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# COURT OF APPEAL FOR ONTARIO

## CARTHY, GOUDGE AND SHARPE JJ. A.

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| **B E T W E E N :** | ) | |
| | ) | **F.J.C. Newbould, Q.C.** |
| **PATRICK BERRY, JAMES DELUCE, JEFFREY KARELSEN, ROBERT JAMES SIMERSON and ERNEST ZURKAN** | ) | **for the appellants/plaintiffs** |
| **Appellants (Plaintiffs)** | ) | |
| **and** | ) | |
| | ) | **J.P. Nelligan, Q.C.** |
| **CHRIS PULLEY, TOM FRASER, LARS T. JENSEN and JAMES GRIFFITH** | ) | **Dougald E. Brown** **for the respondents/defendants** |
| **Respondents (Defendants)** | ) | |
| | ) | **Heard: December 23, 1999** |

**On appeal from the summary judgment of Winkler J. dated June 4, 1999.**

**SHARPE J.A.**

[1] This appeal raises an important issue relating to membership in a union: Does a union member who fails to comply with the union constitution incur personal liability to another union member who suffers damage as a result?

## I. Facts

[2] This is an intended class proceeding brought on behalf of all Air Ontario pilots (the appellants) who were members of the Canadian Air Line Pilots Association ("CALPA"), an unincorporated association on March 28, 1995, the day a crucial arbitration award was handed down. The defendants (respondents on this appeal) are all Air Canada pilots who were members of CALPA on that same date.

[3] CALPA is a trade union and was the certified bargaining agent for over 4,000 pilots across Canada, including pilots employed by Air Canada and Air Ontario. Under the CALPA Constitution and Administrative Policy ("Constitution") the President had the power to declare that employer airlines are merged, even though they have not yet merged in the corporate sense. The purpose of the merger policy is to prevent pilot employee groups from bidding against one another for work.

[4] Invocation of the merger policy required the employees of the merged employers to establish an integrated seniority list. The policy imposed an obligation to negotiate the merged seniority list in good faith. If the two employee groups failed to negotiate an agreement, they were required to submit the matter to arbitration. The merger policy provided that the decision of the arbitrator "shall be final and binding on all parties to this arbitration."

[5] On March 1, 1991 the CALPA President issued a merger declaration with respect to Air Canada and six feeder airlines, including Air Ontario. This triggered the merger policy and the steps outlined above.

[6] The Air Canada and Air Ontario pilots failed to negotiate a merged seniority list, mediation failed, and the issue was referred to arbitration. The Air Canada pilots requested an "endtail merger" that would result in all Air Ontario pilots being ranked after the Air Canada pilots in seniority. On March 28, 1995, Arbitrator Picher released his decision ("Picher Award"). He rejected the Air Canada pilots' position and directed that the bottom 15 percent of the Air Canada pilots should be "dovetailed" with the most senior regional pilots.

[7] The CALPA President officially accepted the Picher Award on April 5, 1995. Captain Pulley, Chairman of the Air Canada pilots' Master Executive Council ("MEC"), advised the CALPA President that the Air Canada MEC had reviewed the decision and found the award unacceptable. Captain Pulley attended, but refused to participate in a meeting to fashion the seniority list in accordance with the award.

[8] The Air Canada pilots were in negotiations with Air Canada for a new collective agreement at the time that the Picher Award was released. They refused to present a merged seniority list to Air Canada. The Picher Award is of no practical force or effect without the agreement of the employer.

[9] The Air Canada pilots voted to reject the Picher Award. They left CALPA and formed their own union, the Air Canada Pilots Association (ACPA) on May 19, 1995. ACPA was certified as the bargaining agent for Air Canada pilots on November 14, 1995. The membership of all Air Canada pilots in CALPA was automatically terminated when ACPA was certified as their bargaining agent.

[10] Two years after CALPA lost its bargaining rights for the Air Canada pilots, the appellants brought this action suing the respondents personally for $300,000,000 in damages. The appellants allege that the respondents are liable for breach of the CALPA Constitution by virtue of their refusal to accept the Picher award and by the actions they took in that regard. The appellants also assert that an agreement was reached in August, 1988 between the President of CALPA and the Air Canada MEC to the effect that both parties would proceed with a merger of the Air Canada and Air Ontario pilot groups. The appellant's claim was originally pleaded as breach of contract. The respondents moved for summary judgment to dismiss the action. The appellants amended the statement of claim to allege conspiracy and unlawful interference with economic interests on essentially the same facts as pleaded in support of the contractual claim.

[11] The motions court judge granted the respondents' motion for summary judgment under Rule 20.04(4) with respect to the claim for damages arising from breach of contract. He dismissed the motion with respect to the tort claims and found that those claims raised an issue for trial.

[12] The appellants appeal the dismissal of the contractual claim and the respondents cross-appeal the dismissal of the motion to dismiss the tort claims.

## II. Issues

1. Does breach of the CALDA Constitution give an individual union member a right of action for damages for breach of contract against other individual union members?

2. Do the torts claims advanced by the appellants give rise to a genuine issue for trial?

## III. Analysis

### 1) Does breach of the CALPA Constitution give an individual union member a right of action for damages for breach of contract against other individual union members?

[13] It is the position of the appellants that all CALPA members were parties to a contract, the terms of which were specified by the Constitution. They contend that by refusing to respect and abide by the Picher Award, the respondents were in breach of their contractual obligations as laid down in the Constitution, that the appellants suffered damages as a result of the breach, and that an action for breach of contract follows. It is common ground that the contractual claims of the appellants rest on the proposition that each individual union member has a contractual right to sue another individual union

member for damages for breach of the CALPA Constitution where that breach causes damage.

[14] We were invited by Mr. Nelligan to find that there was no breach of the Constitution by the respondents. In my view, that issue is plainly one that could not to be decided in the respondents' favour at this stage of the proceedings. The record before the motions court judge contains letters from certain of the respondents that make it clear that they did not accept the Picher Award and that they would not be bound by it. There is evidence that they acted accordingly. The respondents voted to reject the award and eventually left CALPA to form their own union. In my view, there is clearly a triable issue on the question of whether this conduct amounted to a breach of the Constitution.

[15] The real issue on this appeal is whether a breach of the Constitution gives an individual member a cause of action in damages against other individual members for breach of contract. I agree with the motions court judge that on that issue, there are no material facts in dispute and that the only genuine issue is a question of law that can be dealt with pursuant to Rule 20.04(4).

[16] The precise legal character of unions and other unincorporated associations is a matter of some conjecture: see Adams, *Canadian Labour Law*, 2nd ed. (updated 1999), at §14.710 et seq. Trade unions were seen as unlawful conspiracies at common law, and while legislation long ago removed the unwarranted stigma of criminality, the precise nature of the legal personality of unions is not defined by legislation. Unions form an important part of the contemporary legal and economic landscape, but for various reasons, some historical and some policy-driven, they do not enjoy the legal personality of a natural person or a corporation. Absent specific legislation, they are not suable entities. In Canada, the juridical character of unions has been left to the common law.

[17] In view of the economic importance of trade union membership to individual members, the nature of the rights pertaining to membership have been a frequent source of litigation. It is in that context that the jurisprudence defining the legal character of union constitutions has evolved. The leading Canadian authority is *Orchard v. Tunney*, [1957] S.C.R. 436, a case involving a tort claim by a union member for unlawful expulsion. Rand J. dismissed the contention that the claim could properly be analyzed in terms of status, and preferred an analysis of the union constitution as a complex of contracts between each member and every other member of the union. Rand J. explained this in the following terms, at p. 445:

> Apart, then, from statute, that a union is held together by contractual bonds seems obvious; each member commits himself to a group on a foundation of specific terms governing individual and collective action, a commitment today almost obligatory, and made on both sides with the intent that the

rules shall bind them in their relations to each other. That means that each is bound to all the others jointly. The terms allow for the change of those within that relation by withdrawal from or new entrance into membership. Underlying this is the assumption that the members are creating a body of which they are members and that it is as members only that they have accepted obligations: that the body as such is that to which the responsibilities for action taken as of the group are to be related.

By the contract, therefore, liabilities incurred in group action are group liabilities and it is this unexpressed assumption that warrants the conclusion of several of the Lords in *Taff Vale* and in *Bonsor* in limiting execution of the judgments in those cases recovered to the property of the union. That such a limitation can be effected contractually as between the parties is undoubted and its attribution to the agreement is simply making explicit what is implicit in their act or organization. The contractual rights of a member are, then, with all members except himself, otherwise it would be the group as one that contracts; and what ordinarily is complained of as a breach toward a member must, in light of the rules and the agreement to be bound by a majority, be such as at the same time is a violation in respect of all the other members and not of one or more only.

[18] The contractual model was adopted by this court in *Astgen v. Smith*, [1970] 1 O.R. 129 at 135 where Evans J.A. endorsed the proposition that a union constitution is a complex of individual contracts:

> The contract of association is not between the member and some undefined entity which lacks the capacity to contract; it is a complex of contracts between each member and every other member of the union. These are individual contracts impressed with rights and obligations which cannot be destroyed in the absence of the specific consent of each person whose rights would be affected thereby.

[19] While the contractual analysis has been used to facilitate and elucidate an understanding of the rights and obligations at issue, it is apparent that these constitutions are not typical or conventional contracts. Rather, these special contracts create rights and obligations of a particular nature and they have their own particular juridical character, the precise nature of which has perhaps never been fully elaborated. Ordinary contractual analysis serves well for certain purposes, but care must be taken in its application lest it distort the *sui generis* legal nature of the relationship among union members.

[20] In my view, one cannot make an automatic leap from the contractual characterization of the CALPA Constitution to the conclusion that a right of action in

damages arises on behalf of one union member against another union member who breaches the terms of that Constitution.

[21] I agree with the motions judge that the proposition asserted by the appellants cannot be sustained upon close analysis of the contractual construct of the CALPA Constitution. As described in the above quoted passage from the judgment of Rand J. in *Orchard v. Tunney*, the complex of contracts confers on individual members certain rights. However, Rand J. describes the *obligations* as being owed to the individual member *jointly* by the group consisting of the membership as a whole: "each is bound to all others jointly"; "the contractual rights of a member are, then, with all members except himself." This theme of the rights of the individual member as being with all other members is a consistent one in the cases that have followed. In *Astgen v. Smith, supra*, at p. 134 Evans J.A. states that the individual union member "entered into a contractual relationship with every other member" of the union and describes the essence of the union as "the totality of members related to one another by contract." Similarly, in *Bimson v. Johnston*, [1957] O.R. 519 at 530, Thompson J. states that "the contractual rights of a member are with all other members" of the union. This does not, of course, exclude the existence of certain obligations imposed on individual members as, for example, the obligation to pay dues or to respect other provisions of the constitution. However, the rights and obligations of the individual member are not held or owed vis-à-vis other individual members.

[22] Since the rights and obligations of individual members exist in relation to *all the other members as a whole*, a direct, one-on-one individual contractual relationship of the kind asserted by the appellants would be contrary to the essential nature of the union as a group of members, all bound together by a common contractual bond. In my opinion, it would be a distortion of the very nature of the complex of contracts between *each and every* member to suggest that members are *individually* contractually liable to each other. Thus, it follows that the contractual right of an individual member to damages lies against the membership as a whole and not against other individual union members. As was correctly stated in a leading text: "A suit by one member against all the others sounds in contract and an implied condition of that contract ... [is] that the satisfaction of legal judgments is limited to the joint property of the union." See Adams, *supra*, at §14.710.

[23] I note that union membership is often the product of "closed shop" agreements that effectively compel an individual to join a union in order to earn a living. The individual union member has no capacity to negotiate the terms of membership, or even the opportunity to decline membership where a collective agreement is in place. The motions court judge correctly observed that exposing individual members to a damages claim at the insistence of another member could have "the effect of rendering any given defendant bereft of their personal assets", a result that simply would not be in the reasonable expectation of the member upon joining the union. He noted that depriving the

appellants of the right to sue other individual union members in damages did not leave them without recourse, and observed that the appellants had brought an unfair labour practice complaint before the Canada Labour Relations Board.

[24] In my view, the authorities relied on by the appellants do not establish their right of action in contract against individual union members. *Astgen v. Smith, supra*, was a representative action to challenge the legality of the merger of two unions. As I have noted, the judgment of Evans J.A. follows *Orchard v. Tunney* and describes the rights of the individual union member in terms inconsistent with the claim advanced by the appellants. While the case stands for the proposition that an individual union member has certain contractual rights with respect to the collectivity, I see nothing in the case to support the proposition that the individual member may assert contractual rights against other individual members. The appellants also rely on *Horvak v. Paterson* (1966), 58 D.L.R. (2d) 175 (B.C.C.A.) where a union member sued for damages for breach of the union's obligation to distribute job opportunities in an equitable fashion. A union official was sued in a representative capacity. The court concluded, at p. 181, that it was not necessary to bring the suit in a representative capacity and that an action would lie against the official "since he was the person who actively caused the breach of contract by his own deliberate act." In my view, this is unpersuasive authority for the proposition that an action lies against the individual member in contract as the language used by the court to describe the wrong is plainly tortious in flavour. Likewise, *Bonsor v. Musicians' Union*, [1955] 3 All E.R. 518 (H.L.) is readily distinguishable. It involved an action for damages for wrongful expulsion and was brought against the union itself, not individual members, pursuant to English legislation making unions suable entities.

[25] I would also observe that denying such a right of action in contract would not produce a situation where there is a wrong without a remedy. First, as the motions court judge noted, the appellants can always pursue their remedies before the Canada Labour Relations Board. Second, the CALPA Constitution contains a detailed code to deal with members who breach the obligations it imposes. For example, Article II, Section 7 sets out the procedure for dealing with members who fail to live up to their duties under the Constitution and lists a broad range of offences for which a member can be charged. Section 7 also specifies that the remedy that flows from a breach is "expulsion or such other disciplinary action as the Association may fix". Moreover, a detailed procedure for hearings and appeals is specified by Article II, Section 8 which provides that decisions resulting from this process are "final and binding". Thus, in most cases, the Constitution does provide a remedy where an individual member fails to live up to its terms. The individual member is subject to discipline and ultimately expulsion.

[26] Accordingly, it cannot be said that the denial of the right of action in contract asserted here could produce a situation where there is a wrong without a remedy

[27] The Constitution also provides for sanctions against a member found guilty of "initiating legal action against the Association or a member thereof before exhausting all remedies provided in this Constitution". This provision may be read as implicitly allowing for civil actions where the remedies provided in the Constitution have been exhausted or where they have become redundant (as is the case here once the respondents left CALPA and formed their own union). While this provision does not preclude an action in contract for damages by one union member against another of the kind at issue here, neither should it be read as allowing for such an action. There are other forms of civil action available to individual members which, in all likelihood, the drafters of the Constitution had in mind. There is, for instance, a well-established jurisdiction to grant injunctive or declaratory relief with respect to the enforcement of union constitutions: see eg. *Bimson v. Johnston, supra.* A claim for declaratory or injunctive relief is distinguishable from a claim for compensatory damages against the individual union member for the consequences of a breach. The former fosters the purposes of the Constitution. It requires the group as a whole to respect the rights of the members. There is also a well-established body of jurisprudence relating to tort claims: see discussion *infra.* Again, a tort claim against an individual member does not rest solely on an alleged contractual breach of the union constitution.

[28] In sum, it is my view that affording one member the individual right to sue another member for damages for breach of contract does not comport with the fundamental nature of the union constitutions generally, or the CALPA Constitution specifically, as a bond between all its members.

[29] Nor do I accept that the position of the appellants is improved by virtue of the alleged agreement of August 1988 between the President of CALPA and the Air Canada MEC to proceed with a merger. Even assuming, for the sake of this argument, that the discussions of August, 1988 were not superceded by subsequent events, it is difficult to see how these discussions add any qualitatively different source of legal obligation. Any commitments made by the Air Canada MEC were, as stated in the appellant's factum, in substance, derivative of the rights asserted under the Constitution. The 1988 discussions and commitments correspond with the Picher Award years later. As with the Picher Award, they do not create a source of obligation independent of the Constitution but rather purport to implement the rights accorded by the Constitution. As the Constitution affords no individual right of action for damages, I find it impossible to see how these earlier discussions about the impact and implementation of the Constitution assist the appellant.

[30] Therefore, I conclude that the motions judge was correct in granting the respondent's motion for summary judgment.

**2) Do the torts claims advanced by the plaintiffs/appellants give rise to a genuine issue for trial?**

[31] The tort claims were clearly an afterthought on the part of the appellants, added after the motion for summary judgment attacking the contract claim was launched. The portions of the statement of claim alleging conspiracy and unlawful interference with economic interests lack detail. No new facts are pleaded and the tort claims are at least partially dependent upon the contractual theory of union membership. In essence, the appellants argue that even if the CALPA Constitution does not amount to a contract that affords a contractual right to damages, it remains a contract that afforded them specified rights and benefits. The appellants assert that actions of the respondents in refusing to accept the Picher Award were unlawful and that they knew or ought to have known that their actions would cause injury to the appellants. The motions court judge found that these allegations gave rise to a genuine issue for trial, but he gave no reasons for arriving at that conclusion.

[32] It is by no means clear to me that, in the final analysis, the tort claims asserted are tenable. The tort claims are significantly dependent upon the same contract that has been found not to give rise to a right of action. Union activities are inherently collective in nature. The collective action alleged to give rise to a conspiracy claim is the same collective action that does not give rise to the right of action in contract put forward here.

[33] However, it is well recognized that the acts of individual union members may attract tort liability for conspiracy and interference with economic relations: see Adams, *supra*, at §14.990 et seq. A claim for tortious conspiracy to deprive a party of contractual rights is plainly distinct from a claim for breach of those contractual rights. Similarly, there is a distinctive nature to a claim for intentional interference with economic interests. On the record, I cannot say with the necessary degree of certainty that the appellants will be unable to make out the added element of wrongful conduct necessary to support their tort claims and, accordingly, I would dismiss the cross-appeal with costs.

**IV. Conclusion**

[34] For these reasons, both the appeal and the cross-appeal are dismissed with costs.

Released: APR 2 8 2000