COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pecquery v. Gabriel,*
2025 BCCA 194

Date: 20250612
Dockets: CA50034; CA50036

Docket: CA50034

Between:

David Pecquery

Appellant
(Defendant)

And

Andras Gabriel

Respondent
(Plaintiff)

And

Surerus Pipeline Inc., Canadian Iron, Steel and Industrial Workers' Union Local #1

Respondents
(Defendants)

- and -

Docket: CA50036

Between:

Surerus Pipeline Inc.

Appellant
(Defendant)

And

Andras Gabriel

Respondent
(Plaintiff)

And

Canadian Iron, Steel and Industrial Workers' Union Local #1 and David Pecquery

Respondents
(Defendants)

2025 BCCA 194 (CanLII)

Before:	The Honourable Mr. Justice Willcock The Honourable Madam Justice Fenlon The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia, dated June 28, 2024 (*Gabriel v. Surerus Pipeline Inc.*, 2024 BCSC 1676, Vancouver Docket S235967).

Counsel for David Pecquery:	D.S. Penner M. Lusk
Counsel for Surerus Pipeline Inc.:	L. Stansfield
Counsel for Andras Gabriel:	S.W. Tevlin R. Sissons, Articled Student
Place and Date of Hearing:	Vancouver, British Columbia April 1, 2025
Place and Date of Judgment:	Vancouver, British Columbia June 12, 2025

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Justice Edelmann

2025 BCCA 194 (CanLII)

2025 BCCA 194 (CanLII)

Summary:

This appeal arises from two jurisdictional challenges to an action relating to an alleged assault that occurred at the respondent's workplace. The appellants sought to have the claim dismissed on the basis that the Court's jurisdiction was ousted by operation of a collective agreement which refers labour disputes to arbitration or by the exclusive jurisdiction of the Worker's Compensation Board ("WCB"). The chambers judge dismissed both applications, finding that (1) it was unclear whether the respondent was a member of the bargaining unit bound by the collective agreement and (2) she had no jurisdiction to determine whether the claim fell within the jurisdiction of the WCB as that question could only be decided by the Workers' Compensation Appeal Tribunal ("WCAT") according to the statutory mechanism set out in s. 311 of the Workers Compensation Act. She also refused to stay the action pending a s. 311 determination. The appellants challenge the judge's conclusions on both applications and the refusal to grant a stay.

Held: Appeal allowed in part. The chambers judge erred in her conclusion with respect to the collective agreement by misinterpreting the pleadings and the evidence before her. Taken as a whole, the record established that the respondent was a member of the bargaining unit to which the collective agreement applied and the dispute as pleaded appears to fall within the scope of the agreement. The respondent's action against his employer ought to have been dismissed on this basis. The chambers judge did not err in refusing to strike the claim based on the WCB's jurisdiction. The nature of the claim, brought against multiple parties and founded upon an alleged assault and related conspiracy, is such that the jurisdictional question is best determined by the WCAT. However, the judge did err in refusing to grant a stay pending the WCAT's decision.

Table of Contents

	Paragraph Range
INTRODUCTION	[1] - [13]
The Pleadings	[2] - [6]
Applications to dismiss or stay the claims	[7] - [13]
JUDGMENT IN CHAMBERS	[14] - [33]
Applicability of the collective agreement	[14] - [15]
Section 127 of the Act	[16]
Stay of proceedings	[24] - [33]
THE SURERUS APPLICATION	[24] - [50]
Submissions	[24] - [33]
Discussion and analysis	[34] - [50]
THE PECQUERY APPLICATION TO DISMISS THE CLAIM	[51] - [63]
Submissions	[51] - [59]
Discussion and analysis	[60] - [63]
THE PECQUERY APPLICATION FOR A STAY	[64] - [75]
Submissions	[64] - [68]
Discussion and analysis	[69] - [75]
CONCLUSION AND ORDER	[76] - [81]

2025 BCCA 194 (CanLII)

2025 BCCA 194 (CanLII)

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] This is an appeal from a chambers judge's dismissal of applications to dismiss or stay a civil claim. The appellant, Surerus Pipeline Inc. ("Surerus"), says the respondent's claims are all work-related and the judge erred in failing to find the respondent was bound to submit them to arbitration pursuant to a collective agreement. In the alternative, the appellants, Surerus and David Pecquery say the claims are barred by the *Workers Compensation Act*, R.S.B.C. 2019, c. 1 [*Act*] and must be considered by the Workers Compensation Board ("WCB"), which has exclusive jurisdiction to determine whether the claims are barred by the *Act* and to afford relief, if any is warranted.

The Pleadings

[2] In August 2023, the respondent Andras Gabriel commenced an action against Surerus, Canadian Iron, Steel and Industrial Workers Union Local #1 (the "Union") and David Pecquery for damages arising from an alleged assault at Mr. Gabriel's place of employment in July 2021.

[3] He alleges Mr. Pecquery threatened him and caused him to fear for his safety. He claims Surerus is vicariously liable for the acts of Mr. Pecquery, in its capacity as his employer or principal, or, in the alternative, is liable in negligence for failing to "properly supervise or manage" Mr. Pecquery. He claims the Union is vicariously liable for the acts of Mr. Pecquery as a member of the Union or, in the alternative, is liable in negligence for failing to "properly supervise or manage" the acts of a union member.

[4] Mr. Gabriel alleges he was wrongfully dismissed by Surerus on August 28, 2021. He alleges his dismissal was a consequence of his allegation of assault and effected in a high-handed and malicious manner.

[5] He brings a predominant purpose conspiracy claim against all three defendants, alleging they conspired with the sole or predominant intention of injuring him or causing him loss by wrongfully dismissing him.

[6] Finally, he brings a public misfeasance claim against the Union, founded upon an allegation that the Union was authorized by statute to make decisions on behalf of and related to him and conspired to wrongfully dismiss him in retaliation for his reporting of the assault.

2025 BCCA 194 (CanLII)

Applications to dismiss or stay the claims

[7] On June 28, 2024, applications brought by the appellants in these two related appeals were dismissed for reasons indexed at 2024 BCSC 1676:

a) An application by Surerus for an order pursuant to R. 21-8(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 staying or dismissing the respondent's claim on the ground that the court lacks jurisdiction;

b) An application by Mr. Pecquery for an order that the notice of civil claim be struck without leave to amend pursuant to R. 9-5 of the *Supreme Court Civil Rules*, also based on lack of jurisdiction; and

c) In the alternative, an application by Mr. Pecquery for an interim stay of proceedings pending a determination by the Workers' Compensation Appeal Tribunal ("WCAT") pursuant to s. 311 of the *Act*.

[8] The Union received late notice of the civil claim and did not appear on the applications.

[9] The first objection to the jurisdiction of the Court was founded upon Surerus' assertion that the claims for wrongful dismissal, conspiracy, and negligence fall within the exclusive jurisdiction of an arbitrator, pursuant to the grievance procedure in a collective agreement.

[10] A collective agreement dated June 6, 2017 between Surerus and the Union contained the following provisions:

> 1.01 The purpose of this Agreement is to establish and maintain an orderly collective bargaining relationship between the Company and its employees, to set forth all agreements concerning rates of pay, hours of work and working conditions to be observed by the parties hereto, and to provide an amicable method of settling any differences that may arise in the interpretation, application, administration or alleged violation of the Agreement.
>
> …
>
> 2.01 The Company recognizes the Union as the sole bargaining agent for all bargaining unit employees, including general foremen but excluding superintendents of the Company working in British Columbia.
>
> 2.02 Employee or employees wherever used in the Agreement shall mean respectively an employee or employees in the bargaining unit described in Article 2.01.
>
> …
>
> 7.01 Any differences or disputes between the Company and the Union, or between the Company and an employee or employees, relating to the interpretation, application, administration or alleged violation of this Agreement, including any question as to whether or not a matter is arbitrable, that have not been satisfactorily settled pursuant to the grievance procedure … shall upon the written request of either party … be submitted to an Arbitrator. The Arbitrator for this agreement shall be mutually agreed upon.
>
> The Arbitrator shall hear and determine the difference or allegation and shall issue a decision in writing. Such decision shall be final and binding upon the parties and upon any employee affected by it. The Company, the Union and the employees covered by this Agreement shall do or refrain from doing anything required of them by the decision of the Arbitrator. …
>
> [Emphasis added.]

[11] The second jurisdictional objection was founded upon Mr. Pecquery's assertion that certain of the claims fall within the exclusive jurisdiction of the WCB to hear and determine claims in respect of personal injuries arising in the course of employment, pursuant to s. 127 of the *Act*, which provides:

> 127 (1) Subject to subsection (2),
>
> (a) the compensation provisions are in place of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied,

2025 BCCA 194 (CanLII)

> to which a worker or a dependant or family member of the worker is or may be entitled against
>
> (i) the employer of the worker,
> (ii) an employer within the scope of the compensation provisions, or
> (iii) any other worker,
>
> in respect of any personal injury, disablement or death of the worker arising out of and in the course of employment, and
>
> (b) no action lies in respect of such an injury, disablement or death.
>
> (2) Subsection (1) applies only if the action or conduct of
>
> (a) the employer or the employer's servant or agent, or
>
> (b) the other worker,
>
> that caused the breach of duty of care arose out of and in the course of employment within the scope of the compensation provisions.
>
> [Emphasis added.]

[12] The jurisdiction to decide, among other questions, whether Mr. Gabriel is a "worker", Surerus is an "employer", Mr. Pecquery is an "employee" and the Union is an "employer" or "employee" as defined in the *Act,* and whether the alleged wrongs arose out of and in the course of employment as defined in the *Act* is vested exclusively in the WCB, by virtue of s. 122:

> 122 (1) Subject to sections 288 and 289 *[appeals to appeal tribunal]*, the Board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising or required to be determined under the compensation provisions, and the action or decision of the Board on them is final and conclusive and is not open to question or review in any court.
>
> (2) Without restricting the generality of subsection (1), the Board has exclusive jurisdiction to inquire into, hear and determine the following:
>
> (a) whether a worker's injury has arisen out of or in the course of an employment within the scope of the compensation provisions;
>
> …
>
> (h) whether a person is a worker, subcontractor, contractor or employer within the meaning of the compensation provisions;
>
> [Emphasis added.]

2025 BCCA 194 (CanLII)

[13] Section 311 of the *Act* permits the court or a party to request the WCAT to make a determination of these matters and to certify that determination to the court:

> 311 (1) If a court action is commenced based on
>
> (a) a personal injury,
>
> …
>
> the court or a party to the action may request the appeal tribunal to make a determination under subsection (2) and to certify that determination to the court.
>
> (2) For the purposes of subsection (1), the appeal tribunal may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act, including determining whether
>
> (a) a person was, at the time the cause of action arose, a worker,
>
> (b) a worker's injury… arose out of, and in the course of, the worker's employment,
>
> [Emphasis added.]

Judgment in chambers

Applicability of the collective agreement

[14] The chambers judge first dealt with the obstacle to the claims posed by the collective agreement. She held:

a) Mr. Gabriel was a member of the Union.

b) The collective agreement does not make members of the Union subject to the agreement; it makes members of *the bargaining unit* subject to the agreement.

c) It does not define "bargaining unit employees".

d) The evidence does not support the conclusion that "union member" and "member of the bargaining unit" are one and the same.

e) "Schedule A" to the collective agreement lists categories of employment and hourly or daily wage rates. It does not expressly include the position of surveyor, the work that Mr. Gabriel was doing at the relevant time.

2025 BCCA 194 (CanLII)

f) An affiant, Connie Chilcott deposed: "Over the years, there have been few Surveyors hired directly by Surerus, and when they were hired directly by Surerus, they were classified as either 'Tradesmen' or 'Labourer' within the context of the Collective Agreement".

g) To the extent Ms. Chilcott's evidence is relevant to delineating the bargaining unit, it amounts only to a statement that Surerus was unilaterally designating certain employees to be members of the bargaining unit.

h) The bargaining unit is usually described in more detail when it is certified by the Labour Relations Board.

i) Surerus did not provide evidence defining the bargaining unit, such as the certification by the Labour Relations Board.

j) An affiant, Jason McElligott, deposed that Mr. Gabriel was an employee of Surerus, that he was a member of the Union and was subject to the terms of the collective agreement between the Union and Surerus. He does not say why the fact Mr. Gabriel was an employee and a member of the Union should lead to the conclusion that he was subject to the collective agreement.

k) Surerus relies on a June 3, 2021 letter to Mr. Gabriel headed "Offer of Temporary Employment-Coastal Gas link Project (1922)-Union Position". That letter does not refer to the collective agreement. The reference to a "Union Position", standing "in rather conspicuous isolation", muddies rather than clarifies this issue: at para. 39.

[15] The judge concluded the evidence was "not cogent enough" (at para. 39) to permit her to conclude Mr. Gabriel fell within the collective agreement. She was therefore of the view that there was an arguable case for jurisdiction.

2025 BCCA 194 (CanLII)

2025 BCCA 194 (CanLII)

Section 127 of the *Act*

[16] The judge was of the view that s. 127 acts as a statutory bar if a s. 311 determination has been made in a way that engages the statutory bar.

[17] She dismissed Mr. Pecquery's submission that *Nagra v. Coast Mountain Bus Company (TransLink)*, 2023 BCSC 2312; *Chestacow v. Mount St. Mary Hospital of Marie Esther Society*, 2024 BCSC 783; and *Deol v. Dreyer Davison LLP*, 2020 BCSC 771, stand for the proposition that where it is plain and obvious that the claim is barred by s. 127, the court can strike the claim without a s. 311 certification by the WCAT. She did so because she was of the opinion that a determination that it is plain and obvious that a claim is barred by s. 127 of the *Act* can only be made if there is a s. 311 determination, something which the court has no jurisdiction to do. Such a determination is not a matter of looking at the pleadings and accepting them as true; it is, rather, a complicated determination involving facts that may or may not be pleaded in a civil claim.

[18] In any event, she would not have made such a determination even if it were open to her to do so because it was not clear to her whether Mr. Gabriel was a worker under the workers' compensation scheme or whether the alleged assault arose in and out of the course of Mr. Gabriel's employment "as that phrase has been interpreted by the only body that has jurisdiction to interpret it, the WCAT": at para. 57.

Stay of proceedings

[19] Finally, the chambers judge dismissed Mr. Pecquery's application for a stay of proceedings sought in order to permit him to obtain a s. 311 certification from the WCAT.

[20] The chambers judge addressed this application using the three-part test described in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117, which is applicable where parties seek interlocutory injunctions or stays: (1) is there a serious issue to be tried; (2) will the applicant

suffer irreparable harm if the relief is refused; and (3) does the balance of convenience favour the granting of the order sought.

[21] The first question was addressed by asking whether Mr. Pecquery had met the threshold of establishing a serious question to be tried — whether s. 127 of the *Act* was a bar to the claim — before a s. 311 certification. The judge held:

> [62] Without such a certification, the claim does not meet the threshold of a serious question to be tried. It is a fairly elementary step to take. Given that no party has taken it, and even though it is raised in the pleadings, in the circumstances, Mr. Pecquery falls short of the threshold for the first stage of *RJR-MacDonald*.

[22] If she was wrong in that regard, she would not, in any event, have granted a stay because she did not consider the balance of convenience to favour a stay. Without any steps taken toward a s. 311 certification, she considered the application to be for a stay that would indefinitely preclude Mr. Gabriel from proceeding with his claim. That would amount to irreparable harm to Mr. Gabriel.

[23] The chambers judge was of the opinion that there was no prejudice to the defendant because no steps were "looming" in the case: at para. 66. Trial dates had not been set. Discoveries had not been held.

The Surerus application

Submissions

[24] Surerus contends the judge erred in the following respects.

[25] It says the judge attributed arguments to Mr. Gabriel that were neither pleaded nor asserted before the hearing of the Surerus application. While this is said to amount to an error of law (*Ogden v. Canadian Imperial Bank of Commerce*, 2015 BCCA 175 at paras. 8–12) the appellant says the result of doing so was procedural unfairness. It says it was prejudiced because it was unable to adduce evidence with respect to Mr. Gabriel's membership in the bargaining unit.

[26] Notwithstanding that complaint about process, Surerus says there was sufficient evidence of Mr. Gabriel's membership in a bargaining unit. Relying on

2025 BCCA 194 (CanLII)

2025 BCCA 194 (CanLII)

JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd., 2014 BCSC 715, and cases cited therein, Surerus says the judge should have acknowledged that it had tendered evidence challenging Mr. Gabriel's jurisdictional facts: specifically, Mr. McElligott's assertion that Mr. Gabriel was subject to the terms and conditions of the collective agreement. Consequently, the judge should have required Mr. Gabriel to adduce evidence to satisfy the court that there was an arguable case that he did not fall within the collective agreement. Rather than doing so, she explicitly held, at para. 27, that she "[did] not regard it as a failing in Mr. Gabriel's response to this application that he has not led evidence on the issue".

[27] At the hearing of the application the chambers judge expressed the view to counsel that an evidentiary burden rested upon the applicant to show there was "no arguable case" that the court had jurisdiction. In response, counsel for Surerus pointed to the evidence of Mr. McElligott that at all material times, the plaintiff and Mr. Pecquery were members of the Union and "were subject to the terms of a collective agreement between the Union and Surerus". This, counsel submitted, was evidence that, by implication, he was part of the bargaining unit. The judge regarded that as a "bare statement" that did not address the evidentiary "cornerstone" upon which the argument to oust the court's jurisdiction was built.

[28] In an exchange with counsel, the judge indicated she understood Mr. Gabriel's position to be that he was not a member of the bargaining unit but that she might be mistaken in that regard. In response, counsel indicated that Mr. Gabriel's submission was that the collective agreement was silent on how to resolve termination disputes and that he did not expressly say anywhere that he was not a member of a bargaining unit.

[29] Mr. Gabriel did highlight the fact that his position as surveyor was not listed in the schedule of wage rates appended to the collective agreement as Schedule A. The judge noted in her reasons for judgment, apparently referring to that observation on the part of Mr. Gabriel:

> [39] … The evidence to which Mr. Gabriel points raises an arguable question as to whether he is covered by the collective agreement that

> Surerus relies on for its argument that the court does not have jurisdiction. Surerus does not point to evidence that allows the Court to conclude that that arguable issue is not truly arguable but rather should be found in its favour.

[30] Surerus contends that placing weight upon the exclusion of surveyors from the listed wage rates is inconsistent with the judge's own statement, at para. 33, that the collective agreement does not say Schedule A is a description of members of the bargaining unit. The company says the absence of a position from a list that does not describe the bargaining unit cannot reasonably be considered evidence that such position is not in the bargaining unit. However, in weighing this argument we must bear in mind that Surerus' counsel herself argued that the company had considered surveyors to be included in Schedule A as "tradesmen" or "labourers" and, in the words of counsel: "those employees who fall within those categories fall within the collective agreement by implication".

[31] Further, Surerus makes an argument it did not expressly advance before the chambers judge, one it says ought to have been considered in any event because it arises from the pleadings and is an answer to the concerns raised by the chambers judge herself with respect to the applicability of the collective agreement. Under the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [*Code*], all collective agreements in British Columbia must contain clauses on dismissal and grievance procedures. If there are no such clauses in a collective agreement, the *Code* contains dismissal and grievance language that is deemed to be incorporated into the collective agreement. Mr. Gabriel did not dispute that he was a member of the Union during his employment with Surerus, and his pleadings assert that he was subject to a collective agreement. Accordingly, even if Mr. Gabriel was not subject to the June 6, 2017 collective agreement between Surerus and the Union, he was subject to a collective agreement, and by operation of s. 84 of the *Code*, the court's jurisdiction was ousted. The relevant provisions read as follows:

> 84 (2) Every collective agreement <u>must contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable</u>.

2025 BCCA 194 (CanLII)

> (3) If a collective agreement does not contain a provision referred to in subsections (1) and (2), the collective agreement is deemed to contain those of the following provisions it does not contain:
>
> > (a) the employer must not dismiss or discipline an employee bound by this agreement except for just and reasonable cause;
> >
> > (b) if a difference arises between the parties relating to the dismissal or discipline of an employee, or to the interpretation, application, operation or alleged violation of this agreement, including a question as to whether a matter is arbitrable, either of the parties, without stoppage of work, may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference to arbitration, and the parties must agree on a single arbitrator, the arbitrator must hear and determine the difference and issue a decision, which is final and binding on the parties and any person affected by it.
>
> [Emphasis added.]

2025 BCCA 194 (CanLII)

[32] It is noteworthy that the term implied by the statute in s. 84(3)(b) is substantially the same as that in article 7.01 of the collective agreement between Surerus and the Union.

[33] Finally, Surerus contends the judge failed to employ the analytic approach described in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, 1995 CanLII 108 (the *Weber* analysis) by failing to define the substance of the dispute and consider whether it fell within the ambit of the collective agreement.

Discussion and analysis

[34] Rule 21-8 provides that where, as here, a jurisdictional response has been filed by a respondent to a civil claim:

> (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,
>
> > ...
> >
> > (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, …

[35] For reasons set out below, I am of the view that the judge erred in concluding that it had not been established that the appellant was governed by the collective

agreement, declining to engage in a *Weber* analysis and dismissing Surerus' application to dismiss the claim.

[36] Surerus says there is no question that the essential character of the dispute falls within the ambit of the agreement. The respondent does not expressly take issue with that assertion. There are three claims against Surerus in the notice of civil claim:

a) Surerus is vicariously liable for the acts of its employee Mr. Pecquery and liable for any damages resulting from Mr. Pecquery's assaults of the appellant or, in the alternative, was itself negligent in failing to properly supervise Mr. Pecquery;

b) Surerus wrongfully dismissed the appellant without cause and without notice on August 28, 2021; and

c) Surerus, the Union and Mr. Pecquery conspired wrongfully and with the sole or predominant intention of injuring the plaintiff and/or causing him loss by wrongfully dismissing him.

[37] Surerus says courts have been found to lack jurisdiction in cases of wrongful dismissal, bad faith on behalf of the union, conspiracy, constructive dismissal, negligence, and harassment by co-workers. It says it is clear that the essential character of the appellants' claims are workplace grievances and/or employment disputes that fall within the ambit of the Collective Agreement. There is support for this proposition in *Weber*:

> 52 … 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.
>
> 53 Because the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator. However, a review of decisions over the past few years reveals the following claims among those over which the courts have been found to lack jurisdiction: wrongful dismissal; bad faith on the part of the union; conspiracy

2025 BCCA 194 (CanLII)

> and constructive dismissal; and damage to reputation (*Bartello v. Canada Post Corp.* (1987), 1987 CanLII 177 (ON SC), 46 D.L.R. (4th) 129 (Ont. H.C.); *Bourne v. Otis Elevator Co.* (1984), 45 O.R. (2d) 321 (H.C.); *Butt v. United Steelworkers of America* (1993), 1993 CanLII 3352 (NL SC), 106 Nfld. & P.E.I.R. 181 (Nfld. T.D.); *Forster v. Canadian Airlines International Ltd.* (1993), 1993 CanLII 1670 (BC SC), 3 C.C.E.L. (2d) 272 (B.C.S.C.); *Bell Canada v. Foisy* (1989), 1989 CanLII 452 (QC CA), 26 C.C.E.L. 234 (Que. C.A.); *Ne-Nsoko Ndungidi v. Centre Hospitalier Douglas*, 1992 CanLII 4104 (QC CS), [1993] R.J.Q. 536).
>
> 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.*
>
> [Emphasis added.]

[38] In my opinion, the claims made against Surerus expressly arise out of the collective agreement. The negligence claim is founded upon Surerus' obligations as an employer. The wrongful dismissal claim is founded upon Surerus' contractual obligations, also arising out of the collective agreement. The conspiracy claim is founded upon an alleged agreement to cause injury by breaching Surerus' obligations to the respondent as its employee. It is evident, in my view, that the arbitrator is empowered to afford a remedy to the respondent in relation to such claims.

[39] As I have noted, the dismissal of Surerus' application did not hinge upon the characterization of the dispute but, rather, whether the respondent was subject to the collective agreement. In relation to that question, in my opinion, the chambers judge erred in law in failing to give weight to the respondent's pleadings, which, when read as a whole, constituted an assertion that a collective agreement governed the terms of his employment. The unchallenged evidence of the Surerus employees with respect to the applicability of the collective agreement before the court ought to have been weighed in light of that assertion.

[40] Mr. Gabriel's claim, as pleaded, included the following allegations:

2025 BCCA 194 (CanLII)

a) The Union was certified to represent certain employees of Surerus;

b) Mr. Gabriel was employed by Surerus;

c) He was a member of the Union; and

d) The Union was authorized by statute to make decisions on behalf of and related to Mr. Gabriel.

2025 BCCA 194 (CanLII)

[41] Collectively these amount to an assertion that Mr. Gabriel was a member of a bargaining unit for which the Union was certified as the bargaining agent. The scheme of the *Code* calls for a representation vote to determine whether the employees in an appropriate bargaining unit wish to have a trade union represent them as their bargaining agent. Certification by the Labour Relations Board is the means by which the Union is "authorized by statute" to make decisions by and on behalf of Mr. Gabriel. By asserting the Union's statutory authorization to make decisions on his behalf, Mr. Gabriel asserted his membership in a bargaining unit.

[42] It is not necessary in the circumstances to engage in an inquiry into the identity of the unit. It was not put in issue and there is no basis in the evidence to suggest the Union represented another Surerus bargaining unit. Any question with respect to the identity of the bargaining unit or the applicable collective agreement was answered by the affidavits of Mr. McElligott (who, it will be recalled, deposed that the plaintiff was subject to the terms of a collective agreement between the Union and Surerus) and Ms. Chilcott (who deposed that surveyors were classified as tradesmen or labourers in the context of the collective agreement). In my view, that evidence was not contradicted or impeached, but rather confirmed by Mr. Gabriel's assertion that the Union was statutorily authorized to make decisions on his behalf.

[43] In light of the pleadings and the evidence adduced by the appellant Surerus, I am respectfully of the view that the judge erred in concluding (at para. 27) that it was not "a failing in Mr. Gabriel's response" that he did not lead evidence with respect to his membership in the bargaining unit. His response to the jurisdictional challenge was inadequate.

[44] I agree with the appellant's submission that the absence of a reference to surveyors in the list of wage rates was immaterial. The chambers judge to some extent appears to have been of the same mind when she noted that there is no provision in the collective agreement suggesting that only those occupying positions described on Schedule A are members of the bargaining unit.

[45] I would not accede to the respondent's submission that Mr. Gabriel expressly pleaded that his termination was not governed by the collective agreement, by pleading that the agreement between the Union and Surerus "did not govern the termination of the plaintiff's employment with Surerus". That pleading, in my view, suggests that the collective agreement that governed his employment was silent on a particular question.

[46] The terms of Mr. Gabriel's employment were governed by the collective agreement. It is arguable that the essential character of the dispute described in the pleadings arises from the interpretation, application or alleged violation of a collective agreement, whether expressly or by inference, in which case the dispute falls within the exclusive jurisdiction of the grievance and arbitration procedure set out in the collective agreement.

[47] This claim appears to be of the nature of the claims described by Justice Saunders in *Ferreira v. Richmond (City)*, 2007 BCCA 131:

> [83] That this is essentially an issue of the application of the collective agreement is apparent from the pleadings. Mr. Ferreira framed the action as one for negligent supervision, breach of fiduciary duty and breach of contract. The characterization of the complaint as one of negligent supervision directs the enquiry to management's exercise of its rights in response to his communications. The same pleading also directs the enquiry to management's obligation to foster a safe work environment, as well as the issues under the *Human Rights Code* ... The allegation of breach of fiduciary duty, less obviously connected to the collective agreement, again focuses upon management's obligation in response to his complaint to the City concerning the behaviour of his co-workers. As such it is a novel characterization of what is essentially an employment based dispute engaging the terms of employment. Last, the allegation of breach of contract engages the collective agreement because the terms and conditions of Mr. Ferreira's employment contract are set out in the collective agreement. Just as the certificate of bargaining authority granted in favour of the Union

2025 BCCA 194 (CanLII)

> disentitles the City from negotiating individual terms of employment with Mr. Ferreira, so too the role of the Union prevents Mr. Ferreira from suing for breach of a term of his employment contract.

[48] In *Masjoody v. Trotignon*, 2022 BCCA 135, this Court similarly held that allegations of sexual harassment, defamation, conspiracy and wrongful termination fell within the purview of a collective agreement and that an arbitrator had the ability to grant an appropriate remedy under the grievance process because the essential character of the claims advanced, as here, arose from the interpretation, application, administration or violation of the collective agreement.

[49] In my opinion, the evidence unequivocally supported the conclusion that the collective agreement governed the terms of Mr. Gabriel's employment and the dispute described in the pleadings appears to fall wholly within the agreement.

[50] The dismissal of the jurisdictional challenge was affected by what I consider to be the judge's misinterpretation of the pleadings and the evidence. The order sought by Surerus ought to have been granted and the respondent's action against Surerus ought to have been dismissed pursuant to Rule 21-8.

The Pecquery application to dismiss the claim

Submissions

[51] At the hearing of his application for a dismissal founded upon the jurisdictional question, counsel for Mr. Pecquery adopted Surerus' arguments with respect to the ousting of jurisdiction by the collective agreement and the *Code*. He suggested the Pecquery appeal is moot if that argument succeeds.

[52] Principally, counsel for Mr. Pecquery submits the respondent's claim is barred by the *Act*. He says the chambers judge was required to assume the pleaded facts were true, namely, that the alleged assault occurred at the worksite, Mr. Gabriel was an employee of Surerus, and the alleged perpetrator was a co-worker. That being the case, he contends, the claim as pleaded unquestionably falls within the exclusive jurisdiction of the WCB and the judge erred in law when she declined to strike the claim against Mr. Pecquery.

2025 BCCA 194 (CanLII)

[53] In support of that proposition, counsel for Mr. Pecquery relied upon *Chestacow* and *Deol*.

[54] In *Chestacow,* there had been no s. 311 determination. Justice Morley nevertheless dismissed the claim. He held:

> [29] When determining whether a set of material facts set out in a notice of civil claim are true would plainly and obviously be within the exclusive jurisdiction of an administrator, then it is appropriate to strike the claim and dismiss the action under Rule 9-5(1)(a), which authorizes a court to strike out a pleading if it discloses no reasonable claim or defence. That is because, even if the facts disclose a dispute, they do not disclose a reasonable claim: *Masjoody v. Trotignon*, 2022 BCCA 135.
>
> [30] As I have already mentioned, a civil action cannot be brought in respect of injury or disablement arising out of and in the course of employment. Any dispute about an allegation of such injury or disablement must go to WorkSafe and then the WCAT. The Court's role is restricted to judicial review of a WCAT decision. Similarly, if a dispute is about the terms and conditions of employment in a unionized workplace or about representation given by a union, then it is under the exclusive jurisdiction of a labour arbitrator or the Labour Relations Board, and the courts have no power to entertain a civil action in respect of that dispute: Weber v. Ontario Hydro, [1995] 2 S.C.R. 929, CanLII 108 (SCC), at para. 50; Labour Relations Code, ss. 12, 13, 136(1), 137(1).

[55] However, as the respondent points out, the plaintiff in *Chestacow* pleaded that she had made various injury claims to the WCB, some of which were appealed to the WCAT and pending judicial review at the time of the hearing. Therefore, there was an opinion from the WCAT on jurisdiction with respect to some of the claims in the pleadings.

[56] In *Deol*, an application under s. 257 (the predecessor to s. 311) for a determination that the alleged sexual harassment arose out of and in the course of the plaintiff's employment was pending at the time of the hearing. Justice Marzari held:

> [89] I agree with the defendants that insofar as the plaintiff seeks to claim damages for personal injury, comparable to a claim in tort, arising out of and in the course of her employment, these claims would not be within the court's jurisdiction at first instance and must either be struck <u>or referred to WCAT for determination on its jurisdiction.</u>
>
> [Emphasis added.]

2025 BCCA 194 (CanLII)

[57] Not having addressed the possibility of a stay, the judge struck one paragraph of the notice of civil claim, holding that the specific plea in question clearly identified a personal injury in the workplace:

> [105] … I find that para. 21 is worded so broadly that it pleads a claim in tort and personal injury rather than in contract. The implication of the pleading that Ms. Deol "suffered and continues to suffer" as a result of the "foregoing" is that Ms. Deol has ongoing personal injuries arising from the material facts pled, including not only the manner of dismissal but the defined "misconduct", i.e. the harassment itself. I find that this pleading strays too far into a claim for personal injuries directly arising from the conduct itself, and not the manner of dismissal. In addition, to the extent that para. 21 is intended to be limited to losses arising from the manner of dismissal, it adds nothing to para. 20 of the NOCC. Accordingly, para. 21 must be struck from Ms. Deol's NOCC.

2025 BCCA 194 (CanLII)

[58] In the case at bar, the chambers judge was of the view that only the WCAT could find it to be plain and obvious that that the WCB had exclusive jurisdiction.

[59] She rejected the argument that where the pleadings bring the claim within the Workers' Compensation regime and no findings of fact are required, it is in the Court's power to dismiss a claim as barred by s. 127 without a s. 311 determination. The appellant, Mr. Pecquery, says she ought to have followed the precedents of *Chestacow* and *Deol*.

Discussion and analysis

[60] There is good authority for the position taken by the chambers judge. In *Gourlay v. Crystal Mountain Resorts Ltd.*, 2020 BCCA 191, Justice Frankel, referring to *The Dominion Canners Ltd. v. Costanza*, [1923] S.C.R. 46, 1922 CanLII 3, wrote:

> [49] … After the appeal was argued and judgment reserved, the Court called for further submissions on the question of whether the courts below had jurisdiction to decide whether *The Workmen's Compensation Act* barred the action. The majority (4:2) held that neither of those courts had the power to decide that question because it was within the Board's exclusive jurisdiction: at 61. In speaking for the majority, Justice Anglin … stated that in any case where the bar might apply, a trial judge should stay proceedings until that issue is decided by the Board (at 62–63):
>
> > If the defendant does not plead the statutory bar but facts stated in the pleading or adduced in evidence at the trial indicate that the case might fall within s. 3(1) of the statute and that ss. 15(1) and 60(1) might therefore apply, the court would, I think, be if not obliged certainly free *proprio motu*, to take cognizance of those provisions and

> stay further proceedings in the action until the question whether the right to maintain it had been taken away by the Act should be determined by the only competent tribunal. [citations omitted]. Again the defendant would have no interest to have such stay removed. It was probably to meet these difficulties that [s.] 2 was added to s. 15 in 1915 enabling "any party to an action" to apply for the board's adjudication upon the question whether the action is one the right to maintain which is taken away by the statute.
>
> [Emphasis added.]

2025 BCCA 194 (CanLII)

[61] In my opinion, it is unnecessary in this case to determine whether, and if so when, a judge in chambers may dismiss an action that, as pleaded, clearly falls within the exclusive jurisdiction of the WCB. That is because the respondent brings an action against multiple parties and advances claims founded upon an assault in the workplace, a dismissal said to be retaliation for a complaint with respect to the assault and a conspiracy. As the respondent points out, the WCB's adjudication policy expressly recognizes the particular issues arising out of claims founded upon assaults and the difficulty in circumscribing the WCB's exclusive jurisdiction in such cases.

[62] In short, this is a case that calls out for the WCAT's adjudication upon the question "whether the action is (entirely or partly) one the right to maintain which is taken away by the statute".

[63] For that reason, I would not interfere with the chambers judge's dismissal of Mr. Pecquery's application to have the claim against him struck out.

The Pecquery application for a stay

Submissions

[64] In my view, Mr. Pecquery is correct to say it is appropriate to request a s. 311 determination and to stay proceedings pending that determination where there is clearly an issue with respect to whether a civil action is barred by the *Act*. In *Gourlay*, Frankel J.A., writing for the Court, held:

> [46] It is well established that if there is a question as to whether an action is barred by the provisions of a workers' compensation scheme, then the action should not proceed until the plaintiff's status is determined by the

> compensation authority with exclusive jurisdiction to decide it. The seminal authority for this proposition is *The Dominion Canners Ltd. v. Costanza*, [1923] S.C.R. 46, in which the Court considered the provisions of *The Workmen's Compensation Act*, S.O. 1914, c. 25.

2025 BCCA 194 (CanLII)

[65] The Court cited a passage from the reasons in *Dominion Canners* where Justice Anglin wrote:

> … [I]n my opinion, whenever this question arises as a substantial issue in the course of an action the proper course to take is to stay proceedings in the action until it has been adjudicated upon by the board. [citation omitted]. In view of the provisions of s. 20 [requiring a worker to give notice of an "accident" as soon as practicable and claim compensation within six months] the workman-plaintiff will be well advised in every case where there is any conceivable ground for contending that his claim falls within the Act to seek the determination of the board at the earliest possible date.
>
> [Emphasis added by Frankel J.A.]

[66] Mr. Pecquery says where it is "conceivable" that the WCAT might determine that a plaintiff's action involves a claim for an alleged injury arising out of and in the course of employment and is, at least in part, an action based on a personal injury, that low threshold required for the first branch of the *RJR-MacDonald* test is met: relying on *Garritty v. Richmond Kinsmen Home Support Society*, 2016 BCSC 2204 at paras. 36–38.

[67] With respect to the irreparable harm and balance of convenience analyses, Mr. Pecquery says the judge ought to have considered costs that will likely be incurred for discoveries and pre-trial preparation that may be wasted in the event that the WCAT determines that the claim, or some part of it, falls within the exclusive jurisdiction of the WCB. While potential delays to proceedings are considered to cause harm to the plaintiff, the balance of convenience has still been found to favour an avoidance of the costs that would be wasted: *Garritty* at para. 39; *Hartley v. SNC-Lavalin*, 2022 BCSC 2106 at paras. 34 and 37.

[68] The respondent asserts that the jurisprudence supports the view that a stay should only be granted as a matter of course in order to allow a pending s. 311 application to proceed. He submits the logic behind granting a stay in cases such as

Gourlay is clear (and is in step with *Dominion Canners*), but it is not applicable to the present case.

Discussion and analysis

[69] There were three applications before the chambers judge. The first question, posed in relation to the two applications to dismiss the claim, required her to ask whether the court lacked jurisdiction and, for that reason, was obliged to dismiss the case against Surerus on the one hand or Mr. Pecquery on the other. The application for a stay required her to ask a different question: whether there is a serious question with respect to whether the WCB has exclusive jurisdiction to all or part of the claim against Surerus and Mr. Pecquery.

[70] In my opinion, while a judge's decision to grant or refuse a stay is discretionary and reviewable on a deferential standard, the judge in this case erred in law by misapplying the first prong of the *RJR-Macdonald* test. She seemed to be of the view that the failure to obtain a s. 311 determination precluded the court from making any finding with respect to jurisdiction, such that there could be no arguable case with respect to jurisdiction. The question to be asked was whether there was a real prospect that the WCAT would determine that the dispute described in the pleadings (or part of it) fell within the exclusive jurisdiction of the WCB. In my view, that is unquestionably the case.

[71] There is, no doubt, a serious issue with respect to whether the Court has jurisdiction to hear the case, as it is pleaded. In the circumstances, the only question that ought to have been posed on the application for a stay was whether the balance of convenience favoured the granting of the stay.

[72] In addressing that question, in my view, the chambers judge erred in failing to identify and give weight to the irreparable harm arising from costs thrown away, which is recognized in *Garritty*, *Hartley* and other cases, when she held no prejudice would be suffered by Mr. Pecquery if a stay were refused because no steps were looming in the case and discoveries had not been held. It was precisely to avoid the

2025 BCCA 194 (CanLII)

expense of such steps that a stay was sought. The refusal to grant a stay invited the respondent to take those steps.

[73] In exercising her discretion, the trial judge placed some weight upon the fact no trial date had been set. In my view, that fact weighed in favour of granting a stay. In cases where a date has been set, there is a greater prospect of prejudice to the plaintiff arising from a stay: the potential loss of the trial date. In *Lin and R & J Honeyland Inc. v. Tham*, 2007 BCSC 1862, Justice Ehrcke noted:

> [19] The defendant submits that there should be a stay of proceedings now, so that it does not have to continue to prepare for trial until it receives the WCAT's determination. The effect of granting a stay now, however, would be that the parties would not be ready to start the trial on July 9, 2008. The trial would thus be delayed, even if there were a WCAT ruling in the plaintiff's favour well in advance of the current trial date.

[74] Finally, in my view, the judge erred in finding that a stay would prejudice the respondent by "indefinitely preclud[ing] Mr. Gabriel from proceeding with his claim". That conclusion fails to give effect to the statutory provision (s. 311(1)) that permits the court to request the appeal tribunal to make a determination under s. 311(2) and to certify that determination to the court. The respondent submits it would have been inappropriate for the court to request a s. 311 determination because an order to that effect was not sought and the appellant cited no case where such an order was made on the court's own volition. It is correct to say no such order was sought, however, counsel for Mr. Pecquery drew the judge's attention to the statutory provision for making such an order, and it should have been considered in measuring prejudice and weighing the balance of convenience.

[75] In my view, the judge erred in law in her application of the test for the granting of a stay, the appeal should be allowed and a stay ordered on the terms set out below.

2025 BCCA 194 (CanLII)

2025 BCCA 194 (CanLII)

Conclusion and order

[76] I would allow the appeal from the order dismissing the application by Surerus for an order pursuant to R. 21-8(1) of the *Supreme Court Civil Rules*, dismissing the respondent's claim.

[77] I would dismiss the respondent's claim against Surerus in Action VLC-S-S-235967 on the basis that the Court does not have jurisdiction over Surerus in respect of the claim made against it in the proceeding.

[78] I would dismiss the appeal from the order dismissing the application by Mr. Pecquery, for an order that the notice of civil claim be struck without leave to amend.

[79] I would allow the appeal from the order dismissing the application by Mr. Pecquery for an order for an interim stay of proceedings pending a determination by the WCAT pursuant to s. 311 of the *Act*.

[80] I would stay proceedings between the respondent and Mr. Pecquery, pending a determination by the WCAT pursuant to s. 311 of the *Act* or further order of the Supreme Court of British Columbia.

[81] It is not necessary to make a request of the WCAT pursuant to s. 311(1) of the *Act* because we are advised that the appellant, Mr. Pecquery, applied pursuant

to s. 311 on October 25, 2024. The stay being sought is effectively time-limited by the time it takes the WCAT to make its determination.

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Justice Edelmann"

2025 BCCA 194 (CanLII)