
The Standard of Review of Grievance Arbitrators When Deciding on Human Rights Issues: The "Magnificent Goal" vs. Industrial Peace

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This article focuses on the jurisdiction of grievance arbitrators over human rights issues and the standard of judicial review applicable to arbitrators' awards. The author analyses the courts' special approach towards arbitrations involving human rights in light of the Ontario Labour Relations Act, 1995 ("OLRA").

With a view to widening the jurisdiction of grievance arbitrators, section 48(12)(j) of the *OLRA* confers upon arbitrators the power to interpret and apply human rights-related statutes. However, the author suggests that this amendment to the *OLRA*—which echoes other jurisdictions' labour relations statutes—will not necessarily entail greater judicial deference to grievance arbitrators.

The author first identifies the different situations in which grievance arbitrators may be called upon to decide on human rights issues. He then presents the Supreme Court of Canada's current position on judicial review of grievance arbitrators awards on human rights issues. The author subsequently reviews the new *OLRA* provision and considers general Canadian case law in order to determine how this new legislation might be interpreted in light of the court's traditional attitude towards human rights questions. He identifies possible solutions that may be advanced to ensure that the "magnificent goal" of a discrimination-free workplace is achieved, also suggesting ways to mitigate the apparent defects in the operation of judicial review that frustrate the pursuit of such equally pressing objectives as "industrial peace" and expeditious dispute resolution.

The author notes that, on judicial review of human rights-related decisions, the courts will use the standard of review as a vehicle to control the merits of an arbitrator's decision, rather than its mere legality. Indeed, the courts consider human rights so fundamental that any legislative restriction on their surveillance powers will be interpreted restrictively. The judicial review procedure is thus used as a quasi-appeal of arbitrators' awards. The author concludes that it is doubtful that the recent amendments to the *OLRA* will change the courts' traditional absence of curial deference towards arbitrators deciding human rights issues.

Cet article traite de la compétence des arbitres de griefs sur les questions de droits de la personne et sur la norme de contrôle judiciaire applicable aux décisions arbitrales en la matière. L'auteur analyse l'approche particulière des tribunaux à la lumière de la *Loi de 1995 sur les relations de travail* de l'Ontario («*LRTO*»).

Afin d'étendre la compétence des arbitres de griefs, l'article 48(12)(j) de la *LRTO* confère aux arbitres le pouvoir d'interpréter et d'appliquer les lois relatives aux droits de la personne. L'auteur suggère néanmoins que cet ajout à la *LRTO*, aussi repris dans les lois sur les relations de travail d'autres juridictions, ne donnera pas nécessairement lieu à une norme moins stricte de contrôle judiciaire des décisions arbitrales.

L'auteur identifie d'abord les différentes situations dans lesquelles les arbitres de griefs peuvent être appelés à se prononcer sur des questions touchant aux droits de la personne. Il présente la position de la Cour suprême du Canada sur la norme de contrôle judiciaire applicable à ce type de décisions arbitrales. Il passe ensuite en revue les nouvelles dispositions de la *LRTO* et analyse la jurisprudence canadienne afin de déterminer l'impact de ces dispositions sur l'attitude traditionnelle des tribunaux face aux questions de droits de la personne. Diverses solutions sont présentées pouvant servir l'«objectif magnifique» d'un milieu de travail sans discrimination. L'auteur suggère aussi des moyens de mitiger les effets néfastes de la révision judiciaire sur les pressants objectifs que sont la paix dans les relations de travail et la résolution rapide de conflits.

L'auteur est d'avis que les tribunaux utiliseront le contrôle judiciaire comme outil de contrôle du mérite, plus que de la simple légalité, des décisions arbitrales liées aux droits de la personne. Selon l'auteur, les tribunaux considèrent les droits de la personne comme étant si fondamentaux que toute tentative législative de restreindre leur pouvoir de surveillance sera interprétée très étroitement. La révision judiciaire sert dès lors de quasi-appel des décisions arbitrales. L'auteur conclut qu'il est douteux que les amendements récents à la *LRTO* changeront l'approche traditionnelle peu déférentielle des tribunaux face aux décisions arbitrales en matière de relations de travail et de droits de la personne.

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Introduction

Human rights legislation and its application to eliminate discrimination in the workplace is a major area of practice in labour law. All human rights codes in Canada prohibit discrimination on certain grounds, ensuring that, *inter alia*, all people have access to accommodation and services, and freedom to contract with whomever they choose. However, the overwhelming majority of cases and complaints filed with the different human rights commissions in Canada arise in the area of labour relations. For example, out of a total of 2560 complaints filed with the Ontario Human Rights Commission in 1995-96, 1907 (74%) originated in the workplace.¹

Human rights legislation in Canada, including Ontario's *Human Rights Code*,² not only ensures protection against discrimination, but also provides mechanisms of complaint settlement and adjudication.³ Each jurisdiction in Canada has a human rights commission which is responsible for the administration and enforcement of the relevant human rights code.⁴ Even though human rights codes apply to all workers in the organized labour market, the majority of collective agreements specifically include anti-discrimination provisions and similar human rights clauses.⁵ In the context of organized labour relations and collective bargaining, the mechanism for dispute settlement under a collective agreement is generally grievance arbitration. In fact, as Professor Adell notes, a vast majority of case law on discrimination in the workplace arises out of grievance arbitration.⁶

At common law, because of the contractual nature of collective agreements, public order was traditionally the only basis for restricting the terms of the parties' voluntary bargain.⁷ Since the enactment of human rights legislation, however, the statutory restrictions to freedom of contract now include anti-discrimination provisions. For example, section 54 of the new *OLRA* makes it clear that:

54. Discrimination prohibited.- A collective agreement must not discriminate against any person if the discrimination is contrary to the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*.⁸

¹ See Ontario Human Rights Commission, *Annual Report, 1995-96* (Toronto: Ontario Human Rights Commission, 1996) at 63. In 1994-95, the proportion was similar with 76% (1735 out of 2286). The same proportions can also be found in other Canadian jurisdictions as well as with the Canadian Human Rights Commission.

² R.S.O. 1990, c. H-19 [hereinafter *HRC*].

³ See *ibid.*, and see Part III.

⁴ In this article, the emphasis will be on the Ontario *HRC* and *Labour Relations Act, 1995*, being Schedule A of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1 [hereinafter *OLRA*]. The same reasoning could apply to other jurisdictions depending on whether the appropriate legislation contains similar provisions. See *infra* note 95 for examples.

⁵ See Canadian Human Rights Commission, *Annual Report — 1996* (Ottawa: Queen's Printer, 1996) at 91-92.

⁶ See B. Adell, "The Rights of Disabled Workers Revisited" (1991) 2 Lab. Arb. Y.B. 181.

⁷ As this old common law principle was stated in *Christie v. York Corporation*, [1940] S.C.R. 139, [1940] 1 D.L.R. 81.

⁸ *Supra* note 4.

Recently, the Supreme Court of Canada unanimously reiterated the principle of public policy whereby:

Human rights legislation sets out a floor beneath which the parties [to a collective agreement] cannot contract out. Parties can contract out of human rights legislation if the effect is to raise and further protect the human rights of the people affected ... [For instance, the] contract could prevent the employer from discriminating in the employment process [even] where a [*bona fide* occupational qualification] might plainly exist.⁹

Therefore, a unionized worker's human rights may be protected by both a human rights code and by collective agreement. In either case, the protection may be the same, but the dispute resolution mechanism will be different.¹⁰ Under judicial review, this double occupancy of the human rights field by both means of dispute settlement raises the thorny question of whether a grievance arbitrator who is appointed pursuant to the collective agreement — and to the *OLRA* — has jurisdiction over human rights issues.

Consequently, the other issue raised by this double occupancy is the appropriate standard of review of grievance arbitrators' decisions regarding human rights issues. In the absence of clear legislative intervention, and with no definitive answer yet from Canadian courts, this question is mired in intractable controversy. The problem obviously arises more acutely when the arbitrator errs, according to the reviewing courts, in the interpretation or application of human rights provisions. The fact is that in other circumstances, such as where the courts agree with the arbitrator's award, the courts will have no problem deferring to the arbitrator.¹¹

There is a sizeable body of case law on judicial review of grievance arbitrations. The courts have had many opportunities to confirm arbitrators' powers to interpret and apply general statutes. However, this article considers the particular jurisdiction of grievance arbitrators regarding human rights issues and, hence, the applicable standard of judicial review. Problematic circumstances regarding arbitrators' decisions on human rights arise where the provisions of the collective agreement — which arbitrators are called upon to interpret — refer to or mirror those of the human rights statute.

This article is divided into five sections. The first part identifies the different situations where grievance arbitrators may have to decide on human rights issues. The second presents the Supreme Court of Canada's current position on judicial review of

⁹ *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Center)*, [1996] 2 S.C.R. 3 at 16, 134 D.L.R. (4th) 1 [hereinafter *NAPE* cited to S.C.R.]. See *infra* text accompanying note 80 for further analysis of *NAPE*.

¹⁰ Indeed, under the *HRC*, the complaint settlement mechanism is provided for by the statute and administered by the Commission. However, under a collective agreement the dispute resolution mechanism is generally grievance arbitration. For example in Ontario, arbitration is compulsory for every collective agreement (see *OLRA*, *supra* note 4, s. 48).

¹¹ See *NAPE*, *supra* note 9. See also *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, 115 D.L.R. (4th) 609 [hereinafter *Bergevin* cited to S.C.R.], where the Supreme Court eluded the question of the standard of review. See *infra* note 22 and accompanying text for further analysis of *Bergevin*.

arbitrators' awards dealing with human rights. The third analyses the new *OLRA* to delineate how the Ontario Legislature decided to deal with arbitral jurisdiction over human rights issues. Due to the absence of specific case law regarding the standard of review of grievance arbitrators under the *OLRA*, the fourth section of this article considers general Canadian case law to determine how the new legislation might be interpreted in light of the courts' traditional attitude toward human rights questions. In other words, this article questions whether a statute like the *OLRA* might have any effect on the traditional absence of curial deference which the courts have shown toward grievance arbitrators (or administrative tribunals) deciding on human rights issues. Finally, this article will identify possible solutions to ensure that the "magnificent goal"¹² of a discrimination-free workplace is achieved, as well as ways to mitigate the apparent defects in the system of judicial review in this area that frustrate the pursuit of the countervailing objective of "industrial peace."¹³

I. Arbitrators' Jurisdiction over Human Rights

Echoing provisions in other jurisdictions,¹⁴ the *OLRA* states:

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

This provision confers upon arbitrators the power to resolve disputes that arise under collective agreements. Therefore, when a dispute within the scope of a collective agreement occurs, the jurisdiction of an arbitrator stems, pursuant to the *OLRA*, from that particular agreement.¹⁵ Thus, while exercising dispute settlement powers, an arbitrator may have to deal with human rights issues in different contexts and for different purposes.

One situation where an arbitrator will encounter human rights legislation is when the constitutional validity of a provision of the collective agreement is challenged. This situation may require the arbitrator to interpret the *Canadian Charter of Rights*

¹² This was the term Cory J. used to describe fairness in the workplace in *Bergevin*, *ibid.* at 544.

¹³ This other important goal of labour legislation was referred to in *British Columbia Telephone Co. v. Shaw Cable Systems*, [1995] 2 S.C.R. 739 at 776, 125 D.L.R. (4th) 443 [hereinafter *Shaw* cited to S.C.R.].

¹⁴ Although in other jurisdictions there may be a choice given between arbitration and other means of dispute resolution. See for instance section 57(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2.

¹⁵ See *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at 953 & 957, 125 D.L.R. (4th) 583 [hereinafter *Weber* cited to S.C.R.]; *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967 at 969, 125 D.L.R. (4th) 609 [hereinafter *O'Leary* cited to S.C.R.]; *Gendron v. Supply and Services Union of the Public Services Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298 at 1326, [1990] 4 W.W.R. 385; *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704 at 720, 28 D.L.R. (4th) 1 [hereinafter *Nackawic* cited to S.C.R.]; *General Motors of Canada v. Brunet* (1976), [1977] 2 S.C.R. 537 at 542, 13 N.R. 233.

and Freedoms.¹⁶ The Supreme Court of Canada has turned its attention to this question in the *Douglas/Kwantlen Faculty Association v. Douglas College*,¹⁷ *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*,¹⁸ and *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*¹⁹ trilogy, where it stated that although arbitrators may interpret the *Charter* when a provision of the collective agreement is challenged, the standard of judicial review is one of correctness²⁰ since the issue being decided is the arbitrator's own jurisdiction.

An arbitrator will also be called upon to decide on human rights issues when anti-discrimination provisions are included in a collective agreement. Such provisions may be created by the parties or simply copied from the *HRC*. This article will examine the latter situation, namely, where the parties to a collective agreement decide either to refer to the *HRC*, or to mirror its precise wording in their agreement.

II. The Supreme Court of Canada's Current Position

As a preliminary remark, it may be useful to point out that these two situations — where the collective agreement refers to the legislation and where it mirrors the legislation — will be treated as having the same consequences. Indeed, if the contractual human rights provisions that refer to the legislation were treated differently from those which simply replicate it, this would amount to the parties being able to do indirectly what they are not allowed to do directly. As one author notes:

[T]he standard to be used when the collective agreement incorporates the statute is ... difficult to determine.... The technical question is whether the arbitrator is interpreting the statute or the collective agreement. One would suspect that for the sake of consistency, the standard of correctness would be preferable as ultimately the arbitrator is interpreting the statute.²¹

The Quebec Court of Appeal had to deal with the question of whether an arbitrator is interpreting a collective agreement or the statute referred to in the agreement. Quebec's highest court addressed this issue in *Commission scolaire régionale de Chambly v. Bergevin*.²² The facts of the case are straightforward. Jewish teachers requested a special leave to celebrate *Yom Kippur*. The School Board granted them a leave of absence, but without pay. The teachers filed a grievance, arguing discrimination on the grounds of religion. The arbitrator awarded the teachers their full salary for the holiday. On judicial review, the Quebec Superior Court maintained the arbitrator's award. The School Board appealed.

¹⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter *Charter*].

¹⁷ [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94.

¹⁸ [1991] 2 S.C.R. 22, 81 D.L.R. (4th) 358.

¹⁹ [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121.

²⁰ See *infra* note 29 and accompanying text.

²¹ W.B. Rayner, *The Law of Collective Bargaining* (Scarborough: Carswell, 1995) at 18-30.

²² (1992), 48 Q.A.C. 34, 97 D.L.R. (4th) 661, rev'd by *Bergevin*, *supra* note 11.

In this particular case, the human rights provision in the collective agreement referred to the Quebec *Charter of Human Rights and Freedoms*²³ to determine what exclusions or preferences may constitute discrimination under the collective agreement. Writing for the majority of the Quebec Court of Appeal, Brossard J.A. raised the question of whether, by interpreting a provision of the collective agreement that refers to the *Quebec Charter*, the arbitrator effectively interprets the latter:

En d'autres mots, les distinctions, exclusions ou préférences, qui résulteraient de ou qui se retrouveraient dans les gestes, attitudes et décisions de l'appelante (au sens de ... la convention) ne constituent pas nécessairement de la discrimination, à moins qu'elles n'aient pour effets "de détruire ou de compromettre" le droit en litige, termes qui se trouvent uniquement dans la *Charte des droits et libertés de la personne à laquelle ledit article réfère et que les arbitres devaient donc nécessairement interpréter pour décider s'il y avait eu ou non violation de [la convention collective]*. Je suis d'opinion, en conséquence, que le fondement même de la sentence arbitrale repose uniquement sur l'interprétation de la *Charte de droits et libertés de la personne*, interprétation qui, *prima facie*, ne me paraît certes pas relever de la compétence *stricto sensu* du comité d'arbitrage et qui, au contraire, me paraît relever d'un domaine extrinsèque à son champ d'expertise.²⁴

Although the Supreme Court of Canada overruled the Quebec Court of Appeal,²⁵ the majority did not expressly address this question and thereby left the door open to speculation:

[T]here is a further question raised on this appeal; that is whether the arbitration board in interpreting the provisions of the Quebec *Charter of Human Rights and Freedoms* incorporated by the parties in the collective agreement must be correct. In this case, that question need not be answered since, in my view, the arbitration board was correct in its application of the Quebec *Charter*.²⁶

What if Cory J.'s view had been that the board's decision was incorrect? What would have been the applicable standard of review in such a case? Did Cory J. implicitly apply a standard of correctness? It is clear that the Supreme Court did not want to answer these questions. It could therefore be argued that, since it has not been overruled, the point of view of Brossard J. is authoritative on this issue.

²³ R.S.Q. c. C-12 [hereinafter *Quebec Charter*].

²⁴ *Supra* note 22 at 44 [emphasis added]. Author's translation:

In other words, the distinctions, exclusions or preferences, which could result from or be found in the acts, attitudes and decisions of the appellant [pursuant to the collective agreement] do not necessarily amount to discrimination unless they "destroy or compromise" the disputed right, words which can only be found in the *Quebec Charter of Rights to which the clause refers and that the arbitrators necessarily had to interpret in order to decide whether the collective agreement had been violated or not*. It is my opinion, therefore, that the arbitration award is based solely on the interpretation of the *Quebec Charter of Rights*, and, *prima facie*, this interpretation does not seem to me to fall under the arbitrator's jurisdiction *stricto sensu*. On the contrary, this interpretation seems to fall outside the arbitrator's field of expertise.

²⁵ See *Bergevin*, *supra* note 11.

²⁶ *Ibid.* at 537-38.

In 1995, the Supreme Court of Canada had another opportunity to clarify its position with respect to judicial review of grievance arbitrators deciding on human rights cases. In *Weber*,²⁷ Canada's highest court made it clear that the grievance arbitrator has exclusive jurisdiction on matters relating to a collective agreement, even on human rights issues. One of the arguments upon which McLachlin J. based this "exclusive jurisdiction" approach was that arbitrators are subject to judicial review:

Against [the "exclusive jurisdiction"] approach, the appellant Weber argues that jurisdiction over torts and *Charter* claims should not be conferred on arbitrators because they lack expertise on the legal questions such claims raise. The answer to this concern is that arbitrators are subject to judicial review. *Within the parameters of that review*, their errors may be corrected by the courts.²⁸

Once again, the Supreme Court raised the possibility of judicial review of a grievance arbitrator deciding on human rights issues and failed to indicate the appropriate standard of review. What are the "parameters of that review" that McLachlin J. had in mind? The question was left open, and therefore, in the absence of clear legislative intervention, the level of curial deference toward grievance arbitrators, particularly when addressing human rights questions, remains uncertain.

It is a well established principle of administrative law that when arbitrators are acting within the boundaries of their jurisdiction, the standard of review is the "patently unreasonable" test. However, when the same arbitrator decides on a jurisdictional issue or exceeds jurisdiction, the standard of review is the "correctness" of the decision. These principles were well summarized by Beetz J.:

It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:

1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.²⁹

On numerous issues, it is quite simple to determine whether the arbitrator was acting within jurisdiction and therefore to apply the appropriate standard. However, in the case of an arbitrator applying human rights legislation,³⁰ it is not so clear. In other words, when the arbitrator is interpreting a provision of a collective agreement that replicates the wording of a human rights code, is it the collective agreement that is

²⁷ *Supra* note 15.

²⁸ *Ibid.* at 957-58 [emphasis added].

²⁹ *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1086, 95 N.R. 161 [hereinafter *Bibeault* cited to S.C.R.]; see also *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412, 14 D.L.R. (4th) 457; and more recently, *Canadian Broadcasting Corporation v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, 121 D.L.R. (4th) 385 [hereinafter *C.B.C.* cited to S.C.R.].

³⁰ Where a provision of a collective agreement refers to or mirrors the *HRC*.

being interpreted or is it the replicated human rights code? If the arbitrator is interpreting the human rights code, is it within the expertise of arbitrators to do so, and should they benefit from curial deference on those issues? The Supreme Court of Canada has not yet provided a clear answer.

III. The New Ontario *Labour Relations Act*

New labour legislation was enacted in Ontario in 1995.³¹ As is stated in section 2 of the *OLRA*, one of the purposes of this legislation is to “promote the expeditious resolutions of workplace disputes.”³² One way of reaching that objective is to avoid multiple proceedings before multiple adjudicative bodies when the same set of facts raises issues that are governed by more than one statutory regime. For this reason, section 48(12)(j) of the *OLRA* has been enacted³³ and reads as follows:

48.(12) Powers of arbitrators, chair of arbitration boards, and arbitration boards. An arbitrator or the chair of an arbitration board, as the case may be, has power,

...

(j) to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.³⁴

It must be noted that even in the absence of such a provision, an arbitrator could have relied on the principles stated in *McLeod v. Egan*³⁵ to interpret relevant related statutes. Indeed, as Laskin C.J.C. noted in the now famous case:

No doubt, a statute like a collective agreement or any other document may present difficulties of construction, may be ambiguous and may lend itself to two different constructions neither of which may be thought to be unreasonable. If that be the case, it nonetheless lies with the Court, and ultimately with this Court, to determine what meaning the statute should bear. That is not to say that an arbitrator, in the course of his duty, should refrain from constructing a statute which is involved in the issues that have been brought before him. In my opinion, he must construe, but at the risk of having his construction set aside by a Court as being wrong.³⁶

Such a clear and express indication of the legislature’s intent as section 48(12)(j) may appear to solve the problem of arbitrators’ jurisdiction over human rights issues. Pursuant to this section, regardless of the wording of the human rights provisions included in the collective agreement, arbitrators have been granted powers to interpret

³¹ See *OLRA*, *supra* note 4.

³² *Ibid.*

³³ It has been retained from the old act, where it had already been added by the previous government. See the *Labour Relations Act*, R.S.O. 1990, c. L.2, s. 45(8), as am. by the *Act to amend certain Acts concerning Collective Bargaining and Employment*, S.O. 1992, c. 21, s. 23(3).

³⁴ *Supra* note 4 [emphasis added].

³⁵ (1974), [1975] 1 S.C.R. 517, 46 D.L.R. (3d) 150 [cited to S.C.R.].

³⁶ *Ibid.* at 519.

and apply the *HRC*. Therefore, it may be argued that such powers are similar to those the Human Rights Commission (through the Board of Inquiry) has over the interpretation of the *HRC*. Such a conclusion, it is contended, is not inescapable. As one author suggests:

[The] language [of s. 48(12)(j)] is wide enough to be read as giving an arbitrator power to impose obligations created by the statutes mentioned in the section even where those obligations are not found in the agreement. However, the language could also be interpreted as confirming existing powers, but creating no new powers in arbitrators in the interpretation and application of statutes.³⁷

As there are no recent cases regarding section 48(12)(j) and the question of arbitrators' jurisdiction over human rights issues under the *OLRA*, the way in which the courts will interpret this legislative message remains uncertain. However, the general Canadian case law in this area and the attitude of the Supreme Court toward questions of judicial review do not necessarily lead to the conclusion that the provision giving arbitrators power to interpret human rights legislation will be regarded as enlarging their expertise to embrace human rights issues. Unless the courts adopt a stance of curial deference, there will be a tendency to challenge arbitrators' awards when they decide on human rights issues, which will lead to lengthy delays.³⁸ The courts' general attitude analysed hereinafter indicates a will to control the merits of an arbitrator's award on human rights, rather than its mere legality. Three reasons suggest that, on judicial review, the courts are not ready yet to defer systematically to arbitrators on human rights issues even under section 48(12) of the *OLRA*.

IV. Arbitrators' Jurisdiction and Standard of Review

First, despite the fact that arbitrators have been granted powers to interpret and apply the *HRC* and other general laws, arbitration is not necessarily an adequate forum in which to resolve disputes arising in this fundamental area of law. This may lead to a problem of conflicting and inadequate available remedies. Furthermore, the arbitrators' mission *per se* is not to promote nor to protect human rights in the workplace. Finally, human rights-related complaints might be of such a nature as to create conflicts of interest in collective labour relations. Such conflicts would arise when the same union represents both the complainant and the alleged perpetrator and this could be an incentive for the courts to wish to have the last word on human rights issues.

Second, in the absence of a privative clause protecting arbitrators' decisions from judicial review, it is doubtful that the courts will grant a higher level of deference to the arbitrators' awards on human rights issues than the Supreme Court of Canada did toward the Canadian Human Rights Commission in *Canada (A.G.) v. Mossop*.³⁹

Third, the fundamental nature of human rights legislation and the way the courts perceive their role as guardians of social values would make it very difficult for an ar-

³⁷ Rayner, *supra* note 21 at 17-24.

³⁸ Those delays clearly contrast with the purposes of the *OLRA*, *supra* note 4, as stated in section 2.

³⁹ [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658 [hereinafter *Mossop* cited to S.C.R.]; see text accompanying note 61 for a summary of the issues and an history of *Mossop*.

bitrator to benefit from curial deference. These three concerns, which could also apply to other Canadian jurisdictions (depending on their respective legislation), will now be examined individually.

A. Inadequate Forum

1. Conflicting Remedies

Since an arbitrator's jurisdiction is limited to the collective agreement, the remedies that may be administered are the ones provided for in the agreement. The fact that section 48(12)(j) of the *OLRA* gives arbitrators power to interpret and apply the *HRC* does not necessarily mean that arbitrators are then vested with the same remedial power as that available to the Human Rights Commission. Arbitrators still lack expertise in assessing human rights issues and there is a fundamental difference of mission between the Human Rights Commission and grievance arbitrators. For instance, it is hardly imaginable that grievance arbitrators would award damages associated with pain and suffering or with humiliation. These types of remedies are better suited to the role of the Human Rights Commission. Moreover, other statutes that arbitrators are also empowered to interpret and apply may provide for different, or even conflicting, remedies for the same factual situation.

This problem of remedies was one of the concerns of the Ontario Law Reform Commission in its *Report on Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Dispute*.⁴⁰ The Commission was mandated by the Ontario government to examine how adjudicative bodies acting in the workplace may become more efficient in expediting dispute resolution. In its report, the Law Reform Commission raised two basic problems that the new legislation should address. First, it noted that the problem of delays required to move cases along to adjudication conflicts with one of the main purposes of grievance arbitration: the quick resolution of disputes. Second, the Commission concluded that the variety of statutory and common law rules which govern the employment relationship causes a problem of overlapping jurisdictions between the different adjudicative bodies that are responsible for the application of this legislation. For example, when both an arbitrator and the Human Rights Commission may be called upon to decide on a discrimination issue, there is clear overlap between the two.

For the purposes of this article, the problem of overlapping jurisdiction is the most interesting question since it arises when a collective agreement provides for anti-discrimination clauses that mirror those of the *HRC*. As the Law Reform Commission notes:

⁴⁰ Ontario Law Reform Commission, *Report on Avoiding Delay and Multiple Proceedings in Adjudication of Workplace Dispute* (Toronto: Ontario Law Reform Commission, 1995) [hereinafter *Report*]. Although the report dealt with numerous administrative bodies regulating the workplace, this article will focus on the analysis of grievance arbitration and human rights issues.

The area of law that is most likely to overlap with other administrative regimes is grievance arbitration. This is because the basis of grievance arbitration is a contract — the collective agreement. There are two ways in which an overlap can occur between the collective agreement and statutory legislation.

First, because of the contractual nature of the collective agreement, [it] can expressly prohibit action that has already been prohibited by the provincial legislature. Moreover, because the courts have concluded that arbitrators must interpret collective agreements in accordance with other laws that apply to the factual situation, statutory terms can be impliedly included within the collective agreement.

Secondly, because private contracts are subject to rules enacted by the legislator, the validity of terms included in a collective agreement is often tested against legislative rules.⁴¹

In order to deal with the issue of multiple proceedings due to overlapping jurisdiction, the Law Reform Commission recommended a series of measures and legislative amendments. These recommendations form a comprehensive package based on what is called a “referral/deferral” system:

The essence of this option is that every tribunal has the right to interpret and apply external law, and every other tribunal has the obligation to defer to that decision. In other words, the decision made by the first tribunal, including any decision made with regard to external law, becomes binding upon all subsequent tribunals.⁴²

As a result, the Law Reform Commission recommended including what is now section 48(12)(j) of the *OLRA*. However, the Commission also noted that a sole power-conferring provision is not sufficient since it does not solve the remedial problem:

In making this recommendation [*i.e.*, *OLRA*, s. 48(12)(j)], the Commission is aware that different legislative regimes apply different remedies to resolve what is essentially the same dispute. If a tribunal is permitted to resolve disputes by applying all relevant legislation, it may have difficulty in determining which remedy is appropriate.⁴³

Therefore, in order to solve this remedial problem, the Law Reform Commission proposed that each administrative tribunal, when interpreting external laws, should comply with certain principles and guidelines when compensating a wronged complainant:

- (a) A wronged complainant should be entitled to the variety of remedies contained in the various enactments being applied to the dispute.
- (b) In situations where two applicable statutes provide the same remedy (for example, monetary compensation for a wrong), the complainant should be entitled to take advantage of the legislation that provides the most advantageous remedy.

⁴¹ *Ibid.* at 64-65.

⁴² *Ibid.* at 141.

⁴³ *Ibid.*

(c) In no case should a complainant be compensated twice for the same harm.⁴⁴

The necessity of such guidelines and the complicated system of “referral/deferral” illustrate that the remedial problem requires a clear legislative delimitation of jurisdiction. In the absence of such boundaries and guidelines in the *OLRA* and in other labour-related statutes, the possible conflict of remedies still exists. Based on the above-mentioned guidelines, arbitrators could hardly be expected to apply the remedies that the Human Rights Commission is mandated to apply without risking judicial review of their decision if they err.

This conflicting remedial power may lead to injustices which would prompt courts to review arbitrators’ awards. For instance, the Supreme Court of Canada established in *Weber*⁴⁵ the principle of exclusive jurisdiction of a grievance arbitrator on matters included in the collective agreement. Therefore, a unionized worker may be clearly disadvantaged in the case of a collective agreement providing for inadequate or conflicting remedies, or in the case where the worker would be entitled to damages for pain, suffering and humiliation. In such a case, the employee on the one hand would be barred from filing a complaint with the Human Rights Commission, but on the other hand, the employee would be disadvantaged by an arbitrator’s possible lack of expertise and by vague legislation regarding certain human rights-related remedies.

2. Conflict of Interest and Mission

Another disadvantage for a unionized employee clearly arises in the case of a violation of the employee’s human rights by another member of the bargaining unit. This may occur in cases of sexual harassment or even in cases of competition for a vacant position. In such cases, the exclusive carriage of the wronged employee’s grievance by the union⁴⁶ may raise a question of conflict of interest for the union. Due to the “carriage principle” and the exclusive jurisdiction approach stated in *Weber*,⁴⁷ the union would represent both the complainant and the person complained against. The complainant’s interests may be better represented by an independent body such as the Human Rights Commission before a tribunal sensitized to human rights.

Although an employee may, after going through the grievance procedures available in the collective agreement, file a complaint with the Human Rights Commission, a disadvantageous award or a conflicting remedy may cause undeniable harm and delay. Concerning this problem, the Quebec Court of Appeal states:

Ce n’est pas parce qu’on a inséré dans une convention collective une disposition qui ne fait que répéter une disposition identique d’une loi que l’on peut ainsi priver une personne d’un recours statutaire spécifique et distinctif dont cette loi assorti[t] cette disposition.

...

⁴⁴ *Ibid.* at 142.

⁴⁵ *Supra* note 15.

⁴⁶ See for instance *OLRA*, *supra* note 4, s. 45(1).

⁴⁷ *Supra* note 15.

Si l'on reconnaissait que la mise en oeuvre de la procédure de grief par les salariés intimés équivalait à une renonciation tacite des droits que la Charte [québécoise] leur reconnaît, ceci équivaldrait à dire que la mise en oeuvre d'un droit contractuel comporte une renonciation à un droit statutaire de nature différente. De plus, s'il en était ainsi, la convention collective équivaldrait à une renonciation tacite et préalable aux droits édictés par la Charte et l'intention du législateur lorsqu'il a adopté la Charte serait frustrée.

Je ne crois pas que l'on puisse retirer à un citoyen un droit dit «intrinsèque» (Préambule de la Charte) à l'occasion de la négociation d'une convention collective, négociation qui est en soi une série d'accommodements et de compromis économiques. Les droits reconnus dans la Charte sont plus que des «conditions de travail», il sont des «conditions de vie en société».⁴⁸

These situations of conflict of interest and lack of expertise are examples of clear cases where the Human Rights Commission is in a better position to decide the issue. Its investigators have developed great expertise in human rights issues, and the tribunal has a large amount of leeway in awarding damages for intangible losses like pain, suffering and humiliation. It also shows that grievance arbitration may not always be the "forum preferred by the legislature"⁴⁹ for resolution of human rights-related disputes. Consequently, these reasons provide an incentive for the courts to adopt a more severe standard of review or to interpret an arbitrator's jurisdiction restrictively as stated in section 48(12)(j) of the *OLRA*.

The intractable problem of possible conflicting and limited remedies — when combined with the inevitable lack of expertise of grievance arbitrators in the human rights field and the possible conflicts of interest under the grievance arbitration system — can only lead to a more interventionist attitude from the courts. In order to maintain a certain uniformity in the area of human rights and freedoms, the courts may be tempted to narrow the arbitrators' jurisdiction over human rights issues or even limit the application of a privative clause (in jurisdictions where such a clause is enacted) and hence review arbitrators' awards on a standard of correctness.

⁴⁸ *Ateliers d'ingénierie Dominion Limitée v. Québec (Commission des droits de la personne)*, [1980] R.P. 209 at 215-16 (Que. C.A.). Author's translation:

The mere fact that one has inserted in a collective agreement a provision which simply mirrors an identical statutory provision does not prevent a person from a distinct statutory claim provided for in the statute.

...

If we were to recognize the triggering of a grievance procedure by a union member as a tacit waiver of *Charter* rights, it would amount to saying that the exercise of a contractual right implies a waiver of a statutory right of a different nature. Furthermore, the collective agreement would amount to a tacit and preliminary waiver of the rights enacted in the *Charter*, and this would frustrate the legislature's intent. I do not believe that one may take away from a citizen a right said to be "intrinsic" (in the *Charter's* preamble) through the bargaining of a collective agreement, which is, *per se*, a series of accommodations and economic compromises. The rights guaranteed by the *Charter* are more than mere "working conditions", they are "conditions of living in society".

⁴⁹ *Nackawic*, *supra* note 15 at 721.

B. Role of the Privative Clause

The absence of a privative clause in the new *OLRA* is the second reason suggesting that the clause would not automatically result in greater curial deference towards arbitrators deciding human rights issues. In contrast to other jurisdictions, the Ontario Legislature did not protect arbitrators from judicial review.⁵⁰ The absence of such protection in the *OLRA* may expose arbitrators to judicial review on a standard of correctness when they err on human rights issues.

In *Mossop*,⁵¹ however, the Supreme Court of Canada stated that, even in the absence of a privative clause, grievance arbitrators would nevertheless benefit from a degree of deference in certain areas. Yet, in La Forest J.'s opinion, deference is only justified by the expertise that arbitrators have in labour relations issues, which does not necessarily extend to human rights legislation:

[T]he position of a human rights tribunal is not analogous to a labour board (and similar highly specialized bodies) to which, even absent a privative clause, the courts will give a considerable measure of deference on questions of law falling within the area of expertise of these bodies ... A labour arbitrator operates, under legislation, *in a narrowly restricted field*.⁵²

Did the majority intend to include human rights legislation in the "narrowly restricted" expertise of a grievance arbitrator? Considering the *Mossop* decision, the answer appears to be no. Given that the Supreme Court of Canada refused to defer to the most specialised tribunal in human rights matters,⁵³ it would be surprising that in the absence of a privative clause, greater deference would be given to grievance arbitrators.

As stated in *Bibeault*, the expertise of an administrative tribunal is an essential part of the "pragmatic and functional" approach used to delineate its jurisdiction.⁵⁴ Problems arise when arbitrators apply laws other than the *Labour Relations Act, 1995*, as any lack of expertise may appear to remove them from their "narrowly restricted" field of jurisdiction.

Katherine Swinton and Kenneth Swan have criticized the perception of grievance arbitrators' lack of expertise when interpreting human rights statutes:

There is no reason to believe that arbitrators have less "expertise" in interpreting human rights legislation than persons appointed to adjudicate a human rights inquiry. Indeed, many individuals perform both roles from time to time, and the pool of qualified persons from which individuals to perform both func-

⁵⁰ See for instance the *Canada Labour Code*, *supra* note 14, s. 58(1), and the British Columbia *Labour Relations Code*, S.B.C. 1992, c. 82, s. 101. It is interesting to note that the Ontario Labour Relations Board benefits from a privative clause at section 116 of the *OLRA*, *supra* note 4.

⁵¹ *Supra* note 39.

⁵² *Ibid.* at 584-85 [emphasis added].

⁵³ In this context, since the applicable statute was the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, the Canadian Human Rights Commission is the adjudicative body responsible for the enforcement of the *Act*.

⁵⁴ *Supra* note 29 at 1088-90.

tions are usually selected is essentially the same — lawyers, law professors and persons with related training and skills.⁵⁵

With respect, this would seem to be an unduly narrow approach because it personalizes the analysis that must be made in order to determine a tribunal's expertise. Beetz J.'s "pragmatic and functional"⁵⁶ approach does not purport to look at the personal characteristics and qualifications of the particular individuals. Rather, the expertise of an adjudicative body should be determined at the organizational and statutory level. Otherwise, such an individual assessment of qualifications may lead to great confusion when two members of the same board have different backgrounds and different expertise.

It follows that the absence of a privative clause, combined with the arbitrator's lack of expertise in human rights issues, could encourage judicial review on the standard of correctness. As such, the Ontario Law Reform Commission, when recommending the "referral/deferral" system,⁵⁷ recognized the problem of loss of expertise of administrative bodies when applying external laws. That is why it recommended that:

In the context of this report, *the only way* that a loss of expertise can be compensated for, so as not to increase the availability of judicial review, is through the use of privative clauses.

...

The Commission therefore recommends that each legislative enactment subject to this report should be amended to expressly include a privative clause to express the legislature's intention that a tribunal's decision should be final and not reviewable by the courts *even where the tribunal has exercised its jurisdiction to refer to external law*.⁵⁸

When proposing such an "airtight" or "full" privative clause, the Law Reform Commission is well aware of the fact that the courts will require an express and clearly stated intent from the legislature in order to refrain from exercising their surveillance powers. As such, the Supreme Court of Canada, in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*,⁵⁹ recently reiterated that the mere presence of a privative clause is not enough protection; the clause must also be properly drafted. As Sopinka J. phrased it:

To determine the standard of review, I must first decide whether the subject matter of the decision of the administrative tribunal was subject to a privative clause having full privative effect.

...

⁵⁵ K.E. Swinton & K.P. Swan, "The Interaction Between Human Rights Legislation and Labour Law" in K.E. Swinton & K.P. Swan, eds., *Studies in Labour Law* (Toronto: Butterworths, 1983) 111 at 123.

⁵⁶ *Bibeault*, *supra* note 29 at 1088-90.

⁵⁷ See *supra* note 42 and accompanying text.

⁵⁸ *Report*, *supra* note 40 at 152 [emphasis added].

⁵⁹ [1997] 2 S.C.R. 890, 149 D.L.R. (4th) 577 [hereinafter *Pasiechnyk* cited to S.C.R.].

A "full" or "true" privative clause is one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded.... *Where the legislation employs words that purport to limit review but fall short of the traditional wording of a full privative clause, it is necessary to determine whether the words were intended to have full privative effect or a lesser standard of deference.*⁶⁰

Even though *Pasiechnyk* did not concern human rights, the Supreme Court adopted a restrictive approach in its interpretation of the privative clause at section 168 of the Saskatchewan *Workers Compensation Act, 1979*.⁶¹ Considering the fundamental nature of human rights, this restrictive interpretation of privative clauses should be adopted when an administrative tribunal, or a grievance arbitrator, decides on human rights and freedoms.

C. The Fundamental Nature of Human Rights Legislation

The *Mossop*⁶² case is a good illustration of the courts' perception of the special nature of human rights legislation. In this case, Mr. Mossop, a homosexual federal civil servant, was denied bereavement leave to attend the funeral of his partner's father. The collective agreement provided for such leave only if the spouse was of the opposite sex. After an unsuccessful grievance procedure, Mr. Mossop challenged the provision of the collective agreement before the Canadian Human Rights Commission, which stated that the agreement was discriminatory on the basis of "family status". It ordered that the day of the funeral be designated as a "day of bereavement leave" and that the collective agreement be amended to include persons of the same sex as spouses. On judicial review before the Federal Court of Appeal⁶³ the decision of the Canadian Human Rights Commission was set aside on the grounds that its decision needed to meet a standard of correctness and not merely one of reasonableness.

The Supreme Court of Canada dismissed the appeal and confirmed that the applicable standard of review should be one of correctness. The highest Court justified its overruling of the Canadian Human Rights tribunal's decision on the ground that general questions of law fall within the expertise of the courts:

The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal. They must, therefore, review the tribunal's decisions on questions of this kind on the basis of correctness, not on a standard of reasonability.⁶⁴

⁶⁰ *Ibid.* at 904-905 [emphasis added].

⁶¹ S.S. 1979, c. W-17.1.

⁶² *Supra* note 39.

⁶³ Pursuant to the *Federal Court Act*, R.S.C. 1985, c. F-7, s. 28, as am. by S.C. 1990, c. C-8, s. 8.

⁶⁴ *Mossop*, *supra* note 39 at 585.

The implication of *Mossop* is that courts are likely to require a clear legislative statement before refraining from intervening in a field they consider theirs: human rights and freedoms. Such an interpretation may seem to have been overruled by the Supreme Court in *Pasiechnyk*. Indeed, in that recent case, Canada's highest court has reiterated that a "full" or "true" privative clause is a clear indication of the legislature's intent to avoid judicial review. However, Sopinka J. left the door open when he wrote: "Although this expression of intention by the legislature appears to be clear, it must be tested by reference to the other factors involved in the functional and pragmatic approach which this Court adopted in *Bibeault*."⁶⁵ It is argued that if applied to human rights issues,⁶⁶ this "reserve" will necessarily require analysing, among other things, the arbitrators' expertise and the special or fundamental nature of human rights. Consequently, in light of the courts' perception of human rights, the latter will lead them to adopt a restrictive interpretation of the legislature's intent to limit their surveillance powers.

The Supreme Court's attitude toward the fundamental nature of human rights is also clearly articulated in *University of British Columbia v. Berg*.⁶⁷ In this case, the University denied the appellant, Berg, a key to the building although other students were provided with one. The school's director also refused to complete a rating sheet required for the student to apply for an internship. Ms. Berg had previously experienced depression, but nevertheless was capable of attending classes and responding to the same demands as other students. The British Columbia Human Rights Commission found that there had been discrimination on the basis of disability. The decision was overruled in first instance when the British Columbia Supreme Court held that the provision of a key and a rating sheet did not constitute services customarily available to the public within the meaning of section 3 of the British Columbia *Human Rights Act*.⁶⁸ The Court of Appeal upheld the judgment. The question before the Supreme Court of Canada was clearly one of interpretation of the British Columbia *Human Rights Act*. On the standard of review, Lamer C.J.C., writing for the majority,⁶⁹ cited La Forest J. in *Mossop* and added:

Turning to the issue before the Court, it is clear that the question of what constitutes a service customarily available to the public is a general question of law with wide social implications, in which the Council has no particular expertise. There being no reason why deference should be given to the Council on this question, the appropriate standard of review is one of correctness.⁷⁰

The Supreme Court of Canada, therefore, considers a question such as the one in *Berg* as being a "general question of law." In *Mossop*, Canada's highest court held that the meaning of the expression "family status" is also a general question of law that

⁶⁵ *Supra* note 58 at 907.

⁶⁶ As stated above, *Pasiechnyk* is a case on workers' compensation, not on human rights or discrimination issues.

⁶⁷ [1993] 2 S.C.R. 353, 102 D.L.R. (4th) 665 [hereinafter *Berg* cited to S.C.R.].

⁶⁸ S.B.C. 1984, c. 22.

⁶⁹ Note that L'Heureux-Dubé J., who dissented in *Mossop* concurred with the majority in this case.

⁷⁰ *Supra* note 66 at 369 [emphasis added].

“involve[s] concepts of statutory interpretation and general legal reasoning.”⁷¹ Since the mere statutory interpretation of the Human Rights Commission’s constitutive statute is too general a question to benefit from curial deference, it is hard to imagine what kind of questions would prevent the courts from intervening in the field of human rights and freedoms.

By analogy, a grievance arbitrator who is called upon to decide on discrimination issues will necessarily have to construe words and expressions from the *HRC* (or other jurisdictions’ human rights legislation) that are mirrored or referred to in the collective agreement. This will necessarily involve “general questions of law” with “wide social implications.” Giving the arbitrator, in the absence of a privative clause, a different standard of review than the Human Rights Commission would amount to a double standard, something the Supreme Court of Canada does not appear ready to accept. As one author writes:

In the heyday of the *Charter*, courts see law and policy concerning human rights to be at the core of their jurisdiction. *Mossop* and *Berg* are the culmination of a line of cases which play out the tragic flaw in the “quasi-constitutional” characterization which was given to human rights legislation ... and which was welcomed by human rights lawyers who often thought that the courts were according a considerable degree of deference to human rights bodies.⁷²

This fundamental nature of human rights legislation, then, is the third reason why curial deference may not be greater under the new *OLRA* when arbitrators decide on human rights and freedoms issues. These fundamental rights are of a special nature and the Supreme Court has even stated on numerous occasions that they are almost constitutional. As McIntyre J. stated in *Winnipeg School Division No. 1 v. Craton*:⁷³

In any event, I am in agreement with Monnin C.J.M. [in the decision of the Court of Appeal] where he said:

Human rights legislation is public and fundamental law of general application. If there is a conflict between this fundamental law and other specific legislation, unless an exception is created, the human rights legislation must govern.

This is in accordance with the views expressed by Lamer J. in *Insurance Corporation of British Columbia v. Heerspink ... Human rights legislation is of a special nature and declares public policy regarding matters of general concern*. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its

⁷¹ *Supra* note 39 at 585.

⁷² A. Harvison-Young, “Human Rights Tribunals and the Supreme Court of Canada: Reformulating Deference” (1993) 13 Admin. L. R. (2d) 206 at 215.

⁷³ [1985] 2 S.C.R. 150, 21 D.L.R. (4th) 1 [hereinafter *Winnipeg School* cited to S.C.R.; emphasis added]; see also *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, 40 D.L.R. (4th) 577; *Ontario Human Rights Commission v. Simpson-Scars*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321; *Canadian National Railway Co. v. Canadian Human Rights Commission*, [1987] 1 S.C.R. 1114, 40 D.L.R. (4th) 193.

provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims.⁷⁴

This unequivocal consistency in the highest court's majority opinion supports the conclusion that the Supreme Court of Canada considers the courts of justice to have a kind of monopoly over the interpretation of human rights issues and a duty to maintain a necessary control over their potentially wide social implications. As Professor Alison Harvison-Young wrote in 1993:

[I]n the current Canadian context, one could argue that the Charter has added respectability to the exercise of judicial power over human rights commissions by elevating the subject-matter of commission jurisdiction to quasi-constitutional status. Just as it seemed to Dicey to be "natural, right and matter of constitutional principle" that the ordinary courts should be supreme, *it seems now natural and constitutionally required ... by the Charter that the ordinary courts be the guardians of human rights.*⁷⁵

Ken Norman, who supports the application of a standard of correctness to grievance arbitrators deciding on human rights, finds a constitutional justification for curial interventionism:

The courts are now institutionally involved in human rights law enforcement by being given appellate authority over the decisions of human rights tribunals and inquirers. And, given the anti-discrimination provisions of the equality rights sections of the Charter, *it will ultimately be up to the Supreme Court of Canada to develop interpretations of equality comporting with the inherent dignity of the human person* which, in short, fit with human rights definitions under human rights legislation and jurisprudence. There is coherence to all of this. And it is especially important that this be recognized in light of the "quasi-constitutional" status of human rights legislation.⁷⁶

Therefore, it seems that the special nature of human rights legislation places it in a specific category over which the courts' interventions will be greater and their interpretation of any legislative restriction of their surveillance powers will be more restrictive. Consequently, upon judicial review of decisions regarding human rights, the courts seem to act more like an appellate tribunal by addressing the merits of an arbitrator's award rather than simply controlling the legality of the decision.

This attitude toward fundamental rights may also be paralleled with another situation where the courts subject administrative bodies to the standard of correctness. Indeed, when rules of natural justice are violated by an administrative body, the courts do not hesitate to intervene and apply a strict standard of correctness because of the

⁷⁴ *Winnipeg School, ibid.* at 156 [emphasis added].

⁷⁵ A. Harvison-Young, "Keeping the Courts at Bay: The Canadian Human Rights Commission and its Counterparts in Britain and Northern Ireland: Some Comparative Lessons" (1993) 43 U.T.L.J. 65 at 73 [emphasis added].

⁷⁶ K. Norman, "Case Comment on *St. Paul's Roman Catholic Separate School District v. C.U.P.E. and Huber*" (1988) 67 Can. Bar Rev. 364 at 372 [emphasis added].

fundamental value attributed to the rules of natural justice. This principle is well established in law:

A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, *do something which takes the exercise of its powers outside the protection of the privative or preclusive clause*. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, *breaching the provisions of natural justice*.⁷⁷

It then becomes understandable that the same courts would tend to intervene when they felt that, for instance, discrimination has occurred and a fundamental human rights rule has been violated. Even with a privative clause, the state of the law is clear to the effect that a breach of natural justice provisions or an action in bad faith would cause a loss of jurisdiction of the administrative tribunal.⁷⁸ The same conclusion could be drawn in the case of a simple error in the interpretation of fundamental human rights provisions by a grievance arbitrator.

The aforementioned case law illustrates that when a court disagrees with an arbitrator's interpretation of a human rights provision, it will tend to look for a way to intervene and substitute its opinion for that of the arbitrator in order to correct a perceived fundamental injustice. For example, in *Mossop*, the Supreme Court maintained the decision of the Federal Court of Appeal since the majority agreed with the merits of the decision. In that case, the highest court was simply not ready to bypass the legislature — and the political debate over the issue — and add a new ground of discrimination by including homosexual couples in the expression “family status”. Nevertheless, as Lamer C.J.C. suggests in *obiter*, had the Supreme Court not agreed with the Federal Court of Appeal's interpretation, it would have probably overruled it on the standard of review⁷⁹ and reinstated the Human Rights Commission's decision:

Indeed, in this case, if Parliament had decided to include sexual orientation in the list of prohibited grounds of discrimination, my interpretation of the phrase “family status” might have been entirely different and I might perhaps then have concluded that Mr. Mossop's situation included both his sexual orientation and his “family status”.⁸⁰

In contrast, a recent decision of the Supreme Court of Canada states that grievance arbitrators may, in some cases, benefit from curial deference even on human rights issues. In *NAPE*,⁸¹ the respondent issued a job posting for the position of Personal Care Attendant. The health centre determined that a male would be better suited

⁷⁷ *Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association of Nipawin*, [1975] 1 S.C.R. 382 at 389, 41 D.L.R. (3d) 6 [hereinafter *Nipawin*; emphasis added]; see also *Anisimic, Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147, [1969] 1 All E.R. 208 (H.L.).

⁷⁸ See *Nipawin*, *ibid.*

⁷⁹ The only way Lamer C.J.C. could have substituted his interpretation for that of the Federal Court of Appeal would have been for him to come to the conclusion that the applicable standard was “patently unreasonable”, since the appeal was on judicial review.

⁸⁰ *Mossop*, *supra* note 39 at 582.

⁸¹ *Supra* note 9.

for the job since it required intimate personal care of elderly male patients. However, this requirement was not specified on the job offer. A female employee of the health centre applied for the job, but her application was rejected on the grounds that she was a woman. She filed a grievance before a board of arbitration claiming for discrimination based on sex.

The collective agreement contained an anti-discrimination clause. In a sense, the clause was more severe than the one in the Newfoundland *Human Rights Code*⁸² since it did not provide for an exception of *bona fide* occupational qualification ("BFOQ"). The health centre argued that, notwithstanding the collective agreement, it was entitled to rely on the Newfoundland *HRC* and on the BFOQ to legally discriminate against women.

The arbitration board rejected the grievance on the grounds that the parties to a collective agreement cannot contract out of the Newfoundland *HRC* and that the collective agreement must be read in conjunction with the *HRC*. On judicial review, the Newfoundland Supreme Court overruled the decision of the arbitration board. The Court found that the Board had erred in deciding that the parties could not contract out of the Newfoundland *HRC*. A majority of the Newfoundland Court of Appeal restored the board's decision.

A unanimous Supreme Court of Canada reversed the Newfoundland Court of Appeal's decision. With regard to the standard of review, Major J. stated:

In the present appeal, both the "patently unreasonable" and the "correctness" standards of review are involved. The [arbitration] Board interpreted the collective agreement and the Code. If the Board was incorrect but not patently unreasonable in all of its findings, the Court can only interfere on the "correctness" standard with those portions of the decision that as questions of law interpret the Code.

...

The Board found that parties could not "contract out" of the BFOQ provision of the Code. In doing so, the Board interpreted the Code and its interpretation must be correct; with respect, I do not think that it is.⁸³

Major J. added that when determining whether the collective agreement was to be read in harmony with the Newfoundland *HRC*, the standard of review is the decision's patent unreasonableness. The Supreme Court held that the Board was incorrect (on a correctness standard) in its interpretation of the Newfoundland *HRC* by holding that the parties cannot contract out of its BFOQ provision. Regarding the issue of the Board's interpretation of the collective agreement by reading it in harmony with the Newfoundland *HRC*, Canada's highest court held that it was not a patently unreasonable interpretation and consequently deferred to the Board's decision.

This case may be seen as establishing a clear deference to arbitrators even on human rights issues. However, since the relevant provision of the collective agreement

⁸² S.N. 1988, c. 62 [hereinafter Newfoundland *HRC*].

⁸³ *Supra* note 9 at 12.

had the effect of raising and further protecting human rights, a patently unreasonable standard was plainly acceptable and compatible with the Supreme Court's role as guardian of human rights.⁸⁴ Indeed, an interpretation of such a clause having the effect of reducing the protection to a lower level than that provided by the Newfoundland HRC would probably have been considered as patently unreasonable. Further, since Major J. agreed on the merits of the Board's decision, it was much easier for him to defer to the arbitrators' award. Although Major J. stated that while "the Board's conclusion, that the parties intended to be bound by the BFOQ provision, could be incorrect, it cannot be said that it is patently unreasonable."⁸⁵ It appears that Major J. did not reluctantly defer to the Board's decision. Indeed, he fully agreed with its merits, as is indicated by his suggestion of another way to achieve the same result as the Board:

Another way of reaching the conclusion that the parties did not preclude application of the BFOQ to the collective agreement is by examining the definition of discrimination as used in the collective agreement. In determining what the parties meant by prohibiting "discrimination" one must refer to the definition of discrimination which prevails in Newfoundland, namely, that found in the Code. This definition incorporates the concept of BFOQ.⁸⁶

With respect, a decision in which a reviewing court agrees with the administrative tribunal, on the merits of the decision, cannot be binding with respect to the standard of review (particularly for the standard of correctness).

Recently, the Quebec Superior Court, in *Kirkland (ville de) v. Syndicat des Employés Municipaux de la Ville de Kirkland*,⁸⁷ had to decide on the applicable standard of review of a grievance arbitrator's award regarding human rights. In this case, the employer had dismissed an employee who had been working for only two months and then placed his name on a "recall list". The employer based its decision on a medical report establishing that the employee's health did not permit him to adequately perform his janitorial duties (he suffered colour blindness and chronic bronchitis among other diseases).

The collective agreement expressly refers to the *Quebec Charter*.⁸⁸ After a thorough review of the case law, Levesque J. wrote:

À défaut d'autres autorités, je crois que dans le cas présent la Cour supérieure doit faire montre de déférence à l'endroit de l'arbitre, d'une part, et que la norme d'examen est celle de l'erreur déraisonnable ou irrationnelle, d'autre part, lorsqu'elle interprète la convention collective qui incorpore le droit québécois.

Toutefois, à cause de l'importance des questions soulevées et de la rareté des indices, j'analyserai la décision de l'arbitre dans la perspective de l'existence ou non d'une erreur et de la justesse de la décision.

...

⁸⁴ See Part II above.

⁸⁵ *Supra* note 9 at 19.

⁸⁶ *Ibid.* at 20.

⁸⁷ [1997] R.J.Q. 534 (S.C.) [hereinafter *Kirkland*].

⁸⁸ *Supra* note 23.

Si l'on enlève les commentaires de l'arbitre au sujet de la *Loi assurant l'exercice des droits des personnes handicapées* et de la *Loi sur les accidents du travail et les maladies professionnelles*, qui ne sont pas vraiment utiles à sa décision, elle n'a pas commis d'erreur ni dans l'interprétation de l'article 2.07 de la convention collective ni dans celle de la charte québécoise.⁸⁹

The decision was not appealed. It is submitted that this case illustrates the great confusion in this area and, consequently, does not shed much light on the applicable standard of review. What would the Court's conclusion have been had Levesque J. not agreed with the arbitrator's interpretation of the *Quebec Charter* or had found a "simple" error? In particular, this may also confirm that upon judicial review of awards regarding human rights, the courts will tend to analyse the merits of a decision, as an appellate court would, rather than its mere legality.

Conclusion

In light of the case law analysed in this article, it appears that the standard of judicial review is somewhat of a red herring. In human rights-related disputes, the courts will use the standard of review as a vehicle or a tool to control the merits of the arbitrator's decision. The judicial review procedure is then used as a quasi-appeal of the arbitrator's award. This ultimate control allows the courts, and particularly the Supreme Court of Canada, to maintain a uniform application and interpretation of one of the most fundamental aspects of our democratic society: the protection of human rights. It would be doubtful that a sole power-conferring provision such as section 48(12)(j) of the *OLRA* would change the court's traditional stance of lack of deference toward arbitrators deciding human rights issues.

It is questionable whether such active interventionism is desirable. It could lead to an increasing number of applications for judicial review, which would directly affect the delays of adjudication. Although the courts are more favourable to accepting a less expeditious dispute resolution mechanism when human rights are at stake, in the present state of cutbacks and budget restrictions, a backlog of judicial review cases would

⁸⁹ *Supra* note 86 at 542-43. Author's translation:

In the absence of other authorities, I believe that in the present case, the Superior Court must defer to the arbitrator, on the one hand, and to the standard of review being one of unreasonable or irrational error, on the other hand, when the arbitrator interprets the collective agreement which incorporates Quebec law.

However, due to the importance of the questions raised and to the scarcity of guidelines, I will analyse the arbitrator's decision in light of whether or not there was an error and the correctness of the decision.

...

If we remove the arbitrator's comments on the *Act to secure the Handicapped in the exercise of their rights* and the *Act respecting industrial accidents and occupational diseases*, which are not really relevant to her decision, she did not make any error whether in her interpretation of section 2.07 of the collective agreement or of the *Quebec Charter*.

certainly frustrate the *OLRA*'s goal of expediting proceedings. It may also lead to the undesirable consequence of awards regarding human rights being "routinely ... altered by the courts whenever they disagree"⁹⁰ with the arbitrators' interpretations of the agreements. What, then, would be a balanced solution that would both protect the "magnificent goal"⁹¹ of fairness in the workplace and meet the need for an expeditious resolution of disputes in order to maintain "industrial peace"?⁹²

The cost of reaching the "magnificent goal" is very high, both in terms of money and undesirable delays. Indeed, in *Mossop*, the grievance was filed in 1985,⁹³ and the complaint to the Canadian Human Rights Commission was made that same year, but the final judgment was rendered eight years later, in 1993. In *NAPE*, six years elapsed between the original grievance⁹⁴ and the Supreme Court's decision. Such delays can only frustrate the goal of expediency of grievance arbitration, which is a necessary ingredient of industrial peace.

If greater deference is shown to administrative tribunals (including grievance arbitrators) on human rights issues, it might have some undesirable consequences. For example, had the Commission's decision in *Mossop* been maintained, it would have had the effect of including sexual orientation as a protected ground of discrimination when the legislature was not ready to amend the statute. However, regardless of the wording of any privative clause protecting the arbitrators' awards, patently unreasonable decisions will always be quashed on judicial review.⁹⁵ Therefore, any gross injustice will still be controlled by the higher courts, but this also implies that "simple" errors or "small" injustices will survive.

The solution clearly lies in the hands of the legislatures. In most Canadian jurisdictions there is a great disparity between the relevant labour relations statutes. Some confer on the arbitrators the powers to interpret and apply other statutes and at the same time protect their decisions with a privative clause, while others do not.⁹⁶ A nationwide consistency would be desirable in this matter since this lack of uniformity gives the courts (especially the Supreme Court of Canada) an added incentive to try to standardise the level of human rights protection from coast to coast.

Speedy dispute resolution and industrial peace can only be reached by clear legislative intervention and probably at the expense of the "magnificent goal". This

⁹⁰ The Supreme Court of Canada warned against this undesirable consequence in *C.B.C.*, *supra* note 29 at 179-80.

⁹¹ *Bergevin*, *supra* note 11 at 544.

⁹² *Shaw*, *supra* note 13 at 776.

⁹³ See *Mossop v. Canada (Department of Secretary of State)* (1989), 10 C.H.R.R. D/6064 (H.R.C.).

⁹⁴ See *Re Newfoundland (Green Bay Health Care Centre) and N.A.P.E.*, *Loc. 3201* (1989), 6 L.A.C. (4th) 81.

⁹⁵ See *Bibeault*, *supra* note 29.

⁹⁶ For instance the Quebec *Labour Code*, R.S.Q. c. C-27, s. 100.12, contains a power-conferring provision, but no privative clause. The *Canada Labour Code*, *supra* note 14, contains a privative clause (s. 58(1)), but no power conferring provision specifically allowing the arbitrator to interpret human rights statutes. Finally, the British Columbia *Labour Relations Code*, *supra* note 49, contains both.

might be a solution that would begin to solve the thorny question of judicial review of grievance arbitrators deciding on human rights issues, since the courts do not seem amenable to refraining from strict control of administrative tribunals.⁷⁷ Such intervention would require a power-conferring provision like the one found in section 48(12)(j) of the *OLRA*. A provision of this kind should be coupled with a "full" or "true" privative clause like the one recommended by the Ontario Law Reform Commission.⁷⁸ This power-conferring provision would amount to giving arbitrators, who do not necessarily provide the best forum, an even greater protection from judicial review than that available to the Human Rights Commission over its interpretation of the HRC. It seems that only such a clear political choice might circumvent the courts' restrictive interpretation of the legislature's intent and force them to defer to arbitrators' human rights-related decisions. Then again, success would not be guaranteed, especially if courts consider a misinterpretation of human rights law as having the same consequences as a breach of the rules of natural justice.

⁷⁷ The complicated character of the Ontario Law Reform Commission's recommendations shows how detailed and comprehensive the legislative intervention should be in order to counterbalance the courts' interventionist attitude. See *Report, supra* note 40.

⁷⁸ See *Report, ibid.* It is suggested that the privative clause states that the arbitrator's decision should not be reviewable even when the arbitrator had to interpret human rights statutes in order to render a decision.