Berry *v*. Pulley, [2002] 2 S.C.R. 493, 2002 SCC 40

Patrick Berry, James Deluce, Jeffrey Karelsen, Robert James Simerson and Ernest Zurkan *Appellants*

v.

Chris Pulley, Tom Fraser, Lars T. Jensen, James Griffith and Kent Hardisty *Respondents*

and

Canadian Labour Congress *Intervener*

Indexed as: Berry *v*. Pulley

Neutral citation: 2002 SCC 40.

File No.: 27992.

2001: October 30; 2002: April 25.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for ontario

Labour relations — Trade unions — Members — Nature of obligations existing between members of a trade union — Action for breach of contract brought

by union members against other union members — Whether union member may be personally liable to other members in breach of contract action based on terms of union constitution — Whether web of contracts exists between union members and, if so, whether it can form the basis for a breach of contract claim against union members.

The appellants brought an intended class proceeding on behalf of all Air Ontario pilots who were members of the Canadian Air Line Pilots Association ("CALPA"), on March 28, 1995, the day a crucial arbitration award was handed down. The proposed respondent class consists of all Air Canada pilots who were members of CALPA, a trade union that was the certified bargaining agent for over 4000 pilots across Canada, on that same date. In March 1991, pursuant to the merger policy appended to the CALPA constitution, the CALPA president issued a merger declaration that affected the Air Canada pilots, who were then members of CALPA, and the pilots of five regional airlines, including Air Ontario. The effect of the declaration was to trigger a process whereby the separate seniority lists covering the pilots of all six airlines were to be integrated. This process resulted in an arbitration award, the "Picher Award". The Air Canada pilots took exception to the award, refused to present a merged seniority list to Air Canada, and voted to reject the Picher Award. On May 19, 1995, the Air Canada pilots left CALPA and formed their own union. The appellants sued the proposed class of Air Canada pilots personally in tort and for breach of contract. The appellants contended that the respondents' refusal to advance the Picher Award during the collective bargaining with Air Canada constituted a breach of the contract contained in the union constitution. The respondents moved for summary judgment to dismiss the action. The motion for summary judgment was granted in part. The appellants' claim in contract was dismissed, but there was determined to be a genuine issue for trial with respect to the

claims in tort. The appellants appealed the dismissal of the contractual claim and the respondents cross-appealed the dismissal of the motion to dismiss the tort claims. The appeal and cross-appeal were both dismissed.

Held: The appeal should be dismissed.

Historically, at common law trade unions were unincorporated associations lacking legal status. To overcome this status problem, courts developed the theory that union members were joined together by a web of individual contracts, the breach of which could give rise to group liability. This allowed individual members to seek remedies for acts committed against them by their union. Since these early cases, the field of labour relations has become increasingly sophisticated and regulated, with the granting of significant statutory powers and duties to trade unions. As a result, trade unions have come to be recognized as legal entities at least for the purpose of discharging their functions and performing their role in the field of labour relations. As such, it is no longer necessary to maintain the concept that union members are bound to each other through a complex of contracts. The recognition of the legal status of trade unions enables the adoption of a more common sense approach, namely, that each union member has a contractual relationship with the union itself. When a member joins a union, a relationship in the nature of a contract arises between the member and the trade union as a legal entity. Although the relationship includes at least some of the indicia of a common law contract, the terms of the contractual relationship between the union and the member will be greatly determined by the statutory labour relations regime and labour law principles. This contractual relationship is unique in both character and context, since it is essentially an adhesion contract with a statutory labour relations scheme superimposed over it.

The legal fiction that union members are bound to each other through a complex of contracts should be discarded because it is both unnecessary and impractical. A member wishing to sue his or her union for breach of the constitution is not impeded by a lack of legal status. On grounds of both law and policy, there is no contract between union members based on the terms of the union constitution. It is not within the reasonable expectations of union members that they could be held personally liable to other members for breaching the union constitution. If courts were to allow disagreements between union members to result in claims against their personal assets absent the existence of an identifiable wrongdoer in breach of some duty, like the required elements of a tort action, this would have a chilling effect on union democracy, and it would interfere with the ability of unions to manage their internal affairs and conflicts.

Cases Cited

Referred to: *Orchard v. Tunney*, [1957] S.C.R. 436; *Astgen v. Smith*, [1970] 1 O.R. 129; *Bimson v. Johnston*, [1957] O.R. 519; *United Mine Workers of America, Local Union No. 1562 v. Williams* (1919), 59 S.C.R. 240; *Society Brand Clothes Ltd. v. Amalgamated Clothing Workers of America*, [1931] S.C.R. 321; *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426; *Bonsor v. Musicians' Union*, [1955] 3 All E.R. 518; *International Brotherhood of Teamsters v. Therien*, [1960] S.C.R. 265; *International Longshoremen's Association, Local 273 v. Maritime Employers' Association*, [1979] 1 S.C.R. 120; *Hornak v. Paterson* (1966), 58 D.L.R. (2d) 175; *Tippett v. International Typographical Union, Local 226* (1975), 63 D.L.R. (3d) 522.

Statutes and Regulations Cited

Canada Labour Code, R.S.C. 1985, c. L-2, s. 35 [repl. 1998, c. 26, s. 17], 37, 103(1), (2).

Civil Code of Québec, S.Q. 1991, c. 64, arts. 2267 to 2279.

Code of Civil Procedure, R.S.Q., c. C-25, art. 60.

Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 114(2).

Labour Act, R.S.P.E.I. 1988, c. L-1, s. 44(1).

Labour Code, R.S.Q., c. C-27.

Labour Relations Act, R.S.M. 1987, c. L10, ss. 146(1), 150(3).

Labour Relations Act, R.S.N. 1990, c. L-1, s. 141(1).

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A, ss. 107(1), 108 [am. 2000, c. 38, s. 16].

Labour Relations Code, R.S.A. 2000, c. L-1, s. 25(1).

Labour Relations Code, R.S.B.C. 1996, c. 244, s. 154.

Professional Syndicates Act, R.S.Q., c. S-40, ss. 1, 9.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 20.04(4).

Trade Union Act, R.S.N.S. 1989, c. 475, s. 79(1).

Trade Union Act, R.S.S. 1978, c. T-17, s. 29 [am. 1983, c. 81, s. 9].

Authors Cited

Perrins, Bryn. *Trade Union Law*. London: Butterworths, 1985.

APPEAL from a judgment of the Ontario Court of Appeal (2000), 48 O.R. (3d) 169, 186 D.L.R. (4th) 311, 131 O.A.C. 337, 2 C.C.L.T. (3d) 103, 46 C.P.C. (4th) 62, 2000 C.L.L.C. ¶ 220-042, [2000] O.J. No. 1401 (QL), affirming a decision of the Superior Court of Justice (1999), 45 O.R. (3d) 449, 99 C.L.L.C. ¶ 220-052, [1999] O.J. No. 1965 (QL). Appeal dismissed.

Frank J. C. Newbould, Q.C., Benjamin T. Glustein and *Joseph M. P. Weiler,* for the appellants.

Steve H. Waller and *Eric Pietersma,* for the respondents Chris Pulley, Tom Fraser, Lars T. Jensen and James Griffith.

Brian Shell and *Barry E. Wadsworth,* for the respondent Kent Hardisty.

John Baigent, for the intervener.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

1 This appeal raises the basic question of whether a union member may be personally liable to other members in a breach of contract action based on the terms of the union constitution. This requires an analysis of the nature of the obligations that exist between members of a trade union.

2 The idea that union members are contractually bound to each other by the union constitution has its roots in the historical development of the union at common law. Early decisions dealing with actions brought by and against trade unions held that trade unions were unincorporated associations lacking legal status. As a result,

a member who had been wronged by his or her union could not bring suit against the association directly. To overcome this status problem, courts developed the theory that union members were joined together by a web of individual contracts, the breach of which could give rise to group liability. This allowed individual members to seek remedies for acts committed against them by their union.

3 Since these early cases, the field of labour relations has become increasingly sophisticated and regulated, with the granting of significant statutory powers and duties to trade unions. In light of these developments, unions have come to be recognized as entities which possess a legal personality with respect to their labour relations role. This status not only allows a union member to bring suit against his or her union directly, but also enables the union to enter into contracts of membership with each of its members.

4 In this modern context, it is no longer necessary to maintain the concept that union members are bound to each other through a complex of contracts. The notion that every union member has a contract with every other member should be discarded, not only because it is unnecessary, but also because it is largely impractical. Further, on a policy level, to allow a breach of contract action to be maintained on this basis would be detrimental both to individual members and to their unions.

5 Instead, the recognition of the legal status of trade unions enables the adoption of a more common sense approach, namely, that each union member has a contractual relationship with the union itself. This relationship is based on the constating documents of the union, although it must be read in light of the statutory

labour relations regime and governing principles of labour law which regulate unions and their activities.

6 Accordingly, as will be discussed further, I agree with the judgments and basic reasoning of the motions judge and the Ontario Court of Appeal to disallow the action brought against the respondent union members. I would dismiss the appeal.

II. Facts

7 This appeal relates to an intended class proceeding brought on behalf of the appellants, all Air Ontario pilots who were members of the Canadian Air Line Pilots Association ("CALPA"), an unincorporated trade union, on March 28, 1995, the day a crucial arbitration award was handed down. The proposed respondent class consists of all Air Canada pilots who were members of CALPA on that same date.

8 CALPA was the certified bargaining agent for over 4,000 pilots across Canada, including pilots employed by Air Canada and Air Ontario. CALPA is governed by a constitution and appended administrative policy ("constitution"). Under the constitution, CALPA is organized into five sub-units:

(a) local councils at each base of the member airlines;

(b) local executive councils of each local council;

(c) master executive councils ("MEC") for each member airline pilot group;

(d) the board of directors of CALPA; and

(e) the convention assembly of CALPA.

The convention assembly is the highest governing body of CALPA. However, on matters exclusively affecting the members of its bargaining unit, the MEC for that bargaining unit is the highest governing authority. Each MEC chairman was a member of the CALPA board of directors.

9 Contained in the administrative policy was a merger policy pursuant to which the President had the power to declare that employer airlines had merged, even though they had not yet merged in the corporate sense. The purpose of this merger policy was to prevent pilot employee groups from bidding against one another for work.

10 On March 1, 1991, pursuant to the merger policy, the CALPA President issued a merger declaration that affected the Air Canada pilots, who were then members of CALPA, and the pilots of five regional airlines, including Air Ontario. The effect of the declaration was to trigger a process whereby the separate seniority lists covering the pilots of all six airlines were to be integrated. The process contemplated an initial attempt to negotiate an integrated seniority list, and failing agreement, a determination by final and binding arbitration.

11 No agreement was reached through negotiation, which led to an arbitration conducted by Michel Picher. 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, the arbitrator released his decision on the integration of the seniority list ("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 airline pilots.

12 The CALPA President officially accepted the Picher Award on April 5, 1995, as required by the merger policy. Captain Pulley, Chairman of the Air Canada pilots' 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 Picher Award.

13 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 had no practical force or effect without the agreement of the employer.

14 The Air Canada pilots voted to reject the Picher Award. On May 19, 1995, they left CALPA and formed their own union, the Air Canada Pilots Association ("ACPA"). ACPA was certified as the bargaining agent for the 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.

15 On March 20, 1996, CALPA filed an application under s. 35 of the *Canada Labour Code*, R.S.C. 1985, c. L-2, asking the Canada Labour Relations Board ("CLRB") to declare Air Canada and the five regional airline subsidiaries a single employer and to consolidate the six separate pilot bargaining units into one. Also on March 20, CALPA brought an unfair labour practice complaint before the CLRB against ACPA seeking remedies for CALPA and the members of the five connector bargaining units. The CLRB consolidated these proceedings and on December 22,

1999 released its decision dismissing both the single employer declaration and the unfair labour practice complaint.

16 The appellants sued the proposed class of Air Canada pilots personally in tort, alleging conspiracy, interference with economic relations and interference with contractual relations. They also sued for breach of contract. The appellants contended that the refusal of the respondents to advance the Picher Award during the collective bargaining with Air Canada was a breach of the contract contained in the union constitution. The respondents moved for summary judgment to dismiss the action.

17 Winkler J. of the Ontario Superior Court of Justice granted the respondents' motion for summary judgment under subrule 20.04(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, with respect to the claim for damages arising from breach of contract. He dismissed the motion with respect to the tort claims finding that those claims raised a genuine issue for trial.

18 The appellants appealed the dismissal of the contractual claim and the respondents cross-appealed the dismissal of the motion to dismiss the tort claims to the Court of Appeal for Ontario. The appeal and cross-appeal were both dismissed with costs.

III. Judgments Below

A. *Ontario Superior Court of Justice* (1999), 45 O.R. (3d) 449

19 The motions judge, Winkler J., commenced his analysis by examining the theories of legal status regarding unions. He noted that the appellants' case was based on the concept that a union is a complex of individual contracts. He thus framed the motion with respect to the breach of contract claim in terms of the following two issues:

(1) what is the nature of the contract of union membership; and,

(2) is it an incident of the contract that individual members of the union can be personally liable in damages to other union members based on an alleged breach of the union constitution?

20 The motions judge concluded, on the authority of *Orchard v. Tunney*, [1957] S.C.R. 436, *Astgen v. Smith*, [1970] 1 O.R. 129 (C.A.), and *Bimson v. Johnston*, [1957] O.R. 519 (H.C.), that unions are unincorporated associations bound together by the contractual bonds between the members, and that the contracting parties are the member and every other member of the union, as opposed to the member and the other members as a group.

21 The motions judge observed that the issues raised in the proceeding were a matter of first impression, since no other Canadian case had involved individual union members suing other members for breach of the union contract. The determination of the motion thus required an examination of first principles.

22 In Winkler J.'s opinion, the view that a union is a complex of individual contracts was "a legal fiction adopted to create an identifiable legal personality for a construct which otherwise has neither common law nor statutory status" (para. 80). He stated

that the main purpose of imposing legal status on unions was to enable individuals to seek remedies for acts committed against them by or through the auspices of the union.

23 He found that the assertion that the appellants were entitled to the remedy of damages from each defendant individually was "fundamentally flawed". Because the failure to advance the Picher Award was a result of the resolutions of the local councils and because the "vast majority" of the Air Canada pilots opposed the award, the appellants were essentially seeking individual remedies from a group action. Not only was this contrary to the principle stated in *Orchard*, *supra*, namely that "liabilities incurred in group action are group liabilities", but Winkler J. also found that there was an inherent contradiction in seeking an individual remedy for a group action taken by a majoritarian organization.

24 Aside from the question of liability, Winkler J. also found problematic the contention that there existed a remedy of damages as an incident to the union membership contract. He noted that the union contract was essentially an "adhesion" contract, that is, a form of "take it or leave it" arrangement which could not be assigned the same attributes as a commercial contract between two parties of equal bargaining power.

25 He held that union contracts were relational as opposed to transactional and were predicated on a determination of the reasonable expectations of the parties. He found that it could not have been contemplated by individual union members when they joined the union that they would be exposing their personal assets to this type of claim.

26 The motions judge concluded that to give effect to the appellants' contention would "require a disregard for the realities of labour relations and union membership" (para. 95) and "produce an injustice rather than promote the cause of justice". In conclusion, Winkler J. wrote at paras. 94 and 97:

> An extension of the contract theory of union membership to provide a remedy in damages against union members in their personal capacity would be to take the legal fiction well beyond its original purpose and dramatically alter the landscape of labour relations.
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> . . .
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> In conclusion, it is not an incident of a contract of union membership that individual members of the union may be held personally liable to other union members as a result of the collective action of the bargaining unit. The remedy of damages as against individual members is not available for the breach of contract of the nature asserted to exist between the union members.

27 The motion for summary judgment was granted in part. The appellants' claim in contract was dismissed, as the judge found that it raised no cause of action known in law; however, he found, without giving reasons, that there was a genuine issue for trial with respect to the claims in tort.

B. *Ontario Court of Appeal* (2000), 48 O.R. (3d) 169

28 Sharpe J.A., for the court, held that the motions court judge was correct in granting the respondents' motion for summary judgment. The court agreed with the motions judge that the appellants' proposed action could not be sustained upon close analysis of the contractual construct of the CALPA constitution and the case law.

29 After reviewing the three leading cases – *Orchard, supra*, *Astgen, supra,* and *Bimson, supra* – the court concluded that the rights and obligations of the individual union member are not held or owned *vis-à-vis* other individual members. As well, 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. It followed that the contractual right of an individual member to damages lies against the membership as a whole and not against other individual union members.

30 The court also agreed with the motions judge that it would not be within the reasonable expectations of the union members to expose themselves to a claim for damages in contract. The court was further of the view that it could not be said that the denial of the right of action in contract could produce a situation where there was a wrong without a remedy because of the ability to pursue a remedy through the CLRB (now the Canada Industrial Relations Board), as well as the existence of disciplinary measures contained in the CALPA constitution for members who breached the obligations imposed by the constitution.

31 With respect to the tort claims, the court was not certain that the tort claims asserted would be tenable, since they were significantly dependent upon the same contract. However, the court noted that it is well recognized that the acts of individual union members may attract tort liability for conspiracy, interference with economic relations and interference with economic interests, and thus the court could not be certain that the appellants would be unable to make out their tort claims.

32 In conclusion, the Court of Appeal dismissed the appeal, upholding Winkler J.'s decision which dismissed the appellants' claim in contract but found that there was a genuine issue for trial with respect to the tort claims.

IV. Issue

33 The issue on this appeal is whether a union member who breaches or causes the breach of a union constitution may incur personal liability in breach of contract to another union member who suffers damage as a result.

V. Analysis

A. *A Brief Overview of the Historical Development of the Union Contract and Union Status*

34 The use of a contractual model to characterize union membership arose in the early part of the 20th century as a consequence of the rising prominence of trade unions in England. The general rule at common law was that unions, as unincorporated associations, had no legal status. As a result, members could not bring suit against the union itself and courts would normally only engage in union affairs in order to protect the property interests of the members, refusing to interfere to enforce the rules of the association: see B. Perrins, *Trade Union Law* (1985), at p. 90; see also *United Mine Workers of America, Local Union No. 1562 v. Williams* (1919), 59 S.C.R. 240; *Society Brand Clothes Ltd. v. Amalgamated Clothing Workers of America*, [1931] S.C.R. 321. As the role of trade unions became more significant, and unions were able to exercise significant control over employers and employees alike, common law

courts sought to establish a basis for a legally enforceable obligation on unions to follow their internal rules, thereby protecting the rights of individual union members.

35 In *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, the House of Lords held that an action in tort lay against a union for the actions of its agents. The reasoning of the court was that the statutory rights of trade unions (for example to be registered, hold property, and enter into contracts) granted to them by the *Trade Union Act, 1871* (U.K.), 34 & 35 Vict., c. 31, and the *Trade Union Act Amendment Act, 1876* (U.K.), 39 & 40 Vict., c. 22, brought with them corresponding obligations to the unions' members. As such, a trade union possessed the legal status to be sued in its registered name and could be held liable to the extent of the property of the union. The House of Lords was unanimous in its approval and adoption of the reasons of the trial judge, Farwell J., who, at p. 429, rationalized the legal personality of a trade union as follows:

> Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature.

36 In *Bonsor v. Musicians' Union*, [1955] 3 All E.R. 518 (H.L.), an expelled union member brought an action against the union in breach of contract. Lords Morton, Porter and Keith agreed that the reasoning in *Taff Vale, supra*, was applicable, and held that a trade union had the status to be sued in a breach of contract action brought

by a member against the union for expelling the member in contravention of the union's rules. At p. 524, Lord Morton characterized the relationship between the member and the union as follows:

> When Mr. Bonsor applied to join the respondent union, and his application was accepted, a contract came into existence between Mr. Bonsor and the respondent union, whereby Mr. Bonsor agreed to abide by the rules of the respondent union, and the union impliedly agreed that Mr. Bonsor would not be excluded by the union or its officers otherwise than in accordance with the rules. . . . The respondent union broke this contract, by wrongfully expelling Mr. Bonsor and Mr. Bonsor sued the union as a legal entity. He did not sue either all the members of the union at the date of the writ other than himself, many of whom must have joined since the breach of contract, or all the members of the union including himself.

Although Lord Morton recognized that the facts in the *Taff Vale* case differed from the case before him in that the former involved a tort action which was not brought by a member of the union, he held that these were not "vital differences" (at p. 523) and employed similar reasoning in coming to the conclusion that the union had the status to contract with Mr. Bonsor, and could therefore be sued for breaching that contract.

37 In the seminal Canadian case of *Orchard*, *supra,* a union member sued members of the union's executive board in tort for infringing his rights under the union constitution. In addressing the character of the rights and obligations relating to union membership, Rand J. (for the majority) looked to the *Taff Vale* and *Bonsor* decisions for the basis of his judgment; however he noted that those decisions were grounded in the fact that the English *Trade Union Acts* had granted significant rights to trade unions, and that there was no comparable legislation in Manitoba. Thus, with no basis upon which to follow these English decisions, Rand J. was unable to find that trade unions in Manitoba had legal status or personality.

38 In light of this statutory difference, Rand J. did not wholly adopt the reasoning of the House of Lords from *Bonsor*, *supra*, to the effect that there existed an enforceable contract between the union *per se* and each individual member. Instead he held at p. 445 that, although union membership was contractual in nature, the contract was between the members *inter se*:

> There is no legislation in Manitoba similar to that of the *Trade Union Acts*, 1871-1876; and it was not argued that *The Labour Relations Act*, *supra*, had any wider effect than as already stated. 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.
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> 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 of 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 the 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. [Emphasis added.]

Although he characterized the contract slightly differently, the effect of Rand J.'s statement accords with the thrust of the *Bonsor* decision. The essence of both judgments is that the act of joining a union is contractual in nature. By becoming a member, the individual accepts responsibility as a member of the group; however,

liability arising from the union's breach of the constitution is of a group nature and is therefore limited to the property of the union.

39 Since the *Orchard* decision, legislatures have granted statutory rights to trade unions similar to those acknowledged by the House of Lords in *Taff Vale*, *supra*. Recognizing these statutory developments, this Court has come to hold the view that a trade union is a legal entity that can be sued in its own name. In *International Brotherhood of Teamsters v. Therien*, [1960] S.C.R. 265, at pp. 277-78, the Court held through the judgment of Locke J. that:

> The granting of these [statutory] rights, powers and immunities to these unincorporated associations or bodies is quite inconsistent with the idea that it was not intended that they should be constituted legal entities exercising these powers and enjoying these immunities as such. . . .
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> . . .
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> In my opinion, the appellant is a legal entity which may be made liable in name for damages either for breach of a provision of the *Labour Relations Act* or under the common law. [Emphasis added.]

40 Although *Therien* is arguably restricted in its application owing to the fact that the Court relied on specific provisions of the British Columbia *Labour Relations Act*, S.B.C. 1954, c. 17, and *Trade-unions Act*, R.S.B.C. 1948, c. 342, in *International Longshoremen's Association, Local 273 v. Maritime Employers' Association*, [1979] 1 S.C.R. 120, at pp. 135-37, Estey J. speaking for the Court made a more general statement with respect to the legal status of trade unions:

> Federal and provincial labour relations statutes alike have been interpreted by the courts in the same general way as Farwell J. interpreted the United Kingdom legislation in the *Taff Vale* case,

> *supra*, and over the years the concept has crystallized in our law whereby trade unions and employer organizations are deemed to have been constituted by the Legislature as legal entities for the purpose of discharging their function and performing their role in the field of labour relations. . . .
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> . . . The [Canada Labour] Code introduced by Parliament in 1972 . . . establishes in modern form an elaborate and comprehensive pattern of labour relations in all its aspects within the federal jurisdiction. The exercise of the rights and the performance of the obligations arising under that statute can only be undertaken efficiently and conveniently by those groups acting as legal entities. The reasoning in the *Taff Vale* decision, *supra*, and the subsequent cases in this country apply with equal force and effect in the case of the Code. It is not necessary to decide as has been done in some of the judgments cited above whether any action might be maintained in the courts by or against these entities in respect of conduct outside the discharge of their obligations or the exercise of their rights under the Code. It would take the clearest possible language in my view on the part of Parliament when enacting the Code to show that Parliament did not wish to establish the bargaining agent and the employer as legal entities for the purpose of employer relations regardless of the status of each under pre-existing statute law or the common law generally. In the result, the Association is a legal entity fully capable of bringing these proceedings; and the three Locals are likewise each legal entities fully capable at law of being added as a party defendant. [Emphasis added.]

41 I note that neither *Therien* nor *International Longshoremen's Association* involved a breach of contract action. *Therien* considered union status in relation to actions brought against the union by a third party in tort and for breach of the British Columbia *Labour Relations Act*, and *International Longshoremen's Association* involved an injunction application brought against the union. However, in *Hornak v. Paterson* (1966), 58 D.L.R. (2d) 175, McFarlane J.A. of the British Columbia Court of Appeal held, at p. 181, that the reasoning in *Therien* was equally applicable to a breach of contract claim by a union member against the union:

> Respondents' counsel sought to distinguish the *Therien* case on the ground that it involved an action for damages in tort. In my view this is not a valid distinction. I think when Locke, J., referred to damages under the common law he meant to include damages for

> breach of contract such as the contract of union membership here invoked, as well as damages for tort. Locke, J., referred to the rights, powers and immunities conferred upon trade unions by the *Labour Relations Act* of this Province, now R.S.B.C. 1960, c. 205, as amended by 1961 (B.C.), c. 31, which defines a trade union as an organization that has as one of its purposes the regulation in the Province of the relations between employers and employees through collective bargaining. The right to bargain collectively and to enter into agreements for that purpose involves necessarily the creation of contractual obligations as between the union and the employees for whom the Legislature has empowered it to act when certified as the statute provides. Locke, J., said also at p. 11:
>
> > In the absence of anything to show a contrary intention . . . the Legislature must be taken to have intended that the creature of the statute shall have the same duties and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing. *Qui sentit commodum sentire debet et onus*.
> >
> > . . . For these reasons I am of the opinion that Local 97 may be made liable in name for damages for breach of its contract of membership with the appellant.

42 In addition to the judicial recognition of the legal status of trade unions, labour relations legislation in this country has expressly acknowledged the legal status of trade unions to varying degrees. For example, ss. 103(1) and 103(2) of the *Canada Labour Code*, R.S.C. 1985, c. L-2, provide that:

> **103.** (1) A prosecution for an offence under this Part may be brought against and in the name of an employers' organization, a trade union or a council of trade unions.
>
> (2) For the purpose of a prosecution under subsection (1),
>
> (*a*) an employers' organization, trade union or council of trade unions shall be deemed to be a person;

Similarly, ss. 107(1) and 108 of the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, allow for prosecutions for offences under that Act and proceedings to

enforce the decisions of arbitrators or the Ontario Labour Relations Board to be brought against the union in its own name.

43 Section 154 of the British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244, has a broader recognition of legal status:

> **154** Every trade union and every employers' organization is a legal entity for the purposes of this Code.

Substantially similar provisions can be found in Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland labour legislation: see Alta. *Labour Relations Code*, R.S.A. 2000, c. L-1, s. 25(1); Sask. *Trade Union Act*, R.S.S. 1978, c. T-17, s. 29; Man. *Labour Relations Act*, R.S.M. 1987, c. L10, ss. 146(1) and 150(3); N.B. *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 114(2); N.S. *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 79(1); P.E.I. *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 44(1); Nfld. *Labour Relations Act*, R.S.N. 1990, c. L-1, s. 141(1).

44 Under Quebec legislation, a union of fifteen or more members can incorporate under s. 1 of the *Professional Syndicates Act*, R.S.Q., c. S-40, and s. 9 of that Act grants extensive powers to such associations, including the right to appear before the courts and enter into contracts. As well, by art. 60 of the *Code of Civil Procedure* of Quebec, R.S.Q., c. C-25, an unincorporated union may be a party to legal proceedings in its own name provided that, where the association is bringing the action, it deposits with the court a certificate of the labour commissioner-general attesting that it is an association of employees within the meaning of the Quebec *Labour Code*, R.S.Q., c. C-27. Other aspects of legal personality are granted to unincorporated associations by

the section on Associations of the *Civil Code of Québec*: see S.Q. 1991, c. 64, arts. 2267 to 2279.

45 As can be seen, there have been numerous statutory developments aimed at enhancing the legal status of trade unions. In addition to these specific provisions, I agree with the view expressed by Estey J. in *International Longshoremen's Association*, *supra*, at p. 137 that, regardless of the status of trade unions under statutory law, "[i]t would take the clearest possible language" to show that legislatures did not wish to establish the bargaining agent as a legal entity for labour relations purposes.

B. *The Union Contract and Union Status in the Modern Context*

46 As the above cases and statutory provisions suggest, the world of labour relations in Canada has evolved considerably since the decision of this Court in *Orchard*, *supra*. We now have a sophisticated statutory regime under which trade unions are recognized as entities with significant rights and obligations. As part of this gradual evolution the view has emerged that, by conferring these rights and obligations on trade unions, legislatures have intended, absent express legislative provisions to the contrary, to bestow on these entities the legal status to sue and be sued in their own name. As such, unions are legal entities at least for the purpose of discharging their function and performing their role in the field of labour relations. It follows from this that, in such a proceeding, a union may be held liable to the extent of its own assets.

47 Viewed in this modern context, the proposition that a trade union does not have the legal status to enter into contracts with its members is implausible. The

impediments that prevented Rand J. in *Orchard*, *supra*, from holding that by joining a union, the member contracts directly with the union as a legal entity, have been overcome. In order for trade unions to fulfill their labour relations functions, it is essential for unions to control and regulate their internal affairs. Since the regulation of union membership is a fundamental part of the role of trade unions, it is only logical that it should fall within the sphere of activities for which unions have legal status. It follows that unions must have sufficient legal personality to enter into contracts of membership, and that this is an aspect of union affairs for which legislatures have impliedly conferred legal status on unions. In addition, I agree with Lord Morton's statement in *Bonsor*, *supra*, that there are no "vital differences" between an action in tort and an action in breach of contract brought by a member against the union, and to draw a line between the legal status to be sued in tort and the legal status to enter into contracts with its members is arbitrary and illogical.

48 In light of the above, the time has come to recognize formally that when a member joins a union, a relationship in the nature of a contract arises between the member and the trade union as a legal entity. By the act of membership, both the union and the member agree to be bound by the terms of the union constitution, and an action may be brought by a member against the union for its breach; however, since the union itself is the contracting party, the liability of the union is limited to the assets of the union and cannot extend to its members personally. I say that this relationship is in the nature of a contract because it is unlike a typical commercial contract. Although the relationship includes at least some of the indicia of a common law contract (for example offer and acceptance), the terms of the contractual relationship between the union and the member will be greatly determined by the statutory regime affecting unions generally as well as the labour law principles that courts have

fashioned over the years. With this in mind, for ease of reference I will refer to the membership agreement between the individual member and the union as a contract.

49 Having said that there exists an enforceable contract between union members and the union, I believe it is worth elaborating on several factors which make this contract unique. First, it is essentially an adhesion contract as, practically speaking, the applicant has no bargaining power with the union. Moreover, in many situations, union membership is a prerequisite to employment, leaving the individual with little choice but to accept the contract and its terms. Finally, it must be borne in mind that a statutory labour relations scheme is superimposed over the contract between the member and the union, and can create legal obligations. Consequently, the contract must be viewed in this overall statutory context. For example, the statutory right of members to be represented by the union of their choice implies that the contract only exists as long as the members maintain that union as their bargaining agent, and no penalty could be imposed by the contract against members for exercising this statutory right. As it is not necessary to interpret the terms of the membership contract or determine its scope on the facts of this case, I decline from elaborating further on these matters. I simply note that the unique character and context of this contract, as well as the nature of the questions in issue, will necessarily inform its construction in any given situation.

50 In my view, the above characterization not only fulfills the practical purpose of providing a basis from which the terms of the union constitution may be enforced, but it also serves as an accurate and realistic description of the nature of union membership. The individual applies for membership with the union. It is the union, represented by its agents, that accepts the individual as a member, and this individual

agrees to follow the rules of the union. Aside from the fact that the relationship between the union and its members fits naturally into the contractual model, in today's labour relations context, the public has come to view unions as associations with the responsibility to discharge their obligations to members; it would be inconsistent with this view to deny unions the right to enter into legally enforceable contracts with these members.

51 I emphasize that the above recognition of the legal status of trade unions does not automatically extend to other unincorporated associations. The unique status of trade unions is a consequence of the complex labour relations regime governing their existence and operations. By statute, labour unions have been endowed with significant powers and corresponding duties. They are granted the monopoly power to act as the exclusive bargaining agent for a group of employees, and they have a corresponding duty to bargain fairly on their behalf. As well, union membership is often a prerequisite to employment, forcing members to join the union based on its prescribed terms. By acceding to union membership, the individual agrees to be bound by the union constitution, the terms of which will almost inevitably include internal disciplinary provisions in the event of a breach by the member. In light of the significant powers and duties of the union *vis-à-vis* its members, and in particular its ability to enforce the terms of the membership agreement internally, it is only logical to hold that the legislature has intended unions to have the status at common law to sue and be sued in matters relating to their labour relations functions and operations.

C. *Existence of a Contract Inter Se Between Union Members*

52 Given the recognition of the special form of contractual relationship which exists between a trade union and each of its members, the question remains whether there is any basis for maintaining the proposition that there exists a web of contracts between each of the union members *inter se*, and, if so, whether this relationship can form the basis for a breach of contract claim against union members.

53 As discussed above, the idea that union members were joined to each other through a web of contracts arose as a legal fiction designed by courts as a way to exert jurisdiction over the internal affairs of a trade union. It allowed courts to circumvent the lack of legal status of unions and hold unions liable through the medium of their membership. By characterizing the liability as that of the group, the execution of the judgment was limited to the assets of the union.

54 With the acknowledgment of the legal status of unions relating to the fulfilment of their labour relations role, I agree with the view that the legal fiction of a web of contracts between members is no longer necessary. A member wishing to sue his or her union for breach of the constitution is not impeded by a lack of legal status. Since the underlying problem which led to the establishment of the fiction has been resolved, in the absence of some compelling reason to maintain it, the idea that union members are contractually connected to each other should likewise be abandoned.

55 As an initial matter, I would find it difficult, if not impossible, to conclude that the traditional indicia of a contract exist between the members of a union. For example, it stretches the imagination to suppose that each and every member of a union makes an offer of membership to an individual who then accepts these various offers, or vice versa, or that there takes place some mutual exchange of consideration

between and among perhaps thousands of members. This is in contrast with the ease with which the relationship between the member and the union fits into the contractual model. In my view, it is simply unrealistic to posit that such a web of contracts exists between union members. Moreover, I agree with the courts below that it is not within the reasonable expectations of union members that they could be held personally liable to other members for breaching the union constitution. As well, the union constitution does not generally set out obligations which exist between individuals. It is mainly concerned with the obligations of the individual to the union (e.g. to pay dues, to participate in job action, etc.) as well as laying out how the union will be governed and conduct its affairs.

56 The respondents argue that the concept of a contractual relationship between the members should be maintained and enforced in this case in order to fill a gap that would otherwise exist in the labour relations scheme. In my view, there is no gap in this case that needs to be filled; if the appellants were in fact wronged, there are remedies that were and are available to them that appear to be fair and reasonable.

57 First, although the Air Canada pilots subsequently left CALPA, at the time the alleged wrongs were committed, they were still members of CALPA and internal remedies were available to the Air Ontario pilots. For example, Article II, s. 7 of the constitution allowed the Board or any MEC to bring a charge against any member for, among other misdemeanours, a willful violation of the constitution. As well, by Article VI, s. 1(b), the Board had the power to intervene in the affairs of an MEC if the Board was of the opinion that the MEC was contravening the constitution or policies of the union.

58 In addition to these internal procedures, if the appellants were of the opinion that CALPA was not adequately addressing the alleged misdemeanours by the Air Canada MEC, the appellants may have been able to bring a complaint before the CLRB against CALPA for failing in its duty under s. 37 of the *Canada Labour Code*, to fairly represent the appellants in the bargaining of seniority rights. Although the appellants and respondents disagreed on whether the duty of fair representation was broad enough to encompass this situation, the essential point here is that the appellants failed to pursue any of these internal or CLRB procedures. In this connection, the appellants conceded at trial that there were internal remedies available to them which they elected not to pursue (para. 92). In addition, aside from the availability of internal procedures and CLRB proceedings, it is well established that tort claims may lie between union members, and in this case, the tort actions have been allowed to proceed.

59 However, apart from the fact that there were and are remedies available to the appellants in these particular circumstances, on a more general level, it seems problematic for a court to fill legislative gaps in the labour relations scheme by contorting what is essentially a contractual metaphor into a basis for a breach of contract action. Absent an independent basis for recognizing a breach of contract action between members, the mere argument that there exists a legislative gap is insufficient justification for transforming this contractual metaphor, initially created to provide a foundation for finding group liability, into a concrete basis which allows for personal liability to exist between union members.

60 On a policy level, if courts were to allow disagreements between union members to result in claims against their personal assets absent the existence of an identifiable wrongdoer in breach of some duty, like the required elements of a tort action, this

would have a chilling effect on union democracy. The importance of the democratic rights of union members, including the right to dissent, was pointed out in *Tippett v. International Typographical Union, Local 226* (1975), 63 D.L.R. (3d) 522 (B.C.S.C.), at p. 546:

> All members of trade unions have the unqualified right to speak out against the manner in which union affairs are conducted. There is a right of dissent. There is a right to seek decertification, subject to the condition that no member of a union shall conspire with his employer to injure his union. I point out, moreover, that dual unionism is a fact of life in this Province. No person can be expelled or penalized by a trade union for insisting on his rights.

Exposing the personal assets of dissenting union members to liability would be antithetical to this "unqualified right" of union members to speak out against the agenda of their bargaining agent. The result would be to discourage member participation in union affairs and to erode union democracy.

61 As well, I agree with Winkler J. that trade unions would find it difficult to recruit members or obtain certificates to bargain collectively if the act of joining a trade union exposed individuals to personal liability in damages to other members for alleged breaches of provisions of the constitution. Further, if union members were permitted to bring suit against other members instead of resorting to internal dispute resolution mechanisms where breaches of the constitution were alleged, the ability of unions to resolve internal conflicts would be hindered. This loss of control over internal affairs would undermine the ability of unions to present a united front to employers and pursue the collective interests of their members.

62 To summarize, on grounds of both law and policy, I conclude that there is no contract between union members based on the terms of the union constitution. In light

of the finding that the union itself can be held liable in breach of contract, there is no need to maintain the "complex of contracts" model. In addition, to interpret this model so as to allow for personal liability between union members would be contrary to its purpose and intent and would have negative consequences on the operation of the labour relations scheme in this country.

63 However, this is not to say that union members do not have some obligations *inter se*. By joining a union, the member agrees to follow the rules of the union, and, through the common bond of membership, union members have legal obligations to one another to comply with these rules. If there is a breach of a member's constitutional rights, this is a breach by the union, and the union may be liable to the individual. Similarly, the disciplinary measures in the constitution can be imposed by the union on a member who contravenes the union's rules. A failure by the union to follow these disciplinary procedures may cause it to breach its contractual obligations to the other members, giving rise to corresponding contractual remedies.

64 In addition to potential internal procedures, a failure by the union to insist on compliance with the constitution or impose disciplinary measures for its breach may allow members to initiate proceedings either at the Canada Industrial Relations Board, or the courts, depending on the nature of the complaint. Aside from actions against the union, a member who is harmed by the breach of the union's rules by another member may, if the requisite elements are present, have an action in tort against that member.

VI. Conclusion

65 For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

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