NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Attorney General) v. Smith*, 2004 NSCA 106

Date: 20040915
Docket: CA 202492
Registry: Halifax

Between:

The Attorney General of Nova Scotia representing
Her Majesty the Queen in Right of the Province

Appellant

v.

Terrance L. Smith

Respondent

and

The Nova Scotia Government and General Employees Union

Intervenor

Revised Judgment:	The text of the decision has been corrected according to the erratum released December 8, 2004.
Judges:	Roscoe, Freeman and Cromwell, JJ.A.
Appeal Heard:	March 22 and 23, 2004, in Halifax, Nova Scotia
Held:	Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Cromwell, J.A.; Freeman and Roscoe, JJ.A. concurring.
Counsel:	Dale Darling, for the appellant Dale Dunlop, for the respondent Raymond Larkin, Q.C., for the intervenor

Reasons for judgment:

I. Introduction:

[1] This case is part of the aftermath of the allegations of abuse and breach of duty by government employees at the Shelburne Youth Centre. It concerns the employment in the civil service of Mr. Smith, a former Shelburne employee, who was accused of physical abuse and breach of duty but was ultimately found to be blameless.

[2] While the allegations against him were being investigated, Mr. Smith's civil service employment went into a sort of limbo. He was demoted, given busy work in another department and ultimately sent home with pay. Once the allegations had been resolved, the question for the civil service was what to do with him.

[3] The Province recognized the unique and unprecedented situation of people in Mr. Smith's position. It entered into a Memorandum of Agreement ("MOA") which set out extraordinary measures to attempt to provide for their future. With respect to resolving their employment issues arising out of the investigation, the MOA arguably took employees such as Mr. Smith out of the normal administrative control of the deputy minister and turned it over to a committee and a special dispute resolution mechanism.

[4] Mr. Smith claims that the deputy minister has acted beyond his authority by taking steps in relation to Mr. Smith's employment that are not in accordance with the MOA. He has sued and sought an injunction.

[5] A judge of the Supreme Court issued an interlocutory injunction to prevent the deputy minister from taking action which the judge concluded was arguably in breach of Mr. Smith's employment contract and beyond the deputy's statutory powers. The Crown appeals, arguing that the **Proceedings Against the Crown Act**, R.S.N.S. 1989, c. 360, as amended ("**PACA**") takes away the court's authority to issue an injunction in these circumstances and alternatively, that the judge erred in finding the prerequisites for injunctive relief had been established. The appeal, therefore, raises the questions of whether injunctive relief is available at all, and if it is, whether the judge erred in granting it in these circumstances.

[6] In my view, the appeal should be dismissed. Injunctions are available against Crown officers when they exceed their powers. The MOA arguably imposes limits on the deputy's powers which he exceeded in this case thereby breaching obligations owed to Mr. Smith. The MOA also provides ample evidence that what is at stake for Mr. Smith is much more than a paycheck, but also how his future career will unfold, his self esteem and his respect in the community. It shows, in short, that the rights he claims under the MOA cannot be adequately protected by a damage award.

[7] I would grant leave to appeal, but dismiss the appeal.

II. Overview of the Facts:

[8] Terrance Smith has been an employee of the appellant Crown since 1981. From 1981 until 1995, he was the Assistant Superintendent of what came to be known as the Shelburne Youth Centre.

[9] In the early 1990's, the Province launched an investigation into allegations of abuse of children at Shelburne and other provincial institutions. In 1995, Mr. Smith was formally advised of an allegation that he had failed to take appropriate action against abuse of children even though no one had made a direct allegation, complained or provided evidence against him. Not until 2001 did he receive formal notice that this allegation had been fully investigated and that no grounds for disciplinary action had been revealed. He had also, apparently, been accused earlier of physical abuse. Although he received no notice of that allegation, he was advised in the fall of 1996 that there was not sufficient evidence against him to proceed with it.

[10] As a result of the allegations against him, Mr. Smith was demoted to Manager, Administration Services in August of 1995. He remained there until 1998 when he obtained a Property Officer position with the Department of Transportation, a considerable further demotion. The Property Officer position came to an end and Mr. Smith was not provided with an alternate position. However, his salary and benefits were continued apparently under the provisions of a MOA between the Nova Scotia Government Employees Union ("NSGEU") and the Province which, it was agreed, would also apply to non-union managerial employees, like Mr. Smith, who otherwise fell within its terms.

[11] I will have more to say about the MOA later. For now, I note that the MOA was intended to assist employees, such as Mr. Smith, who had been investigated and then cleared of any wrongdoing. It contemplated assistance by: defining the available options; setting out the process for applying and resolving disputes about those options; setting out the obligations of the parties; and, by using a continuing career in the Nova Scotia Public Service as the primary, but not the exclusive, method for assisting employees. A number of options are described in the MOA, including placement/transfer/continuing employment, managed return to work, early retirement, transitioning to careers outside government, LTD and sick leave. The Province, among other things, undertook to identify and keep an inventory of placement and transfer opportunities for employees and to place or transfer employees into appropriate identified opportunities. It was agreed that disputes about how the MOA should be applied to individual employees would be resolved by a process set out in the MOA.

[12] As noted, after the Property Officer position came to an end in June of 2000, Mr. Smith had no other position, but his pay and benefits were continued, apparently under the provisions of the MOA. In the early spring of 2001, he received a letter advising that the allegation against him had been investigated and no basis for disciplinary action revealed. However, the Province refused to return him to his former position at Shelburne, but offered some options. None was agreeable.

[13] In late 2002, Mr. Smith commenced an action for damages against the provincial Crown. The statement of claim (as amended up to May of 2003) alleges negligence in the investigation of the abuse allegations and in the responses made to them, constructive dismissal, harassment and intimidation, defamation, abuse of power, intentional and negligent infliction of mental suffering and breaches of ss. 7 and 12 of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[14] In late March of 2003, Mr. Smith was advised by the deputy minister of justice that his salary would be discontinued effective May 1 unless he made some other arrangement or reported for work to Shelburne as a unit supervisor. That position involved constant contact with youth and Mr. Smith said, with the support of his treating psychologist, that it was not suitable for him.

[15] Mr. Smith then applied to Moir, J. in the Supreme Court for a declaration that he was entitled to remain an employee of the Province pending the trial of his action and an interlocutory injunction restraining the deputy minister of justice or any other employee of the department of justice from terminating his employment pending the outcome of the trial of the action. Moir, J. granted the injunctive relief sought enjoining the deputy minister from terminating Mr. Smith's employment pending trial.

III. Issues:

[16] The provincial Crown seeks leave to appeal, arguing that the judge at first instance made three errors:

1. He wrongly found that Mr. Smith had established an arguable case that his rights had been infringed;
2. Alternatively, if an arguable case was established, **PACA** prohibits injunctions again Crown officers so that the judge erred in finding that he could issue an injunction against the deputy minister in these circumstances; and
3. The judge erred in finding that Mr. Smith had shown that failure to issue an injunction would result in irreparable harm and therefore erred in issuing an injunction when damages would be an adequate remedy.

[17] I will deal with each of these submissions in turn after saying a brief word about the applicable standard of appellate review.

IV. Standard of Review:

[18] The order under appeal is both interlocutory and discretionary. This Court will intervene on appeal from an order of this nature only if persuaded that wrong principles of law have been applied, that there have been clearly erroneous findings of fact or if failure to intervene would give rise to a patent injustice: **Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd.** (1990), 96 N.S.R. (2d) 82 (A.D.) at paras. 10 - 13. Our role is initially one of review to determine whether the judge at first instance misunderstood either the law or the

facts: **Hadmor Production Ltd. v. Hamilton**, [1983] A.C. 191 (H.L.(E.)) at 220; **Gateway** at para. 13; **Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.** , [1987] 1 S.C.R. 110 at 154 - 6.

[19] An interlocutory application is generally not the place to finally resolve difficult questions of law going to the merits of the main action: **American Cyanamid Co. v. Ethicon Ltd.**, [1975] 1 All E.R. 504 (H.L.) at 510; **Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra** at 130. The role of the judge of first instance as regards the merits of the claim is simply to determine whether there is an arguable case in the sense of one that is not frivolous and our role on appeal is to determine whether he erred in that conclusion. Neither the judge at first instance nor this Court on appeal is called upon to express a final and ultimate view on the legal or factual merit of Mr. Smith's claim against the Crown.

[20] In the course of reaching his conclusion, the judge had to interpret the limitation on the availability of injunctive relief against the deputy minister contained in s. 16(4) of **PACA**. His conclusion as to the interpretation of the statute is a question of law and therefore is reviewed on the correctness standard.

V. Analysis:

1. Introduction:

[21] Moir, J. held that the Court has jurisdiction to restrain a Crown servant who acts outside his or her authority and that Mr. Smith had presented an arguable case the deputy minister had done so. The appellant challenges both of these conclusions. The fundamental submission is that there is no arguable case that the deputy's actions were illegal and, in any event, that an injunction cannot be issued against a Crown servant such as the deputy minister in these circumstances.

[22] These submissions relate to two basic points: one concerning the arguable case prerequisite for an interlocutory injunction and the second, the immunity of Crown officers from injunctions. The first point raises the question of whether the judge erred in finding that Mr. Smith had advanced an arguable case of illegal actions by the deputy minister. If the judge did not err on that, the second point is whether the court may restrain a Crown servant such as the deputy minister from committing these allegedly illegal acts.

[23] In making these submissions, the appellant relies on two propositions of law. The first is that an interlocutory injunction may not be granted unless the person seeking it establishes that they have at least an arguable case that their rights have been or are about to be infringed. The second is that Crown servants are immune from injunctive relief by virtue of s. 16(4) of the **PACA.**

[24] These two issues are inter-related, but I have found it helpful to turn first to the question of whether the judge erred in finding that Mr. Smith had shown an arguable case and then to the question of Crown immunity from injunctive relief. For reasons which I will give in the next section of my judgment, I conclude that the judge did not err in his finding that Mr. Smith had established an arguable case. In Part 3 of my analysis I will set out my reasons for concluding that injunctions are available against Crown officers such as the deputy minister in cases like this one in which there is an arguable case that they have acted in excess of their statutory powers.

[25] The appellant also submits that Mr. Smith did not show that damages were an inadequate remedy and, therefore, the judge erred in issuing an injunction. I will deal with that issue in Part 4 of my analysis.

2. The Arguable Case:

[26] The parties do not disagree on the threshold test which the judge used to determine whether the injunction should be granted. He required Mr. Smith to present an arguable case that his rights had been or were about to be infringed. The appellant's submission is that the judge erred in finding that Mr. Smith met this threshold.

[27] The judge found that, in a letter dated March 25, 2003 to Mr. Smith, read in the context of the dealings between the parties, the deputy minister had given Mr. Smith "... the choice of reporting for work as a Unit Supervisor or being dismissed." This, he concluded, was arguably constructive dismissal. He found that such dismissal was arguably in breach of the MOA and beyond the statutory authority of the deputy as set out in the **Civil Service Act**, R.S.N.S. 1989, c. 70. Thus, to the judge, the three essential elements of Mr. Smith's arguable case were the deputy's March 25 letter, the MOA and certain provisions of the **Civil Service Act**.

[28] The appellant's position is that the judge was wrong on each of these points: the deputy's letter was not a dismissal, the MOA did not prevent the deputy from taking the action he did and the **Civil Service Act** authorized the deputy's actions.

[29] Ms. Darling, on behalf of the appellant, correctly pointed out that the statement of claim does not clearly reflect the bases relied on by Mr. Smith for his arguable case. However, both at first instance and on appeal there has been full argument on these points. Bearing in mind that under **Civil Procedure Rule** 43, an injunction may be sought and granted even before an action has been commenced, it would not be sensible to confine Mr. Smith to the causes of action alleged in his statement of claim at this stage. However, his pleadings ought to be amended promptly to reflect the bases of his claim as argued to the judge and in this Court.

[30] Returning to the three essential elements of the judge's conclusion on the arguable case issue, the deputy's letter must be examined in the context of the MOA and the conduct of the parties leading up to the letter. I therefore will turn first to the MOA and then consider the deputy's letter and the provisions of the **Civil Service Act**.

[31] To summarize my conclusions, the judge did not err in finding that Mr. Smith had established an arguable case that he had been or was about to be wrongfully dismissed and that the deputy's actions arguably exceeded his statutory authority. For employees like Mr. Smith, the general managerial power of the deputy arguably has been limited by the MOA.

(i) The MOA:

[32] The MOA was central to the judge's reasoning and, in my view, is decisive of the issues raised on appeal. It is necessary, therefore, to describe its contents in detail.

[33] The MOA was intended, as its words attest, to deal with circumstances that were "unique and without precedent." We are told that scores of employees who had worked at provincial youth facilities had been accused of abuse by former residents of the institutions and that the Province paid compensation to many of those former residents before their claims were proven. The employees were

investigated by the police and by an internal investigation unit established by the department of justice. Some were removed from their positions while those investigations were carried out. The MOA applied to and was intended to assist those employees, like Mr. Smith, who had been investigated and then cleared of any wrongdoing.

[34] The parties to the MOA were the NSGEU and the Province. The Union had negotiated the MOA on behalf of those of its members affected by the allegations of abuse. However, Article 1(3) provided that its terms could be extended to "... any other employee agreed to by the Employer and the Union." This was the basis on which the terms of the MOA were extended to managerial employees such as Mr. Smith.

[35] The purpose and "guiding principles" of the MOA are set out in Articles 2 and 3. The Province and the NSGEU agreed to use continued employment in the Public Service of Nova Scotia as the primary, but not exclusive, method of assisting employees affected by unfounded allegations of abuse. The parties agreed to define options that would be made available to eligible employees, to describe the process to be followed in applying those options and to state the obligations and roles of both parties in applying the MOA. The guiding principles were these:

> a. the importance of the interests, welfare and well-being of the employees in determining which option or options are applicable;
> b. the need for mutual creativity and flexibility in finding solutions for individual employees;
> c. the importance of confidentiality to the employees; and
> d. the need to respect the collective agreement rights of other employees.

[36] Under the MOA, the Province arguably accepted three fundamental obligations:

> 1. it would identify and keep an inventory of placement and transfer opportunities for employees;

2. it would place or transfer employees into appropriate identified opportunities; and, most importantly for this appeal,

3. it accepted that disagreements about the application of the MOA to particular employees would be resolved by a special dispute resolution process set out in the MOA.

[37] There was no time limit placed on the MOA's operation. For example, Article 10 of the MOA allowed for a temporary placement or transfer where that was in the best interests of an employee and recognized that it might take some time to determine if an opportunity was, in fact, appropriate. It provided for "one or more trial placements" until a successful placement had been achieved. In order to further assist employees during the placement and transfer process, the MOA provided for retraining, relocation assistance and counselling. It acknowledged that in some cases the placement or transfer of employees would have to be "managed" in a process similar to that used when an employee returned to work from a lengthy absence on sick leave or long term disability.

[38] Article 11 of the MOA protected the salary of employees in the event they were being placed or transferred to a position that paid less than their original employment. If they were placed within the civil service their salary would be maintained "on a present incumbent basis" and they would be paid as if they were still in their previous position. If they were placed in a position outside the civil service, their salary would be red-circled.

[39] The MOA also set out options for employees who chose not to transfer to an appropriate position within the Province or who, as a result of illness, were unable to do so. An early retirement program was offered to employees who wished to end their employment and begin receiving a pension from the Province and financial support and counselling services were offered to employees who decided to continue their careers elsewhere. Employees who became ill as a result of the abuse allegations would have their short or long-term disability benefits "topped-up" to the full amount of their regular pay so long as they continued to qualify for benefits.

[40] As noted, the Union and the Province agreed they would be jointly responsible for the administration of the MOA. They created a joint committee with representatives of the Union and Management to administer it and respond to

requests for assistance from individual employees. The parties also provided for the resolution of disputes over the application of the MOA. If they could not agree on the appropriate placement of a particular employee, they agreed to refer the matter to a "career development/job placement professional" whose advice would be "determinative." The parties agreed to refer any other dispute over the interpretation of the MOA to binding arbitration.

[41] The judge found that the MOA arguably was part of Mr. Smith's contract of employment, that it ".. includes a promise against termination for redundancy," and limited the deputy's powers to deal with Mr. Smith. The appellant argues that the MOA could not give rise to any enforceable rights on Mr. Smith's part and even if it could, the judge erred in his interpretation of the MOA.

[42] With respect to whether the MOA could be viewed as arguably giving rise to rights enforceable by Mr. Smith, the evidence before the judge amply supports his conclusion that at least arguably the MOA applied to Mr. Smith and that his employer, the Crown, was bound by its terms.

[43] Ms. Young, the Director of Human Resources, Finance Corporate Services Unit and Chair of the Union-Management Committee responsible for administering the MOA, testified that the coverage of the MOA was extended to management employees such as Mr. Smith. The evidence in the record showed that the MOA Committee actively worked on Mr. Smith's behalf. For example, Ms. Young, on behalf of the MOA Committee, wrote on March 15, 2000 that "[i]t is the intent of the Committee to assist [Mr. Smith] in every way possible in securing a suitable career transition" and that "[e]very effort" would be made to do so. The Executive Director of Correctional Services wrote to Mr. Smith on April 2, 2001 advising that even though his former position of Coordinator of Administrative/Support Services at Shelburne had been removed from the complement, his ".. salary was maintained through the MOA process.." Even the deputy's letter of March 25 pointed out to Mr. Smith that "... the Memorandum of Agreement (MOA) which provides a number of enhanced employment provisions continues to be in place." In light of this sort of evidence, I see no reviewable error on the judge's part in finding that the MOA arguably could be viewed as giving Mr. Smith enforceable rights.

[44] The appellant's submissions at times seemed to suggest that Mr. Smith's position was simply that he had a right to be paid indefinitely without working.

With respect, this is not a fair characterization of Mr. Smith's position. The record shows that Mr. Smith wanted to and sought out meaningful work in the public service. That is clear from the judge's summary of the history of Mr. Smith's experience under the MOA:

> [3] .... Mr. Smith had already been placed temporarily as a Property Officer at Public Works when the [MOA] was signed in June 1998. Public Works understood that Department was "to keep him busy" for a two year term, after which "he could go back to Justice". This was confirmed in e-mails between Ms. Young for the committee and officials at Public Works. As the Public Works placement drew to an end, Smith and Young discussed prospects. Mr. Smith wanted to remain in the Shelburne area. It was made clear through both cross-examination and re-direct examination of Ms. Young that this limit was accepted by the Province even though it much restricts opportunities. The other criterion applied by the committee is that the employee must be qualified for the position. Although reluctant to return to the Shelburne institution, Mr. Smith did propose to undertake work in anger management there. The Committee considered this a duplication of services already offered to the incarcerated children. Shortly afterwards, the term at Public Works came to an end and Mr. Smith has been drawing a salary without work since June 2000. Ms. Young agreed that Mr. Smith submitted applications and she said it certainly appeared he wanted to work. ...

[45] The appellant suggests that the judge interpreted the MOA as giving rise to a right to "employment for life" and that in this he erred. Here is what the judge said on this point:

> [14] ... although his former positions have been abolished, the government extended him a special term. His employment contract includes a recognition that he is among a group of employees in a unique situation and it also includes a promise against termination for redundancy. The Province promised him it would "place or transfer [those] employees into appropriate identified opportunities". With a provision such as this, Mr. Smith's employment contract takes on a character which is probably unique to him and the other employees who were wrongfully accused in connection with abuse of institutionalized children.
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> . . .
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> [18] ... Mr. Smith's employment contract is almost unique. It includes a promise by the government to keep an inventory of "available placements and transfer opportunities" and to "place or transfer" Mr. Smith "into appropriate identified opportunities". This provision goes to term. It is not expressed to be limited by time except by whatever time it takes for the government to find an "appropriate"

> position for Mr. Smith. It is not surprising that no time limit is expressed. His employment had been in a state of suspense for the five year investigation, during most of which he had been given no opportunity to do any work in exchange for his salary, let alone work as a supervisor or manager.
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> . . .
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> [20] In my assessment, the affidavits show an arguable case not only that Mr. Keefe's letter constitutes a constructive dismissal and its implementation would constitute an actual termination, but also that implementation would breach the promise to place Mr. Smith into an "appropriate" employment position. I am satisfied that Mr. Smith has an arguable case to present.
>
> [21] ... Mr. Smith's employment contract contains an unusual term according to which the Province will not dismiss him without finding and offering appropriate employment for him. ...

[46] I emphasize that both the judge at first instance and this Court on appeal are concerned with whether there is an arguable case advanced by Mr. Smith. Neither the judge nor this Court, therefore, need to or should express a fixed or final view as to the interpretation of the MOA. The issue at this interlocutory stage is much narrower and entirely preliminary.

[47] The MOA is a complex and unique document. Its provisions are open-textured and potentially have far-reaching implications for employees and employer alike. Its interpretation and implementation have been entrusted by the parties not to the courts, but to dispute resolution mechanisms which they themselves have designed. Both of these facts suggest that we should be careful not to say more than absolutely necessary about the interpretation of the MOA. As I have emphasized already, we are here only concerned with whether there is an arguable case; we are not here to try the issue, but to determine if there is an issue to be tried.

[48] That said, I see no error in the judge's conclusion that the MOA arguably required the employer "... to place or transfer employees [including Mr. Smith] into appropriate identified opportunities" as set out in Article 7 of the MOA. The question for now is not whether this is the correct interpretation, but whether it is an arguable interpretation of the MOA. Moreover, even if the obligation under the

MOA's Article 7 is ultimately found not to be as broad as the judge thought it might be, it is also arguable that the MOA at least precludes unilateral action by the employer with respect to this group of employees.

[49] The MOA, at least arguably, contemplates the development of a mutually agreed upon plan for the employee's future. In the event that is not possible, the parties have provided in the MOA for a mechanism to resolve disputes about how the MOA should be applied to a particular employee. I will set out the relevant provision in full:

> **IX PROCESS**
>
> **Application of Options**
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> 24. The Employer and the Union agree that they will be jointly responsible for the application of this Memorandum of Agreement and that in doing so, they will receive and give full consideration to the advice of third party professionals engaged to work with the employees in the area of career development and job placement, which advice will include a statement of the employee's preferred outcome. If the Employer and the Union cannot agree on the application of this Memorandum to a particular employee, they will refer the disagreement to a career development/job placement professional, not a professional hired to work with the employees, whose advice shall be determinative.
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> (Emphasis added)

[50] This clause of the MOA arguably requires resort to this dispute resolution mechanism in the event that the parties cannot come to some mutually agreeable plan for the employee's future. Arguably, therefore, the MOA promises a suitable, mutually agreed placement if possible and requires resort to a specified dispute resolution process if it is not. Taken together, these provisions arguably prevent the employer from unilaterally imposing a particular option on an employee in Mr. Smith's circumstances.

[51] I recognize that the parties disagree about whether salary continuation, as happened here, is an option under the MOA. As noted, the record supports the view that Mr. Smith's salary was continued under the MOA. However, nothing I have said here should be taken as settling this dispute. All I conclude is that the MOA arguably extends to this option. I note, as well, that the MOA has a dispute

resolution mechanism for disputes of a more general character. Article 25 provides:

> **Dispute Resolution**
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> 25. The Employer and the Union agree that any dispute relating to the general interpretation of this Memorandum may be referred to the process set out in the Appendix to this Memorandum. This process is not applicable to any dispute within paragraph 24.

[52] I conclude, therefore, that Mr. Smith established an arguable case that the MOA: (1) gave him a right to be placed or transferred "... into appropriate identified opportunities"; or (2) provides that in the event of a failure to agree on the appropriateness of such opportunities, Mr. Smith is not to be dealt with unilaterally other than by resort to the dispute resolution mechanisms under the MOA.

(ii) The deputy's letter:

[53] The deputy's letter to Mr. Smith of March 25 covers a lot of ground, its interpretation is contentious and is of central importance to the appeal. I must, therefore, set out the text of the letter in full.

> Dear Mr. Smith:
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> I am writing as a follow-up to the letter of October 30, 2003 from Brian Johnston of Stewart McKelvey Stirling Scales, and in particular to the references in that letter to your employment status.
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> That letter advised that employees in your circumstances who have continued to receive salary while not working would see that arrangement come to an end on April 30, 2003. The letter also indicated that employees who do have a position would be expected to return to that position and for those employees whose former positions no longer exist, the Province would work towards finding an alternate position.
>
> With regards to your situation, the position that you formerly occupied as Manager, Administration Services Services at the Shelburne Youth Centre has

> become redundant. In light of these circumstances, we have identified an alternate position for you as Unit Supervisor at the Shelburne Youth Centre. A copy of the job description is attached for your information. The position is available immediately and it is our expectation that you would report for work in that position by May 1, 2003, as your salary will otherwise be discontinued on April 30, 2003. Please contact Doug Stephens, Superintendent at the Shelburne Youth Centre if you should have any questions on this position. I also want to point out that the Memorandum of Agreement (MOA) which provides a number of enhanced employment provisions continues to be in place.
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> If you wish to seek employment other than at the Shelburne Youth Centre, the Province is prepared to work with you in finding alternate employment opportunities. We have been monitoring the employment bulletins for positions that might be suitable, but as you will appreciate, the opportunities within close commuting distance of your current location are very limited. If, however, you are willing to be considered for positions outside your immediate area, but still within commuting distance, or if you are willing to relocate your residence and thus provide far greater opportunities for placement, the Province would be willing to pursue these options as well. In this regard, the MOA also provides for salary protection (if you are placed in a position that pays less than your former position) and relocation assistance. If you are interested in pursuing any of these options, please notify us as soon as possible.
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> If you are not available to return to work on or after May 1, 2003, based on illness and/or injury, it will be necessary for you to submit standard documentation to your department, supportive of a claim for sick leave or long term disability (LTD) benefits. Your Human Resources department can advise you on applicable documentation requirements and in accordance with MOA provisions, you will be eligible for salary top-up for either disability benefit once approved.
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> Given that your salary will not be continued on its current basis beyond April 30, 2003, we felt it was appropriate to write again at this time. If you have any questions or wish to discuss any of the above, or other options provided by the MOA, please do not hesitate to contact Sharalyn Young at (902) 424-0944.
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> (Emphasis added)

[54] The judge relied on this letter to find an arguable case of actual or constructive dismissal and action by the deputy beyond his powers. The appellant says, however, that the letter does not support either of these conclusions. The deputy, the appellant submits, was simply serving notice that unless some other arrangements were made in the meantime, Mr. Smith's leave of absence with pay

would be discontinued. If Mr. Smith had failed to report for work or provide evidence that he was unable to do so, he would have been considered absent from work without leave. This could have exposed him to future disciplinary action. The appellant underlines the point that this is all hypothetical; no such action had been taken at the time the injunction was issued. Mr. Smith, says the appellant, ought to have dealt with his employer rather than seeking premature intervention by the court.

[55] I emphasize that our role on appeal is not to provide a final and binding interpretation of the deputy's letter. The question is whether the judge erred in finding that the letter supported an arguable case that the deputy minister exceeded his authority and actually or constructively dismissed Mr. Smith.

[56] In my view, the judge did not err in reaching the conclusion he did. It is not unreasonable on this record to conclude that the deputy's letter arguably constitutes both constructive dismissal and unilateral, unauthorized action outside the terms of the MOA.

[57] Quite apart from the MOA, the deputy's letter may reasonably be interpreted as ordering Mr. Smith to report to a position that was a considerable demotion from his original position at Shelburne or lose his pay. I agree with the submission of the intervenor, NSGEU, that directing an employee to accept a significant demotion or face the loss of his pay is, of itself, arguably constructive dismissal.

[58] In my view, the record also fully supports the conclusion that the deputy's action was unilateral and outside the terms of the MOA. His letter states that the arrangements for pay continuation, which had been in place pursuant to the MOA, would be discontinued on April 30, 2003. The letter is consistent with the view, confirmed by Ms. Young's evidence, that the options put to Mr. Smith were: (1) to report for the unit supervisor position referred to in the deputy's letter; (2) to claim sick leave or long term disability; or (3) to lose his salary. While the letter referred to the possibility of other employment options, Ms. Young's evidence was that, in fact, there were none.

[59] There was no suggestion that the options set out in the deputy's letter had been settled upon by the MOA Committee. Ms. Young, who was the Chair of the MOA Committee, testified that she was not privy to the formulation of the options put to Mr. Smith in the deputy's letter. It is a reasonable inference, therefore, that

these options did not originate or have the approval of the MOA Committee. There was no suggestion that these options had resulted from submissions by the parties to a career development/job placement professional as contemplated by the dispute resolution provision set out in Article 24 of the MOA.

[60] The record, therefore, supports the conclusion that the options set out in the deputy's letter were to be imposed on Mr. Smith unilaterally by the employer. This is arguably contrary to both the letter and the spirit of the MOA, which, as I have said, appears to contemplate either mutually agreed upon action or dispute resolution under the process established by the MOA.

[61] I would conclude, therefore, that the judge was justified in finding an arguable case of wrongful dismissal or threatened wrongful dismissal and that the record also supports his finding that the deputy's letter offended the provisions of the MOA.

(iii) The **Civil Service Act**:

[62] The appellant submits that the judge erred in finding that there was an arguable case that the deputy had acted outside of his statutory authority.

[63] The judge concluded that the deputy exceeded his statutory authority to constructively or actually dismiss Mr. Smith. He referred to ss. 25 and 27 of the **Civil Service Act** which provide:

> 25 Notwithstanding any other enactment, when the services of an employee are no longer required because of shortage of work or funds or because of the discontinuance of a function or program, the deputy head, in accordance with the regulations or in accordance with the terms of a collective agreement, may lay off the employee or terminate his services. R.S., c. 70, s. 25 .
>
> 27 A deputy head may for cause dismiss an employee in his department from employment in accordance with the regulations or the terms of a collective agreement. R.S., c. 70, s. 27

[64] The judge concluded that s. 27 did not apply to this situation because no "cause" for dismissal was alleged. As for s. 25, which concerns termination for redundancy, the judge reached two conclusions. First, he noted that counsel for the Crown did not rely on this provision in support of the deputy's action. Second, he found that the MOA precluded termination of Mr. Smith's services on the ground of redundancy.

[65] While the appellant does not accept the judge's conclusion as regards the effect of the MOA, it does not challenge his basic conclusion that neither s. 25 nor s. 27 of the **Civil Service Act** provides authority for the deputy's March 25 letter. The appellant's position is that Mr. Smith has not been terminated or threatened with termination and therefore neither s. 25 nor s. 27 is relevant to what the deputy did in his March 25th letter.

[66] The appellant relies on the more general powers granted to the deputy under the **Civil Service Act** and Regulations in support of his authority to take the action set out in the letter. Reference is made to s. 10 of the **Civil Service Act** which confers on the deputy the authority to oversee and direct the attendance, conduct and work performance of the employees in the department. I would add that s. 67 of the Regulations permits the deputy to grant special leave with or without pay for such period of time as he determines the circumstances warrant: General Civil Service Regulations, N.S. Reg. 20/81, as amended.

[67] The appellant argues that even if the deputy's letter may be viewed as constructive dismissal, the deputy's acts cannot properly be said to be beyond his statutory authority. Apart from the provisions of the MOA, I would be inclined to accept this submission. In my view, however, the MOA at least arguably leads to a different conclusion.

[68] As the Supreme Court of Canada has recently pointed out, the relationship governing the employment of non-unionized, more senior members of the civil service is most realistically viewed as being one of contract. The Court observed that while the terms of that contract may largely be dictated by statute, "... the employment relationship remains a contract in substance ...": **Wells v. Newfoundland**, [1999] 3 S.C.R. 199 *per* Major, J. for the Court at paras. 29 - 30. The terms of the contract are found in the applicable statute and regulations, the written and verbal manifestations of the agreement and the common law: at para. 33.

[69] The deputy minister, by statute and regulation, is granted broad and generally phrased powers to act in relation to Crown employees. From time to time, his actions will be judged after the fact to result in a breach of the employment contract between the Crown and the individual. When this happens, it seems to me to be highly artificial to view it as the deputy minister acting beyond his statutory authority rather than as a simple breach of contract by the Crown. It is probably implicit in the statute and regulatory scheme that the deputy is empowered to act as an employer may act, including taking steps that may ultimately be found to have resulted in a breach of contract. (Of course, the fact that the steps were authorized in this administrative law sense does not prevent the affected person from seeking an appropriate remedy for the breach.)

[70] In light of the MOA, the deputy's actions here were arguably beyond his authority. The Court in **Wells** recognized that contracts of employment for civil servants may have the effect of limiting the breadth of generally phrased statutory powers in relation to those employees. Major, J., writing for the Court, referred to its earlier decision **Nova Scotia Government Employees Association v. Nova Scotia Civil Service Commission**, [1981] 1 S.C.R. 211 at 222 - 223 in support of the proposition that terms of a contract (or in the **NSGEU** case, a collective agreement) may have the effect of circumscribing broadly phrased statutory powers such as the Crown's statutory power to dismiss at pleasure. Major, J., at para. 23, refers to the **NSGEU** case as standing for the proposition that the collective agreement ousted or overcame the prerogative of dismissal which was codified in the legislation.

[71] As I have discussed earlier, the MOA arguably circumscribes what would otherwise be the powers of the deputy in relation to the class of employees to which Mr. Smith belongs. Notably, the MOA arguably prevents the deputy from exercising his general powers in relation to employees where to do so would be to impose changes in their conditions of employment without their consent or without resort to the dispute resolution mechanisms under the MOA. In other words, by entering into the MOA and agreeing that its provisions extend to Mr. Smith, the Crown has arguably limited what would otherwise be the powers of the deputy minister to act in relation to this group of employees.

[72] I recognize, of course, that the extent to which discretionary powers may be circumscribed by contract is a controversial and unsettled area of law: see

generally Rene Dussault and Louis Borgeat, *Administrative Law: A Treatise*, 2d ed., trans by Murray Rankin (Toronto: Carswell, 1985) vol. 1 at 540 - 547. I also would note that Major, J.'s reading in **Wells** of the 1981 decision of the Court in **Nova Scotia Government Employees Association v. Nova Scotia Civil Service Commission, supra**, is a very broad one indeed. However, as I have emphasized before, we are here concerned only with whether Mr. Smith has an arguable case that the deputy has acted beyond his authority. In my view, his allegation that the deputy has exceeded his discretionary powers by failing to observe the limits on them imposed by the MOA is such a case.

(iv) Summary:

[73] To sum up, I conclude that:

1. the judge did not err in finding that the MOA arguably gave Mr. Smith the right to be transferred into appropriate identified opportunities;
2. the MOA arguably gave Mr. Smith a right not to be dealt with unilaterally other than by resort to the dispute resolution mechanism under the MOA;
3. the deputy's March 25th letter arguably constituted wrongful dismissal;
4. The deputy's March 25th letter, having regard to the MOA, arguably constituted steps in relation to Mr. Smith's employment which were beyond the deputy's statutory authority.

3. Crown Immunity

(i) Introduction:

[74] I have concluded that the judge did not err in finding that Mr. Smith had established an arguable case that his rights had been, or were about to be infringed. The next issue is whether the judge erred in finding that he could issue an injunction against the deputy minister in these circumstances.

[75] Section 16 of **PACA** restricts the availability of injunctions against the Crown and Crown servants. The most relevant parts of the section are these:

> **Power of court in proceedings against Crown**
>
> **16 (1)** Subject to this Act, in proceedings against the Crown the court may make any order, including an order as to costs, that it may make in proceedings between persons, and may otherwise give the relief that the case requires.
>
> **No injunction or specific performance**
>
> **(2)** Where, in proceedings against the Crown, any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but may, in lieu thereof, make an order declaratory of the rights of the parties.
>
> ...
>
> **Order against officer**
>
> **(4)** The court shall not in any proceedings grant an injunction or make an order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown that could not have been obtained in proceedings against the Crown, but may, in lieu thereof, make an order declaratory of the rights of the parties.
>
> (Emphasis added)

[76] As a practical matter, these immunities from injunctive relief only cause problems in cases, like this one, in which interlocutory relief is claimed. This is because, as noted in s. 16(2), a declaration of right may be made in place of a permanent injunction. However, it is generally accepted that there is no such remedy as an interlocutory or interim declaration, so if an interlocutory injunction cannot be granted, no alternative interlocutory remedy may be available. I will, therefore, limit myself to discussing the availability of interlocutory injunctions against Crown officers.

[77] The focus of the dispute is s. 16(4) which provides that the court may not grant an injunction against a Crown officer if the effect of doing so is to give any

relief against the Crown that would not be available in proceedings against the Crown.

[78] The appellant's main submission is not that s 16(4) prohibits such injunctions in all circumstances, but that the type of illegality which may be enjoined is limited to acts which are beyond the Crown officer's statutory powers. The deputy minister's actions in this case, the appellant says, were within his statutory powers and at most, arguably, had the effect of breaching Mr. Smith's contract of employment with the Crown. It follows, in the appellant's submission, that the judge erred in issuing the interlocutory injunction because injunctive relief is not permitted against Crown servants in these circumstances.

[79] The premise which is implicit in this position (although the point is not conceded by the appellant) is that s. 16(4) of the **PACA** does not preclude injunctions against Crown servants in all cases. In my view, this premise is correct. However, the narrow issue of whether this is a case in which an injunction may issue requires the interpretation of s. 16(4). To do that, "... 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.": E. A. Driedger, *Construction of Statues*, 2d ed. (Toronto: Butterworths, 1983) at 87; **Barrie Public Utilities v. Canadian Cable Television Assn.**, [2003] 1 S.C.R. 476 at paras. 20 and 86. Thus, a rather extended discussion of the context, purpose and scheme of the **PACA** is required before turning to the precise and relatively narrow point which was the focus of debate in this Court.

(ii) Crown immunity in its historical perspective:

[80] Important context for the interpretation of s. 16(4) of the **PACA** is the position of the Crown as a litigant prior to the enactment of proceedings against the Crown legislation. As the Nova Scotia statute is modelled on the English one of 1947, and the pre-existing law relating to the position of the Crown in litigation was based on English common law, much of the context is to be found in the law of England before 1947.

[81] A thumbnail sketch of the position of the Crown in litigation before the legislation is therefore in order. The Crown could not be sued in the ordinary courts other than by a petition of right. The petition of right could only be taken

out with the permission (*fiat*) of the Crown. The Crown could not be sued at all in tort and had many immunities and prerogatives in other proceedings against it: see generally, Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown*, 3rd ed. (Scarborough: Carswell, 2000) at 1 - 11. These rules persisted for centuries, but their rationale derives from the feudal principles that the lord could not be sued in his own courts and that the King could do no wrong. As a Carol Shield's character observed, history does indeed leave strange accidents behind.

[82] In general, Crown servants, officers and agents were entitled to the immunities of the Crown itself: Hogg and Monahan at 332. While the authorities are not always consistent or capable of reconciliation, it appears to be the better view that this general rule was subject to certain qualifications and exceptions. I will come to these in a moment.

(iii) Purpose and scheme of the **PACA**:

[83] Viewed in this context, the purpose of modern proceedings against the Crown legislation such as the **PACA** is clear. It was intended to overhaul, fundamentally, the previously existing common and statutory laws that gave the Crown a uniquely privileged position in litigation. Stated broadly, the legislation swept away many of the immunities and special procedural rights of the Crown as a litigant and, in general, put the Crown in the same position as an ordinary litigant, subject to specified exceptions.

[84] The scheme of the **PACA** shows how it implements this broad purpose. Part I of the **PACA** deals with substantive law. Sections 4 and 5 provide for the liability of the Crown with respect to property, contract and tort. Certain limitations are evident, however. For example, s. 3(2) specifies that the **Act** should not be interpreted to impose certain liabilities on the Crown and ss. 5(2), (4), (5), (6) and (7) qualify or limit what might otherwise be the tort liability of the Crown. Part II of the **Act** deals with jurisdiction, procedure and remedies. The provisions stipulate, subject to noted exceptions, that proceedings against the Crown are to be pursued in the same courts and using the same procedures that apply in actions between private persons. For example, s. 7 provides that, subject to the **Act**, all proceedings against the Crown are to be instituted and proceeded with under the same rules as govern litigation between private persons. With respect to remedies, s. 16(1) sets out as the general rule (and subject to the other provisions of the **Act**)

that in proceedings against the Crown, the court may make the same sorts of orders as it might make in proceedings between persons.

[85] I conclude that an important contextual consideration in interpreting s. 16(4) of the **PACA** is that, viewed in light of the law at the time of its enactment, its purpose was to reform, fundamentally, the pre-existing common and statute law with respect to proceedings against the Crown by placing the Crown, with some specified exceptions, in the same position as an ordinary litigant as regards liability, court jurisdiction, procedure and remedies.

(iv) The text of **PACA**:

[86] I turn to the text of s. 16. The overall structure of the section reflects the statute's broad purpose. Section 16(1), as noted, states the general rule that in proceedings against the Crown, the court may make any order that it may make in proceedings between persons and otherwise give the relief that the case requires, subject to the exceptions set out in the **Act**. The remaining subsections, including 16(4), set out those exceptions.

[87] The exception set out in s. 16(2) is expressed in absolute language: "... the court shall not, as against the Crown, grant an injunction ..." But the text of the exception in s. 16(4), in contrast, creates a less all-encompassing limitation on injunctions against Crown servants. It does not set out a blanket prohibition with respect to Crown officers as s. 16(2) does with respect to the Crown itself. The prohibition as regards injunctions in s. 16(4) is directed only to situations in which "...the effect of granting the injunction ... [against the Crown officer] would be to give any relief against the Crown that could not have been obtained in proceedings against the Crown ...". If a general prohibition of injunctions against Crown officers had been intended, the Legislature could have used in s. 16(4) the more all-inclusive prohibition that it used in s. 16(2). Moreover, it is implicit in the wording that injunctions against Crown officers were available in some circumstances.

[88] I conclude that the ordinary sense of the words of s. 16(4), read in the context of the pre-existing law and the scheme and purpose of the **Act** leads to two conclusions: first, that in drafting the section, the Legislature assumed that injunctions against Crown officers were available in some circumstances; and, second, that the intention was not to prohibit such injunctions in all circumstances.

(v) Injunctions against Crown officers - historical context:

[89] To come to grips with what s. 16(4) means, it will be helpful to return to the historical context in which provisions like it were enacted.

[90] I mentioned earlier that the general rule giving Crown officers the same immunities as the Crown was subject to certain exceptions. The case law is old or difficult to reconcile or both. But my review of the authorities and scholarly commentary persuades me that these qualifications and exceptions derived from two general principles. The first is that officials whose acts are unauthorized may be enjoined. The second is that, generally, an act which would attract personal liability if committed by a private person is actionable even if committed by a Crown officer: see generally, H. W. R. Wade "*Injunctive Relief Against the Crown and Ministers*" (1991), 107 L.Q.R. 4 at 4 - 6; B. L. Strayer "*Injunctions Against Crown Officers*" (1964), XLII Can. B.R. 1 at 26; **Canada (Le Conseil des Ports Nationaux) v. Langelier**, [1969] S.C.R. 60; Hogg and Monahan at 33 - 38; N.E. Mustoe, *The Law and Organization of the British Civil Service* (London: Sir Isaac Pitman & Sons, Ltd.: 1932) at 108 - 110; J. Tokar, "*Administrative Law: Injunctive Relief Against the Crown*" (1985), 15 Man. L.J. 97 - 103 at 97.

[91] The question then is what effect provisions like s. 16(4) had on this common law position.

(vi) Did provisions like s. 16(4) change the common law?

[92] It has been suggested that provisions such as s. 16(4) changed this position and in effect prohibited injunctions against Crown servants in all or most situations. The English courts at one time adopted this view. It has also been advocated by learned scholars and occasionally adopted by courts in Canada: see, for example, B.L. Strayer at 36 - 37; T. Barnes, "*The Crown Proceedings Act, 1947*" (1948), 26 Can. Bar Rev. 387; **Factortame Ltd. and Others v. Secretary of State for Transport**, [1990] 2 A.C. 85 (H.L.(E.)); **Underhill and another v. Ministry of Food**, [1950] 1 All E.R. 591 (Ch.D.); **Merricks v. Heathcoat-Amory and The Minister of Agriculture, Fisheries and Food**, [1955] Ch. 567; **Alberta Shuffleboards (1986) Ltd. v. Alberta**, [1992] A.J. No. 701 (Q.L.) (Q.B.); **Marion**

(c.o.b. Marion's Grocery) v. Western Canada Lottery Foundation, [1984] M.J. No. 166 (Q.L.) (C.A. Chambers) ; **Bridges Brothers Ltd. v. Forest Protection Ltd.** (1976), 72 D.L.R. (3d) 335 (N.B.Q.B.); **Duplain v. Cameron et al.** (1960), 26 D.L.R. (2d) 340 (Sask. Q.B.).

[93] However, in my opinion the better view is that provisions such as s. 16(4) are declaratory of the common law and, therefore, did not introduce any new restrictions on the availability of injunctions against Crown servants. I say this for two reasons. First, it seems to me to be the better interpretation of the statute read in its full context. Second, this view has the recent support of the House of Lords (effectively overruling much of the earlier English authority to the contrary to which I have referred to in the preceding paragraph), the more recent scholarly writing, and the weight of the admittedly scant Canadian judicial authority: see for example **In re M.**, [1994] 1 A.C. 377 (H.L.(E.)); Sharpe at para 3.1120 *ff*; Hogg and Monahan at 33; **Wittal et al. v. Saskatchewan Government Insurance** (1989), 51 D.L.R. (4th) 461; **Saskatchewan Water Corp., supra**; **MacLean v. Liqour Licence Board of Ontario et al.** (1975), 61 D.L.R. (3d) 237 (Ont. Div. Ct.); **Kohler Drugstore Ltd. et al. v. Ontario Lottery Corp. et al.** (1984), 46 O.R. (2d) 333 (H.C.J.); **Gleneagles Concerned Parents Committee Society v. British Columbia Ferry Corp.**, [2001] B.C.J. No 335 (Q.L.)(S.C.); **Hillcrest Roofers v. Nova Scotia (Minister of Supply and Services)** (1993), 128 N.S.R. (2d) 218; N.S.J. No 472 (Q.L.) (S.C.); **Ollinger v. Saskatchewan Crop Insurance Corp.**, [1993] S.J. No. 220 (Q.L.)(C.A.); **Te'Mexw Treaty Assn. v. W.L.C. Developments Ltd.** (1998), 163 D.L.R. (4th) 180 (B.C.S.C.).

[94] Consider first the text of the statute read in its full context. The **PACA**'s purpose is undoubtedly remedial. As I have pointed out, injunctions were available against Crown servants in at least some situations before the legislative reforms. I agree with Justice Sharpe that it "... would be odd if legislation designed to facilitate redress against the Crown ... should be read so as to significantly curtail individual rights recognized prior to the legislation.": R. J. Sharpe, *Injunctions and Specific Performance* at para 3.1150. In other words, one should be slow to read this remedial legislation as taking away remedies that were available against Crown officers before its enactment. Moreover, as we have seen, the words of the subsection, taken in their ordinary grammatical sense, contemplate the availability of injunctions against Crown servants provided that their effect is not to enjoin the Crown itself. Where the statute intended a blanket prohibition on injunctive relief,

as in s. 16(2) in relation to the Crown itself, clear words were used to that effect. But similar words of complete prohibition were not used in relation to injunctions against Crown servants as addressed in s. 16(4). Thus, the context, purpose, scheme and words of the statute all support the view that s. 16(4) is not a complete prohibition of injunctions against Crown servants.

[95] Turning to the authorities, I find particularly persuasive on this point the relatively recent decision of the House of Lords in **In re M.**, **supra**. The case holds that the English provision comparable to s. 16(4) of the Nova Scotia statute was declaratory of the common law.

[96] The House of Lords addressed in detail the question of whether the courts have jurisdiction to make coercive orders against ministers of the Crown and, in particular, the impact on that jurisdiction of the provisions of the English **Crown Proceedings Act**. The English statute contains s. 21 of which ss. 21(1)(a) and 21(2) are virtually identical to s. 16(1), (2) and (4) of the Nova Scotia statute. For ease of reference, I will set out relevant parts of s. 21 of the English statute:

> *Nature of Relief* - (1) In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require: Provided that: (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and (b) in any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or other property the court shall not order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.
>
> (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.
>
> (Emphasis added)

[97] Most relevant for our purposes is the discussion by the House of the interpretation of s. 21(2) which, as noted, is virtually identical to s. 16(4) of the

Nova Scotia **Act**. In effect, the House ruled that s. 21(2) was declaratory of the common law in relation to injunctions against Crown officers and therefore preserved the availability of injunctive relief against Crown officers as it stood before its enactment. Lord Woolf, speaking for the unanimous House, said this:

> Returning to section 21, what is clear is that in relation to proceedings to which section 21(1) provisos (a) and (b) apply, no injunction can be granted against the Crown. In addition there is the further restriction on granting an injunction against an officer of the Crown under section 21(2). That subsection is restricted in its application to situations where the effect of the grant of an injunction or an order against an officer of the Crown will be to give any relief against the Crown which could not have been obtained in proceedings against the Crown prior to the Act. Applying those words literally, their effect is reasonably obvious. Where, prior to 1947, an injunction could be obtained against an officer of the Crown, because he had personally committed or authorised a tort, an injunction could still be granted on precisely the same basis as previously since, as already explained, to grant an injunction could not affect the Crown because of the assumption that the Crown could do no wrong.
>
> (Emphasis added)

[98] For these reasons, I accept Lord Woolf's view in **In re M.** that provisions like s. 16(4) do not take away the court's pre-existing authority to enjoin Crown officers in certain types of situations.

(vii) When may a Crown officer be enjoined?

[99] Thus, in this case, an injunction may not be issued against the Crown because that is prohibited by s. 16(2). However, an injunction may issue against a Crown officer if the case falls within the type of case that was recognized at common law as not being, in effect, an injunction against the Crown.

[100] As noted earlier, the nub of the dispute here is whether this is the sort of case in which the court may enjoin a Crown officer. The appellant's position is that the court may enjoin only acts in excess of statutory authority and that this case is not of that nature. It is necessary, therefore, to examine in more detail the situations in which courts have enjoined Crown officers both before and after the enactment of modern proceedings against the Crown legislation.

[101] As mentioned earlier, the availability of injunctions against Crown officers at common law was based on two main principles: first, that acts beyond authority could be enjoined; and second, that acts which would attract personal liability of the Crown officer could also be enjoined. Both of these principles are reflected in Canadian authority binding on this Court.

[102] In **Rattenbury v. British Columbia (Land Settlement Board)**, [1929] S.C.R. 52, three of the five members of the panel held that the Land Settlement Board could be sued and enjoined for acting on the basis of legislation that was beyond the competence of the provincial legislature: at 63. The Supreme Court followed the decision of the Privy Council in **Tamaki v. Baker**, [1901] A.C. 561 (P.C., N.Z.) which held that "... an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority.": at 576. See also **Baton Broadcasting Ltd. v. Canadian Broadcasting Corporation et al.** (1966), 56 D.L.R. (2d) 215 (Ont. H.C.J.); **C. P.R. Co. et al. v. Attorney-General of Saskatchewan et al.**, [1951] 3 D.L.R. 362 (Sask. K.B.); appealed [1951] 4 D.L.R. 21 (Sask. C.A.); reversed [1952] 2 S.C.R. 231 but not in relation to this issue; **Carlic v. The Queen and Minister of Manpower and Immigration** (1967), 65 D.L.R. (2d) 633 (Man. C.A.) app'd on this point in **Jaundoo v. Attorney-General of Guyana**, [1971] A.C. 972 (P.C.) at 985; **Wittal, supra** per Bayda C.J.S., Brownridge, J.A. concurring at 652- 53; **Canada (Attorney General) v. Saskatchewan Water Corp.** (1994), 106 D.L.R. (4th) 250 (Sask C.A.) at 258 -59; **Pacific Salmon Industries Inc. v. The Queen**, [1985] 1 F.C. 504 (T.D.); **Esquimalt Anglers' Assn. v. Canada** , [1988] 21 F.T.R. 304 (T.D.) and authorities cited therein; **Padda v. Canada (Minister of Immigration)**, [1987] 15 F.T.R. 7 (T.D.)

[103] With respect to acts giving rise to personal liability such as torts committed by Crown officers, the Supreme Court of Canada, in **Canada (Le Conseil des Ports Nationaux) v. Langelier et al.**, **supra** held that a Crown servant who commits a wrong could be enjoined if personally liable to the person injured. Martland, J., for the unanimous Court, said at 74 - 75:

> But, as already stated, there was always recourse in the common law courts in respect of acts done, without legal justification, by an agent of the Crown, and the Board, on that principle, is liable if it commits itself, or orders or authorizes its servants to commit, an act done without legal justification. Equally, if it threatens

> to commit an act, without legal justification, a subject, whose legal rights are thereby threatened, has recourse to the Courts to restrain the commission of such act.
>
> (Emphasis added)

[104] This case is not concerned with an allegation of personal liability of a Crown officer. We are concerned here with an arguable case that the deputy minister exceeded his statutory powers and threatened to or actually did breach the contract of employment. The question is whether either cause of action falls within the first of the two principles I have just described. It is therefore necessary to examine the authorities in relation to it in more detail.

(viii) Acts in excess of authority:

[105] The principle that Crown officers acting in excess of authority may be enjoined has often been expressed broadly. For example, LeDain, J.A. in **Re Lodge et al. and Minister of Employment and Immigration** (1979), 94 D.L.R. (3d) 326 (F.C.A.) stated that injunctions could issue with respect to acts that were "...*ultra vires* or otherwise illegal." (at 333). Justice Sharpe describes the rule as being that "... an injunction will be granted to restrain a Crown servant from exceeding the lawful limits of authority or from acting without any authority where the acts complained of constitute a violation of the plaintiff's rights." : Sharpe, **supra** at para 3.1050. However, the terms used in these formulations of the exception – "*ultra vires*", "exceeding lawful limits of authority" and "otherwise illegal" – describe a fairly wide variety of conduct. It will be helpful, therefore, to review some of the cases to determine the various senses in which these terms have been used.

[106] There is binding authority for the view that acts taken by Crown officers on the basis of legislation that is *ultra vires* may be restrained by injunction: **Rattenbury v. Land Settlement Board**, [1929] S.C.R. 52; see also **C.P.R. v. Attorney-General of Saskatchewan, supra**; **Canada (Attorney General) v. Saskatchewan Water Corp, supra**; **Ontario Jockey Club v. Smith** (1922), 22 O.W.N. 373 (H. Ct.) and **Home Oil Distributors Ltd. et al. v. Attorney-General for British Columbia et al.**, [1939] 1 D.L.R. 573 (B.C.C.A.). In these and similar cases, the allegation is that the Crown officer has acted outside his or her authority

because the legislation which purports to confer the authority is itself *ultra vires* the legislature.

[107] Many cases base the availability of injunctions against Crown officers on the ground that they are alleged to be acting in excess of valid statutory powers. The "excess of statutory powers", however, may take many forms. The cases illustrate that included in this category are situations in which:

(1) The acts constitute a civil wrong not specifically authorized by statute. For example, in **Baton Broadcasting**, the acts restrained were allegedly civil wrongs committed by the Crown agent that were not contemplated or authorized by its constituent legislation. A similar result was reached in **Bolton et al. v. Forest Pest Management Institute et al.** (1985), 21 D.L.R. (4th) 242 (B.C.C.A. Chambers)

(2) The acts do not fall within the scope of permitted acts on the proper interpretation of the legislation. For example, in **Pacific Salmon**, the court confirmed its jurisdiction to enjoin actions by a minister in excess of his statutory powers. The minister, purporting to rely on power delegated to him by regulation, had ordered the plaintiff to stop delivering certain goods to an airport but the plaintiff claimed that the relevant regulations, properly interpreted, did not prohibit mere delivery of the goods and that the Minister had therefore exceeded his powers under them. See also **Baxter Foods Ltd. v. Canada (Minister of Agriculture)**, [1988] 21 F.T.R. 15; F.C.J. No. 410 (Q.L.)(T.D.).

(3) The acts are authorized by subordinate legislation which is itself *ultra vires*: see for example **Esquimalt Anglers' Association, supra**.

(4) In carrying out the acts in question, the officer denies natural justice or uses delegated authority for an improper purpose. **Padda** is an example of the former and **MacLean** of the latter. In **Padda**, an interlocutory injunction was granted to restrain the Minister from executing a deportation order. The underlying allegation was that the order was invalid because there had been a denial of natural justice. This was also the basis of the decision in **Smoling v. Canada (Minister of Health and Welfare)** (1993), 95 D.L.R. (4th) 739 (F.C.T.D.) In **MacLean**, the Court upheld the granting of an interlocutory injunction against Crown officers who, by advising licensed establishments that their liquor licences would be in jeopardy if they offered the entertainment provided by the plaintiffs, effectively prevented the plaintiffs from performing in licensed premises and induced a breach of contract between the license holder and the plaintiffs. The underlying allegation was that Crown officers acted beyond their statutory powers by threatening to exercise their regulatory powers for an improper purpose.

(5) In one case, the acts of a Crown officer were considered to be "unauthorized" when they were in breach of a collective agreement, although the court divided on the point and the decision was also based on two other factors: a distinction between Crown agents and Crown officers and a distinction between a final and an interlocutory injunction. The case is **Wittal, supra**, in which the claim was based on the breach of a collective agreement and an interim injunction was issued against a Crown agent to preserve the *status quo* pending trial.

(ix) Application to the present case:

[108] Applying these principles to the present case, my view is that the deputy's actions here arguably were beyond his statutory authority in two related senses. First, the MOA may be taken to have constrained his general delegated powers in relation to public servants. Put a different way, his acts arguably violated the provisions of the MOA and his statutory powers, properly interpreted, do not permit him to do this because his acts arguably constitute a civil wrong which is not explicitly or implicitly authorized by statute.

[109] It follows that, in my view, Mr. Smith has advanced an arguable case that the challenged actions by the deputy minister were unauthorized and that this sort of allegedly unauthorized action by a Crown servant purporting to exercise statutory powers may be enjoined.

[110] I think it is doubtful that if Mr. Smith's claim were in breach of contract alone, it would support an injunction against the deputy minister. Justice Sharpe's view in his treatise is that law on this is unclear: at para 3.1180. I have not found a case which materially assists on the point. For the reasons mentioned earlier, **Wittal** is not a very helpful authority. As a matter of principle, it is hard to see how enjoining the deputy from breaching the contract of employment with the Crown is not, in effect, enjoining the Crown from breaching the contract. However, in light of my conclusion that the judge was on firm ground when he concluded that the deputy's acts were arguably beyond his statutory powers and could be enjoined, it is not necessary to address the breach of contract point.

[111] These conclusions leave one issue to be resolved. It concerns the so-called "irreparable harm" requirement for an injunction. The question is whether the judge erred in finding that Mr. Smith had established that an injunction was an appropriate remedy because he would otherwise suffer harm that could not be compensated adequately in damages.

4. Irreparable Harm:

[112] It is common ground that to be entitled to an injunction, Mr. Smith had to demonstrate that failure to grant it would expose him to irreparable harm. While irreparable harm is difficult to define, it generally refers to harm which either cannot be quantified in monetary terms or which cannot be cured: see, for example,

RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at 405 - 406.

[113] As the judge acknowledged, it would be a rare case indeed in which the Court would restrain termination of employment on an interlocutory basis. In general, an employment contract is terminable on reasonable notice. Generally, there is no contractual or other right to continuing employment, but simply either to due notice of termination or pay in lieu of it. The judge concluded, however, that for the purposes of an interlocutory injunction, the MOA took this case out of that general rule. As he said:

> [21] ... Mr. Smith's employment contract contains an unusual term according to which the Province will not dismiss him without finding and offering appropriate employment for him. For years his salary has been frozen and the chances he will ever be able to exceed his present level of salary are slim. Thus, his monetary losses are easy to calculate if the Province is found to have breached the promise to place him in an appropriate position. One would take the present value of his income from dismissal to expected retirement and add the capital amount required to fund any difference in his pension. The question is whether the Court would follow this approach or recognize that his non-monetary losses are so significant that they cannot be compensated in damages. The promise to reinstate was made in the context of employees displaced from their jobs and their careers for many years because of serious allegations that turned out to be unsubstantiated. To promise to return these employees to appropriate positions would not only provide financial security. Such a promise would show that the Province's trust in these employees had been restored. The fundamental place work holds for human integrity is recognized in the Supreme Court of Canada decisions I have referred to and in other cases, to which Mr. Dunlop referred me: *IBEW Local 1574 v. Northwestel Inc.*, cited above, at para. 4; *Hardie v. Summerland* (1985), 24 D.L.R. (4th) 257 (BCSC) at para. 7; and *Mercury Marine Limited v. Dillon* (1986), 30 D.L.R. (4th) 628 (OHC) at para. 25. The circumstance of the promise to reinstate takes this case beyond the normal dismissal and could well found final injunctive relief on the ground that the intangible losses upon breach cannot be calculated in damages.
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> (Emphasis added)

[114] The appellant submits that the judge erred in finding that Mr. Smith had established that the breach of his rights would give rise to irreparable harm. The argument is that through the injunction, Mr. Smith simply seeks continuation of his pay and benefits and such a claim, if proved at trial, is compensable by damages.

[115] In my view, the appellant's characterization of Mr. Smith's claim as being simply for the continuation of his pay and benefits is not only inaccurate, but unfair to him. His unchallenged evidence is that he wants to work and that he does not consider himself disabled from working other than in the context of working directly with troubled youths. Ms. Young testified that it was her impression that Mr. Smith truly wanted to work.

[116] There is considerable evidence of the toll that Mr. Smith's treatment by his employer has taken on him. Dr. Syer said in part:

> ... it is my observation that the manner in which he was treated has resulted in the following:
>
> 1. An undermining of self-confidence in his competency, despite a history of very positive performance reviews. This is due to removal from his position, placement in a position to which he was ill-suited, placement in a virtually non-existent position with no meaningful work to perform, and, finally, an ultimatum to accept a demeaning demotion or face dismissal.
>
> 2. Loss of confidence in the integrity of the Nova Scotia Government as an employer. This is especially distressing as his field of expertise is one in which government is virtually the only employer.

[117] Dr. Rosenburg, a psychiatrist consulted by Mr. Smith, said this:

> ... it is my opinion that Mr. Smith, and others of his peer group who have been alleged to have been involved in the administration of abusive behaviour at the Youth Centre, have been deemed guilty in the public eye of these allegations, regardless of any findings at investigation, or at court. Mr. Smith, and others of his peer group who have been similarly implicated, continue to suffer significant social stigma of having allegedly committed crimes against youth under their supervision and care. ...

[118] The judge, repeating the language of the MOA, found that employees in Mr. Smith's position were in circumstances that were "unique and without precedent". They had been accused of serious criminal wrongdoing in breach of trust to the children for whose welfare they were responsible. They were ultimately found blameless. Their employer, through the MOA, arguably undertook obligations of an extraordinary character and recognized explicitly the importance of the

interests, welfare and well-being of the employees in determining which option or options under the MOA were applicable. To repeat, the MOA set out as one of its first guiding principles "... the importance of the interests, welfare and well-being of the employees in determining which option or options are applicable." Faced with this language and the circumstances, it is surely not unreasonable to conclude, as the judge did, that the MOA was about more than a paycheck. It appears to have been designed to address not simply the financial needs of this group of employees, but to address as well the sort of psychological and emotional impact that these events had on them.

[119] I accept the submissions of the intervenor, NSGEU, that failure to observe the terms of the MOA would cause more than monetary damages. It could deny employees the opportunity of being placed in an appropriate position, thereby helping to restore their self-esteem and self-confidence and demonstrating to their families, colleagues and their communities that they retained the trust and confidence of their employer. I see no error in the judge's conclusion to that effect.

[120] I would emphasize that these conclusions are reached in the context of an application for an interlocutory injunction and in the context of a mechanism for final resolution of disputes found in the MOA itself.

[121] The judge, having found an arguable case and a risk of irreparable harm to Mr. Smith if the injunction were not granted, turned to the balance of convenience. He found that the employer had been paying Mr. Smith for eight years and that this represented the "*status quo*". The financial loss to the Province of having to continue these payments did not outweigh the long term intangible losses to Mr. Smith that refusing the injunction would cause. This aspect of the judge's decision is not challenged on appeal.

5. Summary of Conclusions:

[122] I conclude that the judge did not err in finding that: (1) Mr. Smith had shown an arguable case that the deputy minister breached Mr. Smith's rights by acting in excess of his statutory authority and by either wrongfully dismissing him or stating his intention to do so; (2) that the deputy minister's actions which were arguably in excess of statutory authority could be enjoined notwithstanding s. 16 of the **PACA**; and (3) Mr. Smith had demonstrated a risk of irreparable harm should the

interlocutory injunction be refused. No other aspect of the judge's decision is challenged and I therefore conclude that he did not err in issuing the interlocutory injunction.

[123] In light of these conclusions, it is not necessary for me to address the respondent's notice of contention.

V. Disposition:

[124] I would grant leave to appeal but dismiss the appeal. While interlocutory appeals are generally to be discouraged and will often attract an award of costs payable forthwith against the unsuccessful appellant, this one raised novel and intricate legal issues. I would therefore order that the costs of the appeal, fixed at $3,000 should be costs in the cause of the main action. The intervenor did not seek costs and there should be no costs with respect to it. I would be remiss, however, if I did not acknowledge with thanks the significant assistance which the intervenor provided to the Court.

Cromwell, J.A.

Concurred in:
Freeman, J.A.
Roscoe, J.A.