union's representation of the employee has been so deficient that the employee should be given a right to pursue judicial review."[46]

No doubt other such issues will emerge as the HRTO assesses its role under section 45.1 in circumstances that arise in future proceedings. The complexity of the problems created by the concurrent jurisdiction of labour arbitrators and the HRTO over Code issues is perhaps an inevitable consequence of the tension between collective and individual rights and the allocation of workplace issues among different tribunals.

II. The Interplay of Arbitration and Human Rights Tribunals in Canada

Canadian arbitrators have authority to apply federal or provincial human rights legislation in grievance arbitration cases. For example, a union may allege discrimination on the grounds of disability and seek an award ordering the employer to accommodate the grievor in the workplace. Human rights tribunals also have authority over workplace human rights violations. In this session, the panel discussed questions that arise when an employee loses at arbitration and then takes the case to a human rights tribunal. Is it an abuse of process to allow re-litigation of the same case? On what grounds should a human rights tribunal reverse a decision by a labour arbitrator? The panel reviewed decisions of the Human Rights Tribunal of Ontario and other tribunals that have considered whether arbitrators have "appropriately" dealt with the substance of the human rights dispute. The panel discussed the recent Supreme Court of Canada decision in *British Columbia (Workers' Compensation Board) v. Figliola*,[47] which gives precedence to the principle of finality of decision making in human rights disputes. The effect of *Figliola* on subsequent court and tribunal cases was discussed. The panel considered the relative merits of having human rights disputes decided by labour arbitrators or human rights tribunals.

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[46]Yee v. Trent University et al. (2010), 195 L.A.C. (4th) 97, 320 D.L.R. (4th) 746 (Ont. Div. Ct.) at ¶8 (a decision that makes no reference to the jurisdiction of the OLRB).

[47]2011 SCC 52 (CanLII).

Moderator: **James Oakley,** National Academy of Arbitrators, St. John's, NL
Panelists: **Owen Gray,** Arbitrator, Toronto, ON
David Starkman, National Academy of Arbitrators, Maberly, ON

Jim Oakley: Good afternoon, everyone. My name is Jim Oakley, National Academy of Arbitrators member from St. John's, Newfoundland and Labrador. Thanks for coming out this afternoon to hear the panel on human rights and labour arbitration in Canada. I'd like to, first of all, introduce the members of the panel. David Starkman, National Academy of Arbitrators member from Ottawa, and Owen Gray, Arbitrator and Mediator from Toronto. So welcome to both of you and thanks very much to you for agreeing to participate in the discussion today.

We'd like this to be as interactive as possible. We have some comments prepared, but we would encourage everyone to ask questions or make comments whenever you wish. The leading case that we will be referring to in our discussion is the Supreme Court of Canada decision in *British Columbia (Workers' Compensation Board) v. Figliola.*[48]

To set the background for the topic, in Canada there is concurrent jurisdiction over discrimination and human rights complaints in the unionized employment sector. Both labour arbitrators and human rights tribunals have jurisdiction. The authority of the human rights tribunals is set out in the human rights legislation of their jurisdiction. Each province has its own tribunal, and at the federal level there is the Canadian Human Rights Tribunal. The legislation in each province sets out what are the protected grounds; it varies from place to place. For example, in Ontario, there is a long list of grounds protected from discrimination in the employment sector, namely: race, ancestry, place of origin, color, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability, and record of offenses.[49]

The statistics I have seen show that more than 50 percent of cases deal with disability as the protected ground of discrimination.[50] Each jurisdiction has protection from discrimination in various

[48]2011 SCC 52 (CanLII), [2011] 3 SCR 422 [Figliola].
[49]Human Rights Code, R.S.O. 1990 c. H.19, s. 5(2).
[50]Human Rights Tribunal of Ontario, Annual Report, 2011–2012, online: http://www.sjto.gov.on.ca/stellent/groups/public/@abcs/@www/@sjc/documents/abstract/ec162265.pdf.

sectors, with employment being one, but in Ontario there's also protection in the sectors of accommodation, services, contracts, and vocational associations. The employment area by far sees the majority of complaints. A bit later on we'll look at some of the other areas in terms of how it might affect us as arbitrators.

As far as the authority of labour arbitrators is concerned, there are various sources for that authority, including collective agreements, legislation such as the Labor Relations Acts in some jurisdictions, as well as court precedent, particularly various decisions of the Supreme Court of Canada.

So the fact that we end up with this overlapping jurisdiction leaves an individual employee or the union representative in a bit of a conundrum in terms of what to do. The options include file a grievance or file a complaint with the Human Rights Commission or Tribunal or follow some other procedure.

I'm going to ask David Starkman if he could address that question of where to file a complaint and the question of deferral of a human rights issue.

David Starkman: Let me say that, before *Figliola*, my impression was that people could go to both places, go to a human rights tribunal, and then go to labour arbitration if they lost and there was a good chance of at least getting another hearing with respect to the issue. After *Figliola*, it is going to be very difficult to raise the identical issue in the second forum. I won't get into all the background facts of *Figliola*. It's a 5–4 decision, issued in October, 2011, which is very interesting. I'll just read a couple of paragraphs. This is one of the two different views. The dissenting view is very interesting. The majority is written by Madam Justice Abella, and she says, "Section 27 1 F [which is the section of the British Columbia Workers' Compensation Act], does not codify the actual doctrines or their technical explications. It embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity, and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision making and the avoidance of the re-litigation of issues already decided by decision maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the re-litigation in a different forum of matters they thought had been conclusively resolved.

Forum-shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them."[51]

The majority says: "Relying on these underlying principles at least, the tribunal is asking itself whether there was concurrent jurisdiction to decide human rights issues, whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal, and whether there was an opportunity for the complainant or their privies to know the case to be met and have a chance to meet it regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself."[52]

All of these questions go to determine whether the substance of a complaint has been dealt with appropriately. At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the re-litigation of what essentially is the same dispute.

So the majority says, "Look, you have concurrent jurisdiction. If one forum gets to it before the other one, the second one is more or less bound to follow the decision of the first. This is straightforward. Was it substantially decided by a tribunal in a fair process and if it was, we're not re-litigating the issue."

Now, it's interesting when you go to the minority, written by Mr. Justice Cromwell. This paragraph captures how they see it differently: "I conclude that the court's jurisdiction recognizes that, in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness."[53] And here he's talking about causes of action estoppel, issue estoppel, and collateral attack. "This is done through the exercise of discretion, taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of substantial justice in the particular circumstances of each case. Finality and requiring parties to use the most appropriate mechanisms for review are, of course, important considerations. But they are not the only or even the most important considerations."[54]

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[51] *Figliola*, *supra* note 48, at ¶36.
[52] *Id.* at ¶37.
[53] *Id.* at ¶65.
[54] *Id.*

The majority says, "As long as these preconditions are met, that's the end of it." The minority is saying, "When you're weighing finality and fairness, the decision maker must exercise his or her discretion in determining whether or not the same issue is being raised" and all of the other factors. I think the minority probably has it legally right but procedurally it's a nightmare, because now everybody, all across the country, can take their issues and say, "I should have special consideration. Let's look at the facts. Let's look at my particular facts. It's unfair that this happened to me. You should exercise discretion and let the matter be reheard."

So that's a long way of answering Jim's question. What should someone do when he or she is looking where to go? In order to determine that, you have to look at what sort of remedy an individual is looking for. An arbitrator is more likely to reinstate you. A human rights tribunal is probably not as likely to reinstate you, but it has the power to do so. If a breach is found, a human rights tribunal probably is going to give you greater damages than a labour arbitrator is going to give you. That's what the cases seem to say. If you're an individual, do you want to retain carriage of your matter? Because when we go the arbitration route, the union has carriage. Now, you have great influence over what the union does, and most unions want to accommodate, have the participation of their member, but, ultimately, the member does not have carriage of the matter.

Finally, what type of speed are you looking for? In some jurisdictions you get it quicker or slower depending on where you are, what the tribunal's backlog is, what the labour arbitrator's backlog is. So I would say it's a bit of a mixed bag. It's really hard to tell. Most people seem to file in both places. They go with the union because it's little or no cost. If they want to retain their own representative, there's big cost. They want to go themselves. Some people are nervous; some people aren't, and they just go right ahead. I say there is no clear answer.

Jim Oakley: I'd like to focus on the impact of the *Figliola* decision and direct a question to Owen. Quite a lot of the case law where human rights tribunals have overturned arbitration awards involves Ontario Human Rights Tribunal cases. I wonder if you could comment on how the scene has changed in Ontario from what it was before the *Figliola* decision to the situation now, post-*Figliola*.

Owen Gray: Perhaps I should just take one step back and explain the context. First of all, although we're pretending that

this is a description of what happens in Canada, much of this is about what happens in Ontario, where there's been quite a lot more jurisprudence developed about this interaction than apparently has occurred in other jurisdictions, which is probably a good thing for arbitrators in the other jurisdictions.

In Ontario until 2008, the Human Rights Code had a Human Rights Commission as the gatekeeper to any hearing process for anyone who had a complaint that their human rights had been violated. That Commission could refuse to pass any complaint on to a hearing but, particularly, it could refuse to pass on a complaint if it felt that the matter either had been or could be addressed more appropriately in another forum, such as arbitration.

Then, in 2008, the legislation was changed to allow people who felt their human rights had been violated to apply directly to the Human Rights Tribunal for a hearing with respect to their allegations. The Tribunal was given some powers to control its process but, significantly perhaps, it was not given the power to say, "We won't entertain this because you *could* deal with this somewhere else." They do have the power to say, "We won't entertain this because it *has been* dealt with somewhere else." So employees governed by collective agreements and represented by trade unions studied the ability to go with their complaint that their employer violated their human rights, failed to accommodate them, discriminated against them on the basis of race, age, and a number of other things. But those are the kinds of things that seem to come up most—race, age, family status.

In any event, the Human Rights Tribunal doesn't have the jurisdiction to interpret and apply the collective agreement. On the other hand, an arbitrator has both that jurisdiction and the jurisdiction to entertain the human rights claim, but in a proceeding in which the union controls what's presented. So aggrieved employees would certainly like their unions to take their grievances forward for them. But sometimes grievors don't trust the union to pitch the case the way they want, and they particularly may not trust the union to pitch the human rights aspect. So in Ontario, there seem to be quite a number of employees who go to the Tribunal and file an application with respect to something that's happened in the workplace and that may very well be the subject of grievance proceedings.

The Human Rights Tribunal will generally, of its own motion if it is aware that there's some kind of grievance going on, suggest that perhaps this is a case in which it ought to defer its consideration

of the application until the grievance and arbitration process has run its course. And the dynamic has always been that if you want to go to the Tribunal at all, you're going to have to do it within a year of the event that you're complaining about. Waiting to find out what happens at arbitration first is not a good excuse for not meeting that deadline. So, the Tribunal has made it perfectly clear, "You can file your application while you're waiting for the grievance process to run through. If you don't you're going to be out of luck." So, of course, employees do, and then their application gets deferred because there's something going on somewhere else that might deal with some part of whatever it is that's the complaint to the Tribunal.

Typically, this question of, "What will the Tribunal do post-arbitration?" is with respect to an application that was actually pending all along and was deferred because the grievance and arbitration process was in play. The deferral occurs even before there's a referral to arbitration. The mere fact is the grievance that might get referred to arbitration is cause for deferral, and then the employee can ask that it be revived afterwards.

So, in this context, where there are parallel proceedings, the Tribunal says, "Well, we're not going to worry our heads about this until you're finished up with arbitration." And that's true whether the arbitration is going to use the term "human rights" or not. If the fact situation out of which the arbitration, the grievance, arises has some overlap with the fact situation described in the application to the Tribunal, then the Tribunal is inclined to defer unless it's persuaded that the union is not doing anything with the grievance, not moving ahead, or perhaps there's some conflict—if a complaint to the Tribunal complains about the behavior of officials of the very union that might be processing the grievance—but generally speaking, the tribunals defer to arbitration at the drop of a hat.

When the proceeding finishes, there might be a settlement rather than a decision. You get to the other end of that. The grievor doesn't like the outcome and now wants to have his or her human rights visited or revisited, as the case may be, by the Tribunal. So there's a provision in the Human Rights Code of Ontario that's similar to the one that was considered in *Figliola*, that essentially says the tribunal can dismiss an application if the substance of it has been appropriately dealt with by another tribunal. The word "appropriately" is in the legislation, although critics of *Figliola* would say it's been read right out of it again.

In any event, the Tribunal in Ontario very early on said that it did not read the statute as giving it a right to reconsider the substance of a matter in the form of an appeal. But before *Figliola*, there were two lines of thought at the Tribunal, one line more concerning to arbitrators in Ontario than the other. The line that was concerning said, "Well, while we're not concerned with whether to entertain an appeal, we do have to examine the reasoning of the arbitrator to make sure they went through the sort of disciplined and grueling human rights analysis that we're accustomed to applying to problems. And if we find that there hasn't been that approach, we may just have to do it over." My description of their view is only very slightly hyperbolic as compared with what they actually said. Other members of the Tribunal said something quite close to what *Figliola* ultimately said.

Figliola was considering the corresponding provision in the British Columbia Human Rights legislation. It really doesn't help to talk about how the issue got to the Supreme Court of Canada except to note that it wasn't about arbitration. It was about a proceeding in which the parties, who were trying to re-litigate their issue, were parties who had carriage of the issue, both in the original tribunal, which was a workers' compensation decider, and before the Human Rights Tribunal.

The majority of the Supreme Court of Canada said that when you get into one line of consideration of issues, you have to stay there. If you've got a beef about the decision you get, you go up the vertical line of review that is provided for with respect to that tribunal. You don't allow—under a section like the one I referred to earlier, appropriately considered—collateral poaching. Justice Abella had some very colorful language in her decision—collateral poaching by other tribunals. If some other tribunal's got it, you defer to that. This is all a reflection, said the Supreme Court of Canada, of the common law principles of issue estoppel, collateral attack, and abuse of process.

Within days of the issuance of *Figliola*—there were already cases at the Human Rights Tribunal of Ontario where a number of issues had been deferred, and decisions had been delayed—decisions flooded out of the Human Rights Tribunal saying, "Well, that's it: If some other tribunal has the jurisdiction to deal with it and they did deal with it, that's the end of that. We don't subject it to some analysis that asks whether we would have approached it in the same way, whether we would have had the same process; certainly not whether we would have come to the same result."

So the effect that *Figliola* has had is to eliminate one of the two lines of thought that the Tribunal had earlier about what "appropriately dealt with" meant. It seems that the people who disagree with the Supreme Court in *Figliola* would say that they read "appropriately" right out of it.

They followed some kind of appropriate process.

Jim Oakley: Perhaps I'll ask a follow-up question. You've been dealing with the situation where the arbitrator had decided the human rights issue, and then it goes to a human rights tribunal, where the result seems pretty clear from what you've said about the *Figliola* decision. But what if the arbitrator doesn't address the human rights issue? That could be for various reasons. It could have been a strategy on the part of the union and the grievor to deliberately not raise the issue before the arbitrator, intending to raise it before the tribunal if they had to because they lost the arbitration. Has the tribunal dealt with that kind of situation?

Owen Gray: The tribunal has dealt with some manifestations of that situation. It's important to note, first, that the tribunal reads that section that I referred to earlier as not just asking, not just requiring deference to decisions about human rights issues. It requires deference to decisions about issues. So, for example, if a human rights application depends on a factual proposition that also came up and was rejected in the arbitration, then the human rights tribunal will say "that's dispositive of the application before us" even though the so-called human rights issue or the issue about what rights arose under the Code as a result of the alleged fact, even though that was not before the decider. There are any number of decisions that say, "If you lose the factual premise of your application, then it doesn't matter whether the human rights issue is raised before the other tribunal; we're not supposed to permit re-litigation of issues."

There's one case called *Paterno*,[55] in which the grievor and the union had adopted this very strategy, where the grievor wanted to be able to pursue his human rights on his own at the human rights tribunal and wanted the union to pursue only the just cause issues related to his termination. The employer, however, got wind that there was this complaint, and the employer raised the question before the arbitrator. So the arbitrator took it on and decided that there hadn't been a breach of human rights. In the *Paterno* complaint, when the grievor got to the tribunal he asked it to deal

[55]Paterno v. Salvation Army, 2011 HRTO 2298 (CanLII).

with the human rights issues, saying that it was up to him and the union whether to ask the arbitrator to deal with the human rights issue, and because they had chosen not to, he shouldn't be precluded from going ahead before the tribunal. The tribunal said, "Oh, no, no." Not only does it not matter who raises it but, frankly, you can't divide the human rights issues from the other issues that relate to just cause. If an arbitrator decides there was just cause for your termination, that's tantamount to saying there was no discrimination. And the tribunal seems to say that is the case, whether you raised it or not, although in *Paterno* it was raised.

So it's not clear whether, through the back door, we're now getting to a jurisprudence in which the tribunal won't entertain a complaint about some violation of human rights that could have been raised with the arbitrator but wasn't. There's a case that comes awfully close to saying that you can't do that.[56] But in my research, I haven't found a case that's directly on point—could have raised it, but didn't. Because, of course, nearly all the time if you could have raised it and didn't, it's going to be because you're going to lose on the factual premise anyway. So if you've lost on the factual premise, then you're toast in that other way at the tribunal.

The interesting problem is, suppose the arbitrator finds that there wasn't just cause and makes no finding at all that's inconsistent with the proposition that there had been a breach of human rights and the human rights were never raised. It wasn't a game the grievor was playing. Perhaps the union chose not to raise the human rights issue even though the grievor wanted them to, which is the reverse of *Paterno*, and is a case that the tribunal in *Paterno* said they weren't addressing. "It might be different," said the tribunal, "if the union had refused to take this issue," which means unions will now always refuse, particularly if the grievors don't want them to raise it at arbitration.

So there is that piece that's left undecided in the tribunal jurisprudence. Certainly, you can take your chances at not raising it at arbitration, recognizing that if you get some findings of fact that undermine your application, then you're clearly out of luck when you get back to the tribunal after the arbitration is done.

Jim Oakley: Just to reverse the situation somewhat from the point of view of an arbitrator, and I'm not sure if any of us have dealt with this exact situation so it's perhaps hypothetical, but

[56]Shi v. Holcim (Canada) 2012 HRTO 641 (CanLII).

if there had been a decision made by another tribunal, like the human rights tribunal or some other tribunal that dealt with the human rights issue, and then it comes before us as an arbitrator, how would we deal with that situation? Is that anything like how we've already dealt with criminal cases where there's been a criminal conviction or acquittal and we, as arbitrators, have to decide what to do with the decision in those cases or the facts that were decided? David, I'd like to put that question to you. I'm not sure if you've dealt with the human rights issue, but I think you've dealt with the criminal cases.

David Starkman: I just have a brief comment on this. *Figliola* and the other cases talk about finality and fairness, and that's how they analyze this. But I think the reason that the system doesn't want concurrent proceedings is because to have different results based on the same or substantially the same facts would bring the administration of justice into disrepute. Not only would it make the process longer and cost more money, but it reminds me of the O.J. Simpson hearings. Now, try to explain that to a layperson. O.J. goes on trial and it's a long criminal trial and he's acquitted. Fair enough. Which means he didn't kill his wife. Then there is a civil trial, and they award $20 million to his in-laws. Why? Why did he have to pay $20 million? Because he was responsible for the wrongful death of his spouse. You can say there are different outcomes because there was a different standard of proof.

And then a family member brings an application to take away custody of his two young children, and the matter goes to Family Court. Now, don't forget he's been convicted of participating in a wrongful death of his spouse, but they don't take away custody. Why? Because there's no evidence he abused his children.

Well, that is three different decisions based on the same set of factual circumstances. So I think that's what the courts are really trying to avoid. In Canada, people are probably familiar with the *City of Toronto*[57] decision, in which an employee of the City of Toronto was convicted of a sexual assault at work. He's tried criminally and convicted. So, before the conviction, the City of Toronto had fired him based on sexual assault. The matter comes to arbitration. The union wants to present evidence with respect to the assault, stating that he didn't do it. The arbitrator allows the presentation of that evidence. In the end, the arbitrator concludes that the grievor did not do it. That case went all the way to the

[57]Toronto (City) v. C.U.P.E. Local 79, 2003 SCC 63 (CanLII), [2003] 3 SCR 77.

Supreme Court of Canada, and the Court said, "No, you can't do that. He's been convicted of this assault. We are not re-litigating it." Once that conviction is found and is upheld through whatever appeal process is applied, other people hearing the same facts are bound by the essential findings of fact of the criminal court.

I heard a case in which a bus driver ran into the back of a parked vehicle and killed one of the people in the vehicle. He was charged with dangerous driving, and the employer fired him. The arbitration was put on hold. The matter went to trial—it's a week-long trial—and the fellow is acquitted. In making the acquittal, the judge makes certain determinations with respect to what happened that day. In other words, how fast he was driving, whether he had been drinking, whether he was just distracted, or what the distances were between the vehicles, all types of essential findings of facts. The arbitration starts and the union says to me, "We want it to be clear that you are bound by the essential findings of fact of the trial judge. It's been an acquittal but if the judge said he was traveling at 50 miles an hour or 80 kilometers an hour, you can't find he was traveling at a slower or faster speed. If the judge found he was not intoxicated, you can't find that he was intoxicated. If the judge found that he was distracted, you can't find that he wasn't, because you would have different findings of fact, which would bring the administration of justice in disrepute." Frankly, I agreed with that to the extent that you could parse out from the reasons clear findings of fact and conclude that they were essential to the determination that I had to make.

So this is similar to what is going on in these cases. If a human rights commission made a determination with respect to a certain course of events and somehow made that determination before the matter came to arbitration, this is concurrent jurisdiction. The arbitrator probably has to look at, "What are the essential findings of fact that are made and would it bring the administration of justice into disrepute should I make different findings of fact?" Of course, the arbitrator has to make a decision before he or she has heard the evidence. I find the issue very interesting, because arbitrators tend to want everyone else to defer to them, but they are not so inclined, perhaps, and for some good reasons, to defer to others.

The other issue that comes up a lot in the disability area, at least in Ontario, is that there's a Human Rights Code. You can't discriminate on the basis of disability. But under the Workers' Compensation legislation, employers have to accommodate injured

workers. In the course of Workers' Compensation proceedings, they often make determinations as to whether or not an employer has accommodated an injured worker. If it's determined in the Workers' Compensation process that they have or haven't accommodated, is an arbitrator bound by that decision? We all know there are various levels of appeal in most compensation processes, but certain levels of appeal like the *Figliola* case look very much like an arbitration process. But most arbitrators don't pay any attention to that. They may determine that the employer failed to accommodate or didn't accommodate him, and we don't care. We're proceeding on the basis of something else. There's nothing in the collective agreement that talks in any great detail about accommodation except they might say, "to the point of undue hardship."

Jim Oakley: I'd like to talk about some developments in the other jurisdictions. The focus has been mostly on the Ontario Human Rights Tribunal and how it's changed its application of the law. So one of my roles here is to address the rest of the country, although I'm not going to deal with every other jurisdiction. Obviously, we don't have time. But I am going to talk about a couple of cases in Newfoundland and Labrador that I'm familiar with, and a couple of cases from British Columbia that have looked at this issue. To a large extent I will focus on the general principles as David and Owen have discussed.

Since *Figliola*, one of the cases in Newfoundland was a human rights case that applied *Figliola* in a straightforward manner, *Chiasson v. Town of Happy Valley-Goose Bay*,[58] a decision of the Trial Division of the Supreme Court of Newfoundland and Labrador in November 2011. This case illustrates how it applied *Figliola*. This was a grievance of a termination of employment alleging discrimination on the grounds of mental disability. The arbitrator ordered reinstatement with a time-served suspension, which was about two years. There was no judicial review. Then the grievor filed a complaint on his own, without the union being involved, to the Human Rights Commission. The Commission has the gatekeeper model, the model that Ontario used to have and, under the legislation, the executive director can decide that if the matter has been appropriately dealt with somewhere else, then it can be dismissed. And that's what the executive director decided. That decision was upheld by the court by applying three tests set out

[58]2011 NLTD 156 (CanLII).

by the majority in *Figliola*: (1) Did the arbitrator have jurisdiction? (2) Was the issue decided by the arbitrator the same as the issue before the Human Rights Commission? and (3) Did the complainant have an opportunity to know the case and to meet it?

Of interest from that case is that the section of the statute was similar to the statute considered in *Figliola*. The judge also commented that, if there is no statute that says if it's been appropriately dealt with somewhere else, you can dismiss. The same principles apply. In other words, the common law could be applied by a tribunal or by an arbitrator to say, "Look, this has already been dealt with somewhere else, and we'll dismiss it on those grounds."

The other Newfoundland and Labrador case that is interesting was decided in January 2012.[59] It wasn't a human rights case, but it concerned the "citizen's representative," a name used for the ombudsman. So I'll use the term "ombudsman" because that's the term with which people are more familiar. This was a case involving a settlement. There was an individual who was a construction inspector who worked for the Housing Corporation. He was convicted of a sexual assault that involved a touching that happened in a bar. The incident was completely unrelated to his work, and he was given a 10-month suspension by the employer. That was grieved. In the grievance process, the union, with the grievor's participation, agreed to a settlement to reduce the suspension to 6 months. That was the outcome of the grievance process. Two-and-a-half years later, the grievor complained to the ombudsman about this penalty. The ombudsman took it on to investigate and made a recommendation to the employer. The exact recommendation was not reported in the court decision, but it was basically that the penalty was much too severe and should have been reduced. Everyone else objected in court. The union, the housing corporation, and the government intervened, and they all objected to the ombudsman taking on this case. The trial division judge agreed. The Court of Appeal then overturned the trial judge by a 2-1 decision saying, "Yes, the ombudsman had jurisdiction to interfere with this grievance settlement."

The majority did not mention *Figliola* or any of these principles that we're talking about at all. What's interesting is the minority judgment, by Mr. Justice White, who applied *Figliola* and said

[59]Office of the Citizens Representative v. Newfoundland & Labrador Housing Corporation and Her Majesty's Attorney General and Canadian Union of Public Employees Local 1860, 2012 NLCA 4 (CanLII).

that this was really an improper attack. The minority said that it was an abuse of process and a collateral attack on the settlement that was made, and that the effect of allowing it was to undermine the grievance and arbitration process. The court said that arbitration awards are immune from investigation under the statute but apparently settlement agreements are not. The question that arises is, why would the employer want to settle and then have the settlement reopened by the ombudsman? There's been no appeal of the decision to the Supreme Court of Canada.

In British Columbia there have been a couple of decisions of the Human Rights Tribunal that did not defer, and both looked at settlements. In one case there was a mediated settlement before the Employment Standards Tribunal.[60] The Human Rights Tribunal did not have a copy of any settlement agreement. The Human Rights Tribunal was not satisfied that the human rights issue had been dealt with, and proceeded to hear it. In the other case, there was a settlement agreement.[61] It was actually a small claims court proceeding. But the settlement agreement did not expressly state that the discrimination allegation had been dealt with under the Human Rights Code. Therefore, the Human Rights Tribunal did not defer to the settlement agreement.

I would like the panel to address the question of settlement agreements. If we are acting as a mediator in a case and it's settled, should we ensure that the settlement specifically addresses the human rights issue?

Owen Gray: I think when parties are asking you to help them with identifying what is in dispute, you would encourage them to address that dispute in a settlement agreement lest something not expressly addressed is left not settled.

Years ago, in Ontario, it was rather difficult to be sure that one had settled something involving a human rights claim, because the then–Human Right Commission was quite active about reviewing whether, in effect, deferring to the parties' settlement was in the public interest. It wouldn't, years ago, surprise people to find that there was essentially nothing you could do to quiet a human rights complaint, short of getting a letter of comfort from the Human Rights Commission that they weren't going to entertain a complaint that the settlement was inappropriate.

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[60]Ricard v. Tim Hortons, 2011 BCHRT 368.
[61]Hunter v. Centanni Tile, 2012 BCHRT 38.

The current Human Rights Tribunal takes quite a different view. They regard pursuing an application before it with respect to something that the applicant has agreed to settle as an abuse of process. As you'd imagine, when this is raised by respondents, the Tribunal asks applicants: "Well, you settled. Why are you bringing this complaint?" "Oh, well, I did that under duress. I was told that I wouldn't get the settlement money unless I settled. So I was under economic duress." Imagination is essentially unlimited when it comes to explaining why one should be able to have one's cake and eat it, too. But the Tribunal has been unreceptive to those sorts of objections to dismissal on the basis of abuse of process because there's a settlement. It's been as unreceptive as you'd expect arbitrators or courts to be under similar circumstances.

There's now actually some reason to expect that putting some language specific to the human rights issues into the settlement might actually work to preclude a subsequent human rights complaint by the applicant. Whereas previously, one had to set it all up so that there was enough about the deal that was executory that you provided an incentive to the grievor to not walk away from the settlement and then pursue a human rights complaint.

So in short, it's a good idea if you think you have settled a human rights complaint to write that down and have the grievor sign off on it.

David Starkman: If you're going to follow that along, you have to put enough facts into the settlement so that a third party knows what is being settled. If you're saying that if it's just opaque language, saying the grievance is withdrawn and the employer agrees to reinstate the grievor, paying so much money, and confidentiality, and so on, that doesn't tell anybody what is being settled. Most parties don't put a lot of language into the settlement for all the apparent reasons. So if you want to rely on the settlement, it's got to be at least specific enough, otherwise someone is going to say, "Well, you don't know what was settled here. What was the allegation? What was the give and take?" Most don't go that far.

Allen Ponak: Maybe it's an obvious question, but when I've mediated settlements that have a human rights aspect, one of the things that we put in is that the grievor agrees to withdraw any human rights complaint or to not make a human rights complaint if he or she hasn't already. It's pretty well boilerplate language. We don't talk anything about the fact, we just say the grievance is withdrawn or settled on these terms. Human rights complaints

are either withdrawn or will not be filed. Everybody signs, and it's done.

David Starkman: What if the union settles it, and the grievor does not sign it?

Allen Ponak: There's no settlement.

David Starkman: In Ontario, when the union settles it, there may be a duty of fair representation complaint, but that's another issue.

Audience Member: If the grievor is there, I make sure the grievor signs.

Audience Member: But what if the grievor won't sign?

Audience Member: I haven't been in the situation where the union signs over the objection of the grievor.

Audience Member: No, no. I'm talking about a settlement where the union says, "We're taking it back. We have a committee that deals with this. We're taking it back." And then they say, "Well, the grievor's position is ridiculous. We're going to have a 10-day hearing about something that's ridiculous. We're not going there. We're settling."

Margo Newman: I don't think that the way the language that Allen was just talking about could be entered into by just the union without a grievor. If that's an issue to the parties, they know it's out there or it might come, it then becomes a settlement that deals with that issue. You either have the grievor settle it or you don't. If the union says, "We're not going to settle, we're going to take it back to our people, you're not involved in that drafting of the agreement" and they take it back to their people and they don't deal with the human rights component, and the grievor doesn't agree, then I assume it's a different issue coming before the tribunal. I assume it would be, because I don't know if it's the same party.

David Starkman: I guess that's what I was cozying up to. That issue has not really been determined. In other words, if the union and the employer reach an agreement that has a human rights component to it, and the grievor will not sign the settlement but then wants to bring the matter on their own to a human rights tribunal and argue, I should be able to present my case that the issue has not been settled. This is really the core of it. It is a struggle between collective rights and individual rights. To what extent is the system or society going to allow an individual to bring forward on his or her own behalf, in his or her own interest, an issue that the collective or his or her union has settled? You can see

situations where you say, "It's so much a violation of an individual right, we're going to let this person bring it forward." Then you can see situations where the allegation is about systemic things in the workplace, and the employer says, in response to that, "We're willing to put in place this, this, this, and this to fix this problem, which affected this individual. But now we're going to benefit everybody." They thought they were going to have to defend themselves against all sorts of individual complaints that they want to deal with the workers.

Emily Burke: I would think the employer is not going to sign that agreement without the grievor being wrapped up into it, because it doesn't make any sense at all. You're exactly right about the issue. But every employer is worried about the dual forum problem. If the grievor isn't wrapped up, they're not going to sign it.

Andy Sims: I just wanted to mention an Alberta case that under our legislation deals with overlapping jurisdiction and says, on the basis of the individual rights/collective rights issue, that individuals covered by a collective agreement should not have fewer rights than an unorganized individual, and they have allowed concurrent jurisdiction. The last line of the decision that says, "Subject, of course, to issues of res judicata, estoppel, and so on," has given false assurance to a lot of people. But they did in that decision deal with the question of whether the union was acting as a surrogate for the individual, and the decision seemed to say that if issues, if facts, were decided in the arbitration forum, they would certainly still be binding under issue estoppels. If the union and the employee were close enough, the issue estoppels would apply. So you have this peculiar situation where an individual can apply to the Human Rights Commission for what's left but is still stuck with the findings of fact made in an arbitration by their bargaining agent.

David Starkman: You say the grievor wouldn't sign it, but if the union and the employer make an agreement and the grievor does not sign, then it's arguable that the grievor's course of action is not to go to the Human Rights Tribunal but to the Labor Board under the duty of fair representation. What if the grievor says, "They signed it over my objection. They didn't take into account my human rights issues, my whatever issues." And if there's a remedy to be provided to the individual, it's through that process rather than going to the Human Rights Tribunal and arguing that his or her rights were never taken away.

Jim Oakley: We're getting near the end of time. But I'd just like to give the other panel members an opportunity to add any other comments and perhaps address if there's any other pitfall that we as arbitrators or mediators ought to be aware of in dealing with human rights issues and the effect of overlapping jurisdictions.

Owen Gray: Just on the last point that was mentioned. There's a sort of an escape hatch built into the human rights tribunal jurisprudence. There are cases that say that all of this business of the proceeding between the union and employer being determined and that you then can't re-litigate, is all subject to an assumption that the grievor was going along with being in the grievance until he got the result. But if the grievor didn't want to go through with the grievance, and the union proceeded anyway, or along the way through at some point before the end the grievor dropped out, as they do sometimes, the tribunal has said, "Then all bets are off. They have their individual rights, and we'll entertain their complaint, notwithstanding that at some point what's the subject of that complaint was part of the grievance."

The thing that we haven't touched on is the arbitrator as respondent problem that emerged quickly when unrepresented applicants started figuring out how to plead their cases. Not surprisingly, the unrepresented applicants trying to figure out what pitches to make thought that if arbitrators decided their human rights issues contrary to their view of what was right, that they were supposed to name the arbitrator in their complaint to the tribunal about the fact that their rights have been violated. That has been fairly clearly addressed by application of the doctrine of judicial immunity by the tribunal to the arbitrators.

There are just hints in the jurisprudence that it doesn't cover everything you do. Particularly there are certain things arbitrators do that in a statutory tribunal or court would be done by clerks, and the clerks don't get the benefit of judicial immunity. So when you're doing "clerky" things, you may not be covered by judicial immunity. The precise scope of judicial immunity is if you start investigating it, it's very complex. There was, for example, the case years ago when a judge of one of the Ontario courts told folks they couldn't wear hats in the hearing room. There were people who were wearing headgear in accordance with their view of their religious commitments. The judge was persuaded that that wasn't a tenet of the religion to which they claimed to belong, so they couldn't wear their headgear. This all became subject of various debates at various levels. Ultimately, the Federal Court of Appeal

decided that the Canadian Human Rights Commission had been correct when it rejected the headgear individuals' complaint on the basis that judicial immunity applied.

So, things you actually do while you're running the hearing are probably covered. Things you do in arranging the hearing, like booking it into a hotel that doesn't have ramps for people with wheelchairs or in some other way doesn't accommodate the needs of people who are going to be participating, probably are not covered. Although, it becomes a question of whose obligation it is to cover that. Is it the arbitrator, or the party who's invited that person along, or the parties together? But judicial immunity doesn't cover everything, it appears.

There's a pending proceeding in which the Workplace Safety and Insurance Appeal Tribunal is the respondent to a complaint that when asked to provide a babysitter or money to pay for a babysitter for an applicant or complainant, they refused. The decision not to provide that was capable of being the subject of a complaint. It didn't fall within judicial immunity. Of course, there's no decision that refusing the babysitting money is a breach of the Code, just that if it is, you're not protected by judicial immunity.

David Starkman: It's interesting for us to read and think about these issues. But ultimately, these are public welfare statutes. Somehow an individual who feels that their human rights have been violated should be able to know where to go and how to get there, either on his or her own or with regular, simple advice. The issue that has always troubled me is when an issue comes before an arbitrator in an arbitration proceeding and it's obvious that there are some potential human rights aspects to it. Is it incumbent upon us as the arbitrator to raise the issue directly or explicitly so that both parties know and that there's a clear answer? "No, there are no human rights aspects to this matter," or, "Yes, there are, and these are the aspects." I say that only because if it's just on the fringes, and it's not presented well or not presented at all, or not dealt with in the decision or dealt with at all, then the matter then goes on, say, to the human rights process. And then they say, "Well, you didn't raise it. You could have raised it. You should have raised it." Or that it's unclear what happened, if anything. I'd like there to be greater clarity. I know that some people are very hesitant to raise this issue. It's an adversarial process. What are you doing? People could say, "Why are asking this question? You know we frame the issues. What are you up to? Why would you even think about something like that?"

On the other hand, we are to a certain extent custodians of a process and providing a service, not just to the parties, but to people about how to have their human rights concerns addressed in this complex society. I don't have an answer; I just have a concern about that.

Andy Sims: I wanted to raise, first, an idea, and second, a case that adds just one more dimension to this. We spend huge amounts of money on local forums and on judicial review. There is a jurisdiction in the Superior Courts to marshal proceedings. I think it would be a tremendous development in Canadian law where there is a clear potential for multiple forums coming up to be able to take a relatively quick affidavit-based application to a court and get a binding direction from the court that would say, "Litigate this there, take this issue here or there." Because I think we're getting to a point where—it's almost Dickensian—where after the fact that people are chasing around having pursued or about to pursue different tribunals.

The other dimension I just want to mention is a case I had out of Saskatchewan. It had a human rights complaint, a complaint to the university's human rights internal adjudication process, alleging bullying in the workplace. Then a complaint was made to the Workers' Compensation Board of Saskatchewan, because the person had suffered an injury. That, of course, raised the question of whether the Workers' Compensation Board had jurisdiction to determine jurisdiction over everything. And if there is a complaint of damage, individual damage that's compensable, there is the prohibition on action against the employer for workplace injury. I think that's an area that has been overlooked in this because, increasingly, claims of psychiatric damage are being advanced in arbitration. I think the compensation issue is going to become bigger than we think it will.

Jim Oakley: Thanks to everyone for your comments. We have seen that the *Figliola* decision has addressed the problem of multiple proceedings in human rights cases. However, there are issues yet to be resolved by arbitrators and human rights tribunals. As arbitrators, we need to be aware of our jurisdiction and be prepared to deal with practical problems that arise in this area. I'd like you to join me in thanking the members of our panel. Thank you, David and Owen.