COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pereira v. UNITE HERE Local 40,* 2024 BCCA 27

Date: 20240126
Docket: CA48489

Between:

Corinne Pereira

Appellant
(Plaintiff)

And

UNITE HERE Local 40

Respondent
(Defendant)

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated August 22, 2022 (*Pereira v. UNITE HERE Local 40*, 2022 BCSC 1450, Terrace Docket S21110).

The Appellant, appearing in person (via videoconference):	C. Pereira
No one appearing for the Respondent	
Place and Date of Hearing:	Vancouver, British Columbia January 3, 2023
Appellant's Written Submissions:	January 9, 2024
Place and Date of Judgment:	Vancouver, British Columbia January 26, 2024

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Mr. Justice Abrioux

Summary:

The appellant sued her former union, contending that a union representative defamed her by filing a grievance that alleged that she bullied and harassed other employees. It was common ground that the defamatory words were published on an occasion of qualified privilege. The plaintiff alleged that the privilege was lost because the defamatory words were published with malice. The defendant contended that the issue of malice had been conclusively decided against the plaintiff in proceedings before the Labour Relations Board. It applied to strike the claim. The judge hearing the application agreed with the defendant and struck the claim. Held: Appeal dismissed. It was debatable whether the allegedly defamatory words were published on an occasion of qualified privilege or absolute privilege, but assuming the former, the judge made no error in his analysis. The issue of malice had been determined by the Labour Relations Board and the judge did not err in holding that it could not be relitigated. One complicating factor was that the Labour Relations Board's decisions were arguably not "final" at the time of the application before the judge in the Supreme Court, because there were appeals outstanding. At the appellant's request, this appeal was held in abeyance until those appeals were exhausted. As they have now terminated adversely to the appellant's position, the decision below should not be interfered with.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] Ms. Pereira sued the defendant union over statements that it made in a grievance filed against her employer. In the grievance, a union representative alleged that the employer failed to take adequate steps to stop Ms. Pereira from bullying and harassing other employees. Ms. Pereira claimed that the allegations that she bullied and harassed other employees were unfounded and she sued the union for defamation. The union applied to strike the claim.

[2] On the application to strike the claim, the parties accepted that a union acts on an occasion of qualified privilege when it pursues a grievance on behalf of an employee. Ms. Pereira, however, pleaded that the union acted maliciously in this case, negating a claim for qualified privilege. In particular, she claimed that the grievance was filed for an ulterior purpose — to give the union the ability to transmit confidential documents to employees who were being sued by Ms. Pereira in a proceeding governed by the *Small Claims Act*, R.S.B.C. 1996, c. 430.

[3] Ms. Pereira had made the same allegation in proceedings before the Labour Relations Board, which determined it to be unfounded. The judge found that the issue was *res judicata* and struck the claim.

[4] The main issue on this appeal is whether the issue of malice was *res judicata*, and whether the judge ought to have exercised a discretion against applying that doctrine.

[5] In my view, the judge made no error in finding that the issue of malice had been determined by the Labour Relations Board, and that re-litigation of the same issue before the courts should not occur. Before setting out my reasons, however, I will refer to a complicating factor that has resulted in this appeal being held in abeyance for a period of one year.

The Outstanding Appeals

[6] At the time the application to strike the claim was heard by the chambers judge, Ms. Pereira was continuing to challenge the decisions of the Labour Relations Board. She had brought judicial review proceedings seeking to quash those decisions. Although the judicial review applications had been dismissed, Ms. Pereira was pursuing appeals. There are authorities suggesting that a matter may be *res judicata* notwithstanding that appeal rights remain (see *Minott v. O'Shanter Development Company Ltd.* (1999), 42 O.R. (3d) 321 (C.A.) at 334–35; *Re Winnipeg Motor Express Inc.*, 2009 MBCA 30 at para. 23) but the matter is complex and cannot be said to be completely free from doubt (see *R. v. Mahalingan*, 2008 SCC 63 per Justice Charron (minority judgment) at para. 134; Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed. (Toronto: LexisNexis Canada), 2021, at Chapter 2.B.5.B).

[7] In the circumstances, it might be argued that the decision to strike the notice of civil claim was premature, and that it should not have been made until appeal rights were exhausted in respect of challenges to the Labour Relations Board decisions. I accept that it might have been preferable for the judge to stay these

proceedings pending the conclusion of the judicial review appeals rather than striking the claim.

[8] Ms. Pereira did not pursue that argument on appeal, however. She took a more practical approach. Recognizing that the outcome of the appeals from the dismissal of the judicial review applications was likely to have an impact on this appeal, Ms. Pereira requested that no judgment be pronounced in this appeal until the result of her other appeals was known.

[9] We accommodated that request. At the conclusion of the oral argument on this appeal on January 3, 2023, we agreed not to pronounce judgment for a period of time in order to allow the other appeals to be heard and determined. We also directed that once judgment on those appeals was pronounced, Ms. Pereira would have 30 days to make further written submissions with respect to the impact of that judgment on this appeal.

[10] The appeal from the dismissal of the judicial reviews was heard on March 28, 2023. On April 19, 2023, in a judgment indexed as 2023 BCCA 165, this Court dismissed the appeals.

[11] On July 14, 2023, having not heard from Ms. Pereira, we asked her to indicate, by the end of that month, whether she would be making further written submissions. Ms. Pereira responded by advising that she would be seeking to appeal the judicial review matters to the Supreme Court of Canada. She requested that we hold the matter in abeyance for a further period, to allow her leave application to proceed. We acceded to that request.

[12] On December 21, 2023, the Supreme Court of Canada dismissed Ms. Pereira's applications for leave to appeal. On January 8, 2024, we reminded Ms. Pereira that she was entitled to make further written submissions and extended the deadline to January 31. We received her written submissions the following day.

[13] With the dismissal of the leave applications, the orders of the Labour Relations Board are now unequivocally final. In the result, any concerns that the Court may have harboured about the prematurity of the order below are now moot.

Background to the Defamation Claim

[14] I turn, then, to the merits of the appeal. The background to this matter is complex and is described in some detail in the decisions of the Labour Relations Board that I cite in this judgment. I do not intend to discuss the background in detail but will summarize the most important events.

[15] Ms. Pereira worked for Horizon North Camp & Catering at Crossroads Lodge in Kitimat from May 6, 2019 until September 23, 2020. She was originally hired as a cook but by March of 2020 she was working as a guest services agent.

[16] The defendant union was certified to represent the employees at Crossroads Lodge in November 2019, and a first collective agreement was concluded on May 7, 2020. By June of 2020, the Lodge's business had been severely impacted by the COVID-19 pandemic and the restrictions associated with it. Tensions in the workplace mounted as staffing levels were reduced.

[17] Ms. Pereira began to have employment problems in June 2020, when she received disciplinary sanctions in respect of three complaints made against her:

- a verbal warning for gossiping and bad-mouthing co-workers;
- a written warning for directing an expletive at the head housekeeper; and
- a three-day suspension for discussing union business with a paying guest.

[18] Ms. Pereira denied gossiping and bad-mouthing her co-workers, but admitted to the other two matters. She grieved all three disciplinary sanctions. She also filed a complaint with her employer against a co-worker, alleging that the co-worker had made false statements that led the employer to impose the verbal warning.

[19] Ms. Pereira was assigned a union representative to handle the grievances she filed. The co-worker against whom she filed the complaint had a separate union representative.

[20] In late June 2020, while at work, Ms. Pereira found a draft of a complaint against her by a second co-worker. Upon discovering the draft complaint, Ms. Pereira initiated a complaint (which the employer ultimately dismissed) against the co-worker, asserting that the contents of the draft were false and amounted to bullying or harassment. She also informed the lodge manager that she was going off work on “stress leave”. She absented herself from work for the rest of the summer.

[21] While off work, Ms. Pereira had a number of adverse interactions with other employees. It appears that there were several complaints against her. For her part, she filed a small claims action against two of her co-workers on August 5. In materials before the Labour Relations Board, the claim is described as a defamation claim; before this Court, however, Ms. Pereira refers to the claim as a “civil conspiracy claim”. For the purposes of this appeal, the distinction is inconsequential. We were advised that the claim was eventually abandoned.

[22] The union representative who worked on Ms. Pereira’s grievances ultimately negotiated a settlement under which the employer agreed to remove the verbal warning from the disciplinary record, rescind the suspension, and not to rely on the written warning in future proceedings for the purpose of imposing progressive discipline. Looked at objectively, the settlement was a very good one for Ms. Pereira. She was, however, not satisfied. She did not view the goal of the arbitration to be one of limiting her disciplinary record — among other things, she was seeking vengeance on the co-workers who had made complaints about her, and to be fully exonerated by an arbitrator.

[23] On September 8, 2020, shortly after the settlement was entered into, a union representative for four of Ms. Pereira’s co-workers filed a grievance against their employer, alleging that the employer was failing to provide a workplace free of harassment and bullying (the “September 8 grievance”). The grievance alleged that

Ms. Pereira had continued to engage in problematic behaviour against them during the period when she absented herself from work. This is the grievance that lies at the centre of Ms. Pereira's defamation claim.

[24] On September 20, 2020, Ms. Pereira advised the employer that she planned to return to work but the employer terminated her employment on September 23, 2020. Ms. Pereira grieved the termination. Eventually the union agreed to a monetary settlement, and Ms. Pereira was not reinstated.

Proceedings Before the Labour Relations Board

[25] Ms. Pereira made complaints to the Labour Relations Board alleging that the union had acted in bad faith in its dealings with her. The complaints were under s. 12 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [the "*Code*"] and the procedure under which the Board dealt with the complaints was governed by s. 13:

> **Duty of fair representation**
>
> 12(1) A trade union … must not act in a manner that is arbitrary, discriminatory or in bad faith
>
> (a) in representing any of the employees in an appropriate bargaining unit, …
>
> **Procedure for fair representation complaint**
>
> 13(1) If a written complaint is made to the board that a trade union … has contravened section 12, the following procedure must be followed:
>
> (a) a panel of the board must determine whether or not it considers that the complaint discloses a case that the contravention has apparently occurred;
>
> (b) if the panel considers that the complaint discloses sufficient evidence that the contravention has apparently occurred, it must
>
> (i) serve a notice of the complaint on the trade union … against which the complaint is made and invite a reply to the complaint from the trade union, … and
>
> (ii) dismiss the complaint or refer it to the board for a hearing.

[26] Ms. Pereira's first complaint under s. 12 of the *Code* was largely concerned with the union's representation of her on her discipline grievances, but it also contained a complaint that the union filed the September 8 grievance on behalf of four co-workers in bad faith. She contended that the grievance was filed for improper

purposes.

[27] The complaint was referred to a panel of the Labour Relations Board consisting of a single Associate Chair. Her determination under s. 13(1)(a) of the *Code* is indexed as 2021 BCLRB 44. She describes the allegations in respect of the September 8 grievance as follows:

> [44] The Applicant says [the Union representative] filed the September grievance for two purposes: first, to get the Applicant fired, and two, to obtain documents for AA to use to defend herself in the defamation lawsuit the Applicant had filed against her. Therefore, she says, the Union acted in bad faith by filing the September grievance, which resulted in her being dismissed for "allegedly harassing the one who wrote false complaints against" her.
>
> [45] The Applicant says that AA produced documents she should not have had access to as part of her response to the civil lawsuit the Applicant filed against her, including: a copy of the agreement settling the Applicant's grievances, copies of emails she sent in relation to her own grievances, and a copy of the letter terminating the Applicant's employment. The Applicant says the Union gave AA those documents behind her back….

[28] The Associate Chair's findings with respect to these allegations appear near the end of her decision. She rejected the proposition that the September 8 grievance was brought for an improper purpose, and specifically found that the grievance was not filed for the purpose of providing documents to persons who had been sued by Ms. Pereira:

> [63] Finally, I am not persuaded that Applicant has established a factual basis on which I might conclude the Union filed the September grievance for an improper purpose ….
>
> [64] … Nothing in the application suggests the Union engineered the circumstances for which the Applicant was terminated. On the contrary, the Applicant freely admits, for example, she sent text messages to AA on July 8 and 30th, which show she: included in a group text message a link to a newspaper article describing an embarrassing incident from AA's past; continued to contact AA after AA asked her not to; and threatened to – and did – file a defamation suit against AA. …
>
> [65] In the present case, [the Union representative] filed the September grievance on behalf of employees who alleged that the Applicant continued to bully and harass them after the three-day suspension was imposed. AA was one of those employees. … Here, I am not persuaded the Applicant has established that the Union's decision to file the grievance was based on anything but the interests of the employees who felt they had been – and continued to be – bullied and harassed by the Applicant, at a time when she was about to return to work. While the Union may have brought the

> Applicant's communications and conduct to the Employer's attention by filing the September grievance, I am not persuaded the Union's motivation in doing so was improper. Therefore, I am not persuaded the Union conspired with the Employer to bring about the circumstances which would justify the Applicant's dismissal.
>
> [66] I am not persuaded by the Applicant's argument that the Union filed the September grievance to obtain documents for AA to rely on in defending herself against the defamation lawsuit. For the reasons given, I find the Applicant has not established the Union was doing anything but its job of representing the Applicant's coworkers when it filed the grievance alleging continued bullying and harassment on her part ….

[29] Ms. Pereira applied for leave to have the decision reconsidered by the Labour Relations Board. The application was heard by a three-member panel and was dismissed in a decision indexed as 2021 BCLRB 89. The reconsideration panel described the relevant complaint as follows:

> [12] … The Applicant … alleged that the harassment grievance filed by the Union was to get the Applicant fired for allegedly harassing the person she maintained wrote false complaints against her, and to obtain documents for AA to use to defend against the defamation suit the Applicant had filed.

[30] Later in the decision, the reconsideration panel summarized the relevant portion of the original panel's decision:

> [17] The Original Decision … finds the Union did not file the harassment grievance on behalf of certain co-workers, including AA, for an improper purpose as alleged (para. 63). The Original Decision notes that it is perfectly legitimate for a union to make a decision based on the interests of other employees. The original panel was not persuaded that the decision to file the grievance was based on anything but the interests of the employees who felt they were being bullied and harassed by the Applicant. While this conduct may have been brought to the Employer's attention as a result of that grievance, the original panel was not persuaded the Union's motive in doing so was improper or that the Union conspired with the Employer to bring about its decision to terminate the Applicant's employment (paras. 64-65).
>
> [18] The original panel was also not persuaded the Union filed the grievance in order to obtain documents for AA so she could defend against the defamation suit filed by the Applicant (para. 66). The original panel finds the Union was doing its job of representing the employees when it filed the grievance and that, even if AA obtained documents in the course of that grievance (and no finding was made in that regard), this would not establish an improper purpose on the part of the Union.

[31] The reconsideration panel endorsed the original panel's reasons:

> [33] … [W]e find the original panel had regard to the evidence and arguments presented and sets out an evidentiary basis for concluding that the Applicant had not shown that the Union's representation was contrary to Section 12 of the *Code*. As summarized above, the Original Decision addresses and makes findings with respect to the Union's representation on the grievance, as well as the allegations that it failed to conduct a proper investigation, worked behind her back, acted for an improper purpose, and/or conspired to have her dismissed from her employment.
>
> [34] While the Applicant disagrees with those findings, we find no error in the original panel's application of the law and policy of the *Code* to the facts. We further agree with the reasons in the Original Decision (as summarized above). Having considered the Applicant's submissions, we find the allegations raised on leave and reconsideration are fully and correctly answered in the Original Decision. Accordingly, the Applicant has not raised a serious question as to the correctness of the Original Decision and we decline to grant leave for reconsideration ….

[32] Ms. Pereira brought a second complaint under s. 12 of the *Code*, based primarily on the union's representation of her on her termination grievance. The hearing of her complaint under s. 13(1)(a) of the *Code* was before a single-member panel comprised of the same Associate Chair who had dealt with the earlier s. 12 complaint. Her decision is indexed as 2021 BCLRB 150. The Associate Chair noted that the second complaint also contained allegations surrounding the September 8 grievance:

> [25] [T]he Applicant reiterates her position that the Union only filed the grievance against her in order to obtain documents it could pass on to the defendants named in her notices of civil claim. She says the Union could not have intended to pursue her termination grievance because to do so would disclose that the Union president was using the grievance process to help other members defend against her lawsuits.

[33] The Associate Chair ruled that the matter had already been determined in her earlier decision (2021 BCLRB 44) and refused to revisit it:

> [32] The Applicant invites the Board to revisit the decision in [2021 BCLRB 44] that she did not establish the Union's representation of her was for an improper purpose (para. 65) or that, even if the Union had disclosed documents obtained in the grievance process to other members, it did not affect the Union's representation of her: para. 66. I find that matter has already been decided and is *res judicata*. In any event, to the extent the Applicant now takes issue with [the Union representative's] specific participation in that alleged conspiracy, I find she has not disclosed an apparent breach.

[34] Ms. Pereira again applied for reconsideration, and the Labour Relations Board denied leave in reasons indexed as 2021 BCLRB 195.

[35] Ms. Pereira then applied for judicial review of the Labour Relations Board's decisions to the effect that no *prima facie* case had been made out showing that the union breached its duty of fair representation. The judicial review petition was dismissed in reasons indexed at 2022 BCSC 1205.

[36] As I have indicated, there were further appeals taken with respect to the judicial reviews of the Labour Relations Board's decisions, but those appeals took place after the decision of the chambers judge to strike the notice of civil claim. The appeals were unsuccessful.

The Defamation Claim

[37] On June 3, 2021, just a few days after her first reconsideration application was dismissed by the Labour Relations Board, Ms. Pereira commenced this action.

[38] In the notice of civil claim, she alleged that a union representative defamed her. She particularizes two instances of defamation:

> 44. On or around September 4th, [the union representative] emailed [the employer's] management and defamed me. He accused me of bullying and harassing [other] employees. The exact words were
>
> > "I am not convinced that the company has conducted a proper investigation into all the harassment and bullying that happened after Corrine's suspension".
>
> 45. On September 8th, [the union representative] defamed me again when he filed a grievance against me. He accused me of bullying and harassing multiple front desk staff. The exact words were:
>
> > "The union grieves that several front desk employees have been the target of bullying and harassment by Ms. Corinne Pereira"

[39] The notice of civil claim also refers to other communications between the union and the appellant's employer as the grievance proceeded.

The Judge's Reasons

[40] In the decision that gives rise to this appeal, the union applied to strike the notice of civil claim on the basis that it did not disclose a reasonable claim. It argued that the allegedly defamatory words were published or spoken on occasions of privilege and could not form the basis for a defamation action.

[41] The judge granted the application. The judge first considered the question of whether the statement cited at paragraph 44 of the notice of civil claim was capable of constituting defamation. After citing *Knupffer v. London Express Newspaper Ltd.*, [1994] AC 116 (H.L.(Eng.)) and *Lund v. Black Press Group Ltd.*, 2007 BCSC 559, he found that it was not:

> [18] The statement "I am not convinced that the company has conducted a proper investigation into all of the harassment and bullying that happened after Corrine's suspension" impugns the Employer by questioning whether it conducted a proper investigation into the "harassment and bullying that happened after Corrine's suspension". That is, whether the Employer properly investigated allegations of an unsafe workplace. It does not impugn the plaintiff. As a matter of law, the words are not capable of defaming the plaintiff. The plaintiff's claim the statement if defamatory is not a reasonable claim and is struck pursuant to Rule 9-5(1)(a) [of the *BC Supreme Court Civil Rules*, B.C. Reg. 168/2009].

[42] The judge next addressed the issue of whether the allegedly defamatory statements were made on occasions of qualified privilege. The judge cited *Haight-Smith v. Neden*, 2002 BCCA 132 at para. 52 as authority for circumstances in which qualified privilege arises:

> [52] Qualified privilege applies to statements made on:
>
> ...an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it.
>
> (Lord Atkinson in *Adam v. Ward*, [1917] A.C. 309 at p. 334, cited in *Mcloughlin v. Kutasy*, [1979] 2 S.C.R. 311 at p. 321.)

[43] The judge accepted that a claim of qualified privilege can be defeated where it is shown that a statement was made maliciously or for an improper purpose. He noted that Ms. Pereira made allegations of malice:

> [23] The plaintiff alleges malice on the part of the Union and says that, as a result, qualified privilege is lost. She says the harassment grievance was filed for an improper purpose, namely, to assist the plaintiff's co-worker in obtaining documents that the co-worker could use to defend herself against a civil claim of the plaintiff.

[44] The judge correctly noted that the same allegation had been advanced by Ms. Pereira in her applications to the Labour Relations Board alleging that the union had breached its duty of fair representation, and had been rejected.

[45] The judge found that the issue of malice had been fully and finally determined by the Labour Relations Board and found that the doctrine of *res judicata* and particularly the issue estoppel branch of that doctrine, precluded re-litigation of the issue.

Alleged Errors in the Judgment

[46] Ms. Pereira's factum alleged numerous defects in the reasons, including general inadequacy and a failure to address all of her submissions. In my view, there is no air of reality to most of the suggested errors, and I do not intend to discuss all of them. I would say that the judgment appealed from is admirably clear, and it cannot be said that the basis upon which it was given is in doubt.

[47] Ms. Pereira accepts that the allegedly defamatory statements were made on occasions of qualified privilege. She says, however, that qualified privilege will be defeated where malice is made out. She says that the judge erred in applying the doctrine of issue estoppel to defeat her claim that the statements were made with malice.

Is the Privilege Qualified or Absolute?

[48] Before addressing the question of issue estoppel that lies at the centre of this appeal, I will make some observations about the privilege that attaches to communications made in the course of grievance proceedings.

[49] The application before the chambers judge was founded on qualified privilege. The union did not pursue any claim of absolute privilege. In fairness to the

parties, I am prepared to analyze this appeal on the basis that the words that are allegedly defamatory were written or spoken on occasions of only qualified privilege. I do so, however, while maintaining the view that the words contained in the grievance are probably subject to absolute privilege.

[50] Absolute privilege attaches to allegations made and words spoken in the course of *quasi-judicial* proceedings. In *Hung v. Gardiner*, 2003 BCCA 257, this Court adopted the following statement of the principle from *Sussman v. Eales* (1985), 33 C.C.L.T. 156 (Ont. H.C.J.) at 157:

> The general rule is clear. No action will lie for defamatory statements contained in a document properly used in the course of any proceedings before a court of justice or tribunal recognized by law.

[51] While, as this Court noted in *Hung*, *Sussman* was overturned on appeal ((1986), 25 C.P.C.(2d) 7 (Ont. C.A.)), the endorsement decision of the Ontario Court of Appeal did not cast doubt on the general proposition. See also *Schut v. Magee*, 2003 BCCA 417 at para. 17.

[52] Grievance proceedings under a collective agreement are covered by this absolute privilege:

> In Canada the privilege extends to all judicial and quasi-judicial bodies at every level of jurisdiction. It has been held to attach to … a Board of Arbitration instituted under a collective agreement.
>
> Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed (Toronto: Thomson Reuters) (Release No. 2023-5, December 2023) at §12:21.

[53] In *Rubin v. Ross*, 2013 SKCA 21, the Saskatchewan Court of Appeal was called upon to determine whether a defamation action arising out of a publication connected with a grievance arbitration was actionable. The Court held that the publication in question was not actually part of the grievance arbitration process, and so allowed the appeal and awarded damages. On the general question of whether grievance arbitrations are covered by absolute privilege, however, the Court accepted that they are:

> [39] Two issues arise in this case; first, whether the arbitration board to which Ms. Bowman addressed her Grievance Report is the type of "judicial" institution contemplated by the scope of absolute privilege, and second, whether the publication that took place exceeds what is contemplated by absolute privilege.
>
> [40] With respect to the first issue, the Grievance Report is the originating document leading ultimately to an arbitration proceeding. The trial judge concluded that an arbitration board or hearing under *The Trade Union Act*, R.S.S. 1978, c. T-17 is a quasi-judicial proceeding … which falls within the judicial branch. The trial judge's conclusion would seem to be the correct one. Administrative boards or tribunals that share similar attributes to those of the judiciary have been found to come within the scope of absolute privilege (see, e.g., *Hamalengwa v. Duncan* (2005), 2005 CanLII 33575 (ON CA), 135 C.R.R. (2d) 251 (Ont. C.A.), leave to appeal to S.C.C. refused, [2006] 1 S.C.R. ix).

[54] Once a formal grievance was filed, therefore, absolute privilege applied to statements made within it. It is probable, however, that statements made prior to the commencement of a grievance proceeding are subject to qualified rather than absolute privilege. In *Caron v. A.*, 2015 BCCA 47, this Court held that in a criminal law context, absolute privilege applies to statements made upon the commencement of a criminal proceeding — i.e., the swearing of an information: at para. 54. By analogy, the formal lodging of a grievance would appear to be the first occasion on which absolute privilege would apply in the labour relations context.

[55] Statements made before the grievance proceedings have been formally commenced, on the other hand, will typically be made on occasions of qualified privilege rather than absolute privilege. Indeed, many communications between a union and an employer, or a union and its members, will be made on occasions of qualified privilege — see *Mann v. International Association of Machinists and Aerospace Workers*, 2012 BCSC 181.

[56] On this analysis, the statements made by the union representative prior to the presentation of the formal grievance may well be subject to only qualified privilege. The statements made in the grievance itself, however, would be absolutely privileged.

[57] As the malicious act alleged by Ms. Pereira was the filing of the grievance itself, it is difficult to understand how it could defeat any claim to qualified privilege that pre-dated the filing.

[58] As I have indicated, however, this case was argued in the court below on the basis of qualified privilege, and Ms. Pereira's factum addressed that issue. I am content, in the circumstances, to analyze the appeal on the assumption that the privilege at issue was a qualified one.

Did the Judge Err in Finding the Issue Estoppel Applied?

[59] It is clear that issue estoppel can be invoked in respect of decisions of administrative tribunals that operate as *quasi* judicial entities.

[60] In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the Court considered the degree to which a decision of a quasi-judicial tribunal could found a plea of *res judicata* (specifically concentrating on the issue estoppel branch of *res judicata*). It described the problem as follows:

> [21] These rules [i.e., those governing *res judicata*] were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.
>
> [22] The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s by D. J. Lange in *The Doctrine of Res Judicata in Canada* (2000), at p. 94 *et seq.*, … Modifications were necessary because of the "major differences that can exist between [administrative orders and court orders] in relation, *inter alia*, to their legal nature and the position within the state structure of the institutions that issue them": *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, at para. 4. There is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals.

[61] The Court held that the analysis should proceed in two stages. At the first stage, a court must determine whether the general circumstances giving rise to *res judicata* are made out. In *Angle v. Canada (M.N.R.),* [1975] 2 S.C.R. 248, at 254,

Justice Dickson (quoting Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at 935), described three essential elements for *res judicata*: (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel is raised.

[62] In *Danyluk*, Justice Binnie, speaking for the Court, discussed the question of when decisions by administrative bodies met the test of being "judicial":

> [35] A common element of the preconditions to issue estoppel set out by Dickson J. in *Angle*, *supra*, is the fundamental requirement that the decision in the prior proceeding be a judicial decision. According to the authorities (see e.g., G. Spencer Bower, A. K.Turner and K. R. Handley, *The Doctrine of Res Judicata* (3rd ed. 1996), paras. 18-20), there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, was the decision made in a judicial manner?
>
> [Emphasis in original.]

[63] With respect to the third factor, Justice Binnie was careful to emphasize that the question of whether the tribunal made a decision in a judicial manner is not to be confused with the question of whether the decision was made correctly or in accordance with principles of procedural fairness:

> [47] In my view, with respect, the theory that a denial of natural justice deprives the [*Employment Standards Act*] decision of its character as a "judicial" decision rests on a misconception. Flawed the decision may be, but "judicial" (as distinguished from administrative or legislative) it remains. Once it is determined that the decision maker was capable of receiving and exercising adjudicative authority and that the particular decision was one that was required to be made in a judicial manner, the decision does not cease to have that character ("judicial") because the decision maker erred in carrying out his or her functions.

[64] With respect to the first stage, as I indicated at the outset of this judgment, there may have been some doubt, at the time of the application before the chambers judge, that the decision of the Labour Relations Board was truly "final", in the sense

that appeals from judicial review applications remained outstanding. Ms. Pereira did not, however, raise that as an issue in the court below (or, indeed, on this appeal). The Labour Relations Boards decisions are now indisputably final, so the question of their finality at the time of the hearing in the court below is moot.

[65] All of the other first stage requirements set out in *Danyluk* are also satisfied in this case. The allegations of malice before the Labour Relations Board were precisely the same ones put forward in this case. The allegations of malice were adjudicated upon in a dispute between Ms. Pereira, as the applicant on the s. 12 application, and the union, as the respondent. They are the same parties involved in this litigation. Further, the Labour Relations Board had adjudicative authority, was required to exercise it judicially, and did, in fact and in law, embark on a judicial hearing.

[66] At the second stage of analysis, a court may consider issues raised by the party resisting the application of issue estoppel and may refuse to apply the doctrine on a discretionary basis. While the categories of possible issues are not closed, the typical considerations are the statutory language of the tribunal's empowering statute, the purpose of the legislation, the availability of an appeal or review, the safeguards available within the administrative procedure, the expertise of the administrative decision maker, the circumstances giving rise to the prior administrative proceedings and the potential for injustice: see *Consolidated Maybrun Mines* at paras. 45–50; *Minott* at 340–43; *Danyluk* at paras. 67–80.

[67] The matter appears to have been fully argued before the judge who, evidently, did not consider that any of these factors weighed against the application of *res judicata* in this case. In my view, that exercise of discretion was within his purview. I would go further and say that, in the circumstances of this case, it would be extraordinarily difficult to justify any different result.

[68] The issue of malice was fully canvassed before the Labour Relations Board, which has expertise in the area, and was fully competent to deal with the matter. Further, the issue at hand — whether the grievance filed by the union in respect of

Ms. Pereira's conduct was an abuse — was a matter that fell squarely within the core of the Board's jurisdiction. Procedural fairness applies to the Board's proceedings, and its procedures are akin to those of courts in terms of procedural protections.

[69] Ms. Pereira contends that a finding by the Labour Relations Board in a hearing under s. 13(1)(a) of the *Labour Relations Code* cannot be the basis of issue estoppel, because s. 13(1)(a) is a "gatekeeping" provision that does not require a full adversarial hearing.

[70] She offers no jurisprudential support for that proposition. Ms. Pereira raised the issue of malice in her application before the Labour Relations Board. She had a full opportunity to present materials establishing that there was an arguable case for the malice allegation. The Board fully analyzed the case that she presented. It determined that there was no evidence to support the allegation. I do not agree that the mere fact that s. 13 is a "gatekeeping" provision of the *Labour Relations Code* precludes a finding of issue estoppel.

[71] Ms. Pereira also contends that the Labour Relations Board's determinations were wrong. The whole point of issue estoppel, however, is to preclude re-litigation of an issue. It is not an opportunity to revisit the evidence to see whether a different result might be reached. Even if the correctness of the Board's determination were a valid consideration at this juncture, it would not assist Ms. Pereira. I would observe her theory that the union acted out of malice is very difficult to countenance; it amounts to an allegation that the grievance was filed by the union for the sole purpose of transmitting admittedly irrelevant (and largely innocuous) documents to

her co-workers. It is not at all surprising that that theory was rejected by the Labour Relations Board at the gatekeeping stage.

Conclusion

[72] I would dismiss the appeal.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Abrioux"