2001 S.H. No. 172937

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Eastern Bakeries Ltd. v. Bakery, Confectionery and Tobacco International Union, Local 446 , 2001 NSSC 181]

BETWEEN:

EASTERN BAKERIES LIMITED

Applicant

- and -

BAKERY, CONFECTIONERY AND TOBACCO INTERNATIONAL UNION, LOCAL 446

Respondent

DECISION

HEARD: in Chambers at Halifax, Nova Scotia before the Honourable Justice Gerald R. P. Moir on 24 October 2001

DECISION: 29 November 2001

COUNSEL: Karin A. McCaskill and Lisa M. Gallivan for the Applicant

C. Scott Sterns and Heather L. Stanford for the Respondent

Date: 29 November 2001
Docket: S.H. No. 01-172937

MOIR J.:

Introduction.

[1] Last June, Arbitrator Peter J. MacKeigan Q.C. allowed a grievance where an employer had changed a longstanding practice affecting employees who took trucks on the road to make sales and deliveries. The "past practice", as the grievance form referred to it, had been to allow these employees to take the delivery truck home with them at the end of the workday. The practice had been in place long before any collective agreement, and it was changed some months after the present collective agreement came into effect in May of 1999. The learned arbitrator found that the employer was estopped from relying on any right to have the employees return delivery trucks to company premises at the end of the workday. The employer has applied for an order setting aside Arbitrator MacKeigan's award on the grounds of jurisdictional error and error of law. It says that the finding of estoppel deals with a subject completely outside the collective agreement and, thus, outside an arbitrator's jurisdiction. I have concluded that Arbitrator MacKeigan was acting within his jurisdiction when he found estoppel, and his finding is one that cannot be disturbed.

The Agreement and the Decision.

[2] One needs to look closely at the collective agreement. The management rights provisions are in articles 5.01 and 5.02. Except where specifically abridged by the other terms, management of operations belongs exclusively to the company: 5.01. Article 5.02 reads:

> The company may, at its discretion, make and enforce rules and regulations governing sales procedures and practices, and the conduct of its employees. Where applicable, such rules shall not conflict with the terms of this Agreement. When existing rules are changed or new rules are added, an explanation will be given and the Union and the employees will be notified in advance of implementation.

The employees involved in this grievance are not paid a wage. The collective agreement refers to them as "sales employees" and they work for commissions, which

are based upon net invoice sales for foodstuffs manufactured by the company or acquired by the company for re-sale: article 21.02. The company has control of the route assigned to an employee (15.01), the calls to be made along the route (16.01) and the products to be sold (15.02). However, as their title and remuneration suggest, the employees are not merely delivery men or women. They are required "to service the routes to which they are assigned in a thorough and efficient manner", but they are also obliged to "perform whatever functions are necessary to maintain route sales at a level satisfactory to the company" (article 15.01), and they certainly have an additional motive to do so because of the method of remuneration.

[3]Based upon the evidence he heard, Arbitrator MacKeigan made these findings of fact concerning the manner in which employees discharge their obligations to service customers and to maintain adequate sales:

> The Driver/Salesmen operate on commission and deliver products from the Employer's depot in either Truro or Coldbrook to their customers on assigned routes. The customers vary from large retailers such as Sobeys, Atlantic Superstores and Big Stop restaurants, to smaller corner stores. The Driver/Salesman's workday begins early in the morning. In the case of Frank McNiel, who drives from the Truro depot, his day starts at approximately 2:30 a..m. and finishes sometime in the afternoon around 12:30 p.m. Robert Hardwick operates out of the Coldbrook depot, and his day starts at approximately 3:45 a.m. and ends around 1:00 o'clock in the afternoon on a daily basis.
>
> These Driver/Salesmen, and presumably others with similar positions, have the responsibility of loading their truck, drawing up invoices, delivering to their customers, taking stock of their particular product in their customers' premises, loading the customer shelves, taking back returns and returning them to the depot, placing orders for the next day and providing the information on the current day's sales through the practice of T-COM.
>
> There was also considerable evidence from both Mr. McNiel and Mr. Hardwick as to their responsibilities are to service the customer. Their route and delivery scheduling are based on their discussions with the customer as to customer needs and satisfaction. This would include from time to time requirements at the end of their workday to make what might be referred to as emergency calls on customers when they have run out of a product or to attend to customers' premises from time to time to assist in sales promotions. Essentially the Driver/Salesman is the contact on the daily basis between the customer and Employer in terms of delivery of product, and it is the Driver/Salesman's responsibility to ensure that the customer does not run out of product at any time. [p. 3 and 4]

I emphasize the findings concerning the formation of delivery schedules, the requirement for emergency calls and the responsibility to ensure that the customer does not run out of product. After setting out these findings, Arbitrator MacKeigan referred further to the evidence of employees McNiel and Hardwick:

> There appears to be a long history of the Driver/Salesmen taking their trucks home at the end of the day. Mr. McNiel indicates that he has been a Driver/Salesman for approximately 33 years and for the full length of this time he has taken his truck home at the end of the day versus leaving the truck at the plant overnight. Both witnesses indicated that the Employer told them the current change in practice was a cost saving. This would presumably have to do with fuel costs as well as some vehicle maintenance. The distance these vehicles would cover on the round trip home would range from eight to 15 kilometres or so.
>
> Mr. Hardwick gave evidence that when this change in practice took place in December of 2000, he was required to purchase a new vehicle since his family only had one car which had been used by his wife to go to work. Both witnesses argued strongly that the practice was a downloading of costs from the Employer to themselves. Since the Employer was saving the cost of gas and maintenance, this would then be picked up by the Driver/Salesmen in terms of their own vehicle. They also argued strongly that there were times, although it appears not that frequent that they would be required to use the truck after the end of their shift upon their return home to make special deliveries or to attend at the facilities of their customers. [p. 4]

[4]The collective agreement confines the arbitrator to issues arising on account of the agreement. The grievance must concern a "matter within the terms of this Agreement" (article 7.01) and the arbitrator is restricted as follows:

> Neither the arbitrators nor the Arbitration Board will be authorized to make any decision inconsistent with the provisions of this Agreement, nor will they alter, modify or amend any part of its provisions or deal with any matter not contained in the said Agreement. A majority decision will be final and binding upon the Company and the Union, but if no majority decision is given, the decision of the Chair shall be final and binding. [8.05]

Before Arbitrator MacKeigan, counsel for the employer argued that a change in practice concerned a subject outside the collective agreement. The collective agreement being silent on the point, Arbitrator MacKeigan had no jurisdiction to deal with it. Counsel referred him to a decision of Arbitrator Outhouse.

[5]Before me, the employer argued that the decision of Arbitrator Outhouse stood for the proposition, in the words of the employer's brief, that "because the policy [calculation of travel allowances] was outside the confines of the collective agreement it was not arbitrable" and thus, Arbitrator Outhouse "rejected the union's argument that the recognition and management rights clauses provided jurisdiction". Contrary to the characterization proposed by the employer, Arbitrator MacKeigan took Arbitrator Outhouse to have said "the Employer is free to change policies ... subject to the provisions of estoppel" and, respecting estoppel, "the essential elements ... were lacking within the factual situation before him" (MacKeigan, p. 7). The decision in question is *Nova Scotia Union of Public Employees* v. *Halifax Regional Municipality*, 4 March 1997 (Outhouse, Arb.). An employer changed its method for calculating travel allowances. The union argued that the change constituted a breach of an implied duty to act reasonably in the administration of a collective agreement and it also argued estoppel. Dealing with the first of these, Arbitrator Outhouse referred to the recognition and the management rights clauses of the applicable collective agreement, and he observed "it is common for policies to exist completely outside the ambit of the collective agreement" (p. 15 and 16). Neither the recognition clause nor the management rights clauses could found jurisdiction where "the Employer's conduct relates to a matter which does not fall within the parameters of the collective agreement" (p. 16), but that conclusion was "subject to the possible application of the doctrine of estoppel" (p. 17). At that same page, the learned arbitrator said:

> Turning to the Union's estoppel argument, it is immediately apparent that the essential elements upon which the doctrine of estoppel is founded are lacking in the present case. Specifically, there was never any representation by the Employer that it would not alter the travel allowance policy. Moreover, as previously observed, there is nothing in the collective agreement which deals with travel allowance policy and, consequently, no contractual rights exist which the Employer might, by virtue of its words or conduct, have led the Union to believe would not be exercised. Further, there is a complete absence of any evidence of detrimental reliance on the part of the Union.

I do not read Arbitrator Outhouse to have said that an estoppel cannot operate against reliance upon the management rights clause. Rather, he held that actions taken by the employer under the management rights clause are not arbitrable "subject to the possible application of the doctrine of estoppel". I agree with Arbitrator MacKeigan's reading of Arbitrator Outhouse's decision. It suggests that a change in policy may be subject to estoppel where there is a representation, the representation concerns the

manner in which terms of the collective agreement will be administered and there is detrimental reliance. Arbitrator Outhouse determined that none of the elements of estoppel applied on the facts before him, and he dealt with that subject as distinct from his observations concerning jurisdiction. Arbitrator MacKeigan discussed this decision and, at p. 8, distinguished it on the ground that detrimental reliance had not been established before Arbitrator Outhouse, and, at p. 10, on the ground that none of the elements of promissory estoppel had been established in the case before Arbitrator Outhouse.

[6]The union representative referred the learned arbitrator to *Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 446* v. *Avon Foods Inc.*, 8 February 2001 (Ashley, Arb.). In that case, a union was estopped from relying on the letter of the job posting provisions of a collective agreement where the parties had continued to follow a longstanding practice. The employer makes the point to me that this was a case in which the representation founding the estoppel related to specific provisions of the collective agreement and is, thus, outside the present question of jurisdiction. Arbitrator MacKeigan discussed this decision immediately before making these comments:

> It is obvious that the doctrine of estoppel is applicable to the grievance arbitration setting and will apply if the appropriate test is met in situations which are silent within the provisions of the collective agreement. Essentially it does not interpret the agreement but bypasses it. [p. 8]

I do not think that by "situations which are silent within the provisions of the collective agreement", Arbitrator MacKeigan meant situations to which the collective agreement has no application. On the contrary, the learned arbitrator went on to discuss representation by conduct and then he referred to what he termed a "collateral argument" that added "credibility to the Union's position":

> Article 15.01 contemplates a working relationship between the Driver/Salesmen and their ultimate customers requiring the servicing of the routes to be done in a thorough and efficient manner. The evidence in support of that position adds to the overall understanding as to how this practice may have been reinforced over the years, and contemplates that the Driver/Salesmen would be expected, where there is an emergency or need, to service the customer after the close of their regular shift. There is nothing to suggest that they should do this in their own vehicle versus the Employer's vehicle which would be the initial supposition. [p. 9]

[7]Arbitrator MacKeigan concluded his decision by stating his findings of a representation and detrimental reliance. In reference to the representation, he found "a longstanding practice going back in excess of 30 years" (p. 8), and he noted that, unlike the situation in *Halifax Regional Municipality*, there was no evidence before Arbitrator MacKeigan that the practice in issue had been adapted or changed by the employer unilaterally from time to time. Rather, the practice at issue before Arbitrator MacKeigan had not appeared to change over the span of thirty years. He also took into consideration evidence surrounding article 15.01 as indicating how the practice had been reinforced over the years, and the absence of anything to suggest employees had to use their own vehicles when servicing customers out of schedule. He found a representation "that the trucks would be available to be used at the end of the shift day to take home" (p. 9) by considering "the conduct of the Employer which includes its silence in this factual situation" (p. 9) and he said the period of time, thirty years, lent "considerable weight" to his finding. In finding detrimental reliance, the learned arbitrator referred to both the reliance of the affected employees and that of the union. He saw the employer's decision as a transfer of costs in reference to the employees' obligation to service customers and he referred to evidence that one employee was forced to buy a new vehicle. He also expressed the opinion that the union had "lost the opportunity to bargain at the negotiating table" (p. 10). However, he specifically rejected the argument that a finding of detrimental reliance could be based solely upon the fact that a possible change in policy was not brought up during negotiations. Rather, a finding of the union's detrimental reliance depended on "all the facts" (p. 10). He took account of the "longstanding history" and the very short period between the signing of the collective agreement and the employer's announcement.

Discussion.

[8]Counsel for the employer addressed the issues in these terms:

> What is the Standard of Judicial Review?
>
> Did Arbitrator McKeigan err in law in his interpretation of the doctrine of estoppel and in holding that the doctrine applied to prevent the Applicant from changing policies or practices on subjects where the collective agreement was silent?
>
> Did Arbitrator McKeigan alter, amend or add to the Collective Agreement and thereby exceed his jurisdiction when he rendered a decision on matters not covered in the Collective agreement?

(There is a fourth issue, "Did Arbitrator McKeigan exceed his jurisdiction when he dealt with the issue of 'T-Com'?", which I shall take up later.) Counsel have presented the issues in their logical order. However, I can express my reasons better by first discussing estoppel in relation to collective agreements.

[9]The employer relies upon *Re Smokey River Coal Limited and United Steelworkers of America, Local 7621 et al.* (1985), 18 D.L.R. (4th) 742 (A.C.A.) where the Alberta Court of Appeal concluded that an arbitrator's award was unreasonable. The employer had adopted a practice of paying employees overtime for time spent before and after shifts giving reports to management or receiving briefings from management. The employer decided to stop paying this overtime. The arbitrator held the employer was estopped. The Alberta Court of Appeal disagreed with the Ontario Divisional Court in *Canadian National Railway Co. et al.* v. *Beatty et al.* (1981), 128 D.L.R. (3d) 236 (O.C.D.), and strongly criticized the statement of Osler J. that estoppel effectively modifies a pre-existing legal relationship (p. 747). Justice Osler's decision was referred to by MacAdam J. at para. 37 in *Re United Steelworkers of America, Local 1231 and Trenton Works Limited* (1999), 180 N.S.R. (2d) 97 (S.C.) appeal dismissed (2000), 182 N.S.R. (2d) 198 (C.A.). Justice MacAdam provided an extensive review of Nova Scotia authorities on promissory estoppel and collective agreements at para. 31 to 36, and he prefaced his review with this:

> Clearly, at least in Nova Scotia, reference may be made to past conduct or statements in determining the parties rights and obligations under a collective agreement. Although some jurisdictions appear to have declined to use such conduct or statements to modify, add or vary a collective agreement, such does not appear to be the case in Nova Scotia. [para. 30]

Contrary to the discussion in *Smokey River*, this jurisdiction and others accept that promissory estoppel may modify the effects of a collective agreement and that conduct of the parties before collective agreement may be relevant in determining whether a representation had been made. However, that does not detract from this statement at p. 747 to 748 of *Smokey River*: "Every practice in the workplace is not automatically to be elevated to a term of the collective agreement, freezing the parties to the status they had before each agreement." The court agreed with *Re Hawker Siddeley Canada Inc. and United Steelworkers of America, Local 1237* (1983), 150 D.L.R. (3d) 509 (N.S.S.C., T.D.), where Justice Nathanson held that estoppel cannot be founded upon silence of a collective agreement. There must be an explicit term in

the collective agreement which the employer is asserting and which the employer is estopped from asserting by virtue of its representation and the union's reliance.

[10]The parties disagree on the standard of review. It is common ground that the collective agreement and the *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 42(1) provide privative clauses in respect of arbitrations within this collective agreement. The submission on behalf of the employer includes this summary, in five points, as regards standard of review:

> 1. An Arbitrator's jurisdiction is to determine whether there has been a breach of the Collective Agreement. An Arbitrator does not have jurisdiction to alter, amend or add to the provisions of the Collective Agreement and the Arbitrator must not overlook or ignore the provisions of the Collective Agreement.
>
> 2. Where the issue being raised is a question of law, the arbitrator must be correct in his decision.
>
> 3. The Court can review a decision of an arbitrator where the interpretation of the collective agreement is patently unreasonable, where the arbitrator takes into account irrelevant considerations and ignores relevant considerations.
>
> 4. The Court should set aside a decision where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact.
>
> 5. Neither the privative clause in the Collective Agreement nor the clause imported into the Collective Agreement by operation of the *Trade Union Act* precludes judicial review where an arbitrator's decision is patently unreasonable or where the arbitrator exceeded his jurisdiction.

Counsel for the employer referred me to *Liquor Commission (N.S.)* v. *NSGEW Local 470* (1990), 97 N.S.R. (2d) 55 (S.C., A.D.) and this passage at para. 25: "Where, however, the court's evaluation of the decision leads to the conclusion that rather than having interpreted the agreement, the arbitrator has amended it, added to it or overlooked material provisions in it, the threshold is reached." For the union, the standard of review is set by *Canada Post Corporation* v. *Canadian Postmasters and Assistants Association* (1993), 121 N.S.R. (2d) 112 (C.A.), which, according to counsel for the union, establishes a standard even higher than patent unreasonableness. Both parties referred me to the following passages found at para. 127 and 128 of that decision:

> ... I conclude that greater deference should be shown to awards of consensual arbitrators protected by a privative clause than to judicial review of decisions of statutory tribunals protected by a similar clause. There is no jurisprudence that specifically extends the scope of review of consensual arbitrators awards so as to permit a court to set aside an award that is patently unreasonable although made within his jurisdiction. Therefore I disagree with the submission of the Respondents counsel that the test for review of awards of a consensual arbitrator is the same as that for a statutory tribunal. I find that (the learned trial judge) erred in law in applying the 'patently unreasonable award' test as developed in *Lester, Corn Growers* and *Paccar* ...
>
> The test for judicial review of an award of a consensual arbitrator protected by a privative clause is whether he exceeded or declined to exercise his jurisdiction, which question turns on the determination of the issue before him and whether he dealt with that question. If the issue before him involved the interpretation of clauses of the collective agreement the arbitrator must give to those clauses an interpretation the language will reasonably bear. Finally, in exercising his jurisdiction, an arbitrator complies with these duties, his award is immune from judicial review even if it appears to be wrong or even patently unreasonable.

Counsel for the union pointed out that *Canada Post Corporation* was followed by *Dalhousie University* v. *International Union of Operating Engineers Local 968*, [1999] N.S.J. No. 106 (N.S.C.A.) where it was said, at para. 27, that an award of a consensual arbitrator cannot be set aside on the ground of patent unreasonableness "if there is any evidence supporting the arbitrator's decision".

[11]The employer relied upon *N.S.T.U.* v. *Nova Scotia (Minister of Education and Culture)* (2000), 184 N.S.R. (2d) 110 (S.C.) and *QEII* v. *NSGEU* (1998), 166 N.S.R. (2d) 194 (C.A.). I agree with counsel for the union that these decisions are to be distinguished from the present case on the basis that there the arbitrators were occupied with questions of statutory interpretation.

[12]We have here two issues, one to arbitrability and one to application of law to facts. Based upon *Canada Post Corporation* and *QEII*, which are binding upon me, I must not interfere with Arbitrator MacKeigan's award on the ground that he misapplied the law of estoppel unless it is clear there was no evidence to support his findings. As regards jurisdiction, the *Liquor Commission*, *Canada Post Corporation* and *QEII* decisions show that the court may interfere where the arbitrator lacked jurisdiction, as where he dealt with a dispute wholly outside the collective agreement. What standard applies?

[13]Subsection 42(1) of the *Trade Union Act* requires that "Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences ... concerning its meaning or violation." Subsection 42(2) supplies a deemed arbitration clause for cases where the collective agreement fails to make provision for final settlement without stoppage of work, and the same legislated terminology in Ontario was at issue in a number of Supreme Court of Canada decisions concerning review for jurisdictional error. The legislated terminology provides for final disposition of disputes "relating to the interpretation, application or administration of this agreement, including any question as to whether the matter is arbitrable", and the phrase "whether a matter is arbitrable" is prominent in the jurisprudence provided by the Supreme Court. In this case, the legislatively supplied terminology does not apply. The collective agreement makes its own provisions for arbitration including finality: "A majority decision will be final and binding on the Company and the Union ..." (8.05) and arbitrability: "A board of Arbitration shall be authorized to determine the arbitrability of any matter referred to arbitration." A similar reference to arbitrability is found in s. 43(1)(c) of the *Trade Union Act*. Although the language is not exactly the same, it is identical in substance to the statutorily supplied language considered by the Supreme Court. The line of decisions begins with *Bradburn* v. *Wentworth Arms Hotel Ltd.*, [1979] 1 S.C.R. 846 and concludes with its reaffirmation in *Dayco (Canada) Limited* v. *National Automobile, Aerospace and Agricultural Implement Workers Union of Canada* (1993), 102 D.L.R. (4th) 609 (S.C.C.). While *Dayco* reaffirmed *Bradburn*, Justice LaForest, who wrote the majority decision in *Dayco*, "recast" (para. 27) the earlier decision in light of the law after *U.E.S., Local 298* v. *Bibeault*, [1988] 2 S.C.R. 846 and according to the modern requirement for an analysis "from a pragmatic and functional perspective" (para. 27) in cases of judicial review. *Bradburn* involved a grievance that had been triggered by a strike and the employer took the position that the strike had occurred during the currency of a collective agreement. The arbitrator determined whether a collective agreement had been in effect at the time of the strike. The majority opinion of the Supreme Court in *Bradburn* held that an arbitrator has power to determine whether there was an agreement in effect, thus founding the arbitrator's jurisdiction, but, in today's language, the standard of review is "correctness" (see p. 255 and 256). This was explained in *Bibeault* on the basis that a preliminary question of jurisdiction is not within an arbitrator's jurisdiction in the strict sense and "as this question determines its jurisdiction it cannot err in deciding it" (p 1083). That is, "Any error in the matter amounts to a refusal to exercise its jurisdiction stricto sensu or an excess of jurisdiction stricto sensu ... and makes its

decision illegal and void" (p. 1083). *Bibeault* suggested a pragmatic analysis focused upon "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?" (p. 1087). After referring to *Bibeault* in this way at para. 27 of *Dayco*, LaForest J. said, "This is the new light by which the Bradburn decision should now be considered." In *Dayco*, the collective agreement had been terminated. The union grieved on behalf of retired employees who lost certain benefits after termination. The question was whether rights of grievance, the foundation for arbitration, survived termination of the agreement. The majority held that an issue of that kind attracted a standard of correctness. A distinction is made by Justice LaForest in the beginning of his "pragmatic analysis", which is important to the present issue. I quote the entirety of para. 29:

> The starting point in this analysis is the wording of the statute. As is apparent from the discussion above, the wording of the precise grant of power in s. 44 is not determinative of the scope of an arbitrator's jurisdiction. Bradburn demonstrates that rendering a matter "arbitrable" under s. 44 does not thereby determine jurisdictional content of that grant of power. We must look further afield, considering first the context of these words in s. 44, and the broader structure of the statute. In viewing the text of s. 44(2) as a whole, I have no doubt that the power to determine arbitrability will for many "matters" connote a grant of jurisdiction stricto sensu. Specifically, when the "matter" must be measured against the collective agreement to determine if it is arbitrable, the arbitrator will have the right to be wrong. This takes account of the entire purpose of the provision, which is to empower the arbitrator to deal with differences between the parties relating to the agreement. Moreover, this is in accord with the arbitrator's core area of expertise. After all, the most frequent challenge of an arbitrator's jurisdiction is an assertion by one of the parties that the incident underlying a grievance is not contemplated by the collective agreement. These issues are resolved by the arbitrator's application of the facts to the agreement as he or she interprets it, and this process is clearly intended to be left to the expertise of the arbitrator. However, when it comes to determining whether a collective agreement governs the rights and obligations of the parties irrespective of the interpretation of that agreement, the arbitrator has no benchmark; the existence or subsistence of the collective agreement itself is called into question. Although the arbitrator has the power to decide these questions, he or she must be correct in doing so.

He summarized this passage by saying "while the concepts of arbitrability and jurisdiction will frequently overlap, they are not synonymous" (para. 30). This distinction is also made at the beginning of Justice LaForest's discussion where he felt it necessary to state "I would not wish my conclusions on the standard of review in

this case to be taken as a retreat from the deferential approach to judicial review of administrative tribunals" (para. 19) and he said:

> It is clear that an arbitrator has jurisdiction stricto sensu to interpret the provisions of a collective agreement in the course of determining the arbitrability of matters under that agreement. In that case the arbitrator is acting within his or her "home territory", and any judicial review of that interpretation must only be to a standard of patent unreasonableness. But this is a different case. Here, the viability and subsistence of the collective agreement is challenged. The company alleges that regardless of the interpretation of the agreement, it cannot survive to serve as the basis for this arbitration. The collective agreement is the foundation of the arbitrator's jurisdiction, and in determining that it exists or subsists the arbitrator must be correct.

The functional or pragmatic approach and the decision in *Dayco* were applied in *Halifax* v. *Municipal Association of Police Personnel*, [1994] N.S.J. No. 182 (S.C.). The grievance concerned performance appraisals and candidate ratings for the purposes of promotions, courses and transfers, about which the collective agreement was said to be silent. Saunders J. reached the conclusion that patent unreasonableness, not correctness, was the applicable standard.

[14]In my opinion, the law of promissory estoppel does not stand at the entry to the arbitrator's boardroom in the manner of laws concerning the formation of contracts or duration of rights under extinguished contracts. In the general law of contract, promissory estoppel is profane and is commonplace with laws such as the principles for interpretation or for implication of terms, by which the daily commerce understands and administers its agreements. Although promissory estoppel does not seek to give effect to a term, although it does the opposite, it has to do with the just administration of contracts, not their existence. Promissory estoppel goes to the administration of contracts. Further, an attempt to resort to it may require subtle fact-finding as to representation or reliance, which calls for an understanding of the inner-workings of the contract as well as the broad context of the environment in which it operates. Finally, estoppel necessarily involves interpretation of the agreement. One must ascertain the right before one can determine whether it can still be asserted. When these observations are applied in labour and management, one sees that an assertion of estoppel engages functions the parties intended for the arbitrator. The assertion engages the administration of the collective agreement, expertise in understanding collective agreements and the workplaces in which they operate and interpretation of the terms of the collective agreement. Understood functionally or

pragmatically, the issue raised by the grievors was more of "arbitrability" than "jurisdiction" and it was within "the arbitrator's core area of expertise". Arbitrator MacKeigan's decision attracts the same high level of deference in respect of arbitrability as it does in respect of application of law to facts.

[15]I do not agree that the learned arbitrator altered, modified or amended the collective agreement. As Justice MacAdam put it in *Trenton Works Limited* at para. 40: "It is not the tribunal that is adding, amending or varying the agreement; it is the parties by their conduct or statements." Nor do I agree that Arbitrator MacKeigan found an estoppel in a vacuum, without reference to a term of the collective agreement. Reading his decision as a whole, I would characterize the estoppel this way: the grievers complained of a change in practice, the employer answered that changing such a practice was a right of operational management, but the employer was estopped from relying on the management rights clause because of the representation and the reliance. It is the management rights clause that brought this case within the collective agreement. I cannot interfere with the determination that the grievances were arbitrable.

[16]Turning to the learned arbitrator's application of the principles of estoppel to the facts as found by him, it might well have justified interference if past practice had been the only basis for finding a representation: see Justice MacAdam's comment on *Maritime Electric Co.* v. *IBEW Local 1432* (1993), 112 Nfld. & P.E.I.R. 119 (P.E.I. S.C., A.D.) at para. 51 of *Trenton Works Limited*. The past practice lent "considerable weight" (MacKeigan, p. 9), however Arbitrator MacKeigan took account also of the obligations accepted by the union for the drivers under the collective agreement and the method of pay, which cast light on the significance of the employer's practice, and he also took account of the employer's "silence" in light of the longstanding practice (p. 9). Further, the evidence was clear that the conduct continued for several months after the last collective agreement was signed. As for reliance, Arbitrator MacKeigan had evidence that one employee was forced to purchase a new vehicle and the arbitrator inferred there must have been "other similar hardships" (p. 9). Given the findings of a transfer of costs after thirty years of bearing them and the hardships borne on account of the transfer of costs, the inference is obvious though unstated: the drivers had ordered their household affairs in reliance upon the employer bearing the cost. The employer also argues that the employee's reliance is irrelevant. What matters is the reliance of the other contracting party, the union. I would need to be shown very persuasive authority before I would adopt the proposition that detrimental reliance on the part of employees bound by a collective agreement cannot support

estoppel against the employer. In any case, Arbitrator MacKeigan found detrimental reliance on the part of the union as well, and he explicitly made that finding on evidence beyond mere silence at the bargaining table (p. 10). In conclusion, it is clear from the learned arbitrator's decision that he had some evidence before him supporting the findings he made as to representation by conduct and detrimental reliance. I cannot interfere.

[17]The employer also contests Arbitrator MacKeigan's treatment of an issue concerning the drivers' use of a hand-held computer and a system called T-COM, although the learned arbitrator found in favour of the employer. The employer's position is that no such issue was raised by the grievance, and Arbitrator MacKeigan ought not to have embarked on an inquiry into it. As I see it, there is no consequence to the determination made by Arbitrator MacKeigan and, thus, there is no live issue to be determined by me. Any comment by me would be academic.

[18]I will dismiss the application. The parties may make submissions on costs.

J.

Halifax, Nova Scotia
29 November 2001