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C.A. 156384

NOVA SCOTIA COURT OF APPEAL

[Cite as: Canada (Attorney General) v. Pleau, 1999 NSCA 159]

Glube, C.J.N.S.; Roscoe and Cromwell, JJ.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA, DONALD UHRICH, ROY HALFYARD, MARCEL BUJOLD, PAUL SEQUIN, JANET BALL, ED SNYDER, ALLAN BAGNALL, ANN MacDONALD, and ROBERT BOURGEOIS Appellants - and - PAUL PLEAU, HEATHER PLEAU, and ADRIANNA and PAUL PHILLIP PLEAU, by their litigation guardian HEATHER PLEAU Respondents	)	Sandra MacPherson Duncan for the appellants Blair H. Mitchell for the respondents Appeal heard: October 8, 1999 Judgment delivered: December 21, 1999

THE COURT: Leave to appeal granted and appeal dismissed per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Roscoe, J.A. concurring.

CROMWELL, J.A.:

I. INTRODUCTION

[1] Disputes arising under collective agreements must be resolved through the grievance and arbitration process established under the agreement, not by lawsuits in the courts. This is the principle established by the Supreme Court of Canada in **Weber v. Ontario Hydro**, [1995] 2 S.C.R. 929.

[2] The appellants are defendants and the respondents are plaintiffs in the action giving rise to the appeal. I will generally refer to the parties as plaintiffs and defendants. The defendants say this case is governed by **Weber** so that the plaintiffs' action should be dismissed. But this case is very different from **Weber** in several respects. In **Weber**, the relevant collective bargaining legislation expressly conferred exclusive jurisdiction on an arbitrator, the substance of the dispute itself was addressed in provisions of the collective agreement, the arbitrator could consider the substance of the dispute and was empowered to award effective redress. In this case, the dispute set out in the pleadings cannot be referred to third party adjudication under the Collective Agreement, there is no express grant of exclusive jurisdiction to the grievance process, and the collective agreement does not address the substance of the plaintiffs' complaints. The question on the appeal, therefore, is whether the **Weber** principle is broad enough to bar the action in these considerably different circumstances.

[3] The context in which this appeal arises must also be considered. The Order

under appeal dismissed the defendants' application to strike the plaintiffs' statement of claim under **Rule** 14.25 and for summary judgment pursuant to **Rules** 13.04 and 31.03. The applicable test under **Rule 14.25**, although at various times described in different words, is whether it is plain and obvious that the claim cannot succeed. In the context of a challenge under this **Rule** to the court's jurisdiction on the basis of the **Weber** principle, it must be plain and obvious that the court lacks jurisdiction. It is not suggested that a significantly different test would apply in relation to the summary judgment application in the circumstances of this case.

[4] I should also add that the record before us is, in essence, confined to the pleadings, the legislation, the collective agreements and the Departmental Harassment Policy and some admissions. The proceedings before the adjudicator and the adjudicator's decision are not before us.

II. DECISION OF THE CHAMBERS JUDGE

[5] In December of 1992, Paul Pleau was dismissed from the Public Service of Canada. His employment was governed by the **Public Service Staff Relations Act**, R.S.C., c. P-35 (**"P.S.S.R.A.**"), and a Master Collective Agreement made pursuant to that **Act**. As permitted under the **P.S.S.R.A.** and the Collective Agreement, he grieved his dismissal. In April of 1994 an adjudicator reinstated him and restored lost salary and benefits.

[6] In October of 1994, Mr. Pleau, his wife and two infant children commenced an action in the Supreme Court of Nova Scotia against the Attorney General of Canada and nine federal public servants. The action alleges that the individual defendants conspired to cause injury and damage, breached their fiduciary duty and abused their office by virtue of their wrongful conduct towards Mr. Pleau. It is also claimed that the effect on Mr. Pleau of the conduct of the individual defendants, caused Mrs. Pleau and the children mental distress requiring medical and other professional assistance and treatment. It is not suggested that these claims could or should have been presented before the adjudicator. It is conceded by the defendants that these claims cannot be referred to an adjudicator.

[7] The defendants applied to Hood, J. of the Supreme Court of Nova Scotia for an order striking out the plaintiffs' statement of claim or, alternatively, for summary judgment. The essence of the defendants' position was that the action arose from incidents at Mr. Pleau's employment which, although they cannot be referred to adjudication, are subject to the grievance procedure set out in the **P.S.S.R.A.** and Collective Agreement. This, said the defendants, bars the Court from hearing the action.

[8] Hood, J. refused to strike out the plaintiffs' statement of claim and dismissed the defendants' application for summary judgment. The Chambers judge noted that the statement of claim should be struck out only if it is plain and obvious that the claim

cannot succeed. Referring to the decision of this Court in **Nova Scotia Union of Public Employees v. Halifax Regional School Board** (1999), 171 N.S.R. (2d) 373 (C.A.), she stated that defining the boundary between Court and arbitral jurisdiction requires detailed attention to the facts and careful attention to and sensitivity for the broader labour relations context. She noted that the **P.S.S.R.A.** might be found not to have the "... finality and bindingness that comes from an independent expert tribunal to which the courts have a predisposition to give judicial deference..." and that a "... trial judge may conclude that this is a case falling outside the employer/employee relationship". She concluded, therefore, that it was not plain and obvious that the claim could not succeed.

[9] The defendants seek leave to appeal.

III. ISSUES AND POSITIONS OF THE PARTIES:

[10] The defendants submit on appeal, as they did before Hood, J., that this case is governed by the decisions of the Supreme Court of Canada in **Weber v. Ontario Hydro**, **(supra)**, **New Brunswick v. O'Leary**, [1995] 2 S.C.R. 967 and **Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057**, [1990] 1 S.C.R. 1298. The submission is that it would be inconsistent with the comprehensive dispute resolution mechanisms created by the **P.S.S.R.A.** and Master Collective Agreement for a court to assume jurisdiction over this case which, in its essential character, arises out of the employment relationship. Here, all of the claims

asserted in the statement of claim relate to alleged misconduct by fellow public servants in the workplace, it being admitted that the individual defendants were acting within the course and scope of their employment.

[11] The defendants acknowledge that the **P.S.S.R.A.** and Collective Agreement do not expressly confer exclusive jurisdiction on the grievance procedure for all disputes which in their essential character arise out of the employment relationship. It is submitted, however, that such exclusivity of jurisdiction should be implied from the overall scheme of the statute and Collective Agreement, and further, that a conferral of exclusive jurisdiction, whether express or implied, is not essential. Rather, as a matter of curial deference, courts should decline jurisdiction with respect to allegations like these which are so closely linked to workplace conduct. On this last submission the defendants' position is not so much based on an argument about the jurisdiction of the courts in the strict sense, but on the principle that the courts as a matter of deference should decline to exercise their jurisdiction where the substance of the court action falls within the dispute resolution process put in place by legislation and a Collective Agreement.

[12] With respect to the claims advanced on behalf of Mr. Pleau's spouse and children, the defendants submit that there is no basis in law for these claims and that they should be struck.

[13] The plaintiffs submit that the collective bargaining regime established by the

P.S.S.R.A. is significantly different than the collective bargaining regimes considered by the Supreme Court of Canada in the leading cases of **Weber** and **O'Leary**. In those cases, the legislation and collective agreements conferred exclusive jurisdiction on the grievance arbitrator. The scheme established under the **P.S.S.R.A.** does not do so and should, therefore, not be found to oust the jurisdiction of a superior court.

[14] It is further submitted that the inquiry arising from the **Weber** decision requires detailed attention to the facts and that, in the present case, it is not plain and obvious that the plaintiffs' claim could not succeed. Moreover, the true nature of the dispute in this case concerns the exercise by Mr. Pleau of a civil obligation to report what he believed to be evidence of misconduct in the operation of a government facility. It is submitted that the alleged abuse of government authority is actionable by Mr. Pleau in his capacity as a citizen and does not depend upon his status as an employee. It follows, in the plaintiffs' submission, that the action does not relate to matters arising under the Collective Agreement and that the Court's jurisdiction is not ousted.

[15] With respect to the claims by Mr. Pleau's spouse and children, it is submitted that the claims are not clearly unsustainable and, therefore, should not be struck.

[16] At the root of this appeal is a fundamental question about the scope of the principle set out by the Supreme Court in **Weber**. The plaintiffs submit that **Weber** requires a clear grant of exclusive jurisdiction over the dispute to the alternative forum

before the courts should decline jurisdiction. For the defendants, the **Weber** principle is much broader; that decision, they submit, is premised on a policy of deference by the courts to comprehensive dispute resolution mechanisms established pursuant to legislation and collective agreements. While the defendants argue that the exclusive jurisdiction of the grievance adjudication process should be inferred from the legislation and the collective agreement, they also submit that a finding of exclusivity is not essential.

[17] In my view, the resolution of this appeal requires identification and analysis of the considerations relevant to the Court's decision to decline jurisdiction and determination of how they apply to the particular dispute and legislative scheme involved here. The first part of the analysis that follows will identify the relevant considerations; the second part will apply them to this case.

IV. ANALYSIS

(a) The relevant considerations

[18] In my view, the judgments of the Supreme Court of Canada in **St. Anne Nackowic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219**, [1986] 1 S.C.R. 704., **Gendron**, **Weber** and **O'Leary** show that the decision by courts to decline jurisdiction in disputes like this one is not based simply on a clear, express grant of jurisdiction to an alternative forum. For reasons that I will develop, I am of the opinion that there are three main considerations which underpin these decisions of the Supreme

Court of Canada. The three considerations are inter-related, but it is helpful to discuss them individually for analytical purposes.

[19] The first consideration relates to the process for resolution of disputes. Where the legislation and the contract show a strong preference for a particular dispute resolution process, that preference should, generally, be respected by the courts. While it takes very clear language to oust the jurisdiction of the superior courts as a matter of law, courts properly decline to exercise their inherent jurisdiction where there are strong policy reasons for doing so.

[20] If the legislature and the parties have shown a strong preference for a dispute resolution process other than the court process, the second consideration must be addressed. It concerns the sorts of disputes falling within that process. This was an important question in the **Weber** decision. The answer given by **Weber** is that one must determine whether the substance or, as the Court referred to it, the "essential character", of the dispute is governed, expressly or by implication, by the scheme of the legislation and the collective agreement between the parties. Unlike the first consideration which focuses on the process for resolution of disputes, the second consideration focuses on the substance of the dispute. Of course, the two are inter-related. The ambit of the process does not exist in the abstract, but is defined by the nature of the disputes to be submitted to it.

[21] The third consideration relates to the practical question of whether the

process favoured by the parties and the legislature provides effective redress for the alleged breach of duty. Generally, if there is a right, there should also be an effective remedy.

(b) The **Weber** Principle

[22] The starting point for the discussion of the **Weber** principle must be the 1986 decision of the Supreme Court of Canada in **St. Anne Nackawic, (supra).** That case provided the foundation for Justice McLachlin's reasoning in **Weber**.

[23] In **St. Anne**, the employer sued one of the unions representing its employees for damages arising from an illegal strike. The members of the defendant union, who were mill employees, walked out in sympathy with a legal strike by office employees. The mill unit was bound by a collective agreement banning strikes and lock-outs. Before trial, the trial judge raised the preliminary question of whether the Court had jurisdiction to hear a claim arising out of a collective agreement. The trial judge held that the Court did not have jurisdiction and the Supreme Court of Canada upheld that result.

[24] The main issue, as stated by Estey, J., speaking for the Court, at p. 708 was:

> ... whether a court of otherwise competent jurisdiction is authorized to receive a claim by an employer for damages against a trade union, the bargaining agent for its employees, by reason of a strike which was allegedly .... illegal under the applicable labour relations statute, and which was at the same time a breach of a collective agreement to which the employer and the trade union are parties.

[25] The Court also addressed a second issue, namely, whether the courts had jurisdiction to issue interlocutory injunctions enjoining illegal strikes.

[26] The relevant legislation (the **Industrial Relations Act**, R.S.N.B. 1973, c. I-4, as amended) required every collective agreement to provide that there would be no strikes or lock-outs and for final and binding settlement, by arbitration or otherwise without stoppage of work, of all differences between the parties to, or persons bound by, the agreement or on whose behalf it was entered into, concerning its interpretation, application, administration or an alleged violation of the agreement, including any question as to whether a matter is arbitrable.

[27] On the main issue, the Court held that there was no jurisdiction to entertain a claim for damages brought by an employer against the bargaining agent of its employees based on the prohibition of strikes during the currency of a collective agreement. On the second issue, the Court upheld the jurisdiction of the courts to grant interlocutory injunctions to restrain illegal strikes where such strikes were prohibited by legislation and where the Court's jurisdiction was not explicitly taken away by statute.

[28] The first holding is premised on a combination of substantive and procedural considerations. After reviewing the decision of the Supreme Court in **McGavin Toastmaster Ltd. v. Ainscough**, [1976] 1 S.C.R. 718, Estey, J., for the Court, in **St. Anne** observed that the collective agreement embodies a new form of "triangular

contract but with two signatories" noting that there are serious difficulties in conforming this type of contract to common law principles of privity and consideration. He stated:

> If there were nothing more than the collective agreement between bargaining agent and employer, the courts might still have applied the common law to its enforcement at the suit of the bargaining agent or the employer. The collective agreement embodies a holding out, a reliance, a consent and undertaking to perform, mutual consideration passing between the parties, and other elements of contract which would expose the parties to enforcement in the traditional courts. There would be, of course, a basic difficulty as to the status of the absent third party, the employee, and perhaps the absence of an identifiable benefit in the bargaining agent. All this is overcome by the statute, and the question whether worthwhile enforcement could be realized at common law is, therefore, of theoretical interest only. The missing elements are the status of the members of the bargaining unit and the appropriate forum. The legislature created the status of the parties in a process founded upon a solution to labour relations in a wholly new and statutory framework at the centre of which stands a new forum, the contract arbitration tribunal. Furthermore, the structure embodies a new form of triangular contract with but two signatories, a statutory solution to the disability of the common law in the field of third party rights. These are but some of the components in the all-embracing legislative program for the establishment and furtherance of labour relations in the interest of the community at large as well as in the interests of the parties to those labour relations.
>
> The above-quoted passages illuminate the profound impediments to reaching the conclusion that rights which at common law would flow from a master-servant relationship would survive under a collective bargaining regime and continue to qualify for enforcement in the traditional courts. The problem raised by attempts to escape the contract tribunal so as to seek enforcement in the courts of rights arising under a collective agreement negotiated within the framework of a collective bargaining regime, solely on the grounds that the agreement does not explicitly address the jurisdictional question, is an equally profound difficulty. [emphasis added]

[29] This passage addresses the first two of what I have referred to as the three relevant considerations. As described by Estey, J., the legislation and the collective agreement set up a new and comprehensive scheme of rights and obligations; in short, they transform the substantive law from what was previously known as the law of master and servant into the law of collective bargaining labour relations. Accompanying this substantive transformation, and central to it, is the creation of a forum for the

interpretation and enforcement of these rights.

[30] The Court held that these considerations lead to judicial deference to the arbitration process:

> ..... The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks. [emphasis added] (p. 718-719)

[31] Estey, J. concluded at pp. 720 - 721:

> ..... The courts have no jurisdiction to consider claims arising out of rights created by a collective agreement. Nor can the courts properly decide questions which might have arisen under the common law of master and servant in the absence of a collective bargaining regime if the collective agreement by which the parties to the action are bound makes provision for the matters in issue, whether or not it explicitly provides a procedure and forum for enforcement. ...
>
> What is left is an attitude of judicial deference to the arbitration process. ... It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration, when adopted by the parties as was done here in the collective agreement, is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. ... [emphasis added]

[32] Once again in this passage, Estey, J. refers to both the substantive aspects, that is to the content of the rights and obligations and to the process by which they are interpreted and enforced. Fundamental to the attitude of judicial deference are both that the substance of the dispute is regulated by the collective agreement (i.e., “the collective agreement ... makes provision for the matters in issue ...”) and that the grievance arbitration process was intended by the legislature and the parties to be the

process for the interpretation and enforcement of the substance of such disputes (i.e., "Arbitration ... is clearly the forum preferred ... for resolution of disputes arising under collective agreements."). (The quoted words are those of Estey, J. at p. 720).

[33] In my opinion, the judgment in **St. Anne** is not based uniquely on the express conferral of exclusive jurisdiction on the grievance arbitration process. While Estey, J. uses the language of an absence of court jurisdiction to consider claims arising out of rights created by a collective agreement, his reasons as a whole make it clear that this conclusion is based on curial deference inspired by the overall scheme of collective bargaining labour relations, not simply by language that could be construed as giving exclusive jurisdiction over such disputes to the grievance arbitration process. I would emphasize the following words from his judgment at p. 718:

> The problem raised by attempts to escape the contract tribunal (i.e., the grievance arbitration process) so as to seek enforcement in the courts .... solely on the grounds that the agreement does not explicitly address the jurisdictional question, is an equally profound difficulty. [emphasis added]

[34] That the reasoning is based on deference rather than jurisdiction is also made clear in the portion of Estey, J.'s reasons dealing with the authority of courts to issue interlocutory injunctions to restrain illegal strikes. In discussing whether the jurisdiction of the superior courts was ousted in this regard, Estey, J. said:

> The statutory context may be viewed as ambiguous on this issue. Though setting out a scheme in which arbitration plays a central role, the legislation does not enact any privative clause explicitly ousting the jurisdiction of the courts to deal with breaches of collective agreements which clearly, under the legislation, regulate the legal rights of the parties and are binding and enforceable in the proper forum. ....What the statute does is to establish a preference for arbitration of a particular sort over other means of dispute settlement, by establishing a procedure to be followed where the parties do not expressly provide for any other method of resolving their differences. ... Thus, even where the parties, as here,

> have chosen arbitration, it may be argued that [the legislation] is insufficient to oust the inherent jurisdiction of the superior courts. [emphasis added]

[35] In this passage, Estey, J. is contrasting two ways in which it may be said that the courts lack jurisdiction. One exists when the legislation is sufficiently clear to oust the jurisdiction of a superior court; the second when the courts decide, as a matter of deference, not to exercise jurisdiction they otherwise have. Estey, J. makes clear in this passage that he considers the second way to be the relevant one in this context.

[36] The Court then goes on to consider the impact of retaining judicial authority to issue interlocutory injunctions in cases of illegal strikes on the overall scheme of labour relations. Estey, J. notes at p. 724 that the fundamental *quid pro quo* of labour relations is that strikes and lock-outs during the continuance of the collective agreement are prohibited but disputes will be adjusted quickly and inexpensively through grievance arbitration. It follows, according to Estey, J., that judicial intervention to prevent unlawful strikes supports rather than detracts from the overall legislative scheme of labour relations. Estey, J. quoted, with approval (at 726) words of LaForest, J.A., who had written in the Court of Appeal in **St. Anne**, that the power to issue interlocutory injunctions "... has been used with the intention of supporting the legislative scheme, not to supplant it." This reasoning once again shows that deference arises from the overall scheme, not simply from the conferral of exclusive jurisdiction on the grievance arbitration process. It also suggests that the overall impact of judicial intervention on the overall scheme of collective bargaining labour relations is highly relevant to the question of whether a court should defer.

[37] I conclude from this examination of **St. Anne** that:

1. The decision of the Court to defer to the grievance and arbitration process is not based solely on wording in the statute or collective agreement that would be sufficient, as a matter of law, to oust the Court's jurisdiction. There is "an attitude of judicial deference to the arbitration process ... based on the idea that if courts are available to the parties ... violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship ... in a labour relations setting." (**St. Anne** at p. 721).
2. Fundamental to this attitude of deference is consideration of whether the collective agreement addresses the substance of the dispute and whether such disputes fall within the ambit of the grievance - arbitration process.
3. A further relevant consideration is the likely impact of judicial intervention on the overall scheme of collective bargaining labour relations.

[38] In **Gendron v. Supply and Services Union of the Public Service Alliance of Canada, (supra)**, the Court faced the question of whether the courts have jurisdiction in an action based on a breach of a union's duty of fair representation. In answering this question in the negative, the Court considered four matters. First, the Court concluded that the substance of the union's duty of fair representation was

codified in the **Canada Labour Code** so as to “necessarily oust the common law duty of fair representation in most situations where the terms of the statute apply.” (at 1320). Second, the Court reviewed the legislative scheme and the place of the Canada Labour Relations Board in it. The Court concluded that, while the legislation did not expressly confer exclusive jurisdiction on the Board, the legislation showed that “...Parliament envisioned a fairly autonomous and specialized Board whose decisions and orders were to be accorded deference by the ordinary courts ...”. (at 1321). Third, the Court examined the remedial capacity of the Board and found that the provisions of the statute conferring remedial power on the Board “... improve[d] significantly the position at common law of an aggrieved person.” (at 1318). Finally, the Court noted that the Board was protected by a privative clause and that permitting actions in the courts for alleged breaches of the duty of fair representation would “... endanger the special role of the Labour Board and the policy underlying the [legislation].” (at 1321). Summing up its conclusions the Court stated:

> ..... Parliament envisioned a fairly autonomous and specialized Board whose decisions and orders were to be accorded deference by the ordinary courts, subject only to review within the confines of the privative clause. As noted earlier, Parliament has provided the duty, the procedure for adjudicating an alleged breach, a wide array of remedies and a privative clause protecting the Board. It can be therefore assumed to have intended that the ordinary courts would have but a small role if any to play in the determination of disputes covered by the statute. .....[emphasis added]

[39] In my view, **Gendron** strengthens the conclusion that an express grant of exclusive jurisdiction is not necessary to sustain judicial deference to the statutory dispute resolution process. In **Gendron**, deference arose from consideration of the four factors mentioned in the passage just quoted: that the scheme addressed the

substantive rights in issue, set up a process for adjudicating alleged breaches, gave that process extensive remedial powers and protected the scheme from judicial intervention by a privative clause.

[40] The Court also added two important *caveats*:

> A necessary caveat to this conclusion is that, while the common law duty will be inoperative in a situation where the terms of the statute apply, a different conclusion may be warranted in a case where the statute is silent or by its terms cannot apply. Such may be the case where the statutory duty is, by its terms, applicable only in circumstances where the breach of the duty arises out of contract administration. .....
>
> A different conclusion may also be warranted where it is not clear that the statute exclusively covers the breach. In other instances, such as in the context of human rights violations, while the statute may apply, the breach may not be properly characterized exclusively as a labour relations matter. ..... [emphasis added]

[41] That brings me to **Weber v. Ontario Hydro**. Mr. Weber was a unionized employee of Ontario Hydro. He took an extended leave of absence during which Hydro paid him sick leave benefits. Hydro became suspicious Mr. Weber was malingering and hired a private investigator. The investigators posed as others and gained entry to his home. As a result of information so obtained, Hydro suspended Mr. Weber for abusing his sick leave benefits. The union filed grievances on his behalf. One alleged that Hydro's hiring of the private investigator was a violation of the collective agreement and requested that Hydro be ordered to pay Mr. Weber and his family damages for mental anguish and suffering arising from the surveillance. The arbitration was settled.

[42] Mr. Weber also commenced an action in the courts claiming damages for the

torts of trespass, nuisance, deceit and invasion of privacy as well as for violation of his rights under s. 7 of the **Canadian Charter of Rights and Freedoms**. Hydro applied to dismiss the claims against it and the Supreme Court of Canada upheld the order of the Chambers judge dismissing the action as against Hydro. The Supreme Court was unanimous in its agreement with the Chambers judge that the tort claims should be dismissed but the Court divided 4 - 3 on the question of whether the **Charter** claims should also be dismissed.

[43] McLachlin, J., for the majority, stated that the issue in **Weber** was:

> ... when employees and employers are precluded from suing each other in the courts by labour legislation providing for binding arbitration.

[44] It was common ground on the appeal to the Supreme Court of Canada that civil actions based solely on the collective agreement were precluded by the provision in the Ontario **Labour Relations Act**, requiring every collective agreement to contain a provision for final and binding settlement by arbitration of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement.

[45] The Court in **Weber** adopted an “exclusive jurisdiction” model of grievance arbitration. Differences between the parties arising from the collective agreement must proceed to arbitration. The courts have no power to entertain actions in respect of such disputes: p. 956.

[46] The Court gave three reasons for adopting this “exclusive jurisdiction” model:

(1) The jurisprudential reason: McLachlin, J. relied on the decision in **St. Anne Nackawic** for the proposition that mandatory arbitration clauses in labour statutes deprive the courts of concurrent jurisdiction.

(2) The statutory language: McLachlin, J. noted that the Ontario legislation makes arbitration the only available remedy for differences arising from the interpretation, application, administration or alleged violation of the agreement. The provision referred to was s. 45 of the **Labour Relations Act**, R.S.C. 1990, c. L-2:

> 45(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(3) The purpose of the scheme: McLachlin, J. considered that concurrent jurisdiction in the courts would undercut the purpose of the grievance arbitration regime which lies at the heart of all Canadian labour statutes.

[47] In light of the three reasons discussed by McLachlin, J., I conclude that, while an express statutory grant of exclusive jurisdiction to the grievance arbitration process is one of the bases of the decision in **Weber**, it is not, on its own, dispositive of the

question whether the court should decline jurisdiction in favour of the grievance arbitration process.

[48] The Supreme Court's decisions in **St. Anne**, **Gendron**, and **Weber** show that there are a number of inter-related considerations relevant to whether courts should defer with respect to a particular case to an alternative dispute resolution process established by legislation or agreement of the parties. Absent words clear enough to oust court jurisdiction as a matter of law, the question is whether the court should infer, in the particular circumstances, that the alternate process was intended to be the exclusive means of resolving the dispute. In **Weber**, McLachlin, J. addresses these considerations under two main headings: the dispute and the ambit of the collective agreement. Underpinning this approach is the conclusion that the legislation and collective agreement at issue in **Weber** conferred exclusive jurisdiction on the grievance arbitration process (at 954), that such finding of exclusivity was consistent with the jurisprudence (at 952-953) and that it was also consistent with the policy considerations at the heart of Canadian collective bargaining statutes (at 954). The conclusion was reached, as well, on the basis that the arbitrator had the requisite authority to apply the common law and the **Charter** to the dispute and the remedial power to grant effective redress (at 963).

[49] Taking these underpinnings of **Weber** into account, the relevant considerations may be addressed under three headings.

[50] First, consideration must be given to the process for dispute resolution established by the legislation and collective agreement. Relevant to this consideration are, of course, the provisions of the legislation and the collective agreement, particularly as regards the question of whether the process is expressly or implicitly regarded as an exclusive one. Language consistent with exclusive jurisdiction, the presence or absence of privative clauses and the relationship between the dispute resolution process and the overall legislative scheme should be considered.

[51] Second, the nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation and the collective agreement should be considered. In essence, this involves a determination of how closely the dispute in question resembles the sorts of matters which are, in substance, addressed by the legislation and collective agreement. What is required is an assessment of the "essential character" of the dispute, the extent to which it is, in substance, regulated by the legislative and contractual scheme and the extent to which the court's assumption of jurisdiction would be consistent or inconsistent with that scheme.

[52] Third, the capacity of the scheme to afford effective redress must be considered. Simply put, the concern is that where there is a right, there ought to be a remedy.

[53] I will now examine the legislative scheme under the **P.S.S.R.A.** and the court action in issue here in light of these considerations.

(a) The Process

[54] Before setting out a detailed review of the scheme established by the relevant legislation and collective agreement provisions, it may be helpful to summarize my conclusions based on that review. Under this scheme, not all matters that are grieveable may be submitted to adjudication. The defendants concede that the claims made by the plaintiffs in this case fall into that category; while the scope of the grievance process is broad enough to include these claims, the decision of the employer at the final stage of the grievance process is final (subject only to judicial review). There can be no referral to adjudication. As the Ontario Court of Appeal said in **Danilov v. Canada (Atomic Energy Board)**, [1999] O.J. No. 3735 (C.A.), at para. 9, the grievance process under the **P.S.S.R.A.** does not permit the plaintiffs to take this dispute to binding adjudication by a third party; it permits no more than raising it as a complaint with the employer. There is no express grant of exclusive jurisdiction to the grievance process; the employee is “entitled”, not obliged to use it. Moreover, the Departmental Harassment Policy, which most nearly addresses the substance of the plaintiffs’ complaints, expressly contemplates other forms of legal recourse.

[55] I now turn to a detailed review of the legislative and contractual provisions.

[56] Part II of the **P.S.S.R.A.** addresses collective bargaining and the collective agreement. The provisions deal with applications for certification, the determination of

appropriate bargaining units, and dispute resolution with respect to differences arising in connection with the conclusion, renewal or revision of a collective agreement. The effect of certification is set out, in part, in s. 41(1):

> **41.** (1) Where an employee organization is certified under this Act as the bargaining agent for a bargaining unit, the employee organization has the exclusive right under this Act
> (a) to bargain collectively on behalf of employees in the bargaining unit and to bind them by a collective agreement until its certification in respect of the bargaining unit is revoked; and
> (b) to represent, in accordance with this Act, an employee in the presentation or reference to adjudication of a grievance relating to the interpretation or application of a collective agreement or arbitral award applying to the bargaining unit to which the employee belongs. (emphasis added)

[57] The Statute also provides for the negotiation of collective agreements, including master collective agreements such as the one relevant to these proceedings. Once a collective agreement is in place, it is binding on the employer, the bargaining agent that is party to it and on the employees in the bargaining unit in respect of which the bargaining agent has been certified. Section 59 provides:

> **59.** A collective agreement is, subject to and for the purposes of this Act, binding on the employer, on the bargaining agent that is a party thereto and its constituent elements, and on the employees in the bargaining unit in respect of which the bargaining agent has been certified, effective on and after the day on and after which it has effect pursuant to subsection 58(1). (emphasis added)

[58] In the **P.S.S.R.A.**, the word “arbitration” refers to a process for the resolution of disputes or differences arising in connection with the conclusion, renewal or revision of a collective agreement, i.e., to what is often referred to as “interest arbitration”. The term “adjudication” under the **P.S.S.R.A.** refers to the process for the resolution of grievances arising from the interpretation or application of (among other things) a provision of the collective agreement. In other words, the term “adjudication” under this

statute refers to what is commonly known in other contexts as “grievance arbitration”. I make this distinction because the jurisprudence concerning the exclusive jurisdiction of arbitrators relates to the relationship between the court process and the grievance arbitration process. It is important to understand that the process comparable to what is known as grievance arbitration in many other labour relations contexts is known, under the **P.S.S.R.A.**, as adjudication.

[59] Part IV of the **P.S.S.R.A.** refers to grievances. Pursuant to s. 91, an employee who feels aggrieved by the interpretation or application of (among other things) a provision of the collective agreement or an arbitral award, in respect of which no administrative procedure for redress is provided by an Act of Parliament, is entitled to present a grievance at each of the levels of the grievance process provided for under the **P.S.S.R.A.**. I set out the text of s. 91(1) in full:

> **91.** (1) Where any employee feels aggrieved
> (a) by the interpretation or application, in respect of the employee, of
> (i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or
> (ii) a provision of a collective agreement or an arbitral award, or
> (b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (ii),
>
> in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act. [emphasis added]

[60] In s. 100, the Statute confers on the Public Service Staff Relations Board the authority to make regulations with respect to the grievance procedure. In addition, there

are detailed provisions relating to the grievance procedure set out in the Collective Agreement which I shall review in due course.

[61] The Statute also makes provision for the adjudication of grievances in s. 92. The text of s. 92(1) is as follows:

> **92.** (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to
> (a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,
> (b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),
> (i) disciplinary action resulting in suspension or a financial penalty, or
> (ii) termination of employment or demotion pursuant to paragraph 11 (2(f) or (g) of the *Financial Administration Act*, or
> (c) in the case of an employee not described in paragraph (b), disciplinary action
>
> resulting in termination of employment, suspension or a financial penalty,
> and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.
> [emphasis added]

[62] Not all matters that are grieveable may be referred to adjudication. Pursuant to s. 92(1), only those matters relating to the interpretation or application in respect of the employee of a provision of the collective agreement or an arbitral award, and disciplinary action resulting in suspension or financial penalty or termination or demotion, are referable to adjudication. The defendants, as noted, concede that the complaints set out in the plaintiffs' statement of claim are not referable to adjudication.

[63] With respect to those grievances which are not referable to adjudication, the decision taken at the final level of the grievance process is final and binding. This is set

out in s. 96(3):

> **96.** (3) Where a grievance has been presented up to and including the final level in the grievance process and it is not one that under section 92 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken thereon. [emphasis added]

[64] Certain provisions which are frequently found in labour legislation are not found in the **P.S.S.R.A.**. For example, there is no express conferral on the grievance and adjudication process of exclusive jurisdiction over disputes arising from the interpretation, application and administration of the collective agreement. This is in contrast with provisions such as s. 42 of the Nova Scotia **Trade Union Act**, R.S.N.S. 1989, c. 475 which provides:

> **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.
> .....
>
> (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.

[65] The **P.S.S.R.A.** explicitly excludes from the grievance process disputes for which other forms of administrative redress are provided for under an Act of Parliament. Also absent from the **P.S.S.R.A.** is a requirement that the collective agreement provide for final settlement by arbitration of all differences between the parties concerning its meaning or violation. A typical provision of that sort is s. 45(1) of the Ontario **Labour Relations Act**, R.S.O. 1990, c. L-2 referred to by the Supreme Court of Canada in

Weber , (supra). That section provides:

> 45(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable. [emphasis added]

[66] In contrast to such a provision, the **P.S.S.R.A.**, as noted, specifically excludes certain categories of grievance from submission to adjudication. Whereas typical labour law legislation requires submission to arbitration of disputes relating to the interpretation, application or administration of the collective agreement including any question as to whether a matter is arbitrable, s. 92 of the **P.S.S.R.A.** limits adjudication to those grievances relating to the interpretation or application in respect of the employee of a provision of the collective agreement, disciplinary action, termination or demotion.

[67] The Collective Agreement provides for a grievance procedure. The most relevant article is M-38.02:

> M-38.02 Subject to and as provided in Section 90 [now Section 91] of the Public Service Staff Relations Act, an employee who feels that he or she has been treated unjustly or considers himself or herself aggrieved by any action or lack of action by the Employer in matters other than those arising from the classification process is entitled to present a grievance in the manner prescribed in clause M-38.05 except that,
>
> (a) where there is another administrative procedure provided by or under any Act of Parliament to deal with the employee's specific complaint, such procedure must be followed, ...

[68] Article M-38.15 tracks s. 96(3) of the Statute by providing:

> M-38.15 The decision given by the Employer at the Final Level in the grievance procedure shall be final and binding upon the employee unless the grievance is a class of grievance that may be referred to adjudication. [emphasis added]

[69] The decision at the final step of the grievance procedure is subject to judicial review pursuant to ss. 18 and 18.1 of the **Federal Court Act** .

[70] Similarly, Article M-38.23 tracks the language of s. 92 with respect to submission to adjudication:

> M-38.23 Where an employee has presented a grievance up to and including the Final Level in the grievance procedure with respect to:
>
> (a) the interpretation or application in respect of him or her of a provision of this Collective Agreement or a related arbitral award,
>
> or
>
> (b) disciplinary action resulting in discharge, suspension or a financial penalty,
>
> and the employee's grievance has not been dealt with to his or her satisfaction, he or she may refer the grievance to adjudication in accordance with the provisions of the Public Service Staff Relations Act and Regulations. [emphasis added]

[71] Absent from the provisions of this Collective Agreement are provisions commonly found in private sector collective agreements making the grievance procedure (culminating in submission to arbitration) the mandatory method for resolution of disputes relating to the interpretation, application or administration of the collective agreement: see for example the provisions of the Collective Agreement reviewed in **N.S.U.P.E. v. Halifax Regional School Board, supra**, at 377.

[72] The Department has a policy on harassment which I will review in the next section of my reasons. That policy addresses process under the heading “Other Redress Mechanisms” and specifically provides that if a complainant does not agree with the conclusions or corrective action of the Deputy Minister Representative, the complainant may avail him/herself of any other legal redress procedure.

[73] I think it is apparent that this scheme is not exclusive in the same sense that word was used in **Weber**. As noted, the scheme under the **P.S.S.R.A.** is different in several respects. Matters for which there is another administrative procedure provided for under some other federal statute are excluded (Section 91(1)(b) and Article M-38.02), there is no provision making resort to the grievance or adjudication process mandatory and some types of grievances are excluded from the adjudication process. The Harassment Policy contemplates resort to other legal redress procedures.

[74] While the process is not explicitly made an exclusive one, the legislation and the Collective Agreement deal comprehensively with situations in which an employee feels unjustly treated or aggrieved by occurrences affecting the terms and conditions of employment. Matters for which there is administrative redress under other federal statutes are excluded, but that does not support an argument in favour of court jurisdiction. If the provisions of the **P.S.S.R.A.** and the other fora of administrative redress are considered, there exists a quite comprehensive scheme for dispute resolution outside the courts. However, the absence of a provision requiring (as

opposed to entitling) recourse to the grievance procedure and the inability to submit the dispute to adjudication in my mind make this scheme, in relation to such disputes, entitled to considerably less deference than those under consideration in **Weber** and related cases. It may be that where employees invoke the grievance procedure, as they are entitled, but not required to do, they are bound by the results, subject to judicial review: see s. 96(3) and Article M. 38.15. No recourse to the grievance procedure was taken here.

(b) The Dispute

[75] As Justice McLachlin pointed out in **Weber**, in considering the nature of the dispute, the decision-maker must attempt to define its essential character. She noted that the fact that the parties are employer and employee may not be determinative and neither is the place of the conduct giving rise to the dispute. As Justice McLachlin put it, “The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.”: p. 957. Not all actions in the courts between employer and employee are precluded. Only disputes which expressly or inferentially arise out of the collective agreement are barred.

[76] Highly relevant to the inquiry is whether the substance of the allegations (as opposed to a particular legal characterization of them) can be located within the collective agreement. For example, in **Weber**, McLachlin, J. noted that apart from the particular collective agreement in issue in that case, the conduct complained of by

Weber might well be argued to fall outside the normal scope of employer/employee relations. However, provisions of that agreement were broad and, to use McLachlin, J.'s words, "... expressly purport to regulate the conduct at the heart of this dispute." (emphasis added): p. 964. The grievance procedure in that collective agreement applied to "any allegation that an employee has been subjected to unfair treatment or any dispute arising out of the content of this agreement ...". : p. 964. The sick leave benefits in issue were made part of the collective agreement, which meant that the medical plan and the employer's administration of it expressly fell within its purview. The actions of Hydro which were challenged were taken in the course of making a decision about Mr. Weber's entitlement to benefits under the plan and the allegation that Hydro acted improperly fell within the words "unfair treatment or any dispute arising out of the content of the agreement". McLachlin, J. concluded:

> I conclude that the wide language of Article 2.2 of the Agreement, combined with item 13.0, covers the conduct alleged against Hydro. Hydro's alleged actions were directly related to a process which is expressly subject to the grievance procedure. While aspects of the alleged conduct may arguably have extended beyond what the parties contemplated, this does not alter the essential character of the conduct. In short, the difference between the parties relates to the "administration ... of the agreement" within s. 45(1) of the *Labour Relations Act*. (emphasis added)

[77] In applying the test of whether the dispute in its essential character arises pursuant to the collective agreement, Justice McLachlin said this:

> .... In this case, the fact that the collective agreement covers all unfair treatment regarding matters within its ambit may similarly be said to oust recourse to the courts for complaints of unfair treatment, which is the essence of the appellant's statement of claim. The arbitrator has exclusive jurisdiction to consider the dispute between the parties, provided that the dispute falls under the collective agreement ... That the facts may be capable of being characterized as a tort or a constitutional breach may be taken into account by the tribunal, which must apply the law as it stands. .... (emphasis added)

[78] In **O'Leary**, the Court noted that it is not essential that the collective agreement deal expressly with the complaint advanced in the action if the dispute, in its essential character, arises inferentially under the collective agreement. In that case, the employee was sued by his employer for negligently causing damage to its vehicle. The collective agreement did not expressly deal with employee negligence in relation to the employer's property, but an article of the collective agreement acknowledged the employee's obligations to ensure the safety and dependability of the employer's property and equipment. The court held that this provision, "by inference ... confers correlative rights on the employer to claim for breaches of these obligations." Moreover, the collective agreement, at least by implication, contemplated employer redress through the grievance and arbitration process.

[79] The essential character of a dispute is not always easy to determine. One principle, however, is clear. The Collective Agreement must, expressly or by implication, address the substance of the dispute. I have reviewed Justice McLachlin's comments in **Weber** and **O'Leary** to this effect. Recent appellate authority also confirms this approach. It was stated succinctly by Goudge, J.A. in **Giorno v. Pappas** (1999), 42 O.R. (3d) 626 at 630: "The court must examine the facts of the dispute to determine if the essential character of the alleged conduct is covered by the collective agreement." (emphasis added) To the same effect, Laskin, J.A. said in **Piko v. Hudson's Bay** (1998), 41 O.R. (3d) 729 at 734; application for leave to appeal to S.C.C. dismissed [1999] S.C.C.A. No. 23, that the question is whether the dispute, in its

essential character, arises under the collective agreement. See also, e.g., **Graham v. Strait Crossing Inc.**, (1999), 170 D.L.R. (4th) 152(P.E.I.C.A.) at para. 19; **Gauthier v. Chabot**, [1998] A.Q. No. 2923 (C.A) at para. 22; **Fording Coal Ltd. v. United Steelworkers of America Local 7884** (1999), 169 D.L.R. (4th) 468 (B.C.C.A.) at para. 25.

[80] The claims made by the plaintiffs in this action arise out of alleged conduct in the workplace by fellow federal public servants during the course of Mr. Pleau's employment. The allegations include:

> conspiracy to cause injury, loss and damage;
>
> intentional and malicious conduct designed to discredit the plaintiff, Paul Pleau's, character and veracity;
>
> defamation in the course of an investigation into allegations made by Mr. Pleau in relation to the improprieties in his workplace;
>
> abuse of office and authority;
>
> breach of fiduciary duty; and,
>
> negligent exercise of authority.

[81] More specifically, the statement of claim alleges that:

(i) the defendants Uhrich and Halfyard, who were Mr. Pleau's manager and chief respectively, made defamatory allegations in the course of a departmentally sponsored investigation into Mr. Pleau's allegations

of impropriety in the operation of the workplace.

(ii) The defendants Bujold and MacDonald (Director General of Staff Relations with Pleau's Department and Director of Pleau's Department respectively) altered a record of a complaint of harassment in the workplace by Mr. Pleau.

(iii) The defendants Bagnall and Bourgeois (Regional Director of the Department and Atlantic Director General of the Department) halted the investigation of a departmentally retained consultant into personnel and administrative matters at Mr. Pleau's workplace.

(iv) The defendants Snyder, Sequin and Ball (investigators in the Department) stopped an investigation of the allegations made by Mr. Pleau, and altered an investigation report concerning those allegations.

[82] The claim against the Federal Crown is based on the allegation that in carrying out the acts just referred to, the individual defendants were acting within the course of their employment with apparent authority with the result that Her Majesty the Queen in right of Canada is responsible in law for their actions. The Crown admits that the individual defendants were acting in the course of their employment with apparent authority. Misconduct is denied.

[83] As submitted by the defendants, the scope of the grievance procedure is very broad. Under s. 91 and Article M-38.02, an employee may grieve if he or she "feels

aggrieved ... as a result of any occurrence or matter affecting the terms and conditions of employment of the employee ..." However (unlike the situation in **Weber**) access to adjudication is more restricted than access to the grievance process. Only grievances dealing with "... the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award or disciplinary action ... termination or demotion ..." are referable to adjudication.

[84] This difference in scope of the grievance procedure and the adjudication process is underlined by the defendants' submissions. It is conceded by the defendants that the matters alleged in the statement of claim could not be referred to adjudication under s. 92. This position was not disputed by the plaintiffs. It follows from this concession that the issues raised in the action relate to an occurrence or matter affecting the employee's terms and conditions of employment but do not concern the interpretation or application of the collective agreement or an arbitral award, disciplinary action, termination or demotion within the meaning of s. 92 of the **P.S.S.R.A.**.

[85] We were not referred to provisions of the Collective Agreement or the **P.S.S.R.A.** which set out any standard relevant to consideration of the allegations made in the action. The Collective Agreement does not expressly or by implication deal with the substance of these allegations. The most that can be said is that the scope of the grievance procedure, which Mr. Pleau was entitled (but not expressly required) to employ, is broad enough to cover these complaints. The Collective Agreement

provides no standards for assessing the claims and no process for adjudication of them on their merits by a third party.

[86] We were referred to the Departmental Policy on Harassment dated 1 December, 1989, which arguably addresses the substance of Mr. Pleau's allegations. The policy, however, makes it clear that there are several redress procedures available to complainants. For example, in the Policy's Annex A, entitled Harassment in the Workplace - Special Redress Procedure, the following is found:

> Other Redress Mechanisms
>
> 6. Notwithstanding employees' right to lodge complaints under this directive, they may avail themselves of the following redress mechanisms:
> a) a grievance,
> b) a complaint with the Canadian Human Rights Commission,
> c) a complaint with the Public Service Commission's Investigations Directorate.
>
> .....
>
> Right to Appeal
>
> 18. The complainant who, following an open discussion with the DM Representative, disagrees with the conclusions or considers the corrective actions to be inadequate, may avail him/herself of any other legal redress procedure such as a complaint with the Canadian Human Rights Commission or with the Public Service Commission's Investigations Directorate (see Annex B). (emphasis added)

[87] The existence of this Harassment Policy does not at all support the ouster of court jurisdiction; in fact, quite the opposite. It specifies that where the complainant is not content with the results of the Policy, he or she "... may avail him/her self of any other legal redress procedure."

[88] In my opinion, the argument advanced by the defendants in this case far exceeds the scope of the **Weber** principle. Here it is submitted that the Court action should be struck even though there is no possibility of recourse by the employee to adjudication and the substance of the dispute is not addressed in any way by the Collective Agreement. To paraphrase Laskin, J.A. in **Piko, (supra)** at 735, while the dispute described in the Statement of Claim arises out of the employment relationship, it does not arise under the Collective Agreement; the Collective Agreement does not address the conduct complained of in this action.

(c) Effective Redress

[89] The defendants submit that redress was available through the grievance procedure even though reference to adjudication was not possible with respect to these allegations. As noted, the decision at the final step of the grievance process is final subject to judicial review in the Federal Court: see s. 96(3).

[90] As Justice McLachlin pointed out at p. 958 in **Weber**, “It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction.” Relying on words of Estey, J. in **St. Anne**, Justice McLachlin noted that what must be avoided is “real deprivation of ultimate remedy”.

[91] I attempted to summarize the holding of **Weber** with respect to the

preservation of effective remedies in my reasons in **Nova Scotia Union of Public Employees v. Halifax Regional School Board**, **(supra)** at 379-80:

> The **Weber** decision does not simply limit the jurisdiction of courts; it also takes an expansive view of the jurisdiction of arbitrators. McLachlin, J., referred to these two aspects as "correlative". She said in **Weber** that the exclusive jurisdiction model "...conforms to a pattern of growing judicial deference for the arbitration and grievance process and correlative restrictions on the rights of the parties to proceed with parallel or overlapping litigation in the courts ..." (emphasis added) (at p. 959 [S.C.R.]); In **Weber**, for example, it was held that arbitrators have the power and the duty to apply common law and statutes including the power to grant **Charter** remedies where the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed: at p. 958 and p. 963 [S.C.R.].
>
> I think it is of fundamental importance in **Weber** that the limits of court jurisdiction can only be understood in light of the breadth of arbitral jurisdiction. **Weber** was not a case in which it was suggested that neither the arbitrator nor the court would have jurisdiction to determine the rights of the parties. This is underlined by McLachlin, J.'s, quotation in **Weber** from **St. Anne-Nackawic** to the effect that matters "addressed and governed" by the collective agreement should not be pursued in the courts and that the courts should not be a "duplicative forum" (at pp. 952-953 [S.C.R.]). In **Weber**, there was no question that the grievance was arbitrable. A grievance was, in fact, pursued and settled. The question was which forum had jurisdiction. It was not suggested or contemplated that neither had jurisdiction.
>
> Of course, arbitral and court jurisdiction are not always the mirror image of each other; the correlation is not exact. In some cases, court action may be barred even though there is no remedy available through the arbitration process. .....
>
> However, the collective agreement does not set out the parties' rights exhaustively, and therefore exclude, court jurisdiction in all situations. McLachlin, J., in **Weber** refers to two categories of such cases. Actions between employees and employers which do not "expressly or inferentially arise out of the collective agreement" are not barred, and, in addition, courts "possess residual jurisdiction based on their special powers ...". (**Weber** at p. 957 [S.C.R.]. .....

[92] McLachlin, J. refers to two categories of cases in which courts may retain jurisdiction. The first includes actions which do not expressly or inferentially arise out of the collective agreement. As noted, the appellants concede that the plaintiffs' allegations are not referable to adjudication. It follows that these allegations are,

therefore, not in respect of the interpretation or application in respect of the employee of a provision in the collective agreement. This case falls within the first category. The second category includes cases in which courts have a residual jurisdiction to ensure effective redress. In my view, this case also falls within the second category.

[93] The decision of the Supreme Court of Canada in **Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.**, [1996] 2 S.C.R. 495 is helpful on this aspect. The case concerned the authority of the courts to issue an interim injunction restraining the employer from implementing a new work schedule pending the hearing of a grievance. McLachlin, J., for the Court, said at p. 501:

> The employer further argues that the dispute resolution mechanism provided by the Code is exclusive, and bars any other remedies. The court, it says, disregarded the comprehensive contractual and statutory scheme designed to govern all aspects of the relationship of the parties in a labour dispute. The difficulty with this argument lies in the assumption that the Code covers all aspects of any labour dispute. In this case, the fact is that the Code did not cover all aspects of the dispute. No matter how comprehensive a statutory scheme for the regulation of disputes may be, the possibility always remains that events will produce a difficulty which the scheme has not foreseen. It is important in these circumstances that there be a tribunal capable of resolving the matter, if a legal, rather than extra-legal, solution is to be found. It is precisely for this reason that the common law developed the notion of courts of inherent jurisdiction. If the rule of law is not to be reduced to a patchwork, sometime thing, there must be a body to which disputants may turn where statutes and statutory schemes offer no relief. (emphasis added)

[94] We have been told nothing about the grievance procedure apart from what appears in the statute and the Collective Agreement. Judging by Article M-38, it is a typical stepped process progressing through various levels of management, with a manager at each level being the decision-maker. What is not typical about the

grievance process is that its outcome at the final step (where adjudication is not possible) is protected by a privative clause and is subject to judicial review.

[95] In my opinion, access to the grievance procedure without the right to test the outcome by adjudication on the merits by a third party does not constitute effective redress for the alleged wrongdoing in this case. Of course, it would probably be open to the parties to agree that their redress should be limited in this way. For the reasons advanced earlier, I do not think they have done so here.

(d) Summary of Conclusions:

[96] In my opinion, this action has not been shown to be clearly unsustainable on the basis of lack of jurisdiction. I rely on three main considerations. First, the grievance procedure is not expressly or by implication the sole process selected by the parties or mandated in the legislation for resolution of this sort of dispute. Second, the collective agreement does not explicitly or by inference address or govern the substance of the dispute. Third, no adequate redress is provided for. For these reasons, I conclude the Chambers judge did not err in refusing to strike out the statement of claim.

[97] I have been referred to two decisions of the Federal Court, Trial Division which held that the grievance procedure, at least where it has been resorted to, ousts the jurisdiction of the courts in a tort action: see **Johnson-Paquette v. Canada**, (1998), 159 F.T.R. 42; [1998] F.C.J. No. 1741 (T.D.) (Q.C.) and **Panagopoulos v. The Queen**

(unreported, March 15, 1990 T-747-88, Federal Court, Trial Division).

[98] In **Johnson-Paquette**, the grievance procedure had been pursued to the final step, but judicial review of the decision had not been pursued. The Court held that it did not have jurisdiction "... to hear what is essentially an application for judicial review of a grievance officer's decision by way of an action for damages in tort" (at para. 26). The same was true in **Panagopoulos**: see also **Gagné v. Canada (Department of Veterans Affairs)**, [1992], F.C.J. No. 306 (Q.L.); 90 D.L.R. (4th) 492, 50 F.T.R. 127. Both cases are, therefore, distinguishable because here there was no resort to the grievance process, the final and binding provision of s. 96(3) did come into operation and the action is not a collateral attack on its outcome.

[99] Both **Panagopoulos** and **Johnson-Paquette** held that, even where a matter is not referable to adjudication, court actions are barred. Both held that the **P.S.S.R.A.** and the collective agreements in issue there specified that the grievance procedure was the only proper forum and constituted the only remedy open to the plaintiffs in these actions. For the reasons I have set out at perhaps too great length, I do not think that conclusion can be applied to this case.

[100] I also refer to **Danilov v. Canada (Atomic Energy Control Board), (supra)**. The plaintiff in that case was not bound by a collective agreement, but was subject to the provisions of the **P.S.S.R.A.**. The Court stated:

> Finally, we do not think that the existence of the statutory grievance procedure provided by the **Public Service Staff Relations Act**, R.S.C. 1985, c. P-35 (the "PSSRA") justifies the dismissal of this action. That procedure does not permit the plaintiff to take this dispute to binding adjudication by a third party. He can do no more than raise it as a complaint with his employer. Moreover, unlike the circumstances in **Johnson-Paquette v. Canada** (1998), 159 F.T.R. 42, the plaintiff here did not agree through collective bargaining to have the grievance procedure in the PSSRA serve as his dispute resolution mechanism.
>
> Hence the rationale of **Weber v. Ontario Hydro**, [1995] 2 S.C.R. 929 is simply not applicable. Where the statutory grievance procedure is neither agreed to, nor is a mechanism providing final and binding adjudication of this dispute, that procedure cannot be said to have exclusive jurisdiction over the dispute to the exclusion of the courts.

[101] In this case, of course, the grievance procedure is part of the Collective Agreement, but it is not expressly or by implication the exclusive recourse for disputes of this nature. This case shares with **Danilov** the feature that neither the statute nor the Collective Agreement provide, in relation to this dispute, a mechanism for binding adjudication by a third party.

[102] I have also considered the impact of allowing court actions in these circumstances on the comprehensive labour relations scheme established by the legislation and the Collective Agreement. I have concluded that, in the circumstances of this case, the grievance procedure is not the exclusive method of dispute resolution. However, given the comprehensive nature of the scheme in this collective bargaining context, I think that, to paraphrase Justice L'Heureux-Dubé in **Gendron**, it was intended that under this scheme the courts should have but a small role as decision-makers at first instance in employment related disputes. I emphasize that the scope of court involvement which I find in this case is very narrow indeed. This is a case in which the

dispute is admittedly outside the scope of the adjudication process and in which the employee has not had recourse to the grievance procedure. I do not intend to, and do not address in these reasons, the availability of court actions where one or both of these elements is not present. In my view, confining the scope of court action within this narrow sphere is essential to ensuring effective redress and is not unduly intrusive into the collective bargaining relationship.

(e) The Claim on Behalf of the Spouse and Child:

[103] The Chambers judge did not give reasons for her refusal to strike out these claims. The principal argument on behalf of the defendants is that these claims are derivative of the claims of Mr. Pleau and that if his action fails, so do these claims. In light of my conclusion that Mr. Pleau's claim should not be struck, the principal argument of the defendants with respect to these derivative claims fails.

[104] The defendants also challenge these claims on the basis that they are, in essence, claims for loss of *consortium* for which there is no basis in law. This point was not fully argued; the defendants provided us with no authority in support of this branch of the argument. I am not convinced that the claim, as pleaded, is absolutely unsustainable if ordinary tort principles were applied: see the decision by Hallett, J. (as he then was) in **Blotnicky v. Oliver** (1988), 84 N.S.R. (2d) 14 (S.C.T.D.). While the claim pleaded is novel, that in itself is a reason not to strike it out.

V. DISPOSITION

[105] I would grant leave to appeal, but dismiss the appeal with costs fixed at $2000.00 inclusive of disbursements.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.

Roscoe, J.A.