NOVA SCOTIA COURT OF APPEAL
Citation: ***Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)***, 2007 NSCA 38

Date: 20070405
Docket: CA 269398
Registry: Halifax

Between:

The United Steel Workers of America and The United Steel Workers of America, Local 4122

Appellants

v.

Cherubini Metal Works Limited, a body corporate

Respondent

Judges:	Roscoe, Cromwell and Oland, JJ.A.
Appeal Heard:	February 16, 2007, in Halifax, Nova Scotia
Held:	Leave to appeal granted and appeal allowed per reasons for judgment of Cromwell, J.A.; Roscoe and Oland, JJ.A. concurring.
Counsel:	Raymond F. Larkin, Q.C. and Bettina Quistgaard, for the appellants George W. MacDonald, Q.C. and Michelle Awad, for the respondents Michael Pugsley for the Attorney General of Nova Scotia not participating

Reasons for judgment:

I. INTRODUCTION:

[1] Disputes which, in their essential character, arise out of a collective agreement must be resolved through the grievance and arbitration process provided for in the agreement. They cannot be the subject of a law suit. At issue is whether this principle bars the respondent from suing the two appellant unions in the Supreme Court of Nova Scotia.

[2] Coughlan, J., in Supreme Court chambers, found that it did not, for three reasons: the essential character of the dispute between the parties did not arise out of the collective agreement, an arbitrator would not have jurisdiction over all of the parties whom the respondent has sued and would not be able to provide the respondent with an effective remedy. He therefore dismissed the unions' application for summary judgment and allowed the respondent's court action to continue. (Decision reported at (2006), 246 N.S.R. (2d) 283; N.S.J. No. 327 (Q.L.)).

[3] The unions appeal, saying that each of these three reasons is wrong. Respectfully, I agree. In my view, the respondent's claims against the unions arise out of the collective agreement and the grievance and arbitration process could have afforded effective relief. Neither of these conclusions is altered because the respondent has sued others who are not parties to the agreement. It follows that the respondent's action against the two unions is within the exclusive jurisdiction of the grievance and arbitration process provided for in the collective agreement. The Supreme Court does not have jurisdiction to address these claims.

[4] I would therefore grant leave to appeal, allow the appeal and dismiss the action against the appellants.

II. ISSUES:

[5] The appellants challenge each of three reasons the judge gave for finding the court had jurisdiction in this matter. The respondent, on the other hand, supports the judge's reasons. In addition, the respondent submits, in its Notice of Contention, that the appellants' summary judgment application should have been dismissed on the alternative ground that there were arguable issues of material fact

requiring trial. There is also, of course, the question of the appropriate standard of appellate review of the judge's decision.

[6] The issues to be resolved are these:

1. Was this a suitable case for summary judgment?
2. What is the standard of review of the judge's decision?
3. Does the court have jurisdiction over the respondent's law suit?
    (a) Do the respondent's claims, in their essential character, arise out of the collective agreement?
    (b) Could the grievance and arbitration process have afforded the respondent effective redress?

[7] As noted, the judge relied on the fact that a grievance arbitrator would not have jurisdiction over some of the parties whom the respondent has sued. In my view, this factor is relevant both to defining the essential character of the dispute and to the question of whether the grievance and arbitration process would have afforded effective redress. Accordingly, I will deal with this factor under each of those issues.

III. ANALYSIS:

A. Was This a Suitable Case for Summary Judgment?

[8] Summary judgment is appropriate when a defendant shows that there is no genuine issue of material fact requiring a trial and a responding plaintiff fails to show that its claim is one with a real chance of success: **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423 at para. 27.

[9] The appellants' summary judgment application was, in some respects, like a motion to dismiss the respondent's claim as not disclosing a cause of action. To obtain summary judgment, the appellants had to show that the undisputed facts are such that the action fails in law: **MacNeil v. Bethune** (2006), 241 N.S.R. (2d) 1; N.S.J. No. 62 (Q.L.)(C.A.) at para. 31. As Iacobucci and Bastarache, JJ. said for the Court in **Guarantee Co. of North America**, at para. 35, "... application of the law ... to the facts is exactly what is contemplated by the summary judgment proceeding."

[10] In my view, this case turns on the question of whether the respondent's court action must be dismissed because the complaints advanced in it should have been pursued at arbitration rather than in court. To answer that question, one must determine the "essential character" of the dispute which underlies the court action and consider it in relation to the ambit of the collective agreement. There are, in this case, no factual questions requiring trial at either of these steps. The essential character of the dispute is determined by examining the respondent's claims, not assessing what it can prove. The ambit of the collective agreement is determined by construing the agreement. In short, the relevant legal considerations do not depend on disputed facts.

[11] I conclude, therefore, that the question of the court's jurisdiction over this action is a proper subject for consideration on a summary judgment application. The jurisdictional issue does not, in this case, raise any arguable issue of material fact requiring trial.

B. What is the Applicable Standard of Appellate Review?

[12] The jurisdiction of the court is a question of law on which the judge at first instance must be correct. The issues on which the jurisdictional question turns, that is, the essential character of the dispute and the ambit of the collective agreement, are also questions of law on which the judge must be correct.

C. Does the Court Have Jurisdiction?

[13] The judge rightly concluded that the **Trade Union Act**, R.S.N.S. 1989, c. 475, and the collective agreement create the exclusive process to deal with disputes falling within the ambit of its provisions. He found, however, that the dispute raised by the respondent's court action did not fall within the exclusive jurisdiction of those provisions. As noted, he gave three reasons: the dispute is not one that in its essential character arises from the interpretation, implementation or violation of the collective agreement, an arbitrator would not have jurisdiction over non-parties to the agreement such as the international union or the Attorney General and the collective agreement processes would not provide effective remedies.

[14] Before turning to my analysis of the judge's reasons, it will be helpful to set out the legal framework which applies in this case and to describe the nature of the respondent's claims against the two unions. I can then turn to the essential

character of the dispute, the availability of effective redress through the grievance and arbitration process and how the identity of the parties relates to each of those issues.

1. Legal principles: the exclusive model of arbitral jurisdiction:

[15] The Court has quite recently summarized the general legal principles in this area: **Adams v. Cusack** (2006), 242 N.S.R. (2d) 66; N.S.J. No. 25 (Q.L.)(C.A.) paras. 13 - 15.

[16] Since at least the mid 1980's, the Supreme Court of Canada has recognized that the courts should be cautious not to undermine " ... a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting.": **St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219**, [1986] 1 S.C.R. 704 at 721. To avoid doing "violence" to such a scheme, the courts ought to show "judicial deference" by not routinely hearing cases that fall within it: **St. Anne** at 721. This hands-off policy applies not only where there are clear legislative provisions which expressly oust court jurisdiction. It also applies where the scheme as a whole makes it clear that the courts were intended to have "... but a small role if any to play in the determination of disputes covered by the statute.": **Gendron v. Supply & Services Union of the Public Service Alliance of Canada, Local 50057**, [1990] 1 S.C.R. 1298 at 1321.

[17] **Weber v. Ontario Hydro**, [1995] 2 S.C.R. 929 is still the leading case. Its holding was summarized in the **Morin** case (**Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)**), [2004] 2 S.C.R. 185 at para. 11:

> (i) **Weber** holds that the model that applies in a given situation depends on the governing legislation, as applied to the dispute viewed in its factual matrix. In **Weber**, the concurrent and overlapping jurisdiction approaches were ruled out because the provisions of the Ontario **Labour Relations Act**, R.S.O. 1990, c. L.2, when applied to the facts of the dispute, dictated that the labour arbitrator had exclusive jurisdiction over the dispute.

(ii) **Weber** does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. 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; see, for example, **Goudie v. Ottawa (City)**, [2003] 1 S.C.R. 141, 2003 SCC 14; **Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.**, [1996] 2 S.C.R. 495.

(iii) Because the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator.

[18] To carry out the required analysis, the court must address two main questions. The first concerns the ambit of the dispute resolution scheme and the second concerns whether the dispute falls within it. The court must look at the essential character of the dispute, determined according to its full factual context, and not at the legal characterization which the parties have chosen to place on it: see, e.g., **Morin** at paras. 15-20; **Vaughan v. Canada**, [2005] 1 S.C.R. 14 at para. 11; **Weber** at para. 49. Any other approach would leave it open to innovative pleaders to evade the dispute resolution process established by the legislation and the collective agreement. This would undermine the purposes of the legislative scheme and the intention of the parties: **Weber** at para. 49. As McLachlin, J., as she then was, wrote for the majority in **Weber** at para. 43:

> ... the analysis of whether a matter falls within the exclusive arbitration clause must proceed on the basis of the facts surrounding the dispute between the parties, not on the basis of the legal issues which may be framed. The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one "arising under [the] collective agreement". Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it. [Emphasis in original]

[19] The same idea was expressed by Bastarache, J. in **Regina Police Assn Inc. v. Regina (City) Board of Police Commissioners**, [2000] 1 S.C.R. 360 at para. 25: "... the decision-maker must determine whether, having examined the factual

context of the dispute, its essential character concerns a subject matter that is covered by the collective agreement. ... If the essential character of the dispute arises either explicitly, or implicitly, from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide."

[20] The collective agreement need not deal with a matter explicitly, provided that the essential character of the dispute arises implicitly from the interpretation, application, administration or violation of the agreement.

[21] In light of these principles, I now turn to address the ambit of the dispute resolution process and the nature of the dispute.

(a) The ambit of the dispute resolution process:

[22] The judge correctly found that the collective agreement dispute resolution processes in this case were the exclusive means of addressing disputes falling within their terms. Subject to the courts' residual remedial authority, the exclusive jurisdiction model articulated in **Weber, supra**, applies to disputes arising, as this one does, under collective agreements governed by the **Trade Union Act**: **Nova Scotia Union of Public Employees, Local 2 v. Halifax Regional School Board** (1998), 171 N.S.R. (2d) 373; N.S.J. No. 434 (Q.L.)(C.A.).

[23] Section 42(1) of the **Trade Union Act** requires a collective agreement to provide for the arbitration of all differences between the parties concerning the interpretation, application, administration or violation of the collective agreement. If a collective agreement fails to do so, it is "deemed" to include the arbitration provision in s. 42(2) of the **Act**. Section 42(3) then requires the employer, the union, and bargaining unit employees to comply with the dispute resolution scheme in the collective agreement, or, if applicable, the deemed provision. These sections of the **Act** state as follows:

> 42 (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.

> (2) Where a collective agreement does not contain a provision as required by this Section, it shall be deemed to contain the following provision:
>
> > Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration. If the parties fail to agree upon an arbitrator, the appointment shall be made by the Minister of Labour for Nova Scotia upon the request of either party. The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it.
>
> (3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement.

See: **Halifax (City) v. International Assn. of Firefighters, Local 269** (1982), 50 N.S.R. (2d) 299; N.S.J. No. 306 (Q.L.)(C.A.), at paras. 16 - 20.

[24] The collective agreement between the respondent and the local union provides for a grievance process culminating in final and binding arbitration to resolve differences between the parties relating to the interpretation, application or administration of this agreement: Articles 8.01, 8.02, 8.07. It also provides for policy grievances, affording both the union and the company the right to initiate grievances of a general nature. The collective agreement also addresses occupational health and safety matters (Article 12) and incorporates a number of rights and obligations under the **Occupational Health and Safety Act**, S.N.S. 1996, c. 7.

[25] The question here is not whether these mechanisms are exclusive in relation to disputes falling within their terms. There is no question that they are. Rather, the question is whether the claims made by the respondent in its court action are such disputes.

(b) The nature of the respondent's claims:

[26] The respondent's claims relate to its operation of a steel fabrication plant in Amherst, Nova Scotia. After acquiring the plant, the respondent entered into a collective agreement with the local union. There followed a period of highly rancorous labour relations until the plant was closed in 2002. That year, the respondent sued the Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province, the United Steel Workers of America and Local 4122. (I will refer to the two unions collectively as "the unions" and to them individually as "the international union" and the "local union" respectively.) In brief, the respondent alleges conspiracy, negligence, intentional interference with its economic interests and abuse of public authority. It makes two main sets of factual allegations against the unions.

[27] The first is concerned with the local union's use of the grievance procedure under the collective agreement. The respondent says that the local union filed grievances which were not intended to resolve disputes arising under the collective agreement but rather to harass and cause harm to its business interests. This, it is alleged, was the result of a conspiracy between the unions to injure by increasing the administrative burden and expense of operating the plant or alternatively was the result of their negligence.

[28] The second set of allegations relates to the way in which occupational health and safety issues were addressed by the unions and the Province. It is alleged that the unions complained about occupational health and safety matters directly to the Province rather than raising them with the employer and that various compliance orders were issued by the Province as a result of agreements reached between the Province and either or both of the unions. The respondent says that the Province acted with malice, harassed it and treated it with unusual harshness and that this was the result of a conspiracy involving the Province and the unions.

[29] Relying on both sets of factual allegations, the respondent pleads that the unions committed the tort of intentional interference with its economic interests.

2. The essential character of the dispute:

(a) The judge's decision:

[30] The judge found that the collective agreement does not address the substance of the dispute set out in the respondent's court action. The respondent's

allegations, he found, "... do not deal with the interpretation, application or alleged violation of a provision of the collective agreement, but rather a repudiation of the collective agreement by using the process established by the collective agreement for a purpose for which it was not designed to injure ... [the respondent]. The dispute involves alleged subversion of the relationship between the parties.": See **Cherubini** at para 20, (emphasis in original).

[31] Respectfully, the judge's reasons support exactly the opposite of the conclusion he reached. The judge rightly observed that this dispute concerns the alleged violation and abuse of the provisions of the collective agreement. It could not more clearly, in my respectful view, "arise under the collective agreement" as that phrase is understood in **Weber**. It is the alleged abuse of and failure to adhere to the agreement's provisions which form the basis of the respondent's complaints against the unions. Put more broadly, the respondent's court action is all about the operation of the collective agreement between it and the local union. In essence, this is a claim against a trade union by an employer seeking vindication of the employer's rights under the collective agreement between them.

(b) The allegations relating to abuse of the grievance procedure:

[32] I turn first to the alleged abuse of the grievance procedure. The grievance procedure itself is, of course, explicitly provided for in the collective agreement and is mandated by the **Trade Union Act**. Abuse of that process – that is, failing to use it for the purposes for which it was created – implicitly arises from the same sources. An abuse of the process established by the agreement and the statute can have no other foundation. The respondent had the right under Article 7.06 of the collective agreement to initiate grievances of a general nature and if not resolved, to pursue them to arbitration: Article 8.01.

[33] The appellants submit that abuse of the grievance procedure would be grievable on the basis that such conduct would be in violation of an implied duty of good faith. However, in my view, it is not necessary in this case to rely on the existence of a general, implied duty of good faith. What is in issue here is something much narrower and much more firmly rooted in the scheme of dispute resolution mandated by the collective agreement and the legislative scheme. An arbitrator has broad jurisdiction to give final and binding decisions about grievances. The arbitrator, therefore, cannot be powerless to prevent abuse of the grievance process itself. The authority of arbitrators to remedy such abuse has

been recognized as an essential aspect of their responsibility to reach final and binding settlements of disputes.

[34] For example, in **Re International Nickel Co. of Canada Ltd. and United Steelworkers, Local 6500** (1979), 23 L.A.C. (2d) 424 Arbitrator Shime noted abuse of the grievance process is expensive for both the employer and the union and harmful to the grievance procedure as a whole. Arbitrators, he reasoned, must have the authority to fashion a remedy that will prevent such abuse. See also, for example, **Re Amalgamated Clothing Workers of America and Polax Tailoring Ltd**. (1972), 24 L.A.C. 201 (Arthurs); **Re Samuel Cooper & Co. Ltd. and International Ladies' Garment Workers' Union et al.**,[1973] 2 O.R. 841 (Div. Ct.). As the Divisional Court put it in **Samuel Cooper**, arbitrators have the responsibility under the legislation and the collective agreement to bring about final and binding settlement of all differences arising out of the collective agreement and they must, therefore, have the necessary powers to achieve that result.

(c) Allegations relating to occupational health and safety matters:

[35] Turning to the claims based on the alleged failure to adhere to the occupational and safety processes, they too, in their essential character, arise out of the collective agreement. I agree with the appellants' submission that Article 12 of the collective agreement expressly addresses the conduct at the heart of this dispute. At the root of the respondent's claims is the allegation that the unions did not adhere to the processes spelled out in the collective agreement for dealing with occupational health and safety issues. Those claims, in their essential character, relate to the interpretation and alleged violation of these provisions.

[36] Article 12.02 incorporates any rights and obligations that the respondent, the local union and the employees have under the **Occupational Health and Safety Act**. These rights and obligations include the Internal Responsibility System in s. 2 of the **Occupational Health and Safety Act**, which is pleaded by the respondent in its Second Amended Statement of Claim and repeatedly referred to in the respondent's characterization of the health and safety dispute in other contexts.

[37] Article 12.03 acknowledges that the respondent could discipline employees for breaches of the **Occupational Health and Safety Act** and its safety policies.

Those policies require employees to co-operate in all aspects of health and safety and to raise any concerns about health and safety with the respondent. Articles 12.05, 12.06 and 12.08 of the collective agreement establish a Joint Occupational Safety and Health (JOSH) Committee, which is given responsibility for the promotion of safety at the plant, including the review of all accidents and injuries and the recommendation of corrective action.

[38] In summary, the collective agreement requires the local union to co-operate fully in workplace occupational health and safety matters. Employees represented by the local union must co-operate with the employer and the JOSH Committee with respect to health and safety in the workplace, and are required to report any health and safety concerns to a supervisor. The collective agreement also acknowledges the employer's right to discipline employees for failure to follow the company's safety policies, which also include obligations on the part of employees to co-operate with the employer in health and safety matters and to report any concerns to the employer.

[39] Respectfully, I do not see how the respondent's claims against the unions relating to occupational health and safety matters could more clearly arise out of the collective agreement.

(d) The policy rationale for exclusive jurisdiction:

[40] As noted in **Weber** and many other cases, there is a critical policy choice reflected in the decision to give grievance arbitrators exclusive jurisdiction over disputes which in their essential character arise from collective agreements. Defining the essential character of the dispute identifies the sorts of dispute which ought to stay within the grievance and arbitration process so that its purposes are fulfilled and not thwarted. Thus, the characterization of the essential character of the dispute must be consistent with that underlying policy rationale.

[41] Collective agreement grievance arbitration is at the centre of an "...all-embracing legislative program for the establishment and furtherance of labour relations in the interest of the community at large...": **St. Anne, supra**, at p. 718. Labour relations legislation "... provides a code governing all aspects of labour relations...": **St. Anne** at pp. 718 - 719. A significant objective of this comprehensive scheme is to minimize, if not eliminate entirely, the involvement of the courts as first instance decision-makers with respect to workplace disputes.

"[I]t would offend the legislative scheme to permit the parties to a collective agreement ... to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.": **St. Anne** at pp. 718 - 719. McLachlin, J. (as she then was) in **Weber** underlined this point at para. 46 when she noted that permitting concurrent court actions whenever it can be said that the cause of action stands independent of the collective agreement undermines the goal of collective bargaining labour relations of resolving disputes quickly and economically with a minimum of disruption to the parties and the economy.

[42] Tested against this underlying policy, the result in this case is clear. The respondent's claims, in essence, seek to hold the unions accountable in court for the way the local union has allegedly abused and violated the collective agreement. To address these claims, the court would have to interpret the collective agreement, assess the merits of a myriad of grievances and make findings about the motivations of the parties in their labour relationship. This judicial intrusion into the heart of the administration of the collective agreement would occur in the guise of determining liability for torts. But these torts have no foundation apart from the provisions of the collective agreement itself. This is precisely the sort of judicial intervention deep into the day to day administration of collective agreements which the **Trade Union Act**, the collective agreement and **Weber** seek to prevent.

(e) Summary:

[43] To sum up, the dispute which is the subject of the respondent's court action, in its essential character, arises from the alleged abuse of some provisions in the collective agreement and alleged failure to abide by others. At the root of all of the respondent's allegations are two complaints, both of which concern the interpretation, application and administration of the collective agreement. The first of the two complaints is concerned with alleged union abuse of the grievance process itself, a process which is entirely a product of the **Trade Union Act** and the collective agreement. Whether the grievance process was being abused is a question concerning the interpretation, application and administration of the agreement. The second complaint is the alleged failure to abide by the letter and spirit of the occupational health and safety scheme. Those matters, too, are expressly provided for in the collective agreement. Disputes about how those

provisions should be interpreted and applied similarly raise matters about the interpretation, application and administration of the collective agreement.

(f) Arbitral jurisdiction over the parties:

[44] As noted, the chambers judge found that an arbitrator acting under the collective agreement would not have jurisdiction over all the parties the respondent has sued. Citing the decision of the Supreme Court of Canada in **Morin**, the judge found that this absence of jurisdiction over some of the parties to the dispute supported his conclusion that an arbitrator did not have exclusive jurisdiction over it.

[45] Respectfully, the judge erred in two respects in reaching this conclusion. First, he focused his attention on the causes of action and parties in the respondent's court action – in other words, the legal characterization which the respondent has given the dispute – rather than on its essential character. Second, he erred in relying on the **Morin** case for the proposition that a matter may proceed in the courts if an arbitrator lacks jurisdiction over some of the parties who are sued.

[46] In my view, the fact that a court action is brought by or against non-parties to the collective agreement may be relevant to the **Weber** analysis in two ways. First, the identity of the parties to the dispute and the capacity in which they are involved is part of the "factual matrix" which must be examined in assessing whether the dispute, in its essential character, arises out of the collective agreement. I will deal with this aspect in this section of my reasons. Second, the parties against whom relief is sought may be a factor in determining whether the collective agreement provides effective redress – in other words, a solution to the problem.

(i) Identity of the parties and the dispute's essential character:

[47] Who the parties are and their relationships to the collective agreement are relevant considerations in determining the essential character of the dispute. However, it is the essential character of the dispute, not the identity of the parties who are being sued that remains the central consideration. This principle is in my view correctly stated in George W. Adams, **Canadian Labour Law**, 2nd ed.

(Toronto: The Cartwright Group, 2006) at 12.572c: "[b]ringing an action against someone who is not a party to the collective agreement does not give a court jurisdiction if the essential character of the dispute at hand still arises under the collective agreement."

[48] By way of example, the exclusive jurisdiction principle has been applied to preclude actions brought by an employee against a fellow employee or manager who was not covered by the collective agreement. As was said by the Ontario Court of Appeal in **Piko v. Hudson's Bay Co.** (1999), 41 O.R. (3d) 729 at p. 734:" bringing an action against a person who is not a party to the collective agreement will not give a court jurisdiction if the dispute, 'in its essential character', still arises under the collective agreement."

[49] The approach outlined in Adams' text and in **Piko** has been stated and applied by the courts in many cases. These cases hold that, regardless of how an action is legally framed, and regardless of the identity of the named defendants and their relationship to the collective agreement, the courts are without jurisdiction over a dispute where, in its essential character, it arises from the interpretation, application, administration or alleged violation of a collective agreement. To take any other approach would be to focus on the legal characterization which a plaintiff may impose on the facts and would permit creative plaintiffs to undercut the statutory scheme of mandatory exclusive arbitration. See: **Giorno v. Pappas** (1999), 170 D.L.R. (4th) 160; O.J. No. 168 (Q.L.)(Ont. C.A.); **Ruscetta v. Graham**, [1997] O.J. No. 2786 (Q.L.)(Gen.Div.), aff'd [1998] O.J. No. 1198 (Q.L.)(C.A.), leave to appeal dismissed [1998] S.C.C.A. 220; **Jadwani v. Canada (Attorney General)** (2001), 52 O.R. (3d) 660 (C.A.)**; Dwyer v. Canada Post Corp.**, [1995] O.J. No. 3265 (Q.L.)(Gen.Div.), aff'd [1997] O.J. No. 1575 (Q.L.)(C.A.); **Phillips v. Harrison** (2000), 196 D.L.R. (4th) 69; M.J. No. 606 (Q.L.) (C.A.); **Haight-Smith v. Neden** (2002), 211 D.L.R. (4th) 370; B.C.J. No. 375 (Q.L.)(C.A.), application for leave dismissed [2002] S.C.C.A. No. 176; **Ferreira v. Richmond (City)**, [2007] B.C.J. No. 373 (Q.L.)(C.A.); **Severance v. Oliver**, [2007] P.E.I.J. No.4 (Q.L.)(A.D.) at paras. 79 - 81; **Caressant Care Nursing and Retirement Homes Ltd. v. Priest**, [1999] O.J. No. 4744 (Q.L.)(Sup. Ct.); **McConnell v. Altenburg**, [2001] O.J. No. 4668 (Q.L.)(Sup. Ct.); **Brunet v. Ottawa Police Assn.**, [2004] O.J. No. 2185 (Q.L.)(Sup. Ct.); **Lee v. General Motors Co. of Canada**, [2003] O.J. No. 5822 (Q.L.)(Sup. Ct.); **Soulos v. Leitch,** [2005] O.J. No. 1654 (Q.L.)(Sup. Ct.); **Westmoreland v. Gorman,** [2003] B.C.J.

No. 721 (Q.L.)(S.C.); **LaMoine v. Great West Wife Assurance Co.**, [2002] B.C.J. No. 710 (Q.L.) (S.C.); **Ram v. Prasad**, [1996] B.C.J. No. 1672 (Q.L.) (S.C); **Haynes v. British Columbia Teachers' Federation**, [2005] B.C.J. No. 935 (Q.L.) (S.C.); **Ancheta v. Joe**, [2003] B.C.J. No. 112.(Q.L.)(S.C.).

[50] Even when courts have found that the essential character of the dispute did not arise out of the collective agreement, the identity of the parties was considered relevant, but not the single, decisive factor. For example, in **Bennett v. British Columbia**, [2007] B.C.J. No. 4 (Q.L.)(C.A.), the post-retirement benefits in issue in the action were not provided for in any collective agreement. The fact that the retired employees were not parties to the collective agreement reinforced the court's conclusion that the essential character of the dispute did not arise from the collective agreement: at paras. 47 - 48. See also, **Bohemier v. Centra Gas Manitoba Inc.** (1999), 170 D.L.R. (4th) 310 (Man. C.A.) at para. 33; application for leave to appeal dismissed [1999] S.C.C.A. No. 185.

[51] The respondent has sued the Province and the international union in addition to the local union. The judge seemed to have focused on the inclusion of the Province, noting that "... the arbitrator does not have jurisdiction over the Attorney General of Nova Scotia."(decision, para. 21).

[52] Respectfully, the suit against the Province is not relevant to this analysis. There is no suggestion that the claim against the Province is not within the jurisdiction of the Court. The action against the Province can continue regardless of the outcome of the unions' summary judgment application. Only the unions have alleged that the claims against them fall within the exclusive jurisdiction of an arbitrator. The local union is, of course, a party to the collective agreement. The question becomes, therefore, whether the claims against the international union are such that the essential character of the dispute between the respondent and the unions cannot be said to arise out of the collective agreement. The respondent submits that this is the case.

[53] In my view, the fact that the respondent has sued the international as well as the local union does not change the essential character of the dispute. The allegations against both unions arise out of the collective agreement, there are no distinctive allegations against the international union that do not arise out of the

collective agreement and the relationship between the international union and the local and its members does not justify any other conclusion.

[54] As discussed earlier, the unions' alleged abuse of the grievance process, conspiracy to abuse it, failure to adhere to the occupational health and safety provisions, conspiring to do so or doing so for the purpose of injuring all depend on the collective agreement provisions governing grievances and occupational health and safety. Thus, the allegations against both unions are based firmly in the collective agreement. There are no distinctive allegations against the international union that are not based on the collective agreement. The local union is a chartered local of the international union. The respondent's unionized employees were members of the international union. The international union has defined roles under the collective agreement. For example, under Article 7.06, a staff representative from the international union may be present for discussion of policy grievances and Article 16.01 contemplates representatives of the international union having access to the plant for the purposes of speaking to local union representatives about a grievance or other official union business. The two unions are, for practical purposes, one entity and the respondent's claims against them are identical.

[55] The addition of claims against the international union does not alter the essential character of the dispute as one arising from the collective agreement. Respectfully, the judge erred in finding otherwise.

*(ii) The judge's reliance on the **Morin** decision*:

[56] The judge relied on the Supreme Court's decision in **Morin** for the proposition that the dispute could not be within the exclusive jurisdiction of an arbitrator because an arbitrator would not have jurisdiction over the parties to it. In my respectful view, **Morin** is not authority for that proposition.

[57] In **Morin**, the majority concluded that the dispute fell within the concurrent jurisdiction of two different administrative tribunals: a labour arbitrator and a human rights tribunal. The question in issue, therefore, was not which tribunal had jurisdiction – they both did – but rather which of the two ought to be preferred to deal with the matter. The applicable legislation gave the human rights tribunal the discretion to refuse to act in certain circumstances. The argument was that although it had concurrent authority, it ought, in its discretion, to defer to the

collective agreement arbitration process. Answering that question requires weighing of prudential considerations about the suitability of the respective tribunals to deal with the dispute.

[58] By reviewing these prudential considerations, the Court in **Morin** concluded that the human rights tribunal was better suited than a labour arbitrator to deal with the dispute. Four reasons led to this result: the nature of the question did not lend itself to being characterized as a grievance; the unions were opposed in interest to the complainants; the arbitrator would not have jurisdiction over the parties and the human rights tribunal was a "better fit" for the dispute because it affected hundreds of teachers. Thus, the identity of the parties was simply one of four prudential considerations taken into account in deciding that the human rights tribunal ought to proceed with the matter.

[59] Underpinning this result was the finding that the essential character of the dispute was more concerned with pre-contractual negotiation of the collective agreement than with its operation. As the Chief Justice said at para. 25, "... the dispute, viewed not formalistically but in its essential nature, engages matters which pertain more to alleged discrimination in the formation and validity of the agreement, than to its "interpretation or application", which is the source of the arbitrator's jurisdiction under the *Labour Code*, s 1(f). **The Human Rights Commission and the Human Rights Tribunal were created by the legislature to resolve precisely these sorts of issues**." (Emphasis added)

[60] **Morin** is thus very different from our case in at least two respects.

[61] First, **Morin** was a case of concurrent jurisdiction between two administrative tribunals and the question was which ought to defer to the other. This turned on prudential considerations concerned with which was better suited to deal with the dispute. The issue of the identity of the parties was simply one of several such considerations that led to the result reached in that case. In our case, unlike **Morin**, the question is not which of two different tribunals that have concurrent jurisdiction ought to hear the dispute, but whether the dispute is within the exclusive jurisdiction of an arbitrator and may not be addressed by the courts. The question is not whether the dispute would be better handled by the courts, but whether, given its essential character and the ambit of the grievance and arbitration scheme, it lies within the exclusive jurisdiction of that scheme.

[62] Second, in **Morin**, the key actors in the underlying dispute were not parties to the collective agreement in issue before the human rights tribunal. The local union and the school board had not been involved in negotiating or agreeing to the allegedly discriminatory clause in the collective agreement. That is not at all the situation in the case before us. Here, the local union is a central player in the dispute raised by the respondent. Both are parties to the collective agreement and within the jurisdiction of an arbitrator.

[63] I conclude, respectfully, that the judge erred in relying on **Morin** to support his conclusion.

(iii) Conclusion respecting identity of parties:

[64] For all of these reasons, I conclude that the judge erred in finding that the arbitrator lacked exclusive jurisdiction over the claims against the unions on the basis that not all of the parties to the civil action were also parties to the collective agreement.

3. Effective redress:

[65] The judge found that the grievance process could not provide the respondent with an effective remedy for its complaints. In his view, the time limits in the grievance process effectively barred the sort of complaints which the respondent wanted to assert. The judge's concerns about jurisdiction over the parties is also relevant to whether the grievance process affords effective redress.

[66] In my respectful view, the judge erred in finding that the grievance and arbitration process could not afford the respondent effective redress. The time limits in the collective agreement did not effectively bar the respondent's claims and the grievance process against the local union afforded the respondent a real remedy.

[67] I will first describe how the availability of effective redress is relevant to the question of the court's jurisdiction and then turn to the specific questions about the time limits and the parties.

(a) Effective redress - general principles:

[68] Courts may in exceptional cases take jurisdiction even in cases in which a labour arbitrator otherwise has exclusive jurisdiction: the courts retain residual authority to provide remedies which the arbitrator is not empowered to grant. This extraordinary and discretionary power allows the courts to prevent a "real deprivation of ultimate remedy.": **Weber** at paras. 54 -57 citing **St. Anne** at p. 723. As was said in **Canadian Pacific Limited v. Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation**, [1996] 2 S.C.R. 495 at para. 5, courts have a residual, discretionary authority, even where there is a comprehensive code for settling labour disputes, to grant relief not available under it.

[69] This residual, discretionary power is not to be invoked simply because the rights and remedies in the grievance arbitration process do not mirror judicial remedies. The relevant consideration is not whether the scheme provides the same rights and remedies as would a court, but whether the court's failure to intervene would result in a "real deprivation of ultimate remedy.": **Weber**, at para. 57. In short, what is important is that the scheme provide an answer to the problem: **Vaughan** at para. 36; **Phillips v. Harrison** at para. 80.

[70] Consideration of this issue must take account of the Supreme Court's expansive view of arbitral authority. As the Court noted in **Bisaillon v. Concordia University**, [2006] 1 S.C.R. 666, "[g]rievance arbitrators have very broad powers, both explicit and implicit" whereas the exercise of residual court jurisdiction is "exceptional": see paras. 42 and 55.

[71] For example, **Weber** confirmed that arbitrators have the power and the duty to apply common law and statutes and to grant **Charter** remedies where the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed: at pp. 958, 963. In **New Brunswick v. O'Leary**, [1995] 2 S.C.R. 967, the Court found that the employer could obtain redress through the grievance process against an employee who had allegedly damaged its property as a result of negligence. The Court reasoned that employees were bound under the collective agreement to ensure the safety and dependability of the employer's property and equipment. This impliedly gave the employer the right to claim and the arbitrator the authority to award a financial penalty against the employee for breach of this obligation. Arbitrators have the authority to award damages and, as mentioned

earlier, to fashion remedies to correct and to prevent abuse of the collective agreement.

[72] Thus, where a dispute otherwise falls within the exclusive jurisdiction of arbitrators, their remedial powers will be interpreted broadly and courts should intervene to provide additional remedies only in exceptional cases to prevent a real deprivation of an ultimate remedy.

[73] The judge's concern in this case was not that an arbitrator would be unable to provide a remedy in damages or would lack the remedial authority to correct and remedy abuse of the collective agreement. Rather, the judge was concerned about what he saw as two particular limitations on an arbitrator's authority: first, that the time limits in the collective agreement would prevent arbitral intervention and second, that an arbitrator would lack jurisdiction over the parties.

(b) The time limits in the collective agreement:

[74] Did time limits prevent the respondent from getting effective redress through the grievance process? The judge held that they did. I respectfully disagree.

[75] The collective agreement provides in Article 7.06 that a policy grievance must be filed within five working days of the initial occurrence of the event giving rise to the grievance. The judge thought that this time limit effectively precluded the respondent from advancing its claims through the grievance process. However, in my view, an arbitrator would not be powerless to address the merits of the respondent's claims even in the face of this time limit. At least two tools could be available to allow the arbitrator to provide redress.

[76] First, an arbitrator might find that the time limits effectively precluded access to the grievance process for a whole class of disputes. That sort of preclusion would be inconsistent with the **Trade Union Act.** Section 42 of the **Trade Union Act**, as noted, requires that collective agreements contain provisions for final and binding settlement of all differences arising under the collective agreement. If a provision in a collective agreement bars access to the grievance procedure for certain types of disputes, it may be held to be void to that extent: **Halifax (City) v. International Assn. of Firefighters, Local 269**, **supra** at para. 29.

[77] The respondent takes the position that this is the effect of the time limits in this case. In its submissions, the respondent says that "... grievances relating to the causes of action set out in the Statement of Claim could not have been brought before an arbitrator within the governing time lines" and that "the causes of action herein were not capable of accruing with the governing time frames." (respondent's factum, paras. 177 and 179) If this is the case, it supports the view that the time limit excludes this particular class of grievances and therefore could be found to be void to that extent by virtue of s. 42 of the **Trade Union Act**.

[78] Second, an arbitrator might apply the discoverability principle to the interpretation of the phrase "the initial occurrence of the event giving rise to the grievance" as contained in the time limit provision: see, for example, **Canadian Union of Public Employees, Local 2330 v. Riverton Guest Home Corporation (Valley View Villa)**, (N.S., Outhouse, January 27, 2005). This approach is based on a common sense interpretation of the time limit: the parties could not have intended to bar a grievance when the aggrieved party was not aware of the facts giving rise to it. This is an interpretation of the time limit, not a modification of it and therefore would not likely be found to run afoul of the prohibition of the latter in Article 8.06.

[79] I conclude that the time limits did not preclude the respondent from acting with diligence to obtain effective redress through the grievance procedure.

(c) Effective redress and identity of the parties:

[80] An arbitrator would not have jurisdiction over the international union and the Province, which the respondent has sued. Does this prevent an arbitrator from providing effective redress?

[81] The arbitrator's lack of jurisdiction over the Province is irrelevant to the question of effective redress. The Province has not suggested that the respondent's action against it is barred by the collective agreement and that aspect of the respondent's action may continue whatever the result of the unions' summary judgment application. There is, in this proceeding, no live issue as to the availability of effective redress against the Attorney General.

[82] The question boils down to whether the arbitrator's lack of jurisdiction over the international union would have prevented the respondent from obtaining

effective redress through the grievance and arbitration process. In my view, it would not.

[83] The core of the respondent's problem is alleged abuse of the grievance and occupational health and safety provisions in the collective agreement. The local union, which of course is a party to the collective agreement, is alleged to have been a key player in these misdeeds. The grievance arbitration process could have provided a solution to that problem.

[84] **Giorno** provides an example of how there may be effective redress in the grievance process even though it would not provide a remedy against all of the parties sued in the court action. Goudge, J.A., for the Court, said at para. 28 "Where ... the essential character of the dispute is covered by the collective agreement, the arbitration process allows the employee to seek an appropriate remedy. **While the remedy at arbitration may be against the employer rather than the fellow employee, the remedy is nonetheless real**." (Emphasis added)

[85] A grievance against the local union could have provided a real remedy in this case.

4. Conclusion:

[86] For all of these reasons, I conclude that the essential character of the respondent's claims against the unions arise out of the collective agreement, that this is not altered by the fact that the respondent has sued the Province and the international union which are not parties to that agreement and that the grievance process could have afforded effective redress. The complaints made by the respondent in its court action against the unions therefore fall within the exclusive jurisdiction of an arbitrator under the collective agreement. The Supreme Court has no jurisdiction to entertain the action. In light of that conclusion, it is not necessary to address any of the other grounds on which the appellants sought summary judgment.

IV. DISPOSITION:

[87] I would grant leave to appeal, allow the appeal, dismiss the notice of contention, set aside the order of the chambers judge and dismiss the respondent's action against the unions. The appellants should have their costs, in the amount of

$6,000 as fixed by the chambers judge and any costs paid by the appellants under the judge's order should be refunded. The appellants should also have their costs of the appeal, fixed at $3000 plus disbursements.

Cromwell, J.A.

Concurred in:

Roscoe, J.A.

Oland, J.A.