Date: 19990716

Docket: CA152113
and CA152110

NOVA SCOTIA COURT OF APPEAL

Cite as: Nova Scotia (Labour Relations Board) v. Future Inns Canada Inc., 1999 NSCA 94

Freeman, Hallett and Pugsley, JJ.A.

BETWEEN:

LABOUR RELATIONS BOARD (NOVA SCOTIA), PETER DARBY, BRUCE ARCHIBALD, LEO MacKAY, SANDRA WHITEHEAD, PAULA WEDGE and DIRKJE JOHNSON Appellants - and - FUTURE INNS CANADA INC. Respondent -and- N.S. FEDERATION OF LABOUR Intervenor	)	Catherine J. Lunn for the Appellant Board S. Bruce Outhouse, Q.C. for the Appellants Darby, Archibald, MacKay,Whitehead, Wedge and Johnson . Blair H. Mitchell and Ian Blue, Q.C for the Respondent Raymond Larkin for the Intervenor Appeal Heard: June 1, 1999 Judgment Delivered: July 16, 1999

THE COURT: The appeal is allowed, in part, per reasons for judgement of Pugsley, J.A., Hallett and Freeman, JJ.A., concurring.

Pugsley, J.A.:

[1] The narrow issue in this appeal is whether the Chambers judge applied a wrong principle of law in refusing to strike out the respondent's statement of claim pursuant to a motion brought under **Civil Procedure Rule 14.25**. The broader issue involves a consideration of the immunity of the Labour Relations Board, and its members, from actions based on their alleged malice and bad faith.

Background

[2] The appellant, Labour Relations Board (Nova Scotia), is a statutory board, (the Board) established pursuant to the **Trade Union Act**, R.S.N.S. 1989 c.475, as amended (the **Act**).

[3] At all relevant times:

- The appellant, Peter Darby (Darby) was the chairman of the Board;
- The appellants, Bruce Archibald, Leo MacKay, Sandra Whitehead, Paula Wedge, and Dirkje Johnson, (the individual appellants) were members of the Board;
- the respondent, Future Inns Canada Inc. (Future Inns) operated a hotel in Dartmouth.

[4] The intervenor, the Nova Scotia Federation of Labour, is a federation of affiliated trade unions representing most of the organized employees in Nova Scotia, including

unions certified to represent employees under the **Act**, and was granted leave to intervene in this proceeding pursuant to **C.P.R. 62.35**.

[5] In or about the year 1982, the Board made a finding of unfair labour practices against an employer, Brett Motors Limited (Brett). Bruce Brett, an officer and manager of Brett at the time, is presently a principal of Future Inns.

[6] In February of 1995, five former employees of Future Inns brought complaints of unfair labour practices against Future Inns with the Board.

[7] The complaints were heard by the Board on April 26, June 27 and 28, 1995. The individual appellants were members of the panel who considered the complaints. The decision rendered by the Board, order L.R.B. 4267, dated July 19, 1995, determined that acts of unfair labour practice had been committed, and ordered Future Inns to reinstate the five employees to their former positions and to compensate them for lost wages.

[8] By further order, dated October 16, 1995, (L.R.B. 4284) the Board fixed the amount of compensation to be paid to each of the five employees. The members of the Board who participated in that decision were three of the individual appellants, namely Archibald, MacKay and Johnson.

[9] The Board subsequently declined to grant leave sought by Future Inns for reconsideration of the orders.

[10] Future Inns then brought an application for certiorari to the Supreme Court to quash the Board orders and its decision to refuse leave to apply for reconsideration.

[11] The certiorari application was dismissed on all grounds.

[12] In February, and April, 1996, certain comments made by chairman Darby, to newspaper reporters respecting the actions and motives of Future Inns and Mr. Brett, were reported in two Halifax newspapers.

[13] Future Inns appealed the Supreme Court decision to this Court. By decision dated February 26, 1997, the appeal was granted, quashing the decision of the Board for failure to give reasons. The matter was remitted back to the Board for rehearing before a differently constituted panel of the Board.

[14] In September, 1997, an application for leave to appeal to the Supreme Court of Canada from the decision of this Court was dismissed.

[15] The Board set dates for rehearing the unfair labour practice complaints. Future Inns objected, alleging bias on the part of the Board, and made an application to the Supreme Court for an order in the nature of prohibition to prevent the Board from entering upon the rehearing.

[16] The rehearing of the complaints was scheduled to begin on May 29, 1998. On May 13, 1998, the Board was advised that the parties had reached an agreement on procedure which would likely result in final settlement of the matter and requested the rehearing be adjourned without day. The request was granted and the Board has had no further involvement with the matter.

[17] Future Inns' application for an order in the nature of prohibition was also adjourned without day.

[18] On July 31, 1998, Future Inns commenced the present action in the Supreme Court, alleging that chairman Darby, when he made comments to the press in the spring of 1996, and the individual appellants, by discussing amongst themselves the alleged anti-union animus of Mr. Brett at the time of the 1995 hearings, were not impartial and acted with malice and bad faith in discharging their statutory responsibility. It was also alleged that the Board acted with malice and bad faith when it dismissed Future Inns' submissions of apprehension of bias respecting the Board's proposed rehearing of the unfair labour practice complaints in 1998.

[19] Without filing a defence, the appellants then applied on August 14, 1998, under **Rule 14.25** to strike out the statement of claim.

[20] By oral decision, delivered on November 16, 1998, Justice Tidman, of the Supreme Court, dismissed the application to strike.

[21] It is from this interlocutory decision that the Board, chairman Darby, and the individual appellants now appeal.

The Allegations in the Statement of Claim

[22] The relevant portions of the statement of claim for our purposes include the following:

> 4. The defendants at all material times were persons purporting to discharge responsibilities of a judicial nature vested in them under the *Trade Union Act*. ...
>
> . . .
>
> 6. On or about the 13th day of April, 1982, the Board, with the defendant Darby in the chair, considered complaints against Brett Motors Limited filed by the Canadian Brotherhood of Railway Transport and General Workers, Local 503. The Board's Order of November 26, 1982, stated as follows:
>
> > Unfortunately, testimony elicited in respect an immediate reapplication for Revocation, made it abundantly clear that Mr. Bruce Brett, President and General Manager of the Employer, and avowedly anti-union, had probably instigated the first Application and certainly had arranged it for the second . . .
> >
> > One must not forget the admitted anti-union animus of Mr. Brett which a number of employees admitted having heard him express.
>
> . . .
>
> 10. The plaintiff says that before, during, or following the hearing held on April 26, June 27, and June 28, and before making Order L.R.B. 4267 and Order L.R.B. 4284, the defendants or one or more of them discussed the fact that Mr. Bruce Brett, referred to in paragraph 6, was a principal of the plaintiff and the allegation that he was anti-union, a fact and an allegation that were not in evidence and were therefore irrelevant and extraneous to considering whether the evidence supported a finding of unfair labour practices. The defendants, by doing so, acted maliciously against the plaintiff and thereby discharged their statutory responsibility in bad faith.
>
> 11. The Plaintiff further states that consideration of the fact that Bruce Brett was a principal of the plaintiff and allegedly had an anti-union attitude (and the consequent malice and bad faith referred to in the preceding paragraph) was present in the mind of the defendant Darby when he made the comments referred to in paragraphs 15, 17 and 18 below and were present because he remembered his comments in the Board's November 26, 1982 decision referred to in paragraph 6 above.
>
> . . .
>
> 15. On Sunday, February 18, 1996, following contact with the defendant Darby, journalist Parker Barss Donham, a columnist with the *Daily News* newspaper of Dartmouth, Nova Scotia, reported in a column entitled "Help Wanted", on page 23:

> Meanwhile, Future Inns continues to defy the Board order. In a telephone interview, Labour Relations Board Chairman Peter Darby, who did not sit on the Future Inns case said, "You don't relieve yourself of the obligation to obey an order simply by filing an appeal."
>
> . . .

17. In April, 1996, the defendant Darby discussed the Future Inns case, which was then to his knowledge before the court, with John McDonell, a reporter of the *Halifax Herald Limited*. They discussed the absence from the *Trade Union Act* of any provision allowing Board orders to be made orders of the Supreme Court and enforced as such. In this context, Mr. Darby said "knowing the client, he was not "so sure" that it would have complied with such a provision, even if it had been available. The plaintiff says and the fact is that the defendant Darby's reference to "the client" was a reference to Bruce Brett and to his alleged anti-union attitude and reflected the malice and bad faith with which the Board had made the Order L.R.B. 4267 and L.R.B. 4284.

18. On April 15, 1996, in a story entitled "Burnside Inn fights rulings", journalist Chris Lambie, a reporter with the *Daily News* newspaper, reported:

> "Employers that defy labour relations board rulings are rare, says Chairman Peter Darby.
>
> 'This is an extremely unusual circumstance', said Darby who has been on the board since 1971. 'I can't recall any case where this has happened before.'
>
> Darby was reluctant to say whether he thinks the hotel has a case. 'There's a fair comfort zone given by the courts to the labour relations board when it's acting within its jurisdiction,' he said."
>
> . . .

22. On April 4, 1997, the Board scheduled a pre-hearing conference for the re-hearing ordered by the Court of Appeal. On April 19, 1997 the solicitor for the Applicant, objected to the defendant Darby, as chairman for the pre-hearing conference, on the ground that his past participation and statements gave rise to fears that he would be biased. Owing to this objection, the pre-hearing conference did not take place.

23. On May 15, 1997, the Respondents served a Notice of Application for leave to appeal from the Court of Appeal's decision of February 25, 1997. On September 25, 1997, the Supreme Court of Canada, LaForest, [Gonthier], and Major, JJ's dismissed the application for leave to appeal.

24. On February 9, 1998, counsel for the Respondents requested the Board to reschedule the re-hearing directed by the Court of Appeal.

25. On February 18, 1998, the plaintiff's solicitor responded by re-enclosing his letter of April 15, 1997, to the defendant Darby and a copy of the Board's Executive Director's letter of May 6, 1997. He stated that the facts in the letters gave the plaintiff a reasonable apprehension that any Board panel conducting the new hearing would be biased against it, by being contaminated by things the defendant Darby might have said about the plaintiff, Bruce Brett, or the plaintiff's efforts to challenge the defendant Board's decision as described in paragraphs 16, 20,21 and 23 hereof.

26. There then followed an exchange of correspondence between the plaintiff's solicitor and the Board's Executive Director in which the defendant Board attempted to argue that it was not biased and did not accept the argument of apprehension of bias while the plaintiff's solicitor pressed the plaintiff's concern about apprehension of bias.

. . .

29. The plaintiff states that the actions of the defendant Board, and of the personal defendants who participated in the decisions leading to these actions, described in paragraphs 22 and 26 to 28 above were an attempt to stonewall the plaintiff from uncovering and making public that the personal defendants had taken into consideration in making Orders L.R.B. 4267 and 4284 that Bruce R. Brett was a principal of the plaintiff and that he was alleged to have an anti-union attitude. The defendants thereby continued their malice against the plaintiff and continued to act in bad faith.

30. As a result of the malice and bad faith alleged herein and their consequences for the plaintiff, there were the following actions harmful to the plaintiff:

(a) several articles in the Halifax electronic and print media hurtful to the business image of the plaintiff;
(b) picketing of the plaintiff's hotel on Highfield Park Drive, Burnside, in the Halifax Regional Municipality;
(c) a resolution of the Nova Scotia Federation of Labour condemning the plaintiff; and
(d) a prosecution under the *Trade Union Act* by the Director of Public Prosecutions brought against the plaintiff.

These actions all stemming from the two orders, resulted in a business loss to the plaintiff of approximately $200,000.00 in 1995-1997.

. . .

32. The plaintiff says that the defendants' malicious decision reached in bad faith also entitle it to punitive damages and so claims them.
(emphasis added)

Decision of the Chambers Judge

[23] Justice Tidman said in part:

> The law is clear that a statement of claim should not be struck out unless it is plain and obvious that it discloses no reasonable cause of action. . . .
>
> ...there are some other issues now before the court that in the court's view are questions of law that should more properly have been brought before the court for determination under **C.P.R. 25**. The courts have made it clear that questions of law are not matters to be brought before the court in a Section 14.25 application. . . . I refer counsel to several cases that I believe make it clear and, notwithstanding that some of them are older cases, that question of law are not for determination in an application under **Rule 14.25**.

(Justice Tidman referred to **Curry v. Dargie** (1984), 62 N.S.R. (2d), 416; **Pigeau v. Crowell** (1988), 85 N.S.R. (2d) 431; **McCarten v. Prince Edward Island** (1990), 83 Nfld. & P.E.I.R. 159).

[24] Justice Tidman continued:

> I accept the plaintiff's submission that the statement of claim is not so vague to the extent that it obviously discloses no reasonable cause of action. I also accept the plaintiff's submission that in Canada the extent of the immunity of administrative boards and its members is as yet unclear. It appears also that the constitutional question posed by the respondents has not yet been clearly answered by the courts. The desirability of maintaining supervisory jurisdiction over administrative tribunals by superior courts also appears now to be an open question in Canadian law.
>
> The court therefore declines to strike the statement of claim under **CPR 14.25**(1)(a).
>
> Dealing with the second part of the application, in the court's view this is not a matter of multifarious proceedings, at least not to the extent of being frivolous and vexatious. All appear to the court to be sincerely designed to seek redress of alleged wrongs.
>
> Dealing with the third argument of the applicant, in the Court's view there is no abuse of process based on the principle of *res judicata*.
>
> . . .
>
> In summary, the applicants have not satisfied the Court that it is plain and obvious that the statement of claim discloses no reasonable cause of action and I would therefore dismiss the application.

[25] The appellants apply for leave to appeal, and if granted, appeal from the judgment on the grounds that Justice Tidman erred in law by not striking out the originating notice and statement of claim:

- as disclosing no reasonable cause of action;
- because the appellants are protected by the principle of judicial immunity.

Relevant Provisions of the Civil Procedure Rules

Striking out pleadings, etc.
14.25.(1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,

(a) it discloses no reasonable cause of action or defence;
(b) it is false, scandalous, frivolous or vexatious;
(c) it may prejudice, embarrass or delay the fair trial of the proceeding;
(d) it is otherwise an abuse of the process of the court;

and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

(2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a).

Preliminary determination of questions of law, etc.
25.01.(1) The court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,

(a) determine any relevant question of issue of law or fact, or both ...

Relevant Statutory Provisions

Trade Union Act

Section 16
Powers of inquiry
(7): The Board and each member thereof has the powers, privileges, and immunities of a commissioner under the *Public Inquiries Act*, including, but not so as to limit those powers, the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things which the Board deems requisite to the full investigation of any matter within its jurisdiction. (emphasis added)

. . .

Oath of Office
Section 16
(11) Each member of the Board shall, before acting as such, take and subscribe before a judge of the Supreme Court or a county court and shall file with the Minister, an oath or affirmation of office in the following form:

> I do solemnly swear (affirm) that I will faithfully, truly and impartially, to the best of my judgment, skill and ability, execute and perform the office of member of the Labour Relations Board (Nova Scotia) and will not, except in the discharge of my duties, disclose to any person any of the evidence or other matter brought before the said Board. So help me God.

[26] Public Inquiries Act, R.S.N.S. 1989, C.372, states:

Powers, privileges, immunities

> **5** The Commissioner or Commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in the Supreme Court or a judge thereof in civil cases, and the same privileges and immunities as a judge of the Supreme Court. (emphasis added)

Standard of Review

[27] All parties acknowledge that this court should not interfere with a discretionary order on an interlocutory appeal unless the Chambers judge has applied a wrong principle of law, or a patent injustice would result, adopting the principle enunciated in **Global Petroleum Corp. et al. v. CBI Industries Inc. et al.** (1997), 158 N.S.R. (2d) 201 at 202 (N.S.C.A.)).

The Test Under Rule 14.25

[28] The parties are in agreement that the test on an application under **Rule 14.25** is a stringent one. Where the application involves striking a statement of claim, the applicant must establish under **Rule 14.25(1)(a)** that it is "plain and obvious" that it discloses no reasonable cause of action (**Fraser et al. v. Westminer Canada Ltd. et al.** (1996), 155 N.S.R. (2d) 347.

[29] As put by Justice Freeman for the Court in **American Home Assurance Co. et al. v. Brett Pontiac Buick GMC Ltd. et al. (No. 2)** (1992), 116 N.S.R. (2d) 319, at p. 322:

> The appellant faces an onerous double burden in appealing from the dismissal of an application to strike out the statement of claim, a serious matter that would result in the action being decided against the respondent plaintiffs without trial. A claim will be struck out only if, on its face, it is "absolutely unsustainable" . . . or "is certain to fail because it contains a radical defect".

Analysis

Should Questions of Law Ever be Resolved under Rule 14.25?

[30] Justice Tidman stated:

> The courts have made it clear that questions of law are not matters to be brought before the court in a Section 14.25 application.

[31] He concluded that questions of law were raised before him that "more properly" should have been brought for determination under **Rule 25.** That Rule has been interpreted by this Court to require the parties to submit a question of law to the Court based upon an agreed statement of facts (**Curry v. Dargie**, **supra**; **Seacoast Towers Services Limited v. McLean** (1986) 75 N.S.R. (2d) 70).

[32] With respect, I am of the view that questions of law are appropriate for determination under **Rule 14.25**, in cases where the law is clear, and provided no further extrinsic evidence is required to resolve the issues raised.

[33] Justice Chouinard, on behalf of the majority, in **Morier v. Rivard**, [1985] 2 S.C.R. 716, a case having significant similarities to the one before us, said at p. 745:

> It is important to avoid litigation or to terminate it as quickly as possible when it cannot succeed in law. This is provided in the *Code of Civil Procedure* [i.e. Province of Quebec]. It is also the way litigation is disposed of in many other jurisdictions, by means of a motion or application to strike out the statement of claim.
>
> This is precisely what was involved in *Sirros v. Moore* [[1975] 1 Q.B. 118], where the English Court of Appeal allowed the application to strike out and Lord Denning wrote in the passage cited above:
>
> > Actions based on such allegations have been struck out and will continue to be struck out.

[34] Justice Tidman, in support of his determination that **Rule 14.25** was not available to the applicants, relied on two Nova Scotia cases (**Curry v. Dargie** (N.S.C.A.), **Pigeau v. Crowell** (N.S.S.C.) as well as a decision of the Prince Edward Island Court of Appeal, (**McCarten v. P.E.I.**).

[35] Both **Pigeau** and **McCarten** are distinguishable on their facts.

[36] In **Pigeau**, the issue was the limited immunity conferred on a magistrate pursuant to the **Justices' and Magistrates' Protection Act**, R.S.N.S., 1967 c-157. That immunity did not extent to an act "done maliciously and without reasonable and probable cause". Justice Grant concluded that the issue of whether the defendant exceeded his jurisdiction was a substantive issue to be determined by facts established at trial.

[37] In **McCarten** the issue before the Chambers judge involved arguable matters respecting the plaintiff's mobility rights, and equality rights, as guaranteed under the **Charter**. The Court of Appeal dismissed an appeal from the decision of the Chambers judge as the panel was in agreement that the defendant had not established that it was "clear beyond any doubt" that the action could not succeed.

[38] The Court in both these latter cases was not directed to the decision in **Rivard**.

[39] In **Curry v. Dargie**, Justices MacDonald and Hart filed separate opinions (both concurred in by Justice Pace) allowing the appeal.

[40] The respondent, a residential tenancy officer, employed by the Province of Nova Scotia, had sworn an information against the appellant landlord respecting certain violations of the **Residential Tenancies Act**. The charges were dismissed at trial. The appellant then brought action against the respondent, but not against the Crown, for damages for malicious prosecution. A defence was filed and discoveries were held. The application under **Rule 14.25** was not brought until nine days before trial.

[41] In the course of setting aside the order of the Chambers judge, which had granted the respondent's motion to strike the statement of claim, Justice MacDonald concluded that the appeal should be allowed on three grounds:

- the application was not made promptly, or in time; (delay in bringing the application to strike, is obviously not an issue in this case).
- the issue of whether the respondent, in laying the information, was cloaked with a Crown immunity, was unclear, in law (the foundation of Justice Hart's decision).
- Crown immunity was not a basis for striking a pleading under **Rule 14.25(1)(a).**

[42] With respect to the latter ground, Justice MacDonald said, at p. 429:

> The question whether the defendant has Crown immunity doesn't really touch the issue whether the plaintiff has a reasonable cause of action - rather, it is more akin to a statutory defence to an action. The cases say that such matters are properly

> raised by motion prior to trial to raise a point of law for argument upon agreed facts.
>
> . . .
>
> To my mind the only proper method of having the issue of Crown immunity determined in this case before trial was on a proper application under R. 25. This Rule, however, appears to be applicable only where parties agree to submit a question of law to the Court based upon an agreed statement of fact. ...

[43] In view of the uncertainty respecting the issue of whether the respondent tenancy officer was carrying out a judicial function, that mixed matter of law and fact should not have been determined on a **Rule 14.25** application. With respect, however, I would not share Justice MacDonald's conclusion that the issue of Crown immunity should never be determined on a preliminary application under that Rule. **Curry v. Dargie** was decided a year and a half before the decision in **Rivard**; consequently, Justice MacDonald's comments on that particular issue have to be considered in light of the subsequent opinion of the majority in **Rivard**.

[44] It is now helpful to review the facts in **Rivard**.

[45] Mr. Rivard, a practising lawyer for twenty years, initially commenced two actions against the Police Commission of Quebec, and Messrs. Morier and Boily, authors of a report issued by the Commission, which censured Mr. Rivard's conduct.

[46] The first action requested that the Court declare the Commissioner's report to be null and void, the second requested that the Commission and the two authors be jointly and severally ordered to pay Rivard the sum of $250,000 as exemplary damages. The two actions were then joined in one.

[47] Before filing a defence, counsel for Messrs. Morier and Boily filed a motion to dismiss Rivard's action for damages, relying on the immunity conferred by s. 22 of the **Police Act**, which vested the members of the Police Commission

> . . . with the powers and immunities of a Commissioner appointed under the Act respecting Public Inquiry Commissions.

[48] Section 16 of the **Public Inquiries Act** provided:

> The Commissioner shall have the same protection and privileges as are conferred upon judges of the superior court, for any act done or omitted in the execution of their duty.

[49] The only matter considered by the Supreme Court of Canada was the issue respecting the claim for damages.

[50] Justice Chouinard said at p. 745:

> Indeed, there is no question in the case at bar that appellants, members of the Commission de police, had the necessary jurisdiction to conduct an inquiry and to submit a report. It is possible that they exceeded their jurisdiction by doing or failing to do the acts mentioned in the statement of claim. It is possible that they contravened the rules of natural justice, that they did not inform respondent of the facts alleged against him or that they did not give him an opportunity to be heard. It is possible that they contravened the *Charter of human rights and freedoms*. All of these are allegations which may be used to support the respondent's other action to quash the report of the Commission de Police and the evidence obtained. This action continues to be before the Superior Court, and of course I shall make no ruling upon it; but in my opinion these are not allegations which may be used as the basis for an action in damages. (emphasis added)

[51] Justice Chouinard concluded that the motion to dismiss was "an appropriate proceeding", and declared it to be valid. In addition to the English practice referred to by Lord Denning in **Sirros v. Moore**, approving the employment of a similar rule, Justice

Chouinard also referred to cases arising in British Columbia, Quebec and Ontario, where the courts gave a similar approval.

[52] Since the decision in **Rivard**, the Quebec Court of Appeal upheld a decision to strike an action commenced against a presiding judge by members of the Bar who acted as defence counsel at trial (**Royer v. Mignault** (1988), 50 D.L.R. (4th) 345).The application was made under Article 165(4) of the **Quebec Code of Civil Procedure**., the same procedure successfully invoked in **Rivard**.

[53] A similar result was reached in Ontario in **Kopyto v. Ontario** [1995] O.J. No. 601 (Q.L.), where the application was brought pursuant to **Rule 11.12** of the **Ontario Rules of Practice**, a Rule almost identical to **Rule 14.25(1)**.

[54] In conclusion on this issue, with respect, I am of the opinion that questions of law may be determined under **Rule 14.25** when the law is clear, and no additional evidence is required to resolve the issues raised.

The Issue of Immunity

[55] Justice Tidman accepted the submission on behalf of Future Inns:

> ...that in Canada the extent of the immunity of administrative boards and its members is as yet unclear. It appears also that the constitutional question posed by the respondents has not yet been clearly answered by the courts.

[56] In the context of this case, where a specific statutory immunity has been conferred, in my opinion, the immunity of the Board members is clear respecting actions carried out in their capacity as Board members. The immunity is also clear respecting the actions of the Board when it acts in a Board capacity.

[57] I reach this conclusion because of the provisions of s. 16(7) of the **Act**, as well as s. 5 of the **Public Inquiries Act**. The judgment of the Supreme Court of Canada in **Rivard**, (to which Justice Tidman did not refer) is supportive of this conclusion, and is also determinative of the constitutional question.

[58] The first point to be made is that the legislation is clear and unambiguous.

[59] A guide to the construction of a statute is set out by Chief Justice Lamer (with whom Justices Sopinka, and Cory, concurred) in **R. v. Canadian Pacific Ltd.**, [1995] 2 S.C.R. 1028.

[60] The opinion of the majority of the Court was authored by Justice Gonthier. The Chief Justice agreed with that opinion, but arrived at his conclusion by a "somewhat different route". The following excerpts from the reasons of the Chief Justice were not the subject of comment by Justice Gonthier.

[61] The Chief Justice said, at p.1049:

> The starting point of the interpretive process is the plain meaning of the statute's terms. As I noted in *R. v. McIntosh*, [1995] 1 S.C.R. 686, at p. 697,

> ...where the language of the statute is plain and admits of only one meaning, the task of interpretation does not arise.

[62] These remarks were referred to, with approval, by Chief Justice Lamer and Iacobucci, J. in their dissenting opinion in **R. v. Hydro Quebec**, [1997] 3 S.C.R. 213, at 243.

[63] The Chief Justice, in **R. v. Canadian Pacific**, continued at p. 1050:

> Thus, the first task of a court construing a statutory provision is to consider the meaning of its words in the context of the statute as a whole. If the meaning of the words when they are considered in this context is clear, there is no need for further interpretation. The basis for this general rule is that when such a plain meaning can be identified this meaning can ordinarily be said to reflect the legislature's intention.

[64] I conclude that the wording of the **Act**, as well as the **Public Inquiries Act**, on this issue, is plain, admitting of only one meaning, and that when considered in the context of these statutes as a whole, the meaning of the words in the context is clear, as well.

[65] The immunity of the appellants' respecting actions carried out in their capacity as a Board, or members of the Board, is clear. The only issue is the extent of that immunity.

Immunity is not Absolute

[66] The immunity of Supreme Court judges is inherited from English law.

[67] The reason for the immunity of judges was expressed succinctly in **Garnett v. Ferrand** (1827) 6 B. & C., 611, in these words, at p. 625-6:

> This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all who are to administer justice ought to be.

[68] These comments apply with equal force to Board members.

[69] There are cogent reasons for the granting of such immunity to the Board, and its members, while performing its, or their, statutory duties.

[70] The Board was established by the Legislature to adjudicate disputes arising over the application of the **Act** to employers, employees and unions.

[71] The Board has broad powers of inquiry to determine matters respecting all aspects of labour relations in the province.

[72] The Board's decisions are protected by a privative clause.

[73] In light of the important function it performs in Nova Scotia, it is essential that the public repose confidence in the Board. That confidence could not be created, or maintained, unless the members were "free from actions brought by unhappy litigants".

[74] There are, perhaps, two exceptions to this general principle, that are acknowledged by the appellants.

[75] Counsel for the Board in her factum states:

> It is submitted on behalf of the applicant that the principle of absolute immunity extends to the Board and its members, . . . unless the Board and its members did something they knew they had no jurisdiction to do or if the acts complained of were not done in their capacity as Board members.

[76] One might argue that if the acts were not performed by the appellants in their capacity as Board members, those acts would not constitute exceptions to the principle, but rather would not be covered under the principle of judicial immunity at all.

[77] Counsel for the individual appellants phrased it this way:

> The Board and the members thereof enjoyed the same immunity from civil liability as do superior court judges. The immunity of superior court judges for acts performed or omitted in their judicial capacity is absolute. Similarly, the immunity of members of the Board for acts performed in their capacity as Board members is also absolute.

[78] The critical issue in this appeal is whether the acts, or words (in the case of chairman Darby) of the appellants, forming the subject-matter of the complaints in the statement of claim were performed, or said, in their capacity as a Board, or members of the Board.

[79] Although the majority in **Rivard** concluded that the appellants in that case “had the necessary jurisdiction to conduct an inquiry and to submit a report” (745), Justice Chouinard reviewed the scope of the immunity under the case law and authorities, at p. 737-738.

[80] For example, in the case of **Fray v. Blackburn** (1863) 122 E.R. 217, Crompton, J., stated at p. 217:

> It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly. ...
> (emphasis added)

[81] In **Royal Aquarium and Summer and Winter Garden Society v. Parkinson**, [1892] 1 Q.B. 431, Lord Esher, M.R., wrote at p. 442:

> It is true that, in respect of statements made in the course of proceedings before a Court of justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of Courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorized inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes. . . . (emphasis added)

[82] In *Halsbury's Law of England*, 4th Ed., Vol. 1, 1973, at pp. 197 et seq., it is stated at nos. 206 and 210:

> 206 **Persons protected**. Persons exercising judicial functions in a court are exempt from all civil liability whatsoever for anything done or said by them in their judicial capacity, nor can any action be brought against the Crown in respect of acts or omissions of persons discharging responsibilities of a judicial nature or in connection with the execution of judicial process. . . .

> 210. **Extent of Protection**. Wherever protection of the exercise of judicial powers applies, it is so absolute that no allegation that the acts or words complained of were done or spoken mala fide, maliciously, corruptly, or without reasonable or probable cause suffices to found an action. The protection does not, however, extend to acts purely extra-judicial or alien to the judicial duty of the defendant; and therefore, if the words complained of are not uttered in the course of judicial proceedings, the defendant is not protected. (emphasis added)

[83] H. Brun and G. Tremblay, Droit Constitutionionnel (1982) Wright at p. 514:

> [Translation] Immunity of Judges.
>
> The primary aspect of the independence of the courts is negative: the judges will incur no civil liability when they act in their capacity as judges.

> This absolute immunity is a rule of common law applicable to Superior Court judges even where bad faith has been alleged: see Anderson v. Gorrie, [1895] 1 Q.B. 668. . . . In the case of these judges, it can be said that they are immunized for any act performed in the course of and in connection with their duties. On the other hand, it is clear that Superior Court judges are solely liable for their purely personal acts, which have no connection with their legal responsibilities. (emphasis added)

[84] A review of the statement of claim filed by Future Inns leads me to the conclusion that the claims advanced against the individual appellants, and the claim advanced against the Board, arise out of actions taken within their respective "judicial capacities", and, as a result, those actions are protected by the immunity granted by Statute.

[85] The claim advanced against chairman Darby involves, in my opinion, different considerations. He was not a member of either of the panels which participated in the decision to issue L.R.B. orders 4267 or 4284. Presumably, immunity is invoked as a result of the responsibilities he assumed as chairman of the Board. We have not been directed to any provision in the **Act** or regulations, delegating authority to the chairman of the Board to speak to the media respecting the interpretation of Board orders. Whether the chairman of the Board should discuss with media the likelihood of litigants refusing to comply with Board orders is not a matter that I would consider as being without controversy. It is not, therefore, "plain and obvious" to me, that an action against chairman Darby should fail for these comments, provided it can be said that the statement of claim discloses a question “fit to be tried”.

[86] Counsel for the individual appellants stresses that Future Inns has not claimed it was defamed, and points out that the word defamation does not appear in the statement of

claim. Further, there is no allegation in the statement of claim that any of the appellants, including chairman Darby, acted outside their capacity as Board members, with respect to any actions they carried out, or any statements he made to the media. While the words "malice", and "bad faith", are used in the statement of claim, there is, counsel submits, no tort of malice, nor any tort of bad faith “in the air”. Apart from the question of immunity, it is submitted, that the statement of claim discloses no reasonable cause of action.

[87] Counsel draws our attention to paragraph 4 of the statement of claim which provides:

> The defendants at all material times were persons purporting to discharge responsibilities of a judicial nature vested in them under the *Trade Union Act* . . .

[88] The same point, he submits, is re-emphasized in paragraph 10 of the statement of claim, where it is pleaded:

> The defendants, by so doing, acted maliciously against the plaintiff and thereby discharged their statutory responsibility in bad faith.

[89] These sections may indeed highlight "defects" in the statement of claim, but in my view, a question "fit to be tried" against Mr. Darby is presented in paragraphs 15, 17 and 18, assuming, as we must for the purposes of this application, that the allegations are true.

[90] I am mindful of the comments of Chitty, J. in **Republic of Peru v. Peruvian Guano Company** (1877), 36 Ch. D. 489 at 496 where he stated:

> Under the new rule the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading, which would have been fatal on a demurrer, the Court sees that a substantial case is presented the Court should, I

> think, decline to strike out that pleading; but when the pleading discloses a case which the Court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation.

[91] These comments were cited with approval by Wilson, J., on behalf of the Court, in **Hunt v. Carey Canada Inc.** [1990] 2 S.C.R. 959, at 968.

[92] The same approach was emphasized by Justice Tysoe, for the majority, in **Minnes v. Minnes et al.** (1962), 39 W.W.R. 112, (B.C.C.A.) where he noted, in a case where the statement of claim was "inaptly and inartistically worded", at p. 122:

> In my respectful view it is only in plain and obvious cases that recourse should be had to the summary process under O. 25, R. 4, and the power given by the Rule should be exercised only where the case is absolutely beyond doubt. So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out. (emphasis added)

[93] Justice Wilson, emphasized the sentence underlined with apparent approval, in **Hunt v. Carey,** at p. 978.

[94] In conclusion, it is my opinion, that the claims advanced against the Board, and the individual appellants (other than chairman Darby), clearly arise from actions taken in their capacity as a Board, or as Board members, and that those actions are protected by the statutory immunity.

[95] With respect to the claim against Chairman Darby, I am of the view that a question fit to be tried has been made out, and that it is not plain and obvious that Chairman Darby's

statements are covered by the statutory immunity. I am, accordingly, of the view that Justice Tidman committed no error of law when he refused to strike out the claim against chairman Darby.

Ancillary Submissions Advanced by Future Inns Respecting the General Immunity Issue

[96] Counsel for Future Inns raises three further submissions which require consideration:

- the ratio in **Rivard** should be narrowly construed as it is based on s. 16 of the **Act** respecting public inquiry commissions, R.S.Q. C-37;
- the action set out in the statement of claim is sustainable as the appellants acted in breach of their public duty;
- section 7 of the **Public Inquiries Act** is *ultra vires* the Nova Scotia Assembly under the **Constitution Act**, 1867, because it would have the effect of elevating the members of the Board to the status of s. 96 judges.

1. Should the ratio in *Rivard* be construed narrowly?

[97] In support of its submission, counsel for Future Inns addresses our attention to an article by Professor Dale Gibson *Developments in Tort Law: The 1985-86 Term* (1987), 9 The Supreme Court Law Review, 455 and, in particular, the following excerpt at p. 462:

> All that he [Justice Chouinard] and his majority colleagues did decide was that in the case at bar immunity existed under the legislation because the commissioners, in issuing the report in question, had been acting "in the execution of their duty": . . .

[98] I would not circumscribe the decision in **Rivard** as submitted by counsel for Future Inns. The statutory immunity granted to the Board, and to Board members, in the present case, in the light of the restriction determined by the common law to limit the immunity to judicial acts, is comparable to the immunity granted in **Rivard**.

[99] I do not agree with counsel's further submission that the immunity in issue in this case is subject to an implied limitation by which the immunity would be voided if the Board or Board members acted with malice and bad faith.

[100] Although such a limitation was expressly legislated in the former **Justices' and Magistrates' Protection Act**, the Legislature did not deem it appropriate to include a similar limitation in the Acts before us. There is nothing in the **Act**, or the **Public Inquiries Act**, to justify implying such a limitation.

[101] Counsel for Future Inns also refers us to Professor Gibson's comments at 461:

> A third area of doubt concerns malice. The immunity of superior court judges at common law was said to be "absolute", in the sense that they were not even liable for acting maliciously, so long as the conduct in question was part of a genuine exercise of judicial authority. Inferior court judges, on the other hand, were personally responsible for malicious wrongdoing, even within their areas of jurisdiction. Recent remarks by members of the House of Lords suggests that this special liability of inferior court judges should now be regarded as obsolete in England and Wales. The Canadian situation is unclear.

[102] These comments, in my opinion, are directed to the immunity of provincially constituted inferior tribunals at common law, and are not relevant to the present issue

which is concerned with a specific statutory immunity equivalent to that of a judge of a superior court, or as expressed here, a judge "of the Supreme Court".

2. The Issue of the Breach of Public Duty

[103] The cases cited in support of this submission are distinguishable, in my opinion, as they deal with the concept of absolute, or unfettered, discretion or authority, rather than the principle of absolute immunity. In each of the three cases, relied upon by Future Inns, (**McGillivray v. Kimber**, [1915] 52 S.C.R. 146; **Roncarelli v. Duplessis**, [1959] S.C.R. 121; and **Gershman v. Manitoba Vegetable Producers' Marketing Board** (1976), 69 D.L.R. (3d) 114 (Man. C. of A)), the defendant was exercising a discretionary power and the basis of the defence was that each had unfettered discretion. The question arising under this appeal calls for entirely different considerations.

[104] During the hearing in the **Rivard** case, Justice Chouinard was referred by the respondents' counsel to **McGillivary v. Kimber** and **Roncarelli v. Duplessis**, as well as **Chartier v. Attorney General of Canada**, [1979] 2 S.C.R. 474.

[105] Justice Chouinard concluded, at p. 726:

> However, none of these cases dealt with the interpretation of legislation similar to that applicable in the case at Bar.

The Constitutional Argument

[106] Future Inns submits that s. 7 of the **Public Inquiries Act** is *ultra vires* the Nova Scotia Assembly under the **Constitution Act**, 1867, because it would have the effect of

constituting members of the Board as s. 96 judges, capable of determining their own jurisdiction.

[107] Although the identical issue was considered by Justice Chouinard in **Rivard,** counsel for Future Inns submits that his comments were only *obiter dicta* and hence not binding on this court, as argument was not addressed to the Supreme Court on the Constitutional issue.

[108] It is helpful to refer to the full passage in the judgment of Justice Chouinard, which is found at pp. 736-7:

> Respondent did not argue that the provincial legislator lacks the power to confer on provincial judges or provincial bodies an immunity of the same kind as that enjoyed by superior court judges. The discussion did not turn on this point, though respondent referred to it in passing in the following passage from his submission:
>
> > [Translation] Clearly, the legislator was familiar with the rules of the common law on the personal liability of public employees and the theory of the "attributes of a court of record", and the respondent submits that there would have to be a much more specific provision to bring about such a radical departure from the common law and confer on the members of an administrative body, exercising their powers of inquiry, the same immunity as superior court judges, assuming that a legislator had the constitutional authority to do so.
> >
> > Moreover, I consider that the question is one of delictual liability, which falls within the scope of property and civil rights, matters of exclusively provincial jurisdiction, when as here the legislator is legislating on the civil liability of the members of a commission which he has the power to appoint.

[109] I would adopt the comments of Chief Justice Robertson on behalf of the Court of Appeal of Ontario in **Ottawa v. Napean Township et al.**, [1943] 3 D.L.R. 802, at 804:

> What was there said may be *obiter*, but it was the considered opinion of the Supreme Court of Canada, and we should respect it and follow it even if we are not strictly bound by it.

[110] See also the comments of Justice Chouinard on behalf of the court In **R. v. Sellars**, [1980] 1 S.C.R. 527,

[111] I do not agree with Future Inns' submission. I am further of the view that Justice Chouinard's comments were correct in law. The immunity provisions under s. 7 of the **Public Inquiries Act** do not grant powers that are "broadly conformable or analogous to jurisdiction or powers exercised and exercisable by courts which are within s. 96", to paraphrase the test expressed in **Tomko v. Labour Relations Board (Nova Scotia)**, [1977] 1 S.C.R. 112.

Conclusions

[112] In my opinion, Justice Tidman erred when he:

- concluded that all questions of law, including questions where the law is clear, should not be brought before the Court in a s.14.25 application;
- determined that the constitutional question posed by Future Inns had not yet been clearly answered by the courts;
- determined that the extent of the immunity of the Labour Relations Board, and its members, except for the allegations against chairman Darby, was unclear.

[113] In my opinion, the Board and its members are protected from a civil action for damages arising out of any acts committed by them, provided the acts are committed in the

course of judicial duties, and provided further that a member may lose his or her immunity if while acting in bad faith they did something which he or she knew he or she did not have the jurisdiction to do, or while not acting in the course of judicial duties knew that he or she had no jurisdiction to act.

[114] I would allow the appeal, strike out the originating notice and statement of claim, except for the allegations against Mr. Darby. Under the circumstances, I would not award costs to any of the parties.

Pugsley, J.A.

Concurred in:

Hallett, J.A.

Freeman, J.A.