Date:19980408 Docket: C.A. 144277

NOVA SCOTIA COURT OF APPEAL

Cite as: Nova Scotia Government Employees Union v. Q.E. II Health Sciences Centre, 1998 NSCA 87

Freeman, Jones, Pugsley, JJ.A.

BETWEEN:

NOVA SCOTIA GOVERNMENT EMPLOYEES UNION	)	Ray Larkin, Q.C. and Leanne MacMillan for the Appellant
Appellant	)	
- and -	)	
	)	Eric Durnford, Q.C. and Rebecca Staturley for the Respondent
Q.E. II HEALTH SCIENCES CENTRE	)	
Respondent	)	Appeal Heard: February 19, 1998
	)	Judgment Delivered: April 8, 1998

THE COURT: Appeal allowed per reasons for judgment of Freeman, J.A.; Pugsley concurring; Jones, J.A. dissenting.

FREEMAN, J.A.:

In response to a perceived financial crisis in 1994 the Province of Nova Scotia passed the **Public Sector Compensation (1994-1997) Act**, S.N.S. 1994 c. 11 which froze labour relations between public sector employers and employees and rolled back pay rates by three per cent.

The freeze ended October 31, 1997. The issues are whether an arbitrator had jurisdiction to hold that the wage rollback ceased to apply to collective agreements after that date, and whether he was correct in doing so. His award was quashed by the Supreme Court of Nova Scotia, which held that the wage reductions continued in effect.

The **Act** was a centerpiece of the province's strategy for containing its budget deficit. It imposed across-the-board restraints on all incomes paid by the province which it divided into three categories, unionized employees governed by collective agreements or "compensation plans," salaried employees including elected and appointed officials, and doctors and dentists and others paid fees for providing medical and related services. The **Act** was a self-contained code imposed upon the 1994 public sector labour environment and included an administrator and a Board empowered to make compliance orders.

Rates of compensation of some 15,000 non-union employees, the officials and health professionals, were restored to previous levels as of October 31, 1997 by operation of the provisions of the statute. The issue on this appeal is whether the rollback ended at

the same time for the appellants, the unionized employees of Halifax hospitals merged as the Queen Elizabeth II Health Sciences Centre, the respondent. They are among some 45,000 union employees governed by collective agreements.

The employer's position is that pay rates for workers covered by collective agreements were not restored automatically by operation of the **Act**. They could only be brought back to 1994 levels in the period after October 31, 1997, by further collective bargaining. The employer continued the rollback, paying the employees three per cent less than they had been entitled to prior to November 1, 1994.

The union filed a grievance, arguing that everybody who was paid by the province had to accept the pay rollback, and that nothing in the **Act** suggests an intention by the legislature to treat unionized employees less favourably than others on the provincial payroll. That is, the restraints were intended to terminate for all employees as of October 31, 1997.

This is entirely a matter of statutory interpretation. Section 9(1), which imposes the rollbacks on collective agreements, does not stipulate a termination date, as do the provisions imposing the rollbacks on officials and doctors. But s. 9(1) is only one provision among the many found necessary to effect the legislative purpose in 1994. In my view every other provision of the **Act** terminated as of October 31, 1997, either by its express terms or by necessary implication, and the **Act** is spent, without force to oust the jurisdiction of the arbitrator or to support s. 9(1) as a stand-alone provision. However that

would not determine the main issue if s. 9(1) had amended the provisions of the collective agreements while it was in effect.

The **Act** employed the key device of extending all public sector collective agreements to November 1, 1997, when they all expired together. Under the **Trade Union Act**, R.S.N.S. 1989 c. 475, pay rates in the expired agreements continue provisionally until new collective agreements are negotiated.

The pay rates set forth in the collective agreements were, of course, those in effect before the rollbacks took effect November 1, 1994. The Union wrote the employer on August 22, 1997, stating that:

> It is the Union's opinion that the Employer is obliged to pay the rates of pay required by the collective agreements as of November 1, 1997.

The employer responded September 2, 1997:

> In our opinion, this legislation contemplates that any changes to be made to compensation plans will be made as a result of Collective Bargaining between the Queen Elizabeth Health Science Centre and the Nova Scotia Government Employees Union.

The Union filed a policy grievance stating:

> The Union has been advised by the Employer that it will not be restoring the 3% reduction in pay rates on November 1, 1997. It is the Union's position that the 3% reduction in pay rates expires on October 31, 1997.
>
> As corrective action, we request the following:
>
> * a declaration that the Employer has violated the Collective Agreement;
>
> * that the Employer restore the 3% reduction effective November 1, 1997, and
>
> * that the Employer make whole the Union and any employee(s) adversely affected by this action or lack of action of the Employer.

No agreement was reached and the union referred the grievance to arbitration. When no arbitrator could be agreed upon, the Minister of Labour appointed Eric K. Slone as single arbitrator on October 24, 1997 to hear and determine the matter. Hearings were held November 18, 19 and 20, 1997.

On the eve of the arbitration hearings the employer referred the question of the appropriate pay rate to the Public Sector Compensation Restraint Board created to deal with matters arising under the **1994-1997 Act**. The Board did not decide the matter pending the outcome of the arbitration, review and appeal proceedings. The employer's position is that the Board has exclusive jurisdiction, ousting that of the arbitrator. It did not assert that position by referring the matter to the Board until the arbitration process was well advanced.

Arbitrator Slone's award was released December 5, 1997, upholding the Union position, and finding that the rollbacks ended November 1, 1997, along with the other effects of the **Act**. He found the **Act** did not amend the pay rates set out in the collective agreements but rather legislated a three per cent reduction in the wages paid each employee.

The employer applied under s. 15(2) of the **Arbitration Act** R.S.N.S. 1989 c. 19 to set aside the award. Justice Goodfellow of the Supreme Court of Nova Scotia heard the application on an emergency basis December 29 and 30, 1997 and issued his decision

January 8, 1998, quashing the award, holding that there was no temporal limit to the effectiveness of the s. 9(1) reduction, and that the **Act** did amend the collective agreements. There were specific termination clauses in many of the provisions of the **Act**, and the absence of such a clause in s. 9(1) was in his view determinative.

Both the judge and the arbitrator therefore considered that wage reductions could have been continued under the **Act** after November 1, 1997, in two ways, by the direct, ongoing operation of the statute or if the statute had amended the collective agreements.

Determining the issues on appeal involves construing the statute both as to jurisdiction and the merits.

Statutory Interpretation

The Union cites the recent Supreme Court of Canada decision in **Rizzo & Rizzo Shoes Ltd.** (January 22, 1998, unreported, [1998] S.C.J. No. 2 File No. 24711) in which Iacobucci J. was interpreting the provisions of the **Employment Standards Act** R.S.O. 1980 c. 137. He stated:

> [para 21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1977); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-Andre Cote, *The Interpretation of Legislation in Canada* (2nd ed.1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: **R. v. Hydro-Quebec**, [1997] 1 S.C.R. 213; **Royal Bank of Canada v. Sparrow Electric Corp**., [1997] 1 S.C.R. 411; **Verdun v. Toronto-Dominion Bank**, [1996] 3 S.C.R. 550; **Friesen v. Canada**, [1995] 3 S.C.R. 103.

[para 22] I also rely upon s. 10 of the **Interpretation Act**, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

[para 23] Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the **ESA**, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized.

The Nova Scotia **Interpretation Act,** R.S.N.S. 1989 c. 235 contains the same provisions Iacobucci J. quoted from the Ontario Act. The principles he stated have been called the "words in total context approach". (See **Barrett v. Crabtree** (1993), 150 N.R. 272 (S.C.C.)) I do not consider this to be in conflict with the "modern rule" of interpretation set out by Professor Sullivan in the third edition of Driedger at p. 131:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and © its acceptability, that is, the outcome is reasonable and just.

In the present appeal the overall purpose and effect of the statute as a whole, and its various provisions, must be kept in mind when scrutinizing the language of s. 9(1)

and, as in a two-way equation, s. 9(1) must be assessed for its impact on the statute as a whole. The purpose of the **Public Sector Compensation (1994-1997) Act** was to save the provincial treasury three per cent of public sector wages during 1994 to 1997. It was temporary legislation for a limited purpose, an extraordinary intrusion into the labour law environment justified by necessity. The legislature considered it necessary to support Section 9(1), the rollback provision for collective agreements, by a statutory structure amounting to a complete code within its narrow scope and temporal limits. Most of the numerous provisions of the **Act** are interrelated and interdependent. In my view it is not in issue that all of the **Act's** effects save for the one in question have been extinguished by the passage of time.

That, briefly, is the context within which the ongoing effect of s. 9(1) must be considered: can that twig survive as an anomaly cut off from its statutory trunk?

The Statute

In introducing the bill to the House of Assembly in 1994, the Minister of Finance expressed distaste for legislation that interfered with the results of collective bargaining, but he presented it as the only alternative if the Province was to be restored to financial stability. The alternative of increased taxes would further weaken a fragile economy. The Union submits that $116,000,000 was saved by this strategy alone and a balanced budget can now be contemplated.

The **Act**, one of a series aimed at improving provincial finances dating back to 1983, was given primacy over other legislation, specifically including its immediate predecessor, the **Public Sector Compensation Restraint Act** of 1991. Giving effect to the three per cent rollback strategy was its overriding objective, and all other provisions were subsidiary to that.

Respecting the unionized employees, the first concern of the drafters of the **Act** was to standardize a diversity of collective agreements--which the **Act** includes in the broader term “compensation plans”-- so the rollback could apply across the board to all of them. As all would presumably have expired between 1994 and 1997, all were extended to expire on November 1, 1997. Changes in collective agreements, including increases in pay rates, were forbidden until October 31, 1997. While there were a number of details and exceptional circumstances, these were the two basic approaches that set the legislative stage for the rollback.

That was accomplished in s. 9(1) with an economy of language carefully crafted to ensure that the three per cent reduction applied to each individual employee covered by a compensation plan:

> 9 (1) Effective November 1, 1994, the pay rate for each position covered by a compensation plan shall be reduced by three per cent except as provided by this Section.

The chief exceptions were for employees earning less than $25,000 a year and for merit-related increases.

After Parts II and III relating to non-union employees and medical services the legislators turned their attention to providing for the enforcement of the rollbacks to ensure their effectiveness. An Administrator was provided to decide questions arising under the **Act** as to its application and compliance with it. The Administrator's jurisdiction was mirrored by the Restraint Board, to which he could refer the same questions for decision. The Board had further jurisdiction to decide matters of compliance, and to issue orders to ensure compliance. The orders of the Board were the instruments by which the **Act** was given its effect.

The Board had power to review its own decisions or orders, but otherwise these were protected by a privative clause:

> 22 (3) The Board shall decide any question referred to it and the decision or order of the Board is final and conclusive and not open to question or review. . . .

This was a significant power, to make decisions as to the application of the **Act** and orders to enforce them. It was at the core of the Board's jurisdiction, and necessary to the effectiveness of the **Act**. The order-making power was exclusive to the Board.

The method of enforcement was adapted from the criminal law, not from practices of civil law or labour law, by s. 25:

> 25 Every person who fails to comply with this Act, the regulations or an order of the Board is guilty of an offence and liable on summary conviction to the penalty provided for in the **Summary Proceedings Act.**

The **1994-1997 Act** was clearly emergency fiscal legislation thrust upon public sector labour relationships, which previous to the restraint legislation had been ruled by free collective bargaining under the **Trade Union Act** and such special enactments as the **Civil Service Collective Bargaining Act**, R.S.N.S. 1989 c. 71. Its objective was to remedy the evil of a runaway provincial deficit. Its primacy, to the extent necessary to give effect to its special purposes, cannot be doubted. Section 3(1) and (4) provide:

> 3 (1) This **Act** applies notwithstanding any compensation plan, arbitral or other award or decision, or other agreement or arrangement of any kind.
>
> (4) Every enactment, whether enacted before or after the coming into force of this Act, including, without limiting the generality of the foregoing, the **Public Sector Compensation Restraint Act**, shall be read and construed as subject in all respect to this **Act** and, in the case of conflict with this **Act**, this **Act** prevails.

The jurisdiction of the Restraint Board to determine matters of compliance with the Act during the period of the freeze ending October 31, 1997, appears to be exclusive, although "paramount" may be a better term. Its jurisdiction in the period following October

31, 1997, when the **Act** had become substantially ineffective, remains to be considered below in relation to the jurisdiction of the arbitrator.

Standard of Review

Arbitrator Slone considered that he and the Restraint Board had concurrent jurisdiction to interpret the statute, and that both were governed by the standard of correctness. He cited the decision of Chief Justice Laskin in **McLeod v. Egan** (1974), 46 D.L.R. (3d) 150 (S.C.C.):

> . . . an arbitrator, in the course of his duty, should [not] refrain from construing a statute which is involved in the issues that have been brought before him. In my opinion, he must construe, but at the risk of having his construction set aside by a Court as being wrong.

Justice Goodfellow considered that the standard of correctness applied, and this was not challenged by counsel. It is not necessary to consider the matter further to decide this appeal; I accept correctness as the standard of review for the purposes of this appeal.

Issue No. 1--Jurisdiction

Justice Goodfellow accepted the arbitrator's jurisdiction, finding it unnecessary to consider the question in depth because of the conclusion he reached on the merits. This court invited argument on jurisdiction . If the Restraint Board had exclusive jurisdiction to decide the question determined by the arbitrator, his award could not stand.

The question is whether Arbitrator Slone was without jurisdiction because he intruded into a jurisdictional area reserved exclusive to the Public Sector Compensation Restraint Board under the **Act** and regulations. It is not disputed that the grievance before the arbitrator was a matter over which he would have arbitral jurisdiction unless that jurisdiction was ousted by the exclusive jurisdiction of the Board.

The resort to arbitration in disputes involving the interpretation of collective agreements and legislation relevant to them is deeply entrenched in the law, supported both by statute and case law. At the time the legislature passed the **Act** in 1994, it was necessarily aware of having previously enacted s. 43(1)(e) of the **Trade Union Act** and must be presumed to have been aware that a body of authority has developed around that provision. Section 43(1)(e) provides:

> 43 (1) An arbitrator or an arbitration board appointed pursuant to this Act or to a collective agreement . . .
>
> (e) has power to treat as part of the collective agreement the provisions of any statute of the Province governing relations between the parties to the collective agreement.

During the period prior to November 1, 1997, it was for the Board to determine whether the **Act** applied to a compensation plan, and how it must be complied with. This does not oust the jurisdiction of an arbitrator under the **Trade Union Act** to deal with grievances arising as to whether, for example, employers are actually paying employees wages in compliance with the **Act** or which are specified in a compliance order. His interpretation of the **Act** and order would have to meet the standard of correctness. I have

concerns as to the arbitrator's view that the Board is similarly held to a standard of correctness, for it appears on the face of the statute that the Board was empowered to decide and order what was correct during the restraint period. It would only be after that time, when it could no longer make compliance orders, that its jurisdiction, if any remained, would be limited by the standard of correctness. In the Board's narrow area of core jurisdiction, deciding and ordering compliance during the period that compliance was required, it is my view that the Board's jurisdiction was paramount to that of the arbitrator and, for practical purposes, exclusive. That is not determinative of present issues, and the Board made no orders bearing on this appeal.

In **U.E.S. Local 298 v. Bibeault** [1988] 2 S.C.R. 1048 Beetz J. set out principles that have become known as the pragmatic and functional approach to questions of jurisdiction, stating at p. 1088 that a court in determining the jurisdiction of a tribunal:

> examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

In following this approach, if the Board retains any jurisdiction to consider the continuing effect of s. 9(1) after October 31, 1997, it would not be exclusive jurisdiction sufficient to oust the clear jurisdiction of the arbitrator.

The Board's jurisdiction was essential to the effectiveness of the **Act**, a rational imperative, during the restraint period, that is, between 1994 and November 1, 1997. After that period there appears to be no need for it; the rational foundation crumbles. That

becomes clear when the provisions giving the Board its jurisdiction to decide questions and make orders cited above are read in the context of what may be called the operative provisions of the Act, in which it is made to apply to existing collective agreements. The relevant excerpts are as follows:

> 6 (1) Every compensation plan in effect immediately before April 29, 1994, is continued until November 1, 1997, except as provided by this Act.
>
> ....
>
> 8 (1) No compensation plan, whether established before or after the coming into force of this Act, shall be changed between April 29, 1994, and October 31, 1997, inclusive, except as provided by this Act.
>
> (2) Notwithstanding any compensation plan, there shall not be any increase in the pay rates in a compensation plan between April 29, 1994, and October 31, 1997, inclusive.
>
> 9 Effective November 1, 1994, the pay rate for each position covered by a compensation plan shall be reduced by three per cent except as provided by this Section.

For purposes of the present appeal I have found it convenient to refer to the s. 8 prohibitions of changes in collective agreements as “the freeze” and the s. 9 wage reduction as “the rollback.”

While s. 9 reduces the level of pay, it is s.8(1) that forbids changes and s. 8(2) that prohibits increases. The orders of the Board are to give effect to those prohibitions. When the prohibitions were removed after October 31, 1997, and increases were no longer outlawed, orders of the Board were shorn of their effectiveness. If the Board did attempt to make orders after October 31, 1997, they could be defeated by an amendment to a collective agreement. There was no longer any limitation on pay rates in collective agreements, nor anything to prevent making collective agreements retroactive to October

31, 1997. There was no purpose for the Board to make compliance orders for any time after that: there was no provision of the **Act** that had to be complied with. The Board's jurisdiction was spent, terminated by necessary implication.

In my view then the Board is without jurisdiction to order compliance with the **Act** after October 31, 1997, while the arbitrator's jurisdiction to consider grievances is clear. If the Board had such jurisdiction, it was not exercised, while that of the arbitrator was exercised. There were no relevant orders of the Board to be considered, so the arbitrator was not fettered by the Board in interpreting the statute.

Arbitrator Slone reviewed the awards of two arbitrators who had found they had jurisdiction in similar circumstances. He cited the following from the decision of arbitrator Innis Christie in **Re Nova Scotia Nurses Union and Dartmouth General Hospital and Community Health Centre** (June 12, 1997--Unreported) which dealt with the jurisdiction question under the **1994-1997 Act**:

> . . . If the legislature had intended those questions only to be answered by the Administrator and/or the Board under the **Public Sector Compensation 1994-1997 Act** it would have said so. Instead, it used language identical to that in section 22 of the **Public Sector Compensation Restraint Act**, which was interpreted by arbitrator Outhouse as leaving his jurisdiction intact. Indeed, referring back to my discussion of Section 23 of the current Act, I am struck by the fact that, although legislative attention was obviously turned to the arbitration process, nothing was said about limiting the jurisdiction of arbitrators to apply this **Act** to collective agreements, and in the course of doing so, to interpret it.

Arbitrator Slone stated:

> In my view, if a legislature intended to give exclusive jurisdiction to a statutory board and oust the jurisdiction of a deeply entrenched institution such as arbitration, it would have done so by explicit and clear language. It would not leave the matter to be decided by attempting to read such an interpretation into a general provision . . . [I]t is at least arguable if not established that the jurisdiction of the Restraint Board is at an end following the three year period within which the legislation primarily operates. This argument dovetails with the argument on the merits, which argument depends in part upon the view that the legislation ceases to operate after three years. The issues are related, although not precisely the same, because it would still be possible to find that the board's jurisdiction is at an end without necessarily finding that the three per cent reduction must be restored.

I have found that the Board lacked the power to make compliance orders after October 31, 1997, when the public sector was freed of the need to comply with restraints mandated by the Act. With no jurisdiction to make enforceable orders, any decisions it purported to make would lack any meaningful legal effect. In my view therefore the pragmatic and functional approach would suggest that the Board had exclusive jurisdiction in its core area of deciding and ordering compliance until October 31, 1997, and thereafter ceased to have jurisdiction over any events occurring after that time. I would find for the appellant on the first issue: the arbitrator had jurisdiction to make his award.

The Second Issue--The Merits

Arbitrator Slone's Award

Arbitrator Slone dealt with the jurisdiction and the merits together in a 55-page award in which he reviewed the evidence, finding little help in records of legislative debates and in the testimony of George Fox, former Administrator and Chief Executive Officer of the Restraint Board, and a rebuke to the Province as to the scope of the legislation by the International Labour Organization, to which the Union had complained. He did, however, give weight to three presumptions, the first that Canadian society valued collective

bargaining and the statute should be interpreted to do as little violence as possible to it, the second that legislation should not be presumed to take away an established right without clear language, and the third that the legislature did not intend to change the existing law beyond what was expressly stated or which followed by necessary implication.

He considered that **Act** was not intended to continue the rollback after October 31, 1997, and that, while the legislature could have expressly amended the collective agreements, thus determining the question before him, it did not do so.

> In reading the operative provisions of the 1994 **Act** together, I have come to the conclusion that no operative effect was intended after November 1st, 1997. The act was very specific in continuing compensation plans until November 1st, 1997 (section 6), and prohibiting any changes in those plans between April 29th, 1994 and October 31st, 1997 (section 8). Looking to the Act as a whole and seeking to apply the presumptions as indicated, I conclude that the intention was only to interfere until November 1st, 1997, in order to deal with the temporary financial crisis. To apply an interpretation that extends beyond November 1st, 1997 would be to expand the legislative purpose beyond merely dealing with the financial crisis within an identified time frame, and would give it an enduring scope of operation in the arena of collective bargaining.

Dealing with whether the legislation amended the collective agreements, he stated:

> The legislation could have but did not expressly amend collective agreements. Rather, the Act targeted pay rates for individual positions, and provided in Section 12 that compensation plan providing for pay rates in excess of the pay rates permitted by the Act would be "of no force or effect". In my view, the actual collective agreements were left in existence, untouched by the legislation. Rather, pay rates were reduced for the duration intended and the effect otherwise of the express wording in the agreements was rendered ineffective for the duration.
>
> This view is reinforced by my interpretation of Section 9(2) of the **1994 Act** which reads as follows:
>
> > (2) For greater certainty, the reduced pay rates shall be the basis for any pay-related calculations.

Although the point may appear at first to be a subtle one, in my view this section of the **Act** would be totally unnecessary if the legislation had the overall effect of amending collective agreements. Had the legislation clearly amended collective agreements and simply rewritten the pay scales, once and for all purposes, it would follow as a necessary and irrefutable consequence that the new pay scales would form the basis of any pay related calculations because there would be no pay scales other than the reduced ones. By specifically providing that the reduced pay scales shall be the basis for any pay related calculations, the legislation appears to acknowledge that the original pay rates continue to have some, though perhaps ineffective, life. This inclusion of section 9(2) does, accordingly, support a view that the legislature, for whatever reason, did not intend to accomplish its fiscal purpose by amending collective agreements.

Had the legislation expressly amended the collective agreements, which the legislature had it within its power to do, the grievance could not succeed, because the effect of the amendment would be that there would be no collective agreements in existence other than the amended ones. An amended collective agreement would have to be considered to have been amended for all time. It must be recollected here that what I am seeking to discern is, what is the substance of the expired collective agreement for the very limited purpose of establishing interim pay rates pending collective bargaining. In the circumstances here, I find it difficult to credit why the legislature would not have simply amended collective agreements using explicit language, if that had been the intention.

I am more inclined to the view that the legislature never turned its collective mind to what would happen in this interim period. There is no reason to believe that the government had any such concerns given the knowledge that all of the applicable collective agreements would have to be renegotiated effective November 1st, 1997. For all it knew, the government may have anticipated that collective bargaining would have been completed in anticipation of the end of the freeze.

Other parts of the legislation, in particular Part II, clearly showed the government's intention to freeze the situation and reduce pay for a three-year period, following which matters would return to something resembling normalcy. For elected and public officials it was necessary to provide that the three per cent would be restored because there is no automatic process to re-negotiate for those individuals. For employees subject to compensation plans under Part I, however, the government expressly provided that as of November 1, 1997, their remuneration would be open to bargaining. Their ultimate remuneration will be determined by collective bargaining, and merely paying the employees three per cent less than the amounts written in the collective agreements does not achieve any ultimate fiscal purpose. Rather, the only purpose to which continuing the three per cent reduction would appear to serve would be a negotiating purpose. There might well be a perceived negotiating advantage to the government (in its capacity as employer) for the three per cent reduction to remain in effect after November 1, 1997, but I am not prepared to find that the legislature had any such purpose in mind when it passed this legislation. Affecting the status of future negotiations in the post-freeze period was not a mischief to which this legislation was directed, nor a purpose which it appears to have been intended to achieve.

I am also concerned that to perpetuate the three per cent reduction, even on an interim basis, would be to treat one group of public sector employees different from another. Given the creation of a very clear window of reduction for elected and

> appointed public officials, it is difficult to see why the legislature would have thought it necessary to perpetuate reductions for the public service beyond the same period for which they were exercising restraint themselves. The frank statements of the Minister of Finance in 1994 gave no clue to the possibility that certain public servants were being asked to make a greater sacrifice than others by enduring the rollback for a longer period of time.

In Arbitrator Slone's view it was necessary to legislate the restoration for elected and appointed officials because they did not have the opportunity to negotiate the terms of their employment.

> Different mechanisms were required under Parts I and II because the process was different; not because the intended effect was different.

Arbitrator Slone concluded:

> It is accordingly my view that the correct reading of the statute suggests that the government had no legislative purpose in mind beyond October 31, 1997 and it would be giving the legislation more effect than is necessary to achieve its purpose by finding that the effects linger beyond November 1st, 1997. It follows that, on November 1, 1997, the old, expired collective agreements--as written--are the only legally existing (even if provisional) basis upon which wages and other terms of employment can be determined. The reduction in pay rates legislated by the 1994 Act has served its fiscal purpose, and Section 12 (rendering the original pay scales of no force and effect) is no longer a bar to recovery of the freely negotiated wage scales.

The Supreme Court Decision

Justice Goodfellow carefully reviewed the background, the provisions of the statute he considered relevant, recent legislative history and principles of statutory interpretation. He concluded that the Board did not have exclusive jurisdiction ousting that of the arbitrator, and that the standard of review was that of correctness.

He reviewed the provisions of the **Act** containing a limited time frame and remarked:

> The fact that the legislature chose to introduce time limitations frequently throughout the statute and chose not to insert any time limitation in s. 9(1) is very clear evidence of the intent to render s. 9(21) indefinite in its application from the only date recited its starting date of November 1st, 1994.

He considered the time frame referred to in the title of the **Act**, citing Professor Sullivan in *Driedger* at p. 258:

> The better view is that titles may always be considered, along with all the other elements of legislative context. The weight to be attached to a
>
> title and how it should be used should depend on the circumstances of the case.

He appears to have found the title of little weight, and noted that s. 28 dealing with the date the **Act** became operative did not contain any temporal limit or any hint of a sunset intention.

Like the arbitrator, Justice Goodfellow found little assistance in the extrinsic aids to interpretation. He considered that the arbitrator had attached undue weight to the three presumptions:

> The weighing of these presumptions, combined with a review of the context of the legislation and the specific absence of a termination date, still leave me with a clear conclusion that the intent of the legislation was not to revert to the 1994 rates of pay for s. 9(1) employees automatically as of November 1st, 1997.

Justice Goodfellow considered that the **Act**, with respect to s. 9(1), "effectively amends the terms of the collective agreements by reducing pay rates without any reference to a time limit." He stated as a conclusion:

> In order to reach the result contained in the arbitrator's award, it would be necessary to read into s. 9(1) **effective between November 1, 1994 and October 31st, 1997, inclusive**. It is not the function of the court to legislate. Amending a statute is legislative function, not a function of the court.

Analysis

Is s. 9(1) still operative?

The fact that the thoughtful and careful approaches of Arbitrator Slone and Justice Goodfellow could lead to opposite conclusions, as well as the reasons expressed by Justice Jones, might suggest that the **Act** is ambiguous and unclear, but, with respect, I am not convinced that is the case. Arbitrator Stone opined that the legislative draughtspersons had not directed their minds to what would happen at the end of the freeze, and Justice Goodfellow, after consideration, found a clear intention that the rollback should continue. Both emphasized that their decisions would be only of passing effect until new collective agreements were negotiated; these would govern the actual wages of the employees after November 1, 1997. It must be acknowledged that the future utility of a rollback provision continuing after the lifting of the freeze could not have appeared great to a legislature in 1994. The legislature did not hesitate to flirt with redundancy to achieve clarity of purpose in pursuing its objectives for the legislation during the period of the freeze, and the words “for greater certainty” appear in several provisions.

Justice Goodfellow listed a dozen provisions of the **Act** which contained specific time limitations. He stated:

> The best and strongest evidence of legislative intention (separate from the clear meaning of s. 9(1) standing alone without any temporal limit) is the fact that temporal limits are applied to certain circumstances and employees, and not to others. This is a strong indication that the legislation meant to differentiate rather than give rise to a conclusion calling for a reading in or adding of words to a section that the legislature failed to include. I note again that s. 9(2) directed to the pay related calculations, i.e. C.P.P., et cetera, on the reduced pay rates, <u>without limiting the time</u> <u>application of the reduced pay rates</u>. The drafting of legislation is not a hit

> and miss operation . A primary assumption to make when legislation contains words or a provision in one section and omits to do so in another is that such was a deliberate course to manifest intention.
>
> There is nothing before me to suggest the failure to provide an express time limit in s. 9(1) is the result or careless drafting or inadvertence rather than choice. . . .
>
> With great deference to the arbitrator, the intention to treat different Employees different was clearly intended and accounts for the division within the **Act** and the introduction of various time periods for various employees.

With respect, if Justice Goodfellow's analysis is correct, the wage reduction appears to be the one provision of the **Act** that is intended to live on after November 1, 1997. What could be the legislative purpose in introducing such an anomaly, particularly in view of its transitory nature? In discussing the numerous provisions of the Act setting out specific time limitations, Justice Goodfellow emphasized the absence of an explicit cutoff date in s. 9(1). However he did not consider the temporal limitations imposed by necessary implication when the **Act** is considered as a whole. In my view that constituted reversible error, for the **Act** is to be read in its entire context. (See Iacobucci J. in **Rizzo**.)

The operation of key provisions on which s. 9(1) depends for its effectiveness during the freeze period, ss. 3, 12 and 23 in particular, has been effectively terminated by necessary implication. This effects such a profound change in the statutory regime that I am not persuaded the legislature intended s. 9(1) to stand alone, unsupported by the scheme which gave it meaning. If such a remarkable result was intended, more certain language would have been used.

I have discussed above how the Board's instrument of enforcement, the s. 23 compliance order, was rendered ineffective after October 31, 1997, by the lifting of the freeze in s. 8, making it no longer unlawful for compensation plans to be changed without reference to the wage restraints imposed by the **Act**.

Arbitrator Slone identified s. 12 as a provision that could not survive after October 31, 1997. It states:

> 12 A compensation plan to which this Part applies, entered into, established or amended at any time, is of no force or effect to the extent that it provides for pay rates in excess of pay rates permitted by this Act.

Like s. 9(1), this section does not contain a time limitation and, on its face, could go on forever. Interpreted in the context of the **Act** as a whole, however, it is clear that it can no longer purge excessive pay rates of their force or effect after October 31, 1997. After the freeze is lifted by s.8, there is no limit on pay rates permitted by the **Act.**

Another example is s. 3(1) which was frequently referred to in argument because of its sweeping effect. It provides:

> 3 (1) This Act applies notwithstanding any compensation plan, arbitral or other award or decision, or other agreement or arrangement of any kind.

Section 3(1) on its face contains no hint that it is effective only until October 31, 1997. Yet it is clear that any compensation plan, arbitral or other award or decision made on or after November 1, 1997, can prevail over the **Act**. If collective agreements had been

negotiated in advance to take effect on that date the question of the continuation of the s. 9(1) rollback would not have arisen. It is true of course that s. 8 is an application of the **Act**, but it applies a temporal limitation to every other provision of the **Act** just as surely as it does to s. 3(1).

I therefore attach little weight to the absence of an express time limitation in s. 9(1). I consider its operation after November 1, 1997, to be discontinued by necessary implication.

In a pragmatic reading of the **Act** it will be noted that s. 6 extended collective agreements to November 1, 1997, one day after the freeze had come to an end pursuant s. 8. It cannot be assumed that this timing, ending the freeze the day before the collective agreements expired, was not intentional by the legislature, and that it was not intended to be meaningful. If the timing had been reversed, and the collective agreements expired while the freeze was still in effect, a different inference could be drawn and it could be more readily argued that the reduced wages were to continue in effect. The legislature could have refrained from signaling its intent by causing the freeze to end and the agreements to expire at the same time. It would not be unreasonable to conclude that the legislators, in 1994, intended that the original pay rates had been restored to the collective agreements before they expired. This interpretation is sufficiently obvious that, if it was not intended, it should have been averted by appropriate language.

After October 31, 1997, the **1994-1997 Act** became like any other statute subject to interpretation by an arbitrator as to its effect on collective agreements, pursuant to s. 43(1)(e) of the **Trade Union Act**. Pay rates were returned to the normal sphere of labour relations, and excessive wages were no longer a matter for the criminal courts.

In my view s. 9(1) was not intended to stand alone as the sole surviving effective provision of the **Act** after the remainder of the structure had been dismantled on October 31 and November 1, 1997. After October 31, 1997, its effects were spent and it was effectively repealed by necessary implication. If it retained any legal effect whatsoever, it was not sufficient, standing alone, to operate as a continuing restraint on wages set out in the collective agreements.

Did s. 9(1) Amend the Collective Agreements?

Given the structure of the **Act,** and in particular ss. 6, 8, 9 and the enforcement provisions discussed above**,** s. 9(1) effectively imposes a rollback on wages paid under the relevant collective agreements during the restraint period ending October 31, 1997, and no amendment or alteration to the collective agreements is required for the rollback to have its intended effect.

However, if the **Act**, and in particular s. 9(1), had had the effect of amending the collective agreements to which it related, the amendment, as Arbitrator Slone noted, would have been permanent. There was no mechanism in the **Act** for repealing amendments,

as there was for restoring the collective agreements unaltered to their former effectiveness. If the pay rates in the collective agreements were amended to 97 per cent of their negotiated levels, that would be the pay level in effect when the agreements expired November 1, 1997, and that would provisionally govern pay rates pending the negotiation of new collective agreements.

There are several statutory provisions in addition to those referred to above which are relevant to this question, including the following:

> 3 (3) The reduction in pay pursuant to this Act is not a reduction in compensation for the purposes of any compensation plan and, for greater certainty, shall not be deemed to be a termination of the plan and does not entitle any person to terminate the plan, to receive any payment or any other remedy.
>
> 9 (2) For greater certainty, the reduced pay rates shall be the basis for any pay-related calculations.
>
> 23 (2) Nothing in this Section (s. 23(1) provides for the Board to authorize changes in compensation plans that do not involve pay rates more than the Act permits) authorizes or enables an employer, employee or bargaining agent to resolve, or attempt to resolve, any dispute respecting changes to a compensation plan by strike, lockout, mediation or arbitration.
>
> 24 (2) To the extent that the compensation plan is inconsistent with an order of the Board, the order prevails and is deemed to be part of the compensation plan.

With the exception of s. 24(2), which is not directly relevant for present purposes because it relates to an order and not to the **Act,** there is nothing in these provisions to suggest an intention by the legislature that the **Act** should amend any collective agreement. In fact s. 3(3) appears to be a deliberate expression of legislation intention not to amend,

alter or terminate collective agreements, but rather to treat “the reduction in pay pursuant to this Act” as a specific remedy, a statutory device distinct from and outside the structure of collective agreements. Nor is such a purpose apparent in the other provisions of the **Act**. All are consistent with an intention to suppress pay rates for a limited time and purpose by superimposing a three per cent reduction on the negotiated rates. When the restraint provisions are removed, the underlying labour law structure appears to remain intact as it existed in 1994. What was lawful before the restraints, and unlawful during the restraints, became lawful again when the restraints were removed.

Section. 24(2) is another provision that loses its effectiveness by necessary implication as of October 31, 1997, when parties are free to negotiate collective agreements inconsistent with any order of the Board. It provides:

> 2 (2) To the extent that a compensation plan is inconsistent with an order of the Board, the order prevails and is deemed to be part of the compensation plan.

.

It is noteworthy that s. 43(1)(e) of the **Trade Union Act** also uses the words “part of” in authorizing arbitrators to interpret statutes, which may not always amend collective agreements. It is also noteworthy that in s. 24(2) it is the order, and not the **Act** itself, that is deemed to be part of the compensation plan. This appears to be no more than a guide to interpretation for the benefit of arbitrators. If it is construed as a power in the Restraint Board to amend the provisions of collective agreements to cause them to comply with the **Act**, any deemed amendment would remain in effect only so long as the order remained in effect during the restraint period. This might not have been necessary if the effect of the

Act was to amend the collective agreements directly. It would follow that if the board did not exercise this power with respect to a collective agreement, it would not be not be deemed to be amended. Presumably s. 24(2) was intended as a guide to arbitrators considering agreements which had become the subject of orders, for the orders themselves were enforceable under the **Summary Proceedings Act**.

An overview of the **Act** therefore strongly suggests that the legislature did not intend s. 9(1) to amend collective agreements. However what may be the union's most persuasive argument on this point focuses on the specific wording of s. 9(1). Mr. Larkin on behalf of his clients submits that Justice Goodfellow erred in his interpretation of the section and wrongfully quashed the arbitration award because he failed to attach any significance to the words "the pay rate for each position covered by a compensation plan" in s. 9(1).

He submits the pay rates mentioned in collective agreements often refer only to the maximum and minimum rates for particular employment categories. If the **Act** amended the collective agreements to reduce both the stated minimum and maximum rates by three per cent, the pay of an employee in the middle range might not be affected. The words "the pay rate for <u>each position</u> covered by a compensation plan" apply to all employees but not to the actual language of the compensation plan. The union submits:

> The principle error in the judgment below is the conclusion that subsection 9(1) "effectively amends the terms of the collective agreements by reducing pay rates without any reference to a time limit."
>
> Obviously, if the pay rates in the collective agreements were amended by subsection 9(1) there is great force in the judge's conclusion that the pay rates remain unreduced until altered by collective bargaining. However, the premise upon which this conclusion rests is faulty.

> The union submits that subsection 9(1) does not reduce or amend the pay rates in the collective agreement. Rather, subsection 9(1) provides that "the pay rate for each position covered by a [collective agreement] shall be reduced."
>
> The judgment below did not consider the significance of the words "for each position covered by . . . ". No analysis is given of the effect of these words.

The Union relies on the passage from the arbitrator's award referring to amendment which is cited above.

The gist of the union's argument is expressed by the following:

> The Union submits that subsection 9(1) reduces the rates of pay for each position covered by a collective agreement. The pay scales in the collective agreements are not reduced. . . . [T]he whole focus of subsection 9(1) is to amend individual rates of pay for individuals holding positions, not to amend collective agreement pay scales or individual contracts of employment indefinitely.

I agree with this conclusion. In my view the collective agreements were released from the constraints imposed by the **Act** on October 31. When the collective agreements expired on November 1, 1997, they were in the form in which they were originally negotiated.

Summary and Conclusion

In my view the **1994-1997 Act** was straightforward and effective legislation intended to impose the harsh measure of a three per cent wage rollback on the public sector workers of Nova Scotia from 1994 to October 31, 1997 to combat the evil of a runaway deficit. It was not intended to have any lingering effect beyond that time. There is not a provision in the **Act** that suggests otherwise. The extension of all collective

agreements to November 1, 1997, one day after the removal of the constraints on bargaining, is to my mind an unmistakable expression of legislative intent. The collective agreements were restored to the forms in which they had been found, and the legislature took hands off. The employers and employees were set free to resume normal labour relations including collective bargaining after a three-year interruption as though, to the fullest extent possible, the **Act** had never existed. The statutory structure that supported the rollback, the time limitations express and implied in the ancillary provisions that ran out all together on October 31, 1997, the language of the rollback provision itself, all support this conclusion. Nothing muddies the waters but the effort to read into the statute what was not there originally, an intent to extend the rollback during the provisional period pending the negotiation of new collective agreements. That view finds its sole support in the absence of an express expiry date in s. 9(1) and, when the **Act** is read in context with effect given to what is necessarily intended, that support is insufficient. As both the arbitrator and the chambers judge remarked, the effect of such an interpretation would

serve little purpose except, perhaps, to provide the employers with a bargaining advantage. It is difficult to disagree with the arbitrator that that does not appear to be a mischief which the legislature was seeking to remedy in 1994.

In considering the **Act** as a whole, in its full context, there is no persuasive suggestion in its provisions that the legislature, in imposing a fixed pay rate reduction for a limited time, expected it to have a lingering and ultimately pointless effect on unionized employees that it did not have on other workers in the public sector. The **Act** governed public sector incomes from 1994 until October 31, 1997. By November 1, 1997, when public sector collective agreements expired, it was spent.

The interpretation of the arbitrator, which I adopt, can be justified under the test proposed by Professor Sullivan in terms of its plausibility, for it conforms with the legislative text, its efficacy or promotion of the legislative purpose in imposing restraints for a defined term, and its acceptability as reasonable and just.

I would allow the appeal, set aside the judgment of the Supreme Court, and restore the award of the arbitrator. The union is entitled to costs in the Supreme Court and

on the appeal. I would fix costs on the appeal at $2,000.

Freeman, J.A.

Concurred in:

Pugsley, J.A.

JONES, J.A. (Dissenting)

By Chapter 11 of the **Acts of 1994**, the Legislature enacted the **Public Sector Compensation (1994-97) Act**. The **Compensation Act** imposed a three per cent reduction in pay for the period between November 1, 1994, and October 31, 1997. The operative provision is s. 9(1) of the **Act** which provides:

> 9 (1) Effective November 1, 1994, the pay rate for each position covered by a compensation plan shall be reduced by three per cent except as provided by this Section.

The issue in dispute involves the interpretation of that Section and, in particular, whether the pay reduction continued to apply after October 31, 1997 to collective agreements between the appellant and the respondent.

On August 22, 1997, the Union wrote to the employer expressing the view that the pay reduction expired on October 31, 1997. The employer replied on September 2, 1997, stating that under the legislation any changes to the compensation plan would have to result from collective bargaining. The Union filed a policy grievance on September 10, 1997, under the collective agreements then in force, stating its position that the pay reduction would expire on October 31, 1997. The Union claimed that the employer was in violation of the agreements and requested a restoration of the pay reduction effective November 1, 1997. On October 24, 1997, the Minister of Labour appointed Eric K. Slone as a single arbitrator to hear and determine the matter.

The arbitrator did not have to interpret the collective agreements. He identified the issue as follows:

> The central question, in my opinion, then becomes this: what was the legal effect of the 1994 Act - did it have the permanent effect of amending the collective agreements, once and for ever, as the Employer contends, or - as the Union contends - did it have the more time-limited effect of changing wage scales for the three-year period during which collective bargaining was frozen?

Part IV of the **Compensation Act** provided for the appointment of an administrator for the administration of the **Act**. It also provided for the appointment of a Board. The administrator was given wide powers to determine questions arising pursuant to the **Act.** Decisions of the administrator could be referred to the Board. In view of these provisions the employer challenged the jurisdiction of the arbitrator on the grounds that the administrator and the Board had exclusive jurisdiction to determine the issue raised by the grievance, as it involved the application of the **Compensation Act**. The employer referred, particularly to s. 3(1) of the **Act.**

After extensively reviewing the provisions of the **Act**, the arbitrator concluded that he had jurisdiction to hear the grievance. In finding in favour of the Union, he concluded that the **Compensation Act** had no operative affect after November 1, 1997 and that the **Act** did not amend the collective agreements. On the jurisdictional issue, Mr. Slone stated:

> In the result, after carefully considering the language of the legislation, I am not convinced that the legislature has expressed any intention to vest exclusive jurisdiction in the Restraint Board to consider all matters of interpreting the statute. There can be no doubt that the Restraint Board has jurisdiction over matters properly brought before it, and it is not for me to draw the lines as to where that jurisdiction begins and ends. To the extent that the Restraint Board has jurisdiction, its decisions will receive due respect and deference: see *Conseil Scolaire Clare-Argyle School Board v. N.S.G.E.U.*

However, I agree both with arbitrator Outhouse and arbitrator Christie that this matter before me is one that is obviously appropriate to be arbitrated. I find, as did they, that there is nothing exclusively within the jurisdiction of the Restraint Board that would have the effect of ousting my jurisdiction.

I do not accept that the words of s. 3(1) have the effect contended by Mr. Durnford, nor do I accept that arbitrator Christie may have missed an important point in his analysis. It does not logically follow that because **"this Act applies notwithstanding any ... award or decision ..."**, that the Restraint Board has exclusive jurisdiction, nor that the Restraint Board's application or interpretation of the statute carries inherently more weight than an arbitrator's application of the same statute. I agree fully and wholeheartedly that the Act applies. The law is the law. In fact, one of my principal tasks in this matter is to interpret and apply the Act. If this matter were to go before a Judge, he or she would also apply the Act. It is simply reading far too much into that language to conclude that the Board is given exclusive jurisdiction. In my view, if a legislature intended to give exclusive jurisdiction to a statutory board and to oust the jurisdiction of a deeply entrenched institution such as arbitration, it would have done so by explicit and clear language. It would not leave the matter to be decided by attempting to read such an interpretation into a general provision like s. 3(1).

It is also my view that s. 3(1) is a largely substantive provision designed to ensure that all types of compensation plans, including those determined by interest arbitrators, would be subject to the 1994 Act. The words **"arbitral or other award or decision"** are sandwiched between the words **"compensation plan"** and **"other agreement or arrangement of any kind"** and, in my view, ought to be read as more likely referring to awards or decisions, such as interest arbitration awards, which stand in the place of a collective agreement or other compensation plan. Those words cannot fairly be read to have the rather startling effect contended, namely that a grievance arbitrator is prohibited from determining whether the collective agreement has been violated as a result of an alleged failure to pay the appropriate wages.

Unlike the situation before arbitrators Outhouse and Christie however, there is the additional *a fortiori* factor that in the matter before me, it is at least arguable if not established that the jurisdiction of the Restraint Board is at an end following the three year period within which the legislation primarily operates. This argument dovetails with the argument on the merits, which argument depends in part upon the view that the legislation ceases to operate after three years. The issues are related, although not precisely the same, because it would still be possible to find that Board's jurisdiction is at an end without necessarily finding that the three percent reduction must be restored.

Having heard and reflected upon the arguments and having read the Act numerous times, I conclude that the intent of the legislation was not to extend its reach beyond October 31st, 1997 except perhaps to the extent that certain things done within that time period might have a permanent or enduring effect. Going right to the title of the Act - the *Public Sector Compensation (1994-97) Act* - and continuing through the Act, it is clear to me that the legislature intended to impose certain restrictions and hardships for a very definite three year period - November 1, 1994 to October 31, 1997 - after which things would return somewhat to normal in the sense that parties to collective agreements would again be free to negotiate freely and other employees such as public officials would have their pre-restraint

reductions restored to them automatically. While the Restraint Board may continue to have jurisdiction over unresolved matters that occurred during the three year period, I see nothing in the legislation that suggests that this Restraint Board (as administrator and regulator of the statute) would have any jurisdiction or even concern over what happened afterward. The legislation does not, on the face of it, appear to have any ongoing impact on wages or wage rates to be paid to public sector employees and it would be, in my view, absurd to empower a board to answer questions concerning pay rates to public sector employees when those pay rates are ultimately to be determined by free collective bargaining. While it may be that the very question before me was not one that the legislature turned its mind to, nevertheless it is difficult to imagine that it would have intended to subject employees after November 1st, 1997 to the regulatory and administrative machinery of this Restraint Board given that their collective agreements and wages are not intended to be actively impacted by the legislation. I take some comfort in the language of sections 21 and 22 of the 1994 Act, where it speaks to the appointment of the Board and the duties of the Administrator.

Section 21 states that a **"Board for the purpose of this Act"** shall be appointed. This raises the serious question of what is the purpose of the Act and does it extend to the period after November 1, 1997? In my view, the purpose of the Act for which the Board was appointed was to ensure *inter alia* that the 3% reduction was carried out and not circumvented by ingenious or devious means. Moving on, the opening words of section 22(1) are **"where a question arises pursuant to this Act".** In my view, the question before me does not strictly arise pursuant to the 1994 Act, but rather is a question that transcends the Act. The question is, whether the Act or anything done previously under its auspices continues to have any enduring impact. It being the Union's contention that the effect of the Act is spent, and that the Act no longer plays any role in determining the wages due to its members, it can hardly be characterized as a question arising pursuant to the Act. In my view, a fair reading of the legislation surrounding the jurisdiction of the Board suggests that during the period when the Act was clearly in force and in need of enforcement, that the Board was the appropriate body to ensure that the spirit of the Act would be applied. I do not read those sections as giving that board any jurisdiction, let along any exclusive jurisdiction, to determine whether or not they have a continued mandate to apply the statute after the expiry of the period within which it was clearly intended to operate.

The jurisdiction of an arbitrator derives from the collective agreement and from the *Trade Union Act.* The 1994 Act may have some enduring impact, as a matter of law, but in my view, the statute did not have the effect, explicitly or implicitly, of ousting the long-standing and deep-rooted jurisdiction of a collective agreement arbitrator. The 1994 Act does not render the *Trade Union Act* inoperative; nor does it abolish the collective agreement. Although the 1994 Act will take precedence over other statutes in areas of conflict. I see no conflict between the provisions of the 1994 Act and the powers of an arbitrator provided for in the *Trade Union Act.*

On the main issue he concluded:

In my view the legislation must be read not only with a view to the mischief that it was intended to address, but also subject to the presumptions that the Union submitted must be considered to have been within the intention of the legislature. These presumptions are not artificially created or imposed interpretive devices;

> rather they represent the cultural and historic backdrop against which legislation is enacted. Legislation does not arise in a vacuum. Just as fluency in the language represents a necessary backdrop to discerning the meaning of words, so do these presumptions represent the imputed mind set of the legislator.
>
> The mischief that the legislation was intended to address was the unprecedented fiscal crisis in Nova Scotia. This was the same mischief behind the earlier wage freeze and unpaid leave legislation. The 1994 Act was fiscal legislation, not labour legislation. That it intended to override labour laws and abrogate collectively bargained rights, and that the legislature had the authority to do so, cannot be doubted.
>
> In reading the operative provisions of the 1994 Act together, I have come to the conclusion that no operative effect was intended after November 1st., 1997. The Act was very specific in continuing compensation plans until November 1st., 1997 (section 6), and prohibiting any changes in those plans between April 29th, 1994 and October 31st, 1997 (section 8). Looking to the Act as a whole and seeking to apply the presumptions as indicated, I conclude that the intention was only to interfere until November 1st., 1997, in order to deal with the temporary financial crisis. To apply an interpretation that extends beyond November 1st, 1997 would be to expand the legislative purpose beyond merely dealing with the financial crisis within an identified time frame, and would give it an enduring scope of operation in the arena of collective bargaining.
>
> The legislation could have but did not expressly amend collective agreements. Rather, the Act targeted pay rates for individual positions, and provided in Section 12 that compensation plans providing for pay rates in excess of the pay rates permitted by the Act would be "of no force or effect". In my view, the actual collective agreements were left in existence, untouched by the legislation. Rather, pay rates were reduced for the duration intended and the effect otherwise of the express wording in the agreements was rendered ineffective for the duration.

The Respondent filed an application in the Supreme Court to set aside the award. The matter was heard before Mr. Justice Goodfellow. He allowed the application and set aside the award by decision dated January 8, 1998. On the jurisdictional question Justice Goodfellow agreed with the conclusions of the arbitrator. In interpreting s. 9(1) of the **Act** he stated:

> Conspicuously silent in s. 9(1) is any time limit and this does not appear to have been considered by the arbitrator. In any event, Driedger at page 168, refers to one of the so-called maxims of statutory interpretation; that is, "to express one thing is to exclude another." And went on to state:
>
> > An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly.

> Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

The numerous references I have referred to illustrate the significance of the absence. or failure, of the legislature to legislate a time frame for the duration of the three per cent reduction in s. 9(1). The fact that the legislature chose to introduce time limitations frequently throughout the statute and chose not to insert any time limitation in s. 9(1) is very clear evidence of the intent to render s. 9(1) indefinite in its application from the only date recited its starting date of November 1st, 1994.

This legislation operated to amend the expiry dates of all collective agreements to have them al expire on November 1, 1997. This is the unmistakeable and only conclusion that can be reached by reading s. 6(1) and (2) of the **Act**.

With respect to s. 9(1), it effectively amends the terms of the collective agreements by reducing pay rates without any reference to a time limit. S. 12 of the **Act** provides that the original compensation plan to which the reduced rates section applied in November 1994 is "of no force or effect." I adopt the conclusion of Cacchione, J., in **Nova Scotia Union of Public Employees v. Labour Relations Board N.S. et al** (1995), 144 N.S.R. (2d) 151, at page 159:

> The wage restraint legislation operated to change the collective agreement but not the **Trade Union Act**. This can be seen from the fact, on a reading of the plain language of the wage restraint legislation, that nowhere in that legislation is there any provision explicitly affecting open seasons contained in s. 23 of the **Trade Union Act**. What the wage restraint legislation did was to affect the term of the collective agreements and impose a wage freeze or a roll back. (emphasis added)

In my view, legislative amendments to the collective agreements, both as to the duration and rate of pay, took place.

The Union appealed the decision of Justice Goodfellow. There was no cross-appeal on the jurisdictional question. Because of the fundamental issue raised by the jurisdictional question, this court notified counsel before the hearing of the appeal that we wished to hear representations on the jurisdictional question. I propose to deal primarily with the jurisdictional issue. In doing so, I will make some comments on the second issue.

By way of preliminary comments, there is no dispute that the issues turned on the interpretation of the **Compensation Act.** The standard of review in interpreting the **Act** on both issues is correctness, see **MacLeod et al v. Eagen et al** (1974), 46 D.L.R. (3d) 150. The proper approach in interpreting the statute is that expressed in the recent decision of the Supreme court of Canada in **Rizzo & Rizzo Shoes Ltd.** (January 22, 1998 is unreported). In that case, Iacobucci, J. approved the following passage from Driedger text on the **Construction of Statutes** (2d) at p. 87 where he stated:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". ...

In determining the issues, I do not consider it is necessary to look beyond the language of the statute.

The **Act** contains the following definitions:

> 2 In this Act,
>
> ...
>
> (e) "compensation plan" means a collective agreement, contract of employment or terms of employment;
>
> ...
>
> (l) "pay" means salary, wages, stipends, honoraria, bonuses and commissions;
>
> (j) "pay rates" means single rates of pay or ranges of rates of pay or, where no such rates or ranges exist, any fixed or ascertainable amounts of pay;
>
> ...

The following provisions are relevant:

> 3 (1) This Act applies notwithstanding any compensation plan, arbitral or other award or decision, or other agreement or arrangement of any kind.

(2) The continuation, alteration or termination of a compensation plan pursuant to this Act is not and shall not be deemed to be a breach of the plan and, for greater certainty, does not entitle any person to terminate the plan, to receive any payment or to any other remedy.

(3) The reduction in pay pursuant to this Act is not a reduction in compensation for the purpose of any compensation plan and, for greater certainty, shall not be deemed to be a termination of the plan and does not entitle any person to terminate the plan, to receive any payment or to any other remedy.

(4) Every enactment, whether enacted before or after the coming into force of this Act, including, without limiting the generality of the foregoing, the *Public Sector Compensation Restraint Act,* shall be read and construed as subject in all respects to this Act and, in the case of conflict with this Act, this Act prevails. 1994, c. 11, s. 3.

6 (1) Every compensation plan in effect immediately before April 29, 1994, is continued until November 1, 1997, except as provided by this Act

(2) Where

(a) a compensation plan has expired before April 29, 1994; and

(b) a new compensation plan is not established before April 29,1994,

the expired plan is continued, effective from when it expired but for this Act, until November 1, 1997, except as provided by this Act.

(3) Nothing in this Section extends the period of employment for any person. 1994, c. 11, s. 6.

8 (1) No compensation plan, whether established before or after the coming into force of this Act, shall be changed between April 29, 1994, and October 31, 1997, inclusive, except as provided by this Act.

(2) Notwithstanding any compensation plan, there shall not be any increase in the pay rates in a compensation plan between April 29, 1994, and October 31, 1997, inclusive. 1994, c. 11, s. 8.

9 (1) Effective November 1, 1994, the pay rate for each position covered by a compensation plan shall be reduced by three per cent except as provided by this Section.

> (2) For greater certainty, the reduced pay rates shall be the basis for any pay-related calculations.
>
> (3) This Section does not apply to an employee whose annual pay, as a person described in Section 5, is twenty-five thousand dollars or less.
>
> (4) No employee's annual pay, as a person described in Section 5, shall be reduced by this Section to less than twenty-five thousand dollars. 1994, c. 11, s. 9.
>
> 12 A compensation plan to which this Part applies, entered into, established or amended at any time, is of no force or effect to the extent that it provides for pay rates in excess of pay rates permitted by this Act. 1994, c. 11, s. 12.

1. Part II of the Act applies to elected and appointed public officials including judges. Section. 15 applies to that group and states:

> 15 The remuneration of a person to whom this Part applies shall not exceed
>
> (a) between April 29, 1994, and October 31, 1994, inclusive, the rate in effect immediately before April 29, 1994; and
>
> (b) between November 1, 1994, and October 31, 1997, inclusive, ninety-seven per cent. of the rate in effect immediately before April 29, 1994. 1994, c. 11, s. 15.

Part III of the **Act** applies to payments for insured medical services. The restrictions in that Part were expressly applicable until November 1, 1997.

Part IV contains provisions for the administration of the **Act** including:

> 20 An Administrator and such other persons as are necessary for the administration of this Act shall be appointed in accordance with the regulations. 1994, c. 11, s. 20.
>
> 21 A Board for the purpose of this Act shall be appointed in accordance with the regulations. 1994, c. 11, s. 21.

22 (1) Where a question arises pursuant to this Act as to

(a) whether a compensation plan is a compensation plan to which this Act applies;

(b) whether a compensation plan complies with this Act;

© whether a compensation plan has been established, amended or administered contrary to this Act;

(d) when a compensation plan came into effect;

(e) what information or documentation is required by the Board;

(f) who is an employer or employee for the purpose of this Act;

(g) who is the employer for a particular compensation plan;

(h) whether the increase in pay rates is in recognition of

(I) the successful completion of a program or course of professional or technical education,

(ii) meritorious or satisfactory work performance,

(iii) the completion of a specified period of work experience.

(iv) length of time in employment,

(v) the *bona fide* promotion of an employee to a different or more responsible position;

(I) the application of a provision of this Act to any person, the Administrator may decide the question or refer the question to the Board.

(2) An employer, a bargaining agent or, where there is no bargaining agent, an employee who is affected by and is not satisfied with the decision of the Administrator may request that the Administrator refer the question to the Board and the Administrator shall do so.

(3) The Board shall decide any question referred to it and the decision or order of the Board is final and conclusive and not open to question or review but the Board may, if it considers it advisable to do so, reconsider any decision or order made by it pursuant to this Act and may vary or revoke any decision or order made by it pursuant to this Act. 1994, c. 11, s. 22.

23 (1) The Board may authorize changes to a compensation plan upon application by

(a) the employer and the bargaining agent where the compensation plan is a collective agreement; or

(b) the employer where the compensation plan is not a collective agreement,

if

© the total effect of the changes does not increase the total cost of all compensation in the respect of the employees to whom the compensation plan applies;

(d) the pay rates are not more than that permitted by this Act; and

(e) the changes would not be contrary to the intent and purpose of this Act.

(2) Nothing in this Section authorizes or enables an employer, employee or bargaining agent to resolve, or attempt to resolve, any dispute respecting changes to a compensation plan by strike, lockout, mediation or arbitration. 1994, c. 11, s. 23.

24 (1)Where the Board determines that

(a) this Act is not being complied with;

(b) a compensation plan does not comply with this Act;

© an employer or other person is implementing, has implemented or is likely to implement an increase in pay rates or rates of remuneration that do not comply with this Act; or

(d) an employer or other person is not implementing, has not implemented or is not likely to implement a reduction in pay rates or rates of remuneration as required by this Act,

the Board may make an order:

(e) requiring compliance with this Act;

(f) prohibiting in the manner it specifies the employer or other person from implementing the increase in pay rates or rates of remuneration that do not comply with this Act;

(g) requiring a recipient of pay or remuneration to pay back to the employer or other person any increase in pay or remuneration that does not comply with this Act.

(2) To the extent that the compensation plan is inconsistent with an order of the Board, the order prevails and is deemed to be part of the compensation plan.

(3) An order of the Board is a public document and shall be made available for inspection at the office of the Board during regular business hours. 1994, c. 11, s. 24.

25 Every person who fails to comply with this Act, the regulations or an order of the Board is guilty of an offence and liable on summary conviction to the penalty provided for in the *Summary Proceedings Act*. 1994, c. 11, s. 25.

The thrust of the **Act** was to restrict the wages of all persons in the public service as a necessary measure to control the public debt. In order to make the plan work, the Legislature considered it necessary to set up an administrator and a regulatory body to resolve all questions pertaining to the operation of the **Act.** There is nothing new in this type of legislation. Indeed, the **Trade Union Act** is a perfect example of legislation which provides a new scheme for settling labour disputes and providing a Board and arbitrators to administer the **Act.**

The following is from **Dreidger on the Construction of Statutes** (3d). at p. 306 and p. 309

> ***New right, new recourse.*** Where legislation introduces a new right or duty and provides a procedure for its enforcement, the courts will not create a *new* common law remedy or extend existing remedies in a novel way to supplement the statutory regime. This appears to be well established. There is also a line of cases suggesting where legislation introduces a new right or duty and provides a procedure for its enforcement, resort to *existing* common law remedies is not allowed. This, however, is far from being a rule. Whether resort to the existing common law is precluded depends on the details of the statutory scheme, the type of remedy sought and the values to the protected. Where the enforcement of statutory rights is entrusted to an administrative tribunal, for example, common law remedies are likely to be excluded. However, if the statutory regime fails to protect a value that is judged to be important, reliance on common law remedies may be considered necessary. The cases in which injunctions have issued to enforce statutory rights and duties illustrate this point forcefully.
>
> ***Legislation offers comprehensive regulation.*** Resort to the common law also may be inappropriate where the legislation is broad and detailed enough to offer a comprehensive regulation of the matter in question. This is not say that the Act as a whole necessarily amounts to a comprehensive code, but rather that the matter in

question is dealt with by the legislature in a comprehensive fashion. In so far as the legislation is comprehensive, it displaces the common law.

Legislation is said to be comprehensive when it appears that every aspect of a matter, or every possible response to a matter, has been addressed by the legislature. The result may be set out in the statute itself in the form of rules or the statute may establish a program in which the authority to make rules or decisions is delegated to others.

In *Board of Governors of Seneca College v. Bhaduria,* for example, the issue was whether a victim of discrimination was limited to her recourses under the Ontario Human Rights Code or could bring a common law action for damages before the ordinary courts. Speaking for the Supreme court of Canada, Laskin C.J. noted the comprehensive character of the code on the matter of remedies:

> ...the enforcement scheme under the *Ontario Human Rights Code* ranges from administrative enforcement through complaint and settlement procedures to adjudicative or *quasi*-adjudicative enforcement by boards of inquiry. The boards are invested with a wide range of remedial authority including the award of compensation (damages in effect), and to [sic] full curial enforcement by wide rights of appeal which, potentially, could bring cases under the Code to this court.

Given the elaborate character of the scheme, and its broad scope, Laskin CJ concluded that the legislation was intended to offer an exhaustive code of anti-discrimination remedies. He concluded with the following words:

> The view taken by the Ontario Court of Appeal ...may be commended as an attempt to advance the common law. In my opinion, however, this foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the Courts but rather makes them part of the enforcement machinery under the Code.

To permit a common law action in these circumstances would defeat the apparent intention of the legislature and would risk disrupting the statutory enforcement scheme.

In **Health Sciences Assn. v. B.C. (Industrial Relations Bd.)** (1992), 91 D.L.R. (4th) 582 at p. 591, Southin, J.A. in delivering the judgment of the B.C. Court of Appeal stated:

> The term "curial deference" is a way of expressing the notion that when the legislature sets up a specialized tribunal, invests it with broad powers and incorporates a privative clause into the enabling statute, it is telling the courts that it intends the tribunal to have the right, because it understands the subject-matter better than do judges, to make decisions which the judges might think to be wrong decisions.

> To put it another way, where, by the terms of its legislation, the legislature requires curial deference, the courts are bound, where no constitutional question arises, to obey the legislature and not subvert its intention.

The main thrust of the appellant's argument is that under the terms of the agreements and sections 41 to 48 of the **Trade Union At**, the arbitrator had jurisdiction to hear the grievance and since the **Compensation Act** did not expressly confer exclusive jurisdiction on the administrator and the Board, the arbitrator had power to hear the grievance. That argument was also followed in the decisions of arbitrators Outhouse and Christie which were adopted by the arbitrator in this case. I am not aware of any such requirement in law. Section 42 of the **Trade Union Act** provides as follows:

> 42 (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.
>
> (2) Where a collective agreement does not contain a provision as required by this Section, it shall be deemed to contain the following provision:
>
> > Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration. If the parties fail to agree upon an arbitrator, the appointment shall be made by the Minister of Labour for Nova Scotia upon the request of either party. The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it.
>
> (3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement. R.S., c. 475, s. 42.

It should be noted that the **Trade Union Act** does not expressly confer exclusive jurisdiction on the Board or arbitrators. S. 19 of the **Trade Union Act** which provides for the determination by the Board of questions arising under that **Act** bears a striking similarity to s. 22 of the **Compensation Act.** The privative clause in both **Acts** is identical in substance. The Supreme Court of Canada has repeatedly confirmed the exclusive jurisdiction of arbitrators and Labour Boards created by Trade Union legislation. See **Weber v. Ontario Hydro** (1995), 125 D.L.R. (4th) 583.

In **Canada (Attorney General) v. Public Service Alliance of Canada** (PSAC No. 2), [1993] 1 S.C.R. 941, Cory, J. said at p. 963:

> A board which is created and protected by a privative clause is the manifestation of the will of Parliament to create a mechanism that provides a speedy and final means of achieving the goal of fair resolution of labour-management disputes. To serve its purpose these decisions must as often as possible be final. If the courts were to refuse to defer to the decisions of the Board, they would negate both the very purpose of the Act and its express provisions.

In **CUPE v. NB Liquor Corporation,** [1979] 2 S.C.R. 277 at pp. 235-36, Dickson, J. said:

> Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.
>
> The usual reasons for judicial restraint upon review of labour board decisions are only reinforced in a case such as the one at bar. Not only has the Legislature confided certain decisions to an administrative board, but to a separate and distinct Public Service Labour Relations

> Board. That Board is given broad powers - broader than those typically vested in a labour board--to supervise and administer the novel system of collective bargaining created by the *Public Service Labour Relations Act*. The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met. Nowhere is the application of those skills more evident than in t he supervision of a lawful strike by the public service employees under the Act. Although the New Brunswick Act is patterned closely upon the federal *Public Service Staff Relations Act,* 1966-67 (Can.), c. 762, section 102(3) is not found in the federal legislation nor, in fact, in any other public sector legislation in Canada The interpretation of s. 102(3) would seem to lie logically at the heart of the specialized jurisdiction confided to the Board. In that case, not only would the Board not be required to be "correct in its interpretation, but one would think that the Board was entitled to err and any such error would be protected from review by the privative clause is s. 101: *See Farrell v Workmen's Compensation Board and Attorney General of British Columbia.*

Viewing the broad powers conferred on the Board under s. 22 and 23 of the **Compensation Act** it is manifest that the Legislature intended that the Board would have exclusive jurisdiction to decide all questions arising under the **Act**. This interpretation is confirmed by specific provisions in the **Act**. s. 3(1) provides:

> 3 (1) This Act applies notwithstanding any compensation plan, arbitral or other award or decision, or other agreement or arrangement of any kind.

The arbitrator placed a restrictive interpretation on this section notwithstanding the clear language in the section. What we have in the result is an arbitral award which purports to place restrictions on the **Compensation Act**. It is clear from that provision that no decision or arrangement "of any kind" was to stand in the way of the operation of the **Act**.

> 3 (4) Every enactment, whether enacted before or after the coming into force of this Act, including, without limiting the generality of the foregoing, the *Public Sector Compensation Restraint Act*, shall be read

> and construed as subject in all respects to this Act and, in the case of conflict with this Act, this Act prevails. 1994, c. 11, s. 3

That provision makes it clear that the **Compensation Act** is to prevail even over the **Trade Union Act**.

> 2 (1) Where a question arises pursuant to this Act as to
>
> (a) whether a compensation plan is a compensation plan to which this Act applies;
>
> (b) whether a compensation plan complies with this Act;
>
> © whether a compensation plan has been established, amended or administered contrary to this Act;
>
> ...
>
> (I) the application of a provision of this Act to any person, the Administrator may decide the question or refer the question to the Board.

Section 22 (2) provides for access to the Board by bargaining agents and employees. S. 24 empowers the Board to make orders requiring compliance with the **Act**. The very question referred to the arbitrator falls under the wording of s. 22(1) of the **Act.** It would not be conducive to the operation of the **Act** to have conflicting decisions interpreting the **Act.** The arbitrator acknowledged that the issue before him fell squarely to be determined on the interpretation of the statute. An arbitrator appointed under a collective agreement could still have jurisdiction to determine issues under the collective agreements provided they are not questions arising pursuant to the **Act.**

The appellant also contends that the wage restrictions effectively ended on November 1, 1997, and therefore the Board's power to make decisions after that date was spent. Justice Goodfellow found that the restraints continued until varied by new collective agreements. There is no date in the **Act** terminating the powers of the administrator and the Board. The Board was still in existence when the grievance was referred to the arbitrator. It should be noted that the arbitrator was appointed before November 1, 1997. There could be no question as to the Board's jurisdiction at that time. There is no evidence before this Court to establish what issues were generally determined by the Board or continued to be handled by the Board after November 1, 1997.

Justice Goodfellow found that the provisions of the **Compensation Act** effectively amended the provisions of the collective agreements. The following passage is from the text **Canadian Labour Arbitration** by **Brown and Beatty** (2d) at p. 78:

> At one time the prevailing view was that an arbitrator had no jurisdiction to apply statutes in the course of a grievance arbitration, and because his jurisdiction stemmed solely from the collective agreement, he had no alternative but to construe and apply the collective agreement even where it was directly contrary to the relevant legislation. However, it is now established that where the provisions of a collective agreement are clearly contrary to a statute, the arbitrator is to treat that portion of the agreement as null and void. Conversely, if the provisions of the collective agreement are not inconsistent with the statute but impose a different type of obligation, the collective agreement must prevail.

The following passages are from **Fridman, The Law of Contract** (3d) at p. 347:

> 2 Statutory illegality
>
> (a) **Prohibition by statute**
>
> The concern here is not with the Criminal Code, but with the statutes of a regulatory nature, the infringement of which may involve illegality. The prohibition of a contract by such a statute renders the contract void and of no effect. So said Lord Russell of Killowen,

> speaking for the Judicial Committee of the Privy Council, in *Montreal Trust Co. V. Canadian National Railway*. ...

and at p. 416:

> 4 The consequences of illegality
>
> (a) **Voidness of transaction**
>
> A contract which is illegal either at common law or under statute is void and unenforceable by either party. While the burden may be upon the defendant to establish that the plaintiff is relying upon an illegal contract to prove his case, it would seem that the court is entitled to take note of an illegality that is obvious on the face of the contract.

The result depends, of course, upon the wording of the statute. The effect here, in my view, was to render the pay rates under the collective agreements which expired on November 1, 1997, null and void. The effective rates under the agreements were the rates imposed by the **Act**. To that extent, the contracts were amended until November 1, 1997. Section 12 of the **Act** provides as follows:

> 12 A compensation plan to which this Part applies, entered into, established or amended at any time, is of no force or effect to the extent that it provides for pay rates in excess of pay rates permitted by this **Act.** 1994, c. 11, s. 12.

In the result, I am of the view that the arbitrator had no jurisdiction to determine the second issue and the award is null and void. The exclusive jurisdiction to determine the issue was ultimately in the Board. In conclusion, I agree with Justice Goodfellow when he stated:

> This by no means restricts the parties from determining the rates of pay effective November 1st, 1997 through the bargaining process and whenever such rates of pay are agreed upon, they can, if agreement is reached, be retroactive to November 1st, 1997.

In view of my conclusions, I see no alternative but to allow the appeal on the first issue and set aside the award.

Jones, J.A.

C.A. No.144277

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

NOVA SCOTIA GOVERNMENT EMPLOYEES UNION

Appellant

- and -

Q.E. II HEALTH SCIENCES CENTRE

Respondent

REASONS FOR JUDGMENT BY:

Freeman, J.A.

Jones, J.A. (Dissenting)