

CITATION: Jean-Marie Dixon v. The King (Ontario), 2025 ONSC 5828
COURT FILE NO.: CV-19-00614989-0000
DATE: 20251017

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JEAN-MARIE DIXON, Plaintiff

AND:

HIS MAJESTY THE KING IN RIGHT OF ONTARIO and ASSOCIATION OF
LAW OFFICERS OF THE CROWN, Defendants

BEFORE: AKAZAKI J.

COUNSEL: Jean-Marie Dixon, Self-Represented

Rebecca Jones and Madeleine Andrew-Gee, for the Defendant His Majesty the
King in right of Ontario

Geetha Philpupillai, for the Defendant Association of Law Officers of the Crown

HEARD: August 22, 2025

REASONS FOR DECISION

OVERVIEW

- [1] Jean-Marie Dixon’s employer, the Ontario Government, moves to dismiss or stay this human rights suit, on the grounds that she is party to a collective agreement that requires provincial government lawyers to submit workplace discrimination and harassment claims to private arbitration. Despite the use of these labels by both sides, Ms. Dixon’s employment contract is not a collective agreement, and the leading part of her claim is hard to characterize as discrimination or harassment under current Ontario human rights law.
- [2] Ms. Dixon’s claim extends beyond alleged discrimination and harassment against her as a female Black lawyer in the Crown legal services department of the Ontario Government. She seeks moral redress for injury to her dignity and well-being while exposed to a workplace polluted, in her words, by anti-Black racism and misogynoir. Her pleadings rely on published and internal reports concluding that Ontario’s public service persistently reproduces bad occupational outcomes for Black people despite the Ontario *Human Rights Code*, R.S.O. 1990, c. H. 19, and despite the efforts of people with good intentions to develop a colourblind environment. How she will prove these points is not a question in this motion. However, whether this extension of her claim into general and historical working conditions is justiciable is a question determining whether the whole dispute belongs in an arbitration required by the alleged agreement.

- [3] Panning over her career as an Ontario Crown lawyer in a 250-page claim, Ms. Dixon hoped the court will provide a forum to pursue a novel cause of action. That cause derives its doctrinal foundation from the experience of racial and gendered hostility lived and inherited by Black women. Indeed, she alleges that the grievance and arbitration procedures are part of the problem, by constraining her ability to complain beyond specific instances of unequal treatment and workplace harassment. She contends that these systems are the artifacts of “continually reconfigured” anti-Black racism in Canada reacting to the 1834 abolition of slavery in the British Empire. She essentially considers her hiring and promotion as an Ontario government lawyer as a kind of trap by a white establishment to subjugate her to conditions rife with reminders of hatred or resentment toward Black people.
- [4] Ms. Dixon describes having been subjected to an expectation to perform menial tasks, to non-acknowledgement when stakeholders toured the office, to discouragement from participation in committees, and to the unfiltered racist commentary of white staff members. For example, she states that she and a Black colleague overheard a lawyer yelling the word “black” several times in a manner connoting surprise at the current Chief Justice’s appointment to the Court of Appeal. Because such insults were not directed at Ms. Dixon, as I gleaned from the theory of her case, some of the harm resulted from undirected conduct or conditions outside current human rights law based on unequal treatment or harassment.
- [5] In an attempt to plead a cause of action based on her lived experience, she has used many legal labels that appear to be attempts to force the facts into established categories, such as discrimination, assault, defamation, negligence, breach of privacy, intrusion on seclusion, negligent investigation, intentional infliction of mental suffering, nervous shock, breach of contract, and breaches of the *Charter*. A legal label in a pleading cannot transform the material facts into a legal cause of action: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at para. 49. In *Non-Marine Underwriters, Lloyd’s of London v. Scalera*, 2000 SCC 24, [2000] 1 SCR 551, at para. 50, the plaintiff’s pleading of negligence in a sexual assault case could not attract liability insurance coverage, because assault is an intentional tort. Other legal labels such as conspiracy and breach of privacy also do not alter the substance of a claim, for the purpose of determining whether a statute deprives the court of subject matter jurisdiction: *Yang v. Co-operators General Insurance Company*, 2022 ONCA 178, 21 C.C.L.I (6th) 1, at para. 7.
- [6] The court can appreciate Ontario’s reasons for bringing the motion, although not for the motives Ms. Dixon attributes to it. Seeking to confine her grievances to the workplace human rights breaches expressly covered by the arbitral provisions in the collective agreement, Ontario clearly hopes to divert the case from litigation and confine it to a more manageable process. Otherwise, Ms. Dixon’s prolix exposition of the harm she has endured stands to mire Ontario in an unmanageable lawsuit. Despite the challenges facing the litigants and the court, the motion must stand or fall on the evidence whether Ms. Dixon was party to the arbitration agreement, and on the analysis of pleaded facts extending human rights law beyond the parameters in the agreement.

- [7] Ontario's lead argument in this motion is that, as stated by the Supreme Court of Canada in *Weber*, the court has no jurisdiction to hear a case governed by a collective agreement. In the alternative, pursuant to s. 7 of the *Arbitration Act, 1991*, S.O. 1991, c. 17, the court must grant a stay and permit the arbitrator to determine, at first instance, the extent to which Ms. Dixon's dispute is covered by the clause. In oral argument, Ontario's counsel inverted the order of these points, having realized the weakness of the *Weber* argument in a non-union context. Nevertheless, Ontario refused to withdraw the jurisdictional issue, and I must rule on both points.
- [8] *Weber* dealt with a privative clause typically found in Canadian labour statutes. These privative clauses suspend a unionized worker's rights to bargain individually with the employer and to seek court redress for occupational complaints. Because Ms. Dixon did not belong to a certified union under Ontario law, this part of the motion to dismiss the case for lack of jurisdiction must fail. It is the statute, not the characterization of the agreement, that deprives a court of jurisdiction.
- [9] Ontario's second point in the motion concentrates on the arbitration clause in a tripartite collective agreement among Ms. Dixon, Ontario, and her association. Although the agreement resembled a collective agreement under the labour statutes, it did not have the force of statute to bind all association members. If Ms. Dixon was party to it, it simply recognized that the association acted as her bargaining agent, in accordance with the ordinary law of agency. The relationship between Ms. Dixon and Ontario was a common law contract of employment. For the arbitration agreement to mandate a stay, Ontario first had to prove that Ms. Dixon was party to it.
- [10] Beyond initial two months of time-limited employment, which ended that contract, Ontario was unable to produce evidence of Ms. Dixon being party to the collective agreement. It relied on the circumstantial evidence that it would not have hired her or appointed her to any further employment position, unless she was party to the collective agreement. Despite the compelling logic of this position, an assumption by the employer is not arguable or *prima facie* proof of the binding effect of the contract of adhesion on an employee, under employment law principles. The moving party has therefore failed to prove the arbitration agreement was binding on Ms. Dixon. The motion must therefore fail on this ground.
- [11] Despite the above grounds for dismissal of the motion, its interlocutory nature requires me to consider whether the whole claim fits into the arbitrator's jurisdiction, in the event better evidence of Ms. Dixon's adherence to the collective agreement is later forthcoming. Assuming, for the sake of this argument, that she was party to the agreement, I am unable to foreclose the possibility that the courts might find grounds for recognizing an individual right to sue for the harm suffered from working in a generally harmful environment. The idea that courts can provide redress to individuals affected by conditions affecting many is not without legal precedent. I am also mindful of the appearance of injustice, if the court were to stay her action in favour of an arbitral process constrained by established human rights law, because of her contention that the collective agreement is an instrument of constraint. The arbitral jurisdiction to hear Ms. Dixon's complaints regarding specific

discrimination and harassment directed at her does not extend to her alleged harm from exposure to group hostility toward female Black employees.

[12] In concluding that Ontario's motion must be dismissed, my analysis will traverse the two grounds for the motion, based on the moving party's evidence and Ms. Dixon's claim as pleaded. These grounds require the court to consider whether:

1. the labour law principles in *Weber* deprive the court of jurisdiction over the subject matter of the action; or
2. the action must be stayed pursuant to s. 7 of the *Arbitration Act, 1991*, because:
 - a. the arbitration provisions in the collective agreement were binding on Ms. Dixon, and
 - b. the action arises from matters that the collective agreement required the parties to submit to arbitration.

1. DOES WEBER REMOVE THE COURT'S JURISDICTION?

[13] Ontario has already successfully contested the court's jurisdiction to hear a related case. Ms. Dixon originally combined her claim with that of Hentrose Nelson, another Ontario public servant but not a lawyer. After the claims were severed, Ms. Nelson's action was dismissed for absence of jurisdiction. In *Nelson v. Ontario*, 2020 ONCA 751, 2021 C.L.L.C. 220-021, the Court of Appeal upheld the dismissal. Ms. Nelson's case was different to Ms. Dixon's, because Ms. Nelson was a unionized employee whose relation to her employer was subject to "final and binding settlement by arbitration" pursuant to s. 48(1) of the *Labour Relations Act, 1995*, c. 1, Sched. A ("LRA"). That mandatory provision, as applied in *Weber*, required the court to dismiss the action. Ontario argued that *Weber* also established the general litigation bar preventing employees subject to collective agreements from access to the courts for workplace-related causes of action.

[14] Although the collective agreements in Ms. Dixon's case resemble those in unionized environments, provincial lawyer Crown employees cannot unionize. The definition of "employee" under s. 1(3) of the LRA excludes lawyers. Para. 4(1)(a) extends the application of the LRA to agencies employing Crown employees under the *Crown Employees Collective Bargaining Act, 1993*, S.O. 1993, c.38 ("CECBA"). Subsection 3(1) of CECBA, in turn, excludes operation of s. 1(3) of the LRA. 1.1(3) then excludes operation of CECBA to "Lawyers employed in their professional capacity." Although this legal analysis might require pen and paper to figure out, it means CECBA is inoperative with respect to provincial lawyer Crown employees. The algorithm reverts to the exclusion of lawyers under s. 1(3) of the LRA.

- [15] Although ALOC operated as a bargaining unit and agent for Crown lawyers, it is not a statutory union. The collective agreement operates as a standard-form contract governed by ordinary employment law. The law of agency also applied to the lawyers' relation with ALOC. The arbitration provisions in the agreement may appear analogous to the *Weber* principles, but the source of legal authority defining the relations are different. Legal authority, not practice or similarity to a unionized workplace, governs jurisdiction. *Weber* did not establish a general principle that the court lacks jurisdiction over the subject matter of the dispute, outside the union context. Only Parliament and provincial legislatures can derogate from the powers of the Canadian judiciary inherited from the Royal Courts of Justice and protected under s. 96 of the *Constitution Act, 1867: Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 SCR 3, at paras. 18-23.
- [16] Ontario's motion to dismiss the action for want of jurisdiction must be denied, because no statute deprives the court of jurisdiction.

2. STAY PENDING ARBITRATION

- [17] The lack of grounds to dismiss the action based on jurisdictional grounds does not complete the inquiry on this motion. Ontario also sought a stay of proceedings under s. 7 of the *Arbitration Act, 1991*, relying heavily on the mandatory nature of the relief. To simplify the analysis, I will focus on the following threshold subsection (*italics mine*):

Stay

7 (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced *shall*, on the motion of another party to the arbitration agreement, stay the proceeding.

- [18] In *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, 475 DLR (4th) 1, at paras. 39-41, the Supreme Court upheld the general principle known as 'competence-competence,' that arbitral jurisdiction should be decided at first instance by the arbitrator. However, in para. 42, it reserved the authority of superior courts to resolve disputes over arbitral jurisdiction if the issue entails pure questions of law or questions of mixed fact and law involving superficial consideration of the evidentiary record. There can be no evidentiary consideration more superficial than a pleadings review. Ms. Dixon's pleadings are not evidence of what happened, but only statements of what she intends to prove at trial.
- [19] In paras. 81-90 of *Peace River*, the Supreme Court established a two-step stay framework for applying provincial arbitration legislation modeled after international treaties and conventions to which Canada has acceded. First, the moving party must meet the technical prerequisites for a mandatory stay of court proceedings. Second, the respondent must counter by showing the case falls within the statutory exceptions to a mandatory stay of

court proceedings. In each instance, the standard of proof is that of an “arguable case,” whereby the Supreme Court equated “arguable” with “prima facie”: *ibid.*, para. 84-85.

- [20] My focus will be on the first step, because none of the statutory exceptions apply. I have considered para. 7(2)3 of the statute, which allows the court to refuse the mandatory stay if “The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.” The scope of this exclusion is wider than s. 7(1), referring to subject matter “under the agreement.” Despite my conclusion that the substance of Ms. Dixon’s case is different from the discrimination claim described in the agreement and Ontario human rights law, I am unaware of any reason why her claim could not be the subject of arbitration under Ontario law, if the submission provides for subject-matter jurisdiction akin to the Superior Court’s inherent jurisdiction.
- [21] The four typical technical prerequisites are whether: (1) an arbitration agreement exists; (2) court proceedings have been commenced by a “party” to the arbitration agreement; (3) the court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and (4) whether the party applying for the stay has taken any other step in the court proceeding. Within this rubric, the first and fourth questions were not in dispute.
- [22] A relevant arbitration agreement exists, at least between Ontario and the lawyer associations serving as bargaining units. Art. 6.9.11 of the collective agreement stated, in respect of the arbitration provisions:

These provisions constitute an arbitration agreement for the purposes of the *Arbitration Act, 1991*. The parties agree that they are bound by the decisions of the arbitrator and will apply these decisions to the lawyers to which this collective agreement applies.

- [23] Ontario has not taken any step beyond applying for the stay.
- [24] The second and third questions were not so straightforward.

(a) Was Ms. Dixon a party to the arbitration agreement?

- [25] This part of the analytical framework of the *Peace River* jurisprudence requires the court to apply the definition of “arbitration agreement” in s. 1 of the *Arbitration Act*:

an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them.

- [26] Ontario asserted that Ms. Dixon was party to the arbitration agreement. Ms. Dixon disputed that she was. The issue requires an evidentiary review of the employment contract in place during the relevant intervals. As in the *Weber* analysis above, the court cannot assume a collective agreement simply because Ontario required it of its lawyer employees. Ontario must prove Ms. Dixon agreed to it, and its arbitration provisions, as a condition of her

employment. Party autonomy of parties and freedom of contract to decide the chartering of a “private tribunal” to resolve their disputes go hand in hand with the principle of limited court intervention in arbitral proceedings: *Peace River*, paras. 49-50.

- [27] Ms. Dixon is currently a suspended senior counsel with the Ministry of the Attorney General, Civil Remedies for Illicit Activities Office. She has spent her entire legal career as a provincial government lawyer, having started in the Ontario public service as an articling student in 2002. On July 17, 2003, the Ministry of Community, Family and Children’s Services hired Ms. Dixon as Counsel in the Family Responsibility Office, an agency that enforces family law support obligations. The term of employment lasted less than two months. Ontario continued to employ Ms. Dixon, but the record did not disclose the terms of any renewals or new employment agreements.
- [28] Ontario argued that it treated its lawyer Crown employees in the same manner as unionized employees. To avoid litigation over the constitutionality of the exclusion of these lawyer employees from the statutes providing for collective bargaining rights, the province entered framework agreements with two bargaining units, including ALOC, for the negotiation of non-statutory collective agreements. Renegotiation of the first framework agreement of 2002-2014 led to the second one, for the 2010-2057 period. Ms. Dixon’s statement of claim described employment conditions potentially spanning up to five collective agreements under these framework regimes, from 2001 to 2021.
- [29] Ms. Dixon was not party to the framework agreements. On their face, the parties were Ontario and the two Crown lawyers’ associations, one of which was ALOC. Under the framework agreements, the Crown purported to bind all lawyers employed by the Government of Ontario to collective agreements. It is unlikely Ontario would have employed Ms. Dixon, unless the employer understood she was party to the agreements. Nevertheless, the agreement of two out of three parties does not bind the third, in the absence of evidence that she agreed to it.
- [30] Statutory labour law gives precedence to a collective agreement over an individual contract of employment. However, the employment relationship arises only upon the employee’s acceptance of the employer’s hiring offer. In the unionized context, the individual contract is not extinguished but suspended. Indeed, if a union is decertified, the individual contract returns to the fore: *Isidore Garon ltée v. Tremblay; Fillion et Frères (1976) inc. v. Syndicat national des employés de garage du Québec inc.*, 2006 SCC 2, [2006] 1 SCR 27, at para. 27. It follows that if there is no statutory union, a collective agreement such as the one Ontario and the associations negotiated must be treated as an individual employment agreement, even if the terms and conditions could be identical for all employed lawyers.
- [31] This means Ms. Dixon’s employment was subject to the ordinary common law jurisprudence regarding employment agreements. Côté J., in her dissenting opinion in *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 SCR 118, at para. 177, stated that employers and non-unionized employees enjoyed freedom of contract to submit their relations to arbitration agreements. The majority of the Supreme Court did not disagree with this point. However, before concluding that the arbitral agreement in the Uber contract

was unconscionable for requiring the employee to travel to Amsterdam to have his grievance heard, the majority accepted that the clause was part of a contract of adhesion, drawing closer scrutiny to potential bargaining power inequality: para. 89. Unlike *Uber*, the issue in Ms. Dixon's employment is not whether the arbitral procedure is onerous but rather whether she agreed to be party to it at all. The inequality of bargaining power therefore informs the basic question whether she agreed to arbitration. A party imposing a contract of adhesion must at least bring it and its terms to the counterparty's notice and provide an opportunity to review it. Perhaps that occurred, but the evidence fell well short of presenting a rebuttable case that it did.

- [32] The reason why the enforceability of the collective agreement must be subject to the law of contracts of adhesion is that Ms. Dixon never signed it. Rather, Ontario simply required and assumed its operation as a condition of being a lawyer employee of the provincial government. As such, the collective agreement falls into the general category of "Unsigned Writings": see S. M. Waddams, *The Law of Contracts*, 8th Ed. (Toronto: Thomson Reuters Canada Limited, 2022), at pp. 46-50. A party relying on rights-limiting terms of such a document as forming part of the parties' contract must adduce evidence of reasonable measures to draw the terms to the counterparty's attention: *Craven et al. v. Strand Holidays (Canada) Ltd. et al.* (1982), 40 O.R. (2d) 186 (C.A.), at p. 194. The evidence of a contractual provision submitting disputes to arbitration must be clear, before taking away parties' recourse to the courts: *Johnston v. Mlakar* (2006) 212 O.A.C. 79, at paras. 13-15.
- [33] At a minimum, Ms. Dixon's employer ought to have brought the arbitration provisions to her attention to obtain her agreement, at the outset of the employment and again every time a new contract started after the end of the previous one. Perhaps the hiring officers did precisely that. However, such an important fact cannot be assumed. In most employment cases, the courts generally see important notices such as disciplinary warnings preserved in employment files. There is no reason why the employer in this instance should be relieved of the burden of appropriate record-keeping. The assumption that she would have signed it, as a condition of being hired, is insufficient to establish that she signed it or implicitly agreed to it.
- [34] Before turning to the evidence, I also observe from Ms. Dixon's pleadings that the status of the collective agreement as a contract of adhesion is integral to the theory of Ms. Dixon's case, that the collectivised framework, even one implementing operational systems for tolerance and equity, allegedly allow systemic intersectional racism and misogyny to affect individual employees' lives through unstated rules, privileges, and hierarchies. The following paragraphs elucidate this point in a section of the pleading that otherwise takes liberties with the rule of concision in r. 25.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194:

24. While anti-Black racism is not new to Canada, it is now obscured. Since the abolition of slavery in 1834, anti-Black racism in Canada has been continually reconfigured to adhere to the national myths of racial tolerance. Many Canadians are unaware that slavery and segregation existed here, long before Canada existed as a country. The obscuring of anti-Black racism

from public view makes it harder to address and eliminate, and compounds the mental, physical, psychological, and financial harms suffered by Black people in Canada.

...

34. The OPS's internal systems and processes, including grievances, controlled by unions and the Crown (not employees), and have been ineffective in addressing anti-Black racism, racial discrimination, racial harassment, racial abuse, and tortious conduct against Black employees.

- [35] Ms. Dixon's theory of institutional racism and Black experience informs multiple aspects of her claim. In the above-cited pleadings, she protests having to adhere to the collective agreement framework, based on her opinion that the anti-discrimination provisions in Art. 1A and the Diversity and Inclusion provisions in Art. 4A are intentionally ineffective or constrained measures by the employer to manage racism in the workplace and to advance the careers of racialized employees. It could be unjust to rely on the arbitration agreement to exclude her from access to the courts, if the employer failed to provide clear evidence of her informed knowledge of that she agreed to submit to such compartmentalization of her human rights.
- [36] These pleadings caution the court against assuming her voluntary adherence to a collective agreement, if the employer did not seek her consent each time it offered her employment. The employer had to prove Ms. Dixon's voluntary adherence to the agreement, even if such adherence could have been non-negotiable. The court cannot impose the agreement on her in the absence of cogent evidence, either documented by business records or by the recollection of the hiring personnel in affidavits.
- [37] Proving the pleaded sociological and political connections between immediate post-abolition reaction and current-day forces against Black women may ultimately be a tall order for a self-represented party of modest means, even if she is, as stated at para. 46, an exceptional, diligent, and successful lawyer. Nevertheless, it is not the court's role in this motion to envision the staging logistics of future trial, including the plaintiff's parade of witnesses from the public service legal professionals, experts, and others, as referenced in the pleadings. Despite Ms. Dixon's apparent assumption of the role of a representative plaintiff, this is not a class proceeding requiring consideration of her ability to represent others' interests. These practical considerations may be compelling, but the court cannot stay the proceeding based on s. 7, if the evidence that Ms. Dixon was a party to the arbitral agreement was missing or did not tip the balance of probabilities.
- [38] Because of the importance of the issue to the relations between the Crown and its non-unionized employed lawyers, it could have taken better steps to memorialize Ms. Dixon's relinquishment of access to the courts. Shortly after Ms. Dixon started work, on August 6, 2003, she received a letter from her employer stating: "Your employment status is unclassified and commences July 17, 2003, and ends September 12, 2003." In a subsequent paragraph, the letter stated:

This position is represented by the Association of Law Officers of the Crown - ALOC, and Association dues will be deducted biweekly from your gross salary. As this employment was not obtained through competition process under the ALOC Collective Agreement, the service will not count towards eligibility to be placed on your Association's internal transfer list.

- [39] If the first sentence of this paragraph intended to bring to Ms. Dixon's notice that being a party to the collective agreement was a condition of her employment, the second sentence appeared to convey the opposite meaning. Had the word "not" been used to describe her hiring in relation to the competition process, Ontario could have made out an arguable case (in the sense of rebuttable or *prima facie*) that at least her first job as a lawyer, ending September 12, 2003, was subject to the collective agreement. As the evidence stood, this evidence made it more arguable that the job was *not* subject to that agreement.
- [40] Perhaps some other letters documented Ms. Dixon's employment beyond September 12, 2003, as implied in the affidavit from the Human Resources Manager stating it was the "first offer letter." Because the collective agreements referred to "all lawyers represented by [ALOC]" under the framework agreements, it makes sense that Ms. Dixon's positions beyond that date were also represented by ALOC. Ontario could have stated in clear language that, by accepting the offer of employment, she became party to a collective agreement. Beyond that, the court could infer that a lawyer employee would read the agreement.
- [41] Between her pleading and her factum, Ms. Dixon claims here employment started in 2002, as an articling student. Although this, too, made sense and was not denied by Ontario's affiant, there was no evidence before me how Ms. Dixon's employment as a trainee lawyer transitioned to that of a permanent employee beyond the August 6, 2003, letter.
- [42] In the absence of evidence of Ms. Dixon's express agreement to the arbitration agreement, including any measures to draw it to her attention, Ontario also argued that the agreement should be implied by the conduct of the parties and by Ms. Dixon's own pleadings.
- [43] There was no dispute that Ms. Dixon was employed by Ontario, and that the parties generally conducted themselves in accordance with the terms of the collective agreement. At para. 12 of her pleading, she stated:
12. ALOC had and has the power to act as the representative of Jean-Marie for all aspects of her employment with the Crown, under the Arbitration Act, PSOA and the collective agreement between ALOC and the Crown.
- [44] Ontario relied on this statement as an admission by Ms. Dixon that she was a party to the collective agreements containing the arbitration provisions. However, the paragraph stopped short of including her as a party and described the agreement as between ALOC and the Crown. Ms. Dixon's description of ALOC's *power* to act as her agent, in the overall context of her pleadings, can be construed as appeal to the courts' jurisdiction to relieve

against the practices of the powerful. The idea of power, in the context of Ms. Dixon's pleading, is not synonymous with legal authority.

- [45] The legal and equitable basis for construing the existence of a contractual term from parties' conduct requires a pre-existing contractual relation: *Zeismann et al. v. W. P. W. Developments Ltd.* (1976), 78 DLR (3d) 619, at pp. 621-622; *Cronnox Inc. v. Lloyd's Underwriters*, 2018 ONSC 6437, 88 CCLI (5th) 228, at para. 73. I accept that, by hiring Ms. Dixon to one or more positions, Ontario entered employment contracts with her whose terms could be altered by conduct amounting to promissory estoppel.
- [46] Some conduct put forward as changing contractual terms requires the court's interpretation of what it meant, by drawing inferences from the ensuing transaction. For example, in *Hamilton Gear & Machine Co. v. Lewis Bros. Ltd.* (1924), 54 OLR 585, [1924] 3 DLR 367 (Ont. CA), at pp. 330-71, the placement of an order for 8,000 units following negotiation of 5,000 units did not constitute a separate agreement for 8,000 in addition to the original 5,000. Rather, the court construed it meant an increase to the original order of 3,000. However, the courts have resisted the use of imposing additional terms to an existing agreement by reference to conduct, in the absence of evidence that the alleged obligor knew the conduct could be construed as evidence of a legally binding term.
- [47] The law of employment is also an area of contract law in which the courts have protected employees from terms inferred from compliance with employers' additional requirements. Subject to exceptions where bargaining power is more level, the vulnerability of the employee usually requires courts to construe terms of employment contracts limiting employee rights more narrowly than terms conferring benefits. The hierarchical relationship of a contract of loyal service and habitual compliance with employer directions and practices also constrains the employee's contracting autonomy after hiring. For example, the imbalance of bargaining power can render unenforceable restrictive covenants in an employment contract: *H.L. Staebler Company Limited v. Allan*, 2008 ONCA 576, 92 OR (3d) 107, at paras. 33 and 56. These principles of employment law apply, regardless of Ms. Dixon's elaboration regarding institutional constraints motivated by anti-Black racism.
- [48] Disputes arising from employers' insistence on significant contractual terms that it did not bargain with the employee typically become the subject of suits for constructive dismissal. The question there is whether the employer has fundamentally breached the employment agreement by unilaterally changing the essential employment conditions: *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 SCR 500, at paras. 34 and 39. The employee must then elect to accept either the employer's repudiation and resign or the new terms of employment: R. S. Echlin and J. Fantini, *Quitting for Good Reason* (Toronto: Canada Law Book, 2001), pp. 48-49. Delay in objecting to a change can be construed as condonation or acceptance of the employer's change to the contract: *Duckers v Brant (County)*, [2000] O.J. No. 261 (SCJ), [2000] CarswellOnt 208 (Sup. Ct.), at para. 22. The courts have nevertheless relieved employees against being pilloried to unfair changes in employment terms, in clear cases of unfairness. For example, continuing to work to support a family cannot be construed as waiver of an existing right to enforce

an employment agreement: *Nystoruk v. Precision Diversified Services Ltd.*, 2003 ABQB 222, 13 Alta. L.R. (4th) 284, at para. 34.

- [49] From Ontario's perspective, the collective agreement was a condition of employment from the start and not a change. In the discovery phase of litigation, Ontario might seek to compel Ms. Dixon's admission of her agreement throughout her employment. For the purposes of this motion, no such admission exists on the record. The employer would have endured no hardship to present the collective agreement to Ms. Dixon for her signature. It is not the courts' role to fill in the legal compliance gaps at the time contracts are written or executed: *AXA Insurance (Canada) v. Ani-Wall Concrete Forming Inc.*, 2008 ONCA 563, 91 O.R. (3d) 481, at para. 30.
- [50] I therefore find, at least for the purposes of this motion, that Ontario has failed to establish an arguable or *prima facie* case that Ms. Dixon was a party to the collective agreement containing the arbitration agreement. The failure to prove this precondition to the operation of s. 7(1) of the *Arbitration Act, 1991*, means the court is not required to grant a stay.

(b) Does the action arise from matters that the collective agreement required the parties to submit to arbitration?

- [51] Under s. 7(6) of the *Arbitration Act, 1991*, there is no appeal from the dismissal of the motion. However, there is no express prohibition against relitigating it. Ontario's failure by omission to prove on this motion that Ms. Dixon was party to the agreement leaves the door open to the possibility of a subsequent finding that she was party to the agreement and that it defined the scope of Ontario's contractual obligations toward all its lawyer employees.
- [52] The refusal to grant a stay is similar in operation to the dismissal of a motion to strike out a pleading or of a summary judgment motion. It is interlocutory and therefore does not determine the substantive issue: *Birdseye Security Inc. v. Milosevic*, 2020 ONCA 355, at para. 26, and *Highland Shores Children's Aid Society v. C.S.D.*, 2017 ONCA 743, at para. 5. In contrast, a court's final determination of a substantive issue in an interlocutory order can bar subsequent attempts to raise the same issue: *David v. Loblaw*, 2024 ONSC 5818, at para. 3; and *Atlas Holdings v. Vratisidas*, 2012 ONSC 1375, at para. 19. Because of the rule against multiplicity under s. 138 of the *Courts of Justice Act*, RSO 1990, c. C.43, it is preferable to complete the analysis of the motion, as opposed to leaving it to another judge.
- [53] The application of this further prerequisite of the *Peace River* framework, as defined by the subject-matter component of s. 7(1), depends on the scope of the protected interest under Ontario human rights law, as currently codified in s. 5 of the *Code*. If that body of law does not address Ms. Dixon's claim for redress for her claim beyond specific discrimination and harassment directed at her, the court must consider whether the agreement confers on the arbitrator jurisdiction to recognize a right and a remedy beyond s. 5.

- [54] Ms. Dixon’s pleadings described two categories of complaints against her employer. The first category, spanning pp. 15-26 of the Fresh as Amended Statement of Claim, placed Ms. Dixon among the female Black employees of the Ontario public service subjected to the perpetuation of historical anti-Black racism dating back to the Transatlantic Slave Trade and the reorganization of Canadian society by reactionaries to abolition. She will need to prove the validity of this history and the continued prevalence of these menaces in her employment experience. The balance of her pleadings also harkens back to these injustices as the immersive character of her experience since she started as an articling student in 2002. The second category, starting at p. 26, alleged a connection between her personal characteristics as a Black woman and various discriminatory workplace interactions and disadvantages, such as delegation of tasks beneath her professional standing, lateral career movement, and suspension as reprisal for having raised complaints. I caution that it is hard to draw a line at p. 26, because the balance of the pleadings continues to intersperse Ms. Dixon’s exposure to a general atmosphere of anti-Black hostility with allegations of ill treatment directed at her.
- [55] If proven, the second category of violations of her individual right to equal treatment and freedom from discriminatory harassment would come within the arbitrator’s adjudicative authority under Art. 1A. Had this been the extent of her pleadings, the action would have been “in respect of a matter to be submitted to arbitration under the agreement,” pursuant to s. 7(1) of the *Arbitration Act, 1991*. The analysis of the other category of complaint is not the same as a rule 21 motion to determine whether the pleadings disclose a cause of action recognized by law. Nevertheless, if the complaint is clearly and obviously non-justiciable, a pleading intended to defeat the mandatory stay under s. 7(1) would amount to abuse of process.
- [56] I will start the analysis by unboxing and comparing the anti-discrimination and anti-harassment provisions in the collective agreement defining the arbitral jurisdiction. I will then assess what hope Ms. Dixon might have in obtaining legal recognition of the diffuse and undirected institutional mechanism of harm.

(1) Allegations of Code Violations

- [57] The collective agreement contained what a reasonable person in Canada would consider as being in harmony with human rights legislation:

Article 1A - No Discrimination

1A.1 It is understood that the parties are committed to principles which will foster and encourage diversity in the workplace.

1A.2 There shall be no discrimination or harassment practiced by reason of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status,

family status, same sex partnership status, or disability, as defined in section 10(1) of the Ontario Human Rights Code (OHRC).

1A.3 The Employer has a general duty to take every precaution reasonable in the circumstances to protect a lawyer from personal harassment. Personal harassment is engaging in a course of vexatious comment or conduct against a lawyer in the workplace that is known or ought reasonably to be known to be unwelcome.

[58] The collective agreement described the arbitrator's jurisdiction as follows (*italics mine*):

6.9.3 Except as provided in 6.9.4, the arbitrator shall have jurisdiction to consider any matter properly submitted to him or her under the terms of this collective agreement arising out of the interpretation, application, administration or alleged violation of the collective agreement. The arbitrator shall have the power to interpret and apply the *human rights code*, except in matters where he or she has no jurisdiction pursuant to Article 6.9.4 of the collective agreement.

[59] Ms. Dixon objected to the reference to the "human rights code" in lower case signifying the low priority Ontario gave to it. I do not find this objection justified. She filed no evidence to show the absence of capitalization was intentional.

[60] Article 1A must be compared to the provisions of s. 5 of the *Code*, which sets out employees' rights in the workplace:

Employment

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Harassment in employment

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

[61] Art. 1A of the collective agreement tracked s. 5 of the *Code*. The agreement's reference to the absence of discrimination or freedom from harassment on enumerated protected grounds conformed to the idea that equal treatment precludes discrimination in protected social areas, one of which is employment. Based on the comparable wording of Art. 1A

and s. 5 of the *Code*, it is hard to argue with Ontario's position that the arbitrator has all the subject matter jurisdiction of the Ontario Human Rights Tribunal or of the Superior Court under s. 46.1(1) to consider a claim of infringement of Ms. Dixon's s. 5 rights for equal treatment without discrimination and freedom from harassment.

- [62] In human rights law, the words "without discrimination" means more than general differential treatment of groups or individuals belonging to a protected class. A complainant must establish: (1) having personal characteristics of a group the *Code* protects, (2) adverse treatment of the complainant, and (3) a connection between the characteristics and the adverse treatment: *Peel Law Association v. Pieters*, 2013 ONCA 396, at paras. 55-62.
- [63] In *Pieters*, the Peel County law librarian asked a group of Black lawyers congregating in the courthouse lawyers' lounge to produce their Law Society cards. She had not asked the other occupants to do the same. In finding a *Code* violation and awarding the lawyers compensation of \$2,000 each, the Human Rights Tribunal of Ontario ("HRTO") concluded that the librarian infringed their right to equal treatment without discrimination under s. 1, with respect to facilities. The Court of Appeal upheld the tribunal's rejection of the defence that the librarian had been motivated by upset over the lawyers' suspected rearrangement of furniture: *ibid.*, paras. 91-104. *Pieters* illustrated how the harm of a human rights violation is the *connection* of the adverse treatment to the personal characteristics. Absent a connection between the directed conduct and the fact that the lawyers were Black, the adversity of the treatment would have been non-justiciable under the relevant protection under the *Code*.
- [64] When paired with the remedial purpose of the law, proof of a human rights infringement requires differential impact in the form of burden, obligation, or disadvantage: *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143, at pp. 180-82; *Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 SCR 513, at p. 531. An individual complaint about infringement by another party requires proof of infringement of that person's right. Under the *Code*, the rights under Part 1 are those of every "person," not of a group. An individual cannot complain about discriminatory conduct without specific harm: *Fretz v. BDO Canada LLP*, 2015 HRTO 194, at para. 24.
- [65] In challenges to the constitutionality of legislation or regulation, individuals may enforce public equality rights under s. 15 of the *Charter* to challenge discriminatory legislation or regulation, without individually feeling all the differential public impact of the inequality: *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624, at para. 83. Ms. Dixon's suit does not seek to change a discriminatory law or regulation.
- [66] Ms. Dixon's allegations about specific infringements of her human rights would fall within the ambit of the arbitral jurisdiction under Art. 1A of the agreement. The jurisdiction does not include harm resulting from having to work in an environment where infringements against *others* are tolerated or encouraged; in other words, from systemic infringements of others in the same protected group. For example, if a workplace institutes a quota on the

number of Black women eligible for promotion, the s. 5 of the *Code* provides a remedy to any qualified employees denied promotion because of the policy. For those receiving promotion but psychologically affected by having been promoted in these circumstances, s. 5 offers no remedy. By application so Art. 1A, Ms. Dixon could not grieve or arbitrate cases of discrimination or harassment suffered by other Black women in her workplace.

(2) Allegations of Lived Experience in a Racist Institution

- [67] It is not the court's role in this motion to ask how Ms. Dixon can prove that the Ontario public service, or at least the legal services department that employs her, is permeated by anti-Black racism and perpetuates an organized reaction to the abolition of slavery. The *Peace River* framework and s. 7(1) of the *Arbitration Act, 1991*, require the court to hold the pleadings in the action up against the matters to be submitted to arbitration under Art. 1A. The court's role in reviewing pleadings also does not involve an evaluation of merit but the true nature of the claims as properly pleaded: *Scalera*, at paras. 50-51. Unlike *Scalera*, which dealt with the insurability of a pleading of an intentional tort, the issue in this part of the motion requires the court to consider whether Ms. Dixon's pleadings beyond those covered by s. 5 and Art. 1A are justiciable. If the court has no basis to consider those pleadings, they will qualify as an abuse of process, and the balance will fall into the scope of the arbitral submission.
- [68] Four decades ago, in *Seneca College v. Bhadauria*, [1981] 2 SCR 181, at pp. 194-195, the Supreme Court reversed the Ontario Court of Appeal's attempt to open the door to a common law tort of discrimination. The Supreme Court held that the right to equal treatment and freedom from race-based harassment under 20th-century human rights legislation obviated the need to recognize a tort based on discrimination. The effect of the refusal to recognize such a tort has been reversed to some extent by the recognition of a civil remedy under s. 46.1(1) of the *Code*, although s. 46.1(2) precludes an infringement action based on discrimination alone. It is possible that this limiting provision does not bar her action, because of the pleaded facts amounting to breach of the employment contract. The question whether the claim arises from subject matter contractually required to be submitted to arbitration depends on a full appreciation of Ms. Dixon's lengthy pleading.
- [69] The logic of this category of Ms. Dixon's allegations is essentially that of public nuisance: a suit by an individual who suffers specific harm resulting from a wrong committed against a substantial number of people. Does it apply, or can it be extended to the facts she has pleaded about pervasive hostility toward her demographic group?
- [70] The general law of nuisance is based on a maxim of Roman law, *sic utere tuo ut alienum non laedas*, meaning one must not use property in a way that injures others: *Halsbury's Laws of Canada First Ed., Torts* (Toronto: LexisNexis, 2020), at p. 658. Although the private version of the doctrine is usually invoked by individuals affected by interference with public property, resources, and services such as highways or watercourses, the use of the word "nuisance" as a law limited to property interests is somewhat misleading. The

word itself is derived from French (*nuire*) and Latin (*nocere*) origins meaning hurt or injury of any kind. The tort of public nuisance, as distinct from private nuisance, has preserved the emphasis on the court's power to enjoin a harmful condition or activity and to compensate those specially affected. In *Ryan v. Victoria (City)*, 1999 CanLII 706 (SCC), [1999] 1 SCR 201, at para. 52, the Supreme Court described the tort thus:

The doctrine of public nuisance appears as a poorly understood area of the law. "A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience": see *Klar, supra*, at p. 525. Essentially, "[t]he conduct complained of must amount to . . . an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference": See G. H. L. Fridman, *The Law of Torts in Canada, Vol. I* (1989), at p. 168. An individual may bring a private action in public nuisance by pleading and proving special damage. See, e.g., *Chessie v. J. D. Irving Ltd.* (1982), 1982 CanLII 2918 (NB CA), 22 C.C.L.T. 89 (N.B.C.A.). Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway. See *ibid.*, at p. 94.

- [71] The final sentence of the above paragraph did not limit the tort to property or facilities. Nevertheless, there remains some controversy whether the tort applies to circumstances beyond a public version of the private action for interference with a right to enjoy land or facilities. That appears to be the conclusion of the authors of "W. Neyers and Andrew Botterell, "Tate & Lyle: Pure Economic Loss and the Modern Tort of Public Nuisance" (2016) 53:4 Alberta Law Review 1031, 2016 CanLIIDocs 98, at pp. 1038-39, while recognizing that the judicial language has opened the scope of protected public rights to cover interference with any public right enjoyed by all: Wilfred Estey, "Public Nuisance and Standing to Sue" (1972) 10:3 Osgoode Hall L J 563, at p. 564.
- [72] Support for the Supreme Court's adoption of Klar's description of the tort as interference with public "health, safety, morality, comfort or convenience," beyond the enjoyment of public property, resources, or facilities, can be found in *B.C. (A.G.) v. Couillard*, 1984 CanLII 374 (BC SC), 11 DLR (4th) 567. At paras. 11-27, McEachern C.J.S.C. invoked public nuisance to support an injunction against the takeover of a neighbourhood in the West End of Vancouver by sex workers. Relying on an extract from *Fleming on Torts*, the Chief Justice observed that the "unifying element" of public nuisance resided in the harm and not the activity causing it: *ibid.*, at para. 22. The second paragraph of the decision left no doubt what he considered to be the nature of the public harm:

What has happened is that a small but persistent and probably changing group of young men and women have taken over the streets and sidewalks of a part of the West End for the purpose of prostitution to the great discomfort of the neighbourhood.

- [73] *Couillard* may appear somewhat of a time capsule of the mores of Canadian urban life. The provincial attorney general of the day sought an injunction against street prostitution in a residential neighbourhood between the picturesque Coal Harbour boating facility and the business district of Vancouver. As stated in *Halsbury*, at p. 661, public nuisance is an action normally commenced by “the official representative of the public interest,” because “it is not reasonable to expect one person to take proceedings on his own responsibility to put a stop to it.” Ms. Dixon’s adversary is that collective official representative, however. Although the office of the attorney general is traditionally independent from the government as the employer of Crown lawyers, the distinction may be an abstraction without practical application. The office is not likely to sue the government for institutional racism or failing to stem the harm.
- [74] For an individual to avail herself of the doctrine of public nuisance, she must demonstrate prejudice beyond the collective suffering: *Hickey et al. v. Electric Reduction Co. of Canada, Ltd.* (1970), 2 Nfld. & PEIR 246, 21 DLR (3d) 368 (NLSC), at pp. 371-372. This requirement appears to have been refined to mean actual individual harm, as opposed to a general nuisance: *Tate & Lyle v Greater London Council* [1983] 2 AC 509, [1983] UKHL 2, at p. 9. Ms. Dixon comes to court representing herself. Her claim for harm caused by general racist conditions will require her to prove how the general conditions relate to her personal suffering and the direct insults to her dignity and economic interests. The requirement for this connection between the two facets of her lawsuit will impact any bifurcation argument that, at a minimum, the court should stay the conventional human rights claim in favour of the arbitral submission. At this stage of the proceeding, I need not consider whether Ms. Dixon can prove the special harm element of this tort.
- [75] *Couillard* seems to inform us that if the injury to moral sensibilities by the presence of street prostitutes in a tony neighbourhood constituted a public nuisance, the courts might find room in the doctrinal basis of the civil tort at least to consider the impact of intersectional racism and misogyny on the cohort of Black and female employees of Ontario’s legal services. That the harm may be mental injury does not exclude the operation of tort law, and a racist and misogynistic environment would not be an ordinary annoyance or fear that people should accept: *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 SCR 114, at paras. 8-9.
- [76] Whatever the merits of Ms. Dixon’s allegations of harmful circumstances during her tenure, Ontario courts have historically found remedies for harm inflicted by racist and misogynist presence per se. Our legal heritage includes the case of *R. v. Phillips* (1930), 38 OWN 323, [1931] 2 DLR 461, 55 CCC 49, in which hooded men appeared on the street in front of the home of a mixed-race couple living in Oakville and asked the white woman to leave her Black partner and come with them. She complied with the request, and they drove her to the Salvation Army in Hamilton. The Court of Appeal’s decision, delivered by Mulock C.J.O., did not reveal the offence for which the panel upheld the conviction. According to Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada 1900-1950* (Toronto: The Osgoode Society, 1999), at p. 206, the offence was wearing a mask at night. (To which the defence at trial was that the garb of the Ku Klux Klan was “no more unlawful than holding a masquerade ball”: Backhouse, at p. 218.) In fact, the

Chief Justice’s reasons did not deal with the mask-wearing offence at all. Rather, it was the intimidation by the presence of a racist mob: “No physical force was used, but she said in effect that she acquiesced because of being intimidated by the large body of men, some fifty to seventy-five”: *Phillips*, at p. 462.

- [77] The appellate decision in *Phillips*, upholding a criminal conviction based on civil public nuisance rationale, illustrates the overlap in substantive law, in the way that assault exists in both civil and criminal law. The vigilante arrest and abduction in *Phillips* would undoubtedly have supported a civil remedy, based on the same rationale as the appellate ruling.
- [78] Ms. Dixon’s allegations contain no events of the nature in *Phillips*. Her point is that quotidian anti-Black animosity can be as harmful as the grotesque version, but much more difficult to complain about. Despite her pleading of words such as “atrocities” (para. 42 of her claim), the core narrative of the first category of Ms. Dixon’s pleadings is that her employers fostered an environment of “systemic anti-Black racism, racism in general, and white supremacy.” Without getting into the public/private dynamic of government law departments, the departments identified in her claim are public service agencies, as opposed to those engaged in protection of Crown interests. As such, racist working conditions on public property occupied by Crown lawyer employees could be construed as misuse of property intended for the public interest. I repeat that these are only her allegations. She must still prove their validity.
- [79] The court, in matters involving the superficial consideration of pleadings, cannot dismiss the substance of a pleading based on excess complexity and novelty: *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959, at p. 980. A full trial record is required for resolution of conflicts involving difficult, complex policy issues with broad social ramifications: *Bahlheda v. Santa*, 2003 CanLII 2883 (ON CA), at para. 6. Subsection 7(1) of the *Arbitration Act, 1991*, does not do away with the overarching threshold standard that the claim must be evaluated on the standard of a “serious issue to be tried”: *Morrow v. Insurance Bureau of Canada*, 2008 ABCA 248, at para. 5, and *Gregoire v. Lauzon*, 2013 ONSC 3182, at para. 2.
- [80] For a superficial and provisional legal analysis, I am prepared to envisage the possibility that a judge might apply public nuisance principles, or similar rationale, to harm resulting from the alleged enablement of widespread anti-Black racism, if the evidence warrants such consideration of the principles. I also cannot preclude, at this stage, Ms. Dixon from demonstrating, on a sufficient evidentiary record, that this category of allegation is different from the statutory right to sue for *Code* infringement or the common law tort that the Supreme Court refused to acknowledge in *Bhadoria*. She would have to prove that working conditions in the legal department of the Ontario public service amount to a general harm that cries out for a legal remedy that does not currently exist. Harmful conduct without a current legal remedy, statutory or otherwise, is the threshold condition for the common law inquiry into recognition of a new tort alongside an existing cause of action: *Ahluwalia v. Ahluwalia*, 2023 ONCA 476, at para. 47. Breach of a statute can be evidence of breach of a separate common law duty: *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 SCR 205, at p. 225.

- [81] Ms. Dixon's complaints about institutional racism also seem to find an analogue in the mandate of the Ontario Human Rights Commission, whose functions under Part III of the *Code* entail the type of elimination of racism and other offences to human rights. Its functions and powers, however, are limited to research, public policy, and the holding of inquiries. Under s. 31.2 of the *Code*, evidence from such an inquiry may be received in evidence in an HRTO proceeding. The commission's role, which has changed since *Bhadauria*, no longer concerns the enforcement of rights by individuals. In para. 35 of her pleading, Ms. Dixon alleged that the commission investigated the Ontario public service and reported Black employees' complaints of systemic racism. The evidence she might adduce from that investigation is unlikely to prove discrimination against her, but it could be used to prove the extent of racism affecting a wider group of Black Crown lawyer employees. The current iteration of the *Code* reflects the intention of the legislator to establish a statutory civil remedy for individual adverse treatment and a power of inquiry for systemic discrimination.
- [82] The difference of subject-matter competencies between the commission and the tribunal logically places the first category of Ms. Dixon's pleadings of widespread hostility to her group of female Black lawyers beyond the individual anti-infringement mandate under Art. 1A of the arbitration agreement. Although cases of specific infringement can include acknowledgement of systemic racism, generalized adverse treatment of protected groups cannot found a case under s. 5 of the *Code* in the absence of specific adverse treatment.
- [83] The ultimate outcome of the proceeding could very well be that this category of Ms. Dixon's pleadings stumbles. The court might hold, employing the reasoning in *Bhadauria*, that the common law does not require a new cause of action of the type described in Ms. Dixon's action, if the legislature has mandated the Commission to conduct inquiries into cultures of anti-Black racism in government institutions. In this motion, the court's role in considering the subject matter of the action is not to evaluate the chance of success of Ms. Dixon's suit. Provided the case is not an abuse of process, the court must consider whether the proceeding falls within the subject matter contemplated in the arbitration agreement. The answer must be that this segment of her pleadings falls outside the matters required to be submitted to arbitration under the agreement, if that agreement were binding on Ms. Dixon.
- [84] Finally, I must consider whether to bifurcate the action pursuant to s. 7(5) of the *Arbitration Act, 1991*, because one aspect of it falls outside the arbitral jurisdiction and the other falls within. Ms. Dixon might ultimately find her individual infringement case overburdened by the wider public-interest claim. It is not for this court to force her into a bifurcation. She has elected to assume the burden. Since it is likely that she will have to prove specific harm distinct from those generally affected by the alleged institutionally harmful conditions, her allegations of discrimination and harassment directed at her are necessary elements of both categories of pleadings. I would therefore decline to stay a portion of the case, even if Ms. Dixon was a party to the collective agreement and bound by its arbitration provisions.

CONCLUSION

- [85] Ontario's motion to dismiss or stay the action is hereby dismissed.
- [86] Ms. Dixon may serve and file a cost outline of no longer than three pages, double spaced, within 14 days of the release of this decision. The moving party shall have 14 days to deliver its response, also limited to three pages. These documents shall also be forwarded to my judicial assistant. No costs are awarded for or against ALOC.

Date: October 17, 2025

Akazaki J.