Date: 20010627
Docket: CA 168292
CA 168278

NOVA SCOTIA COURT OF APPEAL

[Cite as: Nova Scotia Union of Public Employees v. Halifax Regional School Board, 2001 NSCA 106]

Roscoe, Bateman and Cromwell, JJ.A.

BETWEEN:

NOVA SCOTIA UNION OF PUBLIC EMPLOYEES

Appellant
Respondent on Cross-appeal

- and -

HALIFAX REGIONAL SCHOOL BOARD

Respondent
Appellant on Cross-appeal

REASONS FOR JUDGMENT

Counsel:	Nancy L. Elliott for the appellant John C. MacPherson, Q.C. for the respondent
Appeal Heard:	May 10, 2001
Judgment Delivered:	June 27, 2001
THE COURT:	Appeal dismissed and cross-appeal allowed per reasons for judgment of Cromwell, J.A.; Roscoe and Bateman, JJ.A. concurring.

CROMWELL, J.A.:

I. FACTS AND PROCEDURAL HISTORY:

[1] On June 30th, 1994, the **Public Sector Compensation (1994 -97) Act**, S.N.S. 1994, c. 11 was given Royal Assent with retroactive effect to April 29th, 1994. The **Act** provided that, between April 29th, 1994 and October 31, 1997, collective agreements could not be changed, pay rates could not be increased and that, effective November 1, 1994, pay rates would be reduced by 3%.

[2] On July 22nd, 1994, the appellant (the union) and the respondent (the employer) signed a collective agreement (the main agreement) and a separate letter (the July 22 letter) which has been found to be part of it. (Both parties are in fact successors of the original signatories, but nothing turns on that for the purposes of this appeal.) The main agreement provided for pay raises to be effective January 1, 1995 and January 1, 1996. These agreed upon pay rates could not become operative because of the wage freeze provisions in the **Act**. The July 22 letter provided that "... monies (wage increases) that were to have been paid to employees pursuant to this collective agreement in years 2 and 3 will be paid to employees as a lump sum payment within 15 days following ..." the expiry of the wage freeze on October 31, 1997. (emphasis added)

[3] Following expiry of the statutory wage freeze in October of 1997, the union, on behalf of its members, demanded payment as agreed to in the July 22 letter. The employer took the position that such payment would contravene the provisions of the **Act**. The union sued in the courts but that action was stayed on the basis that the union's complaint should be submitted to arbitration. In accordance with that ruling, the union filed a grievance dated November 17, 1998, which stated that "the employer had failed to pay monies owed to the grievors pursuant to a letter dated July 22nd, 1994 ... The grievers seek payment of the sums owed." (emphasis added)

[4] This grievance proceeded to arbitration before Milton Veinot, Q.C. who, in a preliminary award dated December 6th, 1999, ruled on a number of objections to his jurisdiction, but did not address the merits of the grievance.

[5] Only one of the main issues addressed by the arbitrator is relevant to this appeal. The employer argued before the arbitrator that the July 22 letter was contrary to the **Act** and could not be enforced. The arbitrator found that although the letter was contrary to the **Act,** this did not necessarily preclude a monetary remedy at arbitration in favour of the union for the employer's

failure to pay as required by the July 22 letter. In reaching the latter conclusion, the arbitrator relied on a series of judicial decisions which addresses the consequences of a finding that a contract is, in various senses, "illegal".

[6] There was some disagreement between the parties during argument in this Court concerning the true basis of the arbitrator's ruling. In my view, it is clear that the issue which he intended to address was whether the July 22 letter, although illegal, might be enforceable through arbitration. I note, for example, that the arbitrator defined the dispute before him as being concerned with "... whether employees in this bargaining unit will get paid at an agreed upon rate, at an agreed upon time, for work performed for their employer." (emphasis added) He observed that, pursuant to the collective agreement, both he and the union were constrained by the claim made in the grievance which, as noted, was for payment of the sums owed to the employees pursuant to the July 22 letter. His discussion of the pertinent authorities is presented under the heading "Can there be remedial action of any kind after a finding of contract illegality." The arbitrator addressed the employer's submission that "... because the July 22, 1994 document is contrary to the statute, it cannot form a part of the agreement and that the matter ... [is] thus inarbitrable." He expressed his conclusions as follows:

> Accordingly, a finding of contract illegality does not necessarily foreclose all remedial action. The law will act in some ways in certain circumstances. Since these are matters of the general law, this must also be the case in the law of the collective agreement. In *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583 (S.C.C.), Madame Justice McLachlin quoted the well known remark of Denning, L.J. - that there "is not one law for arbitrators and another for the Court, but one law for all" - for its full force and effect. See: p. 603. I therefore conclude that as an arbitrator I must recognize the same exceptions to the rule that the law refuses to assist either party to an illegal agreement.
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> ...
>
> An order for the payment of money is within the sphere of remedies that this kind of a Board is authorized to grant. For one thing, arbitrators under collective agreements make orders for the payment of money on a routine basis. Collective agreement rights' arbitrators could not function for a moment without such a power. For another, Article 24.03 requires a determination of the dispute and a "final and binding decision." The language of Article 24.03, taken as a whole, implies that I must have the tools to "determine" the dispute in this sense. Article

> 23.04 explicitly refers to the power to make an order for the payment of money in reinstatement matters, a reference I take as being illustrative rather than exclusive. Thus, I find that if a case were made out for it, I could order the kind of remedy sought - an order for the payment of money.

[7] All of this is only consistent with the view that the arbitrator was addressing the issue of whether the July 22 letter might be enforceable at arbitration although illegal.

[8] The union and the employer sought judicial review of the arbitrator's award before Kelly, J. The learned judge dismissed both applications. He upheld the arbitrator's conclusion that the July 22 letter was unlawful. He also upheld the arbitrator's finding that the illegality of the contract might not preclude a remedy within the arbitrator's jurisdiction. The judge summarized the arbitrator's decision on this point as follows:

> ... 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.

[9] Kelly, J. concluded his reasons upholding this aspect of the arbitrator's award as follows:

> 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. (emphasis added)

[10] The union now appeals the finding that the July 22 letter is unlawful and the employer cross-appeals the finding that some remedy pursuant to the July 22 letter might be available to the union at arbitration.

II. ISSUES:

[11] There are two issues to be resolved: (i) Is the July 22, 1994 letter contrary to the **Act**? and (ii) If so, does this preclude the arbitrator from granting a remedy for the payment of money due under the letter?

III. ANALYSIS:

1. Is the July 22 letter contrary to the Act?

[12] In my respectful view, both the arbitrator and Kelly, J. correctly concluded that the July 22 letter is contrary to the **Act**. While certain other sections of the **Act** were considered and relied on by the arbitrator and the learned judge, I am respectfully of the view that s. 12 of the **Act** provides a complete answer to this issue:

> 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.
> (emphasis added)

[13] The July 22 letter is part of a compensation plan as defined in the **Act** and to which the **Act** applies. The question is whether it "provides for pay rates in excess of pay rates permitted by this **Act**."

[14] The wage increases provided for in the main collective agreement were to take effect on January 1, 1995 and January 1, 1996. In s. 8(2) the **Act** provides:

> s. 8(2) ... There shall not be any increase in the pay rates in a compensation plan between April 29, 1994, and October 31, 1997.

It follows that the wage increases, as provided for in the main collective agreement, are "... pay rates in excess of pay rates permitted by this Act."

[15] As noted, the July 22 letter provides that the wage increases that were to have been paid to employees pursuant to the main collective agreement would be paid as a lump sum following the expiry of the freeze. That is what the union demanded of the employer by letter dated October 3, 1997. The union's letter noted that the parties had agreed "... that monies from January 1, 1994 - January 1, 1996, would be paid by November 15, 1997" and set out the union's interpretation of the employer's obligation:

> To properly pay out the monies owing, the Board must go back to January 1, 1995 and calculate the number of hours worked and pay to the employees a lump sum based on the year 2 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 on the hours worked since then based on the year 3 rate in the Collective Agreement. (p. 175 ab)

[16] Ms. Elliott, in her able submissions, characterized the money due under the July 22 letter as something other than payments of pay rates in excess of the pay rates permitted by the **Act**. However, with respect, it is clear that what the July 22 letter provided for and what the union demanded in reliance on it was the payment of wages at the rates set out in the main collective agreement. Those pay rates were in excess of the pay rates permitted by the **Act**. According to s. 12, the July 22 letter is, therefore, of no force or effect.

[17] I would dismiss the union's appeal.

2. Is the arbitrator precluded from granting a remedy for the payment of money due under the July 22 letter?

[18] As I read the award of the arbitrator, he decided that the law relating to the consequences of an illegal contract is in a state of flux and, therefore, the July 22 letter might be enforceable at arbitration in certain circumstances. Kelly, J. agreed with this conclusion. In my respectful view, both erred in law.

[19] The errors of the arbitrator and the judge have the same origin: failure to distinguish, on the one hand, between "illegal" contracts which are nonetheless enforceable and, on the other hand, claims for restitution to relieve against the consequences of contracts which are both illegal and unenforceable. In my view, an arbitrator acting under a collective agreement may well have authority to address the first of these types of cases. However, an arbitrator has no authority to fashion a remedy where the agreement, which is the foundation of his or her jurisdiction, is both illegal and unenforceable.

[20] Contracts may be "illegal" in several different senses of the word. Common law illegality includes, for example, contracts which are in restraint of trade or involve the commission of a criminal offence or a tort. Statutory illegality may be based on the breach of a myriad of regulatory provisions, prohibiting activities ranging from the sale of ungraded apples to the performance of services by unlicensed persons: see S.M. Waddams, *The Law of Contracts* (4th, 1999) at § 572. The traditional rules are that all illegal contracts are unenforceable and money or property transferred on the strength of them cannot be recovered. However, courts have increasingly sought to avoid the injustice which sometimes flows from the strict application of these rules.

[21] We are here concerned with statutory illegality. Cases of statutory "illegality" fall into two main categories. The first consists of situations in which the statute giving rise to the "illegality" specifies its consequences for the contract; the second consists of situations in which the statute does not do so. In his treatise *The Law of Contracts* (4th, 1999), Professor S.M. Waddams observes at paras. 562 - 563:

> In some cases, the statute itself specifies the consequences of illegal agreements ... In such cases, the legislature has directed its mind to the consequences of the illegality and made provision.
>
> Far more often, however, the statute makes no provision for the consequences of an illegal agreement ... Here the courts, it is suggested, have themselves to decide the consequence.
>
> (emphasis added)

[22] Where the statute does not specify the consequences of the contract's "illegality", the courts must determine whether the "illegality" makes the contract unenforceable. I respectfully adopt the following description of the Court's role in this sort of case from Peter D. Maddaugh and John D. McCamus, *The Law of Restitution*, (1990) at 346-47:

> ...In contemporary circumstances, the most interesting question is whether an agreement which is, in some sense, in conflict with a statutory scheme is thereby rendered unenforceable. In many instances, the regulatory scheme in question will stipulate that the agreement in question is unenforceable. Where this is not so, the problem is obviously more difficult, but it appears to be generally accepted that the proper method of analysis is that set out in the leading decision of [*St. John Shipping Corp. v. Joseph Rank Ltd.*, [1957] 1 Q.B. 267]. In that case, Devlin J. approached the issue by determining whether, in the light of the purposes and structure of the statutory scheme and against the background of the general policy of the common law of enforcing contractual obligations, courts should exercise their discretion to impose on the parties the common law sanction of rendering their agreement unenforceable.
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> (emphasis added)

[23] This point was discussed in **Sidmay Ltd. et al. v. Wehttam Investments Ltd.**, [1967] 1 O.R. 508 (C.A.), aff'd 69 D.L.R. (3d) 336 (S.C.C.), on which the arbitrator relied. The case concerned a mortgage alleged to be illegal because the mortgagee was not registered under the relevant legislation. The Court found that the registration provisions did not apply to the mortgagee. However, it went on to address the question of whether the mortgage would

have been unenforceable if the legislation had so applied. Kelly, J.A. said at p. 525:

> Even if I had been satisfied that Wehttam had been at the relevant times operating a business in contravention of s. 133(1), in my opinion this would not have served to make illegal the mortgage transaction in question. I have come to this conclusion for two principal reasons: first, I find in the Act itself indications of precise and deliberate avoidance of any reference to interference with contractual obligations incurred in the course of a prohibited business. ... Second, the underlying purpose of the Act to afford greater security to the depositors, creditors and security holders of the corporation would be defeated if its assets become depleted by the inability to recover from the borrower the money lent on the security of real estate.
>
> ... It is my opinion that this statute, read as a whole, must be interpreted as indicating an intention not to affect the validity of any contractual obligation arising from a loan made on the security of real estate even if that loan were made in the course of a business, the transaction of which by an unregistered corporation is prohibited.

(emphasis added)

[24] In short, where the governing statute does not specify the consequences of contractual illegality, the courts must make that determination and, in doing so, they should interpret the statute purposively so as to further the legislature's objectives and avoid injustice.

[25] Where the consequences of illegality are not specified by statute, courts have also developed a number of "exceptions" to the general common law rules that such contracts are unenforceable and that money or property exchanged in reliance on them cannot be recovered. Some of these exceptions are founded on the discretion of the court in relation to declaratory relief (see, e.g., **Sidmay, supra**, per Laskin, J.A. at p. 535 and Kelly, J.A. at p. 531) while others are founded on broader equitable considerations (see, e.g., **Zimmerman v. Letkeman**, [1978] 1 S.C.R. 1097).

[26] In addition to these "exceptions", there is also the possibility that an independent action based on unjust enrichment or *quantum meruit* may lie even though the contract is unenforceable.

[27] In other situations, however, the governing statute does specify the consequences of contractual illegality. Where this is so, the courts are obliged to carry out the statutory directive.

[28] In **Meyers v. Freeholders Oil Co. Ltd.**, [1960] S.C.R. 761 at 774 - 5, Martland, J. said:

> The determination of the effect of the breach of a statutory provision upon a contract is often a difficult one and must, of course, depend upon the terms and the intent of the provision under consideration. In some cases the statute clearly forbids the making of a certain kind of contract. In such a case the contract cannot be valid if it is in breach of the provision. ...
>
> On the other hand, some statutes have been construed as only imposing a penalty, where the Act provides for one, although that is not necessarily the result of a penalty provision being incorporated in the Act. ...
> (emphasis added)

In **Beer v. Townsgate I Ltd.** (1997), 36 O.R. (3d) 136 (C.A.) (application for leave to appeal to S.C.C. dismissed April 30, 1998), the Court stated at p. 144:

> I think it is significant that while the **Act** [i.e. the Ontario **New Home Warranties Plan Act**, R.S.O. 1980, c. 350, s. 6 providing that no one is to act as a vendor or builder unless registered under the **Act**] provides for a financial penalty for a breach of section 6, it does not expressly provide that the contract so made is unenforcible. If a statute does not expressly deprive a party of his or her rights under the contract, the question is whether, having regard to the purpose of the **Act**, and the circumstances under which the contract was made, and to be performed, it would be contrary to public policy to enforce it because of illegality.
> (emphasis added)

Finally, I note that Robertson, J.A.'s analysis and conclusion in **Still v. M.N.R.** (1997), 154 D.L.R. (4th) 229 (F.C.A.) that courts ought to determine the consequences of contract illegality are premised on the absence of statutory provisions addressing the question: at § 46.

[29] The present case falls into this second category. The **Act**, in s. 12, clearly spells out the consequences of illegality: the illegal provision is to have no force or effect. This legislative direction must be given effect.

[30] What the arbitrator and Kelly, J. decided is that, even though the provision in the contract between the parties is unenforceable by virtue of an explicit statutory provision to that effect, an arbitrator may be able to provide some monetary remedy for its breach. In my respectful view, this conclusion overlooks one critical point.

[31] The authority of an arbitrator acting under a collective agreement is confined to disputes between the parties arising from the interpretation, application, administration or alleged violation of that collective agreement. If the

relevant provision of the collective agreement is declared by statute to be of no force or effect, the jurisdiction of the arbitrator in relation to it is at an end.

[32] It is fundamental to rights arbitration under collective agreements that the agreement is the "... source of the subject-matter that may come within the arbitrator's jurisdiction": Donald J.M. Brown, Q.C. and David M. Beatty, *Canadian Labour Arbitration*, (3rd, looseleaf edition updated to November 2000) at 2:1200. While the arbitrator's role extends to applying statutes and general legal principles to disputes properly submitted to arbitration and to fashioning remedies for beach of the collective agreement, an arbitrator is "... charged solely with settling disputes arising out of the 'interpretation, application, administration or alleged violation' of the collective agreement": Brown and Beatty, **supra** at 2:1200.

[33] With great respect to both the arbitrator and the judge, both erred when they concluded that an arbitrator has jurisdiction under the principles set out in **Weber v. Ontario Hydro**, [1995] 2 S.C.R. 929 to apply "the common law equitable principle" of restitution in this case. This proposition is unduly broad and, in the context of this case, in error.

[34] It is true that cases such as **Weber**, **New Brunswick v. O'Leary**, [1995] 2 S.C.R. 967 and, more recently, **Regina Police Association v. Regina (City) Board of Police Commissioners**, [2000] 1 S.C.R. 360 take an expansive approach to the jurisdiction of arbitrators. They also make clear, however, that arbitrators only have jurisdiction over disputes which are expressly or implicitly rooted in the collective agreement or statutes or other laws which the arbitrator is bound to apply in relation to the agreement. As Bastarache, J. said on behalf of the Court in **Regina Police, supra**, at § 25:

> ... the decision-maker must determine whether, having examined the factual context of the dispute, **its essential character concerns a subject-matter that is covered by the collective agreement.** (emphasis added)

[35] This principle is illustrated by the cases concerning the jurisdiction of arbitrators to resolve disputes about insurance coverage provided by employers to bargaining unit members. A recent example is **London Life Insurance Co. v. Subreuil** (2000), 190 D.L.R. (4th) 428 (Ont. C.A.) (application for leave to appeal dismissed [2000] S.C.C.A. No. 496). The issue was whether an employee grievance concerning denial of long-term disability benefits was arbitrable. The collective agreement required the employer to maintain a policy of such insurance and the employer did so.

The Court concluded that the grievance was not arbitrable because the dispute was not between the employer and the employee arising out of the collective agreement but between the employee and the insurance company. The breach of obligation, if any, was the insurer's, not the employer's because the employer had maintained the policy as required under the collective agreement. The Court noted that, where the collective agreement does not set out or incorporate the benefit sought to be enforced or (as in that case) only requires the employer to pay the premiums associated with an insurance plan, a benefits entitlement grievance is not arbitrable. Goudge, J.A. for the Court at § 35 held that the grievance in issue in that case did not concern "... a dispute arising out of the interpretation, application, administration or violation of the collective agreement, which has admittedly been fully complied with." In short, the authority of the arbitrator must be rooted, expressly or by implication, in the collective agreement or relevant statutes.

[36] In the present case, the only breach of the collective agreement alleged is the failure to pay money under a provision of the collective agreement which, by statute, is of no force or effect. No other breach of the collective agreement has been alleged or even suggested. The remedial authority of an arbitrator must be founded on the collective agreement or some other duty which the arbitrator is required to enforce as between the parties. There is no arbitral remedial authority "at large". McLachlin, J. (as she then was) made this clear in **Weber v. Ontario Hydro**, [1995] 2 S.C.R. 929 when she stated (at § 55):

> [The exclusive jurisdiction of the arbitrator] ...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*.
> (collective agreement)

[37] Here, as noted, the only provision of the collective agreement which is alleged to have been breached is the July 22 letter. It is unenforceable by statute. If the provision is of no force or effect, it cannot be breached. There can be no monetary remedy at arbitration based on an alleged breach of an unenforceable provision of a collective agreement.

[38] It follows that I would allow the cross-appeal by the employer, set aside the order of Kelly, J. dismissing the employer's application for judicial review

and in its place grant an order quashing the arbitrator's award and dismissing the grievance.

[39] It is not necessary to decide in this case whether an arbitrator has authority to address issues arising under illegal provisions of collective agreements where, unlike the present case, the consequences for the contract of the illegality are not specified by statute. Nothing I have said here addresses the question of whether a court may grant a restitutionary remedy even where the statute does specify the consequences of the illegality: see Maddaugh and McCamus, **supra** at 346 ff and **Safeway Shouldering Ltd. v. Nackawic (Town)** (2001), 196 D.L.R. (4th) 659 (N.B.C.A.).

[40] I will briefly note other issues touched on in the written and oral arguments.

[41] The Court raised an issue relating to s. 6 of the **Act**. It provides that every compensation plan in effect immediately before April 29, 1994 is continued until November 1, 1997. The main collective agreement, as noted, was signed on July 22nd, 1994, but was stated to be effective on January 1st, 1994. Both parties have assumed throughout — and have acted on their assumption — that the main collective agreement was validly entered into and did not run afoul of the provision in s. 8(1) of the **Act** that no collective agreement could be changed between April, 1994 and the end of October, 1997. Upon reflection, counsel for the employer submitted in oral argument that this might well not be the case. However, in view of my conclusion that s. 12 of the **Act** is a complete answer to the issues raised on this appeal, it is not necessary to address this point further. In view of the fact that the parties have acted on the basis of this agreement for several years, it is not desirable to do so.

[42] There were submissions about whether this Court should adopt the so-called "classical" or the so-called "modern" approach to the illegality of contracts: see **Still v. M.N.R. , supra**. In my view, it is not necessary to resolve this question given my conclusion that s. 12 specifies the consequences of illegality in this case and there is no provision of the collective agreement apart from the unenforceable July 22 letter which is allegedly breached.

[43] It was submitted by counsel for the employer that it is unlawful under the **Act** for parties to agree, even after the expiry of the freeze, to pay wages lost during the freeze. In my view, it is not necessary to resolve this issue. Here, the July 22 letter was signed before the expiry of the freeze period provided for in the **Act**.

[44] As stated, I would dismiss the appeal, allow the cross-appeal and make the orders as I have set them out in § 38 above. The employer should have its costs of both the appeal and the cross-appeal which I would fix, in total, at $2,500.00 inclusive of disbursements.

[45] I would be remiss if I did not record how much we were assisted in consideration of this difficult case by the thorough and lucid reasons of the arbitrator, the careful analysis of the learned Chambers judge and the skilful arguments of both counsel in their oral and written submissions.

Cromwell, J.A.

Concurred in:

Roscoe, J.A.
Bateman, J.A.