IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General), 2006 NSSC 240

Date: 20060802
Docket: SH 184701
Registry: Halifax

Between:

Cherubini Metal Works Limited, a body corporate

Plaintiff

v.

The Attorney General of Nova Scotia representing her Majesty the Queen in Right of the Province of Nova Scotia, The United Steel Workers of America and The United Steel Workers of America, Local 4122

Defendants

Judge: The Honourable Justice C. Richard Coughlan

Heard: June 29 and 30, 2006, in Halifax, Nova Scotia

Decision: August 2, 2006 (Re: Summary Judgment)

Counsel: George W. MacDonald, Q.C., for the plaintiff, Cherubini Metal Works Limited
Raymond F. Larkin, Q.C. and Bettina Quistgaard, for the defendants, United Steel Workers of America and the United Steel Workers of America, Local 4122
Michael T. Pugsley and Sarah Bradfield, for the defendant, Attorney General of Nova Scotia (Watching Brief - June 29, 2006 only)

Coughlan, J.:

[1] The United Steel Workers of America and the United Steel Workers of America, Local 4122, (the Unions) apply for summary judgment pursuant to Civil Procedure Rule 13.01.

[2] Amherst Fabricators Limited operated a fabrication plant in Amherst, Nova Scotia. It entered into a collective agreement with Local 4122 dated April 24, 1999. Numerous grievances were filed by the Local against Amherst Fabricators Limited. The Attorney General of Nova Scotia issued numerous compliance orders pursuant to the *Occupational Health and Safety Act*, S.N.S. 1996, c. 7 to Amherst Fabricators Limited. Amherst Fabricators Limited sued the Attorney General of Nova Scotia, the United Steel Workers of America and the United Steel Workers of America, Local 4122. The claims against the Unions include the torts of negligence, conspiracy and intentional interference with the plaintiff's economic interests. Amherst Fabricators Limited was amalgamated with Cherubini Metal Works Limited effective October 1, 2002.

[3] The applicants submit this is not an application for summary judgment on the merits of the plaintiff's action. The application only engages facts not in dispute, but are material to the preliminary issues of law and, therefore, I may decide the preliminary issues of law and grant summary judgment. The plaintiff says there are numerous material facts which are in issue and remain in dispute.

[4] Civil Procedure Rule 13.01 provides:

> **Application for a summary judgment**
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> **13.01.** After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> > (a) there is no arguable issue to be tried with respect to the claim or any part thereof;
> >
> > (b) there is no arguable issue to be tried with respect to the defence or any part thereof: or
> >
> > (c) the only arguable issue to be tried is as to the amount of any damages claimed.

[5] In dealing with the test for summary judgment, Roscoe, J.A. stated in giving the Court's decision in *MacNeil v. Bethune* (2006), 241 N.S.R. (2d) 1 at p. 6:

> In *United Gulf Development Ltd. et al. v. Iskandar et al.* (2004), 222 N.S.R. (2d) 137; 701 A.P.R. 137; 2004 NSCA 35, this court stated:
>
> > 9 ... the appropriate test where a defendant brings an application for summary judgment in Nova Scotia is the test as set out in *Guarantee Co. of North America v. Gordon Capital Corp.,* [1999] 3 S.C.R. 423:
> >
> > > 27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young,* [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd.v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra,* at para. 15).
>
> As stated in *Selig v. Cook's Oil Co.* (2005), 230 N.S.R. (2d) 198; 729 A.P.R. 198; 2005 NSCA 36, it is a two part test:
>
> > [10] ... First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

[6] It is for the applicants to show there is no genuine issue of material fact requiring trial. If there is no legal issue to be resolved at trial, it is an appropriate situation for a summary judgment application. As Saunders, J.A. stated in giving the judgment of the Court in *Eikelenboom v. Holstein Association of Canada* (2004), 226 N.S.R. (2d) 235 (C.A.), in discussing *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423:

> At para. 28, the Court expressed its concurrence with the motions court judge's finding that "the only disputes were on the application of the law". Notwithstanding the complexity of factual and legal issues surrounding the claim,

> and that the application of the law to the circumstances of the case was strongly contested, the Court held that it was an appropriate case for summary judgment. ...”

[7] I will now address the bases put forward by the applicants in support of the application.

Collective Agreement

[8] The Unions submit the plaintiff’s claim against them should be dismissed as the matters in dispute arise from the collective agreement between the plaintiff and the Local, and are within the exclusive jurisdiction of the grievance and arbitration process established under the agreement.

[9] The test for determining whether a matter is within exclusive jurisdiction of an arbitrator was set out by Cromwell, J.A. in giving the Court’s judgment in *Pleau v. Canada (Attorney General)* (2000), 181 N.S.R. (2d) 356 (C.A.) at p. 368 as follows:

> Taking these underpinnings of *Weber* into account, the relevant considerations may be addressed under three headings.
>
> First, consideration must be given to the process for dispute resolution established by the legislation and collective agreement. Relevant to this consideration are, of course, the provisions of the legislation and the collective agreement, particularly as regards the question of whether the process is expressly or implicitly regarded as an exclusive one. Language consistent with exclusive jurisdiction, the presence or absence of privative clauses and the relationship between the dispute resolution process and the overall legislative scheme should be considered.
>
> Second, the nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation and the collective agreement should be considered. In essence, this involves a determination of how closely the dispute in question resembles the sorts of matters which are, in substance, addressed by the legislation and collective agreement. What is required is an assessment of the “essential character” of the dispute, the extent to which it is, in substance, regulated by the legislative and contractual scheme and the extent to which the court’s assumption of jurisdiction would be consistent or inconsistent with that scheme.

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

[10] In reviewing the process for dispute resolution, reference must be made to the provisions of the Statute and collective agreement.

[11] Sections 41 and 42 of the *Trade Union Act*, R.S.N.S. 1989, c. 475 provide:

> **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. *R.S., c. 475, s.41.*
>
> **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 grievances 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. *R.S., c. 475, s. 42.*

[12] The grievance procedure under the collective agreement between Amherst Fabricators Limited and the United Steel Workers of America, Local 4122 dated April 24, 1999 is set out in article 7 as follows:

ARTICLE 7 ADJUSTMENTS OF GRIEVANCES

7.01 The purpose of this Article is to establish procedures for discussion, processing and settlement of grievances as defined in Section 7.02 of this Article.

7.02 A grievance as used in this Agreement involves a dispute as to the interpretation, application or alleged violation of a provision of this Agreement and shall only relate to or concern any grievance which has arisen or arises following the signing of this Agreement.

No grievance will be considered that has occurred more than five (5) working days following the initial occurrence giving rise to the grievance. In the event of a pay discrepancy this five (5) day period commences upon receipt of the employees pay stub.

The procedures for the adjustment of grievances shall be as follows:

Step One

The employee and Shop Stewart shall take the matter up with the Production Manager or delegate. The facts pertaining to the grievance shall be in writing. The Production Manager or delegate shall arrange a meeting within five (5) working days of receipt of

the grievance and shall give a decision in writing within three (3) working days or a time mutually agreed upon. Written replies to the grievance must be given to the Recording Secretary of Local 4122, with a copy to the aggrieved.

If the grievance is not taken to the General Manager of the Company within five (5) working days following the decision of the Production Manager, the grievance shall be deemed to have been settled at Step One.

Step 2

If a settlement is still not reached within five (5) working days after Step One, the matter may be referred to the General Manager or delegate in an attempt to settle the dispute.

The General Manager or delegate will arrange a meeting within fifteen (15) working days of receipt of the grievance.

The employee, the International Representative and the Union Grievance Committee may be present at the meeting.

The General Manager shall submit a decision in writing to the Union within ten (10) working days of the meeting with the Union or at a time mutually agreed upon.

If a notice to take the grievance to an impartial arbitrator is not received by the Company from the Union within twenty (20) working days after receipt of the General Manager's letter or Union reply, the grievance is to be deemed settled at Step Two.

7.04 All settlements arrived at shall be final and binding upon the Company, the Union and the employee or group of employees concerned.

7.05 The Union shall have the right to initiate a group grievance, which involves more than one employee at Step One of Section 7.03. This grievance must comply with all other time restraints.

7.06 The Union or the Company shall have the right to initiate a grievance of general nature (Policy Grievance) within a period of five (5) working days of the initial occurrence of the event giving

rise to the grievance. The Party receiving the grievance shall arrange a meeting within five (5) working days of receipt of the grievance and shall give a decision, in writing, within three (3) working days or a time mutually agreed upon. Such a grievance shall de (sic) dealt with between the Production Manager or delegate and the Grievance Committee. If a settlement is not reached within five (5) working days after receipt of the written reply, the matter may be referred to Step 2 of the Grievance Procedure.

A policy Grievance shall be dealt with between the General Manager or delegate and the Grievance Committee. A Staff Representative from the United Steelworkers of America may be present.

7.07 Matters to be dealt with under the foregoing provisions shall normally be discussed during working hours but lengthy meetings for settlement of grievances shall be conducted outside of working hours.

7.08 The Union Grievance Committee shall consist of the Local Union President or delegate and the Shop Stewart who initiated the grievance.

7.09 Any and all time limits in Article 7 and/or Article 8 may be extended by mutual written agreement between the Parties.

[13] Section 42(1) of the *Trade Union Act* mandates “every collective agreement shall contain a provision for final settlement ... 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 ...” The collective agreement establishes a process to deal with disputes involving the interpretation, application or alleged violation of a provision of the agreement, and confers exclusive jurisdiction on the process established under the collective agreement to deal with all disputes between the parties arising from the collective agreement.

[14] The next question to be addressed is whether the dispute, in its essential character, arises from the interpretation, application or alleged violation of the collective agreement. This question has been addressed by the courts on many occasions. As McLachlin, J., as she then was, stated in giving the majority judgment in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at p. 956:

> ... 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.

[15] In *Weber, supra,* Mr. Weber was employed by Ontario Hydro. As a result of medical problems, he took an extended leave of absence with sick benefits paid pursuant to a collective agreement. The employer suspected Mr. Weber was malingering and hired private investigators. The investigators came on Mr. Weber's property and gained entry to his home using false identities. Based on the information gathered, Mr. Weber was suspended for abusing sick leave benefits. He first filed a grievance and the arbitration was eventually settled. Mr. Weber also commenced a court action based on the torts of trespass, nuisance, deceit and invasion of privacy, as well as breach of his *Charter* rights. The Supreme Court of Canada held the essential character of the conduct related to the "administration ... of the agreement" as it dealt with what benefits the employee would receive, and was covered by the provision of the collective agreement which extended the grievance procedure to "any allegation that an employee has been subjected to unfair treatment or any dispute arising out of the content of the agreement ..." The Court found the arbitrator had exclusive jurisdiction over all aspects of the dispute.

[16] In *Piko v. Hudson's Bay Co.* (1999), 41 O.R. (3d) 729 (Ont. C.A.), the Court dealt with a case where Ms. Piko was employed as a retail sales representative. She was fired for allegedly marking down a comforter and then purchasing it at a marked down price. Ms. Piko claimed the Bay instigated criminal proceedings against her for fraud. She was charged, but the Crown withdrew the criminal charge. Ms. Piko grieved her discharge under the terms of the collective agreement, but the grievance was disallowed as being out of time. Subsequently, Ms. Piko sued the Bay for damages for malicious prosecution and damages for mental distress caused by the criminal proceedings. The Court held the action did not arise from the collective agreement, as the claim of being maliciously prosecuted in the criminal courts lies outside the scope of the collective agreement. Once the dispute went to the criminal courts, it was no longer just a labour relations dispute.

[17] In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)* , the "Morin" case, [2004] 2 S.C.R. 185, the facts were that in 1997 the Teachers' Union entered into a modification of a collective agreement with the Province, which provided the experience acquired by teachers during the 1996-1997 school year would not be recognized or credited toward salary increments or seniority. The term affected only teachers who had not yet obtained the highest level of the pay schedule - a minority group primarily composed of younger teachers. The younger teachers took a complaint under the Quebec *Charter of Rights and Freedoms* to the Human Rights Commission which, in turn, brought the matter before the Human Rights Tribunal. The Attorney General of Quebec, the School Boards and Unions asked the Tribunal to decline jurisdiction on the basis the labour arbitrator had exclusive jurisdiction over the dispute. The majority of the Supreme Court of Canada held this was not a case over which the arbitrator had exclusive jurisdiction as it did not arise "out of the operation" of the collective agreement, but rather out of the pre-contractual negotiation of that agreement. In determining it was not an appropriate case for the Tribunal to decline jurisdiction as the complainants could have asked their Union to "grieve" the alleged violation under the collective agreement, McLachlin, C.J., for the majority, did not accept that argument, stating at p. 199:

> ... First, the nature of the question does not lend itself to characterization as a grievance under the collective agreement, since the claim is not that the agreement has been violated, but that it is itself discriminatory. ...
>
> Second, the unions were, on the face of it, opposed in interest to the complainants, being affiliated with one of the negotiating groups that made the allegedly discriminatory agreement. ...
>
> Third, even if the unions had filed a grievance on behalf of the complainants, the arbitrator would not have jurisdiction over all of the parties to the dispute. ...
>
> Finally, because the complainants' general challenge to the validity of a provision in the collective agreement affected hundreds of teachers, the Human Rights Tribunal was a "better fit" for this dispute than the appointment of a single arbitrator to deal with a single grievance within the statutory framework of the *Labour Code*.

[18] In this proceeding, the claims made by the plaintiff against the Unions arise out of alleged actions including:

- filing grievances for the purpose of harassing the plaintiff and causing harm to its business;
- encouraging harassing actions of the Attorney General of Nova Scotia in the form of issuance of numerous compliance orders and the joint evaluation;
- conspiring between the Local and the Union to injure the plaintiff by filing grievances.

[19] The grievance procedure is established in the collective agreement, and the agreement also deals with occupational health and safety. On the surface, it appears the claims of the plaintiff arise by virtue of conduct to which the collective agreement applies. However, the collective agreement does not address the substance of the dispute.

[20] The plaintiff's claims do not deal with the interpretation, application or alleged violation <u>of a provision</u> of the collective agreement, but rather a repudiation of the collective agreement by using the process established by the collective agreement for a purpose for which it was not designed to injure the plaintiff. The dispute involves alleged subversion of the relationship between the parties.

[21] Secondly, as in the *Morin* case, *supra*, even if the employer filed a grievance, the arbitrator would not have jurisdiction over all the parties to the dispute. The plaintiff's claims include allegations of conspiracy between the Attorney General, Union and Local, and the arbitrator does not have jurisdiction over the Attorney General of Nova Scotia.

[22] Another consideration in determining whether the matter should be before the Courts or an arbitrator is whether the scheme established by the collective agreement affords effective redress. As Justice Cromwell said in *Pleau, supra,* (para. 52), "simply put, the concern is where there is a right there ought to be a remedy".

[23] The scheme established in the collective agreement is designed to deal with problems which generally arise in the course of employment of workers subject to a collective agreement. The procedure, including time limits, does not provide adequate time to deal with allegations of the nature made by the plaintiff. The

Unions submit the conduct alleged against the parties is of a continuing nature and, therefore, the five working days limitation set out in article 7 of the collective agreement is not a bar to the plaintiff's claim. I disagree. The limitation is that no grievance will be considered more than five (5) working days following the initial occurrence giving rise to the grievance. Such a limitation does not give the plaintiff adequate time to deal with the type of claim alleged in this action. The collective agreement is not set up to deal with the type of claims put forward by the plaintiff and does not offer effective redress to the plaintiff.

[24] I find the dispute is not, in its essential character, one that arises from the interpretation, implementation or violation of the collective agreement and the process established by the collective agreement does not provide the plaintiff with effective redress.

All Issues Decided or Settled

[25] The Unions say the action against them should be dismissed as all of the issues raised were decided or settled in the binding mediation/arbitration process between the parties.

[26] Amherst Fabricators Limited and the United Steel Workers of America entered into an agreement for binding mediation/arbitration dated October 26, 2001, which provided:

> Agreement For Binding Mediation/Arbitration
>
> Mediator/arbitrator to be appointed to address all outstanding grievances as described below. If mediation does not resolve all outstanding issues, the process will lead to binding arbitration for any outstanding issues.
>
> The mediator/arbitrator will be Bruce Outhouse, Innis Christie or Milton Veniot, subject to availability (the mediation/arbitration process is to be completed as quickly as possible and mediator/arbitrator to agree to meet with the parties and render his decision by January 18, 2002). Cost to be split between parties. The legal representatives of the parties will together contact the mediator immediately so that a mediator is selected from this list and dates for meetings are set down as quickly as possible.

> Union to immediately withdraw the Complaint of Unfair Labour Practice filed against Employer and individuals.
>
> Bruce Outhouse decision on seniority/bumping to be binding on mediator/arbitrator and incorporated, to the extent necessary, into any agreements/decisions made in the mediation/arbitration process.
>
> The mediation/arbitration process to address all outstanding issues. Union to consider outstanding grievances and prior to mediation/arbitration process to advise the Employer of grievances that need to be resolved. The remaining grievances to be withdrawn before mediation/arbitration meetings start.
>
> If mediation is unsuccessful, the arbitrator's jurisdiction will be:
>
> 1. To render a binding decision on all outstanding grievances including the grievances respecting the Union officers that were discharged in June 2001;
>
> 2. To render a binding decision on the Employer's grievance respecting the illegal work stoppage in June, 2001;
>
> 3. To make findings regarding what has lead to the breakdown in labour management relations and to make recommendations to secure industrial peace and to promote conditions favorable to settlement of disputes.
>
> This agreement made between the Union and the Employer on October 26, 2001.

[27] It is clear the purpose of the agreement was to address all outstanding "grievances" between the parties. Pursuant to the agreement, mediation meetings and arbitration hearings were held by Mr. Bruce Outhouse, Q.C. Mr. Outhouse dealt with the grievances filed by the Union and the plaintiff, stating at para. 10 and 11 of his decision of January 21, 2002:

> I was subsequently appointed as mediator/arbitrator pursuant to the agreement. I met with the parties on November 28th and 29th, 2001; December 18th and 19th, 2001; and January 3rd and 4th, 2002, in an effort to reach a mediated solution. Very considerable progress was made during mediation. There were approximately 85 Union grievances and two company grievances outstanding when mediation commenced. All but thirteen of these were settled or withdrawn during the mediation process and both parties are to be commended for their efforts in this regard. The settlement agreements are attached as Appendix "A" hereto. It should be noted that in some instances grievances were

> simply withdrawn by the Union and formal settlement agreements were not signed with respect to same.
>
> Arbitration hearings were held on January 10th and 11th to deal with the unresolved grievances. In addition to the thirteen grievances mentioned in the preceding paragraph, there were also three additional grievances which were filed on December 7th, 2001. My decisions with respect to all of the outstanding grievances are set forth below. Where the grievances raised similar issues of fact or interpretation, they have been grouped for purposes of convenience.

[28] And at para. 81, Mr. Outhouse introduced the subject of the breakdown in labour/management relations as follows:

> The submission to mediation/arbitration calls for me to "make findings regarding what has led to the breakdown in labour management relations and to make recommendations to secure industrial peace and to promote conditions favourable to settlement disputes". This is an exceedingly difficult task. The dysfunctional nature of the relationship between the parties is self-evident - the cause is not. Even more problematic is the formulation of recommendations which would help improve the relationship between the parties. However, I offer the following brief observations in the hope that they will be of some assistance.

[29] The mediation/arbitration process dealt with the grievances outstanding at the time of the agreement of October 26, 2001, as well as other grievances filed on December 7, 2001, but did not deal with issues raised in the plaintiff's statement of claim.

Duty of Care

[30] The Unions say the action against them should be dismissed because they did not owe the plaintiff a duty of care in tort.

[31] The plaintiff says the Unions, in relation to the exercise of its grievance rights, owed a duty of care to the plaintiff and, through the actions of the Union and Local, they breached the duty of care and caused damage to the plaintiff.

[32] The test as to whether a duty of care exists was set out by Iacobucci, J. in giving the Court's judgment in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at p. 292 as follows:

It is now well established in Canada that the existence of such a duty is to be determined in accordance with the two-step analysis first enunciated by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, at pp. 751-52:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

[33] The first step in the analysis is to determine whether the harm alleged was a reasonably foreseeable consequence of the defendants' actions and was the relationship between the plaintiff and the defendants of such proximity so that a *prima facie* duty of care arises.

[34] The collective agreement between the plaintiff and the defendant, Local Union, established the grievance procedure. It is foreseeable if the process was negligently used, it could cause harm to the plaintiff.

[35] Is there "proximity" between the plaintiff and the Unions?

[36] Proximity was described by McLachlin, C.J. and Major, J. in giving the Court's judgment in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 at p. 552 as follows:

As this Court stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24, *per* La Forest J.:

> The label "proximity", as it was used by Lord Wilberforce in *Anns, supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of <u>such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.</u> [Emphasis added.]

Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially,

> these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[37] What may constitute a close and direct relationship was discussed by Cromwell, J.A. in *Fraser et al. v. Westminer Canada Ltd. et al.* (2003), 215 N.S.R. (2d) 377 at p. 397 :

> While there is no precise definition of what constitutes such a close and direct relationship, the gist of the requirement is that there should be "such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act": *Donoghue v. Stevenson*, [1932] A.C. 562 at 581. In both *D'Amato v. Badger*, [1996] 2 S.C.R. 1071; 199 N.R. 341; 79 B.C.A.C. 110; 129 W.A.C. 110 at para. 49 and in McLachlin, J.'s judgment in *Norsk* at paras. 48 - 53, a number of indicators of proximity are referred to. They include the relationship between the parties, physical "propinquity" (nearness in space), assumed or imposed obligations and the existence of a close causal connection between the act and the harm suffered.

[38] The Unions submit that there is no proximity between themselves and the plaintiff. The role of the Union and Local under the collective agreement is to represent the interests of the bargaining unit employees and not the employer. The Unions are in an adversarial role with the employer and are not the guardians of the employer's economic interests. The *Trade Union Act* does not impose any obligation on unions to exercise reasonable care in the exercise of grievance rights to protect the employer from economic harm. Finally, given the relationship between the parties established under the *Trade Union Act* and the collective agreement, the employer could have no reasonable expectation the unions in filing grievances would protect its economic interests.

[39] Here, there is certainly a relationship between the plaintiff and the Unions. The Local and the plaintiff were parties to the collective agreement. The Union had negotiated the agreement on behalf of the Local. There is a physical closeness between the plaintiff and the Unions. Together, they were involved in the operation of the Amherst plant. The plaintiff and the Unions had obligations arising out of their relationship. The harm alleged by the plaintiff arises out of the alleged conduct of the defendants.

[40] I find there is such close and direct relations between the plaintiff and the defendant Unions, that the Unions would know the plaintiff would be directly affected by their careless act. I find there is "proximity" between the plaintiff and the defendants, Union and Local so that a *prima facie* duty of care exists.

[41] Turning to the second step of the *Anns* test, are there policy reasons why a duty of care should not be imposed?

[42] There is no issue of indeterminate liability. The plaintiff is a clearly ascertained and closed class, one who has entered into a collective agreement with the defendant Local, which was negotiated by the defendant Union. It is the position of the Unions, that there are policy reasons why a duty of care should not be imposed. First, the imposition of a duty of care on the Unions would undermine their existing legal duties to their members and bargaining unit employees and place them in a hopeless conflict of interest. Second, an adequate remedy was available to the plaintiff through the collective agreement. Third, the proposed duty of care would undermine the important role of unions in society.

[43] The Unions are in an adversarial relationship to the plaintiff in connection with the collective agreement. The defendants' role is to advance their members' position. However, if a duty of care exists, it is not to protect the plaintiff's economic interests, but rather not to harm the plaintiff by improper conduct beyond the scope of its representation of its members' interests through the collective agreement process. If it is to succeed, the plaintiff has to prove, on a balance of probabilities, the defendants engaged in conduct beyond their representation of their members' interests through the collective agreement process. If the plaintiff was able to establish such conduct, allowing such a duty of care would not undermine the existing legal duties of the Unions to their members and bargaining unit employees. The Unions would not be in a conflict of interest as if the conduct alleged existed, the Unions used the process under the collective agreement for an improper purpose of harming the plaintiff, for which the process was not designed.

[44] In dealing with the issue of whether the courts or an arbitrator pursuant to the collective agreement has jurisdiction over the issues raised in the statement of claim, I determined there was not an adequate remedy available under the collective agreement.

[45] The imposition of a duty of care would not undermine the role of unions in society generally. It is in society's interests for unions to properly represent their members' interests; but if the union had engaged in the conduct alleged, it would have engaged in conduct society has no interest in protecting. Society has an interest in collective agreement properly functioning, but not in a party subverting the collective agreement process for improper purposes.

[46] I find there are no policy reasons to preclude the duty of care alleged.

Conspiracy

[47] The defendants, Unions, say the action against them for conspiracy with the Attorney General of Nova Scotia should be dismissed because the tort of civil conspiracy should not be extended to the circumstances of this case.

[48] The tort of civil conspiracy exists in Canada. In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, Wilson, J., in giving the Court's judgment, in quoting Fridman, *The Law of Torts in Canada,* vol. 2, stated at p. 985:

> Fridman goes on to observe at pp. 265-66
>
> > In modern Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the predominating purpose of injuring the plaintiff. Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of injuring the plaintiff. Third, an actionable conspiracy will exist if defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others), and the likelihood of injury to the plaintiff is known to the defendants or should have been known to them in the circumstances.
>
> In my view, this passage provides a useful summary of the current state of the law in Canada with respect to the tort of conspiracy. Whether it is "good law", it seems to me, it is not for the Court to consider in this proceeding where the issue is simply whether the plaintiff's pleadings disclose a reasonable cause of action. I agree completely with Esson J.A. that it is not appropriate at this stage to engage in a detailed analysis of the strengths and weaknesses of Canadian law on the tort of conspiracy.

[49] The Unions submit, considering the court's reluctance to extend the tort of civil conspiracy, it would be inappropriate to extent the tort to the facts of this case. However, it is not for the court on an application for summary judgment to deprive the plaintiff of an opportunity to convince a court that the tort of conspiracy should extend to the facts of this case. It is not "plain and obvious" the tort does not extend to this fact situation. If the plaintiff has some chance of success, that is sufficient.

[50] The Unions also submit the tort of conspiracy should not be allowed to proceed as the plaintiff has another available cause of action - the tort of abuse of public authority against the Attorney General of Nova Scotia. In *Hunt v. Carey Canada Inc., supra*, at p. 991, Wilson, J. addressed the argument an action in conspiracy is not available when a plaintiff has another cause of action:

> In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff <u>alleges</u> that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. ...
>
> This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. ...

[51] It is for the trial judge, after hearing the evidence, to determine whether the tort of conspiracy should extend to the facts of this case.

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[52] Having made the determination I have concerning the plaintiff's claims in negligence and conspiracy, there is no need for me to deal with this argument.

[53] The application for summary judgment is dismissed.

[54] On the issue of costs, if the parties are unable to agree I will hear them.

Coughlan, J.