the exclusive jurisdiction of the arbitrator. In *Golzarian v. Québec (Procureur general)*,¹⁰⁶ the Court of Appeal had to decide which was the most appropriate forum to hear the complaint of a former employee of the Sûreté du Québec who claimed he was a victim of discrimination and harassment in the workplace because of his Iranian origins. His employment was terminated after he had been absent on sickness leave for more than four years. While the union representing him had filed a grievance on his behalf to challenge his dismissal, Mr. Golzarian had also lodged a lawsuit in front of the Superior Court and a complaint in front of the Human Rights Commission. In its judgment, the Court of Appeal

¹⁰³ Para. 44 et 45.

¹⁰⁴ L.C., s. 47.2

¹⁰⁵ See also : *Université de Sherbrooke c. Commission des droits de la personne et des droits de la jeunesse*, 2015 QCCA 1397.

¹⁰⁶ *Golzarian v. Québec (Procureur général)*, 2006 QCCA 1571.

held that while the allegations of discrimination and bullying raised by the plaintiff were very serious, they pertained to workplace relations and fell under the grievance mechanism provided for in the Act. Unfortunately in this case, Mr. Golzarian's lawyers had instructed the union to abandon the proceedings before the arbitrator. The Court of Appeal concluded that the plaintiff should have followed the procedure provided for in his collective contract of employment instead of insisting to introduce a claim in front of the Superior Court.¹⁰⁷

In *Québec (Procureur general) v. Désir*,¹⁰⁸ the Court of Appeal had to decide whether the arbitrator had sole jurisdiction over a dispute concerning the dismissal of an employee who alleged her termination was abusive and discriminatory. In that case, the collective agreement contained a provision that deprived the arbitrator from the power to grant damages when deciding over a dispute. The union had grieved the dismissal and reached a settlement with the employer, but not to the employee's satisfaction. She was therefore suing her former employer for compensatory and punitive damages, according to s. 49 of the Quebec Charter, in front of the Quebec Court. In its judgment, the Court of Appeal decided that the dispute was purely a matter of employment relations and derived from the exercise by the employer of his management rights under the collective agreement. In light of his power to interpret statutes to settle a grievance, the arbitrator could apply s. 49 of the Charter that provides for the award of compensatory and punitive damages in cases of discrimination. The Court of Appeal conceded that the provision of the collective agreement depriving the arbitrator from the power to award damages might be considered void or inoperative insofar as it had the effect to prevent the award of a remedy in cases where equality rights were violated. However, for the Court of Appeal, the validity of this provision, in the factual context, had to be analysed by the arbitrator, who had exclusive jurisdiction to settle the issue, in line with the Supreme Court ruling in *Parry Sound*.

This latter case illustrates the difficulty to draw a clear line, as the Quebec Court of Appeal has consistently tried to do, between the integration in the collective agreement of a clause that violates human rights protections and cases pertaining to the application and interpretation of the collective agreement. These judgments, however, clearly show that the exclusive jurisdiction of

¹⁰⁷ Para. 54.

¹⁰⁸ 2008 QCCA 1755.

labour arbitrators over issues related to the operation of the collective agreement, even when they raise human rights issues, is uncontested. The difficulty lies in the identification of the essential character of the dispute.

C) The legal ground for concurring jurisdiction over human rights issues for human rights tribunals and labour arbitrators in other Canadian provinces

The concurring jurisdiction of labour arbitration boards and human rights tribunals has been affirmed by two provincial Court of Appeal outside Quebec, the Saskatchewan Court of Appeal and Nova Scotia Court of Appeal. In two different judgments released concurrently in 2007, the Alberta Court of Appeal held that the jurisdiction of a labour arbitration board to settle a dispute over allegations of discrimination and human rights violations in the course of a grievance was not exclusive, but concurrent to the jurisdiction of the Alberta Human Rights and Citizenship Commission. The factual background of both cases is very similar: considering they had been discharged on discriminatory grounds (physical and mental disability), the employees had filed a grievance and a human rights complaint to challenge their termination. In *Amalgamated Transit Union, Local 583 v. Calgary (City of)*, the union had grieved the dismissal on the ground that there were “insufficient warnings and notice prior to the termination.” Although the collective agreement contained a clause prohibiting discrimination, this was not expressly mentioned in the grievance. In a parallel recourse, the employee filed a complaint with the Commission alleging discrimination from her employer on several grounds. At the arbitration board hearing, the employer asked the board to deal with the human rights aspects of the employee’s complaint with the Commission. The Union objected that it had chosen not to challenge these aspects in the grievance, but instead let the employee file a complaint in front of the Commission. The arbitration board decided he had exclusive jurisdiction over the entire dispute.

The Court of Appeal decided that since it was ceased with a question of competing jurisdiction between two specialized tribunals, the exclusivity of the arbitral jurisdiction could not be presumed, and that it had to apply the two-step approach outlined by the majority of the Supreme Court in *Morin*. Looking at the intent of the Alberta legislature in enacting the Labour Relations Code and the Human Rights Act, the Court considered the wording used in s. 135 and 136 of the

latter to confer jurisdiction upon the labour arbitration board. Comparing the relevant provisions with those used in the Ontario Labour Relations Act considered in *Weber* and in the Quebec Labour Code considered in *Morin*, the Court observed that: “the language in the Alberta statute is arguably weaker than either of them”.¹⁰⁹ Hence, “clearer and more explicit language would be needed to oust the jurisdiction of the Commission over all human rights issues that arise in a unionized workplace.”¹¹⁰ The Court of Appeal also stressed an additional difference between the statutory frameworks in Quebec and Alberta: “unlike the Quebec legislation at issue in *Morin*, the Alberta Human Rights Act does not contain a deferral clause that would allow the Commission to stop acting on behalf of a complainant in circumstances where the complainants has sought a remedy elsewhere”.¹¹¹

When it turned to the nature of the dispute, the Court of Appeal considered there was two separate disputes in reason of the way the union had framed his grievance. Oddly enough, instead of analysing the essence of these disputes as prescribed in *Morin*, the court went on to discuss the Unions’ latitude in grievance process and its duty of fair representation. Hence, the Court mentioned that if the arbitration board would be considered as the appropriate forum to hear the discrimination allegations, the Union would not be compelled “to put forward evidence and argument in support of the discrimination allegations.” Thus, in the Court’s words, “[T]he application of the exclusive jurisdiction model is not appropriate here, as it would effectively leave the unionized employee without a forum in which to air her discrimination allegations.” Coming back to the legislative’s intent revealed by the *Labour Relations Code* and the *Human Rights Act*, the court concluded that the jurisdiction over the matter was concurrent. Although in this case, this led to multiple proceedings, “efficiency alone is not a reason to restrict access to the human rights complaints process”.¹¹²

In *Calgary Health Region v. Alberta (Human Rights and Citizenship Commission)*, the human rights issues raised by the employee’s dismissal were expressly mentioned in the grievance deferred to the arbitration board by the union. They were, of course, also raised in the complaint

¹⁰⁹ Para 55.

¹¹⁰ Para. 57.

¹¹¹ Para. 60.

¹¹² Para. 69.

filed by the employee with the Human Rights and Citizenship Commission. In deciding which of the two forum had jurisdiction over the dispute, the Court of Appeal applied the same approach as it had done in *Amalgamated Transit Union* and recalled the conclusion it reached in the latter that “each of the competing tribunals has prima facie jurisdiction over the subject matter of the dispute”.¹¹³ Turning to the nature of the dispute, the Court of Appeal rejected the view of the Labour Arbitration Board that it was the “best fit” to handle the dispute since it was a case pertaining to the termination of employment: “With respect, we do not agree that an analysis of “best fit” can lead to a finding of exclusive jurisdiction in this case. The intent to grant exclusive jurisdiction must be found in the legislation. The interplay of the two legislative schemes at issue here indicates that neither body was intended to have exclusive jurisdiction over all human rights issues that arise in a unionized workplace environment.”¹¹⁴ The Court decided that the arbitration board had concurrent jurisdiction and therefore could hear the discrimination claim arising from the grievance. The Court however concluded that the Commission also retained jurisdiction.

The Nova Scotia Court of Appeal adopted a similar approach when it had to decide, in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*,¹¹⁵ whether a unionized employee was prevented from filing a race based complaint in front of the Nova Scotia Human Rights Commission because his collective agreement contained an anti-discrimination clause. As its Saskatchewan counterpart, the Nova Scotia Court of Appeal analysed the issue in line with the principles enunciated by the majority in *Morin*, applying the two-step approach to establish the respective jurisdictions of the labour arbitration board and the Human Rights Commission. The Court observed that the *Trade Union Act*¹¹⁶ conferred a broad mandate to the arbitrator with regard to issues pertaining to the interpretation or application of the collective agreement. It found significant, however, that s. 42 of the Act provided for the final settlement of disputes by arbitration *or otherwise*. It also stressed the existence of a clause in the collective agreement that provided for the possibility to grieve a claim pertaining to the violation of different employment and human rights related statutes, including the Nova Scotia Human Rights Act. The said provision also mentioned: “The effect of this clause shall not be to reduce the rights of the

¹¹³ Para. 34.

¹¹⁴ Para. 37.

¹¹⁵ *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2008 NSCA 21.

¹¹⁶ R.S., c. 475.

employee or the Union as prescribed by the legislation”. The Court concluded its analysis of the Trade Union Act and collective agreement in this way: “The statute does not undermine the parties’ intent to enhance rather than to reduce access to human rights remedies in cases of alleged violation of statutorily protected human rights”.

With respect to the human rights commission’s jurisdiction, the Court of Appeal concluded that it was “broad in scope” providing for “a mechanism for the investigation and enforcement of human rights”, and that there was nothing in the act that suggested that it was in any way limited. The legislative context, therefore, did not reveal an intention to grant exclusive jurisdiction over the issue to an arbitrator. Turning to the analysis of the second step, the essential character of the dispute, the Court of Appeal considered that although the discriminatory incidents, which the plaintiff complained of, had taken place on the workplace, the dispute did not “arise explicitly or implicitly from the interpretation, application or administration of the Collective Agreement.” For the Court of Appeal the “heart of the dispute” was about racial discrimination. The Court also asserted that the fundamental and quasi-constitutional character of the Human Rights Act supported the conclusion that the jurisdiction of the arbitrator was concurrent and not exclusive.

Both the Saskatchewan and Nova Scotia Court of Appeal apply the two-step approach outlined by C.J. McLachlin in *Morin* in a similar fashion. At the first step, they make a distinction between the relevant provisions of, respectively, the Saskatchewan Labour Relations Code and the Nova Scotia Trade Union Act on the one hand, and the Quebec Labour Code and the Ontario Labour Relations Act, on the other hand. The Saskatchewan and Nova Scotia Statutes conferring jurisdiction upon labour arbitrator are considered as “weaker” than the ones from Quebec and Ontario. It is interesting to note that none of the court expressly discards the affirmation that the arbitrator has exclusive jurisdiction over issues pertaining to the application or interpretation of the collective agreement as affirmed in *Weber*. Simply, they consider that the language used in the statutes is not strong enough to prevent human rights tribunals from exercising their jurisdiction. This is a fundamental difference with the application of *Morin* in Quebec, since it is very clear from the judgment of the Supreme Court which originated in the province that arbitral jurisdiction is exclusive for all matters concerning the operation of the collective agreement, including human rights issues.

The courts take a distance from the instructions given by the Supreme Court in *Weber* as to the characterization of the essential nature of the dispute. In the three cases analysed in this section, the employees' claims were related to their dismissal. In their factual context, the questions raised would have been considered as issues arising from the application of the collective agreement. Still the courts refused to characterise them as such and considered the claims as human rights or discrimination issues. This is especially obvious in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, where the court at the second-step of the approach set out in *Morin*, delineates the issue as "racial discrimination". Here, the court was clearly considering the legal characterization of the claim and not whether it concerns a matter covered by the collective agreement. This digression from the initial indications given in *Weber*, partly explain the different conclusions reached by the Quebec Court of Appeal and other provincial courts as to the concurring jurisdiction of labour arbitrators and human rights tribunal over human rights disputes arising in unionised workplaces.

CONCLUSION

(forthcoming...)