Translation of the judgment of the Court

COURT OF APPEAL

2025 QCCA 1344 (CanLII)

CANADA
PROVINCE OF QUEBEC
MONTREAL SEAT

No.: 500-09-031096-241
(500-06-001039-201)

DATE: October 27, 2025

CORAM: THE HONOURABLE MARK SCHRAGER, J.A.
STÉPHANE SANSFAÇON, J.A.
SOPHIE LAVALLÉE, J.A.

AIR CANADA
APPELLANT – Defendant
v.

CAROLE DAVIES
RESPONDENT – Plaintiff

JUDGMENT

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[1] The appellant, Air Canada, appeals from a judgment rendered on May 29, 2024, by the Superior Court, District of Montreal (the Honourable Silvana Conte), which dismissed its application for a declinatory exception filed against the respondent's originating application instituting a class action.

[2] For the reasons of Lavallée, J.A., with which Sansfaçon, J.A. concurs, **THE COURT**:

[3] **ALLOWS** the appeal in part;

[4] **DECLARES** that only a grievance arbitrator appointed under the collective agreement binding between the parties has jurisdiction to hear the dispute for any class member who was unionized while employed at Air Canada;

[5] **THE WHOLE** without legal costs;

[6] For other reasons, Schrager, J.A. would have dismissed the appeal, with legal costs.

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MARK SCHRAGER, J.A.

STÉPHANE SANSFAÇON, J.A.

SOPHIE LAVALLÉE, J.A.

Mtre Sébastien Richemont
FASKEN MARTINEAU DUMOULIN
For the appellant

Mtre Michael Earl Heller
HELLER & ASSOCIATES
For the respondent

Date of hearing: May 6, 2025

Translation of the judgment of the Court

REASONS OF LAVALLÉE, J.A.

[7] Air Canada appeals from a judgment rendered on May 29, 2024, by the Superior Court, District of Montreal (the Honourable Silvana Conte), which dismissed the declinatory exception *ratione materiae* it raised following a class action the respondent instituted as representative of the class composed of all Air Canada retirees.[1]

[8] In the originating application instituting the class action, the respondent, Carole Davies ("Davies"), alleges that Air Canada failed to fulfill its contractual obligation to grant its retired employees free and reduced- rate transportation plan flight passes (hereinafter referred to as the "Passes" or "FRT Passes").

[9] The trial judge having concluded that the dispute falls under the jurisdiction of the Superior Court, Air Canada appealed, arguing that the dispute, instead, falls under the exclusive jurisdiction of the grievance arbitrator.

[10] For the reasons that follow, and with all due respect, I am of the view that as regards the class members who, prior to their retirement, were unionized employees of Air Canada, the judge could not conclude that the Superior Court has jurisdiction to determine whether the grant of the Passes falls under Air Canada's management rights and, if so, whether such grant was made reasonably and in good faith.

[11] The facts, which are assumed to be true, reveal an Air Canada practice of issuing FRT Passes to its employees, based on seniority, and to its retired employees.

[12] According to the originating application, Air Canada undertook for decades to grant and continue to make available FRT Passes to all employees with at least six months' experience, including those having retired, and to ensure that priority for the use of those Passes would be determined by their length of service within Air Canada. Davies accuses Air Canada of having breached its undertakings with respect to its retired employees by issuing FRT Passes with a higher priority to tens of thousands of its active employees, thereby causing harm to the former.

[13] A significant number of the class action members were represented by a union while they were employed by the appellant and their working conditions were governed by a collective agreement. Air Canada argues that the recourse of the retirees who were unionized falls exclusively under the jurisdiction of the grievance arbitrator, not the Superior Court. Consequently, it submits that the class action could continue only for retirees who were not unionized when they were active Air Canada employees.

[1] *Davies v. Air Canada*, 2024 QCCS 4599 [Judgment under appeal].

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[14] It is not disputed that the granting of Passes to active or retired Air Canada employees is not specifically provided for in a clause of the collective agreement. The fact remains that Air Canada's practice of granting such Passes falls within the scope of its management rights. That said, the monopoly on collective representation by a union "is not limited to the context of the collective agreement but extends to all aspects of employee- employer relations".[2]

[15] The dispute therefore concerns the characterization, scope and potential legal consequences of this practice, including Air Canada's right to unilaterally modify that practice, as it sees fit, in application of its right of control and direction, a right referred to in Article 3 of the collective agreement. This is the essential character of the dispute and, as regards retirees who were formerly unionized employees, that essential character falls inferentially under the collective agreement. Determining whether this management right was exercised reasonably and in good faith falls under the exclusive jurisdiction of the grievance arbitrator by virtue of the principle of the union's monopoly on representation.

[16] On another point, and with all due respect to the contrary opinion, I cannot agree with the argument that if the dispute fell under the collective agreement, retirees having been granted Passes would, pursuant to tax legislation, have been taxed for such a benefit. The occurrence of this possibility in no way depends on whether or not such benefits offered by the employer to its employees are specifically provided for in the collective agreement.

* * *

I. Context

[17] The facts giving rise to the present dispute have already been described and commented on numerous times in the previous decisions rendered in the case at bar by the Superior Court and this Court following the application for authorization to institute the class action filed in 2020.

[18] Nevertheless, it is important to outline their broad strokes, since the outcome of the declinatory exception depends on the essential character of the dispute, which must be defined in light of the factual context of the case.

[19] The respondent worked for Air Canada for over 29 years. She was a unionized employee,[3] like most of the other retired class members.[4]

[20] On January 23, 2020, she sought the authorization to institute a class action on behalf of all retired Air Canada employees. As she reiterated in her originating application

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2 *Bisaillon v. Concordia University*, 2006 SCC 19, para. 28.
3 Application of the Defendant for Declinatory Exception and for the Revision of the Class Definition, January 12, 2024, para. 10.
4 *Id.*, paras. 10-12; Judgment under appeal, paras. 3 and 14.

instituting the class action, she alleged that Air Canada had failed to perform its obligations "flowing from an agreement with each member of the Class to grant them Free and Reduced-Rate Transportation Plan flight passes […] during their employment and then during their retirement".[5]

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[21] In the application for authorization to institute a class action, she submitted that these Passes are one of the benefits offered to Air Canada employees and retirees. They make it possible for them to benefit from free or reduced fare flights on the airline. The respondent specified that all employees with six months' seniority with the company benefit from such Passes, and that this benefit continues after they retire.

[22] Thus, over the years, these Passes have allowed active and retired employees to obtain a vacant seat on a flight operated by Air Canada, the priority under this benefit being determined, in particular, by seniority. For retired employees, these passes carry a C2 priority rating.

[23] The respondent contended that Air Canada entered into a separate and individual contract with each class member, undertaking to grant them such Passes based on seniority and to continue to make such Passes available to them upon retirement. She alleged that the employer also undertook, throughout this period, to ensure that priority in the use of these Passes would be determined by seniority.

[24] The respondent asserted that by relatively recently starting to issue B1 and C1 Passes unilaterally to certain active employees, Air Canada altered the FRT Pass benefits enjoyed until then by retired employees through their C2 Passes. She claimed that the employer issued tens of thousands of Passes to its active employees and that, in so doing, it diminished the usefulness and priority of the Passes of retired employees — i.e., the class members — many of whom opted for early retirement in order to enjoy the benefits of travel.

[25] The respondent argued that this practice of granting Passes gave rise to one or more implied contracts that constitute the source of Air Canada's obligations towards its employees. She submitted that they were justified in expecting this benefit to materialize through Passes with a higher priority position based on seniority, and that this would continue upon retirement.[6] According to the respondent, the new Passes allow active employees with little seniority to travel before long-serving retirees, thereby reducing the value of the latter's Passes. She alleged that, due to the grant of these new Passes, it is virtually impossible for retired employees to travel with their C2 Passes.

[26] She argued that the change in the priority ranking of the Passes is a violation of Air Canada's obligation to act reasonably and in good faith when exercising its management rights, contrary to arts. 6, 7 and 1375 of the *Civil Code of Québec*.

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5 Originating Demand, September 18, 2023, para. 1.
6 *Id.*, para. 16. See also paras. 1, 41, 48 and 65-66.

[27] She asserted that the promises made by Air Canada management to the class members did not arise explicitly or inferentially from the collective agreement, but rather from individual contracts entered into when the class members were hired, or that they constitute unfulfilled promises made by Air Canada, and that this justifies allowing her class action, in which she seeks the payment of damages to the class members.

[28] On July 22, 2021, Davis, J. dismissed the application for authorization to institute this class action.[7]

[29] On November 17, 2022, the Court, in reasons written by Bachand, J.A., allowed the appeal from this judgment and authorized the class action, except as regards the punitive damages claimed. The respondent was appointed as representative of the class comprised of all retired Air Canada employees eligible for FRT Passes:

> [4] **GRANTS** the appellant's application for authorization to institute a class action;
>
> [5] **ASCRIBES** to the appellant the status of representative for the purpose of exercising a class action on behalf of the following class:
>
> > All retired employees of the defendant eligible for free and reduced travel ("FRT") flight passes in retirement.
>
> [6] **IDENTIFIES** the following as the main issues to be dealt with collectively:
>
> - Is the defendant under an obligation to provide class members with FRT passes?
> - If so:
>   - o what are the contents and/or modalities of the defendant's obligation?
>   - o did the defendant breach its obligation by issuing higher-priority (B1 and C1) FRT passes to current employees?
> - Are class members each entitled to the following remedies:
>   - o $5,000 plus taxes per year representing the value of the yearly savings they make while benefitting from FRT passes based on seniority priority;

[7] *Davies v. Air Canada*, 2021 QCCS 3119, reversed in *Davies v. Air Canada*, 2022 QCCA 1551, application for leave to appeal to the Supreme Court dismissed, June 22, 2023, No. 40559 [Authorization Judgment].

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- $5,000 in moral damages for the stress, trouble and inconvenience caused by the defendant's breach of its obligation;

- $1,000 in moral damages caused by being displaced at the last minute at the loading gate;

- $2,000 in moral damages for being displaced at the last minute at the loading gate when returning from a trip and having to deal with last-minute, urgent ground and air transportation arrangements and hotel accommodations;

- mandatory orders directing the defendant to ensure that current employees holding higher-priority passes will cease having priority over retirees when travelling for personal or leisure purposes and/or directing the defendant to immediately issue to each of the class members three B1 and three C1 flight passes per year;

- interest as well as the additional indemnity provided for in article 1619 of the Civil Code of Québec on the abovementioned amounts;

[7] **IDENTIFIES** the following as the main conclusions sought in relation to the aforementioned questions:

- **ALLOW** the class action against the defendant;

- **CONDEMN** the defendant to pay to each class member the following amounts, with interest as well as the additional indemnity provided for in article 1619 of the Civil Code of Québec:

  - $5,000 plus taxes per year representing the value of the yearly savings they make while benefitting from FRT passes based on seniority priority;

  - $5,000 in moral damages for the stress, trouble and inconvenience caused by the defendant's breach of its obligation;

  - $1,000 for moral damages caused by being displaced at the last minute at the loading gate;

  - $2,000 for the moral damages for being displaced at the last minute at the loading gate when returning from a trip and having

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to deal with last-minute, urgent ground and air transportation arrangements and hotel accommodations;

- **ORDER** the collective recovery of all amounts owed to the class members;

- **ORDER** that current employees' FRT passes will henceforth not have priority over those of retirees when employees are travelling for personal or leisure purposes and/or **ORDER** the defendant to immediately issue to each of the class members three B1 and three C1 flight passes per year;

- **THE WHOLE** with costs, including the cost of all exhibits, experts, expertise reports and notices;

[…][8]

[30] In an *obiter*, the Court raised a potential jurisdictional issue:

> [34] In closing, I note that Air Canada has not raised any objection to the Superior Court's subject-matter jurisdiction over the appellant's claims. I further note that, given the Court's 2020 decision in *Regroupement des cols bleus retraités et préretraités de Montréal*, there may be an issue as to whether those claims fall within the exclusive jurisdiction of a grievance arbitrator. However, I believe that this issue is better left to the Superior Court if and when a jurisdictional objection is raised by Air Canada.[9]
>
> [Underlining added; reference omitted]

[31] On September 18, 2023, the respondent filed the originating application instituting the class action.[10]

[32] On January 12, 2024, Air Canada filed an application for a declinatory exception and for the revision of the class defined in the Authorization Judgment.[11] It sought to have the originating application dismissed, arguing that the dispute falls under the exclusive jurisdiction of the grievance arbitrator because it pertains to an abusive exercise of Air Canada's management rights, the latter having unilaterally modified its practice of allocating FRT Passes to its active or retired employees based on seniority. Air Canada posited that only the grievance arbitrator has jurisdiction to decide whether it has the right

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8 Authorization Judgment, paras. 4-7.
9 *Id.*, para. 34, citing *Regroupement des cols bleus retraités et préretraités de Montréal c. Ville de Montréal*, 2020 QCCA 399, paras. 29ff.
10 Originating Demand, *supra*, note 5.
11 Application of the Defendant for Declinatory Exception and for Revision of the Class Definition, *supra*, note 3.

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to unilaterally modify this practice, a practice that ultimately affects active employees' benefits, which subsequently become retirement-related benefits.

[33] Air Canada contended that the essence of the dispute therefore falls within the scope of its management rights set out in Article 3 of the collective agreement negotiated with the Canadian Union of Public Employees (Airline Division), a collective agreement over which the arbitrator has exclusive jurisdiction in the event of a dispute. It therefore sought the dismissal of the originating application instituting the class action.

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[34] On May 17, 2024, Air Canada amended its application for a declinatory exception in order to specify the subsidiary conclusions sought,[12] namely the dismissal of the originating application, both for the representative plaintiff and for any class member who was unionized while employed at Air Canada, and the revision of the definition of the class as follows:

> All retired employees of the defendant that were not unionized and were eligible for free and reduced travel ("FRT") flight passes in retirement.

[35] On May 29, 2024, the trial judge dismissed the application for a declinatory exception, ruling that the Superior Court has jurisdiction to adjudicate the dispute.

II. The trial judgment

[36] The trial judge began by pointing out that the parties did not intend to include the FRT Passes in the collective agreement.

[37] She explained that, indeed, Air Canada had acknowledged that the FRT Passes had not been the subject of collective bargaining and that the granting of FRT Passes as well as their category or number fell within its discretionary power.[13]

[38] The judge cited *Canadian Union of Public Employees v. Air Canada*,[14] in which the Ontario Superior Court of Justice, without any prior debate regarding the jurisdiction of the grievance arbitrator, upheld an arbitration award. The Superior Court of Justice dismissed the appeal, concluding that the arbitrator had been correct in deciding that the free travel passes allocated to the company's pilots were not the subject of any commitment or promise by Air Canada, but rather that such passes were allocated by the employer on a discretionary basis.[15]

[39] In the case at bar, the trial judge was of the view that Air Canada's alleged promises fall outside the scope of the collective agreement, but that they can also fall

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12 Modified Application of the Defendant for Declinatory Exception and for Revision of the Class Definition, May 17, 2024.
13 Judgment under appeal, para. 22.
14 *Id.*, para. 23, citing *Canadian Union of Public Employees v. Air Canada*, 2019 ONSC 4613.
15 Judgment under appeal, para. 24.

under Article 3 of the collective agreement dealing with the reservation of Air Canada's management rights with regard to the control and direction of its employees.[16]

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[40] The judge added that in the Authorization Judgment, this Court recognized that there could be exceptions to the principle of the union's monopoly on representation.[17] Since the issue of the FRT Passes is not expressly or implicitly referred to in the collective agreement,[18] the judge considered that the essence of the dispute concerns (1) FRT Passes arising from individual and distinct contracts; and (2) the abusive exercise by Air Canada of its management rights through the distribution of C1 passes to active employees, to the detriment of the seniority privilege applicable to the FRT Passes of retired employees (C2).[19]

[41] She was therefore of the opinion that the Superior Court has jurisdiction to determine whether Air Canada's exercise of its management rights with respect to the granting of the Passes had the effect of creating parallel individual contracts, or whether this was, instead, the exercise of the general management right set out in Article 3 of the collective agreement and, in the latter case, whether this power was exercised reasonably and in good faith.[20]

III. Grounds of appeal

[42] In support of its appeal, Air Canada raises two grounds:

(1) The judge committed a reviewable error in failing to impose on the respondent the burden of establishing the jurisdiction of the Superior Court and in finding that the respondent had demonstrated, on a *prima facie* basis, the existence of individual contracts outside of the collective agreement and liable to establish the jurisdiction of the Superior Court.

(2) The judge erred in law by disregarding the fundamental principles of labour law, namely the monopoly conferred on unions over collective bargaining, the interpretation of collective agreements, and the applicable case law and test for establishing the exclusive jurisdiction of grievance arbitrators over matters relating to working conditions or to an alleged abusive exercise of management rights.

[43] In its conclusions, Air Canada asks the Court to grant its application for a declinatory exception and dismiss the originating application instituting this class action or, subsidiarily, to dismiss the originating application, both as regards the respondent and

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16 *Id.*, para. 25.
17 *Id.,* para. 26.
18 *Id.*, para. 20.
19 *Id.*, para. 21.
20 *Id.*, paras. 25 and 27.

any class member who was unionized while employed at Air Canada, and to limit the definition of the class to non-unionized retired employees.

IV. Applicable principles

[44] A few remarks are in order before I examine Air Canada's grounds of appeal.

[45] At the risk of repeating myself, I note that the declinatory exception only targets class members who were unionized while they were active employees.

A. Analysis of a declinatory exception ratione materiae

[46] A court of law either has subject-matter jurisdiction or it does not.[21] As a court of original general jurisdiction, the Superior Court can hear any matter that is not assigned exclusively to another court.

[47] Subject to certain constitutional constraints, its inherent jurisdiction can be diminished in favour of another court or tribunal, but only by a clear and express legislative provision. Instituting a class action does not "have the effect of conferring jurisdiction on the Superior Court over a group of cases that would otherwise fall within the subject-matter jurisdiction of another court or tribunal".[22] Jurisdiction is determined in light of the parties, the subject matter of the dispute and the relief sought.

[48] This analysis of a court's jurisdiction, at the stage of a declinatory exception alleging lack of subject-matter jurisdiction, must be made by taking <u>the facts</u> alleged as proven, which requires caution when analyzing the ground of appeal so as not to prematurely terminate a dispute.[23]

[49] The case law, in particular *Weber* and *O'Leary*,[24] has defined the parameters of what we now recognize as the principles governing the jurisdiction of grievance arbitrators.

[50] Thus, it is now accepted that, in order to rule on a declinatory exception *ratione materia*e, the court must not adopt a party's <u>characterization</u> of the claim, which may

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[21] *Digiulian v. Greene (Succession de Digiulian)*, 2023 QCCA 274, para. 18; *Pinard c. Laplante*, 2022 QCCA 1119, para. 16; *Association des intervenants en dépendance du Québec c. Villeneuve*, 2021 QCCA 1763, para. 40, application for leave to appeal to the Supreme Court dismissed, July 7, 2022, No. 40037.

[22] *Bisaillon v. Concordia University*, *supra*, note 2, para. 22. See also *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, para. 107; *Electronic Arts Inc. v. Bourgeois*, 2024 QCCA 284, para. 24; *955 René-Lévesque Est c. Jetté*, 2023 QCCA 918, para. 25.

[23] *MC Commercial inc. c. Collerette*, 2020 QCCA 305, para. 1, application for leave to appeal to the Supreme Court dismissed, December 10, 2020, No. 39148, citing *Parisien c. Hôtel du Lac Tremblant inc.*, 2018 QCCA 2217, paras. 5-6. See also *Conseil de bande de Pessamit c. Rock*, 2024 QCCA 1532, para. 30, application for leave to appeal to the Supreme Court dismissed, September 18, 2025, No. 41654.

[24] *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967.

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provide a "thin pretence"[25] that the claim pertains to a matter over which the court has jurisdiction. Instead, the court must identify "the essential nature of the dispute", based on "a realistic appreciation of the practical result sought by the claimant".[26] To this end, it may be necessary [TRANSLATION] "[t]o also anticipate the most obvious grounds of defence".[27]

[51] In determining whether a dispute falls within an arbitrator's exclusive jurisdiction, the Supreme Court, in *Bisaillon v. Concordia University*,[28] and our Court, in *Regroupement des cols bleus retraités et préretraités de Montréal c. Ville de Montréal*,[29] followed the two-step approach laid down in *Weber v. Ontario Hydro.*[30]

[52] The first step requires examining the relevant legislative provisions, particularly those relating to jurisdiction.

[53] The second step involves examining not the legal characterization of the dispute as presented in the originating application, but rather the context of the dispute, taking the facts alleged as proven. In doing so, care must be taken not to distort the plaintiff's theory of the case:

> 50 The final alternative is to accept that if the difference between the parties arises from the collective agreement, the claimant must proceed by arbitration and the courts have no power to entertain an action in respect of that dispute. There is no overlapping jurisdiction.
>
> 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. <u>Two elements must be considered: the dispute and the ambit of the collective agreement.</u>
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> 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.

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[25] *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, para. 78. See also *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63, para. 36, citing *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, paras. 25-27.

[26] *Canada v. Domtar Inc.*, 2009 FCA 218, para. 28, citing *Canada v. Roitman*, 2006 FCA 266, application for leave to appeal to the Supreme Court dismissed, December 7, 2006, No. 31634.

[27] *Tremblay c. Conseil de la première nation Malécite de Viger*, J.E. 2001-135, 2000 CanLII 11377 (C.A.), para. 19.

[28] *Bisaillon v. Concordia University*, *supra*, note 2.

[29] *Regroupement des cols bleus retraités et préretraités de Montréal c. Ville de Montréal*, *supra*, note 9.

[30] *Weber v. Ontario Hydro*, *supra*, note 24. See also *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, para. 25, citing, in particular, *Weber v. Ontario Hydro*, *supra*, note 24, paras. 43 and 54; *Bisaillon v. Concordia University*, *supra*, note 2, paras. 31-32; *Commission des droits de la personne et des droits de la jeunesse c. Commission scolaire de Montréal*, 2022 QCCA 398, para. 47; *Pinard c. Laplante*, *supra*, note 21, para. 20.

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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.

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 and constructive dismissal; and damage to reputation (*Bartello v. Canada Post Corp.* (1987), 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), 106 Nfld. & P.E.I.R. 181 (Nfld. T.D.); *Forster v. Canadian Airlines International Ltd.* (1993), 3 C.C.E.L. (2d) 272 (B.C.S.C.); *Bell Canada v. Foisy* (1989), 26 C.C.E.L. 234 (Que. C.A.); *Ne-Nsoko Ndungidi v. Centre Hospitalier Douglas*, [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*.[31]

[Underlining added]

[54] The next step, where relevant, consists in determining whether the factual context as identified falls within the ambit of the collective agreement. To do this, it is necessary to determine whether the collective agreement explicitly or *implicitly* applies to the facts in dispute, as the Supreme Court explained in *Regina Police Assn*:

31 *Weber v. Ontario Hydro*, *supra*, note 24.

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> [25] […] Upon determining the essential character of the dispute, the decision-maker must examine the provisions of the collective agreement to determine whether it contemplates such factual situations. It is clear that the collective agreement need not provide for the subject matter of the dispute explicitly. If the essential character of the dispute arises either explicitly, or implicitly, from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide […].[32]
>
> [Underlining added; references omitted]

[55] In other words, in the instant case, the first step in the analysis is to examine the relevant provisions of the *Canada Labour Code*[33] and the collective agreement. At the second stage, the Court must look at the nature of the dispute, by examining the factual context of the case so as to determine whether the legislature intended the dispute, viewed with an eye to its essential character, to fall within the exclusive jurisdiction of an arbitrator. Indeed, as can be seen from our case law, it is not necessary for the collective agreement to explicitly provide for the subject matter of the dispute. The courts have "clearly adopted a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express *or implicit* connection to the collective agreement".[34]

B. Principle of the union's monopoly on representation

[56] As far back as 1959, in *Syndicat Catholique des Employés de Magasins de Québec Inc. v. Paquet Ltée*, the Supreme Court wrote the following, in a passage that has since been cited repeatedly:

> The union is, by virtue of its incorporation under the *Professional Syndicates' Act* and its certification under the *Labour Relations Act*, the representative of all the employees in the unit for the purpose of negotiating the labour agreement. **There is no room left for private negotiation between employer and employee**. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations.[35]
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> [Boldface and underlining added]

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[32] *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, supra*, note 30.
[33] *Canada Labour Code*, R.S.C. 1985, c. L-2.
[34] *Bisaillon v. Concordia University*, *supra*, note 2, para. 33, citing, in particular, *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42. See also: Manon Savard and Anouk Violette, "Les affaires Weber, O'Leary, et Canadien Pacifique Ltée : que reste-t-il pour les cours de justice?", (1997) 88 *Développements récents en droit du travail*, 49-93.
[35] *Employés de Magasins de Québec Inc. v. Paquet Ltée*, [1959] S.C.R. 206, p. 212, 1959 CanLII 51.

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[57] In 2006, in *Bisaillon v. Concordia University*, LeBel, J. reiterated that the main consequence of union certification is the union's right to retain the monopoly on representation — i.e., "the exclusive power to negotiate conditions of employment with the employer for all members of the bargaining unit with a view to reaching a collective agreement".[36] He explained that this monopoly "also extends to the implementation and application of the agreement", and its effect "takes certain individual rights away from employees", such that employees "are denied the possibility of negotiating their conditions of employment directly with their employer and also lose control over the application of those conditions".[37] He then added the following:

> [28] It is worth noting that the monopoly on collective representation is not limited to the context of the collective agreement but extends to all aspects of employee-employer relations. The union's monopoly with respect to collective bargaining is based not only on the existence of a collective agreement, but also on the certification of the union. For this reason, any negotiations regarding conditions of employment that are not mentioned in the current collective agreement must be conducted by the certified union.[38]
>
> [Underlining added; references omitted]

[58] Subsequently, in *Northern Regional Health Authority v. Horrocks,* the Supreme Court, citing LeBel, J. in *Bisaillon*, emphasized that while the union's monopoly on representation does not imply that all disputes between employers and unionized employees fall within the exclusive jurisdiction of grievance arbitrators, it is well established that it does extend to disputes arising expressly or *inferentially* from the collective agreement.[39]

[59] Thus, it is not necessary that the collective agreement explicitly provide for the subject matter of the dispute in order for the arbitrator to have exclusive jurisdiction to hear and rule on a dispute, a point our Court emphasized more recently as follows:

> [30] Pour identifier l'essence d'un litige et déterminer s'il s'agit d'un « grief » à l'égard duquel l'arbitre de grief est compétent, il n'y a pas que le texte de la convention collective à prendre en compte. La doctrine et la jurisprudence reconnaissent, par exemple, que le pouvoir général d'un employeur de gérer ses opérations et de diriger son personnel est subordonné non seulement aux dispositions expresses de la convention collective, mais aussi aux autres droits

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36 *Bisaillon v. Concordia University*, *supra*, note 2, para. 24. The principle of the union's monopoly on representation is a fundamental principle not only of Quebec labour law, but also of federal law and the law of the other provinces: *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, para. 41.

37 *Bisaillon v. Concordia University*, *supra*, note 2, paras. 24 and 26.

38 *Id.*, para. 28, citing, in particular, *Noël v. Société d'énergie de la Baie James*, *supra*, note 36, para. 57, and *Isidore Garon ltée v. Tremblay*, 2006 SCC 2, paras. 38 and 41.

39 *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, para. 22, citing, in particular, *Bisaillon v. Concordia University*, *supra*, note 2, paras. 30-33; *Goudie v. Ottawa (City)*, 2003 SCC 14, para. 4, and *Weber v. Ontario Hydro*, *supra*, note 24, para. 54.

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> reconnus aux salariés par la loi, notamment ceux découlant des articles 6, 7 et 1375 *C.c.Q.*[40]
>
> [Underlining added; references omitted]

[60] In order to identify the essential character of a dispute and determine whether it is connected to the collective agreement, it is also necessary to take into account the *implicit* content of the agreement, as such content is defined in the doctrine:

> **709** – *Sources* – Dans l'esprit de l'énoncé de l'article 1432 C.c.Q. selon lequel le contrat oblige les parties non seulement pour ce qui y est exprimé, mais également pour « ce qui en découle d'après sa nature et suivant les usages, l'équité ou la loi », la convention collective est sujette à un contenu implicite. Ce dernier se rapporte d'abord aux droits et obligations qui sont les corollaires de ceux que la convention attribue explicitement à l'une ou l'autre des parties.
>
> […]
>
> **Du côté de l'employeur, c'est son pouvoir de direction et les conséquences qui en découlent qui seront, au premier chef, réputés faire partie du contenu implicite de la convention collective**. Enfin, le droit commun peut s'appliquer lorsqu'il s'agit d'interpréter la convention collective.[41]
>
> [Boldface added; references omitted]

V. Determining the essential character of the dispute

[61] I now turn to the analysis set out in *Weber v. Ontario Hydro*, whose first step deals with the provisions at issue and the second with the essential character of the dispute, while taking the facts of the originating application instituting the class action as proven.

A. Step 1: Examining the relevant legal provisions and the clauses of the collective agreement

[62] At the outset, it is important to clearly establish the applicable legislative provisions and the relevant clauses of the collective agreement, which provide a general framework for the jurisdiction of a grievance arbitrator.

[63] In the case at bar, the arbitrator's jurisdiction stems from the definitions of the concepts of "arbitrator" and "collective agreement" set out in ss. 3(1) and 57(1) to 57(3)

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40 *Syndicat de la fonction publique et parapublique du Québec (SFPQ) c. Procureure générale du Québec*, 2017 QCCA 1682.

41 Robert P. Gagnon, *Le droit du travail du Québec*, 8th ed., Yann Bernard and André Sasseville, eds., Cowansville, Éditions Yvon Blais, 2022, p. 5.

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of the https://www.canlii.org/fr/qc/legis/lois/rlrq-c-c-27/derniere/rlrq-c-c-27.html *Canada Labour Code*:

Definitions
3 (1) In this Part,

[…]

arbitrator means a sole arbitrator selected by the parties to a collective agreement or appointed by the Minister under this Part; (*arbitre*)

[…]

collective agreement means an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters; (*convention collective*)

Provision for final settlement without stoppage of work
57 (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.

Where arbitrator to be appointed

(2) Where any difference arises between parties to a collective agreement that does not contain a provision for final settlement of the difference as required by

Définitions
3 (1) Les définitions qui suivent s'appliquent à la présente partie.

[…]

arbitre Arbitre unique choisi par les parties à une convention collective ou nommé par le ministre en application de la présente partie. (*arbitrator*)

[…]

convention collective Convention écrite conclue entre un employeur et un agent négociateur et renfermant des dispositions relatives aux conditions d'emploi et à des questions connexes. (*collective agreement*)

Clause de règlement définitif sans arrêt de travail
57 (1) Est obligatoire dans la convention collective la présence d'une clause prévoyant le mode — par arbitrage ou toute autre voie — de règlement définitif, sans arrêt de travail, des désaccords qui pourraient survenir entre les parties ou les employés qu'elle régit, quant à son interprétation, son application ou sa prétendue violation.

Nomination d'un arbitre

(2) En l'absence de cette clause, tout désaccord entre les parties à la convention collective est, malgré toute disposition de la convention collective,

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subsection (1), the difference shall, notwithstanding any provision of the collective agreement, be submitted by the parties for final settlement

obligatoirement soumis par elles, pour règlement définitif :

(a) to an arbitrator selected by the parties; or

a) soit à un arbitre de leur choix;

(b) where the parties are unable to agree on the selection of an arbitrator and either party makes a written request to the Minister to appoint an arbitrator, to an arbitrator appointed by the Minister after such inquiry, if any, as the Minister considers necessary.

b) soit, en cas d'impossibilité d'entente sur ce choix et sur demande écrite de nomination présentée par l'une ou l'autre partie au ministre, à l'arbitre que désigne celui-ci, après enquête, s'il le juge nécessaire.

Idem

(3) Where any difference arises between parties to a collective agreement that contains a provision for final settlement of the difference by an arbitration board and either party fails to name its nominee to the board in accordance with the collective agreement, the difference shall, notwithstanding any provision in the collective agreement, be submitted by the parties for final settlement to an arbitrator in accordance with paragraphs (2)(a) and (b).

Idem

(3) Lorsque la convention prévoit, comme mécanisme de règlement, le renvoi à un conseil d'arbitrage, tout désaccord est, malgré toute disposition de la convention collective, obligatoirement soumis à un arbitre conformément aux alinéas (2)a) et b) dans les cas où l'une ou l'autre des parties omet de désigner son représentant au conseil.

[Underlining added]

[64] It is also useful to reproduce the relevant provisions of the collective agreement:

3.01 Subject to the provisions of this Agreement, the control and direction of the employees, including the right to hire, to suspend or discharge for just and sufficient cause, to advance or step back in classification, to reassign, to transfer, to promote, to demote, to lay off because of lack of work or for other legitimate reasons, is vested solely in the Company.

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> **3.02** Any of the rights, powers or authority the Company had prior to the signing of this Agreement are retained by the Company, except those specifically abridged, delegated, granted or modified by this Agreement.
>
> […]
>
> **13.01** For the purpose of this Collective Agreement, the word grievance means all differences concerning the interpretation, application, administration, or alleged violation of the Collective Agreement.
>
> **13.02** Grievances under this Article may be initiated by any employee, or group of employees, who consider themselves aggrieved, or by the Union, provided such grievance is filed within a period of sixty (60) days after the grievor would reasonably have knowledge of such grievance.
>
> […]
>
> **15.01** Any dispute not settled in accordance with Article 13 or 14 may be submitted to an arbitrator who will be selected jointly by the parties. The party electing arbitration will serve notice of intent to arbitrate within ninety (90) days of receipt of the Company's decision and will submit the name of one (1) or more arbitrators to the other party. If the parties are unable to agree on the choice of an arbitrator within thirty (30) calendar days after notice of intent has been received, the Minister of Labour will be requested to name the arbitrator.
>
> **15.02** The arbitrator shall have jurisdiction to consider any matter properly submitted to him under the terms of this Agreement.[42]
>
> [Underlining added]

[65] With these provisions in mind, it is now appropriate to examine the factual context of the matter in order to circumscribe its essential character.

B. Step 2: Examining the factual context of the matter, taking the facts as proven

[66] According to jurisprudential principles, what must be determined is whether the decisions or acts that are the source of the dispute arise expressly or inferentially out of the collective agreement.

[67] Determining the essential character of a dispute in order to rule on a declinatory exception does not mean characterizing the dispute by taking the parties' legal characterization as proven, but rather characterizing it in light of the factual context in

[42] Collective Agreement, dated September 1, 1990 to October 31, 1992, arts. 3.01-3.02, 13.01-13.02 and 15.01-15.02. The collective agreement was filed into the Court record only in English.

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which it arose, which requires taking as proven the facts alleged in the legal proceedings. Moreover, it does not involve ruling on the merits of the case or its likelihood of success.

[68] Having carried out this exercise, I am of the opinion that the Court was right to question, in *obiter*, the Superior Court's jurisdiction to hear the case.

[69] Here are the reasons why.

[70] The alleged facts, which are assumed to be true at the class action authorization stage,[43] are essentially to the effect that, over the past several decades, Air Canada: (i) consistently undertook to grant and continue to make FRT Passes available to all employees with at least six months' experience, including during their retirement; (ii) also undertook, throughout that period, to ensure that priority for the use of those passes would be determined by seniority (i.e., length of service as an Air Canada employee); (iii) breached those undertakings by issuing FRT Passes with higher priority to tens of thousands of current Air Canada employees; and (iv) in doing so, caused an injury to its retirees — of which there are approximately 30,000 — primarily by substantially reducing the usefulness of their travel benefits.[44]

[71] In the Authorization Judgment, the Court noted that the respondent had also filed evidence showing that in at least some documents given to its retiring employees, Air Canada used language tending to demonstrate that it intended to make commitments with respect to these benefits: "[t]ravel privileges for employees and eligible family members will continue to apply into retirement in accordance with the Company's retirement regulations", "[y]ou will have the same priority as in active service", "boarding will be based on your length of continuous service".

[72] The facts, which are assumed to be true, therefore reveal an Air Canada practice of granting such FRT Passes based on seniority. This is the essential character of the dispute, and it falls *inferentially* under Air Canada's management rights over the working conditions and benefits of unionized employees, as set out in Article 3 of the collective agreement. I would add that Article 13.01 of the collective agreement provides that the notion of grievance covers "all differences concerning the interpretation, application, administration, or alleged violation of the Collective Agreement".[45]

[73] Admittedly, this is not a practice arising expressly from the collective agreement, as it is true that Air Canada has always refused to incorporate the grant of FRT Passes in the collective agreement. The testimony of Leslie-Ann Vezina, an Air Canada manager who administers the employee travel pass programs,[46] speaks volumes in this regard: "Air Canada has always maintained that the number and nature of FRT Privileges for personal travel extended to any employee group or individual employee at any point in

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43 *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, para. 59.
44 Authorization Judgment, para. 12.
45 Underlining added.
46 Sworn Statement of Leslie-Ann Vezina, September 17, 2020, para. 3.

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time is a matter that is entirely within Air Canada's discretion which it can modify as it sees fit".[47] Indeed, FRT Passes are not expressly mentioned in the collective agreement.

[74] With all due respect, the trial judge committed an overriding error when she concluded that this was not a practice arising inferentially from the collective agreement:

> [25] The promises alleged in the present case fall outside the scope of the Collective Agreement and, can also arguably fall under section 3 of the Collective Agreement dealing with the reservation of Air Canada's management rights with regard to the control and direction of its employees.
>
> […]
>
> [27] The Court on the merits has jurisdiction to determine if the exercise of management rights in issuing the FRT passes resulted in individual contracts with the class members or is simply the exercise of management discretion and, if so, whether these rights were exercised in a reasonable manner and in good faith.

[75] I am of the view that the judge could not conclude that the Superior Court has jurisdiction to determine whether the exercise of management rights in issuing the FRT Passes gave rise to individual contracts with the unionized class members, or whether this was an abusive exercise of the right of management.

[76] The essential character of the dispute, as it appears from the alleged facts that are assumed to be true, stems from the employer's practice of granting FRT Passes based on seniority. This practice is covered by the right of management, and its content and obligations must be determined by the grievance arbitrator.

[77] In other words, it is the grievance arbitrator who must determine whether the unilateral modification of the FRT Pass benefits hitherto enjoyed by the retirees, who were formerly unionized employees, constitutes an abusive exercise of Air Canada's management rights.

[78] To support her ruling on the declinatory exception, the trial judge cited *Canadian Union of Public Employees v. Air Canada*.[48]

[79] I am of the opinion that she could not rely on this judgment to find that the Superior Court has jurisdiction in the case at bar.

[80] Admittedly, in this case, the Ontario Superior Court of Justice rendered a decision. It upheld an arbitration award that had concluded that the special travel passes issued to pilots were not the subject of any commitment or promise by Air Canada, and that such

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[47] *Id.*, para. 19. See also *Air Canada v. Canadian Union of Public Employees, Air Canada Component*, 2018 CanLII 30949, para. 29.

[48] *Canadian Union of Public Employees v. Air Canada*, *supra*, note 14.

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passes were, instead, allocated by the employer on a discretionary basis.[49] Nonetheless, it was the grievance arbitrator who had ruled on the dispute in first instance,[50] without a prior debate about the arbitrator's jurisdiction having taken place. The Superior Court ruled only in the context of an application for judicial review of the arbitration award.

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[81] In *Emerson Electric Canada ltée*,[51] cited in the Authorization Judgment,[52] the Court confirmed a judgment rendered by Justice Clément Gascon, then of the Superior Court. In that case, the employer had — for more than ten years — extended to Quebec employees certain benefits to which their colleagues in Ontario were entitled as a matter of law.

[82] The dispute arose after the employer ceased to continue providing those benefits to Quebec employees in certain situations. Emphasizing the fact that its decision to extend the benefits to Quebec employees was purely discretionary, the employer had argued that the benefits amounted to nothing more than privileges that it could modify as it saw fit. The arbitrator seized of the matter ruled against the employer, relying on the theory of estoppel. As one can see, the dispute fell within the arbitrator's jurisdiction, and the Superior Court ruled only in the context of an application for judicial review of the arbitration award.

[83] Respondent Davies retorts that in the Authorization Judgment in the present matter, the Court stated that although, in principle, a collective agreement covers all aspects concerning the terms and conditions of employment of employees, the case law[53] recognizes the possibility that independent agreements, dealing with matters not mentioned in the collective agreement, may exist and be legally valid. In particular, she cites paragraph 24 of the Authorization Judgment:[54]

> [24] Secondly, the judge erred in dismissing out of hand the possibility that Air Canada's alleged obligations arose out of distinct contracts legally independent from the collective agreements. While, in principle, a collective agreement leaves no room for separate contracts concerning the conditions of employment, there is authority recognizing the possibility that independent agreements addressing matters not mentioned in the collective agreement may exist and be legally effective. For this reason, one cannot exclude the possibility that Air Canada's longstanding practice regarding FRT passes gave rise to one or several tacit contracts constituting the source of its alleged obligations. Again, the issue at this stage is not whether the appellant is likely to succeed, but rather whether her argument is frivolous or obviously ill-founded. I find that it is not.

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[49] Judgment under appeal, paras. 23-24.
[50] *Ibid.*
[51] *Emerson Electric Canada ltée c. Foisy*, 2006 QCCA 12.
[52] Authorization Judgment, paras. 26-28.
[53] The Court cited *Banque Laurentienne c. Werve*, 2008 QCCA 702, and *Larivière c. Ville de Montréal (Service de police de la Ville de Montréal)*, 2017 QCCA 957, para. 72.
[54] Authorization Judgment.

[Underlining in the original; references omitted]

[84] I am of the opinion that Air Canada is correct in asserting that the authorities cited in this passage from the Authorization Judgment, namely *Banque Laurentienne c. Werve*[55] and *Larivière c. Ville de Montréal (Service de police de la Ville de Montréal)*,[56] do not support the respondent's assertion that the Superior Court has jurisdiction to hear the case.

[85] The facts alleged in the present case, as assumed to be true, show that the essential character of the dispute in the case at bar differs from that of the dispute at issue in *Banque Laurentienne c. Werve*.[57]

[86] In that case, Ms. Werve had been employed by the Laurentian Bank for 22 years. When she was thinking of taking early retirement, she had checked with her employer about the conditions under which she could do so. According to the facts alleged, one of the considerations in her decision was whether the drug and health care insurance scheme from which she and her spouse benefited, whose cost was entirely assumed by the Bank, would subsist.

[87] After Ms. Werve made a telephone inquiry to the human resources department, the Bank provided her with a document stating that she would be insured from the start of her retirement, that her dependents would continue to be covered by the insurance if they were already insured at the time of her retirement, and that the cost of this benefit would be paid entirely by the Bank. The document also specified that the insurance would terminate upon her death but would continue to cover her dependents for a period of two years following her death. Ms. Werve took early retirement following receipt of this information, which subsequently proved to be erroneous, leading her to institute proceedings against her employer in the Superior Court.

[88] Baudouin, J.A. concluded that the Superior Court had jurisdiction to rule on the dispute:

> [23] Mais ici, il m'apparaît aussi que nous sommes dans une situation bien particulière. Le litige tel qu'engagé ne porte pas sur l'existence, sur l'interprétation ou sur l'application d'une clause de la convention collective. Il s'agit, en effet, d'un recours en responsabilité civile, fondé sur un renseignement inexact qui a amené l'intimée à prendre la décision de quitter son emploi prématurément, en raison de l'assurance qui lui était donnée que certains frais ne seraient pas à sa charge après cette retraite. L'argument soulevé en première instance relativement aux articles 18.04 et 18.05 de la convention collective qui, d'après l'appelante,

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[55] *Banque Laurentienne c. Werve*, *supra*, note 53.
[56] *Larivière c. Ville de Montréal (Service de police de la Ville de Montréal), supra*, note 53.
[57] *Banque Laurentienne c. Werve*, *supra*, note 53.

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> consacreraient la compétence exclusive de l'arbitre ne me paraît donc pas pertinent.
>
> [24] En outre, le litige, d'après les faits au dossier, a pris naissance dans le cadre précis d'une négociation individuelle entre les parties et non d'un régime collectif de travail, même si bien évidemment celui-ci reste en arrière-plan.
>
> [25] En l'espèce, l'intimée a négocié directement avec l'employeur. L'article 11.12 précité, en effet, ne confère qu'un rôle tout à fait secondaire au syndicat, défenseur des intérêts collectifs, puisque ces programmes ne sont que « discutés avec le syndicat afin de définir les meilleures conditions possibles ».
>
> [26] On imagine mal d'ailleurs que le syndicat soit obligé de défendre, dans des situations semblables, et au nom d'une de ses ex-syndiquées, la validité d'une entente individuelle provoquée par une erreur sur la considération principale de l'engagement. On peut donc comprendre le refus du syndicat de prendre fait et cause pour l'intimée quelque huit ans plus tard. Si l'on pousse plus loin l'analyse, celui-ci pourrait, en effet, se retrouver dans une situation de conflit d'intérêts ayant à défendre l'intérêt individuel d'un de ses ex-membres, au détriment possible de l'intérêt collectif de l'ensemble des travailleurs.
>
> [27] Comme je demeure convaincu que l'affaire est du ressort de la Cour supérieure, il ne m'est pas nécessaire de statuer sur la possibilité de l'existence d'une dualité de recours. Il s'agit alors d'un tout autre débat et je réfère, sur ce point, à l'opinion du juge La Forest dans *Dayco (Canada) Ltd.* c. *T.C.A. Canada* et plus particulièrement à l'arrêt *Tremblay*.[58]
>
> [Underlining added; references omitted]

[89] As one can see, it was because the matter dealt with a decision made by an employee following an error on the part of the employer, caused more specifically by inaccurate information given to Ms. Werve by a representative of the employer, that the Court concluded that her recourse was one in civil liability and fell under the jurisdiction of the Superior Court.

[90] In the case at bar, the facts alleged by the respondent differ considerably. She alleges that Air Canada granted tens of thousands of passes to its active employees and, in so doing, caused harm to retirees by diminishing the usefulness and priority of the category of passes (the FRT Passes) intended for them. These are not allegations about an error due to false information that would constitute a fault on the part of the employer causing them harm. Admittedly, Davies alleges that Air Canada broke "a promise" that led some retirees to decide on early retirement with the hope of travelling thanks to these

[58] *Id.*

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FRT Passes, but the Supreme Court teaches that the essential character of a dispute turns on the facts of the case, not on the way the legal issues are framed in the application:

> [25] To determine whether a dispute arises out of the collective agreement, we must therefore consider two elements: the nature of the dispute and the ambit of the collective agreement. In considering the nature of the dispute, the goal is to determine its essential character. This determination must proceed on the basis of the facts surrounding the dispute between the parties, and not on the basis of how the legal issues may be framed. Simply, the decision-maker must determine whether, having examined the factual context of the dispute, its essential character concerns a subject matter that is covered by the collective agreement. […][59]
>
> [Underlining added; reference omitted]

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[91] The case at bar is also distinguishable from the one in *Larivière c. Ville de Montréal (Service de police de la Ville de Montréal)*,[60] which was cited in the Authorization Judgment.

[92] Mr. Larivière had sued for damages, alleging to two distinct faults on the part of the City. The first concerned the City's refusal to promote him to a management position as a commander, and the second pertained to surveillance, wiretapping, searches and Mr. Larivière's detention by the Service de police de la Ville de Montréal (SPVM) after he tried to contact journalists to speak about his troubles with the SPVM.

[93] The parties in that case had agreed that the appellant's recourse did not fall under the collective agreement that applied to SPVM police officers. Consequently, the debate between the parties before the Superior Court dealt only with the characterization — extra-contractual or contractual — of the part of the appellant's recourse pertaining to the refusal to promote him to a management position.[61]

[94] The judge, acting on her own initiative, had declined jurisdiction over the part of the recourse pertaining to the refused promotion, in order to allow the grievance arbitrator to decide first on his own jurisdiction. She had allowed the other aspects of the recourse to proceed before the Superior Court.

[95] At the final stage of the analysis, the Court concluded that Mr. Larivière's claim relating to the refusal to promote him to a management position did not fall within the scope of the collective agreement because the bargaining certificate of the Fraternité des policiers et policières de Montréal did not cover the position of commander, the union being certified to represent various categories of employees, but not commanders. The

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59 *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, supra*, note 30.
60 *Larivière c. Ville de Montréal (Service de police de la Ville de Montréal), supra*, note 53.
61 *Id.*, para. 22.

collective agreement also expressly defined the employees it governed, and it excluded commanding management personnel.

[96] Thus, these two judgments are in no way relevant for purposes of ruling on the declinatory exception in the case at bar.

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* * *

[97] In the present matter, the grant of FRT Passes to unionized Air Canada employees is a practice that falls *inferentially* within the scope of the collective agreement. Taking the alleged facts as proven, one concludes that although these FRT Passes are not expressly mentioned as working conditions or employee benefits in the collective agreement, the granting thereof is a policy or practice falling within Air Canada's general right of control and direction over its employees (Article 3), and that the dispute concerning the unilateral modification of this practice falls within the exclusive jurisdiction of the arbitrator. Moreover, the collective agreement also expressly states that "the word grievance means all differences concerning the interpretation, application, administration, or alleged violation of the Collective Agreement" (Article 13.01).

[98] The forum that has jurisdiction to interpret an employer's practice such as the one in the case at bar is the grievance arbitrator.

[99] The fact that the union members in the case at bar are retired is not, in and of itself, an obstacle to the arbitrator's jurisdiction. In *Dans Regroupement des cols bleus retraités et préretraités de Montréal c. Ville de Montréal*, the Court, in reasons written by Savard, J.A. (as she then was), summarized the case law on this issue as follows:

> [30] Dans l'arrêt *Dayco*, la majorité de la Cour suprême, sous la plume du juge Laforest, retient que les droits d'un salarié en vertu de la convention collective, dont ceux afférents au régime de retraite, se cristallisent au moment de la retraite et que l'arbitre de griefs demeure compétent pour déterminer si les conditions de la convention collective alors en vigueur, malgré son expiration, créent en sa faveur des droits acquis. Le juge de première instance cite d'ailleurs, à bon droit, le passage suivant de cet arrêt […]
>
> […]
>
> [34] À mon avis, l'arrêt *Tremblay c. S.E.P.B.*, prononcé près de 10 ans après l'arrêt *Dayco*, permet de répondre à cette question. Dans cette affaire, la Cour suprême reconnaît que la fin d'emploi d'un salarié ne fait pas disparaître toute obligation de représentation à son endroit, laquelle survit à l'égard des situations juridiques constituées pendant la période d'emploi :
>
>> [21] Cette obligation [de représentation du syndicat] résulte d'un mandat légal de représentation qui vaut pour l'ensemble d'une unité de négociation, dont la composition varie nécessairement dans le temps. La

> nature continue de cette obligation à l'égard de l'ensemble d'unités susceptibles de se modifier continuellement ne permet pas de conclure que le départ d'un salarié fait disparaître toute conséquence de l'exécution de l'obligation de représentation à son endroit. Une situation juridique peut s'être constituée de telle façon que le syndicat devra continuer à agir et à représenter le salarié pour en régler les conséquences. La reconnaissance d'une telle obligation découlant à l'origine de l'exécution du devoir de représentation s'imposerait d'autant plus que le syndicat continue alors à détenir le pouvoir exclusif de négociation à l'égard de l'employeur et, le plus souvent, à contrôler l'accès à la procédure de grief ainsi que son déroulement. La persistance, sous une telle forme, d'une obligation résiduelle de représentation à l'égard des employés qui cessent de travailler dans l'entreprise, au sujet de problèmes découlant de leur période d'emploi, correspond à l'économie générale de ce système de représentation exclusive et collective. […] [Soulignements ajoutés]

> [35] Je partage donc l'opinion de Me Claude Tardif lorsqu'il écrit qu'« [i]l est donc possible de soutenir que les syndicats ont l'obligation de représenter leurs retraités en ce qui concerne les situations juridiques constituées à l'époque où ceux-ci étaient actifs au sein de l'entreprise ». J'en conclus donc que, sur ces questions, les retraités, tout comme les participants actifs dans l'arrêt *Bisaillon*, perdent « […] [leur] droit d'agir sur une base individuelle, indépendamment du syndicat qui [les] représente ».[62]

[References omitted; underlining in paragraph 35 added]

[100] Consequently, it should be noted that the union's failure to represent retirees who were formerly unionized employees as regards their demands could potentially be the subject of a recourse based on s. 37 of the *Canada Labour Code*, although I make no comment on the merits of such a recourse.

* * *

[101] For the foregoing reasons, I would allow the appeal in part and grant the subsidiary conclusion sought in the application for a declinatory exception, by declaring that only the arbitrator has jurisdiction to hear the dispute as regards any class member who was unionized while employed at Air Canada. The whole without legal costs given the particular context of this case.

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62 *Regroupement des cols bleus retraités et préretraités de Montréal c. Ville de Montréal*, *supra*, note 9.

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[102] It will therefore be up to the parties, if they see fit, to apply to the Superior Court so as to have the definition of the class be limited to retirees who were not unionized Air Canada employees.

SOPHIE LAVALLÉE, J.A.

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MOTIFS DU JUGE SCHRAGER

[103] J'ai lu les motifs de ma collègue, la juge Lavallée. Avec égard, je ne peux souscrire à ceux-ci.

[104] Sans être en désaccord avec la présentation des faits de ma collègue *per se*, j'estime que le juge Bachand a résumé les faits essentiels de manière suffisante et concise dans les motifs de l'arrêt autorisant la présente action collective :

> [12] The relevant alleged facts — which must be assumed to be true at the authorization stage — are essentially to the effect that, over the past several decades, Air Canada: (i) consistently undertook to grant and continue to make available, including upon retirement, free and reduced travel ("FRT") passes to all employees with at least six months' experience; (ii) also undertook, throughout that period, to ensure that priority for the use of those passes would be determined by seniority (i.e. length of service as an Air Canada employee); (iii) breached those undertakings by issuing FRT passes with higher priority to tens of thousands of current Air Canada employees; and (iv) in doing so, caused an injury to its retirees — of which there are approximately 30,000 —, primarily by substantially reducing the usefulness of their travel benefits.[63]
>
> [Renvois omis]

[105] L'intimée, la représentante des demandeurs à l'action collective, allègue de manière claire dans sa demande introductive d'instance qu'Air Canada lui a promis et a promis à tous les autres employés admissibles qu'ils auraient accès à des vols gratuits ou à tarif réduit et qu'ils continueraient de jouir d'un tel accès pendant leur retraite aux mêmes conditions que celles dont bénéficient les employés actifs. Le paragraphe 11 de la demande introductive d'instance est limpide :

> 11. The Defendant had promised to give and/or make available, and in fact gave and made available the right to its FRT flight passes to its employees which automatically vested after their first 6 months on the job and which were honoured throughout the many years while working for the Defendant and were then continued after retirement up until the recent changes referred to in the following paragraphs. The Defendant has been respecting this agreement since at least 1952;

[106] La promesse faite par Air Canada à ses employés n'est pas en litige. Elle s'est concrétisée par l'octroi de laissez-passer de vols gratuits ou à tarif réduit (« Free and Reduced-Rate Transportation Plan flight passes », ci-après les « laissez-passer » ou

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[63] *Davies v. Air Canada*, 2022 QCCA 1551 [*Davies*].

« FRT »). Lorsqu'un employé retraité présente un laissez-passer (c.-à-d. qu'il accepte la promesse), s'il y a des places disponibles (c.-à-d. non occupées par des clients payants), la promesse qui lui a été faite devient un contrat individuel de transport entre lui et Air Canada[64]. En termes juridiques, Air Canada a promis à chaque employé retraité, en contrepartie des années de service effectuées par celui-ci, qu'elle conclurait avec lui des contrats de transport régis par les articles 2030 et suivants du *Code civil du Québec*[65]. Pour les motifs qui suivent, je rejette l'assertion selon laquelle les droits et obligations découlant de cette relation sont couverts par la convention collective, de sorte que tout litige relèverait de la compétence d'un arbitre de griefs.

[107] Cette promesse n'est mentionnée nulle part dans la convention collective. De fait, la position adoptée par Air Canada – tant dans cette instance que dans d'autres instances arbitrales et judiciaires – est que les FRT ne sont pas couverts ou régis par la convention collective. De plus, Air Canada n'a pas mis en doute la compétence de la Cour supérieure au stade de l'autorisation et elle n'a soulevé la question qu'après que la Cour a autorisé l'action collective, en mentionnant en *obiter* la question de la compétence[66]. Dans sa déclaration sous serment déposée en Cour supérieure dans ce dossier, madame Leslie-Anne Vézina, directrice d'Air Canada responsable des voyages et de la reconnaissance du personnel, affirme explicitement que l'octroi de FRT est à la discrétion d'Air Canada et qu'Air Canada peut changer la manière dont elle exerce sa discrétion à tout moment. Monsieur Anthony Bursey, directeur d'Air Canada responsable de l'horaire des équipages, déclare que [TRADUCTION] « année après année, Air Canada a systématiquement refusé d'inclure les FRT accordés à titre de privilège pour les déplacements personnels dans les conventions collectives conclues avec quelque syndicat que ce soit » et que « l'absence de toute référence, quelle qu'elle soit, aux FRT accordés à titre de privilège pour les déplacements personnels dans la Convention collective [en question] concorde en tous points avec le fait qu'Air Canada a toujours considéré que les déplacements personnels [des employés] étaient un privilège […] à la discrétion d'Air Canada ». En outre, en arbitrage de griefs, Air Canada a plaidé que les FRT accordés à titre de privilège ne faisaient pas partie de la convention collective, ne faisaient l'objet de négociations avec aucun syndicat et relevaient [TRADUCTION] « des droits de gérance discrétionnaires de la Société et ne pouvaient être soumis à l'arbitrage »[67]. De toute évidence, pour Air Canada, les FRT ne font pas partie intégrante des conditions d'emploi. Par conséquent, les décisions de la direction concernant les FRT ne se rattachent pas à la convention collective conclue avec son personnel syndiqué.

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64 *Davies v. Air Canada*, 2024 QCCS 4599 [Jugement entrepris], paragr. 12; *Davies v. Air Canada*, 2021 QCCS 3119, paragr. 17; *Air Canada v. Canadian Union of Public Employees, Air Canada Component*, 2018 CanLII 30949 (C.A. L.A.), paragr. 29.

65 Jean-Louis Baudouin, Pierre-Gabriel Jobin et Nathalie Vézina, *Les obligations*, 7e éd., Cowansville, Yvon Blais, 2013, p. 305-306, paragr. 190-192.

66 *Davies*, *supra*, note 63, paragr. 34.

67 *Air Canada Pilots Assn v. Air Canada (Personnel Travel Privileges Grievances)*, [2017] C.L.A.D. no 154, 2017 CarswellNat 3472, paragr. 60 et 67.

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[108] Il a été avancé que la clause 3.01 de la convention collective ouvre la porte à l'assujettissement des FRT à ce contrat. Cette clause est libellée ainsi :

> 3.01 Subject to the provisions of this Agreement, the control and direction of the employees, including the right to hire, to suspend or discharge for just and sufficient cause, to advance or step back in classification, to reassign, to transfer, to promote, to demote, to lay off because of lack of work or for other legitimate reasons, is vested solely in the Company.

C'est faire dire beaucoup à cette clause qu'extrapoler que, puisque les FRT sont (ou ne sont pas) octroyés par Air Canada en vertu d'une décision de la direction, une telle décision peut être une matière relevant de l'arbitrage. La société est administrée par sa direction. Toutes les décisions de la direction ne concernent pas les conditions d'emploi.

[109] J'ajoute que, nulle part dans le dossier, il n'est mentionné que l'un quelconque des intéressés ait considéré les FRT comme un avantage d'emploi assujetti au paiement de l'impôt sur le revenu par son bénéficiaire. De plus, compte tenu de la position d'Air Canada quant à la nature discrétionnaire des FRT, ceux-ci ne peuvent être interprétés comme une disposition relative à la retraite faisant partie des conditions d'emploi, à laquelle la convention collective pourrait être considérée comme s'appliquant implicitement[68].

[110] La convention collective est un contrat. L'insistance constante d'Air Canada à exclure les FRT du champ du contrat constitue une interprétation donnée par une partie audit contrat, interprétation à laquelle, en l'espèce, a souscrit l'autre partie, c.-à-d. l'intimée. Toute ambiguïté dans un contrat doit être interprétée de manière à donner effet à l'interprétation des parties[69], de sorte qu'Air Canada ne peut utilement plaider maintenant qu'en application de la convention collective, la présente instance relève de la compétence d'un arbitre, à l'exclusion de la Cour supérieure. On se demande si ce changement de position constitue une tentative de faire jouer le délai de quatre-vingt-dix jours prévu par la clause 15.01 de la convention collective pour le dépôt d'un grief en invoquant la prescription afin d'éviter un procès sur le fond de l'action collective, au moins en ce qui concerne les retraités anciennement syndiqués.

[111] Je ne conteste pas le principe sur lequel s'est fondée ma collègue selon lequel un litige découlant implicitement de la convention collective doit être tranché sous le régime de celle-ci – c.-à-d. par un arbitre[70] – et ce, même après la retraite, si l'essence du litige est visée par la convention collective (p. ex. l'indexation des prestations de retraite)[71].

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[68] Comme c'était le cas dans l'arrêt *Bisaillon c. Université Concordia*, 2006 CSC 19.

[69] Art. 1426 *C.c.Q.*; *Compagnie de chemin de fer du littoral nord de Québec et du Labrador inc. c. Sodexho Québec ltée*, 2010 QCCA 2408, paragr. 233 et s.; *Vanier c. Montréal (Ville)*, 2004 CanLII 12474 (C.A.), paragr. 21.

[70] *Bisaillon c. Concordia University*, 2006 CSC 19, paragr. 19-22.

[71] *Regroupement des cols bleus retraités et préretraités de Montréal c. Ville de Montréal*, 2020 QCCA 399, paragr. 35.

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Dans l'affaire *Regina Police Assn. Inc. c. Regina (Ville) Board of Police Commissioners,* il s'agissait de savoir si un litige découlant du refus du chef de police d'accepter la démission d'un agent de police remise en vue d'éviter des procédures disciplinaires était susceptible d'arbitrage en application de la convention collective. La Cour suprême a statué qu'un tel litige n'était pas arbitrable, mais ressortait plutôt de la compétence du tribunal administratif auquel la loi confiait l'application du régime disciplinaire applicable aux policiers. Voici comment la Cour suprême a formulé son analyse :

> Pour déterminer si un litige résulte de la convention collective, nous devons donc tenir compte de deux aspects : la nature du litige et le champ d'application de la convention collective. L'examen de la nature du litige vise à en déterminer l'essence. Cette détermination s'effectue compte tenu non pas de la façon dont les questions juridiques peuvent être formulées, mais des faits entourant le litige qui oppose les parties […]. Après en avoir examiné le contexte factuel, l'instance décisionnelle doit tout simplement déterminer si l'essence du litige concerne une matière visée par la convention collective. Après avoir établi l'essence du litige, l'instance décisionnelle doit examiner les dispositions de la convention collective afin de déterminer si elle prévoit des situations factuelles de ce genre. Il est clair qu'il n'est pas nécessaire que la convention collective prévoie l'objet du litige de façon explicite. Si l'essence du litige découle expressément ou implicitement de l'interprétation, de l'application, de l'administration ou de l'inexécution de la convention collective, l'arbitre a compétence exclusive pour statuer sur le litige […].[72]
>
> [Renvois omis]

[112] La Cour suprême a réitéré l'« avertissement » que ce n'étaient pas tous les différends entre employés syndiqués et employeur qui étaient arbitrables, mais uniquement ceux qui résultaient « expressément ou implicitement » de la convention collective[73]. Tel qu'il ressort au vu des déclarations solennelles des membres de la direction d'Air Canada et des positions adoptées par Air Canada dans les affaires antérieures citées plus haut, les FRT sont un sujet qu'Air Canada a explicitement exclu du champ d'application de la convention collective applicable, de sorte que celle-ci est muette à cet égard. Voici les faits pertinents sur la base desquels il convient de dégager une conclusion sur la question de la compétence[74]. Air Canada a refusé d'aborder le sujet lors des négociations. Les juristes ne peuvent, par quelque procédé que ce soit, transformer cette exclusion expresse en une inclusion implicite, comme l'a, selon moi, fait ma collègue. Il ne suffit pas de qualifier une question de « décision de la direction » pour qu'elle relève de la convention collective, puisque toutes les décisions opérationnelles

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72 *Regina Police Assn. Inc. c. Regina (Ville) Board of Police Commissioners,* 2000 CSC 14, paragr. 25 [*Regina Police*].

73 *Office régional de la santé du Nord c. Horrocks,* 2021 CSC 42, paragr. 22.

74 *Regina Police, supra*, note 72, paragr. 25; *Weber c. Ontario Hydro,* [1995] 2 R.C.S. 929, paragr. 43; *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967, paragr. 3; *Commission des droits de la personne et des droits de la jeunesse c. Commission scolaire de Montréal*, 2022 QCCA 398, paragr. 47 [*Commission scolaire de Montréal*].

prises par la direction dans l'administration de la société ne sont pas matière à arbitrage en vertu de la convention collective. Il doit s'agir d'une décision de la direction relative (même implicitement) aux droits conférés aux employés par la convention collective. Ce n'est pas le cas en l'espèce[75].

[113] L'analyse des résultats auxquels aboutirait la conclusion que les FRT sont implicitement assujettis à la convention collective démontre la fausseté de cette prémisse. Si un employé retraité était contraint d'enregistrer son bagage à main avant l'embarquement et qu'Air Canada le perdait, l'exécution des droits de cet employé retraité ressortirait-elle à l'arbitrage de griefs? En cas de retard d'un vol, l'indemnisation serait-elle prévue comme pour le reste des passagers ou dépendrait-elle du dépôt d'un grief, le voyage dans le cadre du programme FRT résultant de la convention collective? Et si un employé retraité tombait malade parce qu'Air Canada avait servi des bretzels périmés, faudrait-il déposer un grief pour pouvoir réclamer des dommages-intérêts, le voyage ayant eu lieu au moyen de FRT et relevant par conséquent de la convention collective? À mon avis, ces quelques exemples hypothétiques illustrent le fait que, comme Air Canada elle-même l'a maintenu par le passé, les FRT ne se rattachent pas et ne sont pas implicitement assujettis à la convention collective.

[114] La Cour a reconnu que les affaires de responsabilité civile pouvaient sortir du champ d'application de la convention collective[76]. Plus précisément, en l'espèce, dans l'arrêt autorisant l'action collective, la Cour a écrit ce qui suit :

> [24] Secondly, the judge erred in dismissing out of hand the possibility that Air Canada's alleged obligations arose out of distinct contracts legally independent from the collective agreements. While, in principle, a collective agreement leaves no room for separate contracts concerning the conditions of employment, there is authority recognizing the possibility that independent agreements addressing matters not mentioned in the collective agreement may exist and be legally effective. For this reason, one cannot exclude the possibility that Air Canada's longstanding practice regarding FRT passes gave rise to one or several tacit contracts constituting the source of its alleged obligations. Again, the issue at this stage is not whether the appellant is likely to succeed, but rather whether her argument is frivolous or obviously ill-founded. I find that it is not.[77]
>
> [Soulignement dans l'original; renvois omis]

[115] En ce qui concerne les recours en responsabilité civile qui sortent du champ de la convention collective, ma collègue fait une distinction entre l'espèce et la décision de la

[75] A contrario, un litige portant sur l'utilisation d'un questionnaire médical dans le cadre du recrutement a été jugé comme étant arbitrable dans l'arrêt *Commission scolaire de Montréal*, *supra*, note 74; les mesures de réparation pour des violences subies au travail par des professeurs sont jugées arbitrables dans l'arrêt *Procureur général du Québec c. Groleau*, 2022 QCCA 545.

[76] *Banque Laurentienne c. Werve*, 2008 QCCA 702; *Trois-Rivières (Ville de) c. Bessette*, 2011 QCCA 966.

[77] *Davies*, *supra*, note 63.

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Cour dans l'affaire *Banque Laurentienne c. Werve* au motif que dans celle-ci, la demanderesse avait été mal renseignée par l'employeur sur ses avantages sociaux à la retraite alors qu'en l'espèce, il n'est pas allégué que l'employeur aurait fourni de l'information erronée. À mon avis, cette distinction est sans fondement. Cette affaire comme le présent appel concernaient une demande de dommages-intérêts pour le préjudice causé par une faute de l'employeur. En l'espèce la faute alléguée est un manquement à une promesse d'offrir des FRT aux employés retraités et aux employés actifs sur un pied d'égalité. L'analogie avec *Banque Laurentienne c. Werve* est évidente : une violation par l'employeur d'un engagement ou d'une promesse cause un préjudice à l'employé. Dans la même veine, dans l'arrêt *Larivière c. Ville de Montréal*[78], la Cour a permis à un policier de poursuivre son employeur en dommages-intérêts pour avoir refusé de le promouvoir, et ce, bien que la question de la promotion elle-même relevait de la compétence d'un arbitre de griefs en vertu de la convention collective.

[116] Pour finir, je relève que puisque les FRT sont offerts à tous les employés retraités, qu'ils aient ou non été syndiqués, décliner la compétence de la Cour supérieure uniquement à l'égard des retraités anciennement syndiqués a pour résultat d'imposer un traitement différent aux deux groupes, en particulier en ce qui concerne la prescription ou les délais applicables au recours[79]. Outre l'iniquité qui en résulterait, cet état de fait rend manifeste que le régime des FRT sort du champ d'application de la convention collective. D'ailleurs, la porte ne devrait pas être ouverte à la possibilité de décisions contradictoires.

[117] En conclusion, la juge de première instance n'a commis aucune erreur révisable en statuant qu'en l'espèce, la relation entre Air Canada et ses employés retraités sortait du champ d'application de la convention collective[80] et que la Cour supérieure [TRADUCTION] « a[vait] compétence sur le fond pour déterminer si l'exercice des droits de gestion lors de la délivrance des laissez-passer a[vait] donné lieu à des contrats individuels avec les membres du groupe »[81].

[118] Pour les motifs qui précèdent, je rejetterais l'appel, avec les frais de justice.

MARK SCHRAGER, J.C.A.

[78] 2017 QCCA 957.
[79] Air Canada demande à titre subsidiaire le rejet du recours pour non-compétence uniquement en ce qui concerne les employés retraités anciennement syndiqués.
[80] Jugement entrepris, paragr. 25.
[81] *Id.*, paragr. 27.

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