NOVA SCOTIA COURT OF APPEAL
Citation: Symington v. HRM, 2007 NSCA 90

Date: 20070822
Docket: CA 272956
Registry: Halifax

Between:

James Symington

Appellant

- and -

Halifax Regional Municipality, Halifax Regional Police Service,
Tim Moser and Fred Sanford

Respondents

- and -

Municipal Association of Police Personnel

Intervenor

Judge(s): MacDonald, C.J.N.S., Cromwell and Fichaud, JJ.A.

Appeal Heard: June 7, 2007, in Halifax, Nova Scotia

Held: Appeal allowed in part per reasons for judgment of Fichaud, J.A.; MacDonald, C.J.N.S. and Cromwell, J.A. concurring.

Counsel: Stephen J. Moreau, for the appellant
Daniel W. Ingersoll and W. Harry Thurlow, for the respondents
Ronald A. Pink, Q.C., for the intervenor

Reasons for judgment:

[1] Cst. Symington was a police officer with the Halifax Regional Municipality's Police Service. He was subject to a collective agreement with sick leave and arbitration clauses. His supervisors took measures against him because they believed he was claiming sick leave while he was capable of working. Police discipline is governed by Nova Scotia's *Police Act*. Cst. Symington's discipline was handled under the *Police Act* process with results favourable to Cst. Symington. Cst. Symington now sues the Regional Police Service for malicious prosecution, negligence, intentional infliction of mental suffering and defamation. The Nova Scotia Supreme Court struck Cst. Symington's statement of claim. The judge said the disputes were inarbitrable, were governed exclusively by the disciplinary process of the *Police Act*, and were outside the court's residual jurisdiction. Cst. Symington appeals.

[2] The issues are (1) whether this dispute is for the collective agreement's arbitration procedure or the *Police Act*'s disciplinary process or a court's tort jurisdiction and, if the court may take jurisdiction, (2) whether his claims should be dismissed for issue estoppel or abuse of process.

1. Factual Context of the Dispute

[3] The respondents (defendants) applied to strike Cst. Symington's statement of claim under *Civil Procedure Rules* 11.05 and 14.25(1). Normally, on such an application, the court assumes the facts pleaded in the statement of claim. When I discuss the essential character of the dispute I will assume the statement of claim's allegations as the factual context that animated the dispute. The parties have filed affidavits adding, in particular, the collective agreement and evidence of regulatory allegations filed by Cst. Symington against other police officers.

[4] In a pleadings application to strike the responding plaintiff often says that the application should be dismissed because there are disputed issues of fact that require trial. At the appeal hearing Cst. Symington's counsel acknowledged that there are no disputed factual issues requiring trial before this application may be determined. Both sides want clarification of the court's jurisdiction to hear the claim.

[5] The following synopsis, except for the references to the union and collective agreement, derives from Cst. Symington's amended statement of claim ("ASC"). No defence has yet been filed.

[6] Cst. Symington was a police officer with the Halifax Regional Municipality's Police Service ("Region") since November, 1988. He received commendations for his work and dedication to duty. He was a team leader of the Emergency Response Team, an officer safety instructor, a firearms instructor and a search and rescue manager. He belonged to the K-9 (service dog) unit and handled a German Shepherd.

[7] The intervenor Municipal Association of Police Personnel ("MAPP") is the union, certified under the *Trade Union Act* R.S.N.S. 1989, c. 475, for the bargaining unit that includes Cst. Symington's position (N.S.L.R.B. Decision # 4277, Sept. 27, 1995). MAPP and the Region had a collective agreement governing terms of employment, including sick leave. Cst. Symington is named in the schedule identifying seniority within the bargaining unit. Later I will discuss the collective agreement's provisions.

[8] Cst. Symington says that his superiors were hostile to him, causing him stress. His ASC pleads:

> 15. Following February 1999, Symington's work environment grew steadily more hostile for him after this time, and he became increasingly stressed by the burden of having to try to do his job in this atmosphere.

[9] On June 11, 2001 Cst. Symington injured his elbow and took sick leave for physical injury. The Region's Police Superintendent Christopher McNeil rejected Cst. Symington's sick leave claim. Superintendent McNeil told Cst. Symington's union representative that Cst. Symington should return to work. The ASC says:

> 18. On that very day, June 13, 2001, McNeil told Symington's union representative that if Symington did not immediately report to work, McNeil would consider him absent without leave and suspend his pay. This ultimatum, coming as it did only 48 hours after Symington took sick leave initially, was an extraordinary response in terms of its severity and haste. It was also extraordinary in the manner in which McNeil chose to override the established Occupational Health Services' procedures under which the HRM normally operated.

[10] Cst. Symington says that Superintendent McNeil's hostility caused Cst. Symington to have a stress related illness and, as a result, Cst. Symington took stress induced sick leave beginning June 14, 2001. I refer to the ASC:

> 19. McNeil was openly hostile towards Symington through these and later events.
>
> 20. On June 14, 2001, Symington, under great stress, went to see his family doctor again. His family doctor came to the opinion that Symington was suffering a stress-related illness which was directly brought on by the hostile work environment to which Symington had been subjected. His family doctor instructed Symington to go on sick leave for this condition.

[11] Cst. Symington alleges that his superiors continued their hostility through the summer of 2001, the Region's "refusal to accommodate his disability thereby exacerbating his condition and protracting his recovery". His ASC pleads:

> 22. HRP's, and certain of his superior officers', hostile stance towards Symington continued through the summer of 2001, including continued interference in Symington's medical treatments.
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> 23. HRP also issued an APB (All Points Bulletin) against Symington during this period, which is dealt with below in the Statement of Claim.
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> 24. Symington remains on stress-related sick leave specific to his work environment, and has been since June, 2001. Despite being aware at all times, of the nature and cause of this illness, members of the HRP have continued to subject Symington to harassment and hostility, including the refusal to accommodate his disability thereby exacerbating his condition and protracting his recovery.

[12] After September 11, 2001, Cst. Symington took his service dog to New York City to assist the search for survivors. His ASC says this "incensed" his superiors:

> 26. Symington's efforts at the World Trade Centre site were reported in the Halifax media. For reasons unknown to Symington, his superiors at HRP were incensed by his rescue mission. Symington's superiors at HRP decided at this time to have Symington fired and branded as a criminal for his rescue mission to the World Trade Centre.

[13] Cst. Symington's superiors believed that his efforts in New York confirmed he was not truly entitled to sick leave. Cst. Symington disputes that view. The ASC describes the point of contention:

> 27. On September 17, 2001, the defendant Sanford wrote a report to then Chief MacKinnon containing allegations that Symington's rescue efforts at the World Trade Centre site were inconsistent with his sick leave status and constituted deceit, disorderly conduct and neglect of duty. Sanford knew, or ought to have known, these allegations were false. Sanford knew, or ought to have known before making this allegation, that Symington's sick leave was based upon a stress-related illness directly related to his work place conditions. Sanford's charges against Symington were based on the allegation that Symington's search and rescue work indicated he was "physically" capable of working. Sanford knew or ought to have known, that Symington's physical capabilities were not the basis of his sick leave,

[14] Superintendent Sanford's disciplinary complaint against Cst. Symington was dismissed at the investigatory level of the process under the *Police Act* R.S.N.S. 1989, C. 348, (as amended), as noted in the ASC:

> 28. The defendant Sanford's allegation that Symington's actions constituted deceit, disorderly conduct and neglect of duty were not sustained by Deputy Chief Bob Barrs, who, in his capacity as Disciplinary Officer, dismissed this allegation. The proceeding on this allegation therefore terminated in Symington's favour.

[15] As an aside, I note that after the relevant events for this proceeding the Legislature enacted a new *Police Act* S.N.S. 2004, c. 31 proclaimed December 20, 2005 and in force January 1, 2006. The new *Act* repealed the former *Police Act*. Under the new *Act*, the governor-in-council enacted new *Police Regulations* (N.S. Reg. 230/2005) by O.I.C. 2005-567 effective January 1, 2006. This proceeding is governed by the former *Police Act* and Regulations under the former *Act*. References to the *Police Act* and Regulations in these reasons are to the former *Act* R.S.N.S. 1989, c. 348 as amended, and to the Regulations under the former *Act,* N.S. Reg. 101/88 as amended.

[16] Returning to the chronology, the ensuing paragraphs (29-32) of Cst. Symington's ASC say that, "based on the foregoing" and "as described above", his superiors maliciously commenced proceedings against Cst. Symington, deliberately engaged in unlawful conduct with intent to harm Cst. Symington, and breached their duty of care to Cst. Symington.

[17] From these pleadings, it is clear that the underlying dispute was whether Cst. Symington either deserved, or had abused, his sick leave. Later passages in the ASC reiterate this difference as the source of the friction:

> 50. On September 17, 2001, Staff Sergeant Sanford of the HRP lodged a complaint against Symington pursuant to the *Police Act* falsely alleging that Symington's rescue efforts at the World Trade Centre site were inconsistent with his sick leave status. On September 24, 2001, HRP Inspector Darnbrough also filed a complaint against Symington under the *Police Act* based upon Symington's acting jobs taken while on stress leave. As referred to herein, Sergeant Tim Moser of the HRP had, sometime on or about September 24, 2001, initiated an investigation based upon a criminal complaint of fraud. It was this *Criminal Code* investigation upon which Sergeant Moser relied as the legal basis for the four search warrants obtained by him as further described and referred to herein.
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> 51. ***The gravamen of the allegation founding the Criminal Code and Police Act complaints was that Symington had been collecting sick benefits from his employer, the HRP, while he was not, in fact, sick.*** Specifically, the informations sworn against him said that Symington was pursuing activities that were inconsistent with his claim that he was physically unable to perform police work. This allegation was false and misleading and HRP knew or ought to have known it was false and misleading. Symington was not on sick leave for a physical injury or disability, but a psychological, stress-related illness specific to problems he had been encountering in the HRP workplace. Symington's attending physician had specifically encouraged Symington to continue to stay active outside of the workplace.
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> . . .
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> 65. ***The central allegation upon which both the criminal and the Police Act investigations were based, that Symington was fraudulently receiving sick benefits because he was physically able to work, was without merit.*** HRP, and its investigating officers, knew, or ought to have known, that this was so, given the medical documentation that was readily available and provided to them. There was never any reasonable and probable cause to suspect Symington was committing a fraud upon HPR or its benefits plan.
>
> . . .

> 83. HRM knew or ought to have known during all material times, based upon doctor's reports furnished to HRM and HRP by Symington, that requiring Symington to deal with certain superiors, medical consultants, and other HRM and HRP personnel with respect to his claim for sick leave benefits would exacerbate his stress-related illness.
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> . . .
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> 86. Dr. Hayes essentially confirmed that Symington was suffering disabling stress as a result of a hostile work environment. Dr. Hayes indicated to Symington that he would be requesting permission from HRP to continue to treat Symington's stress-related illness.
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> 87. Dr. Hayes apparently made such a request. In response to Dr. Hayes' request, then Superintendent Frank Beazley ("Beazley") of HRP met personally with Dr. Hayes. Beazley questioned the validity of Symington's sick leave claim, demanded from Dr. Hayes a date certain for Symington's return to work, and instructed Dr. Hayes that he was not to treat Symington any further.
>
> 88. This was extraordinary behaviour by Beazley, acting as a representative of HRP. Symington says it was motivated by HRP's hostility towards Symington. [emphasis added]

2. Cst. Symington's Claims

[18] From those allegations, Cst. Symington pleads several torts.

[19] **First: Malicious prosecution for discipline.** The Region tried to discipline Cst. Symington. As noted earlier (¶ 13), on September 17, 2001, Staff Sergeant Sanford wrote a report to the Police Chief stating that Cst. Symington's efforts in New York City were inconsistent with sick leave status, and constituted deceit, disorderly conduct and neglect of duty. On September 21, 2001 the Region issued a general bulletin that Cst. Symington was suspended. Paragraph 34 of the ASC elaborates:

> 34. On September 24, 2001, Symington was finally advised of his suspension. On the same date, he was also advised that he was the subject of further allegations made pursuant to the Police Act (Form 8). These allegations purported that he had been further neglecting his duties without an adequate reason and committing deceit when he was acting while on sick leave. Again HRP knew or ought to have known before making this allegation, that

> Symington's sick leave was based upon a stress-related illness directly related to his work place conditions.

[20] On April 9, 2002 Cst. Symington was advised that his suspension under the *Police Act* was lifted. But there followed another letter from Staff Sergeant Sanford, described in the amended statement of claim:

> 63. Within hours of receiving this news, Symington received a letter from Staff Sergeant Sanford instructing Symington that, if he did not return to work immediately, his sick leave benefits would be immediately terminated.

[21] On October 31, 2001 Sergeant Moser initiated another *Police Act* allegation against Symington, that he engaged in corrupt practices by taking employment as an actor while he was on sick leave. To this, Cst. Symington's ASC says:

> 66. . . . Again Moser and the HRP knew or ought to have known that this allegation was false.

[22] With one exception, all the discipline initiated by the Region against Cst. Symington terminated in Cst. Symington's favour. The exception is the Region's assertion that Cst. Symington took an acting job while on sick leave which was adjourned because:

> 64. . . . HRP have refused to accommodate Symington's medically recommended request to hold the hearing at a location offsite from the HRP station.

The pleadings and record do not say what happened to the adjourned hearing.

[23] Cst. Symington pleads that the Region's disciplinary measures are tortious as malicious prosecution (ASC ¶ 29-30, 70-71). He claims that the tort of malicious prosecution applies to professional discipline: *Stoffman v. Ontario Veterinary Association* (1990), 73 OR (2d) 737 (Div. Ct.) at ¶ 8, 14-20; *Bainard v. Toronto Police Services Board*, [2002] O.J. No. 2765 (Sup.Ct.) at ¶ 61.

[24] **Second: defamation.** Cst. Symington pleads defamation. The key facts supporting this allegation appear in the following paragraphs of the ASC:

> 73. On June 15, 2001, Staff Sergeant Fox issued an "all points bulletin" directing all members of the HRP to be on the lookout for Symington. This "APB" was purportedly issued in order to get Symington to sign some routine medical consent to release information forms. The purpose of the APB was not included in the issued bulletin.
>
> 77. HRP and HRM, or their representatives, publicized the suspension and its cause, resulting in the publicization of Symington's condition. This further poisoned the work environment and exacerbated Symington's work-related issues.
>
> 78. Following the termination of the criminal investigation, the HRP subsequently issued a statement that no charges were pending 'at this time'. This misleading statement was reported in both print and broadcast media locally, nationally and internationally and implied guilt and an investigation that may reopen in future. However, the HRP finally conceded, in a hearing before the Nova Scotia Supreme Court in January, 2002, that no charges were going to be laid and none were contemplated in the future.
>
> 79. Following publication of Symington's suspension and its cause by the HRP, the HRM and HRP released ongoing statements to the media that were by their nature and the media environment in which they were released and publicized, meant to defame and cause harm to Symington locally, nationally and internationally.

[25] **Third: negligence.** Cst. Symington says the Region breached its duty of care by undertaking an inadequate investigation of the allegations that Cst. Symington had abused his sick leave (ASC ¶ 31-32, 80-81).

[26] **Fourth: Intentional infliction of (mental) harm.** Cst. Symington sues for intentional infliction of mental harm, prefacing a list of particulars with the following:

> 90. At all material times, thereto, HRP knew that Symington was suffering from a stress-related and stress-induced illness. Knowing this, HRP, through Symington's superiors and certain fellow officers, as well as HRM staff retained by HRP, as referred to above (and below), took the following actions against Symington: . . .

This is followed by 15 allegations of invasion of privacy, instigation of criminal procedures and disciplinary complaints, harassment and defamation. These

particulars stemmed from the underlying dispute whether Cst. Symington had abused his sick leave.

[27] **Fifth: Malicious prosecution/abuse of criminal process.** Cst. Symington pleads that the Region abused the criminal process by maliciously obtaining a search warrant to investigate his sick leave. The ASC says:

> 38. On or about September 24, 2001, Sergeant Tim Moser began an investigation of Symington based upon a suspicion that Symington had defrauded his employer by taking sick leave though he was not physically disabled from working.
>
> 39. Sergeant Tim Moser swore out Informations to Obtain Search Warrants and thereby obtained and subsequently executed four search warrants; two of them were dated October 12th, 2001 one was dated October 16th, 2001 and one was dated October 18th, 2001. The search warrants were directed to the Alliance of Canadian Cinema, Television and Radio Artists ("ACTRA"), Symington's family physician, Nova Scotia Medical Services Insurance, and his employer, HRM.
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> 40. Sergeant Moser failed to include in the affidavits supporting his application for the search warrants any information that would inform the issuing Judge that Symington's sick leave was based upon job-related stress, not physical disability. Sergeant Moser knew, or ought to have known, of this information when he obtained the search warrants. Sergeant Moser also made manifestly false statements in his sworn Informations upon which was based Sergeant Moser's applications for search warrants.
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> 41. Sergeant Moser intentionally or recklessly misled the Justice who issued the search warrants by leading the Justice to erroneously believe that Symington's sick leave was based upon a physical illness or disability. This misrepresentation by commission and omission, permitted Sergeant Moser to allege that certain physical activities as having been performed by Symington raised a suspicion of fraudulent behaviour.

[28] Cst. Symington alleges (ASC ¶ 44-46) that the Region wrongly used the information obtained from these search warrants for the internal investigation of Cst. Symington. On October 31, 2001 the provincial Public Prosecution Office informed the Region that there would be no charges against Cst. Symington (ASC ¶ 42):

> 42. On October 31st, 2001, Sergeant Moser was directed by the Public Prosecution that the fraud charges underlying the search warrants against Symington could not be maintained and no charges were warranted. The investigation was terminated and no charges against Symington were thereafter contemplated. It was confirmed to the HRP in writing by the Public Prosecution Service on November 6, 2001 that no charges were warranted.

[29] Cst. Symington pleads that the institution of the criminal investigation and search establishes the tort of malicious prosecution (ASC ¶ 47-49, 69-70).

3. Cst. Symington's Allegations Under the Police Act

[30] The Regulations under the *Police Act* allowed a police officer to file an allegation against another officer. Cst. Symington filed nine such allegations against other police officers. His complaints substantially mirrored his pleadings in the law suit. All nine were dismissed at the investigatory stage under the *Police Act*'s regulations.

4. Application to Strike

[31] The Region applied in the Nova Scotia Supreme Court to strike Cst. Symington's originating notice and statement of claim. The application was based on *Civil Procedure Rules* 11.05 and 14.25(1)(a), (b) and (d):

> 11.05. A defendant may, at any time before filing a defence or appearing on an application, apply to the court for an order,
>
> (a) setting aside the originating notice or service thereof on him; . . .
>
> and the application shall not be deemed to be a submission to the jurisdiction of the court.
>
> 14.25 (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> (a) it discloses no reasonable cause of action or defence;
>
> (b) it is false, scandalous, frivolous or vexatious;

. . .

(d) it is otherwise an abuse of the process of the court;

and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

[32] Chief Justice Kennedy heard the application in chambers on November 20, 2005. MAPP was not a party.

[33] The Chief Justice issued a written decision on September 26, 2006 and an order on October 31, 2006. He allowed the application and dismissed Cst. Symington's action.

[34] The Chief Justice acknowledged, as decided in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929:

> [76] If the essential character of the dispute arises "explicitly or implicitly" from the "interpretation, application, administration or alleged violation of the collective agreement" - to use the words of Article 29(3) - it would be within the exclusive jurisdiction of the grievance procedure mandated by the agreement.

[35] Article 29(8) of the Region - MAPP collective agreement said:

> All disciplinary matters of sworn members covered under the police act [*sic*] shall be dealt with by the region in accordance with the police act [*sic*] R.S.N.S. 1989, c. 348, its regulations there under [*sic*] and any subsequent amendments to this legislation. The final disposition of disciplinary matters under these procedures and provisions shall be final and binding on the parties and not arbitrable under this Agreement.

[36] The Chief Justice determined that the essential character of the dispute was disciplinary, covered by the *Police Act* and excluded from arbitration by Article 29(8) of the collective agreement:

> [79] If the dispute actually centred on a refusal to accommodate, it would fall within the wording of the Agreement, however, that aspect of the dispute appears

> to me to be secondary to the wider "harassment and hostility" claims which I believe to be in ‘substance' a discipline issue.
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> [80] I find that the allegations, if established, constitute disciplinary default in that they all arise in the context of a disciplinary investigation into the behaviour of the respondent while on "sick leave."
>
> [81] I find that the "substance of the dispute" in this case arises from disciplinary matters and while the agreement does not apply to such matters the *Act* incorporated by the agreement does.

The Chief Justice’s concluding phrase “the *Act* incorporated by the agreement” refers to the *Police Act* and Article 29(8).

[37] The Chief Justice referred to *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360 and *Vaughan v. Canada*, [2005] 1 S.C.R. 146. He said that the *Police Act*’s disciplinary process was a complete code with which the court should not interfere:

> 85. I conclude, as did Bastarache, J. in *Regina Police, supra,* that “... the legislature intended to provide a complete code within the *Police Act* and *Regulations* for th[e] resolution of disciplinary matters involving members of the Police Force.”
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> . . .
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> 89. Having concluded that, the applicants' claim in this action are in their "essential characteristics" matters of a police discipline nature, I determine that these claims were addressed under the provisions of the *Police Act* as incorporated by the Agreement and that the applicants took advantage of the process afforded by that *Act*.

[38] The Chief Justice struck Cst. Symington’s entire action. He did not address the Region’s alternative argument that, based on the dismissal of Cst. Symington’s allegations under the *Police Act* Regulations, his action was subject to issue estoppel.

5. Appeal

[39] Cst. Symington appealed. The Region has filed a notice of contention that the dismissal of Cst. Symington's allegations under the *Police Act* Regulations constitute issue estoppel. MAPP applied to intervene in the appeal, and the court granted intervenor status.

[40] Cst. Symington's action in the Supreme Court named as co-plaintiff Angeline McCarthy, his common law spouse. At the hearing in the Court of Appeal, all counsel agreed that Ms. McCarthy's name should be deleted as a plaintiff/appellant.

[41] Cst. Symington's ASC in the Supreme Court added Sergeant Tim Moser and Superintendent Fred Sanford as defendants. At the hearing in the Court of Appeal, all counsel agreed that those individuals should be formally added as defendants/respondents.

[42] The Region's presentation to the Court of Appeal, respecting the application of the collective agreement, differs materially from its submission to the Chief Justice.

[43] In the Court of Appeal the Region agrees with the Chief Justice's rulings that the essential character of this dispute was disciplinary, and the dispute was not arbitrable by virtue of Article 29(8) of the collective agreement. This is a *volte-face* from its submission to the Chief Justice. At the chambers hearing, counsel for the Region said (Appeal Book vol. 2, p. 109):

> Now, My Lord, that is my task and the Court's task as well this morning, to get to the real bottom line of this case. Now, I think when you start from the bottom line, from the fundamental issue, it is a Collective Agreement issue.
>
> In our brief, we say it's got to be one or the other, and Mr. Symington by laying nine *Police Act* complaints has clearly taken the view that there are disciplinary issues here. But I think -- upon thinking and thinking and thinking about this application, these are grievance issues, and there are seven -- seven ways in which you can come to that conclusion.

There followed a list of seven collective agreement issues that, according to the Region, established the essential character of this dispute. I will return to this point later (¶ 79-86).

[44] Cst. Symington's position in the Court of Appeal is unchanged. He accepts the Chief Justice's ruling that the essential character of the dispute did not arise from the collective agreement. This would eliminate the argument that an arbitrator has exclusive jurisdiction under *Weber*. Cst. Symington accepts that the essential character of his claim is disciplinary. He says that the *Police Act* afforded him an inadequate process and no civil remedy for his claims and the court should exercise its discretion under *Vaughan* to take jurisdiction.

[45] In the Court of Appeal, the Region and Cst. Symington both submitted that any topic covered by the *Police Code of Conduct* for which discipline "could" be taken under the *Police Act* ousts the arbitrator's jurisdiction over that topic. The topic would be inarbitrable even though the Region had taken no actual disciplinary measure against the employee. Under this theory, *Weber*'s deference to the arbitrator is inapplicable, and the appeal would turn on whether the court should accept or decline its exceptional jurisdiction to hear Cst. Symington's claims, under the discretionary principles in *Vaughan*. I will discuss the principles from *Weber*, *Regina Police* and *Vaughan* shortly.

[46] MAPP intervened in the Court of Appeal. MAPP was concerned that the employer (the Region) and Cst. Symington, effectively by consent and in the union's absence, were advancing a submission that would substantially restrict the arbitrator's powers under the collective agreement. Normally, arbitrability is decided by an arbitrator, to whom a court gives significant deference: eg. *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, [2003] 2 S.C.R. 157 at ¶ 16. Here, without an arbitrator and applying a correctness analysis, the court would interpret the collective agreement to determine significant issues of arbitrability.

[47] MAPP's submission was that Article 29(8) of the collective agreement ousted arbitration for the complementary *Police Act* process only respecting an employee's challenge to set aside or vary discipline actually imposed by the Region on that employee. Other collective agreement issues remained arbitrable. The Region and Cst. Symington had an opportunity to file responses to MAPP's factum. Cst. Symington filed a response. At the appeal hearing, MAPP presented its argument respecting the interpretation of the collective agreement, in particular Article 29(8), to which counsel for the other parties had the opportunity to respond.

6. Issues

[48] On Cst. Symington's appeal, the issue is whether the claims in his amended statement of claim were (1) solely for an arbitrator under the collective agreement or (2) solely for the disciplinary procedure under the *Police Act* or (3) entertainable by the Nova Scotia Supreme Court.

[49] The Region's notice of contention says that either the dismissal under the *Police Act* of Cst. Symington's allegations against his superiors established issue estoppel for Cst. Symington's lawsuit or, alternatively, a relitigation of those matters would be an abuse of process.

7. Standard of Review

[50] This is not a judicial review of an arbitration award, where the arbitrator has determined arbitrability based on his interpretation of the collective agreement, and to which the pragmatic and functional approach directs deference by the reviewing court (*Parry Sound*, ¶ 16). The Region's application asked the Nova Scotia Supreme Court, directly and at first instance, to interpret the collective agreement and rule on arbitrability (above ¶ 43) . The Chief Justice's interpretation of the collective agreement is not subject to the pragmatic and functional approach. It is subject to the standard of review in *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235. Issues of law, either pure or extractable from mixed issues of fact and law, are reviewed for correctness. The interpretation of this collective agreement is an issue of law to which I will apply correctness.

[51] With respect to the key issue under *Weber* and *Regina Police*, the determination of the essential character of the dispute, Cst. Symington's pleaded allegations are assumed to be true. The issue is legal. The interpretation of the *Police Act* and the *Trade Union Act* to determine the legislative intent as to the preferred forum and process is a question of law. I will apply correctness to those matters.

[52] The authorities have considered these components of the *Weber* and *Regina Police* tests based on correctness: *Weber*, ¶ 50-58, 67; *Regina Police*, ¶ 21-40; *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 38 at ¶ 12; *Abbott v. Collins* (2003), 227 D.L.R. (4th) 617 (O.C.A.); *Danilov v. Canada*

(Atomic Energy Control Board) (1999), 125 O.A.C. 130 (O.C.A.) leave to appeal denied (2000) 260 N.R. 399 (note); *Phillips v. Harrison* (2000) 196 D.L.R. (4th) 69 (M.C.A.); *Guenette v. Canada (Attorney General)* (2002), 216 D.L.R. (4th) 410 (O.C.A.).

[53] Discretionary rulings are reviewed for error of law, palpable and overriding error of fact or to avoid patent injustice: *L & B Electric Ltd. v. Oickle*, 2006 NSCA 41 at ¶ 13; *Cluett v. Metro Computerized Bookkeeping Ltd.*, 2005 NSCA 84 at ¶ 2.

8. The Legal Principles

[54] In *Weber* the issue was whether the dispute was for the arbitrator under the collective agreement or the court. In *Regina Police*, it was between the labour arbitration and the statutory discipline process. In *Vaughan*, the choice was the statutory process or the court. Cst. Symington's case is triangular. Are his claims governed by the collective agreement's arbitration procedure, or the statutory discipline process under the *Police Act* or the court's tort jurisdiction? A series of Supreme Court of Canada decisions has established the analytical principles.

[55] In *St. Anne Nackawic Pulp & Paper v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, Justice Estey for the Court said (p. 718) that the collective bargaining 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 nonetheless be the subject of actions in the courts at common law." Justice Estey described labour relations legislation as an "all-embracing legislative program" (p. 718), "a code governing all aspects of labour relations" (p. 718) and a "comprehensive statutory scheme" of which arbitration is "an integral part" (p. 721). An action in court, as a "duplicative forum" to enforce the collective agreement, would "offend the legislative scheme" (pp. 718-19). See also *Gendron v. Supply and Services Union of the Public Service Aliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, at pp. 1321, 1326.

[56] In *Weber*, Justice McLachlin for the majority described the framework to address competing jurisdictions of the labour arbitrator and the court. Beginning with Justice Estey's expression in *St. Anne* (¶ 41-46), Justice McLachlin said:

> 43 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 <u>action</u>, defined legally, is independent of the collective agreement, but rather whether the <u>dispute</u> 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.
>
> 44 The appellant Weber suggests that *St. Anne Nackawic* went no further than to exclude concurrent actions based on the master-servant relationship, leaving open the possibility of actions in tort, contract or for *Charter* breach. It is true that Estey J. pointed out that the whole of master-servant law had been subsumed under the labour regime, leaving no scope for a concurrent court action based on this branch of the common law. But this does not undercut the broader proposition that the policy of the legislation is against concurrency and that what matters is not the legal characterization of the claim, but whether the facts of the dispute fall within the ambit of the collective agreement.

Underlying the arbitrator's exclusive jurisdiction is the legislative intent expressed in the mandatory arbitration provisions of labour relations statutes:

> 45 This brings me to the second reason why the concurrency argument cannot succeed -- the wording of the statute. Section 45(1) of the Ontario *Labour Relations Act*, like the provision under consideration in *St. Anne Nackawic*, refers to "all <u>differences</u> between the parties arising from the interpretation, application, administration or alleged violation of the agreement" (emphasis added). The Ontario statute makes 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.

[57] Justice McLachlin set out the two-pronged test that has been followed since:

> 51 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.
>
> 52 In considering the dispute, the decision-maker must attempt to define its "essential character", to use the phrase of La Forest J.A. in *Energy & Chemical Workers Union, Local 691 v. Irving Oil Ltd.* (1983), 148 D.L.R. (3d) 398 (N.B.C.A.). . . . 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.

See also *New Brunswick v. O'Leary* , [1995] 2 S.C.R. 967 at ¶ 3; *Allen v. Alberta*, [2003] 1 S.C.R. 128 at ¶ 12; *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727 at ¶ 41.

[58] Justice McLachlin noted that the court may retain residual jurisdiction where the required remedy is outside the arbitrator's power:

> 54 This approach does not preclude all actions in the courts between employer and employee. . . .
>
> 57 It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction. This Court in *St. Anne Nackawic* confirmed that the New Brunswick *Act* did not oust the residual inherent jurisdiction of the superior courts to grant injunctions in labour matters (at p. 724). Similarly, the Court of Appeal of British Columbia in *Moore v. British Columbia* (1988), 50 D.L.R. (4th) 29, at p. 38, accepted that the court's residual jurisdiction to grant a declaration was not ousted by the British Columbia labour legislation, although it declined to exercise that jurisdiction on the ground that the powers of the arbitrator were sufficient to remedy the wrong and that deference was owed to the labour tribunal. What must be avoided, to use the language of Estey J. in *St. Anne Nackawic* (at p. 723), is a "real deprivation of ultimate remedy".
>
> . . .
>
> 67 I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario *Labour Relations Act* generally confer exclusive jurisdiction on labour 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.

See also *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canada Pacific Ltd.*, [1996] 2 S.C.R. 495 at ¶ 5 - 12.

[59] *Weber's* facts are reminiscent of Cst. Symington's dispute. The employer suspended Mr. Weber for allegedly abusing sick leave. Mr. Weber sued in tort. The collective agreement extended the grievance and arbitration procedure to "unfair treatment" by the employer (¶ 72). Justice McLachlin (¶ 74) held that the dispute, in its essential character, related to the administration of the collective agreement. The arbitrator had exclusive jurisdiction and Mr. Weber's action was struck.

[60] In *Regina Police*, the Court extended the *Weber* test to a jurisdictional contest between the collective agreement's arbitration procedure and a statutory discipline process under the provincial *Police Act*. *Regina Police* has significant bearing on Cst. Symington's case. So I will review the Court's reasoning path.

[61] Justice Bastarache, for the Court, began by restating the *Weber* principle:

> 22. . . . Pursuant to the exclusive jurisdiction model, if a difference between the parties arises from the interpretation, application, administration or violation of their collective agreement, the claimant must proceed by arbitration, absent a mutually agreed settlement. No other forum has the power to entertain an action in respect of that dispute: see *Weber*, at paras. 50-54.

He elaborated on *Weber's* bifold test for determining whether a labour arbitrator has jurisdiction:

> 25 To determine whether a dispute arises out of the collective agreement, we must therefore consider two elements: the nature of the dispute and the ambit of the collective agreement. In considering the nature of the dispute, the goal is to determine its essential character. This determination must proceed on the basis of the facts surrounding the dispute between the parties, and not on the basis of how the legal issues may be framed: see *Weber*, *supra*, at para. 43. Simply, the decision-maker must determine whether, having examined the factual context of the dispute, its essential character concerns a subject matter that is covered by the collective agreement. Upon determining the essential character of the dispute, the decision-maker must examine the provisions of the collective agreement to

> determine whether it contemplates such factual situations. It is clear that the collective agreement need not provide for the subject matter of the dispute explicitly. If the essential character of the dispute arises either explicitly, or implicitly, from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide: see, e.g., *Weber*, at para. 54; *New Brunswick v. O'Leary*, *supra*, at para. 6.

[62] Justice Bastarache then adjusted this test to apply where the contest is between the arbitration regime under labour relations legislation and another statutory process. He injected the critical condition that the court should discern and apply the legislative intent, ideally a consistent legislative intent as expressed in the two statutes:

> 23. . . .Therefore, in determining whether an adjudicative body has jurisdiction to hear a dispute, a decision-maker must adhere to the intention of the legislature as set out in the legislative scheme, or schemes, governing the parties.
>
> . . .
>
> 26 Before proceeding to an analysis of the ambit of the collective agreement, it is important to recognize that in *Weber* this Court was asked to choose between arbitration and the courts as the two possible forums for hearing the dispute. In the case at bar, *The Police Act* and Regulations form an intervening statutory regime which also governs the relationship between the parties. As I have stated above, the rationale for adopting the exclusive jurisdiction model was to ensure that the legislative scheme in issue was not frustrated by the conferral of jurisdiction upon an adjudicative body that was not intended by the legislature. The question, therefore, is whether the legislature intended this dispute to be governed by the collective agreement or *The Police Act* and Regulations. If neither the arbitrator, nor the Commission have jurisdiction to hear the dispute, a court would possess residual jurisdiction to resolve the dispute. I agree with Vancise J.A. that the approach described in *Weber* applies when it is necessary to decide which of the two competing statutory regimes should govern a dispute.
>
> 27 Section 25(1) of *The Trade Union Act* requires that all differences between the parties to a collective agreement regarding its meaning, application or alleged violation are to be settled by arbitration. On the other hand, Article 8 of the collective agreement emphasizes that those disputes that fall within the ambit of *The Police Act* and Regulations are not arbitrable. The task, therefore, is to determine whether the essential character of the dispute between Sgt. Shotton and

> the appellant falls within the ambit of the collective agreement, or whether it falls within the statutory scheme set out in *The Police Act* and Regulations.
>
> . . .
>
> 39 To summarize, the underlying rationale of the decision in *Weber*, *supra*, is to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties. The analysis applies whether the choice of forums is between the courts and a statutorily created adjudicative body, or between two statutorily created bodies. The key question in each case is whether the essential character of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question, a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature.

[63] Justice Bastarache applied the first *Weber* test - determination of the essential character of the dispute. This point bears particularly on Cst. Symington's case, as I will discuss later. A police officer resigned to avoid formal discipline. His resignation was informal consensual discipline under the *Police Act*'s disciplinary process. He then tried to withdraw his resignation, was rebuffed by his superiors, and sought arbitration under the collective agreement to nullify his resignation. The arbitrator was being asked to set aside the informal disciplinary sanction under the *Police Act*. Justice Bastarache focussed on that point:

> 29. . . . To determine the essential character of the dispute, we must examine the factual context in which it arose, not its legal characterization. I agree with Vancise J.A. that, in light of the agreed statement of facts, this dispute clearly centres on discipline. The dispute began when Sgt. Shotton was advised that he would be charged with discreditable conduct pursuant to the Regulations. He was also told that the Chief of Police intended to initiate disciplinary proceedings with a view to dismissal. Some time later, Sgt. Shotton was informed by the Chief of Police that discipline orders would be signed if notices of formal discipline proceedings were successful. It was in this factual context that Sgt. Shotton was given the option of resigning rather than being disciplined. I agree with Vancise J.A. that the informal resolution of this disciplinary matter did not change its essential character.

[64] Applying the second *Weber* test, Justice Bastarache said that the collective agreement should be interpreted consistently with the legislative intent:

> 30. I turn now to the collective agreement to determine whether the dispute falls within the ambit of its provisions. In determining whether the dispute falls within the ambit of the collective agreement, we must bear in mind that the legislature intended that the members of the Regina Police Force be governed by two separate schemes, the collective agreement and *The Police Act* and Regulations. In determining whether the dispute is arbitrable, we cannot interpret the collective agreement in a manner that would offend the legislative scheme set out in *The Police Act* and Regulations. The provisions of the collective agreement, therefore, must be interpreted in light of the scheme set out in *The Police Act* and Regulations. This is recognized in Article 8 of the collective agreement itself, which emphasizes that the collective agreement is not intended to be utilized in any circumstances where the provisions of *The Police Act* and Regulations apply. Article 9 of the collective agreement deals with termination, but provides only for the notice requirements for dismissal or retirement of permanent employees, dismissal of civilian employees, and notice requirements in the event that the entire force be replaced.

[65] The legislative intent expressed in Saskatchewan's *Police Act* was that the statutory process under the *Police Act* and its regulations be a "complete code" (¶ 31) and a "comprehensive scheme" (¶ 34) to adjudicate discipline. Accordingly the matter was for the *Police Act*'s process, not the arbitrator:

> 32 Having examined the ambit of the collective agreement, and of *The Police Act* and Regulations, it is clear that the dispute between Sgt. Shotton and the Employer did not arise, either explicitly or inferentially, from the interpretation, application, administration or violation of the collective agreement. The essential character of the dispute was disciplinary, and the legislature intended for such disputes to fall within the ambit of *The Police Act* and Regulations. As a result, I agree with Vancise J.A. that the arbitrator did not have jurisdiction to hear and decide this matter.

[66] In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*,[2004] 2 S.C.R. 185 (the "*Morin*" case) Chief Justice McLachlin for the majority recognized that the labour arbitrator and statutory process may have concurrent or overlapping jurisdiction:

> 11. . . . Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction; see, for example, *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495. . . .

Chief Justice McLachlin examined the legislation governing both labour arbitration - the *Quebec Labour Code*. (¶ 15-16) – and the competing scheme – Quebec's *Charter of Human Rights and Freedoms* (¶ 17-19). Next she considered the essential character of the dispute from the dispute's factual context, not its legal characterization (¶ 20).

[67] In *Morin*, the dispute arose from the alleged differential treatment of junior and senior teachers by the terms of the collective agreement. Chief Justice McLachlin analysed the essential character of the dispute from the perspective of "the main fact that animates the dispute":

> 22 In *Weber*, the dispute clearly arose out of the operation of the collective agreement. It was basically a dispute about sick-leave, which became encumbered with an incidental claim for trespass. In these circumstances, the majority of the Court concluded that it fell squarely within s. 45 and should be determined exclusively by the labour arbitrator.
>
> 23 Here, the same cannot be said. Taking the dispute in its factual context, as *Weber* instructs, the main fact that animates the dispute between the parties is that the collective agreement contains a term that treats the complainants and members of their group – those teachers who had not yet attained the highest level of the pay scale who were typically younger and less experienced – less favourably than more senior teachers. This, in turn, emerges from the fact that in the course of negotiating the collective agreement, disputes arose over how to meet the government's budgetary demands and how cutbacks in the budget should be allocated among union members. In its factual matrix, this is essentially a dispute as to how the collective agreement should allocate decreased resources among union members. Ultimately, the decision was to impose the costs of the budget cutbacks primarily on one group of union members – those with less seniority. This gave rise to the issue in the dispute: was it discriminatory to negotiate and agree to a term that adversely affected only younger and less experienced teachers? The essence of the dispute is the process of the negotiation and the inclusion of this term in the collective agreement.
>
> 24 Viewed in its factual matrix, this is not a dispute over which the arbitrator has exclusive jurisdiction. . . .

Chief Justice McLachlin ruled that the Human Rights Tribunal under the Quebec *Charter* had jurisdiction, notwithstanding any concurrent jurisdiction that might have been exercised by a labour arbitrator.

[68] In the determination of the essential character of the dispute, the common thread in *Weber*, *Regina Police* and *Morin* is this. The deciding factor is not the lawyers' characterization of the claim. The key, as Chief Justice McLachlin said in *Morin*, is "the main fact that animates the dispute": Mr. Weber's alleged misuse of sick leave, the challenged discipline (consensual resignation) in *Regina Police*, and the differential treatment of junior and senior teachers by the collective agreement in *Morin*. See also: *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, [2004] 2 S.C.R. 223 at ¶ 23, 38; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667 at ¶ 93.

[69] In *Vaughan*, a public servant sought an early retirement benefit provided by subordinate legislation. The federal *Public Service Staff Relations Act* prescribed a grievance procedure - without independent formal adjudication such as arbitration - to resolve such claims. Mr. Vaughan believed this process to be inadequate, and he sued in Federal Court. No collective agreement was involved. Justice Binnie for the majority held that the language in the *Public Service Staff Relations Act* "is not strong enough to oust the jurisdiction of the courts with regard to matters grievable but not arbitrable" (¶ 33). He said that the courts retain residual jurisdiction despite the statutory scheme (¶ 17, 29), but the court must weigh discretionary factors before deciding whether to exercise that jurisdiction or defer to the statutory process . Justice Binnie listed a series of factors governing the Court's discretion (¶ 33-41). He concluded that the Court should yield to the *Public Service Staff Relations Act* process and declined to hear Mr. Vaughan's claim. See also: *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666 at ¶ 42,

[70] The Nova Scotia Court of Appeal has summarized and applied the principles from these Supreme Court of Canada rulings: *Pleau v. Canada (Attorney General)*, 1999 NSCA 159, at ¶ 22-48; leave denied [2005] SCCA No. 83; *Connolly v. Canada Post Corp.*, 2005 NSCA 55, at ¶ 39-40; *Adams v. Cusack*, 2006 NSCA 9 at ¶ 13-18; *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)* 2007 NSCA 38, at ¶ 15-20, 40-42. Particularly useful are Justice Cromwell's concise summaries in *Adams* ¶ 13-18 and *Cherubini* ¶ 15-20.

[71] I will apply these legal principles to Cst. Symington's claims, considering first the essential character of the dispute, next the ambit of the collective

agreement and intent of the *Trade Union Act*, then the intent of the *Police Act*, and finally the court's residual jurisdiction.

9. First Weber Factor - Essential Character of the Dispute

[72] The Chief Justice characterized the dispute as disciplinary. With respect, I disagree. The dispute, from its animating facts, essentially is whether Cst. Symington was truly entitled to sick leave.

[73] I have set out earlier (¶ 6 -17) Cst. Symington's pleading of the facts surrounding the dispute. The inescapable theme is Cst. Symington's assertion that his sick leave was caused by workplace stress, which the Region refused to acknowledge. Because, he alleges, the stress was caused by his hostile working conditions at the Halifax Regional Police Service, he was not disabled from activities elsewhere, in New York City or on the acting stage. Cst. Symington's ASC, ¶ 51 and 65 identifies this difference as "the gravamen" and "central allegation" of the Region's criminal and disciplinary measures. His pleaded causes of action reiterate the point (above ¶ 19 - 29). The "main fact that animates the dispute" (Chief Justice McLachlin's phrase in *Morin*) was the fissure between Cst. Symington's assertion, and the Region's denial, that Cst. Symington suffered workplace related stress, entitling him to sick leave benefits under the collective agreement but allowing him to pursue activities outside his workplace. The Region's conduct, characterized in the ASC as negligence, defamation, intentional infliction of harm and malicious prosecution, stemmed from the Region's view that Cst. Symington had abused his sick leave.

[74] This approach to characterizing the dispute's essential character is consistent with the authorities.

[75] In *Weber* the underlying dispute was whether Mr. Weber was entitled to sick leave. The employer's conduct, that Mr. Weber characterized as tortious, derived from that dispute. As Chief Justice McLachlin noted in *Morin*:

> 22 In *Weber*, the dispute clearly arose out of the operation of the collective agreement. It was basically a dispute about sick-leave, which became encumbered with an incidental claim for trespass.

[76] In *Regina Police*, Justice Bastarache said:

> 2. . . . following events which are not at issue in this case, Sgt. Shotton was . . . advised that he would be charged with discreditable conduct . . .
>
> 3. . . . The Chief of Police also advised Sgt. Shotton that he would not be subject to disciplinary action if he resigned . . .

The officer resigned, which Justice Bastarache termed an "informal resolution of this disciplinary matter" (¶ 29). The Union asked an arbitrator to nullify the resignation. The underlying facts giving rise to the discipline were "not at issue in this case", unlike Cst. Symington's sick leave dispute. Rather, *Regina Police's* issue was whether the arbitrator could set aside the agreed disciplinary sanction. The question here is not whether an arbitrator (or a court, if the civil action proceeded) would set aside the Region's discipline of Cst. Symington. The Region's disciplinary measures were governed by the *Police Act* and terminated in Cst. Symington's favour formally or informally, with one adjourned, all under that statutory process. So the ruling in *Regina Police* does not mean that Cst. Symington's sick leave dispute is disciplinary.

[77] Cst. Symington cites the decision of the Alberta Court of Appeal in *Edmonton Police Assn. v. Edmonton (City)*, 2007 ABCA 456; 2007 AJ No. 456. A police officer's superior accused the officer of using excessive force and lying about it. The superior filed a memo with these allegations on file. The union grieved to have the memo removed from the file - i.e. asked the arbitrator to set aside the discipline. The grievance alleged that placement of the memo on file violated the *Police Discipline Regulations* under Alberta's *Police Act* (¶ 10). The court held that the grievance was "disciplinary" and outside the labour arbitrator's jurisdiction under the *Regina Police*. Other aspects of the grievance - not usurping the statutory discipline process - were arbitrable.

[78] Nothing in *Edmonton Police* changes my view of the essential character of Cst. Symington's dispute. My reason is similar to the distinction regarding *Regina Police*. Had Cst. Symington's civil claim sought an order setting aside or varying his discipline, that would invade the *Police Act*'s discipline process. Unlike the grievances in *Edmonton Police* and *Regina Police*, the dispute here, in its essential character, is not whether the court or the arbitrator should set aside or vary his discipline by the Region. The status of that discipline has been left to the *Police Act* process. The dispute here is rooted in sick leave entitlement or abuse.

10. Second Weber Factor - Ambit of Collective Agreement

[79] Article 43 of the collective agreement ("Sick Leave") entitles an employee to benefits for absences due to illness or disability. The provision allows the Region to require that the employee be examined by the Region's physician. That occurred to Cst. Symington. His ASC pleads:

> 17. [Superintendent] McNeil ordered Symington to be immediately assessed by HRP's designated physician. The meeting took place on June 13, 2001. HRP's doctor thereafter informed HRP that Symington could do light modified duties. Due to the inconsistency between the HRP's doctor and Symington's family doctor, Symington's union representative advised Symington to return to his GP as soon as possible for clarification.

Whether, based on conflicting medical opinions, an employee is entitled to a benefit under the collective agreement's sick leave provision is a typical dispute rooted in the collective agreement.

[80] Other provisions in the collective agreement govern the Region's response to Cst. Symington's assertion of entitlement to sick leave benefits.

[81] Article 4 prohibits discrimination on the grounds outlined in Nova Scotia's *Human Rights Act* R.S.N.S. 1990, ch. 214 including mental disability [s. 5(1)(d) and (o) of the *Human Rights Act*]. Article 4 says that "*bona fide* occupational requirements do not constitute prohibited grounds of discrimination." Article 4 also says that "a sworn member may be accommodated within the Police Service with full police officer status, provided such accommodation does not cause the Region undue hardship. . ." Cst. Symington's ASC pleads that the Region failed to accommodate him:

> 24 Symington remains on stress-related sick leave specific to his work environment and has been since June, 2001. Despite being aware at all times, of the nature and cause of the illness, members of HRP have continued to subject Symington to harassment and hostility, including the refusal to accommodate his disability thereby exacerbating his condition and protracting his recovery.

[82] Article 41 of the collective agreement states that the Region and Union "are committed to their respective duties and responsibilities under the *Occupational*

Health and Safety Act" SNS 1996, ch 7 as amended. These include safeguards of employee health.

[83] Cst. Symington's assistance to the New York City Police Department, after September 11, 2001, while he received sick leave benefits, was a flashpoint with the Region. Assistance to other police agencies is addressed by Article 49 of the collective agreement:

> <u>Assisting Other Police Agencies</u>
>
> When members assist other agencies they shall be entitled to all benefits under this collective agreement provided:
>
> > (a) When possible, permission of the Chief of Police has been requested and granted;
> >
> > (b) When on duty, the member shall not provide such assistance outside of Nova Scotia, unless permission has been granted by the Chief of Police; and
> >
> > (c) When off duty, and when it is not possible to obtain permission of the Chief of Police, such assistance shall only be provided when there is a reasonable expectation of bodily harm or death.

[84] Article 2 of the collective agreement contains a standard management rights clause entitling the Region to exercise all authority for the management and operation of the Police Service, except as limited by the collective agreement. In *Weber* (¶ 72, 74) Chief Justice McLachlin referred to the express "unfair treatment" clause in the collective agreement. Disputes, whose essential character arise implicitly from the collective agreement, are for the arbitrator (*Regina Police* ¶ 25). Arbitral jurisprudence has established principles of fairness and reasonableness and protections against arbitrariness and bad faith to govern the employer's discretion in the exercise of management rights: Brown & Beatty *Canadian Labour Arbitration* (Fourth Edition) - Looseleaf, vol. 1, ¶ 4:2322-2326. I express no view whether these principles apply to Cst. Symington's dispute under this collective agreement. That would be for an arbitrator. But it would be a live issue.

[85] My conclusion includes Cst. Symington's defamation claim (above ¶ 24). The underlying dispute over sick leave under the collective agreement kindled employer reactions that Mr. Symington characterizes as defamatory. In these circumstances, *Weber* applies and the issue is for the collective agreement's dispute resolution process: *Dwyer v. Canada Post Corp.* 1997 CanLII 1110 (O.C.A.); *Giorno v. Pappas* (1999), 170 D.L.R. (4th) 160 (O.C.A.); *Phillips v. Harrison* (2000), 196 D.L.R. (4th) 69 (M.C.A.) at ¶ 71; *Haight-Smith v. Neden* (2002), 211 D.L.R. (4th) 370 (B.C.C.A.), leave denied [2002] S.C.C.A. No. 176; *Sloan v. York Region District School Board*, [2000] O.J. No. 2754 (C.A.), leave denied [2000] S.C.C.A. No. 472; *Ruscetta v. Graham*, [1998] O.J. No. 1198 (O.C.A.), leave denied [1998] 2 S.C.R. x; *Bhaduria v. Toronto Board of Education* (1999), 173 D.L.R. (4th) 382 (O.C.A.), leave denied [1999] S.C.C.A. No. 212.

[86] Subject to Article 29(8) of the collective agreement, that I will discuss next, the animating facts and seminal dispute between Cst. Symington and the Region are governed by the collective agreement. I note in passing that, on the chambers application (above ¶ 43), the Region submitted to the Chief Justice that this dispute was covered by the collective agreement's provisions that I have listed above. When I say that the dispute is governed by the collective agreement, I do not mean that the labour arbitrator would decide whether the Region committed malicious prosecution, defamation, negligence or intentional infliction of mental harm. The standards and terminology in arbitration derive from the collective agreement and arbitral jurisprudence. But the essential character of the issues under the collective agreement substantially overlaps the *lis* from the torts cited in Cst. Symington's statement of claim.

[87] I turn to the arbitration provision of the collective agreement. Article 29(3) says:

> A grievance shall mean a difference between the Region and the Union, or the Region and a member, arising from the interpretation, application or administration or alleged violation of the Agreement.

Articles 29(6)(a) and (d) say that, failing satisfactory resolution in the grievance process, the union may submit the matter to arbitration and "the decision of the arbitrator shall be final and binding upon the Region and the union". Article 29(8) says:

> All disciplinary matters of sworn members covered under the police act [*sic*] shall be dealt with by the region in accordance with the police act [*sic*] R.S.N.S. 1989, c. 348, its regulations there under [*sic*] and any subsequent amendments to this legislation. The final disposition of disciplinary matters under these procedures and provisions shall be final and binding on the parties and not arbitrable under this Agreement.

Much of the argument on this appeal turned on the interpretation of Article 29(8).

[88] Cst. Symington and, on the appeal, the Region say that the "disciplinary matters" excluded from arbitration by Article 29(8) include any matter which "could" be the subject of discipline under the *Police Act*. It would not matter whether discipline actually has been instituted against anybody. If the topic of the proposed grievance overlaps the topic of a hypothetical disciplinary complaint, then the field would be occupied and the entire subject would be inarbitrable. Cst. Symington's factum replying to MAPP summarizes it this way:

> 13. Under the "broader" interpretation, once a member of the police force does something that could [underlining in original] become the subject of police disciplinary proceedings, art. 29(8) prevents another MAPP member who is aggrieved by the member's conduct from grieving over that conduct.
>
> . . .
>
> 17. Symington submits that the broader interpretation is correct.

[89] I disagree with this "broader interpretation"of Article 29(8).

[90] Article 29(8) states that the "disciplinary matters . . . *shall be dealt with by the Region* in accordance with the *Police Act*". Article 1(1) (b) defines "Region" as the Halifax Regional Municipality – i.e. the employer. Article 29(8) says "the final disposition of disciplinary matters" under the *Police Act* is "not arbitrable under this agreement". Article 29(8) expressly refers to actual discipline ("shall be dealt with" to "final disposition") imposed by the employer ("Region") on an employee. "Disciplinary matters" in Article 29(8) does not mean hypothetical discipline or third party allegations that are never adopted by the employer. I acknowledge, of course, that threatened discipline by an employer may be a variant of actual discipline; but that issue does not arise from the "broader interpretation" proposed by Sgt. Symington.

[91] The *Police Regulations*, Nova Scotia Reg. 101/88, as amended, under the former *Police Act*, contained the *Code of Conduct and Discipline* for police officers. The *Code* permitted discipline when an officer engages in "discreditable conduct" that is "reasonably likely to bring discredit on the reputation of the police force", uses "oppressive or abusive conduct or language", or commits "neglect of duty", "deceit", "improper disclosure, "corrupt practices", "abuse of authority" or action contrary to the *Human Rights Act*. If the submissions of Cst. Symington and the Region (on appeal) are accepted, then any grievance that arguably might engage one of these broad standards would be inarbitrable under the collective agreement – even if there was no discipline to trigger the dispute resolution process under the *Police Act*. The submission would relocate differences from the collectively bargained arbitration to a vacuum of dispute resolution under the *Police Act*. Arbitrability analysis would become hypothetical speculation. Unresolved disputes would find errant outlets.

[92] That result was not intended by the collective agreement or the *Trade Union Act*. Section 42 of the *Trade Union Act* requires that collective agreements contain a provision for dispute resolution, failing which the *Act* deems the inclusion of an arbitration clause. Chief Justice McLachlin's passage in *Weber* ¶ 45 (quoted above ¶ 56), concerning Ontario's equivalent provision, and Justice Estey's comments in *St. Anne* (above ¶ 55) are apt. The legislature intended that there be independent resolution of disputes arising under the collective agreement. That would not happen with Cst. Symington's "broader interpretation".

[93] A grievance that sought to affirm, vary or set aside a disciplinary sanction against Cst. Symington (for breach of the *Code of Conduct* under the *Police Act*) would be inarbitrable by Article 29(8). But then the *Police Act* would provide the dispute resolution process, as I will discuss in the next section, including an appeal to the independent Police Review Board. The status of Cst. Symington's discipline is not at issue in this dispute. The Region's disciplinary measures against Cst. Symington have been resolved in Cst. Symington's favour, in accordance with the formal or informal procedures under the *Police Act* (with one adjournment under the *Police Act* process). The disputed issues here are incongruent with the now-resolved disputes concerning the status of the discipline under the *Police Act* and, with one exception I will discuss next, stem from the collective agreement and are not excluded from arbitration by Article 29(8).

[94] There is one exception to my conclusion that Cst. Symington's claims arise under the collective agreement. Cst. Symington has sued for malicious prosecution, based on the Region's institution of the criminal process to investigate and possibly prosecute Cst. Symington. The collective agreement neither incorporates the criminal regime into labour relations nor shelters the Region from the consequences of abuse of the criminal process. I adopt the reasoning of Justice Laskin in *Piko v. Hudson's Bay Company* (1998), 41 O.R. (3d) 729 (O.C.A.), leave to appeal denied [1999] S.C.C.A. No. 23, at pp. 735-736:

> But her claim that the Bay maliciously prosecuted her in the criminal courts lies outside the scope of the collective agreement. The Bay itself went outside the collective bargaining regime when it resorted to the criminal process. Once it took its dispute with Piko to the criminal courts, the dispute was no longer just a labour relations dispute. Having gone outside the collective bargaining regime, the Bay cannot turn around and take refuge in the collective agreement when it is sued for maliciously instituting criminal proceedings against Piko.
>
> The difference between this case and cases such as *Ruscetta* and *Dwyer* is that although the dispute between the Bay and Piko arises out of the employment relationship, it does not arise under the collective agreement. A dispute centered on an employer's instigation of criminal proceedings against an employee, even for a workplace wrong, is not a dispute which in its essential character arises from the interpretation, application, administration or violation of the collective agreement.
>
> . . . The Bay's actions are neither a prerequisite to nor a necessary consequence of its dismissal of Piko. In short, the collective agreement does not regulate the Bay's conduct in invoking the criminal process, which is the conduct at the heart of the present dispute. The dispute, therefore, does not arise under the collective agreement.

See also *Graham v. Strait Crossing Inc.* (1999), 170 D.L.R. (4th) 152 (P.E.I.S.C. A.D.) at ¶ 19-20. In my view, Cst. Symington's action for malicious prosecution for the alleged abuse of the criminal process is not, in its essential character, a dispute arising from the collective agreement, and is not excluded from the court by the *Weber* principle.

[95] There is no issue in this appeal as to the merits of Cst. Symington's claims, or whether the claim for malicious prosecution even discloses a cause of action on

its face. I make no comment on those matters. My reasons deal only with the jurisdictional question.

[96] The appeal record does not reveal whether any grievance was attempted under the collective agreement and, if so, what happened or, if not, why not. Nothing in my reasons comments or signals a view on any representational issue that may exist between MAPP and Cst. Symington.

11. Regina Police Factor - Legislative Intent of Police Act

[97] *Regina Police* requires that the jurisdictional dispute be resolved consistently with the legislative intent of the statutory regime.

[98] Sections 34-37 of the former *Police Act*, in force at the times relevant here, under the heading "Internal Discipline" said:

> Internal Discipline
>
> Proceedings required
>
> 34 No member of a municipal police force is subject to reduction in rank, to dismissal or to any other penalty for breach of the code of discipline except after proceedings have been taken in accordance with this Act and the regulations.
>
> Initiation of review
>
> 35 After a disciplinary decision has been made in accordance with this Act and the regulations, a police officer who is the subject of the disciplinary decision may initiate a review of the decision by filing a notice of review with the Registrar of the Review Board within the time determined by regulation.
>
> Hearing
>
> 36 Upon receipt of a notice of review, the Registrar of the Review Board shall schedule a hearing.
>
> Application of Review Board provisions

> 37 The provisions of this Act respecting the Review Board apply to the hearing of a review of the matter of internal discipline.

[99] Section 34 required the Region to comply with the *Police Act* for discipline resulting from breach of the *Code of Conduct*, but otherwise left the collective agreement untouched. The *Code* was contained in the Regulations under the *Police Act*. Sections 35-37 of the *Act* entitled the disciplined officer to challenge that internal discipline under the process set out in the *Police Act* and Regulations, including appeal to the Police Review Board. Section 28 established the Police Review Board ("Board"), composed of three members appointed by the governor in council.

[100] The *Police Act* enacted a second disciplinary stream initiated by a "complaint" from "a member of the public". Section 2(e) defined "complaint":

> (e) "complaint" means any communication received from a member of the public in writing, or given orally to the chief officer or his delegate and reduced to writing and signed by the complainant, which alleges that a member of a force breached the Code of Conduct and Discipline or alleges the failure of the force itself to meet public expectations;

Sections 22-29 of the *Act* provided for investigation and attempts at informal resolution. If the complaint was not resolved, the complaint would be referred to the Board for a hearing. Section 18(1) of the *Police Act* expressly confirmed the Municipality's vicarious liability for police torts. The legislature did not intend that the complaint from a member of the public would oust civil liability.

[101] Regulation 20 under the *Police Act* authorized a police officer to file a written allegation against another police officer. The *Act* itself did not expressly refer to such a "police-on-police" allegation. Under Regulation 21, after an investigation, the Chief of Police would decide whether to discipline the officer as a result of a police-on-police allegation. The Board has ruled that the police officer who initiated a police-on-police allegation had no power under the *Act* to appeal to the Board from a decision with which the initiating officer disagreed (P.R.B. file No. 02-0029 - written decision April 14, 2004).

[102] Section 29 of the *Police Act* authorized the Board to conduct hearings into internal discipline, suspensions and "complaints". Section 31(b) entitled the

disciplined officer to be a party before the Board. Section 32 stated that the Board's hearings were to be *de novo*, and the parties were entitled to be heard and be represented by counsel, may call witnesses and cross examine.

[103] Section 33(1) listed the Board's powers:

> (1) At a hearing under this *Act*, the Review Board may
>
> (a) make findings of fact;
>
> (b) dismiss the matter;
>
> (c) find that the matter under review has validity and recommend to the body responsible for the member of the municipal police force what should be done in the circumstances;
>
> (d) vary any penalty imposed including, notwithstanding any contract or collective agreement to the contrary, the dismissal of the member of the municipal police force or the suspension of the member with or without pay;
>
> (e) affirm the penalty imposed;
>
> (f) substitute a finding that in its opinion should have been reached;
>
> (g) award or fix costs where appropriate; and
>
> (h) supersede a disciplinary procedure or provision in a contract or collective agreement.

Section 33(2) said that the Board's decision must be in writing and provided to the parties. Section 33(3) said that the Board's decision is "final".

[104] There is no doubt that the former *Police Act*'s handling of internal discipline (disciplinary measures imposed by the Region as employer) for violating the *Code of Conduct* was unreviewable by arbitration under the collective agreement. That was expressed in ss. 33 (1)(d) and (h) and reiterated by section 49(2) of the *Act*:

> Every collective agreement is subject to this Act and the regulations, and where there is a conflict between the agreement and this Act or between the agreement and the regulations, this Act and the regulations prevail.

This conclusion is consistent with my interpretation of article 29(8) of the collective agreement, discussed earlier. It is also consistent with the intent of s. 42 of the *Trade Union Act*, directing that disputes under the collective agreement be resolvable by an independent process of adjudication. The internal discipline process under the *Police Act* included an appeal to the independent Police Review Board outfitted with statutory procedural fairness – representation by counsel, calling of witnesses, cross examination, and a written decision. The independent dispute resolution was under the *Police Act* instead of by labour arbitration.

[105] Cst. Symington's internal discipline by the Region was dealt with under the *Police Act*. The results were satisfactory to Cst. Symington. One *Police Act* matter has been adjourned, but any ruling whether that discipline should be affirmed, set aside or varied would still be for the *Police Act* process, not the arbitrator.

[106] The former *Police Act* did not exhibit a legislative intent supporting the "broader interpretation" suggested by Cst. Symington and (on appeal) by the Region (above ¶ 88). This "broader interpretation" would mean that, if the facts of the dispute hypothetically "could" engage the *Code of Conduct*, then the actual collective agreement dispute is not arbitrable, even if there is no actual discipline by the employer to trigger the *Police Act* process.

[107] In argument it was suggested that the nine police-on-police allegations Cst. Symington filed under Regulation 20 are "disciplinary", and oust the jurisdiction of a labour arbitrator to hear related disputes under the collective agreement. With respect, I cannot agree. The submission turns too many logical somersaults:

> \- *First* The *Police Act* did not even mention the procedure of police-on-police allegations. The *Act* referred to internal discipline by the employer and complaints from members of the public. The police-on-police allegation appears only in the Regulations. In this context, it is difficult to infer a compelling legislative intent from statutory silence.
>
> \- *Second* Regulation 21 said that the Police Chief decides whether discipline should follow from a police-on-police allegation. If the Chief

> imposes discipline, then the process effectively becomes "internal discipline". Unless the Police Chief has acted, there is no "discipline." Here the Chief did not impose discipline on the targets of Cst. Symington's allegations.
>
> - *Third* The Board has ruled that the *Police Act* gave the Board no jurisdiction to hear an appeal by the alleging officer of a police-on-police allegation. The alleging officer is just left with the result of the investigation and the Chief's decision. If the mere filing of police-on-police allegations excluded arbitration of overlapping collective agreement issues, there would be an adjudicatory void, contrary to s. 42 of the *Trade Union Act*.
>
> - *Fourth* Discipline for breach of the *Code of Conduct* engaged the *Police Act* process to review whether the discipline should be affirmed, set aside or varied. So the status of the discipline was exclusively for the *Police Act* process. The status of discipline is not the same issue as the civil claims at play here under the collective agreement related to sick leave entitlement or abuse.

[108] In summary, the legislative intent expressed in the former *Police Act* would exclude any arbitral review of the status of the discipline, ie. an attempt to affirm, vary or set aside the Region's discipline of Cst. Symington for alleged breach of the *Code of Conduct* in the Regulations. But it did not exclude an arbitrator's jurisdiction over the other collective agreement based issues I have recited in the previous section of these reasons.

[109] Neither does the *Police Act* exclude Cst. Symington's action in court for malicious prosecution from alleged abuse of the criminal process. Discipline is no substitute for a civil remedy: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at ¶ 60 per Iacobucci, J. Cst. Symington complains of a *Criminal Code* investigation (see ¶ 17 above, ASC ¶ 50-51). Given that the *Criminal Code* accommodates an action for malicious criminal prosecution (*Nelles v. Ontario*, [1989] 2 S.C.R. 170), the *Police Act* should not impliedly exclude that claim.

12. The Court's Residual Jurisdiction

[110] *Weber* yields residual jurisdiction to the court where the arbitrator's available remedies are inadequate (above ¶ 58). *Vaughan* recognizes that, if the statutory language permits, the court may exercise its discretion to take jurisdiction.

[111] Cst. Symington submits that his inability to appeal his police-on-police complaints to the Board deprived him of an effective remedy, and entitled the court to take jurisdiction under *Vaughan*. His factum says:

> 98. The fact that Symington cannot appeal decisions dismissing his complaints at the investigation stage means that he is denied an independent adjudication of his complaints. He is also denied rights given to those who can appeal: a *de novo* hearing, production or disclosure of evidence, the right to present evidence, the right to cross-examine, a decision by a third party adjudicator after hearing from both sides, and some possible costs.
>
> 99. Symington submits that this lack of any right to an independent adjudication is fatal to the argument accepted by the learned Application Judge that the disciplinary process maintains exclusive jurisdiction over the disputes in Symington's Claim.

[112] The short answer is that Cst. Symington's claims were arbitrable under the collective agreement. That was his avenue to an effective remedy with procedural fairness. The inarbitrable matter, his attempt to set aside the discipline, was appealable to the Police Review Board under the *Police Act*. It is unnecessary to enlist *Vaughan*'s discretionary factors to access the court's residual jurisdiction. Article 29(8) of the collective agreement, to which Cst. Symington was a party, said that the inarbitrable matters were for the *Police Act* process which "shall be final and binding on the parties." The collective agreement and *Police Act* formed a complementary "complete code" with which the court should not interfere.

[113] By a similar argument, Cst. Symington cites *Smith v. Canada (RCMP)*, 2007 NBJ No. 244, 2007 NBCA 58. An RCMP officer sued for work related complaints. There was no collective agreement. Justice Robertson concluded that the grievance process under the *Royal Canadian Mounted Police Act* R.S.C. 1985, c. R-10 was seriously inadequate, and entitled the court to accept its residual and exceptional jurisdiction under *Vaughan*'s discretionary factors. *Smith* does not assist Cst. Symington. Here, unlike *Smith*, there was a collective agreement with arbitration as an independent dispute resolution process.

13. Notice of Contention - Issue Estoppel or Abuse of Process

[114] Under its notice of contention, the Region submits both that the dismissal under the *Police Act* Regulations of Cst. Symington's police-on-police allegations constitutes issue estoppel and, in the alternative, that relitigation of those issues would be an abuse of process. As discussed, in my view the only component of Cst. Symington's ASC that may proceed to court is his cause of action for malicious prosecution based on the alleged abuse of the criminal process. My comments related to the notice of contention are limited to that cause of action. As the Chief Justice did not consider issue estoppel, there is no standard of review.

[115] Cst. Symington's police-on-police allegations included complaints that the criminal investigations were not instituted in good faith and that his superiors knew of his workplace stress disorder when they applied for search warrants. The Region says that the dismissal of these allegations, even at the investigatory stage under the *Police Act* Regulations, establishes issue estoppel for these factual disputes that underlie the malicious prosecution action.

[116] The leading authority is the decision of Justice Binnie in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460. This court has applied *Danyluk* in *Copage v. Annapolis Valley Band*, 2004 NSCA 147, *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Wright* (2006), 272 D.L.R. (4th) 635 (NSCA) and *Connolly v. Canada Post Corp.*, 2005 NSCA 55. In *Danyluk*, Justice Binnie said:

> *1. Issue Estoppel: A Two-Step Analysis*
>
> 33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39;

> *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56.

Justice Binnie had earlier set out the three pre-conditions for the first step:

> 25 The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, *supra*, at p. 254:
>
> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[117] At the appeal hearing, Cst. Symington's counsel conceded that the first step's three preconditions exist. He focussed his argument on the second step from *Danyluk*, whether the court should exercise its discretion to apply issue estoppel. For purposes of analysis, I will accept counsel's concession. But I should not be taken to have agreed that all the pre-conditions from *Danyluk* exist here. In particular, I have concern whether there was a "judicial" decision. As noted, the Police Review Board had no jurisdiction to hear an appeal from a police-on-police complaint. So the Board's powers are irrelevant to issue estoppel (*Danyluk* ¶ 51; *Copage* ¶ 15). Any "decision" relevant to issue estoppel was made at the investigatory stage. Under the Regulations the Police Chief was the disciplinary authority to decide whether a police-on-police complaint should result in discipline. My acceptance of the concession by Cst. Symington's counsel should not be taken as a ruling that a Police Chief's failure to discipline is a "judicial decision". See *N.S. Public Service LTD Plan Trust Fund* at ¶ 50-51 for discussion of the topic.

[118] Nonetheless, on the assumption that the three preconditions exist, I will move to *Danyluk's* second step.

[119] Justice Binnie (¶ 67) noted that "the list of factors is open", then (¶ 68-80) cited seven discretionary factors: the wording of the statute; the purpose of the

legislation; the availability of an appeal; the safeguards available to the parties in the administrative procedure; the expertise of the administrative decision maker; the circumstances giving rise to the prior administrative proceedings; the potential injustice.

[120] In *Danyluk* (¶ 68-81) and in *Copage* (¶ 31-51), the Courts declined to exercise their discretion to apply issue estoppel. In the circumstances here, there is even less reason to bar Cst. Symington's law suit for malicious prosecution based on the allegations of abuse of the criminal process.

[121] Because the Police Review Board had no jurisdiction to hear an appeal by the alleging officer, the analysis focusses on the investigatory stage. At that stage, Cst. Symington was not entitled to the protections of a judicial hearing. He had no right to the investigator's report until after the decision was made. He had no opportunity to rebut findings of the investigator or statements made to the investigator, or to confront witnesses. He had no opportunity to present witnesses, or cross examine. The administrative decision whether to discipline did not follow an "adjudicatory" path. The statutory scheme did not provide a potential remedy to the complainant. I turn to the *Danyluk* factors. Neither the wording nor purpose of the former *Police Act* precluded an action for malicious prosecution because of alleged abuse of the criminal process merely because the Police Chief decided not to discipline. Cst. Symington had no right of appeal to the Board. He had meagre procedural safeguards in the investigatory stage. It is not clear that the decision maker, in the investigatory stage, was impartial and dissociated from Cst. Symington's allegations, which implicates Justice Binnie's sixth and seventh discretionary factors.

[122] In *NS Public Service LTD Plan Trust Fund*, Justice Cromwell considered Justice Binnie's concluding factor, "potential injustice":

> 105 This factor requires "... the Court ... [to] stand back and, taking into account the entirety of the circumstances, consider whether the application of issue estoppel in the particular case would work an injustice": Danyluk at para. 80.
>
> 106 So far as one can tell from the record, there has never been any proper consideration by a neutral party of whether Mr. Wright was disabled within the meaning of the "any occupation" definition in the Plan. It appears that his court action was the only way that could occur.

Similarly, in *Connolly v. Canada Post Corp.*, 2005 NSCA 55, ¶ 25-29 Justice Chipman said:

> [25] I have reviewed the seven factors as they apply to the disposition by the Commission of the appellant's complaints under the *Canadian Human Rights Act*. The matter can, in my opinion, be resolved by testing the proceedings with reference to the third, fourth and seventh factors.
>
> [26] **Third, the availability of an appeal.** Here, the appellant had no appeal. He had only the benefit of judicial review. As MacKay, J. said, deference was owed by the court to the exercise of its discretion by *CHRC* and, in the absence of an error in law or patent unreasonableness in fact-finding, or of breach of procedural fairness, the court could not intervene. This is not a full appeal.
>
> [27] **Fourth, the safeguards available to the parties in the administrative procedure.** This was not an adjudication by the Commission after hearing sworn testimony and cross-examination followed by submissions. It was only an investigation by the Commission, during which the appellant had a right to make a submission, but not a right to confront his opponent, either with the aid of discovery proceedings or trial proceedings.
>
> [28] **Seventh, the potential [injustice].** Binnie, J. said at para. 80:
>
>> As a final and most important factor the court should stand back and taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice.
>
> [29] When the circumstances, particularly as tested with reference to the third and fourth factors are considered, it is obvious that there would be substantial potential for injustice were issue estoppel to be applied to the appellant's claims merely on the basis of his rejected complaint under the *CHRA*. I have no difficulty in concluding that this is a case where the Court should exercise its discretion not to permit issue estoppel to apply to the appellant's claims on the basis of the proceedings under the *CHRA*.

In my view, these comments are apposite to Cst. Symington’s cause of action for malicious prosecution based on alleged abuse of the criminal process.

[123] This is not an appropriate case to exercise the court's discretion to apply issue estoppel.

[124] The Region argues alternatively that a relitigation of the issue would be an abuse of process, citing *Toronto (City) v. CUPE, Local 79*, [2003] 3 S.C.R. 77. Justice Arbour said:

> 37 . . . Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

[125] By claiming abuse of process, the Region does not circumvent *Danyluk*'s discretionary factors. In *Toronto v. CUPE,* Justice Arbour continued:

> 53. The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result.

Those discretionary factors are the outlet to ensure that neither issue estoppel nor abuse of process causes injustice. For the reasons I have described earlier respecting issue estoppel, this is not a case where the doctrine of abuse of process should bar Cst. Symington's cause of action for malicious prosecution resulting from alleged abuse of the criminal process.

[126] I would dismiss both branches of the notice of contention.

14. Conclusion

[127] I would allow the appeal in part, to permit Cst. Symington to pursue in court his cause of action for malicious prosecution resulting from alleged abuse of the criminal process. In all other respects I would dismiss the appeal, and dismiss the grounds in the notice of contention. Rather than parsing the pleadings to strike passages and retain only those that relate to the permitted cause of action, I prefer the remedy applied by the Alberta Court of Appeal in *Edmonton Police*, ¶ 29-30. I would retain the basic pleading of malicious prosecution for abuse of the criminal process to avoid a limitations issue, but would strike the rest of the amended

statement of claim, with leave to Cst. Symington to amend to support his claim for malicious prosecution for alleged abuse of the criminal process.

[128] As success on the appeal was divided, the parties should bear their own costs.

Fichaud, J.A.

Concurred in:

MacDonald, C.J.N.S.

Cromwell, J.A.