Date: 20231215

File: 566-02-41571
XR: 566-02-9894 and 11394

Citation: 2023 FPSLREB 118

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

TRINA KENNEDY

Grievor

and

DEPUTY HEAD
(Department of Citizenship and Immigration)

Respondent

Indexed as
Kennedy v. Deputy Head (Department of Citizenship and Immigration)

In the matter of individual grievances referred to adjudication

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Herself

For the Respondent: Christine Langill, counsel

Decided on the basis of written submissions, filed March 12 and August 7 and 31, 2020.

REASONS FOR DECISION

I. Overview

A. Outline of decision

[1] The issue in this proceeding is whether the Federal Public Sector Labour Relations and Employment Board ("the Board") has the jurisdiction to resolve a dispute over whether a party breached the terms of a settlement agreement resolving a grievance after a grievor has withdrawn their grievance and is no longer an employee.

[2] The Board may enforce a settlement agreement even after a grievor withdraws a grievance. As I will explain in detail, the Board's jurisdiction to enforce a settlement agreement even after the grievor withdraws the grievance is consistent with the text, context, and purpose of the legislation. Further, a party alleging a breach of a settlement agreement does not need to file a fresh grievance and refer it to the Board. Instead, the party alleging a breach should ask the Board to reactivate the closed file for the sole purpose of enforcing the settlement agreement. This process resolves any concern over a grievor no longer being an employee.

B. The identity of the decision maker

[3] As this matter stretches back to 2014, I must explain the statutory basis by which the Board is seized with it.

[4] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that *Act* read immediately before that day.

[5] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the

name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act*, the *Public Service Labour Relations Act*, and the *Public Service Labour Relations Regulations* to, respectively, the Federal Public Sector Labour Relations and Employment Board, the *Federal Public Sector Labour Relations and Employment Board Act*, the *Federal Public Sector Labour Relations Act* ("the *Act*"), and the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*").

[6] I will use the term "Board" throughout these reasons regardless of the technical name of the Board at a particular time.

II. Background to the case

A. Original dispute between the parties

[7] The grievor was employed with what used to be called Passport Canada (now part of the Department of Citizenship and Immigration, the respondent in this case) between 2008 and 2015. On February 14, 2014, the respondent suspended the grievor without pay pending the result of an investigation. On March 27, 2015, the respondent terminated the grievor's employment for cause effective the next working day (February 17, 2014). The termination was retroactive to February 17, 2014 (the first day of the suspension).

[8] The grievor filed grievances against those two decisions. The grievor referred the first grievance to adjudication on July 9, 2014, and referred the second grievance to adjudication on July 24, 2015. The Board gave those two grievances file numbers 566-02-9894 and 566-02-11394 respectively.

B. Settlement of original dispute

[9] On October 22, 2015, the parties entered into a settlement agreement to resolve those two grievances. The parties have not filed a copy of the full settlement agreement, nor have I asked them to. They did provide paragraph six of the settlement agreement, which reads as follows:

> *The Employer confirms there is no Government wide trace of reliability status with respect to the Grievor. The Employer further confirms not to initiate the distribution of information related to the Grievor's reliability status to any other party, except as required by law. If contacted by another Federal Government Department regarding the Grievor's security status and clearance,*

> *the Employer will only confirm that the Grievor no longer has her security status and clearance, except as required by law.*

[10] The agreement also permitted the grievor to resign her employment effective February 17, 2015, which she did.

[11] The grievor withdrew her two grievances as part of this agreement on November 24, 2015. The Board acknowledged that the grievances had been withdrawn and closed its files on November 26, 2015.

C. Alleged breach of settlement

[12] The grievor alleges that the respondent breached the terms of the settlement agreement between November 2016 and August 2017. The grievor alleges that two officials with the respondent distributed information about her reliability status and security clearance in November 2016. The grievor alleges that she lost her employment at a different federal government department as a result. The grievor alleges a similar breach reoccurred in August 2017, costing her employment with another department.

[13] The respondent denies breaching the settlement agreement.

D. The grievor's attempts to enforce the settlement

[14] The grievor approached her bargaining agent about enforcing the settlement agreement. On January 6, 2017, her bargaining agent responded to state that the Board did not have the jurisdiction to enforce the settlement agreement because the grievor withdrew the grievances and was no longer an employee.

[15] The grievor attempted to enforce the terms of the settlement agreement by filing a Statement of Claim in the Ontario Superior Court of Justice on July 13, 2018. The grievor also filed a similar Statement of Claim in Federal Court on June 12, 2019. The Ontario Superior Court stayed the grievor's action on March 15, 2019 pending an application to the Board to enforce the settlement. The Federal Court stayed the grievor's action on the same terms on July 17, 2019.

E. Procedural history with the Board

[16] The grievor filed a new grievance on April 25, 2019. The new grievance alleged that the respondent breached the settlement agreement as discussed earlier in this decision. The respondent denied breaching the settlement agreement and denied the

grievance at the final level of the grievance process on January 20, 2020. The respondent also denied the grievance because it was untimely, as it was filed more than 25 days after the date of the alleged breach of the settlement agreement.

[17] The grievor referred the new grievance to the Board on February 11, 2020 (Board file no. 566-02-41571). The Board immediately decided to resolve the issue of its jurisdiction by written submissions. The respondent filed its submissions on March 13, 2020. The grievor's submissions were then delayed because of the public health emergency in 2020, but ultimately, the grievor filed her submissions on August 7, 2020. The respondent filed its reply submissions on August 31, 2020.

F. My apology

[18] The parties' dispute has sat with the Board for over three years waiting for a decision. The Board took no steps to decide this preliminary issue until prompted by the respondent on July 7, 2023. I have no excuse to offer to explain this delay, and I unreservedly apologize to the parties for the delay deciding this preliminary issue.

III. The parties' positions and issues

[19] This is an unusual case because both parties state that the Board does not have the jurisdiction to hear this matter but for very different reasons.

[20] The grievor states that the Board does not have the jurisdiction to hear this case because she withdrew the grievances and she is a former employee. However, the grievor also states that she has "… no objection to the PSLREB [*sic*] finding that it has jurisdiction to adjudicate her grievance" and takes "… no position as to whether the Board does or does not have jurisdiction …" over this matter.

[21] The respondent states that the Board has jurisdiction to hear a case about an alleged breach of a settlement grievance even if a grievor withdraws their grievance and is no longer an employee.

[22] However, the respondent states that the Board has no jurisdiction because the grievance to enforce the settlement agreement is untimely, as it had to be filed within 25 days of the alleged non-compliance with the settlement agreement. In response, the grievor requested an extension of time to file that grievance. The respondent opposed that request.

[23] Both parties agree that the settlement agreement is binding on them. This means there are two main issues:

1) Does the Board have the jurisdiction to enforce a settlement agreement after a grievor withdraws the grievance that was settled?
2) Does the Board have the jurisdiction to enforce a settlement agreement when the party seeking to enforce the agreement is no longer an employee?

[24] As the Board has stated before, it "… is a creature of statute and not a court with inherent jurisdiction. The parties cannot give it jurisdiction where it has none" (see *Green v. Deputy Head (Department of Indian Affairs and Northern Development*, 2017 PSLREB 17 at para. 340). Therefore, I cannot simply accept that the respondent states that the Board has the jurisdiction to resolve disputes over settlements and that the grievor has no objection to the Board's jurisdiction. If a party, or the Board on its own, raises a question of jurisdiction, the Board must decide the issue.

[25] Another consequence of the Board being a creature of statute is that its jurisdiction must derive from statute. As I will set out in greater detail below, there are a number of policy reasons for the Board to take jurisdiction to resolve disputes over settlements where the underlying grievance has been withdrawn. Those policy reasons do not grant the Board such jurisdiction. Even though those policy reasons are grounded in the Preamble to the *Act*, declarations of policy (such as those set out in the Preamble to the *Act*) are not jurisdiction-conferring provisions and cannot extend the powers of the Board beyond the spheres granted by Parliament in jurisdiction-conferring statutory provisions: see *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at para. 85 ("*Broadcasting Reference*") and *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 85 (Côté J., dissenting).

[26] The submissions by both parties in this case also disclose some confusion about the proper procedure to resolve a breach of a settlement agreement. My reasons are longer than may otherwise be necessary in an effort to eliminate any confusion going forward about the Board's jurisdiction over settlement agreements and the proper process to follow in this enforcement.

IV. The Board has the jurisdiction to hear a dispute over a settlement even after the grievance has been withdrawn

A. What the adjudicator had to say in *Amos* about a grievance being withdrawn

[27] The leading decision on the treatment of settlement agreements remains *Amos v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 74, ultimately upheld in 2011 FCA 38. Before *Amos*, there were many decisions under the old *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35; "the old *Act*") stating that an adjudicator did not have the jurisdiction to hear a dispute over implementing a settlement agreement. Adjudicators under the old *Act* had the jurisdiction to decide whether there was a settlement agreement and whether the agreement was invalid for reasons such as duress (see *Bedok v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 163) or unconscionability (see *Nash v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 98 ("*Nash #1*")). Once the adjudicator concluded that there was a valid agreement, the agreement was a "complete bar to its jurisdiction" (see *Lindor v. Canada (Treasury Board)*, 2003 PSSRB 10 at para. 16), and an adjudicator had no authority to enforce the terms of that agreement (see *Nash #1* at para. 80).

[28] The adjudicator in *Amos* had to decide whether this old line of cases applied to the new *Act* which came into force on April 1, 2005. The adjudicator decided that those older cases did not apply to the new *Act*. In short, the adjudicator concluded that an adjudicator had jurisdiction under the *Act* (as it read at that time) to determine three things: (1) whether a settlement agreement is final and binding, (2) whether a party has complied with it, and, if not, (3) the appropriate remedy for non-compliance. The Federal Court of Appeal ultimately upheld that decision.

[29] But as the grievor correctly points out, in *Amos* the grievor never withdrew his grievance. The adjudicator relied on that fact to distinguish that case from an earlier case refusing jurisdiction, stating:

> …
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> *[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.
>
> …

[30] The Federal Court of Appeal also noted the fact that the grievance had not been withdrawn, stating:

> …
>
> *[15] I hasten to add that at the hearing of this appeal, the appellant made it clear that his second question was not as broad as it reads. Specifically, the appellant argues that the Adjudicator was right to conclude that he had jurisdiction over the enforcement of the settlement agreement since the appellant's grievance had never been withdrawn. While the Judge was of the opinion that the withdrawal of the grievance had no impact on the Adjudicator's jurisdiction, the appellant invites us to limit our analysis to these particular circumstances. I accept his invitation for the following reasons.*
>
> *[16] First, the factual matrix of a case is a determinative factor in assessing a decision-maker's jurisdiction. Second, this event was material to the Adjudicator's analysis. It allowed him to distinguish the facts of the present case from those of* Maiangowi v. Treasury Board (Department of Health), *2008 PSLRB 6 [Maiangowi] as he was not called, contrary to* Maiangowi, *to declare himself without jurisdiction for the reason that "… [t]here is simply no longer any grievance before the adjudicator…" (Adjudicator's reasons at paragraph 53).*
>
> *[17] Third, the non-withdrawal of the grievance cannot be seen as an exceptional occurrence, a rare omission that will never be seen again. In front of the Adjudicator, it had been submitted by the Public Service Alliance of Canada (PSAC) that as a term in the majority of settlement agreements to which it is a party, grievances over which the Board has primary jurisdiction are not deemed withdrawn until the settlement agreement is fully implemented (annex to Adjudicator's reasons, at page 41, paragraph 37).*
>
> …
>
> *[22] There might be, in the future, circumstances warranting a different analysis. For the time being, I am interested in the situation of the appellant, who never withdrew his grievance. Thus, in so far as the Adjudicator's findings could be understood as engaging both scenarios (these being that the grievance has been (1) withdrawn, or (2) not withdrawn), my analysis of his reasons and ultimate conclusion to uphold his decision only apply to the appellant's circumstances.*
>
> …

B. Why the grievance not being withdrawn was important when *Amos* was decided in 2008

[31] This of course begs the question of why a grievance not being withdrawn was important to the adjudicator in *Amos*. While that adjudicator never explained in detail why withdrawing a grievance was important to them, they made the statement immediately after citing *Maiangowi v. Treasury Board (Department of Health)*, 2008 PSLRB 6 (decided under the old *Act*) which dismissed an attempt to enforce a settlement agreement because the grievance had been withdrawn. But even *Maiangowi* does not go into detail about why withdrawing a grievance was important. In my opinion, a review of other cases cited in *Maiangowi* (which in turn was cited in *Amos*) discloses two reasons why withdrawing a grievance was important in 2008.

1. The rule in 2008 about what happens when a grievance is withdrawn

[32] First, the adjudicator in *Amos* was concerned about the principle existing at the time that the withdrawal of a grievance always made an adjudicator *functus officio* — meaning that they no longer had jurisdiction to hear the grievance.

[33] This principle derives from the Federal Court of Appeal's decision in *Canada (Attorney General) v. Lebreux*, [1994] F.C.J. No. 1711 (C.A.)(QL). The grievor in *Lebreux* withdrew his grievances after settling and the Board closed its file. About three weeks later, the grievor tried to set new dates for the adjudication of his grievance because "there was no satisfactory agreement" between the parties — essentially, the grievor regretted the terms of the settlement. The adjudicator relied upon the power under s. 27 of the old *Act* to review and vary an order and reopened the grievor's file. The Federal Court of Appeal set aside the decision, stating:

> …
>
> ***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.*
>
> …

[34] By focussing on whether the grievance had been withdrawn, the adjudicator in *Amos* could sidestep the issue of whether hearing a dispute over the implementation of a settlement agreement after the grievance has been withdrawn contradicts the Federal Court of Appeal's decision in *Lebreux*.

2. The need to find jurisdiction in s. 209 of the *Act*

[35] Second, in 2008 the sole source for an adjudicator's jurisdiction was s. 209 of the *Act*. As an adjudicator put it in a later decision applying *Amos*, "… adjudicators derive their jurisdiction solely from the *PSLRA*. There is no inherent jurisdiction. As applied to individual grievances, the *PSLRA* limits jurisdiction to those matters set out in subsection 209(1)" (see *Wray v. Treasury Board (Department of Transport)*, 2012 PSLRB 64 at para. 22).

[36] Section 209(1) of the *Act* lists the types of grievances that may be referred to adjudication. Settlement agreements are not listed in s. 209(1). Therefore, the adjudicator in *Amos* had to find that he had the implied power to enforce a settlement agreement. The adjudicator concluded that such a power was implied within s. 209(1) of the *Act*, as the power was consistent with other provisions of the *Act* and the purpose of the *Act*; see paragraphs 77 and 106 of the decision. The Federal Court of Appeal found likewise; see paragraphs 56, 57, and 62.

[37] This implied power might have proven more elusive for a grievance that had been withdrawn, particularly considering *Lebreux*.

C. Why a grievance being withdrawn is no longer important

[38] The grievor argues that not withdrawing a grievance is a necessary condition for the Board to have jurisdiction to hear a case about non-compliance with a settlement agreement. As I have stated, the Board is a creature of statute and its jurisdiction must be found in statute. Statutory construction concerns the trinity of the text, context, and purpose of legislation (see *Bernard v. Professional Institute of the Public Service of Canada*, 2019 FCA 236 at para. 7). Changes in the text and context of the *Act* after *Amos* mean that, even if the grievance not being withdrawn was important at the time *Amos* was decided, it is unimportant now. Additionally, the purpose of the *Act* supports an interpretation of the *Act* that permits the Board to re-open a file that has been withdrawn for the limited purpose of resolving a dispute over the implementation of a settlement agreement.

[39] Before I explain further, I want to be clear that the principle of *functus officio* continues to apply to Board proceedings. I am not suggesting that the changes I am about to describe have eliminated that principle. My reasons should be read in the limited context of the issue in this case — namely, whether withdrawing a grievance deprives the Board of jurisdiction to resolve a dispute over the implementation of an agreement settling that grievance. This decision is not an invitation for parties to re-open a case that has been withdrawn for any other purpose.

1. Statutory context: the *Act* has changed

[40] As I stated, at the time *Amos* was decided the jurisdiction of an adjudicator was limited to s. 209(1) of the *Act*.

[41] On November 1, 2014, s. 374 of the *Economic Action Plan 2013 Act, No. 2* came into force. That provision added s. 223(2.1) to the *Act*. Before November 1, 2014, grievances were heard by an adjudicator who was either selected by the parties or designated by the Chairperson of the Board from among the members of the Board; see s. 223(2) of the *Act* as it read before November 1, 2014. Section 223(2.1) now provides that "… **the Board** is seized of the grievance [emphasis added]" referred to adjudication, unless the parties have picked an adjudicator or requested a board of adjudication.

[42] At the risk of oversimplifying this change with a metaphor, before November 1, 2014, a grievance under the *Act* was heard by a Board member who was wearing their adjudicator hat. After November 1, 2014, a grievance under the *Act* is heard by a Board member wearing their Board member hat.

[43] This also means that before November 1, 2014, a Board member sitting as an adjudicator had only the power that the *Act* granted to an adjudicator. The *Act* used to set out a list of powers that could be exercised by an adjudicator, and the Board member wearing their adjudicator hat could exercise only those powers. After November 1, 2014, a Board member adjudicating a grievance exercises the powers of the Board.

[44] This is important in this case because it means that a member of the Board hearing a grievance has the power set out in s. 12 of the *Act*, which reads:

Administration of Act	***Attributions de la Commission***
12 The Board *administers this Act and it* ***may exercise the powers*** *and perform the duties and functions that are conferred or imposed on it by this Act, or* ***as are incidental to the attainment of the objects of this Act****, including the making of orders requiring compliance with this Act, with regulations made under it or with decisions made in respect of a matter coming before the Board.*	***12 La Commission*** *met en œuvre la présente loi et* ***exerce les attributions*** *que celle-ci lui confère ou* ***qu'implique la réalisation de ses objets****, notamment en rendant des ordonnances qui en exigent l'observation, celle des règlements pris sous son régime ou des décisions qu'elle rend sur les questions dont elle est saisie.*

[Emphasis added]

[45] In other words, before November 1, 2014, s. 12 of the *Act* (which was then s. 36) could apply only to the very limited role that the Board played in adjudication, namely, appointing an adjudicator and enacting regulations dealing with adjudication; see *Exeter v. Deputy Head (Statistics Canada)*, 2012 PSLRB 24 (upheld in 2014 FCA 251). However, beginning November 1, 2014, a Board member hearing a grievance may exercise the powers in s. 12 of the *Act*.

[46] Rather than interpreting s. 209 of the *Act* (as the adjudicator in *Amos* had to do), I can interpret s. 12 of the *Act* as well.

[47] In coming to this conclusion, I have considered the decision of this Board in *Nash v. Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 121 ("*Nash #2*"). The applicant in that case applied under s. 43 of the *Act* for reconsideration of an adjudication decision made by the Board dismissing two grievances that he filed. The Board concluded that s. 43 of the *Act* does not apply to decisions made by the Board adjudicating grievances, stating at para. 28:

> *[28] Although the distinction between "adjudicators" and the "Board" has lost its significance in light of changes made to the* Public Service Labour Relations Act *in 2014, it remains that powers given by legislation to decision makers (whether adjudicators or the Board) with regard to adjudication proceedings under Part 2 of the* FPSLRA *are different than those given to the Board with regard to labour relations proceedings under Part 1. It is true that, in some instances, similar powers exist both under Part 2 and Part 1. For example, the general power to summons witnesses is given to the Board with regard to any proceedings by*

> *section 20 of the* Federal Public Sector Labour Relations and Employment Board Act *(S.C. 2013, c. 40, s. 365) and has been extended to adjudicators by section 226(1) of the* FPSLRA. *However,* ***in other instances, some powers are exclusive to Part 2 or Part 1.*** *For example, section 226(2)(a) provides all decision makers with a specific power to interpret and apply the* Canadian Human Rights Act *(R.S.C., 1985, C. H-6) with regard to adjudication proceedings under Part 2 that the Board does not possess with regard to labour relations proceedings under Part 1. Similarly, section 43(1) provides the Board with specific decision-review powers with regard to labour relations proceedings under Part 1 that decision makers do not possess with regard to adjudication proceedings under Part 2 and that the Board itself does not possess with regards to proceedings not covered by Part 1 of the* FPSLRA.
>
> [Emphasis added]

[48] As can be seen from my use of s. 12 of the *Act*, I have not treated Parts 1 and 2 of the *Act* as hermetically sealed compartments. Nor did the Board do so in *Nash #2*. The Board was clear in the emphasized passage immediately above that only some Board powers are exclusive to proceedings commenced under Part 1 or 2 of the *Act*. Other powers overlap between the two parts. Most obviously, the power of the Board in s. 14(c) of the *Act* (contained within Part 1) to mediate grievances overlaps with the Board's powers in Part 2. To give another example, the power of the Board to inspect and view the employer's facilities in s. 16(d) of the *Act* used to be in both s. 40(1)(j) and s. 226(1)(f) of the *Act* prior to the 2014 amendments discussed earlier; those amendments centralized the Board's inspection power in s. 16(d) of the *Act*, which must obviously apply to grievance adjudication as well as Part 1 proceedings.

[49] Additionally, the Board concluded that the applicant in *Nash #2* did not meet any of the preconditions for reconsideration even if s. 43 of the *Act* applied to his case. I leave it to another case for another member of the Board to decide whether that makes paragraphs 27-30 of that decision *obiter* for a case involving s. 43 of the *Act*; however, it is another indication that *Nash #2* does not govern the interpretation of s. 12 of the *Act*. *Nash #2* was only about s. 43 of the *Act*, and I have confined the result in that case to s. 43.

[50] I have confined *Nash #2* to s. 43 of the *Act* in part because *Nash #2* relied upon a series of older adjudication and Federal Court of Appeal decisions stating that adjudicators do not have the authority to reconsider their decisions. There is no such line of authority concerning s. 12 of the *Act*. As I stated earlier, statutory interpretation

is about both text and context. The relevant context led the Board in *Nash #2* to conclude that s. 43 does not apply to Part 2 proceedings. There is no similar context for s. 12. In the absence of this important statutory context, I have adopted the plain meaning of whether s. 12 of the *Act* applies to the Board in all proceedings or just those under Part 1. When s. 12 says "Board", it means "Board", not "Board acting under Part 1."

[51] *Amos* implied the power to enforce a settlement agreement into s. 209 of the *Act* because such a power is incidental to the attainment of the objects of the *Act*. After November 1, 2014, the Board's jurisdiction to enforce a settlement as incidental to the attainment of the objects of the *Act* is found expressly in s. 12, instead of only impliedly in s. 209.

[52] I appreciate that the grievor's first grievance (Board file no. 566-02-9894) was filed before this November 1, 2014 amendment. The first grievance was against a suspension without pay during an investigation. The second grievance, filed after the amendment to the *Act*, was against a termination of employment that was backdated to coincide with the start of the unpaid suspension. In these cases, the suspension grievance becomes moot, and the suspension period becomes part of the termination; see *Apenteng v. Deputy Head (Canada Border Services Agency)*, 2017 PSLREB 58 at para. 99. For that reason, it is the *Act* after November 1, 2014 which is relevant in this case. This also explains why I have reopened only the second grievance file (Board file no. 566-02-11394) in the order at the conclusion of this decision.

2. Other context — the case law

a. The approach to interpreting a statutory basket clause

[53] Section 12 of the *Act* is a broadly drafted basket clause that "cannot be read in isolation" but must be read in context with the rest of that section and the *Act* as a whole; see *Broadcasting Reference* at para. 29. This means that the scope of s. 12 of the *Act* is not infinite but is limited in ways demonstrated by the context of the statute.

[54] This required context includes the principle that powers granted through a general basket clause in a statute cannot be interpreted to give a tribunal powers that are broader than those expressly provided for elsewhere. For example, in *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association*, [1993] 3 SCR 724 at 741 the Supreme Court of Canada concluded that a basket clause similar to s. 12 could not

grant the Canada Labour Relations Board the power to order the pre-hearing production of documents because there was an express provision granting the power to order production during a hearing.

[55] However, in this case, nothing else in the *Act* expressly addresses the enforcement of settlements. If it did, the Board could not rely on s. 12 of the *Act*. Since it does not, I can rely on s. 12 so long as doing so is consistent with the broader context and purpose of that provision.

[56] I have concluded that interpreting s. 12 of the *Act* to give the Board the power to enforce settlements agreements is consistent with that broader context. This is best demonstrated by examining the relevant case law on this point.

b. *Amos* itself

[57] I begin with *Amos* itself. After acknowledging that *Amos* involved a grievance that had not been withdrawn, both the adjudicator and the Federal Court of Appeal went on to ignore any distinction between a grievance that had been withdrawn and a grievance that had not. That silence is not dispositive, but it is telling.

[58] Instead, the adjudicator concluded that the implied jurisdiction to resolve a dispute over non-compliance with a settlement agreement was consistent with s. 236 of the *Act* (which ousts the jurisdiction of the courts) and what were then ss. 13 and 226(2) of the *Act* (which provided that an adjudicator could mediate a dispute between the parties); see paragraphs 69 to 71 about ousting the jurisdiction of the courts and paragraphs 64 to 67 about mediation. The Federal Court of Appeal agreed with the adjudicator on both points; see paragraphs 46 and 57 to 61 on ousting the jurisdiction of the courts and paragraph 66 about mediation.

[59] Sections 13, 15, and 226(2) of the pre-2014 version of the *Act* have been replaced by s. 14(c) of the *Act* and s. 23 of the *Federal Public Sector Labour Relations and Employment Board Act*, both of which also provide that the Board may mediate grievances. Section 236 remains the same as when *Amos* was decided. I agree with the adjudicator in *Amos* and the Federal Court of Appeal in that same case that these provisions are important context to determine the Board's power to enforce a settlement agreement. I go further and state that interpreting s. 12 of the *Act* such that settlement agreements could not be enforced by the Board simply because the

grievance was withdrawn after the settlement was reached would frustrate the Board's use of mediation and the exclusive jurisdiction of the grievance process in s. 236 of the *Act*. I acknowledge that I have no indication that this particular settlement agreement was reached using the Board's mediation services, but the principle that effective mediation requires the ability to enforce agreements remains.

c. Other Board cases

[60] Adjudicators and the Board have applied *Amos* on over 40 occasions since the Federal Court of Appeal affirmed the adjudicator's result. Adjudicators and the Board have never stated that *Amos* does not apply to grievances that have been withdrawn. Instead, they have repeatedly found that "[t]he decision in *Amos* also confirmed the Board's authority to determine whether a party has complied with the terms of a settlement agreement"; see *Reid v. Deputy Head (Library and Archives of Canada)*, 2021 FPSLREB 104 at para. 111. See also *Valderrama v. Deputy Head (Department of Foreign Affairs, Trade and Development)*, 2020 FPSLREB 86 at para. 4; *Ferlatte v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 118; *Jadwani v. Treasury Board (Federal Economic Development Agency for Southern Ontario)*, 2015 PSLREB 22 at para. 164; *Topping v. Deputy Head (Department of Public Works and Government Services)*, 2014 PSLRB 74; *Alibay v. Deputy Head (Department of Employment and Social Development)*, 2014 PSLRB 29 at para. 24; *Chaudhary v. Deputy Head (Department of Health)*, 2013 PSLRB 160 at para. 30; and *Public Service Alliance of Canada v. Parks Canada Agency*, 2012 PSLRB 98 at para. 21.

[61] However, the grievance was not withdrawn in any of the cases listed in the last paragraph.

[62] The respondent cited two cases in which an adjudicator and the Board heard allegations of a settlement breach and the original grievance was withdrawn: *Osman v. Deputy Head (Department of Employment and Social Development)*, 2018 FPSLREB 15 (upheld in 2019 FCA 72), and *Palmer v. Canadian Security Intelligence Service*, 2010 PSLRB 11. In *Osman* the grievor argued that the settlement had been procured by misrepresentation, and in *Palmer* the grievor alleged that the settlement had been procured by fraud. The Board dismissed the first argument, and an adjudicator dismissed the second. I agree with the respondent that those two cases demonstrate that withdrawing a grievance does not completely deprive the Board of jurisdiction to address issues that arise about the agreement culminating in that withdrawal.

[63] The grievor argues that *Osman* stands for the proposition that the Board has jurisdiction only in "exceptional circumstances". That is not what *Osman* states. In *Osman*, the Board stated that it would reopen or set aside a settlement only in exceptional circumstances. Exceptional circumstances were not required for the Board to take jurisdiction over a dispute about a settlement agreement; they were required only to set aside the agreement. In other words, the Board did not suggest that exceptional circumstances were required for it to have jurisdiction to decide that case, only to grant the order sought by the grievor to reopen the settlement.

[64] However, in those two cases, the Board did not expressly address whether the grievance having been withdrawn was relevant. I have addressed the point at length in this decision because the grievor raised the issue and to provide clarity on this point going forward.

[65] The decision in *Godbout v. Treasury Board (Office of the Co-ordinator, Status of Women)*, 2016 PSLREB 5 is also instructive. In that case, the parties reached a settlement but the grievor refused to sign the final minutes of settlement. The adjudicator concluded that there was an agreement despite the absence of signatures, and that the terms of the agreement were a cash settlement in exchange for a withdrawal of the grievance. While the grievor did not withdraw their grievance, the adjudicator did not rely upon that fact in any way in its decision. Instead, not only did the adjudicator conclude that there was an agreement, they also went on to order specific additional terms of that agreement (including accelerating the payment to the grievor) and then closed the Board's file because a term of the settlement was that the grievance would be withdrawn. This case is typical of an adjudicator or the Board ignoring the presence or absence of a withdrawal when deciding its jurisdiction — which, in that case, extended to imposing settlement terms on the parties.

[66] The closest a decision maker has come to requiring that a grievance not be withdrawn was in *Exeter*. In that case, the grievor asked an adjudicator to recuse themself from a hearing into whether a settlement agreement was valid and to appoint another adjudicator instead. The adjudicator refused. The grievor also asked the Board to appoint a different adjudicator. The Board refused. In the Federal Court of Appeal, the grievor argued that the Board had misapprehended the request by focussing on the authority to deal with the validity of the settlement agreement. The Court of Appeal rejected this argument, finding that the Board was properly focussed on the question

of bias. However, the Court of Appeal stated in passing at paragraph 33 that "… the fact remains that, in *Amos*, this Court made it clear that the adjudicator's power to deal with the enforceability and implementation of a MOA arises from being seized with the grievances."

[67] Taken out of context, that passage could indicate that the Board must still be seized with a grievance (i.e., it has not been withdrawn) to have jurisdiction over the terms of settlement. But the passage must be read in context, which was a pre-2014 dispute over which adjudicator (the previous one or a new one appointed by the Board) should decide the validity of the settlement agreement — not over whether the adjudicator had that power at all.

[68] I have also found it instructive to review the cases involving the settlement of proceedings other than grievances.

[69] The Board has extended *Amos* beyond the settlement of grievances. The Board has applied *Amos* to duty-of-fair representation complaints (see *Priest v. Professional Institute of the Public Service of Canada*, 2023 FPSLREB 2; and *Fillet v. Public Service Alliance of Canada*, 2013 PSLRB 43) and unfair-labour-practice complaints (see *Tench v. Treasury Board (Department of National Defence)*, 2013 PSLRB 124).

[70] In those cases, the Board had jurisdiction to enforce a settlement because it had jurisdiction over the underlying dispute under the *Act*. In other words, *Amos* applies more broadly than to grievances that have not been withdrawn; it applies to other Board proceedings under the *Act*.

[71] By contrast, the Board has concluded that it does not have the jurisdiction to order compliance with a settlement agreement reached to resolve a proceeding that was brought under some other statute. The Board found that it lacked that jurisdiction because the agreement resolved a dispute such as a complaint under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13), as in *Abeysuriya v. Treasury Board (Department of Public Works and Government Services)*, 2016 PSLREB 15, or the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6), as in *Mache-Rameau v. Deputy Head (Department of Foreign Affairs, Trade and Development)*, 2021 FPSLREB 15 (upheld in 2023 FCA 5). The Federal Court (and not the Board) also took jurisdiction over a grievor's attempt to enforce a settlement reached to resolve a complaint under the

Public Service Employment Act in *Taticek v. Canada (Border Services Agency)*, 2014 FC 281.

[72] An adjudicator has also found that they lack the jurisdiction to enforce a settlement on behalf of an individual employee when the settlement was between an employer and bargaining agent to resolve an unfair-labour-practice complaint because the individual employee could not grieve the unfair labour practice; see *Cossette v. Treasury Board (Department of Transport)*, 2013 PSLRB 32; and *Wray*. In those cases, they did not have jurisdiction because the person trying to enforce the settlement did not have the required standing as they were not a party to the initial complaint or the settlement agreement.

[73] In other words, the Board has assumed jurisdiction to enforce a settlement agreement when two conditions have been met: (1) the proceeding that was settled was commenced under a provision of the *Act* granting the Board jurisdiction to hear the dispute, and (2) the party trying to enforce the settlement was also a party to the initial proceeding. Since *Amos*, neither the Board nor an adjudicator have ever refused jurisdiction simply because the proceeding that was settled was withdrawn after the settlement.

[74] I want to stress the first of those two conditions — that the proceeding that was settled must have been commenced under the *Act* in a way that would give the Board jurisdiction over the underlying dispute. Section 12 of the *Act* only gives the Board powers that "… are incidental to the attainment of the objects of **this Act** … [emphasis added]". It does not give the Board the power to enforce settlements reached to resolve disputes commenced under other statutes.

[75] Additionally, when dealing with grievances s. 209 of the *Act* remains "… the only provision of the [*Act*] that attributes jurisdiction …" to the Board to determine the grievance: *Chamberlain v. Canada (Attorney General)*, 2015 FC 50 at para. 41. The Board has no jurisdiction to resolve a dispute over the implementation of the settlement of a grievance under s. 208 of the *Act* that was never referred to the Board for adjudication. Such a power would run beyond the scope of a basket clause because it is inconsistent with the broader context of the *Act* which provided Parliament's intention that the Board only deal with some grievances, not all.

3. The *Act*'s purpose supports enforcing a settlement agreement when the grievance has been withdrawn

[76] I begin this section of this decision by repeating what I said earlier about the use of policy or purpose when determining the Board's jurisdiction. The Board does not have jurisdiction over a matter solely because there are good policy reasons for it or because taking jurisdiction is consistent with the purposes of the *Act*. I will use the *Act*'s purpose as an aid to interpreting s. 12 of the *Act*, not as the stand-alone source of the Board's jurisdiction.

[77] Interpreting s. 12 of the *Act* to permit the Board to enforce a settlement even when the grievance that was settled was withdrawn is also consistent with the purpose of the *Act*. In *Amos*, both the adjudicator (at paragraph 63) and the Federal Court of Appeal (at paragraph 44) quoted from the preamble of the *Act* and found that enforcing settlement agreements was "… 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 …'".

[78] I agree.

[79] I also agree with a similar point made by the Canada Industrial Relations Board in *Canadian National Railway Company*, 2006 CIRB 362 at paras. 36 and 39 (cited by the adjudicator in *Amos*) that one of the "primary goals and legislative objectives" of labour relations legislation is "… to promote the constructive settlement of disputes" and that "[t]he 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."

[80] I have also considered the principle of finality. Finality is an important principle in labour relations and in quasi-judicial proceedings more generally: see, for example, *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39 at para. 62 and *Benson v. Treasury Board (Department of Citizenship and Immigration)*, 2020 FPSLREB 30 at para. 57.

[81] In this case, finality can cut both ways. Taking jurisdiction over a grievance that has been withdrawn undermines the principle of finality, as parties are entitled to rely upon such a withdrawal and treat disputes that have been withdrawn as being over.

Normally, therefore, the principle of finality would weigh against the Board having jurisdiction in this case.

[82] On the other hand, an expeditious and straightforward method of enforcing settlements is consistent with the interests of finality, as it encourages parties to abide by the terms of negotiated settlements. Additionally, one consequence of the uncertainty over whether the Board has jurisdiction to resolve a dispute over the implementation of a settlement when the grievance has been withdrawn is that parties refuse to withdraw cases after they are settled. There are hundreds of settled cases that remain open with the Board because grievors will not withdraw them, including cases that were settled over a decade ago. This inventory of settled cases remains despite the Board's ongoing process of informing bargaining agents about these old grievances and asking for written explanations for why they remain open, as described at page 13 of the Board's 2021-2022 Annual Report. Parties are still warehousing old cases with the Board indefinitely to ensure that the Board retains jurisdiction over any disputes about the implementation of those settlements. This undermines the principle of finality as it requires the parties to continuously monitor "open" cases rather than closing cases and re-opening them only when necessary to enforce the terms of a settlement.

[83] Losing jurisdiction once a grievance is withdrawn would also lead to two absurd practical results that are inconsistent with the *Act*'s stated purpose of fostering harmonious labour-management relations.

[84] First, settlements can contain terms implemented once, as well as terms implemented indefinitely. For example, a common settlement of a termination grievance is that the employer pays the grievor a lump sum of money in exchange for the grievor withdrawing the grievance. Those are terms implemented a single time.

[85] In addition, the parties often include terms that go on indefinitely, such as confidentiality clauses, an undertaking by the grievor not to reapply for employment with a particular department, or a non-disparagement clause by which one or both parties agree not to publicly criticize the other. If the Board lost jurisdiction once a grievance was withdrawn, this would mean that the same settlement would be enforced in different forums depending upon what term of the settlement was at issue. A one-time obligation that took place before the grievance was withdrawn would be

resolved by the Board, while an ongoing obligation breached after the grievance was withdrawn would be resolved by a court. This partially explains the practice I described earlier of some parties never withdrawing grievances. In other cases, like this one, the grievor withdrew the grievance after the one-time obligations were fulfilled. It makes little sense for the Board to have jurisdiction to resolve disputes over the one-time obligations, but not have jurisdiction to resolve disputes over the indefinite obligations in the same settlement agreement.

[86] Second, basing jurisdiction on whether a grievance has been withdrawn would also allow grievors to "forum-shop" disputes over the implementation of settlement agreements by strategically withdrawing their grievances to drive jurisdiction over the disputes to the courts. This would be particularly problematic if a grievor withdrew their grievance after a hearing but immediately before the Board was set to rule on whether the grievor breached the terms of settlement, forcing the employer to incur the expense of having to litigate the breach twice: once at the Board, and then again in court if the grievor withdrew the grievance at the conclusion of the Board's hearing but before the Board issued its decision.

[87] For these reasons, the Board retaining jurisdiction to resolve disputes over settlements even after the grievance has been withdrawn is consistent with the purpose of the *Act*, in particular the purposes set out in the Preamble to the *Act* of effective and harmonious labour-management relations and of "… fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment". Declining jurisdiction simply because a grievance was withdrawn after the settlement was reached would also lead to arbitrary results that make the distinction between whether a grievance has been withdrawn untenable.

4. Broader context: change in consequences of withdrawing a case

[88] Finally, the consequences of withdrawing a grievance have changed somewhat since *Amos* was decided in 2008, as the rule in *Lebreux* is less ironclad than it was.

[89] There is a difference between discontinuing or withdrawing a legal proceeding on the one hand and a court or tribunal determining the outcome of that proceeding on the other. For clarity, the terms "discontinue" and "withdraw" mean the same thing; see *DM v. Minister of Employment and Social Development*, 2021 SST 908. The two terms also have the same effect.

[90] In its 2016 decision in *Philipos v. Canada (Attorney General)*, 2016 FCA 79 at para. 13, the Federal Court of Appeal clarified the difference between discontinuing a proceeding and having a court determine the result in that proceeding. The difference is that discontinuing a proceeding does not trigger the bar against relitigation, and a party can "resurrect and continue a discontinued proceeding"; determining a proceeding, on the other hand, does trigger the bar against relitigation. This means that a court can set aside a discontinuance. See also *DLC Holdings Corp. v. Payne*, 2021 BCCA 31 at para. 45, for that rule.

[91] The Federal Court of Appeal was very clear that a discontinuance would be set aside only in "exceptional circumstances" and that "… a discontinued proceeding can **almost never** be resurrected … [emphasis added]" (see *Philipos*, at para. 19). However, this is still a change from *Lebreux*: "almost never" is not the same thing as "never."

[92] The Court of Appeal went on to explain what it meant by "almost never":

> …
>
> *[20] Only some fundamental event that strikes at the root of the decision to discontinue can warrant the resurrection and continuation of a discontinued proceeding. Examples include the procurement of discontinuance by fraud, mental incapacity of the party at the time of discontinuance,* ***or repudiation of a settlement agreement that required a proceeding to be discontinued.***
>
> …
>
> [Emphasis added]

[93] I pause here in my description of *Philipos* to point out that the emphasized passage just quoted about repudiation is not the approach at the Board. The doctrine of repudiation is not recognized in grievance settlements; see *Jadwani*, at para. 179. In other words, a party cannot repudiate the settlement of a grievance, no matter how egregious the breach of the agreement. This also means that the non-breaching party cannot void a settlement agreement because the breaching party repudiated it.

[94] Nevertheless, the Court of Appeal's decision in *Philipos* is a recognition that settlement agreements have some role to play in whether a court or tribunal can resurrect a proceeding that has been withdrawn. In this way, the Court of Appeal's 2016 decision in *Philipos* is a modest change from its 1994 decision in *Lebreux*.

5. The Board's power to resolve disputes over settlements is not found in its power to review and vary a decision

[95] The respondent argued that the Board's power to resolve a dispute over the implementation of a settlement agreement when the grievance had been withdrawn derives from the Board's power to review, rescind, or amend its previous orders under s. 43 of the *Act*. The Federal Court of Appeal rejected that argument in *Lebreux*. As already quoted, the Court of Appeal concluded that discontinuing a grievance closed the file without the need for an order, and therefore, there was no order to review under what is now s. 43 of the *Act*.

[96] I must follow that result.

[97] Additionally, that result is consistent with the approach in *Philipos*. In that case, the Federal Court of Appeal stated clearly that a power to review and vary applies only when there has been a determination by the court — not when a party has discontinued a case. Therefore, I have no good reason to depart from the rule laid out in *Lebreux* that the Board's power to review and vary its decisions does not extend to a case that has been withdrawn instead of decided.

[98] As I have already explained, the Board's jurisdiction is grounded in s. 12 of the *Act*, which was not available to an adjudicator when *Lebreux* was decided. I have not applied s. 43 of the *Act* in this case.

6. Conclusion on whether the Board has jurisdiction to enforce a settlement when the grievance has been withdrawn

[99] For these reasons, I agree with the respondent that the Board has the jurisdiction to resolve a dispute over the implementation of a settlement agreement even if the grievance that was settled was withdrawn.

V. The Board has jurisdiction to deal with disputes over settlements by former employees

[100] I turn now to the second issue the grievor raised — that she is no longer an employee. The Board previously enforced settlement agreements when the grievor was no longer an employee in *Reid*, *Valderrama*, *Godbout*, *Topping*, and *Alibay*. As I will explain, I agree with the results in those decisions that the Board has the jurisdiction to enforce a settlement agreement when the grievor is no longer employed.

A. Disputes over implementing a settlement do not require a new grievance

[101] The grievor's concern arises from a misapprehension shared by both parties that a grievor must file a fresh grievance about an alleged breach of a settlement agreement. A grievor does not need to file a new grievance to enforce a settlement.

[102] The Federal Court of Appeal summarized the correct position in *Amos* as follows, in a passage worth quoting:

> …
>
> *[47] These are the two possible options examined by the adjudicator (adjudicator's reasons, at paragraph 99):*
>
> ***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.*
>
> *[48] The adjudicator opted for the latter ….*
>
> …
>
> *[66] I am unable to accept the respondent's contention that filing a new grievance under section 208 of the Act constitutes an effective redress for the appellant.…*
>
> …
>
> [Emphasis added]

[103] The result in *Amos* is clear: when a grievor alleges a breach of a settlement agreement, they do not need to file a new grievance.

[104] In addition to the reasons provided in *Amos*, this result is also necessary to ensure that an employer can enforce a settlement agreement at the Board. An employer may be entitled to a remedy if a grievor breaches the terms of a settlement agreement, such as damages (see *Community Living Atikokan v. Ontario Public Service Employees Union* (2021), 333 L.A.C. (4th) 143 (Nairn)) or the repayment of the settlement funds (see *Globe and Mail (The)* (2013), 233 L.A.C. (4th) 265 (Davie), upheld in *Wong v. The Globe and Mail Inc.*, 2014 ONSC 6372). Employers have no right to file

grievances except for policy grievances against a bargaining agent under s. 220 of the *Act*. If enforcing a settlement agreement required a fresh grievance, an employer could never enforce a settlement agreement with the Board — it would have to go to court. The decision in *Amos* that a new grievance is unnecessary avoids this result in which one party to a settlement agreement could enforce it with the Board, but the other party would have to go to court.

[105] Finally, I agree with an earlier decision of an adjudicator that states, "In all my years of experience in labour law, I have never heard any party suggest that it is in the interests of good labour relations to encourage the filing of more grievances"; see *Thom v. Treasury Board (Department of Fisheries and Oceans)*, 2012 PSLRB 34 at para. 72. I acknowledge that a judicial review against that decision was dismissed on the basis of mootness and that the Federal Court (*Canada (Attorney General) v. Thom*, 2013 FC 326 at para. 65) stated specifically that "… the precedential value of this decision is extremely dubious when it comes to the way that settlement agreements will function in future disputes"; however, the Court was discussing other aspects of that case. The principle remains: the fewer grievances, the better.

B. Broader context: a former employee can sometimes grieve anyway

[106] Permitting a former employee to enforce a settlement agreement with the Board is also consistent with the broader principle that a former employee still has access to grievance adjudication when the grievance is in relation to their suspension from or termination of employment (see s. 206(2) of the *Act*) or when the material facts underlying a grievance transpired while the aggrieved person was still employed (see *Canada (Attorney General) v. Santawirya*, 2019 FCA 248 at para. 11).

[107] I agree with the respondent that the essential character of this dispute over the enforcement of the settlement agreement arises from the termination of the grievor's employment.

[108] I acknowledge that the alleged breaches of the settlement agreement occurred after the grievor was no longer an employee. However, contrary to the grievor's submissions, I am unpersuaded that the timing of the alleged breaches of the settlement agreement affects the essential character of this case. The essential character of this case is about the termination of her employment, not about the specific nature of the alleged breaches of that settlement. Also, if the grievor is correct

that a former employee could not enforce a settlement with the Board, then no settlement of a termination of employment could ever be enforced with the Board.

[109] The key to the Board's jurisdiction is the nature of the underlying dispute. Whether or not the grievor remained an employee is irrelevant.

C. Timeliness issue

[110] This finding also disposes of the respondent's objection to the timeliness of the grievance alleging a breach of the settlement agreement. The grievance was unnecessary. The grievor could have written to the Board to reactivate the two files that were withdrawn and proceeded with this dispute over the settlement agreement using those existing files. The 25-day deadline to file a grievance simply does not apply to an application to reactivate a file to enforce a settlement agreement. As there is no statutory deadline for such an application, any dispute about the timeliness of a grievor's efforts to enforce the settlement agreement will be determined based on whether the grievor's delay in proceeding constitutes an abuse of process, as described in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29.

VI. Summary of the Board's jurisdiction to resolve disputes over the terms of settlements

[111] In conclusion, the Board has the jurisdiction to resolve disputes over the terms of settlements so long as two conditions are met:

> 1) the proceeding that was settled was commenced under a provision of the *Act* granting the Board jurisdiction to hear the dispute; and
> 2) the party trying to enforce the settlement was a party to the initial proceeding and the settlement.

[112] This approach applies regardless of whether the party that initiated a proceeding with the Board withdrew that proceeding.

[113] Finally, a grievor attempting to enforce a settlement agreement does not need to file a fresh grievance alleging a breach of the settlement agreement. Instead, a grievor may simply write to the Board using an existing file or, if the grievor has already withdrawn their grievance, ask the Board to resurrect their old grievance file for the purposes of resolving a dispute over the settlement agreement.

[114] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VII. Order

[115] I declare that the dispute over the alleged breach of the settlement agreement between the grievor and the respondent falls within the jurisdiction of the Board.

[116] Board file no. 566-02-41571 will be closed.

[117] Board file no. 566-02-11394 will be reactivated to address the claim that the respondent did not comply with the terms of the settlement agreement.

December 15, 2023.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board