SUPREME COURT OF NOVA SCOTIA

Citation: *Casey v. Teachers' Pension Plan Trustee Inc.*
2019 NSSC 135

Date: 20190429
Docket: Hfx No. 437161
Registry: Halifax

Between:

Lynn Casey

Respondent/Plaintiff

v.

Teachers' Pension Plan Trustee Inc. and
Nova Scotia Pension Services Corporation

Applicants/Defendants

Judge: The Honourable Justice John P. Bodurtha

Heard: October 29, 2018, in Halifax, Nova Scotia

Decision: April 29, 2019

Counsel: Barry Mason, for the Respondent/Plaintiff
Nathan Sutherland & Balraj Dosanjh, for the Applicants/Defendants

Background and Conclusion

[1] The Plaintiff, Janet Lynn Casey, commenced an action against the Defendants, the Teachers' Pension Plan Trustee Inc. ("**TPPTI**") and the Nova Scotia Pension Services Corporation ("**NSPSC**"), alleging unjust enrichment, negligence, and bad faith arising from the Defendants' decision to not allow the Plaintiff to apply for disability pension benefits. The Plaintiff is seeking various remedies arising from the denial of benefits under the Nova Scotia Teachers' Pension Plan. The Defendants have brought a motion for summary judgment on the evidence.

[2] The Plaintiff was a teacher employed by the Halifax Regional School Board (the "**Board**") from 2004 until February 2010. During that time, section 9 of the *Teachers' Pension Act*, SNS 1998, c 26, required her to make contributions to the Teachers' Pension Plan (the "**Pension Plan**"). She contributed to the Pension Plan for 10.88 years in total. The Plaintiff was diagnosed with multiple sclerosis in December 2009.

[3] On or about February 13, 2010, the Plaintiff went on sick leave due to disability and has been unable to return to work since. She has not worked for the Board or contributed to the Pension Plan since February 13, 2010. The Plaintiff alleges that she has been continuously disabled within the meaning of the *Teachers'*

Pension Act, SNS 1998, c 26 and the *Teachers' Pension Plan Regulations*, NS Reg 88/99, since that time.

[4] The test for summary judgment is set out by the Court of Appeal in *Shannex Inc v. Dora Construction Ltd*., (2016 NSCA 89). In my view, there is a preliminary question of jurisdiction that must be determined before any analysis of the *Shannex* test. The Defendants address jurisdiction under question 3 of the *Shannex* test, while the Plaintiff addresses it as a preliminary matter, not falling within the *Shannex* test. I agree with the Plaintiff. The threshold issue of jurisdiction must be determined first, and if, the court finds it has no jurisdiction to hear a matter, the proceeding must be struck (see for instance, *Inter Atlantic Canada Ltd. v. Rio Cuyaguateje (The)*, [2001] F.C.J. No. 549).

[5] Although this court has concurrent jurisdiction with the statutory regime to hear this matter, based on the *Weber* analysis, the court should decline to exercise its jurisdiction (see *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929). The matter is dismissed on that basis.

The Pension Plan

[6] The Pension Plan is a registered defined benefit plan, established by the *Teachers' Pension Act*, SNS 1998, c 26, and the terms of the Pension Plan are set out in the *Teachers' Pension Plan Regulations*, NS Reg 88/99.

[7] The Defendant, TPPTI, was appointed as Trustee of the Pension Plan under an agreement between the Nova Scotia Teachers' Union (the "**Union**") and the Province of Nova Scotia dated June 22, 2005 (the "**2005 Agreement**"). TPPTI has been the Trustee and administrator of the Pension Plan effective April 2006. Under the 2005 Agreement, TPPTI was given the responsibility of the day-to-day administration of the Nova Scotia Teachers' Pension Fund (the "**Fund**"), including the determination of benefit entitlement. TPPTI's decisions are binding on the Minister of Finance, the Union, TPPTI, and the Plan members and beneficiaries.

[8] NSPSC is a corporation which administers the pension benefits and investment assets of the Pension Plan under the direction of the TPPTI. The NSPSC holds the funds and assets of the Pension Plan. It also provides Pension Plan members' services and manages the day-to-day benefit administration of the Pension Plan. Practically speaking, although Morneau Shepell Inc. was engaged by TPPTI, that company reports to the NSPSC when providing services related to the day-to-day administration of the Pension Plan, including services related to the disability pension that the Pension Plan provided up to July 31, 2014.

[9] Prior to August 1, 2014, the Pension Plan offered a disability pension to eligible members. From 2009 until 2014, the *Regulations* contained the following provisions regarding applying for a disability pension:

> 17(1) No application for a disability pension shall be received by the Plan administrator unless made within 2 years from the date that the member last contributed to the plan.
>
> (2) Despite subsection (1), if the applicant is, in the opinion of the medical consultant, mentally incapacitated the Plan administrator may extend the period for receiving an application for a disability pension.
>
> (3) An application for a disability pension shall not be considered for approval unless the Plan administrator receives
>
> > (a) a report on the applicant from a medical doctor licensed to practice in Canada certifying that the applicant became mentally or physically incapacitated while employed and specifying the medical diagnosis of, and the prognosis for, the incapacitation; and
> >
> > (b) a report from the medical consultant advising the Plan administrator as to the course of action the medical consultant considers appropriate with respect to the granting of a disability pension to the applicant.

[10] In 2014, the *Regulations* were amended. As of August 1, 2014, the Pension Plan no longer offered disability pensions to members; instead, teachers had access to long term disability coverage under the Nova Scotia Teachers' Union's Long Term Disability Insurance plan. Section 17 of the *Regulations* was amended as follows:

> 17(1) No application for a disability pension shall be received by the Plan administrator unless made within 2 years from the date that the member last contributed to the plan.
>
> (2) Despite subsection (1), if the applicant is, in the opinion of the medical consultant, mentally incapacitated the Plan administrator may extend the period for receiving an application for a disability pension.
>
> (2A) Despite subsections (1) and (2), <u>no application for a disability pension shall be received by the Plan administrator after July 31, 2014 unless the applicant was absent from duty on unpaid sick leave as at June 30, 2014 and the application is made before August 1, 2016</u>. [Emphasis Added]

[11] The mental incapacity provision remained the same under the amended *Regulations*. "Medical consultant" is defined under the past *Regulations* as "a

medical doctor licensed to practice in Canada who is retained by the Plan administrator to provide medical advice on the granting of disability pensions."

The Plaintiff's Application for a Disability Pension

[12] On February 13, 2010, the Plaintiff went on sick leave as a result of multiple sclerosis and other medical issues. The Plaintiff first contacted the NSPSC in January 2013 to inquire about her eligibility for a disability pension. The Plaintiff states that she was unaware of the existence of a total disability pension until January of 2013.

[13] When the Plaintiff contacted the NSPSC in January 2013, she spoke to Laurene MacDonald, an NSPSC Client Services Consultant, over the phone. Ms. MacDonald consulted with the Chief Pension Officer of NSPSC, Kimberley Blinn, about the Plaintiff's disability pension entitlement because more than two years had passed since the Plaintiff last contributed to the Pension Plan. Ms. Blinn reviewed the information and spoke with representatives of the Union and Manulife. Ms. Blinn concluded that the Plaintiff was instructed in the past to apply for both a Teachers' Pension Plan disability pension and a Canadian Pension Plan before the expiration of the two-year window. Ms. McDonald advised the Plaintiff over the phone that she was not permitted to apply for a disability pension because she was out of time.

[14] On February 7, 2013, NSPSC sent a letter to the Plaintiff stating that her eligibility for a disability pension had expired on February 13, 2012. The Plaintiff took no further action at that time. In 2014, the Plaintiff called NSPSC again to dispute the denial of her disability benefits. In response, the NSPSC sent a letter on May 22, 2014 stating that s. 17(1) of the *Regulations* imposes a two-year deadline to apply for disability benefits. The Plaintiff did not appeal the decision of the NSPSC to the Appeals Committee. Instead, the Plaintiff retained counsel to dispute the decision.

Overview of Claim

[15] The Plaintiff says the NSPSC acted as an agent for the other Defendant, TPPTI, which was the administrator of the Pension Plan and trustee of the Pension Plan fund. She claims that the Defendants' "refusal to allow her to apply for benefits pursuant to the Pension Plan resulted in an unjust enrichment" to the trustee. She also alleges that "the Defendant" – without specifying which defendant – "acted negligently, unacceptably and unreasonably in refusing to allow her to apply for Pension Plan benefits." In particular, the Plaintiff says the negligence and "unjustifiable conduct" included the following:

(a) Misinterpreting s. 17 of the *Regulations* to mean that the Plaintiff was prohibited from applying for Pension Plan benefits;

(b) Failing to inquire into whether the Plaintiff had been medically incapacitated from applying for benefits, in accordance with s. 17(2) of the *Regulations*;

(c) Failing to take into account s. 3 of the *Limitations* [sic] *of Actions Act*, RSNS 1989, c 258;

(d) Such other negligence and arbitrary conduct as may appear.

[16] The Plaintiff says the Trustee, as principal of the NSPSC, is liable for the corporation's "negligent administration of her claim for personal injury, emotional distress, mental suffering, aggravation and financial hardship." Along with general, special, aggravated and punitive damages, she seeks a "declaration of entitlement to the Pension Plan."

[17] The Defendants have brought a motion for summary judgment on evidence, pursuant to Civil Procedure Rule 13.04. The Defendants argue that the Nova Scotia Supreme Court lacks the jurisdiction to hear this case. If it does have jurisdiction, they say, the court should decline it. The Defendants also argue that because the limitation period has expired, the Plaintiff's claim has no real

chance of success, and therefore the motion for summary judgment on evidence should be granted.

Analysis

Summary Judgment on Evidence

[18] The Defendant has moved for summary judgment on evidence, pursuant to Civil Procedure Rule 13.04. The Rule reads as follows:

> **13.04 (1)** A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> > **(a)** there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
> >
> > **(b)** the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> **(2)** When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> **(3)** The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> **(4)** On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> **(5)** A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> **(6)** A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> > **(a)** determine a question of law, if there is no genuine issue of material fact for trial;

> **(b)** adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[19] The Nova Scotia Court of Appeal in *Shannex* provided a framework for determining motions for summary judgment under Rule 13.04. Fichaud JA set out the test as follows:

> First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law? [Rules 13.04(1), (2) and (4)]
>
> …
>
> Second Question: If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
>
> …
>
> Third Question: If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: "Does the challenged pleading have a real chance of success?"
>
> …
>
> Fourth Question: If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): Should the judge exercise the "discretion" to finally determine the issue of law?
>
> …
>
> Fifth Question: If the motion under Rule 13.04 is dismissed, should the action be converted to an application and, if not, what directions should govern the conduct of the action?

[20] In *Kaehler v. SystemCare Cleaning & Restoration Ltd.*, 2018 NSSC 219, Justice Muise laid out the additional factors from previous cases that inform the analysis in the *Shannex* test:

> 9 The Court in *Shannex*, at para 33, also noted that: The amended Rule 13.04 frames, but does not materially change *Burton's* tests.
>
> 10 Therefore, it is useful to reproduce the summary of principles listed at paragraph 87 of *Coady v. Burton Canada Co.*, 2013 NSCA 95 (N.S. C.A.), as follows:

1. Summary judgment engages a two-stage analysis.

2. The first stage is only concerned with the facts. The judge decides whether the moving party has satisfied its evidentiary burden of proving that there are no material facts in dispute. If there are, the moving party fails, and the motion for summary judgment is dismissed.

3. If the moving party satisfies the first stage of the inquiry, then the responding party has the evidentiary burden of proving that its claim (or defence) has a real chance of success. This second stage of the inquiry engages a somewhat limited assessment of the merits of the each party's respective positions.

4 The judge's assessment is based on all of the evidence whatever the source. There is no proprietary interest or ownership in "evidence".

5. If the responding party satisfies its burden by proving that its claim (or defence) has a real chance of success, the motion for summary judgment is dismissed. If, however, the responding party fails to meet its evidentiary burden and cannot manage to prove that its claim (or defence) has a real chance of success, the judge must grant summary judgment.

6. Proof at either stage one or stage two of the inquiry requires evidence. The parties cannot rely on mere allegations or the pleadings. Each side must "put its best foot forward" by offering evidence with respect to the existence or non-existence of material facts in dispute, or whether the claim (or defence) has a real chance of success.

7. If the responding party reasonably requires disclosure, production or discovery, or the opportunity to present expert or other evidence in order to "put his best foot forward", then the motions judge should adjourn the motion for summary judgment, either without day, or to a fixed day, or with conditions or a schedule of events to be completed, as the judge considers appropriate, to achieve that end.

8. In the context of motions for summary judgment the words "genuine", "material", and "real chance of success" take on their plain, ordinary meanings. A "material" fact is a fact that is essential to the claim or defence. A "genuine issue" is an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded. A "real chance of success" is a prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation.

9. In Nova Scotia, CPR 13.04, as presently worded, does not create or retain any kind of residual inherent jurisdiction which might enable a judge to refuse to grant summary judgment on the basis that the motion is premature or that some other juridical reason ought to defeat its being granted. The Justices of the Nova Scotia Supreme Court have seen fit to relinquish such an inherent jurisdiction by adopting the Rule as written. If those Justices were to conclude that they ought to re-acquire such a broad discretion, their Rule should be rewritten to provide for it explicitly.

> 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.
>
> 11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.
>
> 12. Where, however, there are no material facts in dispute, and the only question to be decided is a matter of law, then neither complexity, novelty, nor disagreement surrounding the interpretation and application of the law will exclude a case from summary judgment.
>
> 11 *Shannex* interprets the amended Rule 13.04 by adjusting the approach in *Burton* to conform to the new wording and, as directed in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.), by "broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims". That general approach was confirmed in *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52 (N.S. C.A.), at paragraph 7, as being the proper approach.

[21] However, as previously discussed there is a threshold jurisdiction issue that must be addressed before considering the *Shannex* test.

Jurisdiction

[22] In *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 38, Cromwell JA (as he then was) determined that the question of the Supreme Court's jurisdiction over a matter was a proper subject for summary judgment:

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

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

[23] The Defendants argue that the court has no jurisdiction over this matter and, in the alternative, the court should decline its jurisdiction. The court will deal with each separately.

Does the Court have Jurisdiction?

[24] The Defendants submit that this dispute is within the exclusive jurisdiction of the dispute resolution process established under the *Teachers' Pension Act*. They say the court should rely on the principles set out in a line of cases that include *St Anne Nackawic Pulp & Paper Co v. CPW, Local 219*, [1986] 1 SCR 704, and *Weber v. Ontario Hydro*, [1995] 2 SCR 929.

[25] *St. Anne Nackawic* suggests courts should be cautious not to undermine a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties, but should show appropriate deference to the arbitration process. In *Pleau v, Canada (Attorney General)*, 1999 NSCA 159, the court discussed the difficulties with applying common law principles to labour relations:

> 28 The first holding is premised on a combination of substantive and procedural considerations. …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]

[26] In this case there is no collective agreement and no mandatory arbitration clause in the *Teachers' Pension Act*. The comprehensive statutory regime that the courts are referring to in *St. Anne Nackawic* and *Pleau* is arbitration under the collective agreements in a labour relations setting. Arbitration is essential to the scheme set out for labour law disputes, but the same may not be said about every government or regulatory body. The courts would have no difficulty applying common law principles to a statutory scheme involving only two parties. There is no absent third party who could not appear in court, and there is no absence of an identifiable benefit. Thus, the reasons for courts to decline jurisdiction when dealing with labour arbitration, so as to not enact violence

against the comprehensive statutory regime, are not obstacles in Ms. Casey's claim against the Defendants.

[27] The Defendants argue that the principles in *Weber* apply to statutory tribunals generally, not only statutory schemes governing labour relations. *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, indicates that *Weber's* rationale was to ensure that jurisdictional issues are decided in a manner consistent with the statutory schemes governing the parties. That case also involved a collective agreement, but there was an issue as to whether the collective agreement or a statutory regime should govern the dispute:

> …it is important to recognize that in *Weber* this Court was asked to choose between arbitration and the courts as the two possible fora for hearing the dispute. In the case at bar, *The Police Act* and Regulations form an intervening statutory regime which also governs the relationship between the parties. As I have stated above, the rationale for adopting the exclusive jurisdiction model was to ensure that the legislative scheme in issue was not frustrated by the conferral of jurisdiction upon an adjudicative body that was not intended by the legislature. The question, therefore, is whether the legislature intended this dispute to be governed by the collective agreement or *The Police Act* and Regulations. If neither the arbitrator, nor the Commission have jurisdiction to hear the dispute, a court would possess residual jurisdiction to resolve the dispute. I agree with Vancise, J.A. that the approach described in *Weber* applies when it is necessary to decide which of the two competing statutory regimes should govern a dispute.

[28] The Supreme Court of Canada clearly stated that only if both the arbitrator and the Commission lacked the jurisdiction to hear the dispute, would the courts step in. If the arbitrator did not have jurisdiction, but the Commission did, this would still oust the court's jurisdiction. Thus, it can be inferred from this case

that if a statutory regime is created to govern the relationship of the parties, that could oust the jurisdiction of the courts, much like a collective agreement can.

[29] In addition, in *Roumeli Investments Ltd v. Gish*, 2018 NSCA 27 the Nova Scotia Court of Appeal held that *Weber* applies where a court shares concurrent jurisdiction with a tribunal, not just a labour arbitrator:

> [28] This Court has adopted the principles in *Weber v. Ontario Hydro* […] in determining whether the statutory provisions in the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 and a collective agreement implemented thereunder prevented the NSSC from hearing a civil action (*Pleau v. Canada (Attorney General)* […]; whether provisions of the *Securities Act*, R.S.N.S. 1989, c. 418 ousted the jurisdiction of the Nova Scotia Securities Commission to hear a complaint in favour of the Mutual Funds Dealers Association (*Schriver, Re*, 2006 NSCA 1 (N.S. C.A.)); and whether statutory provisions in the *Trade Union Act*, R.S.N.S. 1989, c. 475 served to remove a personal injury claim from the jurisdiction of the NSSC (*Gillan v. Mount Saint Vincent University*, 2008 NSCA 55 (N.S. C.A.)). [Emphasis Added]

[30] *Weber* can be applied in this situation to determine whether the *Teachers' Pension Act* and *Regulations* oust the jurisdiction of the Nova Scotia Supreme Court. However, the Court of Appeal went on in *Roumeli* to state that the *Weber* analysis should be used when deciding whether the court should decline its concurrent jurisdiction with the tribunal:

> 30 In my view, the above general principles can be summarized as follows:
>
> • The NSSC has original jurisdiction to hear civil claims founded in negligence;
>
> • Prior to the passing of residential tenancies legislation, the NSSC historically shared a concurrent jurisdiction with inferior tribunals to hear disputes arising between landlords and tenants;
>
> • As a matter of statutory interpretation, there is a presumption that the legislature does not intend to remove the jurisdiction of the NSSC to hear matters within its original jurisdiction;

> • Statutory provisions which intend to remove jurisdiction from the NSSC must be explicit, clear and specific in that intention. Inferences and implications arising from a single statutory provision, or several read in conjunction, are not sufficient; and
>
> • Where asked to decline to exercise its concurrent jurisdiction in favour of another tribunal, courts should conduct a *Weber* analysis.

[31] There is nothing in the *Act* or *Regulations* that explicitly ousts the jurisdiction of the court. Therefore, it cannot be inferred that it was the legislature's intention to give exclusive jurisdiction to the Appeals Committee. Thus, the court and the Appeals Committee have concurrent jurisdiction and the court must use the *Weber* analysis to determine whether the court should decline its concurrent jurisdiction with the Appeals Committee.

[32] The Plaintiff argues that the cases the Defendants are relying on do not apply in this case because they deal with parties disputing the appropriateness of a particular forum to hear their dispute. The Plaintiff asserts that she is suing the forum itself, and therefore those cases are not applicable. This argument is flawed. The Defendants are the Nova Scotia Pension Services Corporation and the Teachers' Pension Plan Trustee Inc. The Plaintiff is suing these two corporations alleging unjust enrichment, negligence, and bad faith. The jurisdiction issue is whether the Appeals Committee has the exclusive jurisdiction to hear this case, as opposed to the courts. Therefore, if the Plaintiff was suing the forum itself, she would be suing the Appeals Committee, not the bodies that made the decision about the Plaintiff's pension application.

[33] In *Weber*, McLachlin J. rejected the concurrent and overlapping jurisdiction models.

[34] McLachlin J. warned that allowing overlapping jurisdiction would "leave it open to innovative pleaders to evade the legislative prohibition on parallel court actions by raising new and imaginative causes of action"(para 54). Thus, the fact that the Plaintiff frames the claims in terms of negligence, bad faith, and unjust enrichment is irrelevant in this analysis. The Court does not look to the legal characterization to determine jurisdiction. Instead, it looks to the facts of the case.

[35] McLachlin J. adopted the exclusive jurisdiction model which holds "if the difference between the parties arises from the collective agreement, the claimant must proceed by arbitration and the courts have no power to entertain an action in respect of that dispute. There is no overlapping jurisdiction"(para. 55).

[36] This is not a labour dispute with an exclusive arbitration regime. This case deals with the jurisdiction of a tribunal created by statute, not a collective agreement. I adopt the approach laid out by the Nova Scotia Court of Appeal.

[37] Although "the Supreme Court of Canada has expressly rejected any overlapping or concurrence of jurisdiction between courts and arbitrators where

a dispute arises in the context of the collective bargaining relationship" (Donald JM Brown & David M Beatty, "Arbitration of Grievances in Context: Concurrent Jurisdiction with Courts and Administrative Agencies: Courts", *Brown & Beatty Canadian Labour Arbitration*, 1:4200, (QL)), this is not the case if a dispute arises in the context of a statutory regime. Instead, the question here is whether the Nova Scotia Supreme Court should decline its jurisdiction.

Should the Court Decline Jurisdiction?

[38] The Defendants submit the court should decline to hear the dispute as a matter of discretion in order to avoid frustrating the legislative intention. In *Pleau*, Cromwell JA (as he then was) canvassed the relevant case law and described three interrelated considerations to determine whether a court should decline jurisdiction:

> 18 In my view, the judgments of the Supreme Court of Canada in *St. Anne Nackawic Pulp & Paper Co. v. C.P.U., Local 219*, [1986] 1 S.C.R. 704 (S.C.C.), *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.

[39] These are the considerations when determining if the Supreme Court should decline its jurisdiction. Under this test, many determinations pivot on the "essential character" of the dispute making it the central issue in most cases (*Slack v. Capital District Health Authority*, 2014 NSSC 235, 2014 CarswellNS 476, at para. 13).

1. The Process

[40] The court must first examine the process for dispute resolution established by the legislation. The relevant considerations are the provisions of the legislation, particularly with regards to 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" (*Pleau* at para. 50). In determining the process,

courts have turned to a detailed review of the legislative and contractual provisions.

[41] Subsection 6(3) of the *Teachers' Pension Act* gives the Minister and the Union the ability to enter into an agreement where the Minister may appoint another person as the Trustee of the Pension Fund. TPPTI was appointed as Trustee of the Pension Plan under the 2005 Agreement. Section 11 of *Teachers' Pension Act* describes the administration of the Pension Plan:

> **11(1)** The Minister is responsible for the day-to-day administration of the Pension Plan.
>
> **(2)** Notwithstanding subsection (1), the Minister and the Union may enter into an agreement whereby the Minister and the Union appoint another person as Pension Plan administrator and the Minister thereby ceases to be the Pension Plan administrator and has no legal responsibility for the administration of the Pension Plan.

[42] Under the 2005 Agreement, TPPTI was given the responsibility of the day-to-day administration of the Pension Fund, including determination of benefit entitlement (s. 3.1(b)(ii)). NSPSC is a corporation which administers the pension benefits and investment assets of the Pension Plan under the direction of TPPTI. The NSPSC holds the funds and assets of the Pension Plan. It also provides Pension Plan members services and manages the day-to-day benefit administration of the Pension Plan.

[43] Part VI of the *Regulations* (as they were between September 21, 2009, and August 6, 2010) deals with the disability pension. Sections 15 and 17 provide, in part:

> **Total disability pension**
>
> **15(1)** Every member who, while employed, becomes mentally or physically incapacitated to a degree that renders the member incapable of earning a livelihood by engaging in any employment for which the member is reasonably suited by education, training or experience, shall, subject to Section 17, be entitled to a total disability pension during the member's lifetime.
>
> …
>
> **Rules and procedures**
>
> **17(1)** No application for a disability pension shall be received by the Plan administrator unless made within 2 years from the date that the member last contributed to the Plan.
>
> **(2)** Despite subsection (1), if the applicant is, in the opinion of the medical consultant, mentally incapacitated the Plan administrator may extend the period for receiving an application for a disability pension.
>
> **(3)** An application for a disability pension shall not be considered for approval unless the Plan administrator receives
>
> > **(a)** a report on the applicant from a medical doctor licensed to practice in Canada certifying that the applicant became mentally or physically incapacitated while employed and specifying the medical diagnosis of, and the prognosis for, the incapacitation; and
> >
> > **(b)** a report from the medical consultant advising the Plan administrator as to the course of action the medical consultant considers appropriate with respect to the granting of a disability pension to the applicant.
>
> **(4)**
>
> > **(a)** The Plan administrator may request any information, in addition to the reports specified in subsection (3), as the Plan administrator requires to substantiate an application for, or the continuance of, a disability pension.
> >
> > **(b)** If a person fails to provide the information required by the Plan administrator under clause (3)(a), delays in commencement, or suspension of payment of a disability pension, as the case may be, may result.
>
> **(5)**
>
> > **(a)** Despite Section 14, a pensioner who is receiving a partial disability pension shall become ineligible to continue to receive a partial disability

pension on becoming engaged in any teaching activity in an educational institution for which remuneration is received and payment of the partial disability pension shall cease, effective on the date such teaching activity commenced.

(b) Despite Section 15, a pensioner who is receiving a total disability pension shall be ineligible to continue to receive a total disability pension on becoming engaged in any activity from which the pensioner earns a livelihood and the total disability pension shall cease, effective on the date such activity commenced.

(c) A pensioner who is receiving a disability pension and who becomes engaged in the activities specified in either clause (a) or (b), as the case may be, shall inform the Plan administrator immediately in writing, providing the details of, and the remuneration related to, the activity in which the pensioner is engaged.

(d) Failure to inform the Plan administrator in the manner specified in clause (c) may result in the loss of current and future disability pension entitlement under the Plan.

(e) On receiving the information specified in clause (c), the Plan administrator shall confirm the eligibility status of the pensioner and, if the Plan administrator decides that the pensioner is ineligible to continue to receive a disability pension, the Plan administrator shall cease payment of the disability pension and shall recover from the pensioner any ineligible payments made to the pensioner.

(f) A person who ceases the activity specified in either clause (a) or (b) and who subsequently applies for a disability pension shall be treated as a new applicant for a disability pension.

(g) A person who received a disability pension that ceased pursuant to this Section, and who terminated employment with a participating employer and membership in the Plan, and who is consequently entitled to receive either a service pension or a refund under the Plan shall, pursuant to clause (e), reimburse the Plan for any ineligible disability pension payments the person received and the Plan administrator shall effect this reimbursement by reducing the service pension or refund by the amount of the unpaid reimbursement.

[44] Part VI requires that all relevant documents be given to the Plan administrator before an application can be considered. It also sets out the powers the Plan administrator has once the pension has been approved including requesting more information.

[45] The Nova Scotia Teachers' Pension Plan Guide also describes the application process to receive a disability pension:

> An application for disability pension must be filed with the Nova Scotia Pension Services Corporation within two years of your last teaching day. In cases of mental incapacity, the two-year limit may be waived. You are required to have a medical report completed by your family physician and/or specialist. If there is a fee for these reports it will be paid, within certain limits, by the pension plan. The plan's medical consultant then reviews the reports and a determination of your disability status is made.

[46] The *Act* has a grievance procedure for complainants who do not agree with the Plan administrator's decision regarding their eligibility for pension benefits. The Appeals Committee hears and decides appeals regarding the decisions of the Plan administrator. The Appeals Committee is established under s. 15(1). Section 16 sets out its functions:

> **16(1)** The Appeals Committee shall hear and decide upon appeals made by Pension Plan members, pensioners or any other persons claiming a benefit under the Pension Plan of decisions of the Pension Plan administrator involving the application or interpretation of the Pension Plan provisions.
>
> **(2)** The Appeals Committee shall hear such evidence as it considers necessary and shall make a decision based on the evidence and this Act and the regulations.
>
> **(3)** The Minister and the Union may enter into an agreement regarding procedures related to the conduct of the business of the Appeals Committee.
>
> **(4)** Decisions of the Appeals Committee are binding on the Pension Plan administrator and the appellant, subject to the requirement to maintain continuous registration of the Pension Plan under the terms of the Income Tax Act (Canada).

[47] Subsection 16(4) makes it clear the decision made by the Appeals Committee is binding on the parties and it is a final decision, subject to judicial review.

[48] Subsection 16(3) provides the Minister and Union may enter into an agreement regarding procedures related to the conduct of the business of the Appeals Committee. Pursuant to s. 16(3), the Minister and Union have established the *Nova Scotia Teachers' Pension Plan Appeals Process and Procedure* (the "**Appeals Process**"). The following are relevant sections of the Appeals Process document:

> .001 Appeals may only be made concerning decisions on the application or interpretation of plan provisions that have been communicated in writing to a member…
>
> …
>
> .004 Appeals must be received by the plan administrator within 90 calendar days of the day upon which the member… was notified of the decision that is being appealed. […]
>
> …
>
> .014 Where the appeal is in respect of a decision concerning an application for a disability pension, the Committee may require the appellant to be examined by a medical doctor who is a specialist in the subject area under review. The specialist will make and deliver a report to the Committee upon completion of the examination. […]
>
> …
>
> .016 The Committee will decide all questions arising during a hearing in respect of procedure or admissibility of evidence.
>
> .017 The Committee will make a written decision, including reasons, and deliver it to all parties to the appeal…
>
> .018 If the appellant is successful in his appeal, all actual and reasonably out of pocket expenses incurred by the appellant will be reimbursed from the pension fund. […]

[49] The Appeals Process document makes it clear that appeals to the Appeals Committee are only available in specific circumstances regarding decisions made on the application or interpretation of the Pension Plan provisions. Not all

matters that are grievable would be referred to the Appeals Committee. This would make the language inconsistent with exclusive jurisdiction, however, the language in s. 16(1) of the *Act* states "[t]he Appeals Committee shall hear and decide upon appeals made by Pension Plan members". The word "shall" implies a mandatory provision, consistent with exclusive jurisdiction, even if the Appeals Process document limits appeals to cover only decisions on the application or interpretation of plan provisions.

[50] There is no express grant of exclusive jurisdiction to the Appeals Committee in the *Act* or *Regulations*. There is no privative clause in the legislation. However, while the process is not explicitly made an exclusive one, the legislation and the Appeals Process deal comprehensively with situations in which a member feels aggrieved by decisions on the application or interpretation of the Pension Plan provisions.

[51] The Defendants argue the Plaintiff's claims are within the exclusive jurisdiction of the administrator of the Pension Plan and, in turn, the Appeals Committee under the *Teachers' Pension Act*. In their brief they submit three aspects of the statutory scheme demonstrate the intention by the Legislature that the statutory process would exclusively govern questions of benefit entitlement and Plan interpretation:

1. The legislative scheme is comprehensive and establishes a complete code "designed to exclusively govern the benefits provided by the scheme, including all disputes regarding the interpretation and application of the Pension Plan and benefit entitlements provided therein"

2. The *Teachers' Pension Act* demonstrates a clear intention that all decision-making with respect to the Pension Plan would involve the participation of both the Union and the Province. Therefore, the legislative purpose would be frustrated if the Court became the arbiter of issues of Pension Plan interpretation.

3. The statutory scheme provides a clear legislative intent that the TPPTI carefully manages costs to the Pension Plan and this legislative purpose would be undermined if Plan members or other beneficiaries could proceed directly to courts.

[52] The review of the relevant legislation above suggests that the legislative scheme is comprehensive and designed to exclusively govern the interpretation and application of the Pension Plan provisions. This favours the Defendants' first argument.

[53] Regarding the second argument, the *Teachers' Pension Act* demonstrates an intention for both the Union and the Province to be involved by consistently stating the "Union and the Minister" may enter into agreements regarding the administration of the pension plan, appointing a Trustee, amendments, etc. However, the Union does not have as much involvement in the administration of the Pension Plan as the Defendants suggest. Subsection 11(1) of the *Act* states, "[t]he Minister is responsible for the day-to-day administration of the Pension Plan." This suggests a clear intention that all day-to-day administrative decisions would involve only the Minister, not the Union. This is compounded by the fact that s. 11(2) states: "Notwithstanding subsection (1), the Minister and the Union may enter into an agreement whereby the Minister and the Union appoint another person as Pension Plan administrator and the Minister thereby ceases to be the Pension Plan administrator…". The fact s. 11(1) refers only to the Minister, while s. 11(2) refers to the Minister and the Union, implies the Union has no involvement in decisions regarding benefit entitlement and interpretation of the Pension Plan. Thus, even if the Court became the arbiter, the legislative intent would not be frustrated, as the Legislature did not intend the Union to be involved in the day-to-day administration of the Pension Plan, which would include decisions regarding benefit entitlement and interpretation of the Pension Plan provisions.

[54] The Defendants' third argument is not persuasive because there have been cases where cost-effectiveness is explicitly stated as the purpose of the legislation and the court still found it would not decline its jurisdiction. In *Roumeli*, the legislation stated "[t]he purpose of this Act is to provide landlords and tenants with an efficient and cost-effective means for settling disputes" (para. 9). The Nova Scotia Court of Appeal noted the trial judge found the purpose of the legislation was to provide "efficient and cost-effective means" for settling disputes, but, the Court of Appeal still held the statute did not oust the concurrent jurisdiction of the court (paras. 33, 48-49).

[55] The Plaintiff says there is nothing in the legislation that ousts the court's jurisdiction. The Plaintiff argues that the existence of an appeals procedure is not determinative, giving the example of wrongful dismissal cases, where, although non-unionized employees may file complaints with the Labour Standards Board, they may also commence actions with the Nova Scotia Supreme Court. Although the appeals procedure is not determinative, the relationship between the dispute resolution process and the overall legislative scheme should be considered (*Pleau* at para. 50). Thus, the fact there is an appeals process in place for these types of disputes is still helpful information.

Policy Reasons to Decline Jurisdiction

[56] The Defendants raise several policy reasons for the court to decline jurisdiction. In *Pleau*, policy considerations were dealt with under the process for resolution of disputes. At para. 19, Cromwell J.A, stated:

> 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.

[57] The Defendants cite *Vaughan v. Canada*, 2005 SCC 11, for a list of policy reasons the Supreme Court of Canada considered in determining whether the court should decline jurisdiction. They include whether the dispute falls within the dispute resolution scheme established by the statute; whether the dispute could have been remedied under the statutory scheme; whether the plaintiff's legal position is improved by his failure to use the dispute resolution process; whether the comprehensive dispute resolution process contained in the legislation is undermined by permitting routine access to the courts; and whether the dispute resolution procedures established by the statute are a more efficient process for resolving the issues (paras. 35-41). The court noted in *Vaughan* that "[w]hen a benefit is conferred by statute or regulation, the conferring legislature is entitled to specify the machinery for its administration…, subject to a dissatisfied party having recourse to judicial review" (para. 26).

[58] The disability pension benefits were conferred by the *Teachers' Pension Regulations* subject to the *Teachers' Pension Act*, thus the *Act* is entitled to specify the machinery for its administration. The *Act* gives the Appeals Committee the ability to hear and decide upon appeals regarding decisions about pension benefits made by the Plan Administrator. The Defendants argue that the benefit at issue is conferred by statute and the legislature has specified the machinery for the administration of the Pension Plan, and thus this legislative preference should be respected. Because decisions made by the Appeals Committee are subject to judicial review, this would follow the reasoning in *Vaughan* that the legislature is entitled to specify the machinery for its administration and courts should show deference to the legislature's intention.

[59] The Defendants' second and third policy reasons for why the court should decline jurisdiction are dealt with under the nature of the dispute and effective redress.

[60] The Defendants' fourth policy argument is the statutory scheme would be undermined if disputes concerning benefit entitlement and Pension Plan interpretation were permitted to proceed in the courts. Their arguments supporting this policy argument are the joint responsibility between the

Province and the Union, and cost management. Both of these arguments have been rejected above.

[61] The Defendants' final policy argument is that the Appeals Committee process affords an expeditious, inexpensive, and effective process for the determination of the Plaintiff's claim for disability pension. It also allows disputes to be resolved with minimal cost to the beneficiaries of the Pension Plan. Again, this was addressed above. The court in *Roumeli* did not find cost-effectiveness a sufficient reason to decline the jurisdiction of the Supreme Court.

2. The Nature of the Dispute

[62] The nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation should be considered (*Pleau* at para. 51). According to *Pleau*, "[w]hat 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" (*Pleau* at para. 51). The court must determine whether the dispute or difference between the parties arises out of the scheme. To do this, two

elements must be considered: (1) the dispute and (2) the ambit of the scheme (*Weber* at paras. 51-53).

(a) The Dispute

[63] To determine the dispute, the decision-maker must attempt to define the "essential character of the dispute" (*Weber* at para. 57). The fact the parties are employer and employee may not be determinative. 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 (or, in this case, the statutory regime of the *Teachers' Pension Act* and *Regulations*). Only disputes which expressly or inferentially arise out of the statutory regime are foreclosed to the courts. Additionally, the courts possess residual jurisdiction based on their special powers (*Weber* at para. 54). According to *Brown & Beatty*, at 1:4200, "[t]he fact that time-limits for the initiation of a grievance may have passed, and an extension is not likely to be granted, is insufficient to clothe a court with jurisdiction over a dispute". *Regina Police Association* provides a summary of the components to determine whether a dispute arose out of the collective agreement:

> 25 …In considering the nature of the dispute, the goal is to determine its essential character. This determination must proceed on the basis of the facts surrounding the dispute between the parties, and not on the basis of how the legal issues may be framed… Simply, the decision-maker must determine whether,

> having examined the factual context of the dispute, its essential character concerns a subject-matter that is covered by the collective agreement.

[64] The determination of the essential character of the dispute deals only with the facts surrounding the dispute, not the fact the Plaintiff is alleging unjust enrichment, negligence, and bad faith. The dispute arose out of the following undisputed facts. Ms. Casey was a teacher employed by the Halifax Regional School Board until February 2010. On February 13, 2010, Ms. Casey went on sick leave and stopped contributing to the Pension Plan. She had two years from the date she last contributed to the Pension Plan to apply for the total disability pension. Ms. Casey attempted to apply in January 2013. This was over two years after she last contributed to the Pension Plan. Because the limitation period had expired, the Defendants denied her the ability to apply for the total disability pension. The dispute arises from the denial of benefits which arose from the decision made by the Defendants. Therefore, the essential character of the dispute relates to the administration of the Pension Plan provisions by the Plan administrator.

(b) The Ambit of the statutory scheme

[65] Once the essential character of the dispute is determined, the question is whether that essential character falls under the ambit of the collective agreement (or, in this case, the statutory scheme). This analysis was laid out in *Regina Police Assn.*:

> 25 …Upon determining the essential character of the dispute, the decision-maker must examine the provisions of the collective agreement to determine whether it contemplates such factual situations. It is clear that the collective agreement need not provide for the subject-matter of the dispute explicitly. If the essential character of the dispute arises either explicitly, or implicitly, from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide…

[66] The question becomes whether the conduct giving rise to the dispute between the parties arises either expressly or implicitly out of the statutory regime.

[67] The dispute in this case arises from the fact that Ms. Casey was not allowed to apply for disability pension benefits. This falls under s. 16(1) of the *Teachers' Pension Act*, which states that:

> **16(1)** The Appeals Committee shall hear and decide upon appeals made by Pension Plan members, pensioners or any other persons claiming a benefit under the Pension Plan of decisions of the Pension Plan administrator involving the application or interpretation of the Pension Plan provisions.

[68] The dispute involves the interpretation of ss. 17(2) and 17(2A) of the *Regulations* and the decision by the Plan administrator to interpret those provisions to not allow Ms. Casey to even apply for the disability pension. The conduct giving rise to the dispute between the parties arises expressly out of the statutory regime. Under the statute, the Defendants had the right to decide what benefits members would receive, subject to the members' right to appeal the decision to the Appeals Committee. This dispute falls within the ambit of the statutory scheme set out in the *Teachers' Pension Act* and *Regulations*.

[69] Although the provision might not be considered mandatory in the sense it does not state "all disputes regarding the Pension Plan shall be heard", it can be inferred that the purpose of the provision is to cover all disputes and the provision has the effect that all appeals dealing with the decisions made by the Pension Plan administrator involving the application or interpretation of the Pension Plan provisions should go to the Appeals Committee.

3. Effective Redress

[70] Here, the concern is "where there is a right, there ought to be a remedy" (*Pleau* at para. 52).

[71] The Defendants submit the Appeals Committee is able to provide a remedy to the Plaintiff's claim. If the Plaintiff was successful under the process, "she would obtain the very benefit from the Pension Fund that she is seeking from Court". The statutory scheme would also reimburse the Plaintiff for all reasonable costs incurred, if the appeal is successful. The Defendants argue this is effective redress.

[72] The Plaintiff submits the redress available through the legislation is inadequate. Punitive and aggravated damages are not available, and the Plaintiff further argues the redress provided for in the legislation is unfair to a person with a progressive disease that involves potentially lengthy periods of

remission. The Plaintiff also argues because she is seeking damages and alleging negligence, this claim should be heard in the courts because the Defendants lack the expertise to deal with legal principles.

[73] In *Weber*, the appellant argued jurisdiction over torts and *Charter* claims should not be conferred on arbitrators because they lack expertise. This is similar to the Plaintiff's argument the Appeals Committee does not have the competence to deal with claims of negligence, unjust enrichment, and bad faith. However, in *Weber* the Supreme Court of Canada held the answer to that concern is arbitrators are subject to judicial review (*Weber* at para. 55). The same can be said about the Appeals Committee that was meant to deal with this dispute.

[74] The other argument the Plaintiff puts forward is the Appeals Committee does not have the authority to award punitive and aggravated damages, and thus the court should hear this matter. In *Weber*, McLachlin J. dealt with this issue:

> 57 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. This court in *St. Anne Nackawic*, confirmed that the New Brunswick Act did not oust the residual inherent jurisdiction of the superior courts to grant injunctions in labour matters (at p. 724). Similarly, the Court of Appeal of British Columbia in *Moore v. British Columbia* (1988), 50 D.L.R. (4th) 29, at p. 38, accepted that the court's residual jurisdiction to grant a declaration was not ousted by the British Columbia labour legislation, although it declined to exercise that jurisdiction on the ground that the powers of the arbitrator were sufficient to remedy the wrong and that deference was owed to the labour tribunal. What must be avoided, to use the language of Estey J. in *St. Anne Nackawic* (at p. 723), is a "real deprivation of ultimate remedy."

[75] According to *Weber*, the court may keep its residual inherent jurisdiction to grant remedies the Appeals Committee may not have the authority to grant. However, if the arbitrator has powers sufficient to remedy the wrong, the courts will show deference to the arbitrator. The residual jurisdiction may only be used if there is a real deprivation of ultimate remedy. The Nova Scotia Supreme Court expanded on this in *MacLellan v. Canada (Attorney General)*, 2014 NSSC 280:

> 46 The defendants concede that the NDA grievance process did not provide for a monetary remedy in the nature of tort damages. This is not dispositive however. The available remedy need not be identical to what would be available through the court process. Rather, as the Supreme Court of Canada has indicated, "[w]hat must be avoided ... is a 'real deprivation of ultimate remedy'": *Weber* at paras. 56-57, citing *St. Anne Nackawic* at p. 723. In *Gillan*, for instance, the plaintiff argued that effective redress was not available because the arbitrator could not award aggravated and punitive damages. The Court of Appeal held that this was not sufficient to create jurisdiction for the court...

[76] In this case, there was no real deprivation of ultimate remedy. The Appeals Committee had the ability to allow the Plaintiff to apply for the disability pension and could even grant the Plaintiff disability pension benefits. The *Teachers' Pension Act* and *Regulations* do not list the remedies the Appeals Committee can grant. The *Act* only states that the "Appeals Committee shall hear and decide upon appeals made by Pension Plan members" (s.16(1)). Going through the appeals process could have allowed the Plaintiff to be able to apply and be found eligible to receive disability pension benefits. The inability of the Appeals Committee to award aggravated and punitive damages is not decisive,

as indicated by *MacLellan*. The Manitoba Court of Appeal stated in *Phillips v. Harrison*, 2000 MBCA 150, at para. 80: "[w]hat is important is that the scheme provide a solution to the problem". The Appeals Committee could provide a solution to the problem by finding the Plaintiff eligible to apply for or receive disability pension benefits.

[77] In *Gillan v. Mount St. Vincent University*, 2006 NSSC 250, affirmed at 2008 NSCA 55, the Nova Scotia Supreme Court emphasized allowing pleading of remedies beyond the statutory body's control would bring back the overlapping jurisdiction that was cautioned about in *Weber*. The court said if "merely pleading a specific remedy could remove a matter from an arbitrator's jurisdiction, this would make the principles set out in *Weber* a nullity" (para. 50). Therefore, the Plaintiff's argument that the Appeals Committee cannot provide their specific remedy is not sufficient to make the matter one the court should decide to exercise its discretion.

Conclusion

[78] Based on the *Weber* analysis, the court declines jurisdiction to hear the matter. The legislative scheme indicates a preference for using the Appeals Committee as the avenue for the dispute resolution process. The essential character of the dispute clearly falls within the ambit of the statutory scheme.

As discussed above, this factor has been determined by the courts to be the most weighted factor to consider. In addition, the Plaintiff would have effective redress if she had gone through the statutory process and the decision by the Appeals Committee would have been subject to judicial review. Based on the foregoing and the *Weber* analysis, the court declines its jurisdiction.

[79] If the parties are unable to agree on costs within 30 days from the date of this decision, I will accept written submissions.

Bodurtha, J.