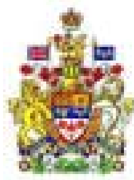
Federal Court of Appeal  Cour d'appel fédérale

Date: 20110203

Docket: A-506-09

Citation: 2011 FCA 38

CORAM: **BLAIS C.J.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

ANDREW DONNIE AMOS

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

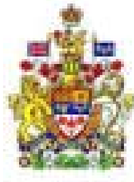
Heard at Ottawa, Ontario, on December 8, 2010.

Judgment delivered at Ottawa, Ontario, on February 3, 2011.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: BLAIS C.J.
DAWSON J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] This case is about the scope of an adjudicator's jurisdiction under the *Public Service Labour Relations Act*, S.C. 2003, c. 22 (*PSLRA* or Act or new Act). Does an adjudicator maintain jurisdiction over disputes relating to settlement agreements entered into by parties in respect of matters that can be referred to adjudication or, as put by the Adjudicator in this case, where does a party go for redress when he or she has settled a grievance referred to adjudication and subsequently alleges that the other party has failed to honour the settlement agreement (Adjudicator's reasons at paragraph 46)?

[2] On a standard of correctness, Boivin J. (the Judge), of the Federal Court, answered no to the first question, adding that pursuant to section 208 of the Act a new grievance related to the settlement agreement could always be filed (2009 FC 1181). This is the appeal from his judgment of 20 November 2009. For the reasons that follow, I would allow the appeal and restore the Adjudicator's decision.

[3] The facts are straightforward and aptly summarized by the Judge:

> [2] The grievor and [appellant], Andrew Donnie Amos, is employed with the Department of Public Works and Government Services (the Department) as a Senior Project Manager at the ENG 5 subgroup and level. The Deputy Minister of the Department (the Deputy Head) imposed a 20-day disciplinary suspension without pay on the [appellant] by letter dated March 29, 2005. On May 2, 2005, the [appellant] filed a grievance challenging the 20-day suspension and the grievance was referred to adjudication on August 10, 2005.
>
> [3] Adjudicator Dan Butler was appointed to hear and determine the matter. A hearing was first convened in Halifax, Nova Scotia, for three days starting on November 28, 2006 and resumed in Halifax on May 1, 2007. With the assistance of the Adjudicator, the parties reached a settlement on May 2, 2007, set out in a [Memorandum of Agreement] (MOA), which dealt with a number of issues. The MOA set out a plan for the parties to meet, discuss and resolve issues relating to the [appellant]'s working relationship with the Department.
>
> [4] Following the MOA, the [appellant] did not withdraw his grievance.
>
> [5] On December 14, 2007, the [appellant] requested that the Board reopen the adjudication hearing on the merits of his grievance on the ground that the Deputy Head failed to comply with the terms of the MOA, namely, that the Department had not honoured the promise to meet to resolve their issues and establish a positive working relationship.
>
> [6] On January 7, 2008, the Deputy Head objected to the [appellant]'s request on two grounds: first, that the existence of a final and binding settlement agreement constituted a complete bar to an adjudicator's jurisdiction; and second, that it was a well-established principle that adjudicators under the *Public Service*

> *Staff Relations Act*, R.S.C. 1985, c. P-35, s. 1 (*PSSRA*), the Act which preceded the *PSLRA*, had no jurisdiction over the implementation of a MOA.
>
> [7] The Adjudicator did not agree to re-open the hearing on the merits as requested by the [appellant]. Rather, the Adjudicator ordered that the adjudication hearing resume for the purpose of determining whether the Deputy Head complied or not with the terms of the MOA, and, if necessary, for the purpose of determining an appropriate remedy.

[4] Because the questions at issue had never been considered in the context of the new Act, Adjudicator Dan Butler (the Adjudicator) sought written representations from the parties and Interveners (who are not taking part in this appeal) on the following three questions:

> 1. Does an adjudicator have jurisdiction under the new Act to determine whether the parties' settlement agreement is final and binding?
>
> 2. If so, does the adjudicator have the jurisdiction to hear an allegation that a party is in non-compliance with a final and binding settlement agreement?
>
> 3. In the event that an adjudicator has the jurisdiction to hear an allegation that a party is in non-compliance with a final and binding settlement agreement, does the adjudicator have the jurisdiction to make the order that the adjudicator considers appropriate in the circumstances?

[5] On the first question, the Adjudicator found that he had not been asked to inquire into whether the settlement agreement was final and binding, or otherwise defective. The root issue revolved around the appellant's allegation that the deputy head had failed to comply with the terms of a final and binding MOA (Adjudicator's reasons at paragraphs 93 and 125). This understanding of the Adjudicator is not contested. His answer to question 1 in unchallenged (see paragraphs [35] and f., *infra*).

[6] The Adjudicator answered questions 2 and 3 favorably. He found that the subject matter of the original grievance was a disciplinary suspension, which fell under subsection 209(1) of the Act. Moreover, the issue of non-compliance with the settlement arose in its essential character from the original grievance, which, he noted, had not been withdrawn by the appellant (Adjudicator's reasons at paragraphs 126 and 53). Therefore, contrary to the Judge, he concluded that he had jurisdiction to entertain the appellant's allegation of the deputy head's non-compliance with the settlement agreement and that he could make a remedial order. There was consequently no need for the appellant to file a new grievance under section 208. I will come back to the Adjudicator's decision later in the course of my analysis.

Relevant Legislation

[7] Section 208 of the Act sets out the situations allowing for individual grievances while section 209 sets out the subject matters that may be referred to adjudication. They read, in their relevant parts, as follows:

Right of employee	Droit du fonctionnaire
208. (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved	**208.** (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :
(*a*) by the interpretation or application, in respect of the employee, of	*a*) par l'interprétation ou l'application à son égard :
(i) a provision of a statute or regulation, or of a direction or other instrument made or issued	(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre

by the employer, that deals with terms and conditions of employment, or

document de l'employeur concernant les conditions d'emploi,

(ii) a provision of a collective agreement or an arbitral award; or

(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;

(*b*) as a result of any occurrence or matter affecting his or her terms and conditions of employment.

b) par suite de tout fait portant atteinte à ses conditions d'emploi.

Reference to Adjudication

Renvoi à l'arbitrage

Reference to adjudication

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

(*c*) in the case of an employee in the core public administration,

(i) demotion or termination under paragraph 12(1)(*d*) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(*e*) of that

Renvoi d'un grief à l'arbitrage

209. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :

a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

c) soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)*d*) de la *Loi sur la gestion des finances publiques* pour rendement

Act for any other reason that does not relate to a breach of discipline or misconduct, or (ii) deployment under the *Public Service Employment Act* without the employee's consent where consent is required; or	insuffisant, soit de l'alinéa 12(1)*e*) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite, (ii) la mutation sous le régime de la *Loi sur l'emploi dans la fonction publique* sans son consentement alors que celui-ci était nécessaire;
(*d*) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.	*d*) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

[8] Under the *PSSRA*, section 92 dealt with references to adjudication. In its relevant parts, it read as follows:

Reference to adjudication	*Renvoi à l'arbitrage*
92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to	**92.** (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à l'arbitrage tout grief portant sur :
(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,	*a*) l'interprétation ou l'application, à son endroit, d'une disposition d'une convention collective ou d'une décision arbitrale;
(*b*) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated	*b*) dans le cas d'un fonctionnaire d'un ministère ou secteur de l'administration publique fédérale spécifié à la partie I de l'annexe I ou

pursuant to subsection (4),
(i) disciplinary action resulting in suspension or a financial penalty, or
(ii) termination of employment or demotion pursuant to paragraph 11(2)(*f*) or (*g*) of the *Financial Administration Act*, or

(*c*) in the case of an employee not described in paragraph (*b*), disciplinary action resulting in termination of employment, suspension or a financial penalty,
and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

désigné par décret pris au titre du paragraphe (4), soit une mesure disciplinaire entraînant la suspension ou une sanction pécuniaire, soit un licenciement ou une rétrogradation visé aux alinéas 11(2)*f*) ou *g*) de la *Loi sur la gestion des finances publiques*;

c) dans les autres cas, une mesure disciplinaire entraînant le licenciement, la suspension ou une sanction pécuniaire.

[9] Two other provisions are also of interest. Subsection 226(2) of the Act gives adjudicators the power to take the parties into mediation at any stage of a proceeding, without prejudice to their power to continue the adjudication "with respect to the issues that have not been resolved". This power was not provided for in the *PSSRA*. Section 236 ousts the Court's jurisdiction over disputes relating to employment:

Power to mediate

226. (2) At any stage of a proceeding before an adjudicator, the adjudicator may, if the parties agree, assist the parties in resolving the difference at issue without prejudice to the power of the adjudicator to continue the adjudication with respect to the issues that have not been resolved.

Médiation

226. (2) En tout état de cause, l'arbitre de grief peut, avec le consentement des parties, les aider à régler tout désaccord entre elles, sans qu'il soit porté atteinte à sa compétence à titre d'arbitre chargé de trancher les questions qui n'auront pas été réglées.

Disputes relating to employment	Différend lié à l'emploi
236. (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.	**236.** (1) Le droit de recours du fonctionnaire par voie de grief relativement à tout différend lié à ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.
Application	Application
(2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.	(2) Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.

The Judgment Below

[10] The Judge was of the view that "there is no substantial change between section 92 of the *PSSRA* and section 209 of the *PSLRA*" (reasons for judgment at paragraph 39). As a result, there was no need to exclude case law interpreting the former, which taught that "the existence of a final and binding settlement agreement is a complete bar to an adjudicator's jurisdiction" (*ibidem* at paragraph 28); see also *MacDonald v. Canada*, (1998), 158 F.T.R. 1, 83 A.C.W.S. (3d) 1033; *Bhatia v. Treasury Board (Public Works Canada)*, [1989] C.P.S.S.R.B. No. 141 (QL) [*Bhatia*]; *Fox v. Treasury Board (Immigration and Refugee Board)*, 2001 PSSRB 130 (QL); and *Bedok v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 163 (QL) [*Bedok*].

[11] More specifically, the Judge wrote:

> [40] As noted by the parties at the hearing, other labour relations regimes allow the Adjudicator to retain jurisdiction over the grievance once a settlement is reached. However, this has never been the case so far within the public service as procedures for the enforcement of employment rights and obligations differ in some respect from those of the private sector (*Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146). There is no clear indication that Parliament, in adopting the *PSLRA*, sought to change this.

[12] Although he accepted that subsection 226(2) and section 236 of the Act were new in relation to the *PSSRA*, the Judge nonetheless refused the appellant's suggestion that these provisions had the effect of extending the Adjudicator's jurisdiction to disputes arising out of a MOA (reasons for judgment at paragraphs 54 and 49). The Judge opined that the signing of a settlement agreement evidenced the parties' intention to abandon the procedure under section 209 of the Act "and thus depart from adjudication by taking the path of resolving their dispute through the MOA" (*ibidem* at paragraph 49). Since the parties' MOA fully settled their difference, there were no issues left to resolve in front of the Adjudicator. Subsection 226(2) was not engaged. The Judge was of the view that the Adjudicator's jurisdiction was not a function of whether or not the grievor withdrew his grievance (*ibidem*).

[13] In any event, as stated earlier, the Judge noted that the appellant was not without recourse. Pursuant to section 208 of the Act, he could always file a new grievance related to the MOA and, if not satisfied with the outcome at the final level of the employer's internal grievance procedure, he could apply to the Federal Court for judicial review of that decision (reasons for judgment at paragraph 55). The appellant takes particular issue with this conclusion noting that a grievance relating to a settlement agreement is not adjudicable under section 209 of the Act.

The Issues in Appeal

[14] The appellant states the issues as follows:

1) What is the appropriate standard of review?

2) Did the Adjudicator err in concluding that he maintained jurisdiction to enforce settlement agreements entered into in respect of adjudicable grievances?

[15] I hasten to add that at the hearing of this appeal, the appellant made it clear that his second question was not as broad as it reads. Specifically, the appellant argues that the Adjudicator was right to conclude that he had jurisdiction over the enforcement of the settlement agreement since the appellant's grievance had never been withdrawn. While the Judge was of the opinion that the withdrawal of the grievance had no impact on the Adjudicator's jurisdiction, the appellant invites us to limit our analysis to these particular circumstances. I accept his invitation for the following reasons.

[16] First, the factual matrix of a case is a determinative factor in assessing a decision-maker's jurisdiction. Second, this event was material to the Adjudicator's analysis. It allowed him to distinguish the facts of the present case from those of *Maiangowi v. Treasury Board (Department of Health)*, 2008 PSLRB 6 [*Maiangowi*] as he was not called, contrary to *Maiangowi*, to declare himself without jurisdiction for the reason that "… [t]here is simply no longer any grievance before the adjudicator…" (Adjudicator's reasons at paragraph 53).

[17] Third, the non-withdrawal of the grievance cannot be seen as an exceptional occurrence, a rare omission that will never be seen again. In front of the Adjudicator, it had been submitted by the Public Service Alliance of Canada (PSAC) that as a term in the majority of settlement agreements to which it is a party, grievances over which the Board has primary jurisdiction are not deemed withdrawn until the settlement agreement is fully implemented (Annex to Adjudicator's reasons at page 41, paragraph 37).

[18] PSAC had also argued that the Board's own practice was that grievances that have been settled "remain active within the Board's registry operations until such time as a settlement is confirmed as implemented and the grievance is withdrawn". Then the Board's file is closed (*ibidem* at paragraph 38).

[19] These allegations are consistent with the facts of the present case. The Adjudicator explained at paragraphs 7 and 8 of his reasons that as he learned of the full settlement between the parties, on May 2, 2007, "I reminded counsel for the grievor that, in the circumstances of a settlement achieved through mediation, the practice under the new Act was to request the grievor to notify formally the [Board's] Registry that he has withdrawn his grievance" (Adjudicator's reasons at paragraph 7).

[20] Several months later, on 6 September 2007, the Registry inquired about the status of the matter, as the Board's record contained no written withdrawal of the grievance. (See *ibidem* at paragraph 8.)

[21] It is safe to conclude from this that grievance files are not automatically closed at the Registry when parties reach a settlement through mediation. It takes a positive step from the grievor to achieve that result.

[22] There might be, in the future, circumstances warranting a different analysis. For the time being, I am interested in the situation of the appellant, who never withdrew his grievance. Thus, in so far as the Adjudicator's findings could be understood as engaging both scenarios (these being that the grievance has been (1) withdrawn, or (2) not withdrawn), my analysis of his reasons and ultimate conclusion to uphold his decision only apply to the appellant's circumstances.

Analysis

a) The Standard of Review

[23] The role of this Court in an appeal of an application for judicial review is to determine first whether the reviewing judge identified the correct standard of review, and second whether he applied this standard correctly (*Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56 at paragraph 84).

[24] The Judge found the issue of the Adjudicator's power to decide the matter to be a true jurisdictional question, "requiring the interpretation of specific provisions of the *PSLRA*" (reasons for judgment at paragraphs 25 and 26). On that basis, he applied the standard of correctness to his review of the Adjudicator's decision. I disagree with the Judge's characterization of the issue for the

reasons given by our Court in *Public Service Alliance of Canada v. Canadian Federal Pilots Association and Attorney General of Canada*, 2009 FCA 223 [*Pilots*].

[25] This case dealt with the Board's power under section 58 of the Act and, more precisely, its authority to allocate an employee to a bargaining unit comprising an occupational group from which he or she was specifically excluded (*ibidem* at paragraph 30). Writing for a unanimous panel on this particular issue (Pelletier J.A. dissenting on the disposition of the application for judicial review), Evans J.A. wrote:

> [39] I well appreciate why correctness is the appropriate standard of review for the interpretation of a statutory provision which demarcates the authority of competing different administrative regimes: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*] at para. 61. However, I can see no justification in contemporary approaches to the roles of specialist tribunals and generalist courts in administrative law for characterizing as a "jurisdictional issue", and thus reviewable on a standard of correctness, the interpretation of other provisions in a tribunal's enabling statute that do not raise a "question of law that is of 'central importance to the legal system … and outside the … specialized area of expertise' of the administrative decision maker" (*Dunsmuir* at para. 55).

[26] The judgment in *Pilots* was issued several months before the hearing-taking place in front of the Judge. It seems, however, that none of the parties brought this judgment to his attention. Had they done so, I am convinced that the Judge would have turned his mind to it, and more particularly to paragraphs 50 through 52:

> [50] To conclude, in order to establish that the Board has exceeded its jurisdiction by misinterpreting a provision in its enabling statute, which neither raises a question of law of central importance to the legal system nor demarcates its

> authority *vis-à-vis* another tribunal, an applicant must demonstrate that the Board's interpretation was unreasonable.
>
> [51] The only qualification that I would add is that the tribunal must have the legal authority to interpret and apply the disputed provision of its enabling legislation. However, administrative tribunals performing adjudicative functions, such as the Board, normally have explicit or implied authority to decide all questions of law, including the interpretation of its enabling statute, necessary for disposing of the matter before it: *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at paras. 40-41.
>
> [52] In my view, it is too late in the development of administrative law in Canada for an applicant to invoke the ghost of jurisdiction past to inveigle the Court into reviewing for correctness a tribunal's interpretation of a provision in its enabling statute, without subjecting it to a standard of review analysis. It would, in my view, make no sense to apply a correctness standard when the tribunal has the authority to interpret and apply the provision to the facts, and a standard of review analysis indicates that the legislature intended the tribunal's interpretation to be reviewed only for unreasonableness.

[27] This being said, no one contests that the Adjudicator had the legal authority to interpret his home statute in order to answer the disputed questions. The answers he gave to these questions brought the parties to the Federal Court. So what is the standard of review applicable to the Adjudicator's interpretation of section 209?

[28] Since the parties did not direct us to any previous authority on this issue, a standard of review analysis is required. This is a contextual analysis, which is dependent on the application of a number of relevant factors, including:

> … (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to

consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case (*Dunsmuir* at paragraph 64).

[29] First, section 233 of the Act contains a strong privative clause where a decision of an adjudicator is involved:

Decisions not to be reviewed by court	Caractère définitif des décisions
233. (1) Every decision of an adjudicator is final and may not be questioned or reviewed in any court.	**233.** (1) La décision de l'arbitre de grief est définitive et ne peut être ni contestée ni révisée par voie judiciaire.
No review by *certiorari*, etc.	Interdiction de recours extraordinaires
(2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any of the adjudicator's proceedings under this Part.	(2) Il n'est admis aucun recours ni aucune décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action de l'arbitre de grief exercée dans le cadre de la présente partie.

[30] Second, the broader aim of the Act is to provide an expert regime for the determination of labour disputes, and to facilitate their resolution expeditiously, inexpensively, and with little formality (*ibidem* at paragraph 68):

68 The nature of the regime also favours the standard of reasonableness. This Court has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference: *CUPE*, at pp. 235-36; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, at para. 58; *Voice Construction*, at para. 22. The adjudicator in this case was, in fact, interpreting his

> enabling statute. Although the adjudicator was appointed on an *ad hoc* basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the *PSLRA* can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. See *Alberta Union of Provincial Employees v. Lethbridge Community College*. This factor also suggests a reasonableness standard of review.

[31] The preamble of the Act confirms this view of the regime. The Act establishes a time- and cost-effective method of resolving employment disputes in a fair and credible way, away from the judicial arena.

[32] Third, the respondent does not contest that the question in dispute neither involves a question of central importance to the legal system nor falls outside the adjudicator's specialized area of expertise (*Dunsmuir* at paragraph 55). Fourth, the Adjudicator is an independent decision-maker with specialized jurisdiction in labour relations within the federal public service. The questions at issue, in light of the broad objects of the Act and the specific mandate given to the Board, under section 13 of the Act, to provide the parties with mediation services "in relation to grievances" (see paragraph 15(*c*) of the Act), fall within the scope of his jurisdiction.

[33] On that basis, I am of the view that the Adjudicator's decision is entitled to deference. His decision is therefore reviewable on a standard of reasonableness.

[34] Having so concluded, I now turn to the crux of the matter: the Adjudicator's authority to entertain the appellant's request to hear his complaint about the employer's breach of contract and to order an appropriate remedy. My analysis will, more or less, follow the path taken by the

Adjudicator. I will now deal with the first question formulated by the Adjudicator. Then I will turn to the features of the new Act and to questions 2 and 3 (see paragraph [4], *supra*.)

b) Question 1: Final and Binding Settlement Agreements

[35] Where in the case of an individual grievance referred to adjudication in relation to a disciplinary action resulting in suspension, the parties have entered into a settlement agreement, does an adjudicator have jurisdiction under the new Act to determine whether the parties' settlement agreement is final and binding? The Adjudicator said yes, and I agree (Adjudicator's reasons at paragraph 88).

[36] It is common ground that under the new Act, adjudicators retained the authority to determine whether a final and binding settlement agreement exists between the parties (*Bedok*), or whether it ought to be set aside for unconscionability, duress or undue influence (*Nash v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 98; *Van de Mosselaer v. Treasury Board (Department of Transport)*, 2006 PSLRB 59; *Macdonald and Treasury Board (Department of National Defence)*, [1985] C.P.S.S.R.B. No. 266). As the parties in this case agree that their MOA constitutes a final and binding agreement, the Adjudicator did not have to rule on the qualities of their settlement agreement. Under these circumstances, there is no doubt that the Adjudicator's answer to question 1 is reasonable.

[37] However, under the former Act it had also been decided that the role of adjudicators was limited to subject matters explicitly set out in section 92(1) of the Act. They were held to retain no jurisdiction over the implementation of a settlement agreement (*Bhatia*; *Treasury Board and Deom*, [1985] C.P.S.S.R.B. No. 150). Therefore, a party alleging non-compliance with a settlement agreement could only seek redress by filing a new grievance (pursuant to section 91), and by subsequently seeking judicial review of that decision in civil courts, the remedy proposed by the Judge in this instance.

[38] This issue of *where* a party alleging non-compliance with a settlement agreement can seek redress under the new Act is the core of the parties' dispute and the subject of question 2.

c) Question 2: Enforcement of Settlement Agreements

[39] Faced with a request that the appellant's grievance be heard on the merits, the Adjudicator had to decide whether the new Act could admit of a different answer on the subject of non-compliance and, should this be the case, whether he could make a remedial order. Before turning specifically to these questions, he sought to compare the legislative framework of the Act to that of the *PSSRA*, identifying, in the former, three distinguishing features: the addition of a Preamble; the adjudicator's power to assist the parties in mediation under section 226; and the inclusion of subsection 236(1).

[40] His discussion on these elements allowed him to posit the general structure on which he would rest his final conclusions on the remaining two questions. At paragraph 86 of his reasons, he wrote:

- I must give the provisions of the new Act "…fair, large and liberal construction and interpretation…" consistent with the objects of the Act…
- A cornerstone of the new Act is its emphasis on the voluntary resolution of disputes through mediation.
- Given subsection 236(1) of the new Act […] Part 2 of the new Act must be viewed as the exclusive and comprehensive regime for the resolution of disputes that proceed "…by way of grievance…"

[41] As I explain below, in my view these three preliminary statements by the Adjudicator are unassailable.

[42] The first statement deals with a well-established principle of interpretation:

> Today there is only one principle of approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Parliament (Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at page 87, cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21).

[43] The respondent contends that since the wording of the provisions dealing with adjudication (section 92(1) of the PSSRA and section 209(1) of the new Act) remained the same, they must be given the same meaning. I disagree with this restrictive approach. As pointed out by Sullivan, "before interpreters can pronounce on the clarity of the words to be interpreted, they must look at

the entire context in which the words appear" (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at page 16). Justice Bastarache also wrote in *ATCO Gas and Pipeline Ltd. v. Alberta (Energy and Utility Board)*, [2006] 1 S.C.R. 140 at paragraph 48:

> This Court has stated on numerous occasions that the grammatical and ordinary essence of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provision to be interpreted, no matter how plain the disposition may seem upon initial reading. [Emphasis added.]

[44] Every statute should be interpreted liberally in such a manner as to best ensure the attainment of its objects. The purpose of a preamble is to assist in explaining the Act's "purport and object."(See section 13 of the *Interpretation Act*, R.S.C. 1985, c. I-21.) Alive to this preamble, the Adjudicator concluded that his task was to interpret the Act in a manner which promotes "…collaborative efforts between the parties…" to support the "...fair, credible and efficient resolution of matters…" and to encourage "…mutual respect and harmonious labour-management relations…" I agree that this was exactly his task.

[45] In his second statement, the Adjudicator acknowledged the Act's emphasis on procedures promoting the voluntary resolution of disputes, particularly through mediation. I agree with him that an essential component of the mediation process is the implementation and enforceability of a settlement agreement.

> In the absence of a reasonable expectation of enforceability, the various processes mandated by the new Act to facilitate voluntary settlements may have little prospect

> of contributing to the attainment of the objects of the new Act as identified by the Legislator.
>
> (Adjudicator’s reasons at paragraph 67).

[46] With his third statement, the Adjudicator took the position that section 236, for which there was no equivalent in the *PSSRA*, confirms that Part 2 of the Act provides an exclusive and comprehensive regime for resolving grievances. The parties agree that section 236 ousts the jurisdiction of courts with respect to matters that can proceed by way of grievance under Part 2 of the Act (sections 206 through 238). However, they differ on the question of whether the present dispute over the settlement agreement made under Part 2 is caught by sections 208 or 209 of the Act.

[47] These are the two possible options examined by the Adjudicator:

> Option 1: The dispute is properly the subject of a new grievance filed under section 208 of the new Act. Given that the subject matter of such a grievance does not fall within the list of subjects that may be referred to adjudication under subsection 209(1), the decision at the final level of the internal grievance procedure is final and binding.
>
> Option 2: The dispute over the settlement agreement arises from the original grievance. Provided that the subject matter of the original grievance falls within the ambit of an adjudicator’s authority under subsection 209(1) of the new Act, an adjudicator has the jurisdiction to consider the dispute.
>
> (Adjudicator’s reasons at paragraph 99)

[48] The Adjudicator opted for the latter, applying to the facts of the case the “essential character test” elaborated by the Supreme Court of Canada in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 [*Weber*].

[49] Weber asked: When may parties who have agreed to settle their differences by arbitration under a collective agreement sue in tort? The question arose in the context of subparagraph 45(1) of the Ontario *Labour Relations Act* (as it read, R.S.O. 1990, c. L.2), which provided that every collective agreement “shall provide for the final and binding settlement by arbitration… of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement”.

[50] For our purposes, suffice it to say that Mr. Weber, an employee of Hydro Ontario (Hydro), had filed grievances against his employer. While the ensuing arbitration was underway, he had also initiated a court action against Hydro based in tort and on the breach of his rights under sections 7 and 8 of the *Charter*. Hydro sought and obtained an order striking out the action on the grounds, *inter alia*, that the dispute arose out of the collective agreement, depriving the court of jurisdiction.

[51] Concerned with the demarcation between the jurisdiction of labour arbitrators and that of the courts, Justice McLachlin (as she then was), accepted that “disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts” (*Weber* at paragraph 54, citing *De Havilland Aircraft Co. of Canada Ltd.* v. *Elliott* (1989), 32 O.A.C. 250 (Div. Ct.) at page 258, per

Osler J.; *Butt v. United Steelworkers of America*, (1993), 106 Nfld. & P.E.I.R. 181 (Nfld. T.D.); *Bourne v. Otis Elevator Co. Ltd.*, (1984), 45 O.R. (2d) 321 at page 326).

[52] At paragraph 67, she concluded, "mandatory arbitration clauses such as section 45(1) of the Ontario *Labour Relations Act* generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character arises from the collective agreement." [Emphasis added.]

[53] This essential character test, applied in *Weber* to the choice of forums between the courts and a statutorily created adjudicative body, was found to be equally applicable to the choice between two statutorily created bodies (*Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14) [*Regina*].

[54] In *Regina*, Justice Bastarache held that (at paragraph 39):

> (t)he key question in each case is whether the essential character of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question, a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature. [Emphasis added.]

[55] In his reasons, albeit in a different context, the Adjudicator asked himself that key question and found that the dispute between the parties, in its essential character, arose from the original disciplinary action. He wrote:

> In reality, no new independent dispute had emerged – or, if it could be said that there was a new dispute, that new dispute was so expressly or inferentially linked to the disciplinary action that it could not be separated from that context (Adjudicator's reasons, at paragraph 109).

[56] The respondent argues that the Adjudicator could not apply the *essential character test* to incorrectly expand his jurisdiction. It was wrong of him to "draw inferences or imply that matters are within his jurisdiction under section 209 of the Act" (respondent's memorandum of facts and law at paragraph 49). Had Parliament intended to extend the jurisdiction of adjudicators to the enforcement of final and binding settlement agreements, it would have expressly said so.

[57] I disagree. *Weber* and *Regina* have signalled a general shift towards the greater empowerment of labour boards and adjudicators. The respondent raised no valid reason to exclude the "inextricable link" test set out in *Weber* and *Regina* because it serves here to choose between two processes available under the Act, rather than competing forums of adjudication or statutory bodies. Rather, I agree with the Adjudicator's opinion that "the Supreme Court of Canada direction in the *Weber* line of decisions favouring exclusive and comprehensive jurisdiction under the labour relations statute (as opposed to the courts) to resolve workplace disputes <u>applies to Part 2 of the new Act</u>, given the explicit wording of subsection 236(1)" (Adjudicator's decision at paragraph 78). [Emphasis added.]

[58] For ease of reference, I once again reproduce the relevant part of section 236 of the Act:

NO RIGHT OF ACTION	ABSENCE DE DROIT D'ACTION
Disputes relating to employment	Différend lié à l'emploi
236. (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.	**236.** (1) Le droit de recours du fonctionnaire par voie de grief relativement à tout différend lié à ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.
Application	Application
(2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.	(2) Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.

[59] I also agree with the Adjudicator that subsection 236(1) is no less substantial and powerful a statement of an adjudicator's primacy in relation to complaints that can proceed by way of grievance than was subsection 45(1) of the Ontario *Labour Relations Act*, at play in *Weber*.

[60] As well, the Adjudicator took further support from subsection 236(2) because it reinforces subsection 236(1) by stating that the prohibition operates even if the employee has not exercised his or her right to grieve, and even if the grievance could not be referred to adjudication.

[61] I agree with him that:

> … subsections 236(1) and (2) of the new Act are compelling indications that the legislator intended that the dispute resolution procedures provided by Part 2 of the new *Act* should oust the jurisdiction of the courts in respect to actions that proceed "… by way of grievance…" I am hard-pressed to find support in those provisions for any contention that a dispute over the implementation of a settlement agreement can or should ultimately involve the courts, other than regarding the limited grounds available for a judicial review application (*ibidem* at paragraph 70).

[62] This power is not expressly provided for in the Act itself, but that is not the end of the matter. As the Adjudicator noted, other labour relations regimes have been interpreted as implicitly authorizing deciders to enforce settlement agreements (Adjudicator's reasons at paragraph 113).

[63] This conclusion is consistent with *Newfoundland Association of Public Employees v. Attorney General for Newfoundland* [1978] 1 S.C.R. 524, cited in *Heustis v. New Brunswick (Electric Power Commission)*, [1979] 2 S.C.R. 768, where the Supreme Court held that arbitration boards should be given latitude to exercise their powers "so as to best effectuate their *raison d'être*" (at page 530). Considering the purport and object of the new Act, I am unable to read section 209 in light of the constraints previously imposed by section 92 of the *PSSRA*.

[64] As *Weber* and *Regina* teach us, the essential character of a dispute can only be determined by looking at the facts of a case. Logically, these same facts will also help in determining the jurisdiction of the Adjudicator.

[65] In the present instance, it is clear that the parties' dispute over the settlement agreement is inextricably linked to the employer's disciplinary action and the appellant's grievance over it. In the course of the adjudication, with the help of Adjudicator Butler, the parties agreed to mediate their differences. The parties considered their agreement as a full, final and binding settlement of the dispute. It is agreed that it is in the interest of certainty in labour relations that legitimate settlement agreements be so (*Lindor v. Treasury Board (Solicitor General – Correctional Service Canada)*, 2003 PSSRB 10). I would add that whether implicitly or expressly, a final and binding agreement incorporates the obligation of the parties to give it effect by implementing it. Without implementation, there cannot be "certainty in labour relations", the purpose itself of final and binding settlement agreements (*ibidem* at paragraph 16, see Adjudicator's reasons at paragraph 50). Without implementation, how can the issue be settled while having the effect of pre-empting the adjudicator's power to continue the adjudication with respect to the issues that have not been resolved within the meaning of subsection 226(2)?

[66] I am unable to accept the respondent's contention that filing a new grievance under section 208 of the Act constitutes an effective redress for the appellant. The respondent's position is inconsistent with the legislator's choice to emphasize mediation as an important tool to resolve labour disputes. Procedures promoting the voluntary resolution of disputes, including mediation, are integral to achieving the labour relations and public interest objectives set out in the Preamble of the Act. Enforceability of settlement agreements is vital to the objectives of the Act. Without clear, efficient and economical means to enforce settlement agreements, mediation runs the risk of becoming meaningless and falling into abeyance. Parliament's intention must be interpreted as

giving consideration to parties' legitimate expectations that a settlement agreement will be enforced, or will at least be enforceable within a reasonable delay.

[67] Giving way to the respondent's solution would add years to the resolution of the appellant's grievance. This, again, cannot be in the best interests of labour relations within the appellant's workplace or any grievor's workplace. I am reminded that Mr. Amos was disciplined in March 2005 and that he referred his grievance to adjudication in August 2005. Twenty-one months later, in May 2007, the parties reached their settlement. As of December 2007, the MOA was still not implemented. These events already cover a period of almost three years. Now, according to the respondent, the appellant would have to initiate a new grievance and, if need be, direct his further grounds of complaint to the Federal Court through an application for judicial review with its ensuing undue cost and delay.

[68] As well, the respondent's solution would impose on the appellant the difficult task of remedying the alleged violation of the MOA through a new grievance to deal separately with an issue of non-compliance that would ultimately be decided by the party effectively in breach of contract, all this while the (original) grievance is still alive. Moreover, given that the allegation of non-compliance with the settlement agreement points to the employer, the procedure would be dictated by the employer's misbehaviour. This is clearly unfair, especially because an important purpose of labour relations statutes is to level the playing field between employees and employers. Grievors like the appellant would have little incentive to settle disputes prior to or during adjudication, as doing so would constitute a waiver of access to independent third-party

adjudication in exchange for what could become an unenforceable promise, or, at least, unenforceable efficiently and economically.

[69] Surely, this is not what Parliament could have intended when it legislated to ensure "fair, credible and efficient resolution" of labour disputes.

[70] A further concern of the respondent is that Adjudicator Butler, when looking at the breach, may lack jurisdiction regarding some of the issues addressed in the settlement agreement. As the settlement agreement may contain clauses in regard of matters not adjudicable under section 209, the respondent contends that the Adjudicator would be prevented from making findings on the appellant's allegation. This argument is unconvincing. If the appellant's allegation was about a settlement agreement plagued with contractual problems, such as fraud, misrepresentation, duress, undue influence or unconscionability, the respondent accepts that the Adjudicator would have jurisdiction to determine whether the parties' settlement agreement is vitiated. In that case, the respondent takes no issue with former jurisprudence stating that in order to do so, the Adjudicator may examine the text of the settlement agreement for content that explicitly conveys the final and binding nature of the deal struck by the parties or analyze other evidence from which the intent of the parties to make such a deal final and binding may be reasonably inferred (Adjudicator's reasons at paragraph 89; respondent's memorandum of facts and law at paragraph 29). If the substance of the MOA, be it restricted to the specific adjudicable issue or not, does not impede an adjudicator's jurisdiction under these circumstances, I fail to see why it does in our case.

[71] Here, the Adjudicator clearly dismissed the request to reopen the adjudication hearing on the merits. I interpret his decision as recognition of the validity of the settlement agreement signed by the parties. He expressed his intention to limit his intervention to the allegation of breach, well aware of the fact that the (original) grievance had not been withdrawn and that the question of its enforcement was still unresolved between the parties. He held that the allegation "of non-compliance must first be proven by the grievor unless the deputy head explicitly concedes that fact. The evidence required to establish the fact of non-compliance will be specific to that issue" (Adjudicator's reasons at paragraph 95).

[72] In brief, the Adjudicator concluded that he had jurisdiction to consider an allegation that a party is in non-compliance with a final and binding settlement where the dispute underlying the settlement agreement is linked to the original grievance, and where the latter falls under subsection 209(1) of the new Act (reasons at paragraph 117). Considering that the appellant had not withdrawn his grievance, I agree with the Adjudicator.

[73] As a result of his conclusion on the second question, the Adjudicator finally turned to the last issue concerning his jurisdiction to make a remedial order assuming the appellant has met his onus of proof.

d) Question 3: Remedial Order

[74] Again, the Adjudicator answered the question favourably, taking support from subsection 228(2) of the Act:

Hearing of grievance	Audition du grief
228. **…** Decision on grievance	**228.** […] Décision au sujet du grief
(2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. The adjudicator must then	(2) Après étude du grief, il tranche celui-ci par l'ordonnance qu'il juge indiquée. Il transmet copie de l'ordonnance et, le cas échéant, des motifs de sa décision :
(*a*) send a copy of the order and, if there are written reasons for the decision, a copy of the reasons, to each party, to the representative of each party and to the bargaining agent, if any, for the bargaining unit to which the employee whose grievance it is belongs; and	*a*) à chaque partie et à son représentant ainsi que, s'il y a lieu, à l'agent négociateur de l'unité de négociation à laquelle appartient le fonctionnaire qui a présenté le grief;
(*b*) deposit a copy of the order and, if there are written reasons for the decision, a copy of the reasons, with the Executive Director of the Board	*b*) au directeur général de la Commission.

[75] He concluded that his remedial authority was broad and not restricted by a specific list of enumerated remedies. This statement is accurate.

[76] In the end, Adjudicator Butler re-convened the parties for the purpose of determining whether the deputy head had not complied with the terms of the settlement agreement, and, if necessary, for the purpose of determining an appropriate remedy.

Conclusion

[77] In my view, the respondent has not succeeded in showing that the Adjudicator's reasoning and decision are unreasonable. Within the specific context of this file, the Adjudicator's approach provides a sensible account of Parliament's intention while recognizing the applicable principles of statutory interpretation. I accept the appellant's argument that the judgment below fails to address the practical labour relations policy reasons put forward by the Adjudicator in support of his decision. The Adjudicator's considerations are consistent with achieving the fundamental objects of the Act. The appellant's settlement agreement dispute is intrinsically related to his underlying and persisting grievance, originally referred to adjudication, and properly within the jurisdiction of the Adjudicator.

[78] I am reminded that when deciding whether a decision satisfies the reasonableness standard, I must not only focus on the decision-maker's reasons but also on the outcome. As stated in *Dunsmuir* at paragraph 47:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

As I am of the view that the Adjudicator's decision meets all of these standards, I conclude that his decision was reasonable.

[79] For these reasons, I propose to allow the appeal. As a result, the judgement of the Federal Court of 20 November 2009 would be set aside, and proceeding to issue the judgement that ought to have been given, I would dismiss the application for judicial review with costs here and below.

"Johanne Trudel"
J.A.

“I agree
Pierre Blais C.J."

"I agree
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	Andrew Donnie Amos v. Attorney General of Canada
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DATE OF HEARING:	December 8, 2010
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CONCURRED IN BY:	BLAIS C.J. DAWSON J.A.
DATED:	February 3, 2011

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