Dated: 20020730

2002 SKCA 96 **Docket: 345 & 347**

THE COURT OF APPEAL FOR SASKATCHEWAN

CORAM: VANCISE, SHERSTOBITOFF & JACKSON JJ.A.

File No. 345

DR. SUSAN J. HEMMINGS

RESPONDENT

- and -

UNIVERSITY OF SASKATCHEWAN, DR. MARK EVERED
AND DR. DAVID POPKIN

APPELLANTS

- and -

UNIVERSITY OF SASKATCHEWAN FACULTY ASSOCIATION
AND THOMAS P. ERICKSON

NON PARTIES

File No. 347

DR. SUSAN J. HEMMINGS

APPELLANT/RESPONDENT BY CROSS-APPEAL

- and -

UNIVERSITY OF SASKATCHEWAN FACULTY ASSOCIATION

RESPONDENT/APPELLANT BY CROSS-APPEAL

- and -

UNIVERSITY OF SASKATCHEWAN, DR. MARK EVERED,
DR. DAVID POPKIN AND THOMAS P. ERICKSON

NON-PARTIES

COUNSEL:

Ms. Catherine Sloan for the University of Saskatchewan, Dr. Mark Evered and Dr. David Popkin
Ms. Merrilee Rasmussen, Q.C. for Dr. Susan J. Hemmings
Mr. Gary L. Bainbridge for the University of Saskatchewan Faculty Association

DISPOSITION:

On Appeal From:	Q.B.G. 2930 of 2000, J.C. of Saskatoon
Appeal Heard:	November 23, 2001
Appeal Allowed	July 30, 2002
Cross-Appeal Dismissed:	July 30, 2002
Reasons By:	The Honourable Mr. Justice Vancise
In Concurrence:	The Honourable Mr. Justice Sherstobitoff The Honourable Madam Justice Jackson

VANCISE J.A.

Introduction

[1] Dr. Hemmings is a tenured professor at the University of Saskatchewan. She was harassed in her office, laboratory and animal colony at the University, and her research projects were sabotaged by a former boyfriend between May of 1994 and April of 1997. Dr. Hemmings repeatedly requested the University, through the Department Head and the Dean, to have the locks changed and to install adequate measures to protect her personally and to ensure the integrity of her laboratory and animal colony during this time. She alleges that the University, Dr. David Popkin, Dean of the College of Medicine, and Dr. Mark Evered, Head of the Department of Physiology, College of Medicine, failed to act to ensure safety of the workplace with the result that she suffered mental distress and anxiety. The failure to secure

her laboratory resulted in the destruction of research material and caused her additional stress and damage to her reputation.

[2] Dr. Hemmings commenced an action in the Court of Queen's Bench against the University, Dr. Mark Evered and Dr. David Popkin claiming damages for negligence, a breach of statutory duty and the independent tort of non-sexual common law harassment. She also claimed the University failed to take appropriate measures to protect her and her research, thereby violating the provision of *The Occupational Health and Safety Act, 1993*.[1] In addition, she claimed that the Faculty Association breached its duty to her to ensure the integrity of her person and the workplace, with the result she suffered damages.

[3] The Faculty Association applied to strike the statement of claim on the ground that the Court of Queen's Bench has no jurisdiction by reason that all matters complained of by Dr. Hemmings as against the Faculty Association were within the sole and exclusive jurisdiction of the Saskatchewan Labour Relations Board.

[4] The University, the Dean and the Department Head applied to strike the statement of claim on the ground that it disclosed no reasonable cause of action and that the Court of Queen's Bench has no jurisdiction by reason that the matters in dispute are within the collective agreement and the exclusive jurisdiction devolves upon an arbitrator pursuant to the terms of the collective agreement and s. 25 of *The Trade Union Act.*[2]

Decision of the Court of Queen's Bench

[5] Justice Barclay struck the statement of claim as against the Faculty Association. He found that the essential nature of the dispute between Dr. Hemmings and the Faculty Association was a claim of a breach of a duty of fair representation and therefore within the exclusive jurisdiction of the Labour Relations Board. He declined to award costs and the Faculty Association appeals that aspect of the order.

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[1] S.S. 1993, c.O-1.1.

[2] R.S.S. 1978, c.T-17.

[6] The chambers judge refused to strike the statement of claim as against the University, the Dean or the Department Head. He found the matters in dispute did not arise under the collective bargaining agreement and were not in their essential character a dispute regarding the meaning, interpretation or violation of the collective bargaining unit.

Issues

[7] The University, Dr. Evered and Dr. Popkin contend that the chambers judge erred in failing to find that the claim was within the exclusive jurisdiction of an arbitrator under the collective bargaining agreement between the University and the Faculty Association.

[8] Dr. Hemmings contends by way of cross-appeal that the chambers judge erred in finding that the essential nature of her dispute with the Faculty Association is a failure of fair representation, with the result that the Saskatchewan Labour Relations Board has exclusive jurisdiction.

[9] The Faculty Association appeals, contending that the chambers judge erred in failing to award it costs in the Court of Queen's Bench.

Relevant Statute

[10] *The Trade Union Act*:

> 25(1) All differences between the parties to a collective bargaining agreement or persons bound by the collective bargaining agreement or on whose behalf the collective bargaining agreement was entered into respecting its meaning, application or alleged violation, including a question as to whether a matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.

Relevant Provisions of the Collective Bargaining Agreement

> 4.1 This Agreement applies to all employees of the University of Saskatchewan covered by the order of the Saskatchewan Labour Relations Board certifying the Faculty Association, and by any subsequent orders amending that order issued up to the date of execution of this Agreement. The Board recognizes the Association as the exclusive bargaining agent for the employees covered by the aforementioned certification in respect of terms and conditions of employment.

No arrangements shall be made hereafter with any employee which are inconsistent with the terms of this Agreement.

. . .

29.1.1 Complaints. The parties confirm their mutual desire that every grievance shall be dealt with promptly with the object of arriving at a fair and proper settlement.

29.1.2 It is the right of each employee to seek to resolve disputes that arise concerning terms and conditions of employment through informal discussions with academic and administrative colleagues, provided that such informal discussions shall not in any way prejudice any dispute resolution procedures set out in this Agreement.

29.2 Grievance. A "grievance" shall be defined as any dispute that arises between the Employer and the Association respecting the interpretation, application, or alleged violation of any of the provisions of the Agreement. The Association is entitled to initiate a grievance in its own right or on behalf of an employee. A statement of grievance must be filed with the Joint Grievance Committee within 90 days of the discovery of the alleged grievance.

A grievance proceeding is initiated by a statement in writing by either party to the Joint Grievance Committee which sets out the substance of the grievance and indicates the provisions of the Agreement that are alleged to have been improperly interpreted, or wrongly applied, or violated.

. . .

29.4 Arbitration. Should a grievance not be resolved to the satisfaction of the Employer or the Association within thirty days of its receipt by the Joint Grievance Committee, either party may within the next fifteen days, give written Notice of Intention to Proceed to Arbitration. Failing such notice the grievance in question shall be considered to have lapsed. The time periods specified in this Article may be subject to extension by mutual agreement of the two parties.

. . .

29.6 Powers of the Arbitrator. The arbitrator shall exercise those powers enumerated in The Trade Union Act, R.S.S. 1978, Chapter T-17, Section

> 25(2) and the arbitrator's decision shall be final and binding on both parties.[3]

Analysis

A. University's Motion to Strike

[11] Dr. Hemmings asserts that she has a claim in tort based on intimidation, intentional infliction of harm, unlawful interference with economic interests, and harassment, which have caused her to suffer mental distress. She contends the matter is not within the jurisdiction of the Labour Relations Board because the claim is not in its essential character a dispute involving the interpretation, violation or meaning of the collective bargaining agreement.

[12] The University's response is three-fold:

1. The Court of Queen's Bench has no jurisdiction because the essential character of the dispute concerns the terms and conditions of Dr. Hemmings' employment under the collective agreement, and as such the appropriate forum for the resolution of the dispute is the grievance and arbitration process.
2. The statement of claim discloses no claim in tort at common law.
3. The Court of Queen's Bench has no jurisdiction because the essential character of the dispute is one involving workplace safety and health, and as such is governed by the terms of *The Occupational Health and Safety Act, 1993.*

[13] The result of this appeal is governed by *Weber v. Ontario Hydro*[4] which states:

> . . . 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.[5]

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[3] Appeal Book at 28a, 104a, 105a & 106a.

[4] [1995] 2 S.C.R. 929; (1995), 125 D.L.R. (4th) 583.

[5] Ibid. at para. 43.

[emphasis in original]

[14] It is therefore necessary to determine whether the dispute: (a) arises out of the collective agreement; or, (b) if the answer to (a) is no, whether the dispute is governed by another statutory regime with the result the Court of Queen's Bench does not have jurisdiction.

[15] The issue of whether arbitrators have exclusive jurisdiction to determine differences arising out of an employment relationship where there is a collective bargaining agreement and a statutory requirement to submit all differences to arbitration was first considered by the Supreme Court of Canada in *St. Anne Nackawic Pulp & Paper Co. Ltd. v Canadian Paper Workers Union, Local 219.*[6] There the question was whether an employer could commence a common law action for damages resulting from an illegal strike, or whether it was restricted to proceeding under the collective agreement. The collective agreement contained an arbitration provision and the *Industrial Relations Act*[7] contained a specific requirement that all collective agreements provide for the final and binding settlement of all disputes by arbitration. The Court, speaking through Estey J., held that the common law courts have no jurisdiction to consider claims for damages arising out of rights created by a collective agreement. In other words, the courts cannot decide questions which might arise under the common law of master and servant if the collective agreement in force between the parties and the applicable labour statute provide for the resolution of the same matters by binding arbitration.

[16] This issue was revisited and expanded upon by the Supreme Court in *Weber v. Ontario Hydro*. McLachlin J. (now Chief Justice McLachlin), writing for the majority, examined the question of whether parties who have agreed in a collective agreement and are required by statute to settle their differences by final and binding arbitration can sue in tort or bring an action for damages for the breach of a right guaranteed by the *Charter*.

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[6] [1986] 1 S.C.R. 704; (1986), 28 D.L.R. (4th) 1.

[7] R.S.N.B. 1973, c.I-4.

[17] The statute considered in *Weber*, which for all practical purposes is identical to s. 25 of *The Trade Union Act*, prevented either party bringing a civil action based solely on the collective agreement. The issue in *Weber* was confined to a determination of whether the employer's actions during an investigation against the employee for benefits claimed under the collective bargaining agreement would oust a court's jurisdiction to consider actions arising from such conduct. In other words, the task was to determine the appropriate forum and that issue was decided on the basis of whether the dispute between the parties arose out of the collective agreement. The employer contended that the dispute was one which in its essential character arose out of the collective agreement and that the court had no jurisdiction.

[18] As a starting point for her analysis to determine jurisdiction and the appropriate forum, McLachlin J. examined *St. Anne Nackawic* where Estey J. rejected the concurrent model in favour of a model which recognized that the labour legislation created a code governing all aspects of labour relations. He said:

> The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law. . . . The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.[8]

He went on to state that subject to a residual discretionary power in courts of inherent jurisdiction over matters such as injunctions, concurrent proceedings were not available. He said:

> What is left is an attitude of judicial deference to the arbitration process. . . . It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration . . . is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective

[8] *St. Anne Nackawic*, s*upra*, Note 6 at pp. 718-719 (S.C.R.).

> agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of a collective agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement.[9]

The underlying basis for his decision was twofold: 1) his interpretation of the legislation which demonstrated an intention by the legislature to have the dispute arising out of the collective agreement resolved by arbitration; and, 2) the characterization of the claim as either arising out of the collective agreement or arising independently of such agreement. In his opinion, where the very nature of the dispute arises out of the collective agreement, despite how it might be characterized legally, the jurisdiction to resolve it lies exclusively with the arbitrator.

[19] McLachlin J. opted for the approach used in *St. Anne Nackawic* to resolve disputes arising out of the collective agreement. She noted the policy considerations that drove *St. Anne Nackawic* were reaffirmed in *Gendron v. Supply and Services Union of P.S.A.C. Local 50057.*[10] In that case, the Court stated that to allow those regulated by labour legislation to also have recourse to the courts would fly in the face of the stated intention of the legislators to provide an exclusive and comprehensive mechanism for the resolution of disputes.

[20] McLachlin J. stated that two elements must be considered to determine the appropriate forum: (1) the dispute; and, (2) the ambit of the collective agreement. In considering the nature of the dispute, the decision maker must define its essential character.[11] In each case, the question is whether the dispute in its essential character arises from the interpretation, application, administration or violation of the collective agreement. She said:

> I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario *Labour Relations Act* generally confer exclusive jurisdiction on labour

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[9] *Ibid*. at p. 721.

[10] [1990] 1 S.C.R. 1298 at p. 1326.

[11] See the comments of La Forest J.A. in *Energy & Chemical Workers Union, Local 691 v. Irving Oil Ltd.*(1983), 148 D.L.R. (3rd) 398.

> tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to *Charter* remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed. The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal. Against this background, I turn to the facts in the case at bar.[12]

Ultimately, it is the characterization of the dispute that will determine the appropriate forum, and in order to do this, as McLachlin J. pointed out in *Weber,* courts must look to the essential nature of the dispute and the ambit of the collective agreement.

What is the essential character of the dispute?

[21] The appellants contend that the essential character of the dispute, notwithstanding the allegations of common law torts, is one arising out of the collective bargaining agreement, or failing that, one arising under *The Occupational Health and Safety Act, 1993,* with the result that the Court of Queen's Bench is without jurisdiction.

[22] An examination of the allegations contained in the statement of claim, and as highlighted in the factum of Dr. Hemmings, reveals that the claim against the University is essentially one relating to the terms and conditions of her employment. She claims she was the victim of stalking and harassment by a former boyfriend at her laboratory at the University, which resulted in destruction of her property because of a failure of the University to take adequate steps to ensure a safe workplace. Details of the failure by the University to take steps to protect Dr. Hemmings' property and research are set out in paras. 10 to 30 of the statement of claim. All of the incidents including harassment, the vandalism of her research and the destruction of animals took place in the Department of Physiology at the University. Dr. Hemmings alleges that the University failed to take any or adequate action to ensure that there were safe and secure working conditions at the Department of Physiology.

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[12] *Weber, supra,* Note 4 at p. 963 (S.C.R.).

[23] Significantly, Dr. Hemmings consulted the Faculty Association in November of 1994 regarding initiating a formal grievance against the University. She alleges that she was dissuaded by the Faculty Association from bringing a formal grievance because her immediate supervisor was in scope. She did, however, participate in an "internal review" which she had been advised was a less confrontational form of arbitration. In due course, a report was prepared by Mr. Dan Ish of the Faculty of Law. For reasons that are not explained in the pleadings, Dr. Hemmings was not prepared to accept the conditions imposed in order that she have access to the report. In essence, Dr. Hemmings availed herself of the grievance and arbitration process of the collective agreement, but was not satisfied with the result and now seeks redress in the Court of Queen's Bench.

[24] The essence of her complaints are set out in paras. 38 and 39 of the statement of claim:

> 38. The Plaintiff states, and the fact is, that in spite of her numerous reports to the University of Saskatchewan, and its various departments and organizations, no action was taken to protect the Plaintiff, the Plaintiff's research project, the University's property, nor the Plaintiff's working colleagues and assistants, and that upon requesting an investigation by the Faculty Association following the incident of devastating sabotage to the Plaintiff's research project and the research facilities of the Department of Physiology, College of Medicine, University of Saskatchewan, the Plaintiff received no assistance, support, additional security, or any other admission of the severity of the attacks to which she was being subjected on the property of the University of Saskatchewan, nor of the significance of the damage to which the University of Saskatchewan was exposing itself and its faculty and staff by ignoring the repeated advice of the Plaintiff that additional security measures were warranted in this instance.
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> 39. The Plaintiff states, and the fact is, however, that although the locks were ultimately changed, and eventually a camera was installed, these measures came far too late, and the damage to the Plaintiff's personal security, sense of well-being and safety were already seriously compromised, and the damage to her professional reputation, including the results of her research project, was so extensive and irreparable that these measures were largely insignificant.[13]

[25] Dr. Hemmings seeks to bring an action based in tort on the basis that the claim is not one in its essential nature and character a dispute arising under the

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[13] Appeal Book at pp. 13a & 14a.

collective agreement. A collective agreement by its very nature deals with the terms and conditions of employment and the working conditions of employees. A review of all the allegations of Dr. Hemmings reveals that they relate to the working conditions and the failure of the University to take adequate measures to ensure a safe and harassment free working environment In an attempt to bring a cause of action against the University, Dr. Hemmings brings an action based on the tort of non-sexual common law harassment, intimidation and unlawful interference with economic interests.

[26] As McLachlin J. stated in *Weber*, the task is to define the "essential character" of the dispute. It is not how the claim is pleaded, in this case in tort, that is determinative, but rather its essential character that will determine the appropriate forum. Here, the essential nature of the dispute is a failure to comply with the obligations under the collective agreement to render the premises safe for Dr. Hemmings. This, in my opinion, is a dispute involving a violation of the terms of the collective bargaining agreement – that is, a dispute dealing with a violation of the collective agreement by the University in failing to ensure safe working conditions for Dr. Hemmings. Thus, the appropriate forum for the resolution of the dispute between the parties is the grievance and arbitration procedure set out in the collective bargaining agreement. The statement of claim will be struck as against the University. Given my finding on this issue, it is not necessary to consider the other issues raised on the appeal by the University and, in particular, whether the claim properly falls under *The Occupational Health and Safety Act, 1993.*

[27] It follows that the claims against Drs. Evered and Popkin must also be struck. The claim against each of them is as agents of the University and not personal in nature.

[28] The appellants shall have one set of costs in the Court of Queen's Bench and in this Court in the usual way.

B. Cross-appeal

[29] The respondent appeals the decision of the chambers judge striking the claim against the Faculty Association. The chambers judge was correct in characterizing the claim as a failure of the duty of fair representation, with the result that the

exclusive jurisdiction rests with the Labour Relations Board. See *Moldowan v. Sask. Government Employees Union.*[14]

C. Faculty Association's Appeal as to Costs

[30] The chambers judge declined to award costs to the Faculty Association on the basis that "success was divided." He was in error in so finding. The claim against the Faculty Association is a distinct claim, separate and apart from that brought by Dr. Hemmings against the University and Drs. Evered and Popkin. The Faculty Association was successful in its application to strike Dr. Hemmings' claim, and is entitled to costs in the Court of Queen's Bench on the appropriate tariff and in this Court on double Column V.

[31] The cross-appeal is dismissed with costs in the usual way on double Column V.

DATED at the City of Regina, in the Province of Saskatchewan, this 30th day of July, A.D. 2002.

Vancise J.A.

I concur

Sherstobitoff J.A.

I concur

Jackson J.A.

[14](1995), 134 Sask. R. 210 (C.A.).