IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Gillan v. Mount St. Vincent University, 2006 NSSC 250

Date: 20060822
Docket: SH 175730
Registry: Halifax

Between:

Brenda Anne Gillan

Plaintiff

v.

Mount St. Vincent University

Defendant

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	May 1st & May 12th, 2006 in Halifax, NS
Counsel:	David W. Richey, Esq., for the plaintiff David A. Miller, Q.C. and Nancy Murray, Q.C., for the defendant

By the Court:

[1] Ordinarily, an individual who has suffered a wrong may seek redress by commencing a court action. Absent tardiness or want of prosecution, a claimant has a right to a hearing. Such a right exists not merely by statute but at common law, from time immemorial.

[2] In this proceeding, the plaintiff, Brenda Anne Gillan, has commenced an action for damages arising from falling on the premises of her employer, Mount St. Vincent University, while performing her duties as a cleaner. The defendant University maintains that the court does not have jurisdiction to adjudicate the claim, on account of both the collective agreement that governed the plaintiff's employment and the *Trade Union Act*. The Court requested submissions on this issue before commencing the trial, which was set down as a jury trial. In addition to an agreed statement of facts, the plaintiff testified.

BACKGROUND

[3] Ms. Gillan was employed full-time as a custodian with the defendant on October 26, 1992. She was a member of the International Union of Operating Engineers, Local 968B ("the Union"), which was a certified bargaining agent pursuant to the *Trade Union Act*. The collective agreement in force when she fell on December 4, 1995, covered the period July 1, 1993 to June 30, 1995, and continued in force thereafter on account of the *Public Service Compensation (1994-97) Act*, S.N.S. 1994, c. 11. The collective agreement governed the plaintiff's employment with the University.

[4] Mrs. Gillan sustained injuries as result of falling on the University campus in the course of performing her employment duties. On the morning she fell, she was spreading salt on the steps in front of the E. Margaret Fulton Center.

[5] Pursuant to article 22 of the collective agreement, the plaintiff received her full salary for 17 weeks as a result of being injured in the performance of her duties. The agreement permitted her to apply for long-term disability (LTD) benefits. She was approved for LTD benefits by Maritime Life effective April 2, 1996, and received $21,845.31 before payments were terminated on April 1, 1998.

[6] The plaintiff never returned to work at Mount St. Vincent University. Her employment was terminated on December 4, 1996. Neither Ms. Gillan nor the union filed a grievance under the collective agreement, either in connection with her injury or with respect to alleged unsafe working conditions, the termination of her employment, or the termination of her LTD benefits. Ms. Gillan stated that she had no contact with the union or the employer with reference to any potential grievance or arbitration and did not pursue any further claim with respect to LTD

benefits once they were terminated. Members of the plaintiff's bargaining unit were not covered by the *Workers Compensation Act*.

[7] The plaintiff stated that she had not seen the job description attached to the Agreed Statement of Facts. She described her duties as cleaning bathrooms and offices, removing snow, salting and opening classrooms. Occasionally she would strip wax floors and set up rooms for meetings. She agreed that it was her responsibility to apply salt on the outside steps when required. She maintained that she did not receive a list of duties and said her job requirements were sometimes posted in the kitchen.

THE COLLECTIVE AGREEMENT AND THE *TRADE UNION ACT*

[8] The relevant provisions of the collective agreement include the following:

> 7.1 (1) Should differences arises between the Employer and the Union or its members employed by the University as to the meaning, application or violation of the provisions of this Agreement, there shall be no suspension of work because of such differences, but an earnest effort shall be made to settle the dispute....

[9] The remainder of Article 7 sets out a grievance procedure applicable to all employees covered by the agreement, “but does not exclude any employee who has been discharged or laid-off provided he/she submits his/her grievance within five working days immediately following his/her most recent discharge or layoff.” It provides for an informal procedure and a two-step formal procedure. Article 7.2 provides that if a satisfactory decision is not reached under step 2 of the formal procedure, “the matter may be referred to arbitration as outlined in Article 8.” Article 8 begins:

> **ARTICLE 8 – ARBITRATION PROCEDURE**
>
> 8.1 Failing a decision under the Grievance Procedure Article satisfactory to the complainant, or in the event that there is no decision, the matter may be referred to arbitration, with either a Board of Arbitrators or a single Arbitrator....

[10] Article 8 goes on to set out procedures for, *inter alia*, notice to the other party of the intention to refer a dispute to arbitration. Notice must be given within five days of the date “such decision was or should have been made” (Art. 8.1(i) and (ii)). A matter which has not been processed under the grievance procedure may not be submitted to arbitration (Art. 8.5). Further:

8.6 The Arbitrator or Arbitration Board shall not be authorized to make any decision inconsistent with the provisions of the Agreement, nor to alter, modify, or amend any part of this Agreement.

8.7 The proceedings of the Arbitrator or Arbitration board will be expedited by the parties thereto. The decision of the Arbitrator, or in the case of an Arbitration Board, the decision of the majority of the Board, will be final and binding upon the parties hereto and the employee(s) concerned.

8.8 In the event of an arbitration concerning an alleged unjust discharge or alleged unjust discipline of an employee, the Arbitrator shall:

(i) confirm or modify the Employer's action in dismissing or disciplining the regular employee; or

(ii) reinstate the employee with full compensation for the time lost; or

(iii) decide upon any other arrangement which may be deemed just and equitable in the circumstances; or

(iv) have the power to substitute for the discharge or discipline any other penalty that to the Arbitrator seems just and reasonable in the circumstance.

[11] The Agreement also deals with on-the-job injuries:

ARTICLE 22 – INJURIES ON DUTY

22.1 The parties agree, injury on duty shall be understood to mean an injury suffered by employees during the course of their employment while engaged in work for the Employer or while on the Employer's premises consistent with

reporting to and from work. Any member of the Bargaining Unit who is injured during the performance of his/her duties shall be paid his/her full salary while disabled due to the injury for up to seventeen (17) weeks.

* * *

ARTICLE 33 – HEALTH AND SAFETY

33.4 The safety of its employees is a primary concern of the University. The University shall provide a safe work environment and shall provide protective clothing, equipment and related training to employees, as deemed appropriate, to ensure employee safety in the performance of position duties. Negligence or failure by an employee to comply with rules and procedures established by the Employer with respect to health and safety may be the subject of disciplinary action.

[12] By Article 36 the employer agreed to make provisions to administer certain programs currently in effect, including Long Term Disability.

[13] The relevant provisions of the *Trade Union Act* include sections 41 and 42:

Parties bound by collective agreement

41 A collective agreement entered into by an employer or an employers' organization and a trade union as bargaining agent is, subject to and for the purposes of this Act, binding upon

(a) the bargaining agent and every employee in the unit of employees; and

(b) an employer

(i) who has entered into the agreement,

(ii) on whose behalf the agreement has been entered into, or

(iii) who has, by contract with an employer or an employers' organization, agreed to be bound by a collective agreement.

Final settlement provision

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

(2) Where a collective agreement does not contain a provision as required by this Section, it shall be deemed to contain the following provision:

> Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration. If the parties fail to agree upon an arbitrator, the appointment shall be made by the Minister of Labour for Nova Scotia upon the request of either party. The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it.

(3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement.

ISSUE

[14] The issue is whether the Court has jurisdiction to entertain the action in view of the provisions of the collective agreement and the *Trade Union Act*.

THE LAW

[15] The Supreme Court of Canada decision in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 is the starting point when the Court's jurisdiction is questioned on account of an allegedly exclusive collective agreement or statutory dispute settlement mechanism. In *Weber,* the appellant's employer suspected he was malingering while on disability and hired investigators who surreptitiously entered his home and obtained information upon which the employer relied when it discontinued the payment of long-term disability. The Ontario *Labor Relations Act* required every collective agreement to "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.” The issue was whether the court's jurisdiction was ousted by the collective agreement and the statute.

[16] McLachlin J., writing for the majority, referred to *St. Anne Nackawic Pulp & Paper Co. v. C.P.U., Local 219*, [1986] 1 S.C.R. 704, which supported the view that:

> the analysis of whether a matter falls within the exclusive arbitration clause must proceed on the basis of the facts surrounding the dispute between the parties, not on the basis of the legal issues which may be framed. The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one “arising under [the] collective agreement”. Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it. [p. 953; emphasis in original.]

[17] McLachlin J. stated that s. 45 (1) of the *Labor Relations Act* made arbitration the only available remedy for such differences:

> ... The word "differences" denotes the dispute between the parties, not the legal actions which one may be entitled to bring against the other. The object of the provision – and what is thus excluded from the courts – is all proceedings arising from the difference between the parties, however those proceedings may be framed. Where the dispute falls within the terms of the *Act*, there is no room for concurrent proceedings. [p. 954.]

[18] There was a further difficulty with the appellant's argument that there could be concurrent jurisdiction between courts and arbitrators:

> The final difficulty with the concurrent actions model is that it undercuts the purpose of the regime of exclusive arbitration which lies at the heart of all Canadian labour statutes. It is important that disputes be resolved quickly and economically, with a minimum of disruption to the parties and the economy. To permit concurrent court actions whenever it can be said that the cause of action stands independent of the collective agreement undermines this goal, as this court noted in *St. Anne Nackawic*.... [p. 954.]

[19] McLachlin J. also rejected the notion of "overlapping" jurisdiction:

> An alternative model may be described by the metaphor of overlapping spheres. On this approach, notwithstanding that the facts of the dispute arise out of the collective agreement, a court action may be brought if it raises issues which go beyond the traditional subject matter of labour law. Following this line of reasoning, the appellant contends that the issues of trespass, nuisance, deceit and the unreasonable interference with and invasion of privacy pleaded in his action go beyond the parameters of the collective agreement, and that consequently the court action should be permitted to proceed.
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> * * *
>
> While more attractive than the full concurrency model, the overlapping spheres model also presents difficulties. In so far as it is based on characterizing a cause of action which lies outside the arbitrator's power or expertise, it violates the injunction of the *Act* and *St. Anne Nackawic* that one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute. It would also leave it open to innovative pleaders to evade the legislative prohibition on parallel court actions by raising new and imaginative causes of action.... This would undermine the legislative purposes underlying such provisions and the intention of the parties to the agreement.... [pp. 955-956.]

[20] McLachlin J. set out “exclusive jurisdiction” as the appropriate analysis for trial courts to follow in deciding whether to assume jurisdiction:

> The final alternative is to accept that 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.
>
> On this approach, the task of the judge or arbitrator determining the appropriate forum for the proceedings centres on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered: the dispute and the ambit of the collective agreement.
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> In considering the dispute, the decision-maker must attempt to define its "essential character,”.... The fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement may occur off the workplace, and conversely, not everything that happens on the workplace may arise from the collective agreement.... Sometimes the time when the claim originated may be important, as in *Wainwright v. Vancouver Shipyards Co.* (1987), 38 D.L.R. (4th) 760 (B.C. C.A.), where it was held that the court had jurisdiction over contracts pre-dating the collective agreement.... In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less than obvious. 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.
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> Because the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of cases that will fall within the exclusive jurisdiction of the arbitrator. However, a review of decisions over the past few years reveals the following claims among those over which the courts have been found to lack jurisdiction: wrongful dismissal, bad

> faith on the part of the union, conspiracy and constructive dismissal, and damage to reputation....
>
> This approach does not preclude all actions in the courts between employer and employee. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts.... [pp. 956-957.]

[21] As to the scope of arbitrators' powers, McLachlin J. said:

> The appellant ... also argues that arbitrators may lack the legal power to consider the issues before them. This concern is answered by the power and duty of arbitrators to apply the law of the land to the disputes before them. To this end, arbitrators may refer to both the common law and statutes.... As Denning L.J. put it, "[t]here is not one law for arbitrators and another for the court, but one law for all": *David Taylor & Son, Ltd. v. Barnett*, [1953] 1 All E.R. 843 (C.A.), at p. 847....
>
> 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". [pp. 958-959.]

[22] In *Weber*'s companion decision *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967, the respondent employer commenced an action against the appellant employee for damage caused to an employer-leased motor vehicle. The collective agreement

required the appellant to maintain the property and equipment of the employer in a safe manner. The relevant statute provided an adjudicator with jurisdiction “to make final and binding decisions with respect to all differences which arise relating to the alleged violation of, or the interpretation, application or administration of the collective agreement” (p. 969). McLachlin J. said:

> The Province's principal argument is that the collective agreement does not expressly deal with employee negligence to employer property and its consequences. However, as noted in *Weber*, a dispute will be held to arise out of the collective agreement if it falls under the agreement either expressly or inferentially. Here the agreement does not expressly refer to employee negligence in the course of work. However, such negligence impliedly falls under the collective agreement. Again, it must be underscored that it is the essential character of the difference between the parties, not the legal framework in which the dispute is cast, which will be determinative of the appropriate forum for settlement of the issue.
>
> Article 24.04 of the collective agreement acknowledges the employee's obligations to ensure the safety and dependability of the employer's property and equipment. By inference it confers correlative rights on the employer to claim for breaches of these obligations. While Article 24 falls under the general heading "Safety and Health", the rationale behind the obligation does not detract from the existence of that obligation to maintain the employer's property. The essence of the dispute concerns the preservation of the employer's property and equipment. Framing the dispute in terms of negligence does nothing to remove it from the contemplation of Article 24. Article 5.03 requires the employer to exercise its rights consistently with the terms of the collective agreement, by implication invoking the comprehensive arbitration scheme established by the *Act* and acknowledged by the collective agreement as the exclusive avenue of recourse. It follows from these provisions that the dispute arises from the collective agreement and that the only means of redress is the statutory arbitration process. [pp. 970-971.]

[23] In *Imperial Oil Ltd. v. Atlantic Oil Workers Union, Local 1* (2004), 227 N.S.R. (2d) 1 (S.C.), a dispute over a severance and pension arrangement involving both unionized and non-unionized employees, Murphy J. concluded, at para. 40, that the words “arbitration or otherwise” in the Nova Scotia *Trade Union Act* were less restrictive than the language in the Ontario statute considered in *Weber*. The collective agreement provided that parties “may seek redress through arbitration” (emphasis by Murphy J.). He stated, at para. 41, that “[r]ecent case law supports construing Nova Scotia legislation and the Agreement to allow the parties to pursue recourse to court as an alternate resolution mechanism in appropriate circumstances”, referring to *Pleau v. Canada (Attorney General) et al.* (1999), 181 N.S.R.(2d) 356 (C.A.), about which more will be said below. As to the essential character of the dispute, he said:

> [44] The essential character of the present dispute does not arise from the collective bargaining process, or from the interpretation, application, administration or violation of a collective agreement. Rather, it relates to the interpretation of individual TCSAP [severance] contracts involving all the Defendants, the terms of which were subsequently incorporated into the Agreement with respect to some Defendants.... The "essential character" of the present dispute does not involve interpretation or application of the Agreement, it arises from interpretation of TCSAP and Releases executed by the Defendants - these were documents with genesis outside the Agreement, which were subsequently adopted and incorporated or referenced in the Agreement, which contains provisos that disputes may be referred to arbitration.

* * *

[46] This case is distinguishable from others in which the court's jurisdiction has been rejected. It involves common law issues of contract, not contemplated or intended to be regulated by the *Trade Union Act*, and the court's jurisdiction should not be ousted.... The Defendants argue that the TCSAP Release contract is illegal.... Arbitrators would not have jurisdiction to address issues involving the alleged illegality of contracts. The claim also raises equitable considerations including application of unjust enrichment principles, outside the ambit of matters covered by collective agreements.

* * *

[49] As jurisdiction given to an arbitrator under the Agreement is not exclusive, it would be inappropriate to prohibit the Court from addressing the present dispute as it affects the unionized Defendants, when it has exclusive jurisdiction to adjudicate the dispute as it concerns other Defendants, the non-union employees. The *Judicature Act* ... directs that a multiplicity of proceedings dealing with precisely the same issue should be avoided. An arbitrator has no jurisdiction under the Agreement to address the claims against non-union members, and to deal with non-union members and union members in different fora could lead to conflicting results, and injustice.

[50] The essential character of the dispute is not interpretation of a collective agreement, but of TCSAP and the Release, and the Plaintiffs seek remedies arising from breach of contract by non-union members and unjust enrichment, which an arbitrator has no jurisdiction to award.

[51] The integrity of the collective bargaining process and respect for arbitration provisions in collective agreements are very important, but in my view they do not override the need to avoid multiple and perhaps conflicting decisions on the same issue, a matter which goes to the integrity of the judicial system as a whole.

[52] Application of the factors enumerated in *Pleau* suggests that the Court should exercise jurisdiction with respect to disputes involving all Defendants in this case, and a multiplicity of legal proceedings should be avoided.

[24] I believe *Imperial Oil* must be distinguished on its facts; the *ratio* in that case, as it appears to me, arose principally from the circumstance that the dispute involved defendants who were not parties to the collective agreement. As such, it was an appropriate situation in which to hold that the Court had jurisdiction to deal with the claim.

[25] The *Pleau* decision involved interpretation of the *Public Service Staff Relations Act*. The respondent alleged that the statute had been breached and claimed for defamation and various torts. The defendant claimed that all such matters arose under the collective agreement and the legislation. The plaintiff was entitled to engage in a grievance process under the legislation but he was not permitted to take the dispute to binding arbitration by a third party. He could only raise a complaint with the employer. If he was not satisfied with the employer's decision, his only alternative was to seek judicial review of the decision of the employer. Cromwell J.A., for the Court, described three considerations arising from the Supreme Court of Canada decisions:

> [18] In my view, the judgments of the Supreme Court of Canada ... 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. [Emphasis in original.]

[26] In considering the provisions under review, Cromwell J.A. stated:

[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*....
>
> [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* ... referred to by the Supreme Court of Canada in *Weber*.... 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."
>
> [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. [Emphasis in original.]

[27] Cromwell J.A. stated that the *Act* did not expressly confer jurisdiction over disputes arising from the interpretation, application and administration of the collective agreement, nor did it require the collective agreement to include mandatory arbitration provisions. Furthermore, it was clear that certain types of disputes were not covered by the arbitral process. He said:

> [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.... No recourse to the grievance procedure was taken here.

[28] The Court concluded that the collective agreement did not expressly or by implication deal with the substance of the allegations. Cromwell J.A. noted that the scope of the grievance procedure which the plaintiff was entitled – but not expressly required – to employ, was wide enough to cover the allegations. However, the collective agreement provided “no standards for assessing the claims and no process for adjudication of them on their merits by a third party.” There was a departmental harassment policy that might address the allegations, but it clearly made several redress procedures available, including grievances, complaints to the Canadian Human Rights Commission and complaints to the Public Service Commission Investigations Directorate. A complainant who disagreed with the conclusion at this stage was entitled to pursue “any other legal redress procedure....” (paras. 85-87).

[29] The Supreme Court of Canada reviewed *Pleau* in *Vaughn v. R.*, [2005] 1 S.C.R. 146; [2005] S.C.J. No. 12. The dispute in that case related to an early retirement benefit conferred by statute, with the final decision vested in the Deputy Minister. There was no provision for independent adjudication and no clear ouster of court jurisdiction. Binnie J., for the majority, distinguished *Pleau* on the basis that in *Pleau* the Court was dealing with the alleged harassment of a whistleblower, raising questions of conflict of interest within the employer department. The claim in *Vaughan*, however, was a garden-variety employment benefit case. Although there was no specific ouster of jurisdiction, he concluded that the court should defer to the statutory grievance procedure, for several reasons:

> ¶ 34 Firstly, the language of the PSSRA sends an unambiguous signal that in the run-of-the-mill case of benefits conferred by a regulation outside the collective agreement, the decision of the Deputy Minister or his or her designate should be final.
>
> ¶ 35 Secondly, the present dispute arises from the employment relationship and falls within the dispute resolution scheme set out in the PSSRA.
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> ¶ 36 Thirdly, the appellant's claim to ERI could have been remedied in the s. 91 grievance procedure. As the Manitoba Court of Appeal stated in *Phillips v. Harrison* (2000), 196 D.L.R. (4th) 69, 2000 MBCA 150: "What is important is that the scheme provide a solution to the problem" (para. 80).

> ¶ 37 Fourthly, the appellant's legal position should not be improved by his failure to grieve the ERI issue. The dispute resolution machinery under s. 91 was there to be utilized. Efficient labour relations is undermined when the courts set themselves up in competition with the statutory scheme.....
>
> ¶ 38 Fifthly, I do not accept for reasons already expressed, the central assumption of the appellant's argument that comprehensive legislative schemes which do not provide for third-party adjudication are not, on that account, worthy of deference. It is a consideration, but in the case of the PSSRA it is outweighed by other more persuasive indications of clues to parliamentary intent.
>
> ¶ 39 Sixthly, where Parliament has clearly created a scheme for dealing with labour disputes, as it has done in this case, courts should not jeopardize the comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts. While the absence of independent third-party adjudication may in certain circumstances impact on the court's exercise of its residual discretion (as in the whistle-blower cases) the general rule of deference in matters arising out of labour relations should prevail.
>
> ¶ 40 Seventhly, the fact that we are dealing with a labour dispute almost a decade old demonstrates (if demonstration is necessary) that more informal dispute resolution procedures are generally faster, cheaper, and get the job done.
>
> ¶ 41 Finally, the dispute in question is entirely straightforward....

[30] Binnie J. characterized *Pleau* as a “whistleblower case” where the court was understandably reluctant to limit the employee’s recourse to a procedure internal to the very department on which they blew the whistle, and in the hands of the person ultimately responsible for running it. Nonetheless, while effective redress was a consideration, the absence of independent adjudication was not conclusive. The

failure of the employee to use the grievance procedure should not provide an advantage.

[31] The defendant also refers to *Lajoie v. Mount St. Vincent University* (2002), 232 N.S.R. (2d) 98 (S.C.). The plaintiff was a member of a bargaining unit and was employed by the University. She filed a grievance which was not entirely successful. She then commenced a civil action, joining the Board of Governors as defendants and her husband as a plaintiff. She complained of medical problems arising during her employment which she alleged led to a general deterioration of her health and the end of her employment. She alleged that the condition of the premises contributed to the deterioration of her health and, in particular, that the heating and ventilation systems were defective and created a work environment that was detrimental to her health. She argued that this breached the employer's obligation to provide a safe work environment. She claimed that the defendant had been repeatedly warned to improve the conditions and had failed to take any remedial steps. She claimed general, special, punitive and exemplary damages. The defendants argued her employment was governed by the collective agreement, which applied to an injury suffered at work. Furthermore, she had grieved the matter. The defendant also relied upon s. 42 of the *Trade Union Act*.

[32] Richard J. referred to *Weber*, remarking that the plaintiff "availed herself of the collective agreement and filed a grievance which was subsequently settled prior to arbitration. The fact that the settlement was not satisfactory to Lajoie does not, of itself, open the door to further court proceedings" (para. 14). After further review of *Weber* and *Pleau* he concluded:

> [18] Applying this guide to the facts under consideration here I can draw the following conclusions:
>
> > 1. The provincial legislation and the existing collective bargaining process leading to the collective agreement indicates a comprehensive scheme, and exclusive process, for settlement of disputes between the parties;
> >
> > 2. The nature of this dispute is an alleged violation of the Mount's duty under Article 30 to provide a "safe work environment" for the members of the bargaining unit. The essential character of the dispute "resembles the sorts of matters which are, in substance, addressed by the legislation and the collective agreement". Therefore, this court's assumption of jurisdiction over this dispute would be inconsistent with that scheme;
> >
> > 3. The collective bargaining scheme and collective agreement provides effective redress for breaches of the duties and responsibilities set out. Article 23 provides for "Leave due to Injury" and Section 2 of Appendix C to the Collective Agreement provides for "Long Term Disability Insurance". Coverage under this plan is a "condition of employment". These are the remedies available under this collective agreement.

[33] As such, the Court did not have jurisdiction and the action was dismissed.

[34] In *Graham v. Strait Crossing* (1999), 171 Nfld. & P.E.I.R. 116 (P.E.I.S.C.A.D.) the plaintiff was covered by a collective agreement. He had made a Worker's Compensation claim alleging injuries suffered at work. He returned to the worksite as part of a public tour and became involved in an altercation with a fellow employee. He was dismissed and the employer informed the Board that he had been working under the influence of alcohol. In the action, in addition to damages for defamation he sought general damages and prejudgment interest. The defendant claimed that the court did not have jurisdiction because the dispute arose from the interpretation, application, administration or alleged violation of the collective agreement. The Court held that the dispute as to whether the plaintiff was defamed did not, in its essential character, arise under the collective agreement.

[35] McQuaid,J.A. referred to *Weber* and stated that two essential elements must be considered in determining the appropriate forum: the dispute giving rise to the action and the ambit of the collective agreement. He said:

> [11] First, the dispute before the court arises from the claim of Blaine Graham for workers compensation benefits following his accident which allegedly occurred

> in the course of his employment.... After he made a claim for benefits, Strait Crossing objected to his entitlement to benefits and made its objection known to the Workers' Compensation Board.... It was in the course of lodging this objection that the alleged defamatory statement was made by a duly authorized agent or employee of Strait Crossing.
>
> [12] Secondly, it is necessary to review the collective agreement to determine if the entitlement to workers' compensation benefits is, expressly or inferentially, within its ambit or scope. It clearly is not. Mr. Graham's entitlement to workers' compensation does not arise from the interpretation, administration, application or any alleged violation of the collective agreement. While Mr. Graham was allegedly injured in the course of his employment with Strait Crossing, his entitlement to workers' compensation arises from the provisions of the *Workers' Compensation Act* and not the provisions of the collective agreement. The collective agreement contains provisions ... with respect to safety on the job and with respect to the employer cooperating with the Workers' Compensation Board to facilitate the workers return after an injury. There is no express or implicit language in the collective agreement which would govern the employee's entitlement to workers compensation benefits or indeed entitlement to any type of benefits as the result of sustaining an injury in the course of employment. A worker's entitlement to any such benefits arises under, and is governed solely by the *Act*. The actions of Strait Crossing itself substantiate this conclusion. When it decided to object to Mr. Graham's claim for benefits, it made no attempt to refer the claim to the dispute settlement mechanisms provided for in the collective agreement but rather chose, quite properly, to object to his claim for benefits in accordance with the provisions of s. 6(7) the *Act*.

[36] McQuaid J.A. held that the dispute did not, in its essential character, arise from the interpretation, application administration or violation of the collective agreement.

DOES THE CLAIM FALL UNDER THE COLLECTIVE AGREEMENT?

[37] The plaintiff argues that the claim does not fall, expressly or inferentially, within the terms of the collective agreement. She maintains that it is merely a claim for negligence and occupier's liability, unrelated to her employment, to be advanced in the usual manner irrespective of the collective agreement.

[38] The defendant argues that the plaintiff is actually alleging that the University breached an implied term of her employment by failing to provide a safe work environment, and that the claim in negligence is effectively an allegation of breach of contract. Article 33.4 of the Collective Agreement requires the University to provide a safe work environment and to provide protective clothing equipment and related training to employees.

[39] I find the analysis by McLachlin J. in *O'Leary* persuasive. The essence of the dispute in that case concerned the preservation of the employer's property and equipment. Framing the dispute in terms of negligence did not remove it from the collective agreement. The employer was required to exercise its rights consistently with the terms of the collective agreement, invoking the arbitration scheme established by the *Act* and the collective agreement as the exclusive avenue of

recourse. The dispute arose from the collective agreement and the only means of redress was the statutory arbitration process.

[40] Also highly persuasive is the reasoning of Richard J. in *Lajoie*, applying a similar collective agreement to the present one. He held that the nature of the dispute was the alleged violation of the University's duty to maintain a safe work environment for members of the bargaining unit. The operative wording of the collective agreement in *Lajoie* is all but identical to the wording here respecting health and safety (Art. 33.4).

[41] In this case the employer was required to maintain safe working conditions. The allegation is that it failed to do so. The allegations, however characterized, arise from the claim that the University failed in its obligation under the collective agreement. It cannot be said that the essence of the dispute does not concern the failure of the defendant to maintain safe working conditions. Framing the action differently does not displace this conclusion.

THE TIME PERIOD FOR ARBITRATION CLAIMS

[42] The plaintiff's argument, which I do not find persuasive, is that the time period for filing a grievance is past, and that it would not be possible to pursue a claim in arbitration. While the ten-year extended limit in the *Limitation of Actions Act* is passed, there is no similar provision for arbitrators to decide whether to extend the time period for grieving and arbitration. I have not been provided with any authorities which would illustrate the extent of the power of an arbitrator to extend the time limits for grievances and arbitration.

[43] The defendant argues that there is a procedure to extend time limits for grievances and arbitration under the agreement. The plaintiff notes that pursuant to article 7.5 the parties are committed to a speedy and effective resolution of grievances and accordingly agree that in processing grievances the time limits will be followed unless they agree in writing to extend the time limits. She also refers to article 8.6, which prevents an arbitrator from rendering a decision inconsistent with the agreement, and from altering, modifying or amending the agreement.

[44] Mr. Richey argues that the matter proceeded on the basis of a civil action, with production of documents, discoveries, etc. In effect, he suggests the matter proceeded on the basis that the defendant had agreed the plaintiff could continue

with a civil action. It is also suggested that by pursuing the grievance procedure, any opportunity to maintain a civil action is consequently affected. The issue is whether the machinery is there to be used, not whether it actually is used. The plaintiff appears to argue that since she was no longer an employee of the University, she had no right to file a grievance. The other point she raises is that it is not the employee who grieves, but the union, and therefore she had no status under the agreement. I find this argument difficult to accept.

[45] Even if the plaintiff is correct, and it is now impossible to proceed under the collective agreement, this does not alter the Court's jurisdiction. The cases are clear that the plaintiff should not gain an improved position on account of not pursuing a grievance (see *Vaughan* at para. 37).

EFFECTIVE REDRESS

[46] A final question is whether the grievance arbitration process provides an effective remedy. Counsel for the defendant agrees that an arbitrator under this collective agreement could not award punitive damages or aggravated damages, but could award general damages for pain and suffering, lost income, future lost

income, diminution of earning capacity and interest. The defendant notes that the plaintiff did not grieve her termination or her claim. It is clear that she received short term disability payments for 17 weeks and long term disability payments for two years. She did not pursue additional claims against the University or take any steps to find out why her long-term disability payments had been discontinued.

[47] The defendant argues that although the plaintiff might receive less by way of an arbitral award than by way of damages, this does not defeat the argument that the proper forum is the arbitration process. Goudge J. A. framed the issue of remedy in this way in *Giorno v. Pappas* (1999), 170 D.L.R. (4th) 160; [1999] O.J. No. 168 (Ont. C.A.), referring to *Weber* and to *Piko v. Hudson's Bay Company* (1998), 167 D.L.R. (4th) 479 (Ont. C.A.):

> ¶ 19 It is of no moment that arbitrators may not always have approached the awarding of damages in the same way that courts have awarded damages in tort. In *Weber*, at p. 603, McLachlin J. made clear that arbitrators are to apply the same law as the courts. Laskin J.A. put it this way in *Piko* at para. 22:
>
> > I do not rest my decision on any differences between the power of courts and the power of arbitrators to award damages for a tort, such as the tort of malicious prosecution. I recognize that arbitrators may apply common law principles in awarding damages, and, more importantly, the breadth of an arbitrator's power to award damages does not necessarily determine whether *Weber* applies.

> ¶ 20 What is important is that the arbitrator is empowered to remedy the wrong. If that is so, then where the essential character of the dispute is covered by the collective agreement, to require that it be arbitrated, not litigated in the courts, causes no "real deprivation of ultimate remedy". (See McLachlin J. in *Weber*, supra, at p. 604.) The individual is able to pursue an appropriate remedy through the specialized vehicle of arbitration. He or she is not left without a way to seek relief.

[48] In *Lajoie* Richard J. held that the collective agreement provided effective redress on the basis that “Article 23 provides for ‘Leave due to Injury’ and Section 2 of Appendix C to the Collective Agreement provides for ‘Long Term Disability Insurance’. Coverage under this plan is a ‘condition of employment’. These are the remedies available under this collective agreement.” The plaintiff submits that *Lajoie* should not be followed in light of *Imperial Oil*, where Murphy J. held that the court had jurisdiction in part because the plaintiffs claimed for unjust enrichment, a claim which he concluded could not be adjudicated by an arbitrator. Essentially Justice Murphy stated that a single arbitrator was not an appropriate tribunal given that the matter involved individuals who were covered by the collective agreement and others who were not.

[49] Does the mere pleading of remedies that are beyond the arbitrator’s jurisdiction create jurisdiction for the Court? I am mindful of the caution in *Weber* that the “overlapping jurisdiction” approach would “leave it open to innovative

pleaders to evade the legislative prohibition on parallel court actions by raising new and imaginative causes of action...” (p. 955). That concern is compounded here because the pleadings and the agreed statement of facts do not appear to establish facts or conduct that suggest that punitive or exemplary damages are appropriate. As Murphy J. said in *Hardy v. Prince George Hotel Ltd.* (2004), 225 N.S.R. (2d) 261 (S.C.) (affirmed 227 N.S.R. (2d) 101 (C.A.)), where he denied an application to amend a statement of claim to plead punitive and exemplary damages, “[t]he Court would be moving into new territory, or extending the present law” if it awarded such damages. He continued, “[t]hat, in itself, is not a reason to deny the amendment, but it is a consideration” (para. 7).

[50] Similarly, without making any comment on the merits, I believe that the lack of an apparent foundation for exemplary or punitive damages supports the view that exclusive jurisdiction lies with the processes mandated by the collective agreement and the statute, as in *Lajoie*. If a 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.

TIMING

[51] The plaintiff suggests that the jurisdiction issue should have been resolved at the pleadings stage rather than awaiting trial. Counsel argues that the by having the issue resolved at the beginning of trial, the defendant has avoided making an application to strike the Statement of Claim under Rule 14.25 or seeking a preliminary determination on the point of law under Rule 25.01. The plaintiff cites several cases, including *Curry v. Dargie* (1984), 62 N.S.R. (2d) 416 (S.C.A.D.) and *Seacoast Towers Services Limited v. MacLean* (1986), 75 N.S.R. (2d) 70 (S.C.A.D.), as authority for the proposition that objections to the Court's jurisdiction "are to be heard promptly, either before or immediately after the close of pleadings." These cases support the view that an application to strike under Rule 14.25 should be made in a timely fashion. This is not a Rule 14.25 application. The plaintiff also refers to cases involving delay in pursuing judicial review, which are not of assistance here; these cases involve considerations of delay and prejudice which do not come into consideration here.

[52] The defendant argues that, the collective agreement having been raised in the Statement of Defence, the timing of the hearing of that defence cannot confer upon the Court a jurisdiction it does not have.

[53] The defendant also submits that no application was possible under Rule 25 or Rule 27 because there was no agreement on certain facts that were relevant to this issue. Further, evidence is generally not permitted on an application under Rule 14.25(1)(a), and the plaintiff did in fact give evidence on the jurisdiction issue.

[54] The defendant further points out that in *St. Anne Nackawic* the jurisdiction arose on the Court's own motion prior to trial, while in *Lajoie* Gruchy J. refused to deal with the jurisdiction issue on a Special Chambers application, holding that it was an issue for trial (a copy of Justice Gruchy's letter on this point was attached to the defendant's submissions). While the plaintiff cites cases in which jurisdiction issues were dealt with at earlier stages of the proceeding, none of them support the argument that the defendant must seek a resolution of this defence at the pleading stage. In the absence of any law supporting the plaintiff's position, I accept the defendant's argument that the jurisdiction defence is not subject to any particular "timeliness" requirement and may be dealt with at any stage of the proceeding.

CONCLUSION

[55] For the reasons stated above, I am satisfied that the Court does not have jurisdiction over the subject matter of this proceeding. The dispute, in its essential character, arises under the collective agreement.

J.