C.A. No. 106662

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Jones and Freeman, JJ.A.

Cite as: Halifax Firefighters Association v. Halifax (City), 1995 NSCA 20

BETWEEN:

HALIFAX FIREFIGHTERS ASSOCIATION Raymond F. Larkin, Q.C. IAFF, LOCAL 268 Appellant - and - CITY OF HALIFAX, a municipal body corporate Respondent	)	David J. Roberts for the Appellant Mary Ellen Donovan for the Respondent Appeal Heard: November 22, 1994 Judgment Delivered: January 19, 1995

THE COURT: Appeal allowed and award of arbitrator restored per reasons for judgment of Clarke, C.J.N.S.; Jones and Freeman, JJ.A. concurring.

CLARKE, C.J.N.S.:

This is an appeal from the decision of Justice Grant of the Nova Scotia Supreme Court, in Chambers, dated June 9, 1994, and his order based thereon. He quashed an award made by Arbitrator Eric Slone concerning a grievance arising from a collective agreement dated March 1, 1988 between the appellant Union and the respondent City. The application was made pursuant to the **Arbitration Act**, R.S.N.S. 1989, Chap. 19, s. 15(2). The decision of Justice Grant is reported in **Halifax (City) v. Halifax Firefighters Association, IAFF, Local 268** (1994), 132 N.S.R. (2d) 1.

General agreement exists between the parties on the facts to such an extent that they can be repeated from their submissions with appropriate consolidation:

> 1. Under the terms of the management rights clause of the collective agreement, the employer had the right to make promotions within the fire department:
>
> > 6.01 The Union and the employees covered by this contract recognize and acknowledge that subject to the terms of this Agreement it is exclusive function of the City to:
> >
> > A. Maintain order, discipline and efficiency;
> >
> > B. Hire, discharge, direct, transfer, promote, demote and suspend, or otherwise discipline any employee covered by this Agreement;
> >
> > C. Make and alter, from time to time, orders, rules and regulations to be observed by employees, which orders, rules and regulations shall not be inconsistent with the terms of this Agreement. In the event of conflict between an existing or new order, rule or regulation and the terms of this Agreement, the terms of the Agreement shall prevail.
>
> 2. The factors on which the employer was to assess a candidate for promotion were defined in Article 23.01 of the collective agreement:

> 23.01 Promotions within the Department shall be made on the basis of skill, ability and efficiency to perform the job required. Where skill, ability and efficiency are equal, seniority shall be the governing factor. Promotions and demotions, for other than disciplinary reasons shall be grievable under the provisions of Article 20 hereof.

3. Article 23.03 required the employer to consult the union before implementing any changes in the means of assessing candidates for promotion:

> 23.03 When any position in the bargaining unit other than in the firefighter classification (which shall be filled by the normal hiring procedure) becomes vacant, such positions shall be filled only by persons within the bargaining unit according to the appropriate promotion roster. No change in any of those schemes shall be made without prior consultation with the union. The City agrees to meet with the Union at their request during the terms of this Agreement to study the appropriateness of the promotion roster scheme.

4. From 1975 until 1989, the employer evaluated candidates for promotion to the positions of lieutenant and captain on the basis of written tests.

5. In March of 1989, the Chief of the Halifax Fire Department introduced a new promotional routine for candidates for lieutenant and captain. The City was not satisfied with the existing system about which it had received complaints. The revised routine evaluated candidates on the basis of their "personal suitability" as well as their knowledge and abilities. The new routine introduced an oral examination in addition to the written test. Sixty percent of a candidate's score was to be derived from the results of the oral examination.

6. In May of 1989, the employer conducted a promotion evaluation based on the new routine. Twenty-eight candidates for promotion were evaluated by a promotional board and awarded priority for promotion when opportunities became available.

7. Candidates were able to review their scores with the promotional board after the routine was conducted. The Union President was present during the examinations. During those interviews, the candidates learned for the first time the weight that had been attached to oral examinations.

8. A promotion list of eight persons was prepared in accordance with the promotional routine results. From this list eight promotions were made, none was grieved.

9. On September 16, 1989, the Union filed a grievance against the promotional routine. The grievance was in the name of two unsuccessful candidates for promotion, Paul Dober and Paul Boyle. The grievance read as follows:

> GRIEVANCE:
>
> Oral and Interview section of promotional routine.
>
> ARTICLE 23.01 - Promotions within the Department shall be made on the basis of skill, ability and efficiency to perform the job required. According to the notice of March 30, 1989 Re Competition for position of Lieutenant, the Promotional Board issued a statement with the following requirements for the position of Lieutenant: EXPERIENCE, KNOWLEDGE, ABILITIES and PERSONAL SUITABILITY. This breaks the collective agreement in that personal suitability is not a prerequisite neither is an oral interview. Employee appraisals or evaluations were not to be used, but during the interview questions were asked directly related to EMPLOYEE APPRAISAL FORM #028-010-R in the categories of INITIATIVE, DEPENDABILITY, ABILITY TO RELATE TO CO-WORKERS and points were given for APPEARANCE and other non job related criteria.
>
> REDRESS SOUGHT:
>
> To have a new promotional list formed on the basis of the marks given for the situation and the written questions and answers sections of the promotional routine.

10. The grievance was heard by Arbitrator S. B. Outhouse, Q.C. Arbitrator Outhouse upheld the grievance of the Union and found the new promotional routine breached Article 23.01 of the collective agreement. He ordered that the results of the routine conducted in May of 1989, be set aside.

11. The award of Arbitrator Outhouse was quashed by Justice Nunn of the Nova Scotia Supreme Court on the grounds that:

(a) interested parties had not been given sufficient notice of the hearing of the grievance, contrary to the principles of natural justice;

(b) the arbitrator exceeded his jurisdiction by enlarging the scope of the grievance and setting aside the entire promotional routine that had been conducted by the Department;

> (c) the arbitrator exceeded his jurisdiction by considering a grievance over the exercise of an exclusive management function, the assessment of candidates for promotion.

The decision of Justice Nunn is reported in (1991), 107 N.S.R. (2d) 401 and indexed as **Mosher et al. v. Halifax (City) et al.**

12. Justice Nunn ordered that if the parties wished to pursue the grievance, it should be remitted to an arbitrator other than Mr. Outhouse.

13. The decision of Justice Nunn was appealed to the Appeal Division of the Nova Scotia Supreme Court. The Appeal Division dismissed the appeal on the ground that there had been a lack of natural justice resulting from the failure to give adequate notice. The Court declined to comment on the other issues raised or considered by Justice Nunn. The decision is reported in (1992), 114 N.S.R. (2d) 18 and similarly indexed.

14. Pursuant to the decision of Justice Nunn, the grievance of Messrs. Dober and Boyle was referred to Arbitrator Eric Slone.

15. Before the merits of the grievance were heard, the City raised a preliminary objection that the grievance of the Union was not arbitrable because it challenged a promotional routine process of the employer which was not subject to the collective agreement, rather than the results of any particular routine, namely, a specific promotion. Arbitrator Slone issued a brief, preliminary award on September 9, 1993 in which he dismissed the jurisdictional objection of the City.

16. Arbitrator Slone held that Justice Nunn's decision did not render the Union's grievance inarbitrable. The matter had been properly remitted to him for consideration, and he was not prepared to dispose of it on a preliminary motion. He wrote, in part:

> It is clear that the primary ground for the quashing of the Outhouse award was the inadequate notice of hearing to the incumbents, which resulted in a failure of natural justice. It is open to some question whether the comments of Justice Nunn on the issue of arbitrability were made in response to full argument, or were made on his own motion, so to speak. Not being necessary to arrive at the result, they may be regarded as *obiter.* There is no authority cited in this part of his decision, unlike the part of his decision dealing with the primary ground of inadequate notice.

...

> I think the bottom line must be this: I am not convinced that there is nothing legitimately before me to be arbitrated. Ironically, the decision of Justice Nunn supports this view. It will be recalled that his order remitted the matter to be heard before a different arbitrator, and this order was not changed on appeal. If his opinion had conclusively been that the grievance was absolutely and in all respects inarbitrable, it would have made no sense to send it back for arbitration. I do not think he sent it back for some arbitrator to engage in the pure formality of pronouncing it inarbitrable.

17. Arbitrator Slone heard the merits of the Union's grievance on September 14, 15 and 16, 1993. On November 30, 1993, Arbitrator Slone issued an award in which he partially upheld the grievance of the Union.

18. Arbitrator Slone found the grievors, Messrs. Dober and Boyle had been denied their right to be evaluated for promotion according to the requirements of Article 23.01 of the collective agreement. In finding that the competition contained many flaws which rendered the posted marks an unsuitable basis upon which to assess the candidates' skill, ability and efficiency, he specifically identified the following:

> (a) the written portion of the promotional routine was not marked consistently;
>
> (b) questions in the oral evaluation were unfair or irrelevant to the standards for promotion contained in Article 23.01 of the collective agreement;
>
> (c) candidates were rated unfairly for their personal appearance at the interview;
>
> (d) candidate scores were compared to determine absolute mathematical equality in a way that was contrary to arbitral jurisprudence and which effectively denied the application of seniority as required by Article 23.01 of the collective agreement.

19. Arbitrator Slone held that it would be neither fair nor practical to order that the promotional routine be conducted again. Instead, he ordered that the results of the 1989 routine be re-evaluated, with the offending portions of the written and oral examinations removed from the scores. He also ordered that seniority be applied to rank scores within certain "ranges" or "bands". He remained seized of the case in the event the parties were not able to agree on the method of re-evaluation or the results.

> 20. On December 23, 1993, the Employer applied to the Nova Scotia Supreme Court for an order quashing the award of Arbitrator Slone. The application was heard on May 3, 1994. On June 9, 1994, Justice Grant issued a decision in which he granted the application.
>
> 21. Justice Grant held:
>
> (a) Arbitrator Slone was bound to follow the finding of Justice Nunn that the grievance of the Union was not arbitrable;
>
> (b) Arbitrator Slone committed a reviewable error and exceeded his jurisdiction by encroaching on an exclusive management function to decide on promotions and the promotion process; and
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> (c) Arbitrator Slone committed a reviewable error in the remedy he fashioned to the grievance of the Union by substituting his own opinions.

There are four issues on appeal arising from the decision of Justice Grant. Each of the parties frame each issue in slightly different language.

The First Issue

The appellant alleges the chambers judge erred when he found Arbitrator Slone was a statutory arbitrator and therefore entitled to a lower degree of deference than that to be accorded a consensual arbitrator acting within jurisdiction. The respondent puts it this way: Is the instant arbitration statutory or consensual? Both versions are to the same effect.

Relevant to this issue is Article 21.01 of the Collective Agreement which provides:

> 21.01 Arbitration proceedings shall be commenced within ten (10) days after notice of intention to arbitrate is given. A single Arbitrator shall be selected. The City and the Union shall jointly agree upon said Arbitrator within the said ten (10) days mentioned herein (days not including Saturdays, Sundays, or paid holidays as

> set forth in Article 14 hereof). In the event that the parties are unable to so agree upon the appointment of an arbitrator by the end of such ten (10) days, then the Minister of Labour for the Province of Nova Scotia may make such appointment upon the request of either party. [emphasis added]

In considering the nature of the proceeding before Arbitrator Slone, Justice Grant stated at pp. 8-9, 132 N.S.R. (2d):

> The parties elected to include in their agreement Article 21.01 wherein if the parties cannot agree on an arbitrator then the Minister of Labour is called upon to make the appointment.
>
> [62] The procedure for appointment is consensual in that both parties agreed upon the manner of appointment. However, the persona of the arbitrator is not consensual. In the absence of an agreed provision in the collective agreement the legislation (**Trade Union Act**, R.S.N.S., c. 475, s. 42) deems it to contain the provision for appointment. It is, in my opinion at least a statutory arbitration (or arbitrator) and is consensual as to the process.
>
> [63] This, is my opinion, relates directly to the degree of deference one must accord to the arbitrator in considering his decision or award.

It is useful to refer to s. 42(1) of the **Trade Union Act**, R.S.N.S. 1989, Chap. 475:

> 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.

A review of the relevant articles in this collective agreement indicates that it follows a traditional path for the processing of grievances, given the variations that are negotiated and applied to specific patterns in the environment of a given workplace.

The usual differences that arise over the meaning, interpretation and application of the collective agreement including whether a matter is arbitrable may be grieved. Grievances which remain unresolved, by Article 21.03, may be submitted to an arbitrator whose decision is final and binding provided the arbitrator does not add to, alter, modify or amend the collective agreement.

But what if the parties are unable to agree on "a single arbitrator". Does the grievance fail or succeed for that reason alone? Anticipating that possibility the parties sensibly provided in Article 21.01 how the impasse shall be resolved: The Minister of Labour will be asked to appoint an arbitrator.

It is inconceivable that the appointment of an arbitrator by the Minister suddenly transforms the arbitrator to the role of becoming a "statutory arbitrator". This is a collective agreement made pursuant to the general provisions of the **Trade Union Act**. The parties have provided for "final settlement without stoppage of work by arbitration or otherwise . . .". The grievance does not belong to the Minister. The Minister is in no way a party to it. The Minister, by agreement of the parties, provides an accommodation to assist in the final resolution of a grievance at its last step. That is all. Section 42(2) of the **Trade Union Act** providing a deemed settlement provision does not apply to this collective agreement: It is already there by agreement.

Arbitrator Slone takes his authority and jurisdiction from the provisions of the collective agreement. He is subject to the **Arbitration Act**. Therefore in the parlance of labour-management relations, he is a consensual arbitrator.

Support for that conclusion and the implications flowing therefrom extend as far back as **Volvo** (1979), 99 D.L.R. (3d) 193 (S.C.C.) where Chief Justice Laskin wrote at p. 197, "... I am content to proceed on the footing that what is under review is the award of a consensual arbitrator. I turn therefore to the issues on this basis".

To like effect are several decisions of this Court including **Aberdeen Hospital Commission v. Nova Scotia Nurses' Union, Aberdeen Local** (1987), 77 N.S.R. (2d) 168 at p. 171; **Nova Scotia Nurses' Union (Halifax Infirmary Local) v. Halifax Infirmary Hospital** (1982), 54 N.S.R. (2d) 289 at pp. 297-299; **International Association of Firefighters, Local 268 v. Halifax, City of** (1982), 50 N.S.R. (2d) 299 at p. 312; **Nova Scotia Union of Public Employees v. Board of Education of Dartmouth District** (1994), 128 N.S.R. (2d) 60 at pp. 61-62.

For the reasons given it was inappropriate, with respect, for the chambers judge to characterize Arbitrator Slone as a statutory arbitrator. The development of the law in this area indicates that the characterization of the arbitrator determines the standard of review.

The development of the law in this area indicates the significance that follows concerning the standard of review once the initial characterization is made. The consensual arbitrator is entitled to a higher degree of deference. This is illustrated by the decision of this Court in **Canada Post Corp. v. Canadian Postmasters and Assistants Association** (1993), 121 N.S.R. (2d) 112. Following a lengthy review of the Supreme Court of Canada decision in **British Columbia Telephone Co. v. Telecommunications Workers Union**, [1988] 2 S.C.R. 564, Hallett, J.A. continues in **Canada Post Corp.** at pp. 127-128:

> ... Based on the majority decision, I conclude that greater deference should be shown to awards of consensual arbitrators protected by a privative clause then to judicial review of decisions of statutory tribunals protected by a similar clause. There is no jurisprudence that specifically extends the scope of review of consensual arbitrators' awards so as to permit a court to set aside an award that is patently unreasonable although made within his jurisdiction. Therefore, I disagree with the submission of the respondent's counsel that the test for review of awards of a consensual arbitrator is the same as that for a statutory tribunal. I find that Mr. Justice Boudreau erred in law in applying the "patently unreasonable award" test as developed in **Lester, Corn Growers** and **Paccar**. In face of the decision of the majority in **BC Telephone**, I would not presume that the Supreme Court of Canada in **Lester** intended the scope of review of decisions of statutory tribunals would apply to consensual arbitrators without having expressly so stated. It would appear to me that the Supreme Court of Canada, in adopting the reasons of Lambert, J.A., has clearly indicated that awards of consensual arbitrators are entitled to be shown greater deference than the decisions of statutory tribunals for the reasons given by Lambert, J.A., which I have set out.
>
> [39] The test for judicial review of an award of a consensual arbitrator protected by a privative clause is whether he exceeded or declined to exercise his jurisdiction, which question turns on the determination of the issue before him and whether he dealt with that question. If the issue before him involves the interpretation of clauses of the collective agreement the arbitrator must give to those clauses an interpretation the language will reasonably bear

> (**Volvo**). Finally, in exercising his jurisdiction, an arbitrator must comply with the recognized tenets of procedural fairness. If the arbitrator complies with these duties, his award is immune from judicial review even if it appears to be wrong or even patently unreasonable.

The conclusion on the first ground of appeal is that the chambers judge erred in his determination that characterized Arbitrator Slone as a statutory rather than a consensual arbitrator. This resulted in the chambers judge according Arbitrator Slone a lower degree of deference than, as the decision in **Canada Post Corp.** indicates, should have been given.

The Second Issue

The appellant contends the chambers judge erred when he held Arbitrator Slone committed a reviewable error by arbitrating a grievance over the way the employer conducted a promotional routine. The city frames this issue as whether the arbitrability of the grievance is a question the arbitrator must correctly decide.

The chambers judge in his decision, being the one under appeal, determined that Arbitrator Slone committed a reviewable error by determining the grievance filed by the Union was arbitrable. In doing so, he principally relied on the earlier decision of Justice Nunn and the manner by which this Court disposed of the decision of Justice Nunn when it came forward on appeal. It will be remembered that Justice Nunn was dealing with an application to quash the first award, that being the one made by Arbitrator Outhouse.

Justice Nunn determined that the award of Arbitrator Outhouse must be set aside because there was a violation of natural justice by failing to give adequate notice to persons who had a right to be heard. On that basis alone Justice Nunn decided the grievance must go back for another hearing before a new arbitrator, other than Mr. Outhouse. Justice Nunn went further. He opined that in any event the grievance was not arbitrable.

When the decision of Justice Nunn came on appeal (114 N.S.R.

(2d) 18), this Court dismissed the appeal on the ground that Justice Nunn made no error in quashing the Outhouse award on the issue of natural justice. The Court was careful to observe that it was making no comment on any of the other issues raised or considered by Justice Nunn. Natural justice was the primary issue underlying the decision of Justice Nunn. The remainder of his observations were secondary and in a real sense gratuitous.

It would have been singularly inappropriate for this Court to have commented upon the additional matters about which Justice Nunn wrote because, (a) it was unnecessary and not material to the appeal, and (b) since by the order of Justice Nunn the grievance was to go back for rehearing before another arbitrator. This Court should not have been in the position of prejudging matters which were no longer live issues lest they should fetter the continuing proceedings.

Therefore it was unfortunate that the chambers judge concluded that what in fact was obiter in the decision of Justice Nunn had been upheld by this Court and accordingly became the standard in law by which he was required to assess the award of Arbitrator Slone. In any event the chambers judge concluded the promotional routine was a non-arbitrable issue and Arbitrator Slone fell into error by determining that it was.

The issue of arbitrability was argued as a preliminary matter before Arbitrator Slone. The City contended the Union could not grieve the promotional routine because it was an exclusive function of management. In a preliminary ruling Arbitrator Slone decided that he was unable to dismiss the grievance without a hearing to assist him "in understanding the substance of the grievance". He indicated the City was free to raise the issue of arbitrability during the hearing of the grievance, and it did. In his final award Arbitrator Slone found the facts did not support the objection. He wrote:

> The Employer argues that it has not been shown by either grievor that there has been a breach of the Collective Agreement vis-a-vis them. The Employer says that what would be grievable is a particular promotion, and not an entire routine, and that there is no specific promotion grieved here. It is argued that the result, and not the process, is grievable. The employer points to the specific wording of article 23.01 (**"Promotions and demotions, for other**

> **than disciplinary reasons shall be grievable under the provisions of Article 20. hereof ..'**).
>
> I disagree with this interpretation. No one grieves their own promotion; they grieve their failure to be promoted. What is being grieved by the grievors is the Employer's failure properly to assess their skill, ability and efficiency in relation to their brethren, thus resulting in their being passed over for promotion. It is acknowledged by the Employer that both Dober and Boyle were among the top 8 candidates in seniority; therefore, given that eight promotions were destined to be made over the two years, it cannot be said with certainty that the grievors have not suffered harm as a result of the Employer's breach of the Collective Agreement.

In determining whether Arbitrator Slone committed a reviewable error in deciding the grievance was arbitrable, it is necessary to follow the relevant provisions of the collective agreement, the **Trade Union Act** and the law.

First, the collective agreement: The criteria for evaluation is provided in Article 23.01 (see para. 2 in the Statement of Facts). By Article 6.01 (see para. 1 in the Statement of Facts), management rights including promotions are "subject to the terms of this agreement". Article 20.01 provides:

> 20.01 Should a difference arise between the City and an employee or the Union regarding the meaning, interpretation operation or application of this Agreement, or where an allegation is made that this Agreement has been violated or that an employee has been disciplined (including discharged) without just cause, or whether a question arises as to whether any matter is arbitrable such differences shall be the subject matter of grievance and shall be processed in the manner set forth herein.

Article 21.03 states that the decision of the arbitrator shall be "final and binding" but the arbitrator "shall have not have the power to add to, alter, modify or amend [the] Agreement".

Second, the **Trade Union Act**: Section 43(1) states:

> 43 (1) An arbitrator or an arbitration board appointed pursuant to this Act or to a collective agreement
>
> ...
>
> (c) has power to determine any question as to whether a matter referred to him or it is arbitrable;

The deemed final settlement provision in s. 42(2) which is surplus to this collective agreement because it is already included, provides in part:

> ... 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.

Third, the law: This raises the question whether Arbitrator Slone in deciding that the grievance was arbitrable was acting within his primary jurisdiction. The answer depends on whether the arbitrability of the grievance can be interpreted as falling within the provisions of the collective agreement. In **Dayco (Canada) Ltd. v. C.A.W.-Canada** (1993), 102 D.L.R. (4th) 609, (S.C.C.), LaForest, J. stated at pp. 627-628:

> ... I have no doubt that the power to determine arbitrability will for many "matters" connote a grant of jurisdiction **stricto sensu**. Specifically, when the "matter" must be measured against the collective agreement to determine if it is arbitrable, the arbitrator will have the right to be wrong. This takes account of the entire purpose of the provision, which is to empower the arbitrator to deal with differences between the parties **relating to the agreement**. Moreover, this is in accord with the arbitrator's core area of expertise. After all, the most frequent challenge of an arbitrator's jurisdiction is an assertion by one of the parties that the incident underlying a grievance is not contemplated by the collective agreement. These issues are resolved by the arbitrator's application of the facts to the agreement as he or she interprets it, and this process is clearly intended to be left to the expertise of the arbitrator. However, when it comes to determining whether a collective agreement governs the rights and obligations of the parties irrespective of the interpretation of that agreement, the arbitrator has no benchmark; the existence or subsistence of the collective agreement itself is called into question. Although the arbitrator has the power to decide these questions, he or she must be correct in doing so.

An examination of the award of Arbitrator Slone reveals that he canvassed the articles in the collective agreement to which reference has been made above. His decision, based on an interpretation of the collective agreement, persuaded him that the differences giving rise to the grievance were arbitrable. He did not assume a jurisdiction that exceeded the bounds of the collective agreement. His conclusion cannot be said to be patently unreasonable or one having no rational basis (see **Canada (Attorney-General) v. Public**

Service Alliance of Canada (1993), 101 D.L.R. (4th) 673, Cory, J., at p. 690).

The exercise of management's rights give rise to arbitrable differences under collective agreements. This collective agreement is no exception. From time to time the awards come forward under appeal to the courts of this Province for review. Examples include: **Canadian Keyes Fibre Co. Ltd. v. United Paperworkers International Union, Local 576** (1974), 8 N.S.R. (2d) 81; **Acadia University v. International Union of Operating Engineers, Local 968B** (1985) 66 N.S.R. (2d) 296; **Civil Service Commission (N.S.) v. Nova Scotia Government Employees Union** (1993), 123 N.S.R. (2d) 217.

In conclusion on this ground, Arbitrator Slone was within his primary jurisdiction in determining that the grievance raised an arbitrable issue. The standard of correctness as that term is understood and as urged by the City does not apply to the circumstances involving this consensual arbitrator. His decision was based on an interpretation of the provisions of the collective agreement. His result was not patently unreasonable. It is a result that is entitled to deference. To conclude otherwise, with respect, is in error.

The Third Issue

The appellant submits the chambers judge erred when he held Arbitrator Slone committed a reviewable error in fashioning a remedy to the grievance. The respondent puts it this way: If the arbitration is statutory in nature, is the decision reviewable?

Having concluded that the arbitration is consensual, and not statutory, responds in part to the question as put by the City on this ground. Nevertheless it does not remove from consideration the subject of the remedy which both the chambers judge and the City considered to be "far out", although neither used such descriptive language. The chambers judge concluded the arbitrator erred in the style and substance of his remedy which attracted review and consequent error because, in the opinion of the chambers judge, the arbitrator amended the collective agreement.

In the summary of the factual background recited at the beginning

of this decision, reference is made in paragraph 18 to several of the flaws Arbitrator Slone found in the promotional routine.

In turning to the vexing issue of remedy, the following are excerpts from the arbitrator's lengthy award:

> I have grappled at great length with the question of whether the competition was so flawed or tainted that it is beyond salvage, or whether it can be said to be flawed only in very discrete areas. If the latter is the case, the effects of these flaws can be severed - thus producing a result which, while far from perfect, reaches some threshold of acceptability.
>
> This prospect must be weighed against the alternative, which is to attempt to fashion a competition to be held now but which would measure the candidates' skill, ability and efficiency as at four years ago.
>
> As already stated, I am not persuaded that the competition was so fundamentally flawed that it cannot be relied upon at all. Perhaps under other circumstances it might have been just as simple to chuck the whole thing and start over again, but this is not the case here. I have little confidence that any process held now - no matter how well-designed - would produce a fair measure of candidates' relative qualifications in 1989. Those who have been promoted would have considerable experience and knowledge gained on the job, which could give them an unfair advantage. For many other reasons, the candidates' performance four plus years later might in no way resemble what their performance might have been in 1989. Furthermore, it might be very difficult to arrive at a competition format which both parties could accept, and this grievance could remain unresolved for years to come. I do not want to see that happen. The 1989 competition, while quite far from perfect, at least contains some data which is both timely and relevant. It was a test conducted in good faith which explored some relevant areas of qualifications, and in my opinion it is the best test of 1989 qualifications that we are ever going to have, subject to having the offending portions removed.
>
> ...
>
> I am in general agreement that it is the task of the Employer, and not arbitrators, to compare candidates. I do not intend to usurp that function, but it is clearly necessary to give very clear guidance as to what steps must be taken to carry out the remedial exercise. As a first step the Employer must excise the offending questions and factor them out of the results.
>
> ...

Nevertheless, some process of banding must be applied to the re-calculated test results. I am not sufficiently knowledgeable about the possible methods; nor am I prepared to say without hearing further from the parties what the precise band width ought to be.

In the interim, while this recalculation and comparison is done, I am not prepared to order the promotions set aside. There can be no escaping the fact that the results of the 1989 competition are suspect, and that some of the promotions made on the basis of this routine are vulnerable. However, there are other considerations.

I am extremely mindful of the fact that people such as Bryson have been on a rollercoaster, having originally been promoted, then demoted as a result of the Outhouse award, only to have their promotions restored by the Courts, but with the case still pending and their promotions again hanging in the balance. I intend to minimize to the greatest extent possible the disruption that must inevitably be created by this grievance. There seems to be no good reason to cast doubt on their status and rank until it is absolutely necessary to do so. It remains an applicable principle in job posting cases that the results should only be set aside where there has been shown to be a miscarriage of justice. Until it is seen whether the recalculation makes a difference, it cannot be determined whether, or to what extent, there has been a miscarriage.

For all of the above reasons, my award herein is that the recalculation take place as set out above for all of the original 28 candidates, and that each of the Union and the Employer prepare proposed banding schedules offering several different band-widths and/or methods, giving priority in order of seniority to those within the same band. In the event the parties can agree on methodology and band width, that may be employed to generate the result; otherwise, I will retain jurisdiction to review the recalculated results and select what I consider to be the fairest of the handings proposed.

Only after the recalculation and banding can it be known whether any of the incumbents would be displaced, and by whom. Only at that point would I be prepared to make an order setting aside one or more promotions, and only to the extent necessary to place those people in the positions who are so entitled.

In the event that one or more of the eight incumbents is displaced, there will remain the one very difficult question: How do we take account of the real possibility that such persons might have competed in the 1991 or 1993 routines, possibly with success, but for their reliance on the promotions which they had already received as a result of the 1989 competition? I do not know how this can be handled, but it would be my hope that some accommodation could be made with the joint effort the Employer and the Union, to minimize the effect on such a person's career.

> To be absolutely clear, then, I am expressly retaining jurisdiction to resolve any and all issues that arise out of the recalculation and consequent comparison of candidates' relative equality through banding. I fully anticipate that this will require me to reconvene the hearing, but I see no reasonable alternative. This matter is too important, and has been going on for so long, that it appears to me to be desirable to carefully monitor the process and deal as effectively, finally and humanely as possible with all of the fallout from this very unfortunate circumstance.
>
> The recalculation is just a mathematical exercise, and ought not to take more than a few days. Proposing banding methods may take a little longer. It is very desirable that this be completed within a reasonable time. I leave it to the parties to establish a timetable, failing which I would consider imposing one. When the parties are ready, assuming it is necessary, I will convene a further hearing to deal with the outstanding issues.

It is unnecessary to review the many judicial pronouncements that support the proposition that the courts should not fetter an arbitrator in fashioning a remedy that provides for the settlement of a dispute. In many respects this dispute has run its course. Arbitrator Slone recognized that four years had elapsed since the grievance process began. By this time, it is even longer. There have been two intervening promotional routines - one in 1991 and the second in 1993. The City is convinced that it has not been well served by the process even in the face of the references made by the arbitrator that commend the City for entering upon and conducting the process in good faith.

The ultimate test, however, is whether Arbitrator Slone has arrived at a remedial process (his work is still unfinished) which is patently unreasonable. Compare it to the Little Brook Post Office which had ceased to exist by the time the arbitrator's decision wended its way to this Court.

In **C.U.P.E., Local 963 v. New Brunswick Liquor Corp.**, [1979] S.C.R. 227, Dickson, J., (as he then was) wrote at p. 233:

> The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that

which may be doubtfully so.

The remedy fashioned by the arbitrator should not be disturbed where it resulted from an interpretation of the collective agreement within his jurisdiction and where it was not irrational or patently unreasonable. It is not for this court to substitute its opinion to displace in some way that which Arbitrator Slone proposes in his journey to resolution.

The response to the third issue is that the arbitrator did not commit a reviewable error in his effort to fashion a remedy to the grievance.

The Fourth Issue

This issue is advanced by the appellant in the form of a question: If Arbitrator Slone committed no reviewable error in his consideration of the Union's grievance, should his award be quashed nonetheless because of the decision of Justice Nunn? The City also frames the same issue in the form of a question: Alternately, was the decision unreasonable and reviewable on this basis?

The thrust taken by the City is directed more toward the award of Arbitrator Slone, contending as the chambers judge found, that it was patently unreasonable because it amended the collective agreement by importing provisions respecting the conduct of the promotional routine.

The matter underlying this ground has been canvassed to some extent when considering the second issue in this appeal. To respond to this issue it is necessary to summarize the background, even at the risk of repetition.

The grievance was first referred to arbitrator Outhouse. He rendered an award in favour of the Union. Justice Nunn quashed the award (see (1991), 107 N.S.R. (2d) 401). He found there had been a denial of natural justice because certain employees received insufficient notice of the arbitration proceeding. He ordered a rehearing of the grievance before another arbitrator. However Justice Nunn went further. He said that the grievance was not

arbitrable because it challenged the promotional routine which in his view was a management function.

The decision of Justice Nunn was appealed to this Court. The appeal was dismissed. Justice Nunn was upheld on the ground on which his decision was based, namely, a violation of natural justice. The court declined to make any comment on anything else Justice Nunn wrote in his decision. (See (1992), 114 N.S.R. (2d) 18). As already indicated, for this court to comment on any of the other matters Justice Nunn chose to discuss would be inappropriate, unnecessary and superfluous.

As per the order of Justice Nunn the grievance was considered afresh by Arbitrator Slone. Pursuant to the **Arbitration Act**, his award was appealed to the Supreme Court. The chambers judge considered the additional issues canvassed by Justice Nunn. For the most part he chose to accept and follow the reasons of Justice Nunn in the belief that they were either persuasive or binding.

When a decision is affirmed, but not the reasons, it cannot be taken that the reasons are therefore binding. In **Hack v. London Provident Building Society** (1882), 23 CH 103 (C.A.), Jessel, M.R. stated at p. 112:

> As regards the judgment of the Court of Appeal in that case, I must say this, that the decision of the Court of Appeal was affirmed, but not the judgment, and that is a very important distinction. When the House of Lords affirm a decision on different grounds from those of the Court below, it is evidence, in fact proof, to those who know the practice of the House of Lords, that they do not agree with those grounds. Therefore a judgment so affirmed, so far from leaving the judgment of the Court of Appeal intact,

shews the contrary, and that you are no longer bound by it. The mere affirmance of the decision is quite a different thing. You are bound by the decision but not by the reasons given for it.

The Alberta Court of Appeal considered whether the dicta in a decision of a trial judge is binding in **Re Pacific Cassiar Ltd. and Esso Canada Resources Ltd.** (1986), 28 D.L.R. (4th) 104. Mr. Justice Lieberman, for the court, wrote at p. 113:

> The decision of the trial judge in **Canadian Superior** was affirmed

> on other grounds on appeal to the Appellate Division of the Supreme Court of Alberta and to the Supreme Court of Canada. Neither court dealt with the question of the caveat considered by the trial judge in the above quoted **obiter dicta** and I do not consider it binding upon me. As was stated by the learned authors Murphy and Rueter in **Stare Decisis in Commonwealth Appellate Courts** (1981), p. 79:
>
> > The situation envisaged here should be contrasted with the situation where the higher court affirms the decision of the intermediate court but on completely different grounds. It has been held that in a case where the House of Lords did this, it thereby indicated that it disagreed with the reasons of the Court of Appeal, and thus the Court of Appeal was no longer bound by them; the "decision" had been affirmed but not the "judgment".

Justice Saunders had occasion to consider the decision of this court in **Halifax (City) v. Municipal Association of Police Personnel** (1994), 131 N.S.R. (2d) 199. He wrote at p. 205:

> Thus, the Court of Appeal's judgment does not affirm Mr. Justice Nunn's obiter on the arbitrability of the grievance. They were rendered dicta by the Court of Appeal's decision and were not binding upon adjudicator Veniot.

It follows that Arbitrator Slone was not prevented by the decision of Justice Nunn, or of this court, from proceeding with the grievance as though it were before him as a matter of first instance. He was properly seized with the grievance. The Chambers judge, with respect, erred in concluding that the decision of Justice Nunn fettered Arbitrator Slone from hearing and deciding the grievance.

CONCLUSION

For the reasons given Arbitrator Slone made no reviewable error in the exercise of his jurisdiction under the provisions of the collective agreement.

I would allow the appeal, set aside the order of the chambers judge, and restore the award of the arbitrator. I would grant the appellant costs of

$1000.00 plus its disbursements.

C.J.N.S.

Concurred in:

Jones, J.A.

Freeman, J.A.

C.A. No. 106662

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HALIFAX FIREFIGHTERS ASSOCIATION)
IAFF, LOCAL 268)
Appellant)
- and -) REASONS FOR
) JUDGMENT BY:
CITY OF HALIFAX,)
a municipal body corporate)
CLARKE, C.J.N.S.
)
Respondent)
)
)
)
)
)
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