COURT OF APPEAL FOR ONTARIO

CITATION: Ball v. McAulay, 2020 ONCA 481
DATE: 20200724
DOCKET: C67662

Strathy C.J.O., Lauwers and Pardu JJ.A.

BETWEEN

Tyler Ball, Gizem Çakmak, Susannah Mulvale,
David Ravensbergen and Stuart Schussler

Applicants (Respondents)

and

Carol McAulay and York University

Respondents (Appellant)

Sarit E. Batner, Brandon Kain, Peter Leigh and Emilie Bruneau, for the appellant

Sean Dewart and Adrienne Lei, for the respondents

Heard: in writing

On appeal from the order of the Divisional Court (Justices Julie A. Thorburn, Frederick L. Myers, and Lise G. Favreau), dated June 18, 2019, with reasons reported at 2019 ONSC 3775.

Lauwers J.A.:

[1] The respondents were graduate students attending York University and were employed there as teaching assistants.[1] During a legal strike by their union against York, they engaged in conduct that the York University Tribunal found warranted discipline under York's *Code of Student Rights and Responsibilities*, despite s. 17(4) of the *Back to Class Act (York University), 2018*, S.O. 2018, c. 10, Sch. 3, which states: "Any dispute between the parties concerning discharge or discipline in respect of activities that took place [during the strike period] shall be determined through the grievance procedure and arbitration procedure established in the new collective agreement."

[2] The Tribunal's findings and sanctions against the respondents were upheld by the York University Appeal Panel. The respondents did not appeal the Tribunal's decision on jurisdiction; instead, they brought an application for judicial review of that decision. The Divisional Court allowed the respondents' application for judicial review on the basis that a labour arbitrator had exclusive jurisdiction over their discipline. A panel of this court granted leave to appeal from that decision.

[3] For the reasons set out below, I would dismiss the appeal.

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[1] The disciplinary complaint against Stuart Schussler was dismissed by the Tribunal.

THE ISSUES ON APPEAL

[4] The appeal raises four issues:

1. What is the applicable standard of review?

2. Did the Tribunal have jurisdiction to discipline the respondents for misconduct?

3. Should the Divisional Court have refused judicial review because an appeal to the Appeal Panel was an adequate alternative remedy?

4. Did the Tribunal breach the duty of procedural fairness?

I address these issues in turn.

I. ISSUE ONE: THE APPLICABLE STANDARD OF REVIEW

[5] This court's approach to an appeal from the Divisional Court on an administrative law matter is to step into the shoes of the lower court and focus on the decision of the tribunal under review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 49; *Ottawa Police Services v. Diafwila*, 2016 ONCA 627, at para. 51. This court does not owe deference to a judicial review decision of the Divisional Court; its findings are not binding: *Diafwila*, at para. 51.

[6] The appellant, Carol McAulay, initially asserted that the standard of review to be applied to the Tribunal's jurisdictional decision was reasonableness, but now

accepts that the standard is correctness because the appeal raises "questions related to the jurisdictional boundaries between two or more administrative bodies": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, at paras. 17, 53, 63-64, 69. As the majority instructed in *Vavilov*, this court "may choose either to uphold the administrative decision maker's determination or to substitute its own view" (citations omitted): at para. 54. The majority added that: "While it should take the administrative decision maker's reasoning into account – and indeed, it may find that reasoning persuasive and adopt it – the reviewing court is ultimately empowered to come to its own conclusions on the question": *Vavilov*, at para. 54; see also *Bell Canada v. Canada (A.G.)*, 2019 SCC 66, 441 D.L.R. (4th) 155, at paras. 4, 35.

II. ISSUE TWO: DID THE TRIBUNAL HAVE JURISDICTION TO DISCIPLINE THE RESPONDENTS FOR MISCONDUCT?

[7] The jurisdictional issue is at the heart of the appeal. In this part of the reasons I address: the factual context; the decisions of the Tribunal and the Divisional Court; the governing principles on jurisdiction; and the application of those principles.

1. The Factual Context

(a) The Parties

[8] The appellant, Ms. McAulay, is York's Vice President, Finance and Administration. Campus safety and security fall within her portfolio of responsibilities.

[9] The respondents are graduate students at York and are employed as teaching assistants. They are members of the Canadian Union of Public Employees, Local 3903 (the "Union").

[10] The Union represents graduate student teaching assistants, contract faculty, and graduate assistants in three bargaining units. Unit 1 consists of approximately 2,000 full-time graduate students who are also part-time employees engaged in teaching, demonstrating, tutoring, or marking. Unit 2 represents contract faculty, of which there are approximately 1,100 members. Unit 3 consists of full-time graduate students receiving financial assistance from or through York and are employed in administrative, clerical, or research work, but not where that research relates to their program and degree requirements. Its total membership is not stated in the record.

(b) The Strike

[11] The members of the Union went on legal strike on March 5, 2018.

[12] Unit 2 members ratified a Memorandum of Settlement with York on June 15, 2018, with some matters referred to interest arbitration. The Unit 1 and Unit 3 strikes continued until July 25, 2018 with the enactment of the *Back to Class Act*, which referred outstanding issues to interest arbitration.[2] The strike was the longest at a post-secondary institution in Canadian history.

[13] William Kaplan, Industrial Disputes Inquiry Commissioner, wrote the Report that led to the *Back to Class Act*. He noted that "since 1998, York has negotiated 79 collective agreements, and the only labour disputes – meaning strikes – involve Local 3903": Ontario, *Report In the Matter of an Industrial Inquiry Commission Pursuant to Section 37 of the Labour Relations Act, 1995 and In the Matter of the Negotiation of New Collective Agreements to Replace the Ones that Expired on August 31, 2017* (Toronto: Labour, Training and Skills Development, 2018) (William Kaplan), at p. 7. He accepted York's submission that "the current dispute was part of a pattern – a pattern of acrimony and labour disruptions that it experienced with none of its other bargaining units": at pp. 5, 9. Mr. Kaplan concluded that the strike could only be resolved by interest arbitration, adding his

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[2] The interest arbitration decisions can be found at: *York University v. Canadian Union of Public Employees, Local 3903*, 2018 CanLII 115050 (ON LA) (Unit 3), 2018 CanLII 115051 (ON LA) (Unit 1), 2018 CanLII 115052 (ON LA) (Unit 2).

observation that “the union’s bargaining parameters and culture [are] … not normative”: at p. 8.

[14] This case bears the unfortunate marks of that unusual and longstanding pattern of acrimony. The protagonists in the dispute are York and the Union, representing the respondents. Both sides had legal representation. The parties’ moves in the unfolding of their struggle for dominance were strategic at every step – in the selection of the forums, the timing of procedural thrusts, and the language and substance of the submissions, to mention only a few. The Union has resolutely opposed the idea that a York-controlled tribunal could determine the fate of its members, and York has resolutely opposed the idea that an outside tribunal should review its decisions.

(c) The Discipline Complaints Against the Respondents

[15] On August 3, 2018, just over one week after the strike ended, Ms. McAulay filed complaints against the respondents with York’s Office of Student Community Relations (“OSCR”) under the *Student Code*. The *Code* applies to non-academic student conduct on-campus; it also applies off-campus if the conduct in question has a real and substantial link to York: *Student Code*, s. 3.

[16] Ms. McAulay complained that the respondents had engaged in personal misconduct in breach of the *Student Code* between April 13, 2018 and July 7, 2018

when they participated in strike-related protests and secondary picketing at York and at off-campus locations. Despite her senior position, Ms. McAulay asserted that she made the complaints as a representative of other staff who had complained to her in her personal capacity, not in her capacity as a senior administrator at York.

[17] The alleged misconduct included: (i) attending at locations on and off campus, including private law firm offices, and refusing to leave until police arrived; (ii) encircling York staff and administrators, pushing them, and preventing them from leaving; and (iii) engaging in verbal insults and profane language, including through social media. Some details follow:

April 13, 2018: Empire Club

- Participants: Ms. Çakmak, Ms. Mulvale and Mr. Ravensbergen
- The group created a disruption by shouting, occupying the stage while holding a large banner, and chanting/singing loudly to prevent York President, Rhonda Lenton, from delivering her address to paying guests. Their conduct resulted in the cancellation of the event.

May 1, 2018: Kaneff Tower/York Lanes

- Participant: Ms. Çakmak
- The group gathered outside the building where the Board of Governor's meeting was scheduled to occur. Ms. Çakmak and others linked arms and surrounded two individuals they thought were Board members to prevent them from attending the meeting. The two individuals informed the group that they were not Board members; they were members of York's administration/staff. The group started chanting while these individuals were in the middle of the circle. Those encircled tried to leave but were physically pushed back, yelled at, and chanted loudly at to prevent them from communicating with each other or others on their phones. They were held in the circle for close to one hour.

May 1, 2018: Shoppers Drug Mart

- Participant: Mr. Ravensbergen
- The group protested outside the store while York staff and a member of the Board of Governors were inside. The group followed the individuals to the West Office Building on campus. Mr. Ravensbergen was one of the loudest in the group – yelling, using profane language, and calling the individuals names.

May 9, 2018: Private Office of York Governor Randy Williamson

- Participant: Ms. Çakmak
- The group entered the private premises of a law firm and were asked to leave after being informed the law firm was preparing for a firm-wide event featuring a high-profile keynote speaker. Ms. Çakmak demanded to meet with Mr. Williamson and threatened office staff, in a loud voice, that she would disrupt the event if denied a meeting. She and the group refused to leave the premises, remained in the office for about 45 minutes, and hung up posters about Mr. Williamson around the office, which office staff removed. The disruption interfered with the ability to proceed with the event.

May 12, 2018: Private Office of York Governor Antonio Di Domenico

- Participants: Ms. Mulvale and Mr. Ravensbergen
- The group entered the private premises of a law firm, gathered in the reception area, and loudly chanted/sang for about 45 minutes. The group caused a significant disruption and only left when they learned Toronto Police Services had been called.

May 25, 2018: Offices of the Vice President Students

- Participant: Mr. Ravensbergen
- This incident lasted several hours. At some point, the group forced their way through a doorway, that two staff members had blocked, into the private office space. Mr. Ravensbergen caused a significant disruption, including by chanting, singing, and banging on workstations.

May 31, 2018: Private Office of York Governor Jacques Demers

- Participant: Mr. Ball
- The group entered private premises uninvited and refused to leave after being informed Governor Demers was not there. They threatened staff by saying that the event could promptly end if the staff could get Governor Demers on the phone and that the group would return later if the staff did

not cooperate. Mr. Ball tweeted about Governor Demers being a “negligent parent”. The group left only when Toronto Police Services arrived.

June 7, 2018: Private Office of York Chancellor Greg Sorbara

- Participants: Mr. Ball and Mr. Ravensbergen
- The group entered private premises uninvited and refused to leave, remaining on the premises for over an hour and causing a significant disruption. They engaged in chanting/singing and Mr. Ball propped open a door from the reception area to the private office area with his foot. The group left only when York Regional Police arrived.

(d) Procedural History

[18] On September 17, 2018, the respondents filed grievances under the collective agreement challenging Ms. McAulay’s complaints on the basis that any disciplinary action by York should have been taken under the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A. The next day, the respondents filed an application with the Ontario Labour Relations Board claiming that in making the complaints Ms. McAulay engaged in an unfair labour practice on York’s behalf under s. 96 of the *Labour Relations Act*.

[19] On September 24, 2018, York’s OSCR told the respondents that the Tribunal would hear together the complaints against them so that the same panel of members could consider the common issues.

[20] The respondents brought nine motions before the Tribunal on a variety of issues, including: (i) the jurisdiction of the Tribunal to adjudicate the complaints; (ii) the removal of Tribunal members on the basis of a reasonable apprehension of

bias; and (iii) the timeliness of the complaints. The respondents also requested that the proceedings be postponed until after the parallel grievance arbitration proceedings were completed.[3] The Tribunal found that it had jurisdiction to hear the complaints. It refused most of the interim relief sought.

[21] The Tribunal heard the complaints on the merits over a number of days in February 2019 and issued its merits and sanctions decisions on March 8, 2019. The respondents brought five appeals before the Appeal Panel regarding the interim relief and the Tribunal's merits and sanctions decisions. The Appeal Panel dismissed all of the appeals, and its final decision on the merits and sanctions appeals was issued on May 14, 2019.

[22] Instead of appealing the Tribunal's jurisdictional decision, the respondents applied for judicial review of that decision.[4] The Divisional Court granted the respondents' application for judicial review on June 18, 2019. The very next day, counsel for the respondents wrote to the Ontario Labour Relations Board and withdrew the unfair labour practice complaint on which a decision was pending.

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[3] The court has no information on the current status of the grievances filed by the respondents on September 17, 2018.
[4] The respondents later amended their application for judicial review to include the Tribunal's merits and sanctions decisions.

[23] This recital of the procedural history shows how acrimonious and hard-fought every step leading to this court has been.

2. The Decisions

(a) The Tribunal's Decision

[24] The Tribunal determined that it had jurisdiction to hear Ms. McAulay's complaints. It accepted the submission by Ms. McAulay's counsel that the complaints were raised by her on behalf of York community members and not as an agent for the employer, York.

[25] The Tribunal's brief jurisdictional decision was carefully written. It invoked the governing precedent, *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. It used the language of *Weber* and tracked the arguments made to the Divisional Court and this court by counsel. However, the decision did not mention or grapple with the unique provisions of the *Back to Class Act* and their possible application to the discipline being pursued, except inferentially.

[26] The Tribunal observed that the respondents' employment as teaching assistants was dependent upon their being York students. The Tribunal acknowledged that the conduct at issue occurred during a labour disruption but did not accept the argument that any conduct during a strike by an employed York graduate student was a labour issue to be governed solely by the collective

agreement. The Tribunal considered that the respondents' unionized status did not supersede their independent responsibilities as students under the *Student Code*, and held:

> The essential character of this case is that the purported actions of students … are alleged to be in violation of the [*Code*]; it does not arise from the collective agreement. The fact that the alleged breaches of the [*Code*] occurred during a time of heightened tensions at York University, or that the [respondents] are members of a labour union, does not remove the responsibilities of students under the [*Code*] or the jurisdiction of the Panel.

[27] Each of the Tribunal's merits decisions contained a similar preamble that buttressed the jurisdiction decision. This was the language picked up by the Divisional Court, at para. 37:

> While the [Tribunal] recognizes that the conduct giving rise to the complaints occurred during a labour disruption, the [Tribunal] finds that student conduct must continue to be governed by the [*Code*] during a labour disruption. The [respondents'] characterization of the conduct as "picketing by striking employees" does not eliminate their responsibilities as students under the *Code*.
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> ...
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> The *Pepsi-Cola* [*R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156] case lays out that "picketing which breaches the criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation or misrepresentation will be impermissible regardless of where it occurs."

[28] The Tribunal found that the respondents' conduct at the various off-campus locations had a real and substantial link to York. It rejected the argument that the respondents' conduct should be seen as a "peaceful protest," an activity that is legally protected and is not contrary to the *Student Code*.

[29] The Tribunal's findings on the merits regarding each respondent[5] were expressed in similar terms linked to the language of the *Student Code*: the particular respondent breached [his/her] responsibilities under the *Code* to (i) "uphold an atmosphere of civility, honesty, and respect for others" (all respondents); (ii) "not disrupt or interfere with University activities" (Ms. Çakmak, Ms. Mulvale and Mr. Ravensbergen); and (iii) "behave in a way that does not harm or threaten to harm another person's physical or mental wellbeing" (Mr. Ball, Ms. Çakmak and Mr. Ravensbergen). The Tribunal also found that each of the four respondents "demonstrated no insight as to why [his/her] actions went beyond the limits of the right to expression and assembly," refused to take responsibility for [his/her] actions, and failed to recognize how [his/her] actions could affect others.

[30] The penalties imposed by the Tribunal consisted of a mix of suspensions and no-contact directions. The suspensions were: for Mr. Ball, 4 months; for

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[5] This discussion does not include Stuart Schussler because the Tribunal found he did not breach the *Student Code*.

Ms. Çakmak, 12 months; for Mr. Ravensbergen, 8 months. Ms. Mulvale was banned from participating in non-essential university activities for 12 months.

[31] As noted, the Appeal Panel upheld the Tribunal's merits and sanctions decisions.

(b) The Divisional Court's Decision

[32] The Divisional Court granted the respondents' application for judicial review and quashed the Tribunal's jurisdictional decision on the basis that the Tribunal did not have jurisdiction to hear the complaints. In the court's view, "the essence of this dispute is an employer-employee dispute governed by the *Labour Relations Act* and must therefore be determined by a labour arbitrator not by the tribunal": at para. 51. The court made the following points in support of this conclusion, at paras. 51, 54:

1. All of the acts took place during a legal strike and while the respondents were picketing and demonstrating;

2. Both parties' witnesses described the respondents' actions as "labour dispute-related". However ill-advised and/or wrongful, their actions were expressions of their dissatisfaction with their working conditions;

3. Section 48(1) of the *Labour Relations Act* clearly provides that all differences between the parties arising from the collective agreement shall be determined by a labour arbitrator. Moreover, the Act's strong privative clause in s. 114(1) requires a high degree of deference;

4. Section 17(4) of the *Back to Class Act* specifically provides that <u>any</u> dispute over activities during the strike must be dealt with under the collective

agreement. This is a complete code. It does not leave room for other discipline;

5. No determination as to jurisdiction was sought or obtained from a labour arbitrator, and the Tribunal refused to adjourn the proceedings to obtain such a decision; and

6. There is no conflicting legislation that specifically empowers the Tribunal to assert jurisdiction in these circumstances. [Emphasis added.]

[33] This review of the factual context and the underlying decisions sets the stage for the legal analysis, to which I now turn.

3. The Governing Principles

[34] The jurisdictional contest in this case is between the Tribunal and a labour arbitrator. In the statutory context and on the facts of this case, do they share disciplinary jurisdiction over the respondent Union members because they are also students? In answering this question, the court must "give effect to the legislature's intent" as revealed in the language of the legislation and by considering its "institutional design choices": *Vavilov*, at para. 36.

[35] I begin with a review of the jurisprudence and then turn to the legislation. However, I make the observation at the outset that the jurisprudence may well be distinguishable because it concerns legislation that is longstanding or pre-existing for general purposes. What is engaged here is strike-ending legislation that deals with the resolution of discipline linked to the strike. It is specific, *ad hoc* legislation that trumps a tribunal established pursuant to a student code governing students'

conduct, not general legislation. That said, I deal with the appellant's argument as presented.

(a) The Jurisprudence

[36] The governing precedents are *Weber* and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185 ("*Morin*". These cases address the jurisdiction of labour arbitrators when another tribunal arguably has responsibility for deciding the issues in dispute between the parties.

(i) *Weber*

[37] In *Weber*, the employer suspended Murray Weber for abusing his sick leave benefits on the basis of surreptitious surveillance obtained during a trespass. Mr. Weber sued the employer for alleged torts, including trespass, and also under the *Charter*: at paras. 33-35. The Supreme Court considered three models for addressing the question of jurisdiction: concurrent, overlapping, and exclusive jurisdiction.

[38] The concurrent model "contemplates concurrent regimes of arbitration and court actions," and leaves each tribunal independent and free to proceed, even if the dispute "arises in the employment context": at para. 39. This model would have allowed Mr. Weber, for example, to proceed with his trespass action in Superior

Court, regardless of the collective agreement. The overlapping model uses the metaphor of “overlapping spheres” under which a court action can be brought if the issues raised “go beyond the traditional subject matter of labour law”: at para. 47. Mr. Weber argued that the trespass and torts pleaded in his action went “beyond the parameters of the collective agreement”: at para. 47. Under the exclusive jurisdiction model, the labour arbitrator has jurisdiction to the exclusion of the court: at para. 50. These descriptions apply, with necessary modifications, when the jurisdictional contest is between a labour arbitrator and another statutory tribunal.

[39] The *Weber* court rejected the first two models and adopted the exclusive jurisdiction model, but later acknowledged in *Morin* that this was not an absolute rule: *Weber*, at para. 67; *Morin*, at paras. 14-15.

[40] In adopting the exclusive jurisdiction model in *Weber*, the court noted that the key question was “whether the dispute or difference between the parties arises out of the collective agreement”: at para. 51. In answering this question, the court found that the *Labour Relations Act* conferred exclusive jurisdiction on the labour arbitrator, relying on the nature of the dispute, employment benefits, and the ambit of the collective agreement in its broad language, both of which supported the arbitrator’s exclusive jurisdiction: at paras. 67, 71 and 73.

[41] The *Weber* court rejected the concurrent model for three reasons. Jurisprudentially, it had been rejected in *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, on the basis that "mandatory arbitration clauses in labour statutes deprive the courts of concurrent jurisdiction": at para. 41. The court also rejected it because concurrency would not be consistent with the language of the *Labour Relations Act*, which required "all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement" to be referred to arbitration (emphasis in original): at para. 45. Lastly, giving effect to the concurrent model would "[undercut] the purpose of the regime of exclusive arbitration which lies at the heart of all Canadian labour statutes": at para. 46.

[42] For largely the same reasons, the *Weber* court rejected the overlapping jurisdiction model, but added an observation that parallel proceedings are to be discouraged: at para. 49. This court reiterated this stance against parallel proceedings in *Naraine*: "*Weber* stands for the proposition that when several related issues emanate from a workplace dispute, they should all be heard by one adjudicator to the extent jurisdictionally possible, so that inconsistent results and remedies … may be avoided": *Ontario (Human Rights Commission) v. Naraine* (2001), 209 DLR (4th) 465 (Ont. C.A.), at para. 60, leave to appeal refused, [2002] S.C.C.A. No. 69.

[43] The *Weber* court noted that its decision in favour of labour arbitrators' exclusive jurisdiction "conforms to a pattern of growing judicial deference for the arbitration and grievance process and correlative restrictions on the rights of parties to proceed with parallel or overlapping litigation in the courts": at para. 58. This pattern has not since abated. Few tribunals have received more judicial deference than labour tribunals and nothing in *Vavilov* detracts from this posture.

(ii) *Morin*

[44] The appellant submits, correctly in my view, that *Weber*'s endorsement of the exclusive jurisdiction model is not absolute: *Morin*, at paras. 11, 15. In *Morin*, the jurisdictional contest was between a labour arbitrator and the Quebec Human Rights Tribunal. Younger, less experienced teachers, who had been represented in collective bargaining by a union, brought a complaint of discrimination against the union, among others, to the Quebec Human Rights Commission. The complaint was that a term of the collective agreement negotiated between the union and the province of Quebec discriminated against them on the basis of age. The Commission referred the complaint to the Tribunal for disposition. The Attorney General, the school boards, and the unions challenged the Tribunal's jurisdiction: at paras.1-4.

[45] McLachlin C.J., speaking for the majority, put a gloss on *Weber*, stating that it "does not stand for the proposition that labour arbitrators always have exclusive

jurisdiction in employer-union disputes”: at para. 11. She added that: “Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction”: at para. 11.

[46] In *Morin*, McLachlin C.J. established a two-step approach for analyzing the jurisdictional issue where a matter could be plausibly found to fall under the jurisdiction of a labour arbitrator and another tribunal, at para. 15:

> The first step is to look at the relevant legislation and what it says about the arbitrator's jurisdiction. The second step is to look at the nature of the dispute, and see whether the legislation suggests it falls exclusively to the arbitrator.

[47] The question at the second step is “whether the legislative mandate applies to the particular dispute at issue”: at para. 15. McLachlin C.J. stipulated that the focus on the particular dispute would discern the “better fit between the tribunal and the dispute” in order to “‘ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties …’”: at para. 15. She identified fidelity to the statutory scheme as “the underlying rationale of *Weber*”: at para. 15.

[48] The *Morin* court ultimately decided that the Quebec Human Rights Tribunal had exclusive jurisdiction, not the labour arbitrator, for several reasons. The

discrimination occurred in the negotiation of the collective agreement in which the union participated. Accordingly, the dispute did "not arise out of the operation of the collective agreement, so much as out of the pre-contractual negotiation of that agreement": at para. 24. The court also noted the incongruity of the union prosecuting a grievance when it was one of the parties against which the teachers had lodged the complaint: at para. 28. The Tribunal was a "'better fit'" to adjudicate the complaint because the challenge affected hundreds of teachers and a labour arbitrator lacked jurisdiction over all the parties to the dispute: at paras. 29-30.

[49] In my view, *Morin* did not materially qualify the *Weber* holding that if the dispute falls under the collective agreement, then the labour arbitrator has exclusive jurisdiction. The key question remains "whether the dispute or difference between the parties arises out of the collective agreement," as the Supreme Court prescribed in *Weber* and repeated in *Morin*: *Weber*, at para. 51; *Morin*, at para. 46.

[50] In *Vavilov*, *Weber*, and *Morin*, the court attended to the statutory scheme and what it reveals about the legislature's intention.

(b) The Statutory Scheme

[51] The intersection of three statutes forms the statutory scheme in this appeal: the *York University Act, 1965*, S.O. 1965, c. 143, the *Back to Class Act*, and the *Labour Relations Act.*

[52] The ordinary principles of statutory interpretation apply in construing this intersecting statutory context. The *Vavilov* majority affirmed the “modern principle” of statutory interpretation, noting that “the words of a statute must be read ‘in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament’”: at para. 117. The *Vavilov* majority explained that this is the proper approach “because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context”: at para. 118.

[53] This court’s task is to construe these three statutes in order to determine their proper application to the dispute between the parties to this appeal. The intersecting statutes together create a tableau in which each is part of the context for the others in the interpretation exercise.

4. The Principles Applied

[54] Do the Tribunal and a labour arbitrator share disciplinary jurisdiction over Union members because they are also students, in the statutory context and on the facts of this case?

[55] The appellant invokes the majority’s decision in *Weber*, which noted that: “only disputes which expressly or inferentially arise out of the collective agreement

are foreclosed to the courts": at para. 54. In *Morin*, the Supreme Court confirmed that the "exclusive jurisdiction" model does not necessarily apply where a labour arbitrator and another statutory tribunal both have arguable jurisdiction over the dispute: at para. 14. The appellant argues that "legislative intent may require a different result" (emphasis in original).

[56] I agree with this submission. As I explain above, in answering the jurisdictional question, the court must "give effect to the legislature's institutional design choices" by putting into practice the legislative intent revealed in the language of the legislation: *Vavilov*, at para. 36. The analytical starting point for considering the jurisdiction of a labour arbitrator is the two-step approach to the statutory scheme prescribed in *Morin*: at para. 15.

[57] I address the *Morin* steps in turn.

(a) The First *Morin* Step: The Legislative Mandate

[58] The first *Morin* step is to see what the relevant legislation says about the arbitrator's jurisdiction. I begin with the *York University Act,* on which the appellant places significant weight.

(i) *York University Act*

[59] I accept the appellant's submission that universities in Ontario enjoy a considerable measure of self-governance flowing from the principle of university

autonomy affirmed in the seminal *Report of the Royal Commission on the University of Toronto* (Toronto: Queen's Printer, 1906). The Royal Commission recommended that the internal administration of the University of Toronto be separate from the provincial government and that a disciplinary body be created to maintain order among students. The *York University Act* has its genesis in the *University Act, 1906*, S.O. 1906, c. 55, which formed a template for university autonomy in Ontario. That autonomy must be taken seriously, as I do.

[60] Section 13(2)(c) of the *York University Act* provides:

> 13(2) The President is Vice-Chancellor and chief executive officer of the University and,
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> …
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> (c) has power to formulate and implement regulations governing the conduct of students and student activities. [Emphasis added.]

[61] York adopted the *Student Code* under this statutory authority. Section 10 of the *Student Code* established the University Tribunal, which is made up of "student, faculty and staff volunteers" appointed by the Vice-Provost Students. Section 11 permits appeals to an Appeal Panel composed of members of the University Tribunal, other than those who sat on the first hearing.

[62] The *Code*'s rationale and application are set out in ss. 2 and 3:

> [This *Code*] applies specifically to students because the behaviours of non-student members of the University community are held to comparable standards of account by provincial laws, University policies and their unions' collective agreements.
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> …
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> York is committed to civil discourse and the free and open exchange of ideas between community members and as such, nothing in this [*Code*] is intended as a method or excuse to suppress peaceful protest, civil debate or other lawful conduct so long as student responsibilities as outlined in Section 4 [which prescribes the "Community Standards for Student Conduct"] are being upheld.
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> …
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> This [*Code*] applies to non-academic student conduct.

[63] In disciplining students who are also employees, the *Code* recognizes the need for the OSCR to "consult with the appropriate offices to determine whether or not the conflict or incident in question falls into the purview of the *Code of Student Rights & Responsibilities*": at s. 3.

[64] The appellant's position is that York's authority to discipline students under the *York University Act* and the *Student Code* leads to the conclusion that "the Tribunal has overlapping or residual jurisdiction" under one of the categories recognized in *Weber*. In her factum, the appellant puts forward several arguments in support of this view.

[65] First, the appellant argues that the *Student Code* and the Tribunal derive from an exercise of statutory powers under York's governing statute, which reflects

the “principle of university self-governance.” The appellant asserts that the Tribunal is a statutory tribunal of co-ordinate status with a labour arbitrator because the authority to establish the Tribunal as part of the student discipline process is set out in s. 13(2)(c) of the *York University Act.* Accordingly, she argues, the Tribunal must have overlapping authority.

[66] Second, the appellant argues that the legislative design gives primacy to the student-university relationship over the employment relationship. To hold otherwise, she submits, “would ignore the Legislature’s intent.” The appellant asserts: “To the extent that a hierarchy exists at all, it is that the student’s relationship to the University *qua* student takes primacy over its employee relationship, not *vice-versa*.” She argues that “as a practical matter, [York] cannot lose jurisdiction over its students each time they act in an employee context.” The appellant uses strong language and asserts that: “taking away York’s ability to govern student-employees pursuant to the [*Student Code*], has eviscerated York’s ability to meet obligations it has to other community members.”

[67] While conceding that an arbitrator would have jurisdiction over disputes about any employment-related discipline connected to the misconduct, the appellant submits that the dispute before the Tribunal engages discipline that relates to the respondents in their capacity as students, not as employees.

[68] Third, the appellant points out that York's ability to impose discipline is not "clearly excluded by the other statutory provisions" in the *Back to Class Act* and in the *Labour Relations Act*. She adds that nothing in the *York University Act* suggests that this authority to discipline students does not apply to students "who engage in misconduct during civil protests just because they are also acting in their capacity as University employees." To the contrary, the appellant notes that the *Student Code*, established under s. 13(2)(c) of the *York University Act*, expressly contemplates that the Tribunal will have jurisdiction over the conduct of student-employees during strikes.

[69] Fourth, the appellant submits that the Tribunal has residual jurisdiction to grant the "several specialized sanctions for violations of [the *Student Code*], including educative requirements, removal from residence, campus restrictions, suspension and expulsion." She argues that these remedies are beyond the authority of an arbitrator. For example, the Tribunal's no-contact direction, designed to protect Sarah Millington from further contact with Gizem Çakmak , is a remedy the appellant claims "only the Tribunal possesses." The appellant's assertion is that removing jurisdiction from the Tribunal would "paralyze York's system of regulation during times of labour strife, leaving student-employees immune from effective University regulation." Accordingly, she argues that the Tribunal's authority must be preserved to ensure that the complainants she

represents are not deprived of appropriate remedies. This claim is attenuated by the fact that the actual suspensions and no-contact orders imposed by the Tribunal did not engage the “special remedies” and are not unusual in labour discipline.

[70] The appellant submits that the jurisprudence supports her position. She builds on *Morin* by referring to a number of other cases for the proposition that there are exceptions to the exclusive jurisdiction of labour arbitrators: *Naraine*; *Calgary Health Region v. Alberta (Human Rights & Citizenship Commission)*, 2007 ABCA 120, 404 A.R. 201, leave to appeal refused, [2007] S.C.C.A. No. 280; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2008 NSCA 21, 264 N.S.R. (2d) 61, leave to appeal refused, [2008] S.C.C.A. No. 245. I accept this proposition. The question is whether it applies in this case.

[71] In my view, the authorities the appellant relies on do not support her arguments, but rather undermine them. They address the interplay between a human rights tribunal and another statutory tribunal. Human rights legislation has a quasi-constitutional status and prevails over inconsistent legislation in the absence of express, unequivocal legislative language: *Naraine*, at para. 47. The *York University Act* and the Tribunal created under it do not enjoy that status.

[72] The appellant also relies on *Nova Scotia (Securities Commission) v. Schriver*, 2006 NSCA 1, 239 N.S.R. (2d) 306, in which the jurisdictional contest

was between the Nova Scotia Securities Commission and the Mutual Fund Dealers Association. Cromwell J.A. (as he then was) concluded that the Association did not have exclusive jurisdiction to determine whether Mr. Schriver breached its rules: at para. 45. He noted that the essential character of the dispute was "whether Mr. Schriver breached s. 30(3) of the [*Securities Act*, R.S.N.S. 1989, c. 418]": at para. 34. He found that "the essential character of the dispute lies at the core of the Commission's statutory mandate": at para. 34. This decision gives no comfort to the appellant.

[73] The appellant also relies on a police discipline case, *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360. In that case, Article 8 of the collective agreement specifically excluded disputes arising under *The Police Act, 1990*, S.S. 1990-91, c. P-15.01 and *The Municipal Discipline Regulations, 1991*, R.R.S., c. P-15.01, Reg. 4 from grievance arbitration. *Regina Police* offers support for the respondents' position, because, by contrast, there is no similar carve out in the *Back to Class Act* in this case.

[74] I do not find the appellant's arguments to be persuasive. The Tribunal is not a creature of legislation like a human rights tribunal, a securities commission, a police services board, or a labour arbitrator appointed under a collective agreement governed by the *Labour Relations Act*. The Tribunal was established under the *Student Code*, which does not amount to a regulation under s. 17 of the

Legislation Act, 2006, S.O. 2006, c. 21, Sched. F, and could be easily changed by York's president at any time. The Tribunal was not established by statute.

[75] However, while not dispositive, the appellant's arguments do establish that the choice among the models of overlapping, concurrent, or exclusive jurisdiction is a live issue in this case, as it was in *Weber* and *Morin*. I return to the appellant's arguments below after considering the rest of the legislative tableau and completing the *Morin* steps.

(ii) *Back to Class Act (York University)*

[76] The most specific statute in the tableau is the *Back to Class Act*, which the Legislative Assembly of Ontario enacted to end the strike in which the respondents participated. Section 10 of the Act referred "all matters remaining in dispute between [the employer and the bargaining agent] with respect to the terms and conditions of employment of the employees in that unit" to a mediator-arbitrator in what is called interest arbitration.

[77] It is important to note that the Act limits the mediator-arbitrator's jurisdiction. Section 17 provides:

> **Restriction – discipline and discharge**
>
> 17(3) The mediator-arbitrator shall not include a provision in an award that prohibits the employer from discharging or disciplining an employee for just cause in respect of any activity that took place during the period that begins

> on the date on which a strike or lock-out in respect of the employee's bargaining unit became lawful and ends on the date on which a new collective agreement is executed by the parties or comes into force under subsection 21(5).
>
> **Same**
>
> 17(4) Any dispute between the parties concerning discharge or discipline in respect of activities that took place during the period described in subsection (3) shall be determined through the grievance procedure and arbitration procedure established in the new collective agreement. [Emphasis added.]

The grievance arbitration provisions in the collective agreements referred to in s.17(4) of the *Back to Class Act* connect to s. 48 and other provisions of the *Labour Relations Act*, to which I now turn.

(iii) *Labour Relations Act*

[78] In *Weber*, the governing authority on the approach to the *Labour Relations Act*, the jurisdictional contest was between the court and a labour arbitrator. The Supreme Court held that labour arbitrators have exclusive jurisdiction over "all differences," including torts, arising in the context of a collective agreement (emphasis omitted): at para. 45. This statement flowed from the language of what is now s. 48 of the *Labour Relations Act*. Section 48 provides:

> 48(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration

> or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

[79] Section 48 of the *Labour Relations Act* applies to the collective agreement in this case. I earlier noted that, under *Weber* and in *Morin,* the key question is "whether the dispute or difference between the parties arises out of the collective agreement": *Weber*, at para. 51; *Morin*, at para. 46. I address this question in detail below.

(iv) Discussion

[80] I make several observations about the intersection of these three statutes. First, the Legislature was well aware that that the members of the two bargaining units ordered back to work were both students and employees. This was adverted to in Hansard during the Minister's remarks at second reading of the legislation and it is reflected in the text of the legislation itself, where the members of the units are expressly described as "graduate students" as well as employees: Bill 2, *An Act respecting Hydro One Limited, the termination of the White Pines Wind Project and the labour disputes between York University and Canadian Union of Public Employees, Local 3903*, 2nd reading, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 1st Sess., 42nd Leg., No. 6 (19 July 2018) at p. 188 (Hon. Greg Rickford); *Back to Class Act*, s. 1(1).

[81] Second, the Legislature was familiar with the fractious situation at York, as Mr. Kaplan finely detailed in his Report that led to the enactment of the legislation: see generally *Report In the Matter of an Industrial Inquiry Commission Pursuant to Section 37 of the Labour Relations Act, 1995 and In the Matter of the Negotiation of New Collective Agreements to Replace the Ones that Expired on August 31, 2017*; *Official Report of Debates (Hansard)*, (19 July 2018).

[82] Third, the form of the legislation was uniquely attuned to that situation. Typical back-to-work legislation does not contain the underlined language set out in ss. 17(3) and 17(4) of the *Back to Class Act*, which I repeat here for convenience:

> **Restriction – discipline and discharge**
>
> 17(3) The mediator-arbitrator shall not include a provision in an award that prohibits the employer from discharging or disciplining an employee for just cause in respect of any activity that took place [during the strike period] …
>
> **Same**
>
> 17(4) Any dispute between the parties concerning discharge or discipline in respect of activities that took place during the period described in subsection (3) shall be determined through the grievance procedure … [Emphasis added.]

[83] Contrast, for example, the *York University Labour Disputes Resolution Act, 2009*, S.O. 2009, c. 1, which was enacted in response to the Union's strike in 2009. There was no similar provision related to discipline and arbitration contained in this Act. Section 12(1) gave the mediator-arbitrator "exclusive jurisdiction to determine

all matters that he or she considers necessary to conclude a new collective agreement," without a similar reference to discipline and grievance arbitration now found in the *Back to Class Act*. The 2009 language was more typical of other back-to-work legislation in the education sector: see, for example, the following now repealed or spent legislation, including *Back to School Act (Toronto and Windsor), 2001*, S.O. 2001, c. 1; *Back to School Act (Simcoe Muskoka Catholic District School Board), 2002*, S.O. 2002, c. 20; *Back to School (Toronto Catholic Elementary) and Education and Provincial Schools Negotiations Amendment Act, 2003*, S.O. 2003, c. 2.

[84] Further, the underlined language in ss. 17(3) and 17(4) was not present in the original version of the *Back to Class Act*, which was given first reading on May 7, 2018 and was similar in form to the 2009 legislation: Bill 70, *An Act to resolve labour disputes between York University and Canadian Union of Public Employees, Local 3903*, 3rd Sess., 41st Leg., Ontario, 2018.

[85] In my view, the underlined language in ss. 17(3) and 17(4) of the *Back to Class Act* must be given a purposive interpretation in the context of its genesis. The unique language was deliberately inserted in the final version of the *Back to Class Act*, which was brought forward as part of Bill 2 and introduced for first reading on July 16, 2018: Bill 2, *An Act respecting Hydro One Limited, the termination of the White Pines Wind Project and the labour disputes between York*

University and Canadian Union of Public Employees, Local 3903, 1st Sess., 42nd Leg., Ontario, 2018 (assented to 25 July 2018), S.O. 2018, c. 10, Sched. 3.

[86] I draw three inferences from the genesis of the *Back to Class Act*. First, the Legislature intended York to be free to discipline Union members for their activities during the strike period without the risk that such discipline would be undone in the mediation-arbitration. Second, the Legislature intended the legislation to be comprehensive, using the words "any activity that took place" during the period of the strike (emphasis added): *Back to Class Act*, s. 17(3). Third, the Legislature required any contested discipline to be resolved under grievance arbitration. I explain these inferences in more detail below.

[87] By using broad language, the Legislature stated its intention that the matters of discharge and discipline "in respect of any activity" were to be reserved to the parties and any disputes to be resolved ultimately by grievance arbitration (emphasis added): *Back to Class Act*, ss. 17(3), 17(4). This text removed authority, which would otherwise have existed, from the mediator-arbitrator to impose a collective agreement that would resolve differences over "discharge or discipline in respect of activities that took place," during the strike period: *Back to Class Act*, s. 17(4).

[88] This wording gave York two advantages. First, York was left free to impose discharge or discipline in respect of any activities that took place during the strike without its authority being nullified by an "all-in" mediator-arbitrator's decision that could wipe the discipline slate clean. Second, the language put the burden on grievance arbitration by taking away from the Union the ability to attack the discipline as an unfair labour practice under s. 96 of the *Labour Relations Act*. This course of action would prevent a protracted and expensive public hearing before the Ontario Labour Relations Board.

[89] This structure was not accidental. Debate at second reading pointed to the difference between the new legislation and the original version of the legislation: "[T]he addition of the 'discipline and discharge' clause … prohibits the arbitrator from including language in the new agreement to prevent disciplinary action against workers for conduct during the strike": *Official Report of Debates (Hansard)*, (19 July 2018) at p. 200. It was also pointed out that the new language "removes the ability of employees to argue that reprisal that is taken against them is an unfair labour practice" and requires employees to "go through the normal grievance procedure if there is discipline implemented against them": at p. 200.

[90] On the other hand, the Union members also benefited from the same broad language. York was not free of any constraint in "discharging or disciplining an employee for just cause": *Back to Class Act*, s. 17(3). A fair reading of ss. 17(3)

and 17(4) together confirms that "[a]ny dispute between the parties" regarding the discipline of a Union member "in respect of activities that took place during [the strike period] shall be determined through the grievance procedure" by a labour arbitrator (emphasis added): *Back to Class Act*, s. 17(4).

[91] To conclude on the first *Morin* step regarding the legislative mandate, s. 17(4) of the *Back to Class Act* is the operative provision to understand the scope of an arbitrator's jurisdiction. In my view, the language chosen was deliberately and uniquely comprehensive in labour law terms, as I have explained. It provides, to repeat for convenience:

> 17(4) Any dispute between the parties concerning discharge or discipline in respect of [any] activities that took place during the period described in subsection (3) shall be determined through the grievance procedure … [Emphasis added.]

[92] I have inserted "any" in parentheses to reflect the language of s. 17(3), with which s. 17(4) must be read. I see this as the legislative mandate to be brought into the analysis. I turn now to the second *Morin* step.

(b) The Second *Morin* Step: The Nature of the Dispute

[93] The question in the second *Morin* step is "whether the legislative mandate applies to the particular dispute at issue": at para. 15. The focus is on the particular dispute and on which tribunal is better fitted to resolve the dispute under the

governing statutory scheme, in this case *ad hoc*, time-limited, strike-ending legislation.

[94] What is the “particular dispute” in this case? It is the discipline imposed on the respondents for their activities during the strike. Where does the legislation repose the authority to decide the dispute: on the Tribunal, a labour arbitrator, or both?

[95] *Weber* decided that the *Labour Relations Act* conferred exclusive jurisdiction on a labour arbitrator, because, on the facts, the dispute or difference between the parties arose out of the collective agreement based on the nature of the dispute – involving employment benefits – and the ambit of the collective agreement in its broad language. Both factors supported the arbitrator’s exclusive jurisdiction: at paras. 67, 71 and 73.

[96] On the facts of this case, the dispute over the discipline the Tribunal imposed on the respondents for their strike-related activities arises out of the collective agreement. I say this for five reasons.

[97] First, the direct and contextual evidence overwhelmingly establishes that the activities underpinning the complaints were linked to the strike, including the off-campus activities, as the Tribunal acknowledged. None were mere random acts of student misconduct completely unrelated to the strike.

[98] Second, I acknowledge that York's ability to discipline the respondents for their activities during the strike could plausibly be rooted in both the *Student Code* and in the collective agreement. It was theoretically open to York to proceed under the *Student Code*, under the collective agreement, or under both. It chose the *Student Code* as its preferred venue in the face of the Union's dogged opposition.

[99] Third, York could have responded to each act of misconduct immediately, but nothing was done until after the strike. Why? Perhaps York had in mind s. 80.1 of the *Labour Relations Act*, which prevents the imposition of discipline during a strike. Perhaps York considered that initiating student discipline would be unduly provocative during the strike. Regardless, it seems obvious that strike considerations played a role in the timing of the complaints.

[100] Fourth, in its earlier January 11, 2019 decision, the Tribunal noted that the complaints were submitted "within 30 days following the end of the disruption of University activities (July 25, 2018)" and that the complaints "cover several incidents that occurred during the labour disruption of 2018." The Tribunal held that the end of the strike period was the date from which it would assess the timeliness of the complaints.

[101] Fifth, the complaints were launched by Ms. McAulay, who is a senior administrator. I see her, in the overall factual context, as a proxy for York, and all of her arguments were aimed at vindicating York's position.

[102] These facts are all demonstrably linked to the strike, to the *Back to Class Act*, and to the collective agreement.

[103] The second *Morin* step also considers which tribunal is the better fit for resolving the particular dispute. In my view, this consideration favours labour arbitration in this case, for three reasons.

[104] First, labour arbitrators routinely consider the appropriateness of discipline for the activities of employees during a strike. They are presumed to have expertise in the assessment of the conduct of Union members and whether that conduct fits within the acceptable parameters of primary and secondary picketing. There are examples of several labour cases in which terminations and suspensions have been upheld, others in which reinstatement has occurred, or the period of suspension has been reduced. The nuances are intensely factual and fall squarely within the expertise of a labour arbitrator: I note that the sanctions imposed by the Tribunal – suspensions and no-contact directions – are not different in kind from what labour arbitrators often see: Carolyn Hart, "Focus 14 – Discipline of Managers

for Harassing Employees” in Adam Beatty, David M. Beatty & Donald J.M. Brown, *Canadian Labour Arbitration*, 5th ed. (Aurora, Ont.: Canada Law Book, 2019).

[105] Second, labour arbitration is governed by the collective agreement, the *Labour Relations Act*, arbitral and judicial case law, and arbitral practice. An arbitrator must provide procedural fairness to the parties.

[106] Third, of particular importance is the impartiality and the appearance of impartiality of the decision-maker. A labour arbitrator is not connected in interest to the disputants, unlike the Tribunal in this case, and is better fitted to resolve disputes over strike-related discipline.

5. Conclusion on Issue Two Regarding the Tribunal’s Jurisdiction

[107] This court is obliged to respect the intention and the instructions of the legislature as set out in the relevant legislation, as *Vavilov*, *Weber*, and *Morin* instruct. The legislative mandate identified in the analysis at the first *Morin* step is in the broad and unique language set out in s. 17(4) of the *Back to Class Act*, which requires “Any dispute between the parties concerning … discipline in respect of [any] activities that took place” during the strike period to be subject to grievance arbitration. The student discipline initiated by the appellant is, in my view, a dispute concerning discipline in respect of activities during the strike period, to paraphrase

s. 17(4). Any dispute about discipline must be resolved by way of grievance under the collective agreement.

[108] The conclusions drawn at the second *Morin* step reinforce this interpretation: this dispute is deeply rooted in the labour conflict and in the collective agreement. A labour arbitrator is better fitted to resolve it. The legislative language is clear and comprehensive: a labour arbitrator has exclusive jurisdiction over disputes connected to discipline for strike-related activities. This interpretation is supported by the principles of statutory interpretation, which discourage parallel proceedings.

[109] The appellant has the strong conviction that York must have primacy over student misconduct and that it must have the last word, not a labour arbitrator. But that does not give effect to the legislative intent driving the enactment of the *Back to Class Act.*

[110] The legislation was carefully designed to minimize the intrusion into York's self-governance. Section 17 of the *Back to Class Act* is a situation-specific, short-acting limitation on York's autonomy. The appellant argues that giving a labour arbitrator the last word improperly gives "primacy to the employer-employee relationship over the student-University [relationship]." However, that, in the particular circumstances, is precisely what the Legislature intended to do.

[111] There is no sense in which the legislation, specific and time-limited, causes York more generally to "lose jurisdiction over its students each time they act in an employee context." Nor has the legislation "eviscerated York's ability to meet obligations it has to other community members." And it was, and perhaps still is, quite open to York to discipline the respondents under the collective agreement. York could have imposed precisely the sanctions set by the Tribunal on the respondents under the collective agreement. The respondents could have grieved the discipline, and the task of the arbitrator would then have been to determine whether the sanctions were warranted.

[112] I do not agree with the appellant's argument that ss. 17(3) and 17(4) of the *Back to Class Act* must be interpreted to apply only to the respondents as employees, and not to them as students. The implied limitation would defeat the Legislature's manifest intention, in this high conflict case, to create a single, exclusive process for resolving disputes about the discipline of the respondents for strike-related activities. The legislation was a surgical intervention designed to restore peace.

[113] The court's caution in *Weber* and in *Naraine* against parallel proceedings applies here, especially given the unusual and unique language of the *Back to Class Act.* There is no basis for the appellant's argument that there is overlapping or residual jurisdiction with respect to the respondents' activities during the strike.

[114] Finally, it is trite law that when a more general provision – the *York University Act* – conflicts with a provision that "deals specifically with the matter in question" – the *Back to Class Act* – the court may resolve the conflict through "applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first": Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: NexisLexis Canada, 2014), at §11.58.

[115] The Divisional Court was accordingly correct in its conclusion that the Tribunal had no jurisdiction to discipline the respondents for their participation in the activities that underpinned the complaints.

III. ISSUE THREE: SHOULD JUDICIAL REVIEW HAVE BEEN DENIED BECAUSE AN APPEAL TO THE APPEAL PANEL WAS AN ADEQUATE ALTERNATIVE REMEDY?

[116] The Divisional Court found that there were exceptional circumstances justifying its decision to decide the jurisdictional issue despite the respondents' failure to pursue an appeal to the Appeal Panel. First, York's change in position about whether it was too late to appeal to the Appeal Panel cast doubt on the adequacy of this remedy: at para. 67. Second, there was no risk of fragmentation because the Tribunal and the Appeal Panel had already finally determined the merits of the complaints and imposed sanctions: at para. 68. Third, there was no utility in requiring the respondents to appeal to the Appeal Panel before continuing

with the judicial review because there was only one outcome: The Legislature had conferred jurisdiction on a labour arbitrator to adjudicate discipline disputes: at para. 69. Fourth, there was evidence of hardship – for example, one of the applicants risked deportation if suspended: at para. 70.

[117] The appellant argues that the Divisional Court erred in not applying the *Strickland* factors for assessing whether an appeal from the Tribunal to the Appeal Panel was an adequate alternative remedy to judicial review: *Strickland v. Canada (Attorney-General)*, 2015 SCC 37, [2015] 2 S.C.R. 713. In *Strickland*, the court considered when a court should exercise its discretion to decline judicial review on the basis that there was an adequate alternative remedy. The court set out a non-exhaustive list of factors to make this determination, at para. 42:

> The convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost. [Citations omitted.]

[118] As the Supreme Court instructed in *Strickland*, it is not enough for the court to consider only whether there is an adequate alternative; it should also consider the suitability and appropriateness of judicial review in the circumstances: at para. 43. This balancing exercise requires the court to account for the purposes

and policy considerations underpinning the legislative scheme at issue: at para. 44. The Divisional Court decided, in its discretion, that it was not appropriate to remit the matter back to the Appeal Panel.

[119] I would reject the appellant's argument that the Divisional Court erred by not considering the *Strickland* factors. While the court did not cite *Strickland*, it did refer to the leading case on the adequate alternative doctrine – *Harelkin v. University of Regina,* [1979] 2 S.C.R. 561: at para. 63; *Strickland*, at para. 40. In my view, the factors the Divisional Court considered adequately map onto the *Strickland* factors.

[120] First, the court noted that it was not clear the appeal process was an adequate alternative remedy because it was uncertain whether the Appeal Panel would grant a time extension: at para. 67. This concern maps onto the *Strickland* factors: convenience of the alternative remedy and whether adequate and effective recourse was available in the forum in which litigation was already taking place.

[121] Second, the Tribunal and the Appeal Panel had determined the merits and sanctions appeals, and so there was no risk of fragmenting the proceedings: at para. 68. Because all the evidence was in, it was more expeditious to proceed with judicial review than to send the matter back to the Appeal Panel and risk another round of judicial review.

[122] Third, the court pointed to the clear legislative wording that required an arbitrator to adjudicate this type of dispute: at para. 69. It seems obvious that the interpretation of the legislation is a legal question that neither the Tribunal nor the Appeal Panel was better qualified to undertake than the Divisional Court.

[123] Fourth, the court pointed to hardship, prejudice, costs or delay as being factors that may constitute exceptional circumstances for the judicial review application to proceed: at para. 70. These considerations map onto the *Strickland* factors: expeditiousness, economical use of judicial resources, and cost.

[124] The Divisional Court decided, in its discretion, that it was not appropriate to remit the matter back to the Appeal Panel. As such, this court should defer unless a legal error was made, or a palpable and overriding error of fact. I see neither.

IV. ISSUE FOUR: DID THE TRIBUNAL BREACH THE DUTY OF PROCEDURAL FAIRNESS?

[125] The Divisional Court decided that there was a lack of procedural fairness in the manner in which the Tribunal scheduled the merits hearings and in how the Tribunal addressed requests for adjournments, on the assumption that it was wrong on the jurisdictional issue.

[126] The appellant contests this finding.

[127] I see no reason to address this issue in light of the disposition of the other three issues.

V. DISPOSITION

[128] I would dismiss the appeal with costs to the respondents. If the parties cannot agree on costs, the court will accept written submissions no more than five pages in length beginning with the respondents, to be served and filed with the court at coa.e-file@ontario.ca within two weeks of the release of this decision, followed one week later by the appellant's submissions, and any reply within another week.

Released: July 24, 2020

P Lauwers J.A.

I agree G. Hoy C.J.O.

I agree G. Pardu J.A.