

Citation: 2025 NBKB 231

Docket: FM-77-2022

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

UNIVERSITY OF NEW BRUNSWICK

– and –

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL
3339, CHRISTINE ROBSON and, NEW BRUNSWICK
HUMAN RIGHTS COMMISSION

Date of Application: May 28, 2025

Date of Decision: October 20, 2025

Subject Matter: Judicial Review - Jurisdiction

Before: Justice E. Thomas Christie

At: Burton, New Brunswick

Appearances: Sheila N. Mecking, for the Applicant
Jamie C, Eddy, K.C, for the Defendant Christine Robson
Brenda L. Comeau, for the Defendant, CUPE
Timothy Bell, for the Defendant Human Rights Commission

INTRODUCTION

[1] From August 3, 2010, until June 30, 2017, the Respondent, Ms. Robson, was employed by the Applicant, the University of New Brunswick (UNB). Her terms and conditions of employment were contained within a collective agreement between UNB and the Respondent, Canadian Union of Public Employees, Local 3339 (Local 3339). The collective agreement contained a term which requires an employee to retire on June 30th of the year following their 65th birthday. In other words, a mandatory retirement provision. Article 26.01 provides as follows:

26.01 Employees shall retire on or before the June 30th following their sixty-fifth (65) birthday.

[2] Ms. Robson wanted to continue her employment beyond the June 30th date. UNB would not alter its position that Ms. Robson had to retire on the noted date, nor was Local 3339 prepared to file a grievance to challenge the application of the article. Attempts by Ms. Robson to convince UNB or Local 3339 to allow her to continue working were not successful.

[3] Having had no success in convincing UNB or Local 3339 that art. 26.01 was discriminatory, and should have no force or effect, Ms. Robson, on June 21, 2017, filed a Human Rights Complaint with the New Brunswick Human Rights Commission against UNB and Local 3339. It has been amended several times since. Nevertheless, the core of the complaint remained consistent in that it alleges that the very process of negotiating art. 26.01 of the collective agreement violated her rights under the *Human Rights Act*, R.S.N.B. 2001 c 171 (*HRA*).

[4] UNB responded to the complaint by noting that art. 26.01 was a negotiated term and fell under the exceptions permitted by ss. 4(6)(a) of the *HRA* which provides:

4(6) The provisions of subsections (1), (2), (3) and (4) as to age do not apply to

(a) the termination of employment or a refusal to employ because of the terms or conditions of any *bona fide* retirement or pension plan,

[5] Local 3339 was also of the view that art. 26.01 was exempt pursuant to ss. 4(6)(a) of the *Act*. Upon receipt of the complaint, and the initial responses from the respondents, the Human Rights Commission conducted its investigation and issued a case analysis report in November 2020. As a result of certain determinations in the case analysis report, the Commission, upon review of the report, determined that there were sufficient grounds to send the matter to a full board of inquiry (New Brunswick Labour and Employment Board - hereafter referred to as the ‘Board’).

[6] UNB raised a preliminary objection to the jurisdiction of the Board based on its view that, pursuant to the provisions of the *Industrial Relations Act*, RSNB 1973, c I-4, (*IRA*), labour arbitration was the exclusive means of resolving any workplace dispute. This view was buttressed, in UNB’s view, by a then recent decision that had issued from the Supreme Court in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42. Subsection 55(1) of the *IRA* provides the following:

55(1) Every collective agreement shall provide for the final and binding settlement by arbitration or otherwise, without stoppage of work, of all differences between the parties to, or persons bound by, the agreement or on whose behalf it was entered into, concerning its interpretation, application, administration or an alleged violation of the agreement, including any question as to whether a matter is arbitrable.

[7] The Board considered argument on UNB’s preliminary issue on jurisdiction and, in a ruling on April 25, 2022, determined that it had jurisdiction over the complaint (*Robson v. University of New Brunswick*, 2022 CanLII 40804 (NB LEB)). In summary, the Board determined that the operative legislation (being the *Human Rights Act* and the *Industrial*

Relations Act) did not create a scheme of exclusive jurisdiction in labour arbitrators over matters which engaged human rights legislation. Furthermore, the essential character of the issue raised (i.e., that *the process of negotiating* a collective agreement article that was discriminatory) was not an issue that fell within what might otherwise be considered as an arbitrator's exclusive jurisdiction.

[8] UNB brings the present Notice of Application for judicial review challenging the Board's April 25, 2022, ruling that it had jurisdiction to determine Ms. Robson's complaint. The Application sets out the following grounds for review:

(a) The Board failed to correctly apply the test set out in the Supreme Court of Canada's decision in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 (*Horrocks*) in that it:

(i) determined that it had jurisdiction over the within dispute when the Industrial Relations Act, RSNB 1973, c I-4 and the applicable collective agreement contained mandatory dispute resolution clauses, conferring the exclusive jurisdiction to decide all disputes arising from the collective agreement to an arbitrator empowered under those clauses; and

(ii) determined that the Board, appointed pursuant to the *Human Rights Act*, had concurrent jurisdiction over human rights disputes which expressly or inferentially arise out of the collective agreement, when no such legislative intent is expressed in the *Human Rights Act*; and,

(b) The Board incorrectly and/or unreasonably determined that the essential character of the Complaint concerned the negotiation of a collective agreement provision in that it:

(i) Incorrectly and/or unreasonably failed to determine that the essential character of the Complaint related to the application of Article 26.01 of the Collective Agreement to Ms. Robson, which fell within the exclusive jurisdiction of an arbitrator, pursuant to s. 55(1) of the *Industrial Relations Act*; and,

(ii) incorrectly and/or unreasonably departed from the common law test for the determination of the essential character of the Complaint; and

(iii) incorrectly and/or unreasonably determined that the Supreme Court of Canada’s decision in *Morin [Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General), 2004 SCC 39]* created an “exception” to exclusive arbitral jurisdiction, when the Supreme Court’s decision in *Horrocks* made no such determination;

[9] I note in passing that there are certain scheduling oddities with respect to this matter. Despite this Application having been filed on June 29, 2022, the Board, at counsels’ request, on November 21, 2022, began a hearing into the merits of Ms. Robson’s complaint and, on May 15, 2023, issued reasons dismissing it. I am advised by counsel that there is a yet-to-be-determined Application for judicial review of that decision (dismissing the complaint on its merits). Moreover, counsel advised me that there is also an outstanding issue before the Board pertaining to the constitutionality of s. 4(6) of the *HRA*. Counsel had advised that that had been scheduled, but the court has not been advised as to the current status of that matter.

[10] Despite there being several outstanding matters or proceedings on this file, the issue presently to be determined is whether the Board was correct in accepting jurisdiction over the complaint.

Standard of Review

[11] The parties agree that the appropriate standard of review is correctness. I concur. At its core, the question before me deals with the proper scope of the Board’s jurisdiction. The Supreme Court of Canada in, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, confirmed that correctness is the proper standard of review in matters of jurisdiction. As

the Nova Scotia Court of Appeal wrote in *Nova Scotia (Human Rights Commission) v. Nova Scotia (Attorney General)*, 2023 NSCA 66, at para. 17:

The BOI’s [Board of Inquiry’s] determination of whether it had jurisdiction to hear Ms. Carleton’s complaint is a question of law, and therefore attracts a standard of correctness.

POSITION OF THE PARTIES

[12] UNB is of the view that Ms. Robson’s complaint, even when it impugns conduct that preceded the signing of a collective agreement, remains in the exclusive purview of the scheme set out in the *IRA*. UNB argues that the Supreme Court in *Horrocks* confirmed the law with respect to arbitrators as the sole source of remedial relief for matters touching upon a collective agreement relationship, including its negotiation. Considering that in New Brunswick, the *IRA* mandates every collective agreement to contain a dispute resolution mechanism, the following excerpt from para. 34 of *Horrocks*, captures the essence of UNB’s argument:

But in light of the jurisprudence of this Court which I have recounted, I am of the view that the inclusion of a mandatory dispute resolution clause in a labour relations statute must qualify as an explicit indication of legislative intent to oust the operation of human rights legislation.

[emphasis added]

[13] UNB points to the test for determining jurisdiction, established in *Horrocks*, which at para. 39, is described as follows:

[39] To summarize, resolving jurisdictional contests between labour arbitrators and competing statutory tribunals entails a two-step analysis. First, the relevant legislation must be examined to determine whether it grants the arbitrator exclusive jurisdiction and, if so, over what matters (*Morin*, at para. 15). Where the legislation includes a mandatory dispute resolution clause, an arbitrator empowered under that clause has the exclusive jurisdiction to decide all disputes arising from the collective

agreement, subject to clearly expressed legislative intent to the contrary.

[14] That the *IRA* mandates the establishment of a dispute resolution scheme within the collective agreement over matters pertaining to the interpretation, application and administration of a collective agreement is not disputed by the parties. The question is, in essence, whether there is a clear legislative intent in the *HRA* to establish concurrent jurisdiction. UNB says there is no such intent. Moreover, the subject matter of the complaint must fall within the stated bounds of the *IRA*, i.e., the interpretation, application and administration of a collective agreement. UNB says that Ms. Robson's complaint does fall within those parameters and that the Board erred in finding otherwise.

[15] UNB points to the Board's finding that its concurrent jurisdiction can be implied from ss. 19(2)(d) of the *HRA* which states:

19(2) The Commission may dismiss a complaint at any stage of the proceedings, in whole or in part, if the Commission in its discretion determines

[...]

(d) the complaint has already been dealt with in another proceeding.

[16] UNB argues that such an interpretation by the Board cannot be supported as it did not apply the doctrine of necessary implication when assessing its own jurisdiction. In addition, UNB argues that it was incorrect for the Board to conclude that it was necessary for it to accept jurisdiction as a means of ensuring the principles enshrined in the *HRA* could be upheld. Collective agreements are considered to have fully incorporated human rights principles that can be enforced by an arbitrator. While s. 19(2) of the *HRA* uses the word 'may' with respect to its authority to dismiss a complaint, it would be absurd, UNB argues, to interpret 'may' as anything other than a mandatory directive to dismiss a complaint. At para. 59 of its pre-hearing brief, UNB wrote, "*When the entirety of s. 19(2) is considered, it is illogical to conclude that the use of*

the word “may” is intended to be discretionary, as opposed to mandatory.” In other words, where a complaint of the type presently at issue comes before the Board, it *must* dismiss the complaint, as it falls within the exclusive jurisdiction of an arbitrator.

[17] UNB notes that the decision of the Nova Scotia Court of Appeal in *Nova Scotia (Human Rights Commission) v. Nova Scotia (Attorney General)*, *supra*, is distinguishable and not binding upon this court. In addition, UNB relies on the dissenting reasons of Chief Justice Wood, where, at para. 93, calls for the necessity of clear language to identify a concurrent jurisdiction in a Human Rights tribunal in the face of what is otherwise understood to be an exclusive regime for dispute resolution resting in an arbitrator.

[18] UNB also argued that the Board erred in its determination that the essential character of the complaint fell outside the scope of an arbitrator, thus taking jurisdiction of the matter. Moreover, UNB asserts that the Board erred in not fully comprehending the distinction in the provisions under review in *Morin* and the more comprehensive wording in ss 55(1) of the *IRA*. UNB argues that the provision at issue in *Morin* spoke only of any issue respecting the *interpretation* or *application* of the collective agreement. New Brunswick’s language includes reference to the *administration* of the collective agreement and *whether a matter is arbitrable*.

[19] The arguments of the Respondents carried a similar theme to one another in defence of the Board’s ruling. The Respondents accept that *Horrocks* and *St. Anne Nackawic Pulp and Paper v. CPU*, [1986] 1 SCR 704, confirmed the principled approach that labour arbitrators occupy the field as it pertains to disputes arising out of the interpretation or application of a collective agreement. However, they argue that the facts underlying the present complaint do not fit within the descriptors of s. 55(1) of the *IRA* and, even if they did, that the *HRA* confers concurrent jurisdiction.

[20] The Respondents argued that the use of the words, ‘*may dismiss a complaint at any time*’, in s. 19(2) of the *HRA* denotes a discretion in the Board to consider, and determine, matters that may engage the rights protected by the *HRA*. The wording of s. 19(2) in the New Brunswick *HRA* is similar to the legislation before the court in *Nova Scotia (Human Rights Commission)*. The Nova Scotia legislation also uses the word *may*, indicating, the Respondents argue, a discretion in the Board. Similarly, the phrases found in s. 19(2) of the *HRA*, ‘*at any time*’, ‘*in its discretion*’, and ‘*another proceeding*’, all indicate a legislative intent to displace an arbitrator’s exclusive jurisdiction. As Ms. Robson wrote in her brief at para. 44:

Accordingly, the Complainant respectfully submits that subsection 19(2) demonstrates a clear legislative intention to displace a labour arbitrator’s exclusive jurisdiction over human rights matters expressly or inferentially arising out of the interpretation, application, administration or alleged violation of a collective agreement.

[21] The New Brunswick Human Rights Commission argues, at para. 27 of its pre-hearing brief, that:

27. To the same effect, the Board held that paragraph 19(2)(d) of the New Brunswick *Human Rights Act* contains similar language that confers concurrent jurisdiction to the Board over human rights matters which are also subject to the grievance process.

[22] The Respondents also argue that, in the event this court was not convinced that the Board had authority over the complaint based on clear wording of the legislation, then the essential character of the dispute is such that it falls to being properly resolved by the Board. The Respondents argue that, since the complaint focused on the issue of the *negotiation* of the article at issue, and not the application or impact of the article itself, then it is a matter over which the Board has jurisdiction.

[23] As the Commission notes in its brief at paras. 50-51:

50. Like *Morin*, in this matter the essence of the dispute is the process of negotiating and including the “retirement plan” as part of the Collective Agreement which permits termination on the basis of age.

51. Accordingly, the Commission says that based on *Morin* and *Horrocks*, *supra*, the Complaint does not fall under the exclusive jurisdiction of a labour arbitrator.

[24] Ms. Robson summarizes the issue at para. 52 of her pre-hearing brief:

52. The Complainant respectfully submits that the Complaint does not fall under the exclusive jurisdiction of a labour arbitrator because it alleges that the negotiation and inclusive (*sic*) of the Discriminatory Clause in the Collective Agreement is, itself, discriminatory.

[25] Local 3339 accepts that *Horrocks* recognizes that s. 55(1) of the *IRA* is an example of a “... *labour relations statute that establishes exclusive arbitral jurisdiction* (para. 17 of pre-hearing brief)”. Local 3339 goes on to set the question as being, “...*whether the Human Rights Act clearly expresses a legislative intent to the contrary. In other words, does the Human Rights Act clearly express an intent for concurrent jurisdiction?*” (para. 18 of pre-hearing brief).

[26] Local 3339 asserts that the Board was correct in concluding that the legislation “... *gives the Human Rights Commission concurrent jurisdiction with an arbitrator appointed under the Industrial Relations Act.*” (emphasis added - para. 36 of pre-hearing brief). Local 3339, like the other Respondents, shares the view that the crux of the issue is the *negotiation process* – not the impact on the employee arising from the *application* of what was negotiated.

ANALYSIS

[27] In this analysis, I will touch upon three points. First, Ms. Robson’s complaint, *vis-à-vis*, Local 3339. Second, I will consider the issue of clear legislative intent. Third, I will consider the issue from the perspective of the essential character or nature of the issue.

[28] On the first point, nothing necessarily needs to be said, as it is not a matter that is in dispute. Nevertheless, it provides a starting off point from which to address the remaining two issues of controversy. I note the following from the reasons of Board Chair Mombourquette at para. 111 of his reasons:

An arbitrator could not grant a remedy against Local 3339 on a grievance filed by the union.

[29] Contained within that statement (and elsewhere in the Board's reasons) is a recognition that the right to grieve belongs to the union and/or the employer, not the employee. A union could not file a grievance against itself, nor could an employee file a grievance against the union. Therefore, when the Board notes that an arbitrator could not, in the present circumstances, grant a remedy against Local 3339, the Board is confirming, by implication, that s. 55(1) of the *IRA* does not even come into play, as it concerns Ms. Robson's complaint against Local 3339. There can be no dispute over jurisdiction as between an arbitrator and a Board. Jurisdiction rests solely with the Board, as it concerns the complaint against Local 3339. UNB's argument, as noted by the Board at para. 41 of its reasons, reflects this point.

[30] With respect to the second issue, the 'clear legislative intent', I want to comment on the use of the phrases, 'concurrent jurisdiction' or 'exclusive jurisdiction', as between the Board and an arbitrator. I say this because, in my view, this case does not necessarily involve a matter of 'concurrent' jurisdiction - it is about which forum has 'exclusive' jurisdiction. The parties, in their oral argument and written briefs, and in the Board's reasons, use those terms repeatedly. By way of example, at paras. 100-101 and 103 of its reasons, the Board wrote:

100. The Commission argues that paragraph 19(2)(d) of the New Brunswick *Human Rights Act* expresses a similar legislative intent to confer concurrent jurisdiction on this Board over human rights matters that are also subject to the grievance process in a collective agreement:

19(2) The Commission may dismiss a complaint at any stage of the proceedings, in whole or in part, **if the Commission in its discretion determines**

(a) the complaint is without merit,

[...]

(c) the complaint is beyond the jurisdiction of the Commission,

(d) the complaint has already been dealt with in another proceeding,

[...]

101. The Board agrees. Subsection 55(1) of the *Industrial Relations Act* expressly gives arbitrators jurisdiction over human rights “disputes which expressly or inferentially arise out of the collective agreement” (*Horrocks*, paragraph 21). However, by conferring discretion on the Commission to dismiss or not dismiss a complaint “that has already been dealt with in another proceeding”, paragraph 19(2)(c) implicitly recognizes a concurrent jurisdiction with arbitrators where a human rights issue is also subject to a grievance.

...

103. The Board concludes that the Legislature did not intend to oust the jurisdiction of the Commission and this Board merely because a human rights complaint could also have been the subject of a grievance. Accordingly, the Board concludes an arbitrator does not have exclusive jurisdiction over human rights issues and the Board is therefore is (*sic*) not required to dismiss the Complaint for lack of jurisdiction. Given that no grievance has been filed with respect to the issues in the Complaint, the issues have not “already been dealt with in another proceeding” and the Commission did not need to consider whether to dismiss the Complaint under paragraph 19(2)(d).

[Bold Emphasis is original reasons – Underlined emphasis added by court]

[31] Later in its reasons, at para. 106, the Board appears to recognize that, if the legislative scheme was intended to produce an ‘exclusive’ model for dispute resolution resting with an arbitrator on issues arising from the interpretation, application or administration of a collective agreement, then the Board would have no jurisdiction to entertain a complaint of that nature.

106. If the Complaint only involved an allegation that Article 26.01 was discriminatory and that the termination of Ms. Robson's employment was therefore an unjust dismissal in violation of Article 9.01 of the collective agreement, the Board would not hesitate to conclude that this matter fell within the jurisdiction of an arbitrator and, if such jurisdiction was exclusive, it would prevent the Board from considering the Complaint. The Board also agrees that under the exclusive jurisdictional model, it would not have jurisdiction over a human rights issue that arose under a collective agreement merely because a union refused to file a grievance (*Horrocks*, paragraphs 36-38).

[Emphasis added]

[32] In Ms. Robson's brief, at paras. 39 and 44, she argues that there can be concurrent jurisdiction between a Board and an arbitrator over a human rights issue:

39. In the current matter, the Complainant submits that subsection 19(2) of the New Brunswick *Human Rights Act* demonstrates clear legislative intent for the New Brunswick Human Rights Commission to possess concurrent jurisdiction over complaints which could also be subject of labour arbitration.

...

44. Accordingly, the Complainant respectfully submits that subsection 19(2) demonstrates a clear legislative intention to displace a labour arbitrator's exclusive jurisdiction over human rights matters expressly or inferentially arising out of the interpretation, application, administration or alleged violation of a collective agreement.

[emphasis added]

[33] The brief filed by the Commission provides as follows at paras. 27 and 30:

27. To the same effect, the Board held that paragraph 19(2)(d) of the New Brunswick *Human Rights Act* contains similar language that confers concurrent jurisdiction to the Board over human rights matters which are also subject to the grievance process.

30. In the within matter, no grievance was filed. Accordingly, the issues were not dealt with in another proceeding and therefore, the Commission did not need to exercise its discretion and dismiss the complaint. It could and did deal with it.

[Emphasis added]

[34] If s. 55(1) of the *IRA* is generally interpreted (*St. Anne Nackawic, Weber, Morin, Horrocks*) as establishing exclusive jurisdiction in an arbitrator over matters concerning the *interpretation, application, administration* of a collective agreement, then it seems contrary to that intent to also have another tribunal (the Board) with jurisdiction to embark upon the same ground - jurisdiction would not be exclusive. It is understood that clear legislative intent would be required to achieve that end. If, however, the present issue as framed (being the *negotiation* of the article) is not one that falls within the scope of s. 55(1), (as per *Morin*) then an arbitrator would never have jurisdiction over it in the first place. There could be no *concurrent* jurisdiction on an issue of that type. I consider *concurrent* jurisdiction to mean that described by McLachlin, C.J. in *Morin* at p. 193:

The first possibility is to find jurisdiction over the dispute in both tribunals. This is called the “concurrent” jurisdiction model. On this model, any labour dispute could be brought before either the labour arbitrator or the courts or other tribunals.

[35] To the degree that the Board intended to confirm that it has *concurrent jurisdiction* with an arbitrator over matters pertaining to the interpretation, application or administration of a collective agreement dealing with human rights matters, I would consider that view to be contrary to long held statements confirming the exclusive jurisdiction of an arbitrator over such issues. While one can argue that s. 19(2) of the *HRA* could be considered as clear legislative intent to establish concurrent jurisdiction of the Board over matters also subject to arbitration, it is my view that s. 55(1) of the *IRA* (as historically interpreted) removed any such jurisdiction. In my view, the arbitrator’s jurisdiction in such circumstances is exclusive. Where, as here, Ms. Robson’s complaint purports to pertain to a matter other than that expressed in s. 55(1), and accepting that characterization to be accurate, an arbitrator could have no jurisdiction at all, as it is outside his or her scope. In a concurrent model, could the employee argue that the matter

should be handled by a human rights Board and the employer argue that the matter should be left with an arbitrator? Who gets to decide which forum should prevail?

[36] While the parties (and the Board) focused their discussion on the clear legislative intent as could be found in s. 19(2) of the *HRA*, it was as important to also focus on the clear legislative intent of s. 55(1) of the *IRA*, and the authorities that have defined the scope of the jurisdiction described therein. In my view, such a review leads to a conclusion that there is no concurrent jurisdiction with the Board over issues that fall within s. 55(1). Nor, as I say, is there jurisdiction in an arbitrator to consider a matter outside the intended scope of s. 55(1). If the Board accepts the nature of the complaint as framed by Ms. Robson, there is no question of there being concurrent jurisdiction. If the essential character of the dispute is *correctly* identified by the Board as involving only the act or process of negotiation, then it has exclusive jurisdiction.

[37] Turning then to the third issue, was it correct for the Board to have characterized, in the alternative, the complaint as addressing only the *negotiation* of art. 26.01, and not a matter of the interpretation, application or administration of that article? In my view, the Board was correct in classifying the essential character of the dispute as one that involves the process of negotiating art. 26.01. *Morin* required the Board to make that finding.

[38] Despite the best efforts of UNB to identify distinguishing factors between *Morin* and the circumstances of the present complaint and, despite my sharing many of UNB's views on that front, I cannot escape the binding precedent of *Morin*. In my view, the dissent of Justice Bastarache in *Morin* better reflects how the complaint should be addressed, and it recognizes the labour relations discord the majority's reasons in *Morin* could cause. This case is an example of the discord Justice Bastarache described.

[39] In *Morin*, McLachlin, C.J. is clear that the issue of the *negotiation* of an article can be distinct from its application or interpretation and thus, it can be a stand-alone issue or complaint

over which a Human Rights Board has jurisdiction. Were it not so, she accepts that *Weber* and *St. Anne Nackawic* would prevail. At pp. 197-198 the Chief Justice wrote:

The essence of the dispute is the process of the negotiation and the inclusion of this term in the collective agreement.

Viewed in its factual matrix, this is not a dispute over which the arbitrator has exclusive jurisdiction. It does not arise out of the operation of the collective agreement, so much as out of the pre-contractual negotiation of that agreement.

[40] While this court, like the Board, is bound by *Morin*, I cannot but remain respectfully concerned over its application and the ease with which it could be used to cast what would otherwise be a question of interpretation, application or administration of an article, into a matter of its negotiation. In theory, any workplace issue, in a unionized setting, that implicates the principles enshrined in the *HRA* could be framed as engaging the negotiation of that provision and, thus, would be beyond the scope of an arbitrator. In dissent in *Morin*, Justice Bastarache wrote at p. 201:

With respect, rejecting the exclusive jurisdiction model, as proposed by the Chief Justice in her reasons, seems to me to be incompatible with the recent decisions of this Court, contrary to the wording of s. 100 of the *Labour Code*, R.S.Q. c. C-27, and irreconcilable with the public interest considerations on which the existing case law is based.

[emphasis added]

[41] Justice Bastarache goes further at pp. 207-208, writing that, on the facts of *Morin*:

Adopting the exclusive jurisdiction model in this case is consistent with the principle of exclusive arbitral jurisdiction that characterizes Canadian labour relations schemes.

...

Adopting a model other than the exclusive jurisdiction model in this case would undermine the comprehensiveness of the scheme, and would be contrary to the legislature's intention.

[42] In the present case, the issue of the negotiation did not arise *until art. 26.01 was applied* to Ms. Robson. No party disputes that the application (or its interpretation) must result in the termination of her employment, as per the provision. Moreover, Ms. Robson had been employed for eight years before she filed her complaint – a complaint made necessary because art. 26.01 became *applicable* to her.

[43] The framing of an issue that arises from the very *application* of a collective agreement provision as a matter that instead arises from the *process of negotiating* that provision is, perhaps, illusory. When, during the course of what are typically complex negotiations between sophisticated parties, does the infraction occur? Is it when one party submits, across the bargaining table, a proposal which contains the proposed language of art. 26.01? Is it when the parties, ‘sign-off’, so to speak, on certain provisions as negotiations continue on other matters? Does anything have any legal effect until the agreement is signed-off, on the complete contract, as part of the ratification process? And, as I alluded to above, what is to prevent any party from taking a negotiated provision in a collective agreement, that is applied to an employee, and then arguing, as here, that the matter is not one of *application*, but rather its *negotiation*? Returning to Justice Bastarache in *Morin* at pp. 211-212:

However, I do not think that negotiations leading up to the conclusion of a collective agreement could qualify as independent grounds for a grievance in the way that pre-employment agreements can, for example.

...

On the contrary, both the negotiation of clauses in a collective agreement and the resulting collective agreement are, as in the present case, closely linked to the application of the collective agreement of which they are a part. Thus, the negotiation of the Accord does not constitute an independent ground for a grievance outside the collective agreement. We cannot separate them for the purposes of determining the essential character of the dispute.

[44] As noted, I do not share the Board’s view that it has concurrent jurisdiction with an arbitrator on human rights issues arising from the interpretation, application or administration of

a collective agreement provision. I am also concerned with the ease by which an issue, as in the present case, could be characterized as a matter arising from the *negotiation* of the collective agreement. Therefore, if I understand the Board’s reasons correctly, an employee could have the choice of *fora*. But this is what cases like, *Horrocks*, *Weber*, *St. Anne Nackawic* appear to restrict. Returning to Justice Bastarache, at p. 217 of his dissent in *Morin*:

Under the current legislative framework, we must determine the essential character of the issue and find one single entity to handle it. If the parties had several fora available to them, violence would be done to the comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting and the foundation upon which the arbitrator’s exclusive jurisdiction is built would be undermined: *St. Anne Nackawic*, *supra*, at p. 721.

[45] Despite what are my respectful concerns with the approach of the majority in *Morin*, I am not able to avoid the clear similarities in the facts and issues as framed in this case and the circumstances in *Morin*. It is a binding authority on me. The Board was not incorrect in finding that the present issue must be determined as per *Morin* - that the negotiation of art. 26.01 is a stand-alone issue and is properly characterized as such in the present complaint – and thus, it has jurisdiction.

[46] While I am aware, as noted above, that the Board has already issued reasons dismissing the complaint, I have not, intentionally, read those reasons. It may be that the Board has expressed some of the same concerns over the vagueness associated with examining the process of negotiations (let alone the evidentiary record that must exist). As noted, that decision is the subject of a separate judicial review application and is awaiting a date to be set. When it does, I want to advise the parties that a different judge will consider that question.

[47] In the result, the within Notice of Application for judicial review is dismissed. UNB will pay costs to each respondent in the amount of \$1,500 plus HST and allowable disbursements.

Justice E. Thomas Christie
Court of King's Bench of
New Brunswick, Trial
Division