Q.B.G. A.D. 2000
No. 2930 J.C. S.

IN THE QUEEN'S BENCH

JUDICIAL CENTRE OF SASKATOON

BETWEEN:

DR. SUSAN J. HEMMINGS

RESPONDENT (PLAINTIFF)

- and -

UNIVERSITY OF SASKATCHEWAN, DR. MARK EVERED, DR. DAVID POPKIN, UNIVERSITY OF SASKATCHEWAN FACULTY ASSOCIATION and THOMAS P. ERICKSON

APPLICANTS (DEFENDANTS)

Merrilee Rasmussen, Q.C. for the plaintiff

Catherine Sloan for the University of Saskatchewan, Dr. Mark Evered and Dr. David Popkin

Gary L. Bainbridge for the University of Saskatchewan Faculty Association

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JUDGMENT BARCLAY J.
May 23, 2001

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[1] This is an application brought by the University of Saskatchewan ("U of S"), Dr. Mark Evered and Dr. David Popkin (collectively referred to as the "applicants"), for an order striking the within action by Dr. Susan J. Hemmings (the "plaintiff").

[2] A separate application was filed by the University of Saskatchewan Faculty

Association ("Faculty Association") requesting the same relief.

[3] The first application is made on the grounds that the statement of claim discloses no reasonable cause of action, and that the Court of Queen's Bench has no jurisdiction over the matter as the matter falls within the ambit of a collective bargaining agreement, and therefore a board of arbitration has exclusive jurisdiction over the dispute.

[4] The second application is made on the grounds that the claim under review alleges negligence and/or breach of duty against the Faculty Association of which the plaintiff was a member at all material times, relating to an employment-related dispute. It is a given that the Faculty Association is a trade union and the plaintiff's certified bargaining agent. The Faculty Association contends that complaints of this nature by union members against their Union are statutory complaints, having been codified by the duty of fair representation in *The Trade Union Act*, R.S.S. 1978, c. T-17, as am. (the "*Act*"), and are not properly matters that ought to be heard in this Court.

[5] The following facts are alleged in the statement of claim:

- The plaintiff was a tenured professor and researcher in the Department of Physiology within the College of Medicine, University of Saskatchewan.

- The defendant, Dr. David Popkin, was the Dean of the College of Medicine.

- The defendant, Dr. Mark Evered, was the Department Head of the Department of Physiology, College of Medicine.

- The defendant, Thomas Erickson was, between May 4, 1994 and April 23, 1997, the perpetrator of criminal activity directed against the plaintiff, which criminal activity included stalking, harassment, intimidation, fraud, sabotage, destruction of personal and university property, trespass on personal and university property, and the malicious and deliberate undermining of the plaintiff's reputation, status and credibility, both personally and professionally.

[6] The plaintiff alleges that the applicants owed a duty to the plaintiff, being one of its employees, to ensure the integrity of the plaintiff personally, as well as the integrity of the work she was engaged in at the behest of the College of Medicine as supervised by the Department of Physiology. The same allegation is made against the Faculty Association.

[7] The plaintiff further alleges that the applicants owed a duty to her and her work and that they were negligent in their conduct of that duty in that they failed to take the necessary steps to protect her and her work, when they knew or ought to have known that the likelihood of damages occurring to the plaintiff and/or to the plaintiff's work was very real.

[8] By consent, the 1992-95 Collective Agreement between The University of Saskatchewan and The University of Saskatchewan Faculty Association, was filed and it contains a provision for binding arbitration for the settlement of grievances. Grievance is defined in s. 29.2 as follows:

> 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.

THE FIRST APPLICATION

[9] The applicants argue that the claim is barred by virtue of the Supreme Court of Canada's dicta in *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583. In that case, the court determined that if the essential character of the dispute arises under the collective agreement, the Court of Queen's Bench has no jurisdiction to consider the matter. The exclusive forum for dispute resolution is the grievance and arbitration process provided for in the collective agreement.

[10] In *Weber*, the appellant, a unionized employee of a publicly owned utility, had been on a period of extended absence because of a work-related injury. The employer, suspecting the appellant of malingering, had hired a private investigator to conduct secret surveillance of him. After the appellant became aware of the surveillance, he filed grievances under the collective agreement, which had been settled. The appellant also brought an action against the employer in tort and under the *Canadian Charter of Rights and Freedoms*, alleging violation of his rights under ss. 7 and 8. The action was dismissed upon a motion by the employer for the determination of a question of law before trial, on the grounds that the existence of the grievance procedure ousted the jurisdiction of the court. The Court of Appeal upheld the dismissal of the tort action, but allowed the *Charter* claim to stand. The appellant appealed to the Supreme Court of Canada, requesting that his action be reinstated in its entirety; the employer cross-appealed the decision to allow the *Charter* claims to stand.

[11] On appeal the Supreme Court of Canada held that the appeal should be dismissed and the cross-appeal allowed, with the result that both the appellant's tort and *Charter* claims are precluded.

[12] The court further stated that mandatory arbitration clauses such as s. 45(1) of the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2, generally confer exclusive jurisdiction on labour tribunals to deal with all disputes or differences between the parties arising either expressly or inferentially 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 approach satisfies the concern that the dispute resolution process which the various labour statutes of the country have established should not be duplicated and undermined by concurrent actions. It conforms to a pattern of growing judicial deference for the arbitration and grievance process and correlative restrictions on the rights of parties to proceed with parallel or overlapping litigation in the courts.

[13] The arbitrator had exclusive jurisdiction over all aspects of the dispute. The appellant's tort action could not stand. The terms of the collective agreement were broad and expressly purported to regulate the conduct at the heart of this dispute. With respect to the *Charter* claims, the arbitrator had jurisdiction over both the parties and the dispute and was further empowered by the Act to award the *Charter* remedies claimed—damages and a declaration.

[14] Canadian provincial trade union legislation requires collective agreements to contain provision for a final settlement of disputes relating to collective agreements. In

Saskatchewan, for example, subsections 25(1) and (2) of the *Act* provide:

> **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 matter is arbitrable, are to be settled by arbitration after exhausting any grievance procedure established by the collective bargaining agreement.
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> …
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> (2) An arbitrator or the chairperson of an arbitration board, as the case may be, may:
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> (a) summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath in the same manner as a court of record in civil cases;
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> (b) administer oaths;
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> (c) accept such oral or written evidence as the arbitrator or the arbitration board, as the case may be, in his or its discretion considers proper, whether admissible in a court of law or not;
>
> (d) enter any premises where work is being done or has been done by the employees or in which the employer carries on business or where anything is taking place or has taken place concerning any of the differences submitted to him or it, and inspect and view any work, material, machinery, appliance or article therein, and interrogate any person respecting any such thing or any of such differences;
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> (e) authorize any person to do anything that the arbitrator or arbitration board may do under clause (d) and report to the arbitrator or the arbitration board thereon.
>
> (f) relieve, on terms that, in the arbitrator's opinion, are just and reasonable, against breaches of time limits set out in the collective bargaining agreement with respect to a grievance procedure or an arbitration procedure;
>
> (g) dismiss or reject an application or grievance or refuse to settle a difference if, in the opinion of the arbitrator or the arbitration board, there has been unreasonable delay by the person bringing the application or grievance or requesting the settlement and the delay has operated to the prejudice or detriment of the other party; and
>
> (h) encourage settlement of the dispute and, with the agreement of the parties, may use mediation, conciliation or other procedures to encourage settlement at any time during the arbitration.

[15] In *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, Estey J. stated at p. 721:

> What is left is an attitude of judicial deference to the arbitration process. This deference is present whether the board in question is a 'statutory' or a private tribunal (on the distinction in the labour relations context, see *Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106*, [1982] 2 S.C.R. 888, *Howe Sound Co. v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663*, [1962] S.C.R. 318, affirming (1961), 29 D.L.R. (2d) 76, *Re International Nickel Co. of Canada and Rivando*, [1956] O.R. 379 (C.A.)). It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration, when adopted by the parties as was done here in the collective agreement, is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. 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.

Here I am not satisfied that the claim arises out of the Collective Bargaining Agreement.

[16] McLachlin J. in *Weber, supra,* at p. 953 states the applicable test:

> Underlying both the Court of Appeal and Supreme Court of Canada decisions in *St. Anne Nackawic* is the insistence 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.

[17] Upon a review of the facts, it is clear that the matters in dispute do not arise under the Collective Agreement and are not in their essential character about its meaning, application or alleged violation. There is no allegation by the plaintiff that the meaning, application or alleged violation of a collective agreement is in question in this case. I agree with counsel for the plaintiff that the mere fact that the events at issue occurred in a workplace does not result in the claim being one that falls to the exclusive jurisdiction of an arbitrator. The dispute must arise under the collective bargaining agreement.

[18] It is alleged that by reason of the nature of the relationship of the applicants and the plaintiff, they jointly and severally owe the plaintiff a duty of care. By their own actions in response to her information and advice, and/or by their deliberate omissions to act in light of her requests, the plaintiff alleges the applicants exacerbated and contributed significantly to the serious disruption of her normal life, magnifying her fears of coming and going as she normally would have, creating increased levels of interference with her right to live as she desired and causing escalated degrees of mental distress well beyond the range of hurt feelings.

[19] One may characterize the actions and/or omissions of the applicants, particularly when viewed from the perspective of cumulative effect, combined elements of assault, nervous shock, intimidation and discrimination or victimization, as harassing conduct. These facts may be sufficient to establish a cause of action sufficient to attract a remedy at law.

[20] Furthermore, the standard to be met on a Rule 173 application is a high one. It is only where there is absolutely no possible cause of action that a claim should be

struck.

[21] In the case at bar, that standard has not been satisfied and I am therefore dismissing the first motion insofar as it applies to the U of S, Dr. Evered and Dr. Popkin.

THE SECOND APPLICATION—THE FACULTY ASSOCIATION

[22] Here the essential character of this dispute against the Faculty Association is clearly a duty of fair representation claims.

[23] In *Moldovan v. Saskatchewan Government Employees Union et al.* (1995), 134 Sask. R. 210 (C.A.) the plaintiff commenced an action against the Saskatchewan Government Employees Union, alleging a breach of its duty of fair representation or, alternatively, that the union was negligent in representing her grievance to the employer. The union and its representative challenged the jurisdiction of the court to determine the issues raised in the plaintiff's statement of claim, arguing that the subject matter was exclusively within the jurisdiction of the Labour Relations Board.

[24] The Saskatchewan Court of Queen's Bench dismissed the union's application, except for deleting two of the individual defendants as parties. The union appealed.

[25] The Saskatchewan Court of Appeal allowed the appeal and struck out the statement of claim.

[26] The ratio of the decision is that if the essential character of the dispute between the employee and his union centres around the provision by the trade union to the employee of fair representation in his dispute with the employer, then the Saskatchewan Labour Relations Board has exclusive jurisdiction to resolve the dispute. At para. 32, Jackson J.A. states:

> [32] In my opinion, in the circumstances where the *Trade Union Act* applies, having regard for *St. Anne*, the nature of the regime established to deal with complaints of this nature, the remedies provided, the ability of the Board to enforce its orders and the privative clause, the legislature intended the Board to have exclusive jurisdiction to hear and determine claims based on breaches of the statutory duty….

This decision was recently followed by the Saskatchewan Court of Appeal in *Floyd v. University of Saskatchewan Faculty Association et al*. (1996), 148 Sask. R. 315. In that case a member of the defendant association commenced an action against the Faculty Association in which a breach of the duty of fair representation was pleaded. An application to strike out the statement of claim as disclosing no reasonable cause of action was dismissed by the Court of Queen's Bench. On appeal, however, the Court of Appeal found that the essential character of the dispute giving rise to the claim was an alleged breach of the duty of fair representation, making the Labour Relations Board the proper (and exclusive) forum. In the result, the appeal was allowed, and the claim was struck.

[27] As the claim by the plaintiff against the Faculty Association is clearly a duty of fair representation claim, I am dismissing the claim against the Faculty Association as the Saskatchewan Labour Relations Board has exclusive jurisdiction over this dispute.

[28] As success was divided, I am not making any award as to costs.

J.