IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***UFCW International v. Finnamore et al.,***
2005 BCSC 1454

Date: 20051018
Docket: S014921
Registry: Vancouver

Between:

United Food and Commercial Workers International Union and David W. Watts on his own behalf and on behalf of all of the members of the United Food and Commercial Workers International Union

Plaintiffs

And

Hugh John Finnamore and Workplace Strategies Inc.

Defendants

Before: The Honourable Madam Justice Gray

Reasons for Judgment

Counsel for the Plaintiffs:	Robert W. Taylor, Miriam Vale
Acting on Behalf of the Defendants:	Hugh John Finnamore In Person
Date and Place of Trial:	April 14, 15, 2005 Vancouver, B.C.

INTRODUCTION

[1] The personal defendant, Mr. Finnamore, was employed by the plaintiff United Food and Commercial Workers International Union ("UFCW International") for a period ending July 4, 1995. During this employment, he was a member of the United Food and Commercial Workers Staff Union, a local of the Communications, Energy and Paperworkers, C.U.R.E. Local 2 ("CEP").

[2] Mr. Finnamore, UFCW International, and CEP executed a written "Terms of Settlement and Release" ("Settlement Agreement") dated October 27, 1995. UFCW International has applied under Rule 18A for an order requiring Mr. Finnamore to comply with the Settlement Agreement, or alternatively, a permanent injunction restraining him from acts including interfering with UFCW International's business.

[3] The plaintiffs were represented at the hearing of this Rule 18A summary trial application by Mr. Taylor and Ms. Vale. Mr. Finnamore acted for himself and the corporate defendant, referred to in these reasons for judgment as "Workplace". The hearing proceeded on the basis of affidavits and, with the agreement of Messrs. Taylor and Finnamore, copies of documents from two other lawsuits in this court.

[4] The documents from ***Finnamore v. Whitlock***, No. C953474, Vancouver Registry ("Finnamore Petition") consisted of the amended petition, affidavit of Hugh Finnamore sworn June 14, 1995 (without exhibits referred to), and consent dismissal order dated January 5, 1996. The documents from ***Workplace Strategies, Inc. v. United Food and Commercial Workers, International Union, Local 777*** ("UFCW

Local 777"), No. C952604, Vancouver Registry ("Workplace Lawsuit") consisted of the amended statement of claim, statement of defence of Mr. Whitlock, statement of defence and counterclaim of UFCW Local 777, and statement of defence to counterclaim.

[5] There were some contradictions between the evidence filed on behalf of the plaintiffs and of the defendants. The affidavits also included hearsay, which is ordinarily inadmissible on a Rule 18A application.

[6] Both the plaintiffs and the defendants accuse the other of acting in breach of the Settlement Agreement. Mr. Finnamore has been publicly criticising international unions, in a way that UFCW International alleges reflect on it in particular. Mr. Finnamore says that these things should be said, and that the terms of the Settlement Agreement that suggest that he should not say them should not be enforced. Alternatively, he says that he has been relieved of the obligation to comply with those terms as a result of UFCW International's conduct.

[7] The clauses of the Settlement Agreement that the plaintiffs seek to enforce are the following:

> 3.2 Finnamore agrees that he will not interfere directly or indirectly with the business of the UFCW International.
>
> 4.2 Except as required by law or permitted by section 4.4 or with approval of [UFCW International], Finnamore shall not disclose to anyone any information, however, or whenever acquired, about the business or any activity of [UFCW International], a Local of it, or the Trustees, or any employee, member or officer of any of them.

> 4.3 Except as permitted by section 4.4, Finnamore shall refrain from contact with a party to this agreement or a UFCW member or employee on any aspect of [UFCW International] or any Local's affairs or any aspect of the terms and conditions of employment covered by a collective agreement or representation by a member, by any Local or the members (sic) exercise of his rights or performance of his obligations under the Constitution and bylaws of [UFCW International] or any Local.
>
> 4.4 The parties may advise any person that:
>
> (1) all disputes between Finnamore and all other parties were settled by agreement on October 27, 1995; and
>
> (2) the settlement included withdrawal by [UFCW International] of both its letter of July 4, 1995 and withdrawal by Finnamore of his letters to [UFCW International] on and after March 22, 1995.

ISSUES

[8] This application raises the following issues:

(a) Was there an accepted repudiation of the Settlement Agreement with the effect that any enforceable continuing obligations of the defendants ended?

(b) Would the relief sought infringe the defendants' ***Charter*** guarantee of freedom of expression?

(c) Are the relevant terms of the Settlement Agreement void and unenforceable as a matter of public policy because they are in restraint of trade and are unreasonably broad in the circumstances?

(d) Are the terms of the Settlement Agreement uncertain?

(e) Is the question of “balance of convenience” relevant to the plaintiffs’ application?

(f) Should the plaintiffs be denied the equitable relief of injunction because they lack “clean hands” or because they have delayed in pursuing their remedy?

(g) Are the plaintiffs entitled to an injunction even though they have not sought a declaration that the defendants have breached the Settlement Agreement?

(h) Are either the plaintiffs or the defendants entitled to special costs?

FACTS

[9] UFCW International is an international trade union which carries on business throughout Canada and the United States. It has about 750 affiliated local unions throughout North America, which in turn represent about 1.4 million workers. UFCW Canada Locals 1518 and 247 are certified to represent workers in B.C. UFCW International is the largest private sector union in North America, and it or its predecessors have existed since 1888.

[10] UFCW International is an unincorporated association. It is not recognized as a trade union in B.C. pursuant to the ***Labour Relations Code***, R.S.B.C. 1996, c. 244. While it is a trade union under the ***Canada Labour Code***, R.S.C. 1985. c. L-2, it does not represent members locally in arbitrations or collective bargaining or before the labour relations board. It assists members in other ways, such as dealing

with the federal government and other trade unions. Because there is some doubt whether UFCW International has the legal capacity to sue for defamation, Mr. Watts has sued as a representative plaintiff on behalf of all of the members of UFCW International.

[11] Mr. Finnamore describes himself as a labour relations practitioner and labour journalist. He makes his living by providing labour relations advice to individuals and organizations, and by writing labour commentaries for the National Post newspaper and other publications. He has represented the Teamsters, Textile Processors Union, and UFCW.

[12] The defendant Workplace is a B.C. company of which Mr. Finnamore is the corporate secretary and the sole employee.

[13] Mr. Finnamore was employed by UFCW Local 777 from about January 1989 to about August 7, 1994.

[14] On or about August 7, 1994, Mr. Finnamore commenced working with UFCW International as an international representative. He was a member of CEP, which was certified to represent the employees of UFCW International.

[15] On May 8, 1995, lawyers on behalf of Workplace commenced the Workplace Lawsuit. Workplace alleged that it had leased certain equipment, including computer equipment, from UFCW Local 777 for the production of a newsletter for UFCW Local 777 entitled “Union Pulse”. It also alleged that UFCW Local 777 had agreed to pay Workplace about $2,300 per month until August 1, 1999 for consulting

work, and that UFCW Local 777 had taken the position that Workplace had breached this agreement. Mr. Whitlock, then president of UFCW International, did not become a defendant to the Workplace lawsuit until June 15, 1995. Workplace alleged that if the agreements were not binding on UFCW Local 777, Mr. Whitlock was liable personally.

[16] In its statement of defence, UFCW Local 777 alleged that the agreements were unauthorized, contrary to public policy, and void. It alleged that Workplace was Mr. Finnamore's alter ego. It alleged that the agreements were contrary to public policy because Mr. Finnamore was employed by UFCW International at the time, and he was prohibited from receiving a financial benefit from a local. Alternatively, it alleged that Workplace breached its consultancy agreement by revealing confidential information about UFCW Local 777. UFCW Local 777 counterclaimed for return of items it alleged Workplace had wrongfully removed from UFCW Local 777's offices.

[17] In his statement of defence, Mr. Whitlock alleged that he executed the lease and consultancy agreement with the authority of UFCW Local 777.

[18] On or about July 4, 1995, Mr. Finnamore left the employment of UFCW International. UFCW International took the position that it had cause to dismiss him and provided him with particulars of the alleged cause.

[19] CEP filed a grievance on behalf of Mr. Finnamore, asserting that he had been wrongfully dismissed. I refer to this as the "Grievance".

[20] On June 19, 1995, lawyers acting on behalf of Mr. Finnamore commenced the Finnamore Petition. In this lawsuit, Mr. Finnamore alleged that the affairs of the UFCW Local 777 Education and Training Fund Trust ("Education Trust") had not been conducted properly, and sought an order for an independent audit of the Education Trust. In his affidavit, Mr. Finnamore deposed that he was a trustee of the Education Trust for the period ending March 22, 1995, but that Mr. Whitlock had deposed that Mr. Finnamore had not been a trustee for at least two years before that. Mr. Finnamore alleged that a number of cheques had been signed on behalf of the Education Trust by unauthorized people, and funds of the Education Trust had been deposited to an account belonging to another entity. Mr. Finnamore deposed that UFCW International had transferred him to Alberta owing to tension between him and the union president, Mr. Whitlock, who was one of the respondents to the Finnamore Petition.

[21] In October 1995, a number of parties agreed to settle the Grievance, the Workplace Lawsuit, and the Finnamore Petition. They entered into an Interim Settlement Agreement dated October 27, 1995 for reference. It required the parties to enter into three final settlement agreements. One was to settle all matters between Mr. Finnamore and the trustees; another to settle all matters between Workplace, UFCW Local 777, and Mr. Whitlock; and the third to settle all matters between Mr. Finnamore, CEP, and UFCW International. The latter agreement is the one referred to in these reasons as the Settlement Agreement. Another term of the Interim Settlement Agreement was that Mr. Finnamore would provide consulting services to UFCW Local 777 in exchange for $114,000 payable over 48 months.

[22] The terms of the Settlement Agreement are as follows:

TERMS OF SETTLEMENT AND RELEASE

BETWEEN:

HUGH JOHN FINNAMORE

("Finnamore")

AND:

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, an international union with a head office in Toronto, Ontario

(the "International")

AND:

UNITED FOOD AND COMMERCIAL WORKERS STAFF UNION, a local of the COMMUNICATIONS, ENERGY AND PAPERWORKERS, C.U.R.E. LOCAL 2

("CEP")

WHEREAS: Finnamore is an employee of the International; and

WHEREAS: Finnamore was dismissed from his employment by letter of termination dated July 4, 1995; and

WHEREAS: CEP has a Grievance outstanding with respect to the termination of Finnamore (the "Grievance");

NOW THEREFORE, in consideration of the settlement of the Grievance, Finnamore and the International agree as follows:

1.0 Finnamore Resignation

1.1 Finnamore agrees to resign from his employment as an International Representative of the International effective July 4, 1995.

1.2 Finnamore agrees to resign as a member of the UFCW Local 777, effective July 4, 1995.

1.3 Finnamore agrees to withdraw from the election of officers of UFCW Local 777 effective October 27, 1995.

1.4 Finnamore agrees to instruct CEP to withdraw the Grievance filed on his behalf, effective October 27, 1995.

1.5 Finnamore agrees to release CEP from any claim that he may have against them for unfair representation.

1.6 Finnamore agrees to withdraw his letters to the International written and delivered on or after March 22, 1995.

2.0 International Allegations

2.1 The International agrees to withdraw and destroy all copies of the letter of termination of Finnamore dated July 4, 1995.

2.2 The International agrees that Tom Hesse will act as an employment reference for Finnamore and the International agrees to direct all enquiries regarding Finnamore's employment with the International to Tom Hesse.

3.0 Interference with the UFCW

3.1 Finnamore agrees that he will not attempt to organize employees in competition with the UFCW, or raid any current members of the UFCW.

3.2 Finnamore agrees that he will not interfere directly or indirectly with the business of the UFCW International.

3.3 The International agrees to release Finnamore from the terms of Article 25 of the UFCW Constitution.

4.0 Confidentiality

4.1 Except as required by law or permitted by section 4.4., no Party shall disclose to anyone the terms, or the facts or matters leading to the formation, of these Terms of Settlement or any agreement made pursuant to it.

4.2 Except as required by law or permitted by section 4.4 or with approval of the International, Finnamore shall not disclose to anyone any information, however or whenever acquired, about the business or any activity of the International, a Local of it, or the Trustees, or any employee, member or officer of any of them.

4.3 Except as permitted by section 4.4., Finnamore shall refrain from contact with a party to this agreement or a UFCW member or employee on any aspect of the International or any Local's affairs or any aspect of the terms and conditions of employment

covered by a collective agreement or representation by a member, by any Local or the members exercise of his rights or performance of his obligations under the Constitution and bylaws of the International or any Local.

4.4 The Parties may advise any person that:

(1) all disputes between Finnamore and all other parties were settlement by agreement on October 27, 1995; and

(2) the settlement included withdrawal by the International of both its letter of July 4, 1995 and withdrawal by Finnamore of his letters to the International on and after March 22, 1995.

5.0 Legal Fees

5.1 The International will pay to Munro Parfitt Lawyers, forthwith upon assessment the legal fees and disbursements Workplace is liable to pay for the commencement of Action No. C952604 and subsequent proceedings on it to and including October 28, 1995.

6.0 Releases

6.1 Finnamore in consideration of the covenants contained in these Terms of Settlement, hereby releases the International from all manner of claims that Finnamore may now or in the future have against the International arising out of or in connection with his employment as an International Representative from August 8, 1994 through July 4, 1995 with respect to which a Grievance was filed on July 4, 1995.

6.2 The International in consideration of the covenants contained in these Terms of Settlement, hereby releases Finnamore from all manner of claims that the International may now or in the future have against Finnamore arising out of or in connection with his employment as an International Representative from August 8, 1994 through July 4, 1995 with respect to which a Grievance was filed on July 4, 1995.

6.3 Finnamore hereby instructs CEP and its solicitor to withdraw the above mentioned grievance, without costs to any Party.

> 6.4 It is expressly understood and agreed that nothing in these Terms of Settlement and Release constitutes an admission of liability on the party of any Party.
>
> 6.5 These Terms of Settlement and Release contain the entire agreement between the Parties and there are no agreements collateral to this Settlement Agreement and Release or any representations or warranties other than those herein contained.
>
> IN WITNESS WHEREOF the Parties have set their respective hands and seals as of October 27, 1995.

[23] Article 25(D) of the 1993 UFCW Constitution read as follows at that time:

> ARTICLE 25 Duties and Obligations
>
> (D) Elected and appointed representatives of the International Union and its Local Unions serve in a position of trust and responsibility and obtain information and confidences and develop abilities which should not be employed in a manner injurious to the best interests of the International Union or its Local Unions; therefore, all such representatives, in the event of termination for any reason whatsoever, assume the obligation not to seek or obtain employment or position or work with, or in, any dual or other organization antagonistic to or in conflict with the objectives, activities, policies, or jurisdiction of the International Union or any of its Local Unions. This obligation shall continue for a period of one year from termination and extends to such geographical areas as may be necessary to protect the International Union or any of its Local Unions. This provision shall in no respect be applied in derogation or limitation of any rights provided for under the United Food and Commercial Workers International Union Pension Plan for Employees or the United Food and Commercial Workers International Union Health and Welfare Plan for Retired Employees.

[24] Mr. Finnamore was represented by legal counsel at the time that he executed the Settlement Agreement. The Grievance was withdrawn. Mr. Finnamore's lawyer sent UFCW International the executed Settlement Agreement and Mr. Finnamore's letter of resignation from employment as an international representative of UFCW International. Mr. Finnamore also signed a letter of resignation as a member of

UFCW Local 777. The International Vice-President of UFCW International signed a letter dated October 31, 1995, marked “without prejudice or precedent”, stating that UFCW International released Mr. Finnamore from all responsibilities he might have under Article 25 of the International Constitution of July 1993.

[25] On January 5, 1996, the court entered a consent order dismissing the Finnamore Petition as if tried on the merits. The evidence did not disclose details of dismissal of the Workforce Lawsuit but it was apparently dismissed as well.

[26] Mr. Finnamore stated in argument that he abided by the Settlement Agreement for four years, and provided consulting services for four years ending November 30, 1999.

[27] On October 7, 2000, the National Post, a Canada-wide daily newspaper, printed an article (“First NP Article”) written by Mr. Finnamore entitled “Let’s shed some sunshine on union bosses’ pay”. UFCW International says that this article is in breach of sections 3.2 and 4.2 of the Settlement Agreement.

[28] The First NP Article states that three UFCW union bosses gave themselves retroactive 65% salary increases for 2000. It included the following passage:

> I was a union official with several international unions, one of which was the UFCW. One of our most tightly held secrets was the money spent on each one of us. We had excuses for the flashy cars, we refused to disclose our salaries to our members, and we sure as heck didn't reveal our perquisites. Houses and cars as retirement gifts are well hidden in the books. When you have hundreds of local unions, you can extract a thousand here and two thousand there without raising any suspicion from the members.

[29] On October 20, 2000, counsel for UFCW International wrote to Mr. Finnamore's legal counsel, alleging that his recent article in the National Post was in violation of the Settlement Agreement. The letter asks for Mr. Finnamore's position.

[30] On October 25, 2000, Mr. Finnamore responded by letter on the letterhead of Workplace. He took the position in this letter that the restrictive covenant in the Settlement Agreement was invalid. He also requested what he termed "particulars" of the allegedly offending statements. There was no evidence that UFCW International responded to this letter.

[31] On February 11, 2001, Mr. Finnamore appeared on Peter Warren's radio talk show program, broadcast in B.C. and other places in North America ("Warren Broadcast"). The plaintiffs allege that Mr. Finnamore's comments were in breach of the Settlement Agreement. Mr. Finnamore argued that he did not understand what allegedly contravenes the Settlement Agreement.

[32] In the Warren Broadcast, Mr. Finnamore referred to UFCW International and stated that some UFCW workers uncovered information that the president of Local 175 in Ontario was chairman of the board of a company which employed UFCW members and negotiated contracts with them. Mr. Finnamore also said that organized crime had been an institution within organized labour in North America for years.

[33] On May 22, 2001, the National Post published an article ("Second NP Article") written by Mr. Finnamore entitled "Loblaws sweetheart union deals could be turning sour". This article referred to a secret 65% wage increase for the UFCW union elite. Again, the plaintiffs allege that Mr. Finnamore's comments were in breach of the Settlement Agreement.

[34] Mr. Finnamore sought to provide evidence that in May 2001, an agent for UFCW International told the editor of the financial post section of the National Post that Mr. Finnamore had been dismissed from UFCW International for dishonesty. The evidence Mr. Finnamore provided was hearsay and inadmissible in a Rule 18A proceeding. However, the fact that Mr. Finnamore wrote to UFCW International demanding an apology for this conduct is admissible.

[35] Mr. Fraser, Vice-President of UFCW International and director of UFCW Canada, wrote Mr. Finnamore a letter in response dated May 28, 2001, which reads as follows:

> This will serve to inform you that UFCW Canada neither acknowledges nor agrees with the accuracy of the statements you reported as having been made to Mr. Terence Corcoran by Mr. Bill Reno. We do not apologize for any statement to the effect of you being guilty of theft of union funds.
>
> It is a fact that your employment with the UFCW was terminated for reasons of embezzlement, fraud, misappropriation of UFCW funds and with respect to your whereabouts while on assignment. You subsequently resigned from employment with the UFCW, amidst the charges I have cited, as a requirement of an October 27, 1995 agreement (attached) you requested and signed following the termination of your employment. The 1995 agreement served to further confirm the end of your employment with the UFCW.

> You have violated the 1995 agreement numerous times by, among other things, interfering with the UFCW on several occasions that we know of and probably many more that we do not know of. In some of those instances you accused the UFCW of setting up or participation in employer-friendly relationships, when it was you who set-up at least one employer-oriented union for your own gain - not for the gain of those whom you were meant to represent. The 1995 agreement you signed was primarily designed by you to protect yourself from being exposed to public scrutiny of your own questionable actions.
>
> We have for some time felt released from the 1995 agreement because of your public violations of it. The so-called facts you have relied on are not facts. They are a tissue of factoids. They are wrong and false, and have been obsessively intended by you to have a maximum negative effect in undermining the character, credit and reputation of the UFCW.
>
> We are disappointed it has come to this. We had hoped that you would live up to the 1995 agreement, but you did not. We have had enough of your nonsense. Because we have had to endure your numerous violations of the 1995 agreement, not to mention the lies you have told about us, we are no longer going to refrain from telling the truth about you.
>
> Take notice that should you make any more defamatory or false comments about the UFCW, as you did in your May 22, 2001 article in the National Post/Financial Post, we will respond according to what we deem appropriate.
>
> Should you decide to proceed with your threatened lawsuit, we will vigorously and publicly defend ourselves and rely in our defence on the facts and documents that will unequivocally establish you wilfully committed intolerable wrong doings against the UFCW and its members.
>
> We welcome an opportunity to make our case in court. The truth will bear out our case - not yours.

[36] On May 28, 2001, Mr. Finnamore sent an email message to Mr. Fraser. In this email message, Mr. Finnamore wrote that:

> I accept your advice that '[the UFCW International has] for some time felt released from the 1995 agreement because of [my] public

> violations of it.' Though I do not believe that I have ever violated the agreement, I assume that if you 'feel' the UFCW is released then, you 'feel' that I am released as well. Thank you for advising me of my release, though such wasn't legally warranted.

[37] Mr. Fraser did not respond.

[38] Mr. Finnamore complained that UFCW Local 501 published material falsely alleging that there had been cause for Mr. Finnamore's dismissal. He demanded an apology from that local, but did not receive one. He argued that UFCW International must have disclosed the alleged basis of the cause for his dismissal to the UFCW Local 501, because otherwise the local could not have obtained this information. He argued that UFCW International's conduct was contrary to the Settlement Agreement.

[39] This lawsuit was commenced on August 31, 2001. At that time the only plaintiff was UFCW International. The lawsuit claimed relief related to alleged defamation and alleged breach of the Settlement Agreement.

[40] The statement of claim in this lawsuit made a number of allegations. One was that UFCW International had cause to dismiss Mr. Finnamore. Another was that in 2000 and 2001, Mr. Finnamore, with the authority of Workplace, made a number of statements which were defamatory of UFCW International, and were published in newspapers or on radio or on web sites. It alleges that Mr. Finnamore breached the Settlement Agreement by making the allegedly defamatory statements, and that he made them maliciously. The relief sought included damages, and an order

restraining Mr. Finnamore from publishing or encouraging the continued publication of defamatory statements, and from breaching the Settlement Agreement.

[41] In May, June, and October 2001, Mr. Finnamore sent email messages to Shauna Holmes, the registrar of the Alberta Pension Commission, regarding the Canadian Commercial Workers' Industry Pension Plan ("CCWIPP"). That Plan is a multi-employer, trusteed pension plan with management and union trustees which was registered in Alberta at that time. Among the union trustees are representatives of UFCW Canada.

[42] Mr. Taylor, counsel for the plaintiffs, advised that CCWIPP is one of several pension plans for UFCW International members, and that collective agreements permit money to be pooled to maximize the benefits. Mr. Finnamore denied that it is a "union" pension plan, saying that it is not owned or run by unions, although the trustees come from both union and management sides.

[43] It is the position of the plaintiffs that communication by Mr. Finnamore regarding CCWIPP is indirect interference with UFCW International because the pension plan is one of the benefits the union provides to its members.

[44] Mr. Finnamore's email messages include the statement that "CCWIPP seems to be involved in a number of odd investment schemes", and "I am a former official with the Teamsters Union, Textile Processors Union and the UFCW." He also wrote "I note that the UFCW has a history of using pension funds to buy members from other unions. They trade lucrative pensions for the other union's executives in return

for a merger." He suggested that the UFCW sold property at below market value to supporters.

[45] Individuals named Sharyn Sigurdur and Kelsey Sigurdur maintain a website known as the “Members for Democracy” or “MFD”. Its prior names referred specifically to UFCW, and the universal resource locator (commonly called a "URL") was and continues to be www.ufcw.net. Many of the postings on this website are attributed to current members of UFCW locals. Mr. Finnamore has been a regular contributor to the MFD website. The postings include copies of the First NP Article, the Second NP Article, and the audio version of the Warren Broadcast.

[46] Mr. Finnamore wrote a letter dated October 5, 2001 on Workplace letterhead to Mr. Taylor as counsel for UFCW International. In the letter, he alleged that UFCW International had published comments which defamed him. He asked for a written apology. There was no evidence that UFCW International responded to this letter.

[47] On February 19, 2002, UFCW International commenced a lawsuit against Sharyn and Kelsey Sigurdur and John and Jane Doe carrying on business under the name Members for Democracy. The action is still pending.

[48] In 2002, the CCWIPP moved to Ontario and is now registered there.

[49] In or before July 2002, Mr. Finnamore sent a letter to Mr. Geoff Wilson, Vice-President, Industry & Investor Relations for Loblaw Companies Limited. It made a number of allegations about the operation of CCWIPP, and asked a number of

questions. At the request of Loblaw Companies Limited, copies were sent to all of the CCWIPP trustees and its auditor, BDO Dunwoody.

[50] On April 14, 2003, the National Post published an article entitled “UnReal Campaign” with Mr. Finnamore’s by-line (“Third NP Article”).

[51] On July 25, 2003, the National Post published an article entitled “A Sweetheart Deal” with Mr. Finnamore’s by-line (“Fourth NP Article”).

[52] On January 10, 2005, the writ of summons and statement of claim in this lawsuit were amended to add the second plaintiff, Mr. Watts on behalf of UFCW International. Mr. Watts is the executive assistant to the national director of UFCW International.

[53] Apart from making the application to amend the pleadings and making this Rule 18A application, the plaintiffs have not pursued this litigation. No trial date or examinations for discovery have been set and discovery of documents is incomplete. The Notice of Motion on this Rule 18A application was dated October 3, 2003, but the hearing did not proceed until April 14 and 15, 2005.

[54] During argument, Mr. Taylor advised that UFCW International offered to undertake to fully abide by its obligations under the Settlement Agreement if the court will grant the injunction sought. In making this offer, Mr. Taylor did not concede that UFCW International had been in breach of the Settlement Agreement.

ORDER SOUGHT

[55] The order sought by the plaintiffs is in the following terms:

> An order enforcing sections 3.2, 4.2 and 4.3 of the Settlement Agreement, and further, or in the alternative,
>
> An order prohibiting Finnamore from the following:
>
> (a) interfering directly or indirectly with the business of the plaintiff;
>
> (b) disclosing to anyone any information, however or whenever acquired, about the business or any activity of the UFCW, a local of the UFCW International, or the Trustees, or any employee, member or officer of any of them, except as required by law or with the approval of the UFCW International; and
>
> (c) contacting the parties to the Settlement Agreement, or a UFCW member or employee on any aspect of the UFCW International's or any local's affairs or any aspect of the terms and conditions of employment covered by a collective agreement or representation by a member, by any Local or the members exercise of his rights or performance of his obligations under the constitution and bylaws of the UFCW International or any local.

[56] Both parties seek special costs.

ANALYSIS

Repudiation

[57] Even if the defendants had enforceable continuing obligations under the Settlement Agreement, if that contract was repudiated, the continuing obligations ended. For the purpose of considering the plaintiffs' entitlement to an injunction, it is therefore appropriate to first consider the issue of repudiation.

[58] Mr. Finnamore argued that UFCW International had repudiated the Settlement Agreement by word and deed on and after May 28, 2001. He referred to the May 28, 2001 letter from Mr. Fraser, and the allegations made by UFCW International in this lawsuit regarding cause for Mr. Finnamore's dismissal.

[59] Mr. Taylor argued that the May 28, 2001 letter could not in law be a repudiation of the Settlement Agreement by UFCW International because most of the obligations under the Settlement Agreement had been performed. He referred to ***Wilson v. Graydon Hall Pizza and Catering Ltd.*** (1994), 11 B.C.L.R. (2d) 266, [1994] O.J. No. 25, aff'd [1996] O.J. No. 1661 (Ont. C.A.). He argued that to constitute repudiation, a breach of contract must go to the root of the contract, and that here, the root of the Settlement Agreement was the settlement of the Grievance and the lawsuits, rather than the parties keeping silent about each other.

[60] A classic statement of what constitutes a repudiation is the following from ***Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.,*** [1962] 2 Q.B. 26 at 66, [1962] 1 All E.R. 474 at 495 (C.A.), where Lord Diplock said:

> … where an event occurs the occurrence of which neither the parties nor Parliament have expressly stated will discharge one of the parties from further performance of his undertakings, it is for the court to determine whether the event has this effect or not. The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit of which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings.

[61] The court may conclude that there is a repudiation when one party indicates, through words or conduct, that he or she no longer intends to be bound by the contract. The court must examine the words and conduct objectively, and determine whether they are such as to lead a reasonable person to conclude that the other party does not intend to fulfil or is incapable of fulfilling his or her part of the contract. See ***Sanko Steamship Co. Ltd. v. Eacom Timber Sales Ltd***. (1986), 32 D.L.R. (4th) 269, 8 B.C.L.R. (2d) 69 (S.C.), citing ***Universal Cargo Carriers Corp. v. Citati***, [1957] 2 Q.B. 401.

[62] In ***Morrison-Knudsen Company Inc. v. British Columbia Hydro and Power Authority***, [1978] 4 W.W.R. 193 at p. 245, 85 D.L.R. (3d) 186 (B.C.C.A.), the court explained as follows:

> …When faced with a fundamental breach the innocent party to a contract may elect to affirm the contract and hold the other party to the performance of its contractual obligations and sue as well for damages. On the other hand, he may elect to accept the breach as a repudiation of the contract. This is an election between inconsistent rights. It must generally be made with promptitude and communicated to the other party, and, once made, it is irrevocable.

[63] See also ***Norfolk v. Aikens*** (1989), 41 B.C.L.R. (2d) 145, 64 D.L.R. (4th) 1 at 15 (B.C.C.A.), where Southin J.A. said as follows:

> The true proposition is this: If one party repudiates the contract, the other has a choice:
>
> (a) He may accept the repudiation and if he does both parties are relieved from the obligation of further performance. Thereupon the contract is the measure of the damages of the innocent party, or
>
> (b) He may decline to accept the repudiation thereby keeping the contract alive in all respects for both parties.

[64] Acceptance of repudiation may be expressed in words or may be reasonably inferred from the circumstances. See ***Canada Egg Products Ltd. v. Canadian Doughnut Co. Ltd.***, [1955] S.C.R. 398, [1955] 3 D.L.R. 1.

[65] In this case, each party accuses the other of having breached the Settlement Agreement. UFCW International relies on the publications, while Mr. Finnamore sought to rely on the inadmissible evidence that UFCW International's agent defamed him to a National Post editor, and on inferences arising from UFCW Local 501 making assertions about his dismissal.

[66] The Settlement Agreement provided both for continuing obligations and immediate ones.

[67] The immediate obligations of Mr. Finnamore were to resign from employment and membership, withdraw from an election, and to instruct CEP to withdraw his Grievance. UFCW International agreed to release Mr. Finnamore from the terms of Article 25 of the Constitution, to direct enquiries about Mr. Finnamore to Mr. Hesse, and to pay Workplace's legal fees. All of these contractual obligations were promptly performed.

[68] Both Mr. Finnamore and UFCW International had continuing obligations. Both of them were required by Article 4.1 to avoid disclosing information relating to the Settlement Agreement and facts leading to it. Mr. Finnamore had further continuing obligations, detailed in articles 3.1, 3.2, 4.2, and 4.3. Those articles can be summarized as requiring him to avoid the following: organizing in competition

with UFCW International, interfering in the business of UFCW International, disclosing information about UFCW International or a local of it, and contacting UFCW members about the affairs of UFCW International or a local of it.

[69] Mr. Finnamore's First NP Article stated that three UFCW union bosses gave themselves retroactive salary increases. Article 4.2 of the Settlement Agreement restricted Mr. Finnamore from disclosing information about the activity of a local, and so the statement in the article was contrary to the Settlement Agreement, assuming it was enforceable.

[70] Mr. Finnamore made comments about the affairs of a UFCW local in the Warren Broadcast. That too is contrary to the Settlement Agreement.

[71] Mr. Finnamore's conduct indicated that he no longer intended to be bound by the terms of the Settlement Agreement with relation to the affairs of UFCW International and its locals. The relevant conduct was writing the First NP Article, stating in the October 25, 2000 letter than certain obligations were void as being a restraint of trade, participating in the Warren Broadcast, and publishing the Second NP Article. Mr. Finnamore may have been willing to perform the mutual duties under article 4.1, but his refusal to perform the obligations under articles 3.1, 3.2, 4.2, and 4.3 deprived UFCW International of a significant portion of the benefit that it was to obtain under the Settlement Agreement.

[72] However, it was not "substantially the whole benefit" that UFCW International was to obtain under the Settlement Agreement. The benefit to UFCW International

of resolution of Mr. Finnamore's Grievance was sufficiently significant that repudiation of most of his continuing obligations does not meet the test articulated in ***Hong Kong Fir Shipping Co.*** for repudiation of a contract.

[73] In his May 28, 2001 letter to Mr. Finnamore, Mr. Fraser wrote that "we have for some time felt released from the 1995 agreement because of your public violations of it." That is a statement that UCFW International is no longer bound by the continuing obligations under the Settlement Agreement. Mr. Fraser wrote that "…we are no longer going to refrain from telling the truth about you." That is a statement that UFCW International will publicly discuss the alleged cause for Mr. Finnamore's dismissal, which is contrary to its contractual obligations under Article 4.1. Mr. Fraser wrote that "we will vigorously and publicly defend ourselves and rely in our defence on the facts and documents that will unequivocally establish you wilfully committed intolerable wrong doings against the UFCW and its members." Again, that is a statement that UFCW International will publicly discuss the facts and allegations surrounding Mr. Finnamore's dismissal, contrary to Article 4.1 of the Settlement Agreement.

[74] Although Mr. Fraser's May 28, 2001 letter was on the letterhead of UFCW Canada, Mr. Fraser was a Vice-President of UFCW International at the time he wrote the letter. These statements constituted a repudiation by UFCW International of its continuing obligations under the Settlement Agreement.

[75] The substantial benefit to Mr. Finnamore under that agreement was UFCW International's agreement to keep silent about its alleged cause to dismiss

Mr. Finnamore. Mr. Fraser recognized that in his May 28, 2001 letter when he wrote "the 1995 agreement you signed was primarily designed by you to protect yourself from being exposed to public scrutiny of your own questionable actions." Although UFCW International had other obligations in the Settlement Agreement, they were modest in comparison with these continuing obligations.

[76] Mr. Finnamore's email of May 28, 2001 accepted Mr. Fraser's advice and stated that both parties were released. This brought the ongoing contractual obligations to an end.

[77] As a result of the accepted repudiation, neither party has any ongoing obligations under the Settlement Agreement. It follows that there is no basis for a permanent injunction in respect of Articles 3.2, 4.2, 4.3, and 4.4.

Charter Rights, Restraint of Trade, Uncertainty, Equitable Bars, and Remedy

[78] As a result of the finding on the question of repudiation, it is unnecessary to consider the other interesting questions raised in this application, apart from costs.

Special Costs

[79] Both parties claimed special costs.

[80] Mr. Finnamore argued that the plaintiffs' application dealt with a small part of a defamation lawsuit that the plaintiffs have not pursued for years. He argued that

the delay in dealing with those issues and this lawsuit meant that the plaintiffs should be denied special costs, and in fact, should be required to pay special costs.

[81] An award of special costs is discretionary, awarded as a punitive measure where the court seeks to disassociate itself from the conduct of a party. The jurisdiction for an award of special costs is found in the inherent jurisdiction of the court to prevent abuse of its processes, and Rule 57(1) of the Rules of Court. See ***MacLeod v. Harrington (Public Trustee of)*** (1995), 14 B.C.L.R. (3d) 201, 131 D.L.R. (4th) 15 at paras. 216, 217 (C.A.).

[82] The leading case on special costs is ***Garcia v. Crestbrook Forest Industries Ltd.*** (1994), 9 B.C.L.R. (3d) 242, 119 D.L.R. (4th) 740 at 746-747 (C.A.) in which Lambert J.A. for the court held at para. 17:

> Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young,* to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui (District),* and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be characterized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard of the award of special costs.

[83] The jurisprudence identifies circumstances of misconduct that warrant an award of special costs. These include circumstances where:

a. a proceeding has been brought for an improper motive;
b. improper allegations of fraud have been made; or
c. a proceeding has been improperly conducted.

(See ***Garcia v. Crestbrook Forest Industries,*** *supra,* at para. 23; ***Genesee Enterprises Ltd. v. Abou-Rached et al.***, [2001] B.C.J. No. 1604, 2001 BCSC 1172 at para. 7; and ***Taychuk v. Strata Plan LMS744***, [2002] B.C.J. No. 2653, 2002 BCSC 1638 at para. 54.)

[84] The plaintiffs failed in the application for a permanent injunction. Because there are other unresolved issues in the lawsuit, including allegations of defamation, the costs award is limited to the costs of this application rather than the entire lawsuit. Usually the unsuccessful party is required to pay the taxable costs of the successful party. There is nothing in the plaintiffs' application for a permanent injunction which is reprehensible. Issues relating to the defamation claim should be dealt with when that claim is resolved.

[85] As a result, the plaintiff's application for an injunction is dismissed, and the defendants are entitled to their taxable costs of this Rule 18A application, on Scale 3.

"The Honourable Madam Justice Gray"