IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Cape Breton (Regional Municipality) v. Nova Scotia Government and General Employees Union, 2005 NSSC 347

Date: 20051220
Docket: SH No. 254580
Registry: Halifax

Between:

The Cape Breton Regional Municipality

Applicant

v.

The Nova Scotia Government and General Employees Union

Respondent

- and-

The Honourable Kerry Morash, The Minister of Environment and Labour

Respondent

- and -

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

Respondent

DECISION

Judge: The Honourable Justice Arthur W. D. Pickup

Heard: December 7, 2005, in Halifax, Nova Scotia

Written Decision: December 20, 2005

Counsel: Eric Durnford, Q.C., for the applicant
Raymond Larkin, Q.C., for the respondent, NSGEU
Dale Darling, for the respondent AGNS

By the Court:

[1] The applicant, CBRM employs a group of unionized police officers who are represented by the respondent NSGEU. The collective agreement between the parties expired on December 31, 2004 and the NSGEU served a written Notice to Bargain on the CBRM on January 12, 2005, pursuant to s. 33 of the *Trade Union Act*.

[2] Subsequent to the Notice to Bargain, but before the parties began negotiations, amendments to the *Trade Union Act* were proclaimed into force that abolished police strikes and employer lock outs of police and substituted a system of interest arbitration.

[3] The parties commenced collective bargaining but were unable to negotiate an agreement. A conciliation officer was appointed but no agreement was reached. The NSGEU gave notice to CBRM that it intended to refer the collective agreement to interest arbitration pursuant to the new amendments. The Minister appointed an Interest Arbitrator. CBRM objected to the application of the interest arbitration provisions, taking the position that the amendments were being applied retrospectively and interfered with its vested rights. The Minister maintained his

position that the matter would go to interest arbitration and, as a result, there is before me an application by CBRM for:

1. An order in the nature of *certiorari* to quash and set aside the decision of the Minister of Environment and Labour dated September 14, 2005 determining that he had jurisdiction to appoint an Interest Arbitration Board;
2. An order in the nature of *certiorari* to quash and set aside the decision of the Minister on September 30, 2005 appointing Milton J. Veniot, Q.C. to act as an Interest Arbitrator.

BACKGROUND

[4] On October 18, 2004 Bill 138 received royal assent. As S.N.S. 2004, c. 47, it was to come "into force on such day as the Governor in Council orders and declares by proclamation" (s. 3). The *Act* included amendments to the *Trade Union Act* which removed police bargaining units' right to strike and their employers' right to lockout. The rights to strike and lockout were replaced with binding interest arbitration.

[5] On January 12, 2005 the NSGEU required the CBRM to commence collective bargaining by serving written Notice to Bargain on the CBRM pursuant to Section 33 of the *Trade Union Act*. On March 17, 2005 the amendments to the *Trade Union Act* came into force by Order In Council 2005-107. The newly introduced provisions became sections 52A to 52G of the *Act*. Of particular note is s. 52A(3), which states as follows:

> 52A(3) The right to strike and the right to lock out police constables or officers or members of a police bargaining unit is hereby replaced with interest arbitration.

[6] The parties were unable to reach an agreement and a conciliator was appointed by the Minister of Labour. The conciliator was unable to conclude a collective agreement and filed his report on August 9, 2005.

[7] By letter dated August 10, 2005 the NSGEU referred the collective agreement to binding interest arbitration pursuant to the newly enacted section 52C of the *Act*. The NSGEU wrote the Minister on September 6, 2005 requesting appointment of an interest arbitrator pursuant to Section 52D(2) of the newly amended *Act*. CBRM objected to the application of the interest arbitration

provisions, arguing that the amendments were being applied retrospectively. The Minister responded to counsel for both parties by letter dated September 14, 2005 as follows:

> This letter is to acknowledge receipt of Mr. Larkin's request for the appointment of an Interest Arbitrator with respect to the above noted matter and subsequent submission from Mr. Durnford and Mr. Larkin relating to the applicability of Sections 52 A to 52 G of the *Trade Union Act* to these negotiations.
>
> I have reviewed the legislation and all submissions with legal counsel and I have determined that the interest arbitration provisions do apply to this collective agreement.

[8] On September 30, 2005 the Minister appointed Milton Veniot, Q.C. to serve as an Interest Arbitrator. On September 15, 2005 CBRM filed an application for judicial review of the Minister's September 14, 2005 decision. On October 7, 2005 CBRM filed an amended application for judicial review seeking to have the Minister's September 30, 2005 appointment of Milton Veniot, Q.C. as Interest Arbitrator set aside.

ISSUES

[9] The issues are as follows:

A. What is the appropriate standard of review?

B. Did the Minister commit reviewable error when he decided that the March 17, 2005 amendments to the *Trade Union Act* apply to the parties where Notice to Bargain had been given by the NSGEU to the CBRM before the amendments came into force.

1. What is the Appropriate Standard of Review

[10] CBRM and NSGEU agree that the appropriate standard of review is correctness or, alternatively, reasonableness. The Attorney General of Nova Scotia takes no position on the merits of the application but did provide submissions on the standard of review to be accorded a Minister of the Crown. The position of the AGNS is less clear but appears to suggest that deference is called for and decisions of the Minister can only be challenged successfully if they are demonstratively unlawful.

[11] The Supreme Court of Canada has confirmed that the standard of review is to be determined by applying the "pragmatic and functional approach". Courts

must consider four categories of factors when determining the appropriate standard of review for a statutory appeal or a judicial review:

a The presence or absence of a privative clause or statutory right of appeal;
b. The expertise of the tribunal relative to that of the reviewing court on the issue in question;
c. The purpose of the legislation and the provision in particular; and
d. The nature of the question - is it a question of law, fact, or mixed law and fact?

[12] In *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, the Supreme Court of Canada stated that the purpose for applying this "pragmatic and functional" approach is to discern the appropriate standard of review to be applied to the particular issue in question. Depending on the court's determination of the four factors there are three possible standards of review. In *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board),* 2005 N.S.C.A. 141 the pragmatic and functional approach was described by Justice Fichaud as follows:

> [21] Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a privative clause or statutory appeal; the comparative expertise of the tribunal and court on the appealed issue; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. From this the court selects, for each

issue, a standard of review of correctness, reasonableness or patent unreasonableness. *Dr. Q*, at paragraphs 26-35; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at paragraph 27; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 55-62.

[13] These standards of review span a spectrum of relative deference. Some decisions of administrative bodies are entitled to a high level of deference while others are entitled to no deference at all.

[14] I will now review the factors to determine the appropriate standard of review.

A. The Presence or Absence of a Privative Clause or Statutory Right of Appeal

[15] The presence of a full privative clause is compelling evidence that a court ought to show deference to the tribunal's decision unless the other factors strongly indicate the contrary. In *Pushpanathan v. Canada (Minister of Citizenship and*

Immigration) [1998] 1 S.C.R. 982, the Supreme Court of Canada suggested that the presence of a privative clause is more significant than the absence of one:

> The absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak of low standard. However, the presence of a "full" privative clause is compelling evidence that the court ought to show deference to the tribunal's decision, unless other factors strongly indicate the contrary as regards the particular determination in question. [para. 30]

The *Trade Union Act* does not contain any privative clause which would signal that this Court ought to show deference to the Minister's decision.

B. The Expertise of the Tribunal Relative to that of the Reviewing Court on the Issue in Question

[16] The second factor in the pragmatic and functional analysis requires an evaluation of the relative expertise of the tribunal and the Court. A high degree of deference is warranted where the tribunal's decision involves the application of its highly specialized expertise. In *Pushpanathan, supra,* the Supreme Court of

Canada suggested the following factors should be considered by the court in making an evaluation of relative expertise:

> a. the expertise of the tribunal in question;
> b. The court's expertise relative to that of the tribunal, and
> c. the nature of the specific issue before the administrative tribunal in relation to this expertise. [para. 33]

[17] Courts have attributed expertise to a Minister of Labour when deciding labour relations matters such as in *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28 where the Supreme Court of Canada noted at para. 152:

> **The Minister, with the assistance of his officials, knows more about labour relations and its practitioners (including potential arbitrators) than do the courts**. The question before him was one of selection amongst candidates he regarded as qualified. **These factors call for considerable deference.** The Minister says his appointments should be upheld unless they can be shown to be patently unreasonable. As was said in [*Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281]:
>
> > Decisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should

> generally receive the highest standard of deference, namely patent unreasonableness. This case shows why. The broad regulatory purpose of the ministerial permit is to regulate the provision of health services "in the public interest". This favours a high degree of deference, as does the expertise of the Minister and his advisors, not to mention the position of the Minister in the upper echelon of decision makers under statutory and prerogative powers. The exercise of the power turns on the Minister's appreciation of the public interest, which is a function of public policy and its fullest sense. [emphasis added]

In this case there was no discretionary or policy decision that the Minister was required to make. The Minister's decision involved an exercise in statutory interpretation dealing with a claim of retrospectivity in regards to the newly enacted amendments to the *Trade Union Act*.

[18] When this court finds its expertise is equivalent to the Minister's, no deference is granted. In *Fairmount Developments Inc. v. Nova Scotia (Minister of Environment and Labour)*, [2004] N.S.J. No. 251 (S.C.) this court noted, at paras. 23-24:

> In this case, the question is the interpretation of the term "a person who is aggrieved.."is a question of Law. The term is in a statutory provision and the question is one which may arise in many cases in the future. (See: *Canada (Director of Investigation and Research, Competition Act v. Southam*, [1997] 1 S.C.R. 748 at pp. 766-768). **The issue being a question of law, less deference is to be accorded. Considering the factors, I find the appropriate standard of review to be one of correctness.** [Emphasis added].

[19] The applicant claims that the amendments to the *Trade Union Act* are being applied retrospectively. The Minister was called upon to determine a matter of legislative interpretation. The expertise of this court is equivalent to, if not greater than, that of the Minister on this issue, and therefore no deference is due.

C. <u>The Purpose of the Legislation and the Provision</u>

[20] The analysis under the third factor must look to the purpose of the *Act* as a whole and the provision in particular. The applicant submits that the *Act* is

specialized legislation designed to govern and facilitate industrial relations between complex parties.

[21] The applicant suggests that the purpose of the amendments to the *Trade Union Act* is to further the overall goal of labour relations, which is to foster stability. However, the Minister's decision is not one wherein he was required to exercise his discretion with a view to those goals. The Minister's decision under review involved a pure legal analysis of the retrospectivity of sections 52A to 52G of the *Act*.

[22] In *Nova Scotia v. Johnson,* [2005] N.S.J. No. 261 (C.A.) the Nova Scotia Court of Appeal provided insight into the third prong of the pragmatic and functional approach in the context of a statutory appeal from the Utility and Review Board, at para. 42:

> The third contextual factor that a reviewing court is to take into account is the purpose of the *Act* as a whole and the provision in particular. In *Dr. Q., supra*, at s. 31, McLachlin, C.J. for the court stated that **greater deference is demanded where a statute's purpose requires an administrative body "to select from a range**

> **of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations."** The *Act* states that its expropriated shall be compensated for that taking (s.2). While there is an element of public policy in its determinations, the work of the Board pursuant to that legislation concerns the resolution of disputes between two parties, namely an owner of land whose property is taken and an expropriating authority. Accordingly the statutory purpose of the Act does not mitigate in favour of greater deference.[Emphasis added].

[23] Here the Minister was engaged in statutory interpretation. This statutory interpretation did not involve these public policy or competing interest considerations as described in *Nova Scotia v. Johnson, supra*.

D. <u>The Nature of the Question</u>

[24] The final factor requires the Court to characterize the question addressed in the Minister's decision as a question of law, fact, or mixed law and fact.

[25] The closer an issue comes to being one of pure law, the less deference the Minister should receive. Generally matters of fact require a higher degree of deference than legal questions. In *Creager v. Provincial Dental Board of Nova Scotia*, [2005] N.S.J. No. 32 (C.A.) at paragraphs 18-20 guidance was provided on this issue. This judicial review involved an issue of statutory interpretation and Justice Fichaud noted:

> In Dr. Creager's case, **there are issues involving the interpretation of legislation** respecting the contents of Notice of Charge, the authority of the Committee to consider an issue not mentioned in the Notice of Charge, and the validity of delegated legislation relating to costs. **These are legal matters for which the court has greater expertise than does the Discipline Committee.**
>
> Different issues may attract different standards of review. Legal issues at the core of the tribunal's area of expertise, which is incorporated by the statutory purpose, should receive deference. This, despite that the Committee's function includes statutory interpretation, such as the meaning of "professional misconduct." **Other legal issues**

> **outside the tribunal's core of expertise usually are reviewed on a correctness standard.[...]**
>
> After considering the four contextual factors of the functional and practical (sic) approach, in my view, the standard of review should be as follows:
>
> ...
>
> (c) The Second Issue includes consideration of whether the legislation permitted the Discipline Committee to consider a per se breach of the Code of Ethics, given the wordings of the Notice of Charge (paras. 69-76). **This is a legal matter outside the Committee's core of expertise to which I would apply the correctness standard of review.** [emphasis added]

[26] The interpretation of the March 17, 2005 amendments to the *Trade Union Act* and the question of retrospectivity are, in my view, questions of law outside the core of the Minister's expertise. In fact, the Minister wrote both parties on September 14, 2005 and commented as follows:

> I have reviewed the legislation and all submissions with legal counsel and I have determined that the Interest Arbitration provisions do apply to this collective agreement.

[27] The issue being determined by the Minister was legal in nature, and he received legal advice.

[28] In *Sand, Surf and Sea Ltd. v. Nova Scotia (Department of Transportation and Public Works)*, [2005] N.S.J. No. 340 (S.C.) Justice Murphy of this Court noted at paragraph 38 that the interpretation of legislation "is a pure legal function, so that the Court should apply a standard of correctness..."

DECISION

[29] I am satisfied that the standard of review should be correctness for the foregoing reasons. I will now review the Minister's decision using the standard of correctness.

[30] In *Granite Environmental Inc. v. Nova Scotia Labour Relations Board, supra*, Justice Fichaud summarized the Supreme Court of Canada's comments in *Law Society of New Brunswick v. Ryan, supra*, as to the difference in the application of the standards of correctness, reasonableness and patent unreasonableness by a reviewing judge:

> [43] For purposes of the analysis, I summarize *Ryan* as follows:
>
> (a) Under correctness, the reviewing judge follows her own reasoning path. If the judge's conclusion differs materially from the conclusion of the tribunal, then the tribunal is incorrect.
>
> (b) Under reasonableness and patent unreasonableness, the reviewing judge does not follow her own reasoning path. She does not ask whether her view is correct, reasonable or preferred. She follows the tribunal's reasoning path. She asks whether there is any line of reasoning to support the tribunal's conclusion. If the answer is "yes", then the decision is upheld, even if there are other reasonably supportable conclusions which the reviewing judge prefers.

(c) This difference between correctness and the two reasonableness standards is especially important when reviewing a tribunal's decision under a statute, such as the *Trade Union Act* here, which authorizes the tribunal to balance competing interests and interpret and apply legislative policies. Then there often may be more than one conclusion with reasonable support. Under the two reasonableness standards any one of these is upheld. Under the correctness standard, a court upholds only its preferred conclusion.

(d) The difference between reasonableness and patent unreasonableness is the degree of probing which the reviewing court is entitled to undertake or, conversely, the obviousness of the defect. Under a reasonableness approach the reviewing court is entitled to undertake a somewhat probing analysis with significant searching and testing before asking whether the tribunal's conclusion has rational support. Under a patent unreasonableness standard, the court, once it has grasped the dimensions of the problem facing the tribunal - a process that may well require some considerable reading and thinking - may

> do no more than look for a clear, evident and patent defect apparent on the face of the tribunal's reasons. A patently unreasonable error does not sprout from a subtle distinction.

2. Did the Minister commit reviewable error when he decided that the March 17, 2005 amendments to the *Trade Union Act* apply to the parties where Notice to Bargain had been given by the NSGEU to the CBRM before the amendments came into force?

[31] The position of CBRM is that the application of the interest arbitration provisions to the current round of collective bargaining constitutes an illegal retrospective application of the legislation in the absence of any indication of retrospectivity in the wording of the legislation. In other words, CBRM claims the interest arbitration provisions are being applied retrospectively to collective bargaining already in progress. CBRM also contends that the Minister's decision violates the presumption against interference with vested rights. The appointment of an Interest Arbitrator after CBRM had received Notice to Bargain allegedly stripped the applicant of its vested rights to have the benefit of the law as it then was applied to the round of bargaining in progress. By this reasoning, when the NSGEU served Notice to Bargain, CBRM acquired a vested right to have the

benefit of the law as it stood when notice was given apply throughout the collective bargaining process.

[32] According to the CBRM the key to understanding their position is viewing the collective bargaining process as a "continuum". CBRM argues that bargaining strategies vary depending upon the rules applicable to that particular round of bargaining. The parties' strategy would vary depending if the end result of a round of bargaining was the usual "economic sanction" of a strike or lock out as opposed to the new provisions for interest arbitration.

[33] Not surprisingly, the position of the NSGEU is that applying the amendment does not result in a retrospective application of the law but a prospective and immediate application. Moreover, the Union argues, the amendments do not impair any vested right of CBRM. While CBRM views collective bargaining as a continuum, the NSGEU suggests that each step (beginning with a Notice to Bargain and ending in a strike or lock out) is a "separate hoop", the requirements of which must be completed before the next step of the process is engaged. These processes, according to the NSGEU, are separate and place different legal duties and obligations on the parties.

[34] CBRM argues that it is a well entrenched principle that legislative amendments such as are before me are not to be given retrospective affect unless the statute signals the Legislature's clear intention that the provision has retrospective affect.

[35] The first question to be determined is whether the amendments in question are retrospective. Retrospective statutes were described — and distinguished from retroactive ones — by Elmer A. Driedger, Q.C., in a passage cited in *Hawker Siddeley Canada Inc. v. Nova Scotia (Superintendent of Pensions)*, (1993), 126 N.S.R. (2d) 81(S.C.):

> [93] In "Statutes: Retroactive Retrospective Reflections", supra, at p. 276, Prof. Driedger summarizes the distinction between retroactive and retrospective statutes:
>
> 1. A retroactive statue is one that changes the law as of a time prior to its enactment.
>
> 2. (1) A retrospective statute is one that attaches new consequences to an event that occurred prior to its enactment.

> (2) A statute is not retrospective by reason only that it adversely affects an antecedently acquired right.
>
> (3) A statute is not retrospective unless the description of the prior event is the fact situation that brings about the operation of the statute.
>
> 3. The presumption does not apply unless the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability or duty.
>
> 4. The presumption does not apply if the new prejudicial consequences are intended as protection for the public rather than as punishment for a prior event.

[36] Retrospectivity was further explained by the Supreme Court of Canada in *Gustavson Drilling (1964) Ltd. v. M.N.R.* [1977] 1 S.C.R. 271. Justice Dickson (as he then was) explained the statutory interpretation presumptions as follows, at p. 279:

> First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of

> the *Act.* An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.....

[37] To determine whether the amendments have retrospective operation it is necessary to read them in their entire context and in their grammatical and ordinary sense. Support for this approach of statutory interpretation can be found in *Rizzo and Rizzo Shoes Limited (Re)*, [1998] 1 S.C.R. 27 where the method set out by Elmer Driedger in *Construction of Statutes* was adopted:

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

[38] In *Bell ExpressVu Limited Partnership v. Rex* [2002] 2 S.C.R. 559, the Supreme Court of Canada reiterated this principle of interpretation as the preferred approach and stated as follows:

> The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their colour from their surroundings".

[39] More recently, the Supreme Court of Canada stated in *Canada Trustco Mortgage Co. v. Canada,* [2005] S.C.J. No.56, that "[t]here is but one principle of interpretation: to determine the intent of the legislator having regard to the text, its context, and other indicators of legislative purpose." (para. 40):

[40] The *Interpretation Act* R.S.N.S. 1989, c.235 is relevant. Section 9(5) of the *Interpretation Act* states:

> (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;

(f) the consequences of a particular interpretation; and
(g) the history of legislation on the subject

[41] As I have stated, the key difference between the parties as to their interpretation of the amendments to the *Trade Union Act* lies in the view each takes of the collective bargaining process. The CBRM views the bargaining process as a "continuum" that begins with service of the Notice to Bargain pursuant to Section 33 of the *Trade Union Act* and ending with either a new agreement by negotiation or economic sanctions by way of strike or lockout.

[42] The NSGEU, on the other hand, argues that the sanction of strike or lockout (now interest arbitration) signals the end of collective bargaining. It therefore suggests that the amendments do not affect the bargaining process, and that the amendments are prospective, not retrospective. This is the approach that I prefer.

[43] Upon a review of the wording of the amendments in their grammatical and ordinary sense and considering context, I am satisfied that they apply only to the right to strike and lockout for police officers and do not affect the bargaining process.

[44] Section 52A(3) of the *Trade Union Act* is clear:

> 51A(3) The right to strike and the right to lock out police constables or officers and members of a police bargaining unit is hereby replaced with interest arbitration.

[45] The process that began with Notice to Bargain given by the NSGEU on January 12, 2005 concluded with the filing of a conciliator's report on August 9, 2005. It was at this point the newly introduced provisions of the *Trade Union Act*, namely Section 52(a) to 52(g), became operative.

[46] Section 52C(b) signals that upon the conciliation officer making a report to the Minister under s. 52C(b) "the employer or the union shall notify the other party in writing of its desire to submit the collective agreement to an interest arbitration board...". The filing of the report to the Minister by the conciliation officer on August 9, 2005 was the triggering event under section 52(c):

> 52C Where
>
> (a) a conciliation officer fails to bring about an agreement between the parties engaged in collective bargaining; and
>
> (b) the conciliation officer makes a report to the Minister,

> the employer or the union shall notify the other party in writing of its desire to submit the collective agreement to an interest arbitration board composed of one person unless the parties agree to submit the collective agreement to an interest arbitration board of three persons.

[47] I am satisfied upon a review of the *Trade Union Act* that the amendments that became effective on March 17, 2005 affected only the provisions dealing with the right to strike or lockout and not those provisions dealing with collective bargaining. Prior to the filing of the conciliator's report on August 9, 2005 the parties were engaged in collective bargaining as defined in s.2(1)(f) of the *Trade Union Act*: "negotiating with a view to the conclusion of a collective agreement or the renewal or revisions thereof, as the case may be...".

[48] Face to face collective bargaining commenced after the March 17, 2005 amendments to the *Trade Union Act* came into force.

[49] Section 33 of the *Act* permits a Notice to Bargain to be served either by the employer or union. Here the NSGEU served the CBRM with a Notice to Bargain. The effect of the Notice to Bargain is set out in Section 35. The serving of the Notice to Bargain requires the parties to meet and "commence to bargain

collectively" or to set dates to meet and commence collective bargaining. The NSGEU and CBRM did agree to set dates to commence Collective bargaining and first met on March 28, 2005.

[50] Until the report to the Minister by the conciliation officer there is no right to strike or lockout. The right to strike or lockout does not arise until the parties have bargained unsuccessfully and have engaged in a conciliation process, a conciliator's report is filed and 14 days have elapsed. The right to strike crystallizes when the steps in 47(1) have been taken and the union has taken a strike vote and provided the relevant notice. It is clear from a reading of these sections of the *Act* in their ordinary grammatical meaning that what the Legislature intended was to eliminate the right to lockout by employers and the right to strike by police officers. The Amendments clearly targeted the right to strike and lock out but did not affect the bargaining process as CBRM alleges. Until the pre-conditions were met in Sections 47 and 49 of the *Act*, the parties were prohibited from strike or lockout. All of the activity between the parties took place after the passage of the amendments except for the Notice to Bargain that had been given on January 12, 2005. There is nothing in the amendments that has any effect on that

obligation or that right to require the other party to meet and commence collective bargaining.

[51] A review of the *Trade Union Act* and, in particular, the headings preceding the various sections of the *Act* ,lends support to this conclusion. The amendments removing the right to strike fall under a new heading of “Interest Arbitration”. The new sections come after the provisions headed “Strikes and Lockouts”. Significantly the sections related to collective bargaining precede the above sections and are headed “Negotiation”. I am satisfied, after reviewing the text as a whole that the intention of the amendments is to alter the sanctions available to the parties following a failure in collective bargaining. In this case, the failure of collective bargaining — signalled by the conciliation officer’s report — occurred after the amendments came into force . Moreover, I am satisfied the new amendments did not change the law with respect to bargaining as set out in the *Trade Union Act*. If the parties had concluded a collective agreement by the bargaining process the amended provisions would not apply, which suggests to me that these provisions only apply after a failure of the collective bargaining process as set out earlier in the *Act.* I am satisfied that there is no retrospective application of the amendments.

[52] The second argument CBRM proffers is that the Minister's decision violates the presumption against interference with vested rights. CBRM emphasised this argument in its oral presentation to this Court. CBRM argues that the appointment of an Interest Arbitrator after it had received Notice to Bargain stripped it of a vested right to have the benefit of the law as it then was applied to that round of bargaining. In other words, on January 12, 2005 (the date the Notice to Bargain was served) CBRM acquired the right to engage in the current round of collective bargaining from beginning to end in accordance with the law that was in place on January 12, 2005. If the parties could not negotiate a successful agreement then the sanctions that were available (as of January 12, 2005) were strike and lockout. Further, CBRM contends that its bargaining strategy would have been arrived at with an eye on the ultimate sanction of lockout and that the rules of the game changed when police lockouts and strikes were no longer available as economic sanctions.

[53] The NSGEU argues that the CBRM had no vested right to lockout bargaining unit employees and the NSGEU had no vested right to strike until the filing of a report by the conciliation officer after the parties failed to reach an

agreement. Therefore, when the amendments came into effect the CBRM only had a possibility to proceed with conciliation and lockout. In response to the CBRM's argument that it would have varied its negotiating strategy if it had known at the onset that lockout would not be an available sanction, the NSGEU points out that the parties did not begin to bargain until the amendments were in force; they did not meet in face to face negotiations until March 28, 2005. The amendments came into force on March 17, 2005. I agree with the suggestion by the NSGEU that CBRM ought to have known that the right to strike or lockout had been abolished by that time and could have changed its bargaining strategy accordingly.

[54] CBRM relies on the recent decision of the Supreme Court of Canada in *Dikranian v. Attorney General of Quebec*, [2005] S.C.C. 73 to support its argument on vested rights. Dikranian was a student who had received student loans pursuant to the *Act Respecting Financial Assistant for Students*, R.S.Q.. C. A-13.3 from the years 1990 to 1996. Although he did not receive student loans after 1996, he did not complete his studies until 1998. When he first received students loans, the loan certificate allowed for an interest-free exemption period where the Minister would pay the interest on his student loan. As a result of amendments to the *Act* in 1997

and 1998, the exemption period was abridged. As a result, when Mr. Dikranian completed his studies in 1998, the bank began deducting interest sooner than had been previously specified in the loan certificate. Mr. Dikranian argued that he had a vested right to the benefit of the original exemption period. The Supreme Court agreed. The Supreme Court of Canada made some comments on the definition of "vested right" at paragraph 37:

> 37. Few authors have tried to define the concept of "vested rights". The appellant cites Professor Côté [Interpretation of Legislation in Canada, 3rd edn.] in support of his arguments. Côté maintains that an individual must meet two criteria to have a vested right: (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement (Côté, at pp. 160-61). This analytical approach was used by, *inter alia*, the Saskatchewan Court of Appeal in *Scott v. College of Physicians and Surgeons of Saskatchewan* (1992), 95 D.L.R. (4th) 706, at p. 727.

[55] Thus, to have a vested right, one's legal situation must be "tangible and concrete" rather than "general and abstract"; and the vested right as defined must

have been sufficiently constituted at the time of the new statute's commencement. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists. The Court commented at paragraph 39 of *Dikranian, supra*, as follows:

> A court cannot therefore find that a vested right exists if the juridical situation under consideration is not tangible, concrete and distinctive. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists: Côté, at p. 161. As Dickson J. (As he then was) clearly stated in *Gustavson Drilling*, at p. 283, the mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued (see also *Abbott v. Minister for Lands*, [1895] A.C. 425, at p. 431; *Attorney General of Quebec*, at p. 743; *Massey-Ferguson Finance Co. Of Canada v. Kluz*, [1974] S.C.R. 474; *Scott*, at pp. 727-28). In other words, the right must be vested in a specific individual.

At the time of the passage of the amendments on March 17, 2005, CBRM did not have the right to lockout in a "tangible and concrete" way. At that time, there was

no right in CBRM to avail itself of the provisions in the *Trade Union Act* to lockout its employees. This is to be contrasted with the very "tangible and concrete" right that existed in the fact situation in *Dikranian*, *supra*. In *Dikranian*, *supra* the court found a contractual obligation existed. At paragraph 23 the Court commented:

> The starting point for this analysis is the observation that there is a private law contract between the student and the financial institution, and the terms of the contract leave no doubt in this regard (arts. 1373, 1385 and 1387 C.C.Q.). The two parties signed the loan certificate and made specific undertakings.

[56] Unlike Mr. Dikranian, the CBRM had no vested right to lockout its employees at the time that the Notice to Bargain was served on January 12, 2005. The right to lockout had not vested in CBRM and would not vest until it had complied with the various provisions of the *Trade Union Act* outlined earlier (see para. 50 above). For this reason, I am not satisfied that these amendments have interfered with any vested rights of CBRM.

[57] At the time of the start of negotiations, I am satisfied that the parties were or ought to have been aware of these amendments. This, coupled with the fact that actual negotiations between the parties began after the amendments came into force, re-enforces my view that there has been no interference with any vested rights of CBRM.

[58] Moreover, the law governing collective bargaining between the parties was the same prior to March 17, 2005 (the date of the amendments) as it was after. What changed was the sanction available at the end of the bargaining process in the event the parties did not reach an agreement.

[59] I take comfort from the recently passed legislation entitled *An Act to Protect Public Safety*, S.N.S. 2005, c.34, which I believe is consistent with my interpretation of the effect of the amendments. This *Act* amends the *Interpretation Act* by adding a new section:

> 32A Sections 52A to 52G of the *Trade Union Act* apply to collective bargaining between a police bargaining unit as defined by Section 52A of that Act and an employer on and after the

> seventeenth day of March, 2005, whether the collective bargaining commenced before, on or after that day.

[60] Section 6(2) of the *Interpretation Act* states as follows:

> Nothing in this *Act* excludes a judicial rule of construction that is applicable to an enactment and not inconsistent with this *Act*.

[61] This subsection seems to suggest that this Court cannot apply a judicial rule of construction that is inconsistent with the *Interpretation Act,* which now provides that sections 52A - G of the *Trade Union Act* apply to collective bargaining as defined in Section 52A of the *Act* on or after the 17th of March, 2005 "whether the collective bargaining commenced before, on or after that date".

[62] I take judicial notice that this amendment became law on November 23, 2005. I am satisfied it is consistent with the interpretation that I have afforded to the interest arbitration amendments to the *Trade Union Act*. It would be inconsistent with the words of the *Interpretation Act* to find that section 52A-52G interferred with "vested rights" or had an improper retrospective effect, because

this would be to apply a rule of construction that was inconsistent with the *Interpretation Act*, specifically section 32A.

[63] Having so concluded I dismiss the application for *certiorari* in respect of the decision of the Minister of Environment and Labour dated September 14, 2005 determining that he had jurisdiction to appoint an interest arbitration board, and I dismiss the *certiorari* application in respect of the decision of the Minister of September 30, 2005 appointing an Interest Arbitrator.

[64] I will hear the parties on costs.

Pickup, J.