Recent Developments in Labour Law in Nova Scotia

Geoff England
Brian Hansen
Greg North

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In the eighteen months since "Recent Developments in Labour Law in Nova Scotia" were last noted, the labour scene, both in Nova Scotia and generally across Canada, has been very active. Both the Supreme Court of Nova Scotia and the Supreme Court of Canada have been involved in several interesting decisions, and of particular interest is the fact that the Nova Scotia Labour Relations Board has issued several written decisions involving sections that hitherto had not been extensively considered.

The following subject areas are noted here: first, unfair labour practices, where the Board has come down with several interesting decisions; second, the ongoing program of certification, where in the last twelve months Board pre-hearing vote procedure has come under attack, new amendments to the Trade Union Act have been passed and the Nova Scotia Board has made decisions dealing with revocation of certification and alteration of terms and conditions of employment during the freeze period; third, administration of the collective agreement, where several decisions of the Supreme Court of Canada should prove of interest to readers and the Ontario Court of Appeal decision in the Zwelling case has been noted as we feel that it is likely to have substantial impact in this province; fourth, several decisions arising out of the C.L.C. -sponsored National Day of Protest, including one in Nova Scotia, dealing with the right of unions to engage in political strikes; finally, arbitration, where both the Nova Scotia Supreme Court and the Supreme Court of Canada have had to deal with general questions relating to arbitration and judicial review.

We have not found it possible to deal with all interesting decisions on this occasion. Thus, we have not dealt with the

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*Brian Hansen, Associate Professor of Law, University of Calgary; G. England, Associate Professor of Law, University of Calgary; Greg North, L.L.M., Cox, Downie, Nunn & Goodfellow

The writers have discussed extensively among themselves the various parts of this paper but wholesale agreement by everyone with all comments herein is not necessarily present.

accrual of the Construction Association Management Labour Bureau in Cape Breton. Nor have we included a discussion of the Board's Balcom-Chittik successor rights case because, although a very important decision, it will be dealt with in an article in the next issue of the journal. Finally, we have decided, after some consideration, not to deal with the plethora of cases involving collective agreements and the Anti-Inflation Board and Guidelines. No such problems seem to have been judicially considered in Nova Scotia but we have footnoted the decisions from other provinces of which we are aware.

Unfair Labour Practices

Unfair labour practices have not frequently come before the Nova Scotia Labour Relations Board. When the last "Recent Development in Labour Law" was written for this journal, there were no decisions of the Board in this area that the writers considered worthy of direct comment. This is not to say that the Board did not receive allegations of unfair labour practices but for the most part they arose in the context of certification applications and the exercise of the Board's discretion under section 24(2)(c). During the last twelve

2. L.R.B. No. 428C, dated April 5, 1977. This order essentially reflects the first Accreditation Order, which related to the industrial and commercial sector of mainland Nova Scotia (L.R.B. No. 392C, dated January 29, 1976 discussed briefly at (1976), 2 Dal.L.J. 791 at 863). Two other decisions of interest in the construction industry might be briefly noted. First, in L.R.B. No. 411C, dated October 7, 1976, the Panel held that the supply of employees by a union to an employer covered by an accreditation order but not a member of the accredited bargaining agent contrary to section 99 of the Act does not constitute an unfair labour practice under section 52 in that such a supply does not amount to interference with the formation or administration of an employers' organization. Second, section 103 of the Act has recently been interpreted by an arbitrator appointed by the Minister pursuant to the section. In Construction Association Management Labour Bureau Limited v. I.B.E.W., Local 625, May 11, 1977 (Richard), one of the parties had applied to the Minister of Labour without first discussing the actual nomination of an arbitrator by consent with the other party. It was alleged on a preliminary objection that there was no "failure to comply with subsection 3" so that any appointment under section 103(4) was invalid. The arbitrator rejected this on the basis that, the purpose of section 103 being speedy arbitration, it would frustrate the intent of the legislation (either by accident or design) to require the parties specifically to discuss and reject an arbitrator by midnight of the date giving rise to the grievance in order to avail themselves of section 103. "Doing nothing must be regarded as a form of non-compliance which would give either party" the right to proceed under the Act.

3. L.R.B. No. 2367, June 1, 1977. (Section 29). See also L.R.B. No. 417C for a discussion of the single employer concept under section 20.
months, however, three unfair labour practice cases came directly for the Board's consideration and in each the Board took the opportunity to discuss the impact of the relevant sections of the Act. In the first, Peter MacIntyre v. Usen Fisheries⁴, the Board had to consider an employer unfair labour practice. In the second and third, the McCulloch⁵ and Crowell⁶ cases, it was the union that was under attack. As the first occasions on which the Board has exercised its discretion to give written decisions in these areas, the three cases assume some importance.

In Usen Fisheries, MacIntyre had been dismissed by the company. He alleged that the reason for his dismissal was his membership and activities in the Canadian Food and Allied Workers Union. There were two issues before the Board. Firstly, the company alleged the Board had no jurisdiction to hear the complaint because the company operated out of Prince Edward Island and the complainant normally resided in that province. Second, there was the expected problem of interpreting the unfair labour practice provisions of the Act and ascertaining the company's motive. The Board held that it had jurisdiction and found the employer had breached sections 51(3)(a)(i) and 51(3)(a)(vi).

The jurisdictional question was swiftly disposed of. The Board simply held that since the alleged act was committed in Nova Scotia, it could hear the complaint.⁷ This decision is not exceptional. Residence clearly cannot be the determinative factor, otherwise companies incorporated and carrying on business mainly in another province but involving periodic visits to Nova Scotia, such as in areas of fishing and transportation, could flout the Trade Union Act with impunity. Perhaps more important, there would be no guarantee that the Province of residence, in this case Prince Edward Island, would assume jurisdiction if the Nova Scotia tribunal did not. It might well feel that it had no power since the act giving rise to the complaint took place outside its territorial limits. Accordingly, the Nova Scotia Board decision makes good sense. It also appears to accord with Ontario practice. In the Inter-Provincial Paving Company⁸ case, the Ontario Labour Relations Board was

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4. L.R.B. No. 2319, dated October 15, 1976
5. L.R.B. No. 426C and supplement. See also L.R.B. No. 404C.
6. L.R.B. No. 431C
7. L.R.B. No. 2319 at 1
8. [1962] O.L.R.B. Rep. 375; 63 CLLC 16, 286. See also Labour Relations Board of New Brunswick v. Eastern Bakers Ltd. and Local Union 76, Teamsters, etc. (1960), 26 D.L.R. (2d) 332. at 339 per Abbott J.
asked to and did assume jurisdiction over workers who resided in Québec but were working in Ontario. While the case is distinguishable in that the employees were continuously employed and the application was for certification, the same principle of jurisdiction was applied.

The Nova Scotia Board spent considerably more time on the actual unfair labour practice. As stated, it was found that the employer on the balance of probabilities had breached both sections 51(3)(a)(i) and 51(3)(a)(vi). The former section prohibits discrimination in employment because the employee was a member or is a member of a trade-union; the latter prohibits discrimination because the employee has exercised any right under the Act — in this case, the right of every employee to be a member of a union and to participate in its activities. More important, however, is the Board’s discussion of the question of onus of proof.

Section 54(3) of the Nova Scotia Act provides for a reversal of onus when an employee alleges an employer breach of s.51(3)(a). One vital component of this section is that the "complainant establishes that it is reasonable to believe that there may have been a failure by the employer . . ." Thus the issue of what proof the employee has to initially supply is vital. The Board took what we feel is the logical interpretation of this clause in placing a relatively light burden of proof on the employee:

In the opinion of the Board, section 54(3) imposes a very light initial onus. It is not even necessary for the complainant to establish that it is reasonable to believe that there was a failure by the employer to comply with s.51(3)(a). He need only establish that it is "reasonable to believe that there may have been" a failure on the part of the employer to comply with section 51(3)(a).9

This interpretation is correct in terms of the section and common sense. Were a tougher onus imposed, the employee would be in the same position as if there were no statutory reversal. The employer has in his possession all details of the dismissal and a record of the employee, so that he is in a stronger position to argue the case and should be expected to bear the heavier burden.

The Board then considered the question of employer motivation. It pointed out that due to the inclusion of the word because in section 51(3)(a), the question of motive is a vital component of employer unfair labour practices. It then stated as follows:

9. L.R.B. No.2319 at 2
Where the onus has shifted, unless the employer is able to satisfy the Board that on the balance of probabilities the Complainant’s union membership or activities was not a significant factor in the refusal to employ or continue to employ him, the Board must find that the Unfair Labour Practice is established.10

In the writers’ view, this seems a typical reaction to the problem of motivation with one exception. We are mildly concerned about the use of the word significant which seems to suggest some idea of importance. Thus, one might compare its use to the terms used by the Canada Labour Relations Board in R. v. Bushnell Communications Limited,11 cited by the Nova Scotia Board, where it is said:

If the evidence satisfies it beyond reasonable doubt that membership in a trade union was present to the mind of the employer in his decision to dismiss, either as the main reason or one incidental to it, or as one of many reasons regardless of priority...12

We feel that the Canada Labour Relations Board description of the onus is marginally more liberal than the Nova Scotian wording.13 The dictionary defines significant as “having or likely to have influence or effect”, but the use of that word would nevertheless seem unfortunate because its everyday connotation to employees may suggest something more substantial than the dictionary meaning. There can be no doubt that this places a substantial onus on the employer which, particularly in the context of certification applications, organization and strikes, may be difficult to rebut. As

10. Id. at 3
11. (1973), 45 D.L.R. (3d) 218
12. Id. at 223 per Hughes J.
13. Reference might also be made to the recent Ontario Labour Relations Board decision in United Garment Workers v. Four B Manufacturing Ltd. (Ontario Labour Relations Board, 1976 — 1162-76-U):

The Board appreciates that the Legislature, in introducing the reverse onus provisions into the Act, has entrusted us with the discharge of a difficult responsibility. Nevertheless, in executing that responsibility the Board recognizes that the Legislature intended that an industrial relations reality, however unfortunate, be accepted. That is to say, implicit in the course of a trade union’s organizational campaign, any prejudicial act taken against affected employees must be justified by a credible explanation free of an anti-union motive. (See: The Barrie Examiner case, [1975] OLRB Rep. 745 at 749.) Failure by the employer to satisfy that onus, notwithstanding the existence of an ostensibly legitimate reason for the alleged wrongdoing, will result in a positive finding of the committal of an unfair labour practice. We are of the view that underlying these requirements is the premise that only the employer knows the real reason for the acts taken to the employees’ prejudice.
stated above, however, we feel that this flows naturally from the employer's preferential position and so long as he can provide plausible justification such as work record or economic considerations, he has nothing to fear from the Board.

One final point in the decision is the remedy or lack thereof provided by the Board. Rather than exercise their power under section 55(a) and order reinstatement and compensation, it appears to have left the parties to come to an agreement, subject to the right to come back to the Board.\textsuperscript{14} We do not know if this is the practice of the Nova Scotia Board; perhaps it is preferable from an industrial relations point of view to allow the parties to come to their own arrangement. One wonders, however, how useful the right to return to the Board would be when Usen Fisheries Ltd. had left Halifax and was outside the Board's effective jurisdiction.

The two union unfair labour practice cases, \textit{McCulloch} and \textit{Crowell}, both arose out of the construction industry and were decided by the Construction Industry Panel. They both concerned the hiring hall system, whereby unions are responsible for providing the work force for the employer. Since to some extent the unions control the "right to work", any abuse of their position may have disastrous consequences for the individuals concerned.

In the \textit{McCulloch}\textsuperscript{15} case, the complainant alleged that he was being refused a "temporary permit" in the International Union of Elevator Operators because in July, 1976, he had given testimony in a hearing before the Panel which preceded the issuance of a Cease and Desist Order against the union and its business representative, Thomas Orman. More particularly, he alleged breaches by the union of sections 52(f), (g), (h), and (i). He also complained that the employer was guilty of a breach of section 51(3)(a)(iii).

Section 51(3)(a)(iii) provides that:

(3) No employer and no person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ any person or otherwise discriminate against any person in regard to employment of any term or condition of employment, because the person

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Act.

\textsuperscript{14} L.R.B. No.2319 at 1
\textsuperscript{15} L.R.B. No.426C Supplement
McCullough alleged that the Union and Orman had discriminated against him in breach of the section and that in doing so, they were acting "on behalf of the employer" in the sense that they were acting as the employer's agent for hiring under the pre-entry closed shop provisions of their collective agreement. The Panel disposed of this claim quickly. It found that insufficient evidence had been adduced by the complainant to even shift the burden of proof under section 54(3).

In some respects this decision by the Panel is disappointing. Their finding was that "we were unable to conclude even that 'there may have been a failure' by the employer or a person acting on his behalf . . ." This implicitly rejects the complainant's agency argument, but unfortunately the Panel did not deem to specify why.

At first sight, the agency argument does have some literal attractiveness. The union is responsible for hiring and delivering all workers; therefore, it can be argued that an agency relationship has been created and that the union was acting "on behalf of" the employer. However, this initial response may be too broad. Is it possible, for example, to conclude that while the union has a general agency responsibility, on occasions when it flagrantly breaches the unfair labour practice provisions of the Act it is off on a frolic of its own? Alternatively, it may well be argued that the agency relationship, if in existence, is not wide enough to fit within section 51(3)(a)(iii). Thus the section operates where there is discrimination with respect to the employment of individuals. Under the typical hiring hall situation, does the union have the right to employ on behalf of the employer or only control the availability of persons? In other words, does the employer have any residual rights or control over whom he employs? If he does, it is suggested that the union's agency would not in all likelihood extend to the employment relationship. Furthermore, while the union does have an obligation to supply labour arising out of the collective agreement, there is considerable doubt whether an agency relationship is created. If an employment agency is hired to supply labour, they have contractual obligations but certainly no agency relationship is created. If one construes agency as an arrangement enabling the agent to affect the legal status of the principal, then quite clearly this is correct. Thus, in a contractual sense the union would never be acting "on behalf of the employer" within section

16. Id. at 2
51(1). It is its own principal, performing its own contractual obligations and is acting on its own behalf and no one else’s. Far more important, however, would be the impact of a successful agency argument from an industrial relations viewpoint. If the complainant’s argument were upheld, it would produce disastrous results in the construction industry since as a result of the hiring hall arrangement, the employer would be responsible for every illegal act committed by the union. Clearly, this could not have been the intention of the legislation which was quite apparently designed to cover persons working directly under the auspices of the employer and those over whom the employer had some control. To this extent, then, the Panel’s refusal to accept the complainant’s argument and refusal to follow a possible literal interpretation of section 51(3)(a)(iii) makes good industrial relations sense. One wishes, however, it had given rather fuller reasons for its decision.

The allegation of union unfair labour practices took the Panel considerably longer to dispose of. The first problem was whether the Panel had jurisdiction to hear the complaints under section 52. Three of the four complaints involved allegations of improper denial of, or suspension, or expulsion from membership in the trade union. McCulloch had never been refused full membership in the union but had been refused a temporary permit which was a status given to employees in the elevator industry until the union saw fit to give them full membership. This permit constituted the basis of his “right to work” in the industry in accordance with the closed shop provision of the collective agreement and had been used by the union for many years. Unfortunately, neither the union’s constitution nor by-laws mentioned the concept of temporary permits. However, the collective agreement used the word “permit” and the Panel wisely held that if the sections of the Trade Union Act were to be given any effect, the term membership in section 52 had to be read as including the status of holding a temporary work permit. Clearly, as the Panel stated, the intent of the Act could not be frustrated “by a device internal to the union”.

The second problem was the timeliness of the complainant’s action under section 53(2) of the Act, which provides that:

Subject to this Section, a complaint shall be made to the Board

17. Id. at 2
18. Id. at 4
pursuant to subsection (1) not later than ninety days from the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

The union and Thomas Orman objected that the complaints were untimely so that the Panel had no jurisdiction. McCulloch had three counter arguments. First, he alleged that the complaints were against continuing offences i.e., every time he was refused a work permit, a new offence was committed. Second, it was claimed that McCulloch was not in a position where he "knew" or "ought to have known" of the circumstances giving rise to the complaint until November, which would have placed him within the ninety-day period. Third, it was argued that these complaints fell within section 54(3) and were thus outside the time limitations in section 53(2).

The Panel upheld the second of McCulloch's three points. They found that it was not until November that McCulloch learned from Orman the reason for his being refused admission and that up until that time he had no solid basis for making the complaint. Thus, the time limits did not apply.

The Panel also commented on the complainant's other two arguments. As to the first point, it was found that the complaint alleged was not of a continuing nature. The Panel concluded that while McCulloch was refused admission every time he went to the union, each refusal was the same as the earlier ones. In other words, the union only committed the one offence in that no new element or reason arose on the occasions when McCulloch kept re-applying.19

This finding by the Panel is extremely important. The question of continuing offences has always been problematic, particularly in the arbitration area and the issue is made more difficult by the fact that there are conflicting industrial relations considerations. On the one hand, there must be some control over matters coming before the Panel or Labour Relations Board. If one were to give a wide interpretation to "continuing offences", the Board might be flooded with complaints. Thus, if X was refused entry into a union in July and found out ninety-five days later that he might have a case, he could go to the union again, be refused again on the same basis and start the action on the basis of a continuing offence. Even in bona fide situations, to allow expulsions to constitute a continuing offence would be to render section 53(2) useless in that

19. *Id.* at 5
area. On the other hand, there is no guarantee that individuals will have the sense to seek advice when they are discriminated against in some way. Should these people be thrown out by the Panel simply because they were insufficiently sophisticated to go to a lawyer?

However, the decision seems to be technically correct. It appears to be generally in line with the very brief comments by the Canada Labour Relations Board in *Sheehan v. Upper Lakes Shipping Co. and C.B.R.T., C.M.U., Local 401.* Moreover, it would seem consistent with the many arbitration decisions in the area. These appear to draw a distinction between breaches of a collective agreement which are part of an on-going obligation and breaches which amount to single violations which have continuing consequences. Certainly, the breach of a union unfair labour practice falls within the latter category, which does not constitute a continuing offence.

The writers feel that the Board or Panel should have some flexibility in order to entitle them to hear deserving cases which are submitted *bona fide* but for some reasons fall outside the time limits. The Panel has decided that a failure to satisfy the requirements of section 52(3) is not merely a technical deficiency within section 7; nor is the former section merely "directory." Accordingly, it might be appropriate to consider the enactment of a provision similar to s.118(m) of the Canada Labour Code which permits the extension of the time limits in appropriate situations.

The decision in *McCulloch* may not necessarily be the last word on continuing offences. We are not certain that repeated breaches of unfair labour provisions will never amount to a continuing offence, or at least give rise to a new offence on each occasion. Suppose that Mr. McCulloch had been refused in July and had *bona fide* gone

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23. See *Cowell, post.*
24. Id.
25. R.S.C. 1970, c.L-I, s.118 (1) (m); “The Board has, in relation to any proceeding before it, power . . . to abridge or enlarge the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence in connection with the proceeding.” See also, *Trade Union and Labour Relations Act, 1974* (U.K.) para. 21(4).
back again in October. We tentatively feel that if there was any reason for McCulloch to believe that circumstances had changed, e.g., union practice had altered, this new element might make the union’s second refusal a new offence. This point remains to be considered.

The final point considered by the Panel in the context of time limits was the impact of section 53(4) which provides:

(4) The Board may, on application to it by a complainant, hear a complaint in respect of an alleged failure by a trade union to comply with Section 52(f) or (g) that has not been presented as a grievance or appeal to the trade union, if the Board is satisfied that

(a) the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or

(b) the trade union has not given the complainant ready access to a grievance or appeal procedure.

The complainant argued that breaches of sections 52(f) and (g) were involved here and that since section 53(4) contained no express time limitations, the ninety-day period did not apply. The Panel found that in the absence of words to the contrary, the section was subject to the time limitation.26

Once again the Panel decision is disappointingly brief and some editorial comment might be in order. We cannot fault the Panel’s concern that it not be flooded with complaints that would otherwise be out of time. However, restraints could easily have been put on the section by the doctrine of laches which would have given the Panel the flexibility they lacked under section 52(3).

One other minor point of concern with the Panel decision involves the situation where section 53(3) is involved. This section provides that any breach of section 52(f) or 52(g) must first be submitted to the union grievance procedure. Only if the conditions in section 53(4) are satisfied, will the Panel hear the matter without that procedure being followed. Suppose Mr. McCulloch had presented the matter to the union in accordance with section 53(3). The union sits on the matter for ninety days and refuses to do anything. McCulloch then goes to the Panel under section 53(4)(b). Does the Panel have any jurisdiction to hear the alleged complaint because the self-imposed ninety-day restraint period applies?

26. L.R.B. 426C at 5
This situation may pose a difficult matter of interpretation for the Panel. If the complaint is made under section 53(4) it would appear that the ninety-day period had elapsed and that it had no jurisdiction. Clearly, this would be an unfortunate result. On the other hand, it might be more satisfactory to alter the basis of the complaint and proceed under section 53(3) (b). This gives the Panel jurisdiction where a complaint has been made under the union grievance procedure and the union “has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to him”. The difficult question for the Panel to decide is whether section 53(3) applies at all. Has the union been seized of the matter simply by the reference? Have they dealt with the matter by doing nothing so as to bring section 53(3)(b) into operation? One would hope that the Panel would decide this question affirmatively. If not we may have a situation of a bona fide complainant having no standing before the tribunal, which is certainly not what the Act intended.

The heart of the Panel’s decision was the complainant’s allegation that the union had breached sections 52(f)(g)(h)(i). The Panel found that both section 52(f) and (i)(1) of the Act had been breached. The union had discriminated against McCulloch because in July, 1976, he had given testimony in a hearing before the Panel preceding the issuance of a cease and desist order. Mr. Orman, the union business representative, offered an explanation of the union activities but the Panel simply did not believe him.27

The Panel, however, did not find a breach of either section 52(g) or (h). It concluded that there was no evidence that the union had taken any action against the complainant “by reason of his having refused to perform an act that is contrary to the Act” within section 52(h).28 More importantly, the Panel found that section 52(g) did not apply because it contains the words “disciplinary action” and “penalty” and denial of, or expulsion or suspension from membership in a trade union did not fit within those terms. The rationale for the Panel’s decision was that to accept the complainant’s argument would be to render redundant section 52(f) which specifically dealt with those matters.29

This decision by the Panel as to what constitutes “disciplinary action” or “a penalty” assumes great importance when the

27. Id. at 2
28. Id. at 3
29. Id.
question of remedies arises. In the *McCulloch* case, the Panel exercised its power under section 55(c) and ordered the union and Thomas Orman to cease their discrimination against the complainant and issue him a temporary work permit in accordance with the generally applicable working rules of the union.\(^{30}\) However, it refused to award compensation to the complainant for time off work. Section 55(d), the section which authorizes compensation, states that the Panel may order the union:

> to pay *compensation* . . . not exceeding such sum as, in the opinion of the Board, is equivalent to any pecuniary or other penalty imposed on the employee by the trade union.

The Panel did not discuss the question of whether Mr. McCulloch was an employee within section 55(d). Presumably they found that he was. It was decided, however, that consistent with the interpretation given to sections 55(g) and (h), the denial of or suspension of expulsion from membership in a trade union was not a *penalty*.

In industrial relations terms this is a disastrous decision. In the hiring hall situation, common to the construction trades, the union has almost complete control over whether or not employment is available. When a union utilizes that sort of power against an individual, it does seem somewhat strange to say that a refusal does not constitute a form of penalty. In the sense of finding a breach of the Act, this does not pose many problems; section 55(f) will normally catch the union. But when, as a result of this interpretation, no monetary compensation can be provided for someone kept off work for three months, the consequences are very serious.

It is frustrating that the Panel's decision is probably a correct interpretation of the Act. It can be argued with some force that membership connections with the union are dealt with by section 52(f) and the corresponding remedy of reinstatement is provided in section 55(c). Disciplinary action and penalties, *i.e.*, internal fines and similar action are dealt with in section 52(g) and the remedy of compensation in section 55(d). Moreover, when one reads section 55(d) one is struck by the terminology. It talks in terms of *penalties*. If one compares this with section 55(a)(ii) which talks in terms of compensation for lost *remuneration*, the basis for the panel's narrow interpretation of section 55(d) becomes apparent.

\(^{30}\) *Id.* at 5
This interpretation does not mean that the Panel’s decision is desirable. Indeed, its concern with the niceties of statutory interpretation is rather strange, compared to its recognizing industrial relations realities as the basis for its decisions in the Schwartz series of cases. One would have thought that this is one occasion when some linguistic flexibility would have been justified. Of greater concern, however, is the present situation. The Panel has subsequently run into trouble with section 55(d) and something must be done.

It is difficult to know why the statute was written as it was. The unfair labour practices were largely lifted straight from the Canada Labour Code which still contains the same provisions. What is uncertain is whether the omission was intentional — it may, for example, be a conscious decision on the part of the legislature to restrict their supervision of unions to fines, etc. imposed and not to open it up to potentially large awards of damages. Alternatively, it may just be a very large gap in the Act. In the writers’ view, either alternative is equally bad and the matter should be remedied at once.

The second of the union unfair labour practice cases, the Crowell case, also involved the International Union of Elevator Operators and Thomas Orman. In this case the complainant, Crowell, was the victim of a nationwide dispute between the Elevator Operators and Dover Corporation. The Complainant was qualified as a “helper” under the terms of the collective agreement but had been working for some time as a “temporary mechanic”. The union had, however, refused the complainant the right to work in the latter capacity as part of an on-going dispute it was having with Dover Corporation. Subsequently, Crowell was refused work even as a “helper”.

The problem continued for some time. Crowell sought special permission from the union to get his status as “temporary mechanic”; he was refused. He worked as “temporary mechanic” without union permission but stopped after receiving a letter threatening disciplinary action. Later he went back to work without union permission on maintenance matters and he was blacklisted by union members. Company supervisory staff were used to back him upon his maintenance route. Eventually, as a result of contraction in

2 Dal.L.J. 791 at 803-819
32. See Crowell, post.
33. R.S.C. 1970, c.L-I, ss.185(f)(g)
34. L.R.B. No.431C
employment opportunities, Crowell was relegated to the status of "helper", again in accordance with the collective agreement. By this time, he had been expelled from the union and since by the collective agreement he could not work alone as a "helper", Dover terminated his position as no union man would work with him.

The Panel found that the union by October 23rd had expelled Crowell from the Union for reasons other than a failure to pay periodic dues, assessments or initiation fees. In fact, it was concluded he had been expelled because he had worked as a "temporary mechanic" without union permission. Similarly, the Panel found that Dover Corporation had terminated the complainant's employment because of the actions of Thomas Orman on behalf of the union in directing other members not to work with him.

The first major issue faced by the Panel was once again the issue of timeliness under section 53(2). As indicated *supra*, the Panel found that section 53(2) was not a mere technical objection within section 7, \(^{35}\) nor was it directory in nature. \(^{36}\) The arguments dealt with in *McCulloch* were raised again but were rejected by the Panel for the same reasons as in the earlier case. It was concluded, however, that two specific complaints were timely. \(^{37}\) The company termination of employment was alleged to be an offence within section 51(3) (a) (ii) and the corresponding union action of encouraging the employer to terminate was stated to be within section 52(e). Both of these actions really only took effect on February 14th; this was the earliest the complainant could have known of them and thus they were within the ninety-day limitation period.

Sections 52(e) and 51(3) (a) (ii) are very similar. Section 52(e) provides that:

52. No trade union and no person acting on behalf of a trade union shall

(e) require an employer to terminate the employment of an employee because he has been expelled or suspended from membership in the trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union;

Similarly, section 51(3)(a)(ii) states that:

\(^{35}\) *Id.* at 4  
\(^{36}\) *Id.*  
\(^{37}\) *Id.*
(3) No employer and no person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ any person or otherwise discriminate against any person in regard to employment or any term or condition of employment, because the person

(ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union.

The Panel had no difficulty concluding that the union had required Dover Corporation to terminate their relationship with Crowell for reasons other than non-payment of dues. There was a clear breach of section 52(e). The Panel also concluded that the Company had breached section 51(3)(a)(ii). It was submitted by Dover Corporation that it did not terminate because of Crowell’s expulsion from the union but because no one would work with him. Clearly, this defence is untenable. As the Panel said, to accept this argument would be to render section 51(3)(a)(ii) inapplicable on most occasions. For example, if the union went on strike rather than simply not work with the individual, the employer could acquiesce and the complainant would have no remedy. The employer, the Panel stated categorically, could not acquiesce in such union conduct.

These factual findings by the Panel represent a logical response to the fairly extreme facts of the case. When the question of remedies arose, however, the Panel ran into the problem that, as in the McCulloch case, they could not award compensation because there was no disciplinary action or penalty imposed within the terminology of section 55(d).

38. Id. at 5
40. L.R.B. No. 431C at 6
41. Id.
The writers have no qualms about the Panel ordering Dover Corporation to pay the full compensation. In the circumstances it was the only way that the complainant could be compensated and it was made very clear that, had the Panel had the power, the union would have had to share the cost. Moreover, Dover Corporation, as the party in a position to refuse the union approach, was substantially at fault. The company knew why Crowell had been expelled from the union; it made no attempt to discipline employees refusing to work with the complainant and made no attempt to protect Crowell by referring the matter in dispute to arbitration. In short, the company completely acquiesced in the union’s argument. This does not, however, alter the position that the present legislation does have a large gap and should be remedied as soon as possible.

One final case involving an unfair labour practice allegation before the Labour Relations Board was the Sydney Police Commission case. In this case, the watchmen working for the Sydney Council, members of the Sydney Civic Workers, were engaged in a lawful strike. Following a series of events, Sydney policemen were required to supervise various warehouses where the watchmen were normally employed. Initially, the police officers remained in the warehouse. Subsequently, however, they supervised the warehouse from outside a picket line set up by the striking watchmen, crossing the line only to phone in to headquarters. The policemen were members of CUPE, Local 758 and eventually at a meeting of the union, it was decided that no member would thereafter cross the picket line. A short time later the City Police Chief ordered the members to enter the warehouse and do police duty. When the police officers refused, all of them, fifty-eight in number, were suspended with a recommendation for dismissal.

CUPE alleged that the Police Chief had breached section 51(3)(c); the first time such a complaint had been made under that section since 1972. It reads:

3. No employer and no person acting on behalf of an employer shall

(c) suspend, discharge or impose any financial or other penalty on an employee or take any other disciplinary action against an employee, by reason of his refusal to perform all or some of the duties and responsibilities of another employee who is participating in a strike that is not prohibited by this Act.

42. L.R.B. No. 2348, dated February 4, 1977
The issue then for the Board was whether the policemen had been suspended by reason of their refusal to perform *some of the duties* of the striking watchmen. The Board in fact found that the policemen were not asked to perform any aspect of the watchmen's duties. While there was a strong similarity between their employment obligations, ultimately the Board decided that the police obligation was to provide 'police protection' which was significantly different from the watchmen's duties of safekeeping and security.43

There is nothing surprising about the decision on the facts. While we have some difficulty in seeing how the policemen's duty was not also "safekeeping and security" in the present case, in at least *some* respects, the Board reached the conclusion that there was a difference between watchmen and police protection after two and a half days of hearing and that finding must be accepted. What is important is the *dicta* of the Board as to general applicability of their decision. The Board made it perfectly clear that normally an employee whose regular duties overlapped the duties of an employee on strike would be protected by section 51(3)(c).44 So presumably, would an employee who normally did completely different work but was asked to perform some aspect of a striking employee's work. The decision in the present case was simply that the police protection was not the same as *any aspect* of the watchmen's duties. The Board has, therefore, left the way open for section 51(3)(c) to be applied in appropriate situations in the future.

**Certification**

Not unnaturally, during the past eighteen months, problems with the certification process have once again been the dominant feature of the industrial relations arena in Nova Scotia. There has fortunately not been a recurrence of the battles in the *Schwartz* case and subsequent authorities discussed in the last Recent Developments Issue although the Labour Relations Board Policy Statement on Pre-hearing Votes, brought in largely as a result of the *Schwartz* decision has been successfully challenged in the *Little Narrows Gypsum*45 decision. More important, however, are the changes in legislation recently introduced to clarify the whole certification process and which promise to make it somewhat more peaceful in

43. *Id.* at 3
44. *Id.*
45. S.H. No. 12787, dated February 1, 1977
the future. Aside from these developments, the only decision worthy of note is the Texaco Canada case where the Board had cause to consider the constitution of the union involved.

In the Texaco Canada Ltd case, the Atlantic Oil Workers had filed for certification of a group of employees in the refining department of the company. The union at the time of application had as "members" more than the requisite forty percent. Nevertheless, the Board rejected the application on the basis that the union had less than 40% of the unit as "members in good standing".

The Board's reasoning is extremely important. The union involved was a new union. Its basis for support was local and it had no international or national parent. More important, because of its new existence, it had only recently adopted a constitution. The Board simply held that of those people who had signed membership cards, only those who had signed after the founding meeting and adoption of the constitution were "members in good standing" within Regulation 10. Those who took "membership" prior to the adoption of the constitution and who had not subsequently affirmed their membership could not be so classified.

Clearly, the Board decision is correct. Regulation 10 pursuant to the Trade Union Act defines who is a "member in good standing". But, as the Board said, one cannot be a member of an organization which does not exist at the time of joining. Aside from this technical rationale, however, there is a sound industrial relations basis for this conclusion. At the time of application for certification, a union must file its constitution — it is extremely important that members of that union in fact know or have the opportunity to know what that constitution says at the time they join. Otherwise, the union might obtain 80% of the unit as members, then adopt a constitution to which 40% of the members might have substantial objections. At this stage, however, it might be too late to withdraw their membership or make any practical objection.

This decision is not particularly novel. It accords with practice elsewhere. Nevertheless, it is important in the sense that the

46. L.R.B. No. 2340
47. Id.
Board is making an attempt to ensure that at least basic democratic rights are sustained in new unions. To this extent, it provides for such organizations a clear indication of Board practice and sound advice as to how they should proceed in their organization programme. Every new union must be formed with a constitution and then it can begin signing up members. This should be compared with new locals of already existing unions. Here the parent organization will have existing constitutional documents to which the new members can make reference at the time they join. Of course there is the possibility that the local constitution will differ from the parent’s, but since to our knowledge the adoption of the standard constitution by the local is compulsory, this does not represent a great practical danger. New unions and their legal representatives should, therefore, take careful note of the decision.

A recurring problem in certification is the method of vote-taking. It will be remembered that following the problems caused by the Schwartz decision, the Board introduced its policy of pre-hearing votes. This was not done by regulation by Order-in-Council, but pursuant to the Board’s power to make rules under section 17(a). There is little sense in restating the procedure. Suffice it to say that a pre-hearing vote was taken in practically all cases within a few days of the application for certification. Any petitions, etc. pursuant to the regulations, had to be filed as usual, but their incidence dropped considerably due to the short time available in which to organize them. Finally, the Board treated the pre-hearing vote in an identical fashion to the manner in which it had previously acted with the traditional voting procedure. If it certified without a vote, the pre-hearing votes were destroyed. If it ordered a vote, the vote previously taken was counted. This procedure continued on a satisfactory basis for approximately eighteen months. However, not surprisingly, someone decided to challenge the new procedure.

In Little Narrows Gypsum Company Ltd. v. Labour Relations Board and International Union of Operating Engineers, Local 721B, an application in the nature of certiorari was made to quash constituted organizations were denied status as a trade union under the Ontario Act.

50. Policy Statement of the Nova Scotia Labour Relations Board, June 1975
51. See the excellent brief outline of the policy in Christie, Certification — Is There a Better Way to Test Employee Wishes (McGill Conference on Industrial Relations, May 1977)
52. S.H. No. 12787
a decision of the Board in which the pre-hearing vote procedure had been utilized. The procedure adopted by the Board in the case was not exceptional.\textsuperscript{53} The application was made, a pre-hearing vote ordered, five interventions and twelve petitions were received by the Board and subsequent to a hearing the Board ordered the pre-hearing votes to be counted. The result was that, of 64 eligible voters, 41 had cast ballots — 22 had voted for the union and 19 against. Accordingly, despite the fact that this did not constitute majority support for the union, the Board certified it in accord with section 24(3).

The company’s argument in the application for \textit{certiorari} was twofold:\textsuperscript{54} firstly, that the Board lacked jurisdiction to conduct the pre-hearing vote and it was therefore a nullity and should not have been relied on in the certification application. Secondly, that even if the pre-hearing vote procedure was valid and within the Board’s power, it was improper in that it did not give the company sufficient time to exercise its rights to express its views to the employees and that the Notice of Election furnished by the Board did not properly inform employees of the purpose of effect of the vote. Therefore, the Board should not have exercised its discretion to certify a union for which less than 50\% had voted.

On the vital first point, Cowan C.J. held that the pre-hearing vote procedure was outside the power of the Board. His Lordship concluded that the only jurisdiction the Board had to order a vote was under section 24 and that before that vote could be ordered, the Board, by virtue of section 2 of the 1973 regulations, and section 24(2) itself, had to consider petition evidence, the dimensions of the appropriate unit and the percentage of the members in good standing. Since under the pre-hearing vote procedure the vote was taken at an earlier stage, the vote was \textit{ultra vires} the Board.\textsuperscript{55}

In my opinion, the Board had no jurisdiction to order a pre-hearing vote of the kind held in this case. The only vote of employees which the Board is empowered to order is that contemplated by s.24(2) of the \textit{Act} and, as indicated above, the Board may, under the \textit{Act} and the regulations, including the regulation of 1973, order such a vote only after taking the procedural steps in making the determination of the dimensions of the appropriate unit, and of the number of members of the

\textsuperscript{53} L.R.B. No. 2336  
\textsuperscript{54} S.H. No. 12787 at 2  
\textsuperscript{55} \textit{Id.} at 17
appropriate unit who are members in good standing of the applicant union. These procedural steps were not taken, in the present instance by the Board. In certifying the union as bargaining agent, in the order which is attached, the Board purported to act under the provisions of s.24(3) of the Act. The Board made a finding that a vote of the employees in the unit had been taken under its direction, that not less than 60% of the employees in the unit had voted, and that a majority of those voting had selected the trade union to be a bargaining agent on their behalf.

In my opinion, the pre-hearing vote is not "a vote of the employees in the unit . . . taken under the direction of the Board", as authorized by the Act and the regulations. In my opinion, express statutory authority is required for the holding of a pre-hearing vote of employees.56

It is difficult to fault the reasoning of the Court on this occasion. The writers have always been of the view that the pre-hearing vote procedure was of doubtful validity57 and Cowan C.J.'s response is quite justifiable. His Lordship was well aware of the policy considerations behind the Board's introduction of the procedure, although one might query the insight behind his response based on legislative intention.58 Cowan C. J. also considered, albeit briefly, the main argument for the Board. Counsel pointed out that the Board had followed appropriate procedure pursuant to section 17 and Regulation 6 in making rules governing its procedure in taking votes under section 24. It was then submitted that the phrase "the taking of a vote" in section 24(2) (c), referred to the complete voting process, including the taking of the vote, the counting of the ballots and determination of the result. In other words, the ordering of the vote was not the vital point under section 24(2). It was the giving effect to them under section 24 that was important and so long as the Board determined the appropriate unit etc. before the vote became determinative, this was perfectly consistent with the

56. Id. at 15-16
57. See (1976), 2 Dal.L.J. 791 at 812 n.98
58. At S.H. No. 12787 at 16 Cowan C. J. States essentially that since the pre-hearing vote procedure was not included in the Act, it must have been the intention of the legislature to contemplate "the lapse of some time between the filing of the applications for certification and the holding of a vote under the direction of the Board and after the preliminary steps had been followed." Our view is not that the legislature intended this time lapse but that such a gap is quite normal when the pre-hearing vote procedure is not used and in the Nova Scotia situation it would appear the pre-hearing vote procedure was never seriously considered.
structure of the Act. In short, counsel was alleging that the vote could not be said to be completely taken until the ballots were counted. Cowan C.J. responded that in his opinion, the decisive point was the casting of the ballots. Accordingly, his Lordship concluded that the Board had no jurisdiction to conduct the vote in the way it did and the pre-hearing vote procedure was struck down.\footnote{59}

Before moving on to the good news about the certification process, two other points dealt with by Cowan C.J. should be mentioned briefly. First, he quickly rejected the arguments of the company based on natural justice.

If, contrary to my opinion, the Board had jurisdiction and authority to order a pre-hearing vote, the manner of conducting the vote would, in my view, be a matter of procedure for the Board. The objections raised by the company to the form of notice would have little merit if the time between the issuing of the Notice of Election and the actual balloting had been more than a few days. This would give the company and the union time to explain to the employees the purpose and effect of the balloting and the effect of abstention.\footnote{60}

Obviously, in the circumstances, this finding would give small comfort to the Board but at least the method of the procedure, if not the validity, survived.

Secondly, his Lordship correctly pointed out that there is an apparent discrepancy between the phrase in the Notice of Election given to employees which reads "THE BOARD MAY DISPOSE OF THE APPLICATION WITHOUT FURTHER NOTICE AND WITHOUT CONSIDERING THE PETITION OF ANY PERSON WHO FAILS TO ATTEND THE BOARD HEARING"\footnote{61} and section 2(3) of the June 14, 1973 regulations. The latter did not require that the person signing a petition should appear himself but only that some witness should appear who could give evidence as to the origin and manner of procurement of the petition.

One wonders why Cowan C.J. even raised this point. Admittedly, the wording was in conflict but this had been clarified with the Board. Moreover, it had not been the Board practice to give effect to the terminology of the Notice of Election. To the writers' knowledge, it had always followed the procedure under the 1973

\footnote{59. S.H. No. 12787 at 17}
\footnote{60. Id. at 18}
\footnote{61. See Form 9 of the \textit{Regulations Pursuant to the Trade Union Act}.}
regulations. At any rate, the point is now moot.

This brings us to the legislative amendments to the certification provisions. Over the period in which the pre-hearing vote procedure was being utilized by the Board, the Joint Labour-Management Study Committee had been attempting to reach a consensus that would put the procedure in legislative form and also make other changes in the certification process. Eventually, the Committee emerged with an agreement which was put before Cabinet and finally received Royal Assent on May 19, 1977, with some changes from the original draft.\^\textsuperscript{62}

\begin{enumerate}
\item Section 24 of Chapter 19 of the Acts of 1972, the Trade Union Act is amended
\begin{enumerate}
\item by renumbering subsections (4), (6), (7) and (8) thereof respectively as subsections (13), (14), (15) and (16); and
\item by repealing subsections (1), (2), (3) and (5) thereof and substituting therefor the following subsections:
\end{enumerate}
\begin{enumerate}
\item Where a trade union makes application for certification in accordance with Section 22 the Board shall take a vote of the employees in the unit applied for to determine their wishes with respect to the certification of the applicant trade union as their bargaining agent.
\item The Board shall conduct the vote under subsection (1) at the place of employment of the employees in the unit applied for during regular working hours.
\item Normally the Board shall conduct the vote under subsection (1) no more than five working days after receipt by the Board of the application and three working days after the Board’s notices are received by the employer, but if, in the opinion of the Board, special circumstances make it inappropriate to hold a vote until the Board has made such investigations as it deems appropriate including, if the Board so decides, giving interested parties an opportunity to present evidence and make representations, the Board may delay the vote.
\item The Board shall determine whether the unit applied for is appropriate for collective bargaining and the Board may, before certification, if it deems it appropriate to do so, include additional employees in or exclude employees from the unit.
\item Where a vote is counted the Board shall remove and destroy without counting the ballots cast by persons not in the bargaining unit determined to be appropriate.
\item The Board shall take such steps as it deems appropriate to determine the trade union membership of employees in the unit determined to be appropriate for collective bargaining.
\item When the Board has determined that a unit of employees is appropriate for collective bargaining, if the Board is satisfied that at the date of the filing of the application for certification the applicant trade union had as members in good standing
\begin{itemize}
\item less than forty per centum of the employees in the unit the Board shall dismiss the application; or
\end{itemize}
\end{enumerate}
\end{enumerate}
There are several key aspects of the new legislation which completely replaces section 24. First, as expected, the pre-hearing vote is given legislative sanction. The procedure is similar to that under the earlier Policy Statement with one exception. By section 24(3) the Board is given a discretion to delay the vote until “the Board had made such investigations as it deems appropriate, including, if the Board so decides, giving interested parties an opportunity to present evidence and make representations.” The writers are not clear what situations this phrase is intended to cover. Presumably it covers evidence and representations made to the Board and not, for example, by the employer to the employees.

(b) forty per centum or more of the employees in the unit the Board shall, subject to subsection (11), take and count the vote.

(8) Where as a result of a vote taken and counted pursuant to clause (b) of subsection (7) the majority of the votes cast are in favour of the applicant trade union, the Board shall, subject to subsection (11), certify the applicant trade union as bargaining agent of the employees in the unit.

(9) Where, in the opinion of the Board, an employer or employer’s organization has contravened this Act or regulations made pursuant to this Act in so significant a way that the representation vote does not reflect the true wishes of the employees in the bargaining unit determined to be appropriate for collective bargaining, and in the opinion of the Board the applicant trade union, at the date of the filing of the application for certification, had as members in good standing not less than forty per centum of the employees in the unit, the Board may, in its discretion, certify the trade union as bargaining agent of the employees in the unit.

(10) Where in the opinion of the Board the applicant trade union or a representative of the trade union has contravened this Act or regulations made pursuant to this Act in so significant a way that the representation vote does not reflect the true wishes of the employees in the bargaining unit determined to be appropriate for collective bargaining, the Board may, in its discretion, dismiss the application.

(11) Where in the opinion of the Board the applicant trade union or a representation of the trade union has contravened this Act or regulations made pursuant to this Act so that the membership information filed with the application does not represent the true wishes of the employees in the unit determined to be appropriate for collective bargaining, the Board may, in its discretion, dismiss the application.

(12) The Board may prescribe the nature of the evidence to be furnished to it, and the Board or any person to whom it may in writing delegate the authority may, for the purpose of making any determination under this Section, Sections 22, 23, 26, 27, and 28, make or cause to be made any examination of records or other inquiries, hold any hearings or take or supervise the taking and counting of any votes that it deems expedient, and no person shall hinder or obstruct the Board or any person so authorized in the exercise of the power conferred by this Section.
Accordingly, it appears likely that the delaying power of the Board will be used where there are problems dealing with a roving workforce, e.g., where the place of employment is undetermined; questions relating to the opportunity to vote, e.g., a university at which everyone is on holiday at the vital time; and possibly preliminary questions relating to the determination of the appropriate unit.

Secondly, the legislation effectively removes petitions from the certification procedure, thus eliminating the main source of problems for the Board in the last four years.

Thirdly, for all intents and purposes, the pre-hearing vote will be counted on every occasion. By section 24(7), where the applicant union has less than 40% of employees in the unit as members in good standing, the Board shall reject the application. Where there are more than 40% members in good standing, a vote shall be held. Provided a majority of the votes cast are in favour of the union, it shall be certified by the Board. The only two exceptions to this compulsory procedure are where the union or the employer has committed an unfair labour practice. If the union has breached the Act or regulations in so significant a way that the vote does not reflect the true wishes of the employees, the Board may disregard the vote and refuse to certify. Similarly, where the union has breached the Act or regulations so that the membership information does not reflect the employees' true wishes, the Board may dismiss the application without even ordering a vote.

Finally, the new legislation adopts the British Columbia and Ontario approach of allowing the Board to certify a union with 40% or more members in good standing where the employer has committed an unfair labour practice which is so significant that the vote does not represent the true wishes of the employees. Employers are thus clearly warned not to interfere illegally in the organizing campaign. If they do, not only will the vote possibly be ignored but the union, which may have only minority support, will likely be certified automatically.

In a rare instance of unanimity, both labour and management seem fairly happy with the amendments. The unions, who have

63. Id. at 24(8)
64. Id. "subject to subs. 10"
65. Id. at 24(10)
66. Id. at 24(11)
67. Id. at 24(9)
been rather obsessed with the disadvantages of secret ballots, seem to have been convinced that so long as the secret ballot is taken quickly there will be no opportunity for possible employer interference and that their support will not be eroded during the three-month wait for a hearing. The employers seem content with the notion that the vote will be counted on almost every occasion, thus ensuring majority support for the Union. Moreover, there is no indication that the system will not work. If the union has support at the time of application, that support should be reflected in a vote which is taken quickly. If the union loses when the vote is counted, that is a clear indication that the union did not enjoy majority support. The only exception to this general rule is where the employer has illegally interfered and, as stated, the Board has the appropriate remedy here.

This is not to say that the amendments are perfect. In the writers’ view, some problems may arise with both of the provisions dealing with union and employer interference which affects the vote. The requirement is that the party be found to have breached the Act or regulations, which will mean in effect a full-scale hearing of an unfair labour practice with all the problems of intent involved in such offences. Moreover, the breach must be made “in so significant a way that the representation vote does not reflect” the employees’ true wishes. These words are much narrower than those in the Ontario Act where the phrase is “not likely to be disclosed.” We are somewhat concerned that if MacKeigan C.J.’s frolics in the Schwartz case are indicative of the likely approach of the Courts in this area, the Board may be in for more trouble. It should be noted, however, that the Board is expressly given the jurisdiction in this matter and this may curb any undesirable judicial tendencies.

One final point that might be mentioned briefly is the compulsory nature of certification under the amendments. It will be remembered that under the old section 24(3)(c) the Board had a discretion as to whether to certify. This was used, inter alia, to prevent the

68. Id.
69. Id.
70. The Labour Relations Act, R.S.O. 1970, c.232, s.7(4)
71. S.N.S. 1972, c.19, s.24(9): “Where, in the opinion of the Board. . . .”
72. See (1976), 2 Dal. L.J. 791 at 800-802. Also Nova Scotia Government Employees Association and the Isaak Walton Killam Hospital for Children, L.R.B. No. 2116
certification of unions that had constitutional deficiencies in the sense that they could not have jurisdiction over the employees or possibly because they discriminated against employees in the unit. Now that the act of certification is mandatory, one wonders where the Board will get this discretion. The new section 24(11) requires that the union breach the Act or regulations before the Board can decide not to hold a vote and the Ontario High Court decision in the CSAO case and subsequent Ontario Board practice would seem to indicate that a discriminatory union constitution is not necessarily a breach of the Act. In other words, unless the union contravenes the express discriminatory provisions in what is now section 24(15), it may be beyond the reach of the Board. It will be interesting to see how the Board deals with this question.

These few points aside, it is our view that the new amendments should prove to be far superior to the former provisions. No doubt difficulties will arise but the removal of petitions and the legislative sanction given to pre-hearing votes should remove many problems for the Board. It is interesting, when the tendency in other provinces is to move away from the necessity of vote counting, that Nova Scotia has chosen to go in the opposite direction. In our view, the Nova Scotian approach would seem to make good sense.

Revocation of Certification

Applications for revocation of certification arise far less than applications for certification. Accordingly, while section 27 of the Nova Scotia Act is an extremely important section, the Board has not had occasion to amplify its meaning until the recent Henwood Foods Ltd. case.

74. "Notwithstanding anything contained in this Act, no trade union, the administration, management, or policy of which is, in the opinion of the Board, dominated or influenced by an employer, so that its fitness to represent employees for the purpose of collective bargaining is impaired or which discriminates against any person because of sex, race, creed, colour, nationality, ancestry or place of origin, shall be certified as the bargaining agent of the employees, nor shall an agreement entered into between that trade union and that employer be deemed to be a collective agreement."
75. L.R.B. No. 2377, dated July 15, 1977. The Board's decision in this case has subsequently been quashed in the Nova Scotia Supreme Court by Glube J. (S.H. No. 16200, dated October 4, 1977). Her Ladyship found that "represents" in
The respondent union, Retail, Wholesale and Department Store Union, Local 1015, had been certified as bargaining agent for "all employees" of the predecessor of the employer. At that stage the practice of the Board was to certify only full-time employees and all collective bargaining had been conducted on a similar basis in subsequent years. In other words, the unit certified had not been extended to include part-time employees by voluntary recognition and the unit at the time of the present application was the same as at the date of certification. Six out of ten employees signed the application for revocation and four of the applicants were part-time. Of the two full-time signatories, one was a union member and one was not. The final point of importance was that the application was made while the union was on strike.

Section 27 of the Act states that where a trade union has been certified for not less than 12 months and

The Board is satisfied that

(a) a significant number of members of the trade union allege that the trade union is not adequately fulfilling its responsibilities to the employees in the bargaining unit for which it is certified; or

(b) the union no longer represents a majority of the employees in the unit;

the Board upon application for revocation of certification may order the taking of a vote to determine the wishes of the employees in the unit concerning revocation or confirm the certification in accordance with the result of the vote.

Thus, there are two ways in which a group of employees can apply for revocation. First, by showing that a significant number of members of the union allege that the union is not adequately fulfilling its functions as a bargaining agent to the employees in the unit. Second, by demonstrating that the union no longer represents a majority of employees in the unit. In the present case, the Board had occasion to discuss both these limbs.

section 27(b) does not mean "has as members" and that employees did not have to resign from the union if they are to take advantage of section 27(b). Moreover, Madam Justice Glube strongly indicated that the circumstances of a strike and the Board taking this factor into account in deciding whether to order a vote might be reviewable. We regard this as an extremely bad decision; one which completely ignores the structure of the revocation provisions and industrial realities. Apart from this, however, Glube J.'s decision is particularly unfortunate as it gives very little, if any, guidance on what is the interpretation of section 27(b).
The Board found that section 27(a) did not apply on the facts. Because the unit had been defined by the Board as a unit of full-time employees, it concluded that a significant number of employees had not made the application. On the facts, only one member of the union had made the allegation and this was insufficient. The Board did make clear, however, that it was not laying down any percentage requirement; thus, you do not have to have 50% of the members involved in the application. Nor do you have to have more than one member; in some very small units, one may be sufficient. The Board simply decided that on the facts of this case, one member was not a significant number.

The Board did make one other significant point. The Nova Scotia provision does not place any time restrictions on the application for revocation apart from the 12 month condition precedent. In Ontario, on the other hand, there is a specific period when a lawful strike is in progress during which such application cannot be made. In the Henwood Foods case, the respondent union argued that despite the silence in the Nova Scotia Act, the Board should exercise both its general discretion to order a vote and its discretion to decide whether a significant number of members are making the allegation in light of the special vulnerability of unions during the strike. The Board agreed that it should not too readily order a vote on an Application for Revocation when a legal strike was current.

This approach makes eminently good sense for two reasons. First, from the union's point of view, it is conceivable that support will lag during a long and bitter strike. Members may not appreciate whatever benefits the strike may bring them and, because the withdrawal of support may only be temporary, the Board must be very careful about giving it any effect. Moreover, any indication of lack of faith may hurt the union in its negotiations. Secondly, it must be borne in mind that the strike provides the employer with a perfect opportunity to break the union. By stretching out negotiations over a lengthy period, the employer can implicitly encourage the withdrawal of support for the union. In other words, what the Board is doing in its position on revocation applications during lawful strikes is minimizing the consequences of that collective action on the union's certification. Nor should this cause

76. Id. at 2-3
77. The Labour Relations Act, R.S.O. 1970, c. 232, s. 53(3)
78. L.R.B. No. 2377 at 3
management undue concern. A genuine employee application will still be successful; they will simply have a heavier onus to satisfy. Moreover, if in fact the union does not have any support, the certification will be *largely redundant as it will not be able to bargain effectively*.

Finally, we should point out that it is a *significant number* of members *alleging* lack of representation by the union that is important. They are under no obligation to prove and the Board is under no obligation to ascertain *whether in fact* the union is properly representing the employees. The employee allegations must of course be in good faith but this is the only requirement.\(^79\)

The Board also had to consider the second limb of section 27 which requires that the union no longer *represents* a majority of employees in the unit. It decided that “*represents*” means “*has as members*” and that since only one of the full-time employees (6 in number) and one of the members had signed the application, section 27(b) had not been satisfied. No proof of lack of union representation had been tendered.\(^80\)

As the Board pointed out, this interpretation of “*represents*” means that for an application to be successful under 27(b), it must be demonstrated that a majority of employees are not members of the union. This, in turn, means that people must *resign* from the union if they wish to demonstrate lack of union representation. On occasion this may cause problems if the union constitution or security clause prevents resignation. However, as the Board pointed out, in this situation the union members may make use of section 27(a) which is extremely widely worded and where withdrawal from the union is not a prerequisite. It might be pointed out, however, that resignation will not always be necessary. For example, where a union has been certified with 52% of the workforce and after a period of time 10% of those members leave, a majority of employees in the unit will not be *represented* by the union. Presumably an application could be made in these circumstances for revocation within section 27(b).

Two final points might be made which were not dealt with in the Board decision in *Henwood Foods Ltd*. First, it should be noted that the employees must indicate under section 27(a) that the union is not fulfilling its proper functions. They may not merely indicate that

\(^{79}\) *Id.* at 2

\(^{80}\) *Id.* at 3
they do not want to be a member of the union nor pay dues. If this allegation is being made, presumably it must be done under section 27(b) after the employees have resigned. The application for revocation must therefore be properly framed. Second, the Board discretion under section 27 is extremely wide. It has a discretion to decide whether a “significant number” of members have made the appropriate allegation. It has a discretion whether to order a vote and a discretion whether to decertify in accordance with that vote. Apart from the occasion of a lawful strike, this discretion will presumably be utilized where the employer has been involved in pressuring the employees into applying for decertification or where perhaps a raiding union has been “persuading” members of the incumbent union to decertify in too “insistent” a manner. One can expect the Board to use this discretion quite freely.

Alteration of Terms and Conditions of Employment During the “Freeze” Period

In Kentville Hospital Employees’ Association and Kentville Hospital Association, the Board had to determine whether the employer had violated section 33(b) of the Trade Union Act, which provides,

Where notice to commence collective bargaining has been given under Section 31 or Section 32 or in accordance with a collective agreement which provides for the revision of a provision of the agreement, the employer shall not, without consent by the certified or recognized bargaining agent or by the Board, increase or decrease rates of wages or alter any other term or condition of employment of employees in relation to whom notice to bargain has been given until (a new collective agreement has been concluded or conciliation procedures have been completed).

The facts were that Mr. Andrews, who was employed on full-time casual basis at Miller Hospital, was ordered by his supervisor to take part in in-service training for doctors outside his normal working hours. There was no question that the employer had in the past ordered Mr. Andrews to work paid overtime, and that he had always complied. On this occasion, he refused and was dismissed. The evidence disclosed that Mr. Andrews had originally agreed to participate but that he changed his mind because he disagreed with the format of the program. At that time, no collective agreement

81. See Form 6 of the Regulations Pursuant to the Trade Union Act
82. L.R.B. No. 2372, dated June 13, 1977
was in force and the conciliation stage under section 33 had not been completed. The question was whether the supervisor's order constituted an alteration in the terms and conditions of employment of Mr. Andrews without the union's consent under section 33(b).

The Board held that the section had not been violated on the ground that Mr. Andrews was contractually obliged to work overtime at his employer's request so that there was no alteration of his terms and conditions of employment. Further, the Board held that the dismissal of an employee does not ipso facto constitute an "alteration" for the purposes of establishing a violation of section 33(b) where there is no "alteration" of another term and condition of employment associated with that dismissal. Thus, if the dismissal is lawful as being in accordance with any applicable requirements for just cause, seniority, or due notice or wages in lieu thereof, and it does not otherwise amount to an unfair labour practice under the Act, the employee has no basis for a complaint. It is submitted that the Board's decision is correct, for the purpose of s.33(b) is to maintain the status quo once notice to bargain has been given.

Enforcement of the Collective Agreement

This section focuses on the enforceability of the collective agreement in two situations: first, during the currency of the agreement; and second, after the expiry of the agreement when it is sought to enforce its provisions through their incorporation into individual employment contracts. Four recent court decisions are examined: Ainscough, decided on April 22, 1975 in the Supreme Court of Canada; Winnipeg Teachers, decided in the same court on October 2, 1975; Zwelling, decided in the Ontario Court of Appeal on December 4, 1975; and Brunet, decided on November 2, 1976, in the Supreme Court of Canada. These decisions are of considerable importance in Nova Scotia.

A. During the currency of the collective agreement.

There are two possible legal bases for enforcement by the courts of a collective agreement:

83. Id. at 2
84. Id.
86. [1975] CLLC 14,299
87. [1976] CLLC 14,047
88. [1977] CLLC 14,067
(a) through direct enforcement of the agreement by one of the parties on whom labour relations legislation makes it legally binding, namely the employer, the union and any employee in the bargaining unit;  

(b) through a contract action founded on the incorporation of the provisions of the agreement into the individual employment contracts of members of the work force.

(a) Direct enforcement

The preponderance of jurisprudence establishes that courts will not permit an employee to enforce benefits under the collective agreement without prior exhaustion of the grievance and arbitration procedures in the agreement where enforcement would require the court to interpret the agreement. The courts will only permit such an action where no question of interpretation is involved and the employee is merely seeking an alternative device for collecting ascertained benefits owing to him.

This reflects two policies. First, public policy endorses arbitration as the appropriate forum for resolving grievances arising under the collective agreement. Arbitration has the advantages over civil litigation of relative speed, informality and cheapness, and the arbitrator, generally selected by the parties themselves, brings greater industrial relations expertise to bear on the problem than does a judge. Indeed, the thrust of recent labour relations

89. E.g., Nova Scotia Trade Union Act, s. 39.


91. See, however, the criticisms of Weiler in The Labour Board and the Collective
legislation in some provinces, and in the *Newfoundland Association of Public Employees* case referred to below, is to limit the scope of judicial intervention in grievance arbitration. Second, public policy recognizes that trade unions have a legitimate interest in "screening" grievances through their exclusive control over access to the higher echelons of the grievance and arbitration procedures, provided that the union does not abuse its power as exclusive bargaining agent by victimizing an individual worker or "trading off" his legitimate grievance so as unfairly to deny him his rightful expectations under the collective agreement. To permit judicial enforcement of the collective agreement would undercut the unions' "screening function". Save for few exceptions, the balance between the interests of the union and the individual employee has been drawn by imposing a "duty of fair representation" on the union, either by statute as in Ontario and British Columbia or at common law as in other provinces, whilst preserving the arbitrator's exclusive jurisdiction to interpret and resolve "rights" grievances, at least unless and until violation of the duty of fair representation is established.

These issues were considered by the Supreme Court of Canada in

*Agreement* (Address to the National Academy of Arbitrators, Toronto, April 14, 1977)

92. Infra, Notes 161 and 199 ff. and accompanying text


95. Only The Ontario Labour Relations Act s. 60 and the British Columbia Labour Code s. 7(1) provide statutory duties. In other provinces, the employee must rely on a common law action, as in *Fisher v. Pemberton* (1970), 8 D.L.R. (3d) 521 (B.C.S.C.). See B. Adell, *The Duty of Fair Representation in Effective Protection for Individual Rights in Collective Agreements* 25 Industrial Relations No. 3. Legal commentators should not ignore the practical constraints on abuses by the union, e.g., adverse publicity, the internal institutions of "union democracy" and the role of the C.L.C. Ombudsman under the C.L.C. Constitution (pp. 46-47). Section 14 (1) of the Nova Scotia Trade Union Act does not, if it is submitted, impose a duty of "fair representation" on the union nor a duty of "fair treatment" on the employer. Rather, it allows the employee to by-pass the collective institutions for dispute resolution and go directly to the employer, but the latter can say "no" at his discretion. The section's function appears to be limited to striking down provisions in the collective agreement or the union rule book which purport to penalize the employee or otherwise prevent him from going directly to his employer.
The facts involved an employee who was discharged when he asked to be assigned to a lighter job following an injury at work. He claimed that the collective agreement entitled him to such a job but that his union, which controlled access to the higher stages of the grievance procedure, including arbitration, had either refused or neglected to process his grievance. He requested the Court to enforce the relevant article in the agreement by reinstating him in the lighter job, with an award of damages for lost work against the union and the employer. Mr. Justice Pigeon, delivering judgment for the Court, dismissed the plaintiff’s action on the ground that it would require the Court to usurp the function of arbitrator by interpreting and applying the relevant provision in the collective agreement. He said that this would not only run counter to section 88 of the Quebec Labour Code, which provides for compulsory “arbitration” as the terminal step in resolving “rights” disputes, but also to those provisions in the collective agreement itself which were to the same effect. He restricted the court’s jurisdiction to enforce provisions of collective agreements to the following situations. First, where the arbitrator has made an award and the court is asked either to enforce that award or to calculate benefits owed to an employee pursuant to the correct formula as determined by the award. Second, where the arbitrator has not made an award but the parties are agreed as to the correct amount of benefits owed to the employee. Third, and most significant, he hinted that the court may enforce a provision of the agreement where the union refuses “in bad faith” to process a grievance, notwithstanding that this requires the court to interpret and apply the relevant provision. It follows that an employee could not seek judicial enforcement under this head prior to his attempting to seek satisfaction under the machinery established by the collective agreement. The issue did not arise on the facts of the case as there was no evidence of union “bad faith”. However, Mr. Justice Pigeon’s remarks do have important implications where the union is in breach of its “duty of fair representation”.

In Nova Scotia, the “duty of fair representation, if it exists at all, must rest on a common law suit for breach of statutory duty following the decision of the British Columbia Supreme Court in Fisher v. Pemberton, the only case to arise on the point in

96. (1977) 77 CLLC, 14067 (S.C.C.)
97. Id. at para. 14596 and para. 14598
98. Supra, note 95
Canada. In that case the court, having established breach of the duty, measured the plaintiff's resulting financial loss by reference to the likelihood of his winning in arbitration. Since his chances of success were remote, nominal compensation was awarded. Strictly speaking, this remedy did not involve the court enforcing the collective agreement as such; rather, it was enforcing the "duty of fair representation" and merely measuring the damage flowing from breach of that duty by reference to the probabilities of the arbitrator enforcing the agreement in the plaintiff's favour had the grievance proceeded to arbitration. In practice, this does require the court to perform the arbitrator's role of interpreting the agreement, which itself makes for unsound policy, but the court does not step into the arbitrator's shoes to enforce the agreement. However, Mr. Justice Pigeon appears to suggest that the court may assume the enforcement powers of the arbitrator as if the court itself were the arbitrator, which is technically different from enforcing an independent "duty of fair representation". Therefore, Mr. Justice Pigeon's remarks go beyond Fisher v. Pemberton and in so doing create additional problems not raised by that decision.

First, many collective agreements provide for "mandatory" time limits within which arbitration must be invoked, as a condition precedent to the arbitrator having jurisdiction. If the court were enforcing the collective agreement qua arbitrator, as Mr. Justice Pigeon implies, it would presumably have to comply with the time limits in light of the Port Arthur\textsuperscript{99} decision and the provision common to collective agreements precluding modification of its terms by the arbitrator. The court's jurisdiction would probably not extend to rewriting the terms of the agreement. Does this mean that the court would be precluded from enforcing the agreement if the hearing were not held within the time limits,\textsuperscript{100} or alternatively, if the hearing were untimely but civil action was commenced within the time limits? It is arguable, though not established law, that this problem would not arise under the Fisher v. Pemberton approach because the court is not enforcing the agreement itself, but speculating as to the outcome of arbitration were the arbitrator to have jurisdiction to hear the case.

Second, the court's remedial powers under both the Pigeon J. and the Fisher v. Pemberton approaches are unsatisfactory as compared

\textsuperscript{99} (1967), 70 D.L.R. (2d) 693 (S.C.C.)
\textsuperscript{100} Pigeon J. hints that this may be the case. See para. 14598
to the remedies available in provinces which have a statutory "duty of fair representation" administered by a labour relations board. In Ontario, the Board has recently spelled out the available remedies for breach of section 60 of the Ontario Labour Relations Act. If the union has wrongfully failed to take a grievance to arbitration, the Board, if it considers arbitration to be the appropriate remedy, can order the union to arbitrate along with an order modifying the agreement, for example, waiving the time limit provisions so as to permit arbitration. If the Board has reason to believe that the union will not represent fairly the employee in arbitration, it can order the union to retain counsel acceptable to the employee at the union's cost. In addition, the Board can make an order at the date of the hearing requiring the union and employer to compensate the employee for financial loss aggravated by the violation of the duty contingent upon his grievance being successful in arbitration. In these provinces, it is both undesirable and unnecessary for the court to intervene because the labour boards are the most suitable body to determine whether a violation of the duty has occurred, and if so, what in their arsenal of remedies is the most appropriate on the facts.

If Mr. Justice Pigeon's approach were followed in provinces not having a statutory "duty of fair representation", the court could probably not arbitrate the grievance itself in the face of expired "mandatory" time limits, nor could it avail itself of the statutory discretion specifically conferred upon "arbitrators" — not courts — to extend time limits in provinces having such legislation. (The Nova Scotia Trade Union Act does not include this provision.) Even if the court were to arbitrate the grievance, it probably could not avail itself of the statutory power conferred specifically on "arbitrators" to order a substitute for the employer's penalty, although this may not be so important after the Newfoundland Association of Public Employees case. Possibly, the court could order reinstatement in unfair discharge grievances after the

102. E.g., Murphy v. Int'l. Printing and Graphic Communications Union Local 482 (1977), March 27th File No. 1687-76-U
103. As in Murphy, Id.
104. The Ontario Labour Relations Act, s. 37(5) (a); Manitoba Labour Relations act, s. 111.2; British Columbia Labour Code s. 98(e)
105. Nova Scotia Trade Union Act, s 41(d) (ii)
106. Infra, Notes 161 and 199 ff and accompanying text.
Ainscough decision because it would not be enforcing an employment contract but a collective agreement. However, were the employee to seek reinstatement after the expiry of the collective agreement/"freeze" on the basis that the provisions of the defunct agreement remain in force through their incorporation into his employment contract, then damages alone would be recoverable because courts will not order specific performance of employment contracts. In addition, the labour relations legislation in some provinces appears to preclude court enforcement either specifically or because it requires all "rights" disputes to be resolved by final and binding "arbitration", not "arbitration or otherwise" as in Nova Scotia. In those provinces, it is probable that courts do not constitute "arbitration". These problems may be avoided under the Fisher v. Pemberton approach by arguing that the court is not setting itself up as arbitrator to enforce the agreement, but is speculating as to what an arbitrator armed with the powers of his position would do were he to resolve the case.

The most attractive course of action for a court faced with a violation of the "duty of fair representation" seems to be to remit the case to arbitration under the collective agreement. The court in Fisher v. Pemberton did not consider this, but had the facts of that case disclosed a manifestly unjust dismissal for which reinstatement was the appropriate remedy, they would have had to consider it because specific performance at that time was unavailable. If the court were to remit the case to arbitration — and it is not established that the court has jurisdiction to do so — the problem arises whether the arbitrator would have jurisdiction in the face of expired "mandatory" time limits. It is doubtful that the court could modify the time limits, and the union and employer would probably not be willing to waive them so that the grievance could be heard. In provinces where the arbitrator has a statutory discretion to extend time limits this problem could be circumvented, but the Nova Scotia

107. See supra, note 85
108. As in the Prince Edward Island Labour Act, s. 36(1), the Quebec Labour Code, s. 88, and The Ontario Labour Relations Act, s. 37(1). See also s. 3(3) of The Ontario Rights of Labour Act and s. 30 of the Saskatchewan Trade Union Act which appear to preclude Pigeon J's approach in those provinces. Even where the legislation does use "or otherwise", the legislative intent in that arbitration is the most appropriate forum, e.g., General Teamsters Local 362 v. Midland Superior Express, [1974] 2 W.W.R. 490, at 504-5 (per Prowse J. A.) (Alta. Sup. Ct., App. Div.). Quaere: can the parties in their collective agreement expressly provide that the court is to be their "arbitrator"?
The Trade Union Act has no such provision. Further, even if the arbitrator has jurisdiction, the courts do not have the power to order the union to hire a lawyer to ensure fair representation for the employee in arbitration.

It is submitted that the unsound policy and the minefield of legal uncertainties involved in the court's dealing with "fair representation" cases make it essential for Nova Scotia to introduce a statutory "duty of fair representation" administered by the labour Relations Board. Unfortunately, it is difficult to see where the political pressure for such a change could be generated since neither management nor labour would be overjoyed with it.

Court enforcement of the collective agreement where "fair representation" is not at issue was considered by the Supreme Court of Canada in Winnipeg Teachers' Association No. 1 of the Manitoba Teachers' Society v. Winnipeg School Division No. 1. During negotiations for renewal of a collective agreement, but while the existing agreement was still in force, the Teachers' Association directed its members to "work to rule" by refusing to supervise the children at their lunchtime meals, which the Association considered to be a voluntary service. The employer alleged that school teachers were legally obliged to supervise school lunches under the collective agreement, which entrenched the Code of Rules and Regulations of the Division which in turn obliged teachers to "... make provision for the supervision of the school during the noon recess ..." and to "... carry out their duties in accordance with the regulations ... of the school system under the direction of the principal." Accordingly, the employer sought compensation for the cost of replacement supervisors arising from the Association's violation of the collective agreement.

Three questions faced the Court. First, whether the dispute should be remitted to arbitration under the collective agreement rather than be resolved in court. Second, whether the collective agreement obliged teachers to perform lunchtime supervision duties. Third, whether the Association was in breach of the collective agreement, assuming it made lunchtime supervision obligatory.

As to the first question, Martland J., speaking for the majority, held that the Court had jurisdiction because both parties agreed that it should hear the case without having challenged its jurisdiction in 109. (1975) 75 CLLC 14,299
the lower courts. He relied on the judgement of Laskin C.J. in *Ainscough*\(^{110}\) to that effect. It is submitted however that Laskin C.J. did not intend in *Ainscough* to formulate a rule of general application that the courts have jurisdiction whenever the parties so agree. Indeed, he stated that, "This Court refrained therefore in this case from taking any position on this question . . ."\(^{111}\) Laskin C.J. disagreed with Martland J., saying that, in fine, what the parties brought before the Court in this case was a matter which should have been submitted in the first place to adjustment, and if not adjusted, to arbitration under Article II (the arbitration procedure in the collective agreement). Their consent or choice to go the the Courts cannot of itself command the Courts' intercession by way of original adjudication.\(^{112}\)

It is submitted that this view makes for sound policy for the reasons stated earlier. Further, Martland J.'s approach appears to conflict with section 381(1) of the Manitoba Public Schools Act,\(^{113}\) which establishes the legal regime for labour relations in the industry. That section requires all disputes arising under the collective agreement to be resolved by "negotiation, conciliation and arbitration, or any of those means". Whereas both parties may waive by agreement a similar provision in their collective agreement, they cannot waive a statutory obligation!

As to the second question, the Court unanimously held that lunchtime supervision was obligatory upon teachers so that any teacher who refused to undertake it was in breach of the collective agreement and therefore subject to disciplinary action. This involved a very sensitive interpretation of the collective agreement. Laskin C.J., with whom the majority agreed said,

Almost any contract of service or collective agreement which envisages service especially in a professional enterprise, can be frustrated by insistence on "work to rule" if it be the case that nothing that has been expressed can be asked of the employee. Before such a position can be taken I would expect that an express provision to that effect would be included in the contract or in the collective agreement. Contract relations of the kind in existence here must surely be governed by standards of reasonableness in assessing the degree to which an employer or a supervisor may call for the performance of duties which are not

\(^{110}\) *Supra*, note 85
\(^{111}\) (1975), 75 CLLC 14, 299, at 15,254
\(^{112}\) *Id.* at 15380. *Supra*, note 18
\(^{113}\) *The Public Schools Act*, R.S.M. 1970, c.P250
expressly spelled out. They must be related to the enterprise and be seen as fair to the employee and in furtherance of the principal duties to which he is expressly committed.  

These remarks suggest that the legal basis of the employees’ obligation to perform lunchtime supervision was the employer’s power to issue orders pursuant to its residual “right to manage” in respect to matters not covered by the collective agreement. This right, which exists irrespective of a “management rights” article in the collective agreement, was reinforced by the entrenchment into the collective agreement of the Code of Rules and Regulations. Laskin C.J.’s remarks are therefore consistent with prior arbitral jurisprudence which establishes that where management issues work directives, either through an “entrenchment” article or through its residual “right to manage”, such rules must be reasonable as to their content and enforcement, they must be consistent with the express terms of the agreement and they must be brought to the attention of employees affected by them. However, suppose that workers are expressly obliged to perform certain tasks under the collective agreement but, as part of a “work to rule” campaign, perform them with such meticulous attention to detail that the job is slowed down as a consequence? Can it be said that the employees are in breach of the collective agreement? Laskin C.J. preferred to leave this question unanswered. An English Court of Appeal decision suggests that a “work to rule” is not in breach of the employment contract where the rule in question is itself a term of the contract. Provided that the employee performs the task to the letter of his contract, he is not in breach by virtue only of withdrawing his “goodwill”. However, where the rule is not itself a contractual term, but is a directive as to how the task should be performed made pursuant to the employer’s right to issue lawful and reasonable orders, then meticulous observance of that rule can amount to a breach of contract under three possible analyses. First, Lord Denning said that there is an implied term in the contract that the employee shall not carry out orders so as to wilfully disrupt

114. Supra, note 111 at 15380-15381
115. Canadian Broadcasting Corp. (1973), 8 L.A.C. (2d) 263 (Shime)
118. Per Lord Denning at 979 and Lord Roskill at 981
business operations.\textsuperscript{119} Second, Lord Roskill suggested that there is an implied term that the employee shall not carry out orders in an unreasonable manner which has the \textit{effect} of disrupting the business.\textsuperscript{120} This differs from Lord Denning's analysis in its emphasis on consequences rather than intent. Third, Lord Buckley said that there is an implied term that the employee shall promote the commercial objectives of the enterprise and not carry out orders in an unreasonable manner which frustrates those objectives.\textsuperscript{121}

Although the standards of the common law are often unacceptable in grievance arbitration, it may nonetheless be possible that arbitrators could analogize to these approaches and hold a "work to rule" to be in breach of the collective agreement where an employee unreasonably performed an order so as seriously to disrupt production, but not where the employee performs the job in the exact manner prescribed by a term of the collective agreement. Indeed, Laskin C.J. may have hinted at Lord Roskill's approach when he spoke of "work to rules" "frustrating" the purpose of the working relationship.

The legal status of "work to rule" may be vital, given that the definition of "strike" in section 1(1) (v) of the Nova Scotia Trade Union Act includes a "... cessation of work or refusal to work or continue to work ..." Presumably, this refers to "work" which the employee is \textit{legally bound} to perform,\textsuperscript{122} otherwise the bizarre consequence would follow that employees could be forced by an injunction or an order to do work which they have not contracted to do. In effect, the court or Board would be re-writing the wage-work bargain! The word "... includes ..." in section 1(1) (v) could permit the court or Board to determine that a "work to rule" does constitute a "strike", notwithstanding that the employees are not in breach of some other obligation under the collective agreement, but the same bizarre consequence would follow again! In the Winnipeg Teachers case, Laskin C.J. held that the "work to rule" was not a "strike", although the matter was not

\textsuperscript{119} Id. at 986-987
\textsuperscript{120} Id. at 980
\textsuperscript{121} Id. at 971-972
\textsuperscript{122} In \textit{Transport Labour Relations v. General Truck Drivers and Helpers Union Local No. 31} (1975), 54 D.L.R. (3d) 457 (B.C.S.C.) the "work to rule", which took the form of a slowdown, was illegal because, first, a slowdown by definition means that work is performed at a slower rate than is legally required under the collective agreement and, second, the definition of "strike" in the Canada \textit{Labour Code} s. 107(1) (b) expressly includes a "slowdown".
argued. He appeared to restrict "strikes" to the situation where workers go "off their jobs". It is submitted that this is overly narrow both in terms of industrial relations reality and in terms of the statutory definitions of "strike" in all provincial labour relations statutes.

The better view, it is submitted, is that "work to rules" should only constitute "strikes" when the employees are in breach of their obligation to obey lawful and reasonable orders under the collective agreement. This gives the courts and labour relations boards broad scope for interpreting the collective agreement because it requires an examination of the employees' obligations under the agreement as an integral step in determining whether there is a "strike". Where an employer alleges that an illegal strike has occurred he will normally seek an interlocutory injunction in the courts for breach of the statute (often because he believes the courts will give him a more sympathetic hearing!) or a "cease and desist" order in the labour relations board for an unfair labour practice. It is clear also that arbitrators have jurisdiction to award injunctions which are then filed as orders of the court. It could be argued that employers alleging an illegal "strike" should be compelled to seek relief in arbitration, but the delay in establishing arbitration may make this impractical. One solution is to confer exclusive jurisdiction in "illegal" strikes on the labour relations board, which is more sensitive to the industrial relations implications of interpreting the collective agreement than are judges.

As to the third question, namely whether the Association was in breach of the collective agreement, the majority of the Court held that it was. Laskin C.J. dissented on the ground that the Association was not in breach of any obligation specifically incumbent upon itself, notwithstanding that it had instructed its members to "work to rule" in breach of their obligations. He said, "such a claim could arise in contract against the Association only if it had expressly underwritten the performance by the individual teachers of their respective individual contractual obligations. . ." Nor he said, was the Association liable in the torts of inducing breach of contract

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123. At para. 15381
125. See the British Columbia Labour Code, ss. 31, 32, 33 and 34(2) which restricts massively the courts' role.
126. At para. 15382
and interference with contractual relations by unlawful means.

The thrust of Marland J.'s reasoning, on the other hand, seems to be that the Association was in breach of its general and overriding obligation to ensure that the terms of the collective agreement were observed by calling on its members to "work to rule" without first determining the legality of that action.

Laskin C.J. took an overly narrow view that the Association had not violated the grievance and arbitration procedure because the employer had agreed to process the dispute in court, thereby waiving any breach. This misses the point that the union specifically condoned its members' disobedience of management orders in order to exert economic pressure on the employer without first determining the legality of their actions. It is a well-established rule in arbitration that the employer's orders must be obeyed and then grieved, unless the employee honestly and reasonably believes the order to be unsafe, illegal or beyond his physical capacity.\(^{127}\) It is no justification for disobedience that there is a reasonable doubt as to the correct interpretation of the collective agreement. It is also well-established that a union is liable for expressly directing its members to exert illegal economic pressure on the employer.\(^{128}\)

(b) The incorporation theory during the currency of the collective agreement

This theory seeks to replace the enforcement machinery of the collective agreement with that of the employment contract as an alternative device for protecting the employees' benefits under the collective agreement. The argument is that certain provisions of the collective agreement are incorporated into, and become enforceable through, the employment contracts of the work force which co-exist with the collective agreement.\(^{129}\) The theory was always of questionable validity in a statutory framework of labour relations whose thrust is to minimize the role of common law in collective bargaining relationships\(^{130}\) and created a minefield of legal

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127. E.g., Re Seneca College (1976), 12 L.A.C. (2d) 27 (Weatherhill)
128. See Re Regent Refining and Atomic Workers (1977), 13 L.A.C. (2d) 88 (Weatherhill)
129. See B. Adell, The Legal Status of Collective Agreements in England, the United States and Canada (Ontario: Queen's University Industrial Relations Centre, 1970) at 203-27
130. C.P.R. v. Zambri (Royal York) (1962), 34 D.L.R. (2d) 654 (S.C.C. (per Judson J.) at 666, but contrast his irreconcilable dictum in Syndicat Catholique des
uncertainties. For instance, are certain provisions of the collective agreement, notably the grievance and arbitration procedures, inherently unsuitable for incorporation into the contract between employer and employee? What is the process of incorporation: is it automatic or by implication based on the parties' intentions and their customs or usages? The attraction of the theory was that it enabled courts to hear an employee's grievance in circumstances where the courts suspected that the union would not process it fairly or competently through the grievance and arbitration procedures. As such, it was a judicial reinforcement of the "duty of fair representation". In addition, the theory arguably could have been utilized to resolve grievances that were "untimely" under the collective agreement, though there are no cases on that point.

In McGavin Toastmaster v. Ainscough the Supreme Court of Canada appears to have delivered the incorporation theory a death blow, at least in situations where the collective agreement remains in force. Laskin C.J., for the majority, rejected the employment contract analysis, saying

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 the 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 common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, serverance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto...

This appears to reject the validity of the incorporation theory, at least during the subsistence of the collective agreement. The role


131. *Infra*

132. (1975), 54 D.L.R. (3d) 1; 75 CLLC 15253 (S.C.C.)

133. *Id.* at 5-6, [1975] CLLC at 15256

134. *Ainscough* has significant implications for the legal position of striking employees. See G. England, *The Legal Response to Striking at the Individual level*
of the employment contract is restricted to fixing the initial "wage-work" bargain between employer and employee at the hiring stage, whereupon it disappears and is replaced by the collective agreement as the exclusive source of job regulation. Even at the hiring stage, the collective agreement will play the dominant role in a pre-entry closed shop situation, although clearly the employee must enter into a contractual relationship with the employer as well as acquire union membership.  

B. After the expiry of the collective agreement: 

incorporation by "reference back".

Laskin C.J.'s judgement in *Ainscough* does not expressly preclude incorporation of the terms of a defunct collective agreement into the employment contract after the expiry of the collective agreement and the statutory "freeze", although the thrust of his reasoning is that this would be somewhat out of place in the statutory framework of collective bargaining. In *Re Telegram Publishing Co. Ltd. and Zwelling and Essig*, the Ontario Court of Appeal suggested that, in certain circumstances, incorporation of the provisions of an expired collective agreement into the employment contract is permissible. The implications of this decision are clearly important in Nova Scotia.

The facts in *Zwelling* involved a collective agreement between the owners of a Toronto newspaper and a union which contained a clause entitling employees to severance pay upon dismissal or "economy lay-off". Some time after the agreement and the statutory "freeze" period on changes in wages and working conditions had expired the newspaper closed down and the work force was discharged. One issue was whether two of the employees could enforce the severance pay provision by an action on their employment contracts, notwithstanding that the collective agreement was no longer in force. The Court held that one of the employees succeeded but the other failed because he had resigned voluntarily and therefore had

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136. *Id.*
not been dismissed or laid off within the meaning of the collective agreement. Kelly J.A. said,

... the accepted view appears to be that where, after the collective agreement has expired, the employee has continued to work for the employer and the employer has continued to accept the benefits of his services, there being no agreement to the contrary, and no other circumstances from which there may be implied terms and conditions of employment different from those set out in the collective agreement, the terms and conditions of employment after expiry are to be implied and would be similar to those set out in the collective agreement which related directly to the individual employer-employee relationship. ¹³⁷

This decision creates a minefield of legal problems.

First, Kelly J.A. clearly envisaged the process by which the terms of the collective agreement were incorporated in the employee's individual contract of employment — it being the parties' intention to "refer back" to the collective agreement to provide the terms and conditions of the employment relationship. This enabled him to circumvent the terminal date article in the collective agreement which would otherwise suggest that its provisions had lapsed as of the specified date. ¹³⁸ On the facts of the case, he was able to construe two memoranda sent to the employees by the employer offering continuation of employment on the old terms as an express "reference back".

Express "reference back" is unlikely to be common. More often than not the parties will simply not have considered how their relationship is to be governed after the collective agreement ends. Employers would normally not be willing to tie their hands by agreeing to express incorporation; rather, their attitude is more likely to be that "everything is up for grabs". Indeed, the lifting of the statutory "freeze", during which unilateral alteration of employment terms is prohibited, reinforces that attitude.

However, Kelly J.A. also suggested that there is a rebuttable presumption that the parties impliedly intend the old terms of employment to be incorporated into the employment contract arising from the sole fact that the employees continue working. It remains to be seen what conduct of the parties will suffice to rebut that presumption. Where no work intercedes between the lifting of the statutory "freeze" and either the occurrence of a strike, lockout

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¹³⁷. Id. at 14485
¹³⁸. See the Ferguson and Denis cases, supra, note 94.
or a unilateral alteration of the terms of the employment by the employer presumably the presumption is rebutted. This is arguably also the case where the employer expressly reserves the right to dictate the terms of employment on a day-to-day basis. Where work does continue it is questionable that the parties intend to incorporate more than the "everyday" provisions on wages, hours, and perhaps pensions where the employer continues to make contributions. The less commonplace provisions such as seniority, severance, holidays, sick pays, grievance procedure, and the like, which are not observed daily but only when the contingency in question arises, are less likely to be impliedly incorporated, at least until the contingency has materialized on one, or probably several, occasions.

Furthermore, Kelly J.A. did not explore the role of the union in the incorporation process. It is an unfair labour practice for the employer to regulate terms of employment on an individual basis directly with one or more employees so long as the union remains as the exclusive bargaining agent. Express incorporation arrangements directly with the employee are clearly impermissible, but what about implied incorporation based on the direct treatment of employees by the employer? It is not clear whether the employer should first clear such treatment with the union, or whether the union's silent acquiescence will suffice to avoid an unfair labour practice. Nor did Kelly J.A. consider the inference raised by the lifting of statutory "freeze" that the employer is thereafter free to impose new terms, at least unless and until he expressly contracts away that right in a subsequent collective agreement. Once terms are incorporated into the employment contract, unilateral variation of them by the employer constitutes a repudiation, unless the union (but presumably not individual employees) accedes to a consensual amendment of the contracts. In practice, the employees cannot enforce the old terms because specific performance is unavailable in court, but they can recover damages. Thus, if an employer wishes to avoid the bad publicity of contract breaking, he must either observe the old terms, thereby severely tying his hands, or impose a "lock-out" within the statutory definition, thereby attracting worse publicity and a full scale battle with the union! What is clear from the foregoing is that lawyers will have a field day in arguing whether there has been an implied "preference back"!

139. Trade Union Act s. 51(1) (a)
140. Trade Union Act s. 51(1) (0)
A second problem arising from the Zwelling decision, even assuming an express or implied ‘‘reference back’’, is that it is not certain whether all the provisions of the defunct collective agreement are suitable for incorporation as terms of an individual employment contract. Some may be too vaguely worded to be enforceable. Others are intended to regulate exclusively relationships between the collective parties, for example, a clause giving the union access to information, or recognizing the rights and facilities of shop stewards.¹⁴¹ In Zwelling, Kelly J. A. appeared to adopt the approach of the Minister’s designee, Carter,¹⁴² that only provisions which ‘‘directly relate’’ to the individual employer-employee relationship are capable of incorporation.

Applying Carter’s test, it is questionable whether the grievance and arbitration procedures can be incorporated, for although they furnish the enforcement machinery for individual rights their paramount function is to preserve industrial peace between the collective parties. Insofar as the incorporation of such procedures connotes that the employee can utilize them as of right, privity appears to be offended in that the union, which is not a party to the employment contract but without whose co-operation the procedures are inoperable, is compelled to co-operate.¹⁴³ Thus, if the procedures do not expressly reserve the union’s ‘‘vetting’’ rights, their incorporation clearly offends privity. Where the union is expressly empowered to ‘‘vet’’ grievances, presumably the privity problem can be circumvented by viewing the employees’ right to utilize procedure as subject to the condition precedent that the union agrees to co-operate. The privity problem could also be avoided by the court implying a term in the contract of union membership that the union agrees to co-operate, but this would deny the union’s legitimate interest in ‘‘screening’’ disputes, leave non-unionists unprotected and generally entangle the court in the legal jungle of union rule books. Alternatively, the court itself could simply interpret and enforce the provision in question, were the union to refuse to co-operate, but this makes for bad law and policy for the

¹⁴¹. Quaere: is the obligation to join the union under a closed/union/agency shop article suitable for incorporation?
¹⁴². (1973), 1 L.A.C. (2d) 1 at 16-17 (Ontario employment standards determination)
¹⁴³. If the union refuses to co-operate in breach of its ‘‘duty of fair representation’’, the court would be faced with the problem of appropriate remedies, supra.
reasons given earlier. 144 Apart from one decision of the British Columbia Supreme Court, 145 which was disapproved by Fraser J. in the Divisional Court in Zwelling, 146 who was not overruled by the Appeal Court on that point, there is no Canadian decision favouring the incorporation of the grievance and arbitration procedures. Dean Adell 147 has argued in favour of incorporation on the ground that the grievance and arbitration procedures along with guaranteed industrial peace represent the quid pro quo for the employer conceding substantive benefits. However, the argument does not compare like with like: it is precisely because grievance resolution machinery is procedural — not substantive — that it is conceptually different and arguably unsuitable for incorporation. Furthermore, it is established that the employer has no legal guarantee of industrial peace after the “freeze” lifts irrespective of the common law employment contract. 148 American courts regard the grievance and arbitration procedures as unsuitable for incorporation, 149 and in Britain, at least before the enactment of recent legislation, it was doubted seriously what they could be incorporated. 150

One eminent British academic 151 has argued that the “institutional nature” of pension schemes, which often involve a third party insurance company, makes them unsuitable for incorporation, but in Canada there is one decision suggesting the opposite. 152

This question of what provisions are suitable for incorporation is not of academic interest only, for if the grievance and arbitration procedures are not incorporated, the employees’ rights must fail for

144. Supra
147. Supra, note 129
148. This is the effect of the Royal York case, supra, note 130
151. O. Kahn-Freund, Labour and the Law (Stevens, 1972) at 149
152. In Re Int’l Assoc. of Machinists and Aerospace Workers, Flin Flon Lodge 1848 and Hudson’s Bay Mining and Smelting Co. Ltd. (1968), 66 D.L.R. (2d) 1 (S.C.C.) it was held that a pension plan enforceable at the individual level was incorporated into a collective agreement under a clause requiring the employer “to continue his support” of the scheme. This implies that the obligation may be incorporated from the collective agreement into the employment contract.
lack of enforcement machinery, unless the court is prepared to assume the functions of the arbitrator, with the unfortunate consequences which, that entails. The fact that the provisions of the collective agreement become contractual terms does not in reality make them any less provisions of a collective agreement.\textsuperscript{153} Even if the procedures are incorporated, if the employer refuses to comply with an arbitration award of reinstatement the grievor’s only remedy in court may be damages for breach of contract.

The arbitrator under the incorporation theory presumably derives his powers from the employment contract, not from the labour relations statute, so that his awards would be enforceable through the contract rather than as orders of the court. It is a nice question whether the court would order specific performance of an arbitration award to reinstate an employee when to do so would result in specific performance of an employment contract. Indeed, it is questionable whether an arbitrator deriving his authority from an employment contract would consider he could make an award of reinstatement in the first place!

A third point arising from Zwelling is that the incorporation theory could be thought to protect an employee although a second collective agreement is concluded which does not expressly preserve his benefits under the first agreement during the interval between them. An arbitrator under the second collective agreement would have no jurisdiction to enforce provisions of the earlier agreement unless the second agreement expressly provided that the provisions of the first agreement were to remain in force during the hiatus,\textsuperscript{154} although under the incorporation theory the provisions of the first agreement would be enforceable through an action on the employment contract. Of course, if the second agreement retroactively “gutted” some or all provisions of the first agreement, the second agreement would supersede any incorporated contractual terms during its retroactivity period. However, supposing a lawful strike or lockout occurred before a second agreement were reached, the incorporation theory would only protect the employees’ benefits up to the date the strike or lockout began, unless employment contracts were suspended for the duration of the industrial action. Although the labour relations legislation preserves “employee” status in this situation, it arguably does so only for the purposes of

\textsuperscript{153} Denis v. Galway Realty, C.F. Ferguson, \textit{supra}, note 94
\textsuperscript{154} Re U.S.W. and Int’l Nickel Ltd. (1970), 22 L.A.C. 286 (Weatherhill)
rights under the legislation, and incorporation is not a statutory right.\textsuperscript{155} It is therefore for the court to develop a common law suspension doctrine, but previous decisions in Canada and England suggest that this is extremely unlikely. The statute does protect employees fully in respect to pension rights and benefits where the employer purports to penalize them for striking, so that the incorporation theory is otiose. However, in respect to other terms and conditions of employment, because the Trade Union Act provides\textsuperscript{156} protection against discrimination for union activities strikers are not protected where everyone is penalized, so there may be a role for the incorporation theory in that situation. It is submitted that, rather than protect strikers by the incorporation theory, the statute should be amended by the substitution of the word "penalize" for "discriminate" as this is more in line with the philosophy of the statutory collective bargaining regime.

Although work must obviously continue on some terms after the expiry of the collective agreement and the statutory "freeze", it is submitted that the incorporation theory is an inappropriate device for settling those terms. It injects an alien common law element with a host of legal uncertainties into a statutory framework whose philosophy is to outlaw the common law.\textsuperscript{157} Even during the period between two collective agreements the statute requires the parties to bargain in good faith and the union remains the exclusive bargaining agent. It is consistent with this statutory framework that the problem of what happens to employment terms during the hiatus be resolved by a statutory "bridging" provision. Section 44(2) of the Ontario Labour Relations Act provides,

\begin{quote}
... the parties may, in a collective agreement or otherwise and before or after the collective agreement has ceased to operate, agree to continue the operation of the collective agreement or any of its provisions for a period of less than one year while they are bargaining for its renewal with or without modifications or for a new agreement, but such continued operation does not bar an application for certification or for a declaration that the trade union no longer represents the employees in the bargaining unit and the continuation of the collective agreement may be terminated by either party upon thirty days notice to the other party.
\end{quote}

\textsuperscript{155} Nova Scotia Trade Union Act, 2. 12(2). c.f. Re Allanson (1971), 20 D.L.R. (3d) 49 at 57 (per Arnup J.A.) (Ont. C.A.)
\textsuperscript{156} S. 51(3) (a) of the Nova Scotia Trade Union Act
\textsuperscript{157} See Royal York, supra, note 130 and Ainscough, supra, note 132
One problem with this approach is that, if the parties do not remove the peace obligation article, they must give thirty days' notice before industrial action can be taken, which may hamper their bargaining power in certain situations. Another drawback is the "contracting-in" philosophy; namely, that the parties appear to have to make some positive agreement. The word "otherwise" has not received judicial attention as yet, so that it is unknown whether the fact of continuing work without a positive agreement will suffice. It is preferable that a "contracting-out" philosophy be adopted whereby the collective agreement is presumed to continue, except for the peace obligation, unless both parties expressly agree to terminate it or modify its provisions. The government of Nova Scotia should consider seriously introducing a statutory "bridging" provision of this kind.

Arbitration

Compared to Ontario and Alberta, there is not a great deal of activity in the arbitration area in Nova Scotia. Over the past year, however, arbitration under collective agreements has been subject to a greater degree of judicial scrutiny than has hitherto been the case. In particular, the decisions of the Appellate Division in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 720 v. Volvo Canada Ltd.* and the Trial Division in *Bowater Mersey Paper Company Ltd. v. Canadian Paperworkers Union, Salaried Workers, Local 243* are of great significance in respect of their impact on consensual arbitrators. Moreover, the very recent decision of the Supreme Court of Canada in *Newfoundland Association of Public Employees v. A/G* has some extremely interesting comments in the area of the arbitrator's residual authority which may be of

158. In the construction industry in Alberta, the collective agreement must terminate either on the date a strike or lockout commences or on the date a second agreement is concluded, whichever occurs first. Alberta Labour Act, R.S.A. 1973, c. 33, s. 89.
160. S.H. No. 13092, dated February 18, 1977
161. Dated May 17, 1977
interest to those in Nova Scotia.

In the *Volvo Canada Ltd*\textsuperscript{162} case, the appellant union had referred a grievance to the arbitrator under the collective agreement to determine whether or not employees of the respondent company had accumulated seniority with respect to holiday pay while they were involved in a lawful strike. The arbitrator concluded that such seniority had not been accumulated under the collective agreement. In reaching his conclusion, he took into account a back to work agreement made in 1969 following a strike. At Trial Division,\textsuperscript{163} MacIntosh J. had dismissed the application to set aside the award under *The Arbitration Act*. On appeal, the Appellate Division upheld the union position and the award was quashed.

Three judgments were presented in the Appellate Division. MacKeigan C.J. N.S. began with an analysis of the very difficult arbitral question; namely, the role of judicial review of a consensual arbitrator when he has decided the very point of law put to him for his determination. As pointed out in this Law Journal recently,\textsuperscript{164} in theory a court should not review an arbitrator's consensual decision on that "very question"\textsuperscript{165} in the same way they review the decision of a statutory decision maker. The parties have agreed to place the matter before him and should be bound to accept his findings. It was also pointed out, however, that the Nova Scotia courts had not developed any real jurisprudence in this area and that perhaps the scope of the "very question" doctrine was being narrowed.

In *Volvo*, MacKeigan C.J.N.S. closed somewhat the difference between the consensual and statutory arbitrator. The Chief Justice initially appeared to accept the full doctrine as it is currently accepted by emphasizing the difficulty of review on the very question, although his Lordship stressed that the court may still intervene if the arbitrator has committed a jurisdictional error or misconducted himself in a procedural sense in reaching his decision.

The above statement should be qualified in the important respect, that where a question of law is the very thing referred to arbitration, in this case the legal construction and meaning of

\textsuperscript{162} S.H. No. 08384
\textsuperscript{163} S.H. No. 10972
\textsuperscript{164} (1976), 2 Dal. L.J. 791 at 850.
\textsuperscript{165} *Kelantan Government v. Duff Development Company*, [1923] A.C. 359 at 409 (H.C.)
clauses in the agreement, the decision of the arbitrator on that
very point cannot be set aside merely or only because the Court
disagrees with that decision:...

This rule that an arbitral decision on a pure question of law is
immune from direct attack is merely an aspect of the broader
principle that no arbitral award is reviewable as to its correctness
on the very question referred to arbitration — whether that
question is one of fact, one of law or one of mixed law and fact.
Judicial review to detect “misconduct” must be as to things done
or omitted, or decisions made by an arbitrator in the course of
reaching his final award or decision on the very matter decided.
That kind of review, including search for possible serious errors
of law in the ancillary matters, is open even though the ‘very
thing’ submitted was a question of law.166

Thus MacKeigan C.J.N.S. was at this stage still preserving the
“very question” doctrine while placing some restrictions on the
arbitrator’s collateral jurisdiction. Later in his judgement, however,
the Chief Justice offered an opinion which, taken literally, could
spell the end of the doctrine.

I should add that in addition to the collateral attack which may be
made on awards where only questions of law are involved, the
Kelantan principle is further qualified, and a direct attack is
probably permitted, where a gross error has occurred in deciding
the very question referred and where, in construing the clauses in
the collective agreement which have been referred for interpreta-
tion, the arbitrator’s interpretation is not one which the language
of the clauses will reasonably bear:...167

This view was not, apparently, shared by other members of the
Court. Coffin J.A., while agreeing with the Chief Justice that the
appeal should be allowed, did not comment on this point.168 On the
other hand, Cooper J.A., dissenting, was very clearly of the view
that a specific question of law had been referred to the arbitrator and
that the only way the decision could be quashed would be if the
arbitrator had proceeded illegally in reaching his decision.169

It is the writers’ opinion that MacKeigan C.J. is wrong in his
assessment of the court’s review power. The cases he cites as
authority for his proposition are hardly supportive. We have
struggled unsuccessfully to find much of relevance in International
Association of Machinists v. Hudson Bay Mining and Smelting Co.

166. S.H. No. 08384 at 3-4
167. Id. at 6
168. Id. at 28
169. Id. at 20
Moreover, while it is true that the reasonability of an arbitrator's decision was discussed in *Regina v. Barber, ex parte Warehousemen and Miscellaneous Drivers' Union*, that decision and the page references given by the Chief Justice involved statutory arbitrators. It may be that some authority for his comments may be found in the *Canadian Keyes Fibre* case, but even here it is not clear whether the Nova Scotia Court was referring directly to the "very question" principle.

A brief look once again at the Supreme Court of Canada decision in the *Metropolitan Toronto Police Association v. The Metropolitan Toronto Board of Commissioners of Police* is pertinent. There, the majority found that it was not a case where the "very question" doctrine would protect a consensual arbitrator:

In my opinion, the present case is not one in which the parties by agreement 'ousted the jurisdiction of the Courts to determine a question of law by choosing to have the question determined by a judge of their own making.' The question of law which arose in the arbitration came up in the course of a consideration of a grievance in the ordinary way under the provisions of the collective agreement.

There was here no joint submission by the parties to the arbitrator, seeking to have a specific question of law determined for them . . . [The] issue came before the arbitrator by virtue of the provisions of the collective agreement governing the processing of all grievances. Its solution certainly involved a consideration of the construction of the agreement, but the submission to the arbitrator was to be determined on the basis of the true meaning of the agreement. The parties had not bound themselves to an unqualified acceptance of the arbitrator's decision as to what the agreement meant.

As has been commented, this decision definitely had the effect of narrowing the "very question" doctrine but only in the sense of when it applied. We feel that it is abundantly clear from this passage that when a specific question is referred to the arbitrator, that question cannot be reviewed by the Courts. The parties have bound themselves to an "unqualified acceptance" of the arbitrator's decision.

We are not surprised at the Chief Justice's approach. His

170. [1968] S.C.R. 113
171. [1968] 2 O.R. 245
172. [1974] 8 N.S.R. (2d) 81
174. Id. at 657; 45 D.L.R. (3d) at 568
Lordship's attitude in the Schwartz case, particularly his comments on what constitutes an unfair labour practice, indicated some reluctance to accept any autonomy for supposedly expert tribunals and boards. Nevertheless, MacKeigan C.J.N.S. has come close in the Volvo case to eliminating completely any distinction between statutory arbitrators in Ontario and Prince Edward Island and the consensual counterpart in Nova Scotia. In so doing, His Lordship has come as close as any judge to admitting that the basis for review is whether or not the arbitrator's decision crosses the Court's "threshold of shock". Hopefully, the dissenting judgment of Cooper J.A. will be followed if the point arises before the Appellate Division in the future.

Aside from the Chief Justice's discussion of judicial review we have few critical comments on his decision. In fact, MacKeigan C.J.N.S. shows a genuine appreciation of the problems and interests of unionized employees engaged in a lawful strike. The issue was whether seniority for holiday pay accumulated during such a strike under the collective agreement. The relevant provisions of that agreement were:

19.04 Subject to the provisions of Article 19.05, an employee is qualified to receive pay for the above holidays if he has attained seniority through completion of his probationary period and he has worked seven (7) hours on the work day immediately prior to, and seven (7) hours on the day after, each of the above-named holidays. Absence from work for reasonable cause on the day before or after the holiday will be counted as time worked in qualifying for holiday pay . . .

19.05 In no case shall the number of consecutively paid holidays (Christmas Holiday Period) exceed the number of full months of accumulated seniority attained on the day prior to commencement of said consecutively occurring holidays . . .

9.01 For the purpose of this agreement and unless otherwise stipulated herein, 'seniority' means the length of service in the bargaining unit.

25.03 For the purposes of this agreement, the word 'service' includes any period of time during which an employee accumulates seniority as well as any period of employment with the Company in any capacity whatsoever.

9.02 Seniority of an employee shall not count until he has completed an accumulated period of thirty-eight (38) days worked in the employ of the Company.

175. See (1976), 2 Dal. L.J. 791 at 810-811
9.04 Whenever an employee with acquired seniority rights is away from work on a leave of absence or because of a disciplinary suspension or illness or injury or any other justifiable reason, his seniority shall accumulate during such absence, unless otherwise stipulated within the present agreement.

9.05 Whenever an employee is laid off, his seniority continues to accumulate during such period of time that his name appears on the recall list.

9.06 Whenever an employee is transferred out of the bargaining unit, his seniority continues to accumulate during a period of twenty-four (24) consecutive months, after which his seniority is maintained but does not accumulate...

The arbitrator was asked to interpret articles 9.01, 25.03, 9.02 and 9.04 to 9.06 inclusive. He concluded that seniority accumulated only in the circumstances specified in articles 9.04, 9.05 and 9.06, and that, since absence because of a strike was not specifically enumerated as one of those reasons, employees on strike did not accumulate seniority. In reaching this conclusion, the arbitrator placed great weight on the fact that there had been no back to work agreement, unlike the one negotiated in 1969, which specifically dealt with the status of striking workers.

MacKeigan C.J.N.S. held that the arbitrator was wrong and had not asked himself the proper question. First, His Lordship concluded that the back to work agreement of 1969 had been wrongly admitted into evidence since it was not used to resolve any ambiguity, patent or latent, in the agreement.

Second, and more importantly, the Chief Justice found that the arbitrator had not asked the appropriate question which was whether absence in a lawful strike constituted a "justifiable reason" within article 9.04. Alternatively, His Lordship held that to overlook that question would be to place on the language of the clauses of the

176. S.H. No. 08384 at 15
177. Id. at 10
agreement an interpretation they could not reasonably bear.\textsuperscript{178}

MacKeigan C.J.N.S. concluded that seniority did accumulate during a lawful strike. His Lordship pointed out that the Nova Scotia Trade Union Act guaranteed the continuance of employee status while on a lawful strike. It was also pointed out that section 51(3) protects accrued and vested pension benefits. However, it was not necessary to decide whether seniority for holiday purposes amounted to \textit{accrued benefits} on this occasion since there was a collective agreement in force which governed the position. In our view, section 51(3) would not include seniority rights. The wording of the section, \textquote{any pension rights or accrued benefits\textquote} would appear to be aimed at only pension benefits. Thus, \textit{pension rights} refers to \textit{vested} benefits and \textit{accrued benefits} to those pension benefits which have not yet vested. In Nova Scotia, it would seem that the seniority of strikers is only protected by the general unfair labour practices.\textsuperscript{179}

His Lordship then proceeded to decide that where a collective agreement is made retroactive, all rights and benefits under that agreement, including seniority, must \textit{prima facie} be treated as having continued to accrue during the retroactive period. To some extent, this bald statement of continuing rights under the collective agreement tends to beg the question since it does not decide whether seniority for holiday pay during a lawful strike \textit{was dealt with in the agreement}. In an extremely perceptive argument, however, MacKeigan C.J.N.S. dealt with this problem. He pointed out that seniority is one of the most important benefits for any trade union member and one which may affect many aspects of his life. Accordingly, any attempt to take away seniority must be made in very clear language, particularly where the only rationale for so doing was participation in a lawful strike. In the absence of such wording, the Chief Justice found that involvement in a lawful strike must be a \textquote{justifiable reason\textquote} for being absent from work within article 9.04. Thus, seniority did accumulate during the strike.\textsuperscript{180}

We agree with this analysis. MacKeigan C.J.N.S.' approach is certainly consistent with previous arbitration decisions\textsuperscript{181} and

\textsuperscript{178} \textit{Id.} at 11
\textsuperscript{179} See England, \textit{The Legal Response to Striking at the Individual Level in the Common Law Jurisdictions in Canada} (1976), 3 Dal. L.J. 440 at 460
\textsuperscript{180} S.H. No. 08384 at 13
academic commentaries. It is also in accord with the philosophy of the Trade Union Act which is that those involved in a lawful strike should not have vested or accrued benefits affected by their participation. The question of seniority may not be specifically dealt with under the Act but the Act does encourage the lawful strike as a legitimate weapon in industrial relations and in our view any attempt to provide adverse consequences for such action must be clear and unambiguous.

The remaining two judgments do not contain much worthy of detailed comment. As stated, Cooper J.A. dissenting, found that since a specific question had been referred to the arbitrator, his response could only be reviewed if the arbitrator had proceeded to his conclusion illegally. In fact His Lordship found that while there was no patent ambiguity, there was a latent ambiguity in that there was uncertainty and difficulty in the application of the articles of the collective agreement to the factual situation. Thus, the arbitrator had admitted the 1969 agreement properly and his decision could not be reviewed. Coffin J.A. concurred with Cooper J.A. in holding that the agreement was ambiguous. However, he agreed with MacKeigan C.J.N.S. that the arbitrator had failed to answer the proper question, viz, whether the absence from work on a legal strike constituted "other justifiable error" within article 9.04. Accordingly, he found the arbitrator to be in error.

The repercussions of MacKeigan C.J.N.S.' approach as to review of arbitration boards soon became apparent. In Bowater Mersey Paper Co. Ltd. v. Canadian Paperworkers Union, Salaried Workers, Local 243, Cowan C.J. had to deal with yet another application to set aside an arbitration award. The appellant employer had transferred an employee from the position of switchboard operator to that of office messenger. The union claimed in a grievance that the employee had breached section 4 of the collective agreement dealing with management rights which reads:

The Management of the Company and the direction of the working forces, including (but not by way of limitation), the size of the work force, the right to hire, promote, suspend, discharge, transfer, lay-off because of lack of work, and discipline employees for cause; the right to decide the number and location

182. England, supra
184. Id. at 28
185. S.H. No. 13092
of departments, products to be manufactured, methods and schedules of production, and means and processes of manufacturing are vested solely in the Management; provided that none of these functions of Management shall be exercised so as to abrogate any specific provision of this Agreement or to discriminate against the Union or any employee.

The employer's rationale for the transfer was that a number of complaints had been received about the switchboard and that, while there was insufficient evidence to discipline the employee, some blame could be attached to the latter and she should be transferred. No demotion was involved and, in fact, the employer testified that some benefit would accrue to the employee. The Arbitration Board decided on the evidence that none of the inadequacies or complaints of the switchboard operations could be attributed to the incompetence of the employee. Moreover, the Board found that, in light of past company practice, the employer had improperly transferred the employee.

The Board then found that the company was attempting to do indirectly, that which it could not have done directly. It stated that the company realized that it would not be able to justify the discharge of the griever on grounds of incompetence and sought to move the griever out of her position using the complaints, which had not been investigated, as the reason for the move, justifying it on the basis of the right of management to promote and transfer employees.

In addition, the Board found that the employer had discriminated against the employee within section 4. Placing a broad interpretation on 'discriminatory', the Board held that while the transfer could not be described as 'injurious', it was 'unfair to the grievor'. The company in the past had allowed employees to refuse promotions or transfers except in 'extraordinary circumstances'. Since there were no special considerations in the present case in the opinion of the Board:

It follows that to require her to accept the promotion in these circumstances creates unfair treatment to this employee in the face of the application of the principle in other promotion situations which the evidence leads one to conclude have existed between this company and this union. This amounts to the kind of unfair treatment that falls within the exception in Section 4 of the collective agreement, described by the rather harsh expression as discrimination against the employee (herein the grievor). 186

186. Id. at 9
Given these findings, the Arbitration Board upheld the employee’s grievance and declared the transfer void.

Cowan C. J. quashed the award. His Lordship commenced by restating what he felt was the general rule; namely, that a management rights clause gives the company the right to transfer and promote employees without qualification or reservation. After citing passages from MacKeigan C.J.N.S.’ decision in the Volvo case, his Lordship found two errors in the arbitrator’s decision. First, he found that to read section 4 as saying that the employer was guilty of discrimination if it did not permit an employee to refuse a transfer which amounted to a promotion was to place a construction on the clause which it could not reasonably bear. Second he found that the Board was in error in finding that there was no extraordinary considerations in the case of the grievor, and in finding that the company was bound to apply its general policy of allowing employees to refuse promotions if the Board found there was no extraordinary considerations on the evidence. In short, His Lordship concluded that the policy of the company was purely a matter for the latter’s consideration and could be changed from time to time, so long as there was no transgressing of the discrimination clause in article 4. Since, on this interpretation, the company view as to ‘extraordinary circumstances’ was decisive, there was no ambiguity in the collective agreement and the evidence of past practice was illegally entered. As a final point, Cowan C.J. held that in interpreting the word “discriminate” to include “unfairness” the Arbitration Board had not been reasonable.

In our view there is very little to be complimentary about in the Bowater case. Cowan C.J. would seem to have not only placed an incorrect interpretation on the collective agreement but also intervened unnecessarily with the arbitral award. First, we are concerned about the Chief Justice’s interpretation of the breadth of the management rights clause. Even assuming that as a general rule management rights are unfettered, clearly in the present case those rights were subject to the discrimination clause. The question as to whether there had been discrimination was therefore a question for the Board. How, then, can Cowan C.J.’s statement that “extraordinary circumstances” are purely a matter for management

187. Id. at 12-14
188. Id. at 14
189. Id. at 15
190. Id. at 17
be correct? Certainly, management may change their policy at any time, but subject to the discriminatory prohibition. If the Arbitration Board is to decide whether there has been discrimination or not they must evaluate to some extent the management rationale for the impugned transaction. To disallow this jurisdiction would be to render the “discrimination” clause meaningless. Moreover, if this argument were carried to its logical conclusion, the “just cause” provision of collective agreements should be interpreted in the same way; the management assessment of what constitutes “just cause” would be determinative and the arbitrator could not challenge or assess the company’s belief.

Moreover, we feel that in ruling the evidence of company past practice inadmissable, the Chief Justice was incorrect. His Lordship concluded that since there was no ambiguity, evidence of past practice could not be permitted. But we are not concerned with ambiguity. Surely the word “discriminate” implicitly incorporates past practice into the collective agreement. Otherwise, how can the arbitration Board decide whether discrimination has taken place? There must be something with which the employer’s action can be compared. The situation is similar to discipline cases where arbitrators have looked at the employer action in the past to determine whether the same penalty is being levied on similar offences.¹⁹¹ No one, to our knowledge, has argued inadmissability of past practice evidence here. If one were not to permit evidence of an employer’s past practice, the only time you could have discrimination is if two or more employees were simultaneously treated in a different manner. This cannot be the effect of such a clause.

¹⁹¹. Re International Association of Machinists, Lodge 1703 and Perfect Circle — Victor Division, VNG Auto Parts Ltd. (1972), 24 L.A.C. 380 at 382 (Weiler):

I would be remiss if I left the matter simply at that. There is a real issue of substance behind the technical objection of the company and I should deal with the opposing arguments on their respective merits. In the first place, despite the company suggestion to the contrary, the evidence as to the absenteeism records of other employees is very relevant. Whether the legal standard for reviewing discipline be its reasonability, justice, equity, uniformity, etc., the particular case cannot be considered in a vacuum. There must be factors which justify singling out one employee for the distinctive treatment of discipline. A key criterion in this regard is the treatment customarily meted out to other employees in the plant for like behaviour, and undue discrimination between employees will be grounds for overturning the more severe discipline imposed on one of them.

See also International Nickel Co. of Canada Ltd. (1974), 7 L.A.C. (2d) 443 (Palmer); Robson Lang (London) Ltd. (1965), 16 L.A.C. 145 (Reville)
Secondly, one wonders whether Cowan C.J.'s intervention in holding that the Arbitration Board's reading of the collective agreement was not reasonable is justifiable. Regardless of whether or not the Arbitration Board was correct in its interpretation, in our view it was a reasonable interpretation, one that is justified on one reading of the collective agreement. If an employer transfers X when no one else has ever been transferred in the past and the arbitrator does not accept the employer's rationale for that action, is it not reasonable to say that X has been discriminated against? A court may not agree with the conclusion on the facts or as a matter of interpretation as to what the collective agreement means, but this should not give them a basis for intervention. Thus, it may be that the word 'discriminate' was intended to mean something more than "unfair" and that at least it incorporates an element of intent to harm. However, the point is that the meaning 'unfair' is not an unreasonable interpretation of the word. There is no gross error. The traditional rule has always been that a court will not interfere with an arbitrator's decision unless the latter's decision could not reasonably have been reached. In our view, this was not the case in the Bowater decision and Cowan C.J.'s judgment represents an undesirable opening up of the arbitration format in the resolution of collective agreement disputes and an unfortunate application of even more unfortunate dicta from the Volvo case.

One final note on the Bowater case: we are not sure whether Cowan C.J. is correct in saying that prima facie a management rights clause gives the employer complete freedom. Recently, some authority has developed which makes it clear that management rights do not give the employer a complete discretion. That discretion must be exercised in a manner that is reasonable in all circumstances. Previously, as demonstrated in the KVP case, it appeared that this reasonable standard was limited to rules unilaterally introduced by the company. More recently, we feel this has been extended in the INCO v. U.S.W.A. decision. At issue here was the reasonableness of the company's action in refusing a leave of absence to a jailed employee but the following passage illustrates the broad philosophy behind the Board decision:

In our view the requirement of The Labour Relations Act to 'further harmonious relations between employers and employees'
as well as the requirement to bargain in good faith, (which ought
to transcend the signing of the document) requires an objective
standard of collective agreement interpretation, and places the
union as the collective bargaining agent for the employees on an
equal basis with the employer for the purpose of defining the
relationships under the collective agreement. Harmonious
relationships are not developed by subordinating one of the
parties to the agreement to the other, and it is in that context and
on that premise that assumptions, if any, are to be made. It is for
those reasons that we hold that the company’s discretionary right
to grant a leave of absence must be exercised on a rational or
reasonably objective basis, rather than on the premise that there is
in the collective agreement an internally implied management’s
rights theory which results in granting to management a complete
discretion in matters which it is compelled to administer.\textsuperscript{194}

Previous to this decision, Laskin C.J. in a dissenting judgment in
the Supreme Court of Canada case of \textit{Winnipeg Builders’
Exchange}\textsuperscript{195} had voiced similar sentiments. There is also other
arbitral authority to the same effect.\textsuperscript{196} What these cases strongly
suggest is that the collective agreement, and all its provisions,
including the management rights clause, be read subject to the
implied term that they be exercised reasonably. One wonders
whether, on the present facts, management would have been found
to have acted reasonably in transferring the employee — perhaps
not. Nevertheless, Cowan C.J.’s assessment of the power under
management rights clauses stands in stark contrast to the recent
trend of putting union and management on a similar footing under
the collective agreement by requiring both to act reasonably.
Accordingly, its accuracy must be in some doubt.

All labour lawyers will remember the Supreme Court of Canada
decision in the \textit{Port Arthur Shipbuilding}\textsuperscript{197} case. In that case, the
arbitor had found that there were grounds for discipline but that
discharge was too onerous a penalty. Accordingly, he had
substituted a penalty. The Supreme Court of Canada concluded the
arbitor had exceeded his jurisdiction by usurping the rights of
management and amending the collective agreement. Once he had
found cause for discipline, he had no power to change the penalty.

\begin{thebibliography}{9}
\bibitem{194}Id. at 3
\bibitem{195}[1975] CLLC 14, 299 at 15380
\bibitem{196}See \textit{Re Oil, Chemical and Atomic Workers & Polymer Corp.} (1958), 10
L.A.C. 31 (Laskin, Q.C.) where a duty of reasonableness was imposed on union
officials.
\bibitem{197}[1969] S.C.R. 85
\end{thebibliography}
Inevitably, the labour legislation in most provinces, including Nova Scotia, was amended to reverse the *Port Arthur Shipbuilding* case. Nevertheless, Newfoundland has still not taken this step and some comments from the Supreme Court of Canada in *The Newfoundland Association of Public Employees v. A.G. - Newfoundland* will be of interest in that province. In a broader perspective, this decision is interesting in that it is indicative perhaps of a changing attitude in the Supreme Court of Canada as to the role of courts in the field of arbitration. In this context, it may be that the Court's development will parallel recent legislative amendments aimed at restricting judicial intervention.

In the *Newfoundland Association of Public Employees* case, several civil servants had been discharged for maltreating children in a special-care home. In upholding the discharge of several of the employees, the Arbitration Board stated that it had no jurisdiction to vary the penalty because of the *Port Arthur Shipbuilding* case. The case was ultimately appealed to the Supreme Court of Canada on the basis that the Board was mistaken as to its power to substitute a lesser penalty.

In the majority judgment, Spence J. ruled that since the matter had not been raised before the Arbitration Board, the appeal could not be decided. His Lordship expressly refused to discuss the *Port Arthur Shipbuilding* case, but did indicate that otherwise the Supreme Court would possibly have had to reconsider the earlier decision. It is in Laskin C.J.'s decision that the extensive discussion is contained. The Chief Justice agreed with Spence J. that the question of arbitral powers did not have to be decided in the present case but gave a much stronger indication that the time might well have come to reverse the decision in *Port Arthur Shipbuilding*, in recognition of the power an arbitrator should have to dispose of grievances effectively:

... Nonetheless, I would not leave this case without saying that the issue dealt with in the Port Arthur Shipbuilding case might, on an appropriate occasion, be reconsidered by the full Court. Subject, of course, to particular collective agreement provisions which lead in another direction, I am of the opinion that an

198. S.N.S. 1972, c. 19, s. 41(d)
199. May 17, 1977
201. May 17, 1977 at 8
arbitration board empowered to consider and decide whether a discharge is for just cause may as part of its remedial authority, unless expressly precluded by the collective agreement or by statute, properly decide that the cause assigned for discharge did not justify such a penalty but did merit some other form of discipline.

Cause and penalty are intertwined, especially in discharge cases. I hold the view that arbitration boards, as domestic tribunals of the parties, should be given latitude, no less than that given by Court decisions to statutory governmental tribunals, to exercise their powers so as best to effectuate their raison d’être.

It is in the sense of the recognition of the necessary power of a board of arbitration, under commonly prescribed arbitration clauses, to effectively dispose of grievances justly, as the board sees the matter after a hearing, that this Court’s decision in the Polymer case (sub nom Imbleau v. Laskin (1962), S.C.R. 338), urged here by the appellant, takes on significance.202

Readers should not forget that Laskin C.J. does make his comments subject to terms of the collective agreement. Thus, where special penalties are provided, the arbitrator is bound to apply them. It should also be borne in mind that Laskin C.J.’s comments are generally restricted to the arbitrator’s powers in imposing penalties in discipline cases. However, the Chief Justice’s reference to the Polymer decision and the need for some power “to effectively dispose of grievances justly” may be indicative of an intention to reconsider at some time the broader philosophy of the arbitrator’s remedial jurisdiction. Thus in the future we may see such problems as mandatory time limits, rectification, laches and estoppel being looked at by at least some members of the Supreme Court in a manner that recognizes the necessary powers an arbitrator must have to function effectively as an interpreter of the collective agreement.

**Strikes — National Day of Protest**

In the writers’ knowledge there have been no developments in Nova Scotia or in the Supreme Court of Canada in the general area of timely or untimely strikes. The introduction of the federal government’s Wage and Price Guidelines and the response of the Canadian Labour Congress did, however, provide the environment for collective action of a sort that Canadian courts had not hitherto

202. *Id.* at 5-7
been called upon to deal with. During 1976, the Canadian Labour Congress (C.L.C.) announced its plans for a National Day of Protest against the federal anti-inflation programme. The date set was October 14, 1976, and it was hoped that a nation-wide work stoppage would convince the federal government of the seriousness of the Canadian Labour Congress' opposition to the programme. Not surprisingly, the legality of the work stoppages was tested in a number of cases.\(^\text{203}\)

In *Bowater Mersey Paper Comp v. Canadian Paperworkers, Local 141*,\(^\text{204}\) the Nova Scotia Supreme Court had occasion to consider the problem. The company intended to commence an action subsequently to recover damages for monies lost as a result of Local 141 participating in the National Day of Protest. At this stage, however, it was seeking an injunction to prevent what would be, in its opinion, a strike contrary to the Trade Union Act and a stoppage of work contrary to the collective agreement.

Counsel for the Local argued that the strike was not contrary to the Trade Union Act because the definition of strike in the Act was not wide enough to encompass the stoppage in the Day of Protest. Section 1(v) reads:

(v) "strike" includes a cessation of work, or refusal to work or continue to work, by employees, in combination or in concert or in accordance with a common understanding, for the purpose of compelling their employer to agree to terms or conditions of employment or to aid other employees in compelling their employer to agree to terms or conditions of employment; and "to strike" has a corresponding meaning;

It was claimed by the Local that "strikes" must be designed to


\(^{204}\) Dated October 13, 1976
compel or be for the purpose of compelling the employer to agree to terms or conditions of employment. The action of October 14 was completely outside the scope of the employment relationship and was aimed at the Government, not the employer. Hart J. agreed with this analysis:

When the legislation prohibits strikes and lockouts it refers to acts done by either employees or employers in their attempt to bring about changes in the working relationship between them and not to actions taken in support or opposition to social causes not related to their terms and conditions of employment. If for instance, an employer wished to close its factory because it no longer wished to produce goods that were damaging to the environment, or if employees wished to withdraw their services in protest of capital punishment they would not, in my opinion, come within the Legislative prohibition against strikes or lockouts contained in the Trade Union Act.\textsuperscript{205} Mr. Justice Hart therefore refused to issue an injunction.

The local also argued that although a breach of the collective agreement would take place the Court had no jurisdiction to decide the matter because the agreement provided for the settlement of such disputes through final and binding arbitration, and it was claimed that the latter was the appropriate forum to settle whether a breach had taken place.

Hart J. rejected this argument.\textsuperscript{206} His Lordship held that there was a clear violation of the collective agreement since willfully refusing to work for a full day in protest of a policy adopted by the government was directly contrary to the union’s obligation to ensure continual employment and production. Hart J. also rejected the Local’s claim based on jurisdiction.

I have perused the grievance provisions of the collective agreement and the provisions of section 40 of the Act and, in my opinion, neither covers the situation where the union has indicated its intention to openly defy its requirements under the collective agreement. We are not considering here a question of a difference of opinion between the parties as to the interpretation, application or administration of the collective agreement, or the resolution of a grievance which had validly arisen between an employee and the company in the course of the administration of the collective agreement. In this case we have been asked to consider the union’s expressed intention to defy the terms of its collective agreement by interrupting the work of the plant on

\textsuperscript{205} \textit{Id.} at 4
\textsuperscript{206} \textit{Id.} at 7
October 14, 1976 to protest a social cause.

I do not believe that under these circumstances there is any requirement on the company to seek redress under the collective agreement as it has not been designed to meet a situation such as this. The company may pursue its remedy at common law to prevent an anticipated breach of contract under which it could suffer irreparable harm.\footnote{207}

Having reached this conclusion, Hart, J. granted the injunction. He found that a chance of irreparable damage to the company was present and in the absence of any justification for breach of the collective agreement, the Court’s discretion should be exercised in favour of the company.\footnote{208}

On first reading, this decision appears logical. On closer analysis, however, there are at least two areas worthy of note. Two decisions of the Labour Boards of Ontario and British Columbia have also been handed down on this point.\footnote{209} Accordingly, it will be useful to discuss the Nova Scotia decision in light of these two cases.

The decision of Hart J. on the breadth of the “strike” definition would seem to be correct. It accords with the terminology of the definition clause and despite the fact that the definition reads, “‘strike’ includes”, his Lordship’s decision to read the clause as exhaustive appears reasonable. His decision is also quite consistent on this point with the decision of the British Columbia board in the \textit{British Columbia Hydro} case.\footnote{210} Here the Board found that since the proposed action had a \textit{political} rather than a collective bargaining purpose it did not fit within the statutory definition of strike which is basically the same as the Nova Scotia provision.

The major difference in the British Columbia and Nova Scotia decisions is one of depth of reasoning. As one might expect, Paul Weiler, the Chairman of the British Columbia Board, went into a lengthy analysis of why the section should be read as exhaustive. Weiler pointed out that while the Ontario definition is worded more widely than the British Columbia provision, other provinces, including Nova Scotia, have for a number of years maintained the

\footnote{207. Id.}
\footnote{208. Id. at 8}
\footnote{210. Id.}
narrow definition. Accordingly, he held that it would be quite undesirable for the Board to rewrite that definition and possibly interpret it in a way contrary to the legislative intent:

Precisely the same definition is contained in the labour legislation of Alberta, Manitoba, and Nova Scotia. In other words, all of these Provinces, including British Columbia, have adopted and acted upon a quite different theme in the definition of "strike" in their legislation by contrast with the Ontario model. Thus it would appear to be an unjustifiable act of legislation on the part of this Board if we were, in effect, to re-write the statutory definition of "strike" in our Labour Code, when that definition has existed for so many years in our law, through so many changes of government and labour law policy, and follows a pattern adopted by several other Provinces as well.\(^{211}\)

Weiler then proceeded to point out that assuming there can be no contracting out of the Act, in other words that the parties cannot agree to permit a strike contrary to the prevailing labour legislation, it would cause great industrial relations problems to adopt the wider Ontario approach.\(^{212}\) The Ontario model, he found, was too broad. Since it catches any two employees when they refuse to do certain work without regard to intent, it is impossible for the union or employer to agree on hot-cargo clauses, refusals to cross picket lines, or non-affiliation clauses. Such clauses, which are relatively common in collective agreements and arguably valid under the British Columbia or Nova Scotia Acts, would be \textit{prima facie} illegal in Ontario. This argument, of course, has more force in British Columbia where specific statutory provisions give the Labour Board jurisdiction over such matters, but the analysis still has much validity in Nova Scotia where it can be claimed that the strike clause has been used in its narrower sense to allow the parties to reach agreement in these areas. In the absence of express legislative language indicating an intent to provide a guarantee against \textit{any} interruption of work during the course of the collective agreement, Weiler refused to interpret the British Columbia decision more broadly.

Finally, Weiler pointed out the obvious concern of the Board with the political connotations of Board action in this area. Thus, for the Board to take action in this area it would have to decide whether the provincial legislation constituted an interference with political rights

\(^{211}\) \textit{Id.} at 16433-16434
\(^{212}\) \textit{Id.} at 16434
or whether the National Day of Protest should not be characterized as a political right at all but rather part of the labour relations environment and thus capable of constitutional regulation in a provincial labour relations statute. The British Columbia Board, unlike its Ontario counterpart, did not decide this question. However, it did point out that solving constitutional and political problems was not the role of the Labour Relations Board. This was particularly so where there was the probability that the National Day of Protest was a once-and-for-all event:

When the problem is faced directly in that situation, we believe that the Legislature would recognize that it is not essentially a matter of collective bargaining law which is the concern of the Labour Code. The Code deals with the entire range of labour/management disputes and establishes this Board, broadly representative of both labour and management, as the tribunal to administer that body of law. By contrast, political work stoppages involve disputes between unions and a government. Neither the resources of the Code nor this Board have much, if anything, to contribute to the resolution of those problems.213

As Weiler added, to force the Labour Board to decide contentious issues such as these could only damage its ability to function effectively as an accepted party in the labour relations area.

In the writers’ view, the decision in British Columbia Hydro succinctly explains why Mr. Justice Hart was correct in not giving the strike clause in the Nova Scotia Act a wide interpretation. Certainly the philosophy of Paul Weiler was not present in the judgement in Bowater Mersey but it provides an underlying basis for Hart J.’s decision which, in our view, makes both literal and industrial relations sense.

The Nova Scotia and British Columbia cases might fruitfully be compared with the decision of the Ontario Board in Domglass Ltd. v. United Glass and Ceramic Workers of North America.214 The Ontario Labour Relations Act defines “strike” somewhat more widely than in Nova Scotia. “Strike” is defined in s.1(1) (n) as including:
(n) a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output.

213. Id. at 16437
214. [1976] CLLC 16050
There is no reference, as there is in Nova Scotia, to compelling the employer to agree to terms and conditions of employment.

If read literally, this definition would cover any concerted work stoppage, regardless of motivation or justification. The problem posed before the Ontario Board was whether it should be read more narrowly by importing the requirement that any action be carried out for the purpose of obtaining concessions from the employer. To this end it was argued by the union that since the Act itself dealt only with terms and conditions of employment between employer and union, so the definition of "strike" should be similarly construed.

The Board rejected this argument. It stated that merely because the dispute was between government and employees, it could still have a profound effect on the employer-employee relationship by disrupting the work programme. To adopt the argument would mean that a fundamental obligation in the collective agreement and the Act would not be protected so long as the strike was politically motivated. The Board, in fact, added that a literal construction of the definition was consistent with the Act. The policy of the statute was to stop all disruptions of work during the course of the collective agreement and the definition should be construed in light of this policy. Its conclusion is succinctly stated in the following passage:

All other strikes, including politically motivated strikes, have been prohibited in order to keep to a minimum conduct disruptive to production and harmful to general labour relations harmony. The strike, in our view, was intended by the legislature to be only a collective bargaining sanction, to be applied in a particular labour relations situation, and to be used in no other context, whether political or otherwise.

Accordingly, the Ontario Board decided that the work stoppage on October 14 would constitute an illegal strike under the Act. We have no problems with this response in that it represents a clear restatement of the literal language of the definition clause, a clause, moreover, which it can be strongly argued the legislature intended to work more widely than its Nova Scotia equivalent. It is interesting, however, to note that the Ontario Board did not grant a direction to cease any intended collective action. It felt that as one of the major questions before it was a fundamental constitutional question involving the jurisdiction of provincial labour relations

215. Id. at 16343
216. Id. at 16344
legislation, it should exercise its powers carefully. Thus, while it
decided the provincial legislation was valid, if it were subsequently
overruled by the Courts its order would have the effect of interfering
with a basic political right. Accordingly, while it chose to provide
some relief, the remedy given was merely a declaration that in the
Board's opinion the stoppage would be an illegal strike. Coupled
with this was a warning that anyone involved in the stoppage would
face all the consequences of an illegal strike. All we wish to say
is that this procedural terminology makes little practical difference.
In the long run, a penalty levied on persons for participating in
illegal strikes, which is struck down subsequently as being
unconstitutional is not better than an unconstitutional *quia timet*
direction.

While the writers are happy with the interpretation placed upon
the strike clause by Hart J. in the *Bowater Mersey* decision, the
same cannot be said about his treatment of the collective agreement.
It will be remembered that Hart J. granted an injunction based on
breach of the collective agreement because of the union's express
intention to defy its terms to protest a social cause. The collective
agreement (and presumably the arbitration process), it was held,
was not designed to meet an occasion like this and therefore his
Lordship held the Court had jurisdiction to grant the injunction. 218

This response might be compared to that of the British Columbia
Board in the *British Columbia Hydro* case when it was asked to
make a similar declaration.

Ordinarily, the interpretation of collective agreements is within
the primary jurisdiction of an arbitrator appointed under the
agreement (although subject to limited supervisory review by this
Board under Section 108). Because of that, and in view of the
expedited nature of these proceedings we do not believe that this
Panel should express any *final* judgment at this stage about the
meaning of the Hydro agreements in this regard. 219

The rationale for this approach would simply appear to be that the
Board was concerned that the terms of the collective agreement be
looked at in their proper environment, past practice and the like, and
that arbitration was the forum chosen for this job.

The question of when a Court should take jurisdiction over the
collective agreement is an extremely complex one. Certainly, Hart

217. *Id.* at 16346
218. Dated October 13, 1976 at 7
219. [1977] CLLC 16066 at 16438
J. could rely on the decision in the Supreme Court of Canada in Winnipeg Builders Exchange v. International Brotherhood of Electrical Workers, Local 2085\textsuperscript{220} as the basis for issuing an injunction based on a strike in breach of the collective agreement. Subsequently, however, as noted elsewhere in this article, the Supreme Court in the Brunet case, has categorically stated that the courts should not get involved in interpreting or applying the collective agreement.

The answer in the present case may well rest on the fact that the union admitted a breach of the collective agreement.\textsuperscript{221} If one accepts that decisions such as Grottoli\textsuperscript{222} and Hamilton Street Railway v. Northcott\textsuperscript{223} are still valid authority, one supposes that Hart J. might say he was in effect enforcing an admitted breach. Whether an admission is the same as an arbitral conclusion remains to be decided, as does the current validity of the Winnipeg Builders Exchange case on this point. In the meantime we may well have to accept the probable legal basis for the Court’s jurisdiction.

In conclusion, the Bowater Mersey case is important as the first opportunity the Nova Scotia courts have had to consider the breadth of the strike definition outside the direct employer-employee context. It is also important in that it should provide some lesson to counsel in the best tactical way to argue cases involving alleged breaches of the collective agreement. The problem of political strikes may arise again in the future and it could be that if this happens the legislature will feel obliged to step in and broaden the statutory language. Until that time, however, unions can be content in the knowledge that at least such collective action will not be in the breach of the Act.

\textsuperscript{220} (1968), 65 D.L.R. (2d.) 242 (S.C.C.)
\textsuperscript{221} Dated October 13, 1976 at 2
\textsuperscript{222} (1963), 39 D.L.R. (2d.) 128 (O.H.C.)
\textsuperscript{223} (1966), 58 D.L.R. (2d.) 708 (S.C.C.)