Date: 20080925

File: 566-02-10

Citation: 2008 PSLRB 74

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ANDREW DONNIE AMOS

Grievor

and

DEPUTY HEAD
(Department of Public Works and Government Services)

Respondent

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2228, PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA and PUBLIC SERVICE ALLIANCE OF CANADA

Intervenors

Indexed as
Amos v. Deputy Head (Department of Public Works and Government Services)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Kenneth A. MacLean, counsel

For the Respondent: Harvey A. Newman and Jennifer Lewis, counsel

For the Intervenor, International Brotherhood of Electrical Workers, Local 2228:
James L. Shields, counsel

For the Intervenor, Professional Institute of the Public Service of Canada:
Geoffrey Grenville-Wood, counsel

For the Intervenor, Public Service Alliance of Canada:
Jacquie de Aguayo, Public Service Alliance of Canada

Decided on the basis of written submissions
filed February 6 and 8, March 14, 26 and 27, and April 18, 2008.

I. Request before the adjudicator

[1] This decision addresses a request filed by Andrew Donnie Amos ("the grievor") to reopen an adjudication hearing on the merits of his grievance on the grounds that the Deputy Minister of the Department of Public Works and Government Services ("the deputy head") refused to honour an undertaking in a Memorandum of Agreement (MOA) signed by the parties settling that grievance.

[2] The subject of the grievance was a disciplinary suspension. Assistant Deputy Minister John Shearer, Service Integration, Department of Public Works and Government Services, suspended the grievor without pay for a period of 20 working days by letter dated March 29, 2005.

[3] The grievor filed a grievance challenging the discipline on May 2, 2005. The details of his grievance are as follows:

. . .

> *. . . this grievance is related to the disc. action as set out in the disciplinary notice of March 29, 2005 signed by ADM Shearer as well as other disc. actions taken to date. These actions were, and are, completely unjustified and unwarranted. There were failures in following established procedures, natural law, burden of proof, standard of proof & admin. fairness.*
>
> *Pls. note that I am still awaiting receipt of balance of long overdue and outstanding information requested 6 months ago through ATIP.*
>
> CORRECTIVE ACTION REQUESTED
>
> *That the disciplinary measures be set aside and that I be reimbursed for all losses and damages.*
>
> [*Sic* throughout]

[4] Being unsuccessful in the internal grievance procedure, the grievor referred his grievance to adjudication on August 10, 2005.

[5] I was appointed to hear and determine the matter as an adjudicator. A hearing was first convened in Halifax, Nova Scotia, on November 28, 2006. The hearing continued through December 1, 2006 and resumed in Halifax on May 1, 2007.

[6] At the outset of the reconvened hearing, the parties agreed to explore the possibility of a voluntary resolution of the issues in dispute. They signed a "Consent to Mediate" form and met privately (for the most part) to discuss the matter. At several points, I provided assistance as a mediator pursuant to subsection 226(2) of the *Public Service Labour Relations Act* ("the new *Act*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c.22, that reads as follows:

> ***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.*

[7] On May 2, 2007, the parties announced that they had reached and executed a full settlement. I reminded the 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 Registry of the Public Service Labour Relations Board ("the Registry") that he has withdrawn his grievance. I then closed the hearing.

[8] The Registry wrote to the grievor's counsel on September 6, 2007, asking for an update on the status of the matter. The record does not contain a response from the grievor's representative to that request nor a written withdrawal of his grievance.

[9] On December 14, 2007, the Registry received the following request from the grievor:

. . .

> *In May 2007 the parties agreed to a Memorandum of Agreement settling the above noted file. In reliance on that agreement, the grievor agreed to withdraw his grievances. A specific term of that agreement upon which the grievor relied reads as follows:*
>
> *The parties hereby agree:*
>
> 1. *To participate in a meeting, or meetings as reasonably required, with a view to discussing and resolving issues of mutual interest relating to the grievors working relationship with PWGSC. This process shall take place as soon as practicable. It is the intent of both parties to establish a positive*

> *working relationship for their mutual benefit for the future.*
>
> *Unfortunately, although the grievor has* [*sic*] *attempted to schedule this meeting immediately after the Agreement was signed and repeatedly over the next seven months, the Department was unwilling to meet. This seven-month delay has moved us well beyond "as soon as practicable". This coupled with the fact that there has been no establishment of a "positive working relationship" and, in fact, a serious deterioration of the relationship.*
>
> *As a result of the above, Mr. Amos hereby requests that his original grievance proceed due to the employer's breach of the Memorandum of Agreement between the parties.*
>
> . . .

[10] The Registry wrote to the deputy head requesting its position in response to the grievor's request. The deputy head filed the following response and objection on January 7, 2008:

> . . .
>
> *It is the employer's position that the adjudicator no longer has jurisdiction over this matter as a complete and final settlement agreement (MOA) was reached between the parties on May 2, 2007.*
>
> *The existence of a final and binding settlement is a complete bar to an adjudicator's jurisdiction. The case law is abundantly clear on this issue (*MacDonald v. Canada *[1998] F.C.J. No. 1562 (FCTD),* Bhatia *(166-2-17829),* Skandharajah *(200 PSSRB 114)* [*sic*], Fox *(2001 PSSRB 130),* Lindor *(2003 PSSRB 10),* Bedok *(2004 PSSRB 163)).*
>
> *It is also a well established principle that an adjudicator has no jurisdiction concerning the implementation of an MOA. (*Déom *(148-02-107),* Bhatia *(166-2-17829),* Carignan *(2003 PSSRB 58),* Van de Mosselaer *(2006 PSLRB 59)).*
>
> *Notwithstanding the above, if the grievor does have concerns in regard to the implementation of the MOA, his local management is more than willing to discuss matters with him.*
>
> . . .

[11] The grievor filed a rebuttal on January 23, 2008:

. . .

> *. . . it is our position that the employer has failed to provide a term of the agreement that was a fundamental point of consideration underpinning the MOA. As a result, the MOA has been clearly breached by the employer, which they make no attempt to deny in their response.*
>
> *. . . this circumstance can be distinguished from the case law sighted [sic] by Mr. Heavens . . . many of the cases consider what is in the best interests of good labour relations under the relevant legislation. For example, in Skandharajah (200 PSSRB 114)* [*sic*] *at paragraph 80, Board Member Giguere concludes as follows:*
>
> > [80] *Having found that the parties have settled this grievance, I conclude that there is no longer a dispute between them and therefore no matter to be determined by an adjudicator under the PSSRA.* ***Furthermore, it is in the best interest of good labour relations that binding mediation agreements be honoured*** *. . . .*
>
> *We share Board Member Giguere's view that it is in the best interest of labour relations that binding settlement agreements be honoured. It is for this reason that Mr. Amos' request to continue with his grievance must be granted, as the employer must not be allowed the option of failing to honour a MOA . . . .*
>
> *Practically speaking, his only other option available would be to grieve the breach of the MOA, which would not provide an opportunity for independent adjudication under the legislated grievance structure, so his grievance would be reviewed by the same department and individuals that failed to honour the MOA. Such a situation is untenable and not in the best interest, spirit nor intent of labour relations. The matter should be put before the Board.*

. . .

[Emphasis in the original]

II. Preliminary matters

[12] The grievor requests that I reconvene the adjudication hearing on the merits of his grievance in light of the deputy head's alleged failure to respect a term of the May 2, 2007 MOA that settled his grievance. The deputy head objects, stating that I

may not consider the grievor's request to reopen the hearing because the existence of a binding settlement constitutes a complete bar to an adjudicator's jurisdiction. That binding settlement, in the deputy head's submission, also bars an adjudicator from considering issues related to the implementation of a settlement agreement.

[13] Under the legislation governing grievances filed before April 1, 2005, the *Public Service Staff Relations Act* ("the former *Act*"), R.S.C., 1985, c. P-35, issues concerning an adjudicator's jurisdiction in a situation where the parties settle a grievance through mediation have been canvassed on a number of occasions, as illustrated by the case law cited by the deputy head. That case law has generally been viewed as placing strict limits on the authority of adjudicators, if not precluding it, once the parties have signed a settlement agreement.

[14] To the best of my knowledge, the grievor's request and the deputy head's objection to it pose for the first time under the new *Act* some of the same jurisdictional issues. Although the two statutes are similar in many respects, there are differences. If only for that reason, I believe that it is appropriate in this first case of its type under the new *Act* to carefully review whether previous findings about an adjudicator's jurisdiction based on interpretations of the former *Act* remain persuasive under the provisions of the new *Act*.

[15] One of the provisions of the new *Act* that could bear upon an adjudicator's jurisdiction in the case before me is section 236, which reads as follows:

> ***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.*
>
> *(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.*
>
> . . .

[16] Subsection 236(1) of the new *Act* appears on its face to indicate that Part 2 of the new *Act* establishes an exclusive regime for resolving grievances over the labour relations subject matter within its scope. If so, does a grant of exclusive jurisdiction

have any impact on how a dispute over the implementation of a settlement agreement should be resolved, or where?

[17] Beyond that, what significance, if any, does the evolving case law about the jurisdiction of arbitrators and labour boards have for understanding an adjudicator's authority in this case? Some analyses have suggested that decisions following in the wake of the seminal findings of the Supreme Court of Canada in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, and in *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967, and later in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, have signalled a general shift toward the greater empowerment of labour boards and adjudicators. Do such decisions offer any insights for determining the matter before me? Do the findings in *Vaughan v. Canada*, 2005 SCC 11, a case where the Supreme Court of Canada ruled specifically on an adjudicator's authority under the former *Act*, provide any relevant direction for this case? If so, how does *Vaughan* apply under the architecture of the new *Act*?

[18] The evolution of case law, in my view, provides another reason why it is timely to re-examine the foundations of an adjudicator's authority in the situation of alleged non-compliance with the terms of a settlement agreement.

[19] Finally, I believe that there is yet another very important reason for doing so that is rooted in the interests of good labour relations. Adjudicators appointed to hear grievances have long promoted the importance of efforts by the parties themselves to resolve their disputes voluntarily, primarily through mediation. Subsection 226(2) of the new *Act*, cited above, now explicitly mandates mediation by an adjudicator in the context of an adjudication hearing. As adjudicators focus increased attention on the central role and possibilities of mediation, it is to be expected that more participants will pose questions about the status of settlements achieved through mediation and, particularly about their enforceability. Those participants are understandably interested in the idea that there should be clarity under the new *Act* concerning the role to be played by adjudicators, if any, with respect to the enforcement of such settlements.

[20] For those reasons, I decided to notify the parties in this case that I needed further guidance from them on several jurisdictional questions that I believe arise from their initial submissions. Moreover, given the possibility that my decision in this case could have broader implications and thus be of interest to the wider labour

relations community under the new *Act*, I determined that I needed to explore with the parties the option of soliciting interventions from other interested persons.

[21] At my direction, the Registry wrote to the grievor and the deputy head on February 4, 2008, as follows:

. . .

> *The record indicates that there is no dispute between the parties over the fact that they have entered into an agreement to settle the individual grievance referred to adjudication in the above-mentioned file. The grievor alleges that the deputy head has failed to fulfil its obligations under the settlement agreement and requests that his grievance be heard on its merits. For its part, the deputy head objects that the settlement agreement constitutes a complete bar to an adjudicator's jurisdiction, relying on a line of decisions rendered under the former* Public Service Staff Relations Act. *The grievor replies that the deputy head's failure to abide by the terms of the settlement agreement must not make him lose his right to proceed with his grievance.*
>
> *The jurisdiction of an adjudicator in the context of the grievor's request has not yet been addressed under the new* Public Service Labour Relations Act *and its section 236. Further, such jurisdiction has not yet been examined in light of the evolving jurisprudence of the Supreme Court of Canada: i.e.* Weber v. Ontario Hydro, *[1995] 2 S.C.R. 929;* New Brunswick v. O'Leary, *[1995] 2 S.C.R. 967;* Regina Police Association Inc. v. Regina (City) Board of Police Commissioners, *2000 SCC 14; and* Vaughan v. Canada, *2005 SCC 11.*
>
> *Adjudicator Butler has decided that he will shortly request the parties to address specific jurisdictional issues, the wording of which will be provided in a later correspondence.*
>
> *Because of the importance of the jurisdictional issues arising from this matter, and of the potential far-reaching implication of any decision made on them, adjudicator Butler is considering granting intervenor status to bargaining agents and employers in the public service, for the sole purpose of filing written submissions on the jurisdictional issues mentioned above. The parties are therefore requested to file with the Executive Director any written representations they may wish to make on the appropriateness of granting such intervenor status . . . .*

. . .

A. Written arguments on the appropriateness of granting intervenor status to bargaining agents and employers

[22] On February 6, 2008, the grievor indicated his consent ". . . to allowing intervenors to provide submissions in this matter."

[23] The deputy head objected to the solicitation of interventions in submissions received on February 8, 2008, as follows:

. . .

> *. . . While the parties have been asked to file their written representations on the appropriateness of granting such intervenor status, the employer is of the view that the granting of intervenor status is inextricably tied to the jurisdictional issue. Therefore, even though Adjudicator Butler will be providing specific questions on the jurisdictional issue, the employer is of the view that the jurisdictional issue must be addressed in the context of these submissions to some extent with respect to intervenor status.*
>
> *Subsection 14(1) of the Public Service Labour Relations Board Regulations, SOR/2005-79 (the "PSLRB Regulations") provides as follows:*
>
> > *14. (1) Any person with a substantial interest in a proceeding before the Board may apply to the Board to be added as a party or an intervenor. [emphasis added]*
>
> *The issue regarding whether persons other than parties ought to be granted intervenor status has been the subject of much debate before both courts and administrative tribunals alike. In fact, the Public Service Staffing Tribunal ["PSST"] has had occasion in the last year to entertain such an application in* Wardlaw v. President of the Public Service Human Resources Management Agency of Canada et al., *2007 PSST 0017 (Giguère) ["*Wardlaw*"] [Attached as Appendix "A"].*
>
> *In that case, the complainant filed her complaint with the PSST because she was not selected in an internal advertised selection process for a position with the Public Service Human Resources Management Agency of Canada ["PSHRMAC"]. The Public Service Alliance of Canada ["PSAC"] was the certified bargaining agent for the complainant, as well as the appointees to that process, but chose not to represent the complainant or the appointees before the PSST. After withdrawing itself as a participant in that proceeding, the PSAC filed an application for intervenor status pursuant to subsection 19(1) of the Public Service*

Staffing Tribunal Regulations, SOR/2006-6 [the "PSST Regulations"], which states as follows:

> *19. (1) Anyone with a substantial interest in a proceeding before the Tribunal may apply to the Tribunal for permission to intervene in the proceeding. [emphasis added] [Attached as Appendix "B"]*

Although, the language under the PSST Regulations is not verbatim to the language under the PSLRB Regulations, it is very similar and it is clear that under either scheme a person applying for intervenor status must have a "substantial interest" in the proceeding. While the PSLRB Regulations offer no further guidance in terms of what the Board may perceive as a substantial interest in a proceeding, subsection 19(4) of the PSST Regulations lists the factors that the PSST may consider when reviewing an application for intervention:

> *19. (4) The Tribunal may allow the applicant to intervene after considering the following factors:*
> *(a) whether the applicant is directly affected by the proceeding;*
> *(b) whether the applicant's position is already represented in the proceeding;*
> *(c) whether the public interest or the interests of justice would be served by allowing the applicant to intervene; and*
> *(d) whether the input of the applicant would assist the Tribunal in deciding the matter. [Attached as Appendix "B"]*

As noted by Chairperson Giguère in the Wardlaw *decision at paragraph 21, "[t]hese factors are akin to those used by the courts in determining whether to grant intervenor status". The factors generally used by the courts have been cited in* Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 (F.C.A.) (QL) [Attached as Appendix "C"], and are as follows:*

1) Is the proposed intervener directly affected by the outcome?
2) Does there exist a justiciable issue and a veritable public interest?
3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
4) Is the position of the proposed intervener adequately defended by one of the parties to the case?
5) Are the interests of justice better served by the intervention of the proposed third party?

6) Can the Court hear and decide the cause on its merits without the proposed intervener?

The employer submits that factors (a), (b), (c) and (d) are comparable to factors 1, 4, 5 and 6 respectively.

In Wardlaw*, the appointment process that was under review was a process used to staff the Joint Learning Program ("JLP"), of which the PSAC was not only a co-sponsor but also an integral partner in the design and implementation. Chairperson Giguère granted intervenor status to the PSAC, albeit on a limited basis, because he determined that the PSAC not only had a substantial interest in the proceeding, but it also had a direct interest in the proceeding given that members of the PSAC staff participated as members of the selection boards that assessed the candidates applying for these positions. On these grounds, the PSAC satisfied criteria (a) and (d).*

Chairperson Giguère was also satisfied, given the PSAC's unique circumstances in that case, that its position was not already being represented in that proceeding. The PSAC's role as selection board members placed it essentially in the shoes of an employer, but its interests were not being represented by the respondent employer in that case. Furthermore, Chairperson Giguère determined that the PSAC not only had experience with discrimination complaints, which was the central issue in that case, but that the PSAC could bring an additional or different perspective from that of the respondent employer and the complainant, who was now unrepresented given the PSAC's withdrawal of representation. On these grounds, the PSAC satisfied criteria (b).

Finally, the PSAC satisfied criteria (c) in that Chairperson Giguère determined that the interests of justice would be served by allowing the PSAC to intervene if its comments were limited to presenting comments only on the arguments raised by the parties. Under those circumstances, Chairperson Giguère was satisfied that the proceeding would not be unduly complicated or prolonged due to the PSAC's intervention.

The employer submits that the four factors codified under the PSST Regulations are most closely related to what the employer considers relevant considerations to the PSLRB's analysis in the present case. Factor (a) stipulates that the applicant must be directly affected by the proceeding. The only persons or entities directly affected by these proceedings are the grievor, Andrew Amos, and the employer. Furthermore, given that Andrew Amos is not represented by a union, nor do his rights involve the interpretation of a collective agreement, any decision in this case on the

jurisdictional issue will have no direct impact on any union or employer. The matter at hand is one involving the rights between two parties only, the grievor and his employer. Therefore, it is the employer's position that any application for intervention in this case would fail on ground (a).

Factor (b) raises the question of whether or not the applicant's position is already represented in the proceeding. Both the employer and Mr. Amos are represented by experienced counsel who are more than capable of raising and debating the jurisdictional issue in this case. Therefore, it is the employer's position that any application for intervention in this case would also fail on ground (b).

In a similar vein, factor (c) questions whether the public interest or the interests of justice would be served by allowing the applicant to intervene. The employer submits that allowing intervention in this case will unduly complicate matters and unnecessarily prolong the proceeding, which is not in the public interest or the interests of justice. Furthermore, this factor begs the question regarding what possible interest an intervenor might have in this case, other than its interest in the jurisprudential outcome of a jurisdictional issue. The case law is clear that intervention should not be permitted where the sole interest of the proposed intervenor is jurisprudential in nature. As stated in Anderson v. Canada (Customs and Revenue Agency), *[2003] F.C.J. No.1388 (F.C.A.) (QL) at paragraph 9: "However, it appears to me that this is a case where the interest of the Institute is primarily a jurisprudential interest. In this Court, that has never been considered a sufficient ground to permit an intervention." [Attached as Appendix "D"]*

Finally, factor (d) raises the issue of whether or not the input of intervenors would assist the Board in deciding the matter. This last factor gives rise to the question regarding the nature of the matter to be decided. Mr. Rabbouh's letter of February 4th indicates that there is a jurisdictional issue in the context of the grievor's request that has not yet been addressed under the new PSLRA and its section 236; nor has this issue been examined in light of the evolving Supreme Court of Canada jurisprudence.

The jurisdictional issue to be decided in this case is whether or not Adjudicator Butler has the authority to reopen the grievor's adjudication case. On this issue, the employer relies on the submissions already put forth in Drew Heavens' letter dated January 8, 2008. The employer reiterates its position that the existence of a final and binding settlement agreement is a complete bar to an adjudicator's jurisdiction.

Furthermore, an adjudicator is without jurisdiction regarding the implementation of a settlement. This well-

established principle has been reiterated in Maiangowi v. Treasury Board (Department of Health) *(2008 PSLRB 6), a recent decision rendered by Adjudicator Mooney under the Public Service Staff Relations Act, R.S.C., 1985, C. P-35. [Attached as Appendix "E"]*

Mr. Rabbouh's letter appears to suggest that section 236 and the Supreme Court cases will somehow provide further guidance to adjudicators on the issue of their jurisdiction. It is on this point that the employer respectfully submits that it is not apparent how the jurisdictional issue in this case is related to either section 236 of the PSLRA or the Supreme Court cases cited in Mr. Rabbouh's letter. The Supreme Court cases cited deal with whether a court has jurisdiction over workplace disputes when an employee would rather sue its employer in court than avail itself of the labour relations scheme already provided for either by statute or by collective agreement. The employer's interpretation of these cases is that they are about whether or not the court's jurisdiction is ousted under the circumstances and do not deal with an adjudicator's jurisdiction. The employer is therefore of the opinion that Supreme Court cases cited can provide little guidance to adjudicators on this issue.

Similarly, section 236 of the PSLRA states as follows:

> *Disputes relating to employment*
>
> *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.*
>
> *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.*

It is the employer's position that section 236 codifies the principles enunciated in Vaughan v. Canada, *[2005] S.C.J. No. 12 (S.C.C.) (QL) [Attached as Appendix "F"] and perhaps takes them one step further effectively barring employees entirely from suing in court in relation to employment disputes, thereby requiring employees to pursue relief under the regime established by Parliament. Having said that however, the employer submits that not only has section 236 of the* PSLRA *not changed the law, but that like the Supreme Court cases discussed above, section 236 deals with a court's jurisdiction and not an adjudicator's. Therefore, the employer fails to see how section 236 can be of assistance to*

> *Adjudicator Butler in this particular case where we are dealing with the effect of a final and binding settlement.*
>
> *In answer to Mr. Rabbouh's letter of February 4, 2008, the employer submits that no invitations to intervene should be made in this case for the reasons stated above.*
>
> . . .
>
> [Emphasis in the original]

B. Ruling on the appropriateness of granting intervenor status to bargaining agents and employers

[24] The deputy head's objection to the possibility of soliciting interventions from other persons in this case raises credible concerns, but, on balance, I have concluded that it would be appropriate and helpful in the circumstances of this case to provide other persons an opportunity to express their views.

[25] The grievor's request comes to me as the adjudicator appointed to hear and determine his grievance, which was referred to adjudication under paragraph 209(1)(*b*) of the new *Act*. The result that he seeks is to reopen and continue the adjudication hearing. In that context, I view this request as properly part of the existing reference to adjudication and not as a separate application. As a matter of record, the grievor did not file this request under a provision of the new *Act* that would have the effect of making it a separate proceeding.

[26] The technical significance of that determination is that subsection 14(1) of the *Public Service Labour Relations Board Regulations* ("the *PSLRB Regulations*"), SOR/2005-79, cited by the deputy head is not the governing authority. Subsection 14(1) applies to matters before the Public Service Labour Relations Board ("the new Board") under Part 1 of the new *Act*. The pertinent provision for interventions in adjudication proceedings is instead section 99 of the *PSLRB Regulations* that reads as follows:

> ***99.*** *(1) Any person with a substantial interest in a grievance may apply to the Chairperson or the adjudicator, as the case may be, to be added as a party or an intervenor.*
>
> *(2) The Chairperson or the adjudicator may, after giving the parties the opportunity to make representations in respect of the application, add the person as a party or an intervenor.*

[27] The technical distinction that I make here is not itself significant. Both subsections 14(1) and 99(1) of the *PSLRB Regulations* focus on the concept of "substantial interest" as a central factor in considering the possibility of interventions. Based on that concept, the deputy head submits that other persons do not have "a substantial interest" in the jurisdictional issues raised by the grievor's request. I concur with the deputy head that the concept of "substantial interest" is germane and will return to it shortly. There is, however, a further technical distinction to be made. In my view, subsection 99(1) would apply if the matter before me were an application from a person to be granted intervenor status. It is not. In this case, the initiative to propose the possibility of interventions comes from me as the adjudicator rather than from an employee, employer, bargaining agent or other person.

[28] Neither the *PSLRB Regulations* nor the new *Act* specifically outlines the procedures or criteria that apply where an adjudicator proposes to solicit interventions in regard to a matter for which he or she is seized. In my opinion, determining whether to do so, and in what circumstances and how, is part of the normal exercise of an adjudicator's authority under Part 2 of the *Act*. It has been widely and consistently recognized in the practice under the new *Act* and the former *Act* that an adjudicator enjoys considerable latitude to determine the organization and conduct of proceedings before him or her. I believe that latitude also exists in this matter.

[29] I find support for that proposition in *Djan v. Treasury Board (Correctional Service of Canada)*, 2001 PSSRB 60. In *Djan*, an issue arose about the jurisdiction of an adjudicator in the context of an individual grievance against a disciplinary termination of employment. In that case, the adjudicator formed the view that the jurisdictional issue would ". . . have ramifications for all federal public servants . . . ." He then invited all employers and bargaining agents to make submissions as intervenors.

[30] I believe that the jurisdictional issues raised by the grievor's request are also issues that would or could have wide ramifications. The deputy head argues to the contrary that other persons do not have a "substantial interest" in the disposition of this case. It maintains that, because the grievor is not represented by a bargaining agent and because his grievance does not involve a collective agreement, ". . . any decision in this case on the jurisdictional issue will have no direct impact on any union or employer. . . ." The deputy head's contention may be correct but only in a narrow and technical sense. There are indeed just two parties, the grievor and the deputy

head, who will be immediately and directly affected by my decision. On the other hand, every employee under the new *Act* and every bargaining agent and employer are possible future parties to mediation proceedings regarding a grievance referred to adjudication. All employees, bargaining agents and employers share an interest in the proper functioning of the mediation process and, I believe, in the integrity of settlement agreements. To the extent that the jurisdictional matters before me address issues related to the fundamental effectiveness of mediation — what happens if one party believes that the other has not complied with the terms of a mediated settlement? — the interests of all employees, bargaining agents and employers are at stake.

[31] The deputy head cites *Anderson v. Canada (Customs and Revenue Agency)*, 2003 FCA 352, a decision of the Federal Court of Appeal, to the effect that interventions should not be permitted where the sole interest of the proposed intervenor is jurisprudential in nature. The deputy head also refers to the criteria used by the Federal Court of Appeal for determining whether to grant intervenor status, as reflected in *Canadian Airlines International Ltd. v. Canada (Human Rights Commission),* 2000 CanLII 14938 (F.C.A.). While those decisions are of some interest, the rules that they suggest are not binding in this matter. They are designed for litigation in the formal setting of a court, where technical and procedural requirements are appropriately more precise and exacting. By contrast, the requirements that generally prevail for administrative tribunals and, more specifically, for adjudication proceedings favour greater flexibility.

[32] The deputy head also draws my attention to the factors used by the Public Service Staffing Tribunal in considering applications for intervention as expressed in subsection 19(4) of the *Public Service Staffing Tribunal Regulations* ("the *PSST Regulations*"), SOR/2006-6:

> ***19.*** *(4) The Tribunal may allow the applicant to intervene after considering the following factors:*
>
> *(*a*) whether the applicant is directly affected by the proceeding;*
>
> *(*b*) whether the applicant's position is already represented in the proceeding;*

> (c) *whether the public interest or the interests of justice would be served by allowing the applicant to intervene; and*
>
> (d) *whether the input of the applicant would assist the Tribunal in deciding the matter.*

[33] Obviously, the *PSST Regulations* have no status in this matter. If they did, however, I would draw quite different conclusions as to how they apply than does the deputy head. For the reasons stated above, I believe that other persons could well be directly affected in the future by the outcome, even if they would not be directly affected now. As to paragraph 19(4)(*b*), not all interests are necessarily represented at the table. The grievor's consideration of the jurisdictional issues is understandably focused on the immediate context of this file. Bargaining agents and employers, on the other hand, arguably have a continuing broad interest in the operation of the dispute resolution procedures mandated by the new *Act* and can be expected to be concerned when jurisdictional determinations are made that potentially impact systemically on those procedures. In particular, bargaining agents and employers are frequently signatories to mediated settlements and can be directly implicated by developments that affect the status of those settlements. They may have valuable experience to share in this matter. As the Supreme Court of Canada stated in a similar vein, ". . . [t]he views and submissions of interveners on issues of public importance frequently provide great assistance to the courts. . .": *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, para 43.

[34] Regarding paragraphs 19(4)(*c*) and (*d*) of the *PSST Regulations*, I am confident that a wider canvass of views on the jurisdictional issues before me will substantially assist my decision making. At the very least, it cannot be argued that the public interest in the effectiveness of the mediation process in the public service will be undermined by opening up the debate. It should instead be well served by doing so. As to the parties themselves, I do not believe that either party will be prejudiced by interventions. The delay caused by soliciting interventions will not be significant. Provided that both parties have a full and fair opportunity to address any issues that are raised by potential intervenors, there will be no denial of natural justice.

[35] I note finally that the deputy head's submissions on the question of interventions also contain comments about the meaning and significance of section 236 of the new *Act* and of the court decisions cited in the Registry's letter to

the parties of February 4, 2008. Those comments reiterate the position that the deputy head took in its original response to the grievor's request. For the purpose of this preliminary determination about interventions, I note only that it would be premature for me to address any of the main points advanced by the deputy head on the merits.

[36] For the reasons above, I ruled in favour of proceeding to contact all bargaining agents and employers under the new *Act* to offer them an opportunity to make written submissions on the same jurisdictional questions to be put to the parties.

[37] On February 15, 2008, the Registry wrote to the parties indicating the jurisdictional questions on which I wished to receive written submissions. The letter also notified the parties of my decision to proceed to solicit interventions on the issues:

. . .

> *The record on the above-mentioned matter indicates that the grievor has referred to adjudication an individual grievance under the* Public Service Labour Relations Act *("the new* Act*") against a disciplinary action resulting in suspension. The record further indicates that there is no dispute between the parties over the fact that they have entered into an agreement to settle the grievance. The grievor alleged that the deputy head has failed to fulfil its obligations under the settlement agreement and requested that his grievance be heard on its merits. For its part, the deputy head objected, arguing that the settlement agreement constitutes a complete bar to an adjudicator's jurisdiction, relying on a line of decisions rendered under the former* Public Service Staff Relations Act*. The grievor replied that the deputy head's failure to abide by the terms of the settlement agreement must not make him lose his right to proceed with his grievance.*
>
> *The jurisdiction of an adjudicator in the context of the grievor's request has not yet been addressed under the new* Act*.*
>
> *Adjudicator Butler has decided to request the parties' written submissions on the specific jurisdictional issues specified below. Because of the importance of these jurisdictional issues, and of the potential far-reaching implication of any decision made on them, adjudicator Butler has further decided, following consultations with the parties, to grant intervenor status to all bargaining agents and employers in the public service, for the sole purpose of filing written submissions, if they so wish.*

> *In light of the coming into force of the new* Act *in general, and of its section 236 in particular, and in light of the evolving jurisprudence relating to the jurisdiction of adjudicators — i.e.,* Weber v. Ontario Hydro, *[1995] 2 S.C.R. 929;* New Brunswick v. O'Leary, *[1995] 2 S.C.R. 967;* Regina Police Association Inc. v. Regina (City) Board of Police Commissioners, *2000 SCC 14; and* Vaughan v. Canada, *2005 SCC 11 —, adjudicator Butler is seeking representations on the following issues:*
>
> > *1) 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?*
> >
> > *2) In the event that an adjudicator has the jurisdiction under the new* Act *to determine whether the parties' settlement agreement is final and binding, 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?*
>
> . . .

III. <u>Written arguments</u>

[38] In the special circumstances of this case, I have decided to depart from my normal practice of offering an independent summary of the arguments made by the parties and, in this instance, by the intervenors. Instead, I have annexed their written submissions in a substantially complete form. I do so as a practical matter and to provide the labour relations community interested in the outcome with the opportunity to review the full scope of the detailed arguments that have been made.

[39] In addition to the submissions of the parties, I received submissions from the following three intervenors: Local 2228 of the International Brotherhood of Electrical Workers (IBEW), the Professional Institute of the Public Service of Canada (PIPSC) and the Public Service Alliance of Canada (PSAC).

[40] I also received brief comments in an email from a representative of a fourth bargaining agent that were clearly submitted outside the time limits. As no reason was given to explain the lateness of that submission, the one-page email has not been taken into consideration.

[41] The deputy head submitted rebuttal arguments. The grievor did not.

[42] I have reviewed all the submissions very closely. The reasons that follow refer to elements in the arguments made on both sides of the issue that I have judged to be most important, without uniformly identifying the origin of those arguments.

[43] In its rebuttal, the deputy head takes the position that the parties and intervenors ". . . were not asked to review the correctness of the body of established Board jurisprudence on the issue of final and binding settlement agreements. . . ." The deputy head argues instead that the questions that I posed were intended to be answered ". . . in light of . . ." the new *Act* and the specifically enumerated case law that I will refer to in this decision as the "*Weber* line of decisions." The deputy head takes that position based on the following excerpt from the Board's letter of February 15, 2008:

. . .

> *In light of the coming into force of the new* Act *in general, and of its section 236 in particular, and in light of the evolving jurisprudence relating to the jurisdiction of adjudicators — i.e.,* Weber v. Ontario Hydro, *[1995] 2 S.C.R. 929;* New Brunswick v. O'Leary, *[1995] 2 S.C.R. 967;* Regina Police Association Inc. v. Regina (City) Board of Police Commissioners, *2000 SCC 14; and* Vaughan v. Canada, *2005 SCC 11 — adjudicator Butler is seeking written representations on the following issues:*
>
> . . .
>
> [Emphasis added by deputy head]

[44] It is unclear to me exactly what substantive or procedural point the deputy head is trying to make. I do not find any instruction in the Registry's letter that could be reasonably construed as prohibiting a party or an intervenor from making the submissions that it felt necessary and appropriate regarding the three questions that I put to them. It is evident from the other submissions that the grievor and the intervenors did not feel any such constraint. If the deputy head believed that it was

more narrowly limited in what could be addressed, I believe that any limitation was self-imposed. In any event, the deputy head had a full and free opportunity in rebuttal to address any aspect of the grievor and intervenors' submissions. In my view, there has been no prejudice to the deputy head, if that is what the deputy head intended to suggest.

IV. Reasons

[45] I wish at the outset to express my appreciation to the parties and to the intervenors for the thought and effort obviously given to their submissions. Taken together, I believe that they offer a rich and comprehensive basis for considering the jurisdictional questions that I have posed in relation to the grievor's request to reopen the adjudication proceedings.

[46] However else I might state the jurisdictional issues, the real problem underlying the grievor's request can be expressed quite simply: 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?

A. Case law under the former *Act*

[47] Bluntly put, the normal answer to that question in the case law under the former *Act* was: "not to an adjudicator." A consistent line of decisions under the former *Act* found that the existence of a final and binding settlement agreement — most often achieved as the result of a mediation process — constitutes a complete bar to adjudication.

[48] As early as 1985 in *Treasury Board v. Déom*, PSSRB File No. 148-02-107 (19850522), the Public Service Staff Relations Board expressed the bar as follows:

. . .

> *The evidence reveals that, on October 27, 1982, after the grievance was referred to adjudication, a settlement was reached between the employer and Mr. Déom. If the case is still pending, it is because Mr. Déom claims that the employer did not fulfil its commitments. The employer denies this.*
>
> *The Board believes that, in view of the above-mentioned settlement, it cannot hear the grievance. The Board is not the competent tribunal to decide whether the terms of the settlement have been fulfilled. It relies in this regard on the*

> *following decisions:* Walter Masson *(File No. 166-2-9779)*; Re Government of the Province of Alberta and Alberta Union of Provincial Employees, *10 L.A.C. (3d) 71; and* The Letter Carriers' Union of Canada and Canada Post Corporation *(unreported decision of April 15, 1985 concerning the grievance of Al Young). These decisions provide an exhaustive study of the consequences of the settlement of a grievance. Arbitration precedent has unanimously held that, where there is a settlement, the arbitration tribunal no longer has jurisdiction.*
>
> . . .

[49] Similar findings followed in, for example, *Bhatia v. Treasury Board (Public Works Canada)*, PSSRB File No. 166-02-17829 (19890531); *Skandharajah v. Treasury Board (Employment and Immigration Canada)*, 2000 PSSRB 114; *Myles v. Treasury Board (Human Resources Development Canada)*, 2002 PSSRB 53; *Lindor v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2003 PSSRB 10; *Carignan v. Treasury Board (Veterans Affairs Canada)*, 2003 PSSRB 58; *Bedok v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 163; *Castonguay v. Treasury Board (Canada Border Services Agency)*, 2005 PSLRB 73; *Van de Mosselaer v. Treasury Board (Department of Transport)*, 2006 PSLRB 59; *Dillon v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 135; and *Nash v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 98.

[50] The statement of finding in *Lindor* is typical of the more recent of those decisions:

> . . .
>
> *[16] It has been long established by this Board that a valid settlement agreement is a complete bar to its jurisdiction . . . It is in the interests of certainty in labour relations that legitimate settlement agreements be final and binding on all parties.*
>
> . . .

[51] An even more recent case, *Maiangowi v. Treasury Board (Department of Health)*, 2008 PSLRB 6, is cited in the deputy head's submissions as a decision in which ". . . this well-established principle has been reiterated . . . ." I disagree. The basis for the adjudicator's decision in *Maiangowi* was not the existence of a settlement agreement but rather the withdrawal by the employee of her grievance. In that fact situation, the

adjudicator relied upon *Canada (Attorney General) v. Lebreux*, [1994] F.C.J. No. 1711 (C.A.) (QL), for the proposition that withdrawal of a grievance comprises a complete bar to adjudication:

. . .

> *[60] The grievor argued that withdrawing her grievance ought not to prejudice her in such a way as to preclude the Board from dealing with the jurisdictional question. I cannot agree with that submission. In my view, the Federal Court of Appeal has clearly established that an adjudicator appointed by the Board loses jurisdiction over a grievance when a grievor withdraws it. In* Canada (Attorney General) v. Lebreux, *[1994] F.C.J. No. 1711 (QL), the employee had reached an agreement with the employer and withdrew his grievance. The Board closed the files, but the grievor later asked that the files be reopened because there had been no satisfactory agreement between the parties. The Board agreed to review the case and hear the grievance on its merits. The Federal Court of Appeal found that the adjudicator erred in doing so because the withdrawal of the grievance rendered the Board without jurisdiction at paragraph 12:*
>
> > *[12] From the time the respondent discontinued his grievances the Board and the designated adjudicator became functus officio since the matter was then no longer before them. The Board was not required either to inquire into the merits or feasibility of such a discontinuance or to agree to accept or reject it. The act of discontinuance forthwith and without more terminated the grievance process in respect of which it was filed. Accordingly, no order or decision could be or was made within the meaning of the Act that could be the subject of cancellation or review under s. 27.*
> >
> > *[Footnote omitted]*
>
> *[61] The Court indicated that the only thing that the adjudicator could have done was to note the withdrawal. In my view,* Lebreux *stands for the proposition that the withdrawal of a grievance is a bar to adjudication, not only regarding the merits of the grievance but also the enforcement of the settlement if I had that jurisdiction. Once a grievance is withdrawn, the Board loses jurisdiction over all matters related to it. There is simply no longer any grievance before the adjudicator.*

. . .

[52] The adjudicator in *Maiangowi* clearly stated that he made no ruling on the issue of the effect of a settlement agreement on jurisdiction, although he did note past jurisprudence on that issue:

> . . .
>
> *[62] Since I have no jurisdiction over this grievance, the issue of whether an adjudicator has jurisdiction over the enforcement of the settlement is moot. I can only note that adjudicators have always refused to take jurisdiction over the enforcement of a settlement . . . .*
>
> . . .
>
> [Emphasis added]

[53] In the case before me, the record indicates that the grievor did not withdraw his grievance after he entered into the settlement agreement. I believe that that distinction is important. Suffice it to say that I am not called on in this case to declare myself without jurisdiction for the reason that ". . . [t]here is simply no longer any grievance before the adjudicator . . ." in the same sense that prevailed in *Maiangowi*. I note as well that *Maiangowi* was decided in accordance with the provisions of the former *Act*, not the new *Act*.

[54] The principal basis for finding that a settlement agreement represented a complete bar to adjudication under the former *Act* was subsection 92(1), the provision that established limitations on the grievance subject matter that could be referred to adjudication:

> ***92.*** *(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> *(*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 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.*

[55] Adjudicators interpreting subsection 92(1) of the former *Act* found that a dispute over a settlement agreement involved neither the interpretation or application of a provision of a collective agreement or an arbitral award under paragraph 92(1)(*a*), nor a disciplinary action or termination within the meaning of paragraphs 92(1)(*b*) and (*c*). As such, they ruled that the statute precluded an adjudicator from enforcing a settlement agreement (presuming that a final and binding settlement did exist).

[56] The case law under the former *Act* did accept that there were specific situations where an adjudicator did have authority to make certain determinations regarding a purported settlement agreement. Adjudicators assumed jurisdiction, for example, to consider a dispute over the very existence of a final and binding settlement itself; for example, *Bedok*. Adjudicators also accepted jurisdiction to determine whether circumstances existed in which a settlement agreement should not stand, such as where a party signs a settlement agreement under duress or undue pressure or where other factors render the agreement unconscionable; for example, *Nash* and *Van de Mosselaer.* In the latter decision, the adjudicator explicitly reconfirmed his ". . . residual discretion to determine that the settlement agreement ought not to be enforced as an unconscionable transaction . . ." and cited *Macdonald v. Canada*, 1998 CanLII 8736 (F.C.T.D.), for criteria to determine whether the bargain was unconscionable.

[57] Beyond those limited determinations, the jurisdiction of adjudicators under the former *Act* ended. The view normally taken was that redress for an alleged failure to comply with a settlement agreement was through a civil action in the courts. Alternatively, an employee could choose to file a new grievance to challenge that failure. Referring such a grievance to adjudication, however, was another matter. In *Fox v. Treasury Board (Immigration and Refugee Board)*, 2001 PSSRB 130, for example, the adjudicator ruled that a settlement agreement could not be considered an "arbitral award" and that a new grievance filed seeking to enforce a settlement agreement as

such was not within the valid subject matter for a reference to adjudication under subsection 92(1) of the former *Act*.

B. <u>Has anything really changed under the new *Act*?</u>

[58] The deputy head states the case that nothing has really changed under the new *Act*, arguing that the case law developed under the former *Act* continues to apply, and the existence of a final and binding settlement agreement continues to constitute an insuperable bar to adjudication. According to the deputy head, the permissible subject matter for a reference to adjudication continues to be defined, under subsection 209(1) of the new *Act*, in a fashion that does not encompass a dispute over a settlement agreement:

> ***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 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*
>
> *(*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.*

[59] The deputy head argues that the recourse open to a party that alleges non-compliance with a settlement agreement is, in the first instance, to file a new grievance. As was the case under the former *Act*, it asserts that a decision rendered by

the employer at the final level of the internal grievance procedure on such a grievance continues to be final and binding under the new *Act*. Reference to adjudication is unavailable. According to the deputy head, the grievor may instead seek judicial review of the employer's final-level decision.

[60] The grievor and the intervenors argue a very different case. Their arguments are based both on a rival interpretation of what is intended under the new *Act* and on how the new *Act* should be viewed in light of the accumulation of court decisions and other arbitral case law.

[61] In determining how the new *Act* should apply in the circumstances of the grievor's request, I accept the proposition that I must give a liberal and purposive interpretation to the provisions of the new *Act*. The intervenor IBEW has referred me, in that regard, to the Supreme Court of Canada ruling in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986. The remedial nature of labour relations legislation has since been consistently confirmed by the courts and the remedial authorities of adjudicators and labour boards generally strengthened. In *Weber*, for example, the Supreme Court of Canada found that statutory tribunals, including those with a labour relations mandate, may have ". . . exclusive jurisdiction . . . to deal with all disputes between the parties arising from the collective agreement. . . ." *Weber* also exemplified what it means to take a purposive and liberal approach to interpreting a labour relations statute by finding that the scope of the labour law under review in that decision not only encompassed disputes that arise expressly under the provisions of a collective agreement but also those disputes that can be inferentially linked to the provisions of a collective agreement.

[62] The intervenor PSAC joined the IBEW in urging that I interpret the new *Act* in a liberal and purposive manner consistent with its remedial nature. In support, it referred me to the governing direction given by the legislator in section 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21:

> ***12.*** *Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.*

Under that section, the ". . . fair, large and liberal construction and interpretation . . ." that I am required to bring to the new *Act* as remedial legislation must be founded in the ". . . attainment of its objects." The objects of the new *Act* are stated in its

preamble, to which I am entitled to refer for guidance under section 13 of the *Interpretation Act*. The pertinent extracts of the preamble read as follows:

> *Recognizing that*
>
> . . .
>
> *effective labour-management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest;*
>
> . . .
>
> *the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment;*
>
> . . .
>
> *commitment from the employer and bargaining agents to mutual respect and harmonious labour-management relations is essential to a productive and effective public service;*
>
> . . .

[63] Given the objects stated in the preamble of the new *Act*, I view it as my task in this case to give the relevant provisions of the new *Act* such ". . . fair, large and liberal construction and interpretation . . ." as is consistent with promoting ". . . collaborative efforts between the parties . . ." while supporting the ". . . fair, credible and efficient resolution of matters . . ." and encouraging ". . . mutual respect and harmonious labour-management relations . . . ."

[64] As argued in several of the submissions, there is no doubt that a cornerstone for achieving the objects of the new *Act* is the emphasis that it gives to procedures that favour the voluntary resolution of disputes by the parties themselves, particularly through mediation. I have previously referred to subsection 226(2) as an important example of that emphasis:

> ***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.*

[65] Subsection 226(2) indicates that, even at the last stage of the dispute resolution process, where a final and binding decision can be imposed by an adjudicator, the parties may still resolve their differences voluntarily. In practice, adjudicators now regularly signal at hearings their availability to serve as mediators and, in a significant number of cases, have successfully assisted in the eleventh-hour settlement of disputes in preference to the imposition of an outcome through final and binding adjudication decisions.

[66] The emphasis on the voluntary settlement of disputes and on the role of mediation in achieving that is equally apparent elsewhere in the new *Act*, such as in section 13, where mediation is identified as one of the three mandates of the new Board. Section 207 also requires every deputy head in the core public administration to establish an informal conflict management system for the early voluntary resolution of disputes. Further, under subsection 223(3), the Chairperson of the new Board may order a conference to attempt to resolve or reduce the issues in dispute. Finally, analogous provisions in Part 1 of the new *Act* apply to interest disputes and other applications: sections 37, 108, 145 and 172.

[67] The conditions for realizing the benefits of mediation processes include the expectation that the parties participating in mediation do so voluntarily and with a good-faith commitment to make the mediation work. An essential component of that commitment is, I believe, the further expectation that undertakings made as elements of a settlement will be faithfully respected. If the parties have no reason to be confident that the terms of a voluntary settlement will be implemented as intended, the rationale for considering a voluntarily mediated agreement in preference to an imposed binding outcome falls away. In that sense, there is a strong argument to be made that the enforceability of a settlement is necessary to the integrity of the mediation process itself. 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. The intervenor PSAC makes that point directly in its submissions as follows:

. . .

> *50. If the Union cannot assure its members that, in signing off on a settlement, the agreement is enforceable by the third-party to whom their grievance has been referred, the likely impact will be that persons would rather litigate than forego their grievance rights and gamble with a tangible risk of non-compliance.*
>
> *51. While the PSAC is cognizant of not putting too strong or strident a point on this, it nevertheless bears emphasis. If it is the case that a settlement agreement cannot be enforced by the Board or an Adjudicator as part of its inherent jurisdiction over the initial proceeding (whether a complaint, application or grievance), the Union cannot in good faith recommend mediation or confirm to its membership that there exists an expeditious means to hold the other party to its bargain.*

. . .

[68] I very much doubt that the deputy head would deny that the enforceability of settlements is vital to the attainment of the objects of the new *Act*. The deputy head's argument, however, is that the *Act* has not given adjudicators the responsibility to address issues related to settlement enforceability. As indicated previously, the deputy head takes the position that that responsibility falls to the final-level decision maker in the employer's internal grievance procedure, presuming that an employee has filed a new grievance to enforce a settlement agreement. Subsequently, the responsibility shifts to the courts if the employee files for judicial review of the final-level decision maker's determination. If the employee does not file a new grievance, the only plausible recourse remaining to him or her, given the deputy head's interpretation of the new *Act*, presumably lies in the courts, although the deputy head's submissions do not address that eventuality.

[69] Is that what the legislator intended? Section 236 of the new *Act*, a new feature, points in a different direction. Subsection 236(1) reads as follows:

> ***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.*

That subsection appears to me to state a strong prohibition against seeking redress for a grievance relating to terms and conditions of employment in any forum other than that provided by the new *Act*. The words used in subsection 236(1) are very broad. The provision applies to ". . . any dispute relating to . . . terms or conditions of employment . . . [emphasis added]" pursued by way of grievance. The exercise of the right to grieve ". . . is in lieu of any right of action . . . [emphasis added]" that the grievor might otherwise have ". . . in relation to any act or omission giving rise to the dispute. [emphasis added]"

[70] The strength of subsection 236(1) of the new *Act* is reinforced by subsection 236(2), which states that the prohibition operates even if the employee has not availed himself or herself of the right to grieve and even if there is no recourse to adjudication for that type of grievance:

> ***236.*** *(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.*

In my view, 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.

[71] Reading subsection 236(1) of the new *Act* as ousting the jurisdiction of the courts where an employee proceeds ". . . by way of grievance . . ." is consistent with viewing Part 2 of the new *Act* as an exclusive and comprehensive regime for resolving those types of labour relations disputes. The concept of "an exclusive and comprehensive regime" for labour dispute resolution flows from the case law that I have characterized as the *Weber* line of decisions.

[72] In *Weber*, the Supreme Court of Canada found that arbitrators governed by the Ontario *Labour Relations Act* (*OLRA*), R.S.O., 1990, c. L.2, enjoyed exclusive and comprehensive jurisdiction over disputes emanating from collective agreements. The

Court relied in part for its finding on subsection 45(1) of the *OLRA*, which reads as follows:

> ***45.**-(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.*

The Court drew the following conclusion from that provision of the *OLRA*:

> . . .
>
> *45 . . . Section 45(1) of the Ontario* Labour Relations Act, *like the provision under consideration in* St. Anne Nackawic, *refers to "all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement" (emphasis added). The Ontario statute makes arbitration the only available remedy for such differences. The word "differences" denotes the dispute between the parties, not the legal actions which one may be entitled to bring against the other. The object of the provision -- and what is thus excluded from the courts -- is all proceedings arising from the difference between the parties, however those proceedings may be framed. Where the dispute falls within the terms of the Act, there is no room for concurrent proceedings.*
>
> . . .
>
> [Emphasis in the original]

[73] The Supreme Court of Canada findings in *Weber* built upon its previous decisions that had generally recognized the expertise of labour tribunals and had deferred to them to resolve disputes over labour relations matters. As early as 1979, the Court, in *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, wrote as follows:

> . . .
>
> *. . . The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective*

> *bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.*
>
> . . .

[74] Similarly, in *St. Anne Nackawic Pulp & Paper v. CPU*, [1986] 1 S.C.R. 704, the Supreme Court of Canada observed the following:

> . . .
>
> *. . . labour relations legislation provides a code governing all aspects of labour relations, and . . . it would offend the legislative scheme to permit the parties to a collective agreement . . . to have recourse to the ordinary courts . . . .*
>
> . . .
>
> *. . . The courts have no jurisdiction to consider claims arising out of rights created by a collective agreement . . . the courts* [cannot] *properly decide questions which might* [otherwise] *have arisen under the common law of master and servant . . . if the collective agreement . . . makes provision for the matters in issue . . . .*
>
> . . .
>
> *What is left is an attitude of judicial deference to the arbitration process. . . .*
>
> . . .

[75] To determine whether a dispute falls to the courts or to a labour tribunal, according to *Weber*, ". . . one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute. . . ." *Weber* specifies that locating jurisdiction requires an analysis that determines the "essential character" of a dispute. According to the Supreme Court of Canada, the essential character of a dispute is a labour relations matter — and is thus within the exclusive authority of an adjudicator — if ". . . the conduct giving rise to the dispute between the parties arises either expressly or inferentially out of the collective agreement between them."

[76] In the companion case *O'Leary*, the Supreme Court of Canada summarized its viewpoint as follows:

. . .

> *. . . the courts lack jurisdiction to entertain a dispute between the parties which arises out of the collective agreement, subject to a residual discretionary jurisdiction in courts of inherent jurisdiction to grant relief not available under the statutory arbitration scheme. Whether a matter arises out of the collective agreement is to be determined having regard to the essential character of the dispute and the provisions of the collective agreement. . . .*

. . .

[77] The Supreme Court of Canada elaborated the *Weber* test in *Regina Police Assn. Inc.*:

. . .

> *25 To determine whether a dispute arises out of the collective agreement, we must therefore consider two elements: the nature of the dispute and the ambit of the collective agreement. In considering the nature of the dispute, the goal is to determine its essential character. This determination must proceed on the basis of the facts surrounding the dispute between the parties, and not on the basis of how the legal issues may be framed: see* Weber, supra, *at para. 43. Simply, the decision-maker must determine whether, having examined the factual context of the dispute, its essential character concerns a subject matter that is covered by the collective agreement. Upon determining the essential character of the dispute, the decision-maker must examine the provisions of the collective agreement to determine whether it contemplates such factual situations. It is clear that the collective agreement need not provide for the subject matter of the dispute explicitly. If the essential character of the dispute arises either explicitly, or implicitly, from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide: see, e.g.,* Weber, *at para. 54;* New Brunswick v. O'Leary, *supra, at para. 6.*

. . .

[78] In my opinion, 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 applies to Part 2 of the new *Act*, given the explicit wording of subsection 236(1). That subsection is no less substantial and powerful a statement of the adjudicator's primacy vis-à-vis actions that

proceed ". . . by way of grievance . . ." than is, for example, subsection 45(1) of the *OLRA*. Subsection 236(1) means that Part 2 of the new *Act* provides the only dispute resolution mechanisms that may be used to resolve grievances launched under that *Act*. It is, in other words, an exclusive and comprehensive regime for resolving grievances.

[79] I do not ignore that some features of the new *Act* restrict the scope of disputes that may be resolved using the grievance procedure in a manner that differs, for example, from the *OLRA*. For example, section 7 of the new *Act* recognizes the exclusive right of the employer to assign duties and to classify positions, thereby removing those subjects from the jurisdiction of an adjudicator (and from the scope of collective bargaining). The point remains, however, that subsection 236(1) confirms that Part 2 of the *Act* is an exclusive and comprehensive regime for resolving those matters that can proceed ". . . by way of grievance . . . ."

[80] The authority of a court over grievances under Part 2 of the new *Act* is also limited by a privative clause, at least where a decision of an adjudicator is involved:

. . .

> ***233.*** *(1) Every decision of an adjudicator is final and may not be questioned or reviewed in any court.*
>
> *(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.*

. . .

[81] There is an important distinction to be drawn here between the new *Act* and the former *Act*. In *Vaughan*, the Supreme Court of Canada did confirm a general posture of deference to the adjudicators under the former *Act* as expert tribunals but did not accept that the language of the former *Act* itself served to oust the jurisdiction of the courts:

. . .

> *2 I agree with the appellant that the statutory language and context of the PSSRA do not amount to the sort of explicit ouster of the jurisdiction of the courts as was the case in* Weber v. Ontario Hydro, *[1995] 2 S.C.R. 929. Nevertheless,*

> *while the courts retain a residual jurisdiction to deal with workplace-related issues falling under s. 91 of the PSSRA, but not arbitrable under s. 92, the courts should generally in my view, as a matter of discretion, decline to get involved except on the limited basis of judicial review. The facts of this case, insofar as we can ascertain them, afford a good illustration of why judicial restraint in this area is desirable. . . .*
>
> . . .
>
> *13 Labour relations has long been recognized as a field of specialized expertise. The courts have tended in recent years to adopt a hands-off (or deferential) position towards expert tribunals operating in the field, including arbitrators. The posture of deference was crystallized in* Weber *where this Court established a bright line demarcation in the case of disputes governed by the sort of labour relations legislation that typically exists across Canada and which provides for compulsory arbitration. In such cases, if the dispute between the parties in its essential character arises from the interpretation, application, administration or violation of the collective agreement, it is to be determined by an arbitrator appointed in accordance with the collective agreement, and not by the courts.*
>
> . . .
>
> *39 . . . where Parliament has clearly created a scheme for dealing with labour disputes, as it has done in this case, courts should not jeopardize the comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts. . . .*
>
> . . .

[82] Notably, even without a statutory provision explicitly ousting the jurisdiction of the courts, *Vaughan* nevertheless confirmed that the former *Act* did in fact comprise a ". . . comprehensive dispute resolution process . . ." for disputes arising out of the employment relationship. Following in the *Weber* approach, *Vaughan* effectively confined the exercise of the courts' residual discretion in relation to matters within the purview of the former *Act* to relatively narrow circumstances. With *Vaughan* and its emphasis on a ". . . general rule of deference . . .", any doubt that adjudicators under the former *Act* enjoy the same pre-eminent status over labour relations disputes within their mandate as do other arbitrators or labour boards in Canada disappeared.

[83] In its submissions, the deputy head takes the following position regarding section 236 of the new *Act:*

. . .

> . . . *section 236 codifies the principles enunciated in* Vaughan . . . *and perhaps takes them one step further effectively barring employees entirely from suing in court in relation to employment disputes, thereby requiring employees to pursue relief under the regime established by Parliament.*
>
> . . .
>
> [Emphasis in the original]

To that extent, the deputy head appears to agree with the conclusion that Part 2 of the new *Act* must be viewed as an exclusive and comprehensive regime for resolving grievances. The deputy head, however, does not find anything in section 236 that changes the jurisdiction of an adjudicator:

. . .

> . . . *the employer submits that not only has section 236 of the* PSLRA *not changed the law, but that section 236 deals only with a court's jurisdiction and not an adjudicator's. Therefore, the employer fails to see how section 236 can be of assistance to Adjudicator Butler in this particular case where we are dealing with the effect of a final and binding settlement.*
>
> . . .
>
> [Emphasis in the original]

[84] Before leaving *Vaughan*, I wish to note that the circumstances considered in that decision do differ in several important respects from the case before me. In *Vaughan*, the employee had launched an action in the Federal Court alleging negligence on the part of his employer after unsuccessfully grieving its failure to provide him with a benefit under an early retirement incentive policy. That failure was a matter that was grievable under section 91 of the former *Act* but that could not be referred to adjudication under subsection 92(1). The Supreme Court of Canada ultimately dismissed the employee's effort to use the courts to challenge his employer's decision and deferred to the decision made by the employer at the final level of the internal grievance procedure denying the benefit.

[85] In the case before me, the originating cause for action was a disciplinary decision. The grievor was entitled to file a grievance against that decision and, additionally, was entitled to refer the grievance to adjudication under subsection 209(1) of the new *Act* (as he would have been under subsection 92(1) of the former *Act*), and did so. That access to adjudication comprises an important distinguishing element relative to *Vaughan*. Furthermore, unlike the case before me, *Vaughan* did not involve a voluntary settlement of a grievance, nor was there any question posed in *Vaughan* about the jurisdiction of an adjudicator where a final and binding agreement has been signed by the parties.

[86] I draw from the discussion to this point the following conclusions that will guide my analysis of the three questions that I put to the parties and to the intervenors:

> – I must give the provisions of the new *Act* ". . . fair, large and liberal construction and interpretation . . ." consistent with the objects of the *Act* to promote ". . . 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 . . . ."
>
> – A cornerstone of the new *Act* is its emphasis on the voluntary resolution of disputes through mediation. Essential to the effectiveness of mediation processes is the expectation that the terms of a settlement agreement will be respected.
>
> – Given subsection 236(1) of the new *Act*, and with the direction given by the *Weber* line of decisions, including *Vaughan*, 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 . . . ." The jurisdiction of an adjudicator must be understood within that framework.

C. Question 1: 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?

[87] The answer to the first question is, I believe, straightforward. In its submissions, the deputy head argues that neither the new *Act* nor the case law reviewed above has materially altered the situation. Both under the former *Act* and the new *Act*, an adjudicator has the authority to determine whether the parties have concluded a final and binding agreement. The deputy head states that conclusion as follows:

. . .

> *. . . The employer's position is that none of the aforementioned jurisprudence, nor any provisions of the new Act, has changed the adjudicator's jurisdiction in this regard.*
>
> . . .
>
> *. . . The case law submitted in the employer's letter of January 8th is consistent, and the employer submits correct, in its approach that the first issue to be determined is whether or not there is in fact a final and binding memorandum of agreement between the parties. If there is no final and binding memorandum, then perhaps the adjudicator has jurisdiction. The analysis of whether or not a final and binding memorandum of agreement exists is therefore inherent in the adjudicator's determination of his or her jurisdiction in accordance with section 209 of the* PSLRA*. . . .*
>
> . . .

[88] The submissions of the grievor and of the intervenors also recognize without reservation the jurisdiction of an adjudicator to determine whether a final and binding settlement exists. I find no reason based on the provisions of the new *Act* or on case law to disagree. Therefore, I answer Question 1 in the affirmative.

[89] Determining whether a final and binding settlement agreement exists requires an examination of the facts. That examination may include an analysis of the text of a settlement agreement for content that explicitly conveys the final and binding nature of the deal struck by the parties or an analysis of other evidence from which the intent of the parties to make such a deal final and binding may be reasonably inferred. Such an examination may proceed with appropriate procedural caution despite the

confidential nature of the mediation process that resulted in the settlement; see *Van de Mosselaer*. As substantiated by other case law, the examination of the final and binding effect of a settlement agreement may also involve an assessment of evidence that purports to prove that a party has signed that agreement under duress or undue pressure, or that there are other factors that render it unconscionable.

[90] To conduct the necessary examinations, I find that it is well within the recognized authority of an adjudicator to convene or reconvene a hearing for that purpose. To that extent, the adjudicator's normal powers under subsection 226(1) of the new *Act* apply equally and fully during a hearing that considers a settlement agreement, including the following:

> ***226.*** *(1) An adjudicator may, in relation to any matter referred to adjudication,*
>
> *(*a*) summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath in the same manner as a superior court of record;*
>
> *(*b*) order that a hearing or a pre-hearing conference be conducted using a means of telecommunication that permits the parties and the adjudicator to communicate with each other simultaneously;*
>
> *(*c*) administer oaths and solemn affirmations;*
>
> *(*d*) accept any evidence, whether admissible in a court of law or not;*
>
> *(*e*) compel, at any stage of a proceeding, any person to produce the documents and things that may be relevant;*
>
> . . .

[91] If an adjudicator finds that there is no final and binding settlement, the adjudicator may hear or continue to hear the grievance on the merits.

[92] If an adjudicator finds that a settlement agreement is unconscionable or that there are other compelling reasons why the agreement should not stand, he or she is similarly seized to hear or to continue to hear the grievance on the merits, having set aside the settlement agreement.

[93] In the circumstances of the request before me, there appears to be no dispute that the parties signed an agreement that they considered at that time to be a final and

binding settlement of the issue in dispute. Moreover, there is no allegation before me that the settlement agreement is defective on the grounds that it is unconscionable or for any other grounds. Instead, the grievor submits that there is non-compliance with a provision of the settlement agreement.

[94] The deputy head has not directly offered a position on the allegation of non-compliance. It stated in its original reply to the grievor's request only that ". . . if the grievor does have concerns in regard to the implementation of the MOA, his local management is more than willing to discuss matters with him."

[95] The alleged fact of non-compliance, according to the grievor, requires that I reopen the adjudication hearing for the purpose of considering the merits of the original grievance. I disagree. Reopening a hearing for that purpose may conceivably be an appropriate remedy in some circumstances, but other and more direct remedies will normally be available where there is a finding of non-compliance. In any event, the fact 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. The "merit evidence" stage of the proceedings has passed. What must be determined, therefore, is whether an adjudicator, providing that a final and binding settlement exists, has the jurisdiction to proceed further. Can he or she rule on the issue of non-compliance and then do something about it?

D. Question 2: In the event that an adjudicator has the jurisdiction under the new *Act* to determine whether the parties' settlement agreement is final and binding, does the adjudicator have the jurisdiction to hear an allegation that a party is in non-compliance with a final and binding settlement agreement?

[96] Question 2 is the crux of the matter. Where should a dispute over a settlement agreement be decided, and how? Does an adjudicator have jurisdiction?

[97] Under the new *Act*, the jurisdiction and authority of an adjudicator is not principally defined by a collective agreement, as is widely the case elsewhere in Canadian labour relations. Instead, an adjudicator's jurisdiction and authority is established by provisions of the new *Act* itself, beginning with subsection 209(1). In giving subsection 209(1) a ". . . fair, large and liberal . . ." interpretation consistent with the objects of the new *Act* — and given that Part 2 of that *Act* comprises an exclusive regime for the resolution of disputes that proceed ". . . by way of grievance . . ." by virtue of subsection 236(1) and in light of the *Weber* line of decisions — should the

mandate given an adjudicator by the new *Act* be viewed as including the authority to hear an allegation that a party is in non-compliance with a final and binding settlement agreement?

[98] The arguments made by the grievor and by the intervenors have convinced me, on balance, that I must answer the second question put to them in the affirmative. I believe that there are compelling reasons both in law and on policy grounds to take a new approach under the new *Act*. I do so with great respect to the contrary findings of adjudicators preceding me who addressed the question under the former *Act*.

[99] As argued in the submissions, there are two possible scenarios for processing a dispute over a settlement agreement under Part 2 of the *Act*:

> 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.

[100] The deputy head has argued that neither section 236 of the new *Act* nor the *Weber* line of decisions offers any reason why Option 1 should not continue to be the proper approach. In the deputy head's submissions, section 236 and the *Weber* line of decisions are only pertinent where the problem is one of choosing between the courts and adjudicators in assessing jurisdiction. In the case before me, the choice is different. According to the deputy head, section 236 and the *Weber* line of decisions provide no relevant guidance for deciding which of the two dispute resolution options under Part 2 of the new *Act* should apply when a party alleges non-compliance with a settlement agreement.

[101] I disagree in a crucial respect. I take the view that the *Weber* line of decisions, as further developed in *Regina Police Assn. Inc.*, does in fact suggest a strong basis for choosing between Options 1 and 2.

[102] A vital contribution of the *Weber* line of decisions, reviewed above, is the Supreme Court of Canada direction that assigning jurisdiction requires the decision maker to determine the "essential character" of a dispute. In the original cases in the *Weber* line of decisions, the Court applied the "essential character" test to demarcate the jurisdiction of an arbitrator as opposed to that of the courts. In *Regina Police Assn. Inc.*, the Court extended the application of the test to decide which of two competing statutory dispute resolution procedures governed a dispute.

[103] In the situation examined in *Regina Police Assn. Inc.*, a police sergeant resigned from duty in the face of a disciplinary termination and then tried to withdraw his resignation on the grounds that it had been coerced. The Chief of Police refused to accept the withdrawal. The Supreme Court of Canada was required to determine whether the sergeant was entitled to grieve the decision under the provisions of the Saskatchewan *Trade Union Act*, R.S.S., 1978, c. T-17, or was required instead to proceed under the discipline appeal procedure mandated by the Saskatchewan *Police Act*, *1990*, S.S. 1990-91, c. P-15.01. The Court applied the "essential character" test. It found that the sergeant's case did not arise expressly or inferentially from the collective agreement — the subject matter of a grievance under the *Trade Union Act* — and was in essence about the Chief of Police's decision to discipline the sergeant. As such, the *Police Act*, *1990* had to apply.

[104] In *Regina Police Assn. Inc.*, the Supreme Court of Canada summarized the approach that it used to determine jurisdiction as follows:

. . .

> *26 Before proceeding to an analysis of the ambit of the collective agreement, it is important to recognize that in* Weber *this Court was asked to choose between arbitration and the courts as the two possible forums for hearing the dispute. In the case at bar,* The Police Act *and Regulations form an intervening statutory regime which also governs the relationship between the parties. As I have stated above, the rationale for adopting the exclusive jurisdiction model was to ensure that the legislative scheme in issue was not frustrated by the conferral of jurisdiction upon an adjudicative body that was not intended by the legislature. The question, therefore, is whether the legislature intended this dispute to be governed by the collective agreement or* The Police Act *and Regulations. If neither the arbitrator, nor the Commission have jurisdiction to hear the dispute, a court would possess residual jurisdiction to resolve the dispute. I*

> *agree with Vancise J.A. that the approach described in* Weber *applies when it is necessary to decide which of the two competing statutory regimes should govern a dispute.*
>
> . . .
>
> *39 To summarize, the underlying rationale of the decision in* Weber, supra, *is to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties. The analysis applies whether the choice of forums is between the courts and a statutorily created adjudicative body, or between two statutorily created bodies. The 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.*
>
> . . .

[105] For the purposes of this case, the vital precedent established by *Regina Police Assn. Inc.* is that the "essential character" test from *Weber* can and should be used where a decision maker must determine which of two or more available statutory dispute resolution processes should apply to a dispute. In *Regina Police Assn. Inc.*, the two candidate options were found in separate statutes. I see nothing in the logic of the Supreme Court of Canada approach, however, to suggest that the same test should not apply where the choice is between two statutory dispute resolution options under the same statute, as is the case here. In my view, the same "essential character" test provides a necessary and sufficient basis for deciding whether a dispute over a settlement agreement falls within the ambit of a final-level decision maker (Option 1) or an adjudicator (Option 2).

[106] It seems to me, therefore, that a review of the case law and the new *Act* supports the following analytical path:

– Part 2 of the new *Act* is a comprehensive regime for resolving disputes that proceed by way of grievance: *Weber*, *Vaughan* and s. 236 of the new *Act*.

– A settlement agreement dispute falls within the dispute resolution regime under Part 2 of the new *Act*: *Vaughan* and s. 236 of the new *Act*.

– Courts should refrain from exercising their residual discretion when relief is available under the statutory regime: *Vaughan*.

– The task is to determine whether the essential character of a settlement-agreement dispute to be resolved under Part 2 of the new *Act* falls within the ambit of adjudication under subsection 209(1) or outside: *Regina Police Assn.*

– The settlement-agreement dispute is within the jurisdiction of an adjudicator if the factual context demonstrates that it arises either explicitly or implicitly from subject matter under subsection 209(1) of the new *Act*: *Weber* and *Regina Police Assn. Inc.*

[107] The most important contextual fact in examining the linkage of a settlement-agreement dispute to subject matter under section 209 of the new *Act* is the nature of the original grievance.

[108] The intervenor PSAC referred me to *Canadian National Railway Company*, [2006] CIRB no. 362, to support the proposition that a dispute over the enforcement of a settlement agreement is not a new action but is instead tied to the original case:

. . .

> *[32] . . . the union filed its request to have the Board determine and declare that a settlement had been reached and to have the terms of that settlement enforced. In this context, the union's request was not a distinct or "fresh" application with no underlying proceeding before the Board. It was not a stand-alone application that sought to have the Board exercise its general powers and remedial authority in isolation, as was the case in the decisions referred to above and relied on by CN.*

. . .

[109] The link between a dispute over a settlement agreement and the original dispute that the settlement agreement purports to resolve appears to me to be necessary and inextricable. Using the case before me to illustrate, the original dispute between the grievor and the deputy head was the latter's decision to impose a disciplinary suspension. The grievance procedure that ensued focused on that decision. When the parties decided to explore a voluntary resolution to their dispute during the adjudication hearing, a necessary condition for settlement was their agreement on

what to do about the disciplinary action. By concluding a settlement, the parties signified that they had reached a common understanding about the disposition of the disciplinary action. When the grievor subsequently formed the opinion that the deputy head was not honouring a term of the settlement, the effect was that he maintained that the dispute in relation to the original disciplinary action was no longer conclusively resolved. That is why he requested reopening the hearing. In that very important sense, the dispute over the settlement agreement, in its essential character, arose from the original disciplinary action. 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.

[110] One compelling indicator of the inextricable link between a settlement-agreement dispute and the original grievance lies with the question of remedy. When a party asks a decision maker to determine whether there has been compliance with the terms of a settlement agreement, the underlying objective is normally to enforce the terms of settlement. Those terms of settlement have no independent meaning or importance outside the context of the original dispute. The party alleging non-compliance is not normally seeking a new remedy but rather the enforcement of a remedy that it alleges has already been agreed to by the parties. In terms of remedy, then, a settlement-agreement dispute is necessarily linked to the original grievance. It is not meaningfully separate.

[111] I am strongly persuaded that the correct view, applying the "essential character" test in the manner suggested by *Regina Police Assn. Inc.*, is that disputes over a settlement agreement are expressly or inferentially linked to the original grievance and are adjudicable under subsection 209(1) of the new *Act* if the original grievance is itself a matter that could be referred to adjudication. In that sense and under those circumstances, it can be said that the "essential character" of the settlement-agreement dispute is within the jurisdiction of an adjudicator.

[112] I am very cognizant that there is no explicit provision of the new *Act* that proves the intent of the legislator to give an adjudicator jurisdiction to consider a dispute over a settlement agreement. I believe, however, that confirming the jurisdiction of an adjudicator to determine and resolve such a dispute where the subject matter of the original grievance falls under subsection 209(1) of the new *Act* is consistent with the

attainment of the objects of the *Act*, appropriately reflects a "... fair, large and liberal ..." interpretation of subsection 209(1), and flows logically from the application of the "essential character" test in *Weber*, as refined by *Regina Police Assn. Inc.*

[113] The Canada Industrial Relations Board (CIRB) finding in *Canadian National Railway Company* provides, in my view, strong indirect validation for the conclusion that I have drawn. Faced as well with a statute that did not expressly confer on the CIRB the authority to address disputes over settlement agreements, the CIRB found in very strong terms both that its jurisdiction must include such matters if it was to achieve the purposes of the statute and that jurisdiction over settlement-agreement disputes was inherent to the powers already given to it:

...

> *[39] The Board is of the view that . . . of this statutory objective, it is necessary to protect the integrity of the informal settlement process. The Board's general powers must be interpreted in a manner that allows it to fulfill its statutory objectives and commitment to the constructive settlement of disputes. To that end, the Board must have the authority to inquire into the issue of whether or not a settlement has been reached and if so, to enforce the terms of settlement in order to prevent parties from reneging on commitments made during the informal dispute resolution process affecting the issues that are the subject of complaints or applications before it.*
>
> *[40] . . . Contrary to the employer's assertion, the Board does not see the need for a distinct legislative provision to confer express authority to allow the fulfilment by the Board of the* Code*'s objectives in this regard. As an administrative tribunal, the general powers of the Board to determine matters before it necessarily include the power and jurisdiction to determine whether an application or complaint before it has become moot or is* res judicata*, for example, or whether there exists a labour relations purpose to proceed with a particular inquiry. This power, combined with its broad remedial powers under sections 98 and 99, exercised for the purpose of ensuring the fulfilment of the objectives of the* Code *is, in the Board's view, sufficiently broad to enable it to also determine the question of whether a binding settlement has been reached between the parties concerning a matter presently before it and, thus, whether or not it is required to proceed to adjudicate all or part of the matter. To find that the Board lacks this power, where one of the central legislative purposes and objectives under the* Code *is to assist the parties coming before it to effect the settlement of disputes, would seriously undermine the*

> *Board's authority and its process in fulfilling its statutory mandate. To force parties and the Board to proceed with the merits of a matter, or to force parties to have to institute civil proceedings for breach of agreement, would go against some of the clearly established purposes behind the existence of the Board and its mandate under the* Code.
>
> . . .
>
> *[50] In conclusion, where the parties have engaged in the informal settlement process contemplated by the express provisions and general statutory objectives of the* Code, *to resolve issues in disputes that are properly before it, the Board has the necessary jurisdiction to determine the issue of whether a settlement has in fact been reached, and if so, to enforce its terms. This remains true whether or not any Board officer is directly involved with the parties at the time a settlement is reached. The Board finds that there are compelling labour relations reasons and purposes, as contemplated by the* Code *and the Board's statutory mandate, to conclude that it has the requisite jurisdiction to make the determination in question and that the powers conferred on the Board under sections 15.1, 16(p), 98 and 99 are sufficiently broad to support and justify such a finding.*
>
> . . .

[114] Further indirect support for empowering a labour board or an adjudicator to deal with settlement agreement disputes can be found in a number of arbitral decisions from outside the federal jurisdiction, as cited most prominently in the submissions of the intervenor PIPSC. I note, in particular, the conclusions of the Ontario Labour Relations Board in *Rexway Sheet Metal Limited*, [1989] OLRB Rep. November 1154, at para 11:

> . . .
>
> *. . . Further, and in any event, I am satisfied that the Board has jurisdiction to deal with complaints that settlement of matters properly brought before it have been breached in circumstances like those in this proceeding. If that were not the case, it would tend to make a mockery of the settlement process and permit parties to ignore settlements with impunity. This Board is constituted as an expert administrative tribunal and is charged with the responsibility of applying and administering the Labour Relations Act. It would indeed be curious if a party could remove from the Board a matter which is within its exclusive original jurisdiction through the simple expedient of entering into and then not honouring a settlement agreement. Even if an*

> *aggrieved party to a settlement agreement could go to some other forum for relief, surely the Legislature could not have contemplated or intended that some forum other than this Board should deal with the matter specifically within the labour relations expertise and original jurisdiction of the Board.*
>
> . . .

[115] There are a number of practical policy reasons why empowering an adjudicator to determine settlement-agreement disputes (where the subject matter of the original grievance falls under subsection 209(1) of the new *Act*) is a preferable approach. First and foremost, the approach supports the mediation process and the objects of the new *Act* to provide fair, credible and efficient dispute resolution. It addresses a primary concern about settlement agreement enforceability that might otherwise cause some parties not to use mediation and to take their original dispute instead through the full process of adjudication to a final decision. It enhances the credibility of the system by giving substance to the expectation that undertakings made to settle a grievance will be respected.

[116] The approach eliminates the need to file a new grievance to deal separately with an issue of non-compliance. By doing so and by supporting mediation processes that can shorten the dispute resolution process, the approach contributes to greater problem-solving efficiency. The approach is also equitable in that it would appear to open the possibility that both parties can have a settlement-agreement dispute heard by an adjudicator. Where a grievance has been properly referred to adjudication and then settled, there would appear to be no barrier to the respondent, as a party to that grievance, referring a compliance issue back to the adjudicator. Under Option 1, no such opportunity would ever be available to a deputy head.

[117] For the reasons outlined above, I find that an adjudicator has jurisdiction to consider an allegation that a party is in non-compliance with a final and binding settlement where the settlement-agreement dispute is linked to an original grievance, the subject matter of which falls under subsection 209(1) of the new *Act*.

E. Question 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?

[118] The final question addresses the remedial options available to an adjudicator under the new *Act* in the situation where he or she has determined that there is a final and binding settlement, has assumed jurisdiction to hear an allegation that a party has not complied with a term or terms of that settlement, and has upheld the allegation.

[119] In its principal submissions, the deputy head did not specifically address Question 3, other than to state the following:

. . .

> *Given the employer's position on question #2, the employer relies on its answer above to question #2 and submits that an adjudicator is without jurisdiction as set out in question #3. The employer further submits that none of the aforementioned jurisprudence, nor any provisions of the new Act, has changed the adjudicator's jurisdiction in this regard.*

. . .

[120] In its rebuttal submissions, the deputy head did not specifically address the representations of the grievor and of the intervenors in response to Question 3. It also did not make new submissions specific to Question 3.

[121] The deputy head's position on Question 3 is simple. Given that an adjudicator has no jurisdiction to consider an allegation that a party has not complied with a term of a settlement agreement, neither can the adjudicator have jurisdiction to make the order that he or she considers appropriate.

[122] I regret that I thus have no guidance from the deputy head as to the nature of an adjudicator's jurisdiction where an adjudicator does have the jurisdiction to hear an allegation that a party is in non-compliance with a final and binding settlement agreement. In that sense, the deputy head's response to Question 3 does not answer Question 3.

[123] In the absence of an argument to the contrary by the deputy head or in the case law referred to me, and in light of the submissions of the grievor and of the intervenors, I believe that Question 3 can be succinctly answered in the positive. The

remedial powers of an adjudicator under the new *Act* are broad. An adjudicator is not bound to a specific list of enumerated remedies — the new *Act* contains no such list. Instead, the new *Act* states the following in subsection 228(2):

> ***228.*** *(2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. . . .*
>
> . . .

[124] I therefore find that an adjudicator has the jurisdiction to make the order that he or she considers appropriate in the circumstances. Doing so is fundamental to the mandate given to an adjudicator by the new *Act*. I would add that the Supreme Court of Canada decisions in cases such as *Weber*, *O'Leary* and *Vaughan* consistently describe the remedial authority of arbitrators as broad.

F. Conclusion

[125] Earlier, I found that there is no basis to reopen the adjudication hearing for the purpose of hearing the merits of the original grievance. I noted that I have not been asked to inquire into whether the settlement agreement signed by the parties on May 2, 2007, is final and binding or to determine whether it is otherwise defective. The root issue in the request before me is the grievor's allegation that the deputy head has not complied with a term of the settlement.

[126] The subject matter of the original grievance is a disciplinary suspension, which falls under subsection 209(1) of the new *Act*. The issue of non-compliance with the settlement agreement arose in its essential character from the original grievance. The grievor has not withdrawn that grievance.

[127] I find that an adjudicator has jurisdiction to consider whether the deputy head has not complied with the terms of the settlement signed May 2, 2007, and the jurisdiction to make an order that he or she deems to be appropriate in the circumstances.

[128] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[129] I declare that an adjudicator has jurisdiction to determine whether the parties have entered into a final and binding settlement agreement.

[130] I further declare that an adjudicator has jurisdiction to consider the grievor's allegation that the deputy head is in non-compliance with the parties' final and binding settlement agreement.

[131] I also declare that an adjudicator has jurisdiction to make the order that he or she considers appropriate in the circumstances.

[132] The adjudication hearing shall resume for the purpose of determining whether the deputy head has not complied with the terms of the settlement agreement signed by the parties on May 2, 2007, and, if appropriate, for the purpose of determining an appropriate remedy.

September 25, 2008.

Dan Butler,
adjudicator

[1]

I. Written submissions

A. For the grievor

. . .

With respect, we submit that when an individual grievance has been referred to an adjudicator under the Public Service Labour Relations Act *(2003), C.22, S.2 (the "*Act*") and the parties have entered into a settlement agreement during the proceedings, the adjudicator has the jurisdiction to:*

- *Determine whether the parties' settlement is final and binding;*
- *Hear an allegation that a party is non-compliant with a final and binding settlement agreement; and*
- *Make an order that the adjudicator considers appropriate in the circumstances.*

In this regard, we agree and echo the submissions of [Local 2228, International Brotherhood of Electrical Workers] *and* [the Public Service Alliance of Canada]. *As we support their positions, we will not repeat their arguments regarding the relevant sections of the* Act. *Their submissions allow us to be brief.*

In our view, the crux of the issue at hand arises out of the case law cited by Adjudicator Butler in his correspondence of February 15, 2008. Beginning with Webber v. Ontario Hydro *[1995] 2 S.C.R. 929 and* New Brunswick v. O'Leary *[1995] 2 S.C.R. 967, employees governed by a collective agreement or, as established later in* Vaughan v. Canada, *2005 S.C.C.11, a legislated grievance scheme have no access to the Courts for employment related issues. Case law has been clear, if a dispute arises out of issues dealt with by the collective agreement or legislative scheme, it must be dealt with through the grievance procedure rather than the Courts.*

Mr. Amos' case is, in a way, closely related to New Brunswick v. O'Leary. *In* O'Leary, *the government attempted to circumvent its own legislative scheme to access the Courts. In Mr. Amos' case, the federal government is attempting to do the same by stating that the issue at hand cannot be dealt with by Adjudicator Butler. Since Vaughan, the federal government has consistently and successfully brought applications to dismiss civil actions brought by its employees. The federal government argues that the scheme in question should keep employees from accessing the Courts, allow for the mediation and settlement of these matters and then, subsequently, allow the employer to breach the settlement agreement without redress for the employee. In this way, the*

federal government has an economical and efficient means to deal with employee related issues, but no such means is available to the employee if the employer does not live up to a mediated resolution under the scheme. This simply cannot be the proper application of the Act.

With respect, in our view the law developing the exclusive nature of grievance procedures answers the question at hand. In New Brunswick v. O'Leary, *Justice McLachlin states as follows:*

> 3. In the companion case of Weber v. Ontario Hydro, [1995] S.C.R. 929, I discuss the applicable law. I conclude that the courts lack jurisdiction to entertain a dispute between the parties which arises out of the collective agreement, subject to a residual discretionary jurisdiction in courts of inherent jurisdiction to grant relief not available under the statutory arbitration scheme. Whether a matter arises out of the collective agreement is to be determined having regard to the essential character of the dispute and the provisions of the collective agreement.
>
> 4. It follows from this that the Court of Appeal erred in stating without qualification that "[n]egligence can be the subject of an action independent of the collective agreement " (p. 160). In fact, negligence can be the subject of an action only if the dispute does not arise from the collective agreement.
>
> 5. <u>The remaining question is whether the dispute between the parties in this case, viewed in its essential character, arises from the collective agreement.</u> In my view, it does. [Emphasis Added]
>
> 6. The Province's principal argument is that the collective agreement does not expressly deal with employee negligence to employer property and its consequences. However, as noted in Weber, a dispute will be held to arise out of the collective agreement if it falls under the agreement either expressly or inferentially. Here the agreement does not expressly refer to employee negligence in the course of work. However, such negligence impliedly falls under the collective agreement. Again, it must be underscored that it is the essential character of the difference between the parties, not the legal framework in which the dispute is cast, which

> will be determinative of the appropriate forum for settlement of the issue.

Adjudicator Butler's questions cannot be any more clearly addressed. If the matter arises out of the collective agreement, in its essential character, the matter cannot be dealt with by the Courts, it must be dealt with through the legislative scheme. Importantly, we see that it is the essential character of the matter at hand that is the important indicator, not the legal framework in which the dispute is cast. As well, as long as the issue impliedly falls under the collective agreement (or Act*), the grievance process will apply.*

It is undeniable that Mr. Amos' present circumstances arises out of the Act *and his employment. A settlement was reached between the parties, with the assistance of the Adjudicator through mediation. The present dispute arises out of that settlement.*

All parties will agree, a mediated settlement should be the goal of any such process, and is in the best interest of labour relations. The Adjudicator's power in this regard flows from section 226(2) of the Act*. The section reads as follows:*

> *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 issues without prejudice to the power of the adjudicator to continue the adjudication with respect to the issues that have not been resolved.*

Therefore, the Adjudicator not only has the power to take the parties into mediation, but this power is done without prejudice to the adjudicator's power to continue the adjudication with respect to issues that have not been resolved*. In Mr. Amos' case, there are clearly issues that have not been resolved, notwithstanding the signing of a Memorandum of Understanding. We respectfully submit that under the* Act*, including section 226(2), the Adjudicator must have the power to determine whether issues have been truly resolved in order to determine whether or not the adjudication should be continued. The adjudicator's powers to do so are at least implied by section 226(2) and the law summarized above by Justice McLachlin, if not express.*

If the Adjudicator determines that issues remain unresolved, notwithstanding a settlement agreement, the power to make an appropriate order is not only implied by the previously cited case law and the Preamble of the Act*, it is clear in section 226(2) and section 228(2) of the* Act*.*

> *Admittedly, previous cases have noted that settlement agreements are binding, and a plaintiff must not be allowed to re-litigate an issue settled through such a process. However, with the development of the case law in question and the clear statement in section 236 of the* Act, *an adjudicator must have the jurisdiction to determine if a party has actually resolved the issue by meeting the terms of a settlement under the* Act. *Otherwise, an employee will have no recourse to the Courts to pursue the breach, as the essential character of the dispute clearly arises from the* Act. *Such a circumstance is directly contrary to the best interests of good labour relations and the notion that binding mediation agreements must be honoured, a notion referred to in paragraph 80 of Board Member Giguere's decision in Skandharajh (200 P.S.S.R.B. 144).*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[133] B. <u>For the deputy head</u>

> . . .
>
> *. . . The grievor is now requesting that his grievance, which was settled in accordance with the terms of the MOA, be heard on its merits. The employer objected to this request in its letter to the Board dated January 8, 2008. The employer's position is that the existence of a final and binding settlement agreement is a complete bar to an adjudicator's jurisdiction. The employer relied on the following cases in support of its position:*
>
> MacDonald v. Canada *[1998] F.C.J. No. 1562 (FCTD)*
> Bhatia *(166-2-17829)*
> Skandharajah *(200 PSSRB 114)*
> Fox *(2001 PSSRB 130)*
> Lindor *(2003 PSSRB 10)*
> Bedok *(2004 PSSRB 163)*
>
> *Further, the employer also objected to the grievor's request given that an adjudicator has no jurisdiction regarding the implementation of a memorandum of agreement. The employer relied on the following cases in support of its argument:*
>
> Déom *(148-02-107)*
> Bhatia *(166-2-17829)*
> Van de Mosselaer *(2006 PSLRB 59)*

These cases relied on by the employer were all decided under the former Public Service Staff Relations Act, *R.S.C., 1985, C. P-35 (*"PSSRA"*). In light of this fact, Adjudicator Butler has indicated in the Board's letter of February 15th that the jurisdiction of an adjudicator in the context of the grievor's request that his grievance, which was the subject of the MOA, now be heard at adjudication has not yet been addressed under the new* Public Service Labour Relations Act, *R.S.C., 2003, c. 22, s. 2 (*"PSLRA"*). Adjudicator Bulter has requested that the parties provide written submissions as follows.*

1. ***In light of the coming into force of the new* Act *in general, and of its section 236 in particular, and in light of the evolving jurisprudence relating to the jurisdiction of adjudicators – ie.* Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929;* New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967;* Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14; and* Vaughan v. Canada*, 2005 SCC 11 – 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 the jurisdiction under the new Act to determine whether the parties' settlement agreement is final and binding?***

In essence, the root of the question is: where under the new Act *does an adjudicator have jurisdiction to determine whether the parties' settlement agreement is final and binding? This question is to be answered in light of the new* Act, *specifically section 236 of the new* Act, *and the evolving jurisprudence mentioned above. The employer's position is that none of the aforementioned jurisprudence, nor any provisions of the new Act, has changed the adjudicator's jurisdiction in this regard.*

It is the employer's position that the existence of a final and binding memorandum of agreement is a complete bar to an adjudicator's jurisdiction. An adjudicator's jurisdiction is derived from section 209 of the PSLRA *and does not include matters of enforcement or interpretation with respect to memorandums of agreement. The case law submitted in the employer's letter of January 8th is consistent, and the employer submits correct, in its approach that the first issue to be determined is whether or not there is in fact a final and binding memorandum of agreement between the parties. If there is no final and binding memorandum, then perhaps the adjudicator has jurisdiction. The analysis of whether or not a final and binding memorandum of agreement exists is therefore inherent in the adjudicator's determination of his or her jurisdiction in accordance with section 209 of the*

PSLRA. *As stated above, the employer's position is that none of the aforementioned jurisprudence, nor any provisions of the new* Act, *has changed the adjudicator's jurisdiction in this regard.*

2. ***In light of the coming into force of the new* Act *in general, and of its section 236 in particular, and in light of the evolving jurisprudence relating to the jurisdiction of adjudicators – ie.* Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929;* New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967;* Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14; and* Vaughan v. Canada*, 2005 SCC 11 – in the event that an adjudicator has the jurisdiction under the new Act to determine whether the parties' settlement agreement is final and binding, does the adjudicator have the jurisdiction to hear an allegation that a party is in non-compliance with a final and binding settlement agreement?***

Given that the employer's position on question #1 is that the adjudicator still has jurisdiction to determine whether the parties' settlement is final and binding, the next question to be answered is, in light of the new section 236 under the PSLRA *and the Supreme Court of Canada decisions cited above, does the adjudicator have the jurisdiction to hear an allegation that a party is in non-compliance with the final and binding settlement agreement?*

The employer's position on this question is that the adjudicator has no jurisdiction concerning the implementation of an MOA and therefore no jurisdiction to hear an allegation that a party is in non-compliance with the final and binding settlement agreement. In addition to the case law relied on in its January 8th letter, this well-established principle has been reiterated in Maiangowi v. Treasury Board (Department of Health) *(2008 PSLRB 6)*[1]*,, a recent decision rendered by Adjudicator Mooney under the* PSSRA. *The employer submits that none of the aforementioned jurisprudence, nor any provisions of the new* Act, *has changed the adjudicator's jurisdiction in this regard.*

As indicated previously in the employer's letter of February 8, 2008, the employer respectfully submits that it is not apparent how the jurisdictional issue in this case is related to either section 236 of the PSLRA *or the Supreme Court cases cited above. Three of the Supreme Court cases cited deal with the court's jurisdiction over workplace disputes when an employee would rather sue its employer in court than avail him or herself of the labour relations scheme already provided for either by statute or by collective agreement. The* Regina Police Association Inc. *case is a bit of an anomaly in*

that the disputed forums are between the collective agreement (and thus arbitration in accordance with The Trade Union Act, *R.S.S. 1978, c. T-17) and* The Police Act, *1990, S.S. 1990-91, c.P-15.01 and Regulations. The issue under appeal in that case was whether the dispute between the employer and employee arose out of the collective agreement. If it did, the arbitrator would have jurisdiction to hear and decide the dispute. If not, the jurisdiction would reside with the commission under* The Police Act.

The Supreme Court applied the exclusive jurisdiction model adopted in Weber *and in determining whether the dispute arose out of the collective agreement, the Court considered two elements: the nature of the dispute and the ambit of the collective agreement. The Court determined that the essential character of the dispute was disciplinary and that the collective agreement did not govern dismissal for cause. Given that the legislature intended for such disputes to fall within the ambit of the* The Police Act *and Regulations, the Court held that the arbitrator did not have jurisdiction to hear and decide that matter.*

The Supreme Court summarized its position on the issue of jurisdiction at paragraph 39 as follows:

> *"To summarize, the underlying rationale of the decision in Weber, supra, is to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties. The analysis applies whether the choice of forums is between the courts and a statutorily created adjudicative body, or between two statutorily created bodies. The 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]*

Given the Supreme Court's analysis in paragraph 39, the employer's February 8th submissions that the Supreme Court of Canada cases cited deal only with the court's jurisdiction over workplace disputes and not the adjudicator's jurisdiction may have somewhat over-simplified the matter. Having said that, the employer is still of opinion that the Supreme Court of Canada cases cited do not shed any more light regarding the jurisdiction of an adjudicator who is appointed under the PSLRA *than the body of PSLRB case law already in existence and cited in the employer's letter of January 8th. First and foremost, not including* Vaughn *(which will be addressed below), the most recent Supreme Court case was decided in March 2000. Five of the PSLRB*

cases cited in the employer's letter of January 8th were decided post March 2000 (and one case was in fact decided post Vaughn*). It is the employer's position therefore that the body of PSLRB jurisprudence currently in existence is good law and has already been decided upon in the wake of these Supreme Court decisions. Therefore, the employer submits that the Supreme Court of Canada decisions cited above offer no further guidance to Adjudicator Butler in the determination of his jurisdiction over the implementation of the MOA. To determine otherwise would be to improperly ignore years of sound Board jurisprudence.*

In Regina Police Association Inc., *the Supreme Court also stated the following at paragraph 23:*

> *"Therefore, in determining whether an adjudicative body has jurisdiction to hear a dispute, a decision-maker must adhere to the intention of the legislature as set out in the legislative scheme, or schemes, governing the parties." [emphasis added]*

The intention of the legislature, both under the old PSSRA *and under the current* PSLRA, *is clear in terms of an adjudicator's jurisdiction and is set in section 209 of the* PSLRA, *which states as follows:*

> *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 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*
>
> (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.*

With respect to grievances that are referable to adjudication, it is the employer's position that section 209 of the PSLRA *is determinative of an adjudicator's jurisdiction. Unlike provincial labour relations and federal employers governed by the Canada* Labour Code, *adjudicators in the Federal public service derive their jurisdiction from statute and not from the collective agreement. Therefore, in accordance with section 209, an adjudicator has jurisdiction over grievances related to the interpretation or application of a provision of a collective agreement or an arbitral award that affects the employee. An adjudicator also has jurisdiction over grievances related to a disciplinary action taken against the employee resulting in either termination, demotion, suspension or a financial penalty; and over demotions and terminations due to either unsatisfactory performance or any other reason not related to a breach discipline or misconduct.*

Therefore, an employee is entitled to grieve a memorandum of understanding in accordance with section 208 of the PSLRA, *and if need be, an application for judicial review to the Federal Court can be made from the final step of the grievance process. However, it is the employer's position that section 209 of the* PSLRA *does not confer jurisdiction to an adjudicator over the implementation of a memorandum of agreement. Substantially, the language under section 92 of the old Act and section 209 of the new Act has not changed such as to allow a different interpretation of an adjudicator's jurisdiction in this regard.*

Similarly, specifically with respect to Vaughn *and section 236 of the* PSLRA, *section 236 states as follows:*

> *No Right of Action*
>
> *Disputes relating to employment*
>
> *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.*

> *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.*
>
> *Exception*
>
> *(3) Subsection (1) does not apply in respect of an employee of a separate agency that has not been designated under subsection 209(3) if the dispute relates to his or her termination of employment for any reason that does not relate to a breach of discipline or misconduct.*

As already stated in the February 8th submissions, it is the employer's position that section 236 codifies the principles enunciated in Vaughan v. Canada*, [2005] S.C.J. No. 12 (S.C.C.) (QL) and perhaps takes them one step further effectively barring employees entirely from suing in court in relation to employment disputes, thereby requiring employees to pursue relief under the regime established by Parliament. Having said that however, the employer submits that not only has section 236 of the PSLRA not changed the law, but that section 236 truly deals only with a court's jurisdiction and not an adjudicator's. Therefore, the employer fails to see how section 236 can be of assistance to Adjudicator Butler in this particular case where we are dealing with the effect of a final and binding settlement.*

3. ***In light of the coming into force of the new* Act *in general, and of its section 236 in particular, and in light of the evolving jurisprudence relating to the jurisdiction of adjudicators – ie.* Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929;* New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967;* Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14; and* Vaughan v. Canada*, 2005 SCC 11 – 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?***

Given the employer's position on question #2, the employer relies on its answer above to question #2 and submits that an adjudicator is without jurisdiction as set out in question #3. The employer further submits that none of the aforementioned jurisprudence, nor any provisions of the new Act*, has changed the adjudicator's jurisdiction in this regard.*

Conclusion

In the end, we have not been asked to review the correctness of the body of established Board jurisprudence on the issue of final and binding settlement agreements. Rather, we have been asked by Adjudicator Butler whether any of the new provisions in the PSLRA *or any of the Supreme Court of Canada case law would allow a different interpretation of the established Board jurisprudence. The employer's submits that nothing in the new* Act*, nor anything in the cited Supreme Court case law, would allow a different interpretation regarding an adjudicator's jurisdiction insofar as final and binding settlements are concerned.*

. . .

[*Sic* throughout]

[Emphasis in the original]

[Footnotes omitted]

[134] C. <u>For the intervenors</u>

[135] The written submissions of the intervenors are reported here in the order that they were received.

[136] **1. <u>International Brotherhood of Electrical Workers, Local 2228</u>**

. . .

<u>SUBMISSIONS</u>

An adjudicator appointed pursuant to the PSLRA has the jurisdiction to determine whether a settlement agreement is final and binding; hear allegations that a party is in non-compliance with the agreement; and make an order that the adjudicator considers appropriate in all the circumstances.

The adjudicator's jurisdiction in these three respects is based on:

1.) The fact that any dispute arising from the terms and conditions of employment and the administration or interpretation of the collective agreement is subject to the grievance and arbitration process;

2.) A broad and purposive reading of the PSLRA;

3.) Supreme Court of Canada (SCC) jurisprudence on the exclusive jurisdiction of labour arbitrators and the liberal interpretation required by remedial legislation such as the PSLRA.

1.) An Adjudicator has exclusive jurisdiction under the Collective Agreement

*The exclusive jurisdiction of an adjudicator or arbitrator includes all controversies where the "essential character" of the dispute has a factual basis rooted in the express, implied or inferred terms of a collective agreement (*Weber v. Ontario Hydro, *[1995] 2 S.C.R. 929;* New Brunswick v. O'Leary, *[1995] 2 S.C.R. 967; and* Regina Police Ass'n. v. Regina Police Commission, *[2000] 1 S.C.R. 360, where the collective agreement was interpreted in light of a broader legislative scheme). In* Vaughan v. Canada, *[2005] 1 S.C.R. 146 the SCC applied this approach to the PSSRA. In that case, a majority of the Court found that Parliament had created a comprehensive legislative scheme under the PSSRA. Under this scheme, Parliament intended that workplace disputes be decided under the grievance procedure established by the Act.*

An adjudicator has jurisdiction over settlement agreements vis a vis [*sic*] *his or her primary and exclusive jurisdiction over the underlying dispute. A settlement agreement represents a final disposition of a workplace issue. However, in cases where the validity of the agreement is in question, or where it is alleged that a party is not in compliance with the agreement, the original matter between the parties has not been resolved. In such cases, the parties disagree over what was intended to be the final disposition of the underlying workplace dispute. Judicial review notwithstanding, the legislature and the courts have consistently agreed that only an arbitrator or adjudicator has the jurisdiction to determine the outcome of workplace grievances.*

2.) An Adjudicator has Implied Jurisdiction over Settlement Agreements under the PLSRB

A broad and purposive reading of the PSLRA supports the conclusion that the adjudicator has jurisdiction over disputes relating to settlement agreements.

While express jurisdiction over settlement agreements is not set out under the Act, an adjudicator's jurisdiction can be implied and inferred under ss. 208 and 209. An adjudicator's authority to determine matters related to a settlement agreement flows from his or her jurisdiction to resolve the underlying workplace dispute between the parties. An adjudicator may also have authority over settlement

agreements under his or her residual jurisdiction to administer the Act under its Preamble and ss. 36.

Sections 208 and 209

Under s. 208 of the PSLRA, an employee has a general right to present an individual grievance if she or he "feels aggrieved" by the interpretation or application of the following:

(a) …(i) a provision of a statute or regulation, ***or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment****, or*

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

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

Under s. 208 (a)(i) of the PSLRA, a settlement agreement stemming from a contested disciplinary action may be interpreted as constituting an "instrument made or issued by the employer that deals with the terms and conditions of employment," although one that the employer "made or issued" in cooperation with the union. This interpretation of s. 208(a)(i) would attract the adjudicator's jurisdiction.

An adjudicator may also claim jurisdiction over a matter relating to a settlement agreement under s. 208(b), which sets out a broad category of instances where an employee may bring a grievance. A settlement agreement is intended to resolve a dispute between the parties over a term or condition of employment. A disagreement over the final resolution of that dispute is directly related to an employee's terms and conditions of employment.

Section 209 provides additional grounds for an adjudicator to assume jurisdiction over a matter concerning a settlement agreement:

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;* [Emphasis added]

A settlement agreement contested by the employee indicates that the underlying grievance that the agreement was intended to resolve has "not been dealt with to the employee's satisfaction." Under these circumstances, a settlement agreement would properly fall within the jurisdiction of an adjudicator under s. 209.

In instances where an adjudicator finds that one of the parties has not complied with a valid settlement agreement, she or he has broad powers under s. 228(2) of the Act to make any order that he or she "considers appropriate in the circumstances" to resolve the matter, which may include enforcement orders.

Residual Powers under the Preamble

Under the Preamble of the Act, an arbitrator also has residual or incidental powers regarding the settlement of a grievance over which he or she originally had jurisdiction.

The objects and purpose of the Act are contained in the Preamble:

> *Recognizing that . . .*
>
> *effective labour-management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest; . . .*
>
> *the Government of Canada is committed to fair, credible and* ***efficient resolution of matters arising in respect of terms and conditions of employment****; [Emphasis Added]*

These provisions express the importance of supporting mediation and dispute resolution as a means of resolving workplace issues under the PLSRA. Finding that an adjudicator has jurisdiction over the implementation of a settlement agreement is consistent with the Act's objects and purpose.

The Public Service Staff Relations Board (PSSRB) and Public Service Labour Relations Board (PSLRB) have not adopted a

*broad interpretation of these provisions under either the old or new Acts (*Maiangowi v. Treasury Board *(Department of Health), 2008 PSLRB 6). The respective Boards have narrowly interpreted an adjudicator's powers under the Act and declined to find that they have jurisdiction over the implementation of settlement agreements.*

Recent Supreme Court of Canada jurisprudence supports our broad interpretation of the PSLRA. The case law supports our conclusion that an adjudicator has jurisdiction under the Act to determine the validity of a settlement agreement, whether a party has complied with the agreement, and to make orders to enforce a valid agreement.

3.) The PSLRA Attracts a Broad, Liberal and Purposive Interpretation

*The Supreme Court of Canada (SCC) has consistently ruled that human rights and other remedial legislation should be interpreted broadly, liberally and purposively (*Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), *[1987] 1 S.C.R. 1114*, Gould v. Yukon Order of Pioneers *[1996] 1 S.C.R. 571;* Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), *[2000] 1 S.C.R. 665.*

*The SCC has extended this approach to other types of remedial legislation. Like human rights legislation, labour and employment statutes protect the fundamental rights of workers. The Court has acknowledged the inherent vulnerability of workers within the employer/employee relationship (*Reference Re Public Service Employee Relations Act (Alta.), *[1987] 1 S.C.R. 313;* Slaight Communications Inc. v. Davidson, *[1989] 1 S.C.R. 1038, Dickson C.J at. 1051;* Vorvis v. Insurance Corp. of British Columbia *[1989] 1 S.C.R. 1085; [1989] S.C.J. No. 46 and* Wallace v. United Grain Growers Ltd., *[1997] 3 S.C.R. 701.).*

*Given the unequal bargaining power between the parties in the employment relationship, the Court has viewed legislation that protects the interests of employees as remedial, requiring a "fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit" (*Machtinger v. HOJ Industries Ltd., *[1992] 1 S.C.R. 986). It is our submission that the PLSRA also falls into this category of remedial legislation that attracts a liberal interpretation.*

Most recently, the Court found that collective bargaining rights set out under provincial statute are protected by the

freedom of association guarantee in section 2(d) of the Canadian Charter of Rights and Freedoms (Health Services and Support – Facilities Subsector Bargaining Assn. V. British Columbia, *2007 27* [*sic*]*). Through this decision, the Court has underscored labour legislation's quasi-constitutional status. A consequence of that status is that labour legislation, which includes the PSLRA, requires a broad and liberal interpretation, rather than a narrow one.*

*Finally, the SCC has ruled that in determining whether a workplace dispute in its "essential character" or "expressly or inferentially" arises from the collective agreement or from a statutory scheme, a liberal interpretation of the legislation is required to ensure that the scheme is not offended by the jurisdiction of a forum not intended by the legislature. (*Regina Police Association, *supra at 39.)*

The PSLRA attracts a broad and liberal interpretation. A broad interpretation of the Act supports a finding that an adjudicator has implied jurisdiction to determine whether a settlement agreement is final and binding; hear allegations that a party is in non-compliance with the agreement; and make an order that he or she considers appropriate in all the circumstances. Such an interpretation would be consistent with the object and purpose of the Act, which is to mediate and resolve workplace disputes, and protect employee rights.

CONCLUSION

An adjudicator appointed under the PLSRA has the jurisdiction to:

1) *Determine whether a settlement agreement is final and binding;*

2) *Hear allegations that a party is in non-compliance with the agreement; and*

3) *Make an order that he or she considers appropriate in all the circumstances to resolve the dispute.*

An adjudicator's jurisdiction is grounded in the collective agreement and in the provisions of the Act. These instruments give an adjudicator exclusive authority to determine issues arising from the terms and conditions of employment and to provide adequate and efficient redress to parties seeking resolution of a dispute. Disputes over settlement agreements arise from the employment relationship. They therefore fall within the dispute resolution scheme set out in the PSLRA.

A finding that an adjudicator does not have jurisdiction to resolve disputes over settlement agreements under the

PSLRA would have a negative impact on labour relations and the public interest. Such a finding would force employees to the courts for redress. Permitting routine access to the courts each time parties have a dispute over a settlement agreement would undermine efficient labour relations. Moreover, this outcome would thwart the intention of Parliament, given that s.236 of the Act expressly prohibits employees from bringing civil actions in respect of disputes relating to their terms and conditions of employment.

As acknowledged by the Supreme Court in Vaughan*, supra (paras 33-41), the PSSRA/PSLRA regime provides an efficient, comprehensive dispute resolution process. Seeking redress before an adjudicator is a more informal procedure that is, in comparison to the courts, "generally faster, cheaper, and gets the job done." The personal and financial cost of going to court to settle disputes over settlement agreements is beyond the resources of most employees. Given these costs, an employer would likely not be held accountable to settlement agreements entered into in good faith by employees, and intended to resolve workplace issues. Without recourse before an adjudicator, an employee would be left without a remedy to a wrong arising out of the employment relationship.*

. . .

[Emphasis in the original]

[137] 2. <u>Professional Institute of the Public Service of Canada</u>

. . .

<u>III. ANALYSIS:</u>

QUESTION 1: 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 the jurisdiction under the new Act to determine whether the parties' settlement agreement is final and binding?

The generally accepted principle is that a settlement agreement is a contract and it can be enforced just like any other contract. If one party fails to comply with the terms of a settlement, the non-breaching party may have the option to accept the failure to comply as a repudiation of the contract of settlement and proceed to litigate the original dispute as if there was no settlement. The non-breaching party will likely also have the option to start or continue an action to enforce the terms of the settlement.

In the instant case, however, the issue to consider is whether or not the Act provides the Board with the necessary jurisdiction to enforce agreements. Here, the parties presumably engaged in an informal settlement process in good faith, and were able to finalize an agreement. For the purposes of the within memorandum, I have also assumed that the reference to adjudication was not withdrawn as a result of the settlement concluded between the parties.

The question [the intervenor has] been asked to address is whether or not the Board has the jurisdiction to enforce the terms of the agreement.

A similar question was addressed in the decision before the Canada Industrial Relations Board in Re Canadian National Railway Co. *[2006] C.I.R.B. (2d) 137. The question before the Board in that case was whether it had the authority under the* Canada Labour Code *(the "Code") to make a determination as to whether a matter had been settled between the parties.*

The Board considered the provisions of the Code, *and specifically Articles 15.1, 16(p), 98 and 99. I have reproduced Sections 15.1, 21, and 98 below, which I believe to be the most relevant sections in the context of the matter before the Board in* Amos, *and which specifically drew the attention of the Board in this case:*

> *15.1 The Board, or any member or employee of the Board designated by the Board, may, if the parties agree, assist the parties in resolving any issues in dispute at any stage of a proceeding and by any means that the Board considers appropriate, without prejudice to the Board's power to determine issues that have not been settled*[1].
>
> *21. The Board shall exercise such powers and perform such duties as are conferred to imposed on it by this Part, or as may be incidental to the attainment of the objects of this Part, including, without restricting the generality of the foregoing, the making of orders requiring compliance with the provisions of the Part, with any regulation made under the Part or with any decision made in respect of a matter before the Board.*
>
> *98.(1) Subject to subsection (3), on receipt of a complaint made under section 97, the Board may assist the parties to the complaint to settle the complaint and shall, where it decides not to so*

> *assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, determine the complaint.*

In that case, the Employer took the position that the Board did not have the jurisdiction to determine whether the parties had reached a binding settlement agreement and that such a determination rested with the Courts pursuant to a civil proceeding instituted by the party alleging that a settlement exists.

The Board disagreed with the Employer's position. While it agreed that section 15.1 does not expressly state that the Board has the authority to determine the issue of whether a binding settlement has been concluded, it was of the view that the overall context in which the issue had arisen as well as the legislative and policy objectives of the Code *assist in determining the scope of the Board's power. At paragraphs 36 and 37 of its decision, the Board wrote:*

> *"It cannot be doubted that one of the primary goals and legislative objectives of the* Code *it to promote the constructive settlement of disputes. Encouraging or enabling the parties to resolve issues between themselves without resorting to formal adjudication is preferable for a multitude of reasons which are ultimately based on the fact that labour relations are never static. The parties must continue to deal with each other on an ongoing basis. Solutions to issues particular to a relationship which are achieved through mutual agreement by the affected parties are more likely to be acceptable and sustainable in the long term than are remedies imposed by a third-party adjudicator.*
>
> *The Board is committed to assisting parties in resolving disputes and reaching a settlement of complaints or applications filed before the Board prior to their formal adjudication or final determination by a panel of the Board. This has been a long-standing practice of the Board, in which its professional staff and panel members continue to participate. This commitment is reflected in several provisions of the Code, in addition to the general statement of the statutory purpose and objectives contained in its preamble[2]. The addition of section 15.1 to the* Code *in 1999 reflects the Board's enhanced and expressed commitment to this informal mediation process and settlement discussions. Previous statements of*

> *the Board acknowledge and confirm its role in this regard."*

As a result, the Board concluded that the terms of the Code *were sufficiently broad to encompass the power and authority to enforce the settlement of the parties. At paragraph 40, it remarked:*

> *"To find that the Board lacks this power, where one of the central legislative purposes and objectives under the* Code *is to assist the parties coming before it to effect the settlement of disputes, would seriously undermine the Board's authority and its process in fulfilling its statutory mandate. To force parties and the Board to proceed with the merits of a matter, or to force parties to have to institute civil proceedings for breach of agreement, would go against some of the clearly established purposes behind the existence of the Board and its mandate under the* Code.*"*

The Board relied on the decision from the British Columbia Labour Relations Board in MacLure's Cabs (1984) Ltd.*, No. 80/86, April 3, 1986, in which the BCLRB explained the importance of its informal settlement process as it relates to its statutory mandate:*

> *"The Board regards the informal process as an integral and vital aspect to its mandate under the* Labour Code. *Quite simply put, the Board is committed to a policy of assisting parties whenever possible to resolve their differences without resort to formal adjudication. This is consistent with the scheme of the* Code *as a whole and, in particular, the purposes and objects set out in Section 27.*
>
> . . .
>
> *In order to protect the integrity of the informal process, there must be strict limits on the circumstances in which one party can unilaterally repudiate a settlement agreement . . . an agreement cannot be avoided merely because one party has had "second thoughts" or altered its position after further consultation and discussion: see* Tamco Limited*, [1975] 1 Can LRBR 219 (Ont. LRB)."*

The CN Rail *(supra) decision has not been overturned, and it continues to stand for the proposition that the Board, under the* Code*, has the jurisdiction to enforce settlement agreements. This is of particular importance to the case in* Amos *as, much like the* Code*, the PSLRA does not confer express authority to the PSLRB to find that a binding*

settlement of a complaint pending before it should be enforced. However, if the PSLRA is read as a whole, taking into consideration the preamble which specifically provides that the "Government of Canada is to committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment" and is committed "to mutual respect and harmonious labour-management relations", it would be against these stated principles to force formal adjudication, or to force civil proceedings in the event that a party did not comply with the terms of its settlement.

Further, the PSLRA, much like the Code, *contains specific provisions for the Board to assist parties in resolving disputes and reaching settlement of complaints or applications prior to the formal adjudication or final determination by the Board. There are indeed compelling labour relations reasons and purposes, as contemplated by the PSLRA and the Board's mandate, to conclude that it is vested with the necessary authority to make the determination in question that the powers conferred to the Board under sections 13, 14, 15, 226(2) and 228(2), along with the objectives are outlined in the Act's preamble. It would be contrary to the spirit and intent of the Act, and the concept of good labour relations to conclude otherwise.*

Another interesting decision is the one in Selkirk College and British Columbia Government and Service Employees' Union (Hatherly Grievance) *[1996] B.C.C.A.A.A. No. 489 (Chertkow), in which the Union sought to reconvene the board pursuant to the Settlement Agreement on the basis that new legislative changes to the Pension Act had not been contemplated, and therefore, that there was a mutual error by the parties in reaching the agreement.*

The adjudicator took the view that there was no jurisdiction remaining in respect of this matter, as the implementation of the settlement had been completed. At paragraph 43, the adjudicator wrote:

> *"…the authorities recognize the need for certainly in settlement…Where a settlement has been reached, it does not matter that the settlement agreement might not have been entered into if, in this case, further information was available at the time the settlement was reached with respect to the grievors' pension benefits."*

As a result, the board concluded that it did not have the jurisdiction to rewrite the Memorandum of Agreement, preferring instead the reasoning of the Board in Re De Havilland Aircraft Co. of Canada, Division of Boeing of Canada and C.A.W., Loc. 112 *(1991), 19 L.A.C. (4th) 198 (Gorsky) in which it was stated:*

> *"The principle which supports the encouragement and enforcement of settlements is a very strong one. If a person is represented by a union and enters into a settlement of a grievance, every effort should be made to carry out the terms of that agreement…I have no doubt that if there is a settlement, and if the terms of that settlement can be proved, my jurisdiction in this matter is limited to determining whether or not the company has abided by the terms of the settlement."*

MacLure's Cabs *(1984), supra, was cited with authority in the* CN Rail decision, *supra. Here, the issue related to the failure of the Employer to comply with an agreement that had been agreed to between the parties. In coming to the conclusion that it did have the jurisdiction to enforce the settlement agreement, the adjudicator wrote at p. 3 of his decision:*

> *"The Board regards the informal process as an integral and vital aspect to its mandate under the Labour Code. In referring to the "informal process", I have in mind not only settlement efforts by the panel members but also informal meetings conducted by Special Investigating Officers. Quite simply put, the Board is committed to a policy of assisting parties when ever possible to resolve their differences without resort to formal adjudication. This is consistent with the scheme of the Code as a whole and, in particular, the purposes and objects set out in Section 27."*

In this decision, there was also a question regarding the necessity for the parties to request a consent order in order for a settlement to be enforced by the Board, in accordance with Section 28(3)[3] of the Code. *The adjudicator did not agree with the Employer's argument, stating that:*

> *"When parties conclude a settlement in good faith during the informal process, it is expected that the terms and conditions of the agreement will be respect by both sides. This is unfortunately not always the case. However, in the context of labour relations, it would be unnecessarily heavy-handed approach to require that all settlements be reduced to the form of a consent order so as to ensure enforceability in the event that one party subsequently repudiates its side of the agreement. The parties' verbal agreement – or, preferably, a short written agreement – should suffice. Only later, if there is a problem regarding implementation of the settlement, should it be necessary for the Board to issue a consent order."*

Thus, the adjudicator concluded that the parties had indeed reached a binding agreement, which could be enforced by the Board.

In Re Canadian General-Tower Ltd. and U.R.W., Loc. 292 *(1990) 12 L.A.C. (4th) 153 (Craven), the grievance was referred to adjudication, and the parties successfully arrived at a settlement agreement with the assistance of the Ministry of Labour's Settlement Officer. The union took the position that the employer had violated the agreement, and sought to have it enforced by the arbitrator.*

At p. 3 of his decision, Arbitrator Craven wrote:

> *"It is generally accepted that boards of arbitration have jurisdiction to enforce settlements reached during the grievance procedure, and that in exercising this jurisdiction an arbitrator is to give effect to the parties' agreement, without going behind the terms of settlement to determine whether it was the "right" result in the circumstances. The latter principle follows not only from the law of contracts, but also from the sound industrial relations policy of encouraging the parties to settle their own disputes: see generally,* Crown Electric, *[1978] O.L.R.B. Rep. 344;* Perfection Rug Co. Ltd., *[1984] O.L.R.B. Rep. 68;* Corporation of Borough of Scarborough and C.U.P.E., Loc. 368 *(unreported, May 23, 1978 (Brandt));* Re Corp. of Borough of Etobicoke and Etobicoke Professional Firefighters Assn., Loc. 1137 *(1982), 5 L.A.C. (3d) 52 (Kennedy);* Re Stelco Inc. *(Hilton Works)* and U.S.W. *(1989), 5 L.A.C. (4th) 284 (Haefling). I accept these propositions."*

The Arbitrator ultimately enforced the settlement agreement, and ordered the employer to abide by the terms of the same.

Interestingly, in this decision, the Arbitrator does not even refer to the Ontario legislation as authority for the enforcement of settlement. Rather, the arbitrator is merely referring to the generally accepted principle in the context of labour relations that parties should be encouraged to settle matters amicably, and without recourse to the formal process.

In Re Geo Tech Industries and International Association of Machinists & Aerospace Workers, Lodge 456 *(1999) 83 L.A.C. (4th) 411, the issue was whether or not Arbitrator Somjen had the jurisdiction to determine the terms of settlement and order remedy for breach of the settlement. In concluding that it had the necessary jurisdiction to enforce the settlement agreement, the Arbitrator quoted from the*

Supreme Court of Canada decision in Weber v. Ontario Hydro, *[1995] 2 S.C.R. 929, in which the Supreme Court of Canada made it clear that disputes arising under a Collective Agreement are generally to be resolved by arbitration boards or Labour Boards, not the Courts. At paragraph 67 of that decision, the Court wrote:*

> *". . . mandatory arbitration clauses such as s. 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. [page421] I, therefore, dismiss the Employer's objection with respect to my jurisdiction to hear this matter."*

Arbitrator Somjen thus relied on the provisions of the British Columbia Labour Relations Code as well as the jurisprudence in concluding that, generally, arbitrations boards have the power "and indeed the obligation to require parties who settle a grievance to abide by the terms of that settlement."

In light of the above, the principles which emerge from the jurisprudence, despite the language of the Labour Act or Code, is that, where parties have engaged in the informal settlement process to resolve issues in dispute that are properly before it, the Board has the necessary jurisdiction to determine the issue of whether a settlement has in fact been reached, and if so, to enforce its terms.

Under the predecessor legislation (the Public Service Staff Relations Act*), the Public Service Staff Relations Board was of the view that, where a grievance had been withdrawn, this constituted a bar to adjudication, not only regarding the merits of the grievance but also the enforcement of the settlement. Indeed, in* Canada *(Attorney General) v.* Lebreux, *[1994] F.C.J. No. 1711 (QL), the employee had reached an agreement with the employer and withdrew his grievance. The Board closed the files, but the grievor later asked that the files be reopened because there had been no satisfactory agreement between the parties. The Board agreed to review the case and hear the grievance on its merits. The Federal Court of Appeal found that the adjudicator erred in doing so because the withdrawal of the grievance rendered the Board without jurisdiction at paragraph 12:*

From the time the respondent discontinued his grievances the Board and the designated adjudicator became functus officio since the matter was then no longer before them. The Board was not required either to inquire into the merits or

feasibility of such a discontinuance or to agree to accept or reject it. The act of discontinuance forthwith and without more terminated the grievance process in respect of which it was filed. Accordingly, no order or decision could be or was made within the meaning of the Act that could be the subject of cancellation or review under s. 27.

The PSSRB took the view in this, and in subsequent decisions that, once a grievance is withdrawn, the Board loses jurisdiction over all matters related to it. This principle was again reiterated by the Board under the Public Service Labour Relations Act *in the recent decision of* Maiangowi v. Treasury Board *(2008 PSLRB 6). In that case, Treasury Board and Maiangowi had entered into a settlement agreement and, as a result, the grievance had been withdrawn. When the terms of the settlement were not followed, Maiangowi sought to have the terms enforced by the Board. Relying on the decision in* Leroux, *the Board wrote that because the grievance was withdrawn, the Board had lost its jurisdiction over the matter.*

Having considered the arguments which were brought forward in CN Rail, McLure Cabs, *and the others which are highlighted above, we submit that the adjudicator erred in failing to find jurisdiction in enforcing the settlement offer. We are now dealing with new legislation, which contains many of the same provisions that have been interpreted by various jurisdictions throughout the country. In* Maiangowi, *the adjudicator does not consider case law from the CIRB, which contains similar wording. Also, there are a number of arguments that were not considered by the adjudicator (i.e. the importance of "labour relations"; and the liberal interpretation of the Act). We submit that there are still strong arguments to suggest that the adjudicator does indeed have the necessary jurisdiction to enforce a settlement agreement, whether or not a grievance has been withdrawn.*

Further, we submit that the Maiangowi *decision is distinguishable. First, the grievor's reference to adjudication was under the predecessor Act. Thus, the mediation occurred under the purview of that Act. Once the reference was withdrawn in accordance with the agreement, they sought to have the matter heard under the new Act. The arbitrator had therefore to deak with different legislation. Also, assuming that the grievance was not withdrawn, it should follow the Board remains seized with the matter.*

The main difficulty with which we are confronted in the event that the PSLRB is not convinced that it has the necessary jurisdiction to enforce settlement agreement is that the Supreme Court of Canada has taken the view that considerable deference will be accorded in the field of labour

relations. Most recently, in Vaughan v. Canada *[2005] 1 S.C.R. 146, the Court refused to hear a matter which was not adjudicable under the terms of the* Public Service Staff Relations Act *(the predecessor to the PSLRA). This resulted in an employee having no recourse beyond the grievance process to address his concerns. At paragraph 22, Binnie, J., on behalf of the majority, noted:*

> I do not agree with the appellant that the absence of independent adjudication is conclusive. The task of the court is still to determine whether, looking at the legislative scheme as a whole, Parliament intended workplace disputes to be decided by the courts or under the grievance procedure established by the PSSRA.

If the PSLRB does not conclude that it has jurisdiction, the Courts will apply the test elaborated in Weber v. Ontario Hydro*, supra, to determine whether or not the dispute is one in which the Courts should interfere. The question will be whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.*

In Amos*, the dispute clearly arises from the interpretation, application, administration or violation of the collective agreement, as it relates to disciplinary action resulting in termination. Collective Agreements generally contain clauses relating to disciplinary action and termination of employment.*

In our review of the legislation and the case law, it is our understanding that, if we were to proceed before the Courts for the enforcement of the settlement agreement, the Courts would likely defer to the Tribunal for consideration. This is in accordance with the long line of jurisprudence which has followed Weber[4]*.*

QUESTION 2: In the event that an adjudicator has the jurisdiction under the new Act to determine whether the parties' settlement agreement is final and binding, does the adjudicator have the jurisdiction to hear an allegation that a party is in non-compliance with a final and binding settlement agreement?

It should follow that, if the Board has the necessary jurisdiction to enforce the settlement of the parties, it has the necessary jurisdiction to hear whether or not a party is non-compliant with the terms of a settlement agreement. This is in accordance with the Board's general mandate to resolve matters which are properly before it, along with issues which have not been resolved in mediation.

Further, the PSLRA contains a specific clause which provides the Board with the power to hear allegations regarding non-compliance. This power is vested in the Board in accordance with section 226.(1), which states that an adjudicator has the power to "compel, at any stage of a proceeding, any person to produce documents and things that may be relevant." If there is a dispute relating to non-compliance of a settlement agreement, clearly evidence of such non-compliance would be relevant.

In the context of this particular case, the Board should be entitled to use s. 226(1), along with the spirit and intent to the Act, and the specific provisions relating to its power to resolve disputes which are properly before it, to hear allegations that a party is in non-compliance with the final and binding settlement agreement.

The Employer may argue that the admissibility of evidence relating to settlement discussions should not be disclosed, as to do so would call into question the confidentiality and the integrity of the informal resolution process, specifically when the agreement stipulates that the discussions are "without prejudice". However, this must be balanced with the need for finality and to have the parties know that once a deal is struck, that they may not simply walk away from it with impunity.

In Architectural Mouldings Ltd. v. U.S.W.A., Local 1-700, *[2005] O.L.A.A. No. 273 (QL), Arbitrator Norman clearly and persuasively describes the conflicting interests between the two principles of confidentiality and finality. Arbitrator Norman referenced and discussed the four elements of the* Wigmore *test at paragraphs 17 and 18 of his decision:*

> *The scope of privilege that protects discussions in the grievance procedure, according to the* Canadian Pacific Forest Products *case, and the* Inco *case, should be interpreted broadly, and provide a level of freedom and protection that will not undercut, but will foster, good labour relations. And good labour relations require clear, safe opportunities for informal meeting, and unlimited exchange, about the issues that are disputed. The privilege is not unduly limited, for example, to the realm of formal grievance meetings. More is achieved in the hallways and parking lots of our workplaces that can ever be accomplished in the hearing room, and it is valuable to ensure that the parties have confidence in that universal practice.*
>
> *But none of the authorities address that which constitutes a clear and critical exception to the privilege.* ***The privilege does not extend to***

> ***protect from admissibility, the content of discussions which are said to have resulted in settlement.*** *Once the existence of a settlement becomes the issue for determination by a court or board of arbitration, the privilege that would be granted by* Wigmore's *first three criteria is defeated by the considerations referred to in his fourth.* ***When it is alleged that the discussions resulted in settlement, it is in the greater interests of justice, not to mention greater value to the relationship between the parties, that the allegation of settlement be explored in evidence****, in order that the jurisdiction of the board can be correctly applied. [Emphasis added]*

The decisions in Rexway Sheet Metal Limited, *[1989] OLRB Rep. November 1154 and* Re Sunwest Food Processors, Ltd. *[1999] B.C.L.R.B.D. No. 49, also stand for the proposition that the Board may hear evidence to establish the existence of an agreement or to support a party's allegation that terms of the agreement have been breached.*

In CN Rail*, supra, the Board was asked to consider whether or not the terms of the agreement should be disclosed for the purpose of establishing whether or not the settlement agreement had been breached. In that decision, the Employer argued that the* Code *contains an express provision that speaks to the binding nature of settlements reached and the Board's authority to enforce the terms of the settlement (section 96(7) of the Code). The Board did not agree with the Employer's proposition. At paragraph 48, the Board noted that the OLRB decisions illustrated that the OLRB would take jurisdiction of the matter, even in the absence of language such as section 96(7) based upon "labour relations principles and rationale". The Board referenced the following statement with authority from* Rexway Sheet Metal Limited*, supra, at paragraph 11:*

> *". . . Further, and in any event, I am satisfied* ***that the Board has jurisdiction to deal with complaints that settlement or matters properly brought before it have been breached in circumstances like those in this proceeding. If that were not the case, it would tend to make a mockery of the settlement process and permit parties to ignore settlements with impunity.*** *This Board is constituted as an expert administrative tribunal and is charged with the responsibility of applying and administering the Labour Relations Act. It would indeed be curious if a party could remove from the Board a matter which is within its exclusive original jurisdiction through the*

> *simple expedient of entering into and then not honouring a settlement agreement. Even if an aggrieved party to a settlement agreement could go to some other forum for relief, surely the Legislature could not have contemplated or intended that some forum other than this Board should deal with the matter specifically within the labour relations expertise and original jurisdiction of the Board. [Emphasis added]*

In Amos, *it will be necessary for the adjudicator to hear evidence as to the existence of a settlement in order to properly ascertain whether there are issues that remain unresolved, as contemplated by section 226.(2) of the PSLRA.*

QUESTION 3: In the event that the 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?

It should also follow that, if the adjudicator has the necessary jurisdiction to enforce the terms of settlement of the parties, and to hear allegations regarding non-compliance, the adjudicator has the necessary jurisdiction to make an order that is appropriate in the circumstances.

In our submission, the adjudicator can impose the terms of the settlement agreement, if the evidence can clearly demonstrate that the parties entered into the agreement in good faith.

It would be argued that the adjudicator's jurisdiction to enforce the terms of a settlement is limited by the specific provisions of the PSLRA. Since the powers of adjudicators are limited to those in the Act, an adjudicator cannot impose terms which are not specifically outlined therein. Indeed, when an adjudicator finds that a grievance is well founded, he or she has the power to make the grievor whole and to compensate the grievor for any losses suffered. This includes, among others, the power to:

- *reinstate a grievor in his or her job, with back pay and benefits;*
- *rescind a disciplinary action that resulted in a suspension or financial penalty; and*
- *order monetary compensation when a collective agreement provision has been violated.*

The adjudicator can also interpret, apply and give relief in accordance with the Canadian Human Rights Act*, except for matters relating to the right to equal pay for equal work. The adjudicator can also award interest in grievances involving termination, demotion, suspension or financial penalty at a rate and for a period that the adjudicator considers appropriate.*

Heeding the principles that adjudicators should support parties' endeavours to settle their own disputes, and that they ought not be limited to remedies which are outlined in the PSLRA, there should be no reason to disturb an agreement entered voluntarily and in good faith between the parties. It would necessarily contravene the spirit and intent of the Act as well as the general principles of good labour relations to be limited to the remedies which may be imposed by a third-party adjudicator. This is neither the purpose nor the intent of the informal dispute resolution provisions of the Act, nor of the applicable Collective Agreement.

There is one caveat to the above statement that the adjudicator should have the power to enforce the terms of the settlement agreement. In the event that the parties seek to repudiate the settlement agreement and simply have the matter heard de novo, it should follow that an adjudicator will be limited to the express powers which are conferred to it by the PSLRA. Apart from this exception, a Board or an adjudicator may not substitute his or her decision for one which was entered into by the parties, especially where the latter was entered into voluntarily and in good faith.

IV. SUMMARY

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 the jurisdiction under the new Act to determine whether the parties' settlement agreement is final and binding?

The principles which emerge from the jurisprudence, regardless of the specific language of the Act or Code, is that, where parties have engaged in the informal settlement process to resolve issues in dispute that are property before it, the Board has the necessary jurisdiction to determine the issue of whether a settlement has in fact been reached, and if so, to enforce its terms. This is in accordance with the generally accepted principle that settlement between parties should be encouraged.

The Public Service Labour Relations Act *has entrenched many of these good labour relations principles. It has also adopted a specific clause which enables adjudicators to*

mediate conflicts between the parties, and to retain jurisdiction on issues which remain outstanding.

While it is clear that the wording of the PSLRA is certainly not as advanced as the Code and some of the provincial acts, the language is certainly stronger than that found in many of the early decisions referred to herein, in which the arbitrators found jurisdiction, despite clear language in the Act (see MacLure's Cabs, *supra,* Selkirk College, *supra,* Re De Havilland Aircraft, *supra, and* Re Canadian General Tower, *supra). From the caselaw cited, it would seem to be the generally accepted principle that where the parties settle a grievance, an arbitrator has jurisdiction to require that they abide by the settlement.*

The PSLRB has consistently refused to find jurisdiction for the enforcement of settlements where the matter had been withdrawn from the Board, and there is some jurisprudence in support of this general proposition. However, there is also a significant body of jurisprudence which suggests that if a matter is withdrawn from adjudication, but the grievance is not, or where the grievance and reference is withdrawn "without prejudice", there are authorities which suggest that a subsequent grievance or referral dealing with the same matter will not be inarbitrable. Thus, there are certainly distinctions to be made between the decisions in which the PSLRB has refused jurisdiction, and those matters such as in Amos where, the issue is still alive and needs to be considered by the Board.

In the event that an adjudicator has the jurisdiction under the new Act to determine whether the parties' settlement agreement is final and binding, does the adjudicator have the jurisdiction to hear an allegation that a party is in non-compliance with a final and binding settlement agreement?

While the integrity and confidentiality of the informal process should be preserved, there is an overriding principle that settlement agreements must be taken seriously, and the need for parties to know that once a deal is struck, that they may not simply walk away from it with impunity.

Further, since adjudicators need to hear evidence as to the existence of a settlement agreement in order to ascertain whether there are any issues which remain unresolved, adjudicators have the jurisdiction to hear evidence of non-compliance with a final and binding settlement agreement.

In the event that the 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?

It has generally been accepted that once the fact of a settlement has been established, the arbitrator's jurisdiction is confined to determining where or not the terms of the settlement have been complied with. Accordingly, while adjudicators may order that which they believe to be appropriate in the circumstances of any given case, subject to the limits which are imposed upon them in the Act, as long as the agreement between the parties was entered into voluntarily and in good faith, the adjudicator should not substitute his/her decision for that of the parties.

V. CONCLUSION:

1) Where parties have engaged in the informal settlement process to resolve issues in dispute that are property before it, the Board has the necessary jurisdiction to determine the issue of whether a settlement has in fact been reached, and if so, to enforce its terms.

2) Since adjudicators may need to hear evidence as to the existence of a settlement agreement in order to ascertain whether there are any issues which remain unresolved, adjudicators have the jurisdiction to hear evidence of non-compliance with a final and binding settlement agreement.

3) While adjudicators may order that which they believe to be appropriate in the circumstances of any given case, subject to the limits which are imposed upon them in the Act, as long as the agreement between the parties was entered into voluntarily and in good faith, the adjudicator should not substitute his/her decision for that of the parties.

. . .

[*Sic* throughout]

[Emphasis in the original]

[Footnotes omitted]

[138] 3. <u>Public Service Alliance of Canada</u>

. . .

. . . At the outset, we would like to thank the Board for allowing the Union to speak to these issues given their importance to the affected labour relations community.

Our responses to the jurisdictional questions posed by Adjudicator Butler are based on two fundamental assumptions: that the subject matter of the grievance in issue is one that may be referred to adjudication under the PSLRA; and that the grievance itself has been duly referred to the Board under that Act. We understand from the information provided by the Board that the grievance in issue in the present case meets these criteria.

The Legislative Framework

1. It is trite to say that in determining the jurisdiction of the Board to inquire into, decide upon, and issue a remedy in relation to a settlement agreement, one must have regard to the terms of the Public Service Labour Relations Act *("the* PSLRA" *or "the* Act*").*

Public Service Labour Relations Act, *S.C. 2003, c.22, s.2*

2. In so doing, it is important to remember that section 12 of the Interpretation Act *states as follows:*

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Interpretation Act, *R.S.C.1985, c.1-21, s.12*

3. Section 13 of the Interpretation Act *also provides that the Preamble of an enactment "shall be read as part of the enactment intended to assist in explaining its purport and object". The Preamble to the* PSLRA *includes the following statements in support of a comprehensive, efficient statutory scheme designed to resolve disputes and, ultimately, serve the labour relations community and the public interest:*

. . .

[E]*ffective labour-management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the abilty of the public service to serve and protect the public interest; . . .*

[T]*he Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment; . . .*

PSLRA, supra, *Preamble*

Interpretation Act, supra, *section 13*

4. The PSAC submits that, in determining the jurisdictional questions posed, the PSLRA *must be interpreted in a manner consistent with its remedial nature and the objective of fostering an effective, comprehensive labour relations regime and the efficient resolution of disputes relating broadly to terms and conditions of employment.*

5. The PSAC further submits that a review of the PSLRA *demonstrates that the Board and an Adjudicator appointed by the Board to inquire into a grievance have been given a significant mandate by Parliament to encourage and facilitate the consensual resolution of disputes. A settlement agreement is a necessary product, and realization, of that mandate.*

6. Indeed, the centrality of consensual settlement under the PSLRA *extends beyond the boundaries of the Board to include the resolution of workplace disputes within the core public administration. Specifically, the Act directs that every deputy head in the core public administration must establish an alternate dispute resolution (ICMS) process in the workplace.*

PSLRA, supra, *section 207*

7. With respect to the Board, section 13 of the Act *provides that the Board's mandate is three-fold: to provide adjudication, mediation, and compensation and research analysis services. In the context of adjudication, section 14 provides that the Board has a broad mandate to hear applications and complaints under Part I, matters relating to occupational safety and health under Part 3, as well as the power to refer grievances to adjudication under Part 2 so that they may be heard by an adjudicator. An adjudicator is defined in the Act as a member of the Board.*

PSLRA, supra, *sections 2 and 13*

8. Section 15 of the Act *further states that the Board may offer mediation services in relation to grievances. A large number of grievances are, under the new* PSLRA, *dealt with through this statutory process under the auspices of the Board. Indeed, upon a referral to adjudication to the Board, the presumption is that the parties will go to mediation unless the Board is advised otherwise.*

PSLRA, supra, *section 15*

9. The centrality of the consensual settlement of disputes is also found in section 37 of the Act, *which states:*

***37** The Board, or any member or employee of the Board designated by the Board, may, if the parties agree, assist the parties in resolving any issue in dispute at any stage of a*

proceeding by any means that the Board considers appropriate, without prejudice to its power to determine issues that have not been settled.

PSLRA, supra, *section 37*

10. This broad power is re-affirmed with respect to the adjudication process in subsection 226(2) of the Act, *which provides:*

***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.*

PSLRA, supra, *subsection 226(2)*

11. Moreover, in accordance with subsection 223(3) of the Act, *the Chairperson, any time after a notice of referral is sent, can attempt to settle the grievances.*

PSLRA, supra, *subsection 223(3)*

12. Section 36 confirms that the powers of the Board are broad, and include the exercise of those powers and functions that are incidental to the attainment of the objects of the Act. *The PSAC states that this principle extends to the powers of an Adjudicator - the statutory decision-maker charged with adjudicating grievance disputes. One need look no further than the* Interpretation Act, *the Preamble, the duties and functions assigned to an Adjudicator as a member of the Board under the* PSLRA, *as well as the dicta of the Supreme Canada (set out fully below) to conclude that Adjudicators have the capacity to exercise those powers that are "incidental to the attainment of the objects of the* Act*".*

PSLRA, supra, *section 36*

13. Indeed, precedent demonstrates that Adjudicators have consistently exercised powers to resolve disputes that were not express under the Act *but were incidental to its powers to resolve disputes that, in their essential character, fall within matters that are referable to adjudication.*

Dhaliwal *2004 PSSRB 109 (166-2-32549) at paras. 93-94: also applied by the current PSLRB in, among others,* Wright *(2005) PSLRB 139 (166-2-34499),* Chaudry *2005 PSLRB 72 (166-2-338368: 561-2-25).*

Van de Mosselaer *2006 PSLRB 59 (166-02-35993 to 35995) at para.42*

14. A decision of the Canada Industrial Relations Board in Canadian National Railway *may offer assistance in dealing with the three jurisdictional questions raised by Adjudicator Butler. In that case, the Board concluded that it had the authority to determine (a) whether a settlement agreement had been reached; (b) whether the agreement had been violated; and (c) to order the agreement complied with. In so finding, it drew its jurisdiction from analogous provisions in the* Canada Labour Code *to sections 37 and 226(2) of* the PSLRA*, as well as its powers in relation to proceedings before it.*

Canadian National Railway (Re), *(2006) CIRB No. 362 at paras. 14, 31-50*

15. In light of the foregoing, the PSAC states that the Board and Adjudicators have an express mandate under the PSLRA *to foster, encourage and facilitate the consensual resolution of disputes properly before them. Again, a settlement agreement is simply the physical evidence of the success of that mandate and, accordingly, there exists a direct nexus between the agreement and the statutory grants of authority under the* PSLRA.

Section 236 of the PSLRA and the Jurisprudence of the Supreme Court of Canada

16. The PSAC respectfully submits that section 236 of the new Act *simply incorporates into the statute a principle that has already been confirmed by the Supreme Court of Canada: Where there exists a statutory mechanism for the resolution of a dispute, access to the Courts is ousted. Section 236, effectively, gives full answer to the question of forum as between the* Act *and the Courts. Section 236 provides as follows:*

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.

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.

Exception

(3) Subsection (1) does not apply in respect of an employee of a separate agency that has not been designated under

subsection 209(3) if the dispute relates to his or her termination of employment for any reason that does not relate to a breach of discipline or misconduct.

17. It is well accepted by our Highest Court that labour relations statutes are intended to be comprehensive schemes for the resolution of workplace disputes and that they establish a more effective and efficient means of resolving disputes than seeking relief in the Courts. Indeed, the Supreme Court of Canada has repeatedly held that, subject to the residual jurisdiction of the Courts, efficient labour relations are undermined where the Courts set themselves up in parallel to, or in competition with, a comprehensive statutory labour relations regime.

Weber v. Ontario Hydro, *(1995) S.c.J. No. 59 at paras. 55-58*

New Brunswick v. O'Leary, *(1995) S.C.J. No. 60 at para. 6*

Vaughan v. Canada, *(2005) S.C.J. No. 12 at paras. 37-40*

18. In deferring to arbitration and adjudication for the resolution of disputes, the decisions of the Supreme Court of Canada also serve as a caution in determining jurisdiction. One must not be too quick to characterize as jurisdictional that which is doubtfully so by trying to couch the dispute in the language of a civil claim – whether an action in breach of contract or tort. An arbitrator's jurisdiction can arise both expressly and inferentially out of the collective agreement and the objective is to determine whether the essential character of the dispute is a labour relations one.

Weber v. Ontario Hydro, supra

New Brunswick v. O'Leary, supra

Vaughan v. Canada, supra

19. One can apply this dicta in the context of the PSLRA. *While it is a labour relations scheme that includes a mechanism for the referral of collective agreement disputes to arbitration (bringing it squarely within* Weber *and* O'Leary*), it also provides for a statutory mechanism for a range of other matters including disciplinary suspensions such as the one in the present case (thereby bringing it within* Regina Police Association*). Deference to the legislative scheme is equal in both scenarios. In other words, under the* PSLRA*, the Adjudicator's jurisdiction is to be assessed with regard to not only the collective agreement but also the governing statute.*

Regina Police Association Inc. v. Regina (City) Board of Police Commissioners, *(2000) S.C.J. No. 15 at paras. 32*

20. The pertinent question, therefore, is: does a settlement agreement arise expressly or inferentially out of the scheme of the PSLRA *such as to confer on an Adjudicator the jurisdiction to determine a dispute relating to that agreement and to, thereby, deprive the Courts of jurisdiction over the same dispute?*

21. In Weber*, a claim in tort was found to be, in its essential character, a matter arising out of the collective agreement and within the jurisdiction of an arbitrator. In* O'Leary*, a claim in negligence against an employee's use of a company motor vehicle was also found to arise, in its essence, out of the collective bargaining relationship and was, accordingly, within the jurisdiction of an arbitrator. In* Vaughan*, a claim in negligence with respect to an early retirement incentive was found to fall within the range of subject matters that could be grieved up to, but not beyond, the final level of the grievance procedure under the former* PSSRA*. In* Regina Police Association*, a dispute relating to discipline was found, in its essential character, to arise under a specific statutory scheme for discipline matters, notwithstanding a concurrent right of access to arbitration on related matters. In all these cases, the challenge was to move away from broad characterizations of the dispute, toward an assessment of its essential nature.*

Weber v. Ontario Hydro, supra

New Brunswick v. O'Leary, supra

Vaughan v. Canada, supra

Regina Police Association Inc. v. Regina (City) Board of Police Commissioners, supra

22. In December 2002, the former Board issued a direction under the former Public Service Staff Relations Act *("the* PSSRA*") stating, among other things, that the mechanism for enforcement of a settlement was a civil, not a labour relations, matter. The jurisprudence of the former Board has confirmed that view.*

Letter, dated December 5, 2002, from Chairperson Tarte to the PSAC

Myles *2002 PSSRB 53 (166-2-30744 & 45), at paras. 13, 19 & 20*

Skandharajah *2000 PSSRB 114 (166-2-24127) at paras. 78-80*

Lindor *2003 PSSRB 10 (166-2-30803 to 804) at para. 16*

Dilon *2006 PSLRB 135 (166-02-35947) at para. 9*

Bedok *2004 PSSRB 163 (166-2-3314 & 149-2-249) at para. 53*

Carignan *2003 PSSRB 58 (166-2-29047) at para. 48*

Castonguay *2005 PSLRB 73 (166-2-30919) at paras. 30 to 34*

23. The PSAC respectfully submits that this is contrary to the overwhelming weight of authority and is inconsistent with the provisions of the new PSLRA. *Section 236 is statutory confirmation of the fact that, subject to the Courts overarching residual jurisdiction, disputes that are, in their essential character, related to labour relations and terms and conditions of employment must be dealt with under the relevant statutory scheme. Accordingly, to the extent that the jurisprudence under the former* PSSRA *directed the parties to resolve any dispute concerning a settlement agreement to the civil courts, it is clear that such a direction cannot be upheld in the face of section 236 of the current* PSLRA *where a finding is made that its essential character falls under the labour relations regime of the* PSLRA.

24. The PSAC submits that, in light of the review of the legislative framework and the jurisprudence of the Supreme Court of Canada, there can be no doubt that settlements arise expressly out of a mandate conferred under the PSLRA *and are, in their essential character, labour relations matters.*

25. From this conclusion, the inquiry does not end. The focus shifts to the question of what mechanisms exist within the PSLRA to address an alleged breach of a settlement agreement: do such disputes arise expressly or inferentially out of the originating dispute set out in the form of a grievance, thereby maintaining the jurisdiction of an Adjudicator, or are such disputes to be resolved by the filing of a further, non-adjudicable, grievance.

26. The PSAC wil address this question in its responses to the jurisdictional questions, below. However, the overall position of the PSAC is that where a dispute has been properly referred to adjudication, the Adjudicator retains jurisdiction over the ultimate resolution of that dispute, including any settlement agreement that may have arisen to resolve it.

Canadian National Railway, supra, *paras. 31-32*

1) Where, in the case of an individual grievance referred to adjudication in relation to disciplinary action resulting in suspension, the parties have entered into a settlement agreement, does an adjudicator have the jurisdiction under the new Act ***to determine whether the parties' settlement agreement is final and binding?***

27. Part of the dicta in the Van de Mosselaer *decision ((2006) PSLRB 59) stands for the proposition that an adjudicator has the inherent jurisdiction to determine whether there exists a final and binding settlement agreement. This inquiry can range from the question of whether the agreement was reached in circumstances that could be considered unconscionable (and therefore ought not to be binding), to whether there was, in fact, an agreement having regard to any terms set out in writing and/or the conduct of the parties at the relevant time.*

28. While Van de Mosselaer *was a decision rendered under the former* Public Service Staff Relations Act, *the inherent jurisdiction of a member of the Board sitting as an adjudicator has not been narrowed under the new* PSLRA.

29. If an Adjudicator finds that a settlement agreement is unconscionable, it follows as a matter of law that the agreement is not binding and, accordingly, the Adjudicator must be entitled to make such a ruling and proceed with the underlying grievance. If an adjudicator finds that a settlement agreement was reached, it becomes final and binding and the parties ought to be held to their agreement to resolve the grievance on the terms set out.

30. If, for example, a grievor seeks to challenge a suspension at adjudication and the employer asserts that there is a final and binding settlement in place, an assertion that the Grievor rejects, it is critical that an inquiry be made to determine which assertion prevails. It is a necessary part of the Adjudicator's authority as a trier of fact to be able to accept or reject such an assertion.

31. Stated another way, if the answer to the first question is no, then a party can wipe away a statutory right to third party adjudication of a dispute by a mere assertion of settlement. This cannot be the case and, accordingly, the PSAC respectfully submits that the first question must be answered in the affirmative.

2) In the event that an adjudicator has the jurisdiction under the new* Act *to determine whether the parties' settlement agreement is final and binding, does the adjudicator have the jurisdiction to hear an allegation that a party is in non-compliance with a final and binding settlement agreement?

32. This question requires a determination as to whether an allegation of noncompliance with a final and binding settlement agreement arises expressly or inferentially out of

the statutory scheme. The PSAC respectfully submits that the answer to this question must be yes.

33. It is not enough to characterize the issue in legal terms. On the contrary, the Supreme Court of Canada has been clear on this point: the question is whether this is - in its essential character - a labour relations dispute contemplated by the legislative scheme. In making this determination, a few key points must be borne in mind.

34. One must be careful not to confuse form with substance. The settlement agreement does not fundamentally change the character of the underlying dispute. A reference to adjudication alleging a failure to properly accommodate an injured worker in the workplace that is settled by agreement on a work reintegration plan does not cease to be a discrimination grievance because the employer has failed to meet its obligations under the settlement. The dispute, in its essential character, is not altered. A person who is not reintegrated in accordance with the settlement continues to have their human rights violated.

35. Similarly, an individual who refers a grievance to adjudication challenging a 20 day suspension, but settles the matter based on an agreement to wipe away the suspension and to receive 20 days' pay, does not cease to have, in its essential character, a dispute with the employer about the suspension where the employer fails to reimburse that 20 days' pay.

36. The PSAC states, therefore, that the essential character, the substance, of the grievance dispute remains and, accordingly, continues to fall within the range of subject-matters that fall within the jurisdiction of an Adjudicator. An allegation of a violation of a settlement agreement confirms that the dispute remains unresolved and it is incumbent upon an Adjudicator under the PSLRA *to resolve disputes and bring finality to the process. Determining whether an agreement has been breached furthers those legislative objectives.*

37. In addition, the current practice before the Board, incorporated expressly as a term in the majority of settlement agreements to which the PSAC is a party, is that the grievance over which the Board has primary jurisdiction is not deemed withdrawn until the settlement agreement is fully implemented. The jurisdiction of the Board is maintained in that the grievance is not resolved or withdrawn until the conditions precedent set out in the agreement have been complied with.

38. The Board's own practice confirms this in the sense 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. The Board's fie is then closed.

39. The PSAC maintains that a settlement agreement remains organically linked to the subject-matter of the grievance and is not an entirely separate, or "fresh", proceeding with a separate recourse mechanism.

Canadian National Railway, supra, *paras. 31-32*

40. Yet, the former Board has concluded that the filing of a grievance seeking the enforcement of a settlement is a non-adjudicable grievance (i.e. that it requires the filing of a "fresh" proceeding). In light of all the foregoing, the PSAC respectfully submits that this decision cannot stand. If the Adjudicator in Myles *is correct, it would, mean accepting, for the purposes of the new* PSLRA*, that a settlement agreement ceases to have any proximate link to the originating dispute and grievance. For the reasons already set out here, the PSAC submits that can be no basis for adopting a form over substance approach to settlement agreements under the* PSLRA*.*

Myles *2002 PSSRB 53 (166-2-30744 & 45), at para. 20*

41. In so stating, the PSAC does not suggest that this opens the door wide enough to allow the referral of any matter to adjudication - thereby rendering the provisions of the PSLRA *meaningless. On the contrary, as is set out above, the PSAC maintains that an Adjudicator's jurisdiction to enforce a settlement is part of its primary jurisdiction over the original grievance dispute.*

42. Furthermore, it would undermine the legislative scheme, outlined in detail above, to suggest that the Board or an Adjudicator can have wide-ranging powers to encourage and facilitate settlement of grievances duly referred to adjudication, yet is powerless to determine an allegation that one of those parties to the bargain has violated its terms.

Canadian National Railway, supra, *paras. 35-40*

43. The PSAC submits that the power to determine whether there has been a breach of a settlement agreement is not only incidental but necessary to the Board, an Adjudicator or the Chairperson's ability to maintain the integrity of the legislative scheme, to ensure accountability between the parties, and to achieve the objects of an efficient, fair and expeditious dispute resolution process within the labour relations community it serves.

44. Accordingly, the PSAC respectfully submits that an Adjudicator has the power to determine whether an agreement has been violated.

3) In the event that the 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?

45. Subsection 228(2) of the PSLRA *is clear that an Adjudicator is required to make the order that he or she considers appropriate. Beyond subsection 228(2) and the Board's procedural powers and powers related to the* Canadian Human Rights Act, *the powers of an Adjudicator are not exhaustively enumerated in the* PSLRA.

46. As the Supreme Court has said, the powers of an Adjudicator are broad and include the ability to interpret and apply the law of land including the Charter, *and to craft an appropriate labour relations remedy.*

Weber v. Ontario Hydro, supra

New Brunswick v. O'Leary, supra

Vaughan v. Canada, supra

47. If one accepts that an Adjudicator has the inherent authority to determine whether a settlement agreement is final and binding, and whether there is noncompliance with that agreement, then it follows that there cannot be a right without a remedy. Accordingly, an Adjudicator must have the authority to hold the parties to the terms of resolving the grievance dispute. The authorities listed under the PSLRA *are broad enough to encompass an order that the parties carry out their agreement to resolve a labour relations grievance that was squarely and properly before the Board through a referral to adjudication, before the Board through its Board-appointed mediators, or before an Adjudicator acting as a mediator.*

Canadian National Railway, *supra, para. 50*

48. Respectfully, the PSAC submits that the capacity of the Board to hold parties to settlement agreements is fundamental to its labour relations mandate and it would be anathema to that mandate to allow parties, through non-compliance, to resile from a settlement of a grievance over which the Board has original jurisdiction and, at the same stroke, insulate itself from third-party review.

49. An overriding preoccupation of the existing jurisprudence is the importance of finality. Upholding the principle that a signed settlement agreement is final and binding prevents persons from walking away from an agreement on the basis of second thoughts or doubts or a desire to give less or seek more. Upholding the principle of finality furthers the public and labour relations interest in certainty and bolsters the confidence of the parties in the legitimacy of the process. Stated another way, if a party can change its mind after having signed a settlement, it has a systemic chilling effect on our collective confidence that a settlement is a meaningful and reliable resolution to a workplace dispute.

50. If the Union cannot assure its members that, in signing off on a settlement, the agreement is enforceable by the third-party to whom their grievance has been referred, the likely impact will be that persons would rather litigate than forego their grievance rights and gamble with a tangible risk of non-compliance.

51. While the PSAC is cognizant of not putting too strong or strident a point on this, it nevertheless bears emphasis. If it is the case that a settlement agreement cannot be enforced by the Board or an Adjudicator as part of its inherent jurisdiction over the initial proceeding (whether a complaint, application or grievance), the Union cannot in good faith recommend mediation or confirm to its membership that there exists an expeditious means to hold the other party to its bargain.

Conclusion

52. In light of the foregoing, the PSAC respectfully submits that, whether a decision-maker under the Act is the Board, the Chairperson, or a member of the Board sitting as an Adjudicator (as in the present case), the legislative scheme under the PSLRA *sets out significant statutory powers to encourage and facilitate the consensual resolution of disputes. As the physical evidence of that process, a settlement agreement falls squarely within the mandate of the Board and Adjudicators under the* PSLRA *and, accordingly, their subject matter falls expressly within their powers. The subject matter of the dispute remains, in its essential character, as stated in the grievance.*

53. The PSAC states that the enforcement of a settlement of an otherwise adjudicable grievance is a matter that is within the Board and an Adjudicator's jurisdiction as it involves the administration of the Act, *is incidental to achieving the objects of that* Act, *and is part of the decision-maker's*

primary and inherent jurisdiction to see the grievance-related dispute fully and finally resolved.

. . .

[*Sic* throughout]

[139] II. <u>The deputy head's rebuttal</u>

. . .

First and foremost, the employer is of the view that the arguments filed by the other party and the intervenors seek to challenge the Public Service Staff Relations Board ("PSSRB") jurisprudence in its entirety and without regard to the actual questions posed by Adjudicator Butler in this instance. Adjudicator Butler's three questions were presented subject to a preamble, which stated as follows:

> *"<u>In light of the coming into force</u> of the new* Act *in general, and of its section 236 in particular, <u>and in light of the evolving jurisprudence</u> relating to the jurisdiction of adjudicators – i.e.* Weber v. Ontario Hydro, *[1995] 2 S.C.R. 929;* New Brunswick v. O'Leary, *[1995] 2 S.C.R. 967;* Regina Police Association Inc. v. Regina (City) Board of Police Commissioners, *2000 SCC 14; and* Vaughan v. Canada, *2005 SCC 11 – adjudicator Butler is seeking written representations on the following issues:" [emphasis added]*

Therefore, it is the employer's position that we were not asked to review the correctness of the body of established Board jurisprudence on the issue of final and binding settlement agreements.[6] Rather, we were asked whether any of the new provisions in the Public Service Labour Relations Act, *R.S.C., 2003, c. 22, s. 2 ("*PSLRA*") or any of the Supreme Court of Canada case law would allow a different interpretation of the established Board jurisprudence. The Board's jurisprudence is quite clear with respect to an adjudicator's jurisdiction on final and binding settlements. Unless an argument presents itself in the analysis of the Supreme Court of Canada decisions or in the provisions of the* PSLRA, *it is the employer's position that the body of established jurisprudence should not be overturned.*

The arguments submitted on behalf of Mr. Amos and the intervenors seem to focus on Adjudicator Butler taking jurisdiction over this matter in order to foster labour relations. Many sections of the PSLRA, *including the preamble, are cited to further these arguments. The employer will not repeat its arguments here, but adjudicators derive their jurisdiction from section 209 of the*

PSLRA, *and not from the preamble, nor any of the other sections cited in other arguments. It is the employer's position that a process is arguably in place to deal with the enforcement of final and binding settlement agreements; that process involves the grievor grieving a memorandum of understanding under section 208 of the* PSLRA, *and if need be, filing an application for judicial review to the Federal Court. That an adjudicator remain seized with a grievance, which has been referred to adjudication and subsequently settled, is not an issue that Parliament intended to allow for. The parties may not like the recourse in this case, but their preferences still do not permit an adjudicator to take jurisdiction where there is none.*

In particular, sections 37 and subsection 226(2) of the PSLRA *were cited and state as follows:*

> *Provision of assistance to parties*
>
> *37. The Board, or any member or employee of the Board designated by the Board, may, if the parties agree, assist the parties in resolving any issue in dispute at any stage of a proceeding by any means that the Board considers appropriate, without prejudice to its power to determine issues that have not been settled. [emphasis added]*
>
> *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. [emphasis added]*

These sections permit the Board, or any member or employee of the Board (including an adjudicator under ss.226(2)), to assist the parties with respect to issues that have not been settled or resolved. First, it is the employer's position that the matters in this case are covered by a final and binding memorandum of agreement and are therefore settled or resolved. The employer submitted in its March 26th letter that an adjudicator retains jurisdiction to determine whether or not a final and binding settlement is in place. However, once it has been determined that the agreement between the parties is final and binding, the adjudicator no longer has jurisdiction. Second, these sections presume that the parties are requesting assistance. Neither of these sections assists the parties in establishing whether or not an adjudicator has jurisdiction to hear an allegation that a party is in non-compliance with a final and binding settlement agreement,

or that an adjudicator has jurisdiction to make an order he considers appropriate under the circumstances.

With respect to the submissions made by PSAC in its enumerated paragraph 13 regarding PSSRB and PSLRB jurisprudence, the cases cited involved rejections on probation. These cases follow a long line of Board jurisprudence that the adjudicator does not have jurisdiction over a rejection on probation if it falls within the ambit of the Public Service Employment Act, *which the employer can establish with evidence that the rejection was related to employment issues and not for any other purpose. The employer would like it noted that the adjudicators still had reference to section 92 of the* Public Service Staff Relations Act, *R.S.C., 1985, C. P-35 ("PSSRA") and still had to determine their jurisdiction in accordance with that section (now section 209 of the* PSLRA*). These cases do not assist Adjudicator Butler in his determination of jurisdiction.*

Without repeating the employer's submissions of March 26, 2008 in their entirety, it is the employer's position that section 209 of the PSLRA *is determinative of an adjudicator's jurisdiction. Adjudicators in the Federal public service derive their jurisdiction from statute and not from the collective agreements. Therefore, with respect to any arguments forwarded based on collective agreements or legislation other than the* PSSRA *or* PSLRA*, the employer submits that such language is not relevant or determinative in this instance.*

In conclusion, the employer's submits that nothing in the new Act, nor anything in the cited Supreme Court case law, would allow a different conclusion regarding an adjudicator's jurisdiction insofar as final and binding settlements are concerned.

. . .

[Emphasis in the original]

[Footnotes omitted]