IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gabriel v. Surerus Pipeline Inc.,*
2024 BCSC 1676

Date: 20240628
Docket: S235967
Registry: Vancouver

Between:

Andras Gabriel

Plaintiff

And:

Surerus Pipeline Inc., Canadian Iron, Steel and Industrial Workers' Union Local #1, and David Pecquery

Defendants

Before: The Honourable Justice Matthews

Oral Reasons for Judgment

In Chambers

The Plaintiff, appearing in person:	A. Gabriel
Counsel for the Defendant David Pecquery:	M. Lusk
Counsel for the Defendant Surerus Pipeline Inc.:	L. Chang
Place and Date of Hearing:	Vancouver, B.C. June 28, 2024
Place and Date of Judgment:	Vancouver, B.C. June 28, 2024

[1] **THE COURT:**

Overview

[2] The plaintiff, Andras Gabriel, has brought claims against his former employment, Surerus Pipeline Inc. (“Surerus”); another person employed by Surerus, David Pecquery; and the Canadian Iron, Steel and Industrial Workers' Union (“Union”).

[3] The claims relate to an incident that Mr. Gabriel alleges was an assault committed by Mr. Pecquery against him and the termination of Mr. Gabriel's employment after he made a complaint about that assault to his employer.

[4] Mr. Gabriel's claims sound in personal injury based on the alleged assault. He brings that claim against Mr. Pecquery, the Union, and Surerus; wrongful dismissal against Surerus; conspiracy relating to his dismissal against Surerus, Mr. Pecquery, and the Union; and a claim in public misfeasance against the Union.

[5] The fourth cause of action, public misfeasance is, as I have said, only made in relation to the Union. The Union did not appear on these applications. I was advised by counsel for one of the applicants, Surerus, that the Union had only been served with the notice of civil claim recently, and that is the reason for its non-response to these applications. I understand that the Union was served with the applications. Counsel for Surerus advised me that she was not aware that the Union took the position that the application should not proceed in its absence.

[6] Surerus and Mr. Pecquery brought separate applications. Surerus' application is for an order pursuant to Rule 21-8(1) of the *BC Supreme Court Civil Rules*, B.C. Reg. 168/2009 staying or dismissing Mr. Gabriel's claim on the ground that the court lacks jurisdiction, or in the alternative an order staying or dismissing the claim on the grounds that the court ought to decline to exercise its jurisdiction.

[7] Surerus’ notice of application seeks alternative relief that if the court decides it has jurisdiction, it ought not exercise it. Surerus has not made any submissions on

that alternative relief other than to state it in the alternative. All of Surerus' submissions relate to relief on the basis that the court does not have jurisdiction, and that is what I will address.

[8] Mr. Pecquery's application is for an order that the whole of the notice of civil claim be struck without leave to amend pursuant to Rule 9-5 of the *Supreme Court Civil Rules*, based on lack of jurisdiction, and in the alternative an order for an interim stay of proceedings pending a determination by the Worker's Compensation Appeal Tribunal (“WCAT”) pursuant to s. 311 of the *Workers Compensation Act*, R.S.B.C. 2019 c. 1.

[9] Mr. Pecquery's application, whether considered under Rule 9-5(1) or as an application for a stay is based on the proposition that Mr. Gabriel's claims are statutorily barred by s. 127 of the *Workers Compensation Act* as arising in or out of the course of Mr. Gabriel's employment and brought against persons who are employers or employees under the *Workers Compensation Act*.

[10] The issues that are raised by the applications require the resolution of some or all of the following issues. First, is Mr. Gabriel covered by the collective agreement between Surerus and the Union? Second, if so, is the essence of his claims related to his employment? Third, if so, does the ambit of the collective agreement cover the dispute in its essence? The fourth issue is raised by Mr. Pecquery's application, and that is whether the matter should be dismissed or stayed because the claims are barred by s. 127 of the *Workers Compensation Act*.

[11] I am going to give reasons for judgment on the two applications that I have heard today.

[12] I am giving these reasons orally. If a transcript is requested, I will edit the transcript without changing the substance.

First Issue – Was Mr. Gabriel's Employment Covered by the Collective Agreement

[13] Surerus' position is that Mr. Gabriel was a member of the bargaining unit covered by a collective agreement between it and the Union. Mr. Gabriel acknowledges that he was a member of the Union but disputes that the work he was doing was covered by the collective agreement. This issue is therefore the subject of a factual dispute which in turn raises the legal question of what the evidentiary burden is on an application to strike a claim on the basis that the court has no jurisdiction.

[14] Counsel for Surerus referred to this Court's earlier decision in *Viking Air Ltd. v. Aevex Aerospace, LLC*, 2024 BCSC 502. *Viking* was about territorial competence, including the application of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. Counsel for Surerus advised me that it relies on it with respect to the subject matter jurisdiction and statutory jurisdiction issues that arise in this case pertaining to the evidentiary burden on such an application.

[15] In *Viking*, I reviewed *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85, in which the Court of Appeal for British Columbia addressed the evidentiary burden pertaining to applications to strike a claim based on lack of territorial competence. The Court of Appeal held that the court will be found to have jurisdiction, i.e. the application will not succeed, where the plaintiff shows through pleaded facts or evidence of jurisdictional facts an arguable case that the court has jurisdiction. The court on such an application reviews those jurisdictional facts, which are not proven facts but rather facts which if found to be true, support jurisdiction.

[16] In summary, the plaintiff must merely show an arguable case that those jurisdictional facts can be established. This burden and evidentiary threshold is described as "not high." See, for example, *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2014 BCSC 715 at para. 59.

[17] If the defendant tenders evidence that challenges the plaintiff's jurisdictional facts or goes to whether the plaintiff's claim is tenuous or without merit with regard to

jurisdiction, the plaintiff is required to adduce evidence that satisfies the court that there is an arguable case that the contentious jurisdictional facts can be established: *Purple Echo Productions* at para. 35.

[18] Counsel for Surerus submitted those principles apply to this case. As I understand the submission, applying those principles to this case, the question is whether Mr. Gabriel has pleaded or adduced jurisdictional facts that raise an arguable case that the court has jurisdiction and, if so, whether Surerus has provided evidence that shows that Mr. Gabriel's position on jurisdiction is tenuous or without merit.

[19] The collective agreement is an appropriate place to address this issue. That was put into evidence by Surerus, not by Mr. Gabriel, but that is of no matter to determine whether there are jurisdictional facts. The collective agreement is between Surerus and the Union. It is common ground that Mr. Gabriel is a member of this Union. However, the agreement does not make members of the Union subject to the agreement; it makes members of the bargaining unit subject to the agreement. Article 2, Scope and Voluntary Recognition, provides:

> 2.01 The company recognizes the Union as the sole bargaining agent for all bargaining unit employees, including general foremen but excluding superintendents of the Company working in British Columbia.
>
> 2.02 Employee or employees whenever used in the Agreement shall mean respectively an employee or employees in the bargaining unit described in Article 2.01.

[20] Article 3.01 provides that all employees covered by the agreement must make application to become members in good standings of the Union.

[21] The agreement has a schedule called "Schedule A, Wage Rates," which lists categories of employment and hourly or daily rates of pay. The list does not include the position of surveyor, which is, again, on the uncontested evidence, the work that Mr. Gabriel was doing when the events that he complains of in his notice of civil claim arose.

[22] Neither Schedule A, nor the body of the collective agreement, define "bargaining unit employees" as persons who fall into those Schedule A categories. The collective agreement does not define "bargaining unit employees" other than what I have read from section 2.01. It is not possible from reading the collective agreement to determine whether a surveyor is a bargaining unit employee.

[23] Counsel for Surerus helpfully advised that usually the bargaining unit is described in more detail when it is certified by the Labour Relations Board. It may be that such a more helpful description exists which might shed some light on this matter, but it is not evidence on this application. That is not a matter, in my view, that undermines Mr. Gabriel's argument that his work as a surveyor is not described in the collective agreement, including in Schedule A to the collective agreement, and therefore despite that he was member of the Union, he was not covered by the collective agreement at the time.

[24] In my view, it was clearly open to Surerus to provide evidence on how to interpret the bargaining unit, other than the evidence that is before the Court, including perhaps the certification by the Labour Relations Board, but it did not. Surerus points to the evidence of Mr. Gabriel. He has not deposed that he was not a member of the bargaining unit. He has claimed in his notice of civil claim that he was a member of the Union.

[25] In my view, although Surerus' affiants and submissions conflated those two descriptions, "union member" on the one hand and "member of the bargaining unit" on the other, the evidence does not support that they are one and the same. It is well known that many unions have hundreds of thousands of members, and not every collective bargaining agreement that a given union enters into, covers every person in its membership in every circumstance.

[26] Specifically, in this case, the collective agreement is not said to cover every member of the Union. It is said to cover members of the bargaining unit who must also be members of the Union. So, in my view, the evidence is clear that while a member of the bargaining unit must be a member of the Union, the fact that a

person is a member of the Union does not necessarily make them a member of the bargaining unit.

[27] I do not regard it as a failing in Mr. Gabriel's response to this application that he has not led evidence on the issue. In his application response he points to evidence, specifically the collective agreement and Schedule A. He argues that his position, surveyor, is not listed in Schedule A and that is evidence that he is not covered by the collective agreement.

[28] Surerus takes the position that the Court can draw an inference that this collective agreement covered surveyors. In this regard, it relies on the evidence of Mr. Jason McElligott, who deposed that Mr. Gabriel was an employee of Surerus, that he was a member of the Union and was subject to the terms of the collective agreement between the Union and Surerus.

[29] Mr. McElligott does not say why that the facts to which he has deposed with regard to Mr. Gabriel, namely that he was an employee and that he was a member of the Union, should lead to the conclusion that he was covered by the collective agreement. Clearly not everyone working for Surerus was covered by the collective agreement. Section 2.01 carves out certain persons as not members of a bargaining unit. With respect, the submission made from Mr. McElligott's evidence is reductive or a submission based on bare statements that do not provide sufficient cogent evidence for the conclusion that Surerus has asked the Court to reach.

[30] Surerus also refers to the affidavit of Connie Chilcott, who deposed that Surerus and the Union have entered into a collective agreement that covers the terms and conditions of employees in the bargaining unit. I stress the bargaining unit. Ms. Chilcott goes on to depose as follows at para. 5:

> It is my understanding that "Surveyors" were not specifically listed in the Schedule "A" of the Collective Agreement at the time when the Collective Agreement was initially and subsequently bargained and drafted. Many of the technical positions were not specifically listed in the schedule "A." Instead they were grouped under "Tradesmen" or "Labourer."

[31] Paragraph 6 of Ms. Chilcott's affidavit reads as follows:

> Over the years, there have been few Surveyors hired directly by Surerus, and when they were hired directly by Surerus, they were classified as either "Tradesmen" or "Labourer" within the context of the Collective Agreement.

[32] Ms. Chilcott's affidavit does not say that surveyors hired by Surerus were bargaining unit members. To the extent that I should draw inference on that subject from what she says, what it amounts to is a statement that Surerus was unilaterally designating certain employees to be members of the bargaining unit when that was not provided for in the collective agreement.

[33] I repeat that the collective agreement does not contain a provision that the Schedule A descriptions of positions are members of the bargaining unit. Even if I infer that, Ms. Chilcott's evidence does not bridge the gap that exists in this case. Either expressly or by implication, there is no evidence that a surveyor is considered a tradesperson either generally or specifically in the pipeline-construction industry, and the same is true of a surveyor in relation to the description of workers as "labourers."

[34] Ms. Chilcott's evidence goes no higher than advising the Court that Surerus was unilaterally designating certain persons as members of the bargaining unit. That is inconsistent with the notion of a collective agreement, as a bargained contract between the Union and the employer including who is covered by that contract under what terms. A collective agreement is bilateral and cannot be unilaterally altered or interpreted by one party to it.

[35] In *Ferreira v. Richmond (City)*, 2007 BCCA 131, at para. 64, the Court of Appeal for British Columbia described the collective agreement as the core representation of the bargain struck between the employees and employer. The Court of Appeal decided the issues in that case pursuant to that fundamental principle, including whether the court had jurisdiction to deal with disputes arising out of the employment of a person, a matter fundamental to the justiciability of a civil claim. That is the same dynamic in this case.

[36] That core representation and the fundamental importance it presents is inconsistent with finding, as a jurisdictional fact, that Mr. Gabriel was a member of the bargaining unit.

[37] In addition to the evidence I have already related, Surerus provides and relies on evidence of what is arguably a separate contract of employment specific to Mr. Gabriel. It is a letter dated June 3, 2021, with a re line "Offer of Temporary Employment-Coastal Gas link Project (1922)-Union Position."

[38] That letter offers employment to Mr. Gabriel and sets out terms of employment that are under the same general topics as those covered by the collective agreement. It does not refer to the collective agreement. It does refer in the re line to "Union Position" but says no more than those two words in the re line. Accordingly, on the evidence of Surerus, Mr. Gabriel is arguably subject to two contracts governing his employment, one a collective agreement and one a private contract.

[39] As I have noted, the separate contract does, in the re line, use the words "Union Position." These words, standing in rather conspicuous isolation, muddy rather than clarify the evidence on this issue. In my view, the evidence is not cogent enough for this Court to determine it has no jurisdiction. The evidence to which Mr. Gabriel points raises an arguable question as to whether he is covered by the collective agreement that Surerus relies on for its argument that the court does not have jurisdiction. Surerus does not point to evidence that allows the Court to conclude that that arguable issue is not truly arguable but rather should be found in its favour.

[40] Having decided that, it is not necessary to decide whether Mr. Gabriel's claims or any of them in their essence relate to his employment and come under the ambit of the collective agreement that covers the disputes. I therefore turn to the fourth issue I have identified, which is raised in Mr. Pecquery's application, and is whether the matter should be dismissed or stayed because the claims made are barred by s. 127 of the *Workers Compensation Act*.

Fourth Issue – Are Mr. Gabriel's Claims Barred by s. 127 of the *Workers Compensation Act* and If So, Should the Action be Dismissed or Stayed?

[41] Section 127 of the *Workers Compensation Act* is a statutory bar to certain claims. It reads as follows:

> **Limitation on legal proceedings against employers or workers**
>
> 127 (1) Subject to subsection (2),
>
> (a) the compensation provisions are in place of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker or a dependant or family member of the worker is or may be entitled against
>
> (i) the employer of the worker,
>
> (ii) an employer within the scope of the compensation provisions, or
>
> (iii) any other worker,
>
> In respect of any personal injury, disablement or death of the worker arising out of and in the course of employment, and
>
> (b) no action lies in respect of such an injury, disablement or death.
>
> (2) Subsection (1) applies only if the action or conduct of
>
> (a) the employer or the employer's servant or agent, or
>
> (b) the other worker,
>
> That caused the breach of duty of care arose out of and in the course of employment within the scope of the compensation provisions.

[42] It is apparent that several things have to be determined in a case like this in order for the statutory bar to be a defence to the entire claim. In this case, that would include that:

- Mr. Gabriel is a "worker" as defined in the *Workers Compensation Act*;
- Surerus is an "employer" as defined in the *Workers Compensation Act*;
- Mr. Pecquery is an "employee" as defined in the *Workers Compensation Act*;
- The Union is an "employer" or "employee" as defined in the *Workers Compensation Act*;

- Mr. Gabriel was in the course of his employment when the matters that he raises in each of his claims arose;

- Mr. Pecquery was in the course of his employment when those matters arose;

- The alleged wrongs of Surerus arose out of and in the course of Mr. Gabriel's employment; and

- The alleged wrongs of the Union arose out of and in the course of Mr. Gabriel's employment.

[43] I pause to say that all of those matters would have to be determined in that way to strike the claim in its entirety. Positive determinations on some those matters could result in parts of the claim being struck depending on which matters were decided positively.

[44] The jurisdiction to decide those issues is vested exclusively in the Workers' Compensation Board by virtue of s. 122 of the *Workers Compensation Act*. Section 311 of the *Workers Compensation Act* provides for a court or a party to the action to apply to the WCAT for a determination of these matters and to certify that determination to the court. That is referred to as a s. 311 determination and certification.

[45] Mr. Pecquery relies on recent cases, including *Nagra v. Coast Mountain Bus Company (TransLink)*, 2023 BCSC 2312; *Chestacow v. Mount St. Mary Hospital of Marie Esther Society*, 2024 BCSC 783; and *Deol v. Dreyer Davison LLP*, 2020 BCSC 771, for the proposition that because of the provisions of the *Workers Compensation Act*, to which I have referred, this court has no jurisdiction over Mr. Gabriel's claims.

[46] I do not read the statutory provisions or these cases that way. While Justice Morley in *Chestacow* did refer to circumstances where the legislature has vested jurisdiction in administrative tribunals and ousted that jurisdiction from the courts, he did not specifically tie those observations to the Worker's Compensation statutory

bar. In that case, he was considering arguments that the claims were barred by s. 127 of the *Workers Compensation Act*, but he was also considering whether the *Human Rights Code* ousted jurisdiction in the court in favour of the Human Rights Tribunal.

[47] It is my understanding that in some cases, the Human Rights Tribunal has exclusive jurisdiction, and its authority is a matter of jurisdiction that affects the court's jurisdiction. It is my understanding of the significant jurisprudence on the statutory bar provided under the Worker's Compensation that that statutory bar is just that, a statutory bar, a defence that can be raised to the claim and is not a matter of jurisdiction of the court over the subject matter of the claim.

[48] What is clearly a matter over which the court has no jurisdiction is the determination of whether or not a claim is subject to the statutory bar. That determination, which involves whether a plaintiff is a worker under the act who has brought a claim for a matter that rose in and out of the course of his employment against an employer or another employee under the *Workers Compensation Act*, is a matter where the exclusive jurisdiction resides not with the court but with the Workers' Compensation Board, and specifically the WCAT under s. 311 of the *Workers Compensation Act*.

[49] Section 127 then acts as a statutory bar if those determinations have been made in a way that engages the statutory bar. A review of WCAT’s decisions shows that such determinations are not simple. Just because someone was working does not mean that they are a "worker" within the meaning of the act. Just because someone was working for a person or entity who paid them for that work does not make them workers and does not necessarily make the payor an employer.

[50] A person who might at first glance be considered to be a "worker" because they were working at the time the alleged wrongful conduct occurred could be an independent contractor, for example. There is a very large body of cases decided by the WCAT on that topic. Events that occurred during the course of a person's workday and while that person was at work with other coworkers do not necessarily

rise in and out of the course of employment. One large category of situations that have spawned a significant number of cases decided by the WCAT are workplace altercations giving rise to allegations of assault. In some cases, they do arise in or out of the course of employment, and in some cases they do not, according to the WCAT's decisions. The facts that go into the s. 311 certifications are finely examined by the WCAT on those applications.

[51] Mr. Pecquery relies on *Nagra* for the proposition that Rule 9-5(1)(c) or (d) can be used by the court to strike an action for want of jurisdiction where the defendant asserts the claim is barred by the *Workers Compensation Act*. That manner of approaching the type of relief that Mr. Pecquery seeks, i.e. applying under Rule 9-5(1) instead of under the jurisdiction Rule 21-8, is not contested. I would not expect it to be a matter on which a self-represented litigant such as Mr. Gabriel would find themselves comfortable addressing. I note that other judges have addressed these matters under Rule 9-5, and so I will proceed in that manner without deciding whether it is more appropriately addressed under Rule 21-8.

[52] Mr. Pecquery argues that in *Chestacow*, *Deol*, and *Nagra* judges of this court have held that where a court considers, based on the pleadings, that it is plain and obvious that the claim is barred by s. 127, the court can strike the claim despite that no s. 311 certification has been made by the WCAT. I do not regard those cases as standing for that proposition. I do not agree that this court can decide that it is plain and obvious that the s. 127 bar applies and, on that basis, dismiss the claim.

[53] I say that for these reasons.

[54] First, although I understand why counsel for Mr. Pecquery submits that those cases can be read that way, they do not clearly say that. Without a clear statement that is binding on me, I cannot accept that proposition because a determination that it is plain and obvious that a claim is barred by s. 127 can only be made if the court has made the s. 311 certification determination, something which the court has no jurisdiction to do for reasons that I have already explained.

[55] Second and related, if the court were to strike the claim on the basis that is was plain and obvious but did not make or have a s. 311 certification, it amounts to the court doing what it has no jurisdiction to do.

[56] Third, such a determination is not a matter of looking at the pleadings and accepting them as true. It is a complicated determination involving facts that may or may not be pleaded in a civil claim. The determination has implication for the Workers' Compensation Board and what claims it must pay. That is one of the reasons why the decision making is vested in the WCAT and is not within the jurisdiction of the court.

[57] Alternatively, and in addition, if it is open to me to make that determination, I would not. The pleadings in this case would not allow me to make the determination appropriately given the myriad of issues that go into a s. 311 decision and certification. For example, for the reasons I have already given, it is not clear to me that Mr. Gabriel was a bargaining-unit member or employed under a separate contract of employment or both. Determinations of those facts may relate to whether or not he was a worker under the Worker's Compensation scheme. I have insufficient evidence to determine whether the alleged assault arose in and out of the course of Mr. Gabriel's employment as that phrase has been interpreted by the only body that has jurisdiction to interpret it, the WCAT.

[58] Accordingly, the application to dismiss the claim based on the s. 127 statutory bar is dismissed.

[59] Alternatively, Mr. Pecquery seeks a stay. The applicable framework is well known and set out in *RJR-MacDonald Inc. V. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117. It is a three-part test. First, is there a serious issue to be tried? Second, will the applicant suffer irreparable harm if the stay is refused? Third, does the balance of convenience lie with the applicant? As has been stated many times, the second and third branches of the test are often decided together and described as the balancing exercise.

[60] Mr. Pecquery asserts that for the same reasons the Court ought to view the pleadings as leading to the conclusion that it is plain and obvious that the claim will be barred by s. 127 of the *Workers Compensation Act* to decide that there is a serious question to be tried, that the notice of civil claim sets out allegations that are captured by s. 127. I repeat the analysis I have already given as to the problems with that assertion given the Court's lack of jurisdiction to make those findings. If I accept that I should not be troubled by a lack of jurisdiction to make those findings because of the relatively low threshold for the first branch of the *RJR-MacDonald* test, then I would observe that in order for it to be an arguable issue in this case, it will need to be determined through a s. 311 certification.

[61] This claim was commenced in late August 2023, and a response was delivered by Mr. Pecquery in March of 2024. Responses were delivered by Surerus in October 2023. I add that with regard to Mr. Pecquery, I do not know when the claim was served, and that may have something to do with the date of his response. I observe that at this time, which is late June 2024, no party has sought a s. 311 determination or certification for the findings that could result in this claim being statute barred under s. 127 of the *Workers Compensation Act*.

[62] Without such a certification, the claim does not meet the threshold of a serious question to be tried. It is a fairly elementary step to take. Given that no party has taken it, and even though it is raised in the pleadings, in the circumstances, Mr. Pecquery falls short of the threshold for the first stage of *RJR-MacDonald*.

[63] If I am wrong on that because raising the defence in the pleadings, together with the evidence that is not contested that Mr. Gabriel was working at the time that the matters that are the subject of his claim occurred, and that the defendants were in some way or the other engaged with those matters, is enough to meet the threshold of a serious issue to be tried, I would not stay the matter because I do not consider the balance of convenience to favour a stay.

[64] That is largely because of the lack of any steps towards a s. 311 certification. Without any steps towards a s. 311 certification, the application is for an indefinite

stay that will indefinitely preclude Mr. Gabriel from proceeding with his claim. Not only has Mr. Pecquery not taken those steps, but he has also not deposed that he intends to do so and what the timeline would be.

[65] In some circumstances, courts will address the time between when a s. 311 application has been made in relation to pending major steps in litigation and will give relief from those pending steps because of the s. 311 application. For example, in *Gourlay v. Crystal Mountain Resorts Ltd.*, 2019 BCSC 1134, aff'd 2020 BCCA 191, Justice Hori adjourned an imminent trial because a s. 311 certification was outstanding. The Court of Appeal for British Columbia upheld that decision.

[66] In this case, there is irreparable harm to Mr. Gabriel in having his claim stayed indefinitely with no plan or timeline in place to address how long the stay would be in place or when it would be clear as to whether the claim could proceed. I conclude there is no prejudice to the defendant because nothing is looming in the case. No trial dates have been set. No discoveries have been held. For this reason, this case is not like *Gourlay*, and I see no reason to prevent Mr. Gabriel from proceeding with his claim because a defendant may do something it could have done by now and has not.

[67] For that reason, I also dismiss the application for a stay of the claim based on the pleaded defence under s. 127 of the *Workers Compensation Act*.

Disposition

[68] For these reasons, both applications are dismissed.

"Matthews J."