IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bruce v. Cohon,*
2016 BCSC 419

Date: 20160311
Docket: S145512
Registry: Vancouver

Between:

Arland Richard Bruce

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 Cub, 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

Defendants

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for Plaintiff	R.L. Wishart and D. Jones
Counsel for Defendant, CFL Teams and M. Cohon	S.J. Shamie and G.J. Litherland
Counsel for Defendant, CFL Alumni Association and L. Ezerins	V.J. Pahl and J.A. Bank
Counsel for Defendant, Dr. C.H. Tator	N.L. Trevethan
Counsel for Defendant, Krembil Neuroscience Centre	A.K. Foord
Place and Date of Trial/Hearing:	Vancouver, B.C. February 23, 2016
Place and Date of Judgment:	Vancouver, B.C. March 11, 2016

Introduction

[1] The applicants each brought applications for declarations that this Court is without jurisdiction to hear Mr. Bruce's claims. They seek to have Mr. Bruce's claims struck or dismissed in their entirety. They did not pursue their alternative application that this Court decline jurisdiction in this matter.

[2] The plaintiff, Arland Richard Bruce, played professional football in the Canadian Football League ("CFL") from 2001 until February 2014.

[3] The defendant, Mark Steven Cohon ("Commissioner Cohon"), was the Commissioner of the CFL from 2007 to 2015.

[4] The defendant, B.C. Lions Football Club Inc. ("BC Lions"), is a company incorporated under the laws of British Columbia.

[5] The defendant, Edmonton Eskimo Football Club ("Edmonton Eskimos"), is a company incorporated under the laws of Alberta.

[6] The defendant, Calgary Stampeders 2012 Inc. ("Calgary Stampeders"), is company incorporated under the laws of Alberta.

[7] The defendant, Saskatchewan Roughrider Football Club Inc. ("Saskatchewan Roughriders"), is a company incorporated under the laws of Saskatchewan.

[8] The defendant, Winnipeg Blue Bombers ("Winnipeg Blue Bombers"), is a company incorporated under the laws of Manitoba.

[9] The defendant, The Hamilton Tiger-Cat Football Club ("Hamilton Tiger-Cats"), is a company incorporated under the laws of Ontario.

[10] The defendant, Toronto Argonauts Football Club Inc. ("Toronto Argonauts"), is a company incorporated under the laws of Ontario.

[11] The defendant, Compagnie Club de Football des Alouettes de Montréal ("Montréal Alouettes"), is a company incorporated under the laws of Quebec.

[12] The defendant, Capital Gridiron Limited Partnership, doing business as Ottawa Redblacks Football Club (“Ottawa Redblacks”), is a limited partnership registered under the laws of Ontario.

[13] The defendant, Capital Gridiron GP Inc., the general partner of Capital Gridiron Limited Partnership, is a company incorporated under the laws of Ontario.

[14] The defendant, The Canadian Football League (CFL) Alumni Association (“CFLAA”), is a Canadian company.

[15] The defendant, Leo Ezerins (“Leo Ezerins”), is the founder and executive director of the CFLAA.

[16] The defendant, Krembil Neuroscience Centre (“KNC”), is a health care facility specializing in treating patients with diseases and injuries to the brain, spinal cord and eyes, with an administrative office in Toronto, Ontario.

[17] The defendant, Charles H. Tator (“Dr. Tator”), is the Project Director of the Canadian Sports Concussion Project at the KNC, Toronto Western Hospital, with a business address in Toronto, Ontario.

[18] The CFL is an unincorporated association consisting of separately owned and independently-operated professional football teams which operate out of nine different cities in Canada.

Background

[19] The Canadian Football League Players’ Association (“CFLPA") was established in 1965, and has represented the professional football players in the CFL since that time. It is a trade union acting as the bargaining representative for all professional football players in the CFL, in accordance with the labour relations legislation of each of the respective provinces in which the teams operate.

[20] Under the collective bargaining agreement ("CBA"), the CFLPA negotiates on behalf of all players, and is responsible for representing players in their disputes with their teams or the CFL, including the enforcement of player rights under the CBA.

[21] The Canadian Football League Player Relations Committee ("CFLPRC") is a party to the CBA between the CFLPA, the CFLPRC and the CFL. The CFLPRC is the collective bargaining representative for all of the teams in the CFL.

[22] During his CFL career, Mr. Bruce played for the following teams in the years indicated:

2001 – 2002	Winnipeg Blue Bombers
2004 – 2009	Toronto Argonauts
2009 – 2011	Hamilton Tiger-Cats
2011 – 2012	BC Lions
2013 – 2014	Montréal Alouettes

[23] Throughout his career, Mr. Bruce was a member of the CFLPA and was subject to the terms of the CBAs between the CFLPA, CFL and CFLPRC.

The CBA

[24] The collective bargaining relationship between the parties is governed by a CBA, which sets out the rights and obligations of the players, the teams and the CFL. On June 13, 2014, the parties ratified a new collective bargaining agreement (the "2014 Collective Agreement"). The term of the 2014 Collective Agreement runs from May 30, 2014 until May 15, 2019, or the day prior to the first day of training camp in 2019, whichever is later.

[25] The 2014 Collective Agreement was in force at the time that Mr. Bruce commenced his action in this Court on July 16, 2014. Its terms and appendices are

substantially the same as the predecessor CBA that was in force from June 6, 2010 until May 29, 2014. The 2014 Collective Agreement includes the following preamble:

> WHEREAS the C.F.L.P.A. has been and is recognized by the C.F.L.P.R.C. and the C.F.L. as the bargaining representative of all professional football Players who are members of the C.F.L.P.A. and are on a team Roster of a Member Club of the C.F.L.; and,
>
> WHEREAS the C.F.L.P.R.C. has been and is recognized by the C.F.L.P.A. and the C.F.L. as the bargaining representative of all of the Member Clubs of the C.F.L. and each of the Member Clubs of the C.F.L.; and,
>
> WHEREAS the Member Clubs in the C.F.L. are as follows:
>
> > The Montreal Alouettes Football Club Hamilton Tiger Cat Football Club (2007) Corp.
> >
> > Calgary Stampeders 2012 Limited Partnership,
> >
> > As Represented by its General Partner,
> >
> > Calgary Stampeders 2012 Inc.
> >
> > Edmonton Eskimo Football Club Saskatchewan Roughrider Football Club Inc.
> >
> > Winnipeg Football Club
> >
> > Toronto Argonauts Football Club Inc.
> >
> > Lions Football Club Inc.
> >
> > Ottawa RedBlacks Football Club
>
> WHEREAS the C.F.L.P.A. has negotiated with the C.F.L.P.R.C. on behalf of all Players in the C.F.L. with respect to terms and conditions of employment, and it is specifically understood and agreed that each individual Player has, and shall have the right, to negotiate with his Member Club for regular season compensation, including bonuses and any form of deferred or other compensation.

[26] The 2014 Collective Agreement includes the following terms that are relevant to the applications before me:

> Section 1.01 Recognition of the C.F.L.P.A.
>
> (a) The C.F.L.P.A. is recognized by the Member Clubs and the C.F.L.P.R.C. as the bargaining agent for professional football Players in the C.F.L.
>
> (b) The parties hereto mutually agree that the C.F.L.P.A. has the right to negotiate terms and conditions of employment for professional football Players in the C.F.L.; however, the C.F.L.P.A. shall not bargain with

respect to regular season compensation for individual professional football Players except for the following:

(i) The C.F.L.P.A. has the right to negotiate in relation to the minimum regular season salary which may be paid to Players or in relation to any other exception expressly provided for within the terms of this Agreement.

(ii) The C.F.L.P.A. has the right to provide players with information to assist them in their negotiation of regular season compensation and other compensation payable to the Players.

(iii) If more than one Player with a Member Club is requested to re-negotiate an existing C.F.L. Standard Player Contract (including the option year) for economic reasons, the C.F.L.P.A. has the right to negotiate on behalf of such Players the regular season compensation and other compensation payable to the Players.

…

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).

The C.F.L. Standard Player Contract for all Member Clubs for the term of this Agreement is attached to this Agreement and marked as Appendix “A”.

When a Player is signing his first C.F.L. Standard Player Contract or his first Practice Roster Agreement with a Member Club (herein referred to as the "First Contract"), the Member Club must offer the Player a one year C.F.L. Standard Player Contract with an option to renew for one year provided however, commencing on the 13th day of June, 2014, no Player shall sign a C.F.L. Standard Player Contract with an option to renew after the Player has signed his First Contract. The C.F.L. Standard Player Contract with the option to renew ("First Contract") is attached to this Agreement and marked as Appendix "AA". For greater clarity, a Player's "First Contract"

means any contract for his first year in the C.F.L. and for which he has received payment for one regular season or playoff game. In addition, on a Player's First Contract, it is still open to a Member Club to provide the Player with alternatives to a one (1) year CFL Standard Player Contract with an option to renew for one (1) year. Those alternatives could include multiple one (1) year contracts for three (3) years or more with no option year.

…

Section 4.01 Definition

Any dispute (hereinafter referred to as a “grievance”) between a Player and a Member Club and/or Member Clubs and/or the C.F.L., or between the C.F.L.P.A. and any Member Club and/or Member Clubs and/or the C.F.L., may be submitted to arbitration by any one of the parties (hereinafter referred to as the “complainant”) notifying the other party or parties (hereinafter referred to as the “respondent”) in writing of its desire to submit the grievance to arbitration, and by sending a copy of the notice to the C.F.L.P.R.C., the C.F.L.P.A. and the C.F.L.

Section 4.02 Initiation

A grievance may be initiated by a Player, a Member Club, the C.F.L.P.R.C. or the C.F.L.P.A.

A grievance must be initiated within one (1) year from the date of the occurrence or non-occurrence upon which the grievance is based, or within one (1) year from the date on which the facts of the matter became known or reasonably should have been known to the party initiating the grievance, whichever is later.

A Player may initiate a grievance if he has at any time previously been signed to a C.F.L. Standard Player Contract or a Practice Agreement with a Member Club and a Player need not be under contract at the time when he initiates a grievance.

A grievance initiated pursuant to a Practice Agreement shall be limited to the benefits provided for in the said Practice Agreement and Article 17 of this Agreement.

…

Section 4.08 Procedures of the Arbitrator

The complainant and respondent shall, subject to any legal objection, submit to be examined by the Arbitrator on oath or affirmation in relation to the matters in dispute, and subject as aforesaid, produce before the Arbitrator all books, contracts and documents within their possession or power respectively, which may be required or called for, and do all other things which during the proceedings the Arbitrator may require.

…

The Arbitrator shall hear and determine the matter and his award shall be final and binding upon the complainant and respondent.

The Arbitrator - shall render a decision within thirty (30) days following the conclusion of the hearing.

The Arbitrator may render a decision by consent if the complainant and respondent(s) consent to the terms and conditions thereto.

The Arbitrator shall be limited in his determination to the difference or allegation set forth in the Notice to Arbitrate and the Reply thereto including any counterclaim, and shall have available for reference the Agreement between the C.F.L.P.A., the C.F.L. and the C.F.L.P.R.C. representing the Member Clubs in the C.F.L., and all C.F.L. Standard Player Contracts between the complainant and the respondent.

If a Player and a Member Club enter into any agreement which is not part of the C.F.L. Standard Player Contract or referred to in the C.F.L. Standard Player Contract, and is not registered with the C.F.L., the Arbitrator shall have jurisdiction with respect to such agreement; however, such jurisdiction shall be limited to making an order against or directing a payment by an individual Member Club, and the Arbitrator shall have no jurisdiction to make an order against the C.F.L. If the decision of the Arbitrator results in a Player being awarded a sum of money in relation to an agreement which is not part of the C.F.L. Standard Player Contract or referred to in the C.F.L. Standard Player Contract, and is not registered with the C.F.L., and if the Member Club required to make payment of the said sum of money fails to make payment, Section 4.12 of this Article shall not apply.

The *Arbitration Act* of the Province or State where the dispute arose shall apply to the proceedings except where the Act conflicts with any term or condition contained in this Agreement.

The complainant and respondent shall have the right to be represented by their own counsel, and in addition thereto, the C.F.L.P.A. and the C.F.L.P.R.C. shall have the right to participate in the arbitration and/or represent the Player or the Member Club respectively.

Section 4.12 Non-Payment of Award

If the decision of the Arbitrator results in a Player being awarded a sum of money, and if the party required to make payment of the said sum of money fails to make payment, upon the expiration of the appeal period in accordance with the applicable *Arbitration Act,* or thirty (30) days from the date of the decision of the Arbitrator, whichever first occurs, the Canadian Football League shall, upon demand, make payment to the Player of all monies awarded by the Arbitrator.

[Emphasis added]

…

ARTICLE 9: Minimum Compensation

It is mutually agreed that during each year of the term of this Agreement the minimum earnable annual compensation for all regular season games during a season payable to a Player in the C.F.L. shall be:

[List omitted.]

In the event that any Player's Contract or renewal of an option in a Contract, regardless as to when the said Player's Contract or renewal of an option in a Contract was signed or came into effect, provides for payment to the Player an amount less than the minimum earnable annual compensation as provided herein, the Member Club shall be obligated and shall be required to pay to the Player the minimum earnable compensation as provided herein regardless of the terms of the Contract between the Player and Member Club.

…

Section 11.01 Compensation

During each year of the term of this Agreement, the Member Clubs in the C.F.L. shall pay the sums described herein to the veteran Player described herein per week, for a minimum of three (3) weeks for each week, or any part thereof, commencing with the first day of the training camp period and ending on the 7th day prior to the day before the day when 9 Member Clubs in the C.F.L. shall have played their first regular season game:

[List omitted.]

Section 11.02 Payment in Advance

The monies which are described in this Article shall be paid by all Member Clubs in advance weekly.

Section 12.01 Playoff Games

Definitions:

In this Section the following words and phrases shall have the following definitions:

> "Playoff games" shall mean the Western Division Semi Final Playoff game, the Eastern Division Semi Final Playoff game, the Western Division Final Playoff game and the Eastern Division Final Playoff game.
>
> "minimum compensation" shall mean the minimum amount payable to each Player on the Roster and/or Injured Players List for Division standing and Playoff games and shall be the following in relation to each year during the term of this Agreement:

First Place Standing	$3,400.00
Semi-Final Participation	$3,400.00
Division Championship Participation	$3,600.00

IT IS MUTUALLY AGREED throughout the term of this Agreement that each Player on the Roster and/or Injured Players' List of a Member Club

finishing in first place and/or participating in Playoff games shall be paid the minimum compensation.

…

Section 12.02 Grey Cup Game

Definitions:

In this Section the following words and phrases shall be given the following definitions:

"minimum compensation" shall mean the minimum amount payable to each Player on the Roster and/or Injured Players List for the Grey Cup Game and shall be the following in relation to each year during the term of this Agreement:

Grey Cup Loser	-	$ 8,000.00
Grey Cup Winner	-	$16,000.00

IT IS MUTUALLY AGREED that throughout the term of this Agreement each Player on the Roster and/or Injured Players List of a Member Club participating in the Grey Cup Game shall be paid the minimum compensation.

IT IS MUTUALLY AGREED that throughout the term of this Agreement each Player on the Roster and/or Injured Players List of the Member Club participating in and winning the Grey Cup Game shall be provided with a Grey Cup Ring.

Section 12.03 General

In accordance with the terms of Section 1 and Section 2 of this Article, minimum compensation shall be paid to the Players eligible to receive the same within 48 hours following the game for which it was earned. The compensation for first Place Standing shall be paid to the Players eligible to receive the same within 48 hours following the Division Semi-Final Playoff Game.

…

A Player shall be allowed to participate in a deferred compensation plan (salary deferral arrangement) provided that his Member Club consents to provide such a plan for the Player. If a Member Club agrees to establish a deferred compensation plan, the Member Club shall name a company, which shall be insured with the Canada Deposit Insurance Corporation to administer such deferred compensation plan and shall provide the name of that company to the Players. Before a Member Club establishes a deferred compensation plan, all documentation required to establish such salary deferral arrangement shall be submitted to the C.F.L.P.A. for approval.

…

Section 14.09 Minimum Player Compensation

(a) Definitions: In this Article, "Member Club Players' Salary" shall mean the same as Defined Player Compensation in Article 15, Paragraph 15.03 and

> Paragraph 15.04 of the C.F.L. Constitution. Article 15, Paragraph 15.03 and 15.04 of the C.F.L. Constitution, (attached as Appendix "E") shall not be amended during the term of this Collective Agreement without the written consent of the C.F.L.P.A.
>
> MINIMUM MEMBER CLUB PLAYERS' SALARY
>
> The Minimum Member Club Players' Salary during each year shall be as follows:
>
> [List omitted.]

Each Member Club must pay to the Players no less than the Minimum Member Club Players' Salary during each year.

SALARY MANAGEMENT SYSTEM

The C.F.L. and the Member Clubs may implement a salary management system which may have a salary expenditure cap ("SEC") for Player compensation; however, any salary expenditure cap shall not be less than the Minimum Member Club Players' Salary per Member Club.

In the event that the C.F.L. and the Member Clubs implement a salary management system with respect to the operations of the C.F.L. and the Member Clubs, the C.F.L. and the Member Clubs shall forthwith provide in writing to the President and to Legal Counsel of the C.F.L.P.A. particulars in relation to any such salary management system.

In the event that the C.F.L. and the Member Clubs implement a salary expenditure cap for Player compensation, it shall not include compensation paid to Players and compensation paid for player benefits with respect to pre-season compensation, Pension Plan, travel allowance, play-off compensation, Grey Cup compensation, compensation paid to Players named to the Six Game Injury List, other than players duly removed from, the six game injury list in accordance with Section 14.02 of this Article, compensation paid to Players for the reasonable fair market value of services other than practicing and playing professional football; and, compensation paid to Players on the Practice Roster in excess of 10 Players per Member Club, compensation paid to Players on the Practice Roster for housing or housing allowance, and compensation paid to Players in the form of gifts, free services, travel and items or services of value provided by Member Clubs to Players provided that such payments to an individual Player shall not exceed $2,000.00 in the aggregate in a single year and such payments to all Players by each Member Club shall not exceed $92,000.00 in a single year."

All information with respect to the salary management system including any resolutions, regulations, by-laws or policies shall be provided to the C.F.L.P.A. within fourteen (14) days of being approved by the Board of Governors.

…

Section 15.05 Injury Grievances

It is mutually agreed that in the event that a Player's Contract is purported to be terminated prior to the dates set out in Sections 1, 2, and 3 herein, and that thereafter the Player through the injury grievance procedure or arbitration becomes entitled to compensation payable up to or after the applicable date in Sections 1, 2, or 3 herein, the Player shall be entitled to the benefit of Article 15 as if he had been terminated on the date that he became fit to play skilled football.

…

Section 24.01 Neutral Physicians

For the purposes of this Agreement, the C.F.L.P.A. and the C.F.L.P.R.C. shall maintain a jointly approved list of neutral physicians, including at least two orthopaedic physicians in each city in which a Member Club is situate. The list may be subject to review and modification by mutual Agreement. In the event that there is a resignation of a neutral physician and the C.F.L.P.A. and C.F.L.P.R.C. cannot agree on who should replace the neutral physician who has resigned, the Commissioner of the C.F.L. shall name a replacement for the neutral physician. Each neutral physician should be willing and able to examine Players in the C.F.L. promptly. The neutral physicians during the term of this Agreement are described in the list of neutral physicians which is attached hereto and marked as Appendix "J".

In the event that a neutral physician is required who is a specialist in an area other than orthopaedic medicine, the Commissioner shall appoint such neutral physician upon request.

…

Section 24.06 Decision of the Neutral Physician

The decision of the neutral physician shall be final and binding upon the Player, the Member Club of the C.F.L., the C.F.L.P.A. and the C.F.L.P.R.C.

If the neutral physician is able to render an opinion to the effect that the Player is either fit to play skilled football or unfit to play skilled football, his decision shall not be subject to review.

Section 24.07 Pre-Existing Conditions

The words "pre-existing condition" as they are contained in paragraph 20 and paragraph 21 of the C.F.L. Standard Player Contract shall not include the use of alcohol or drugs.

Section 24.08 Pre-Training Camp Examination by a Neutral Physician

A Member Club in the C.F.L. may, prior to the commencement of the training camp period, require a Player to attend before a neutral physician in order to determine the status of any pre-existing condition for purposes of determining whether there is in the future an aggravation of said pre-existing condition.

…

Section 31.01 Compositions

A joint committee on Players' safety and welfare (hereinafter referred to as the "joint committee") will be established for the purpose of discussing Players' safety and welfare aspects of playing equipment, playing surfaces, stadium facilities, playing rules, Player coach relationships, drug abuse prevention programs and any other relevant subjects. The joint committee shall consist of four members, two selected by the C.F.L.P.R.C. and two selected by the C.F.L.P.A.

…

Section 34.14 Equipment

(a) General

Each Member Club shall provide each Player with all equipment necessary to participate as a professional football Player at his position during practices and games. The C.F.L. and the Member Clubs shall make their best efforts to secure an agreement with a corporation which will result in all Players being provided with football shoes, both artificial turf and grass. If a Member Club sells football shoes to Players, the Member Club shall sell the said football shoes at a price no greater than the cost to the Member Club.

If there is a complaint by a Player or the C.F.L.P.A. with respect to sufficiency or quality of equipment, the Commissioner or his delegate may conduct an audit of the equipment. If the Commissioner or his delegate finds that there is a deficiency with respect to the sufficiency or quality of the equipment, the Commissioner shall order the Member Club to rectify the deficiency and the Member Club shall comply with any such order.

…

(c) Helmets

Each Member Club shall provide each Player who participates in a practice or a game with a helmet. A Player may choose a helmet other than the helmet provided by the Member Club; however, the Player will be required to pay for the helmet; provided however, if the Player has sustained a head injury including a concussion or if the Member Club Trainer or Equipment Manager recommends a different helmet because of the Player's head size or shape, the

> Player may select any helmet and the Member Club shall pay for the same.
>
> …
>
> Section 30.01 Salary Expenditure CAP
>
> The Salary Expenditure CAP for each Member Club shall be no less than the amounts set out in the following schedule for the following years:
>
> 2014 - $5,000,000.00
>
> 2015 - $5,050,000.00
>
> 2016 - $5,100,000.00
>
> 2017 - $5,150,000.00
>
> 2018 - $5,200,000.00

[27] Appendix "A" to the 2014 Collective Agreement is the "Standard Player Contract" form. Included in this form are the following terms, which are relevant to the applications before me:

> 6. Prior to the start of each football season, the Player shall attend before the Club's Medical Committee for a complete physical and medical examination, and, shall answer completely and truthfully all questions asked of him with respect to his physical and medical condition, and, if, in the opinion of the said Medical Committee, the Player is not completely fit to participate in football activities, the Club shall either accept the Player or forthwith terminate this contract with the Player. In the event that the Club does not accept the Player, the Club shall serve written notice upon the Player prior to the first Club practice for which the Player is available. In the event that the Club does not serve written notice, the Player shall be deemed to have been accepted by the Club. In the event that the Player disagrees with the findings of the said Medical Committee, the Player may proceed to arbitration of the dispute in accordance with the arbitration procedure contained in Paragraph 21 of this contract. If the Player is accepted and provided the Player has answered completely and truthfully all questions asked of him and has made full disclosure concerning any and all illnesses and injuries, then in the event of a subsequent injury and claim under Paragraph 20 and/or 21 made by the Player, the Club shall be estopped from raising by way of defence any prior existing condition or injury.
>
> 6A. If at any time during the term of this Contract, the Player is found by the Club's Medical Committee not completely fit to participate in football activities as a result of an injury or an illness which is unrelated to an activity performed by the Player in accordance with the terms of this Contract or any previous Contracts between the Player and the Club or any other Member Club in the Canadian Football League, the Club shall either forthwith terminate this contract with the Player or place the Player on the C.F.L. Disabled List in accordance with the terms of the Collective Agreement. In the

event that the Player disagrees with the findings of the said Medical Committee, the Player may proceed to arbitration of the dispute in accordance with the arbitration procedure contained in Paragraph 21 of this contract.

…

20. If the Player is injured (injury shall include the aggravation of a pre-existing condition) in the performance of his duties called for hereunder and without restricting the generality of the foregoing, those duties shall include attendance at any practice session called by the Club or any coach thereof and attendance at and performance in any Pre-Season game, regular season game, play-off game and Grey-Cup Game, 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 which approval shall not be unreasonably withheld; 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.

21. It is further agreed that if the Player is a veteran and is injured (injury shall include the aggravation of a pre-existing condition) in the performance of his duties called for hereunder and without restricting the generality of the foregoing, those duties shall include attendance at any practice session called by the Club or any coach thereof and attendance at and performance in any Pre-Season game, regular season game, playoff game and Grey Cup Game; and the injury or injuries are such as to render him unfit to play skilled football during the current football season or any part thereof, the Club shall pay to the Player so long as the Player continues to be unfit to play skilled football, One Hundred (100%) percent of the salary and all other benefits to which the Player would be entitled pursuant to the provisions of this Contract and the Collective Agreement including payment for all Pre-Season games, regular season games, playoff games, byes, Grey Cup Game, in which the Club participates, it being understood and agreed that this obligation shall not extend beyond the day before the first day of the training camp period in the season following the current playing season. The Club shall be prohibited from terminating this Contract with the Player so long as the Player remains unfit to play skilled football until the day before the first day of the training camp period in the season following the current playing season. If the Club purports to terminate this Contract with the Player and if the Player maintains he is unfit to play skilled football, the Player may notify the Club in writing within ten (10) days from the date it became known or should have become known to the Player that the Contract had been purported to be terminated, and may within twenty (20) days from the date when it became known or

> should have become known to the Player that the Club has purported to terminate the Contract, submit to an examination by a neutral physician as agreed upon in accordance with the Collective Agreement. The Player hereby authorizes the Club to, and the Club shall, provide the neutral physician with copies to the Canadian Football League Players Association and the Canadian Football League Players Relations Committee, the medical history reports relating to the injury or injuries; and such medical history reports may contain all actions taken by the Club doctor, and the Club doctor's opinion as to whether the Player is or is not fit to play skilled football. The opinion of the neutral physician who examines the Player as to whether the Player is fit or unfit to play skilled football shall be conclusive and binding upon the Player and the Club. The expense of obtaining the opinion of such neutral physician shall be borne by the Club if his opinion agrees with that of the Player and by the Player if such opinion agrees with the position of the Club. If the Player is not a veteran, this clause shall not be applicable to any injury sustained prior to the playing of the first regular season game of the season but shall be applicable thereafter mutatis mutandis.

[28] Appendix "E" to the 2014 Collective Agreement consists of the "CFL Constitution", the "CFL Bylaws" and the "CFL Regulations". Included in this Appendix is the following term, which is relevant to the applications before me:

> ARTICLE 2 - OBJECTS AND MISSION
>
> …
>
> 2.03 The mission of the League is to produce a distinctively Canadian football product of the highest quality, which is built upon and reflects the traditions of the past, and at the same time is progressive in outlook and relevant to the circumstances of the present and future. In accomplishing this mission, the League recognizes that it has responsibilities to the general public, to Players and officials, and to. its franchise holders to manage its affairs in a professional manner so as to:
>
> (a) Present an exciting product on a continuing basis;
>
> (b) Strive continually for both excellence of play and competitive balance throughout the League;
>
> (c) Provide for the equitable treatment, safety and well-being of Players and officials;
>
> (d) Provide financial returns appropriate to the need for continuing stability of the franchises; and
>
> (e) Maintain the highest integrity in all matters.

Relevant Provisions in British Columbia's *Labour Relations Code*

[29] In British Columbia, s. 48 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [*BC Labour Relations Code*] provides that the terms of a collective agreement are binding on the employer, the union and every employee.

[30] Section 84 of the *BC Labour Relations Code* requires every collective agreement to contain mandatory grievance and arbitration provisions, and imposes a provision for a mandatory grievance and arbitration process in the event that a collective agreement fails to contain such a provision.

[31] Section 89 of the *BC Labour Relations Code* provides arbitrators with broad remedial jurisdiction and obliges arbitrators to have regard to the real substance of the matters in dispute.

Relevant Provisions in the Quebec *Labour Code* and the *Civil Code of Québec*

[32] The Quebec *Labour Code*, C.Q.L.R. c. C-27 [*Quebec Labour Code*], provides that the terms of a collective agreement are binding upon all present or future employees contemplated by a certification, and requires that any dispute regarding the interpretation, application, operation or alleged violation of a collective agreement be resolved through a grievance and arbitration procedure.

[33] Section 100.12 of the *Quebec Labour Code* provides arbitrators with broad remedial authority similar to the authority granted to the arbitration board under s. 89 of the *BC Labour Relations Code.* In particular, arbitrators under the *Quebec Labour Code* have the authority to interpret and apply any legislation to the extent necessary to resolve a grievance, and to provide a final and conclusive remedy the matters raised by Mr. Bruce in this action.

[34] Labour arbitrators in Quebec also have additional remedial powers under articles 1614 and 1615 of the *Civil Code of Québec,* C.Q.L.R. c. C-1991*,* to award damages for the alleged bodily injuries sustained by Mr. Bruce, including damages to compensate for future aspects of the injuries.

[35] Section 101 of the *Quebec Labour Code* provides that an arbitrator's decision is final and binding on the parties and any employee concerned with the dispute, and that the decision is not subject to appeal. Specifically, s. 101 states:

> 101. The arbitration award is without appeal, binds the parties and, where such is the case, any employee concerned. Section 51 of the Act to establish the Administrative Labour Tribunal (chapter T-15.1) applies to the arbitration award, with the necessary modifications.

Positions of the Parties

[36] Mr. Bruce alleges that he was knocked unconscious and suffered a concussion while playing in a football game for the BC Lions on September 29, 2012. He further alleges that he sustained multiple sub-concussive and concussive hits while playing in a football game for the BC Lions on November 18, 2012. He also alleges that while displaying the ongoing effects of concussion to the medical professionals and coaching staff of the Montréal Alouettes, he was permitted to play for that team in the 2013 CFL season.

[37] Commissioner Cohon, the BC Lions, the Edmonton Eskimos, the Calgary Stampeders, the Saskatchewan Roughriders, the Winnipeg Blue Bombers, the Hamilton Tiger-Cats, the Toronto Argonauts, the Ottawa Redblacks, the Montréal Alouettes, Capital Gridiron GP Inc., and Capital Gridiron Limited Partnership contend that the allegations in Mr. Bruce's notice of civil claim arise solely from his employment with the BC Lions and the Montréal Alouettes, and are thus subject to the grievance and arbitration process set out in the 2014 Collective Agreement, and fall within the exclusive jurisdiction respectively of the *BC Labour Relations Code* and the *Quebec Labour Code*.

[38] The CFLAA and Leo Ezerins' application effectively adopts the same position as set out in the preceding paragraph.

[39] The applications by Dr. Tator and the KNC also effectively adopt the position of Commissioner Cohon and the various defendant teams, but do so on the basis that even though they are strangers to the 2014 Collective Agreement, the action

against them will not give this Court jurisdiction if the dispute is indeed covered by the 2014 Collective Agreement.

[40] Mr. Bruce contends that the 2014 Collective Agreement is an atypical one and that the authorities that suggest that this dispute falls within the exclusive jurisdiction of the *BC Labour Relations Code* or the *Quebec Labour Code* have no application to his claim.

[41] In any case, Mr. Bruce contends that the 2014 Collective Agreement does not give exclusive jurisdiction to arbitrators pursuant to the *BC Labour Relations Code* or the *Quebec Labour Code*.

[42] The original notice of civil claim in these proceedings was filed on July 16, 2014. Pursuant to Rule 21-8 of the British Columbia *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], I must take the allegations in the notice of civil claim as true for the purposes of this application.

[43] Mr. Bruce claims against the CFL, Commissioner Cohon, Dr. Tator, the KNC, Leo Ezerins, and the CFLAA for allegedly withholding and downplaying the effects of repetitive head trauma. Specifically, Mr. Bruce claims against these parties for their alleged negligence, for breach of what he asserts to be their common law duty of care to protect the safety of CFL football players, for their alleged negligent misrepresentation of player safety issues respecting concussions and traumatic head injuries made to induce players to play football in the CFL, and for negligence with respect to their alleged failure to institute available technology to reduce the risks to players from traumatic head injuries, and to advise players of those risks.

[44] In his notice of civil claim, Mr. Bruce asserts that the CFL is a legally distinct and separate entity from its member teams, and that the respondent teams are “jointly and severally liable as partners or alternatively a joint venture for all act[s] and omission[s] of the CFL and its employees, servants and agents including but not limited to Commissioner Cohon and the [d]efendants”.

[45] Mr. Bruce challenges the applicants' assertion that the 2014 Collective Agreement confers exclusive jurisdiction to the CFLPA to represent CFL players for all purposes or that the 2014 Collective Agreement confers exclusive jurisdiction to CFL arbitrators to resolve issues such as his common law right to bring an action in this Court.

[46] The applicants' applications are pursuant to Rule 21-8 of the *Rules*, which provides the following 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.

[47] The various applications came on for hearing before Mr. Justice Joyce from June 2-4, 2015. He reserved judgment on the applications, but I concluded that he was unable to complete reasons for judgment in the case, and thus, on December 17, 2015, granted an *ex mero motu* order assigning myself the task of rendering a written judgment in the case. I reviewed all of the material filed before Joyce J. and ordered and read a transcript of the oral submissions before him. At the request of counsel, I agreed to give the parties the opportunity to make further oral submissions, which I heard on February 23, 2016.

Discussion

[48] In deciding this application, Mr. Bruce urges me to consider the conduct of the applicants in their research and representations to the public with respect to

concussions and repetitive head injuries. I decline to engage in that sort of analysis, as it is unnecessary for me to do so in order to resolve the issue of jurisdiction. Such an inquiry would go to the merits of the action, and would not answer the question before me, which is whether this dispute can be resolved by the Court or must proceed through arbitration.

[49] Mr. Bruce contends that there is a presumption in Canada that an individual has a right to sue at common law, which can only be rebutted by evidence that there is a complete and exhaustive alternative dispute resolution framework contained in a written collective bargaining agreement.

[50] The applicants contend that arbitration is the mandatory dispute resolution process under both the *BC Labour Relations Code* and the *Quebec Labour Code* with respect to any difference relating to the interpretation, application, operation or alleged violation of the 2014 Collective Agreement, and that both statutory regimes provide arbitrators with the authority to fairly, effectively and expeditiously resolve disputes like that of the plaintiff by granting them the authority to interpret and apply all legislation relating to the plaintiff's health and safety or otherwise, and to provide a final, binding and complete remedy for each of the complaints he has raised in this action.

[51] In *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, an arbitrator dismissed the grievance of a union employee, wherein he sought reinstatement after having his employment terminated. Under the collective agreement, his union had the exclusive authority to represent employees for the purposes of the grievance and arbitration procedure and none of its provisions gave an employee the right to take a grievance to arbitration personally or to be a party to a proceeding before the arbitrator. Following the arbitration award, the union decided, despite the employee's demands, that it would not take the matter further. The employee then decided to act on his own and filed an application for judicial review. The Quebec Superior Court granted the employer's motion to dismiss and found that the employee did not have the requisite interest to bring such proceedings since he was not a party within the

meaning of relevant legislation. The employee then brought a direct action in nullity but the Superior Court again granted the employer's motion to dismiss, on the ground that he did not have the requisite interest. A majority of the Quebec Court of Appeal affirmed the judgment, which was then upheld by the Supreme Court of Canada.

[52] At paras. 41 – 42 of the reasons for the Court, Mr. Justice LeBel discussed the principle of exclusive representation under Quebec labour law:

> [41] One of the fundamental principles we find in Quebec labour law, and one which it has in common with federal law and the law of the other provinces, is the monopoly that the union is granted over representation. This principle applies in respect of a defined group of employees or bargaining unit, in relation to a specific employer or company, at the end of a procedure of certification by an administrative tribunal or agency. Once certification is granted, it imposes significant obligations on the employer, imposing on it a duty to recognize the certified union and bargain with it in good faith with the aim of concluding a collective agreement (s. 53 L.C.). Once the collective agreement is concluded, it is binding on both the employees and the employer (ss. 67 and 68 L.C.). For the purposes of administering the collective agreement, the certified association exercises all the recourses of the employees whom it represents without being required to prove that the interested party has assigned his or her claim (s. 69 L.C.). (With respect to these mechanisms, see, for example: F. Morin and J.-Y. Brière, *Le droit de l'emploi au Québec* (1998), at pp. 867-70; R. P. Gagnon, *Le droit du travail du Québec: pratiques et théories* (4th ed. 1999), at p. 362.)
>
> [42] The collective agreement is implemented, first and foremost, between the union and the employer. Certification, followed by the collective agreement, takes away the employer's right to negotiate directly with its employees. Because of its exclusive representation function, the presence of the union erects a screen between the employer and the employees. The employer loses the option of negotiating different conditions of employment with individual employees. In *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, at p. 519, Chouinard J., who wrote the reasons of this Court, quoted the following passage from the decision of the British Columbia Labour Relations Board in *Rayonier Canada (B.C.) Ltd. and International Woodworkers of America, Local 1-217*, [1975] 2 Can. L.R.B.R. 196, at pp. 200-201, regarding the situation created by certification:
>
> > Once a majority of the employees in an appropriate bargaining unit have decided they want to engage in collective bargaining and have selected a union as their representative, this union becomes the exclusive bargaining agent for all the employees in that unit, irrespective of their individual views. The union is granted the legal authority to negotiate and administer a collective agreement setting terms and conditions of employment for the unit ... . This legal position expresses the

> rationale of the Labour Code as a whole that the bargaining power of each individual employee must be combined with that of all the others to provide a sufficient countervailing force to the employer so as to secure the best overall bargain for the group.

[53] The reasoning of the Supreme Court of Canada respecting the principle of exclusive representation was embraced in this province by our Court of Appeal in *Driol v. Canadian National Railway Co.*, 2011 BCCA 74. At para. 18 of that decision, Mr. Justice Chiasson explained that in a unionized environment, employees relinquish their individual rights to gain the collective rights provided by the collective agreement:

> [18] In the absence of special circumstances, unionized employees give up their individual employment contractual rights in exchange for collective rights provided by a collective agreement. The law was stated succinctly by Russell J. in *Belik v. Purolator Courier Ltd*., 2007 BCSC 579:
>
> > [14] 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.
> >
> > [15] 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.

[54] Mr. Justice Esson, as he then was, considered the jurisdiction of this Court to hear a claim for negligence by a professional hockey player against his employer in *Robitaille v. Vancouver Hockey Club*, [1979] B.C.J. No. 887 (S.C.). The plaintiff and

the defendant in that case had a collective bargaining agreement that was common throughout the hockey league, but it did not include provisions relating to liability for negligence.

[55] At paras. 184 – 187, Esson J. held that:

> [184] The submission for the defendant is that, because of the existence of the collective bargaining agreement, the common law is "irrelevant", i.e., no rights or duties can arise out of the employer/employee relationship except such as are spelled out in the collective agreement. This submission is based upon two decisions of the Supreme Court of Canada: *Le Syndicat Catholique des Employes de Quebec Inc. v. La Companie Paquet Ltee*, [1959] S.C.R. 206; and *McGavin ToastMaster Ltd. v. Ainscough et al*, [1976] 1 S.C.R. 718; [1975] 5 W.W.R. 444; (1975), 54 D.L.R. (3d) 1.
>
> [185] Both cases deal with unions certified as exclusive bargaining agents under provincial legislation. In the *Syndicat Catholique* case it was held that, to the extent of the matters covered by the collective agreement, freedom of contract between master and servant was abrogated and there was no room left for private negotiation.
>
> [186] In the *McGavin* case, it was held that the common law rules of repudiation and fundamental breach of contract did not apply to collective agreements entered into under legislation imposing the duty to bargain collectively. In the result, employees who had struck illegally and had thus, under common law rules of contract, repudiated the contract, were nevertheless held entitled to rely upon its terms to recover severance pay.
>
> [187] It is doubtful that these decisions have any application to collective agreements to which the concept of certification under labour legislation does not apply. There is, in any event, 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.

[56] The decision of Esson J. was upheld on these grounds by the Court of Appeal at (1981), 124 D.L.R. (3d) 228.

[57] In *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 [*Weber*], the Supreme Court of Canada settled the law with regard to the jurisdiction of Courts and labour arbitrators. Madam Justice McLachlin, as she then was, writing for the majority, considered the question of when a Court's jurisdiction over civil actions would be

ousted by s. 45(1) of the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2 [*Ontario Labour Relations Act*]. In answering that question, McLachlin J. considered three different views on the effect of final and binding arbitration clauses in labour legislation that were apparent from the authorities: the concurrent model, the model of overlapping jurisdiction, and the exclusive jurisdiction model.

[58] Under the concurrent model, the Court has jurisdiction to hear any dispute that has a basis in the common law or in statute, even if the subject matter is covered by the collective agreement. McLachlin J. rejected this view because it was inconsistent with previous jurisprudence, the wording of the *Ontario Labour Relations Act* and the purpose of labour relations schemes.

[59] At para. 41 – 43, McLachlin J. explained that previous jurisprudence has rejected the concurrency approach:

> [41] The jurisprudential difficulty arises from this Court's decision in *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704. As the Court of Appeal below noted, both the holding and the philosophy underlying *St. Anne Nackawic* support the proposition that mandatory arbitration clauses in labour statutes deprive the courts of concurrent jurisdiction. In *St. Anne Nackawic*, the employer, after obtaining an interim injunction against the striking union, sued the union in tort for damages caused by its illegal strike. The employer had argued that where the claim could be characterized as arising solely under the common law, and did not depend for its validity on the collective agreement, the mandatory arbitration clause of the legislation did not apply -- the same argument which Weber makes on this appeal. The Court, per Estey J., rejected that argument, concluding that to allow concurrent actions in the courts would be to undermine the purpose of the legislation (at pp. 718-19).
>
> > The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law. . . . The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are

> in the circumstances a duplicative forum to which the legislature has not assigned these tasks. [Emphasis added.]

Estey J. concluded at p. 721 that subject to a residual discretionary power in courts of inherent jurisdiction over matters such as injunctions, concurrent court proceedings were not available:

> What is left is an attitude of judicial deference to the arbitration process. . . . It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration ... is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of a collective agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement. [Emphasis added.]

[42] The New Brunswick Court of Appeal in *St. Anne Nackawic* also rejected the concurrency approach (1982), 142 D.L.R. (3d) 678. La Forest J.A. (as he then was) wrote that simply framing the action in terms of the tort of conspiracy would not be sufficient to take the action outside the realm of the collective agreement.

[43] Underlying both the Court of Appeal and Supreme Court of Canada decisions in *St. Anne Nackawic* is the insistence that the analysis of whether a matter falls within the exclusive arbitration clause must proceed on the basis of the facts surrounding the dispute between the parties, not on the basis of the legal issues which may be framed. <u>The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one "arising under [the] collective agreement". Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it.</u>

[Emphasis added.]

[60] McLachlin J. also rejected the overlapping jurisdiction approach, which she found carried a similar risk of undermining the purpose of labour legislation: *Weber* at paras. 47 – 49.

[61] Ultimately, the Supreme Court of Canada in *Weber* adopted the exclusive jurisdiction approach, which requires unionized employees to proceed by arbitration in any disputes that arise from the collective agreement, and ousts the jurisdiction of

the Court in such disputes. At paras. 51 – 52, 54 and 56, McLachlin J. provided direction for the Court's application of the exclusive jurisdiction approach:

> [51] On this approach, the task of the judge or arbitrator determining the appropriate forum for the proceedings centres on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered: the dispute and the ambit of the collective agreement.
>
> [52] In considering the dispute, the decision-maker must attempt to define its "essential character", to use the phrase of La Forest J.A. in *Energy & Chemical Workers Union, Local 691 v. Irving Oil Ltd*. (1983), 148 D.L.R. (3d) 398 (N.B.C.A.). The fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement may occur off the workplace and conversely, not everything that happens on the workplace may arise from the collective agreement: *Energy & Chemical Workers Union, supra*, per La Forest J.A. Sometimes the time when the claim originated may be important, as *in Wainwright v. Vancouver Shipyards Co.* (1987), 38 D.L.R. (4th) 760 (B.C.C.A.), where it was held that the court had jurisdiction over contracts pre-dating the collective agreement. See also *Johnston v. Dresser Industries Canada Ltd.* (1990), 75 O.R. (2d) 609 (C.A.). In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less than obvious. The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.
>
> …
>
> [54] This approach does not preclude all actions in the courts between employer and employee. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts: *Elliott v. De Havilland Aircraft Co. of Canada Ltd*. (1989), 32 O.A.C. 250 (Div. Ct.), at p. 258, per Osler J.; *Butt v. United Steelworkers of America, supra; Bourne v. Otis Elevator Co.*, supra, at p. 326. Additionally, the courts possess residual jurisdiction based on their special powers, as discussed by Estey J. in *St. Anne Nackawic, supra*.
>
> …
>
> [56] The appellant Weber also argues that arbitrators may lack the legal power to consider the issues before them. This concern is answered by the power and duty of arbitrators to apply the law of the land to the disputes before them. To this end, arbitrators may refer to both the common law and statutes: *St. Anne Nackawic; McLeod v. Egan*, [1975] 1 S.C.R. 517. As Denning L.J. put it, "[t]here is not one law for arbitrators and another for the court, but one law for all": *David Taylor & Son, Ltd. v. Barnett*, [1953] 1 All E.R. 843 (C.A.), at p. 847. This also applies to the *Charter*: *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 597.
>
> [Emphasis added.]

[62] Concurrently with the release of *Weber*, the Supreme Court of Canada released its reasons in the companion case of *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967 [*O'Leary*]. In *O'Leary*, the Court considered whether negligence could be the subject of an action independent of the collective agreement. McLachlin J. summarized her reasoning as follows at paras. 3 – 7:

> [3] In the companion case of *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, I discuss the applicable law. I conclude that the courts lack jurisdiction to entertain a dispute between the parties which arises out of the collective agreement, subject to a residual discretionary jurisdiction in courts of inherent jurisdiction to grant relief not available under the statutory arbitration scheme. Whether a matter arises out of the collective agreement is to be determined having regard to the essential character of the dispute and the provisions of the collective agreement.
>
> [4] It follows from this that the Court of Appeal erred in stating without qualification that "[n]egligence can be the subject of an action independent of the collective agreement" (p. 160). <u>In fact, negligence can be the subject of an action only if the dispute does not arise from the collective agreement.</u>
>
> [5] The remaining question is whether the dispute between the parties in this case, viewed in its essential character, arises from the collective agreement. In my view, it does.
>
> [6] The Province's principal argument is that the collective agreement does not expressly deal with employee negligence to employer property and its consequences. However, as noted in Weber, a dispute will be held to arise out of the collective agreement if it falls under the agreement either expressly or inferentially. Here the agreement does not expressly refer to employee negligence in the course of work. However, such negligence impliedly falls under the collective agreement. Again, it must be underscored that it is the essential character of the difference between the parties, not the legal framework in which the dispute is cast, which will be determinative of the appropriate forum for settlement of the issue.
>
> [7] Article 24.04 of the collective agreement acknowledges the employee's obligations to ensure the safety and dependability of the employer's property and equipment. By inference it confers correlative rights on the employer to claim for breaches of these obligations. While Article 24 falls under the general heading "Safety and Health", the rationale behind the obligation does not detract from the existence of that obligation to maintain the employer's property. The essence of the dispute concerns the preservation of the employer's property and equipment. Framing the dispute in terms of negligence does nothing to remove it from the contemplation of Article 24. Article 5.03 requires the employer to exercise its rights consistently with the terms of the collective agreement, by implication invoking the comprehensive arbitration scheme established by the Act and acknowledged by the collective agreement as the exclusive avenue of recourse. It follows

> from these provisions that the dispute arises from the collective agreement and that the only means of redress is the statutory arbitration process.
>
> [Emphasis added.]

[63] Mr. Bruce has referred me to the decision of Mr. Justice Gans of the Ontario Court of Justice (General Division), as it then was, in *Belanger v. Pittsburgh Penguins Inc*., [1998] O.J. No. 427. There Gans J. considered a claim in negligence or breach of duty by another professional hockey player against his employer. He concluded 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 player's contract. At paras. 11 – 12 Gans J. concluded:

> [11] I reject the Club's argument that Claim 3 is similarly one which arises out of contract. The allegations of negligence or breach of duty, in my view, cannot rationally be considered to be of matters arising out of the Collective Agreement or the Contract, as that concept has been judicially considered, most recently by the Supreme Court of Canada in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.
>
> [12] Leaving aside, for the moment, the wording of both the Contract and the Collective Agreement which supports this view, a similar matter was considered by the British Columbia Supreme Court in *Robitaille v. Vancouver Hockey Club Limited* (1979), 19 B.C.L.R. 158 and, by implication, by the British Columbia Court of Appeal in a decision found at (1981), 124 D.L.R. (3d) 228. In the trial decision, Esson J. reviewing a predecessor standard player's contract and collective agreement ruled that there was nothing in the agreement that expressly or impliedly excluded liability in tort, with which conclusion I am in agreement.

[64] With respect, this summary treatment of the application of *Weber* is unpersuasive, and no reference to the decision in *O'Leary* is made.

[65] In my view, the authorities require the consideration of three factors in order to determine whether the Courts have jurisdiction to entertain a dispute between an employee and his or her employer, in the face of a collective agreement:

a) the ambit of that collective agreement;

b) the essential character of the dispute between the parties; and

c) whether the collective agreement provides the employee or the employer with an effective remedy.

[66] I will examine each of these factors in turn.

a) The Ambit of the 2014 Collective Agreement

[67] Mr. Bruce benefitted from the efforts of the CFLPA and from the collective bargaining process in which the CFLPA engaged on behalf of all CFL players. The trade-off for those benefits is that he has given up his common law right to commence proceedings in the Courts relating to matters arising either expressly or inferentially under the 2014 Collective Agreement. He may only seek redress for such matters arising through the grievance procedure established under the 2014 Collective Agreement.

[68] The parties disagree over the effect of the 2014 Collective Agreement provision that permits a player to initiate a grievance or to be represented by his own counsel at any arbitration. Mr. Bruce contends that this means that the 2014 Collective Agreement does not cover all aspects of the employer/employee relationship, whereas the defendants contend that these provisions simply afford the player greater rights than do the provisions of comparable CBAs involving other sports.

[69] I am not persuaded that the fact that Mr. Bruce was able to negotiate his personal compensation or certain other terms of his player contract leaves the CFLPA with less than exclusive bargaining rights for the CFL players. I find that the players' entitlement to bargain for personal compensation or certain other terms of their player contracts is a delegation of certain issues from the CFLPA that must still be performed within the ambit of the 2014 Collective Agreement.

[70] The 2014 Collective Agreement addresses player safety in general and player equipment. It contains an arbitration clause that the applicants argue requires, *inter alia,* any difference concerning the interpretation, application, or operation of the

agreement, or any alleged dispute between a player and his team and/or the CFL be finally and conclusively settled through the grievance procedure and, ultimately, arbitration.

[71] Mr. Bruce points to the permissive wording of Article 4.01 of the 2014 Collective Agreement that “Any dispute … between a Player and a Member Club and/or Member Clubs and/or the C.F.L., or between the C.F.L.P.A. and any Member Club and/or Member Clubs and/or the C.F.L., *may be submitted* to arbitration by any one of the parties” and in Article 4.02 that a grievance “*may be initiated*” as evidence that the grievance and arbitration procedure under the 2014 Collective Agreement is optional, and therefore non-exclusive.

[72] I find that the arbitration clause is not worded as broadly as the applicants maintain. However, its permissive wording also does not make the arbitration clause optional and non-exclusive, as contended by Mr. Bruce. This argument was clearly rejected by the Supreme Court of Canada in *Vaughan v. Canada*, 2005 SCC 11, where Mr. Justice Bastarache, in his dissenting reasons for judgment stated at paras. 50 and 59 – 60 that:

> [50] The first notable difference is that the PSSRA does not have a mandatory arbitration provision. Whereas in Weber, s. 45(1) of the *Ontario Labour Relations Act*, R.S.O. 1990, c. L.2 (now S.O. 1995, c. 1, Sch. A, s. 48(1)), required that "[e]very collective agreement shall provide for the final and binding settlement by arbitration", ss. 91 and 92 of the *PSSRA* use permissive language by providing that employees who feel aggrieved are "entitled ... to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act" (s. 91). As discussed below, this permissive language simply reflects the fact that no employee is required to file a grievance and it is not determinative of legislative intent with regard to exclusivity of the grievance process.
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> …
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> [59] Here, the statutory language does not explicitly provide for exclusivity. This, however, is not determinative of the legislature's intent. As discussed above, the wording of the provision is but one of three factors considered by this Court in determining exclusive jurisdiction.
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> [60] In *Pleau*, at p. 381, the Nova Scotia Court of Appeal held that a decision to decline jurisdiction is not based solely on a clear, express grant of jurisdiction to another forum. Rather, Cromwell J.A. properly stated the question to be asked: have the legislature and parties shown a strong preference for a particular dispute resolution process other than the court

> process? If the legislation is unclear, certain policy considerations should be taken into account, such as, among other things, the desire for the establishment of an inexpensive, efficient and definitive mechanism for the resolution of labour disputes. This will manifest itself essentially in a finding with regard to the comprehensiveness of the labour-related dispute resolution scheme.

[73] Bastarache J.'s reasoning on this point was adopted by Mr. Justice Binnie, for the majority, who remarked at para. 28 that:

> [28] Both courts also fastened on the words in s. 91 that the employee is "entitled" to grieve as showing that the s. 91 procedure is just one of the employee's options. A similar point was taken by the Ontario Court of Appeal in *Danilov v. Atomic Energy Control Board* (1999), 125 O.A.C. 130, at para. 11. For the reasons given by my colleague Bastarache J., I do not agree with this interpretation. The word "entitled" in s. 91 simply recognizes that an employee is not required to grieve every decision that he or she disagrees with.At 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.

[74] 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.

[75] But what of Mr. Bruce's claims against Dr. Tator, Leo Ezerins, the CFLAA, the KNC? At first instance, one might ask how Mr. Bruce's claims against non-parties to the 2014 Collective Agreement could be affected by the 2014 Collective Agreement. One short answer to this question is that Mr. Bruce has alleged in his notice of civil claim that each are agents of the CFL and its teams. But a more reasoned answer is found in various appellate authorities.

[76] The authorities establish that even so-called “strangers” to a collective agreement are properly subject to the arbitral process even if they are not agents to parties to the agreement and owe independent duties to the employee.

[77] In *Giorno v. Pappas* (1999), 170 D.L.R. (4th) 160 (Ont. C.A.) at paras. 24 – 26, Mr. Justice Goudge stated:

> [24] … The appellants argue that relief is sought in the civil litigation against the respondent Pappas and the respondent Board, neither of whom are the employer under the collective agreement, the party from whom a remedy is normally sought at arbitration.
>
> [25] I cannot agree that this 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.
>
> [26] 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 Company*, [1998] O.J. No. 4714] *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.

[78] Goudge J.A.’s reasoning on this point was endorsed by Madam Justice Levine for the British Columbia Court of Appeal in *Haight-Smith v. Neden*, 2002 BCCA 132 at para. 47.

[79] I find that Mr. Bruce’s dispute does not extend beyond what was expressly or inferentially provided for in the 2014 Collective Agreement, and that it is thus within the ambit of the 2014 Collective Agreement, whether or not all of the defendants are parties to the 2014 Collective Agreement.

b) The Essential Character of the Dispute between the Parties

[80] Mr. Bruce contends that the essential character of this dispute is compensation. He argues that had he known about the effects of repetitive head injuries and the risk associated with concussions, he would have been in a position to negotiate compensation for medical treatment. I disagree. Were I to accede to this argument, disputes involving any condition of employment could conceivably be considered matters of compensation, and thus not subject to the 2014 Collective Agreement. Mr. Bruce would thus gain the rights and benefits of collective bargaining through the CFLPA without needing to surrender his individual right to sue, which would be antithetical to the purpose of labour relations schemes.

[81] I accept the submission of the defendants that one essential character of the dispute between them and Mr. Bruce relates to health and safety; specifically, whether the CFL or its member teams for whom Mr. Bruce played professional football, in carrying out the duties that Mr. Bruce alleges they owed to him, took steps to ensure his health and safety.

[82] For the purposes of my decision, I accept the view expressed in the decision of the Nova Scotia Court of Appeal in *Gillian v. Mount Saint Vincent's University*, 2008 NSCA 55 at paras. 35 – 36 [*Gillian*]:

> [35] The essence of … claim as set out in the appellant's statement of claim is that her employer failed to provide safe working conditions, which caused her to fall and injure herself. Ms. Gillan was employed as a custodian by the University. Her job description required her to report damage, needed repairs and potential hazards. She was injured at her workplace when, in the course of her employment, she fell while spreading salt, which was one of her duties. At the time, she was a member of the Union certified as the bargaining agent with respect to her work at the University. Article 22 of the Collective Agreement addresses injuries on duty and Article 33.4 declares that the safety of its employees is a primary concern of the University and requires it to provide a safe work environment.
>
> [36] The submission that the employer-employee relationship is merely "incidental" to the dispute ignores these facts and their cumulative effect. 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 University's obligation to provide a safe workplace are clearly integral to the dispute.

[83] I conclude that the provisions of the 2014 Collective Agreement do not distinguish its scope from the scope of comparable CBAs involving other sports, and more importantly, do not affect the dispute between the parties in this case, which I find, viewed in its essential character, arises from the 2014 Collective Agreement.

c) Effective Remedy

[84] Mr. Bruce argues that in determining whether he has an effective remedy available to him, this Court should consider the fact that CFL players are not protected by the provincial workers compensation scheme, and thus they cannot receive those benefits when they are injured. Mr. Bruce refers to an order of the Board of Governors of the Workers Compensation Board, which he says allows a professional athlete to commence an action in court regardless of the existence of a collective agreement.

[85] However, the order referenced by Mr. Bruce pre-dates *Weber* and the exclusive jurisdiction model, and as such, should be treated with caution. Further, 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.

[86] Ultimately, the 2014 Collective Agreement allows for effective redress for any workplace injuries that Mr. Bruce may have sustained and thus is consistent with the policies of the Workers Compensation Board.

[87] It is clear that at the time that he filed his notice of civil claim in these proceedings, Mr. Bruce, as a former player, could have filed a grievance under the 2014 Collective Agreement for compensation arising from the injuries for which he seeks compensation and based upon the duties he asserts in these proceedings.

[88] He is still arguably eligible to file a grievance, although he would apparently require a ruling from an arbitrator to do so, as grievances under the 2014 Collective

Agreement must be initiated within one year from the latter of the date of occurrence or non-occurrence upon which the grievance is based, or within one year from the date upon which the facts of the matter became known or reasonably should have been known to him.

[89] There are no monetary limits to the compensation that a player can seek pursuant to the 2014 Collective Agreement.

[90] Even if Mr. Bruce is not now permitted an extension of time to file a grievance, I accept the view of Mr. Justice Oland in *Gillian* at para. 46 that:

> [46] 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.
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> [Emphasis added.]

[91] As Mr. Justice Joyce stated in *Moznik v. Richmond (City)*, 2006 BCSC 1848 at para. 81:

> The question is not whether the plaintiff can obtain the precise remedy she seeks through the court; it is whether she can obtain effective redress of the alleged harm through the mandatory arbitration provisions of the collective agreement and the Code.

[92] I therefore find that Mr. Bruce was entitled to seek compensation by way of grievance and arbitration under the 2014 Collective Agreement for the matters raised in his notice of civil claim in these proceedings and had he done so, could have obtained a meaningful remedy for those complaints.

Conclusion

[93] I find that the disputes raised by Mr. Bruce arise from the 2014 Collective Agreement and can only be resolved through the grievance and arbitration process.

[94] In the result, I find that this Court lacks the jurisdiction to entertain Mr. Bruce's claim and order that his notice of civil claim be struck in its entirety.

"The Honourable Chief Justice Hinkson"