Date: 20120124
Docket: 09/119
Citation: *Office of the Citizens' Representative v. Newfoundland and Labrador Housing Corporation et al,* 2012 NLCA 4

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN: OFFICE OF THE CITIZENS' REPRESENTATIVE
APPELLANT

AND: NEWFOUNDLAND AND LABRADOR HOUSING CORPORATION
FIRST RESPONDENT

AND: HER MAJESTY'S ATTORNEY GENERAL
SECOND RESPONDENT

AND: CANADIAN UNION OF PUBLIC EMPLOYEES AND ITS LOCAL 1860
THIRD RESPONDENT

Coram: Wells, Barry and White, JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador Trial Division (G) 200701T5034

Appeal Heard: December 8, 2011
Judgment Rendered: January 24, 2012

Reasons for Judgment by Wells J.A.
Concurred in by Barry J.A.
Dissenting Reasons by White J.A.

Counsel for the Appellant: Barry Fleming, Q.C.
Counsel for the First Respondent: Jamie Smith, Q.C.
Counsel for the Second Respondent: Joseph Anthony
Counsel for the Third Respondent: Susan Coen

Wells J.A.:

[1] The appellant ("the Citizens' Representative") appeals the decision rendered on an application taken in the Trial Division, pursuant to s. 21 of the *Citizens' Representative Act*, SNL 2001, c-14.1, ("the Act"). That section provides:

> 21. Where a question arises as to the jurisdiction of the Citizens' Representative to conduct an investigation or class of investigations under this Act, he or she may apply to the Trial Division for a declaratory order determining the question.

[2] The applications judge decided that the matter before the Citizens' Representative satisfied three of the four jurisdiction criteria he identified. As to the fourth criterion he decided that the complaining citizen ("the Citizen") was not "aggrieved" within the meaning of s. 15 of the Act, which provides:

> 15. The Citizens' Representative may, on a written complaint or on his or her own initiative, investigate a decision or recommendation made, including a recommendation made to a minister, or an act done or omitted, relating to a matter of administration in or by a department or agency of the government, or by an officer, employee or member of the department or agency, where a person is or may be aggrieved.

[3] As a consequence of his conclusion that the Citizen was not aggrieved, the applications judge decided the Citizens' Representative "does not have jurisdiction to conduct an investigation into or otherwise entertain the complaint as filed by the Citizen referred to in this proceeding". The outcome of the appeal by the Citizens' Representative turns on the narrow point of whether the applications judge erred when he so interpreted s. 15 as to result in a conclusion that the Citizen is not "a person who is or may be aggrieved within the meaning of s. 15".

BACKGROUND FACTS

[4] The facts are not in dispute and they are not complex. The Citizen, who is an employee of the first respondent ("NLHC"), was, as a result of an incident that occurred at a bar in May 2003, charged with sexual assault. The record indicates that on June 9, 2004 he pleaded guilty, on the basis of "acknowledging that he touched the female bartender on the buttocks". The sexual assault, as the applications judge in this matter found, "did not occur

while the Citizen was on duty as an employee of NLHC or was otherwise acting in a capacity in which he could be said to be representing NLHC. The victim of the assault was not a client or an employee of NLHC."

[5] Notwithstanding these circumstances, on the day the Citizen was convicted, NLHC suspended the Citizen from his employment for a period of ten months. The Citizen was notified of the suspension by a letter from the Regional Manager of NLHC, the substance of which was:

> In light of your recent conviction for sexual assault, we have determined that an immediate ten (10) month suspension without pay is warranted. During your suspension a review of your duties as a Construction Inspector will be conducted in order to determine the appropriateness of your returning to that position or being transferred to another position.
>
> Your illegal conduct, although outside working hours, was clearly inconsistent with the values of the Corporation and the expectations associated with your position. In addition, your conviction reflects poorly upon the Corporation and has damaged it's [sic] reputation within the community.
>
> I hope you will take this opportunity to consider your actions and how you'll conduct yourself upon returning to work. I must stress, however, that failure to allow supervisory direction or any future incident of unsatisfactory conduct or non-compliance with Corporation policies, procedures or guidelines will result in your immediate dismissal.

[6] The third respondent ("the Union") presented a grievance on behalf of the Citizen. On July 7, 2004, NLHC and the Union agreed upon a settlement of the grievance that reduced the period of suspension to six months and was expressed to be "full and final settlement of the grievance". The applications judge also found that:

> Following the suspension, the Citizen returned to his previous job as a construction inspector with no change in his duties or the degree of supervision to which he was subject prior to the suspension.

[7] On December 27, 2006, nearly 2 ½ years after the settlement agreement, the Citizen filed a complaint with the Citizens' Representative. The events following that complaint are best described in the originating application that the Citizens' Representative filed in this matter, specifically in the following excerpts:

4. The Citizens' Representative investigated the complaint and in correspondence to Housing dated May 22, 2007 summarized its findings to that date. They included:

   a) the Citizen's conviction was the result of a guilty plea;

   b) the conduct subject to the charge did not occur while the Citizen was on duty or otherwise representing Housing;

   c) On June 9, 2004 the Citizen was suspended for ten months by Housing;

   d) On July 7, 2004, with the aid of his Union, the Canadian Union of Public Employees, the Citizen's suspension was reduced to six months and a corresponding loss in seniority;

   e) the Citizen returned to work with no change in his duties or the supervision he was subject to prior to the suspension.

5. On June 13, 2007 the Solicitors for Housing wrote the Citizens' Representative stating in part:

   We believe it necessary to raise, as a preliminary matter, the Citizens' Representative jurisdiction to investigate and report on this particular complaint. As a secondary issue, the jurisdiction of the Citizens' Representative would appear restricted because the complaint has been the subject of a grievance process under public service collective bargaining legislation and a collective agreement between the parties.

6. By letter dated July 5th the Citizens' Representative wrote the Solicitors for Housing to reassert its jurisdiction. Subsequent discussions between the Parties resulted in a letter dated October 18, 2007 being forwarded to the Citizens' Representative by Housing advising that it considers the Citizens' Representative to be without jurisdiction to investigate the Citizens' complaint.

PRIOR PROCEEDINGS

[8] The applications judge reviewed the history and nature of ombudsman or parliamentary commissioner type legislation and discussed at length the specifically remedial nature of such legislation. In doing so, he considered the views of a number of authors and authorities but relied considerably on the reasons of Dickson J. (as he then was) in *British Columbia Development Corp. v. Friedman (Ombudsman),* [1984] 2 S.C.R. 447. Noting that the language in s. 15 of the Act is very close in its key words to the language

under consideration in that case, the applications judge observed, correctly in my view, that "much guidance can and should be taken from the comments in that case". With respect to the provisions of s. 15, the section critically at issue in this appeal, the applications judge wrote, and I would endorse, that:

> [26] An appreciation of the scope of s. 15 must be informed by reading it together with other key sections of the **Act**. Certain other sections reinforce the breadth of the remedial jurisdiction the Citizens' Representative is intended to exercise. Section 37 provides:
>
> > **37.** (1) Where, after making an investigation under this Act, the Citizens' Representative is of the opinion
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> > (a) that a decision, recommendation, act or omission that is the subject matter of the investigation appears to be
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> > (i) contrary to law,
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> > (ii) unreasonable,
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> > (iii) unjust,
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> > (iv) oppressive,
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> > (v) improperly discriminatory,
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> > (vi) in accordance with a practice or procedure that is or may be unreasonable, unjust, oppressive, or improperly discriminatory,
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> > (vii) based wholly or partly on a mistake of law or fact, or
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> > (viii) wrong;
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> > (b) that in making a decision or recommendation, or in doing or omitting an act, a power or right has been exercised
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> > (i) for an improper purpose,
> >
> > (ii) on irrelevant grounds, or
> >
> > (iii) on the taking into account of irrelevant considerations; or

(c) that reasons should have been given for a decision, recommendation, act or omission that was the subject matter of the investigation,

the Citizens' Representative shall report his or her opinion and his or her reasons and may make those recommendations that he or she considers appropriate to the appropriate minister and to the department or agency of the government concerned.

(2) In making a report under subsection (1), the Citizens' Representative may recommend

(a) that a matter should be referred to the appropriate authority for further consideration;

(b) that an omission should be rectified;

(c) that a decision should be cancelled or varied;

(d) that a practice on which a decision, recommendation, act or omission was based should be altered or reviewed;

(e) that a law on which a decision, recommendation, act or omission was based should be reconsidered;

(f) that reasons should be given for a decision, recommendation, act or omission; or

(g) that other steps should be taken.

[27] To be able to formulate an opinion on the wide range of issues set out in s. 37, the Citizens' representative must be able to investigate those matters. It is clear, therefore, that the Citizens' representative may investigate and revisit the merits of, and the analytic process leading to, decisions. In the end, he may conclude simply that the decision or act is just "wrong". He is not limited to considering issues of procedural fairness.

[28] On the other hand, his recommendations have no binding force. His report cannot affect or impair legal rights. See, **Re Workers' Compensation Board v. Friedmann** 1985 CarswellBC 100 at para [12]. The effectiveness of his work therefore depends not on legal enforcement but on the cogency of his analysis and reasoning and the subtle pressure that comes from the potential exposure of the improper decision or conduct to public scrutiny.

[9] Although s. 24 specifies circumstances in which the Citizens' Representative "may refuse" to investigate, the applications judge concluded that it was relevant in the current context. It demonstrated, he decided, that:

> … even though a complainant may have an adequate remedy at law or under administrative procedures, the Citizens' Representative does not, by virtue of that fact alone, lose jurisdiction to deal with the issue as well.

I would endorse that conclusion as well.

[10] The applications judge explained the basis for his recognition that the jurisdiction of the Citizens' Representative can be exercised in relation to circumstances in respect of which another statutory regime has jurisdiction to investigate or adjudicate. He referred to s. 18 of the Act which reads:

> 18. The Citizens' Representative may exercise and perform the powers, duties and functions conferred or imposed on him or her under this Act notwithstanding a provision of another Act to the effect that a proceeding, decision, recommendation, act or omission that he or she is investigating is
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> (a) final;
>
> (b) not subject to appeal; or
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> (c) not subject to be challenged, reviewed, quashed or called into question.

With respect to this section the applications judge commented that:

> [34] To a limited degree this section addresses potential conflicts between the Citizens' Representative's investigatory powers and the jurisdiction conferred by another statutory regime; it in effect recognizes that there will be circumstances when two regimes can co-exist rather than acting, one to the exclusion of the other.
>
> [35] The fact that other legislation may attempt to cut off further examination of an administrative decision by the use of a finality clause, while precluding further legal recourse, does not preclude further examination by the Citizens' Representative. This makes sense because the result of the work of the Citizens' Representative is different from other rights-adjudicating bodies or processes. It does not, without the consent of the decision-maker affected, legally change the original result. There is no clash between two rights-determining agencies, each striving for the last word.

I would fully endorse those remarks as well.

[11] Following the approach taken by Justice Dickson in the *British Columbia Development* case, the applications judge enumerated what he described as "constituent parts" of the Citizens' Representative's power to investigate, namely:

(i) a decision or recommendation made or an act done or omitted;

(ii) in or by a department or agency of government or by an officer, employee or member of a department or agency;

(iii) with respect to a matter of "administration"; and

(iv) where the complainant is or may be "aggrieved".

[12] To decide whether the Citizens' Representative had jurisdiction, the applications judge, again as Justice Dickson did in *British Columbia Development*, weighed the circumstances in this case in the context of those four criteria. Essentially he treated each criterion as a pre-requisite to the exercise of jurisdiction by the Citizens' Representative.

[13] With respect to the first three, he concluded that:

(i) the Citizen's complaint resulted from conduct that can properly be called a decision or recommendation made or act done or omitted within s. 15;

(ii) NLHC is a department or agency and the complaint alleges an event that arises from a decision, recommendation, act or omission by NLHC or by an officer, employee or member of NLHC; and

(iii) the decision, act or omission about which the Citizen complains related to a matter of administration by a department or agency within the meaning of s. 15.

Thus, the applications judge was satisfied that the first three of the four pre-requisites he enumerated were present.

[14] With respect to the fourth, a complainant who is or may be aggrieved, the applications judge concluded that "in the factual circumstances of this case, the Citizen is not a 'person who is or may be aggrieved' within the meaning of s. 15". He reached that conclusion notwithstanding his acknowledgment that: "On one level, in this case, one can say that a

suspension of 6 months is clearly a genuine harm that is prejudicial to the Citizen's interests". That, I would note, is the basis on which Justice Dickson found the complainant in *British Columbia Development* to be aggrieved. The applications judge's reasoning for accepting, instead, the opposite conclusion is expressed in the following excerpts:

> [73] Nevertheless, NLHC and the Attorney General argue that because this punishment resulted from an agreement between NLHC and the Union, acting as the legal representative of the Citizen for the purpose of processing his grievance, designed to settle the Citizen's grievance in a fair and reasonable manner, he no longer can say that he is aggrieved. A settled grievance, they say, cannot, without more, come within the notion of an act that is substantively or procedurally "contrary to law", "unreasonable", "unjust", "oppressive", "discriminatory", based on a "mistake of law or fact" or "wrong" as those words are used in s. 37 of the **Act** (the section that defines the inquiry focus of the Citizens' Representative). Nor can the Citizen in such circumstances be said to be a person who, in the words of **British Columbia Development**, "genuinely suffers, or is seriously threatened with, any form of harm prejudicial to his interests." Counsel for NLHC also submitted that an agreement voluntarily entered into to resolve a grievance must be presumed to be fair and acceptable and, as a result, the complainant should be thereafter estopped from saying that he continues to have a complaint or grievance; hence he is no longer "aggrieved".
>
> [74] I find these arguments persuasive. It is difficult to regard the voluntary settlement of a grievance – even though it still involves a punishment, though muted from the original imposition – as having the effect of making a party to the settlement "aggrieved", any more than a litigant in court could say, in a legal sense, that he continues to be aggrieved following a formal settlement that he has voluntarily accepted. While a settling litigant may not be totally satisfied with the terms of the settlement that has been reached, it nevertheless cannot be said that he has a continuing grievance in any real sense – continuing disgruntlement, maybe, but not a legitimate grievance. His consent removes the moral and legal right to complain.

Consequent upon his conclusion that the Citizen was not aggrieved, the applications judge decided the Citizens' Representative was without jurisdiction to investigate the Citizen's complaint.

APPEAL

[15] In its notice of appeal, the Citizens' Representative expressed the basis for its appeal as being on two grounds. In fact, they are two aspects of a single ground. One aspect describes the alleged error and the other describes the conclusion that resulted in that alleged error. Thus, the ground

expressed in the notice is more correctly summarized as: the applications judge erred in law when he decided, on the basis of his conclusion that the Citizen referred to was not a person who is or may be aggrieved within the meaning of s. 15 of the Act, that the Citizens' Representative does not have jurisdiction to conduct an investigation into or otherwise entertain the complaint as filed by the Citizen. That reflects the issue focused on by the Citizens' Representative and also addressed by the respondents. The respondents, however, presented and emphasized other arguments to support their respective positions as to the manner in which s. 15 should be interpreted.

(a) Argument of the Citizens' Representative

[16] The factum of the Citizens' Representative sets out in detail several arguments to support its submission that the applications judge erred in interpreting the s. 15 phrase: "where a person is or may be aggrieved". In summary, the Citizens' Representative argues that the applications judge erred as a result of: his failure to properly apply the principles of statutory interpretation identified by this Court in *Archean Resources Ltd. v. Newfoundland (Minister of Finance)* 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124; his failure to adequately give weight to the purposes of the Act; his reliance on the decision on *Harrup v. Bayley* (1856), 6 El. & Bl. 218 (Eng.K.B.), for the proposition that by consenting to an action the consenter is precluded from claiming to be aggrieved by that action, when *Harrup v. Bayley* involved a statute entirely different in nature from the Act, instead of applying the principles applied in *British Columbia Development* to decide the meaning of "aggrieved"; his failure to consider the surrounding text in ascribing meaning to the word "aggrieved"; and his concluding that the Citizen was not an aggrieved person, as contemplated by s. 15, because his union settled the grievance by mitigating his suspension from work.

[17] The Citizens' Representative submits that the Citizen "genuinely suffered harm prejudicial to his interests, irrespective of whether his legal rights under his collective agreement were utilized to mitigate his original ten month suspension". It also submits that it was error to interpret "aggrieved" as the applications judge did, having regard to the Supreme Court of Canada jurisprudence.

[18] In its factum, the Citizens' Representative also argued that the applications judge erred by failing to give weight to the effect of section 18 of the Act, and submitted that that section gives the Citizens' Representative

"jurisdiction to investigate the Citizen's complaint even though the collective agreement and governing labour legislation provide that a settled grievance between his union and employer was final".

(b) Argument of NLHC

[19] Counsel for NLHC commenced his oral argument with the comment that he considered the sole issue before the Court to be: Is the definition of aggrieved adopted by the applications judge correct in terms of the Act? The factum of NLHC is more expansive and provides its detailed arguments, but that question is the focus of the arguments set out in it. Its factum places emphasis on application of the principles of statutory interpretation identified in *Archean Resources*. However counsel's oral argument emphasizes avoiding interference with the processes of the labour relations regime resulting from the collective agreement involved and the *Public Service Collective Bargaining Act*, RSNL 1990, c. P-42.

[20] In summary, NHLC acknowledges that "the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislatures and the executive cannot effectively resolve". However, that acknowledgement is followed by the observation that "it is difficult to appreciate, in the circumstances of the present case, how there is anything remaining for the Citizens' Representative to investigate that has not already been 'effectively resolved'".

(c) Argument of the Second Respondent ("the Attorney General")

[21] Certain of the arguments of the Attorney General were similar to those of NLHC and the Union. However, the factum of the Attorney General emphasized:

> … if this Honourable Court finds that questions of overlapping jurisdiction must be determined, that the principle of statutory interpretation that specific legislation supersedes general legislation should apply. The Second Respondent further submits that the labour relations legislation is, in this instance, the specific legislation which should prevail. When viewed in the entire context, including consideration of the phrase, "where a person is or may be aggrieved", the Second Respondent submits that the correct interpretation would be that, given the facts in this case, the specific jurisdiction bestowed by labour relations legislation should prevail over the Citizens' Representative's more general remedial jurisdiction.

[22] With respect to the meaning to be applied to the word "aggrieved", the Attorney General, for the most part, quotes extensively from the applications judge's decision and asserts its correctness. The factum summarizes the position by submitting that the applications judge:

> … employed principles of statutory interpretation that both achieved the greatest harmony between potentially conflicting legislation and the need to protect the broad remedial jurisdiction of the Citizens' Representative. Having done so, the Learned Chief Justice correctly interpreted the law and applied it to the undisputed facts.

(d) Argument of the Union

[23] The Union's submission also has similarities to those of NLHC, but there are aspects of the Union's argument that are quite different. First, the Union notes that s. 19 specifies circumstances where the *Act* does not authorize the Citizens' Representative to investigate, one of which is in the case of "an award, decision, re-consideration or omission of an arbitrator or board of arbitrators in an arbitration to which the *Arbitration Act* [RSNL 1990, c. A-14] applies". The Union argues that this should be interpreted to include any prior aspect of the matter that is the subject of the arbitration. In this case, that would include the suspension imposed by NLHC on the Citizen.

[24] The Union also emphasizes the argument made by the Attorney General that the Act should be so interpreted as to avoid investigation of any matters that are or may be subject to statutory procedures established for dispute resolution in collective bargaining matters. The justness of suspension, the Union argues, is provided for in and was dealt with pursuant to the procedures established by the collective agreement, all of which procedures are governed by the *Public Services Collective Bargaining Act*.

ISSUES

[25] As noted above, the primary issue to be resolved is simply stated. It is: Did the applications judge err in deciding that the Citizens' Representative had no jurisdiction to investigate the matter of the Citizen's suspension by NLHC, as a result of concluding that the Citizen is not a "person who is or may be aggrieved" within the meaning of s. 15 of the Act? However, it is also necessary for the Court to address the emphasis by all respondents, in particular by the Attorney General in his factum, and by NLHC and the Union in oral argument, on the importance of the Court deciding the appeal

in a manner that avoids the possibility of the exercise of jurisdiction granted under the Act interfering with jurisdiction exercised by tribunals in the course of dispute resolution in collective bargaining circumstances. That renders it necessary to consider the nature and extent of the jurisdiction conferred on the Citizens' Representative by the Act.

[26] Thus, analysis of two distinct issues is required. They are:

1. Is the Act to be construed in such a manner as to limit the jurisdiction of the Citizens' Representative to investigate where the circumstances are or can be the subject of jurisdiction exercised by tribunals under relevant labour legislation?

2. Did the applications judge err in deciding the Citizens' Representative did not have jurisdiction to investigate the Citizen's complaint because the Citizen was not "aggrieved" within the meaning of s. 15 of the Act?

ANALYSIS

Issue 1: Potentially Conflicting Jurisdiction

[27] When the Act is carefully examined, it becomes clear that where the Citizens' Representative is exercising jurisdiction to investigate a matter that is or can be the subject of jurisdiction exercised by any of the myriad of administrative tribunals that exist under provincial legislation, even where those tribunals are entitled to make decisions of a quasi-judicial nature, it is exercising jurisdiction of an entirely different nature from that of the administrative tribunals. In exercising its jurisdiction the Citizens' Representative is not, in any manner, deciding the same issue or varying or directing a different result from that directed by the administrative tribunal. The jurisdiction of the Citizens' Representative is restricted by the Act to reporting "his or her opinion and his or her reasons and [making] those recommendations that he or she considers appropriate to the appropriate minister and to the department or agency of the government concerned".

[28] The minister, department or agency can reject the recommendation of the Citizens' Representative and continue to apply the practice or enforce the decision made in respect of the questioned matter. On the other hand, if the agency or official agrees with the opinion of the Citizens' Representative and concludes that steps should be taken to apply its recommendations then

the agency or official may choose to do so. However, there is no statutory or other requirement that the recommendations be applied.

[29] Even that limited jurisdiction to "report" is confined, by s. 37, to being exercised where "a decision, recommendation, act or omission" appears to be: (i) contrary to law; (ii) unreasonable; (iii) unjust; (iv) oppressive; (v) improperly discriminatory; (vi) in accordance with a practice or procedure that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; (vii) based wholly or partly on a mistake of law or fact, or (viii) wrong, or reporting where the making of the decision or the doing or omitting of the act resulted from a power or right being exercised for an improper purpose, on an irrelevant ground or the taking into account of irrelevant considerations. Most of these enumerated circumstances are clearly of the nature of an impropriety. The very purpose of the Citizens' Representative statute is to promote adoption of procedures and practices that will avoid citizens suffering the consequences of such "improprieties", or if they cannot be avoided, suggesting measures that might ameliorate adverse consequences when they have occurred.

[30] I have already indicated my full agreement with the comments of the applications judge, excerpted in paragraphs 8 to 10 above, as to the breadth of the jurisdiction of the Citizens' Representative. However, I would emphasize his comments in the excerpt set out in paragraph 8 above that:

> To be able to formulate an opinion on the wide range of issues set out in s. 37, the Citizens' representative must be able to investigate those matters. It is clear, therefore, that the Citizens' representative may investigate and revisit the merits of, and the analytic process leading to, decisions. …

[31] I would note that that conclusion is quite consistent with the conclusion of the Ontario Court of Appeal in *Ontario (Ombudsman) v. Ontario (Labour Relations Board)* (1987), 58 O.R. (2d) 225. There the court concluded:

> … the Divisional Court correctly concluded that the decisions of the Ontario Labour Relations Board affecting any person or body of persons in his or its personal capacity are subject to investigation by the Ombudsman "even if the sole focus of the investigation is the merits of a decision reached by the Ontario Labour Relations Board".

[32] It is appropriate to restate here my endorsement, as noted in paragraph 10 above, of the comments of the applications judge that:

> The fact that other legislation may attempt to cut off further examination of an administrative decision by the use of a finality clause, while precluding further legal recourse, does not preclude further examination by the Citizens' Representative.
>
> (Emphasis added.)

Nothing raised in this appeal demonstrates any conflict between the jurisdiction of the Citizens' Representative to investigate a circumstance and the jurisdiction of a labour dispute resolution tribunal, functioning as a consequence of the *Public Service Collective Bargaining Act*, to render a decision in respect of that circumstance. Essentially, that is what the applications judge decided in the foregoing excerpt.

[33] Notwithstanding the arguments of the respondents, that the Court should be concerned that an interpretation resulting in the Citizens' Representative having jurisdiction to investigate the Citizen's complaint would result in the Citizens' Representative interfering with normal collective bargaining processes, I would agree with the applications judge's conclusions, referred to in the three preceding paragraphs, because the two jurisdictions are of an entirely different nature. There is no possibility of conflict in the exercise of the jurisdictions. There may, however, be a potential for the comments of the Citizens' Representative, following upon its investigation, to motivate the agency of government concerned to vary the result emanating from the dispute resolution tribunal or other operation of the collective bargaining procedure. That is as it should be if the comments of the Citizens' Representative indicate the existence of an "impropriety" of the kind enumerated in s. 37 of the Act, and set out in paragraph 8 above.

[34] The full extent of the potential impact of the Citizens' Representative exercising jurisdiction under the Act, is amply demonstrated in the last paragraph of the letter sent by the Citizens' Representative to NLHC on May 22, 2007. It reads:

> This Office considers its investigation into this matter complete and asks that the Newfoundland and Labrador Housing Corporation consider the recommendation contained herein and respond accordingly within 15 days. Failure to respond will result in a final report being issued to NLHC and the Complainant. Should NLHC accept the recommendation contained herein, it will be reflected in any final report issued by this Office. Furthermore, if NLHC opts not to accept the

> recommendation contained herein, that decision and accompanying rationale will also be reflected in any subsequent report issued.

[35] The last sentence reflects the Citizens' Representative's ultimate power: it can expose the circumstance to public view by reporting to the legislature. None of those possible actions involve interference with collective bargaining processes, including dispute resolution processes. It is simply a suggestion as to the manner in which a governmental action, objectively found to be an "impropriety" of the kind enumerated in s. 37 and, in the opinion of the Citizens' Representative justifying corrective action by the governmental agency concerned, can be corrected. Of course, it has the risk of the action by the governmental agency being exposed to public view if it is not corrected.

[36] The Union argues that, in addition to excluding actions and decisions of the legislature, the executive council and courts from investigation by the Citizens' Representative, s. 19 precludes investigation of an award or decision resulting from "an arbitration to which the *Arbitration Act* applies". Counsel submits that, by its terms, the *Arbitration Act* applies and, even though paragraph (c) of s. 19 of the Act refers to "an award or decision", by implication that should be interpreted to include all preceding events and circumstances leading up to the award or decision even where the process is resolved before it reaches the award or decision stage.

[37] I am not persuaded by that argument but it is not necessary to analyze it in any detail. It is sufficient to simply note that either one of paragraph (d) of that section or s. 18 would preclude its adoption. Section 18 is excerpted in paragraph 10 above but it is convenient to set out both ss. 18 and 19 together here so that the ensuing comments may be more readily appreciated:

> 18. The Citizens' Representative may exercise and perform the powers, duties and functions conferred or imposed on him or her under this Act notwithstanding a provision of another Act to the effect that a proceeding, decision, recommendation, act or omission that he or she is investigating is
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> (a) final;
>
> (b) not subject to appeal; or
>
> (c) not subject to be challenged, reviewed, quashed or called into question.

> 19. Nothing in this Act authorizes the Citizens' Representative to investigate
>
> ….
>
> (b) an order, decision or omission of a court, a judge of a court, a master of a court, or a justice of the peace made or given in an action or proceeding in the court, or before the judge, master or justice of the peace;
>
> (c) an award, decision, recommendation or omission of an arbitrator or board of arbitrators in an arbitration to which the *Arbitration Act* applies;
>
> (d) a matter in respect of which there is under an Act a right of appeal or objection or a right to apply for a review on the merits of the case to a court or tribunal constituted by or under an Act, until after the right of appeal, objection or application has been exercised or until after the time limit for the exercise of that right has expired;

[38] Section 18 is quite explicit. The power of the Citizens' Representative can be exercised "notwithstanding a provision of another Act" to the effect that a proceeding or decision being investigated is "final, not subject to appeal or not subject to be challenged, reviewed or quashed or called into question". While paragraph (c) of s. 19 specifies that the Act does not authorize the Citizens' Representative to review an award of an arbitrator, s. 18 specifically provides that the Citizens' Representative may exercise its powers, i.e., to investigate decisions and actions of governmental agencies, even where there may have been a proceeding or decision under another Act which provides that any such decision or proceeding is final and not subject to appeal or challenge. It is the action of the governmental agency that the Citizens' Representative is investigating not whether the legal entitlement of an aggrieved citizen was correctly decided by the arbitrator. Those provisions of s. 18 alone would preclude acceptance of the Union's argument that the prohibition against reviewing decisions or awards of arbitrators should be interpreted to include all preceding events and circumstances connected with the subject matter of the award.

[39] Although it may be expressed in negative terms, paragraph (d) of s. 19 of the Act effectively authorizes investigation of matters that have been the subject of decisions by dispute resolution tribunals. The unavoidable implication of providing that the Citizens' Representative is not authorized to investigate <u>a matter</u> where there is a right to apply for review on the merits to a court or tribunal, <u>until after the right of appeal has been</u>

exercised, is that, thereafter, there is a right to investigate the matter. (See *Re Alberta Ombudsman Act* (1970), 10 D.L.R. (3d) 47 (Alta.S.C.T.D.) at page 59.) Again, it is the matter, i.e., action by a governmental agency that the Citizens' Representative is permitted to investigate, but not "until after the right of appeal, objection or application has been exercised". That section, as well, would require rejection of the Union's argument respecting interpretation of paragraph (c) of s. 19. The provisions of the two sections together, in the context of the Act as a whole, can leave no doubt.

[40] There is no principled reason why actions of a governmental agency that have been reviewed by public service collective bargaining tribunals should be exempt from scrutiny of alleged "improprieties", when governmental actions reviewed by other tribunals are not exempt. If the end result of the Citizens' Representative investigating an alleged "impropriety" is to motivate an agency of government to cause a change in its practice or a reversal of a specific decision, then the legislation would have achieved its purpose. As Milvain C.J.T.D. wrote in *Re Alberta Ombudsman Act*, at pages 60-61.

> These sections seem to make it clear that, as an ultimate objective, the ombudsman can bring to the Legislature his observations on the misworking of administrative legislation. He can also focus the light of publicity on his concern as to injustices and needed change. It must, of course, be remembered that the ombudsman is also a fallible human being and not necessarily right. However, he can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds. If his scrutiny and observations are well-founded, corrective measures can be taken in due democratic process, if not, no harm can be done in looking at that which is good.

I would endorse those comments and apply them to this appeal.

[41] Thus, the argument of NLHC, the Attorney General and the Union that, by exercising the kind of jurisdiction he sought to exercise here, the Citizens' Representative would be interfering with the exclusive jurisdiction of collective bargaining dispute resolution tribunals, established under collective bargaining regimes, must be rejected.

Issue 2: Whether the Citizen was Aggrieved

[42] At trial, NLHC argued, and the applications judge accepted, that because there was a settlement agreement to which the Citizen must be taken to have consented, he could no longer say that he was aggrieved. The

applications judge concluded that the consent "removed the moral and legal right to complain". In its factum on appeal, even though NLHC acknowledged that "the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislatures and the executive cannot effectively resolve", it, nevertheless argued that "it is difficult to appreciate, in the circumstances of the present case, how there is anything remaining for the Citizens' Representative to investigate that has not already been 'effectively resolved'". This position ignores two significant factors.

[43] The first is that it is not a rational proposition to say that the Citizen had no sense of grievance or dissatisfaction as a result of his loss of income being reduced from a ten month loss to six month loss. The applications judge effectively recognized this when he commented that: "On one level, in this case, one can say that a suspension of 6 months is clearly a genuine harm that is prejudicial to the Citizens' interests". Clearly, the Citizen is still deprived of income for one-half of a year. That is a massive penalty by any standard and, on the fundamental meaning of the word, the Citizen is, understandably, "aggrieved" as a consequence.

[44] The second significant factor is the potential impropriety involved in a government agency deciding to impose on an employee, who was convicted for an offence that had no connection whatsoever with his work at that agency, a penalty over and above that imposed by the court that tried him and, therefore, presumed to be <u>the</u> penalty appropriate to the offence. Clearly, the Citizens' Representative was considering the impropriety of NLHC taking upon itself the right to increase, to a severe degree, the punishment imposed by the court for the offence for which the Citizen was convicted. That is demonstrated by both its letter of May 22, 2007 and its letter of July 5, 2007. In the former he wrote:

> To take away (or suspend) a person's ability to earn a living is a serious disciplinary act. [The Citizen] was already punished by the courts for his crime. To inflict another punishment because the employer feared for its reputation seems needlessly punitive. We recognize that the Corporation is a public housing provider and that its standing in the community is important. We are not convinced that the Corporation did not act in haste by "anticipating" complaints from clients (in hindsight, complaints that did not occur) and by taking a significant step to proactively prevent itself from being liable should [the Citizen] act inappropriately (again, in hindsight, acts that did not occur) during his employment.

In the latter, he wrote:

> The essence of [the Citizen's] complaint is that his employer, the Newfoundland and Labrador Housing Corporation (NLHC) treated him unfairly with respect to his employment. Specifically he states that the discipline imposed upon him for his conviction of a criminal offence while off-duty was harsh. He acknowledges that he was a member of a bargaining unit when the discipline occurred but that his union was only successful in having the discipline – a suspension – reduced as opposed to rescinded.

[45] There appears to be a dearth of appellate decisions on the issue. However, the propriety of such action by an employer was considered by L. D. Barry, J, as he then was, in *Strowbridge v. Re/Max United Inc.*(2002), 99 Nfld. & P.E.I.R. 64 (Nfld.T.D.). There Barry J. decided:

> From the cases cited I believe it is clear that an employee may be dismissed for misconduct which arises outside of working hours and outside of his employment. I believe an employer, however, in such cases, has the burden of showing that the misconduct affected the employee's ability to perform his duties in a satisfactory manner…

He drew that conclusion after reviewing the principles found in the authorities and authors to which he referred. He quoted those principles to be:

> … whether an employee may be disciplined for <u>off-duty conduct</u> will depend upon whether the conduct is work-related. This will involve a consideration of the nature of the offence, the employment duties, and the nature of the employer's business. In particular, it will depend upon whether the employee's conduct
>
> (1) detrimentally affects the employer's reputation;
>
> (2) renders the employee unable to properly discharge his or her employment obligations;
>
> (3) causes other employees to refuse to work with him or her; or
>
> (4) inhibits the employer's ability to efficiently manage and direct the production process.
>
> In short, a connection or nexus must be established between the employee's actions and the employment relationship.

(Emphasis in original.)

I would adopt and apply that as the appropriate standard by which to weigh the propriety of NLHC's actions in this case.

[46] In its letter to NLHC the Citizens' Representative noted:

> a) that there is no record of any complaints being registered by co-workers of [the Citizen].
>
> b) that there is no record of any complaints being received from NLHC clients as it pertains to [the Citizen] entering NLHC units.
>
> c) that [the Citizen] worked from the time of being charged to the time of conviction and returned to the exact same duties upon serving his suspension, at all times incident free and with no restrictions.
>
> d) that this conviction resulted from actions that occurred while [the Citizen] was off duty.
>
> e) that the victim was neither an employee [n]or client of NLHC.
>
> f) that there is no indication that NLHC considered reassigning [the Citizen] to other duties within the organization.
>
> g) that there was no record of any consideration being given to having [the Citizen] supervised or accompanied while carrying out his duties as a construction inspector.
>
> h) that NLHC did not consider other employment options before proceeding with the suspension.

[47] On the face of the record, without more, it is not possible to conclude that NLHC could meet the standard adopted by Barry J. in *Strowbridge.* The record as it stands indicates the opposite: there was no nexus between the employee's actions and the employment relationship. In those circumstances, the action of the employing government agency in imposing a penalty equivalent to a fine amounting to one-half year's salary, when the court had already decided that probation was the appropriate punishment for the offence, would seem to be the very kind of "impropriety" that the Act was intended to permit the Citizens' Representative to investigate, seek correction for and, failing corrective action, to expose. Thus, in this case, there was something to investigate that had not already been effectively resolved.

[48] While the applications judge dealt at length with the normal operations of the collective bargaining processes, he did so primarily for the purpose of supporting his conclusion that: "the entry by the Union into the settlement on behalf of the Citizen bound the Citizen to the result and can be said, on the basis of a legally imposed agency relationship, to amount to his consent to the resolution". From that, the applications judge reasoned that if the employee is still aggrieved, it "is not in relationship to the result of the grievance itself but in the conduct of the bargaining agent in the handling of the grievance". The remedy for that, the applications judge concluded, lies not with complaint to the Citizens' Representative but with exercising his right to complain about his union representation as provided for in s. 43 of the *Public Service Collective Bargaining Act*. As a result, the applications judge decided that "the consent implicit in the settling of the grievance by the Citizen's union, as bargaining agent, can and should be attributed to the Citizen himself".

[49] In my view, issue cannot be taken with those conclusions in the context of the legal rights of the Citizen under the collective bargaining regime governing his employment. However, immediately following that conclusion, the applications judge added the comment that "thereafter, the Citizen cannot be said to be 'aggrieved' within the meaning of s. 15 of the Act". It is with that conclusion that I disagree.

[50] First, I would note that, in my view, that conclusion of the applications judge is not consistent with his conclusion, as to the nature of the jurisdiction of the Citizens' Representative, excerpted in paragraph 32 above. There, he concluded that a finality clause respecting a decision by an administrative tribunal, "while precluding further legal recourse, does not preclude examination by the Citizens' Representative". The Citizen, as a result of the settlement agreement, may no longer be aggrieved for purposes of the *Public Service Collective Bargaining Act* and may be precluded from further legal recourse. However, that does not, in any manner, preclude the Citizen from being considered aggrieved within the meaning of s. 15 of the Act. With great respect, I am of the view that the applications judge erred when he so found. That error may have resulted from his assessing the fourth criterion, the existence of a person who is or may be aggrieved, by weighing it in the context of an entirely different underlying factor than he weighed the first three criteria.

[51] When weighing the first criterion, the "decision or recommendation", the applications judge rejected the argument of NLHC that it was not the

imposition of the penalty by NLHC but the decision of the Union to enter into the settlement agreement that produced the Citizen's dissatisfaction. The applications judge wrote:

> Whether one characterizes the matter being complained of as NLHC's decision to discipline or its decision to enter into a settlement agreement that provided for discipline, in the end it is the decision of NLHC to impose, or its act in imposing, the discipline in accordance with the agreement that generated the complaint, not the subsequent reduction in the length of the suspension resulting from the settlement. The decision to suspend was the underlying trigger for the call for the Citizens' Representative's investigation. That decision, in the last analysis, is a management decision attributable to NLHC.

(Emphasis added.)

[52] With respect to the "department or agency" criterion, the applications judge concluded that the criterion was met because the complaint alleged "an event that arises from a decision, recommendation, act or omission of NLHC [emphasis added]".

[53] With respect to the "matter of administration" criterion, the applications judge rejected the Attorney General's argument that the challenged decision was not the result of administration of policy but the result of a settlement agreement, as "an incorrect characterization". He then wrote that:

> … The settlement merely resulted in a modification of the penalty. The appropriateness of the imposition of some form of discipline was in fact confirmed. The original imposition of discipline was, as indicated above, the result of the application by NLHC of its human relations policies.

(Emphasis added.)

[54] Thus, with respect to the first three criteria, the applications judge rejected reliance on the settlement agreement, reached through the collective bargaining regime established pursuant to the *Public Service Collective Bargaining Act,* as the underlying factor and required reliance on the "imposition of the penalty" by NLHC to determine whether the criterion was met in each case. However, in the case of the fourth criterion, whether the Citizen was "aggrieved", he did the opposite. He first described the arguments of NLHC and the Attorney General when he wrote:

> … NLHC and the Attorney General argue that because this punishment resulted from an agreement between NLHC and the Union, acting as the legal representative of the Citizen for the purpose of processing his grievance, designed to settle the Citizen's grievance in a fair and reasonable manner, he no longer can say that he is aggrieved… Counsel for NLHC also submitted that an agreement voluntarily entered into to resolve a grievance must be presumed to be fair and acceptable and, as a result, the complainant should be thereafter estopped from saying that he continues to have a complaint or grievance; hence he is no longer "aggrieved".

He then immediately stated.

> I find these arguments persuasive…

[55] Notwithstanding his earlier rejection of the settlement agreement as the underlying factor to be considered, with no explanation of his reason for doing so, the applications judge assessed whether or not the Citizen was aggrieved by considering the impact of the settlement agreement in its legal context: in reality, in the context of its legal effect for purposes of the *Public Service Collective Bargaining Act*. He wrote:

> … It is difficult to regard the voluntary settlement of a grievance – even though it still involves a punishment, though muted from the original imposition – as having the effect of making a party to the settlement "aggrieved", any more than a litigant in court could say, in a legal sense, that he continues to be aggrieved following a formal settlement that he has voluntarily accepted. While a settling litigant may not be totally satisfied with the terms of the settlement that has been reached, it nevertheless cannot be said that he has a continuing grievance in any real sense - continuing disgruntlement, maybe, but not a legitimate grievance. His consent removes the moral and legal right to complain.

(Emphasis added.)

[56] Clearly, those comments, the references to "in a legal sense" and "not a legitimate grievance" in particular, can only be viewed as considering the effect in law of the settlement agreement to be the underlying factor by which the fourth criterion, whether the Citizen was aggrieved, is to be measured. As support for doing so the applications judge relied on the manner in which "aggrieved" was interpreted in the 165 year old decision in *Harrup v. Bayley*, interpreting "aggrieved" in the context of a town improvement statute giving a right of appeal to persons who consider themselves aggrieved. In applying that decision the applications judge here wrote:

> This notion of consent removing the ability of a person to claim he or she is aggrieved has surfaced in other contexts. In *Harrup v. Bayley* (1856), 6 E1. & B1, 218 (Eng. K.B.), for example, a town improvement Act gave a right of appeal from an order made by commissioners for municipal improvements to "any person or persons who may think himself, herself or themselves aggrieved by" any order made under the Act. The commissioners made an order for payment of the expenses of an application to parliament to promote a local Bill out of town funds. The mover of the resolution empowering the commissioners to promote the Bill applied, as a ratepayer, against the order, claiming he was aggrieved. The Court held he was precluded from appealing because he had sanctioned the act which led to the order. Lord Campbell, C.J. stated at pp. 223-224:
>
> > In the present case, the Act … gives an appeal to any person who may think himself aggrieved; but *that does not mean to any person who says or fancies he is aggrieved*. … Now how can such a provision apply to a person who wished to complain of the act which he himself has authorized, and expressly required to be done … How can the appellant say he is aggrieved by this order? Volenti non fit injuria. According to every principle of justice he cannot complain of what was his own act. [italics added]

[57] With great respect, I agree with the submission of the Citizens' Representative that *Harrup v. Bayley* does not reflect a comparable circumstance from which to draw guidance in interpreting a modern piece of "ombudsman" type legislation. It was decided more than one hundred years before the legislature in any English speaking common law jurisdiction enacted ombudsman type legislation. In *Harrup v. Bayley* the jurisdiction was to hear and decide an appeal against a municipal decision. As noted above, the jurisdiction of the Citizens' Representative is entirely different. It is simply to consider and report to the appropriate minister or department of government whether, in the view of the Citizens' Representative, a decision by an agency of government might be contrary to law, unreasonable, unjust, oppressive, improperly discriminatory, etc. In that context, a person who could not be described as "aggrieved" in law for purposes of asserting a legal right, could nevertheless, still be aggrieved in the general sense of that word as it is used in s. 15 of the Act.

[58] The applications judge, having referred to the comments of Justice Dickson in the *British Columbia Development* decision, and, as noted in paragraph 8 above, having observed that "much guidance can and should be taken from the comments in that case", ought to have applied the principles expressed therein as being more appropriate, if not indeed binding, for the purpose of determining the meaning of "aggrieved" in the context of

ombudsman type legislation. Bearing in mind: (i) the observation of Justice Dickson that "This appeal may affect Canadian jurisdictions beyond British Columbia"; (ii) the observation of the applications judge here that " … much guidance can and should be taken from that case"; and (iii) the similarity of purpose and language in the two statutes, I would consider the interpretation Justice Dickson gave to "aggrieved", used in that legislative context, to be binding on this Court.

[59] In *British Columbia Development,* Justice Dickson described arguments by the Attorney General of British Columbia that are comparable to the arguments put forward by NLHC and the Attorney General here. At pages 467-468 he wrote:

> … the appellants and the Attorney General of British Columbia contend that the phrase "aggrieves or may aggrieve", as used in s. 10(1), is a term of art intended to describe the denial or potential denial of a legal right; to be aggrieved a person must have been deprived or, or denied something, to which he was entitled by law. They argue that since King Neptune had no right to purchase the land upon which the restaurant stood, or to compel the renewal of the lease, it cannot be said to have been aggrieved by its inability to do so.

(Emphasis in original.)

Justice Dickson then referred to several decisions cited by the British Columbia Attorney General and at pages 468-469 wrote:

> I find these authorities inconclusive. Although each dealt with the meaning of the phrase "person aggrieved", none dealt with a statute remotely resembling the one at bar. Our understanding of s. 10(1) of the *Ombudsman Act* is not likely to be furthered by reference to different statutes containing differently worded sections dealing with different subject matters. The issue can only be resolved by an analysis of the legislation before us in this particular case and the purpose that legislation is designed to achieve.
>
> That the Ombudsman's powers of investigation and reporting were meant to extend beyond those cases in which the complaining party asserts a cause of action is evident from s. 22 of the *Ombudsman Act,* which speaks of determinations by the Ombudsman that something the government did was "unjust", "oppressive" "based in whole or in part on a mistake", brought about through "arbitrary, unreasonable or unfair procedures", or "otherwise wrong". This section also provides that in such cases the Ombudsman "shall report his opinion and the reasons for it to the authority and may make the recommendation he considers appropriate". This makes clear the intent of the legislature not to

> confine the Ombudsman to investigating governmental acts that "aggrieve" a person in the narrow sense argued for by the appellants.
>
> Secondly, the appellants offer no principled justification for limiting the meaning of "aggrieves" to the infringement of a legal right. The absence of such justification is not surprising since it was, at least in part, the lack of any remedy at law for many administrative injustices that gave rise to the creation of the office of Ombudsman. The courts, not Ombudsmen, have responsibility for remedying violations of legal rights. As counsel for the Ombudsman of Ontario submits, "the purpose of the Ombudsman Act *inter alia* is to create someone who can investigate actions which prejudice someone's interest even if those actions fall short of violating the strict legal rights which a court protects". To interpret the phrase "aggrieves or may aggrieve" in the manner urged by the appellants would run counter to the legislature's clear intention to provide redress for grievances not legally cognizable.
>
> I would hold that a party is aggrieved or may be aggrieved whenever he genuinely suffers, or is seriously threatened with, any form of harm prejudicial to his interests, whether or not a legal right is called into question. In this case, it is quite clear that the loss of the waterfront location for the restaurant could cause harm prejudicial to the interests of King Neptune and therefore the King Neptune might be aggrieved by the conduct of B.C.D.C. and First Capital.

(Emphasis added.)

[60] The nature of the circumstances in that case is so nearly identical to the nature of the circumstances in this appeal and the principles identified by Justice Dickson are so clearly consistent with the purposes of the Act under consideration here that, even if the view expressed by Justice Dickson could not be considered binding on this Court, I would find it to be persuasive in these circumstances, rather than the view expressed in *Harrup v. Bayley*.

CONCLUSION

[61] For the foregoing reasons I would conclude that the applications judge erred when he decided that "the Citizen is not a 'person who is or may aggrieved' within the meaning of s. 15 and, accordingly, the jurisdiction of the Citizens' Representative is not engaged". In the circumstances of this case, the Citizen must be considered a person who is or may be aggrieved within the meaning of s. 15. Accordingly, the appeal is allowed, the decision of the applications judge is set aside and it is declared that the Citizens' Representative has jurisdiction to investigate the complaint placed before it by the Citizen.

[62] As counsel for each of the parties indicated costs were not requested, there will be no order as to costs.

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C. K. Wells J.A.

I concur: _____________________________

L. D. Barry J.A.

Dissenting Reasons by White J.A.:

[63] Justice Wells has thoroughly summarized the background facts, the proceedings in the applications court, the arguments of the parties and the relevant issues. I will not repeat any of these except where necessary to highlight a particular point.

ANALYSIS

[64] At the heart of this appeal is the resolution of conflict between two statutory regimes. While different in character, and providing different processes, the interaction between the two methods of dealing with grievances must be at the forefront of the analysis. Crucial to this consideration is the special nature of the labour dispute resolution regime in this Province. My reasons and comments should be read in that context.

(a) "is or may be aggrieved"

[65] I would agree with Justice Wells that the primary issue is "Did the applications judge err in deciding that the Citizens' Representative had no jurisdiction to investigate the matter of the Citizen's suspension by NLHC,

as a result of concluding that the Citizen is not a person who "is or may be aggrieved" within the meaning of s. 15 of the Act". This section provides:

> 15. The Citizens' representative may, on a written complaint or on his or her own initiative, investigate a decision or recommendation made, including a recommendation made to a minister, or an act done or omitted, relating to a matter of administration in or by a department or agency of the government, or by an officer, employee or member of the department or agency, where a person is or may be aggrieved.

(Emphasis added.)

[66] The applications judge, at paragraph 65 of his decision, stated that in order for the Citizens' Representative to embark on an investigation, the complainant must be a person who "is or may be aggrieved", pursuant to section 15 of the Act. I would agree and also accept, for the purposes of this appeal, that the other requirements in section 15 identified by the applications judge are satisfied in this case, as the findings of the applications judge were not objected to before this Court.

[67] Justice Wells accepts that the Citizen is "aggrieved", as that word is employed in section 15 of the Act, as he has been subjected to disciplinary action by his employer, even though the specific penalty was the result of a settlement agreement. I would disagree with him. My reasons are substantially the same as those of the applications judge. I would, however, also make the following comments.

[68] The object of the analysis is to determine the meaning of the word "aggrieved". While I agree that the plain words "is or may be aggrieved" could support the interpretation urged by Justice Wells, this does not end the analysis. Legislative and jurisprudential guidance require that courts go beyond the plain words of the enactment. The starting point for the interpretation of statutes in this province is section 16 of the *Interpretation Act*, RSNL 1990, c. I-19. That section states:

> 16. Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.

[69] The practical result of this section was discussed by Green J.A., as he was then, in *Archean Resources,* at paragraph 22. There Justice Green stated:

> …s. 16 directs the court to consider every provision "remedial" and to interpret it so that it "best" ensures the attainment of its "objects" according to its "true" meaning. This requires a consideration, as an integral part of the interpretive exercise, of the problem or "mischief" to which the legislature directed its legislative act as a remedy and then the drawing of an inference, based on the language of the whole enactment and the court's general knowledge of the state of the pre-existing law and any information as to the broad social context in which the legislative act occurred, as to what, broadly speaking, the object or objects of the legislative act must have been. The end result is to arrive at a "true" meaning. That inevitably requires an examination of more than the bare words of the legislative enactment that is in issue, no matter how clear or unambiguous they may at first blush appear. The surrounding text, the interrelation of other related statutes, the social and legislative context in which the provision was enacted, and other extrinsic aids are all sources to be consulted in this exercise…

(Emphasis added.)

[70] Part of the interpretive exercise involves determining the impact of the interpretation on other related statutes. Interpretations that are in harmony with other legislative policies should be preferred where more than one interpretation is possible. Justice Wells' reasoning takes a different view of the impact that his interpretation might have on the regime set out in labour relations legislation. This was explicitly considered by the applications judge in his reasons at paragraph 92, where he stated:

> I would also observe that this result is consistent and in harmony with the policy of labour relations legislation in the province. The legislation is designed to promote labour peace by, amongst other things, providing mechanisms for the timely resolution of disputes that arise between employers and employees. The emphasis, throughout, is on trying to settle grievances through rational discussion in a fair, efficient and timely way so that they will not continue to fester and thereby disrupt continuing working relations in the workplace. A process which allows an employee to resurrect a grievance, albeit in a different forum, and require the employer to once again respond to it substantively years after the parties to the collective agreement thought that the matter had been satisfactorily resolved, has the potential of undermining the grievance arbitration process. An interpretation that can avoid such a result while still not otherwise unduly restricting the important remedial jurisdiction exercisable by the Citizens' Representative is to be preferred.

(Emphasis added.)

[71] If this grievance had not been settled and had proceeded to arbitration, any award, decision, recommendation or omission of the arbitrator would be shielded from review by the Citizens' Representative pursuant to section 19(c) of the Act. The result of Justice Wells' interpretation is that any settlement made prior to the arbitrator's decision being released may be re-examined by the Citizens' Representative. This may provide a disincentive to settle, undermining the grievance arbitration process. I would agree with the applications judge that an interpretation that promotes the finality of properly negotiated settlements is to be preferred.

[72] The reasoning can be taken even further. If a party to a collective agreement may be said to be aggrieved even after settlement of a grievance, could a citizen who is a party to a dispute outside of the labour relations arena be said to be aggrieved after having reached a final, binding settlement with "a department or agency of the government"? Section 19(b) of the Act prevents the Citizens' Representative from investigating "an order, decision or omission of a court, a judge of a court, a master of a court, or a justice of the peace made or given in an action or proceeding in the court, or before the judge, master or justice of the peace". Following the reasoning of Justice Wells, section 19(b) would not prevent the investigation of a private settlement reached between a citizen and government, where the settlement did not require approval from the court. This might similarly provide a disincentive for a governmental authority to settle litigation in an attempt to definitively resolve an issue. It would also allow a citizen, years later, to attempt to reopen a final settlement agreement by seeking to have the Citizens' Representative report to government and disclose publicly his opinion that the settlement was unjust. This would run counter to the many provisions in the *Rules of the Supreme Court, 1986*, which aim to encourage parties to settle their disputes.

[73] As a corollary to the two foregoing paragraphs, I would disagree with Justice Wells' interpretation of section 19(d) of the Act, where he says, "paragraph (d) of s. 19 of the Act effectively authorizes investigation of matters that have been the subject of decisions by dispute resolution tribunals." The decisions of arbitrators and courts are specifically shielded from review by paragraphs 19(b) and (c), respectively. This must include the matters that are the subject of the decisions made by courts and arbitrators.

[74] Consider the implication had this case proceeded to arbitration. The arbitrator would have made a decision on the propriety of the penalty imposed in this case. Could the Citizens' Representative then investigate

whether the penalty imposed was proper, as he had done in this case? While this would be a matter that was the subject of the decision, paragraph 19(d) cannot be construed to allow such a collateral attack on the decision of an arbitrator. This would eviscerate paragraph 19(c).

[75] I would suggest that paragraph 19(d) is a "catch-all" provision which implicitly allows the Citizens' Representative to examine the final decisions of other tribunals after the time limit for the exercise of the right of appeal has expired, but that it does not extend to courts and arbitrators.

[76] As Justice Wells' interpretation of the words "is or may be aggrieved" may undermine the legitimate policy aims of other legislative enactments, namely the promotion of settlements, the interpretation of the applications judge should be preferred.

[77] While the interaction of the Act with other dispute resolution mechanisms is an important consideration, my reasoning rests on broader grounds. Clearly a party that has settled a grievance has settled their legal rights. Following the guidance provided by Dickson J., as he was then, in *British Columbia Development*, however, I would agree that a party may be aggrieved even where it is not a strictly legal right that is potentially infringed. Thus, the fact that it is not a legal right is no bar to the Citizens' Representative's jurisdiction. The usefulness of *British Columbia Development* is, however, limited. That case does not discuss, as here, the unique circumstances existing where a party has settled the very matter they are complaining of.

[78] I agree with the applications judge's reliance on *Harrup v. Bayley* for further support for the common sense proposition that consent removes a person's ability to claim that he or she is aggrieved. I would also agree with the applications judge's statement that "[the Citizen's] consent removes the <u>moral</u> and legal right to complain" [Emphasis added]. For a person to be able to say, "I agree with my punishment" only to turn around to the Citizens' Representative and say, "I do not agree with my punishment", strikes at the core of what most would consider just.

[79] I also respectfully disagree with the comments made by Justice Wells at paragraph 44. I believe it is a mischaracterization of the events to say that the second significant factor which must be considered is, "the potential impropriety involved in a government agency deciding to impose on an employee… a penalty…". That may have been the case had the Citizen not

grieved his suspension. What followed, however, was that the six month suspension was the result, not of unilateral imposition by the employer, but of mutual agreement. If the Citizen now has a grievance, it is that the settlement was entered into by his union, not that the employer imposed a penalty. While the Citizen may continue to be aggrieved as a result, I agree with the applications judge's comments where he stated:

> [89] In such a situation, the employee who does not agree with the way he was treated by his union in the processing of the grievance is not without remedy. The protection that is given to an employee where a union settles a matter in a manner that is unfair to the employee or prejudicial to his interests is not to be able to resile from the settlement but to complain to the Labour Relations Board under s. 43 of the *Public Service Collective Bargaining Act*. That section allows an employee to complain to the Board about action of the bargaining agent in the handling of a grievance that is "arbitrary, discriminatory or in bad faith" and empowers the Board to grant a remedy to the employee as against the bargaining agent, not against the employer. The Citizen in this case did not avail himself of that process.
>
> [90] It is also worth noting that s. 43 gives this right to an employee "who claims to be aggrieved". The claim to be aggrieved, however, is not in relation to the result of the grievance itself but in the conduct of the bargaining agent in the *handling* of the grievance. The integrity of the grievance process is thus nevertheless preserved. The employee does not continue to be "aggrieved" about the discipline imposed by the employer under the settlement agreement, but he still is "aggrieved" about the way in which his bargaining agent handled the grievance. That of course, is not a complaint against the employer but against his union.

[80] For the foregoing reasons, I respectfully disagree with the conclusion reached by Justice Wells. I would find that the Citizen is not aggrieved as required under section 15 of the Act and I would dismiss the appeal.

(b) exclusive jurisdiction argument

[81] I would also add the following comments with respect to the other issue advanced by the respondents in this matter.

[82] The respondents argue that labour relations legislation governs labour relationships and operates to the exclusion of all other competing mechanisms that exist to address grievances arising in a unionized workplace between an employee and his employer. In his decision the applications judge summarized the "exclusive jurisdiction" argument advanced by the respondents stating:

> [38] It was noted earlier in this judgment that counsel for NLHC and the intervenors submitted that the jurisdiction of the Citizens' Representative was ousted by the dispute resolution mechanisms in the province's labour relations legislation and the applicable collective agreement. Those provisions require that disputes arising out of the interpretation, application, administration or alleged violation of a collective agreement must be resolved by a provision for "final settlement" by "arbitration or otherwise" (*Public Service Collective Bargaining Act*, R.S.N.L. 1990, c. P-42, s. 39(1)). In the collective agreement, there is a 4-step grievance process, culminating in a "final, binding and enforceable" arbitration decision (Article 12:04).

[83] This argument was based on the line of reasoning expounded in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, where McLachlin J., as she was then, for the majority, stated:

> [41] … Estey J. concluded at p. 721 that subject to a residual discretionary power in courts of inherent jurisdiction over matters such as injunctions, concurrent court proceedings were not available:
>
> > What is left is an attitude of judicial deference to the arbitration process. . . It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration ... is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of a collective agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement. [Emphasis added.]
>
> …
>
> [67] I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario *Labour Relations Act* generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to *Charter* remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed. The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal. Against this background, I turn to the facts in the case at bar.

[84] This legislative deference to arbitration was confirmed in the Act in section 19(c), which provides:

> 19. Nothing in this Act authorizes the Citizens' Representative to investigate
>
> …
>
> (c) an award, decision, recommendation or omission of an arbitrator or board of arbitrators in an arbitration to which the *Arbitration Act* applies;
>
> …

[85] Notably, the prohibition on the investigation of arbitral decision making does not specifically extend to the investigation of grievance settlements. Those settlements, however, fall under the labour relation grievance resolution mechanism, which, under section 39(1) of the *Public Service Collective Bargaining Act*, is clearly the preferred process for the resolution of such grievances.

[86] While this exclusionary jurisdiction argument appears at first blush to be persuasive, the applications judge, in his decision, subsequently noted that:

> [41] I would observe, however, that the *Weber* analysis arose in the context of a choice between the jurisdiction of the courts and a labour arbitrator to decide an employment-related issue. It has been applied in a competition between the jurisdiction of two statutory decision-makers in a labour relations context (see, e.g. *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360 at para 39; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2008 NSCA 21). In the current case, however, there is no competition between two rights-adjudication regimes. The result of the Citizens' Representative's work is not a binding adjudication; it does not, in itself, affect legal rights. As noted previously, his "watch-dog" jurisdiction is intended to be broad and pervasive and he is entitled by s. 18 to investigate a matter notwithstanding the fact that a provision expresses the administrative decision to be final and not subject to appeal of judicial review. In these circumstances it becomes difficult to say that the applicable grievance arbitration process was intended to operate to the complete exclusion of the Citizen's Representative. However, a more in-depth analysis can be left for another day.

[87] I would agree with the applications judge and Justice Wells that any argument that the labour relations dispute resolution process operates to the exclusion of the Citizens' Representative's jurisdiction would likely fail due

to (1) the difference in the remedy provided by the Citizens' Representative; and (2) section 18 of the Act. I would suggest, however, that the Citizens' Representative should, pursuant to section 24 of the Act, refuse to exercise his jurisdiction in cases like this.

- ***the nature of the remedy***

[88] As the applications judge noted, the Citizens' Representative does not adjudicate disputes over the respective rights of parties. The Citizens' Representative, rather, performs the duties and exercises the powers traditionally conferred on an ombudsman (see, the Act, s. 2(b)). This is patent when examining the powers of the Citizens' Representative following his completion of an investigation, set out in section 37:

> 37. (1) Where, after making an investigation under this Act, the Citizens' Representative is of the opinion
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> (a) that a decision, recommendation, act or omission that is the subject matter of the investigation appears to be
>
> (i) contrary to law,
>
> (ii) unreasonable,
>
> (iii) unjust,
>
> (iv) oppressive,
>
> (v) improperly discriminatory,
>
> (vi) in accordance with a practice or procedure that is or may be unreasonable, unjust, oppressive, or improperly discriminatory,
>
> (vii) based wholly or partly on a mistake of law or fact, or
>
> (viii) wrong;
>
> (b) that in making a decision or recommendation, or in doing or omitting an act, a power or right has been exercised
>
> (i) for an improper purpose,
>
> (ii) on irrelevant grounds, or
>
> (iii) on the taking into account of irrelevant considerations; or

(c) that reasons should have been given for a decision, recommendation, act or omission that was the subject matter of the investigation,

the Citizens' Representative shall report his or her opinion and his or her reasons and may make those recommendations that he or she considers appropriate to the appropriate minister and to the department or agency of the government concerned.

(2) In making a report under subsection (1), the Citizens' Representative may recommend

(a) that a matter should be referred to the appropriate authority for further consideration;

(b) that an omission should be rectified;

(c) that a decision should be cancelled or varied;

(d) that a practice on which a decision, recommendation, act or omission was based should be altered or reviewed;

(e) that a law on which a decision, recommendation, act or omission was based should be reconsidered;

(f) that reasons should be given for a decision, recommendation, act or omission; or

(g) that other steps should be taken.

(Emphasis added.)

[89] The Citizens' Representative's powers are limited to the completion of a report which must be forwarded to the appropriate governmental authority. I would again note Justice McLachlin's comment in *Weber* that, "The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal". Justice McLachlin had also noted that:

> [57] It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction. This Court in *St. Anne Nackawic* confirmed that the New Brunswick Act did not oust the residual inherent jurisdiction of the superior courts to grant injunctions in labour matters (at p. 724). Similarly, the Court of Appeal of British Columbia in *Moore v. British Columbia* (1988), 50 D.L.R. (4th) 29, at p. 38, accepted that the court's residual jurisdiction to grant a declaration was not ousted by the British Columbia labour legislation, although it

> declined to exercise that jurisdiction on the ground that the powers of the arbitrator were sufficient to remedy the wrong and that deference was owed to the labour tribunal. What must be avoided, to use the language of Estey J. in *St. Anne Nackawic* (at p. 723), is a "real deprivation of ultimate remedy".

[90] This reasoning may be extended to situations where the other dispute resolution mechanism provides a remedy unavailable in the labour relations dispute resolution mechanism. In such cases, the rationale for the exclusionary jurisdiction of the labour relations dispute resolution mechanism is no longer present. This is the situation here. The ultimate remedy provided by the Citizens' Representative is public scrutiny. This is different in quality than the remedy provided through settlement of the grievance. For this reason, the *Weber* analysis is inapplicable in this instance.

- *section 18 of the Act*

[91] This conclusion is further reinforced by section 18 of the Act, which provides:

> 18. The Citizens' Representative may exercise and perform the powers, duties and functions conferred or imposed on him or her under this Act notwithstanding a provision of another Act to the effect that a proceeding, decision, recommendation, act or omission that he or she is investigating is
>
> (a) final;
>
> (b) not subject to appeal; or
>
> (c) not subject to be challenged, reviewed, quashed or called into question.

[92] Thus, providing Justice Wells is correct that a person who has settled their grievance may still be aggrieved, any argument that a settlement reached through the grievance process is final is ineffective in barring the jurisdiction of the Citizens' Representative where the process did not culminate in an arbitral award or decision. The effect of section 18 is to bar any claim of *res judicata* or abuse of process that may be raised where an aggrieved party seeks a parallel remedy through the Citizens' Representative (assuming the Citizens' Representative is not barred from investigating the matter under section 19).

- ***section 24 of the Act***

[93] It is further no argument that there is a complete, comprehensive regime governing labour relations disputes as section 24(1)(f) provides:

> 24. (1) The Citizens' Representative, in his or her discretion, may refuse to investigate or may cease to investigate a complaint where
>
> …
>
> (f) the law, or existing administrative procedure provides an adequate remedy in the circumstances for the person aggrieved and, where the person aggrieved has not availed himself or herself of the remedy, there is no reasonable justification for his or her failure to do so.

[94] Clearly the Citizens' Representative maintains discretion to investigate a matter where there is a comprehensive administrative regime in place to deal with the aggrieved person's complaint. I would suggest by way of guidance, however, that the following considerations are relevant in determining whether the Citizens' Representative should exercise his jurisdiction in a given situation.

[95] In *British Columbia Development* at 461, Dickson J., as he was then, stated:

> The Ombudsman represents society's response to these problems of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed. The Ombudsman "can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds": *Re Ombudsman Act* (1970), 72 W.W.R. 176 (Alta. S.C.), *per* Milvain C.J., at pp. 192-93. On the other hand, he may find the complaint groundless, not a rare occurrence, in which event his impartial and independent report, absolving the public authority, may well serve to enhance the morale and restore the self-confidence of the public employees impugned.

[96] I would agree with the respondents' submission that the area of labour relations is not a "dark place" which requires "the lamp of scrutiny". The legislation provides a "comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting" (see

Estey J.'s comments, cited by McLachlin J. in *Weber*, above). To the extent that the Citizens' Representative may re-examine settled grievances, the careful balance put in place by the scheme may be upset.

[97] I would also note at this point that paragraph 24(d) of the Act provides the Citizens' Representative may, in his discretion, refuse to exercise jurisdiction where:

> (d) in his or her opinion it should not be investigated or the investigation should not be continued because the public interest outweighs the interest of the person aggrieved;

[98] Further to this, while the application of the doctrines of *res judicata*, collateral attack and abuse of process have been legislatively overridden by section 18, the principles which gave rise to them should be considered by the Citizens' Representative when determining whether to exercise his jurisdiction where the matter had previously been settled. These principles were discussed in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52. In that case the Supreme Court of Canada considered whether the British Columbia Human Rights Tribunal had jurisdiction to hear a complaint that had already been heard and decided by the British Columbia Workers' Compensation Board. The *Human Rights Code* provided in section 27(1)(f) that the complaint may be dismissed where it has already been "appropriately dealt with in another proceeding". In her discussion, Abella J., for the majority, outlined the common underlying principles behind the doctrines of *res judicata*, collateral attack and abuse of process as being:

> - It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
>
> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
>
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).

- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).

- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

[99] These concerns are particularly acute in this situation where the Citizens' Representative's jurisdiction and the labour dispute resolution mechanism overlap. As noted by the applications judge at paragraph 92 (excerpted above), it is in the interest of the public and the parties that the finality of a resolution of a labour dispute can be relied upon. A premium is placed on the timely, final resolution of such matters. This is recognized in the Act itself at paragraph 19(c) which shields arbitration decisions from review.

[100] Respect for the finality of the settlement of labour disputes would increase the fairness and integrity of the labour dispute resolution process. Further to this, reinvestigation of issues that have been previously decided by way of settlement may undermine confidence in the settlement process by creating inconsistent results and unnecessarily duplicative proceedings. Allowing the Citizens' Representative to investigate matters resolved by settlement in the labour relations context would open the "floodgates" for other such complaints to be made. This would undermine the finality of settlements and, as I have noted earlier, create a disincentive to settle matters.

[101] Had the Citizens' Representative refused to exercise his jurisdiction in this case, the parties could have avoided extensive, and likely expensive, relitigation. NLHC may now wonder, in hindsight, whether it would have been more cost effective to proceed to arbitration, as opposed to engaging in good faith with the union and arriving at a settlement. The Citizens' Representative has effectively given notice that he will exercise jurisdiction in such cases. Clearly, this provides a disincentive to settle.

[102] Thus, even if the Citizens' Representative had jurisdiction to deal with this matter, in light of the foregoing reasons, I have concluded that he should not have done so on two bases: first, having regard to section 24(1)(f) of the Act, the Citizen failed to avail himself of an alternate "adequate remedy" under labour relations legislation; and, second, having regard to section 24(d) of the Act, his dealing with this matter is contrary to the public interest

in the operation of the labour relations scheme and, on the facts of this case, that “outweighs the interest of the person aggrieved”.

CONCLUSION

[103] I would dismiss the appeal.

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White J.A.