

In the Provincial Court of Alberta

Citation: Telecommunications Works Union Local 202 v. Macmillan, Pinchak, Gejdos, 2008 ABPC 38

Date: 20080201

Docket: 0602600312

0602600313

0602600314

Registry: Lethbridge

Between:

Telecommunications Workers Union Local 202

Plaintiff/Respondent

- and -

Wayne MacMillan, Robert (Bob) Pinchak and Cody Gejdos

Defendants/Applicants

Judgment of the Honourable Judge J.N. LeGrandeur

Nature of Proceedings

[1] In each of the matters before this Court, the Plaintiff, Telecommunication Workers Union Local 202 (the TWU) seeks a monetary judgment against the Defendants, MacMillan, Pinchak and Gejdos equal in amount to the fine imposed upon the respective Defendants by a trial board established pursuant to the TWU Constitution. The Defendants each dispute the right of the TWU to obtain judgment against them as sought and bring before the Court a preliminary application seeking dismissal of the Plaintiff's claims and costs.

[2] The Defendants' application asserts that:

- a. the enforcement of penalties in the courts by the TWU is prohibited by s.4(1)(a) and (b) of the Trade Unions Act;
- b. there is no common law cause of action allowing enforcement of the penalties imposed by the TWU Trial Board, and
- c. the penalties imposed by the TWU Trial Board on the respective Defendants (fines) are not a debt or damage and therefore not enforceable in the Provincial Court of Alberta.

Facts

[3] The facts on which the applications before the Court are based are found in Exhibits 1 through 11, which are described as follows:

- . Exhibit 1 - Statement of Agreed facts
- . Exhibit 2 - Membership application for Wayne MacMillan
- . Exhibit 3 - Membership application for Robert Pinchak
- . Exhibit 4 - Membership application for Cody Gejdos
- . Exhibit 5 - Three page copy of notice of lockouts
- . Exhibit 6 - Telecommunication Workers document
- . Exhibit 7 - Telecommunication Workers Union document dated November 18th, 2005
- . Exhibit 8 - Telecommunication Workers Union Constitution
- . Exhibit 9 - Evidence log for Wayne MacMillan
- . Exhibit 10 - Evidence log for Robert Pinchak
- . Exhibit 11 - Evidence log for Cody Gejdos

[15] The agreed facts as set out in Exhibit 1, for ease of reference are repeated hereunder:

1. The defendant Wayne MacMillan signed an application for membership with the Telecommunications Workers Union ("TWU"), Local 202 (**Exhibit 2**) on August 15, 2000. The application reads in part: "If my application for membership is accepted, I will comply with the constitution of the Telecommunications Workers Union and By-Laws as written and amended from time to time." At the material times defendant Wayne MacMillan was a member and Vice President of TWU Local 202.
2. The defendant Robert (Bob) Pinchak signed an application for membership with the TWU, Local 202 (**Exhibit 3**) on August 17, 2000. The application reads in part: "If my application for membership is accepted, I will comply with the Constitution of the Telecommunications Workers Union and By-Laws as written and amended from time to time." At the material times defendant Robert (Bob) Pinchak was a member of TWU Local 202.
3. The defendant Cody Gejdos signed an application for membership with the TWU, Local 202 (**Exhibit 4**) on August 23, 2004. The application reads in part: "If my application for membership is accepted, I will comply with the constitution of the Telecommunications Workers Union and Bylaws as written and amended from time to time." At the material times defendant Cody Gejdos was a member of TWU Local 202.
4. The TWU is, and was at the material times, the collective bargaining agent for employees of TELUS.
5. At the material times the defendants Wayne MacMillan, Robert (Bob) Pinchak and Cody Gejdos were employees of TELUS.

6. On 18 April 2005, TELUS issued 72-hour First Notice of Lockout pursuant to *Canada Labour Code* s.87.2(2) (**Exhibit 5**). Pursuant to *Canada Labour Code* s.87.1(1), the TWU Local 202 commenced a strike on 21 July 2005 in response to the lockout by TELUS; the TWU announced that it was setting up picket lines across Alberta and British Columbia, effective 6:00 a.m. local time (**Exhibit 6**). This labour dispute ended 18 November 2005 after TWU members voted to accept a proposed agreement with TELUS (**Exhibit 7**).
7. The defendants Wayne MacMillan, Robert (Bob) Pinchak and Cody Gejdos, having been accepted as members by the TWU, had agreed to comply with TWU Constitution (**Exhibit 8**), Article XVIII Sections A and C of which stated at the material times:

SECTION A: Offences

Any member may be disciplined for violation of any of the provisions of this Constitution or Local by-laws, or for violation of the policies of the Union, or for cause detrimental to the welfare of the Union, or for bringing charges under this Article without reasonable grounds for believing such charges to be true, or for crossing or working behind any picket line without authorization from the Executive Council.

SECTION C: Penalties

1. Upon a verdict of guilty of any charge the Trial Board may impose a penalty of expulsion, suspension, fine (not to exceed (\$1,000), public reprimand or admonishment by the President, special remedial action appropriate to cure the offence or other penalty appropriate to the offence or any combination thereof, and the Trial Board shall determine when any such penalty has been satisfied. Pending satisfaction of a penalty, except expulsion, a penalized member shall be denied the right to attend meetings and any benefits they may receive as a member in good standing.
 2. Any imposed fine shall be collected from the member by the Secretary of the Local concerned and shall be paid into the Local funds within 30 days. Failure to pay the fine within 30 days from the date such fine was imposed shall invoke automatic suspension.
 3. Expulsion shall mean expulsion from the Union with loss of all benefits.
8. The defendants Wayne MacMillan, Robert (Bob) Pinchak and Cody Gejdos crossed picket lines and worked for TELUS.
 9. On 17 October 2005 the defendant Wayne MacMillan was charged per the TWU Constitution Article XVIII with working behind a picket line

without authorization from the Executive Council, and with failure to uphold his oath of executive office. On 19 November 2005 TWU Local 202 held a trial to determine his guilt or innocence. On 19 November 2005 the Trial Board found defendant Wayne MacMillan guilty of all charges and a fine of \$1,500 was imposed (**Exhibit 9**).

10. On 14 October 2005 the defendant Robert (Bob) Pinchak was charged per the TWU Constitution Article XVIII with working behind a picket line without authorization from the Executive Council. On 19 November 2005 TWU Local 202 held a trial to determine his guilt or innocence. On 19 November 2005 the Trial Board found defendant Robert (Bob) Pinchak guilty of all charges and a fine of \$3,650 was imposed (**Exhibit 10**).
11. On 21 November 2005 the defendant Cody Gejdos was charged per the TWU Constitution Article XVIII with working behind a legal picket line. On 14 January 2006 TWU Local 202 held a trial to determine his guilt or innocence. On 14 January 2006 the Trial Board found defendant Cody Gejdos guilty of all charges and a fine of \$2,150 was imposed (**Exhibit 11**).
12. The defendants Wayne MacMillan, Robert (Bob) Pinchak and Cody Gejdos have not paid the imposed fines.

Analysis

[16] At the heart of this matter, the applicant members dispute that the TWU has the right to utilize the court system to enforce fines it has imposed upon its members through internal rules and processes for disciplinary purposes. In support of this position, the applicant members rely upon the *Federal Trade Unions Act*, the “Penalties” provision of the TWU Constitution, and various cases. In reply, the TWU asserts that the *Trade Unions Act* does not bar commencement of the subject proceedings. It also argues that the cases relied upon by the applicant members are no longer sound authority given the Supreme Court of Canada’s decision in *Berry v. Pulley*, [2002] S.C.R. 493. The TWU argues that *Berry* stands for the proposition that trade unions have evolved to become entities possessing a legal personality that enables them to enter and enforce contract relations with union members.

[17] Assuming that the TWU does have the ability to impose fines or penalize by other methods members who have breached rules of the union constitution, the question that arises here is whether the penalty (in this case a fine), imposed by the union upon the member for breach of union rules may be enforced against the member by having the Provincial Court transform the fine into a money judgment giving the disciplinary action of the union the authority of law thereby allowing enforcement of the penalties imposed by the union outside the context of the enforcement provisions as specified in the contractual arrangement between the union and the Defendants?

[18] The jurisdiction of the Provincial Court is set out in s.9.6 of the *Provincial Court Act*. The parties have argued the interpretation of the following sections:

9.6(1) The Court has, subject to this Act, the following jurisdiction:

- a. For the purposes of Part 4
 - i. to hear and adjudicate on any claim or counter-claim
 - A. for debt, whether payable in money or otherwise, if the amount claimed or the counter-claim, as the case may be, exclusive of interest payable under an Act, or by agreement on the amount claimed does not exceed the amount prescribed by the regulations,
 - B. for damages, including damages for breach of contract, if the amount claimed or counter-claimed as the case may be, exclusive of interest payable under an Act or by agreement on the amount claimed, does not exceed the amount prescribed by the regulations,

[19] The TWU asserts that the claim before the Court is one for debt, or alternatively for damages, while the Defendants assert that it is neither.

[20] Each applicant member was charged, tried and found guilty of crossing the picket line in contravention of the TWU Constitution. Previously, all three individuals had signed an application for membership which stated:

If my application for membership is accepted, I will comply with the Constitution of the Telecommunication Workers Union and By-laws as written and amended from time to time.

[21] The relevant portions of the Constitution state:

Article XVIII - Offences, Charges, Penalties and Appeals

Section A: Offences

Any member may be disciplined for violation of any of the provisions of this Constitution or Local by-laws, or for violation of the policies of the Union, or for cause detrimental to the welfare of the Union, or for bringing charges under this Article without reasonable grounds for believing such charges to be true, or for crossing or working behind any picket line without authorization from the Executive Council.

Section C: Penalties

1. Upon a verdict of guilty of any charge the Trial Board may impose a penalty of expulsion, suspension, fine (not to exceed (\$1,000), public reprimand or admonishment by the President, special remedial action appropriate to cure the offence or other penalty appropriate to the offence or any combination thereof,

and the Trial Board shall determine when any such penalty has been satisfied. Pending satisfaction of a penalty, except expulsion, a penalized member shall be denied the right to attend meetings and any benefits they may receive as a member in good standing.

2. Any imposed fine shall be collected from the member by the Secretary of the Local concerned and shall be paid into the Local funds within 30 days. Failure to pay the fine within 30 days from the date such fine was imposed shall invoke automatic suspension.
3. Expulsion shall mean expulsion from the Union with loss of all benefits.

Section D: Appeals

1. An appeal may be taken from the decision of any Local Trial Board to the Trial Board of the Convention. The procedure for appeal referred to in this Section shall be invoked by the member by filing notice in writing with the Secretary-Treasurer of the Union of his intention to appeal not more than 30 days after any final decision of the Local Trial Board.
2. The appeal notice must state the grounds for such appeal with reasons why the decision of the Local Trial Board should be reversed, varied, amended or set aside.
3. Upon receipt of any such appeal the Secretary-Treasurer of the Union shall notify the Local Secretary, the Local Trial Board and provide copies of appeal papers to them. The Local Trial Board or any party affected by such decision, shall have a right to state reasons in writing within 15 days after receipt of a copy of appeal papers why such decision should be upheld.
4. The Secretary-Treasurer of the Union shall notify the accused and accuser(s), of the time and place of the appeal.
5. The Convention Trial Board shall dispose of such appeal upon the record and documents before it or may determine to allow a new hearing. The accused and accuser(s) shall be afforded the opportunity to make a written or oral submission to the Convention Trial Board.
6. The Convention Trial Board may make such decisions as justice requires and shall have the authority to affirm, set aside or vary the decision of the Local Trial Board in any manner considered reasonable and proper. The decision of the Convention Trial Board shall be rendered within thirty (30) days after the conclusion of the hearing of the appeal.
7. Pending appeal or expiration of time in which appeal may be taken, a member found guilty of any offence shall be in the status of a suspended member.

8. Within 30 days after receipt of any decision of the Convention Trial Board an aggrieved member may file an appeal to the next regular convention of the Union by filing notice of appeal with the President of the Union. The decision of the Convention shall be final and binding.

Application of s.4(1)(a)(b) of the Trade Unions Act

[22] The applicant asserts that the Court is without jurisdiction to hear and adjudicate the Plaintiff's claim as a consequence of the provisions of s.4(1)(a) and (b) of the Trade Unions Act, R.S.C. (1985), c.T-14. This section provides:

- 4(1) Nothing in this Act enables any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any agreement
 - (a) between members of a trade union, as such, concerning the conditions on which any members of the trade union shall, or shall not, sell their goods, transact business, employ or be employed;
 - (b) for the payment by any person of any subscription or penalty to a trade union;
 - (c) for the application of the funds of a trade union
 - (i) to provide benefits to members,
 - (ii) to furnish contributions to any employer or workman, who is not a member of the trade union, in consideration of the employer or workman acting in conformity with the rules or resolutions of the trade union, or
 - (iii) to discharge any fine imposed on any person by sentence of a court of justice;
 - (d) made between one trade union and another; or
 - (e) is secured by bond or suretyship the performance of any of the agreements mentioned in paragraphs a-d
- (2) Nothing in this section shall be deemed to constitute as unlawful, any of the agreements mentioned in subsection (1).

[23] The Respondent TWU asserts that s.5(2) of the *Trade Unions Act* is applicable and that as the Plaintiff union is not registered under the *Trade Unions Act*, the proscription under s.4(1) does not apply and the Court is not barred from hearing the Plaintiff's claim in this regard. Section 5(2) provides:

- 5(2) This Act does not apply to any trade union not registered under this Act.

[24] Parliament has, by this section, clearly expressed a complete limitation as to application of the *Trade Unions Act*. The words of s.5(2) display no ambiguity and on their face are not

capable of any other meaning but that the Act does not apply to any trade union not registered thereunder. In this case, the Plaintiff trade union, TWU is not registered under the Act and therefore the provisions of the Act have no application with respect to these proceedings. That being the case, the claim of the Plaintiff would not be barred from being brought to this or any other Court.

[25] Some cases would however suggest otherwise, in particular, the decisions of the Newfoundland Supreme Court in *I.A.M. v. Hearn*, (1986) N.J. No.261 and the Manitoba judgment of *B.M.W.E. v. Litke*, 133 Man.R. (2d) 146, Man.Q.B., affirmed on appeal (1999) M.J. No.433. In the *Hearn* case, Mr. Justice Barry considered the history of the *Trade Unions Act* and adopted the approach of Lord MacDermott in *Bonsar v. Musicians Union 1955*, (1956) A.C. 104 which is a case dealing with the English *Trade Unions Act* of 1871 which had a similar proscription against court enforcement of penalties imposed by trade unions. Lord MacDermott concluded that this proscription applied to trade unions within the definition of the Act, whether they were registered or unregistered and Barry J. adopted that reasoning with respect to the Canadian *Trade Unions Act*, concluding that the prohibition against enforcement of penalties imposed by a trade union against a member in the Courts as specified in s.4 of the *Trade Unions Act* applied even to non-registered trade unions. He appears to have adopted Lord MacDermott's rationale as expressed in *Bonsar* that it was not the intention of the legislature to allow unions to circumvent s.4 of the Act by simply not registering and thereby not being bound by the provisions of the Act.

[26] In *B.M.W.E. v. Litke*, Justice Keyser adopted the reasoning of Barry J. in *Hearn* and concluded that the Court had no jurisdiction to deal with the matter given the provisions of s.4 of the *Trade Unions Act*. In that case, at paragraph 9 of the judgment, he states:

It was unclear whether the English Act embodied a specific provision of non-applicability to unions which were not registered under it. Notwithstanding that, however, Barry J., adopted those comments in finding the prohibition in the *Trade Unions Act* to extend, in Canada, even to unions which were not registered.

Justice Keyser's adoption of Barry J.'s reasoning in *Hearn* was confirmed by the Manitoba Court of Appeal.

[27] With the utmost respect, I must disagree with the conclusion reached by these courts on this point. The British *Trade Unions Act* of 1871 as considered by Lord MacDermott in *Bonsar*, is different from the Canadian *Trade Unions Act* as considered in *Hearn* and *Litke* and this case, in that in *Bonsar*, the legislation does not have any provision comparable to s.5(2) of the Canadian *Trade Unions Act*. Indeed the original *Trade Unions Act* which was passed by the Parliament of Canada in 1872 being 35 VICT., c.30, one year after the British *Trade Unions Act*, was modelled on the British *Trade Unions Act* of 1871 save that unlike its British counterpart, it specifically provided in s.5 thereof that:

... nor shall this Act apply to any trade union not registered under this Act.

[28] In *Bonsar*, Lord MacDermott was not faced with that specific limitation of application and concluded that as long as the trade union fit the definition as specified in the Act, the legislation applied to it.

[29] The *Bonsar* decision is clearly distinguishable from the circumstances presented by the Canadian *Trade Unions Act* and with respect, in my view, cannot support the position taken in *Hearn* and *Litke* that s.4 of the *Trade Unions Act* applies in any event of whether the trade union seeking to bring proceedings before the Court is registered or not. In *Bonsar* the legislation had no such limitation of statutory application. In *Hearn* and *Litke* and the cases before this Court, such limitation as specified by s.5(2) is present and in my view ousts the application of the *Trade Unions Act*. This view I believe is supported by the decision of the Supreme Court of Canada in *Int'l Longshoremen's Ass'n v. Maritime Employers Association* (1979) 89 D.L.R. (3d) 289 wherein Estey J. made the following comments with respect to the application of the *Trade Unions Act*. At p.299 of the reported decision, he states:

It should also be noted that the Parliament of Canada in 1872 enacted the *Trade Unions Act*, supra s.17 of which follows the British Act enacted in the previous year. This statute applies only to a trade union registered thereunder.

At p.301 Justice Estey states further:

The *Trade Unions Act* of 1872 is not applicable here because the three locals here have not been revealed on the record to have been registered thereunder and hence for the purposes of these proceedings, the Act is not in force.

Later in the same paragraph he states:

...The *Trade Unions Act* on the other hand is precise legislation dealing with a number of matters concerning trade unions. All the terms of which are placed on an optional basis without force of law unless the trade union voluntarily registers under the Act.

[30] This case does not appear to have been considered by the Courts in either *Hearn* or *Litke*.

[31] No other conclusion can be reached but that the *Trade Unions Act* and specifically the prohibition set out in s.4(1)(a) and (b), has no application in the proceedings before the Court and does not bar the Court from at least entertaining the Plaintiff's claims as filed herein.

No Jurisdiction or Cause of Action

[32] The Plaintiffs assert that the proceedings before this Court represent an action by the union to enforce a debt owing by the individual Defendants to the union, or in the alternative that the monies claimed by the union represent damages which the union is entitled to receive as a consequence of the individual Defendants purported breach of their contractual obligations to the union as set out in the constitution and by-laws of the union. The action before the Court, they assert, is one for debt or damages for breach of contract.

[33] The Defendant/Applicants assert that the proceedings before this Court represent neither an action based in debt or damages arising from breach of contract and therefore the Provincial Court has no jurisdiction to adjudicate on these claims. The Defendant/Applicants

also assert that enforcement of a fine imposed through the internal procedures of a union upon a union member, is not a cause of action known to law and therefore not actionable in any court.

The True Nature of the Plaintiff's Claim

Debt

[34] The Plaintiff submits that the fines are "debts" in that they represent sums that are fixed and certain and are payable to the union by the Defendants under the terms of the contract between the union and its individual members.

[35] There is no doubt that the "fines" which the Plaintiff asserts are debts enforceable under the jurisdiction of the *Provincial Court Act*, have some of the attributes of many of the definitions of "debt". Nonetheless I have no hesitation in concluding that the fines the Plaintiff seeks be made into judgments of this Court are not debts within the meaning of that word as used in the Provincial Court Act or as broadly understood at common law. The fines imposed by the Plaintiff against the individual Defendants and asserted to be debts are penalties imposed upon the Defendants through an internal union disciplinary process as a consequence of their apparent misconduct in breaching the union constitution by crossing a picket line. This Court is, in reality, being asked to confirm that fine and thereby confirm the discipline imposed by the union under its internal procedure and thereby in fact impose a disciplinary measure upon the individuals in the form of a judgment which has the authority of law. The Provincial Court of Alberta has no jurisdiction to discipline union members for an apparent breach of the union constitution and certainly making a fine imposed by a union through its internal procedures, a judgment is to in fact impose the fine. That is not enforcement of a debt, it is discipline.

[36] It is my view that this is a complete answer to the Plaintiff's claim of debt.

[37] If however I am wrong in that conclusion, I do not hesitate to adopt the reasoning of the learned justices in *Hearn*, supra and *Newfoundland Association of Public Employees v. Drake* (1996) N.J.No.170 and 2002 N.J.No.25, both of which Courts concluded that the enforcement of fines imposed by the union as discipline do not constitute debts within that common law or within the jurisdiction of what was described therein as Small Claims Court. The jurisdiction of the court in both those cases is essentially the same as the jurisdiction of the Provincial Court of Alberta.

[38] In *Hearn*, Barry J. stated the following:

To meet the definition of a civil debt, which arises out of a contract, the claim must be either for a specific amount stipulated in the contract, or an amount ascertainable from the terms of the contract by the parties by arbitration or in a court of law. The penalties imposed in this case do not meet any of those criteria. The sections in the appellants rules which establish penalties for breach of its mandatory provisions leave their calculation entirely in the hands of other members of the union. In my view, apart from any consideration of the question whether a penalty imposed by a trade union could qualify as a debt, it would be contrary to public policy to require the courts to enforce payment of a monetary

penalty whose limits are not fixed. In such a case as this, it was open to the appellant through the procedure in its constitution to set the fine at any amount it chose and in cases where the fines imposed may be inordinately excessive, the court would be required to enforce unjust penalties without having the right or power to review or adjust of them.

While there are circumstances in which parties to an agreement may pre-determine a penalty to be paid by a defaulting party, and the penalty will be enforced by action in court as a debt or as liquidated damages, a penalty which is to be determined after the breach by the party claiming to be wronged, cannot be so classified. It cannot be said that the fine imposed in this case was an amount agreed upon by the parties to the appellant's constitution since it was not specified therein, or otherwise made known to the respondents prior to the alleged breach. For these reasons alone, it is clear that the fines cannot be regarded as debts within the meaning of *The Small Claims Act*.

[39] Following that reasoning, the Plaintiff's claim is not a debt nor actionable as a debt before this Court, nor in my view, before any Court of law.

Damages

[40] The Plaintiff asserts in argument that if the claims are not debts within the meaning of the *Provincial Court Act*, then the fines are in the nature of a damage and therefore enforceable in the Provincial Court. Without delving deeply into the issue of what is enforceable in the Provincial Court under the heading of damages, I have no hesitation in saying that the Provincial Court has jurisdiction to give judgment in damages for actionable wrongs whether they be in tort, contract or based on some equitable principle. I believe the answer to the Plaintiff's claim in this regard, simply put, is that the fines represent a penalty for disciplinary purposes, not damages in either contract, tort or equity. The fines were imposed to discipline the alleged wrong doer and demonstrate the authority of the union under the constitution and to deter others who might choose not to follow the union constitution. These fines in no way relate to compensation of the union for damage suffered by the union as a result of the Defendants' conduct. No loss is asserted by the TWU and the fines were not intended or designed to address any loss, if any exists. As discussed in determining whether the Plaintiff's claim constituted a debt, this is simply an action seeking to give the authority of law to the internal discipline process imposed upon the Defendants by the TWU. Calling the fines a debt or damages does not make them so. I do not hesitate to say that there is no cause of action in such circumstances for which any court could give relief.

[41] If I am wrong in this view, then I would address the Plaintiff's assertion of a damage claim as follows.

a. Liquidated or Pre-determined Damages

[42] With respect to the assertion that the fines could be seen as a pre-estimate or liquidated damages in a breach of contract situation, again I have no hesitation in adopting the reasoning of Barry J. in *Hearn* and R. Smith J. in *Birch v. Union of Taxation Employees Local 70030*, [2007] O.J. No.3980, (Ont. Sup.Ct.), and concluding on the basis thereof that the Plaintiff's claim is not enforceable as a claim in liquidated damages. In *Hearn*, Barry J. made the following comments:

Other than in the case of a statutory penalty the question of the enforceability of a penalty in court generally arises in actions for breach of contract wherein some monetary detriment or forfeiture is imposed upon the defaulting party. The general rule is that penalties are unenforceable, although there are some exceptions which are not relevant to this appeal. In considering whether such detriment or forfeiture may be a penalty or liquidated damages, Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd. V. New Garage & Motor Co. Ltd.*, (1915) A.C. 70 enunciated the following statement of law as a guide to a determination of the question, at page 713 of his judgment:

1. Though the parties to a contract who use the words “penalty” or “liquidated damages” may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.
2. The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party, the essence of liquidated damages is a genuine covenanted pre-estimate of damage (*Clydebank Engineering and Ship-building Co. v. Don Jose Ramos Yzquierdo y Castaneda*, (1905) A.C. 6).
3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach. (*Public Works Commissioner v. Hills*, (1906) A.C. 368, and *Webster v. Bosanquet*, (1912) A.C 394).

Ogus in his text “*The Law of Damages*” published by Butterworths, 1973 at page 41 referred to the above quoted statement of Lord Dunedin and declared:

This requires little comment. The notion that a party may be punished for failing to perform his contractual obligations is repugnant to a system of law which subscribes to a general compensatory principle of damages. Exemplary damages are not recoverable for breach of contract. Consistently English law regards the punitive element in no more favourable a light when it is the subject of a contractual agreement. ‘Caveat promisor’ is not a reliable precept in this context.

Apart from the question as to whether any court of law can enforce a penalty imposed by a trade union, the other issue in this appeal is whether a penalty could be classified as a debt under The Small Claims Act. It is evident that these penalties are not liquidated damages and the appellant has not so alleged. ...

[43] In *Birch*, R.Smith J. stated:

...I find that the fines were imposed on the union members in order to persuade them not to cross the picket line during a strike by imposing a financial penalty, which exceeded the income which a member could earn by crossing the picket line and working. I find the essence of the penalty and the fine imposed was really used "*in terrorem*" in the words of Lord Dunedin, to prevent union members from crossing the picket line and working during a legal strike.

I am also persuaded that the fine represented a penalty by examining the wording of Section 25 Sub-section 91) of the PSAC constitution which states that the National Board of Directors may discipline members...for contravening any provision of the constitution. Section 25 Sub-section (3) states that any disciplinary action taken under the provisions of Sub-sections (1) and (2) of this Section for a cause listed in Sub-Section (5)(n) of this Section shall include the imposition of a fine. The terminology used in the Union's constitution is clear that a member who crosses a picket line during a legal strike is subject to disciplinary action including a fine.

I find that the plain and ordinary meaning of the words imposing a fine and taking disciplinary action is in fact to impose a penalty to dissuade Union members from crossing the picket line during a legal strike. The purpose of the clause is clear and it is not related to making a genuine estimate of damages, but rather is intended to force members of the Union to follow the terms of the constitution by imposing a financial penalty if a member does do so.

[44] Clearly the fines imposed in this instance are not a pre-estimate of damage in any sense of that phrase. The imposing of the fines is not an attempt to assess damages consequent upon the offending parties action, but to penalize the members who breached the constitution by crossing the picket line during a strike and to deter others from doing the same in the future. These fines were imposed "*in terrorem*" and ought not be enforced in any court of law.

[45] The Plaintiff's claim does not demonstrate a cause of action based upon a claim for pre-estimated or liquidated damages. Accordingly, for the fines imposed in this instance to be enforceable in this Court, they must be found to fit within some other actionable head of damage.

[46] The Plaintiff asserts in the further alternative that the fines are in the nature of an aggravated or punitive damage. For purposes of discussion of this issue, I proceed on the basis that the Provincial Court has jurisdiction in the proper circumstances to grant both aggravated and punitive damages.

[47] Aggravated damages, as explained in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 at 1098-99;

... are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose.

[48] Punitive damages *Vorvis* at p.1098-99 describes:

, ... are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such a nature that it merits punishment.

[49] The distinction between the two types of damages is clear, aggravated damages seek to compensate, punitive damages are employed to punish.

[50] Again, it is my view that the claim in this regard is answered fully and completely by the fact that this is not an action by the Plaintiff asking the Court to weigh and assess damages whether they be aggravated or punitive, but simply to rubberstamp the union trial board's imposition of a fine and call it a judgment for aggravated or punitive damages. The fines imposed were for disciplinary purposes and do not represent any form of damage in my view.

b. Aggravated Damages

[51] Aggravated damages are intended as compensatory to augment other damages suffered and take account of intangible injuries such as distress and humiliation that have been purportedly caused by the Defendant's behaviour. (See: *Vorvis*, para.16) Even if the Plaintiff had commenced proceedings for damages to be assessed by the Court, there would have to be some compensatory basis for ordering them under the title of aggravated damages. The fines imposed upon the Defendants are not in any way compensatory, nor were they imposed to augment any other damage.

[52] Further, I do not accept that the union as a legal entity within the confines as described in *Berry* is capable of suffering such mental distress and humiliation or other intangible injury as to justify an award of aggravated damages. Given the purpose of aggravated damages, and the limited nature of the union as a legal entity, it is my view that a union would have no claim for compensation in the form of aggravated damages, therefore no cause of action exists for a union to advance before a court of law.

c. Punitive Damages

[53] Punitive damages are employed to punish and may be awarded in breach of contract cases, however the circumstances of such will, according to McIntyre J. in *Vorvis* (p.1107) be "very rare". The issue at this juncture is whether the fines could be seen, in the context of the broad pleadings filed as founding a claim for punitive damages.

[54] For a claim in punitive damages to be actionable the offensive conduct which the order of damages is sought to address must constitute a separate actionable wrong from the principle breach of contract upon which the damage claim is initially founded. This principle is expressed by McCamus in his text, *The Law of Contracts*, Irwin 2005 at p.886 where he states:

Subsequently, Canadian courts have taken a view that the decision in *Vorvis* does require that in addition to finding that a principle breach of contract sounding in damages has occurred, one must find, in order to grant an award of

punitive damages, that the offensive conduct constitutes a separate actionable wrong in the form of either tortious misconduct, or an additional breach of contract.

[55] In the text, *Damages for Breach of Contract*, Carswell 2nd ed., the authors in commenting on the impact of *Vorvis* stated at p.4-52:

The court then went on to consider what limited circumstances would justify punitive damages awarded in contract. To establish the claim, it held that the conduct complained of had to both constitute an independent actionable wrong and had to have been the cause of damage.

[56] The Ontario Court of Appeal in *Marshall v. Watson, Wyatt and Coe* (2002) 209 D.L.R. (4th) 411, confirmed this view to be an accurate description of the law in Canada. In paragraph 44 of the aforementioned judgment, Laskin J.A. states:

...To be entitled to punitive damages the Plaintiff must meet a three-fold burden. First, the Plaintiff must show that the Defendants' conduct is so "harsh, vindictive, reprehensible and malicious" or so "malicious", oppressive and high-handed that it offends the court's sense of decency. ... Second, the Plaintiff must establish that the Defendant committed a separate or an actionable wrong causing damage to the Plaintiff. Although the requirement of an independent actionable wrong does not easily explain some of the breach of contract cases where punitive damages have been awarded and though it has been criticized by several academics, it remains the current law in Canada.

[57] Even, taken at its widest, the pleadings filed in this instance by the Plaintiff against each Defendant if looked at as a claim for damages, do not demonstrate or reveal an independent actionable wrong over and above the principle breach of contract alleged. The Plaintiff does not allege any facts supporting any independent actionable wrong. Accordingly, the Plaintiff's claim cannot stand - no cause of action is shown. (See: *Desimone v. Herrmann Group Ltd.* (1990) 2 W.D.C.P. 384 and *Taylor v. Pilot Insurance Co.* (1990) 75 D.L.R. (4th) 370 Ont.Gen. Div.)

Contractual Limitation of Disciplinary Remedies

[58] In *Berry v. Pully* (2002) 2 S.C.R. 493, the Supreme Court of Canada identified and clarified the legal nature of the relationship between the union and its members and the members as amongst themselves. The Court concluded that in order for unions to fulfill their labour relation functions, it is essential for them to control and regulate their internal affairs and that as the regulation of membership is a fundamental part of the role of trade union, it is only logical that it should fall within the sphere of activities for which unions have legal status. In paragraph 42 of the Court's judgment, Iacobucci J. for the Court states:

...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 (offer and acceptance) the terms of the contractual relationship between the union and the member will be greatly determined by the statutory regime effecting unions generally as well as the labour law principles that courts have fashioned over the years. ...

[59] He states further in paragraphs 49,50 and 51:

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 [page 151] 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 [page 516] 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-a-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.

[60] In the cases before this Court the constitution and by-laws of the TWU specify the nature of the members duties and obligations, set up a disciplinary procedure for determining whether a member has breached the individual obligations with respect to his conduct as a union member and specifies the consequences to which the member may be liable should a member be determined through the defined process to have breached his or her responsibility to the union as identified and described in the constitution and by-laws.

[61] In these matters, disciplinary proceedings were instituted within the framework established by the union constitution and by-laws, the subject members were found guilty *in absentia* and fines were imposed on all three of the Defendants. The constitution provides that in the event the fines were not paid within the time frames specified therein, the members would automatically stand suspended.

[62] It is my view that the union has exhausted its remedies as against these Defendants and that absent statutory authority, they may not seek to impose any other consequence upon the members as a disciplinary action. The Defendants entered into this unique contractual relationship as described by the Court in *Berry* with the terms as to disciplinary proceedings and consequences being specified and identified therein. The union in this case invoked the disciplinary process under the provisions of the constitution and followed through with that process, and sought and obtained a remedy. The union now seeks to impose a further consequence upon the member for the disciplinary breach for which they were internally prosecuted, that being a monetary judgment of the Court equal to the respective fines levied in these matters. Such an action is not authorized nor contemplated by the terms of the contract between the parties.

[63] In these matters, none of the Defendants appeared at their hearing to answer the charges against them. It can only be presumed that they did so knowing full well what they were liable for if convicted. They made a choice with knowledge of the potential consequences. It is reasonable to conclude that that choice may have been different if they were aware that they might also be liable to the consequential remedy of a monetary judgment of the Court.

[64] At paragraph 49 of *Berry*, Iacobucci stated:

...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.

[65] The contract between the TWU and the member is an adhesion contract. The Applicant has little he can say when applying for membership as the terms of the contract as represented by the constitution and by-laws, have already been established. The applicant accepts them or doesn't get admitted into the TWU. Included within those set terms are provisions regarding when a member may be disciplined, the process of discipline, the consequences for finding actual misconduct and an appeal process. Nowhere does this contractual arrangement authorize the TWU to seek enforcement of its disciplinary decision through the Courts. Given the context of the contractual relationship and how it has come into being, coupled with the fact that the issue relates to the discipline of a member, the TWU must be strictly limited to the disciplinary measures the constitution and by-laws provide. The TWU ought not to be able to step outside the terms which it has established, as to allow it to do so would undermine the integrity of the contract.

[66] In this case, the disciplinary process set out in the contract contemplates democratic self-government by the parties. To permit the TWU to prosecute the claim outside the terms of its own constitution is to allow unilateral amendment to the constitutional contract. This would be contrary to the democratic self-governance that the parties have contemplated in the formation of the union and its constitution.

[67] This view is supported by the provisions of the constitution itself, specifically Article IV, paragraph 4 which states:

The locals of the union shall conduct their affairs in accordance with this constitution, and any local by-laws they may adopt which do not contravene any provision of this constitution or stated policy of the convention.

[68] It is my conclusion that the Plaintiff union is limited to the disciplinary remedies specified in the constitution and by-laws and given that the action before this Court seeks directly or indirectly to enforce disciplinary action by imposition of a remedy outside the contractual framework, the union is precluded from advancing the same as it is limited to the process established by its own constitution.

Transfer to Queen's Bench

[69] The Respondents' submit that in the event the Court concludes that it does not have jurisdiction to hear and adjudicate on the Respondents' claim pursuant to the *Provincial Court Act*, then the Court should transfer the within proceedings to the Court of Queen's Bench, pursuant to s.56 of the *Provincial Court Act*. Section 56(1) of the *Provincial Court Act* provides:

If at any time a claim, counter-claim or defence involves a matter that is beyond the jurisdiction of the court, the court may order that the matter be transferred to the Court of Queen's Bench.

[70] Given my conclusions on the various arguments made, there is nothing for Queen's Bench to adjudicate upon. No order for transfer will be made.

Summary of Judgment

[71] My judgment herein is summarized as follows:

1. The Plaintiff is not precluded from advancing its claims before this Court by the provisions of s.4(1)(a) and (b) of the *Trade Unions Act*.
2. The Plaintiff's claim against the Defendants is not an action in debt or damages. There is also no cause of action at common law or by statute authorizing the Plaintiff to enforce the disciplinary penalties in a court of law.
3. The TWU constitution and by-laws do not authorize the TWU to seek redress in the courts for an internal disciplinary matter.

Accordingly, the Plaintiff's claim is dismissed against each of the Defendants.

Costs

[72] The Defendants shall have costs against the Plaintiff. Counsel may make arrangements through the Clerk to speak to costs if necessary.

Heard on the 21st day of August, 2007.

Dated at the City of Lethbridge, Alberta this 1st day of February, 2008.

J.N. LeGrandeur
A Judge of the Provincial Court of Alberta

Appearances:

David J. Corry
For the Defendants/Applicants

W.J. Johnson
For the Plaintiff/Respondent