IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Nova Scotia Government and General Employees Union v. Capital District Health Authority, 2006 NSSC 16

Date: 20060116
Docket: SH 246169
Registry: Halifax

IN THE MATTER OF: The *Arbitration Act*, R.S.N.S. 1989 c.19

-AND-

IN THE MATTER OF: An Application by the Nova Scotia Government and General Employees Union for an Order under Section 15(2) of the *Arbitration Act* to set aside a part of the Supplemental Award dated March 7, 2005 of an Interest Arbitration Board

Between:

The Nova Scotia Government and General Employees Union

Applicant

v.

The Capital District Health Authority

Respondent

Judge: The Honourable Justice A. David MacAdam

Heard: December 15, 2005, in Halifax, Nova Scotia

Revised decision: The text of this decision has been corrected according to the erratum dated February 9, 2006

Counsel: Raymond F. Larkin, Q.C., and Heather L. Totton for the Applicant
Eric B. Durnford, Q.C. and Nancy F. Barteaux, for the Respondent

By the Court:

[1] By Originating Notice (Application Inter-Partes), the Nova Scotia Government and General Employees Union (the "NSGEU" or the "Union") seeks an Order, pursuant to section 15(2) of the *Arbitration Act*, R.S.N.S. 1989, c.5, setting aside the Supplemental Award of a Tripartite Interest Arbitration Board (the "Board"), dated March 7th, 2005 on the grounds the majority of the Board misconducted itself.

BACKGROUND

[2] On August 18th, 2004, the Board issued an Award (the "Award"), concluding a three-year collective agreement between the Union and the Capital District Health Authority (the "Health Authority"). The Award provided for two types of wage increases, one identified as "economic increases", and the other entitled "catch-up". The economic increases were 2.9% for each of three years, effective November 1st, 2003, 2004 and 2005. The "catch-up" adjustments were 2.1% each, effective May 1st, 2004, 2005 and 2006. In respect to the "catch-up" increases, the Board stated:

> Given all of the circumstances, and bearing in mind the factors we have identified, the Board has determined that an appropriate award should include a staged "catch-up" adjustment in addition to the normative 2.9% annual economic increase. The Board has also determined that there will be cases where a "catch-up" adjustment should not be made; it will not be awarded to any classification where the rate for a CDHA classification is already leading in Atlantic Canada as of October 31, 2003. Moreover, if as a result of any catch-up award, the classification in question moves to the top, none of the future staggered catch-ups will be awarded. Conversely, if, as a result of settlements occurring in Atlantic Canada during the term of this agreement, a classification falls behind the top rate in the region, it will become eligible for the next scheduled catch-up payment. The Board recognizes that this award does not meet the "leading in Atlantic Canada" objective for each and every classification but overall we have sought to achieve a reasonable balanced outcome. And we have done so, bearing in mind, that boards of arbitration, even where catch-up is demonstrably justified, must take into account other criteria which in this case, property applied, have been applied to moderate the result.

And later:

> Where, as of October 31, 2003, and thereafter in the case of classifications that move to the top as a result of implementation of one of the staggered catch-ups, the employer can demonstrate that the hourly wage rate for any classification ranks highest already in Atlantic Canada for equivalent classifications in the region, the awarded May increases shall not be awarded. And where, as noted above, economic adjustments in Atlantic Canada during the term of this agreement result in a classification falling behind, it will be eligible for the next scheduled catch-up...

In concluding, the majority Award stated:

> **Conclusion**
>
> We remain seized with respect to the implementation of our award.

[3] The majority Award was signed by the chair and the Union nominee, with the Employer nominee dissenting.

[4] The Employer nominee, in his written dissent, stated:

> The first catch-up adjustment is based on whether or not a CDHA classification is leading in Atlantic Canada as of October 31, 2003. Where, as of that date, CDHA can demonstrate that the wage rate for any classification ranks highest already in Atlantic Canada for equivalent classifications in the region, the first catch-up increase is not effective.
>
> There are several basic flaws. Firstly, the catch-up is calculated without full consideration of economic increases, both those resulting from the Majority Award and those which are scheduled in other Atlantic Provinces. Secondly, the catch-up applies the full 2.1% even if that takes the rate for classification above the top Atlantic Rate...

[5] In dissenting, the Employer nominee stated the process involved in the majority Award created a windfall, while the Award itself stated "...there should be no windfalls".

[6] The Union representative, in an addendum, and while concurring in the Award, made a number of observations. Included among the observations by the Union representative was:

> ... The Award provides the employer with the ability to deny catch-up if it can demonstrate as of October 31, 2003 that the wage rate for any classification ranks highest already in Atlantic Canada, or, if as a result of any subsequent catch-up award, the classification in question moves to the top.

[7] On November 15, 2004 the Health Authority wrote the chair of the Board advising:

> Over the last month it has become apparent that there are a number of significant disagreements between the parties relating to the interpretation and application of the Board's award. At the conclusion of the hearing in this matter both parties requested that the Board retain jurisdiction for the purpose of resolving such issues. This reservation of jurisdiction was incorporated in the award itself.
>
> We are writing at this time to request that the Board reconvene for the purpose of resolving the differences which have arisen relating to the implementation of the award...

[8] Counsel for the Union responded, suggesting the Health Authority indicate the issues it wished to have set down for a further hearing. In response, the Health Authority indicated seven (7) issues, of which number five (5) read:

> 5. Determining eligibility for the next two "catch up" adjustments.

[9] Subsequently, on November 25, 2004, counsel for the Union indicated, among other things, the Health Authority was seeking the Board's interpretation or clarification in determining eligibility for the next two "catch-up" adjustments. Counsel suggested the resolution of this issue went beyond the reservation of jurisdiction "with respect to the implementation of our Award".

[10] In correspondence dated December 2, 2004 the Chair of the Board indicated the Board had agreed to re-convene on a date to be arranged. The chair indicated "...the Board would like to receive a brief summary of the issues in dispute and the parties' positions with respect to them."

[11] The Health Authority, on December 16, 2004, responded that it understood it was being asked to address "...only the question of jurisdiction as raised by Mr. Larkin." In its response, the Health Authority also commented:

> In general, however, we would also like to point out that the case law has made fairly clear that the application of the principle of *functus officio* must be more flexible and less formallstic (sic) in respect to decisions of interest arbitration boards, *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 (SCC). Following that approach, the Manitoba Court of Queen's Bench in a decision on this point stated,
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> > We are dealing in this case with an interest arbitration where the arbitrator was appointed consensually pursuant to a collective agreement. The arbitrator indicated at the end of his award that he would remain seized for the purposes of implementation of his award. As well, statute and case law confirm that an arbitrator retains jurisdiction until he has determined every aspect of the matter, *Rogers Sugar Ltd. v. U.F.C.W., Local 832*, [1999] M.J. No. 342.

[12] Counsel for the Union, in concluding his written response of December 23, 2004, indicated that if the Board did not agree with his submission on jurisdictional issues relating to other issues raised by the Health Authority, he wished an opportunity to address the Board on whether it had jurisdiction to deal with the issue of "catch-up" adjustments as also outlined in the Health Authority letter of November 24, 2004.

[13] Apparently a conference call ensued involving the Health Authority, counsel for the Union and the Board. However, particulars of the submissions made during this conference call were not tendered in evidence on this application. In written reasons, contained in a letter dated January 13, 2005, the Board responded:

> Having carefully considered the arbitration agreement, the written submissions of the parties, and the submissions made by counsel during the conference call, a majority of the Board, with Mr. Hayes dissenting, is of the view that the Board has always had jurisdiction and, pursuant to governing authorities such as *Chandler*, we possess a continuing jurisdiction with respect to the implementation of our award and all of the implementation issues put before us as those issues relate, directly or indirectly, to the determination of wage rates, the central matter we decided. As has been observed, the Board adopted a novel approach with respect to the determination of wage rates and as implementation issues have

> arisen in giving effect to the Board's award, it is our view that we must deal with those issues.

[14] Following a hearing on February 19, 2005, the Board issued a Supplemental Award dated March 7, 2005. With respect to the issue of the "two catch-up adjustments" the Supplemental Award states:

> With respect to eligibility for the next two catch-up adjustments it is our view, albeit perhaps not as clearly set out in the award as it might have been, that once a classification reaches the top rate in Atlantic Canada it is no longer eligible for further catch-up payments. The clear and overriding purpose of the award was to ensure that employees of this employer were paid the highest rate in Atlantic Canada. The objective was not to create any windfalls and that would be the result of on-going catch-up payments once the top rate was achieved. Put another way, once a classification, through both the ATB and catch-up reaches the top rate, it is no longer eligible for further catch-up (although continues throughout the term to be eligible for the scheduled ATB). Should the rate fall behind the top Atlantic Canada rate during the term of the award, however, another catch-up payment would then be made to bring it back to or towards the top rate.

[15] The Union nominee concurred with the Supplemental Award with the exception of the ruling concerning the question of eligibility for the next two catch-up adjustments. The dissent, in part, reads:

> ... In my respectful view the language of the original award, in which I concurred, was clear and unambiguous and admits no further clarification at this stage. I would have adopted the submission of the union that, on this point, the panel was functus officio and that the plain meaning of the original award should have been accepted. *Nova Scotia Teachers Union v. Nova Scotia (Minister of Education and Culture)* [2001] N.S.J. No. 320, 2001 NSSC 113; *Chandler v. Alberta Association of Architects* [1989] 2 SCR 848.

[16] In concurring with the Supplemental Award, the Employer nominee filed a written addendum, which reads as follows:

> In support of its position on this issue, the Union referred to a passage from my Dissent. However, my Dissent does not support the Union's position. It was based on my understanding of the Majority Award - that after the first catch-up adjustment, once a classification has moved to the highest rate in Atlantic Canada, whether by way of catch-up or ATB, the classification is no longer eligible for the next catch-up adjustment (unless the rate later falls behind the top Atlantic rate).

> My Dissent stated that "The catch-up adjustment is calculated without full consideration of economic increases, both those resulting from the Majority Award and those which are scheduled in other Atlantic Provinces." (underlining added). The statement was intended to express my disagreement with the catch-up adjustment of May 1, 2004 being based on rates in effect on October 30, 2003, before the ATB increase of November 1, 2003 and before any potential increases at other relevant employers in the Atlantic Provinces prior to May 1, 2004. The statement did not apply to the next two catch-up adjustments.

[17] In dispute is whether, in determining eligibility for the 2005 and 2006 "catch-up" adjustments, reference is to be made to the "economic increases" as well as to any previous "catch-up" adjustments.

ISSUES

1. Whether the Board was *functus officio* when it dealt with eligibility for catch-up adjustments in its August 18, 2004 Award.

2. What is the appropriate standard of review of the Board's decision and did it commit reviewable error when it determined, in the Supplemental Award, that the determination for eligibility is based on both the economic increases as well as previous catch-up adjustments?

3. Is the Union's application out of time?

LAW AND ARGUMENT

1. Was the Board *"functus officio"*?

[18] In the Unions submission, the Board made a final determination in respect to eligibility for catch-up in its decision of August 18, 2004. The Board, in the submission of the Union, became *functus officio* in respect to this issue. The Union refers to Section 5(h) of the *Arbitration Act*, wherein it is stipulated the Board's Award "shall be final and binding on the parties", and then to Section 10, which reads:

> The arbitrators, or umpire, acting under a submission shall, unless the submission expresses a contrary intention, have power to
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> (c) correct in an award any clerical mistake or error arising from an accidental slip or omission.

[19] The Union, in its written submission on this application, refers to the decision of the Nova Scotia Supreme Court in *Nova Scotia Teachers Union v. Nova Scotia (Minister of Education and Culture)*, [2001] N.S.J. No. 320 where Chief Justice Kennedy, at paras. 40-41, stated:

> 40. Jonquière (Cité) v. Munger [1964] S.C.R. 45, a decision of Cartwright, J. is the Supreme Court of Canada case oft cited for the proposition that an arbitration tribunal, once it has been definitive in an award, has no power to subsequently make alterations or amendments to that finding. It has 'the right to interpret the award ... but not to amend it".
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> 41. In Regina Police Assn. v. Regina (City) Police Commissioners, [1998] S.J. No. 79, Hunter, J. gives a useful review of the law at pp. 7 and 8:
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> "23 With respect to the application of the doctrine of functus officio, both parties rely on the principles as stated in Brown and Beatty, Canadian Labour Arbitration, 3d ed. (Aurora: Canada Law Book, as am.) as follows at p. 1-37; 1:5600:
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> > 'An Arbitrator's jurisdiction to make a decision in any particular case begins with the submission to arbitration and concludes when he finally determines the matters so submitted to him ... where the arbitrator has done everything which he had to do to perfect the award, he is said to be functus officio and he cannot afterwards alter his award except to correct clerical mistakes, errors arising from accidental slips or omissions, or errors of a merely technical nature. Thus, a positive response by a board to a request for clarification would constitute an amendment to the original award which the board of arbitration has no authority to make and, in such circumstances, a court would hold that the board had completed its award and was functus officio ... [See: Crown in right of Ontario (Ministry of Health) (1994), 44 L.A.C. (4th) 215 (Kaplan); Nelsons Laundries Ltd. v. Laundry, Dry Cleaning & Dye House Workers' Int'l Union, Local 292 (1964), 44 D.L.R. (2d) 463, 64 C.L.L.C. 15, 509 (B.C.S.C.). See discussion in Canada Post Corp. (1990), 10 L.A.C. (4th) 244 (Burkett); Barber Hydraulic

> Turbine Ltd. (1978), 20 L.A.C. (2d) 372 (Shime); but see discussion in Skeena Sawmills (1990), 15 L.A.C. (4th) 432 (Bird); Canada Post Corp. (1990), 10 L.A.C. (4th) 244 (Burkett); but see Northern Telecom Co. Ltd. (1989), 4 L.A.C. (4th) 11 (O'Shea); see discussion in Kingston (City) (1996), 55 L.A.C (4th) 148 (H.D. Brown); Canada Post Corp. (1995), 52 L.A.C. (4th) 81 (Thistle); Firefighters' Social and Athletic Club (1994), 45 L.A.C. (4th) 440 (Kelleher); Lake Ontario Steel Co. (1992), 24 L.A.C. (4th) 355 (Mikus); Metropolitan Authority of County of Halifax (1988), 33 L.A.C. (3d) 333 (MacDougall); Cf. Board of School Trustees, School District No. 35 (Langley) (1996), 55 L.A.C. (4th) 1 (Bruce); R. v. Andrews, ex p. Nurses' Ass'n, St. Joseph's General Hospital (1969), 8 D.L.R. (3d) 193, 69 C.L.L.C. 14, 209 (Ont. H.C.J.), affd 10 D.L.R. (3d) 43, 70 C.L.L.C. 14, 032 (C.A.); Cf. Dunkley Lumber Co. Ltd. (1984), 17 L.A.C. (3d) 192 (Brokenshire)].'

24 In discussing the exhaustion of jurisdiction of an arbitrator, Brown and Beatty, at p. 2-105; 2:4000, note as follows:

"The doctrine of functus officio stipulates that once a board of arbitration has finished making its decision, its grant of jurisdiction is terminated and thereafter it has no power to render any further decision or award. As one court has put it:

> ...there is abundant authority for the proposition that a board of arbitration set up under commercial agreements or under the *Labour Relations Acts* of the various Provinces is functus when it has made its award, probably upon making of the award and undoubtedly upon communication of it to the parties.

...

Thus, where an arbitrator has in his view issued a final and binding award he is functus unless he has failed to determine an issue which was specifically submitted to him. Moreover, in any subsequent decision an arbitrator may not reinterpret his prior award, nor may he expand the scope of a previous award. Rather, he is limited simply to completing it ... However, where an arbitrator has retained a jurisdiction to deal with a remedy, e.g. respecting the calculation of compensation, either with or without the parties' agreement, the issuance of a subsequent award particularizing the remedy is within his jurisdiction ...'

25 The applicability of the doctrine of functus officio to Labour arbitrators was considered in McDonnell Douglas Canada Ltd. and C.A.W., Loc. 673, Re (1992), 29 L.A.C. (4th) 284 (Burkett) where at p. 285 the arbitrator accepted that after issuing an award he was not entitled to amend, vary or revoke it. In reviewing the jurisprudence he referred to his previous decision in Re Canada Post Corp. and C.U.P.W., re National Policy Grievance, No. N-00-88-00022, Medical remuneration Supplement (August 14, 1992), unreported (Burkett) wherein he considered the decision in Re Gearmatic Co., a division of Paccar of Canada Ltd. and U.S.W., [1978] 1 Can. L.R.B.R. 502 and quoted as follows at p. 287:

> 'However, the doctrine of functus officio continues to have some vitality in the industrial relations setting of grievance arbitration. It continues to operate to the extent of preventing an arbitration board from reversing the substance of an earlier decision or clearly altering the nature of an earlier decision ...'

26 Accordingly, once a board of arbitration has finished making its decision, its jurisdiction is terminated and it has no power to render any further decision or award. It is functus officio. While the arbitrator may clarify, the arbitrator has no power to reinterpret or expand the scope of his award (see: R. v. Andrews, exp. Nurses' Assn., St. Joseph's General Hospital (1969), 8 D.L.R. (3d) 193 affm. 10 D.L.R. (3d) 43). It is common practice for arbitrators to retain jurisdiction to deal with matters naturally flowing from their decision such as the calculation of the compensation awarded in the award.

27 In Palmer and Palmer, Collective Arbitration in Canada, 3d ed. (Toronto: Butterworths) at p. 42 the authors note that the arbitrators often retain jurisdiction until the award is final and that clarification of an earlier award is possible provided the clarification does not constitute an amendment to the arbitrator's decision.

28 In this case, the CBA expressly provides that the arbitrator may clarify his award. But this is limited to clarifying the decision. The arbitrator cannot amend, alter, vary or revoke his award. If he has amended or varied his original award, he exceeds his jurisdiction and the supplementary award is subject to being quashed on an application for judicial review.

29 The word 'clarify' is defined in the Oxford dictionary as meaning 'to cause to become clear or easier to understand'. In the Webster dictionary it is defined as 'to explain clearly ... make understandable ...' and 'to make less complex or less ambiguous'.

> 30 'Amend' is defined as to correct, rectify; to alter formally by modification, deletion or addition; to make minor improvements in, change slightly. 'Vary' means to make different by introducing changes."

[20] The Health Authority refers to the decision of the Manitoba Court of Queens Bench in *Rogers Sugar Ltd. v. United Food and Commercial Workers Union*, Local 832 [1999] M.J. No. 342. At issue was the doctrine of *functus officio* as it applied to an interest arbitrator's Supplemental Award. Subsequent to the initial Award, a dispute arose and a telephone conference was convened. Following the telephone conference, the parties continued to disagree on the meaning of the arbitrators ruling and subsequently a written decision was made by the arbitrator. As noted by the Health Authority, the court indicated the doctrine of *functus officio* applied even where parties have consented "since consent cannot clothe the arbitrator with jurisdiction he does not have". The Health Authority, in its written submission, then refers to paragraphs 30-32 of Justice Steele's decision:

> This doctrine certainly applies to administrative tribunals and Labor arbitrators. However, the court takes note of several points. We are dealing in this case with an interest arbitration where the arbitrator was appointed consensually pursuant to the collective agreement. The arbitrator indicated at the end of his award that he would remain seized for the purposes of the implementation of the award. As well, statute and case law confirm that an arbitrator retains jurisdiction until he has determined every aspect of the matter. (See The Labour Relations Act, s. 121(4) and Westfair Foods Ltd. v. United Food and Commercial Workers, Local 832 (1993), 87 Man.R. (2d) 224 (Man. Q.B.) at p. 226.)
>
> In addition, when applying the doctrine of functus officio to these types of situations, one should be mindful of the comments of the Supreme Court of Canada in Chandler v. Alberta Association of Architects, [1989] 2 S.C.R. 848:
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> > ... I am of the opinion that is [sic] application (the principle of functus officio) must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal (in a court proceeding). (p. 862) (Chandler was followed in Canada Post Corp. v. C.U.P.W. (1991), 84 D.L.R. (4th) 574.)
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> Most importantly in this case, the principle of functus officio is subject to two exceptions. It does not apply where there has been a slip in drawing up the

> judgment or a clerical error. It also does not apply when there has been an error in expressing the manifest intention of the fact finder.
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> > An order, as it seems to me, even when passed and entered, may be amended by the Court so as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice. (Re Swire (1885) 30 Ch.D. 239 at p. 247 as quoted in Canadian Broadcasting Corp. v. Joyce (1997), 34 O.R. (3d) 493 (Gen. Div.) at 496. See also Paper Machinery Ltd. v. J.O. Ross Engineering Corp., [1934] S.C.R. 186, followed in Chandler at p. 860.)

[21] In his submission, counsel for the Health Authority maintained the court should use a more flexible and less formal approach in determining whether a Board is *functus officio,* in the circumstances of an "interest arbitration". Counsel, in his written as well as oral submissions referred, as had the Health Authority itself in its initial submission to the Board, to the decision of the Supreme Court of Canada in *Chandler v. Alberta Association of Architects* [1989] 2 S.C.R. 848, at pp. 861-862; [1989] S.C.J. No. 102 at para 20 - 24. The majority of the court held the Board had failed to dispose of the matter before it, in a manner permitted by the relevant *Act*. The Board, in the view of the majority, had not exhausted its jurisdiction and was therefore, not *functus*:

> I do not understand Martland J. to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, supra.
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> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice

> may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*, supra.
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> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.)
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> In this appeal we are concerned with the failure of the Board to dispose of the matter before it in a manner permitted by the *Architects Act*. The Board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision.

[22] Counsel for the Health Authority, in his submission, suggests the Supplemental Award, in the present instance, was a clarification of the initial Award, much like the court in *Roger Sugar Ltd.*, *supra*, found that the subsequent actions by the arbitrator were in the nature of clarification and therefore, accordingly, “the arbitrator was not *functus*”.

[23] With the Health Authority submission I cannot agree. The initial Award clearly did not require the taking into account of the economic increases in determining eligibility for the two subsequent catch-up adjustments. The Supplemental Award, on the other hand, attempted to incorporate the economic increases into the determination of eligibility. There is no indication of a “careless mistake or error arising from an accidental slip or omission” such as to make

Section 10 of the *Act* applicable. In the present instance, the Board made its decision in August and in its Supplemental Award amended that decision to change the criteria of eligibility for the subsequent two catch-ups. The Board was functus.

2. Standard of Review

[24] In *Nova Scotia Teachers Union, supra,* at paras. 43-45, Chief Justice Kennedy, in respect to the standard of review, made the following comments:

> Because this is a question of jurisdiction, Arbitrator Christie, finding that he was functus officio on the issue of "start date" is reviewed by this Court based on the standard of "correctness". Deference to the administrative tribunal is at its lowest under this test.
>
> Either an Arbitrator has jurisdiction or he doesn't. He cannot be wrong when he determines that issue.
>
> He cannot mistakenly create jurisdiction that he does not have, or in this context, decline jurisdiction on a significant issue that he does have.

[25] The Health Authority in its written and oral submissions suggests the court should take a pragmatic and functional approach in determining the appropriate standard of review of interest arbitration Awards. Counsel, in addition to referencing the decision of the Supreme Court of Canada in *Chandler, supra,* referred to a discussion by Richard J. Charney and Thomas E.F. Brady in *Judicial Review in Labor Law,* (Canada Law Book Inc., Release No. 7, December 2004). In respect to the issue of judicial deference, counsel referred to the statement by the authors, at para. 10.1680:

> In general, then, courts will defer to interest arbitrators, provided that they do not assume jurisdiction over matters which have been removed from the arbitration table.

Counsel referenced a further statement at para. 10.4480:

> While the standard of review with respect to whether an interest arbitrator has jurisdiction, although probably that of correctness, is not entirely certain, the question of how an interest arbitrator exercises his or her authority is probably reviewable on the basis of patent unreasonableness...

[26] There is nothing in the submissions of counsel, nor in the decision of the Supreme Court of Canada in *Chandler, supra*, to indicate the standard of review in respect to the issue of jurisdiction is not one of correctness. Although the Supreme Court has repeatedly indicated a reviewing court should apply a "pragmatic and functional approach" with respect to decisions of interest arbitration Awards, that approach has not been suggested in respect to the determination of whether a Board has the jurisdiction which it purports to exercise.

[27] I am satisfied, as was Chief Justice Kennedy, that in respect to determining whether a Board has jurisdiction, the standard of review is correctness. The Board could not clothe itself with jurisdiction even, as noted in the Manitoba Court of Queens Bench in *Roger Sugar Ltd., supra*, where the parties have consented.

3. Time Lines of this Application

[28] Section 16 of the *Arbitration Act* provides as follows:

> **Issue and service of originating notice for Section 15**
>
> **16(1)** In an application to a court or a judge respecting the mattes referred to in Section 15, the originating notice shall be issued and served within a reasonable time.
>
> **Interpretation of Section**
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> **(2)** In this Section, "within a reasonable time" means within sixty days after service of a copy of the award of the arbitrator has been made upon the party issuing the originating notice or such longer time as a court or a judge may determine.

[29] The Health Authority says the Union has not brought this application in a timely manner, in view of Section 16 of the *Arbitration Act*. In its written submission, the Health Authority refers to the decision of Justice Hallett, then of the Trial Division, in *N.S.N.U. Halifax Infirmary Local v. Halifax Infirmary Hospital* [1989] N.S.J. No. 195. The Union had brought an application for an

extension of time in which to apply for judicial review of an arbitrators decision. Justice Hallett dismissed the application. He stated that although the court had a broad discretion in respect to granting an extension of time, the Union had not shown a reasonable excuse for failing to commence the proceedings within the 60 days stipulated.

[30] Counsel notes the Originating Notice (Application Inter Parties) was filed on May 6, 2005, while the Board's decision in respect to jurisdiction was rendered in a letter dated January 13, 2005. The submission further states the considerations outlined by Justice Hallett, in *N.S.N.U., Halifax Infirmary Local, supra*, as to whether the judgment being complained of was at least arguably wrong, whether the appellant had a bonafide intention to appeal while the right to appeal existed, and whether the appellant had a reasonable excuse for its failure to launch the appeal within the prescribed time, are not here present and therefore, the Union should not be entitled to an extension of time.

[31] On the other hand, the Union says:

> The Board's decision on January 13, 2005 was strictly an interim decision, dealing only with the Board's jurisdiction to reconvene for the purposes of resolving differences arising from the implementation of its August 18, 2004 Award, including issues related to the determination of wage rates.

[32] The submission further states it was only upon the issuance of the Supplemental Award that it was known the Board "... chose to exceed its continuing jurisdiction to implement the original Award by changing and amending the method of determining eligibility for the May 2005 and May 2006 catch-up adjustments from the method outlined in the original Award."

[33] Counsel says he was not required to file an application to set aside this interim decision, but instead, it was proper to wait for the final determination, before making this application. Counsel suggests that where a Board makes a ruling on jurisdiction, but has not yet decided the merits, there is no decision or Award on which time has begun to run, with respect to an appeal. In this respect, counsel refers to the decision of the Saskatchewan Court of Queens Bench in *Dominion Bridge Inc. v. Routledge* [1997] S.J. No. 707. Counsel quotes from the decision of Justice Gerein, at para. 3:

> A "decision" comes into existence and the appeal period begins to run only when all of the issues have been dealt with fully in a final award.

[34] Interestingly, the Health Authority, in its reply to the Union's submission, also references the decision of Justice Gerein in *Dominion Bridge Inc. v. Routledge*, referring to paragraph 4:

> Having concluded that there is no final award in this instance, I go on to the consequent question of whether a party can seek review of an interim decision, whether by appeal or otherwise. The general rule is that there is not to be piecemeal reviews, but that all issues be dealt with at one time following the final award. However, the rule may not be followed where there are exceptional circumstances which may include a preliminary decision as to the jurisdiction of the tribunal. That issue is fundamental to the whole of the proceedings and its final determination may avoid a significant expenditure in time and money.

[35] The Union refers to a number of authorities, including *Mississauga of Scugog Island First Nation v. National Automobile Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [2003] O.J. No. 3949 (Ont. S.C.J.), and *Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 99 D.L.R. (4th) 738 (Ont. Div. Ct.) in support of the proposition that, absent exceptional or extraordinary circumstances, the court will not fragment proceedings before administrative tribunals by hearing appeals on interim decisions.

[36] The Health Authority referred to *Re: Roosma et al and Ford Motor Company of Canada* [1989] 66 O.R. (2d) 18, where Justice Reid, at p. 25, noted the reluctance of a reviewing court to intervene in proceedings of tribunals prior to their completion apart from issues relating to the jurisdiction of the tribunals:

> ... courts will do so in order to avoid wasting time and money. Thus, if it appears at the outset that a proceeding in a tribunal will be fatally flawed, a means exists by way of judicial review to challenge it...

> ... It was open to appellants to have challenged Professor Mercer's ruling by way of judicial review last November if they considered that they were infected with fatal jurisdictional defect...

[37] In declining to hear an application for review of a Board's interim Award, the Ontario Court of Justice, Divisional Court In *University of Toronto v. C.U.E.W., Local 2* (1988), 52 D.L.R. (4th) 128 at p. 142, stated the following

> 1. This is not a situation where exceptional circumstances exist. Such cases are rare and success on review is even more remote.
>
> 2. To decide the issue raised is to invite further delay and thereby contribute to the denial of labour relations rights.
>
> 3. The question raised is at this point, in part, moot or hypothetical and the court is entitled to the benefit of the reasoning and decision of the board on the merits.
>
> 4. The preliminary questions can best be resolved after a determination on the merits without any prejudice to the applicant and with less inconvenience to the parties and the board than is the consequence of a two-stage hearing.
>
> 5. This court should discourage the interruption of labour relations hearings by declining to decide judicial review applications from interim awards, and by imposing appropriate costs orders, unless the proceeding arose out of exceptional circumstances.

[38] Although in certain exceptional circumstances reviewing courts have agreed to entertain appeals or reviews of interim decisions by Boards, particularly as they relate to the Board's jurisdiction, courts have discouraged the bringing of such applications by way of review or appeal prior to the final determination by the Board on all issues before it. The mere fact that in certain exceptional circumstances courts have agreed to hear and determine such appeals, does not necessarily mean the issue could not have been brought following the final determination by the Board, whose decision is under review. The mere fact a court will agree to hear a matter does not mean the party interested in having the matter reviewed could not have waited until the tribunal had made its final determination on all issues. This is not, as was the case before Justice Hallett in *N.S.N.U., Halifax Infirmary Local, supra*, the circumstance of an application for an extension

of time to file an application for review but rather a circumstance in which the party decided to wait until the final determination by the Board on all issues before it. Whether as suggested by Counsel for the Health Authority, this enabled the Union to have "two kicks at the can", namely, to reserve its option to contest the issue of jurisdiction while awaiting the final determination by the Board, is really irrelevant. The time for reviewing the Board's decision, which included its interim decision in respect to jurisdiction, began to run from the filing of the Supplemental Award. This application is not "out of time".

[39] The application by the Union is, therefore, granted.

MacAdam, J.