Appeals from (1998) 127 Man.R. (2d) 61

IN THE COURT OF APPEAL OF MANITOBA
Religious Leave Challenge

Coram: Huband, Philp and Monnin JJ. A.

Docket No. AI 98-30-03815

BETWEEN:	) **M. Myers, Q.C**. and) **V. J. Matthews Lemieux**) for the Appellants
LORNE BILLINKOFF, MARGO KATZ, SHELDON MINDELL, JUDY ROSEN, ELAINE SHENBACK, HAROLD SOSNOWICZ, ALLAN STARGARDTER, ARLA STRAUSS, ANITA WOLK ***(Applicants) Appellants***	)) **G. D. Parkinson** and) **K. L. Gibson**) for the Respondent) Winnipeg School Division No. 1)) **R. B. McNicol, Q.C**. and
- and -	) **R. A. Simpson**) for the Respondents
WINNIPEG SCHOOL DIVISION NO. 1 AND THE WINNIPEG TEACHERS' ASSOCIATION OF THE MANITOBA TEACHERS' SOCIETY AND HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA ***(Respondents) Respondents***	) Seven Oaks School Division,) Assiniboine South School Division)and Fort Garry School Division)) **A.L. Bert** and) **D.G. Guenette** for the Respondent) Her Majesty the Queen in Right) of the Province of Manitoba
Docket No. AI 98-30-03816	))
BETWEEN:	))
EVA AZUELOS, NANCY CAMPBELL, FERN CARR, REGINA CHODIRKER, DONNA COHEN, ARA GARFINKEL, SANDRA GOLDBERG, MURRAY GOLDENBERG, MARC GOLDSTINE, SANDRA GORDON, ESTHER HERSHFIELD, SHEILA HIRT, AL KATZ, PENNY KLEIN, LOUISE KNELLER, BELLA KRAITBERG, DAVILA LYRON, WILLIAM MORRIS, GAIL NEP, RORY PAUL,	) Appeals heard:) **December 3, 1998**))) Judgment delivered:) **February 10, 1999**)))

ARLINE ROSEMAN, GERALD ROSNER, SUSAN ROSNER, CARLA RUBENFELD, MOSHE SELCHEN, LYNNE SHAPIRO, HOWARD SINAISKY, RON SOLOMON, FRAN STANDIL, MAXINE SWICK, FREYA TARGOWNIK, BARBARA WALY, CLAIRE WEISS, SHERRY WOLFE-ELAZAR, GILLLAN WOODFIELD, PHILIP YAKIR

(Applicants) Appellants

- and -

SEVEN OAKS SCHOOL DIVISION NO. 10 AND THE SEVEN OAKS TEACHERS' ASSOCIATION NO. 10 OF THE MANITOBA TEACHERS' SOCIETY AND HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA

(Respondents) Respondents

Docket No. AI 98-30-03817

BETWEEN:

TERRY CALOF, RENNE KAPLAN, FRAN KOGAN, MURRAY NAGLER, BEV WERBUK, TERRI-MAE WOLODARSKY

(Applicants) Appellants

- and -

ASSINIBOINE SOUTH SCHOOL DIVISION NO. 3 AND HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA

(Respondents) Respondents

Docket No. AI 98-30-03818

B E T W E E N:

LINDA FEWER, FERN HERSHFIELD, SONDRA HOCHMAN, SHERNA POSNER, HILDA SCHWARTZ	)
(Applicants) Appellants	)
- and -	)
WINNIPEG SCHOOL DIVISION NO. 1 AND HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA	)
(Respondents) Respondents	)
Docket No. AI 98-30-03819	)
B E T W E E N:	)
MARSHALL CARROLL, ARNOLD GARDNER, HINDA GRUBER, BARBARA PAUL, GEMMA SWYSTON, RICHARD SWYSTON, FREYA WASEL	)
(Applicants) Appellants	)
- and -	)
FORT GARRY SCHOOL DIVISION NO. 5 AND HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA	)
(Respondents) Respondents	)

HUBAND J.A.

This case is not as complex as the enormous volume of material might suggest.

Some Jewish teachers employed in four school divisions in Manitoba complain that they are not accorded the right to observe their religious holy days with pay. Five separate applications were filed in the Court of Queen's Bench, each seeking a declaration of the applicants' rights. The applications are all very similar.

Two of the applications name the Winnipeg School Division No. 1 (Winnipeg No. 1) as a respondent. The three remaining applications involve Assiniboine South School Division No. 3 (Assiniboine South

No. 3), Fort Garry School Division No. 5 (Fort Garry No. 5), and Seven Oaks School Division No. 10 (Seven Oaks No. 10). In each application, the Province of Manitoba is also a named respondent. In one of the applications involving Winnipeg No. 1 and in the application involving Seven Oaks No. 10, the local association of The Manitoba Teachers' Society is also named as respondent.

In all of the applications, an order is sought declaring ss. 4 and 5 of Manitoba Regulation 470/88R (under *The Public Schools Act*, C.C.S.M., c. P250) to be unconstitutional. Subsequent to the initiation of the applications, the regulation was changed, and the provisions are now found in ss. 6 and 7 of Manitoba Regulation 101/95. Those provisions are attached as Appendix "A" to these reasons. Essentially, s. 6 specifies that certain specified days are to be holidays in all public schools - Good Friday, Victoria Day, Labour Day, Thanksgiving Day, and Remembrance Day - plus any other day so designated by the Minister. Section 7 mandates a Christmas vacation beginning no later than December 23rd and extending to January 2nd at the earliest, spring vacation for a week commencing the last Monday in March, and a summer vacation of at least six weeks commencing on July 1st. The constitutional attack is not intended to set aside these holidays. The complaint is that the regulations do not provide for paid days off to enable the applicants to observe their holy days.

In the respondent school divisions, a standard form of contract with teachers employed by the respective divisions is used, which specifies that " [t]he teacher shall not be required to teach on holidays and vacations prescribed by the law and the regulations." That clause is also challenged.

One of the applications in which Winnipeg No. 1 is named as a respondent is initiated by teachers who are in a bargaining unit and whose employment is governed by a collective agreement. The other application concerning Winnipeg No. 1 is initiated by Linda Feuer and others who work in the "English as a Second Language Program," which derives its funding from special federal and provincial grants. Those teachers are not under contract with the division and are not covered by a collective agreement.

With respect to Winnipeg No. 1 and Seven Oaks No. 10, the respective collective agreements specify whether and to what extent teachers are entitled to time off with pay on their religious holy days, and these provisions are also put in issue. With respect to Assiniboine South No. 3 and Fort Garry No. 5, the collective agreements do not deal with the question, and in the absence of specific provisions, those divisions have developed their own policy. The respective policies regarding religious leave are put in issue.

The arrangements vary from one school division to another. In Winnipeg No. 1, for example, subject to permission from the superintendent, the teacher is entitled to two days' leave for observation of religious holy days with full pay, with the teacher assuming the cost of a substitute for any additional day or days. The point is that none of the arrangements satisfies the desires of the applicants for three full days with full pay to observe their religious holy days.

In each of the applications, the applicants rely upon ss. 15(1) and 24(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter)* and s. 52(1) of the *Constitution Act, 1982* as the foundation for the order which they seek. Those provisions read as follows:

> ***Canadian Charter of Rights and Freedoms***
>
> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just In the circumstances.
>
> ***Constitution Act, 1982***
>
> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

In addition, in each of the applications, an order is sought pursuant to ss. 9, 12, 14, and 56 of the Manitoba *Human Rights Code,* C.C.S.M., c. H175. Section 9(1) and (2) are attached to these reasons as Appendix "B." These provisions define "discrimination." It seems to me that the central focus of the applications is on these provisions. Specifically, while school divisions have made some accommodation to meet the special needs of Jewish teachers wishing to observe their religious holy days, the applicants will argue that these provisions do not amount to a "reasonable accommodation" and that the court should order a higher level of compliance.

There are innumerable affidavits and exhibits and transcripts of cross-examinations on affidavits to confuse and abuse the mind.

When the matter came on for hearing, the respondents raised the issue of the jurisdiction of the court. It was argued that the applicants had chosen the wrong forum. In the case of unionized employees, it was argued that the proper course was the grievance procedure under the respective collective agreements. Concerning the claim of non-unionized applicants and the claim of all applicants for relief under *The Human Rights Code,* it was argued that the proper forum was the Human Rights Commission. The respondents argued that these forums had the necessary authority to hear and decide *Charter* issues.

The learned motions judge accepted the fundamental argument presented by the respondents, except that he held that the court actions should continue in order to resolve the arguments based upon the *Charter*.

Relying on the Supreme Court of Canada decisions in ***Weber v. Ontario Hydro***, [1995] 2 S.C.R. 929, ***St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219***, [1986] 1 S.C.R. 704, and ***New Brunswick v. O'Leary***, [1995] 2 S.C.R. 967, the learned motions judge held that in those applications where there is a collective agreement, the dispute should be considered by an arbitration board. At p. 67 of his reasons:

> Other than the action commenced by Linda Feuer et al., the disputes arise under the collective agreements. The jurisdiction to resolve those disputes lies exclusively with Boards of Arbitration appointed pursuant to the collective agreements.

Relying on the Supreme Court of Canada decision in ***Seneca College of Applied Arts and Technology v. Bhadauria***, [1981] 2 S.C.R. 181, the learned motions judge held that the application of the non-unionized teachers involved with Winnipeg No. 1 should be considered by the Human Rights Commission. At pp. 67-68:

> ... [T]he application commenced by Linda Feuer et al., may be the subject of a complaint under the **Human Rights Code** and may be processed in accordance with the provisions of the **Human Rights Code.**

The learned motions judge stated that there should not be concurrent hearings before arbitration boards and the Human Rights Commission. He concluded that an arbitration board could grant relief under *The Human Rights Code*. At p. 68:

> For the reasons expressed by the Supreme Court of Canada in **Weber v. Ontario Hydro,** supra, and **New Brunswick** v. O'Leary, supra, a Board of Arbitration appointed pursuant to a collective agreement is the proper forum to deal with the issue of religious leave.

As to *Charter* issues concerning the constitutional validity of the regulations under *The Public Schools Act* and the statutory form of teachers' contract, the learned motions judge ruled that they must be heard by the court, but by consent, those issues were adjourned.

Although the reasons for decision speak of an adjournment of those *Charter* issues, the judgments subsequently entered dismiss each of the five applications.

The thrust of the applicants' appeal to this Court is that all matters should be consolidated and proceed to the Court of Queen's Bench for determination.

In my view, it would be desirable to have all issues resolved at the same time, in the same forum, which should be the Court of Queen's Bench. That would save the cost of separate proceedings in different forums, with the possibility of inconsistent results. While the consolidation of the applications and their consideration in a single proceeding in court is desirable, the question is whether it is achievable in law. I think it is.

THE ARBITRATION ROUTE

In my opinion, the issue raised by the applicants is not an appropriate subject for grievance and arbitration under the various collective agreements.

Section 78(1) of *The Labour Relations Act,* C.C.S.M., c. L10, requires that every collective agreement contain a provision for the final settlement of all differences "between the parties thereto, or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning, application, or alleged violation." The issue raised by the applicants is not about what is in the collective agreement but rather, what has been left out. Indeed, as has been noted, the collective agreements involving Assiniboine South No. 3 and Fort Garry No. 5 have no provisions whatever concerning time off for the observance of religious holy days, with or without pay. With respect to the two remaining collective agreements, with Winnipeg No. 1 and Seven Oaks No. 10 which do contain provisions concerning observance of religious holy days, no one questions the meaning of the existing terms. When the collective agreement with respect to Winnipeg No. 1 states that subject to permission from the superintendent, a teacher is entitled to be absent with pay to observe a maximum of two religious holy days, but must bear the cost of a substitute for any further observance, there is no dispute as to the meaning or application of the provisions. The school divisions have not violated the terms of the collective agreements and no one makes that assertion. The issue is not one that concerns the "meaning, application, or alleged violation" of the collective agreement.

As a general rule, arbitrators who are called upon to adjudicate grievances under a collective agreement are entitled to apply the ordinary laws of the jurisdiction to the dispute in question. That includes both common law and statutory provisions: see ***McLeod et al. v. Egan et al.,*** [1975] 1 S.C.R. 517.

Applying the law of the land is one thing. Applying the *Charter* or the Manitoba *Human Rights Code* may pose very different considerations .

In ***Douglas/Kwantlen Faculty Assn. v. Douglas College***, [1990] 3 S.C.R. 570, the Supreme Court of Canada decided that an arbitrator was entitled to apply the *Charter* with respect to a grievance arising under a collective agreement. The agreement was between a post-secondary educational institution which derived its funding from government, and its faculty association. The grievance related to a term of the collective agreement requiring mandatory retirement at age 65. It was asserted the provision constituted discrimination based upon age contrary to s. 15(1) of the *Charter*.

In holding that the arbitrator had the jurisdiction to hear and determine the dispute, the Court considered two conflicting provisions: the collective agreement itself, which stated that the arbitrator could not " alter, amend, add to or delete from any of the provisions" in the collective agreement, while s. 98(g) of the British Columbia *Labour Code* authorized an arbitration board to "interpret and apply any Act intended to regulate the employment relationship … notwithstanding that its provisions conflict with the terms of the collective agreement."

The Court ruled that the words "any Act" in s. 98(g) included the *Charter* and that the statutory provision overrode the limitation on the authority of the arbitration board in the collective agreement. In the majority reasons by La Forest J., it is stated at p. 598:

> It is true that Article 15.03 of the collective agreement provides that the arbitrator has no jurisdiction to amend, alter, add to or delete from any of its provisions. However, this must be viewed in light of the fact that s. 98(g) allows a statutory provision to override a clause in the collective agreement. Surely, the arbitrator when confronted with an "offensive" term in a collective agreement can hold it inapplicable. Even if the association also wanted reinstatement of their instructors, this remedy is within the arbitrators' powers under s. 98(b). If the retirement clause is held to be of no force or effect, then any dismissal would have been contrary to the collective agreement.
>
> I, therefore, conclude that the arbitrator has jurisdiction over the remedy or order sought in this case, as well as over the parties and the subject matter.

The ***Douglas College*** case was a simple matter of excising an offensive term in the collective agreement. In an article, ***The Arbitrator, the Collective Agreement and the Law****(1972),* 10 Osgoode Hall L.J. 141, the author, Paul C. Weller, indicates when this kind of excising can be done, but it makes no sense where the rights and the duties of the parties cannot thereafter be determined by the application of other terms in the collective agreement. At p. 146:

> Sometimes, the objectives of the stagnate may be negative - the prohibition of

> certain kinds of contractual terms - and the arbitrator will satisfy them by simply holding the offending contract term to be void for illegality. For example the contract may provide for compulsory overtime in breach of the Employment Standards Act, or employer reimbursement of the last 10% of doctor's bills in breach of the O.H.S.I.P. Act, or sex as a criterion for promotion, or pregnancy as an automatic reason for discharge. If this clause is deemed null and void, it is simply treated as excised from the collective agreement and the rights and duties of the parties in arbitration can be determined by the application of the other terms of the agreement.

It must be pointed out that in Manitoba, there is no provision comparable to s. 98(g) of the British Columbia *Labour Code*, which was relied upon by La Forest J. in the ***Douglas College*** case to override the collective agreement. In this jurisdiction, the arbitrator's authority under s. 78(1) is to resolve differences concerning the "meaning, application, or alleged violation" of the collective agreement. That does not mean that the *Charter*, or for that matter any other enactment, is not applicable. But an arbitration board is not authorized to rewrite the collective agreement by striking down whole paragraphs or adding new passages.

The authority of an arbitration board in Manitoba must also be considered in conjunction with the provisions of the collective agreements. Unfortunately, the collective agreement involving Assiniboine South No. 3 is not before the Court as an exhibit, but the other three collective agreements are. The wording of the collective agreements does not quite mirror the wording of s. 78(1) in that another word is introduced. Specifically, in Article 19:01 of the Seven Oaks No. 10 agreement, it speaks of resolving differences concerning the "content, meaning, application or violation" of the collective agreement. But the addition of the word "content" does not broaden the scope of the arbitration board. The arbitration board has the jurisdiction to resolve differences with respect to what is contained in the collective agreement. It is not empowered to resolve differences with respect to what it does not, and perhaps should contain by writing in additional provisions.

That becomes demonstrable when one turns to the remaining collective agreements involving Winnipeg No. 1 and Fort Garry No. 5, respectively. Under Article 8.02 of the Winnipeg No. 1 agreement, a grievance procedure and arbitration, if necessary, are contemplated to resolve differences concerning the "content, meaning, application or violation" of the collective agreement. But under that same article, it is specifically provided that the arbitration decision "shall not change, add to, vary or disregard any provision of this agreement." The Fort Garry No. 5 agreement contains similar wording under Article 28. It becomes clear that the addition of the word "content" was not intended to clothe an arbitration board with authority to add to the content of the collective agreement by introducing new provisions.

In determining whether arbitration is the route to be followed, it is well to recall what the applicants are seeking.

With respect to each school division, the applicants seek an order that the schedule of specified holidays and vacations is "of no force and effect, or alternatively, can be rectified by reading in constitutionally permissible language." (There are slight variations in the wording of the applications, but they amount to the same thing.) The reality is that the applicants do not wish to cancel existing holidays and vacations for themselves and all others. They want the legislation rewritten to provide that school divisions must also allow teachers (and presumably other employees of the public schools) to observe religious holy days with pay. The applicants also seek an order with respect to each of the school divisions that the standard employment contract violates their constitutional rights. They seek an addition to the statutory form of contract to provide that teachers shall be entitled to time off to observe their religious holy days without deduction of salary. Plainly, as the motions judge recognized, an arbitration board has no authority to amend legislation or regulations.

In two of the applications, an order is sought declaring a portion of the collective agreement to be contrary to the *Charter*. In the application concerning Seven Oaks No. l0, the validity of Article 6:07 is called into question. That provision states that absences for religious holidays, up to a maximum of three days in a school year, are to be paid by the person involved on a formula basis, which, without going into unnecessary detail, would likely be slightly less costly to the teacher than the usual replacement cost of a substitute. In the application concerning Winnipeg No. 1, the validity of Article 19.08(a) is called into question. That provision is more generous than the Seven Oaks No. 10 agreement. It allows two paid absences for religious holidays, with the teacher receiving regular salary, but absorbing the cost of a substitute for any day in excess of two.

No doubt arbitration boards have jurisdiction to interpret and apply these provisions, but that is not what the applicants seek. They want the terms of those collective agreements modified to provide more generous leave provisions. They want what an arbitration board lacks the jurisdiction to do; namely, to add to the terms of the collective agreement. This is not a case of striking out a clause in a collective agreement which is found to be discriminatory on the basis of age, as in the ***Douglas College*** case. This is a case where the remedy sought would involve substantial alteration of the collective agreements.

The collective agreements involving Fort Garry No. 5 and Assiniboine South No. 3 contain no provisions respecting leave of absence for the observation of holy days. The situation is dealt with as a matter of administrative policy. There is nothing in the collective agreement to be considered, let alone interpreted or applied. There is no basis for a grievance or for arbitration. The applicants ask that these two school divisions change their administrative policies to comply with the applicants' demands and that the policies, so changed, be enforced as though imposed as a term in the collective agreement. I suppose it is conceivable that such relief could ultimately be granted, but not by an award of an arbitration board.

The case of ***Assiniboine South Teachers' Association of the Manitoba Teachers' Society v. Board of Education of Assiniboine South School Division No. 3*** (1998), 128 Man. R. (2d) 231 (Q.B.), is noteworthy because, like the present case, it deals with a grievance in relation to administrative policy rather than the terms of a collective agreement. The decision was by Wright J. of the Manitoba Court of Queen's Bench. In his reasons, Wright J. underlines the importance of relating a *Charter* issue or a human rights issue with the interpretation of the collective agreement. By way of background, a teacher

lodged a grievance because, as a matter of policy, the school division had denied her request to reveal to her class of students her lesbian sexual orientation. She claimed that the policy violated both her *Charter* rights and her rights under the Manitoba *Human Rights Code* The arbitration board held that it did not have jurisdiction to deal with these issues in the abstract, there being no provision in the collective agreement in conflict with those statutes. On judicial review, Wright J. agreed with the position of the arbitration board (although he quashed the award for a completely different reason). Wright J. held that there must be "a proper linkage between the grievance and the collective agreement." He made reference to s. 56(1) of *The Human Rights Code.* That provision specifies that a contract, including the collective agreement in the matter before Wright J. and the collective agreements involved in the present litigation, is deemed to contain a stipulation that no parry to the contract shall contravene *The Human Rights Code* in carrying out any term of the contract. This provision, however, can be of no consequence if there is no term of the contract in dispute.

With respect to each of the school divisions, the applicants also seek a declaratory order that the school divisions have failed to make reasonable accommodation for the applicants pursuant to *The Human Rights Code.* This, in turn, requires a determination in each case of what constitutes reasonable accommodation and a declaration of the applicants' entitlement. An arbitration board would find itself considering not the terms of the collective agreement, but the employment statistics of the school divisions, budgetary considerations, tax implications, and the jurisprudence surrounding human rights legislation. In the end result, if there is merit to the applicants' case, the collective agreement will have to be rewritten rather than interpreted or applied. In short, an arbitration board is no more able to provide relief pursuant to *The Human Rights Code* than the *Charter,* for both would involve exceeding the jurisdiction conferred upon arbitration boards under s. 78(1) and under the collective agreements themselves.

The extent to which an arbitration board might provide relief under human rights legislation was considered by the Saskatchewan Court of Appeal in ***Yorkton Union Hospital v. Saskatchewan Union of Nurses et al***. (1993), 109 Sask. R. 198. Bayda C.J.S. stated that an arbitration board appointed under a collective agreement was limited to using *The Saskatchewan Human Rights Code* "in interpreting the collective agreement." He continued in these terms at pp. 219-20:

> ... I find, ... that the role of the Code in arbitration proceedings such as those undertaken here, is limited to using its provisions to assist in the interpretation of the collective agreement. The role does not extend to implementing the provisions of the Code in an effort to resolve a complaint in a manner similar to that assigned to a board of inquiry constituted under the Code.

In a concurring judgment for himself and Vancise J.A., Sherstobitoff J.A. makes yet another salient point; namely, that if the applicants were to proceed to arbitration, and if the results were not to their satisfaction, they would still be at liberty to pursue a remedy under the human rights legislation before a different tribunal, which, under the Saskatchewan legislation, would be its Human Rights Commission. I would add that it makes no practical sense to proceed with arbitration hearings with the prospect of

having the same issues re-litigated later on before an adjudicator under *The Human Rights Code* or in the Court of Queen's Bench.

In ***Weber v. Ontario Hydro***, McLachlin J. makes it clear that a dispute will be held to arise out of the collective agreement if it falls under the collective agreement either expressly or by inference. In my view, the present dispute does not emerge out of any of the collective agreements, even inferentially.

Even if the applicants did have an arbitrable issue, it is not one which The Manitoba Teachers' Society could take up on their behalf as a grievance. Having negotiated the terms of the collective agreement, it would be unconscionable for The Manitoba Teachers' Society to raise a grievance concerning the adequacy of those very terms. Moreover, it is highly unlikely that the applicants could successfully raise a complaint of an unfair labour practice under s. 20 of *The Labour Relations Act* against the bargaining agents for failing to proceed with a grievance. Given the circumstances, it could hardly be asserted that the refusal to proceed with a grievance would be "arbitrary, discriminatory or in bad faith."

The reasons for decision of McLachlin J. in ***Weber v. Ontario Hydro*** emphasize that where the arbitration board under a grievance proceeding has jurisdiction, there is no room for concurrent jurisdiction in the courts. But that case has no application. This is not a case of concurrent jurisdiction, but one where the only jurisdiction is other than the arbitration process under the collective agreement.

THE HUMAN RIGHTS ADJUDICATION ROUTE

The route of a complaint under *The Human Rights Code* is also unattractive.

With respect to the claim that the school divisions have failed to make reasonable accommodation for the special needs of the applicants, based on their religious beliefs, there is no doubt that an adjudicator appointed under *The Human Rights Code* has the jurisdiction to resolve the disputes. If the issues were resolved in the applicants' favour, the effect would be to set aside, as might be necessary, the provisions of the regulations and the statutory contract under *The Public Schools Act*, the relevant terms of the collective agreements involving Winnipeg No. 1 and Seven Oaks No. 10, and the present policies of Assiniboine South No. 3 and Fort Garry No. 5: see the decision of the Supreme Court of Canada in ***Winnipeg School Division No. 1 v. Craton et al***., [1985] 2 S.C.R. 150. To resolve the question of "reasonable accommodation,"all of the applicants, not just those in the "English as a Second Language Program," might be redirected to the Human Rights Commission with their complaints.

However, as has been noted, the applicants rely in part upon the *Charter* and in part upon *The Human Rights Code*. I must observe in parenthesis that arguments based upon the *Charter* seem to me unlikely

to succeed, but at this stage, the weakness of those arguments is not before us, and they should be considered as potentially sound for the purposes of this decision. It is at least conceivable that an adjudicator would hold that Winnipeg No. 1, for example, has made reasonable accommodation, but that the provisions in the collective agreement offend s. 15(1) of the *Charter* - not very likely, but conceivable. While there may be debate as to whether, and to what extent, arbitration boards have the necessary authority to apply the *Charter* when reaching decisions, it seems clear that an adjudicator appointed under *The Human Rights Code* has no such jurisdiction. That is because of the wording of *The Human Rights Code* itself. When adjudicating a complaint, the adjudicator is to decide whether a party has "directly or indirectly contravened [the] Code in the manner alleged in the complaint" (s. 43(1)). The adjudicator may order a party to comply with *The Human Rights Code (s.* 43(2)). There is no statutory authority to make rulings beyond what is set forth in s. 43. There is no jurisdiction to deal with *Charter* issues or to provide *Charter* remedies. Hence, Goodman J. was right in concluding that the *Charter* issues would have to be resolved in the Court of Queen's Bench.

THE COURT OF QUEEN'S BENCH ROUTE

There are practical reasons why it is desirable that this matter proceed ahead in the Court of Queen's Bench if the issues can be resolved in that court. The court would be able to consider and decide both *Charter* issues and the matter of "reasonable accommodation" in the one hearing (assuming a consolidation of the five actions for the purpose of that hearing). Judging from the affidavits and the attached exhibits, including transcripts of cross-examinations on affidavit evidence, all of which are contained in the voluminous appeal books, the matter is ready for hearing, or nearly so. Redirecting the applicants to the Human Rights Commission would not mean starting all over, but it would mean retracing at least some steps. Complaints would have to be filed, served, and then investigated by the Commission. Time and money would be expended just to bring things to the point they are now at in the Court of Queen's Bench. It is desirable that the waste of time and money be avoided if that is possible.

There is no doubt that the court has jurisdiction to deal with the *Charter* issues. The question is whether it is appropriate for the court to also hear the parallel complaints by the applicants of a failure on the part of their employer to make "reasonable accommodation" for the applicants, as required by s. 9 of *The Human Rights Code.*

The decision of the Supreme Court of Canada in the ***Seneca College*** case was that the plaintiff was not entitled to sue for the "tort of discrimination" or to base a cause of action on an alleged breach of *The Ontario Human Rights Code.* But there are obvious distinctions between that case and the present one beyond the fact that *Charter* issues are engaged in the present litigation.

The Ontario *Code,* as it was at the time of the ***Seneca College*** case, gave a broad right of appeal from the board of inquiry to the court "on questions of law or fact or both," which led Laskin C.J.C. to conclude that it would be inconsistent to permit alternative proceedings before the board of inquiry or the courts. The Ontario *Code* contemplated a potential two-stage process. By contrast, the Manitoba *Human Rights Code* allows judicial review - not an appeal - on the limited grounds of an error of

jurisdiction, a breach of the principles of natural justice, or an error of law on the face of the record (s. 50(1)).

Moreover, the Manitoba *Human Rights Code,* unlike the Ontario *Code,* does contemplate an initial consideration of certain matters by the court rather than by an adjudicator functioning under *The Human Rights Code.* In particular, s. 55 of the Manitoba *Human Rights Code* permits any person, by statement of claim, to seek injunctive relief in court to prevent the deprivation of rights under *The Human Rights Code.*

In ***Parkinson v. Health Sciences Centre*** (1982), 13 Man. R. (2d) 233, this Court concluded that *The Human Rights Act* (the predecessor of the present *Human Rights Code)* in Manitoba did not preclude the alternative of an action in court seeking declaratory relief. The *Parkinson* case was heard and determined subsequent to the decision of the Supreme Court of Canada in the ***Seneca College*** case, and the reasons for decision of Freedman C.J.M. and my reasons for decision take pains to distinguish the ***Seneca College*** decision. Like the present case, the remedy being sought in the *Parkinson* case was a declaratory order. Freedman C.J.M. emphasized the "broad scope of the right to secure declaratory relief," as outlined in the Supreme Court's decision in *Solosky v. The Queen,* [1980] 1 S.C.R. 821. Effectively, if an application for declaratory relief is not barred, it should be available in appropriate circumstances, and this Court did not see provisions in the Manitoba *Human Rights Act* which would bar such proceedings. Indeed, in my reasons in the *Parkinson* case, I emphasized that direct access to the courts as an alternative to a complaint to the Human Rights Commission is specifically provided for in the Manitoba *Human Rights Act.* At p. 250:

> Obviously, in order to obtain injunctive relief, which is contemplated under the Act, the courts must declare that there is, or is likely to be a restriction upon the person of a right under the *Human Rights Act* by reason of age, or some other prohibited ground of discrimination. If injunctive relief is contemplated by the Manitoba legislation, surely an applicant has a proper basis for claming relief falling short of an injunction, namely, a mere declaration.
>
> As it happens, in the instant case, injunctive relief does not appear to be appropriate, but declaratory relief may be appropriate, and appears to be a type of intervention by the courts which was contemplated by die legislature.

Subsequent to the ***Parkinson*** decision, there have been other decisions in this province which have distinguished the ***Seneca College*** case on the basis of the statutory differences between the Ontario *Code* and the Manitoba *Human Rights Code,* and in appropriate cases, the courts have provided a speedy alternative to the processing of a complaint under *The Human Rights Code:* see ***Lajoie v. Kelly*** (1997), 116 Man.R. (2d) 221 (Q B)

In my view, the motions judge was in error in concluding that "complaints under the *Human Rights Code* should be processed in accordance with the provisions of the *Human Rights Code***."** Given all of the circumstances surrounding these applications, I would order that the applications be consolidated and proceed ahead in the Court of Queen's Bench.

While the applicants seek declaratory relief, and while their applications should be consolidated for hearing, it is by no means clear that the applicants are entitled to any relief or that they are entitled to the same relief. That is to say, what constitutes reasonable accommodation in one school division might not be the same as in another school division where there are different budgetary and personnel considerations. But this all lies ahead.

The costs of these proceedings, both in the Court of Queen's Bench and in this Court, are costs in the cause.

APPENDIX "A"

Holidays

6(1)
The following days are to be holidays in all schools:
(a) Good Friday;
(b)Victoria Day;
(c) Labour Day;
(d) Thanksgiving Day;
(e) Remembrance Day, when it falls on a weekday;
(f) any other day designated as a holiday by the minister.

6(2)
A day designated as a holiday under clause (l)(f) counts as a teaching day.

Vacations
7
For all schools there must be:

(a) a Christmas vacation that begins not later than December 23, or an earlier day that the school board may determine, and extends to January 2 inclusive, or a later day that the school board may determine;

(b) a spring vacation consisting of the week beginning on the last Monday in March; and

(c) a summer vacation of at least six weeks beginning on July 1.

APPENDIX "B"

"Discrimination" defined
9(1) In this Code, "discrimination" means

(a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or

(b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or

(c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or

(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

Applicable characteristics
9(2)

The applicable characteristics for the purposes of clauses (l)(b) to (d) are

(a) ancestry, including colour and perceived race;

(b) nationality or national origin;

(c) ethnic background or origin;

(d) religion or creed, or religious belief, religious association or religious activity;

(e) age;

(f) sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;

(g) gender-determined characteristics or circumstances other than those included in clause (f);

(h) sexual orientation;

(i) marital or family status;

(j) source of income;

(k) political belief, political association or political activity;

(1) physical or mental disability or related characteristics or circumstances, including reliance on a dog guide or other animal assistant, a wheelchair, or any other remedial appliance or device.