2-4-1982

# Re Campbellton (City of) and Canadian Union of Public Employees, Local 76

Innis Christie

H Harvey

D Cochrane

## RE CITY OF CAMPBELLTON AND CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 76

*I. Christie, H. Harvey, D. Cochrane. (New Brunswick) February 4, 1982.*

EMPLOYEE GRIEVANCES alleging unjust discharge.

*M. Hikl* and *L. P. Arseneault*, for the union.
*J. G. Petrie* and *S. Fraser*, for the employer.

## INTERIM AWARD

We are concerned in this interim award with the legal questions of whether this board of arbitration is properly constituted and whether we have jurisdiction to deal with the grievances before us. At this stage we are not concerned with whether or not the dismissal of the grievors by the employer was just and reasonable. Indeed, we do not have before us evidence of the facts on the basis of which any decision on that ultimately important issue will have to be made. The only facts which concern us now are those which are necessary for the legal decision we must make on the employer's preliminary objection, and I will attempt to state them briefly.

For the period January 1, 1979 to December 31, 1980, the collective bargaining relationship between the parties was subject to a collective agreement between the parties made January 12, 1979. That collective agreement included the right of management under art. 1.02(f): "To discharge, suspend or discipline employees for just and reasonable cause." It also contained quite standard grievance and arbitration provisions, concluding with the following:

> 13.01 *Composition of Board of Arbitration*
>
> When either party requests that a grievance be submitted to arbitration, the request shall be made by registered mail addressed to the other party of the Agreement, indicating the name of its nominee on an Arbitration Board. Within five (5) scheduled working days thereafter, the other party shall answer by registered mail indicating the name and address of its appointee to the Arbitration Board. The two arbitrators shall then meet to select an impartial chairman.
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> 13.02 *Failure to Appoint*
>
> If the recipient of the notice fails to appoint an arbitrator, or if the two appointees fail to agree upon a chairman within seven (7) scheduled working days of appointment, the appointment shall be made by the Minister of Labour, upon request of either party.
>
> . . . . .
>
> 13.05 *Decisions of the Board*
>
> The decision of the majority shall be the decision of the Board. Where there is no majority decision, the decision of the Chairman shall be the decision of the Board. The decision of the Board of Arbitration shall be final and binding and enforceable on all parties, but in no event shall the Board of Arbitration have the power to change this Agreement or to alter, modify or amend any of its provisions. However, the Board shall have the power to dispose of any discharge or discipline grievance, by any arrangement which in its opinion it deems just and equitable.

There can be no doubt, therefore, that if this board were sitting during the regular term of the 1979-80 collective agreement we would be properly constituted and have jurisdiction to deal with this matter. Our constitution and jurisdiction have been put in issue because the grievors were not dismissed until April 6 or 7, 1981. The resolution of City Council that the grievors "be discharged immediately" was passed on April 6th. They were not advised of their dismissals by the city in its capacity as employer until April 7th.

On April 8, 1981, a new collective agreement was signed by the parties. It provides in art. 34.02:

> *Term of Agreement*
>
> This Agreement shall be binding and remain in effect from the date of signing to December 31, 1982, with wages only being retroactive to January 1, 1981.

Two provisions of the 1979-80 collective agreement bear on the question of the state of the collective bargaining relationship between the parties and the grievors just prior to April 8, 1981. The article entitled "Term of Agreement" provided:

> 34.01 *Term of Agreement*
>
> This agreement shall be binding and remain in effect from January 1, 1979 to December 31, 1980 and shall continue from year to year thereafter unless either party gives to the other party notice in writing by October 1st, 1980 that it desires its termination or amendment.

The critical provision in the 1979-80 collective agreement for purposes of this award was art. 34.05(b), the continuation or "bridge" provision:

> 34.05(b) *Agreement to Continue in Force*
>
> Both parties shall adhere to the terms of this Agreement during the collective bargaining. If negotiations extend beyond the termination of the Agreement, any revision in terms mutually agreed upon shall, unless otherwise specified, apply retroactively to that date.

It is undisputed that on October 1, 1980, the union gave notice to bargain. (My notes of the testimony of Mr. Murray, the grievor, show that he gave the date as October 1, 1979, but it is perfectly evident from the context that what he intended to say was "1980".) In the months that followed there were normally two bargaining sessions of about two days each per month. In November, 1980, the union applied for the services of a conciliation officer. These services were first provided early in December or late in November. At any rate the parties met once with the conciliation officer before Christmas and several times after the New Year, that is after the 1979-80 collective agreement had expired. The union then applied for the appointment of a

conciliation board and, under date of February 2, 1981, received a "no board letter" from the provincial Department of Labour and Manpower. On February 11th a strike vote was conducted, the propriety of which was admitted by counsel for the employer. It is to be noted that the grievor, Kelly Murray, testified that because of his function as a fire-truck driver he did not participate in the strike vote. On February 13th, the union served the city with a proper strike notice and received from the city a proper notice of lock-out. However, according to the uncontradicted evidence of Mr. Murray, all the members of the union continued to work and negotiations continued. Toward the end of February, the following was delivered by the city to the homes of the members of the union:

EMPLOYEES' INFORMATION BULLETIN

The purpose of this bulletin is to inform all members of CUPE Local #76 of the City's position relative to negotiations for a new Collective Agreement and to acquaint each one of you with the benefits proposed by the City's negotiating team.

In late January, Mr. Leopold Arseneault, on behalf of CUPE Local #76, applied to the Minister of Labour for a Conciliation Board and upon being denied this Board, the Local was then in a position to take a strike vote on February 11, 1981; but by this action of Local #76, under the Industrial Relations Act, February 11, 1981 also brought about the termination of the 1979-80 working agreement.

While the City regrets any inconvenience that may result, we must advise you that since we no longer have a working agreement, the City will no longer contribute to such benefits as Blue Cross and Group Insurance.

This same information was given to the CUPE negotiating team who failed to respond to the City's offer to have the union continue to make payments to ensure the continuation of these benefits.

The Union Bargaining Committee, by rejecting the employer's last proposal, has deprived all members of the Local of the benefits of a number of excellent proposals which were submitted by the City negotiator for consideration.

One item in particular, namely a long term disability plan, caused our negotiating team to stare in disbelief and amazement when CUPE Local #76 rejected this offer outright. Here was a means of providing each member of the Local with a life-time income in the event of total disability at low cost; the Local said "No." I find it extremely difficult to rationalize such an attitude.

The City also offered increased life insurance, a dental plan, an improved maternity plan, hazard pay for Water Department employees, clothing for Dispatcher/Receptionists and several other items to improve the quality of working life for all members of Local #76.

Even after consideration of the costs of the above-mentioned items, the City negotiator offered an extremely generous wage package, as is evident from the attached sheet, which provides a very attractive salary for each and every member of the Local.

> The spokesman for the Union placed great emphasis on training for employees in the Fire Department. The City negotiator, despite instructions to the contrary, in an effort to satisfy what appeared to be the number one concern of the Union, offered a program whereby the Drivers were guaranteed training. It appears that once this benefit was in the hands of the spokesman for the unit, it became less important.
>
> We trust that you will study this bulletin very carefully and, after due consideration, that you will strongly urge the executive of CUPE Local #76 to accept the City's offer so that we may all get back to the business at hand, namely, making a living and making living worthwhile.
>
> Yours truly,
>
> (signed) Richard J. Tingley

In accordance with this "Bulletin", benefits as provided for by the 1979-80 collective agreement were discontinued for a time, although not in the case of the grievor, Kelly Murray. His benefits were continued after he discussed his special status as fire-truck driver with Mr. Fraser, industrial relations officer for the employer. The evidence is that benefits were restored to all members of the union on March 5th as a result of negotiations between Mr. Murray, in his capacity as president of the union, and Mr. Petrie, as chief negotiator for the employer.

The position taken by the City of Campbellton was that at the time the "Bulletin" was delivered it had no further obligations under the 1979-80 collective agreement. Whether or not that position was correct is closely related to the issue before us, and should not be assumed. At any rate, the reinstitution of the benefits was, without question, an aspect of ongoing negotiations which eventually resulted in the 1980-81 collective agreement.

Because only the preliminary issue is before us, the evidence is quite properly somewhat vague with respect to what transpired between the time of the reinstitution of the benefits and the dismissal of the grievors. During the union meeting in February at which the strike vote had been taken, a motion to restrict voluntary overtime, as a bargaining device, had also been passed. Apparently, some time around the first of April there was a refusal to work overtime which involved the grievors and it was this that resulted in the resolution of the Campbellton City Council that they be discharged.

As has already been stated, the resolution that the grievors be discharged was passed on April 6th, and its effect communicated to the grievor, Kelly Murray, by the city in its capacity as employer on April 7th. There is no evidence before the board as to when Mr. Charlong was advised of his discharge but we may proceed on the basis that the two grievors are to be treated the same for the purposes of this preliminary objection.

On April 16, 1981, the grievors filed grievances adverting to the *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, and art. 1.01(f) of the collective agreement. Mr. Murray's grievance refers specifically to "the Collective Agreement dated January 12, 1979". Mr. Charlong's grievance refers simply to "the Collective Agreement" and "the applicable Collective Agreement".

From the time the grievances were filed the employer has taken the position that no collective agreement was in force at the time the grievors were discharged, as evidenced by the following letter to Mr. Murray:

> May 4, 1981
>
> Mr. Kelly Murray, President
> CUPE Local #76
> 38 Lansdowne Street
> Campbellton, N.B.
>
> Dear Kelly:
>
> We have received your letter of April 30, 1981 and we have noted your reference to the 1979 Labour Agreement which, as you know, expired on December 31, 1980.
>
> As we have stated on many occasions, we consider that this agreement ended when the Union was in a legal strike position and the City was in a legal lock-out position; therefore, it has no application whatsoever to the alleged grievances of yourself and Mr. Charlong.
>
> Yours truly,
>
> J. E. Woods
> City Clerk-Administrator

In accordance with this stance the employer refused to make a nomination to this board of arbitration. Accordingly, Mr. Cochrane was appointed by the Minister of Labour and Manpower for the Province of New Brunswick, over date of August 6, 1981, in the following terms:

> Pursuant to the authority vested in me under Section 73(2) of the Industrial Relations Act or Article 13.02 of the 1979-80 collective agreement between the parties, or both, I hereby appoint Mr. Denis Cochrane, Employer Nominee, as Member of an Arbitration Board being established to deal with grievances number 70, 71 and 72 in dispute between the Canadian Union of Public Employees, Local 76 and the City of Campbellton, New Brunswick.

Subsequently, over date of October 5, 1981, I was appointed chairman of this board of arbitration in the following terms:

> Pursuant to the authority vested in me by Section 73, Subsection (2), Industrial Relations Act, I hereby appoint Mr. Innis Christie as Member and Chairman of an Arbitration Board being established under the said Act to deal with matters in dispute between the Canadian Union of Public Employees, Local 76 and the City of Campbellton, New Brunswick.

At the hearing on this preliminary issue this board of arbitration was duly sworn, and any objection to our manner of proceeding in that respect was waived by counsel for both parties, but beyond that the employer participated subject to objection as to the propriety of our constitution and to our jurisdiction to deal with the grievances before us.

*The issues*

Primarily, the issue is whether, under the terms of the 1979-80 collective agreement between the parties, particularly art. 34.05(b), the bridge provision, considered in the context of the New Brunswick *Industrial Relations Act* and the relevant judicial decisions, this board is properly constituted and has jurisdiction to deal with the dismissals of the two grievors. Alternatively, we should consider whether we are properly constituted and have jurisdiction under the 1981-82 collective agreement, read in the same context.

*Decision*

Before dealing with the issues as I have stated them I think it useful to address three difficult legal questions adverted to by counsel which I do not believe to be in issue here. Counsel for the employer raised these issues and laid the base for his very able argument with a quote from Arthurs, Carter and Glasbeek, *Labour Law and Industrial Relations in Canada* (1981), where, at paras. 699-701, the learned authors state:

> *Potential legal vacuum upon expiry of the collective agreement*
>
> 699. Collective agreements, unlike many individual contracts of employment, are not of indefinite duration and must be renewed at periodic intervals. Negotiations for renewal may be protracted and often extend past the expiry of both the collective agreement and the period of the statutory freeze. Where employees continue to work beyond both the expiry of the collective agreement and the freeze period a question may arise as to whether their terms and conditions of employment are still governed by the expired collective agreement.
>
> 700. It appears to be recognized that the provisions of the collective agreement relating to the terms and conditions of employment of the employees in the bargaining unit survive both the expiry of the collective agreement and the period of the statutory freeze (*Telegram Publishing* (1976), 76 C.L.L.C. para. 14,047 (Ont. C.A.)). At that point the right to alter unilaterally these terms of employment is not entirely unqualified, since in some circumstances a unilateral alteration might be interpreted as a breach of the obligation to bargain in good faith. Moreover, at this stage, there is a question of how the surviving terms and conditions of employment might be enforced. It is open to argument as to whether these terms survive in the form of individual contracts between employer and employee that would be enforceable in the ordinary courts, or whether they still must be enforced

through grievance and arbitration procedures administered by the trade union. One court has held that the grievance and arbitration procedures become part of the individual contracts of employment between the employer and the employees upon the expiry of the collective agreement (*Re Prince Rupert Fishermen's Co-op. Assoc. and United Fishermen* (1969), 66 W.W.R. 43 (B.C.S.C.)). Some doubt has been expressed, however, as to whether this type of provision, which is integral to the relationship between union and employer, is consistent with the terms usually found in individual contracts of employment.

701. The legal vacuum created by the expiry of the collective agreement usually poses a problem only where there has been a failure to renew the collective agreement. In those cases where the collective agreement is renewed the parties are likely to make the new agreement retroactive to the expiry date of the previous agreement. These retroactive provisions, however, have sometimes been interpreted by arbitrators as not touching all terms of the collective agreement. Where full retroactivity would lead to impractical and unintended results, then certain terms of the agreement may not be given retroactive effect (*Penticton and District Retirement Service* (1978), 16 L.A.C. (2d) 97 (B.C.L.R.B.)).

First, it is quite clear that "the statutory freeze" was not in effect when the grievors were discharged and is not relevant here. In the *Industrial Relations Act*, as amended, the "freeze" is found in s-s. 35(2) which provides:

35(2) Where notice has been given under section 32 or 33 [which refers to notice to renew a collective agreement as occurred here] and no collective agreement is in operation, no employer . . . shall, except with the consent of the trade union or council of trade unions, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the employers' organization, the trade union, the council of trade unions, or the employees . . . until a collective agreement or a renewal or revision of the agreement or a new agreement has been concluded or one of the following conditions has been met:

. . . . .

(*b*) until, where the Minister has appointed a conciliation officer or mediator to confer with the parties, fourteen days have elapsed after the Minister has released to the parties a notice that he does not deem it advisable to appoint a conciliation board . . .

Here, when the Department of Labour issued its "no board report" the conditions of cl. (2)(*b*) were satisfied and the freeze no longer applied. That much at least this board, unarguably, has jurisdiction to decide. Subsection 35(3) provides:

35(3) Where notice has been given under section 33 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (2) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation with the reference made thereunder and section 55 applies *mutatis mutandis* thereto.

Section 55 is the standard statutory arbitration provision in the

New Brunswick Act to which I make further reference below. Also relevant is s. 75(3) which provides:

> 75(3) Notwithstanding that the term of a collective agreement has expired, the provisions thereof and of section 55 for the final settlement without stoppage of work by arbitration or otherwise, of all differences concerning the interpretation, application, administration or an alleged violation of the agreement, including any question as to whether a matter is arbitrable, continue in force after the expiry of the term, where a notice has been given under section 33, until the date when one of the conditions, whichever occurs first, prescribed in subsection 91(2), for a strike or lock-out is met.

Subsection 91(2) provides, in terms similar but not the same as those in s-s. 35(2), that:

> 91(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock-out an employee
>
> . . . . .
>
> (*b*) until, where the Minister has appointed a conciliation officer or a mediator, as defined in paragraph (*a*), to confer with the parties, seven days have elapsed after the Minister has released to the parties a notice that he does not deem it advisable to appoint a conciliation board . . .

Section 75(3) is relevant because counsel for the employer submitted that it defines the situation, and, he submitted, by implication the only situation, in which the arbitration provisions of a collective agreement and of s. 55 apply after the expiry of "the term" of a collective agreement. I am unable to accept this submission. In my view, s-s. 75(3) deals only with the statutory freeze. It has the effect of maintaining the arbitration provisions and s. 55 in effect under those conditions. When the statutory freeze conditions no longer apply, the subsection, by its own terms, does not operate. Logically, it has no effect, positive or negative, where it is the collective agreement itself, not the statutory freeze, that is in question. I see no reason to make the negative implication suggested by counsel for the employer.

Turning to the second of the difficult legal issues raised by counsel; we are not directly concerned here with any statutory obligation to bargain in good faith. The employer submitted that there is, in fact, no such obligation under the New Brunswick *Industrial Relations Act.* However, s. 34(2) requires the parties to "meet and commence to bargain collectively" and to "make every reasonable effort to conclude" a collective agreement and I would have thought that that obligation was not significantly different from the obligation "to bargain in good faith" found in the legislation of other Provinces. Indeed, in *R. ex rel. Hodges v. Dominion Glass Co. Ltd.* (1964), 45 D.L.R. (2d) 109 at p. 117 (Ont. C.A.), Roach J.A. stated:

> There may be some subtle distinction between bargaining in good faith and making every reasonable effort to make a collective agreement but it is so tenuous and elusive as to lose any legal significance.

Be that as it may, a failure to meet any such obligation is the direct concern of the provincial Minister and the Industrial Relations Board under s. 107 of the Act. As a board of arbitration we can be concerned in only a very limited way about the possibility, as suggested by Arthurs, Carter and Glasbeek in the quote above, that the discharge of the grievors might not have been consistent with the employer's obligation to make every reasonable effort to reach a collective agreement. At most, where the obligations of the employer under the continuation or "bridge" provisions of the collective agreement are unclear, we might properly be inclined to interpret them in a way that would avoid any potential conflict with the Board of Industrial Relations' interpretation of the Act. However, that notion does not assist here because the issue of whether there is an obligation under the bridge provisions is quite separate from any obligation under the Act. If we conclude that the grievors have arbitration rights under the 1979-80 collective agreement, that merely buttresses their possible rights under the Act. If we conclude that they do not, their rights of recourse to the Industrial Relations Board under s. 107 (or on the basis of any allegation that they were discharged for union activities), are in no way lessened.

I turn now to the third of the difficult legal questions which I do not believe to be in issue here. While as Arthurs, Carter and Glasbeek suggest, in the period after the expiry of both the collective agreement and the statutory freeze, terms and conditions of employment may be drawn by implication from the collective agreement, in my view, at that stage there are no obligations enforceable by arbitration. I have never found the reasoning in *Re Prince Rupert Fishermen's Co-operative Assoc. et al.* (1967), 68 C.L.L.C. para. 14,079, 66 W.W.R. 43 (B.C.S.C.), convincing, and there is now the contrary opinion of the Divisional Court of the Ontario High Court of Justice in *Re Communications Union Canada and Bell Canada* (1979), 97 D.L.R. (3d) 132, 23 O.R. (2d) 701, Henry J., speaking for the Court, stated, at p. 141:

> We also consider that the board of arbitration correctly decided that after the expiry of the old collective agreement, the terms of employment that continued as between individual employees and the company did not include the arbitration provisions of the expired collective agreement. We say simply that we agree with the reasons of the board of arbitration on this point: see in this respect *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, 54 D.L.R. (3d) 1, [1975] 5 W.W.R. 444, *per* Laskin, C.J.C., at p. 727 S.C.R., pp. 7-8 D.L.R., and *C.P.R. Co. v. Zambri*, [1962] S.C.R. 609, 34 D.L.R. (2d) 654.

In the course of the award under review in that case the chairman, M. G. Picher, considered *Re Telegram Publishing Co. Ltd. and Zwelling et al.* (1975), 13 L.A.C. (2d) 112*n*, 67 D.L.R. (3d) 404, 11 O.R. (2d) 740, in which the Ontario Court of Appeal accepted that after the expiry of a collective agreement the employees' terms and conditions of employment were to be implied, and would be "similar to those spelled out in the collective agreement which related directly to the individual employer-employee relationship". The arbitrator then went on to say:

> The terms and conditions of employment under the expired collective agreement are obviously not all inevitably and automatically extended after the expiry of the freeze period. For example, the "no strike" and "no lockout" clauses clearly do not subsist. It must therefore be determined precisely which terms do continue. The *Telegram* decision reflects a recognition of the practical reality that the terms of individual contracts of employment fall to be defined in a number of ways including the taking into account of silence or the adoption of a "business as usual" approach by an employer after the expiry of a collective agreement. Where a company treats its employees no differently after the collective agreement ends it may be inferred that matters of individual concern such as rates of pay, hours of work and fringe benefits will be as they were under the collective agreement. If, on the other hand, a company indicates that wages or hours of work are altered or some other individual terms of employment are varied, to the extent that individuals accept the new terms by continuing to work rather than striking or quitting, the altered terms form part of the individual contract of employment. Thus the individual contract of employment may consist of those terms of the collective agreement that bear directly on the relationship between the employer and individuals to the extent that they are not amended by any different practice on the part of the employer.
>
> But, generally, grievance and arbitration procedures are not strictly matters of individual employment. No less than "no strike" and "no lockout" clauses, they have their roots and live in the ground between the union and the company, rather than between the individual employee and the company. That labour relations reality is reflected in the collective agreement before us. Article 2 of Part 2 of that agreement stipulates that arbitration may be initiated by the union exclusively. It is not within the power of the individual to either commence or have the carriage of arbitration proceedings.

For those reasons and on the authority of *Bell Canada* I accept the submission of counsel for the employer that if the grievors had any individual employment contract rights which were breached by their dismissals their remedy does not lie in arbitration. That is not to say, however, that we do not have jurisdiction here. It simply disposes of a matter of argument and brings us finally to the real issue; whether we have jurisdiction under art. 34.05(b) of the 1979-80 collective agreement.

I turn now to a consideration of the terms of the 1979-80 collective agreement relevant to our jurisdiction in this matter and

to the submission by counsel for the employer that, regardless of the apparent meaning of art. 34.05(b), the decision of the Supreme Court of Canada in *Re Bradburn et al. and Wentworth Arms Hotel Ltd. et al.* (1978), 94 D.L.R. (3d) 161, [1979] 1 S.C.R. 846, 79 C.L.L.C. para. 14,189, requires us to conclude that after the expiry of the statutory freeze the employer was free to change the terms and conditions of employment of the employees who were subject to the 1979-80 collective agreement and dismiss the grievors.

The pertinent provision of the 1979-80 collective agreement between the parties is the first sentence of art. 34.05(b) which provides: "Both parties shall adhere to the terms of this Agreement during the collective bargaining." The next sentence, which provides that if negotiations extend beyond the termination of the agreement any revision shall apply retroactively unless otherwise specified, is irrelevant to a consideration of whether the terms of the 1979-80 collective agreement applied at the time the grievors were discharged.

In the circumstances of the case before us art. 34.01, which provides:

> This Agreement shall be binding and remain in effect from January 1, 1979 to December 31, 1980 and shall continue from year to year thereafter unless either party gives to the other party notice in writing by October 1st, 1980 that it desires its termination or amendment

does not appear to be relevant. It is not disputed that the notice to bargain given on October 1st precluded the continuation of the agreement after December 31st under this provision. The factual issue for us, therefore, is simply whether "the collective bargaining" referred to in art. 34.05(b) was taking place when the grievors were discharged. If it was, then, on the face of it, art. 34.05(b) applied. The legal issues are whether the case law, most importantly the *Wentworth Arms Hotel* decision, leads us to a different conclusion and, if not, whether we have jurisdiction to give effect to the grievors' rights flowing from art. 34.05(b).

The facts as we know them from the testimony of the grievor and documentary evidence entered by agreement of the parties are outlined above. It is clear that from October 1st through to the signing of the 1981-82 collective agreement on April 8th, the parties engaged, in a general way, in collective bargaining, meeting at least monthly for periods of a day or two. Counsel for the employer emphasized the fact that in the "Information Bulletin" delivered to employees' homes in mid-February, the employer took the position that the Minister's "no board report"

and the notices of strike and lock-out "brought about the termination of the 1979-80 working agreement" and that on that basis fringe benefits payable under the collective agreement were discontinued. The evidence is that the grievors' benefits were not, in fact, discontinued because they were fire-truck drivers and, as such, had not participated in the union's strike vote but, quite apart from that, the important point is that merely because the employer treated the collective agreement as no longer applying does not mean that in fact it no longer applied. The very issue before us is at what point art. 34.05(b) ceased to bind the employer. That determination could no more be made unilaterally with regard to employee benefits in February than the employer could determine unilaterally that it had the right to discharge the grievors on April 7th without regard to the just cause provisions of the 1979-80 collective agreement.

Early in March employee benefits were reinstated because the parties felt they had a deal. The only way they could have had a deal was through the continuation of collective bargaining. The evidence is that from early March to April 8th there was a series of contacts between Mr. Petrie as, for the most part, the chief negotiator for the employer and the grievor, Kelly Murray, as president of the union, or between Mr. Murray and Mr. Fraser, the employer's industrial relations officer. The very fact that on April 8th the new collective agreement was made seems to me to make it virtually impossible to conclude that the action of discharge on April 6th and 7th was not "during the collective bargaining".

On the face of it, therefore, I have concluded that the discharge of the grievors took place while the employer was bound by art. 34.05(b) of the 1979-80 collective agreement to "adhere to the terms of this Agreement".

Counsel for the employer argued vigorously and with considerable cogency that to give art. 34.05(b) the effect of precluding the employer from changing the terms and conditions of employment after the expiry of both the regular term of the 1979-80 collective agreement and expiry of the statutory "freeze" would be contrary to the decision of the Supreme Court of Canada in *Re Bradburn et al. and Wentworth Arms Hotel Ltd. et al., supra.* In that case the collective agreement provided:

> 13.02 This Agreement remains in effect until the new Agreement has been negotiated and signed, but when the new Agreement has been signed this Agreement becomes null and void.

Based on that "bridge" provision, Wentworth Arms Hotel took

the position that any strike in the period between the expiry of the collective agreement in question and the signing of the new collective agreement would be illegal because the terms of the collective agreement in question, which were continued by the "bridge" provision, contained a standard no strike provision. The employer's position was sustained by the board of arbitration [unreported], over the strong dissent of member T. E. Armstrong, and by the Ontario Divisional Court [56 D.L.R. (3d) 168, 7 O.R. (2d) 592], and the Ontario Court of Appeal [70 D.L.R. (3d) 303, 13 O.R. (2d) 56], in both cases with strong dissents. The case went finally to the Supreme Court of Canada [94 D.L.R. (3d) 161, [1979] 1 S.C.R. 846, 79 C.L.L.C. para. 14,189], which, unanimously, reversed the lower Courts and the arbitration board. Estey J., speaking for six members of the nine-man Court, held that art. 13.02, quoted above, could not be construed as precluding the right to strike between collective agreements. At pp. 170-1, His Lordship stated:

> There are serious consequences for the participants in the field of labour relations were a Court to construe the provisions of the *Labour Relations Act* and the collective agreement in such circumstances as now before us, in such a way as to cause the establishment of a perpetual collective agreement terminable only on the execution of a new collective agreement by the parties. Where not barred by the statute the parties of course can, by unambiguous language, bring about results which others might consider to be improvident. In such circumstances the Courts may not properly interfere. The scheme of labour relations under the Ontario Act is founded upon collective bargaining leading to a collective agreement and thereafter to replacement agreements. Collective bargaining in turn is an activity in which the parties participate in the full realization of their respective economic positions and strengths subject only to the limitations and boundaries imposed on the parties by the *Labour Relations Act*. Consequently, collective agreements, which are of course creatures of statute finding both their origin and their extent within the Act, reflect these realities. A Court therefore should not be quick to place a meaning on a term of a collective agreement which would put that clause in conflict with the general philosophy of labour relations as established under the applicable statute. Such should be the case only where the contract by its clearest intent and provisions dictates otherwise. I do not find such to be the case here.

His Lordship then goes on to describe the provisions of the Ontario *Labour Relations Act* with respect to the right to strike and concludes [at p. 172]:

> The right to strike is suspended or postponed until the procedures prescribed by the statute have been implemented and fully performed. It is difficult therefore against this panorama of labour relations rules to interpret a collective agreement between two parties operating under that statute as an attempt by the parties to get away from those provisions. The language employed here by the parties when given its plain meaning does not produce that result.

Quite explicitly, then, the Supreme Court of Canada was interpreting the collective agreement in the *Wentworth Arms* case, but doing so in a way that made the provisions of the collective agreement consistent with the policy of the statute from which the collective agreement drew its life. Exactly what the Court was doing is made even clearer in the penultimate paragraph of Mr. Justice Estey's reasons which, despite its length, was worth quoting in full [at p. 174]:

> The disposition of this proceeding calls into play all the interpretive tools available to a Court in construing both a contract and a statute. The conclusions reached by the various majorities below depend, of course, upon the approach taken in the interpretation of the contract and the statute and their relationship. The minority of the arbitration board, T. E. Armstrong for example, concluded:
>
> > "I do not believe that it was the intention of the Legislature to permit a collective agreement to be fashioned which would perpetually foreclose the right to strike and lockout. Accordingly, I believe that any tenable interpretation of the contract language which will preserve the statutory right to strike in the post-conciliation period, is to be preferred to an interpretation which will negate that right."
>
> Lacourcière, J.A., in dissenting in the Court below, stated [at p. 310]:
>
> > "In assessing the significance of this art. 13.02, one must not only follow ordinary canons of construction, but do so in the framework of the *Labour Relations Act* as a whole as well as modern labour law and practice. The conflicting interests must be weighed realistically and fairly, having regard to the social policy behind the *Labour Relations Act* as progressively administered by the Labour Relations Board and interpreted by the Courts. It is a prevailing assumption in the area of labour conflicts that a union can legally strike, and that a company can resort to lock-out, when conciliation procedures have been exhausted and statutory restraints followed. It is in that context that the article relied upon by the employers must be interpreted. In that respect, I prefer the view stated by T. E. Armstrong, Q.C., in his dissent from the majority award."
>
> With these views I concur with great respect.

The heart of the case for the employer before us is that the ruling and reasons of the Supreme Court of Canada in the *Wentworth Arms Hotel* case dictate that we interpret art. 34.05(b) of the collective agreement as not precluding the employer from changing the terms and conditions of employment of the grievors and therefore as not precluding the employer from discharging them without just cause on April 6th and 7th. In effect, the submission is that what is sauce for the goose is sauce for the gander; what applied to the union's right to strike in *Wentworth Arms* must apply to the employer's right to change terms and conditions of employment here.

I have concluded that I must reject counsel's very able submission based on the *Wentworth Arms Hotel* case. I do so on the basis of the wording of the collective agreement before us, on consideration of the labour relations policy that the Supreme Court of Canada was explicitly effectuating in that case and in light of what I think to be the labour policy underlying the New Brunswick *Industrial Relations Act*.

First, it must be noted that the "bridge provision" in the *Wentworth Arms Hotel* collective agreement, if given literal effect, would have operated until a new agreement had been signed, whereas art. 34.05(b) would only apply "during the collective bargaining". There is some authority for the position that the duty to bargain collectively continues in some form right through any legal strike but it is unnecessary to conclude that the phrase "during the collective bargaining" in art. 34.05(b) is co-extensive with the period during which there is any obligation whatever to bargain collectively, particularly when to so construe that term of the collective agreement would be to do the very thing that the Supreme Court of Canada held should not be done in the *Wentworth Arms Hotel* case. To avoid that result we need only interpret the phrase "during the collective bargaining" in art. 34.05(b) as meaning "at any time until the union goes on a legal strike" or, by parity of reasoning, "at any time until the employer engages in a legal lock-out". The parties here did not undertake to adhere to the terms of their agreement until the next one was signed, as the parties did in the *Wentworth Arms Hotel* case, so by a perfectly common sense interpretation of art. 34.05(b) we can avoid the result which in that case could only be avoided by "call[ing] into play all the interpretive tools available to a Court in construing both a contract and a statute" (at p. 174).

Second, leaving aside the specific wording of the collective agreement, counsel for the employer submitted that the policy behind the decision of the Supreme Court of Canada in the *Wentworth Arms Hotel* case is such that art. 34.05(b) must be interpreted not only so that it does not preclude the legal right to strike and lock-out but also so that it does not preclude the employer from an opportunity to change the terms and conditions of employment. Unquestionably, in the absence of a "bridge provision" such as art. 34.05(b), after the expiry of the statutory "freeze" the employer does have that power. The immediate question is whether there is anything, in the judgment of the Supreme Court of Canada in *Wentworth Arms Hotel*, to suggest that the changing of terms and conditions of employment is a right of the same order as the union's right to engage in legal strike.

I have already pointed out that if the union went on strike or the employer locked out the "bridge provision" would, on its own terms, be inapplicable so that in the context of any such cessation of "the collective bargaining" the employer could change the terms and conditions of employment of the members in the bargaining unit. Did the Supreme Court of Canada think the employer should be able to do so short of a strike or lock-out? I see no support for the proposition that, in the face of the clear words of art. 34.05(b), the employer should be able to change the terms and conditions of employment during bargaining. In neither the judgment of Mr. Justice Estey, from which I have quoted above, nor the minority concurring the opinion of Chief Justice Laskin, speaking for himself and Martland and Ritchie JJ., is there anything at all that bears on a policy consideration in favour of protecting the employer's power to change the terms and conditions of employment "during the collective bargaining". The Court was there faced with a preclusion of the right to strike which it saw as central to the statutory scheme. While not specifically in issue, the Court also addressed the preclusion of the employer's right to lock-out which it saw as correspondingly central to the statutory scheme of labour relations. While the issue was apparently not argued, there is nothing to suggest that the Court saw the employer's power to change terms and conditions of employment as standing on the same policy plane as the right to strike and the right to lock-out.

It was, of course, implicit in the argument on behalf of the employer that the giving of strike notice on the one hand and lock-out notice on the other amounted to a termination of the duration of "the collective bargaining", every bit as much as actually engaging in a strike or lock-out would have. However, the facts are that "the collective bargaining" continued after those notices were given and, of course, experience tells us that collective bargaining may well be at its most intense between the time of giving such notice and the commencement of the strike or lock-out.

Apart from the *Wentworth Arms Hotel* decision, are there any helpful considerations of labour law and policy which we may properly treat as underlying the New Brunswick *Industrial Relations Act* from which this collective agreement draws its legal validity? (See ss. 52 to 57, particularly s. 56(2).)

Counsel for the union submitted that the collective bargaining relationship is a continuing one although, generally, collective agreements are for specified terms. In the context of interpreting

retroactivity provisions the then chairman of the British Columbia Labour Relations Board, Paul Weiler, said in *Re Penticton & District Retirement Service and Hospital Employees' Union, Local 180* (1977), 16 L.A.C. (2d) 97 at p. 99:

> Finally, this continuity in the life of successive collective agreements provides legal support to the real life experience that there is one, *enduring* collective bargaining relationship between the parties; and this relationship sets the basic terms and conditions of employment in the plant, until and unless they are modified by the parties.

Certainly, no one would argue that the expiry of the collective agreement between the parties here affected the "exclusive authority to bargain collectively on behalf of the employees in the unit" that the trade union had gained by its certification pursuant to s. 21(1)(*a*) of the New Brunswick *Industrial Relations Act*. On the other hand, it is equally unarguable that even where the exclusive authority of a union as collective bargaining agent continues unterminated and unaltered there may well be gaps in the applicability of the terms of the collective agreement which it negotiates. Nothing in the New Brunswick *Industrial Relations Act* precludes this. Indeed, the very fact that the statutory freeze period has a definite end (see s. 75(3)) appears to contemplate such gaps. However, as Weiler goes on to point out in his reasons in the *Penticton* decision of the British Columbia Labour Relations Board, the norm is for the gap to be closed as far as can be reasonably done by retroactivity provisions in any new collective agreement. Viewed from the other end, it is not unusual to close the gap by the use of "bridge" provisions like art. 34.05(b). There is nothing new about such provisions. The very fact that the New Brunswick Legislature does not address them but is confined in its language to the effect of the "freeze" suggests we should not refuse to give the collective agreement its plain meaning and apparent effect in the absence of any clear conflict with a policy espoused with by the statute, as was found in the *Wentworth Arms Hotel* case.

Section 44(2) of the *Labour Relations Act*, R.S.O. 1970, c. 232 [now R.S.O. 1980, c. 228, s. 52(2)], is addressed explicitly to such "bridge" provisions with the effect, according to the *dicta* by Estey J. (at p. 169), of the limiting of their validity to a period of one year. (With respect, Maloney J., speaking for the Ontario Divisional Court in *Re Perth District Health Unit and Ontario Nurses' Assoc. et al.* (1979), 107 D.L.R. (3d) 138 at p. 141, 27 O.R. (2d) 537, appears to have the better view of the meaning of that section of the Ontario Act.) The fact that the New Brunswick

Legislature has chosen not to speak to the impact of "bridge" provisions although the Ontario Legislature, with a very similar statute, has done so suggests that we should be slow to limit the effect of the provision that the parties have agreed upon.

Article 34.02 of the 1981-82 collective agreement between the parties provides that it is to be in effect "from the date of signing" which was April 8th, "with wages only being retroactive to this January 1, 1981". Thus, contrary to what is the normal situation, a gap appears to be opened in the applicability of collective agreement provisions to the relationship between the parties here, unless the "bridge" provision in the 1979-80 agreement is given full effect. There is no question that by the use of appropriate language, as where the new collective agreement is not made retroactive and there is no "bridge" provision, such gaps can be opened. See, for example, *Re Plainfield Children's Home and Service Employees Int'l Union, Local 183* (1980), 28 L.A.C. (2d) 419 (Brown), and decisions of the arbitrator and the Divisional Court of the Ontario High Court of Justice in *Re Communications Union of Canada and Bell Canada* (1979), 97 D.L.R. (3d) 132, 23 O.R. (2d) 701, referred to above. The fact remains that here the employer is not asking us to give effect to language that clearly opens such a gap; we are being asked to give art. 34.05(b) something other than its plain meaning in order to open a gap.

It must not be forgetten that what is in issue here is not whether or not the grievors were properly dismissed. What is in issue is the right of the employer to dismiss them without regard for "just and reasonable cause" and without being subject to any right on their part to grieve their dismissal and have the employer's decision subjected to the power of a board of arbitration under art. 13.05 of the collective agreement "to dispose of any discharge or discipline grievance, by any arrangement which in its opinion it deems just and equitable". In *McGavin Toastmaster Ltd. v. Ainscough et al.* (1975), 54 D.L.R. (3d) 1, [1976] 1 S.C.R. 718, [1975] 5 W.W.R. 444, Chief Justice Laskin said, at p. 7:

> Central to all the benefits and obligations that rest upon the union, the employees and the company under the collective agreement are the grievance and arbitration provisions ...

For purposes of this preliminary objection we must proceed as if the cause for dismissal could, on the one hand, be the most grievous breach of morality, law and the collective agreement, or, on the other hand, be something so insignificant that the very idea that an employee would lose his job over it would be offensive to

anyone's sense of fairness. The fact that the evidence before us gives some hint as to the actual cause of dismissal can have nothing to do with our determination because the parties were not given an opportunity to lead evidence with respect to that matter. The question at this stage is whether there is anything in the law, including its underlying policy, which can assist us in our interpretation of art. 34.05(b). I see no reason why we should give the "bridge" provision in the collective agreement before us a restricted interpretation which defeats these normal expectations of the people subject to it, which denies dismissed employees the right to have the justness of their dismissal determined by a board of arbitration and which gives effect to legal ingenuity.

For all of these reasons I rule that the words of art. 34.05(b) of the 1979-80 collective agreement are to be given their plain meaning. On April 6th and 7th, the employer was bound to adhere to the terms of that agreement and was not entitled to discharge employees except "for just and reasonable cause" as provided in art. 1.02.

Any remaining objection to our jurisdiction as a board of arbitration would have to rest on the fact that on April 16th when the grievances were filed and at all subsequent stages of the procedure the 1981-82 collective agreement was in force and art. 34.05(b) of the 1979-80 collective agreement was clearly spent. But any objection on those terms cannot be sustained. Like a Court, we must be loathe to find that there is a right without remedy. More specifically, the 1979-80 collective agreement must be read as impliedly providing that where there is any difference between the parties concerning "an alleged violation of the agreement, including any question as to whether a matter is arbitrable", that matter is to be carried through the grievance procedure to "final and binding settlement by arbitration or otherwise". Section 55(1) of the New Brunswick *Industrial Relations Act* permits no other interpretation, and if we do not thus interpret the collective agreement, by s. 55(2) the collective agreement will be deemed to contain the arbitration provisions set out in the Act.

Usually on the basis of a statutory directive similar to the one in s. 55(1) of the New Brunswick Act, arbitrators and labour relations boards have consistently held that a grievance arising out of the violation of a collective agreement can be grieved and arbitrated under the provisions of that collective agreement, notwithstanding the lapse of the regular term of the agreement before the completion of grievance and arbitration procedures. The one exception with which I am familiar is the award of

D. J. M. Brown in *Re Plainfield Children's Home, supra*, a situation which can, perhaps, be distinguished on the basis that at the time of the grievance a new union had acquired collective bargaining rights and signed a collective agreement with the employer. Even in those circumstances, however, the Ontario Labour Relations Board reached the opposite, usual, conclusion in *Genstar Chemical Ltd. and Int'l Chemical Workers Union, Local 721*, [1978] 2 Can. L.R.B.R. 558, in which the board stated, at p. 560:

> Here, the Board is dealing with a difference between the parties arising from a collective agreement even though the grievance was filed following the agreement's termination. That being the case, the Statute requires that the arbitration procedure provided for in the collective agreement be available to the parties. The Board does not consider that the legislative policy set out in section 37 [the Ontario equivalent of s. 55 of the New Brunswick *Industrial Relations Act*] was intended to be limited by reference to the time at which the grievance was filed. While the time of filing is a factor which may be taken into account by a board of arbitration — in deciding whether to arbitrate a grievance which is not filed within the time limits specified in the grievance procedure — it cannot preclude the establishment of an arbitration board to deal with a grievance arising during the term of a collective agreement.

In its reasons in *Genstar*, the Ontario Board goes on to consider arbitration awards which have reached a similar conclusion. My own reading of those awards leads me to simply quote their interpretation by the Ontario Board, at pp. 560-1:

> This fundamental policy of compulsory arbitration of all contract grievances has been recognized by a number of arbitrators. See, for example, *Re International Chemical Workers, Local 564 and Cyanamid of Canada Ltd.*, 20 L.A.C. 111 (Palmer), where the board of arbitration, relying on section 37(1) of the Act, assumed jurisdiction to deal with a grievance after the expiry of the collective agreement in question. Although the grievance in *Cyanamid* had been filed while the agreement was still in effect, that was clearly not the basis for the board's assumption of jurisdiction. In deciding that the grievance was arbitrable, the Board in Cyanamid explicitly rejected the argument of the employer that its jurisdiction derived from the existence of a collective agreement. In conclusion, the Board stated:
>
> > "As it is quite possible to have rights determined by arbitration after the agreement which gave rise to those rights ceases to exist where the specific right involved crystallized before the expiry of that agreement ... this board is of the opinion that this matter is arbitrable."
>
> See also *Re Truck Crane Ltd. and International Union of Operating Engineers, Local 793*, 4 L.A.C. (2d) 250 (O'Shea) where the board of arbitration decided that it had jurisdiction to deal with a grievance which had been filed after the expiry of the statutory freeze period but before the expiry of the time limits set out in the collective agreement. The Board in *Truck Crane* stated:
>
> > "The right to file a grievance for a breach of the collective agreement

> which takes place during the eleventh hour of the operation of the collective agreement is not extinguished until after the expiration of any mandatory time limits referred to in the grievance procedure of the collective agreement..."

See also ... *The City of Kelowna and Canadian Union of Public Employees, Local 338*, November 12, 1975 (unreported), where the British Columbia Labour Relations Board ... assumed, over the employer's objection, jurisdiction to deal with a grievance which had not been filed until after the agreement had expired. The Board's ruling was based on its finding that the rights of the union had "crystallized" before the agreement had expired....

> Our conclusion is that the policy mandated by section 37 of the Act requires that all grievances which relate to events arising during the term of a collective agreement may be submitted to arbitration, even though the grievance is not filed until after the agreement has expired. In the Board's view, rights which accrue to a party during the life of a collective agreement are in the nature of vested rights which are not automatically extinguished by the termination or expiry of the collective agreement under which they arose. To hold otherwise would be to, in effect, give both employers and unions a licence to violate terms of collective agreements in the period immediately preceding their expiration.

It should be noted, perhaps, that the *Genstar* case came before the Ontario Labour Relations Board under the section of the Ontario Act which provides for the Minister of Labour to refer to the Labour Relations Board any question which arises as to his authority to appoint a person to constitute a board of arbitration under a collective agreement. The *City of Kelowna* case [unreported] referred to by the board in *Genstar*, on the other hand, came before the British Columbia Labour Relations Board acting under the authority of s-s. 96(1) of the *Labour Code of British Columbia*, 1973 (B.C.) (2nd Sess.), c. 122 [now R.S.B.C. 1979, c. 212], which allows the board, in effect, to act as arbitrator.

In addition to *Genstar* and the arbitration awards and labour board decisions cited there, an alternative basis for our jurisdiction to deal with a grievance arising under the 1979-80 collective agreement but filed after the date, for all other purposes, of its termination is provided by the award in *Re Orenstein and Koppel Canada Ltd. and Int'l Assoc. of Machinists, Local 1740* (1976), 12 L.A.C. (2d) 417 (Brunner). There, according to the award of the board, at p. 421:

> Counsel for the company says that the substantive rights of [the grievor] must be decided under the continuation agreement but the procedure for the enforcement of these rights is governed by the current collective agreement. In the alternative he submits that at the time the grievance arose ... no collective agreement was in existence, the continuation agreement had no grievance or arbitration provisions, and therefore we are without jurisdiction to embark upon the hearing of this grievance.

The board rejected these submissions, stating at pp. 421-3:

> We are of the opinion that the grievance provisions of the current collective agreement have no application. . . . The grievance having arisen . . . prior to the existence of the current collective agreement, the said collective agreement has no application, even though the grievance was not submitted until well after [its commencement date]. Accordingly [a provision of the new collective agreement sharply differentiating between employee and policy grievances], does not apply and is not a bar to these proceedings.
>
> . . . . .
>
> If it were not for the continuation agreement, all of the provisions of the first collective agreement would have . . . expired. The effect of [the freeze provision of the Ontario Act] was by that date also clearly spent. . . . However . . . the parties agreed to continue the operation of [the relevant provision] of the first collective agreement until a new collective agreement was entered into. . . . Accordingly [the grievor's] substantive rights . . . continued [after the expiry of the old collective agreement] for a period ending at a point in time when the parties entered into a new collective agreement. However, no other provisions of the first collective agreement were expressly agreed to be continued following [its expiry]. The question arises then, whether [the grievor] has any procedural rights to enforce the provisions of the continuation agreement. This he can only do if the said agreement contains grievance and arbitration provisions respecting its breach. As already stated, the continuation agreement contains no such express terms. Can such terms be implied; *i.e.*, should the grievance and arbitration provisions of the first collective agreement be implied to be a term of the continuation agreement. If such terms cannot be implied, there is no machinery to enforce the breach, if any, by the company of the terms of the continuation agreement, and the grievance herein fails for want of jurisdiction. If, however, such terms can be implied, the grievance and arbitration provisions of the first collective agreement are sufficient to give us jurisdiction to hear this grievance.
>
> . . . . .
>
> Having given the matter our best consideration, we are of the opinion that such terms should be implied.
>
> . . . . .
>
> . . . by implying the aforesaid terms we are not altering or changing provisions of the agreement or substituting any new provisions in lieu thereof, nor are we giving a decision inconsistent with the terms and provisions of the agreement.
>
> . . . . .
>
> It is a matter of no small difficulty to decide in any given case whether a term should be implied into any agreement. Reference should be made to . . . *R. v. Board of Arbitration, Ex parte Stevens* (1970), 12 D.L.R. (3d) 284 (N.B.S.C.A.D.) . . . [where] the New Brunswick Supreme Court Appeal Division, had to consider whether a term to the effect that an employee could not be dismissed except for appropriate and sufficient cause should be implied into a collective agreement.

The award of the board then quotes from the decision of Chief Justice Bridges in the *Stevens* case [*R. v. Board of Arbitration, Ex p. Stevens* (1970), 12 D.L.R. (3d) 284]. After considering the

so-called "officious bystander" test for determining whether terms should be implied into a contract, His Lordship concluded that the term in question should not have been implied in that case. The award of the board in *Re Orenstein and Koppel Canada Ltd.*, then goes on [at pp. 424-5]:

> It should be noted that the abrogation of an established common law right referred to by the Court has no application to the issues considered by us.
>
> It is reasonably clear, therefore, from the foregoing authorities, that a board of arbitration does have the power to imply a term into a collective agreement and the question becomes whether, in the particular circumstances of this case, such a term should be implied into the continuation agreement. . . .
>
> Is it therefore necessary for the efficacy of the continuation agreement to imply a term that the grievance and arbitration provisions of the first collective agreement apply to any breaches thereof? We think that it is.
>
> . . . . .
>
> Without the implication of the terms in question, the agreement to continue the benefits would have the effect of forcing an employee to resort to the Courts for its enforcement, with all the difficulties that arise therefrom. . . .
>
> We think that the grievance and the arbitration provisions must be implied because they are necessary in the labour relations sense to give efficacy to the continuation agreement. . . . We therefore have jurisdiction to hear the within grievance.

We are here, of course, dealing with a continuation provision contained in the 1979-80 collective agreement, not a separate continuation agreement, but the same considerations of labour relations efficacy apply. Beyond that, I agree with the award of the board in that case, to the effect that the normal method of implying terms into any contract or collective agreement would lead to the implication that a grievance arising under the "bridge" provision in art. 34.05(b) of the collective agreement before us was to be dealt with according to the grievance and arbitration provisions of that collective agreement. In my view, however, s. 55(1) of the New Brunswick *Industrial Relations Act* provides even stronger basis for the same conclusion, as held by the Ontario Labour Relations Board in the *Genstar* case.

Having concluded that by virtue of art. 34.05(b) the terms of the 1979-80 collective agreement were in effect when the grievors were dismissed and that they have a right to proceed to arbitration under that collective agreement, I can see no basis for concluding that this board is not properly constituted. Because of its stance on the jurisdictional issue the employer refused to appoint a nominee to the board. As a consequence the Minister of Labour and Manpower for the Province appointed Mr. Denis Cochrane on August 6, 1981. There is nothing before us to suggest

that there was any failure to comply with s. 73(2) of the New Brunswick *Industrial Relations Act* in making his appointment. When Mr. Cochrane and the nominee of the union, Mr. Harvey, failed to agree upon a chairman the Minister appointed me as a member and chairman. Once again, there is nothing before us to establish that in so doing the Minister did not act in accordance with s. 73(2) of the Act and, for that matter, in accordance with art. 13.02 of the 1979-80 collective agreement.

*Alternative basis for jurisdiction — the 1981-82 collective agreement*

Had I not been able to satisfy myself that this board of arbitration has jurisdiction and has been properly constituted under the 1979-80 collective agreement between the parties, my sense that to deny the grievors access to arbitration would be contrary to the legitimate expectations of the parties and to the policy of the New Brunswick *Industrial Relations Act* would have "call[ed] into play all the interpretive tools available to a [board of arbitration] in construing both a contract and a statute" to ascertain whether the 1981-82 collective agreement might apply to them. I have here borrowed the words of Mr. Justice Estey in *Re Bradburn et al. and Wentworth Arms Hotel Ltd. et al.* (1978), 94 D.L.R. (3d) 161 at p. 174, [1979] 1 S.C.R. 846, 79 C.L.L.C. para. 14,189, the case so heavily relied upon by counsel for the employer.

I recognize that both the grievances and the Minister's appointment of Mr. Cochrane to this board refer specifically to the 1979-80 collective agreement. Nevertheless, in respect of the grievance it must be borne in mind that arbitrators have often allowed sloppily-drafted grievances "filed by laymen not schooled in the niceties or language of legal or arbitration procedure" to be modified at the hearing: see Gorsky, *Evidence and Procedure in Canadian Labour Arbitration* (1981), at p. 73, citing *Re U.S.W., Local 3998, and Dunham-Bush (Canada) Ltd.* (1964), 15 L.A.C. 270 (Lang) at p. 273, and also Palmer, *Collective Agreement Arbitration in Canada* (1978), pp. 23 et seq., and Supplement (1980). In respect of Mr. Cochrane's appointment, s. 73(2) of the New Brunswick *Industrial Relations Act* provides that "any person so appointed by the Minister shall be deemed to have been appointed in accordance with the collective agreement, the provisions of section 55, or subsection (1)". It might well, therefore, have been open to this board of arbitration to conclude that we were properly constituted under the 1981-82 collective agreement

and that we had jurisdiction to determine, as a threshold question, whether art. 34.02 of that collective agreement is worded with sufficient clarity and specificity to preclude the application retroactively of its just cause provisions.

I will not burden an already long award with further elaboration on this possible alternative basis for finding that we do have jurisdiction in this matter because I am satisfied that the "bridge" provision of the 1979-80 collective agreement does give us jurisdiction.

*Conclusion*

This board of arbitration is properly constituted and has jurisdiction to deal with the grievances of Kelly Murray and Ronald Charlong with respect to their discharge by the employer on April 6th and 7th. The board will reconvene to hear evidence and argument with respect to the substantive issues.

DISSENT (Cochrane)

I respectfully disagree with the decision of the chairman, Mr. Innis Christie, concurred with by the union nominee, Mr. Harrison Harvey. I am of the opinion that, due to the wording of art. 34.01 and in light of the fact that on October 1, 1980, the union gave notice to bargain, the collective agreement scheduled to expire on December 31, 1980, terminated with the union's notice on February 13th of its intention to withdraw services.

The Supreme Court of Canada's decision, *Re Bradburn et al. and Wentworth Arms Hotel Ltd. et al.* (1978), 94 D.L.R. (3d) 161, [1979] 1 S.C.R. 846, 79 C.L.L.C. para. 14,189, took the position that the collective agreement on its face, cannot contract away the legal right of a collective bargaining unit to strike. Accordingly, logic would dictate that, if the Supreme Court of Canada upheld the union's right to strike in the *Wentworth Arms* decision, similarly, the employer must have the right to change terms and conditions of employment given the interpretation of the bridge provision outlined in art. 34.05(b) terminating upon the reciprocal notice of lock-out and strike. Therefore, no collective agreement was in existence and thus, no recourse to the grievance procedure was available to Messrs. Murray and Charlong.

It is the interpretation of the writer that since no collective agreement existed, the bridge provisions were non-existent and whereas the new collective agreement, in its retroactivity, was limited to wages only, that in itself did not contract a bridge provision, which would provide recourse to the grievance procedure.

Thus, I respectfully dissent with the decision of the board

chairman, concurred with by the union nominee and, therefore, would sustain the preliminary objection regarding the board's jurisdiction.