IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Moon v. International Alliance of Theatrical Stage Employees (Local 891),* 2024 BCSC 1560

Date: 20240828
Docket: S242388
Registry: New Westminster

Between:

Kelly Moon

Plaintiff

And

IATSE Local 891, Gary Mitch Davies, James Fantin, Gwendolyn Margetson, Michael Billings, Amanda Bronswyk, Dana Gaudet, David Curley and John Doe

Defendants

Before: The Honourable Madam Justice Sukstorf

Reasons for Judgment

Counsel for the Plaintiff:	M. Freedman
Counsel for the Defendants:	J.D. Wong
Place and Date of Hearing:	Vancouver, B.C. April 18, 2024
Final Written Submissions:	May 6, 2024 May 17, 2024
Place and Date of Judgment:	New Westminster, B.C. August 28, 2024

Table of Contents

Introduction

[1] On January 20, 2022, the plaintiff, Ms. Moon, filed the Notice of Civil Claim ("NOCC") in this proceeding.

[2] On February 13, Ms. Moon filed the Amended Notice of Civil Claim ("ANOCC").

[3] Ms. Moon, a former long time Senior Steward (an elected position) with International Alliance of Theatrical Stage Employees Local 891, ("IATSE Local 891"), a trade union representing technicians and artists in the British Columbia film industry pursuant to the *Labour Relations Code,* R.S.B.C. 1996, c. 244 [*LRC*] is suing multiple defendants for compensatory damages related to an *en masse* distribution of a report that flowed from an investigation into her credit card use (the "Report").

[4] The Report contained disputed and serious allegations of misconduct against Ms. Moon which she alleges became a major issue in her continued employment and subsequent re-election in the 2019 General Election for the position she held for 11 years.

[5] The defendant IATSE Local 891 is a chartered local of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada (the "International").

[6] The individually named defendants, Gary Mitch Davies, James Fantin, Gwendolyn Margetson, Michael Billings, Amanda Bronswyk, Dana Gaudet and David Curley were on the Executive Board for IATSE Local 891 (the "Executive Board") for various terms, including on or about December 4, 2018 when the decision was made to disclose the Report.

[7] The defendant John Does is one or more employees, officers or members of IATSE Local 891 who copied and disseminated Ms. Moon's highly personal

information in or around the period of December 2018 to October 2019 and whose identity is unknown to the plaintiff.

[8] In short, the ANOCC alleges a number of claims, different defendants and different acts or omissions as follows:

a) Defendant IATSE Local 891 for:

   i. Breach of contractual duty of good faith as the plaintiff's employer;

   ii. Breach of *Privacy Act,* R.S.B.C. 1996, c. 373, for publishing the Report;

   iii. Breach of the common law tort of public disclosure of private fact by publishing or causing the Report to be published;

   iv. Vicarious liability for John Doe's breach of the *Privacy Act* and/or public disclosure of private fact;

   v. Negligence; and

   vi. In the ANOCC, damages under s. 57 of *Personal Information Protection Act*, S.B.C. 2003, c. 63 [*PIPA*], further to an order that IATSE Local 891 breached *PIPA*.

b) John Doe Leaker for:

   i. Breach of *Privacy Act* by leaking/distributing the Report;

   ii. Breach of the tort of public disclosure or private fact by leaking/distributing the Report.

c) Individually Named Members of the IATSE Local 891 Executive Board for:

   i. Conspiracy or conspiracy by illegal means on the basis that they:

(1) knew or ought to have known that publishing the Report was a breach of various statutory, tort, and fiduciary duties;

(2) conspired with the sole or predominant intent to injure Ms. Moon's reputation and to harm her re-election prospects by causing IATSE Local 891 to publish the Report without safeguards; and/or

(3) conspired to act unlawfully in breach of the *Privacy Act*, *PIPA*, tort law, fiduciary duties, duty of good faith to produce the Report with actual or constructive knowledge that the plaintiff may be injured.

ii. Intentional interference with contractual relations between the plaintiff and IATSE Local 891.

d) Election Committee:

i. The plaintiff applies for review of the Election Committee's decision for breach of contract, legal errors and lack of procedural fairness.

[9] Pursuant to Rule 9-5(1)(b) of the *Supreme Court Civil Rules* [*Rules*], the defendants have applied to have Ms. Moon's ANOCC struck without leave to amend and to have her claims dismissed for failure to disclose a reasonable cause of action.

[10] However, at para. 15 of the defendants' written reply submissions filed on May 17, 2024, they clarified that they are only seeking to dismiss claims against IATSE Local 891 and the Individual defendants and not the claims made against John Doe. They do refer to the individual named defendants who I note were also members of the Executive Board, but they fail to comment or clarify what they are seeking with respect to the actions of the Executive Board itself.

[11] In the alternative, pursuant to Rules 3-1, 3-7 and 9-5, the defendants challenge the following:

a) The “materiality” of the newly alleged paragraph 48 that describes when Ms. Moon was provided with a final version of the Report prior to its disclosure;

b) The newly alleged paragraph 74 that describes the Breaches of the *PIPA*;

Relevant Facts

[12] The plaintiff, Kelly Moon was a long-time Senior Steward (an elected position) with IATSE Local 891 from January 1, 2008 until December 31, 2019.

[13] As Senior Steward, she supervised nine staff, and was responsible for all investigations, grievances and arbitrations involving 891 members, as well as all other collective agreement issues. She oversaw the dispatch of employees to employers, and determined approval of work permit requests.

[14] At the time of termination, Ms. Moon was collecting an annual salary of approximately, $170,000, RRSP Contributions of 9% of her earnings, she had comprehensive benefits coverage and a healthcare spending account, automobile and cellular phone allowances, six weeks of paid holidays plus statutory holidays and other benefits that she intends to prove at trial.

[15] In order to continue to hold the elected position that Ms. Moon held for 11 years, she had to successfully run for re-election.

[16] Ms. Moon campaigned for re-election as Senior Steward in Fall 2019, but lost to the defendant Amanda Bronswyk.

[17] In her notice of claim, Ms. Moon alleges that her failure to get re-elected flowed from a combination of the following factors:

a) Prior Conflict with the Executive Board:

i. After the 2016 re-election, Ms. Moon experienced conflict with the former president of IATSE Local 891, Mitch Davies and other members of the Executive Board.

ii. In or about May 2017, Ms. Moon filed internal union charges against members of the Executive Board alleging, *inter alia*, that the defendant Mitch Davies and the Executive Board had engaged in a course of bullying, harassment and intimidation toward her.

iii. The charges were heard by an IATSE Local 891 Trial Board (the "Trial Board") pursuant to IATSE Local 891's Constitution and Bylaws.

iv. IATSE Local 891's Trial Board issued their decision on July 10, 2018 and noted the hostile relationship between Ms. Moon and President Davies and the rest of the Executive Board. A majority of the Trial Board specifically commented upon President Davies' inability to set aside his dislike for Ms. Moon and found that the Executive Board's actions were "unnecessarily antagonist[ic]".

v. The charges were all dismissed. The members of IATSE Local 891 were informed of the Trial Board findings at a General Membership Meeting on September 8, 2018, because they had the right to approve the findings or contest them. The General Membership upheld the Trial Board findings dismissing all of the charges filed by Ms. Moon against the members of the Executive Board.

vi. Ms. Moon appealed the Trial Board findings.

vii. The defendant, Mitch Davies and other members of the Executive Board argued that Ms. Moon should be found guilty of

having preferred false charges and sought to have her fined and banned from holding any elected or appointed office in IATSE Local 891 (including the position of senior steward) for five years.

viii. The Executive Board's effort to ban Ms. Moon from her Senior Steward position or other elected positions by way of the Trial Board was ultimately unsuccessful. While the Trial Board at first instance found that Ms. Moon had made false charges, this finding was overturned on appeal by the International President of IATSE.

b) Credit Card Report:

i. On or about November 16, 2018, just over five weeks after Ms. Moon had filed her appeal of the Trial Board decision, Brian Witfield, the Managing Director of the Union in an email requested to meet with Ms. Moon to discuss an investigation that had concluded a year earlier in 2017 regarding Ms. Moon's personal use of her corporate credit card.

ii. The credit card investigation flowed from Ms. Moon self-reporting that she had used her corporate credit card to pay for a ferry ticket for a terminally ill friend who was in medical distress.

iii. The Audit Committee reviewed Ms. Moon's credit card use, determined she had breached the policy on credit card use and recommended that her credit card privileges be revoked.

iv. Prior to the end of 2017, Ms. Moon repaid the outstanding amount on the credit card for approximately $283.00 and her credit card was cancelled based on the recommendation by the Audit Committee.

v. The issue of the Credit Card was not raised again until one year later when Ms. Moon received an email on November 16, 2018 from Mr. Witfield.

vi. On November 20, 2018, Mr. Witfield provided Ms. Moon a copy of the Report and briefly discussed it with her.

vii. The facts suggest that the purpose of releasing the Report to the IATSE Local 891 membership was for internal governance and accountability. IATSE Local 891s assets are derived from dues paid by its members and investment returns on those dues. Consequently, unions must be able to hold members in elected fiduciary positions accountable.

viii. The facts suggest that Ms. Moon accepted that disclosure of the result of the investigation was appropriate but contests the timing of the release of the Report and the nature and amount of information included therein.

ix. On November 23, 2018, Mr. Witfield sought Ms. Moon's consent to include a reference to her gambling addiction, which she had previously disclosed to IATSE Local 891 during the investigation. Ms. Moon did not provide permission as it was not relevant to the alleged use of the credit card in 2016/2017 and she argued that it would be a breach of her human rights by unilaterally disclosing her disability to the membership.

x. The Report contained sensitive and private information regarding Ms. Moon including:

1) Personal expenditures made by her going back 10 years, including irrelevant and unnecessary information.

2) The existence of an investigation against her for alleged misconduct. The Report included terminology that falsely implied what she had been investigated for, or committed, fraud and the minutes of the Local's grip department meeting refers to the Report as related to Credit Card Fraud.

3) Her responses to the allegations were mischaracterized.

4) When rumours began circulating that she had engaged in theft or fraud, they did not correct the baseless accusations allowing members to believe that she had misused funds and committed theft or fraud, which was false.

c) Leaking of the Report:

i. In December 2018 and January 2019, a version of the Report that had not been shown to Ms. Moon was leaked to an untold number of individuals by John Doe.

ii. The only persons with access to the Report with the ability to leak it were employees of IATSE Local 891 and the departing and new members of IATSE Local 891's Executive Board, Executive Committee and Audit Committee who had been provided access to the Report by IATSE Local 891.

iii. On or about January 20, 2019, Ms. Moon learned about the leaks and informed IATSE Local 891.

d) Executive Board conspired to have IATSE Local 891 publish the Report:

i. On December 4, 2018, the 2018 Executive Board (which included the defendant Mitch Davies who had lost his re-election and would be leaving office effective January 1, 2019) resolved to distribute an unredacted copy of the Report to the entire IATSE Local 891 membership. This decision was made after a new President Keith Woods, had been elected, but had not yet taken office.

ii. The incoming President, Mr. Woods expressed significant reservations with the previous Executive Board's binding decision to publish the report given that there was "no illegal activity that took place" and releasing the Report would be seen as "vindictive, inflammatory and retaliatory at best." He expressed that distributing the information was "unnecessary unless the point is to punish the Senior Steward." Further, he was of the view that the Report also raised questions about the actions of other individuals, including the treasurer and controller.

iii. Phil Klapwyk, the Union's Business Representative, also noted his objections to releasing the report to the membership. He said that publicizing the Report "seems to only serve to publicly attack the character of the [Senior Steward]." He also noted his concern that the Report would make its way to the media and damage the reputation of the union as a whole.

iv. Others echoed the same concerns about privacy and damage to the union's reputation and suggested that, as with a trial, the Union should only make a physical copy of the Report available to be reviewed at the union office.

v. The Executive Board dismissed these concerns directing the newly elected President Woods that he was bound by the decision taken by the Executive Board before he took office.

vi. On January 24, 2019, IATSE Local 891 published the Report on its internal website where it was accessible to anyone with a password, including all 9,000 members, and the employees of IATSE Local 891.

vii. Ms. Moon was only provided a copy of the Report that was being published one day prior.

viii. On January 31, 2019, the Report was removed from IATSE Local 891's website.

e) Aftermath of the Publication of the Report. As a result of the publication and removal of the Report:

i. A number of IATSE Local 891 members posted on social media and wrote in to IATSE Local 891 in January and February 2019, making baseless accusations of theft, misuse of funds and fraud against Ms. Moon.

ii. Many of the messages specifically mention the Report's allegations of improper expenditures and her personal struggles.

iii. IATSE Local 891 was aware of the second order effects that flowed from the publication of the Report and took no action to mitigate or correct the baseless accusations.

iv. Several of the IATSE Local 891 officers, including members of the 2018 Executive Board, engaged in a concerted effort to amplify the rumours and allegations prior to the Senior Steward election using the authority of their positions to disadvantage

Ms. Moon and promote her opponent in the election for Senior Steward, Amanda Bronswyk (the “Misinformation Campaign”).

f) Further Leaking of the Report:

i. On September 25, 2019, on the first voting day for Senior Steward, IATSE Local 891 sent a letter to all of its members, addressing the Report and why it was removed from the website.

ii. Shortly thereafter, in late September 2019, the Report was anonymously copied and disseminated by John Doe at film industry productions staffed by IATSE Local 891 members.

iii. The Report was also sent to an online news website by John Doe and on October 24, 2019, an article was published that contained Ms. Moon’s personal information, as well as excerpts from the Report and the September 25 letter. This article was then shared on unofficial IATSE Local 891 departmental Facebook pages, and on personal pages of members a week before the final ballot in the 2019 Senior Steward election.

g) Alleged Damage and Loss Suffered by Ms. Moon:

i. As a result of the publication and leaking of the Report, as amplified by the Misinformation Campaign, the Report became a major, if not the main issue in the election, despite the fact that the alleged breaches occurred two years prior.

ii. Although Ms. Moon did make it through the first ballot, she faced a mounting misinformation campaign during the second round of balloting and was forced to spend a significant amount of her campaign addressing misinformation and rumours.

iii. Ms. Moon believes that if it was not for the publication and / or leaking of the Report, given her previous record and increasing popularity with the membership, she would have been re-elected Senior Steward once again.

h) Election Committee Failure to Act in Response to Election Issues:

i. On January 1, 2020, Ms. Moon filed a challenge to the election with the IATSE Local 891 Election Committee as a result of the substantial irregularities in the election, including the publication and leaking of the Report and the Misinformation Campaign.

ii. By January 31, 2020, after not hearing back from the Election Committee, Ms. Moon followed up and on February 3, 2020, legal counsel for the Elections Committee responded and advised Ms. Moon that the Elections Committee were following "due process" and expected to respond within 14 days.

iii. On February 7, 2020, Ms. Moon inquired about the "due process" that would be followed, but the Elections Committee did not respond.

iv. On February 12, 2020, the Election Committee issued a 1-page decision denying the plaintiff's challenge, including the following statement:

> The Elections committee reviewed, considered and had a meeting to discuss the letter and materials provided by your letter of January 1st with respect to Sister Moon's challenge pursuant to Article 13.7 of the IATSE Local 891 Constitution;
>
> The Committee has determined that the election was conducted in compliance with the applicable governing Constitution, By-laws, policies & procedures, rules and guidelines of the Local. In particular, the Elections Committee has determined that the election was conducted in compliance with the functions of the Elections Committee pursuant to Article 13.1(d) of the Constitution. Therefore, the Elections Committee denies the requests/ demands made in your letter of January 1st.

> This represents a final determination by IATSE Local 891 with respect to Sister Moon's challenge.

v. There were no other reasons provided by the Election Committee.

a) On February 26, 2020, Ms. Moon appealed the IATSE Local 891 Election Committee decision to the International President;

b) On June 8, 2020, the International President denied Ms. Moon's appeal;

c) On June 23, 2020, the International General Executive Board denied her appeal; and

d) On July 29, 2021, the International Alliance in Convention, voted and denied her appeal.

e) Ms. Moon argues that she exhausted the internal appeals available through the IATSE Local 891 and IATSE International Constitution, all of which failed to comply with the required due process and procedural fairness, which she states included the Election Committee failing to provide the record of its decision which she alleges was in breach of the IATSE International Constitution.

[18] On January 30, 2020, Ms. Moon made a complaint to the Office of the Information & Privacy Commissioner ("Commissioner") under *PIPA*.

[19] On August 21, 2023, the Commissioner issued a decision (the "OIPC Decision") and Order P23-08 in relation to Ms. Moon's complaint. The adjudicator found IATSE Local 891 had not complied with its duty under s. 34 of *PIPA* to make reasonable security arrangements to protect Ms. Moon's personal information.

Procedural History

[20] On January 20, 2022, Ms. Moon filed the NOCC.

[21] On February 13, 2023, Ms. Moon filed the ANOCC.

[22] On October 30, 2023, counsel for IATSE Local 891 wrote to counsel for Ms. Moon to advise of IATSE's intention to bring an application to strike.

[23] On January 28, 2024, IATSE Local 891 filed a notice of application for a hearing to be held on February 8, 2024 to strike the ANOCC on the basis the entire claim was an abuse of process as Ms. Moon had failed to follow IATSE Local 891's and the International's internal rules and procedures set out in the Local Constitution and International. In the alternative, the defendants seek to strike various facts and claims set out in the ANOCC.

[24] The parties consented to the adjournment of the February 8, 2024 hearing to allow the plaintiff more time to prepare an application response.

[25] On February 23, 2024, the defendants filed a notice of application to reset a hearing on April 18, 2024 to strike Ms. Moon's ANOCC.

[26] On April 18, 2024, the court heard the defendant's application to strike Ms. Moon's ANOCC.

[27] The parties followed up with final written submissions on May 6, 2024 and May 17, 2024.

[28] Given that this ANOCC is still in its early stages, it sets out a combination of multiple claims against multiple defendants. I find that the connections between the facts alleged, the remedies sought, and the legal bases for seeking those remedies are intricate. I will nonetheless address each of the main arguments specifically raised by the defendants in their notice of application. I begin first by analysing the challenges to Ms. Moon's claim requesting a review of the Elections Committee decision.

Positions of the Parties

Applicants (Defendants)

[29] Relying upon Rules 8-1, 9-5(1), and 14-1 of the *Rules* and the inherent jurisdiction of the court, the defendants ask the Court to strike out the ANOCC, or any part of the pleadings on the following grounds:

a) The Court does not have jurisdiction regarding the challenges to the Elections Committee Decision;

b) The entire claim is an abuse of process as the plaintiff has failed to follow IATSE Local 891 and the International's Internal Rules and Procedures;

c) Claims against the defendant Gary Mitch Davies are bound to fail;

d) Tort of Public Disclosure of Private Facts does not exist in British Columbia;

e) Breach of *PIPA* Claim as pleaded is bound to fail;

f) *Privacy Act* Claim is a collateral attack on the OIPC Decision and is bound to fail; and

g) Negligence Claim is bound to fail.

[30] They argue that the amendments sought in the ANOCC do not disclose a reasonable claim as the Court has no jurisdiction to review the claims as they constitute a collateral attack and an abuse of process on IATSE Local 891's internal processes and procedures.

[31] The defendants ask the Court to dismiss all the claims against IATSE Local 891 and the individual defendants, but not John Doe.

Respondent (Plaintiff)

[32] Ms. Moon rejects all the challenges to her ANOCC argued by the defendants and her position will be discussed within the analysis that follows.

The Law

[33] The parties agree that the test for allowing amendments to pleadings is the same as the test on an application to strike pleadings.

[34] At any stage of a proceeding, Rule 9-5(1) provides that the court may order to be struck out or amended the whole or any part of a pleading on the ground that:

a) it discloses no reasonable claim or defence, as the case may be,

b) it is unnecessary, scandalous, frivolous or vexatious,

c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[35] Rule 3-1(2)(a) also establishes that a notice of civil claim is to set out a "concise statement of material facts giving rise to the claim" and Rule 3-7(a) prohibits evidence from being included in a pleading.

[36] A pleading may be struck for disclosing no reasonable cause of action only where this is plain and obvious that the claim has no reasonable prospect of success; *Yenal v. Sahota*, 2023 BCSC 1022 at para. 6, *Berenguer v. Sata Internacional - Azores Airlines*, S.A., 2023 FCA 176 at para. 23, leave to appeal to SCC ref'd, 40949 (11 April 2024).

[37] With respect to amendments, the key question that the court must decide is whether it is plain and obvious that the proposed amendment fails to disclose a cause of action or defence: *Wales v. Wales Estate*, 2017 BCSC 546 at para. 25.

[38] The plain and obvious test applies to both the discernment of whether a claim pleaded is justiciable and to the discernment of whether it falls within the jurisdiction of the court: *Berenguer* at para. 24.

[39] For the purposes of determining whether there is a reasonable cause of action, the pleading is to be read generously and with the pleaded facts accepted as true. The power to strike out pleadings must be exercised with considerable caution and reluctance and neither the length or complexity of the issues nor the novelty of the cause of action should prevent a plaintiff from proceeding with his action.

Discussion and Analysis of Individual Arguments

Does the Court have jurisdiction to review the Elections Committee Decision?

Positions of the Parties

Respondent (Plaintiff)

[40] On January 1, 2020, Ms. Moon filed a challenge to the election to the Election Committee alleging substantial irregularities, including the publication and leaking of the Report and the Misinformation Campaign. She requested her immediate reinstatement on an interim basis as Senior Steward, a declaration that the election was null and void, and requested a new election to be conducted fairly and in accordance with the International and IATSE Local 891 Constitutions. She reserved the right to seek all such additional relief necessary to be made whole (the “Election Challenge”).

[41] Ms. Moon states that she expected to hear back from the Elections Committee on the process whereby her challenge would be heard and decided, but she didn’t. She eventually followed up with them.

[42] At paras. 62 to 73 of her ANOCC, Ms. Moon alleges that the Election Committee failed to act in response to the election issues and that their decision was fatally flawed for the following reasons:

a) The Elections Committee failed to provide procedural fairness, including allowing certain members of the Committee to participate (Hon Lui and Jeanne Andrews) despite them having a real or reasonably perceived apprehension of bias, and failing to provide reasons supporting its decision;

b) The Elections Committee committed jurisdictional errors including improperly fettering its jurisdiction and finding that it had no authority to consider whether a coordinated digital misinformation campaign could affect the integrity of the election;

c) The Elections Committee failed to properly interpret and apply the express and implied terms of the International and Local Constitutions;

d) The Elections Committee failed to properly address the issues raised in the Election Challenge.

[43] Further, Ms. Moon argues that the Election Committee's decision breached the contract between her and IATSE Local 891, was fatally flawed and procedurally unfair as were the subsequent reviews.

Applicants (Defendants)

[44] IATSE Local 891 argues that the facts asserted at paragraphs 62–70 of the Statement of Facts and the arguments asserted at paragraph 11 of the legal basis of the ANOCC appear to suggest that the Election Committee Decision is subject to review on its merits and appears to challenge the substance of the election itself.

[45] IATSE Local 891 further argues that the court's jurisdiction is limited to considering whether the Election Challenge Decision was carried out in accordance with the IATSE Local 891s and International's internal rules and requirements of natural justice.

[46] Article 13 of the Local Constitution sets out the process for nominations and elections for IATSE Local 891 and Article 13(d) sets out the functions of the Election Committee as:

> (d) It will be the function of the Election Committee to:
>
> i. see that all elections procedures, ballot instructions and ballot handling are followed as per the Constitution and By-Laws;
>
> ii. see that all nomination notifications are in place;
>
> iii. ensure that all nominees meet eligibility requirements;
>
> iv. present the elections results to the Executive Committee;
>
> v. ensure the elections results are reported in the newsletter;
>
> vi. ensure the integrity of the elections; and
>
> vii. secure storage of the ballots.

[47] Nothing in Article 13 of the Local Constitution requires or allows the Election Committee to consider the campaign process or the fairness of the discourse related to the democratic election choices made by IATSE Local 891 membership. Rather, the Election Committee is solely responsible for the integrity of the nomination, balloting, voting and reporting process.

Analysis

[48] There is general consensus that Ms. Moon has exhausted all the avenues of redress that she had before her with respect to the decision of the Election Committee.

[49] As explained above, a motion to strike under Rule 9-5(1)(a) is whether the pleading discloses a reasonable cause of action. However, in a case where the action sought is akin to a petition for review, the pleading does not need to disclose a specific cause of action, but rather it must establish a foundation for a type of proceeding that is authorized to be brought by petition. Therefore, the proper inquiry under Rule 9-5(1)(a) in this instance is whether the ANOCC discloses the type of claim against the Election Committee that may be brought by petition: *E.B. v. Director of Child, Family and Community Services*, 2016 BCCA 66 at para. 42.

Procedural Fairness

[50] IATSE International is a private entity with local chapters, such as IATSE Local 891 which has its own Constitution, By-laws, and democratic processes for decision-making. The evidence suggests that they operate independent of government control. While they may collaborate with government agencies and / or advocate for labour rights, their organizations structure is completely autonomous.

[51] IATSE Local 891 represents technicians and artists who work in the film and television industry in BC, and its day to day business is carried out by officers, officials, trustees and department chairs, all of whom are elected by the general membership.

[52] Ms. Moon had been an IATSE member since June 10, 1991 and served as Senior Steward since January 1, 2008. At the time of the election, Ms. Moon was an elected, full-time, paid official of the IATSE Local 891. She was not a technician or artist. However, s. 6 of the International Constitution, makes it a necessary requirement that she hold membership of the Alliance in good standing.

[53] As a long time, Senior Steward with IATSE Local 891, Ms. Moon was subject to IATSE Local 891 internal rules and procedures as well as those set out in the IATSE Local 891 Constitution (“Local Constitution”).

[54] Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Judicial review is a public law concept that allows courts to ensure that lower tribunals respect the rule of law: *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 [*Wall*].

[55] The *Wall* decision involved a Highwood Congregation of Jehovah's Witnesses’ decision affecting its member Randy Wall. The Highwood Judicial Committee disfellowshipped (excommunicated) Randy Wall after he engaged in sinful behaviour and was considered insufficiently repentant. Mr. Wall argued the Judicial Committee's decision was procedurally unfair.

[56] The Court, in *Wall* noted the following limitation on judicial review:

> [14] Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature — such as renting premises and hiring staff — and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (ibid.). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

[57] Given the facts of this case, jurisdiction cannot be established on the sole basis that there is an alleged breach of procedural fairness or that Ms. Moon has exhausted IATSE's internal processes. Since IATSE is a private entity, its decisions are not authorized by statute, and consequently the decisions made by the Executive Committee and the subsequent parties are not generally amenable to judicial review.

[58] Courts can only intervene if there is an underlying legal right at stake, such as a contract or property right. Mere membership alone does not give rise to legal rights. At para. 24 of *Wall*, the Court wrote:

> Indeed, there is no free-standing right to procedural fairness with respect to decisions taken by voluntary associations. Jurisdiction cannot be established on the sole basis that there is an alleged breach of natural justice or that the complainant has exhausted the organization's internal processes. Jurisdiction depends on the presence of a legal right which a party seeks to have vindicated. Only where this is so can the courts consider an association's adherence to its own procedures and (in certain circumstances) the fairness of those procedures.
>
> [Emphasis added.]

[59] What is required is that a *legal right* of sufficient importance — such as a property or contractual right to be at stake: *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586, 1940 CanLII 59.

[60] Firstly, it is not exactly clear what "decision" Ms. Moon is requesting the Court to review. Generally, the proper party of any judicial review should be the final decision maker. On February 12, 2020, the IATSE Local 891 Election Committee rendered a determination denying Ms. Moon's challenge. On February 26, 2020, under the terms of the International Constitution, Ms. Moon appealed the IATSE Local 891 Election Committee decision to the International President who on June 8, 2020, denied her appeal of the Election Committee decision. Ms. Moon then appealed the decision of the International President to the International General Executive Board who on June 23, 2020 also denied her appeal. Lastly, on July 29, 2021, the International Alliance in Convention voted and denied her final appeal.

[61] In her pleadings, Ms. Moon states that she is seeking review of the first level Election Committee's decision for breach of contract, legal errors and lack of procedural fairness.

[62] The specific relief sought by Ms. Moon when she challenged the results of the election was for the Elections Committee to nullify the results of the election and for her to be reinstated into her former position.

[63] Before proceeding further, the Court must determine if it has jurisdiction and decide whether the decision of the Election Committee being challenged is justiciable.

Does this action raise a legal right giving this Court jurisdiction to review the Decision of the Election Committee?

[64] The essence of Ms. Moon's argument is that the Election Committee decision was fatally flawed, for the following reasons:

a. The Elections Committee failed to provide procedural fairness, by allowing certain members of the Committee to participate (Hon Lui and Jeane Andrews despite a real or reasonably perceived apprehension of bias, and failing to provide reasons supporting its decision.

b. The Election Committee committed jurisdictional errors including improperly fettering its jurisdiction and finding that it had no authority to consider whether a coordinated digital misinformation campaign could affect the integrity of the election.

c. The Elections Committee failed to properly interpret and apply the express and implied terms of the International and Local Constitutions.

d. The Elections Committee failed to properly address the issues raised in the Election Challenge.

[65] The arguments put forward by Ms. Moon relate to the review and decision-making process followed by the Elections Committee in responding to her challenge. However, as described above, the court may only interfere to address procedural fairness concerns if legal rights are at stake. Only in a case where such a valid cause of action is in evidence, can the courts consider whether the decision was based on decision maker's adherence to its own procedures and (in certain circumstances) the fairness of those procedures.

[66] In other words, this Court's authority to intervene is contingent upon the presence of a legal entitlement that the court is being requested to uphold. As the SCC held in *Wall*, at para. 24, "[j]urisdiction depends on the presence of a legal right which a party seeks to have vindicated".

[67] Legal rights that can establish jurisdiction include private property rights, contractual rights, tort claims, unjust enrichment, and statutory causes of action. Natural justice by itself is not a basis for jurisdiction, although it may be relevant when assessing whether a legal right was violated. The key question this Court must answer is whether the relief sought by Ms. Moon aims to vindicate a legal right.

[68] When courts assess what cases are justiciable, they consider the surrounding context, including the nature of the relationship among the parties and the interests at stake. This broader perspective helps determine whether a legal right is affected and whether judicial intervention is warranted.

[69] In the ANOCC, Ms. Moon alleges that the Election Committee's decision breached the contract between her and IATSE Local 891. Given that IATSE Local 891 has a written Constitution, by-laws etc., Ms. Moon was entitled to have those agreements enforced in accordance with their terms. By assessing the alleged breaches of the Constitution, rules and by-laws infringed by the Election Committee, the court would be able to determine if the alleged breaches are contractual in nature.

[70] However, the mere membership in an association that has a constitution, bylaws and written rules does not create a "legal right" of the kind referred to in *Wall*. It requires more.

[71] As the Supreme Court of Canada found at para. 33 of *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 [*Aga*], "membership in a voluntary association is not automatically contractual. Rather, a contract exists only if the conditions of contract formation, including intention to create legal relations, are met." In *Aga*, the Court rejected the position that membership in a voluntary association that has a written constitution and bylaws itself constitutes a contract.

[72] I am cognizant of the fact that courts have the jurisdiction to determine whether the deprivation of a person's ability to earn their livelihood was a breach of contract, as the Ontario Court of Appeal determined in *McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481, 1991 CanLII 7048 (C.A.). In *McCaw*, the matter related to the minister's eligibility to earn his living as a minister within the church. If an individual's eligibility to earn their living is unlawfully taken away, it is obvious that the unlawful action will cause pecuniary loss to the individual.

[73] While I appreciate that the underlying issue is Ms. Moon's election loss of her long-held position and livelihood as Senior Steward, there are nuances in Ms. Moon's case that set it apart from the *McCaw* case. In her case, it was her failure to be re-elected by the membership that led to her loss of employment. She was not improperly dismissed or fired from her position.

[74] While the case law is clear that a person who wrongfully interferes with the status of a person to earn his living is answerable in damages if financial injury results from that interference, that is not what Ms. Moon's request for review engages. She is asking the Court to assess the procedural fairness and natural justice of the decision rendered by the Elections Committee.

[75] Without any guarantee of security of tenure, she had no continuing right to hold her position without being successfully re-elected. Although the Court was not provided with a copy of any contract she held in that position, the evidence before the court set out in the IATSE Local 891 Constitution suggests that successful re-election was a necessary condition of her continued service in that role.

[76] At this time, there are no basic facts pleaded that support where the contractual breach lies nor are there any alleged bylaw contraventions or other governance shortcomings identified.

[77] In her January 1, 2020 challenge to the Election Committee, Ms. Moon argues that IATSE Local 891 has as its core responsibilities, the teaching of appropriate "democratic decorum". She further argued that the following fundamental rights are enshrined in both the IATSE International and IATSE Local 891 Constitutions:

a) The right to run for and hold union office; and

b) The right to a fair trial in response to any charges or conduct contrary to the Constitution or in violation of elected office.

[78] The responsibilities of the Election Committee are set out in Article 13 of the IATSE Local 891 Constitution, which reads as follows:

> Article 13. Nominations and Elections
>
> 13.1 Election Committee
>
> (a) An Election Committee, whose members are appointed by the Executive Committee, will administer all elections of Local 891 officers and officials.

(b) The Election Committee shall consist of no fewer than seven members in good standing from seven different departments.

(c) Five Election Committee members shall constitute a quorum for a meeting.

(d) It will be the function of the Election Committee to:

i. see that all elections procedures, ballot instructions and ballot handling are followed as per the Constitution and By-Laws;

ii. see that all nomination notifications are in place;

iii. ensure that all nominees meet eligibility requirements;

iv. present the elections results to the Executive Committee;

v. ensure the elections results are reported in the newsletter;

vi. ensure the integrity of the elections; and

vii. secure storage of the ballots.

13.2 Nominations

(a) A nomination period for the election of officers and officials shall be declared open in the newsletter or by notice mailed and/or by electronic means to the membership no less than 60 days prior to the expiration of the incumbent officers' or officials' terms.

(b) To be eligible for nomination as an officer or official of the Local, a person must have been a member in good standing of Local 891 for two years, and must be actively engaged in the industry within Local 891's jurisdiction and have worked for at least one hundred and twenty (120) days in the past thirty-six (36) months. Time served as an officer or official or in the service of Local 891 shall be applicable towards the one hundred and twenty (120) days in the past thirty-six (36) months requirement. The continuous good standing for two years is not broken unless the member has been suspended under Local 891's Constitution and By-Laws.

(c) Nominations may be presented in writing to the Executive Board or declared on the floor of an Executive Committee or General Membership meeting.

(d) The nomination period shall be declared closed at the next scheduled Executive or General Membership meeting, whichever may occur first, but no less than 28 days from the date the nomination period was declared.

(e) Once a nomination period is closed for any election, a ballot shall be sent to the membership within ten (10) business days. From that date, thirty (30) days shall be allowed for ballot return.

13.3 Elections

(a) All elections of officers and officials of Local 891 shall be conducted by mail-out ballot and/or electronic ballot.

> (b) The candidate receiving at least 50 per cent plus one vote (of votes cast) shall be declared elected.
>
> (c) If no candidate receives the required majority, the candidate(s) receiving the lowest number of votes cast will be automatically dropped, and the top two candidates' names will be submitted to the membership on a second ballot.
>
> (d) No officer or official shall be allowed to hold more than one office at one time, or to serve as a Trustee, excluding the Business Representative who shall serve as a Trustee of the Health Benefits Trust during a term of office.
>
> …
>
> 13.7 Recounts/Challenges
>
> Any member or officer may apply in writing for a recount/challenge to the Chair of the Election Committee no later than thirty (30) days after the election results have been announced.
>
> [Emphasis added.]

[79] Upon review of the above provisions set out at Article 13 of the IATSE Local 891's Constitution, it is clear that the functions of the Election Committee are very limited. The Committee itself has very little power or discretion. Their role is strictly technical and procedural in nature. The only function that might have afford them any discretion is set out at s. 13.1(d)(vi) which requires them to "ensure the integrity of the elections."

[80] In interpreting what function the Election Committee is required to fulfil in ensuring the integrity of the elections, the provisions set out in Article 13 must be read in context. The practical, common-sense approach to contractual interpretation requires the court to read the Constitution as a whole, consistent with the surrounding circumstances, or factual matrix, known to the parties at the time they entered into the contract. The meaning of a specific provision is derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement: *Sattva Capital Corp*. *v. Creston Moly Corp*., 2014 SCC 53 at paras. 47–48.

[81] Upon a broader review of the Constitution, it is clear that there are no investigative mechanisms or authorities to empower the Election Committee to take the steps that Ms. Moon requested. Further, the Election Committee is required to

"present the elections results to the Executive Committee." At s. 13.7, any requests for recount/ challenges are to be made to the Chair of the Election Committee no later than thirty (30) days after the election results have been announced.

[82] In Ms. Moon's original complaint filed on January 1, 2020, I note that she raised a number of issues, most of which focus on the dispute between her and the Executive Board as well as the investigation and preparation of the Report and the manner upon which the Report was released during the pivotal election period. In short, her challenge to the election results was not straightforward nor was it a simple request for a recount. The allegations she sought to be resolved by the Election Committee strike at the core of the campaign tactics that unfolded during the election.

[83] On February 12, 2020, the IATSE 891 Elections Committee responded as follows:

> We write further to our recent communication including your most recent letter of February 7th.
>
> The Elections Committee reviewed, considered and had a meeting to discuss the letter and materials provided by your letter of January 1st with respect to Sister Moon's challenge pursuant to Article 13.7 of the Local 891 Constitution.
>
> The Committee has determined that the election was conducted in compliance with the applicable governing Constitution, By-laws, policies & procedures, rules and guidelines of the Local. In particular, the Elections Committee has determined that the election was conducted in compliance with the functions of the Elections Committee pursuant to Article 13 (d) of the Constitution. Therefore, the Elections Committee denies the requests/ demands made in your letter of January 1st.

[84] Ms. Moon's subsequent appeals raised the issue that IATSE Local 891's conduct violated the integrity of the Senior Steward Election and the actions of IATSE Local 891 and its officers not only failed to meet the requirements of the local and international Constitutions, but they failed to meet the basic requirements of procedural fairness and natural justice required under the law. More specifically, her arguments were based on their handling of her challenge as summarized in the following grounds:

a) The Elections Committee failed to properly interpret and apply the express and implied terms of the International and Local Constitutions;

b) The Elections Committee failed to properly address the issues raised in my election Challenge;

c) The Elections Committee failed to provide reasons supporting its decision; and

d) The Elections Committee failed to engage in a fair process.

[85] All of the responsibilities outlined in the respective provisions are technical and very procedural in nature and do not afford the Election Committee the ability to expand its scope. Candidates are permitted to challenge and request recounts of the number of votes cast, but ultimately there is no additional authority for the Election Committee to do more. More particularly, the breadth that exists in Article 13 is guided by the fact that the constitution requires the Election Committee to report the election results to the Executive Committee and there is no power or authority for them to take independent action to nullify the results nor restate Ms. Moon back into the position. When read together, I find that their tasks and responsibilities are focused on ensuring that the procedures and process of the election are complied with.

[86] My assessment is fortified by the reasons provided by the International President in dismissing Ms. Moon's internal appeal of the Election Committee Decision where he confirmed that the issues raised by Ms. Moon fell outside the legitimate purview of the Election Committee:

> In this Office's view that the issues that Sister Moon may have with the Report and its use by political adversaries fall outside the legitimate purview of the Election Committee responsibilities contemplated by Article 13 of the Local Constitution and Bylaws. The Election Committee cannot be expected to control what election issues may emerge in the course of an election or to police general membership discourse as Sister Moon's submissions suggest. I also do not accept Sister Moon's submission that the absence of a detailed discussion or analysis of her challenges to the election by the Elections Committee in its decision, in and of itself, automatically leads to the conclusion that the Election Committee accepted her allegations of fact. The

> appeal record also does not support a conclusion that the Election Committee failed to interpret and apply the express or implied terms of the International and Local Constitutions or failed to property address the issues raised. The members of the Election Committee are rank-and-file members of the Local. They are not legally trained. As such, the Election Committee cannot reasonably be expected to issue appeal decisions in a way that might otherwise be expected from a court of law or administrative tribunal. The Election Committee's decision although brief, is nevertheless clear and concise and confirms that the Committee was of the view that the Senior Steward election was conducted in compliance with the Local Constitution and Bylaws.
>
> [Emphasis added.]

[87] Further, I find that the ANOCC is void of any facts or pleadings to suggest that the interpretation made by the International President in the final decision on the role and responsibilities of the Election Committee set out at Article 13 is unreasonable.

[88] In summary, I find that the facts and pleadings do not establish that Ms. Moon has a legal right of sufficient importance at stake. Without such an underlying legal right that is being sought to be vindicated, the Court does not have jurisdiction to review the Election Committee's decision, even if it might be procedurally flawed.

[89] Even in cases where it is determined that an issue is justiciable, the reviewing court will not consider the merits of the internal decision, but will determine only whether the decision was carried out in accordance with the organization's rules and the requirements of natural justice: *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada,* 2011 ONCA 728 at para. 19.

[90] Consequently, I find Ms. Moon's challenge to the Election Committee's decision does not establish a foundation for a type of proceeding authorized to be brought by petition. Therefore, I grant the defendants' request to strike those allegations from the ANOCC.

Is the entire claim an abuse of process because the plaintiff has failed to follow IATSE Local 891 and the International's Internal Rules and Procedures?

Positions of the Parties

Applicants (Defendants)

[91] The defendants argue that prior to seeking any compensatory relief from the court, Ms. Moon was contractually obligated under Article 11.6 of the Local Constitution and s. 7 of Article 17 of the International Constitution to first exhaust all internal remedies and procedures before resorting to a court action.

[92] Article 11.6 of the Local Constitution reads as follows:

> 11.6 Exhaustion of Remedies Members, officers or officials of Local 891 who may have controversies related to union affairs, or against whom charges have been preferred, or against whom disciplinary or adverse action has been taken, shall be obliged to exhaust all remedies provided for in this Local Constitution and the International Constitution before resorting to any other court or tribunal.

[93] Section 7 of Article 17 of the International Constitution reads as follows:

> Section 7. Exhausting Internal Remedies. The members of this Alliance further consent to be disciplined in the manner provided by this Constitution and Bylaws. Under no circumstances shall a member resort to the civil courts until all remedies and procedures herein provided shall have been exhausted.

[94] The defendants contend that Ms. Moon did not take steps internally to overturn the decision of the Executive Board in relation to the finalization and disclosure of the Report by a two thirds majority of the membership at a regular or special General Meeting as required by Article 3.2(c) of the Local Constitution. Article 3.2 reads as follows:

> 3.2 The Authority to Make and Overturn Decisions
>
> (a) The day-to-day business of Local 891 shall be conducted through:
>
> i. the Offices of the President;
>
> ii. the Offices of the Business Representative & Senior Steward; iii. the elected Executive Board of the Local; and iv. the elected Executive Committee of the Local.

> (b) Decisions of the President may be overturned by a two-thirds majority vote of the Executive Board.
>
> (c) Decisions of the Executive Board or Executive Committee may be overturned by a two-thirds majority vote of the membership at regular or special General Meetings.
>
> (d) Any member in good standing may appeal to a higher union authority regarding any action taken by any officer or official of the Local.

[95] Further, they argue that Ms. Moon made no attempt to have the Report rescinded or amended after its disclosure. Additionally, they argue that Ms. Moon did not file charges or seek a decision from the Trial Board regarding the disclosure of the Report or promotion of Ms. Bronswyk during the campaign for the 2019 election of Senior Steward.

[96] In short, their argument is that Ms. Moon was required to seek redress concerning these matters through IATSE Local 891's and the International's internal procedures, and by failing to do so, she did not exhaust all of IATSE Local 891's internal remedies available to her.

[97] The defendants rely upon the doctrine of abuse of process submitting that Ms. Moon's commencement of a court action, without having exhausted internal remedies is considered a collateral attack on IATSE's appeal processes and constitutes an abuse of process.

Respondent (Plaintiff)

[98] In response, Ms. Moon argues that where a labour or administrative process does not provide for effective remedies (such as damages), a plaintiff should not be deprived of a proper forum for their claim.

[99] She submits that a decision on whether IATSE Local 891 or the International union should have exclusive jurisdiction over the claims in this matter engages the *Weber* analysis, where the SCC set out the principles to determine whether a dispute properly belongs in the courts or whether it should be decided by another adjudicative body.

[100] **Article 3.2:** with regards to her allegations against IATSE Local 891, Ms. Moon argues that action taken pursuant to Article 3.2 (c) of the Constitution which permits decisions made by the Executive Committee to be overturned by two-thirds majority vote of the membership at regular or special General Meetings would not have provided her an effective remedy because of the timing of IATSE Local 891's actions. Since the remedy available under Article 3.2 required a "special meeting," and she only received the final version of the Report the day before its release, it was impossible for a special meeting to be called to address it.

[101] She submits that the next opportunity to challenge the decision to publish the Report would have been at the next General Meeting. However, by the time of the General Meeting, the Report had already been published without safeguards against copying and had already been further disseminated.

[102] Ms. Moon further argues Article 3.2 could not provide her with a remedy of financial damages similar to that she would be entitled to under s. 57 of *PIPA* when an order from the Office of the Information and Privacy Commissioner has decided that a privacy breach has occurred.

[103] Further, Ms. Moon argues that Article 3.2 serves as a mechanism to overturn IATSE Local 891's decisions on an *a priori* basis, permitting the challenges of union decisions within the democratic process, and it does not provide *post facto* redress. She submits that the defendants have failed to prove that Article 3.2 can award any remedy, let alone the financial compensation sought by here. It is her position that this lack of effectiveness undermines its status as a remedy.

[104] **Article 11.6 and Internal Remedies**: Ms. Moon argues that Article 11.6 deals with charges against individual union members, not challenges to union decisions.

[105] **Article 17 of International Constitution**: Ms. Moon disputes the suggestion that she should have used Article 17 of the International Constitution to challenge IATSE Local 891's publication of the Report for the following reasons:

a) Article 17 is not intended for seeking compensatory relief in tort claims against a local union. The specific language in s. 7 suggests it primarily applies to appeals from disciplinary actions taken by local unions and the grounds for such charges do not allow for tort or statutory claims. The relief is punitive. The defendants have provided no evidence of Article 17 being used in a similar situation to the case at bar.

b) Section 6 of Article 17 explicitly pertains to “rights and privileges accruing from membership.” There is no evidence that it conclusively addresses other rights, such as statutory or tort claims.

c) The process set out therein does not provide for compensatory damages, which is the relief sought by Ms. Moon.

[106] **Executive Board**: Ms. Moon contends that the defendants have not proven the existence of effective remedies against the individual members of the executive committee for the torts of conspiracy and intentional interference with contractual relations.

[107] Ms. Moon asserts that there is no evidence that tort claims can even be preferred under the Local Constitution or International Constitution. Section 1 of Article 16 of the International Constitution states that the grounds for charges are violations of the international and Local Constitution and bylaws, conduct detrimental to the advancement of the purposes of the union, and conduct that would reflect discreditably upon the union. It provides an exhaustive list. There is no evidence that the tort claims made by the Ms. Moon could be made under the local or International Constitutions, which target misconduct against the union, not misconduct directed at a specific individual member.

[108] Further, the potential remedies in the trial process under Article 11.4 of the Local Constitution are strictly punitive in nature, not compensatory. This further supports the interpretation that the process is meant to be a quasi-criminal hearing about wrongdoing, not an adversarial claim for compensation. There is no evidence

that a trial board has any ability to assess or award compensatory damages, or that a trial board has ever awarded damages to any member of the union: see *Duteil v. Offley,* 2017 BCSC 659 at para. 49.

[109] Further, she argues that supporting the notion that the trial process is punitive and about the "guilt or innocence" of the accused is the fact that there are no procedural safeguards or rights for complainants, only respondents. The only procedural rights contemplated under Article 11 of Local Constitution and Article 16 of the International Constitution belong to an "accused", and there is no indication that a complainant even has the right to participate in the "trial", let alone be represented, receive disclosure, or make submissions.

[110] In short, Ms. Moon argues that the defendants haven't proven that her claims against IATSE Local 891 fail due to unexhausted internal remedies. Nor have they demonstrated that these provisions apply to claims against a local union or that effective remedies exist for the harms caused by the Report's publication.

Analysis

[111] Under R. 9-5(1)(d), in order to find an action constitutes an abuse of process, the court must conclude that it is plain and obvious: *Shuswap Lake Utilities Ltd. v. Mattison,* 2008 BCCA 176 at para. 35.

[112] In *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 40, the Court described the doctrine of abuse of process as flexible which "engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute" (quoting from *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481, 2000 CanLII 8514 (C.A.) at paras. 55–56).

[113] As a general rule, the superior courts have jurisdiction to adjudicate claims of breach of contract or in tort. However, there are exceptions to this general rule.

a) One well-recognized exception is when the essential character of a dispute between an employer and employee arises from the interpretation, application, or violation of a collective agreement. In such cases, these disputes must be resolved through arbitration, rather than through a court action: see *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929,1995 CanLII 108.

b) Another exception is when the rules of a self-governing organization provide an internal dispute resolution process. In these cases, individuals who voluntarily choose to be members of the organization or who have been aggrieved by a decision of the organization must seek redress through the internal procedures of that organization.

[114] In the submissions of the parties, there was disagreement on whether this Court should apply the test set out in *Weber*, in determining whether Ms. Moon's claims can be heard. The disagreement lies in whether *Weber* can be applied to self-governing organizations. It is helpful to highlight the key nuances in distinguishing cases where a collective agreement exists and the *Weber* test clearly applies, versus cases that do not have a collective agreement. This is important in determining how such cases should be assessed. To do so, I begin by addressing the facts that exist in this case that distinguishes it from some of the various precedents relied upon by the parties.

[115] In *Weber*, Madam Justice McLachlin, (as she then was), set out the principles to be applied in determining whether the courts have jurisdiction over a dispute between an employer and employee whose relationship is governed by a collective agreement and an exclusive arbitration clause. In *Weber*, the central issue was whether an employee had the right to bring a court action against their employer. The employer had hired private investigators to investigate the employee while they were on extended leave and collecting sick benefits under the collective agreement. The Court ruled that the arbitrator designated by the collective agreement, rather than the courts, had exclusive authority to address the dispute. Justice McLachlin emphasized that the arbitrator's jurisdiction depended on whether the dispute

fundamentally related to the interpretation, application, administration, or violation of the collective agreement itself. This decision reinforced the role of labour arbitrators in resolving workplace disputes within the established framework.

[116] The holding in *Weber* was succinctly summarized in the *Morin* case (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General),* 2004 SCC 39) at para. 11:

> (i) *Weber* holds that the model that applies in a given situation depends on the governing legislation, as applied to the dispute viewed in its factual matrix. In *Weber*, the concurrent and overlapping jurisdiction approaches were ruled out because the provisions of the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2, when applied to the facts of the dispute, dictated that the labour arbitrator had exclusive jurisdiction over the dispute.
>
> (ii) *Weber* does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction; see, for example, *Goudie v. Ottawa (City),* [2003] 1 S.C.R. 141, 2003 SCC 14; *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd*., 1996 CanLII 215 (SCC), [1996] 2 S.C.R. 495.
>
> (iii) Because the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator.

[117] It is clear from the above summary in *Morin* that the *Weber* test applies to a union environment, where there is a collective agreement and legislation that imposes exclusive jurisdiction to labour arbitrators in resolving employer-union disputes.

[118] In *Stuart v. Hugh*, 2009 BCCA 127, the Court of Appeal addressed the application of *Weber* in BC. The main issue in *Stuart* was whether the defamation claim brought by Mr. Stuart against the Surrey School Board and Richard Hugh should be heard in court or whether it had to be resolved through the grievance arbitration process under the collective agreement governing Stuart's employment. The chambers judge initially dismissed the defamation action, finding that the collective agreement applied and the court lacked jurisdiction.

[119] The Court of Appeal applied the principles set out in *Weber* to determine whether the defamation dispute fell within the scope of the collective agreement and outlined the two-part test from *Weber*:

a) Determine the "essential character" of the dispute based on the factual context, not just how the legal issues are framed; and

b) Examine the provisions of the collective agreement to see if it contemplates resolving such disputes, either explicitly or implicitly.

[120] In *Stuart*, the court concluded that the "essential character" of the defamation dispute did not arise under the collective agreement, despite the chambers judge's initial finding that it was covered.

[121] On the facts of this case, Ms. Moon voluntarily chose to be a member of IATSE Local 891, occupied the position of Senior Steward for approximately 11 years, and chose to seek re-election in that position and to be subject to IATSE Local 891 internal rules and procedures. IATSE Local 891's actions are governed by the laws of British Columbia and the *LRC* governs the relationship between the parties. The *LRC* covers the establishment of union representation, collective bargaining, conflict, and grievance resolutions. As IATSE Local 891 represents workers in the film and entertainment industry, an industry falling under provincial jurisdiction, the *LRC* applies to their Collective Agreement.

[122] Section 84(2) of the *LRC* requires a collective agreement to provide for the arbitration of all differences between the parties concerning the interpretation, application, administration or violation of the collective agreement. If a collective agreement fails to do so, it is "deemed" to include the arbitration provision. s. 84(3) of the *LRC*. Section 84(3) further requires the employer, the union, and bargaining unit employees to comply with the dispute resolution scheme in the collective agreement, or, if applicable, the deemed provision.

[123] The Collective Agreement Between IATSE Local 891 and Unifor Local 3000 April 1, 2017 - March 31, 2022 is deemed to include a grievance process which

culminates in final and binding arbitration to resolve differences between the parties relating to the interpretation, application or administration of the agreement.

[124] However, s. 2.01 of the Collective Agreement, states that it was expressly agreed that the Collective Agreement will not apply to any elected or appointed officer, business agent or representative of the employer. This framework does not apply to Ms. Moon.

[125] Collective agreement grievance arbitration plays a central role in labour relations legislation, which aims to establish and further labour relations in the interest of the community. The legislative scheme seeks to minimize or eliminate court involvement in workplace disputes. Allowing parties to resort to ordinary courts would be contrary to this scheme. It is for this reason, legislators have also placed limitations that oust the jurisdiction of courts for those matters that fall within the collective agreement.

[126] However, the same can not be said for the case at bar. Unlike the policy choices made by legislators in drafting and implementing legislation to achieve this end, the Constitution and Bylaws that govern self-governing organizations exist outside of this purposefully designed framework.

[127] The Court examined the nature of Ms. Moon’s claim within the structure of the dispute resolution processes available to her. The internal rules and procedures of IATSE Local 891 as well as IATSE International should be interpreted liberally.

[128] The parties have debated the application of the *Weber* analysis upon the IATSE Local 891 Constitution, but its application requires the Court to review a Collective agreement and the supporting provincial legislation which provide structure to guarantee procedural fairness in the determination of their disputes.

[129] That is not applicable here, but rather, in this case, the Court must review the scope of the dispute resolution scheme that exists for elected officials in IATSE Local 891 under the Constitution and Bylaws to determine whether the dispute can be appropriately resolved within the available internal scheme.

(a) The ambit of the dispute resolution process

[130] The applicants (defendants) rely upon two different provisions in the Constitution to advance their argument that Ms. Moon must exhaust all internal resolution schemes. Their arguments are based on an underlying premise that these provisions have the same effect and limitations as an exclusive arbitration clause. However, for the reasons I will explain, they do not.

[131] The first provision is set out in the Local Constitution and the second provision is set out in the International Constitution. Article 11.6 of the Local Constitution reads as follows:

> 11.6 Exhaustion of Remedies Members, officers or officials of Local 891 who may have controversies related to union affairs, or against whom charges have been preferred, or against whom disciplinary or adverse action has been taken, shall be obliged to exhaust all remedies provided for in this Local Constitution and the International Constitution before resorting to any other court or tribunal.
>
> [Emphasis added.]

[132] Section 7 of Article 17 of the International Constitution reads as follows:

> Section 7. Exhausting Internal Remedies. The members of this Alliance further consent to be disciplined in the manner provided by this Constitution and Bylaws. Under no circumstances shall a member resort to the civil courts until all remedies and procedures herein provided shall have been exhausted.

[133] Firstly, I find that s. 7 of Article 17 of the International Constitution is of little assistance as it relates to members consenting to be disciplined under the regime and is of no assistance to the facts before this court. Ms. Moon's action is in tort and is not a discipline matter.

[134] Importantly, it bears emphasizing that the mere inclusion of the above type of provisions within a Constitution, does not provide them the same authority as the exclusive arbitration regimes established in Collective Agreements and implemented by governments under labour legislation such as the *LRC*. As an example, s. 136(1) of the *LRC* establishes the exclusive jurisdiction of the Labour Relations Board as follows:

> **Jurisdiction of board**
>
> **136** (1) Except as provided in this Code, the board has and must exercise exclusive jurisdiction to hear and determine an application or complaint under this Code and to make an order permitted to be made.
>
> [Bold in original, underline emphasis added.]

[135] The BC Supreme Court is a court of inherent jurisdiction which means that it has the authority to hear any matter that comes before it, unless a statute has specifically limited that authority. In the *LRC*, there is such a limitation restricting the jurisdiction of this Court at s. 137 which reads, in part as follows:

> **Jurisdiction of court**
>
> **137**(1) Except as provided in this section, a court does not have and must not exercise any jurisdiction in respect of a matter that is, or may be, the subject of a complaint under section 133 or a matter referred to in section 136, and, without limitation, a court must not make an order enjoining or prohibiting an act or thing in respect of them.
>
> (2) This Code must not be construed to restrict or limit the jurisdiction of a court, or to deprive a court of jurisdiction to entertain a proceeding and make an order the court may make in the proper exercise of its jurisdiction if a wrongful act or omission in respect of which a proceeding is commenced causes immediate danger of serious injury to an individual or causes actual obstruction or physical damage to property.
>
> …
>
> **Finality of decisions and orders**
>
> **138** A decision or order of the board under this Code or a collective agreement on a matter in respect of which the board has jurisdiction is final and conclusive and is not open to question or review in a court on any grounds.
>
> [Bold in original, underline emphasis added.]

[136] Article 11.6 is not an exclusive jurisdiction clause comparable to s. 136 of the *LRC* and is not supported by any legislative limitation similar to s. 137 of the *LRC* to limit the inherent jurisdiction of this Court.

[137] In short, the above referenced provisions relied upon by the defendants do not have the same authority as a statutory exclusive arbitration regime and they to not limit Court's jurisdiction to the same extent.

[138] Consequently, the same judicial deference imposed by a legislative scheme such as that set out in the *LRC* that establishes exclusive arbitration clauses and ousts the jurisdiction of this Court, does not exist on the facts before this Court.

[139] This means that, this Court cannot automatically decline jurisdiction just because the organization has internal dispute resolution processes. The Court must closely examine the organization's Constitution and Bylaws to determine if they provide an effective mechanism for resolving the specific type of dispute.

[140] In short, without legislative limitations on its jurisdiction, the Court retains authority to hear the matter, unless the internal processes provide sufficient procedural fairness and effective remedies for the matter at issue.

[141] In cases involving voluntary organizations, the Court must assess the adequacy of the internal processes on a case-by-case basis.

(b) The nature of the respondent’s claims

[142] I examined very closely the Constitution and Bylaws to determine if there was in fact a mechanism for resolving the type of dispute before the Court.

[143] As outlined above, Ms. Moon's allegations stem from her unsuccessful re-election as Senior Steward, a position she held for approximately 11 years. She claims that her prior conflict with the Executive Board led to their failed attempt to terminate her prior to the election, and during the election, she was targeted by a deliberate campaign of misinformation. Before the election, a version of the credit card Report, containing sensitive and private information about Ms. Moon, was published and leaked to various individuals by someone known as John Doe. This publication resulted in unfounded accusations on social media and messages to the union, referring to the report's allegations of improper expenditures and personal struggles.

[144] Furthermore, the leaked Report was anonymously shared by John Doe within the film industry productions staffed by IATSE Local 891 members. The Report was

also sent to an online news website, which published an article containing Ms. Moon's personal information and excerpts from the report. Ms. Moon believes that the publication and leaking of the Report, in conjunction with the subsequent Misinformation Campaign, significantly impacted the election and hindered her re-election as Senior Steward. Following the election, Ms. Moon filed a challenge with the IATSE Local 891 Election Committee, citing irregularities such as the publication and leaking of the Report and the Misinformation Campaign. However, her challenge was ultimately dismissed. She also asked this Court to review the decision of the Election Committee.

[145] In her other pleadings, Ms. Moon alleges conspiracy, breach of contract, breach of the *Privacy Act* and negligence against the defendants.

[146] Ms. Moon is seeking financial damages for the losses she suffered, which she argues are not available as a form of relief under the Constitution. As a basis of comparison, under the *LRC*, an arbitration board's authority is set out in s. 89, which provides, in part:

> For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may
>
> (a) make an order setting the monetary value of an injury or loss suffered by an employer, trade union or other person as a result of a contravention of a collective agreement, and directing a person to pay a person all or part of the amount of that monetary value.
>
> [Emphasis added.]

[147] The defendants argue that Ms. Moon's failure to exhaust the internal resolution processes amounts to an abuse of process. Abuse of the grievance process occurs when the internal resolution processes are not used for their intended purpose. Such abuse arises from the same sources as the grievance procedure itself.

[148] Given that the doctrine of abuse of process is flexible, its application in the context of a volunteer organization will depend on the nature of the organization

including its function, membership and the sophistication of its internal processes – in particular, its appellate powers.

[149] The defendants rely upon the case of *Hart* decided by the Ontario Court of Appeal. The facts in *Hart* involved a Roman Catholic priest, who was appointed as a pastor by the Roman Catholic Episcopal Corporation of the Diocese of Kingston (the "Archdiocese") in 2004 for a renewable 6-year term. In 2006-2008, the Archdiocese became concerned about Rev. Hart's business relationship and parish finances, and issued three decrees against him, placing him on administrative leave, suspending his sacramental ministry, and removing him from office.

[150] Rev. Hart did not appeal these decrees through the internal canon law review process, but instead sued the Archdiocese for constructive dismissal. The Archdiocese brought a motion to stay Rev. Hart's civil lawsuit, arguing the court had no jurisdiction as the dispute was ecclesiastical in nature and subject to canon law. The motion judge agreed with the Archdiocese and stayed Rev. Hart's lawsuit, finding the dispute was fundamentally ecclesiastical and Rev. Hart had not exhausted the internal canon law review process available to him. On appeal, the Court of Appeal for Ontario upheld the motion judge's decision. The key issue was whether the civil courts had jurisdiction over Rev. Hart's employment-related dispute with the Archdiocese, or whether it was an ecclesiastical matter that had to be resolved through the internal canon law review process. The court found that it was an ecclesiastical matter that needed to be resolved through the internal canon law process. According to the court's analysis, the internal canon law review process provided by the Roman Catholic Church was the proper avenue to provide the relief requested by the plaintiff. The Court of Appeal also found that the internal canon law process met the requirements of procedural fairness and natural justice which included an unbiased tribunal. Importantly, the canon law process allowed for a large range of remedies, including substituting a different decree, monetary compensation, and even a full trial. The motion judge specifically found that the internal canon law review process "meets the requirements of natural justice." The court also noted that

Rev. Hart did not contest the fairness of the canon law process nor that the relief he sought was directly available to him under the internal processes.

[151] The defendants also rely upon the case of *Morin Dal Col v. Métis Nation British Columbia*, 2021 BCSC 964. The *Morin* case involves a dispute between Clara Morin Dal Col, the president of the Métis Nation British Columbia (“MNBC”) board, and other members of the MNBC board. In January 2021, the MNBC board passed two resolutions, one removing Morin Dal Col as the MNBC representative to the Métis National Council, and another suspending Morin Dal Col as president of the MNBC board. Morin Dal Col claims the January 2021 resolutions were unlawful and breached her rights as an MNBC member. She applied for an injunction to set aside the resolutions. The MNBC board argued that Morin Dal Col's action should be dismissed as an abuse of process, as she had not exhausted the internal appeal process to the MNBC Senate. The matters were directly related to the internal governance of the Metis Nation. The Court found that Morin Dal Col's suspension, rather than removal, fell directly under the MNBC Senate's jurisdiction to hear appeals under the MNBC Constitution. Importantly, the specific relief that Morin Dal Col was seeking was available to her under the internal appeal process. The Court concluded Morin Dal Col's action was an abuse of process, as she had not exhausted the internal appeal process, and dismissed her claim.

[152] In coming to its decision, the Court specifically addressed the issue of procedural fairness and potential bias in the MNBC Senate's internal appeal process and found that Morin Dal Col's contention that the MNBC Senate was biased against her and that she wouldn’t get a fair hearing was highly speculative. The Court was also not satisfied the evidence showed the MNBC Senate had prejudged the matter of Morin Dal Col's suspension. The Court concluded it was not reasonable to believe at that stage that Morin Dal Col would not receive a fair and unbiased hearing before the MNBC Senate. A reasonably informed bystander would not perceive bias in the circumstances.

[153] In short, the cases of *Morin* and *Hart* involved issues that were related to grievances within their respective organizations' internal governance structures. In each case, the courts assessed whether the remedy sought could be granted by the internal authorities and whether the internal processes available were compliant with procedural fairness and natural justice.

[154] Ms. Moon relies on the BC case of *Duteil* to support her position. In *Duteil*, the defendant, Willoughby Offley, applied to have a defamation claim against him dismissed or stayed on the basis that the court lacks jurisdiction. The plaintiff, Gayle Duteil, was at the time, the President of the BC Nurses Union ("BCNU") and alleged that Mr. Offley had defamed her in a series of emails sent to over 3,000 people. Mr. Offley argued that the matters were governed by the BCNU Constitution and Bylaws, and since Ms. Duteil had not exhausted the internal union remedies, the action should be stayed or dismissed. The Court applied the legal framework from *Weber* which required it to determine the "essential character" of the dispute. The Court concluded the essential character of the dispute was a personal defamation claim, not a labor relations issue covered by the union Constitution and Bylaws. Importantly, the Court found the Bylaws' disciplinary process did not provide the same procedural safeguards and remedies as the court process, and that Ms. Duteil should not be required to exhaust those internal remedies. Therefore, the Court dismissed the defendant's application and vacated the interim stay order, allowing the defamation lawsuit to proceed in court.

[155] The defendants argued that the case of *Duteil* relied on by Ms. Moon is distinguishable because it deals solely with a claim of defamation. I do not agree.

[156] I find that the misinformation campaign alleged by Ms. Moon, which undermined her re-election, is more akin to a defamation claim than it is to a typical labor relations dispute covered by the union's Constitution.

[157] Further, the defendants submit that there is no analysis considering whether the *Weber* analysis should be applied to a self-governing organization and this case has not been followed by any other court and is an outlier.

[158] As previously mentioned, the *Weber* test was formulated to address the tension between exclusive arbitration clauses and an individual's right to seek redress in the courts. It is particularly insightful that the B.C. Court of Appeal in *Stuart* came to the exact same conclusion in applying the *Weber* test in that case where a collective agreement and an exclusive arbitration clause existed.

[159] I find that the cases of *Duteil* and *Hart* reinforce the fact that the *Weber* analysis is extremely helpful in assessing whether a plaintiff has exhausted the internal process within self-governing organizations, but unlike cases involving an exclusive arbitration clause, it is not determinative for the reasons I have set out above. The determination of the issue requires the court to also assess the nature of the issue and whether the remedy or relief sought is actually available when pursuing the internal mechanisms. Further, the courts must also concern themselves with whether there are sufficient protections guaranteeing procedural fairness and principles of natural justice for the specific matter to be resolved internally.

[160] In reviewing the internal avenues of redress within the Local Constitution, I find that Article 11 of the Local Constitution, which is entitled "Discipline" is void of any description of the power and authorities of a trial board that would be applicable to the facts pleaded, nor does it provide a description on how such a trial would unfold. At s. 11.3, it simply speaks to composition of the board, "The Local's Trial Body pursuant to the International Constitution shall be a Trial Board comprised of the members in good standing of the local's Good and Welfare Committee."

[161] Article Sixteen of the International Constitution also specifically relates to the "Discipline of Members" and sets out the guidelines for charges that are made against union members who breach their duty as a member by violation of the express provisions of this or the local union's Constitution and Bylaws. It also includes conduct that is detrimental to the advancement of the purposes which this Alliance pursues, or as would reflect discreditably upon the Alliance.

[162] Ironically, at s. 14 of Article Sixteen, the International Constitution stipulates that the trial body is to be the Executive Board or Committee of the local union, "who

shall sit as a trial body to hear all evidence upon the charges, and to determine the guilt or innocence of the accused and make recommendations as to the penalty to be imposed if found guilty."

[163] The structure is specifically designed for monitoring misconduct and only provides procedural fairness provisions for an "accused" person who is appearing to account for accusations of conduct alleged against the union. In short, it is strictly an internal disciplinary process.

[164] Ms. Moon argues that as in the case of *Duteil*, the defendants have failed to prove that a union trial board has jurisdiction over the tort claims, or that they have the requisite expertise and procedural safeguards to properly consider her claims and provide her with an effective remedy. Further, she argues that the Constitution does not provide her with the same procedural or legal safeguards as this Court. Ms. Moon states that she is not seeking to challenge the election result or to punish the individuals responsible. She is not seeking to pursue a discipline process against the defendants; she is seeking to be compensated for the harms she says she intends to prove at trial and submits that there is no evidence that the Trial Board could provide her with such redress.

[165] Under the Local Constitution, I find that there is no formal process to be followed to address Ms. Moon's grievances nor is there any body or tribunal that can effectively resolve her claims. Even in cases where there is an authority as noted with respect to the Elections Committee, the decision makers have no power or authority to properly hear the breadth of her claim nor grant her financial damages if she is successful.

[166] I find that Article 11 of the Local Constitution that the defendants rely upon as the avenue Ms. Moon was required to pursue is inadequate. The Local Constitution lacks a structured framework for resolving grievances and does not provide an effective means to resolve disputes similar to the facts before this court. In substance, it also lacks the same breadth, framework, and procedural fairness that would otherwise exist under collective agreement structures.

[167] I do not accept the defendant's submission that the provisions of Article 11 of the Constitution are broad enough to apply to the facts of this case. As the International President concluded in responding to Ms. Moon's allegations with respect to the Elections' Committee, the issues raised by Ms. Moon "fall outside the legitimate purview of the Election Committee responsibilities contemplated by Article 13 of the Local Constitution and Bylaws." In my view, so do the issues raised in her other pleadings. Based on the facts before the Court, I find that the Constitution and Bylaws do not contemplate adjudicating the type of issues that flow from the underlying facts in this case. They all fall outside the purview of IATSE internal resolution processes.

[168] For the reasons explained above, I accept Ms. Moon's submissions, that it is highly relevant that the Local Constitution does not provide the same procedural or legal safeguards as does this Court.

[169] In short, after assessing all the relevant factors, I find the Constitution's internal processes are focused on disciplinary matters and challenges to union decisions within the democratic process, rather than providing redress for *post-facto* harms like the Misinformation Campaign that Ms. Moon alleges affected her re-election.

[170] I also find that the remedies sought by Ms. Moon are not available in the internal review structure, which appears to be designed specifically for discipline hearing processes. As explained earlier, I do not accept the defendants' submission that there is acceptable relief for Ms. Moon within the internal resolution process.

[171] I am supported in my position by the comments by Justice Sigurdson in *Sportstown B.C. Holdings Ltd. v. British Columbia Soccer Association*, 2013 BCSC 2017 at para. 98:

> With respect to the defendant's argument that the plaintiffs have failed to exhaust their internal remedies, the law is clear that there is no obligation to exhaust internal remedies if the remedy is unreasonable, impractical and ineffective": *Gee v. Freeman* (1958) 1958 CanLII 258 (BC SC), 16 D.L.R. (2d) 65 (B.C.S.C.) at para. 18, cited with approval in *Vancouver Hockey Club*.

[172] In summary, I find that requiring Ms. Moon to pursue the misinformation allegations solely through the union's internal processes would deprive her of an effective remedy, since the union's internal processes do not provide for compensation or avenues to address the specific nature of her claim. Consequently, this argument of the defendants is dismissed.

Is the claim against the Defendant Gary Mitch Davies Bound to Fail?

Positions of the Parties

Applicants (Defendants)

[173] The pleadings state that on December 4, 2018, the 2018 Executive Board (including Mitch Davies who had lost his re-election campaign and would be leaving office effective January 1, 2019) resolved to distribute an unredacted copy of the Report to the entire membership. The defendant, Mr. Davies argues that even if he was involved in the alleged December 2018 Executive Board meeting regarding the disclosure of the Final Report, the resolution to finalize and release the Final Report was not made until January 9, 2019 at the Executive Board meeting attended by the new president Keith Woods.

[174] Accordingly, they argue that Mr. Davies was in no way involved in the Executive Board's decision to finalize and disclose the Report or its resolution to confirm its disclosure on January 9, 2019 and that the Report was not released until January 9, 2019 after Mr. Davies' term as President had expired.

[175] In any event, Mr. Davies emphasizes that the Executive Board's decision to disclose the Report to IATSE Local 891 membership (whether it occurred in December 2018 or on January 9, 2019) has not been properly challenged through IATSE Local 891's internal processes and procedures.

[176] In the further alternative, Mr. Davies asserts that Ms. Moon failed to bring charges against him prior to filing this action. It is his position that by failing to do so, Ms. Moon failed to satisfy the contractual pre-condition for bringing this court action under the Local Constitution and International Constitution. He also argues that for

that reason, those claims constitute a collateral attack on IATSE Local 891's internal processes and procedures and ought to be struck under Rule 9-5(1)(d).

Respondent (Plaintiff)

[177] In response, Ms. Moon argues that the defendants' argument to strike this claim is based simply on their disagreement with the facts set out in the ANOCC and cannot be sustained under Rule 9-5(2).

[178] She further contends that the defendants have failed to prove that the claims against the individual members of the Executive Board (in this case, Mitch Davies) are bound to fail because charges were not preferred against them under Article 11 of the Local Constitution.

[179] Further, she rejects Mr. Davies argument that her claim constitutes a collateral attack on IATSE Local 891's internal processes.

Analysis

[180] Relying upon R. 9-5(1)(d), Mr. Davies requests the Court to find that Ms. Moon's action against him constitutes an abuse of process. For all those reasons provided in this Court's response to the second issue above, I do not find there is any merit to the argument that Ms. Moon should have exhausted the internal remedies available to her under the Constitution.

[181] I find that the substance of this pleading regarding Mr. Davies' is based, principally, on sub Rule 9-5(1)(a) that the statement of claim disclosed no reasonable cause of action. However, I find that this argument is based primarily on him citing a different version of the facts.

[182] In conducting its analysis, the Court must proceed on the assumption that all facts pleaded by Ms. Moon are true. An excellent statement describing the test for striking out a claim under such provisions is that set out by Justice Wilson in *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, 1990 CanLII 90 at p. 980:

> …assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect…should the relevant portions of a plaintiff's statement of claim be struck out…

[183] The test to be applied is rigorous. The facts must be accepted as pleaded. Only if the statement of claim is certain to fail due to a "radical defect" should the plaintiff be dismissed from the judgment.

[184] With respect to the first argument, Mr. Davies must establish that it is "plain and obvious" that the pleading discloses no reasonable cause of action. The mere fact that a case may be weak, not likely to proceed, or novel is no ground for striking the pleading.

[185] The allegations against Mr. Davies involve conspiracy. To establish a claim in conspiracy, the test set out in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, 1983 CanLII 23 [*Canada Cement*], at 471-72 must be met.

[186] In *Canada Cement*, the Court acknowledged that "the scope of the tort of conspiracy is far from clear", but said it may be found where parties come together and effect loss in the following manner:

1. Whether the means used by the defendants are lawful or unlawful the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or

2. Where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

[187] For a conspiracy tort to be established, there must be a concerted action that results in harm to the claimant. This agreement can be tacit and does not have to take a particular shape or form a legally enforceable contract, as noted by Lewis N Klar in *Tort Law*, 5th ed. (Toronto: Carswell, 2012) at page 731.

[188] The elements of civil conspiracy are:

a) an agreement between two or more persons;

b) concerted action taken pursuant to the agreement;

c) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;

d) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent); and

e) actual damage suffered by the plaintiff.

(*Can-Dive Services Ltd. v. Pacific Coast Energy Corp.*, [1993] B.C.J. No. 2958 (C.A.) at para. 5 as cited in *Le Soleil Hospitality Inc. v. Louie*, 2010 BCSC 1183 at para. 341.)

[189] Ms. Moon alleges that after the 2016 re-election, she experienced conflict with Mr. Davies, who at the time was the President of IATSE Local 891. In or about May 2017, Ms. Moon filed internal union charges against members of the Executive Board, including Mr. Davies, alleging they had engaged in a course of bullying, harassment and intimidation towards her. The Trial Board found the Executive Board's actions, led by Mr. Davies, were "unnecessarily antagonistic" towards Ms. Moon.

[190] The ANOCC alleges that in retaliation to Ms. Moon's charges against the Executive Board, including Mr. Davies, they conspired to target her and undermine her re-election as Senior Steward.

[191] Specifically, the ANOCC alleges that the Executive Board, including Mr. Davies, resolved in December 2018 to publish the report containing sensitive and private information about Ms. Moon, that contained inaccurate inferences of fraud. This was despite the incoming president's objections.

[192] The publication and subsequent leaking of the Report, along with the Misinformation Campaign, allegedly made the Report a major issue in the election and significantly impacted Ms. Moon's ability to get re-elected.

[193] The allegations suggest the Executive Board, including Mr. Davies, conspired with the intent to injure Ms. Moon's reputation and harm her election prospects by publishing the Report at the specific time that they did.

[194] The facts allege an agreement between individuals on the Executive Board taking concerted action to obstruct Ms. Moon’s re-election and the facts suggest that her re-election campaign was harmed and she suffered damage in not being re-elected, losing her long-held position as Senior Steward.

[195] Based on the pleaded facts, I find that it is not plain and obvious that the claim against Mr. Davies will fail and consequently, this argument raised by the defendants is dismissed.

Does the tort of Public Disclosure of Private Facts exist in British Columbia?

Positions of the Parties

Applicants (Defendants)

[196] The defendants argue that Ms. Moon’s allegations arising out of a tort of Public Disclosure or Private fact are bound to fail.

[197] With regard to sub Rules 9-5(1)(b) and (c), which both have a similar test, the applicant must show it is “plain and obvious” or “beyond a reasonable doubt” that the action is certain to fail. In other words, the applicant must demonstrate that it is clear the allegations in the statement of claim are unnecessary, scandalous, frivolous,

vexatious or would prejudice, embarrass or delay the fair trial or hearing of the proceeding: *347202 B.C. Ltd. v. Canadian Imperial Bank of Commerce*, [1995] B.C.J. No. 449 (S.C.); and *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266, 1999 CanLII 5860 (B.C.S.C.) [*Citizens*]. In *Citizens*, Justice Romilly nicely summarized the law relating to sub rules (b) and (c) at para. 47:

> Irrelevancy and embarrassment are both established when pleadings are so confusing that it is difficult to understand what is being pleaded: *Gittings v. Caneco Audio-Publishers Inc.* (1987), 1987 CanLII 2561 (BC SC), 17 B.C.L.R. (2d) 38 (B.C.S.C.). An "embarrassing" and "scandalous" pleading is one that is so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues: *Keddie v. Dumas Hotels Ltd.* (1985), 1985 CanLII 417 (BC CA), 62 B.C.L.R. 145 at 147 (B.C.C.A.). An allegation which is scandalous will not be struck if it is relevant to the proceedings. It will only be struck if irrelevant as well as scandalous: *College of Dental Surgeons of B.C. v. Cleland* (1968), 1968 CanLII 1008 (BC CA), 66 W.W.R. 499 (B.C.C.A.). A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law: *Strauts v. Harrigan*, 1992 CanLII 595 (BC SC), [1992] B.C.J. No. 86 (Q.L.) (B.C.S.C.). A pleading that is superfluous will not be struck out if it is not necessarily unnecessary or otherwise objectionable: *Lutz v. Canadian Puget Sound Lumber and Timber Co.* (1920), 28 B.C.R 39 (C.A.). A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: *Chrisgian v. B.C. Rail Ltd. et al.* (July 13, 1992), Doc. Prince George Registry 20714 (B.C. Master).

[198] It is the defendants' position that Ms. Moon has provided this Court with no evidence to support the viability of an independent tort for privacy invasion within the province of B.C.

Respondent (Plaintiff)

[199] In her ANOCC, Ms. Moon asserts that IATSE Local 891 wilfully and without a claim of right violated her privacy by publishing the Report. As a result, she argues that the facts establish a claim against IATSE Local 891 for the tort of public disclosure of private fact, though their publishing of the Report or alternatively causing it to be published.

[200] She argues that courts should adopt a generous approach with respect to novel claims which should not be struck at the pleadings stage: see *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61.

[201] Consequently, it is her position that, in the circumstances, it is premature to strike this claim, which is at its very early stages. The law on common-law privacy torts in this province is still in development, and therefore, it is not plain and obvious that such a claim will fail by the time it comes to be adjudicated on its merits.

Analysis

[202] A review of case law suggests that B.C. courts have consistently held that a common law tort related to a breach of privacy does not exist in the province. The common law tort of intrusion upon seclusion was recognized in Ontario in *Jones v. Tsige*, 2012 ONCA 32. However, in B.C., the superior courts have declined to hold that a common law tort of invasion of privacy exists, in light of the fact that the *Privacy Act* creates a statutory tort: *Hung v. Gardiner*, 2002 BCSC 1234, aff'd 2003 BCCA 257; *Bracken v. Vancouver Police Board et al.*, 2006 BCSC 189; *Demcak v. Vo*, 2013 BCSC 899; and *Ari v. Insurance Corporation of British Columbia*, 2013 BCSC 1308.

[203] It is often believed that the intrusion upon seclusion tort is not necessary where the BC *Privacy Act* is pleaded: *Tucci* at para. 155. However, the *Privacy Act* prohibits intentional conduct, whereas the tort of intrusion upon seclusion includes reckless conduct within its definition of intention which is not included within the *Privacy Act* definition. Although the torts are arguably almost identical, the common law tort is broader.

[204] In *Tucci v. Peoples Trust Company*, 2020 BCCA 246, the Court of Appeal, suggests that "the time may well have come for [the court of appeal] to revisit" the issue (para. 55) as the previous decision on this issue was "a very thin one" with little analysis.

[205] In a more recent decision, in *Insurance Corporation of British Columbia v. Ari*, 2023 BCCA 331 [*Ari BCCA*] at paras. 69 and 104, the Court of Appeal clearly stated that "[t]he question of whether the common law breach of privacy tort exists in BC is unsettled."

[206] In *Tucci*, the court noted that the Ontario Court of Appeal had recognized the tort of intrusion upon seclusion, and since technological changes have increased, the need for legal protection of privacy rights are important. The court acknowledged that in a bygone era, a legal claim to privacy may have been seen as unnecessary, but that today, personal data has assumed a critical role, and a failure to recognize at least some limited privacy tort may be seen as anachronistic.

[207] However, the Court of Appeal noted that since the appeal in *Tucci* did not directly address the existence of privacy torts in BC, the issue on whether the law needs to be reconsidered would have to wait for a different appeal.

[208] In summary, in *Tucci* and *Ari BCCA*, the court indicated an openness to potentially revisiting the issue of whether common law privacy torts exist in British Columbia, given the evolving technological and social landscape, but ultimately deferred making a definitive ruling on the matter.

[209] Based on *Tucci*, I find that the BC case law suggesting the non-existence of a privacy tort is questionable. In my view, the *Tucci* case left the privacy tort issue open. While not setting a precedent, it may influence future privacy actions' which are still in their early stages, potentially altering the claims made by Ms. Moon. Consequently, absent a Court of Appeal decision that specifically examines this issue, I am not persuaded it is plain and obvious there is no common law tort in BC.

[210] However, for the common law tort to exist, if it is determined to be similar to that formulated by the Ontario Court of Appeal in *Jones*, the following elements must be met:

a) The defendant must have invaded or intruded upon the plaintiff's private affairs or concerns without lawful excuse;

b) The defendant's conduct, which constitutes the intrusion or invasion, must have been done intentionally or recklessly, and

c) A reasonable person would regard the invasion of privacy as highly offensive, causing distress, humiliation or anguish.

[211] In *Jones*, the Ontario Court of Appeal held that "proof of harm to a recognized economic interest is not an element of the cause of action" and that "given the intangible nature of the interest protected," damages would ordinarily be measured by a "modest conventional sum."

[212] Relying upon the approach in *Jones*, if such a tort does exist in common law, it is arguable that the alleged misconduct must be intentional. In *Tucci*, the BC Court of Appeal noted that "[t]he tort of breach of confidence is, in my view, well-defined as an intentional tort. The gravamen of the civil wrong is the betrayal of a confidence" (at para 113). I note that in the facts pleaded, the essence of Ms. Moon's claim is that the disclosure of her private information was intentional.

[213] I find that the allegations, which I must assume to be true, do set forth the necessary averments for a claim based on breach of privacy and intrusion. The fact that the claim may seem incongruous or novel is no reason to strike the claim pursuant to Rule 9-5(1)(a). While there is no direct precedent to support such a tort of privacy in the province of British Columbia, the comments of the Court of Appeal in *Tucci* suggest that it is not plain and obvious that a claim for breach of privacy is bound to fail. Consequently, the argument raised by the defendants on this issue is dismissed.

Is the breach of *PIPA* claim as pleaded bound to fail?

Positions of the Parties

Applicants (Defendants)

[214] The defendants argue that the claim in the ANOCC as pleaded for a breach of *PIPA* does not disclose a cause of action as a complaint to the Commissioner is the appropriate process.

[215] The defendants further argue that para. 12 of the ANOCC did not rely upon *PIPA*. As such, they argue that the facts asserted at paras. 40, 44, and 53 of the Statement of Facts and the arguments asserted at para. 12 of the Legal Basis of the ANOCC should be struck in relation to the claim for the breach of *PIPA*.

Respondent (Plaintiff)

[216] Ms. Moon confirms that in her original NOCC, she did not make a claim in *PIPA*. The claim in *PIPA* in the ANOCC was raised based on the Commissioner's findings that IATSE Local 891 breached their responsibilities under *PIPA* and Ms. Moon's claims that this caused her actual harm.

[217] Ms. Moon submits that she relies on *PIPA* for two purposes: for her claim under s. 57 of *PIPA*, and as a basis for claims which themselves rely on underlying illegal or independently wrongful conduct – conspiracy by illegal means, and punitive damages. She submits that there is nothing inappropriate with these claims and they are not bound to fail.

[218] Furthermore, she argues that the defendants have not proven that IATSE Local 891 had jurisdiction to rule on or provide compensation pursuant to a claim under s. 57 of *PIPA*.

Analysis

[219] *PIPA* grants individuals a statutory right of action against organizations that have breached their rights under *PIPA*. However, this cause of action only arises after specific conditions are met. Specifically:

a) The Commissioner must have issued an order under *PIPA* against the organization.

b) The organization must have been convicted of an offence under *PIPA*.

[220] Section 57 of *PIPA* provides that once the Commissioner has made an order against an organization and it has become final, then "an individual affected by the order has a cause of action against the organization for damages for actual harm

that the individual has suffered as a result of the breach by the organization of obligations under [the] Act."

[221] Upon reviewing the evidence, it is noted that the Director of Adjudication was satisfied that the unknown individual(s) could only have gained access to the leaked information because they were members or staff of IATSE Local 891: para. 45 of Order P23-08.

[222] Under s. 57 of *PIPA*, a Commissioner can make an order that grants a complainant a cause of action. In this case, the Director of Adjudication found that the information leaked contained Ms. Moon's personal information and issued an Order: para. 49 of Order P23-08.

[223] The final order set out at paras. 133–134 of Order P23-08 reads as follows:

> [133] Section 52(3) of PIPA is the source of remedial authority in this case. For the reasons provided above, pursuant to s. 52(3), I make the following orders:
>
> > 1. I confirm that PIPA authorized Local 891 to use and distribute to its members the complainant's personal information in the minutes of the January 27, 2019 general membership meeting, in the president's September 25, 2019 letter and in the Final Report, with the exception of its detailed spending/repayment lists.
> >
> > 2. I require that Local 891 comply with its duty under s. 34 of PIPA to make reasonable security arrangements to protect the complainant's personal information from unauthorized access, collection, use, disclosure, copying, modification, disposal or similar risks.
>
> [134] I decline to make any order under s. 52(3) requiring Local 891 to stop using or disclosing the complainant's personal information in the ways that I found PIPA did not authorize. That is because those uses and the disclosure took place several years ago and there is no indication that they are ongoing.
>
> August 21, 2023
>
> ORIGINAL SIGNED BY
>
> Elizabeth Barker, Director of Adjudication

[224] As Ms. Moon has been affected by the Order, she has a cause of action against the IATSE Local 891 for damages for actual harm that she has suffered as a result of the breach by IATSE Local 891 of its obligations under *PIPA*.

[225] When pursuing legal action under *PIPA*, Ms. Moon is limited to recovering damages for actual harm suffered due to the breach. In light of the Order issued by the Commissioner, Ms. Moon is entitled to file her claim in the BC Supreme Court as the Court has the jurisdiction to hear and decide on claims for damages arising from contraventions of *PIPA*.

Is the *Privacy Act* a Collateral Attack on the OIPC Decision and bound to fail?

Positions of the Parties

Applicants (Defendants)

[226] The defendants argue that in the OIPC Decision, the Commissioner found it was reasonable for IATSE Local 891 to have disclosed most of the specifics of the Report with its membership for the purposes of informing them of the results of the investigation, with the exception of the detailed spending/ repayment lists.

[227] Considering the Commissioner's findings regarding IATSE Local 891's disclosure of the Report being reasonable, the defendants argue that Ms. Moon cannot establish that publishing the Report was a wilful breach of privacy without claim of right.

Respondent (Plaintiff)

[228] In response, Ms. Moon argues that the defendants have incorrectly portrayed the OIPC Decision as proving that they had a "claim of right" in the publication of the Report. In fact, the Commissioner found that the publication of the Report breached *PIPA* and IATSE Local 891 further breached *PIPA* by leaking the Report on multiple occasions.

[229] Ms. Moon submits that the Commissioner found that IATSE Local 891 had committed six separate breaches of *PIPA*, including breaches related to the publication of the report and it is not plain and obvious that the Commissioner's conclusions mean that Ms. Moon's claim is bound to fail.

Analysis

[230] The *Privacy Act* establishes a statutory tort that allows individuals to take legal action for unauthorized violations of privacy. Importantly, such an action under the *Privacy Act* can be pursued without the need to prove specific damages. The act covers various privacy violations, including eavesdropping and surveillance. It also encompasses breaches of informational privacy, as exemplified in the case of *Jones*. The act strikes a balance between protecting privacy rights and considering the lawful interests of others.

[231] Under the *Privacy Act*, s. 1 provides:

> (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
>
> (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
>
> (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.
>
> (4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

[232] In B.C., the statutory tort of violation of privacy requires: a wilful violation of privacy without claim of right and notably the "consequence requirement" is not as stringent in the *Privacy Act* as it appears to be in common law tort in the province of Ontario.

[233] The analysis of whether a person's privacy entitlement has been violated under the *Privacy Act* involves a reasonableness standard. The threshold for the statutory tort is context-dependent. The level of privacy to which a person is entitled is what is reasonable in the circumstances, considering lawful interests of others, the nature of the act or conduct, and the relationship between the parties: ss. 1(2), (3) of the *Privacy Act*; *Ari BCCA* at paras. 51–53.

[234] The applicants (defendants) assert that Ms. Moon cannot establish that publishing the Report was a wilful breach of privacy without claim of right. It is a defence to a claim under s. 1 of the *Privacy Act* that the breach of privacy was not wilful or without claim of right. This limits the scope of liability under the *Privacy Act*.

[235] Further, s. 2 of the *Privacy Act* provides additional defences:

> 2 (1) In this section:
>
> "court" includes a person authorized by law to administer an oath for taking evidence when acting for the purpose for which the person is authorized to take evidence;
>
> "crime" includes an offence against a law of British Columbia.
>
> (2) An act or conduct is not a violation of privacy if any of the following applies:
>
> (a) it is consented to by some person entitled to consent;
>
> (b) the act or conduct was incidental to the exercise of a lawful right of defence of person or property;
>
> (c) the act or conduct was authorized or required under a law in force in British Columbia, by a court or by any process of a court;
>
> (d) the act or conduct was that of
>
> (i) a peace officer acting in the course of his or her duty to prevent, discover or investigate crime or to discover or apprehend the perpetrators of a crime, or
>
> (ii) a public officer engaged in an investigation in the course of his or her duty under a law in force in British Columbia
>
> and was neither disproportionate to the gravity of the crime or matter subject to investigation nor committed in the course of a trespass.

[236] Based on the Order P23-08 released by the Commissioner, the defendants rely upon the following wording:

> I confirm that PIPA authorized Local 891 to use and distribute to its members the complainant's personal information in the minutes of the January 27, 2019 general membership meeting, in the president's September 25, 2019 letter and in the Final Report, with the exception of its detailed spending/repayment lists.

[237] If the defendants did have a claim of right, it is limited by the wording in the Order which states "the exception of its detailed spending/repayment lists." Section 34 of *PIPA* imposed a duty on IATSE Local 891 to protect personal information in

their custody or under their control by making reasonable security arrangements to prevent unauthorized access, collection, use, disclosure, copying, modification, disposal or similar risks.

[238] It is Ms. Moon's submissions that the breach of her privacy has already been determined. Ms. Moon argues that given the orders of the Commissioner finding that IATSE Local 891 breached *PIPA,* it automatically gives rise to her claim under s. 57 of the *PIPA* which reads as follows:

> **Damages for breach of Act**
>
> **57.** (1) If the commissioner has made an order under this Act against an organization and the order has become final as a result of there being no further right of appeal, an individual affected by the order has a cause of action against the organization for damages for actual harm that the individual has suffered as a result of the breach by the organization of obligations under this Act.
>
> (2) If an organization has been convicted of an offence under this Act and the conviction has become final as a result of there being no further right of appeal, a person affected by the conduct that gave rise to the offence has a cause of action against the organization convicted of the offence for damages for actual harm that the person has suffered as a result of the conduct.
>
> [Bold in original, underline emphasis added.]

[239] At this stage of the proceeding, I am required to take a generous approach and consider whether the facts as pleaded by Ms. Moon *could* disclose a reasonable cause of action. A motion to strike is to be used with care: *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at paras. 64–66. *Olumide v. British Columbia (Human Rights Tribunal)*, 2019 BCCA 386 at para. 10.

[240] Although s. 57 of *PIPA* requires an individual affected by the order to sue for damages of actual harm, the *Privacy Ac*t expressly does not require a claimant to show that the privacy breach caused damage in the sense of actual harm: s. 1(1); *Davis v. McArthur* (1970), 17 D.L.R. (3d) 760, 1970 CanLII 813 (B.C.C.A.) at pp. 764–765.

[241] In this case, the facts plead a cause of action under both *PIPA* and the *Privacy Act*. The critical question is whether the separate pleadings set out under the

PIPA and the *Privacy Act* are viable at this stage of the proceedings. Although I received submissions from the defendants on why the individual claims must fail, I did not receive any substantive submissions on whether the three claims: common law tort, *PIPA* and the *Privacy Act* can all co-exist at this stage of the proceedings. Neither the legislation in *PIPA* nor the *Privacy Act* have limiting language.

[242] As explained above, there are some key differences in the intention/wilfulness requirements for the three potential tort avenues available to Ms. Moon. If the Common Law Tort of Breach of Privacy/Intrusion upon Seclusion exists in common law in B.C., it would likely require the defendant's conduct to be intentional or reckless. For a successful statutory tort under the *Privacy Act*, the violation of privacy must be "wilful and without a claim of right" to be actionable. However, under the *Privacy Act*, a complainant is not required to prove actual harm suffered due to the breach.

[243] Conversely, under *PIPA*, a claim is based on the Commissioner's finding and order that organization's breach of its statutory obligations, without a specific intent requirement, which then gives rise to a statutory cause of action for actual damages under s.57 of *PIPA*.

[244] Importantly, a common law duty of care can co-exist alongside a statutory duty, as a general rule, as noted in *Tucci* at paras. 18–30. Additionally, there is no legal impediment to a party pleading a breach of both the *Privacy Act* and *PIPA* particularly at the early stages.

[245] Consequently, moving forward, as the evidence is disclosed, it is fully expected that the above nuances will be further assessed, as the three potential tort avenues may interact in different ways.

[246] Most of the assertions within the pleadings suggest there was an intentional breach, but there are also allegations against John Doe, who may have been a lone or "rogue" actor. Further, Ms. Moon has also raised allegations in negligence which will be discussed next.

[247] Depending on the evidence that is produced on discovery and in evidence, it is expected that Ms. Moon will narrow her claim into appropriate avenues to seek a remedy for the alleged privacy breach. Based on the evidence, the nuances in the various approaches may make one avenue more viable than another.

[248] Based on the facts pleaded, which I must presume to be true, I do not find that Ms. Moon's claim under the *Privacy Act* is bound to fail nor do I find that there is any evidence before me to suggest that a parallel entitlement to raise a cause of action under *PIPA* is an abuse of process.

Negligence

Positions of the Parties

Applicants (Defendants)

[249] The applicants argue that if Ms. Moon's alleged duty of care is based on a statutory duty arising out of the statute *PIPA*, then her claim is "bound to fail".

[250] The defendants further argue that even if a duty of care unconnected to *PIPA* did exist, Ms. Moon has not pleaded how failing to take reasonable safeguards and failing to investigate leaks of the private information caused her loss other than "campaign time addressing fake information and rumours" as she states at para. 58 of her ANOCC.

[251] In addition, the defendants assert that Ms. Moon fails to make a connection between the alleged failure to investigate the leak of private information to any compensable loss.

[252] Finally, they submit that Ms. Moon has failed to plead facts to support the conclusion of mental distress over and above the loss of campaign time. They argue that loss of time and inconvenience are not compensable losses and do not constitute mental distress.

Respondent (Plaintiff)

[253] In response, Ms. Moon submits that the defendants' interpretation of the ANOCC whereby a duty of care is founded in statute is incorrect. She confirms that her negligence claim was not framed as a breach of *PIPA*. Rather*, s*he argues that the proper elements of the tort of negligence are pleaded, including damages, and it is not plain and obvious that IATSE Local 891 did not have a duty of care over the sensitive private information of its employees, including Ms. Moon: *Tucci* at para 51.

[254] Further, she argues that the defendants' position that her claims in negligence are bound to fail because they are based in a breach of *PIPA* and because there is no pleaded loss, or connection between the loss and the negligence are inaccurate. The pleadings show that this is not the case.

[255] At para. 26 of Part 1 of the ANOCC, Ms. Moon pleads a duty of care owed to her by IATSE Local 891 on the basis of her status as an employee and union member. She argues that it is not plain and obvious that IATSE Local 891 did not have a duty of care over the sensitive private information of its employees, including the plaintiff: *Tucci v. Peoples Trust Company*, 2017 BCSC 1525 at para 12 rev'd in part but confirmed on this point: 2020 BCCA 246 at para. 51.

[256] At paras. 59–64, Ms. Moon sets out the material facts related to causation and damages in sufficient detail, including the mental distress caused by leaks of the Report which were in turn caused by IATSE Local 891's negligence.

[257] Further, she adds that it is extremely common for plaintiffs to plead "mental distress", and the defendants provide no authority to support their argument that the plaintiff's claim should be struck because it did not include further particulars as to the specific gravity or weight of the mental distress suffered by the plaintiff.

[258] Ms. Moon submits that the case of *K.W. v. Accor Management Canada Inc.*, 2023 BCSC 1149, cited by the defendants is distinguishable as it was a class action case where customers of a spa were the victims of a data breach. There were no facts pleaded with respect to the manner in which their personal information had

been or would be misused, but the plaintiff nevertheless claimed “serious and prolonged” mental distress. The Court relied on other cases regarding large but seemingly harmless consumer data breaches to find that in those cases, there must be more than lost time and inconvenience pled to ground a claim for mental distress *K.W.* at paras. 60–62.

[259] She emphasizes that this case is not about a general data breach where misuse of personal information remains a hypothetical risk. As pled in the ANOCC, the Report was repeatedly disseminated and republished, including on a news website and at worksites, as a result of IATSE Local 891’s negligent failure to take reasonable security measures. This occurred during a sensitive time when the plaintiff was seeking to keep her job by winning re-election. In this context, she argues that the pleadings sufficiently establish a claim for mental distress caused by IATSE Local 891’s negligence.

[260] In the alternative, she argues that if the court finds any of the pleadings in need of clarification or amendment, she requests that leave to amend be provided as a condition for dismissing the application: *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61 at para. 41.

Analysis

[261] The case of *Mustapha v. Culligan of Canada Ltd.,* 2008 SCC 27 at para. 3, sets out the requisite elements that a plaintiff must plead to establish a cause of action in negligence:

a) that the defendant owed the plaintiff a duty of care;

b) that the defendant's behaviour breached the standard of care;

c) that the plaintiff sustained damage; and

d) that the damage was caused, in fact and in law, by the defendant's breach.

[262] In her ANOCC, Ms. Moon pleads the following key facts relevant to the tort of negligence claim against IATSE Local 891:

a) IATSE Local 891 owed a duty of care to Ms. Moon as an employee and union member to safeguard her private and sensitive personal information;

b) IATSE Local 891 breached that duty of care by:

i. Failing to take reasonable safeguards to prevent the unauthorized disclosure and dissemination of the private information contained in the Report about Ms. Moon; and

ii. Failing to properly investigate the leaks of the Report that occurred.

c) It was reasonably foreseeable that the failure to properly safeguard and investigate the leaks of Ms. Moon's private information would result in harm to her, such as mental distress.

[263] The applicants deny that IATSE Local 891 owed a duty of care to Ms. Moon as an employee and union member to safeguard her private and sensitive personal information. The essence of their argument is that Ms. Moon is limited to breach of a statutory duty, not a common law duty of care.

[264] It is also the defendants' position that if a duty of care in the negligence pleadings is based on a statutory duty, such claim is "bound to fail". They cite *G.D. v. South Coast British Columbia Transportation Authority*, 2023 BCSC 958, which at paras. 53–60 discussed the Court of Appeal decision in *Ari BCCA* affirming the chambers judge finding that s. 30 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FIPPA*] (an analogue to *PIPA* governing public bodies) does not give ground to duty of care sufficient to sustain a claim in negligence.

[265] In response, Ms. Moon argues that her claim in negligence is not based on a statutory breach, but is based on the common law.

[266] In the recently released decision of *G.D. v. South Coast British Columbia Transportation Authority*, 2024 BCCA 252 [*G.D. BCCA*], the Court of Appeal dismissed the arguments advanced by the defendants while also confirming that both a statutory claim and a common law claim can co-exist. The court held that *FIPPA* does not preclude a common law negligence claim from being brought in parallel. *FIPPA* is not a "complete code" that displaces common law duties and remedies: *G.D. BCCA* at paras. 177, 181–182.

[267] At para. 189 of *G.D.*, the Court of Appeal reminds trial judges that the determination of whether a common law duty of care exists is to be made by application of the *Anns/Cooper* analysis referring to *Anns v. Merton London Borough Council*, [1978] A.C. 728, and *Cooper v. Hobart*, 2001 SCC 79 [*Cooper*]: see also *Ari BCCA* at paras. 38, 44.

[268] As summarized in *Canada (Attorney General) v. Frazier*, 2022 BCCA 379 at paras. 26–27, the *Anns/Cooper* analysis requires two questions to be determined:

a. Does a *prima facie* duty of care exist between the parties, for which the onus is on the plaintiff to establish?

i. a sufficiently proximate relationship; and

ii. reasonable foreseeability of harm; and

b. Do residual policy considerations negate or limit the scope of that duty, to the class of persons to whom it is owed or the damages recoverable on its breach, for which the burden is on the defendant?

Does a prima facie duty of care exist between the parties, for which the onus is on the plaintiff to establish?

a) Is there a sufficiently proximate relationship?

[269] Proximity is characterized by the closeness and directness of the relationship, which obligates the defendant to be mindful of the plaintiff's interests. Courts must therefore consider diverse factors which will depend on the circumstances of the case: *Waterway Houseboats Ltd. v. British Columbia,* 2020 BCCA 378.

[270] In *G.D*. *BCCA*, the court recognized that the employer-employee relationship is sufficiently proximate to establish a duty of care, especially when the employee is vulnerable to the employer's demands and care: para. 194, citing *James v. British Columbia,* 2005 BCCA 136. Although the determination as to whether IATSE Local 891 owed a duty of care to Ms. Moon is an issue to be resolved at trial, for the purposes of this application, the Court must simply assess whether it is plain and obvious that the claim will fail.

[271] In my view, based on the facts pleaded by both the defendants and Ms. Moon, it is clear that Ms. Moon was an elected officer serving directly with IATSE Local 891 as their Senior Steward. She received her full pay and benefits from them in exchange for fulfilling her role. She was also accountable to the membership for her conduct.

[272] Given the role of Ms. Moon as fulfilling a relationship that is akin to an employer-employee relationship, I find it cannot be said it is plain and obvious there is an insufficient proximate relationship between Ms. Moon and IATSE Local 891.

b) Was there a reasonable foreseeability of harm?

[273] The defendants in the case at bar argued that if there was a breach of privacy, it did not result in any harm to Ms. Moon and therefore the action in negligence is bound to fail.

[274] At paras. 56–61 of the ANOCC, Ms. Moon sets out the material facts related to causation and damages in sufficient detail, including the mental distress she alleges was caused by leaks of the Report which were in turn caused by Local 891's negligence. Within those paragraphs she details how her campaign for re-election was significantly harmed by the leaking and publication of the Report, and the Misinformation Campaign. She argues that the Report became the main issue in the election and she was forced to spend a significant amount of her campaign time addressing false information and rumours.

[275] Ms. Moon argues that given her previous record and popularity with the membership, she would have been re-elected Senior Steward. She alleges damages as follows:

a) Damage to her reputation;

b) Loss of the financial compensation she would have earned had she had been re-elected again as Senior Steward;

c) Mental distress and / or moral damages; and

d) Such other loss or damage as shall be advised at trial.

[276] Although the loss of personal information *per se* is not compensable in negligence without proof of pecuniary loss, the sensitivity of the information can influence the outcome: *Setoguchi v. Uber B.V*., 2023 ABCA 45.

[277] In *Tucci* the Court of Appeal found that allegations of negligent storage of personal information resulting in foreseeable harm were arguable and found that it was not plain and obvious the claims in negligence could not succeed: paras. 51, 123.

[278] I am not persuaded that the determination as to whether significant harm resulted from the breach of Ms. Moon’s privacy can be evaluated at the pleadings stage. Based on the facts of this case, it is an issue for trial. However, I find that the pleadings sufficiently plead facts to suggest that Ms. Moon suffered harm, including mental distress, as a result of IATSE Local 891's actions and her subsequent loss in the election.

[279] I therefore find that based on the relationship between IATSE Local 891 and Ms. Moon, who was at the time their Senior Steward seeking re-election, and had been the subject of an IATSAE Local 891 internal investigation, it is not plain and obvious that IATSE Local 891 owes no duty of care in negligence to Ms. Moon. IATSE Local 891 had in their possession private information it collected and stored, and I cannot find that IATSE Local 891 should not owe such a duty of care.

> **Do residual policy considerations negate or limit the scope of that duty, to the class of persons to whom it is owed or the damages recoverable on its breach, for which the burden is on the defendant?**

[280] As for whether there are residual policy concerns that should negate a duty of care, the defendants did not make any significant submissions in this regard.

[281] Where the duty of care is based on a sufficient proximate relationship such as an employer-employee relationship, the policy arguments to narrow the scope of the duty are limited given that there are no concerns of indeterminate liability that apply. In *G.D. BCCA*, the court found that policy concerns did not apply where the duty is based on a sufficiently proximate relationship, rather than merely statutory duties: para. 193.

[282] This case is about liability of IATSE Local 891 to one of its elected officers which involves a sufficient proximate relationship. At the pleadings stage, I see no policy reason, to negate a duty of care owed by an organization to one of its elected officials.

[283] Given that the facts alleged by Ms. Moon establish sufficient proximity in the relationship between herself and the defendants, and given the novelty of the cause of action, the sensitivity of the information allegedly shared, the alleged misuse of that information to prejudice her election campaign, in my view it cannot be said, at this stage of the litigation, it is plain and obvious the negligence claim will fail.

Arguments in the Alternative

[284] The defendants argued that para. 48 of the ANOCC contains facts that are "not material"; this paragraph reads as follows:

> The final version of the Report was provided to the Plaintiff only a day earlier by the President Keith Woods, while the two were attending meetings in Los Angeles.

[285] In response, Ms. Moon argues that:

> However, the facts in para 48 are material, as they describe the context in which the Plaintiff received a final version of the Report – only a day earlier to its publication, and while she was abroad on a work trip. This fact bolsters her

> claims in the Further Amended NOCC, including her claims for breach of good faith, negligence, and conspiracy. It demonstrates both the unfairness and bad faith surrounding the release of the Report, and also the impossibility of effectively challenging the release before it occurred. Regarding this last point, the alleged failure of the Plaintiff to prevent the release of the Report is a foundational part of the current Application to Strike, as the Defendant argues that within this 24 hour period, the Plaintiff should have somehow caused a special meeting of the membership to be called in order to prevent the release of the Report.

[286] I agree with Ms. Moon's argument that "materiality" is not the test at this stage as the test is whether it is plain and obvious that the claim has no reasonable prospect of success. Those portions of the statement of claim that the defendants argue are irrelevant or not materiel may well be relevant once evidence is presented. I find that the defendants will not have difficulty responding to the statement of claim. There is no reason to strike these paragraphs. It is not plain and obvious that the allegations are embarrassing, prejudicial, or unnecessary.

[287] The defendants further object to para. 74 of the ANOCC (as well as para. 12 of Part 3), but this is related to their argument that a claim under *PIPA* has no reasonable prospect of success, which I dismiss following the discussion above.

Conclusion

[288] In summary, on the various issues raised by the defendants, I find as follows:

a) Review of the Election Committee Decision – I find that the Court does not have jurisdiction to review the decision of the Election Committee. While Ms. Moon exhausted the internal appeal process, I concluded that in her pleadings, Ms. Moon did not establish an underlying legal right that would give the Court jurisdiction to review the Election Committee's decision.

b) Abuse of Process Argument – I find that the defendants' argument that Ms. Moon's entire claim constitutes an abuse of process for failure to exhaust internal remedies is not persuasive. The internal processes under the IATSE Constitution do not provide Ms. Moon with effective remedies, particularly the ability to seek financial damages. In short, requiring Ms. Moon to pursue the

internal processes would result in a real deprivation of her ability to seek an effective remedy.

c) Tort of Public Disclosure of Private Facts – I find that while previous BC case law has suggested this tort does not exist in the province, the recent decision by the BC Court of Appeal in *Tucci* suggests that the law may need to be reconsidered. In light of the Court of Appeal's apparent willingness to re-examine this issue, I do not find that it is plain and obvious that Ms. Moon's claim for this tort would fail.

d) Breach of *PIPA* Claim – I find that it is not plain and obvious that Ms. Moon's claim under *PIPA* is not viable, as the Privacy Commissioner has issued an order finding IATSE Local 891 breached *PIPA.* A breach of *PIPA* gives rise to a claim for damages under the statute itself. Ms. Moon could pursue a claim under s. 57 of *PIPA* for damages resulting from the breaches.

e) Breach of *Privacy Act* – Although the defendants argued the OIPC decision found it was reasonable for IATSE Local 891 to disclose most of the report to its membership, such that Ms. Moon could not show a willful breach of privacy without a claim of right, the facts pleaded by Ms. Moon highlight multiple *PIPA* breaches related to publishing and leaking the report. I find that the OIPC's *PIPA* breach findings could possibly support a claim by Ms. Moon under the *Privacy Act*. Based on the facts pleaded, I find that the *Privacy Act* claim is not plainly bound to fail nor is it an abuse of process. However, I find that there are nuances in how the statutory *Privacy Act* and *PIPA* claims may interact particularly with a potential common law tort claim, which will require further assessment as evidence is disclosed.

f) Negligence Claim – I find that Ms. Moon has properly pleaded a negligence claim, including the existence of a duty of care, breach of that duty, and resulting damages. It is not plain and obvious that this claim will fail.

[289] In summary, the Court dismisses the defendants' application to strike Ms. Moon's claims, with the exception of the challenge to the Election Committee's decision, which the Court grants as it finds that based on the facts, it lacks jurisdiction to review.

[290] In light of the mixed results of this application, I am of the view that each party should bear their own costs.

[291] If either party wishes to make submissions for a different cost allocation, they should do so in writing within 21 days.

"Sukstorf J."