COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bruce v. Cohon,*
2017 BCCA 186

Date: 20170512
Docket: CA43559

Between:

Arland Richard Bruce

Appellant
(Plaintiff)

And

Mark Steven Cohon, Leo Ezerins, B.C. Lions Football Club Inc., Edmonton Eskimo Football Club, Calgary Stampeders 2012 Inc., Saskatchewan Roughrider Football Club Inc., Winnipeg Blue Bombers, The Hamilton Tiger-Cat Football Club, Toronto Argonauts Football Club Inc., Compagnie Club de Football des Alouettes de Montréal, Capital Gridiron Limited Partnership, Capital Gridiron GP Inc., The Canadian Football League (CFL) Alumni Association, Charles H. Tator, Krembil Neuroscience Centre

Respondents
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated March 11, 2016 (*Bruce v. Cohon*, 2016 BCSC 419, Vancouver Registry Docket S145512).

Counsel for the Appellant, Arland Richard Bruce:	R. Mogerman R.L. Wishart
Counsel for the Respondents, the CFL Teams and Mark Steven Cohon:	S.J. Shamie G.J. Litherland
Place and Date of Hearing:	Vancouver, British Columbia March 3, 2017
Place and Date of Judgment:	Vancouver, British Columbia May 12, 2017

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Fitch

Summary:

Plaintiff, former CFL player who had suffered concussions in 2012, sued CFL, member clubs, CFL Commissioner, and various others alleging negligence, negligent misrepresentation, and failure to warn (about the dangers of concussion). Defendants applied successfully to have action struck on basis of lack of jurisdiction in accordance with Weber v. Ontario Hydro *(1995). Chambers judge ruled that dispute arose 'out of' collective agreement, which dealt with player health and safety, and was therefore outside jurisdiction of courts. Plaintiff appealed on various grounds. After hearing of appeal, he informed CA that the action had been discontinued as against certain 'outside' defendants, who were not bound by collective agreement.*

Held: appeal dismissed. Determining "essential character" of dispute raises issue of law although interpretation of collective agreement is presumably matter of mixed fact and law. Judge did not ignore cause of action as pleaded or factual matrix. Although action might, when 'outside' parties were defendants, be seen as having "double aspect", action against remaining parties more closely resembled claim for workplace injuries. Judge's ruling that exception in collective agreement to exclusive representation did not "distinguish its scope" from comparable agreements, had not been shown to be clearly and palpably wrong. Plaintiff could have obtained effective remedy as against remaining defendants through arbitration.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This appeal requires the court to apply the well-known decision of *Weber v. Ontario Hydro* to an unusual claim brought by a former professional football player against all the football clubs of the Canadian Football League ("CFL"), the CFL itself, and others associated with them. The plaintiff, Mr. Bruce, played professional football between 2001 and 2014 for various CFL clubs. He asserts that he suffered concussions when playing for the B.C. Lions in 2012, and was still showing symptoms thereof in 2013 when playing for the Montreal Alouettes. He says he continues to suffer from chronic traumatic encephalopathy ("CTE"), depression, paranoia, delusions, headaches and other problems and that in one way or another, the defendants knew or should have known he should not have been permitted to continue playing "despite displaying the ongoing effects of concussion to medical professionals and coaching staff" in the 2012 and 2013 seasons.

[2] Mr. Bruce seeks damages against B.C. Lions Football Club Inc. and Compagnie Club de Football des Alouettes de Montréal for negligence, failure to warn and negligent misrepresentation, particulars of which are said to include:

> a) denying the proven link between repetitive traumatic head impacts and later in life cognitive brain injury including CTE and related symptoms;
>
> b) downplaying the dangers the plaintiff faced in returning to action and the long-term effects of continuing to play after sustaining the concussion;
>
> c) concealing information about technology available to record and report the plaintiff's ongoing and continuing head trauma;
>
> d) misleading the plaintiff about the value of the technology available to report and report the impact of suffering multiple sub-concussive and concussive blows to the head …

He makes similar claims of negligent misrepresentation against the CFL, its member clubs and its then commissioner, Mr. Cohon.

[3] Mr. Bruce also asserted broader allegations of negligence and negligent misrepresentation on the part of various other defendants, but we have now been told that this action is to be discontinued as against them. I will proceed on the assumption, then, that Mr. Ezerins and Dr. Tator (who are said to be the co-authors of a report entitled "Absence of Chronic Traumatic Encephalopathy in Retired Football Players with Multiple Concussions and Neurological Symptomology"), Krembil Neuroscience Centre, and the Canadian Football League Alumni Association ("CFLAA"), whom I will refer to collectively as the "Outside Parties", are no longer defendants in this action. This was not the case at the time the court below issued its decision.

[4] Perhaps not surprisingly, the collective agreement to which the CFL, its Player Relations Committee (the "CFLPRC", the bargaining agent for all CFL clubs) and the CFLPA (the "Players' Association", being the players' bargaining agent) are parties is an unusual one. For one thing, it does not purport to contain all the terms and conditions of employment of CFL players. Instead, it requires that players negotiate certain terms of their employment (including the important matter of regular season compensation) with the clubs directly, rather than through the

Players' Association. For another thing – and for obvious reasons – the collective agreement contains no provision for seniority or security of employment; and the terms dealing with workplace injury are geared to determining with despatch whether players are fit to return to playing "skilled football".

[5] Another unusual feature of the employment relationship in this case is that in contrast to most other workers throughout the province, professional football players are exempted from Part 1 of the *Workers' Compensation Act*, R.S.B.C. 1996, c. 492. The employer clubs are therefore not subject to WCB regulations regarding safety, and players are not entitled to participate in the WCB scheme or to receive WCB benefits. Conversely, they are not precluded by the Act from suing their employers for workplace injuries.

[6] The chambers judge below concluded that the unusual features of the CFL collective agreement did not "distinguish its scope" from that of comparable collective agreements involving other sports, and that the parties' dispute arose from the collective agreement. (At para. 83.) He applied *Weber* to hold that the Court had no jurisdiction over Mr. Bruce's claims, and dismissed the action pursuant to Rule 21-8(1) of the *Civil Rules*.

The Weber Analysis

[7] In 1995, in *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929 and its sister case, *New Brunswick v. O'Leary* [1995] 2 S.C.R. 967, the Supreme Court of Canada adopted the "exclusive jurisdiction" model of 'final and binding' clauses in labour legislation. Under this model, once it is shown that the parties' dispute 'arises from' a collective agreement, the claimant may proceed only under the dispute resolution mechanism (arbitration) set out in that agreement. The courts have no jurisdiction to entertain the dispute unless the remedy claimed is one the arbitrator may not grant, or the remedy granted would be otherwise inadequate. (*Weber*, at para. 57.)

[8] In *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners* 2000 SCC 14, the Supreme Court described in one paragraph the

analysis required by *Weber* to determine whether a given dispute arises, expressly or inferentially, from a collective agreement:

> 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…. [At para. 25; emphasis added.]

[9] The *Weber* analysis, however, is not as 'simple' as it seems. Indeed, McLachlin J. (as she then was) observed in *Weber* that it is "impossible to categorize" the kinds of case that will fall within the exclusive jurisdiction of an arbitrator. It is clear that the analysis does not turn solely on whether the dispute arises between employee and employer (*Weber*, at paras. 52, 54); nor does it depend on the form(s) of action being advanced by the claimant – although as mentioned, the court will take jurisdiction where the arbitrator has no power to grant a remedy that is called for. Courts have ruled that arbitrators had jurisdiction (and that the court lacked jurisdiction) in cases involving various torts such as interference with contractual relations (see *Jadwani v. Canada (Attorney General)* (2001) 52 O.R. (3d) 660 (C.A.), *lve. to app. dism'd* [2001] S.C.C.A. No. 200); deceit, negligent misrepresentation and conspiracy (see *Maynard v. Arvin Ride Control Products* (2000) 49 C.C.L.T. (2d) 305 (Ont. S.C.J.)); and defamation – where the alleged defamatory statements were closely associated with the employment relationship and were captured by the collective agreement (see *Haight-Smith v. Neden* 2002 BCCA 132, *lve. to app. dism'd* [2002] S.C.C.A. No. 176; *Giorno v. Pappas* (1999) 42 O.R. (3d) 626 (C.A.)). On the other hand, where a claim of defamation was made by an employer in respect of comments made by a union officer to a local newspaper

about the employer's production practices, this court found that the action fell "well outside the normal scope of employer–employee relations, and [that] the context of the Collective Agreement [was] not broad enough to exclude the Company's right of recourse to the regular courts for this action of defamation." (*Fording Coal Ltd. v. United Steelworkers of America, Local 7884* 1999 BCCA 38 at para. 27.)

[10] In a similar vein, the Ontario Court of Appeal ruled in *Piko v. Hudson's Bay Co.* (1998) 41 O.R. (3d) 729, *lve. to app. dism'd* [1999] S.C.C.A. No. 23, that the plaintiff's claim that she had been maliciously prosecuted by her employer in a criminal court did not arise "under" the collective agreement. Accordingly, her civil action was not foreclosed by *Weber*. The following passage from the judgment of Mr. Justice Laskin in *Piko* illustrates the kind of careful analysis, both in respect of the statutory and contractual scheme in question and the nature of the dispute, that *Weber* requires:

> This case also differs from *Weber* itself. In *Weber*, the plaintiff employee took an extended leave of absence for which he received sick-leave benefits. The employer, Ontario Hydro, suspecting that the plaintiff was malingering, hired a private investigator to conduct surveillance on him. The investigator went on the plaintiff's property and, pretending to be someone else, was allowed inside the plaintiff's home. Hydro then suspended the plaintiff for abusing his sick-leave benefits. The plaintiff sued Hydro for damages for trespass, nuisance, deceit, invasion of privacy and breach of ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*. On a motion to determine a question of law before trial, the Supreme Court of Canada dismissed the action because the plaintiff's claims, though framed in tort and under the *Charter*, arose under the collective agreement. In so concluding, McLachlin J. emphasized two considerations: the broad language of the collective agreement and the conduct alleged against Hydro was "directly related to a process which is expressly subject to the grievance procedure."
>
> The collective agreement between Hydro and its employees extended the grievance procedure to "any allegation that an employee has been subjected to unfair treatment or any dispute arising out of the content of this Agreement." Also, Hydro's decisions concerning sick-leave benefits were subject to being grieved under the collective agreement. Hydro was alleged to have acted improperly in deciding to suspend the plaintiff for malingering. That allegation fell within the phrase "unfair treatment or any dispute arising out of the content of this Agreement." Moreover, Hydro's actions were related to its decision to suspend the plaintiff, a decision that was arbitrable under the collective agreement. Thus McLachlin J. could say that "[t]he provisions of the agreement are broad, and expressly purport to regulate the conduct at the heart of this dispute."

> Neither consideration emphasized by McLachlin J. in *Weber* applies in the present appeal. The language of the collective agreement for the Bay's employees is not nearly as broad as the language in the Hydro agreement. And the Bay's actions in instigating criminal proceedings are not directly related to the dispute over whether Piko was unjustly dismissed. 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. [At 735–6; emphasis added.]

[11] Another well-known decision, *Pleau v. Canada (Attorney General)* 1999 NSCA 159 (*lve. to app. dism'd* [2000] S.C.C.A. No. 83), is also helpful in unpacking the elements of *Weber*. In *Pleau*, the plaintiff had been dismissed from the federal civil service. He brought a grievance and was re-instated. He and his family then sued various other civil servants for conspiracy to cause injury and damage, breach of fiduciary duty, and abuse of office. (Mr. Pleau's wife and children sued on the basis that they had suffered mental distress as a result of the defendants' wrongful conduct and the defendants agreed those claims could not be referred to an adjudicator.)

[12] The defendants argued that the then *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 ("***PSSRA***") and the collective agreement were the only avenue for resolving the plaintiff's allegations, but both the judge of first instance and the Court of Appeal disagreed. Writing for the latter court, Mr. Justice Cromwell noted at the outset that the case was:

> … very different from *Weber* in several respects. In *Weber*, the relevant collective bargaining legislation expressly conferred exclusive jurisdiction on an arbitrator, the substance of the dispute itself was addressed in provisions of the collective agreement, the arbitrator could consider the substance of the dispute and was empowered to award effective redress. In this case, the dispute set out in the pleadings cannot be referred to third party adjudication under the Collective Agreement, there is no express grant of exclusive jurisdiction to the grievance process, and the collective agreement does not address the substance of the plaintiffs' complaints. The question on the appeal, therefore, is whether the *Weber* principle is broad enough to bar the action in these considerably different circumstances. [At para. 2; emphasis added.]

[13] The Court took the view that *Weber* and related cases showed that the decision by courts to decline jurisdiction in cases of this kind was not based simply on a "clear, express grant of jurisdiction to an alternative forum." Rather, the Court said, there were three main considerations underpinning *Weber* and its progeny. The first consideration related to the process provided by the legislation and the contract for the resolution of disputes. Cromwell J.A. explained:

> Where the legislation and the contract show a strong preference for a particular dispute resolution process, that preference should, generally, be respected by the courts. While it takes very clear language to oust the jurisdiction of the superior courts as a matter of law, courts properly decline to exercise their inherent jurisdiction where there are strong policy reasons for doing so. [At para. 19.]

[14] Assuming the legislature and the parties had shown a "strong preference" for an alternative dispute resolution process, the second consideration to be addressed was the "sorts of disputes falling within that process." *Weber* dictated that the "substance" or "essential character" of the dispute be governed, expressly or inferentially, by the collective agreement and by the scheme of the legislation. The ambit of the process does not exist in the abstract, Cromwell J.A. observed, but is "defined by the nature of the disputes to be submitted to it." (At para. 20.) The third consideration related to the practical issue of whether the process favoured by the parties and the legislature could provide "effective redress for the alleged breach of duty. Generally, if there is a right, there should also be an effective remedy." (At para. 21.)

[15] The Court then recalled *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219* [1986] 1 S.C.R. 704, which had provided the foundation for the majority's reasoning in *Weber*. In *St. Anne*, the Supreme Court had described the *Industrial Relations Act*, R.S.N.B. 1973, c. I-4 as creating "the status of the parties in a process founded upon a solution to labour relations in a wholly new and statutory framework at the centre of which stands a new forum, the contract arbitration tribunal." Estey J., speaking for the Court, continued:

> Furthermore, the structure embodies a new form of triangular contract with but two signatories, a statutory solution to the disability of the common law in

> the field of third party rights. These are but some of the components in the all-embracing legislative program for the establishment and furtherance of labour relations in the interest of the community at large as well as in the interests of the parties to those labour relations. [At 718.]

[16] Given this 'transformation' of the substantive law of master and servant into the law of collective bargaining labour relations, the Court in *St. Anne* took the view that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts for the resolution of their disputes. (At 718–9.) It followed that courts should develop an attitude of judicial deference to the arbitration process, "based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of a relationship of the parties in a labour relations setting." (At 721.)

[17] Cromwell J.A. in *Pleau* then turned to *Weber* itself, noting that it had been common ground on the appeal to the Supreme Court that civil actions based only on the collective agreement were precluded by s. 45 of the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2. Section 45 required that every collective agreement contain a provision for the final and binding settlement by arbitration of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement. (As will be seen below, the *Labour Relations Code*, R.S.B.C. 1996, c. 244, contains a similar provision at s. 84(2).)

[18] The majority's analysis in *Webe*r was of course carried out under two main headings – the nature or character of the parties' dispute and the ambit of the collective agreement in question. Both the legislation and the collective agreement were found to have conferred exclusive jurisdiction on the grievance arbitration process; but the decision had, Cromwell J.A. observed in *Pleau*, also been consistent with:

> … the jurisprudence (at 952–953) and … with the policy considerations at the heart of Canadian collective bargaining statutes (at 954). The conclusion was reached, as well, on the basis that the arbitrator had the requisite authority to apply the common law and the *Charter* to the dispute and the remedial power to grant effective redress (at 963). [At para. 48.]

[19] In his analysis, the relevant considerations could be addressed under three headings:

> First, consideration must be given to the process for dispute resolution established by the legislation and collective agreement. Relevant to this consideration are, of course, the provisions of the legislation and the collective agreement, particularly as regards the question of whether the process is expressly or implicitly regarded as an exclusive one. Language consistent with exclusive jurisdiction, the presence or absence of privative clauses and the relationship between the dispute resolution process and the overall legislative scheme should be considered.
>
> Second, the nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation and the collective agreement should be considered. In essence, this involves a determination of how closely the dispute in question resembles the sorts of matters which are, in substance, addressed by the legislation and collective agreement. What is required is an assessment of the "essential character" of the dispute, the extent to which it is, in substance, regulated by the legislative and contractual scheme and the extent to which the court's assumption of jurisdiction would be consistent or inconsistent with that scheme.
>
> Third, the capacity of the scheme to afford effective redress must be considered. Simply put, the concern is that where there is a right, there ought to be a remedy. [At paras. 50–2; emphasis added.]

[20] In connection with "effective redress", Cromwell J.A. noted that in *Weber*, McLachlin J. had referred to two types of cases in which courts may retain jurisdiction – actions that do not expressly or inferentially arise out of a collective agreement, and actions in which "courts have a residual jurisdiction to ensure effective redress." He quoted the following passage from *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.* [1996] 2 S.C.R. 495:

> The employer further argues that the dispute resolution mechanism provided by the Code is exclusive, and bars any other remedies. The court, it says, disregarded the comprehensive contractual and statutory scheme designed to govern all aspects of the relationship of the parties in a labour dispute. The difficulty with this argument lies in the assumption that the *Code* covers all aspects of any labour dispute. In this case, the fact is that the *Code* did not cover all aspects of the dispute. No matter how comprehensive a statutory scheme for the regulation of disputes may be, the possibility always remains that events will produce a difficulty which the scheme has not foreseen. It is important in these circumstances that there be a tribunal capable of resolving the matter, if a legal, rather than extra-legal, solution is to be found. It is precisely for this reason that the common law developed the notion of courts of inherent jurisdiction. If the rule of law is not to be reduced to a patchwork,

> sometime thing, there must be a body to which disputants may turn where statutes and statutory schemes offer no relief. [At para. 8; emphasis added.]

The Court in *Pleau* concluded that access to the grievance procedure under the *PSSRA* would not constitute effective redress for the wrongdoing alleged by the plaintiffs. (See para. 95.) In the result, the court retained jurisdiction and the appeal was dismissed.

[21] *Pleau* was considered by the Supreme Court of Canada a few years later in *Vaughan v. Canada* 2005 SCC 11. Ironically, the judges dissenting in that case – Chief Justice McLachlin and Bastarache J. – were the authors of the majority opinions in *Weber* and *Regina Police*, respectively. The majority in *Vaughan* ruled that the lower court did not err in deferring to the *PSSRA* procedure, even though it did not provide recourse to independent adjudication, as opposed to a grievance (decided by internal department officials). The majority agreed with Cromwell J.A. in *Pleau* that the capacity of the scheme to afford effective redress must be considered, but did not agree with Mr. Vaughan that the absence of access to independent adjudication was conclusive. The majority ultimately ruled that his only recourse was under the statutory grievance scheme.

[22] Bastarache J. for the minority, on the other hand, stressed that the existence of a "comprehensive" mechanism for the resolution of disputes was not necessarily enough to oust the jurisdiction of the court. Other factors, including procedural fairness, had to be considered. The minority endorsed the passage from *Maintenance of Way Employees* reproduced above at para. 20, concluding that although the *PSSRA* created a "comprehensive and efficient dispute resolution regime", the non-availability of independent adjudication, combined with the absence of mandatory language in the statute and the lack of expertise of the employer-appointed decision-maker, weighed against a finding of exclusive jurisdiction. In such circumstances, Bastarache J. stated, employees "should not be precluded from commencing an action in the courts." (At para. 73.)

[23] The final case in the *Weber* line of authorities to which I shall refer is *Bisaillon v. Concordia University* 2006 SCC 19. It revolved around a pension plan established by the defendant university for its employees. Most of the members of the plan were unionized employees, but there were nine certified unions and thus nine collective agreements extant between the university and its unions. The plaintiff was a unionized employee of the university who sought to institute a class action in order to contest various decisions made in the administration and use of the pension fund. One of the unions agreed to the conduct complained of, and applied to have the Quebec Superior Court dismiss the motion for certification. The other eight unions supported the class action. The Superior Court granted the "declinatory exception" – i.e., the motion to have the action dismissed – on the basis that since the pension plan was a "benefit" provided for in the collective agreement, the dispute "resulted from the application of that agreement." (At para. 11.) The Court of Appeal disagreed, ruling that the case had "nothing to do" with the collective agreement since the pension plan existed independently of any collective agreement and a grievance arbitrator would not have jurisdiction that would extend to the claims of employees covered by the other eight collective agreements or those of the non-unionized employees of the university. The Court of Appeal also expressed concern about the possibility of having different arbitration tribunals render contradictory decisions.

[24] In the Supreme Court of Canada, the majority allowed the appeal. It accepted that the facts alleged by the plaintiff concerning amendments made by the employer to the pension plan and the question of their validity were "at least implicitly, and perhaps even explicitly, linked to the collective agreements and to the application thereof." (At para. 50.) The majority mentioned *Weber*, but did not purport to carry out an analysis of its two (or three) elements, at least in the terms used in *Weber*. Instead, LeBel J., speaking for the majority, noted that the Supreme Court had "clearly adopted a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement." (At para. 33; my emphasis.) Whether the

majority intended to signal a departure from *Weber* is not clear, but at the least, *Bisaillon* indicates a broad view of "connection" between collective agreements and matters not concerned 'essentially' with employer-employee relationships.

[25] Although the majority acknowledged that the arbitration of the plaintiff's claims would not be "free of procedural difficulties, particularly because of the multiplicity of possible proceedings and of potential conflicts between separate arbitration awards", these were not considered sufficient to justify referring the matter to a court. (At para. 58.) LeBel J. continued:

> The Court of Appeal was … concerned about the chaos that could ensue if contradictory decisions were to result. The respondent has not demonstrated that a real possibility of such procedural chaos exists. It is not a foregone conclusion that confirming the jurisdiction of grievance arbitrators would automatically lead to multiple arbitration proceedings. Various options remain open under the fundamental rules of labour law. … Assuming the worst, if there were contradictory or incompatible arbitration awards, Concordia could probably, subject to the limited possible grounds for judicial review by the Superior Court, resolve any conflict by complying with the award least favourable to it. [At para. 60.]

[26] The dissenting justices (Chief Justice McLachlin and Bastarache and Binnie JJ.) disagreed that the pension dispute could be "traced back to the collective agreement that binds the respondent to the appellant university – or that it can be said to arise out of *any* collective agreement involving the appellant university, for that matter." In the words of Bastarache J.:

> Put simply, the Plan transcends any one collective agreement. To state otherwise – in other words, to state that the Plan does indeed arise out of a given collective agreement – implies that the parties to that collective agreement, and the arbitration that results therefrom, effectively have the power to bind all other persons who have an interest in the Plan.
>
> Because the Plan cannot be reduced to a single collective agreement, it should be expected that problems will result if a labour arbitrator is given exclusive jurisdiction by virtue of one such agreement. … If this was an unfortunate consequence of the correct application of *Weber*, and a necessary evil in guarding the rightful territory of labour unions and arbitrators, then I, like my colleague, would be willing to accept it. With respect, however, I believe the risk of inconsistent decisions is symptomatic of a misapplication of *Weber*. I cannot agree that *Weber* allows for the same party to be bound by inconsistent directions from different courts and arbitrators, all claiming – rightfully, according to my colleague – to have jurisdiction over the essential character of the dispute. The fact that this

> possibility exists here confirms that the essential character of this appeal arises out of something other than the collective agreement: the Plan itself. [At paras. 68–9; emphasis added.]

[27] Bastarache J. touched on the question of the "essential character" of a dispute that "transcends" any one collective agreement. In his analysis:

> In my view, the absurd multiplicity of proceedings associated with the respondent's claim is symptomatic of a misapplication of the *Weber* test. Bringing the claim in front of the Quebec Superior Court's inherent jurisdiction is the only way to avoid this result because it is the only solution that recognizes that the essential character of this dispute transcends any one collective agreement, and thus the exclusive jurisdiction of any labour arbitrator. It is the only principled and practical way for the respondent's claim to finally be resolved. At the same time, and for the same reason this claim escapes the labour arbitrator's exclusive jurisdiction in the first place, a decision by the Quebec Superior Court will not imperil any of the terms negotiated individually by any of the unions involved. Such matters remain the exclusive domain of the labour arbitrator. [At para. 96.]

Statutory Process

[28] Against this jurisprudential background, I turn to an examination of the "process" provided by the *Labour Relations Code* and the provisions of the collective agreement to which Mr. Bruce is subject through the Players' Association. The chambers judge below briefly summarized the relevant provisions of the *Code* at paras. 29–31 of his reasons, but it may be helpful to examine them in more detail here. Like counsel, I will confine my remarks to the *Code,* and will not address its Quebec counterpart in these reasons.

[29] Counsel are in agreement that Mr. Bruce was an "employee" for purposes of the *Code*, and that each of B.C. Lions Football Club Inc. and Compagnie Club de Football des Alouettes de Montréal was his "employer". It is also common ground that the collective agreement between the Players' Association, the CFL and the CFLPRC, dated June 13, 2014, is a "collective agreement" as defined by s. 1 of the *Code*. Section 1 also defines "dispute" to mean:

> … a difference or apprehended difference between an employer or group of employers, and one or more of his or her or their employees or a trade union, as to matters or things affecting or relating to terms or conditions of employment or work done or to be done. [Emphasis added.]

[30] Division 3 of Part 8 of the *Code* deals with arbitration provisions in collective agreements. For our purposes, ss. 84 and 89 are of importance:

> **Dismissal or arbitration provision**
>
> **84** (1) Every collective agreement must contain a provision governing dismissal or discipline of an employee bound by the agreement, and that or another provision must require that the employer have a just and reasonable cause for dismissal or discipline of an employee, but this section does not prohibit the parties to a collective agreement from including in it a different provision for employment of certain employees on a probationary basis.
>
> (2) Every collective agreement must contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable.
>
> (3) If a collective agreement does not contain a provision referred to in subsections (1) and (2), the collective agreement is deemed to contain those of the following provisions it does not contain:
>
> > (a) the employer must not dismiss or discipline an employee bound by this agreement except for just and reasonable cause;
> >
> > (b) if a difference arises between the parties relating to the dismissal or discipline of an employee, or to the interpretation, application, operation or alleged violation of this agreement, including a question as to whether a matter is arbitrable, either of the parties, without stoppage of work, may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference to arbitration, and the parties must agree on a single arbitrator, the arbitrator must hear and determine the difference and issue a decision, which is final and binding on the parties and any person affected by it.
>
> . . . .
>
> **Authority of arbitration board**
>
> **89** For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may
>
> > (a) make an order setting the monetary value of an injury or loss suffered by an employer, trade union or other person as a result of a contravention of a collective agreement, and directing a person to pay a person all or part of the amount of that monetary value,
> >
> > (b) order an employer to reinstate an employee dismissed in contravention of a collective agreement,
> >
> > …

> (e) relieve, on just and reasonable terms, against breaches of time limits or other procedural requirements set out in the collective agreement,
>
> (f) dismiss or reject an application or grievance or refuse to settle a difference, if in the arbitration board's opinion, there has been unreasonable delay by the person bringing the application or grievance or requesting the settlement, and the delay has operated to the prejudice or detriment of the other party to the difference,
>
> (g) interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement, even though the Act's provisions conflict with the terms of the collective agreement,
>
> …
>
> [Emphasis added.]

[31] I note that like s. 45(1) of the Ontario *Labour Relations Act*, s. 84(2) does not use the word "exclusive"; however, s. 136(1) of the *Code* does. Sections 136–9 deal with the jurisdiction of the Labour Relations Board and courts of law:

> **Jurisdiction of board**
>
> **136** (1) Except as provided in this Code, the board has and must exercise exclusive jurisdiction to hear and determine an application or complaint under this Code and to make an order permitted to be made.
>
> (2) Without limiting subsection (1), the board has and must exercise exclusive jurisdiction in respect of
>
> (a) a matter in respect of which the board has jurisdiction under this Code, and
>
> (b) an application for the regulation, restraint or prohibition of a person or group of persons from
>
> (i) ceasing or refusing to perform work or to remain in a relationship of employment,
>
> (ii) picketing, striking or locking out, or
>
> (iii) communicating information or opinion in a labour dispute by speech, writing or other means.
>
> **Jurisdiction of court**
>
> **137** (1) Except as provided in this section, a court does not have and must not exercise any jurisdiction in respect of a matter that is, or may be, the subject of a complaint under section 133 [re contravention of *Code* or collective agreement] or a matter referred to in section 136, and, without limitation, a court must not make an order enjoining or prohibiting an act or thing in respect of them.
>
> . . . .

> **Finality of decisions and orders**
>
> **138** A decision or order of the board under this Code or a collective agreement on a matter in respect of which the board has jurisdiction is final and conclusive and is not open to question or review in a court on any grounds.
>
> **Jurisdiction of board to decide certain questions**
>
> **139** The board has exclusive jurisdiction to decide a question arising under this Code and on application by any person or on its own motion may decide for all purposes of this Code any question, including, without limitation, any question as to whether
>
> (a) a person is an employer or employee,
>
> (b) an organization or association is an employers' organization or a trade union,
>
> (c) a collective agreement has been entered into…..

[32] Given the wording of ss. 84 and 136 and their resemblance to the Ontario legislation considered in *Weber*, there is little doubt that the *Code* demonstrates a "strong preference" for the resolution of disputes arising under collective agreements by arbitration.

The Collective Agreement

[33] As the chambers judge below noted, a collective agreement dated June 6, 2010 was in force between the CFL, the CFLPRC and the Players' Association between June 6, 2010 and May 29, 2014; but by July 16, 2014, when Mr. Bruce commenced this action, a new agreement running from May 30, 2014 to May 15, 2019 had come into force. We are told that the agreements are virtually identical and counsel chose to refer to the 2014 collective agreement (the "Collective Agreement") in their arguments. I will do likewise in these reasons.

[34] As mentioned earlier, the Collective Agreement does not purport to contain all the terms and conditions relating to players' employment. Rather it requires each player to sign a "Standard Player Contract", generally in the form of Appendix A to the Collective Agreement. The parties to a Standard Player Contract are the player and the club employing him; no union or players' association is involved as

bargaining agent. I will describe the relevant terms of the Standard Player Contract below.

[35] Section 1.01 of the Collective Agreement, headed "Recognition", recognizes that the Players' Association is the "bargaining agent for professional football players in the CFL." That agency is not an exclusive one, given that under s. 1.01(b), the Players' Association is expressly prohibited from bargaining with respect to regular season compensation for individual players. Section 1.02 of the Collective Agreement does recognize, on the other hand, that the CFLPRC is the "sole and exclusive [my emphasis] bargaining agent" for the member clubs.

[36] Article 28 of the Collective Agreement, headed "Negotiation of Individual Player Contracts", is apparently concerned with the Standard Player Contracts. Article 28 confirms that each club must "negotiate with each Player [my emphasis] or any person designated by the Player in writing to represent the Player" and use its best efforts not to deal with anyone not registered as a "Contract Advisor" with the Players' Association. If a club is contacted by a Contract Advisor who is not registered, the club must notify the Players' Association forthwith. Although the Players' Association is clearly excluded from representing players in this context, the Commissioner and the President of the Players' Association may under subsection 2 act as mediators to "assist in the negotiation of CFL Standard Player Contracts" between member clubs and players.

[37] Article 3 of the Collective Agreement deals expressly with Standard Player Contracts thus:

> **Section 3.01 Definition**
>
> The C.F.L. Standard Player Contract shall govern the relationship between the Member Clubs and the Players except that this Agreement shall govern if any terms of the C.F.L. Standard Player Contract conflict with the terms of this Agreement; subject, however, to the rights of any individual Player and any Member Club to agree upon changes in the C.F.L. Standard Player Contract consistent with this Agreement.
>
> All Players in the C.F.L. shall sign the C.F.L. Standard Player Contract which shall hereafter be known as the "C.F.L. Standard Player Contract"; provided however, that each Player shall have the right to negotiate any change he

> may desire in relation to the C.F.L. Standard Player Contract in his personal capacity that is not inconsistent with and does not detract from the terms, rights and benefits conferred by this Agreement and its appendices (including the C.F.L. Standard Player Contract).
>
> . . . .
>
> **Section 3.04 Amendments to the C.F.L. Standard Player Contract**
>
> The C.F.L. Standard Player Contract shall be used by all Member Clubs with all Players, and all paragraphs contained therein except as provided for in this Agreement are obligatory and shall be used in their entirety without alteration with the exception of paragraph 11, which may be amended by mutual consent of the parties to the Contract only to provide for payment after termination or to guarantee payment. [Emphasis added.]

[38] Article 4 provides generally for the arbitration of disputes between a player and club or the CFL, or between the Players' Association and a club or the CFL. Section 4.01 provides that any dispute (referred to thereafter as a "grievance") between such parties "may be submitted to arbitration" (my emphasis) by a party by notifying the other parties in writing. Under Section 4.02, a grievance is required to be initiated within one year from the date of the occurrence on which the grievance is based or within one year from the date on which the facts of the matter became known or should reasonably have been known to the initiating party. A person who was signed as a player at any time may initiate a grievance; thus a player need not be under contract when initiating a grievance.

[39] Section 4.04 contemplates that the Players' Association and the CFLPRC will provide the Commissioner with a list of arbitrators and that where the first respondent to a notice to arbitrate is a member club, the arbitrator shall be the first person listed who resides in the east or west, as appropriate. Under Section 4.06, the list must contain at least three names at all times and is subject to review and modification by mutual agreement of the Players' Association and the CFLPRC. An arbitrator must be independent of the CFL, the CFLPRC, the Players' Association and member clubs of the CFL.

[40] The rules of procedure applicable to arbitrations are provided for in the balance of Article 4. It is fair to say that even the non-expedited process provided is a fairly summary one. The complainant and respondent are required, no later than

20 days before the hearing, to provide each other with the "exhibits" proposed to be entered at the hearing and a list of witnesses intended to be called. The parties must produce all "books, contracts and documents" within their possession that might be required or called for and must "do all other things which during the proceedings the Arbitrator may require."

[41] Witnesses are examined on oath or affirmation and the Arbitrator is required to make a decision within 30 days following the conclusion of the hearing. The complainant and respondent may be represented by counsel, and the Players' Association and CFLPRC may "participate in the arbitration and/or represent the Player or the Member Club respectively." If a player is awarded a payment of money, the paying party must pay certain costs of the arbitration. If that party fails to do so within 30 days or upon the expiration of the appeal period contemplated by the applicable *Arbitration Act*, the CFL must make the payment upon demand by the player.

[42] Section 4.08 states that the *Arbitration Act* of the province where the dispute arose will apply to the proceedings "except where the Act conflicts with any term or condition contained in this agreement." This would suggest that the parties to the Collective Agreement intended that a private arbitration, rather than one under the *Code,* would be used for the resolution of disputes not specifically provided for in the Agreement. Section 97 of the *Code* provides, however, that the *Arbitration Act* does not apply to an arbitration under the *Code*.

[43] Under Article 16 of the Collective Agreement, headed "Medical Plan and Life Insurance" the member clubs are obliged to provide group life insurance, group accident death and dismemberment insurance, and group medical plans for the benefit of players. These are administered by advisory committees on which the Players' Association and CFL are represented. Mr. Bruce's pleadings are silent on the matter of his medical plan.

[44] Article 24 deals with "Injury Grievances". (This subject, of course, is an unusual one in collective agreements, since most workers are covered by workers'

compensation schemes.) The Players' Association and the CFLPRC must maintain a list of neutral physicians approved by both of them in each city where a member club is situated. Appendix K to the Collective Agreement provides the form of letter of instruction to be given to such physicians. The letter provides in part:

> Your only contact with the Player shall be when he attends at your office for examination or examinations. The C.F.L. would ask that you remain objective and that you base your examination upon your findings at the time the Player attends at your office. Your decision shall be final and binding upon both the Player and the Member Club, and it is therefore imperative that it be carefully considered. Your decision shall be required to be one of the four following decisions:
>
> 1. In my opinion, the Player is fit to play skilled football; or
>
> 2. In my opinion, the Player is unfit to play skilled football and shall remain unfit to play skilled football until the conclusion of the football season; or
>
> 3. In my opinion, the Player is unfit to play skilled football and shall remain unfit to play skilled football until the _____ day of _____, _____; or
>
> 4. In my opinion, the above-named Player is unfit to play skilled football and I shall require a further examination of this Player on the _____ day of _____, _____ in order to determine whether the Player is either fit or unfit at that time.
>
> It is not contemplated that you will be called upon to attend any formal arbitration proceedings. [Emphasis added.]

Mr. Bruce's pleading is silent as to whether Article 24 was followed when he suffered his concussions in 2012 and in particular, as to whether he was found by a neutral doctor to be fit to continue playing.

[45] Article 31 contemplates the establishment of a joint committee on players' safety and welfare with two members elected by the CFLPRC and two by the Players' Association. Under Section 31.03, the joint committee does not have the "power to commit or bind" any of the parties on any issue. However, it may make recommendations, which are to be given "serious and thorough examination".

[46] Under Section 34.14, member clubs are required to provide players with helmets. If a player has sustained a head injury, including a concussion, the player may select any helmet and the club must pay for it.

The Standard Player Contract

[47] The relevant provisions of the Standard Player Contract are paragraphs 10, 20 and 21. Paragraph 10 provides that an employer club is entitled to terminate the contract (i.e., terminate the player's employment) upon notice to the player if:

> (a) the Player fails at any time during the term of this Contract to demonstrate sufficient skill and capacity to play football of the calibre required by the Club;
>
> (b) the Player's work or conduct in the performance of this Contract is unsatisfactory;
>
> (c) where there exists a limit to the number permitted of a certain class of Player and the Player, being within that class, should not be included amongst the permitted number; or
>
> (d) termination of this contract is in the best interest of the Club having regard for the competitiveness of the Club as a whole or the formation of a team with the greatest overall strength.
>
> It is agreed by both parties that the Club's head coach and/or general manager, as the case may be, shall be the sole judge(s) as to the competency and satisfaction of the Player and his services and, in particular, as to the criteria set out in sub-paragraphs (a) to (d) of this paragraph.

It is unclear how the foregoing terms regarding termination relate to s. 84(1) of the *Code*, but this issue was not raised by either party.

[48] Paragraph 20 deals with players who are injured (including by the aggravation of a pre-existing condition) in the course of their duties. Where this occurs, the contract provides:

> … the Club shall pay the Player's hospitalization and medical expenses necessarily incurred or arising from the injury provided that the hospital and doctors are selected by the Club, or if selected by the Player, are approved in writing by the Club …; the Club's obligation to pay such expenses shall continue until such time as the Club's doctor, or the doctor selected by the Player and approved by the Club, certifies in writing that the Player has sufficiently recovered from the injury to play football, or until one year from the date that the injury occurred, whichever event shall first occur; thereafter the Player relieves the Club from any and every additional obligation, liability, claim or demand whatsoever in connection with the injury, provided in no event is the Club, its servants or agents relieved from any negligence on the part of its servants or agents in the treatment of said injury, nor does the Player release the Club of any of its obligations arising under Paragraph 21 hereof. [Emphasis added.]

[49] Paragraph 21 builds on para. 20 when "veteran" players such as Mr. Bruce are involved. It provides for the club to pay the player, as long as he is unfit to play skilled football, 100% of his salary and other benefits until the first day of the training camp in the next season. If the club purports to terminate the contract of a player who maintains that he is unfit to play, he may notify the club in writing to that effect and submit to an examination by a neutral physician as agreed upon in the Collective Agreement. That physician's opinion as to whether the player is unfit or fit is conclusive and binding on both parties.

[50] Time is of the essence in the Standard Player Contract and paragraph 24 contains an 'entire agreement' clause; both provisions are subject to the terms of the Collective Agreement.

The Parties' Dispute

[51] I have already summarized in very general terms the material pleadings of negligence, failure to warn, and negligent misrepresentation advanced by Mr. Bruce against the defendants. We have not been provided with the amended pleading that will reflect the abandonment of the claims as against the four Outside Parties, but I assume that all or most of paras. 54–101 of Part 1 and paras. 20–54 of Part 3 of the Amended Notice of Civil Claim ("NOCC") will be deleted. On the other hand, I assume that allegations such as that at para. 155 of Part 1 continue with respect to the CFL and that paras. 157–226, which detail the development of knowledge concerning the consequences of concussion and the diagnosis of CTE, remain relevant to Mr. Bruce's case against the remaining defendants.

[52] On its face, Mr. Bruce's case does not rely on the terms of the Collective Agreement or Standard Player Contract. Rather, it purports to assert a duty of care based on ordinary negligence principles. At the same time, it may be that the Collective Agreement and/or the Standard Player Contract underlie at least some of Mr. Bruce's allegations. Notably, he pleads that the CFL "assumed the role of protecting players on and off the field; informing players of safety concerns; and imposing unilaterally a wide variety of rules and equipment requirements to protect

players from injury", and failed to do so. He says the CFL "acted as the guardian of the sport of football for the players and the general public" and was bound to "provide truthful information to the plaintiff regarding the risks to his health and to take all necessary steps to ensure the safety of the players." Further, the NOCC alleges in Part 3:

> 11. At the material time, the CFL assumed a duty to use reasonable care in the study of brain trauma by Dr. Tator and the Canadian Sports Concussion Project and use the information they [compiled] accurately in the publication and pronouncement of informing the general public and CFL players, including the plaintiff about the risk of sub concussion and concussion.
>
> 12. For these reasons, the plaintiff relied upon the representation made by the Defendants to intervene in matters of player safety, to recognize issues of player safety, and to be truthful on the issues of player safety.

Although it is possible for a person to "assume" a duty gratuitously to another, the Collective Agreement arguably defined the contents of such duty in this case.

[53] As against the B.C. Lions and Montreal Alouettes, Mr. Bruce alleges that they were responsible for the health and safety of their players – presumably by virtue of the Collective Agreement – and that they breached their "common-law or statutory" duty by permitting him to play despite obvious signs of concussion, failing to provide him with "helmet sensor technology after [he had sustained] multiple concussive and sub-concussive blows to the head", failing to provide educational materials on when to stop playing football as a consequence of sustaining concussion, and allowing him to play football despite "displaying the ongoing effects of concussion to medical professionals and coaching staff as defined in paragraph 21 of the Standard Player Contract."

[54] "Failure to warn" is pleaded as a separate tort and in addition, the clubs are said to have made negligent misrepresentations to Mr. Bruce which included those reproduced above at para. 2.

[55] With respect to Mr. Cohon, the pleading continues:

> 8. At the material time, Commissioner Cohon made it known to the plaintiff and the general public that the CFL was taking an active leadership role in governing player health and safety on and off the field.
>
> 9. At the material time, Commissioner Cohon made it known to the plaintiff and general public that the CFL would be taking the necessary steps for the safety, health and wellbeing of the plaintiff, his family and the participants of football generally.
>
> …
>
> 13. At the material time, Mark Cohon was an agent and employee of the CFL and made misrepresentations to the plaintiff which he intended to induce and did induce the plaintiff to return to play football in the CFL.
>
> 14. The particulars of the misrepresentations include the following:
>
> (a) The CFL was aware and understood the significance of the published medical literature demonstrating the serious risk of both short term and long term adverse consequences from the kind of traumatic impacts to the head to which the plaintiff was exposed and denied that there was a scientifically proven link between repetitive traumatic head impacts and later in life cognitive brain injury including CTE and related symptoms.
>
> (b) Misrepresenting the dangers the plaintiff faced in returning to action after sustaining a concussion and the long term effects of continuing to play after a concussion.
>
> (c) Issuing a Concussion Initiative to the general public and the CFL players, including the plaintiff, and omitting from the Concussion Initiative 1) any information about the increased risks of concussion after an initial concussion; 2) when a player should not return to football (three strikes and you're out); and 3) what to do if the player is unsure of his concussions symptoms ("when in doubt sit out").
>
> (d) Issuing public statements, articles and the Concussion Initiative to the plaintiff which mislead, downplayed, and obfuscated to the plaintiff the true and serious risks of repetitive traumatic head impacts.
>
> (e) Withheld information from the plaintiff about the significance of the published medical literature demonstrating the serious risk of both the short term and long term adverse effects of concussion to which the plaintiff was exposed.
>
> (f) Making public statements at the Campaign [a campaign undertaken by the CFL to promote concussion awareness, prevention and research] that the CFL was at the worldwide forefront of helmet technology without HITS Helmets mandatory or available league-wide.

> (g) Making public statements at the Campaign that the CFL was at the worldwide forefront of concussion research without disclosing to the plaintiff or the general public that Dr. Omalu and the work of Dr. Ann McKee at the Sports Legacy Institute had studied more donated brains effected with CTE.
>
> (h) Making public statements at the Campaign that the CFL was at the worldwide forefront of instituting concussion protocols without disclosing to the plaintiff and the general public that the Concussion Initiative was largely based on information the CFL knew or ought to have known in 2001.
>
> (i) Making public statements at the Campaign that the CFL was at the worldwide forefront of instituting concussion protocols without disclosing to the plaintiff and the general public that the Concussion Initiative omitted well known phrases such as, "when in doubt sit out" and "three strikes and you're out."
>
> (j) Making public statements at the Campaign highlighting the importance of medical independence in the diagnosis and return to play after a player sustained a concussion when it was aware of the pressure on coaching and medical staff to return players to games as soon as possible and not to report concussion. The reluctance to report concussion was compounded by the fact that non-guaranteed contracts would mean players, including the plaintiff, would expose themselves to increased risk of injury to maintain work.
>
> (k) Making public statements at the Campaign that the CFL was at the worldwide forefront uniform reporting and documentation of concussion across the CFL when it knew or ought to have known that the only way to be certain about the reporting and documentation of concussion was to use the HITS Helmets.
>
> 15. The CFL and Commissioner Cohon made these misrepresentations when it knew or ought to have known because of its superior position of knowledge that the plaintiff faced serious health problems if he returned to the play football or returned too soon the play the game of football.
>
> 16. The CFL and Commissioner Cohon knew or ought to have known the misleading nature of the statements when they were made.
>
> 17. The CFL and Commissioner Cohon made the representations knowing that the plaintiff would and did rely on the misrepresentation or omissions in making his decision to return to CFL football after the Incident. [Emphasis added.]

[56] Other allegations against Mr. Cohon and the allegations that were made against the Outside Parties have or had little or no connection with the Collective Agreement. These were concerned with misrepresentations, many made publicly, in connection with a study called the "Canadian Sports Concussion Project"; the

suppression of research into the effects of concussion and CTE; and the alleged funding of a "campaign of disinformation disguised to dispute accepted and valid neuroscience regarding the connection between repetitive traumatic brain injuries and concussions and degenerative brain disease such as CTE." With respect to Mr. Ezerins and the CFLAA (of which he is executive director), for example, the NOCC states:

> 36. At the material time, Leo Ezerins, the CFLAA, their employees, servants and agents, singly or in combination voluntarily assumed the role of protecting players on and off the field, informing players of safety concerns, and influencing the CFL and Commissioner Cohon on a wide variety of rule and equipment requirements to protect players from injury.
>
> …
>
> 40. At the material time, Leo Ezerins, the CFLAA and agents, trustees, servants, joint ventures, contractors, and/or employees assumed a duty to act in the best interests of the health and safety of the plaintiff, to provide truthful information to the plaintiff regarding the risks to his health and to take all necessary steps to ensure the safety of the players.
>
> …
>
> 43. At the material time, Leo Ezerins, as a member of the Canadian Sports Concussion Project, voluntarily assumed a duty to accurately develop, publish and share publicly the findings of Dr. Tator and the Canadian Sports Concussion Project.
>
> …
>
> 46. The particulars of the misrepresentations include the following:
>
> (a) Leo Ezerins stated publicly that the CFLAA was not an "advocacy group" however Leo Ezerins campaigned publicly and took the following action: (1) interfering with the research and investigation into ImPact tests being administered and interpreted by the Dave Braley Sports Medicine and Rehabilitation Centre at McMaster University resulting in the experts at Dave Braley Sports Medicine Rehabilitation Centre refusing to continue interpreting the results; (2) antagonizing the efforts of the researchers connected to Chris Nowinski's Sports Legacy Institute; and (3) publicly stating that he was and would do anything to "protect the CFL."
>
> (b) The CFLAA was aware or ought to have been aware and understood the significance of the published medical literature demonstrating the serious risk of both short term and long term adverse consequences from concussion to which the plaintiff was exposed and denied that there was a scientifically proven link between repetitive concussion and later in life neurodegeneration including CTE and related symptoms.

> (c) Misrepresented the dangers the plaintiff faced in returning to action after sustaining a head injury and the long term effects of continuing to play after a head injury.
>
> (d) Participated in issuing a Concussion Initiative to the general public and the plaintiff omitting any information about the increased risks of concussion after an initial concussion; omitting information as to when a player should not return to football (three strikes and you're out); and, omitting to include information on what to do if the player is unsure of his concussion symptoms ("When in doubt sit out").
>
> (e) Issuing public statements; writing articles; and assisting in preparing and advertising the Concussion Initiative to the CFL, CFLAA, general public and the plaintiff which mislead, down played, and obfuscated to the plaintiff the true and serious risks of repetitive concussion.
>
> (f) Withheld information from the plaintiff about the significance of the published medical literature demonstrating the serious risk of both short term and long term adverse consequences from concussion to which the plaintiff was exposed.

[57] Mr. Bruce seeks punitive and aggravated damages as against all defendants.

Reasons of the Chambers Judge

[58] The chambers judge began his reasons by describing the factual background, reproducing relevant provisions from the Collective Agreement, and summarizing portions of the *Code* and the *Quebec Labour Code*, C.Q.L.R. c. C-27. He then described the positions of the parties – Mr. Bruce's position that the Collective Agreement was "atypical" and did not give exclusive jurisdiction to arbitrators under the *Code* or the *Quebec Labour Code*; and the defendants' position that Mr. Bruce's allegations arose solely from his employment by the B.C. Lions and Montreal Alouettes and were therefore subject to the arbitration process in the Collective Agreement and within the exclusive jurisdiction of the two labour statutes. (At paras. 37, 40–1.)

[59] The application before the chambers judge was brought by the defendants pursuant to R. 21-8 of the *Civil Rules,* which provides in sub-rule (1):

> (1) A party who has been served with an originating pleading or petition in a proceeding, whether that service was effected in or outside British Columbia, may, after filing a jurisdictional response in Form 108,

> (a) apply to strike out the notice of civil claim, counterclaim, third party notice or petition or to dismiss or stay the proceeding on the ground that the notice of civil claim, counterclaim, third party notice or petition does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,
>
> (b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding, or
>
> (c) allege in a pleading or in a response to petition that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

The chambers judge acknowledged that for purposes of the application before him, he was required to assume that the allegations in the NOCC were true. He therefore found it unnecessary to consider the conduct of the defendants "in their research and representations to the public", in order to decide the question of jurisdiction under R. 21-8.

[60] In terms of case authority, the chambers judge quoted extensively from the Supreme Court's decision in *Noël v. Société d'énergie de la Baie James* 2001 SCC 39 concerning the principle of exclusive representation in Quebec labour law. The Supreme Court's reasoning, he noted, had been adopted by this court in *Driol v. Canadian National Railway Co.* 2011 BCCA 74. At para. 18 thereof, Mr. Justice Chiasson had in turn adopted the Court's reasoning in *Belik v. Purolator Courier Ltd*. 2007 BCSC 579:

> The bargaining relationship that exists between the employer and the union means that the employer cannot negotiate a separate contract with individual employees. The union and the union alone speaks for the employees covered by the Collective Agreement. The employees give up their individual rights in return for greater power to deal with the employer as a collective body, and the employer gains a degree of certainty, stability and the notion that employees will work now, grieve later in the event of a dispute. There is an additional trade-off for the employees as well. As stated by the court in *Noël v. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207, 2001 SCC 89 at para. 44:
>
> > … However reluctant the members of a dissenting or a minority group of employees may be, they will be bound by the Collective Agreement and will have to abide by it.

> Put simply, a union member has no individual right of action arising out of a dispute with her employer arising out of the Collective Agreement and, if the union decides not to proceed with a grievance, the union member affected must abide by that decision. [At paras. 14–5; emphasis added.]

[61] In contrast, the chambers judge noted the decision of Esson J. (as he then was) in *Robitaille v. Vancouver Hockey Club* [1979] B.C.J. No. 887 (S.C.), ***aff'd.*** [1981] 124 D.L.R. (3d) 228 (C.A.). Mr. Robitaille was a professional hockey player who had sued his employer in negligence. Esson J. concluded that although the plaintiff had been subject to a collective bargaining agreement applicable to the hockey league, it did not bar his action. Importantly, at the time the case was decided, there was no legislation pursuant to which the collective agreement had been entered into and there was no certification in effect in any jurisdiction. (See para. 180.)

[62] Esson J. noted that although the agreement in *Robitaille* was "quite comprehensive" and governed many aspects of the relationship between owners and players, there was nothing in it that 'touched on' liability for breach of a duty of care or which purported to exclude liability in tort. The defendant cited *McGavin Toastmaster Ltd. v. Ainscough* [1976] 1 S.C.R. 718 in support of the proposition that because of the existence of a collective bargaining agreement, the common law was "irrelevant". Esson J. found, however, that cases such as *McGavin* did not apply to collective agreements that were not certified under labour legislation. He added that in any event:

> There is… nothing in the decisions which would indicate that the duty of care imposed by the general law is eliminated or affected by the existence of a collective agreement, even one entered into by a certified bargaining agent. If the defendant's proposition is right, the result is that an employer is not under any duty of care to his employees where the relationship between him and his employees is governed by a collective bargaining agreement. Only clear words could justify the conclusion that that result was intended by the legislature. [At para. 187; emphasis added.]

In the end, Mr. Robitaille was awarded substantial damages in negligence.

[63] As the chambers judge noted, however, *Robitaille* was decided before *Weber* and *O'Leary*, *supra*. After reviewing *Weber*, he noted a later case, *Belanger v. Pittsburgh Penguins Inc.* [1998] O.J. No. 427 (O.C.J. (Gen. Div.)). Like *Robitaille*, it concerned claims in negligence and breach of duty brought by a professional athlete against his employer. Despite *Weber*, the Court ruled that the player's allegations of negligence or breach of duty "could not rationally be considered to be matters arising out of" the league's collective agreement or the parties' contract. The chambers judge here found the Court's treatment of *Weber* in *Belanger* to be "unpersuasive", but did not elaborate further.

[64] He then considered the three *Webe*r factors – the ambit of the Collective Agreement, the "essential character" of the dispute, and whether the Collective Agreement could provide Mr. Bruce with an effective remedy. (At para. 65.) With respect to the first factor, the judge rejected Mr. Bruce's argument that the fact he was required to negotiate his "personal compensation" and certain other terms in the Standard Player Contract directly with his employers, meant that the Players' Association had "less than exclusive" bargaining authority for the players. The judge saw the Standard Player Contract arrangement simply as a "delegation" of certain issues from the Players' Association that still had to be performed "within the ambit" of the Collective Agreement. (At para. 69.)

[65] The judge also rejected Mr. Bruce's contention that the permissive wording of Section 4.01 of the Collective Agreement ("Any dispute … between a Player and a Member Club … may be [my emphasis] submitted to arbitration by any one of the parties") and similar wording in Section 4.02 meant that the grievance and arbitration procedures under the Collective Agreement were optional and non-exclusive. This argument, the judge observed, had been clearly rejected in *Vaughan*, where it was ruled that permissive language of this kind "simply recognizes that an employee is not required to grieve every decision that he or she disagrees with." (At para. 28, *per* Binnie J. for the majority, and Bastarache J. at para. 50.) In the chambers judge's analysis, a similar interpretation was appropriate in this case. In his words:

> As set out above, Article 4.08 of the 2014 Collective Agreement provides that the award of an arbitrator appointed under the 2014 Collective Agreement is final and binding upon the parties. The language relied upon by Mr. Bruce does not diminish the scope of the 2014 Collective Agreement, nor render the grievance and arbitration procedure under it optional, and therefore non-exclusive. In my view, the arbitration clause in this case requires parties to submit disputes that fall within the ambit of the 2014 Collective Agreement to arbitration. [At para. 74.]

(I note that *Vaughan* was decided before the Supreme Court of Canada ruled in *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53 that contractual interpretation should henceforth be regarded generally as a matter of mixed fact and law, rather than law alone.)

[66] Finally in connection with the ambit of the Collective Agreement, the judge considered whether the fact Mr. Bruce had asserted claims against the four Outside Parties would affect the mandatory nature of the arbitration process under the Collective Agreement, assuming the Outside Parties were not agents of the contracting parties. (Mr. Bruce pleaded they had been agents of the CFL.) The judge cited *Giorno v. Pappas*, *supra*, where the Ontario Court of Appeal ruled:

> I cannot agree that this [the fact the claim was made against persons who were not parties to the collective agreement] makes a difference in this case. As to the respondent Board, Ms. Giorno correctly treated it as part of the employer for the purposes of the grievance process. Indeed, the settlement that was reached required certain steps to be taken by Board officers. The civil action against the Board must be seen as an action against an entity which is, for this purpose, part of the employer and subject to the collective agreement. Hence, the *Weber* principle is applicable to the civil action against this respondent.
>
> As to the respondent Pappas, while he is an employee of the respondent Crown, he had no managerial responsibility over Ms. Giorno. Nor was he an employee covered by the collective agreement. Despite this, given that this dispute arises under the collective agreement the principle in *Weber* applies. As Laskin J.A. said in [*Piko v. Hudson's Bay, supra]* at para. 13:
>
> > Where an employee has sued another employee for a workplace wrong, this court has held that bringing an action against a person who is not a party to the collective agreement will not give a court jurisdiction if the dispute, "in its essential character", still arises under the collective agreement.
>
> [At pp. 631–2; emphasis added.]

This reasoning was endorsed by this court in *Haight-Smith v. Neden, supra,* at para. 47 in connection with a claim brought by a union member against officials of her employer (a school) and against various employees of the school district.

[67] In the result, the chambers judge found that Mr. Bruce's dispute did not extend "beyond what was expressly or inferentially provided for in the … Collective Agreement" and that it lay within the ambit of the Agreement regardless of whether all the defendants were parties thereto.

[68] With respect to the "essential character" of the dispute, the Court rejected Mr. Bruce's contention that it was concerned with "compensation" – in the sense of compensation that he might have negotiated for medical treatment had he fully appreciated the effects of repeated concussions. The judge reasoned that if this argument prevailed, disputes over any condition of employment could be seen as a matter of "compensation". Mr. Bruce would then be entitled to all the rights and benefits of collective bargaining through the Players' Association "without needing to surrender his individual right to sue, which would be antithetical to the purpose of labour relations schemes." (At para. 80.)

[69] The judge accepted the defendants' submission that "one" essential character of the dispute related to health and safety – specifically, whether the CFL or its member clubs had taken steps to ensure Mr. Bruce's health and safety in accordance with the "duties that Mr. Bruce alleges they owed to him." On this point, the Court referred to *Gillan v. Mount Saint Vincent University* 2008 NSCA 55, in which the plaintiff had been injured while carrying out her duties as a custodian. She was not covered by workers' compensation and sued her employer on the basis of occupier's liability and negligence. She did not pursue a grievance under her collective agreement and was no longer employed by the university. The Court of Appeal rejected the submission that the employer/employee relationship had been merely "incidental" to her claim. In the Court's analysis:

> Rather than being of little or no consequence, the relationship between the parties, the appellant's injury at her workplace and during the course of her

> employment, and the [employer's] obligation to provide a safe workplace are clearly integral to the dispute. [At para. 36; emphasis added.]

It also rejected the notion that the unavailability of punitive damages in arbitration would "create jurisdiction in the court." (At para. 43.)

[70] The chambers judge in the case at bar concluded that the provisions of the Collective Agreement did not distinguish it from the scope of comparable collective agreements involving other sports; more importantly, he found that the provisions did not affect the dispute which, "viewed in its essential character, arises from the 2014 Collective Agreement." (At para. 83.)

[71] Finally, with respect to the issue of "effective remedy", Mr. Bruce argued that the Court should consider the fact that CFL players are not protected by provincial workers' compensation schemes. The chambers judge emphasized that the order of the Workers' Compensation Board of British Columbia exempting professional athletes pre-dated *Weber* and "as such, should be treated with caution." Again, he did not elaborate, but went on to say:

> … the order does not displace the long line of judicial authority emanating from *Weber*. It does not provide an automatic right for the plaintiff to bring an action in Court and does not preclude this Court from conducting the *Weber* analysis. The order does not deal with the rights of parties under a collective agreement, nor does it deal with the underlying principles of the labour relations framework. [At para. 85.]

He ruled that the Collective Agreement allowed for effective redress for workplace injuries and was thus consistent with the policies of the Workers' Compensation Board. (At para. 86.)

[72] Another argument raised by Mr. Bruce with respect to the "effective remedy" issue arose from the fact that he had not filed a grievance within the one-year period referred to in Section 4.02 of the Collective Agreement and would therefore have to seek an extension of time from an arbitrator in order to proceed to arbitration. Whether or not Mr. Bruce would succeed in obtaining such an extension, the chambers judge agreed with the Court in *Gillan* to the effect that:

> As stated in *St. Anne Nackawic* at p. 729 and in *Weber* at para. 54 and para. 57, the courts possess limited residual jurisdiction in certain situations involving labour relations. In this situation, where the appellant could have sought effective remedies under the Collective Agreement, there is no need for the exercise of that residual jurisdiction. [At para. 90.]

(I note that at the end of the hearing of this appeal, counsel for the CFL and Mr. Cohon undertook not to object to the granting of an extension of time to Mr. Bruce should this court affirm the order of the chambers judge.)

[73] In the result, the chambers judge ruled that Mr. Bruce had been entitled to seek compensation "by way of a grievance and arbitration" under the Collective Agreement for the matters raised in his pleadings and "had he done so, could have obtained a meaningful remedy for those complaints." Overall, the Court was found to lack the jurisdiction to entertain his claims. The chambers judge granted the defendants' application for an order striking the claims in their entirety.

On Appeal

[74] In this court, Mr. Bruce asserts in his factum that the chambers judge erred in law in his analysis and application of *Weber*, in particular:

> a. In failing to consider the cause of action as [pleaded] in the amended notice of civil claim to determine the essential character of the dispute; and
>
> b. By concluding that the Collective Agreement provided for exclusive representation, thereby putting this dispute within the ambit of the arbitration clause.

In his oral submissions, however, counsel for Mr. Bruce made other arguments – or at least objections – that extended well beyond these two grounds. In general terms, these were addressed in the (remaining) defendants' written and oral submissions. I propose to address the various points raised on appeal within the parameters of the three *Weber* factors – the "essential character" of the dispute, the ambit of the Collective Agreement and whether it covers the "subject matter" of the dispute; and whether the "process favoured by the parties and legislature" (i.e., arbitration under the Collective Agreement) could provide "effective redress" for the alleged breaches of duty asserted by Mr. Bruce. This assumes, of course, that *Weber* remains the law

in Canada, notwithstanding the somewhat more summary analysis of the majority in *Bisaillon*.

Standard of Review

[75] I begin, however, with the ever-present question of standard of review. Strangely, we were not referred to any case in which a court has squarely addressed whether the application of *Weber* to oust the jurisdiction of courts of law raises an issue of law, or otherwise. This may be because the answer seems obvious: court jurisdiction, at least in the "true" sense, is regularly seen as a matter of law: see *Gillan*, at para. 10; *Canada v. Toney* 2013 FCA 217 at para. 5; *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)* 2007 NSCA 38, *lve. to app. dism'd* [2007] S.C.C.A. No. 278, at para. 12; *Smith v. National Money Mart Company* (2006) 209 O.A.C. 190, *lve. to app. dism'd* [2006] S.C.C.A. No. 267, at para. 8; *Khan Resources Inc. v. W.M. Mining Co., LLC* (2006) 208 O.A.C. 204 at para. 7.

[76] Nevertheless, as we have seen, the application of *Weber* requires that at least two sub-issues be considered, one of which is the determination of the "ambit" of an agreement. That sub-issue is now presumably to be regarded as a matter of mixed fact and law in accordance with *Sattva*. (I doubt that a collective agreement negotiated by a union and employers' association would be regarded as analogous to a standard form contract of insurance like that at issue in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* 2016 SCC 37; see also *Barber v. The Manufacturers Life Insurance Co. (Manulife Financial)* 2017 ONCA 164 at para. 7.) If we find ourselves interpreting or construing the Collective Agreement in deciding this appeal, then, we may not interfere with the findings of the court below unless a palpable and overriding error is shown.

[77] However, there are other issues to be decided before that stage may be reached. Our first task is to determine the "essential character" of the parties' dispute. The law is not altogether clear as to whether this sub-issue is a matter of law, fact, or mixed fact and law, but three decisions of the Nova Scotia Court of

Appeal have addressed that issue directly and concluded it is a matter of law. The first is *Cherubini Metal Works, supra*. There, Cromwell J.A. stated for the Court:

> The jurisdiction of the court is a question of law on which the judge at first instance must be correct. The issues on which the jurisdictional question turns, that is, the essential character of the dispute and the ambit of the collective agreement, are also questions of law on which the judge must be correct. [At para. 12; emphasis added.]

Similarly, in *Symington v. Halifax (Regional Municipality)* 2007 NSCA 90, Fichaud J.A., writing for the Court, said this:

> 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.
>
> The authorities have considered these components of the *Weber* and *Regina Police* tests based on correctness: *Weber*, paras. 50–58, 67; *Regina Police*, paras. 21–40; *Cherubini* … at para. 12; *Abbott v. Collins* (2003) 227 D.L.R. (4th) 617 (Ont. C.A.); *Danilov v. Canada (Atomic Energy Control Board)* (1999) 125 O.A.C. 130, *lve. to app. denied* (2000) 260 N.R. 399 (note); *Phillips v. Harrison* (2000) 196 D.L.R. (4th) 69 (Man. C.A.); *Guenette v. Canada (Attorney General)* (2002) 216 D.L.R. (4th) (Ont. C.A.).
> [At paras. 51–2; emphasis added.]

[78] Finally, in *Gillan*, Oland J.A. wrote:

> In his reasons, the judge did not explain in detail how the [*Trade Union Act*] and Collective Agreement together showed a strong preference for the dispute resolution process contained within the legislation and the contract between the parties for this matter, rather than a proceeding before the court. Much of his reasoning was directed to defining the essential character of the dispute. However, where the standard of review on this issue is that of correctness, his limited consideration of this aspect will not lead to appellate intervention unless an analysis shows that the *Act* and the Collective Agreement do not indicate that strong preference, and further that when all three inter-related considerations in *Pleau* are taken into account, the judge erred in his conclusion that the court lacks jurisdiction to hear this dispute.
>
> …
>
> In summary, the judge's finding that the essential character of the dispute arose from the Collective Agreement meets the standard of review of correctness. [At paras. 27, 38; emphasis added.]

[79] A slightly different view was taken in *O.P.S.E.U. v. Seneca College of Applied Arts & Technology* (2006) 212 O.A.C. 131, *lve. to app. dism'd* [2006] S.C.C.A. No. 281. Laskin J.A. suggested in that case that the essential character of a dispute is "largely factual" and that the second and third issues, "… though questions of law [my emphasis] turn on the Board of Arbitration's interpretation of the scope of its remedial authority under the collective agreement – in other words, whether OPSEU's claim for aggravated and punitive damages was arbitrable." In his analysis, the Board was on "the familiar terrain of the provisions of the collective agreement and thus was entitled to a large measure of deference on those issues." (At para. 60.)

[80] These cases pre-dated *Sattva* and may therefore require revisiting, in an appropriate case and after full argument, insofar as they involve the construction of collective agreements. However, it seems to me that characterizing the "essential character" or "substance" of a dispute involves determining the legal crux of the action as pleaded (not to be equated with the form of action, such as negligence, breach of fiduciary, etc.) and is thus a matter of law to be reviewed on a standard of correctness. In this instance, this conclusion is buttressed by the fact that the chambers judge was not required to make any findings of fact or credibility; he had simply to assume the facts pleaded in the NOCC were true.

Application

[81] Applying the correctness standard, I do not agree with Mr. Bruce's suggestion that the chambers judge below 'ignored' the cause of action as pleaded, or the factual matrix thereof. While it is true the judge gave a great deal more attention in his reasons to the provisions and ambit of the Collective Agreement, he did consider as a separate matter the "essential character of the dispute between the parties" at paras. 80–83, disagreeing with the plaintiff's contention that the essential character of the dispute was "compensation". Instead, he saw the dispute as one relating to health and safety, similar to that at issue in *Gillan*. Since the Collective Agreement addresses, albeit in rather limited terms, the subject of players' health and safety, he

ruled that the dispute, "viewed in its essential character", 'arose from' the Collective Agreement.

[82] In his oral submissions, Mr. Mogerman on behalf of the plaintiff challenged the notion that the assertions made by Mr. Bruce in his pleading were similar to those of any other employee injured in the workplace. For one thing, most other employees are able to obtain care and compensation through the workers' compensation scheme; Mr. Bruce is not. Thus as mentioned earlier, workplace injuries are not normally dealt with by labour arbitrators. Counsel stressed as well that the causes of action – negligence, negligent misrepresentation and failure to warn – asserted in the NOCC are not the kinds of tort usually dealt with by labour arbitrators, and that the arbitration process contemplated here is a summary one that may not have the capacity to accommodate Mr. Bruce's wide-ranging allegations. (This of course overlaps with the matter of adequacy of remedy, the third *Weber* factor.)

[83] Certainly before the Outside Parties were dropped as defendants, this was an unusual action in terms of labour arbitrations. When "viewed as a whole" (see *Walters v. Toronto Transit Cmn.* 2010 ONCA 119), the parties' dispute would have been difficult to characterize in one word or phrase. (I note the chambers judge did not purport to state that "the" essential character of the dispute was health and safety; rather, he said, "one" essential character of the dispute related to health and safety.) Although the allegations against the CFL and the employer clubs have some 'link' to the Collective Agreement, the allegations against the Outside Parties (and to some degree, Mr. Cohon), bore more resemblance to a class action aimed at behaviour modification and public awareness of concussion and CTE in professional sports. The dispute could be seen as having a "double aspect" – as being partly about compensation for a workplace injury, but also about illuminating the effects of concussion in athletes and efforts allegedly made by the CFL and associates to suppress public knowledge and concern about concussion.

[84] In any event, if the Outside Parties were still defendants and were not agents of the CFL, an arbitrator would not have *in personam* jurisdiction over persons not bound by or connected to the Collective Agreement. As this court stated in *Hospital Employees' Union v. Children & Women's Health Centre* 2000 BCCA 170, *lve. to app. dism'd* [2000] S.C.C.A. No. 199, "It is well-settled law that an arbitration board obtains jurisdiction over parties either by their consent, or as a result of statutory appointment. An arbitration agreement will not bind strangers to the agreement in the absence of a stranger's consent." (At para. 11). Similarly, in *Bisaillon*, the majority stated:

> It is true that the courts generally focus on the subject-matter aspect of the grievance arbitrator's jurisdiction…. However, as the Court of Appeal concluded in the instant case, "the arbitrator responsible for hearing grievances arising out of the collective agreement between the respondent and the intervener has no jurisdiction to hear claims of persons to whom the agreement does not apply" (at para. 14). In my view, there is no disputing this conclusion. R. Blouin and F. Morin refer to this dual aspect of the arbitrator's jurisdiction:
>
> > In fact, if there is a collective agreement, a grievance is possible if the dispute can be resolved based on the collective agreement. However, it must be added that a grievance will be possible only to the extent that the disagreement involves parties with a connection to the agreement in question, that is, the employer and the certified union or the employees to whom the collective agreement applies.
> >
> > (*Droit de l'arbitrage de grief* (5th ed., 2000), at p. 149)
>
> When a grievance arbitrator finds it impossible to resolve a dispute or a part of a dispute because he or she does not have jurisdiction over the parties, the ordinary courts retain jurisdiction over the dispute …. Such situations are likely to arise where the grievance arbitrator cannot claim to have authority over persons considered to be third parties in relation to the collective agreement and cannot render decisions against them. [At paras. 39–40; emphasis added.]

See also *Seidel v. TELUS Communications Inc*. 2011 SCC 15 at para. 39.

[85] I must therefore disagree with the chambers judge's observation that Mr. Bruce's dispute "does not extend beyond what was expressly or inferentially provided for in the 2014 Collective Agreement … whether or not all of the defendants are parties to the 2014 Collective Agreement." (At para. 79; my

emphasis.) In so ruling, the judge relied on *Giorno v. Pappas,* in which the Court in turn relied in part on *Piko v. Hudson's Bay Company.* In *Giorno*, one defendant was a board to which the plaintiff had been seconded. The Court ruled that it had been correctly "treated … as part of the employer for purposes of the grievance process." (At p. 631.) The other defendant was an employee of the board who was not bound by the collective agreement. The Court acknowledged that an arbitrator would be in a position to grant a remedy only against the employer. (At 632.) In *Piko*, the defendant was the plaintiff's former employer. The Court allowed her action for malicious prosecution to proceed because the employer's actions in the criminal court took the dispute out of the ambit of the collective agreement. Otherwise, the court's jurisdiction would have been ousted.

[86] At the least, then, if the Outside Parties were still defendants in this action, it would be problematic for us to cede jurisdiction to a labour arbitration on the basis that the essential character of the parties' dispute 'arises under' the Collective Agreement. Further, an arbitrator would lack the jurisdiction to give effective remedies against several (alleged) wrongdoers. However, we need not characterize the essential nature of the dispute as it was originally brought. Since the Outside Parties are no longer defendants, the allegations are less complex and the action comes closer to a claim for injuries suffered in the workplace. An important part of Mr. Bruce's case against the remaining defendants is that he should not have been "permitted" to return to play after suffering the concussions in 2012. If the decision to return him to play was made by his employer in accordance with para. 21 of the Standard Player Contract with the participation of a "neutral physician" selected in accordance with Article 24 of the Collective Agreement, the connection with that agreement would be clear. But even if Mr. Bruce (not being aware of the potential medical risks) simply decided himself to return to play after suffering concussion(s), his complaint could still be characterized as essentially about a workplace injury. Paragraph 20 of the Standard Player Contract (see para. 48 above) confirms that a club is not relieved from any negligence on the part of its servants or agents in treating any such injury.

[87] In all the circumstances, I am unable to say that the chambers judge erred in law in characterizing the essence of the action as it now stands as one about health and safety in the workplace, or more particularly, a workplace injury. That matter is dealt with by the Collective Agreement (including the Standard Player Contract) and may be said to 'arise under' it. Certainly the 'link' between Mr. Bruce's claims against the remaining defendants and the Collective Agreement is no less close than the connection between the plaintiff's allegations in *Bisaillon* concerning the administration of a pension plan, and the collective agreement in that case.

[88] With respect to the "ambit of the Collective Agreement" (a topic on which the standard of review is likely one of palpable and overriding error), Mr. Mogerman submits that the chambers judge erred in ruling that the Agreement provided for the exclusive representation of Mr. Bruce by the Players' Association, "thereby putting this dispute within the ambit of the arbitration clause." In his submission, the usual "trade-off" described by the chambers judge at para. 53 of his reasons (quoting from *Belik v. Purolator*) was not present here, with the result that Mr. Bruce did not give up his "individual rights in return for greater power to deal with the employer as a collective body". As well, counsel relies on *Robitaille* and *Belanger,* in particular the holding in *Belanger* that the plaintiff's allegations of negligence and breach of duty could not "rationally be considered to be matters arising out of the collective agreement" between him and his employer.

[89] The chambers judge in the case at bar did not explain why he found *Belanger* to be "unpersuasive", but in my view, the law is clear that a tort claim, including negligence, can be prosecuted in a labour arbitration as long as the subject matter of the dispute is "covered by the collective agreement". (At para. 25 of *Regina Police*, quoted earlier.) The key question concerning the "ambit" of the Collective Agreement is whether the exception it makes to the principle of exclusive representation (by requiring players to negotiate their regular compensation directly with their employers, and to do so within the confines of the Standard Player Contracts), takes the case out of the arbitration scheme. We were not referred to any authorities in which a similar exception to the exclusivity principle was made in a collective

agreement. The exceptions made here, however, are limited, and Section 3.01 of the Collective Agreement specifies that in any conflict with the terms of a Standard Player Contract, the Collective Agreement governs. Although players may negotiate changes under the Standard Player Contract, no such change can be inconsistent with or detract from the terms of the Collective Agreement. Very arguably, then, we would be putting form over substance if we were to regard Mr. Bruce's contractual rights as arising under two separate agreements one or both of which runs contrary to the principle of exclusive representation.

[90] Bearing in mind the high degree of deference owed on this issue of contractual interpretation to the finding of the court below, I am not able to say the chambers judge committed a palpable and overriding error in deciding that the players' obligation to negotiate their own terms of compensation in the regular season could be seen as a 'delegated' power sanctioned by the Collective Agreement and that accordingly, the terms of the Collective Agreement did not "distinguish its scope" from comparable agreements.

[91] Finally, on the subject of whether effective redress could be afforded by the arbitration process in this case, although again a different result would have obtained if the Outside Parties had remained defendants and had not been agents of the CFL as pleaded, I am not persuaded the chambers judge erred in concluding that if Mr. Bruce had sought compensation pursuant to arbitration under the Collective Agreement for the matters raised in his NOCC, he could have obtained an effective remedy as against the remaining defendants.

[92] Finally, I reiterate that in this court, counsel for the CFL and Mr. Cohon undertook not to object to any application Mr. Bruce might make for an extension of time in which to bring his complaint before an arbitrator under the Collective Agreement.

Disposition

[93] In the result, I would dismiss the appeal, with thanks to counsel for their helpful submissions.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

I AGREE:

"The Honourable Mr. Justice Fitch"