DECISION DATE: 20001204
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CANADA
PROVINCE OF NOVA SCOTIA

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Nova Scotia Union of Public Employees v. Halifax Regional School Board, 2000 NSSC 83

BETWEEN:

NOVA SCOTIA UNION OF PUBLIC EMPLOYEES

Applicant

- and -

HALIFAX REGIONAL SCHOOL BOARD

Respondent

DECISION

HEARD: **in Chambers on October 30th, 2000 before the Honourable Justice F.B. William Kelly**

DECISION: **December 4th, 2000**

COUNSEL: **Nancy Elliott, for the Applicant**
John C. MacPherson, Q.C., for the Respondent

Kelly, J.

[1] This is the second application by the parties for a review of a portion of an arbitrator's decision. A previous application also sought review and a request by the Board for leave to seek review of a further portion of the Arbitrator's reasons after the statutory period of sixty days for bringing such an application has expired.

[2] In 1994 the Civic Workers Union entered negotiations with the Halifax District School Board for a new collective agreement for its janitorial or custodial staff. This was the first opportunity for the parties to do so since the expiration of the *Public Sector Compensation Restraint Act*, S.N.S. 1991, c.5, which had restricted negotiated wage increases in the public sector. At the time of their 1994 negotiations, the parties were aware that the Provincial Government was preparing new rollback/freeze legislation and the parties attempted to add to negotiated terms a clause, by way of a 'side' letter, that they believed would comply with that proposed legislation, but would remove or dramatically reduce its effects on wages.

[3] Ken Zwicker, president of the Union requested increased compensation for the building custodial staff who were members of the Union. He also requested an "opt-out clause" that would provide for a delay in payment of this increased compensation in the hope that the negotiated wage increases would not violate provisions of the anticipated legislation.

[4] On June 30, 1994 the *Public Sector Compensation (1994-1997) Act*, S.N.S. 1994, c. 11 came into effect and froze collective agreement compensation plans retroactive to April 29 of that year. Subject to certain exceptions not relevant to this case, the *Act* prohibited wage increases for public employees and rolled back compensation by three percent for part of the three years ending October 31, 1997.

[5] The Union and Board signed two documents on July 22, 1994, one of which was a standard form of collective agreement dealing with wages and other benefits of the Union members during the period from January 1st, 1994 to December 31st, 1996. The Union proposed to the Board that the money that would have been paid during the wage and freeze period as new increased compensation would instead be paid as a lump sum at the expiry of the *Act*'s application. This was agreed to by Mr. Marriott, then the chair of the Board, in a letter the same day ("Marriott

Letter") which states:

> This is to confirm that the Halifax District School Board agrees that the monies (wage increases) that were to have been paid to the employees pursuant to this Collective Agreement in years two and three will be paid to employees as a lump sum payment within fifteen (15) days following the completion of the present legislated Bill No. 52 scheduled to expire on October 31, 1997.
>
> It is also agreed that should the present scheduled expiry date of October 31, 1997, for Bill No. 52 be extended, the previously-mentioned monies and conditions would also be extended to the expiry of such extension.

[6] On October 31, 1997, the freeze period ended. During the interim, Halifax was included into a new municipality with several other municipalities by provincial statute. The Nova Scotia Union of Public Employees succeeded the Civic Workers Union and a Regional School Board succeeded the District Board.

[7] The new Regional Board did not pay the lump sum as described in the Marriott letter as it believed that, were it to do so, it would be in contravention of the *Act*. The Union claimed its members were entitled to the salary payments promised in the agreement as embodied in the Marriott letter. Both parties here agree the agreement was designed as an attempt to avoid the salary reduction effects of the *Act.*

[8] After some preliminary dispute in this Court and the Court of Appeal as to whether the claim could proceed, the Union filed a grievance that was heard by Mr. Milton Veniot, Q.C.

[9] The Arbitrator made essentially two findings. First, he found that the Marriott letter was contrary to the *Act* because it contravened at least the following provisions of the *Act*:

> s.6(1) Every compensation plan in effect immediately before April 29, 1994, is continued until November 1, 1997, except as provided by this *Act*.
>
> s. 8(1) No compensation plan, whether established before or after the coming into force of this Act, shall be changed between April 29, 1994, and October 31, 1997, inclusive, except as provided by this act.
>
> s. 8(2) Notwithstanding any compensation plan, there shall not be any increase in the pay rates in a compensation plan between April 29, 1994, and October 31, 1997.
>
> s. 9(1) Effective November 1, 1994, the pay rate for each position covered by a compensation plan shall be reduced by three per cent except as provided by this Section.
>
> s. 12 A compensation plan to which this Part applies, entered into, established or amended at any time, is of no force or effect to the extent that it provides for any pay rates in excess of pay rates permitted by this Act.

[10] The Arbitrator's second finding was that the issue of the entitlement of the grievers to some financial award was not concluded by the first finding referred to above. He found that the grievance was arbitrable and that there was a possibility

of providing a remedy on a “restitution” basis. He retained jurisdiction to deal with such matters and invited the Union to determine whether there was a case to be made on that basis.

[11] In an earlier application for judicial review, the parties appeared before me in June, 2000 on the main issue, whether the Marriott letter was contrary to the *Act.* The Board submitted that if I concluded the Arbitrator properly determined the Marriott contravened the Act, that I should find he did not have the jurisdiction to consider the grievance further. The Union argued that issue was then not before me and that the Board was out of time to raise the issue.

[12] I concluded that the “restitution” issue was not encompassed in the filed application that the Board could make a timely application for judicial review of the Arbitrator’s findings regarding restitution and also that the two matters should be heard at the same time.

[13] This application was made and thus both matters are now before me for judicial review.

Issues

[14] Does Marriott letter contravene the *Act*?

[15] If so, did the Arbitrator properly retain residual jurisdiction over the grievance to determine if the Union had another remedy?

The Effect of the Marriott Letter

[16] An initial consideration of whether the Marriott letter contravenes the *Act* involves the interpretation of the *Act*. The parties agree that an arbitrator, when interpreting a statute other than the *Trade Union Act*, R.S.N.S. 1989, c.475, must interpret it "correctly." Re: *McLeod et al.. v. Egan et al.*. (1974), 46 D.L.R. (3d) 150 (S.C.C.).

[17] The Union claims the Arbitrator's interpretation was incorrect and that the parties were only seeking to minimize the effects of the *Act* on the Union custodial members. The Union relies on *Continental Bank Leasing Corporation v. Canada*, [1998] 2 S.C.R. 298 as an authority that their attempt to "minimize" the effects of the *Act* does not in itself mean the *Act* was contravened. *Continental Bank* was an *Income Tax Act* matter where the court at paragraph 51 stated that it was

permissible for the taxpayer to structure a transaction for the sole purpose of minimizing taxation. From this, the Union argues it was permissible for them to structure their agreement to minimize the effect of the *Act.*

[18] With respect, I find considerable merit in the response of the Board that this citation and comparison is "irrelevant" to the issues before us. The Marriott letter, which is admittedly designed to ensure that wage increases and related wage benefits to be lost by the *Act* during the period it was in force would be paid as a "lump sum" after the *Act* expired, was something dramatically more than "a transaction solely motivated by the desire to minimize" the effect of the *Act*. Here, the motivation was clearly to avoid the purpose and effect of the *Act*.

[19] The Arbitrator determined that the Marriott letter was the result of the "collective bargaining" process as defined in s.2(1)(f) of the *Trade Union Act,* and resulted in the new collective agreement consisting of the Marriott letter and a more standard document providing for new terms, including increased salary terms, which was to take effect during the term of the 'wage freeze' period of the the *Act*. The parties agree both of these documents were signed by the parties on July 22nd, 1994. The *Act* was passed by the Nova Scotia Legislature and received

Royal Assent on June 30th, 1994 and s.28 provided, with an exception not relevant to this matter, that it would take effect on and after April 29, 1994.

[20] The Arbitrator determined that these documents together constituted a single collective agreement and that, as such, constituted a "compensation plan" as defined in the *Act*. This finding of the Arbitrator was one of the several 'preliminary findings' he was required to make at that stage of his hearings and it is not contested by the parties.

[21] The Arbitrator considered whether the Marriott letter was inconsistent with various sections of the *Act*, including s.6, 8 and 9. Section 6(1) provides as follows:

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

[22] During this hearing, I questioned counsel as to the effect of this section on the matters in issue. As the parties had a compensation plan in effect before April 29th, and the collective agreement in issue in this proceedings was signed during the period of wage freeze, I suggested it was at least arguable that by application of 6(1) that the 'new' collective agreement of June 22, 1994 has no force and effect

during the wage freeze period of the *Act*, "except as provided by" the *Act*. In other words, the 'old' collective agreement of the parties which was in effect on April 29, 1994 continued in effect until November 1st, 1997 at least in relation to the wage changes that would be barred by the operation of the *Act*. Both counsel were concerned that I was considering s.6(1) in this manner, and seemed to agree that I did not have jurisdiction to do so. They argued it was not part of the award of the Arbitrator and thus not an appropriate consideration on judicial review.

[23] The Arbitrator in his award reviewed the issues before him, principally the effect of the Marriott letter, by considering the history of the negotiations of the parties leading up to the signing of the Marriott letter and the more formal document of agreement. The parties were negotiating a new collective agreement at a time between the 1991 restraint legislation and the proposed 1994 *Act*. Anticipating almost the exact nature of the proposed *Act*, they discussed in oral and written negotiations the possibility of agreeing to an "opt out clause." As noted above, both documents which constituted the 'compensation plan' were actually signed on July 22, 1994, after the Act came into effect on April 29, 1994.

[24] The adjudicator noted the following excerpts from an April 17, 1994 letter

from the Union representative in the negotiations to the Board representative:

> In addition to the points I will address . . . the Union will also be seeking an opt out clause . . . should the negotiated wage increases be affected by any type of a provincial wage roll back legislation that, if rumours are correct, may be implemented within the next few weeks.
>
> I look forward to discussing the areas I will be addressing as well as my position on an opt out clause. [Emphasis is in original text]

[25] On April 22, 1994, the Union representative sent a further letter to his counterpart which reads, in part, as follows:

> In reference to the "opt out" provision the Union is seeking, I'm sure you can appreciate the position I find myself in with the number of rumours surfacing that the government will very shortly enact legislation which will call for a three (3) years rollback of wages in the amounts of, based on the latest rumour I have heard, 3%, 2 ½% and 2%.
>
> As you can clearly see, if the latest rumour were to be fact, the negotiated wage increases for the janitors and teacher assistants, for all intensive *(sic)* purposes, would be completely eliminated.
>
> When the Union recently entered into contract negotiations with the School Board to bargain on behalf of the two groups represented by Local 108, we did so with the full knowledge that the Board was faced with the same tough economic restraints as were being experienced by our membership. The Union's philosophy to deal with this concern was a very simple one - certain contract concessions would have to be made in order to secure a fair wage increase for our membership.
>
> Having said this, I'm sure you can see the position we are in. Without an "opt out" clause, our members could end up with a zero wage increase, while the Board would benefit from the concessions that were made during collective bargaining.
>
> . . . .
>
> ... the "opt out" provision we are seeking is a very simple one from our position. If during the next few months, legislation is introduced that would affect the

> negotiated wage increases that have been bargained for both groups, all terms of the negotiated package reached between the parties would become null and void at this point. See Exhibit 13, p. 2.

[26] From there the type of 'opt out' clause changed in form during the negotiations. On June 29, 1994, a draft of the new clause was forwarded by the Board representative as follows:

> This is to confirm that the Halifax District School Board agrees that the monies that were to have been paid to employees pursuant to this collective agreement in years two and three will be paid to the employees as a lump sum payment on completion of the third year of the agreement.

[27] After further discussions between the representatives, the Union presented a final draft as a means of dealing with the *Act*, then in force, and this document, the Marriott letter, was placed on the Board's letterhead and signed by the parties on July 22, 1994. It reads as follows:

> Halifax District School Board (letterhead)
> July 22nd, 1994
>
> Mr. Ken Zwicker, President
> Halifax Civic Workers' Union
> Local 108
> 2785 Isleville Street
> Halifax, N.S. B3K 3X2
>
> Dear Mr. Zwicker:
>
> This is to confirm that the Halifax District School Board agrees that the monies (wage increases) that were to have been paid to employees pursuant to this collective Agreement in years two and three will be paid to employees as a lump sum payment within fifteen (15) days following the completion of the present

legislated Bill No. 52 scheduled to expire on October 31, 1997.

It is also agreed that should the present scheduled expiry date of October 31, 1997 for Bill No. 52 be extended, the previously mentioned monies and conditions would also be extended to the expiry of such extension.

Dated at Halifax, Nova Scotia, this 22nd day of July, 1994.

(Sgd. R.J. Stinson)	(Sgd. E.D. Marriott)
Witness	Chairman
	Halifax District School Board

[28] Attached to the new usual collective agreement was a new pay scale as Appendix "A". The Arbitrator explained the effect of the two documents constituting the 'compensation package' as follows at p. 21-22:

APPENDIX "A"

SALARIES

CLASSIFICATION	JAN.1/94	JAN.1/95	JAN.1/96
Group 1 (Custodian-High School)	13.23	13.55	13.88
Group 2 (Custodian - 2 plus)	13.13	13.45	13.78
Group 3 (Custodian - 0-1)	12.93	13.25	13.58
Group 4 (Cleaning Persons)	12.59	12.91	13.24

Group 1 - High Schools - Plus $.10 over Group 2
Group 2 - Custodian with two (2) or more cleaning persons
Group 3 - Single school plus one (1) cleaning person

It was intended originally that employees covered by the agreement would accrue wages, at the hourly rates set out in Appendix "A", as they worked the hours, and that they would be paid those wages every second Friday. The July 22/94 document amended this scheme. In the result, it was intended by the parties that the agreement (as amended by the July 22/94 document) would change the timing of payment of some of the wages provided for under Article 14/Schedule "A" of the agreement. Specifically, the employer would pay "year 1" wages as agreed for the first year of the contract, but payment of a portion of the year two and three wages is deferred. The deferred portion was to be paid within the fifteen

> days “following the completion of the present legislated Bill No. 52, scheduled to expire on October 31, 1997". See July 22/94 document. If the “scheduled expiry date was extended, so was the payment date.

At the end of the freeze period a municipal amalgamation had occurred and NSUPE had succeeded the previous Union and a Regional School Board had succeeded the former District School Board.

[29] Early in the month of October 1997, just before the freeze period ended, the agent for the new Union sent a letter requesting what the Board interpreted as the method of calculating the amounts due pursuant to the Marriott letter. In read in part:

> ... to properly pay out the monies owing, the Board must go back to January 1995, and calculate the number of hours worked and pay to the employees a lump sum based on the year two rate in the collective agreement up to January 1, 1996. In addition, the Board must go back to January 1, 1996, and calculate a lump sum based on the hours worked since then based on the year three rate in the collective agreement. The Board should pay the total amount of both calculations to each member on, or by, November 15th, 1997.

[30] The response of the new Board was to refuse to pay the lump sum as it believed to do so would be in contravention of the *Act*. They submitted it would be contrary to the intent and purpose of the *Act* in that it would require non-approved changes in the compensation plan and an increase in the wage rate, both prescribed by s.8 of the *Act*.

[31] The Union then sought to enforce the payment by an action in the Supreme Court which eventually found its way to the Nova Scotia Court of Appeal ((1998), 171 N.S.R. (2d) 373). Rendering the Court of Appeal's unanimous decision, Cromwell, J. A. found the grievance should be arbitrated and stayed the Supreme Court action noting it could be raised again if the Arbitrator determined the dispute not arbitrable. The grievance was then filed by the Union on November 16, 1998 and reads as follows:

> DETAILS AND REMEDY:
> The Employer has failed to pay monies owed to the grievers pursuant to a letter dated July 22, 1994, from E. Marriott, Chairman of the Halifax District School Board, to Ken Zwicker, President of the Halifax Civic Workers' Union. The grievers seek payment of the sums owed.
>
> VIOLATION(S): Such Articles and violations as may become apparent including:
> This grievance is filed in accordance with the decision and Order of the Nova Scotia Court of Appeal, dated November 12, 1998, copies of which are attached.

[32] To return to the award of the Arbitrator, one of the preliminary matters he dealt with was whether the Marriott letter was part of the collective agreement. The submission was that it was not because it was contrary to the *Act* (see p. 24 ff). The Arbitrator concluded that it was part of the new collective agreement and further that it was ineffective as it was contrary to the *Act*. Counsel before me urge that this is the primary issue in their dispute and that it is mainly to test the Arbitrator's determination of this issue that they seek judicial review of this matter.

The remaining issue they wish to test is the determination of whether the Arbitrator had properly retained jurisdiction to determine if another remedy, such as restitution, is available if the Marriott letter is contrary to the *Act*.

[33] As is appropriate in any legislative assessment, the Arbitrator in his award commenced his determination of whether the letter was contrary to the *Act* by determining the purpose of the *Act*. His primary source for this determination were the comments of Freeman, J.A., writing for the Court in *QEII Health Sciences Centre v. Nova Scotia Government Employees Union* (1998), 166 N.S.R. (2d) 194 (C.A.) Justice Freeman concluded at p. 196 that the *Act* was a public statute of important public purpose in that it was "a centre piece of the Province's strategy for containing its budget deficit".

[34] The *QEII* case is referred to by both parties to support their position. The Board refers to further quotations of the learned Judge as indicating the main or the only focus of the *Act* was to control wage increases in the public sector and enforce a one-time wage reduction as a highly important public objective. The Union quotes the Court of Appeal decision as one emphasizing that the effects of the *Act* ended at October 31st, 1997, and that the *Act* had no subsequent effect and thus

payment of a lump sum to public employees *after* that date was not in contravention of the *Act*.

[35] The claim of the Union is that after the wage freeze ended the parties were free to put into effect any agreement in relation to wages that was arrived at before or during the wage freeze period of the *Act* and that it did not expressly forbid that. They cite as authority for this proposition Justice Freeman's comments at pp. 212-213 of *QEII*:

> **[83]** In my view the 1994-1997 *Act* was straightforward and effective legislation intended to impose the harsh measure of a three per cent wage rollback on the public sector workers of Nova Scotia from 1994 to October 31, 1997 to combat the evil of a runaway deficit. It was not intended to have any lingering effect beyond that time. There is not a provision of the *Act* that suggests otherwise. The extension of all collective agreements to November 1, 1997, one day after the removal of the constraints on bargaining, is to my mind an unmistakable expression of legislative intent. The collective agreements were restored to the forms in which they had been found, and the legislature took hands off. The employers and employees were set free to resume normal labour relations including collective bargaining after a three-year interruption as though, to the fullest extent possible, the *Act* had never existed....

Freeman J.A. also comments on purpose of the *Act* earlier at page 210:

> **Did Section 9(1) Amend The Collective Agreement?**
>
> **[72]** Given the structure of the Act, and in particular ss. 6, 8, 9 and the enforcement provisions discussed above, s.9(1) effectively imposes a rollback on wages paid under the relevant collective agreements during the restraint period ending October 31, 1997, and no amendment or alteration to the collective agreements is required for the rollback to have its intended effect.

> **[73]** However, if the *Act*, and in particular s.9(1), had had the effect of amending the collective agreements to which it related, the amendment, as Arbitrator Slone noted, would have been permanent. There was no mechanism in the Act for repealing amendments, as there was for restoring the collective agreements unaltered to their former effectiveness. If the pay rates in the collective agreements were amended to 97 per cent of their negotiated levels, that would be the pay level in effect when the agreements expired November 1, 1997, and that would provisionally govern pay rates pending the negotiation of new collective agreements.

[36] The substance of the Union's position is that the Marriott letter was part of the collective agreement entered into by the parties, and that after the effect of the *Act* was spent, the Union was free to enforce that agreement to pay the wages lost during the period of the *Act* by way of the lump sum authorized in the Marriott agreement.

[37] The Arbitrator found it was "inescapable" to conclude that the Marriott letter was contrary to the Act as it had as its explicit objective the avoidance of "the three most important financial provisions of the *Act*", sections 6, 8 and 9.

[38] It is overtly clear that the parties, in developing the "Marriott" agreement, were attempting to avoid the effects of the *Act*, which was wage restraint legislation directed to the salary increases provided by the collective agreement of the parties. The Union does not dispute this and submits that an attempt to

"minimize" the effects of the *Act* does not in itself mean the *Act* was contravened. The Board replies that there is a clear distinction between an 'attempt to minimize' the effect of a statute, and the outright contravention of it and its effects.

[39] The Union contends that the Arbitrator was in error in finding that three sections of the *Act* were contravened by the Marriott letter. Section 8 states as follows:

> Changes in compensation plan prohibited
>
> 8(1) No compensation plan, whether established before or after the coming into force of this *Act*, shall be changed between April 29, 1994 , and October 31, 1997, inclusive, except as provided by this *Act*.
>
> Increase in pay rates prohibited
>
> (2) Notwithstanding any compensation plan, there shall not be any increase in the pay rates in a compensation plan between April 29, 1994, and October 31, 1997, inclusive.

In reference to sections 8(1) and (2), the Union submits that these were not contravened as the Marriott agreement did not change their collective agreement in any way *between the dates referred to in the section*, nor did its members receive a pay rate increase during that period of time. This, it contends, shows there was no contravention of s.8.

[40] Section 9 goes further. It required a reduction of 3% in certain pay rates established in the collective agreements to which the *Act* applied. The relevant subsections of section 9 provide as follows:

> Reduction in pay rates
>
> 9(1) Effective November 1, 1994, the pay rate for each position covered by a compensation plan shall be reduced by three per cent except as provided by this Section.
>
> Pay-related calculations
>
> (2) For greater certainty, the reduced pay rates shall be the basis for any pay-related calculations.

The Union's argument is that s.9 also was complied with as the Union members in question did have their pay rates reduced as of November 1st, 1994. These sections of the *Act* were summarized by Freeman, J.A. in *QEII, supra,* at page 203 where he stated that "[w]hile s.9 reduces the level of pay, it is s.8(1) that forbids changes and s.8(2) that prohibits increases."

[41] I decline to get involved in the contradictory calculations the parties advanced to demonstrate whether the 3% reduction of November 1st, 1994, was deducted from the Union members. The Union alleges, and the Board disputes, that the reduction of pay required by the *Act* was effected and that it was not claimed by the Union. The Arbitrator based his decision on the agreement

contravening the *Act* essentially on s.6 and s.8 and I will be determining whether his finding in that regard was an appropriate interpretation of the *Act*. Nevertheless, I would note that in the Marriott letter and the subsequent claim to the Board after the freeze, the Union does claim for its members all of the salary benefits lost pursuant to the *Act*. If so, this would apparently include the benefits promised in their "new" collective agreement with the Board which did not, of course, include the 3% reduction required by s.9 of the *Act*.

[42] The main thrust of the Union with reference to the Arbitrator's conclusion that each of the sections of the *Act* referred to above was breached, was to submit that there was not a technical breach as the payments of the forbidden increased wages were not made *during the period the Act was in effect*. The Arbitrator found that *when* the payments were to be made, whether during or after the wage freeze period, did not make any difference to his conclusion that sections 6, 8 and 9 of the *Act* were breached and that the Marriott letter (which he refers to as "the July 22, 1994 document") was contrary to the *Act* in its "formation and its performance". At pp. 29-30 he states as follows:

> "In this context it is useful to advert to a distinction made in the case law between the formation of a contract and its performance. The distinction is drawn for the purpose only of pointing out that a contract may be found to be illegal in connection with either its formation or its performance. See, for example: *Halifax*

Relief Commission v. City of Halifax (1965), 50 D.L.R. (2d) 69 (N.S.S.C.-App.D.) at page 77. There, the court adopted the following passage from *St. John Shipping Corporation v. Joseph Rank, Ltd.*, [1956] 3 All E.R.683 (P.C.):

> Whether it is the terms of the contract or the performance of it that is called into question, the test is just the same: Is the contract, as made or as performed, a contract that is prohibited by the statute? (Emphasis added).

The July 22, 1994 document, as made, established a scheme to which failed to comply with sections 6, 8 and 9 of the *Act.* It was contrary to the *Act* on the day it was made.

As well, it was prohibited by the statute as performed. Except only for the payment, post-*Act*, the July 22, 1994 document was intended to be, and was, entirely performed during the freeze period, and what was done under it was prohibited by the *Act*.

Under the July 22, 1994 document, union members worked certain hours in the freeze period, and the employer accrued liability at Appendix A rates to pay wages for those hours. It is clear from the document itself that any money owing under the July 22, 1994 document accrued as those hours were worked - that is, within the freeze period. That is the sense of the phrase "monies that were to have been paid to employees pursuant to this collective agreement in years two and three". This violates the *Act*."

[43] I have considered the argument of the Union that the interpretation of the *Act* advanced in *QEII* and *Nova Scotia Minister of Education and Culture v. Nova Scotia Teachers' Union*, [2000] 184 N.S.R. (2d) 110 (S.C.), to support their argument that the provisions of the *Act* did not extend beyond the end of the freeze period, and payment made after that time, negotiated in advance of it, were valid. I would also note that in these cases, the work which was affected by the decision occurred after the freeze. Here, the Union submits, the parties entered into an

agreement by virtue of the Marriott letter, signed after the *Act* was in force and while it was in effect, to avoid the effects of its salary provisions on its custodial members by paying the negotiated increases of the new agreement and in a lump sum after the end of the effectiveness of the *Act*.

[44] The focus in the above authorities is that certain benefits negotiated by the parties to take effect after the period of the effectiveness of the *Act*, and to take effect after the *Act*, were not affected by the *Act*. I agree with counsel for the Union that a bonus based on the unusual considerations agreed upon during the period of the *Act* could arguably survive the *Act* - but I do not accept that a bonus based exclusively on the salary losses to Union employees due to the *Act* would also survive. I do not disagree with the Arbitrator's conclusion in this regard that "it does not make any difference to [his] conclusion that payment ... would only be made after November 1, 1997 ...". At p. 29 of his award, he noted that the Marriott letter aspects of the agreement between the parties can be challenged either as to its formation or its performance. In this respect, he referred to *Halifax Relief Commission v. City of Halifax* (1965), 50 D.L.R. (2d) 69 (N.S.S.C., A.D.) where, at p. 77 the court referred to St. *John Shipping Corporation v. Joseph Rank Ltd.*, [1956] 3 All E.R. 683 (P.C.) and adopted the portion of the reasons therein:

> Whether it is the terms of the contract or the performance of it that is called into question, the test is just the same: Is the contract, as made or performed, a contract that is prohibited by statute.

The Arbitrator here concluded that the Marriott letter "established a scheme which failed to comply with sections 6, 8 and 9 of the *Act*. It was contrary to the *Act* on the day it was made."

[45] In my opinion, the Arbitrators interpretation of the *Act* was consistent with the principles of interpretation enunciated in *QEII* at paragraphs [18] to [31]. I would echo the words of Freeman, J.A. in his conclusion of that case at para [85], p. 213:

> **[85]** The interpretation of the arbitrator, which I adopt, can be justified under the test proposed by Professor Sullivan in terms of its plausibility, for it conforms with the legislative text, its efficacy or promotion of the legislative purpose in imposing restraints for a defined term, and its acceptability as reasonable and just.

[46] After commenting on the effect of the *Apportionment Act*, R.S.N.S. 1989, c.16, which he stated and I agree is not necessary to his conclusion on this issue, the Arbitrator summarizes as follows on p. 31-32 of the Award:

> On a more general level, stepping back a bit and looking at the purpose of the *Act* as articulated by Mr. Justice Freeman, it is clear that the July 22, 1994 document was designed to frustrate the general purpose of the *Act*: "to save the provincial treasury three per cent of public sector wages" in the freeze period.
>
> The July 22, 1994 document is thus contrary to the *Act* in both formation and performance.

[47] I have had the advantage of a most thorough review of this issue by counsel by means of several briefs and extensive argument. After considering their submissions, the evidence and the award of the Arbitrator, I find I cannot conclude that his finding that the Marriott letter contravenes the *Public Sector Compensation Act* is incorrect.

Is There Residual Arbitrational Jurisdiction to Award Another Remedy?

[48] This issue deals with the reservation by the Arbitrator of jurisdiction to deal with certain aspects of the "preliminary issues" discussed in his award, to determine if, after determining the Marriott letter was contrary to the *Act*, there could be *any* remedial action. He determined there was a possibility of other remedial action. The Board submits this finding is in excess of his jurisdiction and that any such finding would be inconsistent with the finding that the Marriott letter was in contravention of the *Act*.

[49] The Board argues that after the Arbitrator had decided not to enforce the Marriott letter, it was not open to him to find a remedy based upon it. The Union submits that labour arbitrators have a broad entitlement to apply common law principles of contract and torts in exercising their jurisdiction. The learned

Arbitrator here referred to several non-labour authorities which indicate a common law judicial jurisdiction to grant restitution in certain situations where the contract between the parties was found to be illegal. See *Sidmay Ltd. et al. v. Wehttam Investments Ltd* (1967), 61 D.L.R. (2d) 358 (Ont. C.A.); *Zimmerman v. Letkeman* (1977), 79 D.L.R. (3d) 508 (S.C.C.); *Menard et al. v. Genereux et al.* (1982), 138 D.L.R. (3d) 273 (Ont. H.C.). The Board dismissed these authorities as not relevant to employment law and as exclusively property-related.

[50] The learned Arbitrator considered the issue of the two compelling policies - contract illegality and restitution. He referred to the Supreme Court of Canada decision in *Zimmerman v. Letkeman* (1977), 79 D.L.R. (3d) 508 which had been replied upon by Krever, J. at pp. 285-286 of his reasons in *Menard et al. v. Genereux et al.* (1982), 138 D.L.R. (3d) 273 (Ont. H.C.), when he set out the three recognized exceptions to the rule that parties cannot benefit from an illegal contract. The learned Arbitrator at p. 41 ff., an observation of his award stated these exceptions generally in property law terms, but he noted Krever, J. continued to review the facts to determine if nevertheless the Court should consider if an unjust enrichment devolved unto either party. The facts in the case involved a third party, the solicitors who held the funds advanced on an illegal contract.

> Of the three concerned interests, the plaintiffs, the defendants and the solicitors, it is clear that the solicitors have no claim to the deposit. As between the plaintiffs and the defendants, there is at work a conflict between two policies of the law, the first, that unjust enrichment should, where possible, be presented and the second, that the law will not come to the assistance of persons who behave illegally. It is apparent that in these circumstances, to prefer the second policy of the law would result in the unacceptable situation. I have described and, therefore, it seems to me that the only reasonable recourse is to adopt a position that would return the deposit to the plaintiffs and thus prevent the unjust enrichment of the defendants.

As a rationale for his actions, Mr. Justice Krever, at p. 291, adopted the following statement from the then current edition of Waddams' The Law of Contracts:

> It would seem sounder to recognize at the outset that a balance must be struck between competing policies. In recent years there has been a revival in the law of restitution. It is now recognized that the law must provide a remedy for unjust enrichment and this recognition is as much a public policy as any other. Several recent cases have refused to give effect to a defence of illegality on the ground that it would cause an unjust enrichment. These cases indicate what appears to be a sound approach. Where property has been transferred in the expectation of compensation that does not materialize, there should, it is suggested, be a right to restitution, unless the policies of the statute would be thereby subverted, or would otherwise outweigh the policies favouring restitution.

[51] The Arbitrator then noted a number of other decisions which have expanded the exceptions to granting restitution in illegal contract situations. To a great extent these are reflected in subsequent Supreme Court of Canada decisions such as *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583, where the Supreme Court has not only acknowledged the expansion of the exemptions, but noted that Arbitrators have similar rights as courts - and thus could apply this common area of

the law in dealing with collective agreements. In *Weber*, Iacobucci, J., with Sopinka and Major J.J. agreeing, concurred with the majority, but dissented on the *Charter* issues. McLachlin, J. (as she then was) spoke for a unanimous court on this issue and reviewed three different models of jurisdiction for courts and statutory tribunals. At p. 601 the Court concluded as follows:

> The final alternative is to accept that if the difference between the panties arises from the collective agreement, the claimant must proceed by arbitration and the courts have no power to entertain an action in respect of that dispute. There is no overlapping jurisdiction.

At 602, the Court declared that a court or Arbitrator, in determining the appropriate forum for proceedings should focus on whether a dispute arises out of a collective agreement. In such an analysis, two elements should be considered: the dispute and the ambit of the collective agreement. After a discussion on the jurisdiction of arbitrators, McLachlin, J. stated at p. 603:

> **[55]** Against this approach, the appellant Weber argues that jurisdiction over torts and Charter claims should not be conferred on arbitrators because they lack expertise on the legal questions such claims raise. The answer to this concern is that arbitrators are subject to judicial review. Within the parameters of that review, their errors may be corrected by the courts. The procedural inconvenience of an occasional application for judicial review is outweighed by the advantages of having a single tribunal deciding all issues arising from the dispute in the first instance. This does not mean that the arbitrator will consider separate "cases" of tort, contract or Charter. Rather, in dealing with the dispute under the collective agreement and fashioning an appropriate remedy, the arbitrator will have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty, or of the Charter.
>
> **[56]** The appellant Weber also argues that arbitrators may lack the legal power to consider the issues before them. This concern is answered by the power and

> duty of arbitrators to apply the law of the land to the disputes before them. To this end, arbitrators may refer to both the common law and statutes: *St. Anne-Nackawic; McLeod v. Egan* (1974, 46 D.L.R. (3d) 150, [1975] 1 S.C.R. 517, 74 C.L.L.C. ¶ 14,220. As Denning L.J. put it, "[t]here is not one law for arbitrators and another for the court, but one law for all": *David Taylor & Son, Ltd. v. Barnett*, [1953] 1 All E.R. 843 (C.A.) at p. 847. This also applies to the Charter: *Douglas/Kwantlen Faculty Assn. v. Douglas College* (1990), 77 D.L.R. (4th) 94 at p.120, [1990] 3 S.C.R. 570, 50 Admin. L.R.69.

[52] Here, the Arbitrator reviewed the issues before him and concluded that the parties agreed to resolve the issues between them by arbitration. He found that the issue in particular was whether he had the power to make an order for "restitution" or the payment of money by way of reinstatement. After reviewing his authority under sections 3 and 24 of the *Trade Union Act*, he concluded he had such authority.

[53] At pp. 58-59 of his award, he summarized as follows:

> In summary:
>
> - the finding that the July 22, 1994 document is contrary to the Act, does not necessarily mean that there is nothing which can be done by way of remedy. At this stage of the inquiry, there is no finding that anything should be done; only that in certain circumstances the general law recognizes that contract illegality may not preclude remedial action.
>
> - the specific kind of remedy requested by the grievance - an order for the payment of money - is one of the remedies the courts have applied in resolving cases involving cases of contract illegality;

- this dispute arises directly out of the agreement;
- the agreement, both expressly and impliedly, contemplates that an Arbitrator appointed under this agreement has the power to make this kind of order: an order for the payment of money;
- an Arbitrator has exclusive jurisdiction over this dispute to the extent, if any, that a case is made out for the remedy requested.

[54] He then disposed summarily of the sub-issues of whether the grievance does not claim a breach of the agreement or that it does not arise out of the agreement between the parties. He found that as the Marriott letter was part of the collective agreement of the parties, a grievance raising the effect of the Marriott letter provides him with the jurisdiction to determine what remedies should flow from a breach of that document. I cannot find he made any error considering the essential logic of his statement.

[55] When a contract is illegal and not merely void, the general rule is that it cannot be enforced: *in Pari delicto Potior est condition defendentis.* See *Chitty on Contracts*, 28th ed. (London: Sweet & Maxwell, 1999) at p. 1499. If the Marriott letter is illegal in that it is contrary to the *Act*, the Union claims it is thus left in a position of foregoing certain advantages in the negotiation process in order to obtain the Board's consent to the Marriott letter.

[56] The harshness of the illegality doctrine has been tempered in appropriate circumstances in Canada by the equitable doctrine of restitution, often by the return of property, the return of money paid on the contract, or unjust enrichment. It appears from *Weber v. Ontario Hydro, supra*, that the Arbitrator has jurisdiction to apply such common law equitable principles. What is not so clear is whether the Arbitrator in these circumstances might also have the basis for such a remedy. To find for the Board on this issue would require me to conclude either that such circumstances do not exist at all, or that after a full review of all of the facts that I could conclude that in the circumstances of these parties, no such recovery was possible.

[57] I am not satisfied that I have had the benefits of full argument on the latter of these options - nor am I satisfied that I have all of the background facts on the negotiation process here that would necessarily have to be considered to determine if some restitution is appropriate in the circumstances. Here the matter would presumably require a consideration of whether the Union did in fact forego the bargaining advantages it claims, what exactly that "bargaining item" was, whether it constitutes an "unjust enrichment" or some such equitable remedy, and whether it can be restored by a monetary payment. What that amount would be and

whether it is appropriate to order it in these circumstances would also have to be considered. For example, if the cost benefit in issue involved an increase in pay, or was otherwise restricted by the *Act*, arguably no remedy would be available. I do not mean to suggest the above must be the nature of an Arbitrator's inquiry, but merely to indicate that it is a complex determination. In my opinion, this must be the determination of the learned Arbitrator and not one for this Court, even if I had before me the necessary material to make that determination.

[58] I turn then to the issue of whether on the material before me that there is *no* basis for the Union's claim to such a remedy, or indeed a remedy *similar* to one that might follow a loss of opportunity or an entitlement to damages.

[59] The Arbitrator did not accept the Board's contention that as the Marriott letter was contrary to the *Act* it could not form part of the collective agreement and was not therefore arbitrable. He concluded, as mentioned above, that it did form part of the agreement. At p. 38 of the award he added "[r]ather, it is more accurate to say it is there, but unenforceable." He then rejected the Board's position that in these circumstances no further remedy was available as not tenable. The Arbitrator then embarked on a review of the law of remedy in relation to 'illegal' contracts,

commencing with *Sidmay Ltd. et al. v. Wehttham Investments Ltd.* (1967), 61 D.L.R. (2d) 358 (Ont. C.A.), where Laskin, J.A., then sitting in that court, noted at p. 388 that the word 'void' "in the contract illegality sense" means the court will "refuse to act either on one of them in a suit between them unless the case is brought within some exception." He then reviewed some issues considering such exceptions which expanded the law of restitution and allowed the courts to grant such remedies as unjust enrichment mostly on a public policy basis, and allowed some form of restitution unless such a policy favouring
restitution was outweighed by the policy basis of the statute or subverted the statute. The learned Arbitrator also referred to the discussion of the subject in Waddam's *The Law of Contracts*, (4th ed. 1999) at pp. 419-420.

[60] I also found a useful discussion of this same topic in Fridman's *The Law of Contract in Canada*, 4th ed. (Toronto: Carswell, 1999) at pp. 167-178. The author there refers to the two tests which the courts have applied to determine if a remedy might be considered in a matter based on a contract made contrary to a statute. The earlier test has been termed the "classical" test and Fridman explains it as follows at pp. 368-369:

> The following, oft-cited test was laid down by Lord Esher in *Melliss v. Shirley and Freemantle Local Board of Health*:

> ... although a statute contains no express words making void a contract which it prohibits, yet, when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to the decision, either from the context or the subject matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law.

> Applying this test, (which has been termed "classical") the factors that must be taken into consideration in determining whether a statute impliedly makes a contract illegal and void are therefore: (1) whether it is designed for the protection of the public generally rather than a particular group; (2) whether the penalty imposed by the statute necessarily implies a prohibition or is simply for the purpose of inflicting some punishment upon infringers of the law, (3) whether the purpose of the statute is simply to obtain revenue by the creation of some licence which must be purchased from the state in order to carry on a particular kind of activity which involves the making of contracts. It is a matter of construction. There must be a clear implication or necessary inference from the statute that contracts which infringe it should be void.

[61] After reviewing additional more current cases on the subject, Professor Fridman continues at p. 374:

> What these decisions illustrate is that, recently, courts in Canada have been placing more emphasis upon the underlying policy and aims of a statute than upon other factors which previously were invoked to determine the legality of a contract that infringed the statute. The courts appear to be playing a more interpretive role in these instances, and are being less technical in their approach to the problem of construction of the statutes. The language of McIntyre J. of the Supreme Court of Canada in the *Ontario Human Rights Commission Case* (1982), 40 N.R. 159 (S.C.C.) suggests that the true basis for declaring a contract invalid for infringement of a statute is the common-law doctrine of "public policy". If public policy, rather than the construction of the statute in terms of an "implied prohibition" of a contract (as suggested by Devlin J.) Is the correct rationale for statutory illegality in such instances, then it becomes clear that the proper function of a court is to determine the policy behind the statute in question, to discover whether it is in accordance with that policy, or outside that policy's ambit or scope, to hold the allegedly offending contract to be illegal and therefore invalid.

(iv) *The Still case*

That approach was endorsed and exemplified by the Federal Court of Appeal in *Still v. M.N.R.* (1997), 154 D.L.R. (4th) 229 (Fed.C.A.). The plaintiff was an American citizen who had worked in Canada without a work permit, i.e., illegally. During that time, unemployment insurance premiums had been paid by the plaintiff. When the plaintiff was laid off, she applied for unemployment benefit. This was denied her on the ground that she had been employed illegally. The Federal Court of Appeal granted judicial review of the Tax Court's decision against the plaintiff. In other words, the ruling that she was not entitled to such benefit was overturned. In arriving at this conclusion, the court examined the doctrine of statutory illegality in relation to contracts and explained how the classical view - that this was an issue to be determined by construction of the statute - had given way to the modern approach, which was to examine the situation in any given instance by reference to the policy that was intended to be achieved by the statutory provision that was breached by the contract. In this case

before the court, the policy of the relevant statute did not require that the plaintiff be deprived of unemployment benefit she had earned by being employed in Canada and contributing to the fund from which such benefit was paid.

The court differentiated the classical model of illegality from the modern approach by stating that the modern approach rejected the understanding that simply because a contract was prohibited by statute it was illegal and therefore void. The other distinguishing feature of the modern approach was that enforceability of a contract was dependent on an assessment of the legislative purpose or objects underlying the statutory prohibition. Under the classical mode, the purpose of the statute was only relevant when determining whether the prohibition was for the sole purpose of raising revenue (which, in view of what has been explained earlier, may be argued was an oversimplification of the position taken under what the court termed the classical model). In the words of the court:

> "Today, the purpose and object of a statutory prohibition is relevant when deciding whether the contract is or is not enforceable."

Professor Fridman added further at pp. 376-377:

As the doctrine of illegality was a judicial creation, not a creature of statute, it was incumbent on the judiciary to ensure that the doctrine's premises accorded with contemporary values. Moreover, the precepts of the common law doctrine of illegality (i.e., the classical model) were ill-suited to resolve the issue about unemployment benefits. Hence the court was impelled to "chart a course. ..

> reflective of both the modern approach and its public law milieu". In the federal context, the court concluded, the doctrine of statutory illegality was better served by this principle (not rule):
>
> > "Where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy reflected in the relief claimed, to do so.
>
> The application of this principle, and the consideration of the public policy underlying the *Unemployment Insurance Act*, the *Immigration Act*, and the Immigration Regulations, led to the ultimate conclusion that the plaintiff should be entitled to unemployment benefit despite the illegality of her employment. In this respect, it was relevant that the plaintiff was a legal immigrant, had acted in good faith, and that the penalty that would be imposed if she were denied benefit would be disproportionate to the breach of the statutory prohibition. This was not a case where relief should be denied in order to "preserve the integrity of the legal system" a factor stressed by McLachlin, J. in *Hall v. Hebert* (which discussed the application of the doctrine *ex turpi causa non oritur* action in the context of an action for negligence).
>
> Although this case was a decision of the Federal Court of Appeal, a court of a bilingual nature, as it was described in the judgment, and dealt with the effected federal, non provincial statutes, it would seem that the approbation by the court of the "modern approach" must carry considerable weight, in view of the court's reliance on decisions involving provincial statutes. Taken into conjunction with cases referred to earlier, and discussed in the *Still* case, this judgment confirms the decline of the older, constructionist approach to illegality and the rise of the modern, policy approach.

[62] I can conclude from the above summary of the law that the learned Arbitrator's determination that another remedy might exist is not incorrect. It thus remains for the Union to determine if it wishes to apply for him to determine if there is any such remedy available in these circumstances.

[63] As the result is divided, I would award no costs in this application.

Kelly, J.