SUPREME COURT OF YUKON

Citation: *Kornelsen v. Yukon Employees Union*, 2020 YKSC 01

Date: 20200117
S.C. No. 17-A0066
Registry: Whitehorse

BETWEEN

JEANNIE KORNELSEN

PLAINTIFF

AND

YUKON EMPLOYEES' UNION
PUBLIC SERVICE ALLIANCE OF CANADA

DEFENDANT

Before Madam Justice S.M. Duncan

Appearances:
Jeannie Kornelsen — Appearing on her own behalf
Meagan Hannam — Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the Yukon Employee's Union ("YEU") for dismissal of a claim against them by one of their members, Jeannie Kornelsen, for a breach of the duty of fair representation. The dismissal application is based on a want of jurisdiction of the Supreme Court of Yukon, pursuant to Rule 14(4)(a) of the *Rules of Court*.

[2] The issue is whether a complaint by a union member against her union of unfair representation is properly brought before this Court, or whether as a result of the labour

relations statutory scheme her complaint is more properly brought before the Yukon Public Service Labour Relations Board (the "Yukon Board").

[3] The Yukon Board is established under the Yukon *Public Service Labour Relations Act*, R.S.Y. 2002, c. 185 ("Yukon *PSLRA*") to administer the statute.

[4] The Yukon *PSLRA* does not expressly include a provision about the duty of fair representation by a union.

BACKGROUND

[5] This is a pleadings application. The following background comes from allegations as set out in the pleadings as well as from affidavit evidence and oral submissions in support of this application.

[6] The YEU is part of the Public Service Alliance of Canada and is the union that represents employees of the Government of Yukon. Jeannie Kornelsen commenced employment with the Government of Yukon in 1995. She has been a member of the YEU since 1998, when she first occupied a permanent seasonal position in the Marketing Branch of the Department of Tourism and Culture. She retained her status as a permanent seasonal employee throughout her employment.

[7] The employment relationship was governed by the *Public Service Act*, R.S.Y. 2002, c. 183, the Yukon *PSLRA*, and the collective agreement.

[8] Ms. Kornelsen originally approached the YEU in 2015 for assistance with an employment accommodation request on the basis of a claimed disability. Several meetings were held between her and the YEU representative assigned to her file. She also attended a number of meetings with the Government of Yukon, accompanied by YEU representatives. Attempts over several months to create an accommodation plan

were unsuccessful. The employer had concerns that Ms. Kornelsen did not participate fully in the accommodation process. Her employment was terminated by the deputy head pursuant to s. 121 of the *Public Service Act* by letter dated September 4, 2015. The reasons were declining reasonable accommodation; refusing to cooperate with accommodation efforts; and not being available for work.

[9] Ms. Kornelsen indicated to the YEU by email her intention to appeal the decision of the deputy head. The *Public Service Act* allows an employee's bargaining unit representative to assist the employee in the appeal process. After some further email exchanges between Ms. Kornelsen and the YEU, the YEU offered to meet with her to discuss how they could assist her with an appeal. Ms. Kornelsen did not respond to that offer. YEU says they have no knowledge of whether the appeal was initiated and, if so, its outcome.

[10] Ms. Kornelsen alleges that the YEU failed to fulfill their duty of fair representation during the accommodation process, up to and including the termination of her employment. She claims damages for pain and suffering plus an amount equivalent to her union dues over the years. For the purpose of this pleadings application, it is not necessary to set out the allegations in any detail or address the merits of the underlying claim of unfair representation.

[11] Ms. Kornelsen says the Supreme Court of Yukon is her last resort to address this matter. In her oral submissions she says she attempted unsuccessfully to contact the Yukon Board and concluded they do not exist.

ISSUES

[12] Does the absence of an expressly stated duty of fair representation in the Yukon *PSLRA* prohibit the Yukon Board from assuming jurisdiction over a complaint of a breach of duty of fair representation?

[13] If the Court has residual jurisdiction, should it assume jurisdiction in this case?

Short Answer

[14] The duty of fair representation exists implicitly in the Yukon *PSLRA*. The exclusive statutory right of the union to bargain on behalf of and represent employees gives rise to a corresponding obligation on the union to act fairly when exercising those duties. The Yukon *PSLRA* sets out a comprehensive scheme to regulate the employer-employee relationship and creates a specialized tribunal, the Yukon Board, to administer the statute.

[15] The statute provides the Yukon Board the ability to exercise powers and perform functions conferred or imposed upon it by the statute, or as are incidental to the attainment of the objects of the statute. Protection of the implied right of employees to be fairly represented is one of the objects of the statute. The Yukon Board is given the specific statutory mandate to examine and inquire into any complaint made to it that any employee organization, or person acting on its behalf, has failed to observe any prohibition or give effect to any provision contained in the Yukon *PSLRA* or the regulations. Upon the Yukon Board determining such a failure, it may make an order addressed to the person and/or the employee organization directing them to observe the prohibition, give effect to the provision, or to take any action that may be required within a specified period of time. Where the order is not complied with, the Yukon Board is mandated to forward a report to the Minister of the circumstances and related

documents and a copy shall be provided to the legislative assembly by the Minister within 15 days after receipt.

[16] Every order or decision of the Yukon Board is final and may only be subject to judicial review on the grounds of lack of jurisdiction, failure to observe natural justice or procedural fairness, or acting or failing to act by reason of fraud or perjured evidence.

[17] This comprehensive statutory scheme demonstrates legislative intent that judicial restraint be exercised in the context of labour relations. It is consistent with the modern approach that recognizes labour relations as a field of specialized expertise. The Yukon *PSLRA* contains provisions that allow for effective redress of a complaint by an employee of unfair representation by her union. It is not necessary to determine with finality whether the jurisdiction of the Yukon Board is exclusive or whether there is any residual jurisdiction of the Court. On the allegations set out in the pleadings in this case, it is appropriate for jurisdiction to be assumed by the Yukon Board.

I. Board jurisdiction in the absence of express statutory duty of fair representation

a. Legal Principles

[18] The first question to be determined is whether the absence of an express duty of fair representation in the Yukon *PSLRA* is fatal to the ability of the Yukon Board to hear any complaint of unfair representation against the YEU by one of its members.

[19] It is undisputed that the duty of fair representation exists at common law. Once a union is given by statute the exclusive right to represent employees, there is a commensurate obligation on the union to act fairly, impartially, without arbitrariness, discrimination or in bad faith. The Supreme Court of Canada (*Canadian Merchant*

Service Guild v. Gagnon, [1984] 1 S.C.R. 509) has acknowledged and endorsed this common law duty as described originally by the United States Supreme Court to be necessary "in order to balance unions' statutory grant of power. It was recognized that while the union's status as exclusive bargaining agent operates to counteract the economic power of the employer, and therefore works to the benefit of those represented, it was nevertheless necessary to ensure that unions wielded their power fairly" (*Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298 ("*Gendron*") at p. 1312).

[20] Most Canadian jurisdictions have codified the duty of fair representation into the relevant labour relations statutes. Although in each case the specific provisions of the statute must be examined, generally the jurisprudence provides that where codification of the duty exists and there are statutory remedies to address breaches of the duty, the procedure under the statute should be followed, rather than allowing litigation of the complaint through the court. This approach has been followed even where the legislation does not expressly provide that the statutory tribunal has exclusive jurisdiction.

[21] Judicial deference is justified by the legislators' choices to establish specialized structures under the legislation, including specialized tribunals operating within a particular field of expertise. As stated in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 at p. 5,

> The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise

> its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

[22] Further, as noted in *Gendron* at p. 1325:

> The rationale for this approach has to do with the Court's deference to the "expertise" of statutorily established and administered tribunals. In the field of labour law, the concentration of decision making power among labour tribunals and arbitrators is designed for efficiency, and is tailored to the development of a coherent labour law policy.

[23] Where Parliament has codified the common law duty, the Court in *Gendron* concluded that:

> … while the legislation does not expressly oust the common law duty of fair representation, it does however effect this end by necessary implication …
>
> A necessary caveat to this conclusion is that, while the common law duty will be inoperative in a situation where the terms of the statute apply, a different conclusion may be warranted in a case where the statute is silent or by its terms cannot apply. Such may be the case where the statutory duty is, by its terms, applicable only in circumstances where the breach of the duty arises out of contract administration…
>
> A different conclusion may also be warranted where it is not clear that the statute exclusively covers the breach. (p. 1319-20)

[24] In cases such as this one where no express statutory duty of fair representation exists, the courts are divided. Courts in New Brunswick, Nova Scotia and Prince Edward Island have held that the absence of an express statutory duty means that the courts have exclusive jurisdiction to determine if the duty has been breached and if so, provide a remedy under the common law, which is usually restricted to damages.

[25] None of the court decisions from the provincial or territorial superior courts to which this Court was referred provides any analysis of the issue of jurisdiction where there is no express duty. The discussion ends with the finding that there is no express duty in the relevant labour relations statute. The Courts conclude that displacement of the common law duty of fair representation by a statutory duty of fair representation cannot be effected by inference (*Re United Brotherhood of Carpenters and Joiners of America, Local 1023 v. Laviolette*, (1998) 199 N.B.R. (2d) 270 (C.A.)). There is no discussion of whether or not an implied duty exists. In one case from the Northwest Territories, *McLeod v. Union of Northern Workers,* 2002 NWTSC 57, court jurisdiction was necessarily found because there was no applicable labour relations legislation. Court jurisdiction in the absence of an express statutory duty of fair representation is viewed in the referenced cases as an exception to the modern approach of judicial deference in the context of a comprehensive labour relations statutory scheme.

[26] By contrast, the jurisprudence from the Federal Court shows deference to labour relations schemes set out by statute even in the absence of an express statutory duty.

[27] The first step in the analysis in these cases is a finding that an implied duty of fair representation exists in the statute. The first court to address this was the Federal Court of Appeal in *Canadian Air Traffic Control Association v. The Queen in right of Canada as represented by the Treasury Board*, [1985] 2 F.C. 84 (C.A.), in which the Court examined the federal *Public Service Staff Relations Act* ("*PSSRA*"). Before its 1992 amendments, that statute contained no express duty of fair representation. Thus it was the same as the current Yukon *PSLRA*.

[28] The Federal Court of Appeal noted the acceptance by Canadian courts (as first stated in *Canadian Merchant v. Gagnon*) of the American precedents that concluded once a union has the right to represent employees, it has resulting obligations. The Federal Court of Appeal further stated that the specific statutory provisions setting out the union's exclusive right to bargain and its exclusive right to represent employees inevitably result in an implied duty.

[29] On the basis of this decision as well as the decision in *Gendron*, in which the rationale for the jurisdiction of boards or tribunals established by statute received judicial approval in the context of an express duty, labour boards in the federal context began to assume jurisdiction over complaints of unfair representation even in the absence of an express statutory duty. (See *Albert v. Hawley*, [1987] C.P.S.S.R.B. No. 292; *Beaulne v. Public Service Alliance of Canada*, [2009] C.P.S.L.R.B. No. 10, aff'd 2011 FCA 62, leave to appeal dismissed [2011] S.C.C.A. 214 ("*Beaulne*"); *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp*, cited above; *Morin v. Ford*, [1989] C.P.S.S.R.B. No. 263). These jurisdictional decisions have been upheld by the Federal Court and the Supreme Court of Canada.

[30] In assuming jurisdiction, the boards have relied in part on the statutory provision that sets out their mandate and the powers and functions conferred on them. For example, in *Beaulne*, a complaint about the duty of fair representation was filed with the Canada Public Service Staff Relations Board, pursuant to the *Parliamentary Employment and Staff Relations Act* ("*PESRA*"). The *PESRA*, like the original *PSSRA* before the 1992 amendments and the current Yukon *PSLRA*, did not contain an express duty of fair representation. The Board found that the duty was implied under the statute,

following the reasoning in *Canadian Air Traffic Control Association.* It then based its assumption of jurisdiction on the following section of the *PESRA*:

> 10. The Board shall administer this Part and shall exercise such powers and perform such duties as are conferred or imposed on it by, or as may be incidental to the attainment of the purposes of, this Part including, without restricting the generality of the foregoing, the making of orders requiring compliance with this Part, with any regulation made hereunder or with any decision made in respect of a matter coming before it.

[31] This reasoning was followed in *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group),* 2010 PSLRB 88, aff'd 2011 FCA 257. The case was not about the duty of fair representation. It was about the employer's exclusive power under s. 120 of the federal *Public Service Labour Relations Act* ("*PSLRA*") to determine the level of essential service in the event of a strike. The issue was the same as in the duty of fair representation cases, and in the case at bar: was there an implied duty on the employer to exercise their discretion fairly given their exclusive power, and if so, could the board created under the *PSLRA* determine disputes related to this implied duty? The Board held at para. 164 (upheld by the Federal Court of Appeal on judicial review):

> Parliament intended that the Board take responsibility for the labour relations processes that the *Act* mandates provided that it acts in a fashion that is consistent with the objects of the *Act*. With *Vaughan* and other more recent decisions, the courts have increasingly recognized that labour statutes create exclusive regimes for the supervision of labour relations and for the resolution of labour relations disputes. Effective stewardship of those regimes requires that boards and arbitrators or adjudicators, as opposed to the courts, actively supervise the parties to the extent that their enabling statutes (or collective agreements) permit. … Had Parliament intended section 120 to operate outside the exercise of any administrative supervision by the Board

> whatsoever, it could have achieved that end by expressly exempting section 120 from section 36 [the provision giving the board powers and functions conferred on by the *Act* or incidental to the attainment of objects of the *Act*] in either or both provisions. Parliament did not.

[32] Further, as stated by the Nova Scotia Court of Appeal in *Adams v. Cusack*, 2006 NSCA 9 at para. 13:

> Since at least the mid 1980's [sic], the Supreme Court of Canada has recognized that the courts should be cautious not to undermine "…a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting": **St. Anne Nackawic Pulp & Paper v. Canadian Paper Workers Union, Local 219**, [1986] 1 S.C.R. 704 at 721.

[33] In the *Adams v. Cusack* case, the relevant statute was the federal *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 ("*PSSRA*"), the statute on which the Yukon *PSLRA* was modelled before its 1992 amendments. The issue was whether a Captain in the Coast Guard could access the courts to remedy his allegation of constructive or wrongful dismissal, or whether his complaints should be addressed under the grievance and adjudication provisions of the *PSSRA*, and the harassment provisions of the Public Service Commission. The Nova Scotia Court of Appeal noted that even though the *PSSRA* did not contain language sufficiently clear to oust court jurisdiction, judicial deference was appropriate because of the clear legislative intent that disputes be resolved within the scheme set out in the statute.

[34] The Supreme Court of Canada in *Vaughan v. Canada*, 2005 SCC 11, a case about whether a workplace dispute over entitlement to certain benefits should be decided under the grievance procedure established by the federal *PSSRA*, or by the

court, summarized the court's task in such jurisdictional determinations as follows:

(p. 157, para. 22)

> The task of the court is still to determine whether, looking at the legislative scheme as a whole, Parliament intended workplace disputes to be decided by the courts or under the grievance procedure established by the PSSRA.

b. The Yukon *PSLRA*

[35] The Yukon statute is silent on the duty of fair representation. However, the statute provides that the union has the exclusive right to bargain and represent employees in a grievance. Section 30 states:

> 30(1) If an employee organization is certified under this Act as the bargaining agent for a bargaining unit,
>
> (a) the employee organization has the exclusive right under this Act
>
> > (i) to bargain collectively on behalf of employees in the bargaining unit and to bind them by a collective agreement until its certification in respect of the bargaining unit is revoked, and
> >
> > (ii) to represent, in accordance with this Act, an employee in the presentation or reference to adjudication of a grievance relating to the interpretation or application of a collective agreement or arbitral award applying to the bargaining unit to which the employee belongs;

[36] Sections 77(2) and 78(2) provide that the union must approve any grievance presentation or referral to adjudication by an employee. Those sections state:

> 77(2) An employee is not entitled to present any grievance relating to the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies, or any grievance relating to any action taken

> pursuant to an instruction, direction, or regulation given or made as described in section 100.
>
> …
>
> 78(2) The employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies signifies in the prescribed manner
>
> > (a) its approval of the reference of the grievance to adjudication; and
> >
> > (b) its willingness to represent the employee in the adjudication proceedings.

[37] The Yukon *PSLRA* also contains a comprehensive scheme for remedy for breach. Section 6 of the Yukon *PSLRA* establishes the Yukon Board. It is made up of members of the Public Service Labour Relations Board ("PSLRB") appointed under the federal statute. The Chair and the Vice-Chair of the Yukon Board hold the equivalent positions in the federal PSLRB. They are members who clearly have specialized expertise in this area of labour relations.

[38] Section 16 of the Yukon *PSLRA* sets out the mandate of the Yukon Board as follows:

> 16 The board administers this Act and it may exercise the powers and perform the functions that are conferred or imposed on it by this Act, or as are incidental to the attainment of the objects of this Act, including the making of orders requiring compliance with
>
> > (a) this Act;
> >
> > (b) regulations made under this Act; or
> >
> > (c) decisions made in respect of a matter coming before the board. *S.Y. 2004, c.8, s.49; S.Y. 2002, c.185, s.16*.

[39] Section 19 describes the specific powers of the Yukon Board relating to evidence, witnesses, documents, types of hearings and other matters related to the conduct of hearings and the making of decisions and orders, with respect to any matter that comes before them. Section 19.9 provides for judicial review of any order or decision of the Yukon Board on grounds of jurisdiction, natural justice or procedural fairness, or fraud/perjury.

[40] Most significantly, s. 19.11 sets out the nature of the complaints that may be examined or inquired into by the Yukon Board:

> 19.11(1) The board shall examine and inquire into any complaint made to it that the employer, or any person acting on its behalf, or that any employee organization, or any person acting on its behalf, has failed
>
> > (a) to observe any prohibition or to give effect to any provision contained in this Act or the regulations;
>
> …
>
> (2) If under subsection (1) the board determines that any person has failed to observe any prohibition, to give effect to any provision or decision, or to comply with any regulation as described in subsection (1), it may make an order, addressed to that person, directing them to observe the prohibition, give effect to the provision or decision, or comply with the regulation, as the case may be, or take any action that may be required in that behalf within any specified period the board may consider appropriate, and …
>
> > (b) if that person has acted or purported to act on behalf of an employee organization, it shall direct its order as well to the chief officer of that employee organization. *S.Y. 2004*, c.8, s.49.

[41] Section 19.12 provides that where an order made under s. 19.11 is not complied with, the Yukon Board is required to forward a report to the Minister setting out the

circumstances and including documents, and that material must be put before the Legislative Assembly by the Minister within 15 days of receipt.

c. Analysis

[42] There is one Yukon decision from this Court dealing with the same subject matter- *Laforet v. Public Service Alliance of Canada,* [1995] Y.J. No. 108 (S.C.). The plaintiff brought an action against his union for breach of the duty of fair representation for failure to grieve the termination of his employment. The union withdrew its initial objection that the Supreme Court of Yukon did not have jurisdiction. The Court speculated that the reason for the withdrawal of the objection was because neither the *PSLRA* nor the collective agreement contained an express duty of fair representation.

[43] This conclusion was in *obiter* after the union's objection was withdrawn. The decision was issued 25 years ago, without the benefit of legal argument on the matter of jurisdiction. It does not take into account the more recent jurisprudence from the Federal Court and Supreme Court of Canada analysing implied duty and judicial deference to a comprehensive statutory scheme in the labour relations context.

[44] I am persuaded instead by the analysis in the Federal Court jurisprudence that the existence in the Yukon *PSLRA* of an exclusive right of the union to bargain and represent employees gives rise to a corresponding obligation to do so fairly, implicit in the statute. Sections 30 and 77 clearly set out those exclusive rights of the union. This case is not one of the exceptions contemplated in *Gendron* where the statute does not cover the subject matter of the alleged breach or by its own terms does not apply.

[45] The analysis requires a review of the statute to determine if it provides a remedy for a complaint of breach of the implied duty. In this case, s. 16 sets out the Yukon

Board's powers, which include doing anything the Yukon *PSLRA* confers or imposes, or anything incidental to the attainment of the objects of the Yukon *PSLRA.* The objects include the protection afforded to the employees of the union's duty to them of fair representation, implied in the statute (*Albert v. Hawley*).

[46] Even more specifically, the provisions in ss. 19.11 and 19.12 set out the Yukon Board's obligation to inquire into any complaint that an employee organization has failed to act in accordance with the statute or regulations. The wording is almost identical to that in the *PESRA* that was assessed in the case of *Beaulne,* except in one important respect. In that case, the complainant employee filed a complaint of unfair representation against his union under the equivalent of s. 19.11. The Board took jurisdiction of the complaint on the basis of the reasoning in *Gendron* and *Canadian Air Traffic Control Association v. The Queen*, as described above. The Board's decision was upheld by the Federal Court of Appeal, with application for leave to appeal to the Supreme Court of Canada dismissed.

[47] The important difference between the Yukon *PSLRA* in this case and the *PESRA* in the *Beaulne* case is the breadth of each Board's powers. In *Beaulne*, the Board was restricted by statute to a complaint that an employee organization had failed to observe any prohibition contained in three sections of the statute, none of which is an unfair representation provision. That duty was implied. Still, the Board assumed jurisdiction for an unfair representation complaint. By contrast, the Yukon *PSLRA* states that the Board shall examine and inquire into a complaint that an employee organization has failed to observe any prohibition or give effect to any provision in the Act or regulation. This is a broader mandate than that contained in the statute in *Beaulne*, and reinforces

the ability of an unfair representation complaint to be addressed by the Yukon Board in this case. Accepting that the Yukon *PSLRA* contains an implied duty of fair representation by the union, means that ss. 19.11 and 19.12 provide effective redress for a failure to meet that duty.

[48] Further, the remedy under s. 19.11 of the Yukon *PSLRA* is broad. It includes giving effect to the provision that has not been complied with or taking any action that may be required. This is similar to the situation in *Gendron,* where the Court observed that the remedial provisions in the *Canada Labour Code* improved "significantly the position at common law of an aggrieved person" (p. 1318) by providing more options than damages, the sole remedy at common law.

[49] To resort to the common law, outside the statutory scheme, would defeat one of the purposes of the Yukon PSLRA which is to preserve a procedural code, with disputes presided over by a competent authority, well-versed in the nature of union representation and factual contexts of disputes. A consideration of the statute as a whole, and the specific provisions as set out above, are sufficient to persuade me that an implied duty exists under the statute and its breach can be addressed by mechanisms available in the statute.

[50] Given the wording in s.19.11 requiring the Board to examine and inquire into a complaint that an employee organization has not met its duty of fair representation, implicitly found in the statute, it is not necessary to apply the doctrine of necessary implication in this case.

[51] Judicial deference to the Yukon Board is warranted in this case, given the following:

i. a finding that the Yukon *PSLRA* contains a duty of fair representation by implication (ss. 30 and 77);

ii. powers of the Board to do anything conferred or imposed on it by the Yukon *PSLRA* or as are incidental to the attainment of the objects of the Yukon *PSLRA* (s. 16);

iii. recognition that the statute sets out a process for dealing with failure to comply with the duty of unfair representation, including a broad remedy (ss. 16, 19.11 and 19.12);

iv. a privative clause, restricting court intervention to judicial review on specific grounds (s. 19.9).

II. Residual Jurisdiction of the Court

a. Legal Principles

[52] The next question is whether the court may have concurrent jurisdiction with the Yukon Board to determine a complaint of unfair representation, and if so, whether the court should still defer to the Yukon Board.

[53] Many of the cases in which boards assumed jurisdiction do not address the issue of the court's residual or concurrent jurisdiction. Two leading decisions in which this issue was addressed are *Gendron* and *Vaughan*.

[54] In *Gendron*, the Court found the Board had exclusive jurisdiction because of specific statutory provisions, including an express duty of fair representation. The Court indicated that this conclusion might vary with different statutory wording.

[55] In *Vaughan*, the Supreme Court of Canada held that the courts will retain jurisdiction if the remedy sought is not one which the statutory scheme can provide. In that case, the majority held that the language of the statute was not strong enough to

oust the jurisdiction of the ordinary courts with respect to matters that were grievable but not arbitrable. However, the majority held that the courts should defer to the jurisdiction of the board, for a number of reasons that are applicable in this case.

b. Analysis

[56] Like *Vaughan*, this is a case where the court should defer to the process in the *PSLRA* for the following reasons (based on *Vaughan*):

a. The complaint of unfair representation by an employee against her union arises from the employment relationship.

b. Section 19 of the Yukon *PSLRA* provides a mechanism and remedy for the complaint to be resolved. The matter of unfair representation can be determined by an independent Board with specialized expertise in labour relations, and the broad remedy, including an order requiring a person or employee organization to take any action required that the Board considers appropriate, provides effective redress to the employee.

c. Efficient labour relations is undermined when the courts set themselves up in competition with the statutory scheme (*St. Anne Nackawic Pulp & Paper v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; and *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14).

d. The legislature has created a comprehensive scheme for addressing labour disputes and courts should not jeopardize the comprehensive dispute resolution process in the legislation by permitting routine access to the courts.

e. More informal dispute resolution procedures are generally faster and less expensive, and provide a solution. This case has taken five years to get to court and is still at the stage of a pleadings application.

f. The dispute is straightforward. Specialized tribunals like the Yukon Board (who are all members of the federal board with expertise in labour relations and union/employee relationships) are best equipped to interpret and apply the duty of fair representation. Like in the case of *Vaughan*, there remains concern about a floodgates argument if the courts were able to hear any complaints by employees against their union for failure to represent them fairly.

[57] Therefore it is not necessary to decide for the purpose of this application whether the Court may have residual jurisdiction in some circumstances. There are sufficient reasons as set out above for the Court to decline to exercise jurisdiction on the facts of this case. As stated by the Court of Appeal in *Pleau (Litigation Guardian of) v. Canada (Attorney General)* 1999, 182 D.L.R. (4th) 373 (N.S.C.A.), quoted in *Vaughan* at p.157, in concluding that Parliament's intent in ss. 91 and 92 of the *PSSRA* was not to oust the jurisdiction of 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.

III. Concerns of Ms. Kornelsen

[58] Ms. Kornelsen states in her outline that the Supreme Court of Yukon is her only and last resort to address her concerns about unfair representation by her union. She

says her attempts to contact the Yukon Board were futile and she was told by a number of individuals that it did not exist.

[59] Counsel for the YEU responded that the Yukon Board does indeed exist and provided Ms. Kornelsen with phone numbers by which she could access them.

[60] At the Court's request, counsel for the YEU provided a letter after the hearing confirming that if Ms. Kornelsen were to bring a complaint now under the Yukon *PSLRA* against the YEU, about the events that occurred in 2015, the YEU would take no position on any limitations argument.

[61] Most of Ms. Kornelsen's submissions, both written and oral, focussed on the background to her workplace accommodation request, and difficulties with her experiences in seeking union representation and assistance. I am sympathetic to Ms. Kornelsen's frustrations and acknowledge her strong sense of injustice in her dealings with the union. However, this is not the focus of this application.

CONCLUSION

[62] Based on the foregoing, the action is dismissed pursuant to Rule 14(4)(a) on the ground that the pleading does not allege facts that, if true, would establish that the Supreme Court of Yukon has jurisdiction in this matter. As noted at the outset, I make no findings on the merits of Ms. Kornelsen's complaint. Given the YEU is taking no position on limitations if she were to bring a complaint to the Yukon Board now, based in part on this decision, Ms. Kornelsen is not without a potential remedy for her complaint.

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DUNCAN J.