IN THE SUPREME COURT OF NOVA SCOTIA

**Citation:** Nova Scotia (Transportation and Public Works) v.
Canadian Union of Public Employees, Local 1867, 2004 NSSC 211

**Date:** 2004 12 15
**Docket:** S.H. 220214
**Registry:** Halifax

**Between:**

The Department of Transportation and Public Works,
representing Her Majesty the Queen in Right of the Province of Nova Scotia

Applicant

and

CUPE Local 1867, representing the Nova Scotia Highway Worker's Union

Respondent

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DECISION

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**Judge:** The Honourable Justice Gerald R. P. Moir

**Date Heard:** 18 August 2004

**Counsel:** Dale A. Darling, Counsel for the Applicant
Lionel G. Clarke, Counsel for the Respondent Union

**Moir, J.:**

[1] The collective agreement between CUPE Local 1867, Nova Scotia Highway Workers Union and the Province of Nova Scotia, Department of Transportation and Public Works expired two years ago. Bargaining continued into May 2003 when the parties were referred to conciliation. In December 2003 the conciliator concluded that the parties could not reach an agreement. The Highway Workers Union applied to the Highway Workers Employee Relations Board for the appointment of an arbitration board and to settle arbitrable items. The provincial government contended:

> a) Only the Nova Scotia Court of Appeal has jurisdiction to determine which issues are arbitrable.
>
> b) In any case, certain of the issues proposed by the Highway Workers Union are not arbitrable.
>
> c) The Union nominee for the arbitration board gives rise to a reasonable apprehension of bias.

The Board provided a written decision in March 2004. The Board unanimously rejected the government's arguments on jurisdiction and bias. The Board unanimously accepted the government's position that union proposals respecting Article 10 concerning adjudication of grievances, Article 13 concerning allocation to vacancies according to seniority and Article 29 concerning a special program for street

exchanges were not arbitrable. The Board unanimously accepted that proposed amendments to a classification and rates of pay schedule in the expiring collective agreement were arbitrable. And, by a majority of two to one, the Board accepted the union's position that proposals concerning article 14 on severance pay were arbitrable. In that regard, the Board noted an exception to its position that Article 29 is not arbitrable. It said, "We generally support the Employer's view, except in relation to Article 29.01(d) which must be considered by the Arbitration Board in its deliberations on the Union's Article 14 proposals."

[2] The provincial government seeks review on all questions that were decided against it: jurisdiction, bias and the arbitrability of the schedule for rates of pay, Article 14 and Article 29.

## JURISDICTION

[3] For the government, Ms. Darling submits that "under the *HWCBA*...whether a matter fits within the arbitrable terms and conditions of the Schedule to the Act...is determined by the Court of Appeal...". Mr. Clarke, counsel for the union, says "this is a straightforward issue of statutory interpretation" and he agrees that the standard

on review is correctness, “the Board is required to be correct in the event of judicial review.”

[4] The fundamental approach to statutory interpretation in Canada is as expressed by Professor Driedger in the first and second editions of his famous text: *Barrie Public Utilities* v. *Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476 para. 20 and 86; *Smith* v. *Nova Scotia*, [2004] N.S.J. 343 (CA) para. 79. The meaning of a statute and of each enactment in it depends on the words chosen by the legislators, which the courts cannot override by referring to object or purpose. However, the words are to be read in their full context and not in literalist isolation. Context includes the critical elements of the statute’s scheme and purpose. Thus, the words are to be given their grammatical and ordinary meanings when read harmoniously with the scheme and purpose of the statute. The instance upon context in Driedger’s approach to statutory construction can be traced to the work of Dr. J. A. Corry in the early 1930's and it may be that this approach was influenced by the New Criticism in English Literature. See Elmer A. Driedger, *The Constructions of Statutes*, 2ed (Butterworths, Toronto, 1974), p. ix and p. 203 - 234. This instance upon context frees us from literalism by bringing purpose and other elements of context to bear upon our reading of the words chosen by the Legislature while it also avoids that which is constitutionally impermissible,

changing the language of the Legislature to accord with a judicial assessment of purpose or reasonableness. See 2ed p. 62-63 for Professor Driedger's rejection of purpose as dominant and 2ed p. 63 - 64 for his rejection of literalism.

[5] The authoritive acceptance of Driedger's theory lends weight to his method of construction (2ed. p. 81) although it is only a loose guide. So, I intend to determine the "straightforward issue of statutory interpretation" according to Professor Driedger's fundamental theory of statutory construction and with some guidance from his method of statutory construction.

[6] Historical Background and Purpose. Counsel tell me that there was no collective bargaining legislation governing relations between highway workers and the provincial government before 1997. Until then, the rules for collective bargaining were set by Order in Council. That is, they were set unilaterally by one of the parties, the government. This unsatisfactory situation was addressed through enactment of the *Highway Workers Collective Bargaining Act*, S.N.S. 1997 (2nd Sess.), c. 1, later amended by S.N.S. 2001, c. 4, s. 9. The preamble gives some information about the historical context:

> WHEREAS the Department of Transportation and Public Works, and its predecessors, and highway workers employed in the Department have governed their relations through collective bargaining since before 1973;
>
> AND WHEREAS the highway workers have been employed under a series of collective agreements between the Minister of Transportation and Public Works, and the Minister's predecessors, and the Nova Scotia Highway Workers Union, currently represented by CUPE Local 1867, and authorized by Order in Council 73-41;
>
> AND WHEREAS the Department and the Union are in agreement that their existing and continuing relationship should be put on a more secure foundation through collective bargaining legislation that is consistent with legislation applying to other unionized employees of Her Majesty the Queen in right of Nova Scotia.

[7] A purpose of this statute is to provide for collective bargaining between highway workers and the government, but that is not a satisfactory exposition of its whole purpose. The Legislature chose to enact a special statute and to create a special Board rather than to leave collective bargaining with this group of workers to the *Civil Service Collective Bargaining Act* and the Civil Service Employee Relations Board. Like the *Civil Service Collective Bargaining Act,* the *Highway Workers Collective Bargaining Act* seeks to provide a regime for collective bargaining and for arbitration instead of the worker's right to strike and the employer's right to lockout. The purpose of this *Act* is to provide a collective bargaining scheme and compulsory arbitration for the government and highway workers exclusively.

[8] *Scheme.* This statute adopts a conventional system for collective bargaining between government workers and government, but without rights of strike or lockout. The status of the Nova Scotia Highway Workers Union, CUPE Local 1867 is preserved by subsection 4(1), but section 4 goes on to provide for substitution, with the Labour Relations Board conducting the vote. The legislation provides for commencement of collective bargaining upon notice within appropriate times (s. 19). It provides for good faith bargaining, "authorized representatives...shall make every reasonable effort to conclude...a collective agreement": s. 20. The *Act* provides for conciliation in s. 21. It prohibits lockouts and strikes: s. 40 and s. 41. Instead, it provides a scheme of compulsory arbitration. As for administration of collective agreements, this statute provides for grievance of rights disputes before an adjudicator or adjudication board. Otherwise, it assigns responsibilities sometimes left to rights arbitrators and certain administrative responsibilities to an administrative board that deals exclusively with relations between government and highway workers.

[9] The provisions for interest arbitration and the provisions respecting the Highway Workers Employee Relations Board bear most directly on the issues. Let us start with the general provisions for the Board. The Province makes the appointments after consulting the union: s. 5(1), (2), (3), and (4). The Board has the

powers and immunities of a commissioner under the *Public Inquiries Act* and it is given broad discretionary powers to receive evidence and other information: s. 5(7) and (8). The Board is obligated to "give an opportunity to all interested parties to present evidence and make representation[s]": s. 5(9). The Board may make orders and they may be enforced as orders of this Court: s. 9.

[10] Section 12 of the *Act* confers certain substantive powers upon the Board, such as to determine whether a person is an employee, whether there is a collective agreement, whether a person is bound by the collective agreement and whether persons have engaged in activities prohibited by certain sections of the *Act.* On these matters, "the Board's decision is final and binding": s. 12(1). Other powers of the Board concern conciliation, interest arbitration (defined as "arbitration" by s. 2) and rights arbitration (defined as "adjudication" by s. 2). Interest arbitration is of direct importance to the issues.

[11] As noted, the statute forbids lockouts and strikes. Final resolution of impasses is left to arbitration. Sections 24 to 28 provide the Board with various powers in respect of the initiation of arbitration. It also has powers after arbitration, such as to amend the arbitrable award. Subsection 33(5) provides:

> The Board may...amend the arbitral award if it is shown to the satisfaction of the Board that the arbitration board has failed to deal with any matter and disputes referred to the arbitration board or that an error is apparent on the face of the arbitral award.

As regards initiation of arbitration, the Board's powers arise "[w]here the Employer and the union have bargained collectively with a view to concluding a collective agreement but have failed to reach agreement": s. 24(1) The party requesting arbitration must provide "a list of arbitrable terms it claims are in dispute": s. 24(2) (a) and (b). It is not entirely clear, but s. 24(4) appears to require the other party to present its list of arbitrable terms. Under s. 25(1)(b) the Board has power to establish an arbitration board if it is satisfied on each of four points:

> (i) there are arbitrable terms and conditions of employment within the meaning of the Schedule to this Act to refer to an arbitration board,
>
> (ii) the arbitrable items can satisfactorily be considered together,
>
> (iii) it is an appropriate time to refer the matter to an arbitration board, and
>
> (iv) the dispute is a proper one to refer to an arbitration board.

There is a process for appointing arbitration board members, which culminates in a notice from the Highway Workers Employee Relations Board to the chairperson of

the arbitration board by which "the Board...shall...establish the members as an arbitration board": s. 28(1)(a).

[12] *Language of the Specific Enactments.* In the same notice as constitutes the arbitration board, the Highway Workers Board is required to "list the arbitrable items in dispute to be resolved by the arbitration board": s. 28(1)(b). The arbitration board must "in its award deal with each arbitrable item in dispute": s. 29(1). Section 45 provides:

> (1) The question as to whether or not a matter is a matter within the meaning of arbitral terms and conditions listed in the Schedule to this Act is a question of law.
>
> (2) An arbitration board, adjudicator or an adjudication board may, of its own motion or on application of the Employer or the Union, state a case in writing for the Nova Scotia Court of Appeal upon any question that is a question of law.
>
> (3) A like reference to that contained in subsection (2) may also be made by the Board.
>
> (4) The Court of Appeal shall hear and determine questions of law arising as a result of a stated case taken pursuant to subsection (2) or (3) and remit the matter to the arbitration board, the adjudicator, the adjudication board or the Board, whichever is appropriate under the circumstances with the opinion of the Court thereon.

The Schedule referred to in s. 28(1)(b) and s. 45(1) is a list of: e.g. "Wages and salaries", "Pay procedures on promotions, demotion, reclassification and increments", "Hours of work", "Overtime compensation" and so on.

[13] *Conclusion.* The position of the government is that the power to determine whether a term or condition is arbitrable lies exclusively with the Court of Appeal pursuant to s. 45(4) of the *Act.* In my assessment this interpretation does not accord with the words of s. 45(4) and s. 28(1)(b) when understood in context.

[14] The words of section 45 do not provide for exclusive original jurisdiction in the Court of Appeal. Rather, s. 45 calls for a stated case, which is a procedure sometimes available to courts of original jurisdiction by which they might refer a "question of law" to a higher court for determination. Although such procedures were commonly provided in rules of procedure (eg. *Civil Procedure Rule* 27.06) and in statutes constituting trial level courts and tribunals, resort to them has been limited in the past few decades. Such provisions do not imply original jurisdiction. Rather, the power to "state a case" implies that the original jurisdiction resides with the tribunal having the power to state the case.

[15] Context denies the government's interpretation of section 45. The legislation provides that the question of arbitrable issues is a question of law, but even the Legislature cannot change the tides. Each of the disputed issues involves a factual

background without which one cannot determine whether they are arbitrable. The most section 45(1) accomplishes is to provide an indication of legislative intent as to standards upon review. To place this in context, the Act empowers the Board, not the Court of Appeal, to hear evidence: s. 5(7) and (8). The Court of Appeal is only abnormally involved in fact finding. Subsections 5(7) and 5(8) provide for determinations of fact in the normal way.

[16] Contrary to the government's position, counsel for the union submits and I accept that s. 28(1)(b) empowers the Board to determine arbitrable issues. This fits with the immediate scheme, which has the parties submitting to the Board, not the Court of Appeal, their positions on the issues for arbitration. And, it fits with the Board's power to receive evidence and accept other information. The word "list" in s. 28(1)(b) does not imply the Board is limited to clerically making up a list after the Court of Appeal determines the questions of law. Not when the verb is understood in a context that has the Board receiving the original statements of positions, hearing evidence, and determining "there are arbitrable terms", and a context that involves a scheme that should lead efficiently to arbitration, and a purpose that concerns collective agreement and binding arbitration. That context suggests a single body efficiently establishing an arbitration board and fixing its terms of reference. In that

context, to "list the arbitrable items in dispute" involves determining which of the issues in dispute are arbitrable.

## ARBITRABLE TERMS

[17] As Mr. Clarke put it for the union, "...the Board was required by Section 45 of the *Act* to be correct in its determination of which items submitted to it by the parties are 'arbitrable'." The government's position is that the Board erred in including the disputed subjects proposed by the union. The union's position is that the Board correctly included those subjects and it erred in excluding other subjects the union had proposed. The union, however, has not challenged the Board's decision.

[18] As earlier noted, the Board must be satisfied "there are arbitrable terms and conditions of employment within the meaning of the Schedule": s. 25(b)(i). And, the Board must "list the arbitrable items in dispute to be resolved by the arbitration board": s. 28(1)(b). In the section dealing with the jurisdictional challenge, I interpreted these provisions as giving the Board the original jurisdiction to determine subjects for arbitration and to refer them for arbitration. Although the determination obviously requires findings of fact, the legislation provides that such a determination

is a question of law: s. 45. The parties are agreed that a consequence, perhaps the only consequence, of that provision is that the determination must be correct. The correctness of any determination that an issue is arbitrable depends entirely on whether the issue falls within any of the subjects set out in the Schedule. The Schedule includes the titles “Schedule” and “Arbitrable Terms and Conditions of Employment”. It then provides this list:

1. Wages and salaries

2. Pay procedure on promotions, demotion, reclassification and increments

3. Hours of work

4. Overtime compensation

5. Premium allowances for work performed

6. Holidays

7. Vacation

8. Employee relocation expenses

9. Public Service Award

10. Leaves of absence other than for elective public office or political activity or education or training and development

11. Conditions of education leave

12. Conditions of sabbatical leave

13. Consolidated Health Plan

> 14. Layoff policy taking into account the competency, merit and seniority of the employees
>
> 15. Procedures for discipline and discharge for cause of employee
>
> 16. Grievance procedure
>
> 17. The mileage rate and allowance payable to an employee for kilometres travelled when the employee is required to use the employee's own automobile on the Employers business
>
> 18. Group life insurance
>
> 19. Long-term income-protection insurance
>
> 20. Duration of collective agreement
>
> 21. Interpretations and definitions of words and expressions used in the collective agreement and not defined by the collective agreement or an applicable enactment.

So, the issue for the Court is whether the subjects in contention fall within any of these titles.

[19] *The Record.* The evidentiary or informational material upon which the Board made its determinations includes:

> 1. The Union's letter of 2 December 2003 identifying subjects in dispute by reference to article numbers and titles in the existing collective agreement.
>
> 2. The government's letter of 10 December 2003 advising that, in its view, the differences between the parties are not arbitral as regards "Article 10 (adjudication), Article 13 (Job Opportunities), Article 14 (Severance Payment, No Lay-Off Due to Contracting Out, etc.), Article 29 (Municipal Street Exchange), Article 30 (Severance), and Classification Changes".

> 3. Extensive written submissions, which included some assertions of fact.
>
> 4. Oral submissions before the Board, which included some assertions of fact. These were not recorded but some agreed facts are apparent from the decision of the Board.

This was the second time the parties had been before the Board where negotiations had reached an impasse and where the parties had disagreed about arbitrable terms. A previous Board had determined such issues in reference to the first set of negotiations under the new legislation: *CUPE Local 1867, Nova Scotia Highway Workers Union* v. *Department of Transportation and Public Works,* 14 March 2004 (MacDougall, Boyle and Broderick). The present disputes result from the second set. The decisions of both Boards show that the determinations of what terms were and what terms were not arbitrable drew upon the Board members' knowledge of the field.

[20] *"Classification Changes and Adjustments to Rates of Pay".* The union submitted this title as describing one of the subjects for arbitration. The union's written submission to the Board read:

> The union argues that item 2 or 5 under the Schedule to the Act, are applicable to these proposals. In each case the Union argues that the duties of the classification have changed sufficiently and require reclassification.

1. Steel bridge painter crew to be paid at the Group II rate. These workers are performing duties that exceed in terms of safety training and precaution, exposure to weather and other hazards and sand blasting, the duties of the divisional crewman.

2. Crewman on the centerline paint crew to be paid at the Group II rate. These employees work on a moving highway, they need to be continually focussed, they are exposed to greater danger and require greater awareness of safety factors, than those in Group I.

3. Winter Dispatchers and Baseman I to be at the Group III rate. Duties and responsibilities have changed.

4. Baseman II to be paid at Group IV rate. Duties and responsibilities have changed.

5. Union proposes a set rate of pay for bargaining unit employees performing supervisory positions outside the bargaining unit. Under the current article 21 payment of wages and allowances, 21.04 provides that:

> When an employee is assigned to perform the principle duties of a higher paying positions outside the bargaining unit for a temporary period of five (5) or more days, the employee shall receive a temporary increase in rate of pay equivalent to ten percent (10%) of the employees current rate of pay.

And in Article 21.05 it provides:

> employees designated to assume supervisory duties of a charge hand will be paid an additional one dollar fifty cents ($1.50).

6. Crane operator/boom operator to be paid at the Group [V] rate. When this grouping was set the position didn't require anything other the ability to do the job. It is now necessary to be licensed to operate either the crane or boom by Department of Labour.

7. Operators that operate equipment such as backhoe, grader, gradeall, while operating that equipment, receive a premium payment of $1.00 per hour. The employees are now working with specialized equipment requiring more training, expertise and technical competence.

The government's submission read:

Union Proposed Language:

1. Union proposes to increase rates of pay by an amount to be discussed.

2. Steel bridge painter crew to be paid at Group II rate.

3. Crewmen on the centreline paint crew to be paid at Group II rate.

4. Winter dispatchers to be paid at Group III rate of pay.

5. Baseman II to be paid at Group IV rate of pay.

6. Union proposes to establish a new rate for operators who operate grader, backhoe, 07 or above truck with tag trailer and float and excavator during summer months. We propose to add $1.00 per hour premium allowance to the operator's salary while they are operating the above equipment.

7. The Union proposes a set rate of pay for bargaining unit employees performing supervisory duties outside the bargaining unit.

8. Crane operator/boom operator to be paid at the Group VI rate of pay.

Analysis: Rates of pay are arbitral under wages and salaries, but classification changes are not. Reference can be made to the 2001 Board decision for analysis in that regard. Classification is a management right under Article 2 of the Collective Agreement.

As a result, #1 above is arbitral, while #2 through #5, and #8 require changes to classification groups, and are not. #6 in substance is proposing a new classification, an operator who operates certain equipment, and is not arbitral. The creation of a new classification is also necessary for #7, and it is therefore not arbitral.

The parties "clarified" an aspect of the facts related to this issue during oral submissions to the Board. It appears the parties agreed and the Board found "that particular job classifications within the Groups can have their rates within the Groups increased, without the need for reclassification to another Group.": (para. 45).

[21] The Board referred to the Schedule to the expiring collective agreement entitled "Classification Groups and Rates of Pay". This records the rates of pay for "Labourer" generally and then for various kinds of workers in seven groups. For example, Group I is made up of "Division Crewman...Steel Bridge Painter...Baseman I...Survey Assistant...Centreline Crewman". The rates of pay increase as one reads down the list from the classes of Group I ("[$] 13.02...13.02...13.02...13.48...13.02") to the only class in Group VII ("[$] 18.84"). The Board also referred to the management rights provision in the Collective Agreement which included among the exclusive functions of the employer, "hire, discharge, direct, classify, transfer, promote, demote and suspend any employee": art. 2.01(b).

[22] The Board acknowledged that "classification is a management right": para. 45. However, the Board referred to the clarification and the expiring collective agreement and said, "particular job classifications within the Groups can have their rates within the Group increased, without the need for reclassification to another Group". The Board concluded that all of the proposed changes were arbitrable because they fall under "1. Wages and salaries" and "5. Premium allowances for work preformed".

[23] Before me, the government argued:

> The *Dictionary of Canadian Law* defines "job classification" as "the rating of jobs based on skills and other requirements". In every instance put forward by the Union in their proposal with respect to revised classifications, the justification for the change in classification is based on performing new or enhanced duties. The only way in which these changes can be argued at arbitration is by putting in evidence the approved job description for each position, and then arguing that the position description has changed. That will lead to the "reclassifying" by the Board of the position, based on the argument made. The proposal, and the Board approval of it, puts classification within the determination of the arbitration board, when it is a management right.

I disagree with this submission. There are two answers to it, one is narrow, the other broad.

[24] The narrow answer is that, for pay purposes, the classes within "Groups" are the governing classifications, not the "Groups". As the parties "clarified" for the Board, different classes within the same Group may be paid at different rates. For example, the Schedule to the old collective agreement has "Survey Assistant" in Group I at $13.48 and "Steel Bridge Painter", also in Group I, at $13.02. Instead of saying in its written submission to the Board, "Steel bridge painter crew to be paid at the Group II rate.", the union might have said "Group I, steel bridge painter crew class to be paid $XX.XX", where $XX.XX equals the increased rate of pay sought for all classes within Group II.

[25] The broader answer is this: classification of individual employees is the management right. Article 2.01(b) recognizes the management right to "classify...any employee". To create the descriptions of classes is not to "classify...any employee". The description of classes, as opposed to the classifying of employees as falling within those descriptions, has to be a subject for negotiation and, negotiations having failed, arbitration. In my assessment, the description of classes is as integral to "Wages and Salaries" as is the setting of rates of pay. In short, the first subject in the arbitrable terms Schedule to the *Act* covers all aspects of the "Classification Groups and Rates of Pay" schedule to the collective agreement. Were it otherwise, the employer could unilaterally alter wages and salaries by unilaterally altering one component of the contracted Schedule.

[26] In my opinion, the Board correctly referred the classification and rates of pay proposals to arbitration.

[27] *Severance.* The union's letter of 2 December 2003 also referred to "Article 30 Severance" as a subject in dispute. According to its submissions, the union had been bargaining for a severance payment of two weeks pay per year of service upon layoff, less for those who had been employed for less than a year. The expiring collective

agreement provided for one week of pay per year of service. It appears this had been the formula before the new legislation. The first Board under the *Act* held that severance was not arbitrable: p. 8, item 19. It did not given reasons. However, the Board in *NSGEU* v. *Nova Scotia*, 8 March 2002 (Charles, MacLennan and Campbell) held that the amount of severance is arbitrable. That Board applied similar legislation as now concerns us and it concluded that severance is integral to layoff policy, the fourteenth title in the Schedule of *Civil Service Collective Bargaining Act*, which is identical to the arbitrable terms schedule of the *Highway Workers Collective Bargaining Act*. The present Board adopted Professor Charles' reasoning in that case.

[28] For the government, Ms. Darling criticizes this reasoning as "a torturous extension of the language of the statute". On the contrary, it would be artificial to separate severance from the rest of the subjects concerning layoff in employment relations such as those that pertain to the government and the highway workers. Professor Charles expressed his reasoning as follows:

> A laid off employee can be granted a severance payment either at the end of the eighteen (18) month period referred to in Article 34.19, or, alternatively, the employee may choose to invoke his right to severance pay at any point up to the expiry of the eighteen (18) month period. Thus, the employee's entitlement to severance pay that would triggered by the notice of layoff continues through the eighteen month layoff period during which the employee retains the status of a laid-off employee. Following the payment of the severance pay, the employment

> relationship is severed and layoff is converted into a termination of employment. Hence, severance pay is an on-going entitlement which an employee can access at any point throughout the layoff period. Therefore, it is an integral part of the layoff policy and is therefore an arbitral term and condition of employment.

The term in the expiring contract, which term appears to have been taken from earlier contracts dating from before the *Highway Workers Collective Bargaining Act*, provides for payment of severance pay at the end of a one year recall period or, if the employee wishes to terminate his or her employment earlier, upon the employee waiving recall rights. The situation is the same as that considered by Professor Charles. Severance pay severs the employment relationship and converts layoff into termination. In the meantime, it is "an on-going entitlement which an employee can access at any point throughout the layoff period." Thus, severance pay is integral to layoff policy. Thus, severance pay is a subject within the scope of the words of the fourteenth title in the Schedule of arbitrable terms.

[29] *Layoff.* The union proposed three new clauses in addition to the amendments to the provision for severance terminating layoff: a provision against layoff or reduction of hours due to contracting out of work; a provision against layoff or reduction of hours due to reassignment of work to a municipality or devolution to any

other employer; and a provision, generally against layoff due to work being performed by persons outside the bargaining unit.

[30] The government submits that these proposals concern contracting-out and job security, not layoff policy. Consistent with its position on severance, the government argues for a narrow interpretation of the fourteenth title in the Schedule: "Layoff policy taking into account the competency, merit and seniority of employees". According to the government's view, "layoff policy" captures policies concerning who gets laid off individually and what happens to them but it does not concern a decision to layoff employees generally, a decision to reduce the workforce through layoff.

[31] The first Board, in March 2001, reached a conclusion favourable to the government regarding Municipal Street Exchange as well as Severance, which may indicate that that Board found the fourteenth title to have a narrow scope. The Board did not express its reasoning. Apparently the parties asked it only to express conclusions.

[32] The Charles-MacLennan-Campbell Board under the *Civil Service Collective Bargaining Act* in March 2002, had to interpret the fourteenth title because of numerous proposals concerning layoffs that the government contended were not arbitrable. I have already referred to some of the Board's reasoning when discussing severance as an aspect of layoff. We need to take a closer look at that Board's reasoning for the assistance it may provide on the question of arbitrating the government's power to lay off highway workers.

[33] In the 2002 case under the *Civil Service Collective Bargaining Act*, the government advocated a very narrow scope for the fourteenth title, which is identical to that under the *Highway Workers Collective Bargaining Act*. The government argued "that the only arbitrable item relating to layoff policy which would be arbitrable was the question of who would be laid off and not the consequences of such a layoff": *NSGEU* v. *Nova Scotia*, 8 March 2002 (Charles, MacLennan and Campbell) p. 12. The Board interpreted the phrase "taking into account competency, merit and seniority of the employees" as "a direction to the arbitration board": p. 13. This phrase did not modify "policy" by limiting the scope of that noun. The Board in that case pointed out, "The words 'taking into account' are not words which are normally used to limit." It concluded:

> We characterize layoff in the context of this relationship as denoting a status rather than an event. The layoff policy therefore includes not only the notice of layoff, but those aspects of the layoff which continue up to the point of termination or recall.

That took the interpretation of the fourteenth title far enough to dispose of all layoff issues in that case on the basis that each was arbitrable. This included a union proposal to limit contracting-out:

> The Employer argues that contracting out is not an arbitral term or condition. Ms. Darling argues that contracting out is the "why" and not the "who" of the layoff issue. The Board recognizes that contracting out is a significant issue in and of itself and in many collective agreements is not found within the layoff article but is on its own. Its impact on employees, however, is through the layoffs which result from the contracting out. Reference to contracting out is logically part of the concept of a layoff policy and is therefore an arbitral term and condition of employment.

This reasoning was accepted by a majority of the Board in the present case. This is the one subject upon which there was dissent.

[34] In his dissent, Mr. Boyle said that the treatment of severance pay as arbitrable does not limit "the employer's right to contract out work, reassign work to a municipality or devolve bargaining unit work to another employer or limit the work that may be performed by persons outside the bargaining unit.": p. 2. He said, "it may be reasonable to bring any issue in dispute between the parties before an arbitration

board": p. 3. He qualified this by saying that the statute "limits the terms and conditions which are arbitrable": p. 3. Continuing on the same page, he said limits on contracting out, reassigning work and devolving work "are not in essence terms or conditions having to do with layoff policy." The union proposals were "not directed at the consequences and circumstances of a layoff of an individual employee". Rather, they "are directed at the size and number of employees in the bargaining unit." Clearly, Mr. Boyle interprets the scope of the fourteenth article as limited to the consequences of layoff. For him, "layoff policies", in the context of the Schedule, cannot include policies designed to limit laying workers off.

[35] No doubt, contracting-out is part of the subject of the union's first proposal and there is nothing in the Schedule that refers to contracting-out. However, the proposal is not just about contracting-out. Indeed, it does not prohibit contracting-out. It prohibits laying off workers as a consequence of contracting-out. It is as much about layoffs as contracting-out. If "layoff policy" has a narrow meaning in the fourteenth title to the Schedule, such as with Mr. Boyle's interpretation, the term is not arbitrable.

[36] The scope of “layoff policy” depends upon the ordinary meaning of the words when read in full context, including surrounding text, legislative scheme and statutory purpose. In my opinion, the plain meaning of the words is not limited to the consequences of a management decision to have a layoff. Quite plainly, a policy limiting layoffs would be a “layoff policy”. The broad meaning suggested by the text is in keeping with the context of the text. I agree with Professor Charles and his Board in their inclusive interpretation of “taking into account the competency, merit and seniority of employees”. Those are not words of limitation. Nothing in the rest of the text of the statute suggests to me that the Schedule should be interpreted narrowly. A broad interpretation of each title in the Schedule would be harmonious with the scheme and purpose of the statute, to provide for collective bargaining with arbitration rather than strike and lockout. It would be harmonious for the very reason expressed by Mr. Boyle: it would be reasonable to bring any issue in dispute before the arbitration board. Mr. Boyle is right to say that this does not justify a departure from the limits of the Schedule. However, the context provides good reason not to limit the scope of the words of the Schedule. The context suggests they are being used according to their full meanings and not in some specific, narrow or limited way.

[37] In my opinion the words of the fourteenth title of the Schedule plainly allow for arbitration of any terms within "layoff policy", including policies regulating or restricting layoffs generally. Proposals that would prohibit layoffs on account of contracting-out, assigning work to other parts of government or devolving work to the private sector are within "layoff policies". In my opinion, the majority of the Board were correct on this issue.

[38] *Municipal Street Exchange.* The Board rejected most of the union's proposals for terms on street exchanges as not being arbitrable. The one exception was a proposal to change article 29.01(d) of the collective agreement. It reads,

> In the event of a devolution of bargaining unit work to an employer in the broader public sector of Province that would be considered a sale, lease, transfer, annexation or amalgamation under the *Trade Union Act*, the Employer will make reasonable efforts to accomplish the devolution as if Section 31 of the *Trade Union Act* were applicable. Where compliance with Section 31 is not accomplished, the Employer will make reasonable efforts to obtain job offers with the new employer for employees whose work is devolved, in accordance.

The union proposal is:

> The entire article to be removed except for "In the event of a devolution of bargaining unit work to another employer that would be considered a sale, lease, transfer, annexation or amalgamation under the *Trade Union Act*, the Employer will apply the provisions of section 31 of the *Trade Union Act"*.

The government's objection as stated by Ms. Darling in her brief read:

> In essence, the new article creates a mandatory application of the *Trade Union Act* Section 31 provisions, as opposed to the current "best efforts" language. There is nothing in the arbitral terms and conditions of employment that allow for arbitration of the applicability of the *Trade Union Act*.

Respectfully, this objection confuses subject with a mechanism for dealing with the subject. The union was not seeking to negotiate the applicability of the *Trade Union Act*. It was negotiating for a provision under the collective agreement that would obligate the government to obtain terms from successor employers by which the collective agreement would continue upon sale or other transfer. This is the same subject as is dealt with in the expiring collective agreement. The proposal would have that subject dealt with more stringently. Further, the subject is within the twentieth title, "Duration of the collection agreement".

[39] *Conclusion.* The Board correctly concluded that the subjects under review were arbitrable.

## BIAS

[40] The government challenges the Board's appointment of the union's nominee to the arbitration board. As earlier noted, the Board has the power under s. 28(1)(a)

to “establish the members as an arbitration board”. It did so over the government’s objection that the union nominee “raises a reasonable apprehension of bias”. The union nominee is Mr. David Roberts, whose firm represents CUPE frequently and who personally represented the Highway Workers local in the previous arbitration.

[41] The government relies upon *Wood* v. *County of Wetaskiwin No. 10*, [2001] A.J. 775 (QB) affirmed [2003] A.J. 836 (CA) and *Universite du Quebec à Trois-Rivières* v. *Larocque*, [1993] 1 S.C.R. 471 for the proposition that no deference is owed by this Court to decisions that effect a breach of natural justice, such as a decision to proceed despite reasonable apprehension of bias. The union does not disagree that the standard of review is correctness. I, myself, have some reservations about that. The Board is not alleged to have been biased. It had the legislated responsibility to establish an arbitration board. Unlike the situations in the cases to which the government refers, arbitration boards of the kind we are concerned with have built-in, countervailing biases. A functional and pragmatic interpretation of s. 28 could lead to the conclusion that deference is due to any decision of the Board establishing an arbitration board. Having stated my reservation, I am content, in light of the mutual position of the parties, to review the Board’s decision on the basis that it had to be correct.

[42] Firstly, the Board dealt with s. 28(3), which provides:

> (3) No person shall be appointed as a member of an arbitration board who has any direct pecuniary interest in the matters coming before it or who is acting or has, within a period of six months immediately preceding the date of the person's appointment, active as a solicitor, counsel or agent of either of the parties.

The Board asked for and received evidence that Mr. Roberts had no direct pecuniary interest in the arbitrable issues and that it had been more than six months since he had represented the union. In the opinion of the Board this would not be enough. "The question of reasonable apprehension of bias is entrenched in our common law and we accept that it applies in addition to the statutory requirements.": para. 66. The Board went on, secondly, to determine that Mr. Roberts' appointment was appropriate. At para. 69 it said, "Arguing that an issue is arbitrable is different from deciding whether the issue has merit." The Board concluded by saying that it was not satisfied that Mr. Roberts' appointment "would raise a reasonable concern for his ability to act impartially or fairly".

[43] Before me, the government's position was that Mr. Roberts' appointment raises a reasonable apprehension of bias. Ms. Darling acknowledged that "wingers on

tripartite panels such as this arbitration panel...will display a degree of partisanship." However,

> ...a solicitor client relationship with one of the parties on labour relations generally, and the last interest arbitration between these parties specifically, creates a level of partiality that cannot withstand judicial scrutiny.

The union position has always been that s. 28(3) prescribes the standard for excluding persons from serving on an arbitration board on grounds of financial interest or representation. There is no need to go further, as the Board did in this case.

[44] I accept Mr. Clarke's submission. In my opinion, the correct interpretation of s. 28(3) is that it establishes *the* standards for exclusion on the basis of financial interest or representation. Respectfully, the fact that the common law is well settled as regards the standard for removal of an adjudicator on grounds of a reasonable apprehension of bias is no justification for departing from a different standard if it has been prescribed by legislation. The question is one of statutory interpretation. Are the standards prescribed by s. 28(3) minimal or exclusive as regards disqualification from arbitration boards for financial interest or for association as agent or counsel?

[45] In the context of arbitrations, and especially interest arbitrations, there is much reason for the Legislature to have substituted its own standard for whatever the common law might require where bias is alleged to appear from financial interest or from previous representation. Firstly, the nominee members of arbitration panels always bring biases to the panel. They are appointed by or on account of one of the parties. Thus, with arbitrations generally but with interest arbitrations especially, a discussion of reasonable apprehension of bias in traditional terms becomes artificial. Note the strained results described in this passage from Brown and Beatty as quoted at para. 68 of the Board's decision:

> ...In grievance arbitration, where commonly each party nominates one arbitrator who in turn select a third arbitrator to be chairman, the requirement of impartiality has given rise to certain unique considerations. While stipulating that arbitrators nominated directly by the parties are under duty to act judicially, the courts have recognized that the nominees do represent the interest of their nominators. However, where the relationship or interest of the nominees transgresses the accepted norm, the board of arbitration will be prohibited from proceeding, and where the facts do not come to light until after the award is handed down, it will be quashed. For example, of one of the members of the board is an official of the union that is a party to the arbitration, or is the auditor of the employer, or an employee of the same or another hospital in the same employers' association, the board will be prohibited from proceeding or its award will be quashed. Merely having acted as a solicitor for one of the parties in the past, however, has been held not to be sufficient to warrant disqualification. Under Alberta legislation, the employer nominee's involvement in negotiation of the collective agreement in question was held insufficient to disqualify him, as was having sat on an earlier board dealing with a similar issue. As well, neither being a representative of a union which, while not a party in the proceedings, has a collective bargaining relationship with the employer, nor merely having a known interest or representing a point of view, will suffice to impugn the impartiality of an arbitrator. Similarly, in another case where father and son were members of the same law firm and acted as the company nominee and counsel respectively, it

> was held that the practicalities ought to be recognized and the application to quash was dismissed. As well, acting as both arbitrator and conciliation commissioner for a union has been held not to raise a reasonable apprehension of bias.

The standard at play here cannot be "reasonable apprehension of bias". The standard must be about excessive bias, bias beyond what is expected in rights arbitrations where nominees make up part of the arbitration board. The subject becomes even more difficult with interest arbitrations, where the arbitrators are not adjudicators of rights under agreements but are the makers of simulated agreements. The Board in this case pointed out that no case law had been cited for excluding interest arbitrators on the basis of bias: para. 69. For the government, Ms. Darling referred me to *Re Beacon Hill Lodges of Canada and Hospital Employee Union* (1985), 19 L.A.C. (3d) 288 (Hope, Leibik and Francis), which embraced the general approach to interest arbitration where arbitrators strive to impose terms that would replicate a collective agreement had the parties been able to negociate under threats of strike and lockout. The majority held that replecation had to be ascertained objectively. The employer's nominee followed a subjective method in his dissent. Ms. Darling argues that the objective approach of the majority "reflects that the process of interest arbitration is an objective analysis, underlying the need for objectively in panellists". On the contrary, we are speaking of two kinds of objectively. Bias is just as much a problem in an adjudicator who has to apply a subjective test as it is in an adjudicator who has

to apply an objective test. So, like the Board, I am not assisted by any authoritive guidance on this subject of bias and party nominees to an interest arbitration board.

[46] The words of s. 28(3) do not suggest that the prescribed standards for exclusion on the basis of financial interest or representation are minimal. The interpretation that the legislated standards are exclusive is harmonious with the context in which the words are to be read. The situation of nominee arbitrators and the acceptance of some level of bias are part of the context and tend to show that the Legislature intended its standards to provide some certainty for resolving the question of disqualification where financial interest or previous representation may suggest excessive bias. The scheme and purpose of the *Act* lend force to that same conclusion. The Legislature concentrated its effort upon a single employment relationship and produced standards for those particulars. Why have a minimum standard if a more stringent common law standard was to apply?

[47] In my opinion s, 28(3) prescribes when a nominee will be excluded on the basis of financial interest or on the basis of having represented a party and, by applying more stringent standards, the Board failed to give effect to s. 28(3). However, the

Board reached the correct result when it established an arbitration board inclusive of Mr. Roberts.

## CONCLUSION

[48] The Board has original jurisdiction to determine whether a subject proposed for arbitration is arbitrable and the Board is not required to refer all such issues to the Court of Appeal. In this case, the Board was correct in its determination of each of the issues challenged by the government. Finally, the government's challenge to the arbitration board on the basis that the union nominee presents a reasonable apprehension of bias is rejected.

[49] I am prepared to grant an order dismissing the application for judicial review with costs to the union in the amount of $1,500 plus disbursements.

J.