1997 **Date: [20010911]**
Docket: [S.H. No. 143464]

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Haughn v. Halifax (Regional Police Commissioners), 2001 NSSC 117

BETWEEN:

LENARD HAUGHN, TIM MOSHER, KEVIN TELLENBACH, JOE COLLINS, DAVE WORRELL and CHRIS MELVIN

Plaintiffs

- and -

HALIFAX REGIONAL BOARD OF POLICE COMMISSIONERS and VINCENT J. MacDONALD, CHIEF OF POLICE OF THE HALIFAX REGIONAL POLICE SERVICE

Defendants

- and -

MUNICIPAL ASSOCIATION OF POLICE PERSONNEL

Intervenor

DECISION

HEARD:	Before the Honourable Justice A. David MacAdam, in Chambers, at Halifax, Nova Scotia, on July 19, 2001
DECISION:	July 19, 2001
WRITTEN RELEASE OF DECISION:	September 11, 2001
COUNSEL:	Nancy L. Elliott, counsel for the Plaintiffs Terry L. Roane, Q.C., counsel for the Defendants Ronald A. Pink, Q.C., counsel for the Intervenor

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[1] The ***Halifax Regional Municipality Act***, S.N.S. 1995, c. 3 (the "***Act***"), effective as of April 1, 1996, provided for the amalgamation of the Cities of Halifax and Dartmouth, the Town of Bedford and the remainder of the County of Halifax into the Halifax Regional Municipality ("HRM"). The amalgamation included the joining together of the various municipal police forces under one administration.

[2] Prior to amalgamation the plaintiffs, other than Tim Mosher, had all been employed as police officers by the Town of Bedford, each holding the rank of corporal. In February 1994, Bedford decided to eliminate the rank of corporal and these plaintiffs were named to the rank of sergeant. The plaintiff, Tim Mosher, was a constable who was promoted to the rank of sergeant in 1995. As sergeants in the Town of Bedford, the plaintiffs were not members of a union but were subject to a working agreement established between the Town and a Liaison Committee on behalf of the sergeants.

[3] Some members of the City of Halifax Municipal Police Force, including sergeants, were members of a Bargaining Unit represented by the intervenor, Municipal Association of Police Personnel ("MAPP"). Under the collective agreement between MAPP and the City of Halifax, there were provisions designating two pay levels for the classification of sergeant, being Sergeant I and Sergeant II.

[4] Prior to amalgamation a vote was held, pursuant to the ***Trade Union Act***, R.S.N.S. 1989, c. 35 ("***TUA***)", of police employees of the various former municipalities to determine the

bargaining agent to represent them. On September 27th, 1995, the Labour Relations Board (Nova Scotia)(the "Board") , declared MAPP as the successor trade union in relation to a bargaining unit, described as follows:

> "all police personnel employed by the Halifax Regional Municipality below the rank of Deputy Chief, including Communication Technicians, and other civilian employees performing police functions and former police functions".
>
> Labour Relations Board Order, No. 4277, September 27, 1995

[5] As a result, the plaintiffs were to be included in the bargaining unit established pursuant to Labour Relations Board Order, No. 4277. Consequently, as a result of amalgamation, on April 1, 1996 the plaintiffs became employees of "HRM" and members of the bargaining unit represented by MAPP.

[6] The defendant, Vincent J. MacDonald, who was appointed Chief of Police of the newly constituted police force, on April the 12th, 1996 issued a Department Order which provided, among other things, that the plaintiffs would *"now be referred to as Sergeant II"*. The Order also provided that the titles of the job classifications would not increase or decrease the benefits of the respective ranks but would create a two-tier structure within the sergeant rank and members were required to "qualify" for any change in classification from the Sergeant II to the Sergeant I level.

[7] Although MAPP, in June 1996, filed a grievance on behalf of some of the plaintiffs in respect to another issue involving the appropriate rate of pay for police personnel holding acting positions, it advised the plaintiffs it would not support their position that the Order of the Chief of Police constituted a demotion. The position of MAPP was that the

designation of Sergeant II was a *"pay level, not a rank*".

[8] The Halifax Regional Board of Police Commissioners, in response to a letter from the plaintiffs dated January 14, 1997, indicated they supported the decision of the Chief of Police. The Nova Scotia Police Commission ("the Commission"), as a result of a letter from the plaintiff, Lenard H. Haughn, dated October 9, 1996, by response dated November 8, 1996 declined to consider the matter on the basis it had no jurisdiction to convene an investigation or inquiry since there was no evidence any demotion was the result of a disciplinary default.

[9] HRM and MAPP had commenced collective agreement negotiations in January 1996, and prior to concluding an agreement agreed the sergeant rank would include the designations of Sergeant I and Sergeant II. However, no agreement was reached on the appropriate rates of pay for the designations and the matter was referred to an Interest Arbitration Board. The Interest Arbitration Board, by Award dated November 27, 1997, assigned wages to the sergeant classifications, and subsequently on January 12, 1998, HRM and MAPP signed a collective agreement which incorporated the findings of the Interest Arbitration Award, including the classifications of Sergeant I and Sergeant II.

[10] On December 2, 1997, the plaintiffs initiated this proceeding seeking judicial review of the April 12, 1996 decision of the Chief of Police and the May 29, 1997 decision of the Halifax Regional Board of Police Commissioners on the ground the two-tier system for sergeant violates ***Section 35(1)*** of the ***Regulations*** made under the ***Police Act***, R.S.N.S. 1989, c. 348. ***Section 35(1)*** of the ***Regulations*** reads as follows:

> Every municipal police force may have all or any of the following ranks, but no others:
>
> Chief of Police
>
> Deputy Chief
>
> Staff Superintendent
>
> Inspector
>
> Sergeant
>
> Corporal
>
> Constable
>
> Cadet

[11] The plaintiffs also claim they were reduced in rank contrary to ***Regulation 4(3)*** of the ***Police Act***, which states:

> No member of a municipal force is subject to any penalty, including reduction in rank or dismissal, until after proceedings have been taken pursuant to the Act and these regulations...

[12] At issue in this application is whether this Court has jurisdiction to deal with the subject matter of this proceeding. MAPP and the defendants maintain this Court has no jurisdiction, in that the issues are matters which fall within the exclusive dispute resolution process established under the ***TUA***. They say the nature of the dispute arises from the "*interpretation, application, administration and potential violation of the terms of a collective agreement*", and, therefore, the plaintiffs are bound by the provisions of the collective agreement pursuant to ***s. 41*** of the ***TUA***. They add, the plaintiffs are bound by the provisions of ***s. 42*** which provides for a final and binding settlement of differences

between the parties to or persons bound by a collective agreement and the issues raised by the plaintiffs in this proceeding fall within the exclusive jurisdiction of an Arbitrator appointed under the provisions of the collective agreement and the ***TUA***. They also suggest the issues raised by the plaintiffs involve the interpretation of sections of the ***TUA*** and in particular, ***s. 23(7)*** and ***s. 35***. These sections provide that employers may not increase or decrease rates of wages or alter any other term or condition of employment, in the case of ***s. 23(7)***, without consent of the Board, after an application has been made for certification of a union as a bargaining agent , and after certification before notice to commence collective bargaining has been given under ***s. 33*** and in the case of ***s. 35***, without the consent of the bargaining agent, after notice to commence collective bargaining has been given under ***s. 33*** or ***s. 34***.

[13] MAPP and the defendants also note that pursuant to ***s. 43(1)(e)*** of the ***TUA*** an arbitrator or arbitration board has jurisdiction to interpret and apply the provisions of other statutes that affect relations between parties to a collective agreement.

[14] The plaintiffs, on the other hand, and as summarized in the agreed statement of facts filed by the parties on this application, maintain the court has jurisdiction to hear the matter on the basis of the following grounds:

1. Sections 41 and 42 of the *Trade Union Act* do not apply because the cause of action pre-dates the collective agreement;

2. If there is a conflict between the *Police Act* and any other Act or collective agreement, the *Police Act* prevails;

3. The terms and conditions of employment during the statutory freeze prior to the signing of the first collective agreement between MAPP and HRM included the rights of the Plaintiffs to pursue their common law rights in the courts;

4. The dispute in its essential character does not arise out of the collective agreement but instead centres on the meaning of the *Police Act* Regs. 4(3) and 35(1);

5. The exclusivity of the bargaining agent is not applicable because police officers' rights under the *Police Act* are individual rights as opposed to collective rights. Also, any individual who can establish standing has a right to challenge whether a statute has been violated.

[15] Counsel for the defendants on an earlier application by the defendants to dismiss the plaintiffs' action on the basis the court lacked jurisdiction referenced statements by the Supreme Court of Canada adopting the *"exclusive jurisdiction"* model in respect to the interpretation and application of collective agreements and trade union legislation. Her submission reads:

> The Supreme Court of Canada adopted and has held scrupulously to an "exclusive jurisdiction" model since at least 1975 when Laskin, C.J. wrote the decision for the majority in *McGavin Toastmaster Limited and Ainscough*, [1976] 1 S.C.R. 718. It was decided in McGavin that individual contracts/rights (whether pre-existing or not) are fully replaced by the collective agreement and the Union's status as exclusive bargaining agent under labour relations legislation:
>
> > I do not think that in the face of labour relations legislation such as existed at the material time in British Columbia, in the face of the certification of the union, of which the plaintiffs were members, as bargaining agent of a specified unit of employees of the company and in the face of the collective agreement in force between the union and the appellant company, it is possible to speak of individual contracts of employment and to treat the collective agreement as a mere appendage of individual relationships. The majority of this Court, speaking through Judson J. in *Syndicat*

> *catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée,* at p. 212, said this in a situation where a union was certified for collective bargaining under Quebec labour relations legislation:
>
> > There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations.

[16] In her submission on this application counsel notes the recent decision of the Nova Scotia Court of Appeal in ***Pleau v. Canada (Attorney General)*** (1999), 181 N.S.R. (2d) 365, in which Justice Cromwell, on behalf of the court, set out three interrelated considerations governing the determination whether a court should decline jurisdiction in favour of the grievance/arbitration process. She notes from paras. 50-52:

> First, consideration must be given to the process for dispute resolution established by the legislation and collective agreement. Relevant to this consideration are, of course, the provisions of the legislation and the collective agreement, particularly as regards the question of whether the process is expressly or implicitly regarded as an exclusive one. Language consistent with exclusive jurisdiction, the presence or absence of privative clauses and the relationship between the dispute resolution process and the overall legislative scheme should be considered.
>
> Second, the nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation and the collective agreement should be considered. In essence, this involves a determination of how closely the dispute in question resembles the sorts of matters which are, in substance, addressed by the legislation and collective agreement. What is required is an assessment of the "essential character" of the dispute, the extent to which it is, in substance, regulated by the legislative and contractual scheme and the extent to which the court's assumption of jurisdiction would be consistent or inconsistent with that scheme.

> Third, the capacity of the scheme to afford effective redress must be considered. Simply put, the concern is that where there is a right, there ought to be a remedy.

[17] Counsel then continues:

> Applying those principles to the facts in *Pleau*, the Court of Appeal concluded that the Statement of Claim should not be struck out. The Court of Appeal based its decision on a finding that the grievance procedure in that collective agreement and/or mandated by the governing legislation (the Nova Scotia *Public Service Staff Relations Act*), did not create an exclusive mechanism for the resolution of the plaintiff's dispute. The Court of Appeal concluded that the collective agreement did not explicitly or by reference govern the substance of the dispute in *Pleau* and, given the structure of the *Act* and the fact that a third party had no independent right to challenge the outcome of the grievance procedure, decided that no adequate form of redress existed.
>
> The Defendants submit that, although the principles enunciated by the Court of Appeal apply...the facts in the two cases are substantially different and necessarily lead to a different conclusion. Specifically, the applicable legislation in this case (the *Trade Union Act*, R.S.N.S. 1989, c. 475) and the Collective Agreement between the Defendant Halifax Regional Municipality and MAPP, differ significantly from the legislation and collective agreement considered in *Pleau* in that they establish an exclusive arbitration process which encompasses the allegations made by the Plaintiffs in this proceeding.

[18] Counsel for the plaintiffs, on the other hand, after referencing the decision of Justice Cromwell in ***Pleau v. Canada (Attorney General)***, *supra*, responds:

> The collective agreement does set out a grievance and arbitration process. However, it is clear from the collective agreement that there is also an alternate forum for some matters: Article 2 of the 1997-1999 collective agreement...explicitly provides that all disciplinary and non-disciplinary matters which affect the employment status of a police officer shall be dealt with in strict accordance with the procedural and substantive requirements for discipline as set out in the *Police Act* and its regulations. The exclusivity of the grievance/arbitration process does not exist for police officers.

However, from the plaintiffs perspective the more compelling of the considerations set out by Justice Cromwell are the latter two. The substance of the dispute in its essential character is a dispute over the meaning of the *Police Act* and its regulations. From the plaintiffs' review, it does not appear that the collective agreement includes any provisions regarding the demotion of a police officer who falls under the *Police Act.* The collective agreement does, however, include a provision for non-police officers: "The Region shall show just cause to demote, suspend, or discharge, for disciplinary and non-disciplinary reasons, members who are not included under the Police Act."...It would appear that the parties did not contemplate demotions except under proceedings taken under the *Police Act.*

Further, even if the parties had explicitly agreed that demotions could take place for administrative reasons, the plaintiffs would still say such an agreement constitutes a violation of the *Police Act.* A union and an employer cannot simply agree to establish provisions within a collective agreement that violates a statute and thereby become impervious to challenge. There must be some means for a union member to challenge provisions in a collective agreement where they believe a statute has been contravened. For example, if an employer and a union put a provision in a collective agreement that constitutes discrimination under the *Human Rights Act*, then an employee can take a complaint before the Human Rights Commission. It is submitted that likewise, if a police officer believes a union and an employer have put provisions in a collective agreement which violate the *Police Act*, there must be a means of having that dispute heard. The plaintiffs claim the ranks of Sergeant I and Sergeant II were not permitted under the *Police Act* regulations....The essential character of the dispute arises out of the legislation, not the collective agreement.

This is especially so when it is considered whether there is an effective remedy. The Defendants and Intervenor have suggested the plaintiffs could have brought an action against MAPP for failure to represent. However, such an action, if successful, would only have provided the plaintiffs' damages - it would not have remedied any statutory violations. Such a result can hardly be said to be an effective remedy.

[19] As noted by counsel for the intervenor, in her submission of November 17, 1998, ***s. 23(7)*** of the ***TUA*** provides a *"statutory freeze"* on terms and condition of employment once an application for Certification has been made and ***s. 35*** provides a "*similar statutory freeze in terms and conditions of employment where notice to commence collective bargaining*

has been given". ***Subsection (b)*** of ***s. 35*** recognizes an exception where the employer is able to obtain the consent of the *"certified or recognized bargaining agent"* or the *"Board"* to alter terms and conditions of employment. Counsel also suggests ***s. 36*** makes it clear that the bargaining agent has exclusive authority to represent employees in a bargaining unit in circumstances where an alleged breach of terms and conditions of employment has occurred.

[20] *Section 36* of the *TUA* provides that where the Minister of Labour of the Province of Nova Scotia, receives a complaint from a party to a collective agreement that another party to the collective bargaining has failed to comply with *s. 35*, they may refer the complaint to the Board and, in such circumstance, the Board is to inquire into the complaint and to do all things necessary to ensure compliance with *s. 35*. *Section 36*, therefore, vests jurisdiction in the Board to make the determination as to whether or not there has been a violation of *s. 35*, and secondly, to fix the appropriate remedy.

[21] Counsel references the decision of Chair Christie of the Board, in *Order No. 2372*, dated June 13, 1977, involving the ***Kentville Hospital Employees Association and Kentville Hospital Association***, as to the purpose of ***s. 35*** in *"maintaining the status quo"*.

> The purpose of *Section 33(b)* ***(now Section 35(b))*** is to maintain the status quo between an employer and his employees once notice to bargain has been given. The employer may not increase or decrease wages or "alter any other term or condition of employment" without the consent of the certified bargaining agent because to allow him to do so is inconsistent with the collective bargaining regime to which he had become subject by certification. In cases of hardship the consent of the Labour Relations Board is made available. That does not mean, however, that the general terms of employment already in force should not be given effect in relation to specific employees...

[22] Counsel for the intervenor, in her submission, continues:

> The Intervenor submits...the question of whether a term or condition of employment was changed by the employer is one within the exclusive jurisdiction of the Labour Relations Board as set out in the provisions of Section 35 and 36 of the *Trade Union Act.*
>
> The exclusive bargaining agent has the authority to either consent to a change, or alternatively to make a complaint to the Minister of Labour. The employer does not need to obtain the consent of individual employees for any change to terms and conditions of employment. The ability to consent has been transferred, by the *Trade Union Act*, to the certified bargaining agent.
>
> Whether the ability to pursue a breach of an employment contract was part of terms and conditions of employment prior to certification, clearly the *Trade Union Act* has taken away that right of individual employees. It is not a matter of the union and the employer "agreeing to take away common law rights prior to the conclusion of a collective agreement". It is expressly contemplated by Section 35 and 36 of the *Trade Union Act.*
>
> Employees are not left without a remedy. They may raise the issue of whether a term or condition of employment has been changed with the exclusive bargaining agent. If the union goes not agree that a term or condition of employment has been changed, then it may decide not to refer the matter to the Minister of Labour. If the union agrees that a term or condition of employment has been changed, it may make a complaint to the Minister of Labour. Alternatively, if the Union agrees that a term or condition of employment has changed, the union might decide not to make a complaint, but rather to agree to the change with the employer. In all cases, the certified bargaining agent makes those determinations, not the individual employees.
>
> If the employees do not like the actions of the certified bargaining agent, they have options like application for de-certification, or to sue the union for breach of its common law duty to represent employees. Employees are not left without a remedy.

[23] As noted, amalgamation occurred effective April 1st, 1996, although, as agreed in the agreed statement of facts, collective agreement negotiations between HRM and MAPP had commenced in January 1996. The plaintiffs are correct, that in September 1995

when the Board declared MAPP as the successor trade union in relation to the bargaining unit to be composed of former police personnel of the various municipal units, and at the time negotiations for a collective agreement commenced in January 1996, they were not employees of HRM. This only occurred on April 1, 1996. However, on that date they did become employees; they did become members of the bargaining unit and were such on April 12, 1996 when Chief MacDonald issued the *Department Order*. The *"status quo"* provided for in ***s. 35*** of the ***TUA*** therefore may be applicable. Whether the *Order* violated the provisions of the ***TUA***, the ***Police Act*** or any employment rights of the plaintiff is a matter to be resolved having regard to the procedures for such resolution established in the applicable labour relations legislation.

[24] If the plaintiffs are correct in asserting ***ss. 41*** and ***42*** of the ***TUA*** do not apply, because the order of the Chief of Police predated the collective agreement, or there is a conflict between the ***Police Act*** and another ***Act*** or the collective agreement, or the statutory freeze contained in the ***TUA***, does not preclude the plaintiff pursuing any common law rights in the courts, or that the dispute in its essential character does not arise out of the collective agreement but rather pursuant to the Regulations under the ***Police Act***, or that the exclusivity of the bargaining agent provisions in the ***TUA*** are not applicable because the plaintiffs' rights as police officers under the ***Police Act*** are individual as opposed to collective rights, these are matters that involve the threshold question of whether the question is itself arbitrable. As such, the decision of Justice Cromwell of the Nova Scotia Court of Appeal in ***Nova Scotia Union of Public Employees, Local 2 v. Halifax***

Regional School Board (1999), 171 N.S.R. (2d) 373, is informative as to the appropriate approach to be taken when there is such a threshold question.

[25] Recognition of the central role of the arbitration process in the scheme of collective bargaining labour relations was noted by Justice Cromwell in referencing the decision of Justice Estey, for the court, in ***St Anne-Nackawic Pulp and Paper Co v. C.P.U. Local 219,*** [1986] 1 S.C.R. 704, at p. 721:

> What is left is an attitude of judicial deference to the arbitration process. ... It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration ... is an integral part of that scheme, and is clearly the forum preferred by the Legislature for resolution of disputes arising under collective agreements. (emphasis added)

[26] Justice Cromwell, at para. 22, continues:

> In the cases of **Weber** and **O'Leary,** supra, the court has reaffirmed this view. Those cases establish an "exclusive jurisdiction" model for analyzing the effect of final and binding arbitration clauses. This model holds that, if the difference between the parties arises from their collective agreement, arbitration is the exclusive process for its resolution; the courts have no concurrent jurisdiction: see e.g., **Weber v. Ontario Hydro**, *supra* at p. 956 [S.C.R.]. The court has reinforced this approach by stressing that, in determining whether the dispute arises from the collective agreement, its essential character, not simply its legal characterization, must govern: see **Weber** at p. 956 [S.C.R.]. I conclude, therefore, that the pre-eminent role of the arbitration process is not simply a product of particular provisions, but is a central aspect of the overall scheme of collective bargaining labour relations.

[27] In the present circumstance, MAPP has consented to the order of the Chief of Police and this consent is evidenced by the fact the classifications were included in the Collective Agreement entered into on January 12, 1998. It would appear, as observed by Justice

Cromwell in ***Nova Scotia Union of Public Employees v. Halifax Regional School Board,*** *supra*, that as there, there has here been no determination by any arbitrator whether the complaints set out in the statement of claim are in fact arbitrable. Justice Cromwell, at para. 32, continues:

> This is an important aspect of the question of whether the court has jurisdiction. The interests of ensuring that matters do not fall between the two jurisdictions are better served by having a determination of arbitrability made first at arbitration. In that way, the court will know when it rules on the question of its jurisdiction the full implications of its decision.

[28] Justice Cromwell then continues at para. 33:

> In my view, each of the four factors just discussed supports the conclusion that, where there is doubt about the arbitrability of the dispute, that issue should generally be determined initially at arbitration. This view is mandated by the text of the collective agreement and the *Trade Union Act*. It also best reflects the central role of arbitration in collective bargaining labour relations, recognizes that arbitration is the forum best suited to conducting the necessary inquiry and helps ensure that no one, absent sound reasons, will be left with rights but no effective remedy.

[29] In addressing the limits of the court's jurisdiction, including where the union declines to proceed with an individual employee's grievance or settles it against the employee's wishes, Justice Cromwell at paras. 27 and 28, comments:

> I think it is of fundamental importance in **Weber** that the limits of court jurisdiction can only be understood in light of the breadth of arbitral jurisdiction. **Weber** was not a case in which it was suggested that <u>neither</u> the arbitrator nor the court would have jurisdiction to determine the rights of the parties. This is underlined by McLachlin, J.'s quotation in **Weber** from **St Anne-Nackawic** to the effect that matters "<u>addressed and governed</u>" by the collective agreement should not be pursued in the courts and that the courts should not be a "<u>duplicative</u> forum" (at pp. 952-953 [S.C.R.]). In **Weber**, there was no question that the grievance was arbitrable. A grievance was, in fact, pursued and settled.

> The question was which forum had jurisdiction. It was not suggested or contemplated that neither had jurisdiction.
>
> Of course, arbitral and court jurisdiction are not always the mirror image of each other; the correlation is not exact. In some cases, court action may be barred even though there is no remedy available through the arbitration process. For example, if a grievance is time barred, there may be no remedy available at arbitration and yet the court may also decline jurisdiction: **Piko v. Hudson's Bay Co.** (1997), 24 O.T.C. 238 (Gen. Div.). Similarly, a union may decide not to proceed with an individual employee's grievance or settle it against the employee's wishes and yet the court may not take jurisdiction in the individual's court action raising essentially the same complaint: **Bhairo v. Westfair Foods Ltd.** (1997), 118 Man.R. (2d) 172; 149 W.A.C. 172; 147 D.L.R. (4th) 521 (C.A.); **Callow v. Board of Education of School District No. 45 (West Vancouver) et al.** (1997), 86 B.C.A.C. 241; 142 W.A.C. 241; 29 B.C.L.R. (3d) 199 (C.A.). The premise of such decisions is that all of the employees' rights, substantive and procedural, in the given area are exhaustively codified in the collective agreement. There are no others to be asserted in court.

[30] Justice Cromwell, at para. 36 concludes his summary by stating:

> ...absent sound reasons to the contrary, courts should apply the general principle that arbitration, and not the court, is the forum for the initial determination of whether a matter is arbitrable.

[31] In concluding, at para. 37, he adds:

> Whether or not an arbitrator finds this dispute arbitrable at the end of the day, it is more respectful of the processes adopted by the parties and the Legislature and in the interests of sound decision-making in this key area of labour relations law to have the matter first addressed at arbitration in light of all the facts and circumstances of the particular situation. The arbitration process is better suited to that exercise.

[32] During the course of argument, it was suggested the plaintiffs may yet have a right to argue before the Commission that HRM has violated the ***Act.*** Whether the plaintiffs have such a right and whether given such a right their argument has merit, are not matters before this court. Nothing in these reasons is intended directly or indirectly to suggest

the plaintiffs do or do not have such a right or whether HRM has or has not violated the ***Act.*** Nor is it relevant if the plaintiffs have now, for any reason, lost the right to initiate the arbitration process. The only issue before this court is whether there is jurisdiction to entertain the proceeding brought by the plaintiffs and, having concluded there is no jurisdiction, it is not for this court to comment on the merits or lack of merits of the position of any party in the event any such alternative proceeding may be brought, nor not having been brought in time, has now been lost.

[33] Justice Cromwell, in ***Nova Scotia Union of Public Employees v. Halifax Regional School Board****, supra*, at para 40, in addressing the question of whether the appropriate relief was to stay or strike the proceeding, made the following comments:

> In this case, I have addressed only one question. It is whether the court action should not proceed because an arbitrator, and not a court, should determine at first instance the issue of arbitrability. In light of my conclusion, it is not necessary for me to address the broader aspect of the employer's substantive argument that the court has no jurisdiction regardless of the conclusion of the arbitrator on the question of arbitrability. That issue not having been decided in this appeal, it will be open to the parties to raise it again in the future, if for example, an arbitrator finds the dispute not to be arbitrable. Out of an abundance of caution that these reasons not be seen as settling anything other than the narrow issue which they address, I think the wise course is to direct a stay of the action which could be lifted by a judge of the Supreme Court in appropriate circumstances in the future. So as to avoid the possibility of the action being suspended indefinitely, I would add the proviso that if no application is made to lift the stay within two years of today's date, the action will stand dismissed.

[34] Similarly, the only issue addressed in these reasons is whether this court action should not proceed because an arbitrator has not, in the first instance, determined the issue of arbitrability. Broader issues as to the substantive rights of the plaintiffs, if any, have not been addressed. As a consequence, I would, as Justice Cromwell did, stay the present

proceeding, pending submission to arbitration or any other form of proceeding that is permitted under the statutory enactments applicable to the parties and the disputes in question. Also, so as to avoid the possibility of this action being suspended indefinitely, I would add the proviso that if no application is made to lift the stay within two years of the date of these reasons, then this action will stand dismissed.

J.