December 14, 2023

FIAT: Let the within Brief of the Respondents be filed notwithstanding that it is being filed late

other side consents

J.C.K.B.A.

JSC June 5, 2024

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JUDICIAL CENTRE	CALGARY
APPLICANTS	THE UNIVERSITY OF LETHBRIDGE and THE GOVERNORS OF THE UNIVERSITY OF LETHBRIDGE
RESPONDENTS	JONAH PICKLE, PAUL VIMINITZ, and FRANCES WIDDOWSON
DOCUMENT	**BRIEF OF THE RESPONDENTS, JONAH PICKLE, PAUL VIMINITZ, and FRANCES WIDDOWSON FOR SPECIAL CHAMBERS APPLICATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Glenn Blackett Law [redacted]

BRIEF OF THE RESPONDENTS

DATE OF HEARING: June 5, 2024

Table of Contents

I. INTRODUCTION

1. The applicants, in effect, apply under Rule 3.68(2)(a) to dismiss the originating applicant Paul Viminitz ("**Viminitz**") on the basis that it is plain and obvious the Court has no jurisdiction.

2. The application is premised on a misunderstanding and misapplication of the relevant caselaw. The essential character of Viminitz's claim does not arise within a labour arbitrator's exclusive jurisdiction, which is relatively narrow. Rather, the essential character of the claims of the originating applicants, including Viminitz, is a freedom of speech and assembly claim with only ancillary aspects touching on the collective agreement. A labour arbitrator has no jurisdiction over the applicants, other than Viminitz, and no jurisdiction to entertain Viminitz's *Charter* claims.

II. FACTS

3. The originating applicant:

   a. Viminitz is a professor of Philosophy at the University of Lethbridge ("**University**");[1]

   b. Frances Widdowson ("**Widdowson**"), is a former tenured professor at Mount Royal University with a specialty in indigenous politics and economy;[2]

   c. Jonah Pickle ("**Pickle**"), is an undergraduate student at the University in the department of neuroscience and is an Arts & Science representative on the University's Student's Union[3].

4. Viminitz is subject to the University of Lethbridge Academic Staff Collective Agreement (the "**CA**") between the University of Lethbridge and the University of Lethbridge Faculty Association ("**Association**").[4] Neither Widdowson nor Pickle is a subject to the CA.

5. In November 2022, Viminitz invited Widdowson to speak at the University in two contexts:

   a. An event open to University students, faculty, and members of the public at the University on the topic of "*How Woke-ism Threatens Academic Freedom*" which was to be hosted at the University, Anderson Hall, on February 1, 2023 at 4:30 p.m. (the "**Non-Academic Event**");

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[1] Affidavit of Paul Viminitz, sworn July 27, 2023 ("**Viminitz Affidavit**"), para 3.
[2] Affidavit of Frances Widdowson, sworn July 26, 2023 ("**Widdowson Affidavit**"), paras 2, 3, 4, and 14.
[3] Affidavit of Jonah Pickle, sworn July 27, 2023 ("**Pickle Affidavit**"), para 2.
[4] Agreed Statement of Facts, para 1 and Exhibit "A".

b. In Viminitz's class called Philosophy 2002 (Belief, Truth and Paradox) on the issue of whether universities should foster respect for indigenous "ways of knowing" on January 31 and February 2, 2023 (the "**Academic Event**").[5]

6. Pickle and Viminitz intended to attend the Non-Academic Event.[6]

7. The Non-Academic Event was booked by Viminitz with the University pursuant to the "Use of University Premises for Non-Academic Purposes Policy" (the "**Non-Academic Booking Policy**").[7] The Non-Academic Booking Policy defines a guest lecture as a "non-academic purpose" The Non-Academic Booking Policy ranked such a Non-Academic Event as the lowest of three priorities.[8]

8. The Non-Academic Booking Policy applies to University and non-University groups and individuals.[9] Widdowson, Pickle, and many other persons not subject to the CA could have booked the Event–it just happened to have been booked by Viminitz.

9. The University cancelled the Non-Academic Event on January 30, 2023.[10] In cancelling the Non-Academic Event[11], the University asserted the University's right to regulate the "time, place and manner of expression" under the University's "Statement on Free Expression,"[12] which applies to "all members of the University community."

10. The University did not, however, cancel the Academic Event.[13] In a statement intended for the University community, Erasmus Okine, the University's Provost and Vice-President, Academic, explained the distinction:

> *The decisions of an Academic Staff Member within their classroom, and the Administration's ability to respond to such decisions, is governed by the University of Lethbridge Academic Staff Collective Agreement … As a result, while we were able to take action with respect to the public lecture, we do not have that same capability here in advance of the potential classroom guest lecture ...*

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[5] Viminitz Affidavit, paras 10, 11, and 15.
[6] Viminitz Affidavit, para 18, Pickle Affidavit, para 12.
[7] Viminitz Affidavit, Exhibit "B"
[8] See sections 4.7, 5.1 and 5.2.
[9] See section 2.1.
[10] Viminitz Affidavit, para 15.
[11] See Certified Record of Proceedings p. 000002.
[12] A copy of which is at Viminitz Affidavit, Exhibit "I".
[13] Viminitz Affidavit, para 15.

11. In connection with the cancellation, on March 6, 2023, Viminitz presented an allegation of a grievance to the Association. The allegation referenced breaches of Viminitz's rights under the *Canadian Charter of Rights and Freedoms* (the "***Charter***") but did not allege such *Charter* breaches were or could be the subject of a grievance.[14]

12. On April 18, 2023, the Association filed a grievance (the "**Grievance**") relating to Viminitz's allegation which did not assert any *Charter* right nor seek any Charter remedy.[15]

13. There is, therefore, no overlap whatsoever between the claims asserted by Viminitz in the within action and the claims asserted, on Viminitz's behalf, by the Association in the Grievance–although they both arise from the cancellation of the Non-Academic Event.

14. Further, there is no evidence that the Grievance has advanced whatsoever, nor is there evidence as to the position taken by the University in the Grievance. It is, therefore, possible the University will maintain its position referred to at paragraph 9 – that the matter is not subject to Grievance under the CA.

III. ISSUE

15. Is it plain and obvious that the courts lack jurisdiction over the dispute as it exists between Viminitz and the University?

IV. ARGUMENT

The plain and obvious standard

16. The University purports to rely on Rule 3.68(2)(b)[16] but, given the University challenges this Court's jurisdiction to decide the matter as it relates to Viminitz, and given that the University does (and must) rely on evidence to argue this application, this is, in fact, an application under Rule 3.68(2)(a).

17. The test is whether it is "plain and obvious that the court has no jurisdiction, after considering evidence on the surrounding facts."[17]

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[14] Agreed Statement of Facts, Exhibit "B".
[15] Agreed Statement of Fact, Exhibit "C".
[16] Brief of the Applicants, para 15.
[17] *Prodaniuk* v. *Calgary (City)*, 2021 ABQB 906 ("***Prodaniuk***") at paras 20-22, overturned in part on other grounds, 2023 ABCA 165 ("**Prodaniuk CA**").

The extent of any exclusive arbitral jurisdiction depends on the operative legislation, the essential nature of the dispute and the ambit of the collective agreement

18. Starting with *St. Anne Nackawic Pulp and Paper* v. *CPU, Local 219*, [1986] 1 S.C.R. 704 ("***St. Anne***") the Supreme Court of Canada (the "**SCC**") has analyzed the extent to which Canadian legislation evidenced an intention to exclude courts from jurisdiction in labour disputes. As emphasized by the SCC in *Northern Regional Health Authority* v. *Horrocks* [2021] 12 W.W.R. 1 ("***Horrocks***"):

> *"This is not a judicial preference, but an interpretation of the mandate given to arbitrators by statute."*[18] *[all emphasis added in this brief]*

19. At issue in *St. Anne* was the following statutory provision:

> *55(1) Every collective agreement shall provide for the final and binding settlement by arbitration or otherwise … of all differences between the parties … concerning its interpretation, application, administration or an alleged violation of the agreement …*[19]

20. On the basis of, *inter alia*, this provision, the SCC found the following scope of exclusivity:

> *… The courts have no jurisdiction to consider claims arising out of rights created by a collective agreement. Nor can the courts properly decide questions which might have arisen under the common law of master and servant in the absence of a collective bargaining regime if the collective agreement by which the parties to the action are bound makes provision for the matters in issue …*[20]

21. To some extent, the scope of the exclusivity depends on the wording of the collective agreement itself subject, however, to legislatively mandated clauses[21].

22. The SCC found a legislative intention that grievance was the "exclusive recourse open to parties to the collective agreement for its enforcement." [22] [emphasis added] The Court also found an important exception to exclusivity: courts retained jurisdiction to enjoin illegal strikes."[23]

23. *Weber* v. *Ontario Hydro* [1995] 2 S.C.R. 929 ("***Weber***") relied on very strong legislative language:

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[18] para 30.
[19] *St. Anne*, para 4.
[20] para 19.
[21] see para 4.
[22] para 20.
[23] para 22.

> *45. — (1) Every collective agreement shall provide for the final and binding settlement by arbitration … of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement …*

24. On the basis of this legislation, the SCC found arbitral exclusivity over "[all] dispute[s] or difference[s] between the parties aris[ing] out of the collective agreement."[24] Cognizant of "innovative pleaders" who might seek to "evade the legislative prohibition on parallel court actions by raising new and imaginative causes of action,"[25] the SCC adopted an "essential character" test:

> *The question in each case is whether the dispute, in its essential character, arises [expressly or inferentially][26] from the interpretation, application, administration, or violation of the collective agreement.*[27]

25. In applying the "essential character" test, there are two elements: the dispute and the ambit of the collective agreement.[28] The relevant inquiry is into the facts alleged, not the legal characterization of the matter.[29] Neither the fact that the parties are employer and employee nor the fact that the conduct occurred at the workplace are determinative."[30] *Weber* was "basically a dispute about sick leave, which became encumbered with an incidental claim for trespass."[31] On the basis of, *inter alia*, these facts, the claim was found in its "essential character" to have arisen from the collective agreement. *Weber* is also authority for the propositions that labour legislation does not oust the court's jurisdiction to give a declaration and that residual jurisdiction may be exercised if there is a real deprivation of an "ultimate remedy."[32]

26. In Morin the Court made several valuable observations including that there is no legal presumption of exclusivity "*in abstracto*"; depending on the legislation and the nature of the dispute, other tribunals may possess overlapping, concurrent, or exclusive jurisdiction.[33]

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[24] para 56.
[25] para 54.
[26] para 59.
[27] para 57.
[28] para 56.
[29] para 43.
[30] para 57.
[31] *Québec (Commission des droits de la personne & des droits de la jeunesse)* c. *Québec (Procureure générale)* [2004] 2 S.C.R. 185 at para 22 ("***Morin***").
[32] para 62.
[33] para 11.

> *…. the question … is whether the … legislation applied to the dispute at issue, taken in its full factual context, establishes that the labour arbitrator has exclusive jurisdiction over the dispute. This question suggests two related steps. The first step is to look at the relevant legislation and what it says about the arbitrator's jurisdiction. The second step is to look at the nature of the dispute, and see whether the legislation suggests it falls exclusively to the arbitrator …*[34]

27. Based on the particular wording of the *Quebec Labour Code* (which was found to be weaker than that at issue in *Weber*)[35] the Court found the arbitrator had only exclusive jurisdiction "over matters arising out of the collective agreement's operation."[36] The Court found that a claim of discrimination was not subject to arbitral exclusivity because,

> *"It does not arise out of the operation of the collective agreement, so much as out of the precontractual negotiation of that agreement."*[37]

28. In support of this conclusion, the Court further observed that,

> *"… even if the unions had filed a grievance on behalf of the complainants, the arbitrator would not have jurisdiction over all of the parties to the dispute …"*

and,

> *"… because the complainants' general challenge to the validity of a provision in the collective agreement affected hundreds of teachers, the Human Rights Tribunal was a "better fit" for this dispute than the appointment of a single arbitrator … "*[38]

29. In Horrocks the SCC again emphasized that:

> *"The scope of an arbitrator's exclusive jurisdiction will depend on the precise language of the statute but, in general, it will extend to all disputes that arise, in their essential character, from the interpretation, application, or alleged violation of the collective agreement."*[39] *The SCC found the matter essentially arose "foursquare" from the collective agreement and added that, "… while the claim invokes Ms. Horrocks'*

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[34] paras 14 and 15.
[35] para 21.
[36] para 16.
[37] para 24.
[38] paras 29 and 30.
[39] para 40.

> *statutory rights, those rights are 'too closely intertwined with collectively bargained rights to be sensibly separated' and cannot be 'meaningfully adjudicated ... except as part of a public/private package that only a labour arbitrator can deal with.'"*[40]

30. In 2023 the Alberta Court of Appeal applied the above line of cases in Alberta, agreeing with the lower Court's finding that the "… essential character of [the plaintiff's] claim against the defendants other than CPA is workplace harassment or similar misconduct and the City's alleged failure to provide safe working conditions that were free from such wrongdoing."[41] Although Ms. Prodaniuk had also advanced *Charter* claims, in commenting on the allegation her Charter rights were infringed by a limitation period, "… [they] are, in their own essential character, an ancillary element of the overall workplace issues raised by the appellant. Put another way, as in Weber, at para 60: '[w]hile the Charter issue may raise broad policy concerns, it is nonetheless a component of the labour dispute'. …[42]

31. Based on the foregoing, the following test may be summarized:

    a. The scope of an arbitrator's jurisdiction, including whether and to what extent it is exclusive, depends on:

        i. the legislative intent, as evidenced in the particular wording of the statute;

        ii. the ambit of the collective agreement, including both voluntary[43] and mandatory clauses; and

        iii. whether the essential character of the claim is expressly or inferentially within the scope of exclusivity, being a factual not legal analysis – closely intertwined, inseparable labour and statutory rights militates in favour of arbitral exclusivity;

    b. the court retains jurisdiction where there would be a real deprivation of an ultimate remedy, as where a party seeks a general declaration;

    c. neither that that the parties are employer and employee nor that the conduct occurred at the workplace is determiniative;

    d. even where a grievance is filed, the existence of parties to the dispute which are not subject to the exclusive jurisdiction of a labour arbitrator militates against a finding of exclusivity.

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[40] para 50.
[41] *Prodaniuk CA* and *Prodaniuk* at para 78.
[42] para 27.
[43] The parties can, by agreement, render matters exclusive to arbitration.

Application - Operative Legislation

32. The *Alberta Labour Relations Code* (the "***Code***") states at section 135:

> *135. Every collective agreement shall contain a method for the settlement of differences arising (a) as to the interpretation, application or operation of the collective agreement, (b) with respect to a contravention or alleged contravention of the collective agreement, and (c) as to whether a difference referred to in clause (a) or (b) can be the subject of arbitration, between the parties to or persons bound by the collective agreement.*

33. This is a weak exclusivity clause (as noted also by the Alberta Court of Appeal in *A.T.U., Local 583* v. *Calgary (City)* 2007 ABCA 121):

    a. It references "a method" as compared to the Ontario legislation (*Weber*) which specified "final and binding settlement by arbitration." Parties in Alberta may provide for any method, including arbitration or the courts. There is no exclusivity mandated to any particular forum, arbitration or otherwise. See also subsection (c) which leaves to the parties the freedom to determine whether differences "can be the subject of arbitration."

    b. The agreement must provide for the "settlement of differences arising as to the interpretation, application or operation of the collective agreement or with respect to a contravention or alleged contravention … " Compare Ontario (*Weber*) regarding "all differences … arising from the interpretation, application, administration or alleged violation … "

    c. In Ontario (*Weber*), as long as a difference "arises from" the operation of the agreement, it is subject to mandatory arbitration. For example, Weber's trespass claim "arose from" the operation of the agreement (employer's right to monitor medical entitlements).[44] Alberta's *Code* does not speak to differences which are merely "arise from" the operation of the agreement.

34. As to this point (the broader meaning of "arising from") Alberta caselaw arguably took a slight wrong turn in *Prodaniuk* and *Prodaniuk CA*. While *Weber* had applied an exclusive jurisdiction model for differences "arising from" the collective agreement, that was based on express statutory language to that effect.[45] Contrary to the caution in *Horrocks* that, "… this is not a judicial preference, but an interpretation of the mandate given to arbitrators by statute …" *Prodaniuk* applied the *Weber* "arise

[44] Paras 73 to 78.
[45] See paragraph 233, above.

from" test, without accounting for the fact that such words (and concept) were entirely absent from the Alberta *Code*.[46] Given the wording of the *Code*, the forum designated by the CA is the exclusive forum to settle differences which, in their essential character, arise: 1) "as to" the interpretation, application or operation of the CA; or 2) "with respect to" its contravention, in addition to any other difference made exclusive to that forum under the CA voluntarily. In the alternative, notwithstanding the wording of the *Code,* the forum designated by the CA is the exclusive forum to settle differences which, in their essential character arise, expressly or inferentially, from the interpretation, application, operation, or contravention of the CA and any other differences made exclusive to that forum under the CA. As we will see below, on either iteration of the test, the University's application should fail.

Application - Ambit of the Collective Agreement

35. The CA very neatly tracks the minimum requirements of the Code. "Grievance" is defined as "a claim that there has been a violation, improper application or non-application of the terms of this Collective Agreement."[47] The "method for the settlement of differences" contained in the collective agreement is: 1) informal meeting between the parties; 2) then, if that fails, investigation and report by the President of the University and President of the Association; and 3) then, if that fails, arbitration.[48]

36. The Grievance alleges a violation of two articles of the CA: 1.01.2: "… (a) Members are entitled to the freedom to carry out research and to publish the results, to the freedom to teach and discuss their subjects, and to the freedom from institutional censorship;" and 11.01 (Academic Freedom):

> *11.01.1 The Board and Association recognize the need to protect academic freedom. Academic freedom is generally understood as the right to teach, engage in scholarly activity, and perform service without interference and without jeopardizing employment. This freedom is central to the University's mission and purpose and entails the right to participate in public life, to criticize University or other administrations, governments or public figures, to champion unpopular positions, to engage in frank discussion of controversial matters, to raise questions and challenges which may be viewed as counter to the beliefs of society, and to act according to the Member's standards as a professional in the Member's field …*

[46] See especially para 75 and 80.
[47] Agreed Statement of Facts, Exhibit "A", clause 9.02.01.
[48] Clause 9.03.

37. Perhaps the University differentiates between the cancellation of the Academic Event and the Non-Academic Event on the basis that Viminitz was not teaching, engaging in scholarly activity, or performing [his] services as an academic teaching Philosophy 2002, or other such course when he booked the Non-Academic Event.

38. While Viminitz's allegation references the *Charter*, the Grievance does not. In fact, the CA nowhere references the *Charter* either expressly or impliedly. Neither the *Code* nor the CA indicates that an arbitrator (or other selected method for the settlement of differences) has any jurisdiction to consider Viminitz's *Charter* claims, much less exclusive jurisdiction. This is relevant to the exclusivity inquiry. As stated by the Court in St. Anne:

> *… The courts have no jurisdiction to consider claims arising out of rights created by a collective agreement. Nor can the courts properly decide questions which might have arisen under the common law of master and servant in the absence of a collective bargaining regime if the collective agreement by which the parties to the action are bound makes provision for the matters in issue, whether or not it explicitly provides a procedure and forum for enforcement…* [49]

39. The University, relying on *Weber*, asserts in its brief at paragraph 30 that, "provided the legislation 'empowers the arbitrator to hear the dispute and grant the remedies claimed,' and the essential character of the dispute is captured by the collective agreement, the arbitrator has 'exclusive jurisdiction… to deal with all disputes between the parties arising from the collective agreement'." However, as shown above, *Weber* is based on a very strong exclusivity provision:

> *… mandatory arbitration clauses such as s. 45(1) of the Ontario … Act generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to Charter remedies, provided that the legislation empowers the arbitrator to hear the dispute **and** grant the remedies claimed …* [50]

40. While it appears the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3, section 11, and the *Designation of Constitutional Decision Makers Regulation*, Alberta Regulation 69/2006, section

[49] para 19.
[50] para 72.

1(b)(iv) and Schedule 1 (the "**Regs**") empower labour arbitrators to determine "all questions of constitutional law," *Prodaniuk*, referencing this regulation states that: "… an Alberta labour arbitrator does not have jurisdiction to make a binding declaration …"[51]

41. As to the clause in *Weber*, "… provided that the legislation empowers the arbitrator to hear the dispute …" neither the *Code* nor the CA "empower the [parties, presidents or the] arbitrator to hear the dispute." The (weaker) Alberta *Code* only "empowers" the decision maker to hear disputes "as to" the interpretation etc. or "with respect to" contravention. The CA goes no further. Neither the Alberta Code nor the CA, then, provide the parties, presidents, or arbitrator the jurisdiction to entertain Viminitz's *Charter* claims (his only claims in this action). Had the CA contained an article compelling the University's compliance with the *Charter*, then any alleged breach of the *Charter* would constitute a dispute "with respect to" the contravention of the CA rendering the matter subject to grievance, but the CA contained no such express article.

42. The ambit of the agreement, for the purpose of the "essential character" test is one which goes no further than the narrow "exclusivity" requirements of the *Code*. It only contemplates, as a "Grievance" only claims that "there has been a violation, improper application or non-application of the terms of [the] collective agreement."

43. We will return to "ambit" shortly.

Application - essential character of the dispute

44. The essential character of the dispute is a freedom of expression (including the right to hear) and freedom of assembly claim arising from the University's cancellation of a non-academic room booking. It does not, in its essential character, arise, either: 1) "as to" the interpretation, application or operation of the CA or "with respect to" its contravention (the narrow framing of exclusivity); or 2) expressly or inferentially, from the interpretation, application, administration, or violation of the collective agreement (the broader framing of exclusivity).[52] This is apparent with reference to the surrounding facts:

    a. The same *Charter* claims are made by three different originating applicants, only one of whom is subject to the CA. It would be irrational to claim that Viminitz's claim "essentially" arises from the

[51] para 156.
[52] *Weber*, para 57 – assuming this to be the correct test based on Alberta's *Code*.

CA where Widdowson's and Pickle's claims – which are nearly identical – arise "essentially" from a totally different source. Viminitz's Charter claims are not "intertwined with" rights under the CA.

b. Unlike the Academic Event, the Non-Academic Event (which was cancelled) was largely unrelated to Viminitz's employment, it: 1) was to take place outside of Viminitz's class, in a public hall; 2) was not a component of Viminitz's course *curriculum*; and 3) was open to anyone including students, staff, faculty or the general public. The "essential character" of the dispute does not, therefore, arise from the "terms and conditions of employment" of Academic Staff[53] as, for example, the claims in *Prodaniuk*[54]

c. The Non-Academic Event was booked by Viminitz with the University pursuant to the Non-Academic Booking Policy which defines a guest lecture as a "non-academic purpose." The CA governs the working conditions of "Academic" Staff.

d. The Non-Academic Event just happened to have been booked by Viminitz. Countless others, who are not bound by the CA, could have booked the Event. It would be irrational to claim that cancellation "essentially" arose from the CA because it happened to have been booked by a person who was subject to the CA. In addition, as set-out in paragraph 28 and d), above, the existence of parties to the dispute which are not subject to the exclusive jurisdiction of a labour arbitrator militates against a finding of exclusivity.

e. The University cancelled the Non-Academic Event under the University's "Statement on Free Expression" which applies to "all members of the University community," not just to parties bound by the CA. It would be irrational to characterize the difference as arising from the CA, when it expressly arose from the "Statement on Free Expression," which applies to everyone, not just academic staff.[55]

f. It is irrational for the University to claim that the essential character of the dispute is one that arises under the CA, having earlier claimed that the CA had no application whatsoever.

45. The cancellation does, however, trigger Viminitz's ancillary rights under the CA. For this reason Viminitz alleged a grievance and the Grievance was filed. Of course, this is irrelevant to the "essential character" of the dispute which is a factual, rather than legal, characterization.[56] Indeed, all of the

[53] See the CA at clause 1.02.1.
[54] *Prodaniuk*, para 78.
[55] Viminitz Affidavit, Exhibit "I".
[56] See paragraph 25, above.

above caselaw is about deciding whether a proceeding commenced by a complainant should be allowed. *Ipso fact*, which proceedings the complainant commenced does not determine essential character.

46. The University's brief states at paragraph 33:

> *The dispute between Viminitz and the University is covered by the Collective Agreement. The "essential character" of the dispute between Viminitz and the University concerns Articles 1.01.2 and 11.01.1 of the Collective Agreement, governing academic freedom, and whether the University breached these principles and its obligations to Viminitz under the Collective Agreement by cancelling the Frances Widdowson Event …*

47. This is not a correct application the "essential character" test. As shown above, The test is not "does the collective agreement in some way 'cover' the dispute?" As shown at paragraph 24 above, the question is whether the dispute, in its essential character, arises within the scope of the arbitrator's exclusive jurisdiction (as defined by the relevant legislation and the collective agreement). For the reasons described above, the dispute here arises entirely independent of the CA.

48. The University's quote seem to stem from *Prodaniuk CA.*[57] Whether a matter "is covered by" the collective agreement is, to some extent, relevant because if the matter "is not covered by" the collective agreement (expressly or inferentially) it cannot be within the arbitrator's exclusive jurisdiction. However, the question to be answered is whether the "essential character" of the dispute is within the exclusive jurisdiction of the arbitrator. It might likewise be observed that, if a difference does not, in its essential character, arise within an arbitrator's exclusive jurisdiction, the fact that it may extend into the ambit of the agreement does not alter the essential character of the dispute.

49. For the reasons outlined at paragraph 44 above, the essential character of the dispute does not arise within the exclusive jurisdiction of the arbitrator.

Application - Ambit of the Collective Agreement Continued

50. Having demonstrated that the "essential character" of the dispute does not arise within the exclusive jurisdiction of the arbitrator, the University's application should be dismissed.

[57] para 8.

51. It should be noted there is some confusion in the caselaw here again tracing back to *Prodaniuk*. In *Weber* the SCC stated, in connection with the prevailing exclusive jurisdiction model:

> *On this approach, the task of the judge or arbitrator determining the appropriate forum for the proceedings centres on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered: the dispute and the ambit of the collective agreement.*

52. In *Morin* the SCC stated, in connection with a competing claim of jurisdiction of the Quebec Human Rights Tribunal (which ultimately prevailed):

> *This question suggests two related steps. The first step is to look at the relevant legislation and what it says about the arbitrator's jurisdiction … The second step is to look at the dispute in issue to determine whether it falls withing the ambit of the arbitrator's exclusive jurisdiction.*[58] *[emphasis added]*

53. *Horrocks* similarly stated that:

> *… First, the relevant legislation must be examined to determine whether it grants the arbitrator exclusive jurisdiction and, if so, over what matters … the next step is to determine whether the dispute falls within the scope of that jurisdiction … The scope of an arbitrator's exclusive jurisdiction will depend on the precise language of the statute but, in general, it will extend to all disputes that arise, in their essential character, from the interpretation, application, or alleged violation of the collective agreement. This requires analysing the ambit of the collective agreement and accounting for the factual circumstances underpinning the dispute … The relevant inquiry is into the facts alleged, not the legal characterization of the matter …*[59]

54. In *Prodaniuk* the lower Court, first, characterized the "essential character" of Ms. Prodaniuk's claim as "workplace harassment" etc. and then "… proceed[ed] to the second issue in the exclusive jurisdiction analysis: the ambit of the collective agreement. … In my view the plaintiff's … claims … arise expressly or inferentially from the interpretation, application, operation or alleged violation of the collective agreement."[60]

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[58] Morin, paras 15 and 20.
[59] para 39 and 40
[60] para 79.

55. This seems to divide the indivisible. The first step is to look at the legislation and collective agreement to determine over what matters a body has exclusive jurisdiction. The whole second step is to determine whether the "essential character" of the dispute is one that arises within that exclusive jurisdiction. It is incorrect, therefore, to separately: 1) characterize the "essential character" of the dispute; 2) then look at the ambit of the agreement.[61] To separate the two aspects of the test renders the "essential character" portion of the test an exercise in labelling detached from the scope of exclusivity and, therefore, collapses the entire test into "ambit." For reasons explained above, this is not the correct test.

56. In any case, applying the *Prodaniuk* approach to Viminitz's claim also leads to the dismissal of the University's application: 1) The essential character of the dispute is a freedom of expression (including the right to hear) and freedom of assembly claim which is shared by academic staff, students and the public, arising from the University's cancellation of a "non-academic" room booking; 2) Such claims do not arise expressly or inferentially from the interpretation, application, operation or alleged violation of the collective agreement and, in fact, are not subject to Grievance at all. To put that into the language applicable to Rule 3.68(2)(a), it is not plain and obvious that the Court lacks jurisdiction over the dispute. In fact, it is plain and obvious the Court retains jurisdiction over the dispute.

Real Deprivation of Ultimate Remedy

57. Given that the University has claimed that cancellation of the Academic Event was governed by the CA and the Non-Academic Event was not, and given the wording of the CA which, to some extent, supports this argument, it is entirely possible the University will take the position that the cancellation is not subject to Grievance under the CA.

58. In addition, for the reasons outlined in paragraph 41, above, even had the Grievance alleged *Charter* violations (which it does not), the arbitrator has no jurisdiction to entertain such claims.

59. Finally, the above caselaw indicates that, notwithstanding the Regs, arbitrators have no jurisdiction to make a binding declaration.

60. Therefore, to strike Viminitz's claim is to deprive him of his ultimate (and, possibly, any) remedy.

61. This Court should therefore, exercise its residual jurisdiction.

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[61] Although note that, in connection with "ambit" the Court queried whether it "arose expressly or inferentially from … the agreement" – which was the scope of exclusivity set out in *Weber* (based on Ontario's legislation).

Alternate Remedies

62. A Court may exercise discretion to refuse judicial review where an applicant has not exhausted internal administrative processes which provide adequate alternative remedies.[62]

63. This rule has no application here. For the reasons outlined above, Viminitz has no alternative but judicial review. The CA does not grant the arbitrator jurisdiction to entertain his Charter claim. As to Viminitz's claims under the CA (which are not the subject of this action), Viminitz is pursuing those claims via "internal administrative processes" – i.e. by way of grievance.

64. To the extent the "essential character" test results in the Court taking jurisdiction (notwithstanding the ancillary matters "covered by" the CA) the *St Anne* line of cases do not contemplate a "second kick at the can" by application of the Strickland test. In other words, the *St Anne* line of cases is a comprehensive test for jurisdiction.

65. In the alternative, *Strickland* indicates that this Court should not decline jurisdiction. Strickland identifies a number of factors to consider when deciding whether to refuse a judicial review including:

    a. the convenience of the alternative remedy and expeditiousness – there is no evidence the Grievance has proceeded even to the informal resolution phase;

    b. the nature of the error alleged and the relative expertise of the alternative decision-maker – this is purely a Charter claim over which the Courts have relatively greater expertise[63] than labour arbitrators;

    c. the nature of the other forum which could deal with the issue, including its remedial capacity – the arbitrator has no jurisdiction to deal with Viminitz's *Charter* claims under the CA and no power to grant binding declarations;

    d. economical use of judicial resources – unlike in the cases cited by the University, the within originating application for judicial review will continue regardless of Viminitz's inclusion or exclusion. No material savings of judicial resources would be expected if this Court struck Viminitz. Nearly identical issues have to be determined with respect to Pickle and Widdowson. In fact, should the Court strike Viminitz, the Charter issue would be fragmented and duplicated between

[62] *Strickland v. Canada (Attorney General)*, 2015 SCC 37 ("***Strickland***") at paras 40-41.
[63] See *Weber*, para 16 (dissenting opinion)

the Court (handling the Charter claims as they relate to Widdowson and Pickle) and the arbitrator. It is only by striking Viminitz that this Court would risk conflicting decisions.

66. The test is a balancing exercise that takes into account the "suitability and appropriateness of judicial review" and "the purposes and policy considerations underpinning the legislative scheme in issue."[64]

67. The policy considerations that underpin labour legislation in Canada are (1) the prevention of unrest in the labour force or interruption to industry; and (2) an expeditious manner of resolving labour disputes.[65] There is no evidence of a threat of a strike or disruption to Viminitz's duties to his employer.

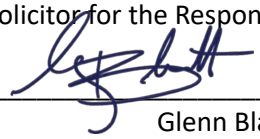
68. This Courts remains the only and best forum to handle Viminitz's claims. It is not plain and obvious that this Honourable Court this should dismiss Viminitz on this basis.

V. CONCLUSION

69. The respondents request that the Court dismiss the applicants' application – it is not plain and obvious this Court has no jurisdiction.

All of which is respectfully submitted at Calgary, Alberta, this 13th day of December 2023

GLENN BLACKETT LAW
Solicitor for the Respondents



Glenn Blackett

[64] *Strickland* at paras 43-44.
[65] *Weber* at para 51.

VI. LIST OF AUTHORITIES

1. *A.T.U., Local 583 v. Calgary (City)*, 2007 ABCA 121
2. *Northern Regional Health Authority v. Horrocks,* [2021] 12 W.W.R. 1
3. *Prodaniuk v Calgary (City)*, 2023 ABCA 165
4. *Prodaniuk v. Calgary (City)*, 2021 ABQB 906
5. *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Québec (Procureure générale)*, [2004] 2 S.C.R. 185
6. *St. Anne Nackawic Pulp and Paper v. CPU, Local 219*, [1986] 1 S.C.R. 704
7. *Strickland v. Canada (Attorney General)*, 2015 SCC 37
8. *Weber v. Ontario Hydro [1995]*, 2 S.C.R. 929