IN THE MATTER OF AN ARBITRATION

BETWEEN

CITY OF VANCOUVER

AND

CANADIAN UNION OF PUBLIC EMPLOYEES
LOCAL 15

(Pension Plan Dispute)

Arbitrator	:	Donald R. Munroe, Q.C.
For the City	:	Gregory J. Heywood
For Local 15	:	Leo McGrady, Q.C.
Date and place of hearing	:	May 29, 2006 Vancouver, B.C.

I

The parties to this arbitration proceeding are the City of Vancouver (the City) and the Canadian Union of Public Employees Local 15 (Local 15). I have been constituted by the parties as an arbitration board under their collective agreement, but with objection as to jurisdiction by the City.

The grievance giving rise to this proceeding was filed by Local 15 as the result of the City's admitted failure during the period 1999-2003 (approx.) to provide certain eligible part-time and auxiliary employees with the option to enroll in the pension plan which for some of that period was governed (in part) by the *Pension (Municipal) Act* and the Municipal Pension Plan Regulation, and latterly by a Joint Trusteeship Agreement and the Municipal Pension Plan Rules having their authoritative source in the *Public Sector Pension Plans Act*; and as the result of the parties' inability to agree on the appropriate remedial consequences of the City's admitted failure aforesaid.

The City describes what occurred as an administrative oversight that was caught in 2003. The issue ultimately requiring resolution is the affected employees' rights, and more particularly, the appropriate remedial directions to be made, if any, as flowing from the City's oversight.

The pension plan is one requiring contributions from both the municipal employer and participating employees. Local 15 says that in the circumstances of this case, the City should be directed to pay the employer's contribution arrears, whether or not an affected employee wishes to "purchase" his or her own contribution arrears; and says further that the affected employees should be "made whole" by the City. The process of making the affected employees whole was described by Local 15 in the following terms:

- Amongst other things, 'make whole' in these circumstances means that the employer must forthwith pay its contribution to the pension fund for those employees who should have been notified of their eligibility to enroll in the pension plan, but were not, or were misinformed, and who wish to enroll.

- Provide interest free loans to those employees wishing to purchase the time back. The repayment of those loans should be by payroll deduction, and should be spread out over a time period equal to the time lapsed between the employees' eligibility date and the time they enroll.

- As enrollment arrears must be paid by the employer on the basis of the employee's full time equivalent salary for the most recent month of employment, the employer must make the employee whole for any increased amounts flowing from this method of calculation with respect to the employees' contribution.

- A declaration that any waivers relied upon by the employer be declared a nullity unless the employee was provided with full and accurate information from the employer prior to signing the waiver, and unless it was in the form of a Waiver of Pension Coverage Form prescribed by the MPP Instructions for Employers.

- That the employer provide the union forthwith with the following information:

    - The names of auxiliary, part time, and temporary part time employees who chose to enroll, but did not do so retroactively
    - The names of auxiliary, part time, and temporary part time employees who declined to enroll, or who signed a waiver
    - The names of auxiliary, part time, and temporary part time employees who left the employment of the employer after the changes in the legislation, who were eligible to en enrolled, and who did not enroll.

For its part, the City says that the affected employees' rights and remedies "...arise strictly under the terms of the Municipal Pension Plan Rules and the *Public Sector Pension Plans Act*, Public Sector Pension Plans Regulations and most significantly, the Municipal Pension Plan Joint Trust Agreement". And fundamentally, the City argues that the dispute between the parties does not in its essential character arise from the interpretation, application, administration or violation of the parties' collective agreement. Thus, says the City, the dispute is not within the jurisdiction of an arbitration board constituted under the collective agreement.

This award addresses the preliminary issue of arbitrability.

II

As a municipal employer, the City is bound by the *Public Sector Pension Plans Act* (sometimes hereafter "the PSPPA"), which received Royal Assent on July 15, 1999, and which repealed and replaced the *Pension (Municipal) Act* (sometimes hereafter "the PMA").

The PSPPA introduced certain changes to British Columbia's four statutory pension plans covering a range of public sector employees, including the Municipal Pension Plan which had been continued under the predecessor PMA.

By Section 5 of the PSPPA, the British Columbia Pension Corporation was established as an agent of the government, consisting of the Pension Management Board appointed under Section 8.

The PSPPA has four schedules (A, B, C and D) having application respectively to the four statutory pension plans, namely, the College Pension Plan,

the Municipal Pension Plan, the Public Service Pension Plan and the Teachers' Pension Plan.

The Municipal Pension Plan is governed by Schedule B. Section 18(2) of Schedule B states that, "The partners may enter into a unanimous joint management agreement that provides for [certain matters]". Section 1 of Schedule B defines "partners" as meaning "...the plan employer partner and the plan member partner".

The "plan employer partner" is defined as meaning "...the government of British Columbia, the municipal governments, including regional districts, as represented by the Union of British Columbia Municipalities, and health sector employers as represented by the Health Employers Association of British Columbia".

The "plan member partner" is defined as meaning "...the Municipal Employees' Pension Committee which represents: (a) the British Columbia Nurses' Union, (b) the Canadian Union of Public Employees, (c) the Health Sciences Association of British Columbia, (d) the Hospital Employees' Union, (e) the British Columbia Federation of Police Officers, (f) the British Columbia Professional Fire Fighters' Association, and (g) the other unionized plan members".

The matters contemplated to be covered by the unanimous joint management agreement are described at Section 18(2) of Schedule B of the PSPPA as follows:

> (a) the continuation of the pension plan and pension fund, that were continued under this Schedule, for the benefit of plan members;

(b) the joint management of the pension plan and the pension fund;

(c) establishing who will manage the agreement;

(d) the establishment of an arrangement to hold and invest the pension fund;

(e) the composition of the board of trustees of the pension plan, including the appointment of trustees and the delineation of their powers, functions and duties;

(f) the sharing by employers and plan members of gains or surplus and of liability for deficiencies in the pension fund;

(g) the method for amending the pension plan by the agreement of the partners;

(h) the resolution of disputes;

(i) any other matter on which agreement is reached.

Section 18(4) of Schedule B states that the pension plan continued under the joint management agreement (i.e., the Municipal Pension Plan) must provide for all of the following:

(a) employer and employee eligibility to participate in the pension plan;

(b) employer and plan member contributions to the pension plan;

(c) pensionable service, including the calculation of pensions, purchase of service, reinstatement and portability;

(d) eligibility to receive a benefit and the determination of the amount of that benefit;

(e) benefits on termination, early retirement, normal retirement, late retirement, disability retirement and pre-retirement death;

(f) [Repealed 2003-02-15];

(g) pension indexing;

(h) general administrative requirements;

(i) supplemental benefits;

(j) continued recognition of any rights vested in a plan member or beneficiary, in the same manner and to the same extent as provided under the pension plan;

(k) any matter necessary or advisable to establish the pension plan rules, including those matters described in section 16(1).

By implication of Sections 18(5)(b) and (c) of Schedule B, and the definition of "plan administrative agent" in Section 1 of Schedule B, the British Columbia Pension Corporation established under Section 5 of the PSPPA is required to be the plan administrative agent of the Municipal Pension Plan as continued under the unanimous joint management agreement.

The scheme of the PSPPA was that once a unanimous joint management agreement was concluded as envisaged by Section 18 of Schedule B, the agreement thus concluded together with the Pension Plan Rules as may be adopted thereunder (which continued and replaced the rules prescribed by the Municipal Pension Plan Regulation, B.C. Reg. 113/2000) would be the documents governing the Municipal Pension Plan.

All of that was concluded on April 21, 2001, on which date the "plan employer partner" and the "plan member partner" entered into a Joint Trust Agreement (being the unanimous joint management agreement contemplated by Section 18(2) of Scheduled B of the PSPPA) and, pursuant to Article 11 of the Joint Trust Agreement, continued and replaced the rules earlier prescribed by the

Municipal Pension Plan Regulation, B.C. Reg. 113/2000. The replacement document is called the Municipal Pension Plan Rules (sometimes hereafter "the Rules").

Sections 80(1) and (2) of the Rules describe certain employer duties as follows:

> (1) An employer must do all of the following:
>
> (a) provide to the plan administrative agent, in the manner and within the time limits specified by the plan administrative agent, complete, accurate and sufficient personal information and records respecting any member as may be necessary for the administration of this Plan;
>
> (b) collect and remit to the plan administrative agent all required member and employer contributions in accordance with Part 2;
>
> (c) provide each member with the information supplied by the plan administrative agent as required by the *Pension Benefits Standards Act*, and provide any other information and records in the manner, and within the time limits, established by the plan administrative agent;
>
> (d) obtain and retain a form of waiver from any employee who elects in writing not to be covered as a member under this Plan.
>
> (2) An employer must reimburse the plan administrative agent, on demand, for the full amount of any costs, charges, expenses or penalties imposed on, and paid by, the plan administrative agent on behalf of the employer arising out of
>
> (a) the employer's failure to report information in the form or within the deadlines specified by the plan administrative agent, or

(b) the employer's submission to the plan administrative agent of incomplete, inaccurate or insufficient data for the purposes of calculating the pension adjustment.

Section 3 of the Rules describes employee eligibility for participation in the Municipal Pension Plan in these terms:

(1) Subject to terms and conditions of eligibility specified by the board or former board, this Plan applies to the following employees:

(a) a person who

(i) is receiving a salary as compensation for services rendered as an employee on the permanent staff of the employer and is engaged on a continuous full time basis, or

(ii) has been employed in a continuous full time capacity by the same employer for a period of 12 months, including an employee who is employed on the basis of at least 10 months of full time employment each year,

whichever first occurs;

(b) a person who is not within paragraph (a) and who has completed 2 years of continuous employment with earnings from an employer of not less than 35% of the year's maximum pensionable earnings in each of 2 consecutive calendar years, unless the employee elects not to participate in this Plan and makes the waiver required by subsection (4);

(c) an employee designated by a resolution of the employer to be included under this Plan, subject to terms and conditions specified by the board or former board.

(2) Despite subsection (1), this Plan does not apply to an employee of an employer who, by virtue of that

employment, is making contributions to the College Pension Plan, the Public Service Pension Plan or the Teachers' Pension Plan in respect of that employment.

(3) Despite subsection (1), if an employee is in the employ of an employer to whom this Plan begins to apply on or after April 1, 2000, the employee may, by giving written notice to the employer not mere than 90 days after the date this Plan begins to apply to the employee, elect not to participate in this Plan by making the waiver required by subsection (4).

(4) An employee referred to in subsection (1)(b) or (3) who elects not to participate in this Plan must sign a wavier form to that effect, and the employer must retain a copy of the wavier form.

(5) The waiver form referred to in subsection (4) is effective until

(a) subsection (1)(a) applies to the employee, or

(b) the employee elects coverage under subsection (6).

(6) An employee who elected not to participate in this Plan may, at any time, on application to the employer, elect coverage under this Plan and that employee must begin making contributions with the first pay period following the date of application to become a member of this Plan.

(7) For the purposes of this section, an employee is deemed to be on the permanent staff of an employer when the employee

(a) completes the employee's probationary period, or

(b) has completed 2 years of continuous employment with earnings of not less than 35% of the year's maximum pensionable earnings in each of 2 consecutive calendar years....

The focus here is Sections 3(1)(b), (4) and (5). By virtue of Section 3(1)(b), eligibility for participation in the Municipal Pension Plan is extended to part-time and auxiliary employees provided the employee has completed 2 years of continuous employment with earnings from a covered employer of not less than 35% of the year's maximum pensionable earnings (YMPE) in each of 2 consecutive calendar years, unless the employee elects not to participate in the Plan and makes the waiver required by Section 3(4). The YMPE is the maximum earnings upon which Canada Pension Plan contributions are required to be made. In the years 1999 through 2004, 35% of the YMPE was in the range of $13,000 to $14,000.

The eligibility of part-time and auxiliary employees to participate in the Municipal Pension Plan, subject to the prescribed earnings test, was not new upon the publication in 2001 of the Municipal Pension Plan Rules. Such eligibility had been a feature of the prior regulatory regime since 1993. And it was that feature of the Municipal Pension Plan which was the subject of the City's administrative failure in the period 1999-2003. Very simply, in that period, the City neglected to provide eligible part-time and auxiliary employees with the option to enroll in the Plan. In the result, the employer failed in certain of its duties under the applicable rules.

Section 9 of the Rules deals with enrollment arrears. Section 9(1) provides as follows:

> (1) If an employer has not made deductions under sections 5(1) from the date an employee becomes eligible to contribute to the pension fund, the plan administrative agent must order the employer
>
> (a) to commence making deductions immediately, and

(b) to pay to the pension fund, at the time and in the manner specified by the plan administrative agent,

(i) an amount determined in accordance with section 6(1) but using the member's full time equivalent salary payable for the most recent month of employment

multiplied by

(ii) the number of months and fractions of a month of pensionable service to be credited from the employee's eligibility date to the date contributions commenced in accordance with paragraph (a),

and the employer must comply with the order.

I go now to the Joint Trust Agreement (sometimes hereafter "the JTA"). Article 4 of the JTA establishes a Board of Trustees (the Board) representative of government, employers and unions.

By Article 4 of the JTA, the Board may enforce the payment of required contributions by employers and plan members by action in any court in the name of the Board as a debt due to the Board. And under Article 6.6, the Board has the power to settle claims relating to the Pension Plan or Pension Fund.

As I earlier noted, the plan administrative agent is the British Columbia Pension Corporation established under Section 5 of the PSPPA. Under Article 8.1 of the JTA, a person or organization directly affected by a decision of the plan administrative agent in the application of the Rules may appeal the decision to the Board.

Article 13 of the JTA is entitled Dispute Resolution. If the Board is deadlocked on a matter, then depending on the circumstances, the chair may be empowered to decide the matter. Where that does not occur, and where the matter remains unresolved after the processes described at Article 13.5, then the final step is arbitration "...pursuant to s. 62 of the *Pension Benefits Standard Act*" (the PBSA).

Section 62(1) of the PBSA states that:

> 62(1) A pension plan must contain a provision for final and conclusive settlement by arbitration, or another method agreed to by the parties to the plan, of disputes respecting the following:
>
> (a) any provision of a plan under section 24(1)(g);
>
> (b) the taking of a contribution holiday under section 41(1.2);
>
> (c) the allocation of any surplus assets on the winding up of a plan under section 45(2);
>
> (d) the withdrawal under section 46 of a participating employer from a multi-employer plan;
>
> (e) the payment or transfer under section 61(1) of any surplus assets of a plan.

I will simply state here that the subject matter of the dispute at hand is not within any of matters listed in the above Section 62(1).

The final two provisions of the JTA to which I will refer are Articles 17.4 and 17.6. They provide as follows:

17.4 Binding Effect of Pension Plan Rules, etc.

The Pension Plan Rules and amendments thereto and all of the Board's decisions, rules, regulations, policies and procedures made or established in accordance with this Agreement or the Pension Plan Rules, shall be binding upon the Trustees, the Signatories, the Unions, the Employers, the Plan Members and their respective beneficiaries, dependents, estates, heirs, executors, administrators, successors and assigns.

17.6 Governing Law

The Province of British Columbia is the location for legal purposes of the Pension Fund. All questions pertaining to the validity, construction and administration of this Agreement or the Pension Plan Rules shall be determined in accordance with the laws of the Province of British Columbia. Any litigation which arises pursuant to or in connection with this Agreement, the Pension Plan Rules or any of their respective provisions, shall be referred to the courts in the Province of British Columbia.

III

The parties' collective agreement contains four references to the *Pension (Municipal) Act* which, as will be recalled, was a predecessor statute to the *Public Sector Pension Plans Act*. The first is at Article 10.13:

Pension (Municipal) Act

In accordance with the Pension (Municipal) Act, where, due to a layoff, an employee's hours of work are reduced or employment status changed, the employee shall continue to contribute to the Municipal Superannuation Plan.

Effective 2004 June 17, where an employee has, prior to retirement, paid the full cost of extending their pensionable service by purchasing time served by the employee in a probationary capacity with the Employer which has not heretofore been considered as pensionable service, the Employer shall, upon the employee's

> retirement, reimburse the employee for one-half (1/2) of the costs previously paid by the employee provided the employee has reached the maximum retirement age. This provision is subject to the provisions of the Municipal Pension Plan and the maximum period of time that the Employer will cost share with the employee is six (6) months.

The second reference to the PMA is found at Article B.10.13 of Schedule "B" to the collective agreement. Schedule "B" is headed Auxiliary and Temporary Full-Time Employees. The preamble to Schedule "B" states that Parts A and B of the Schedule apply to auxiliary or temporary full-time employees who have less than one year of continuous work in a temporary full-time capacity; and to temporary full-time employees hired into a posted temporary full-time position but who have not yet worked continuously in the position for one year. The purpose of Schedule "B" is to identify the provisions of the collective agreement that apply unaltered to the employees to whom Schedule "B" applies (Part A); and to stipulate certain other working conditions for such employees with respect to those parts of the main text of the collective agreement that do not apply to them (Part B).

One of the provisions of the collective agreement identified in Part A of Schedule "B" as applying to the employees covered by Schedule "B" is the above-quoted Article 10.13.

Then, in Part B of Schedule "B", Article B.10.13 states that, "The *Pension (Municipal) Act* shall apply as appropriate to Temporary and Auxiliary Employees".

The final reference to the *Pension (Municipal) Act* contained in the collective agreement is in Schedule "C" of the collective agreement: which applies to regular part-time employees; and for such employees performs the same function

as does Schedule "B" for the temporary full-time and auxiliary employees thereby covered. Part A of Schedule "C" includes the same reference to the above-quoted Article 10.13 as found in Part A of Schedule "B". Schedule "C" does not contain a provision like Article B.10.13 found in Part B of Schedule "B". But of course, the City must apply any pension statutes to all employees as the statutes may require.

IV

The City argues that the dispute represented by Local 15's grievance arises solely under the terms of the Rules and the PSPPA, which are extrinsic to the collective agreement; accordingly, that the dispute between the parties does not in its essential character arise from the interpretation, application, administration or alleged violation of the collective agreement; and thus, that the matter cannot be heard and decided by an arbitration board constituted under the collective agreement.

I begin by reference to the 1985 decision of our Court of Appeal in *Kinsmen Retirement Centre* [1985] B.C.J. No. 2299. That was an appeal by an employer under Section 109(1) of the *Labour Relations Code* (now Section 100 of the *Code*) of an arbitration award made under a collective agreement.

The collective agreement in that case included a provision stating that, "Upon completion of three (3) months' service eligible employees shall be brought within the scope of the *Municipal Superannuation Act*" (which had since been replaced by the *Pension (Municipal) Act)*. Apparently, the employer construed the statute as requiring new employees to join the pension scheme, but as giving existing employees a choice of whether to join or not. The union, on the other hand, understood the above-quoted provision of the collective agreement as

requiring all employees to join the scheme, even if the statute gave them a choice, and that in any case the statute did not give even existing employees a choice.

The arbitration board rendered an award deciding both the collective agreement issue and the statutory issue. On the employer's appeal to the Court of Appeal under Section 109(1) of the *Labour Relations Code* (now Section 100), the union first argued that the jurisdiction for curial review of the award lay exclusively with the Labour Relations Board under Section 108(1) of the *Code* (now Section 99(1)). Under that latter provision, the Labour Relations Board is empowered to review and set aside an award on the ground that the award is inconsistent with principles expressed or implied in the *Code* "...or another Act dealing with labour relations", while under the former provision the Court of Appeal is assigned a review jurisdiction "...where the basis of the...award is a matter or issue of the general law not included in Section 108(1)".

The Court of Appeal determined that the real substance of the parties' dispute was the statutory issue, not the collective agreement issue. The Court then determined that the *Pension (Municipal) Act* was not a "labour relations" statute within the meaning of Section 108(1) of the *Labour Relations Code*, but rather was a matter of the general law within the meaning of Section 109(1).

On that dual footing, the Court undertook a review of the arbitration award on the merits of the employer's appeal. What is noteworthy for present purposes, however, is that there was no suggestion in the Court's judgment that the arbitration board did not have the jurisdiction to hear and decide the statutory issue (the substance of the dispute) at first instance. The Court observed that, "...the interpretation of the *Pension (Municipal) Act* affects not only this employer, this union and these employees, but also other unions, and other employees, union and non-union". But while that was a reason given by the Court for asserting a review

jurisdiction under Section 109(1) -- the "general law" provision of the *Labour Relations Code* -- rather than acceding to the union's argument that the review jurisdiction lay with the Labour Relations Board under Section 108(1), it was not identified as a bar to the arbitration board adjudicating the statutory issue in the first place.

The situation was similar in *Bisaillon v. Concordia University*, 2006 SCC 19, a recent decision of the Supreme Court of Canada in which arbitral jurisdiction was directly in issue. There, the university had a pension plan for both its unionized and non-union employees. The non-union employees numbered approximately 350. The unionized employees, who comprised the majority of the plan members, were covered by nine collective agreements between the university and its nine certified unions.

One of the unionized employees in one of the bargaining units applied to the Quebec Superior Court for authorization to institute a class action against the university alleging that the university, as plan administrator, had wrongfully used the pension fund to pay for contribution holidays and certain administrative costs, and to finance early retirement packages. The issue before the Supreme Court of Canada was whether the proposed class action was incompatible with the exclusive jurisdiction of grievance arbitrators and the representative function of unions.

The Quebec Superior Court had declined to authorize the class action, but was overturned by the Court of Appeal. As part of its reasoning, the Court of Appeal noted that a grievance arbitrator appointed under a single collective agreement would not have the necessary jurisdiction to hear all the claims raised in the proposed class action; that is to say, that the grievance arbitrator's jurisdiction would not extend to the claims of the employees covered by the other eight collective agreements or those of the non-union employees. The Court of Appeal

expressed concern about the chaos that could ensue if different arbitration tribunals were to render contradictory decisions.

The Supreme Court of Canada, by a 4-3 majority, restored the judgment of the Quebec Superior Court. LeBel J., for the majority, acknowledged the potential for procedural difficulties in the event of a multiplicity of proceedings and possible conflicts between separate arbitration awards in respect of the different bargaining units. However, those potential difficulties were not seen as depriving a grievance arbitrator of what would otherwise be a subject matter falling within the arbitrator's exclusive jurisdiction.

As in *Kinsmen Retirement Centre*, the employer in this proceeding (the City) and its employees are only one of a number of employer-employee groups affected by the PSPPA (and the predecessor PMA) and the resulting JTA and Municipal Pension Plan Rules -- a fact highlighted by the City in final argument. But that fact alone is not a basis for my declining jurisdiction over a dispute that is otherwise within jurisdiction.

That takes me to the City's observation, in argument, that "...the issue [at hand] is whether the dispute between the parties falls within an arbitrator's exclusive jurisdiction or the court's exclusive jurisdiction". The City pointed to Sections 82, 84(2) and (3), and 89 of the *Labour Relations Code*: which deal with the jurisdiction of an arbitrator appointed to resolve a dispute under a collective agreement. As I earlier noted, the City's argument is that the dispute represented by Local 15's grievance arises solely under the terms of the Rules and the PSPPA; and accordingly, that the dispute between the parties does not in its essential character arise from the interpretation, application, administration or alleged violation of the collective agreement.

The premise underlying the City's argument is that the substance of this dispute lies in certain documents (the Rules and the JTA) whose authoritative origins lie in the PSPPA. Even accepting that premise, and in the light of the Supreme Court of Canada's decision in *Parry Sound* [2003] 2 S.C.R. 157 and our Court of Appeal's decision in *Canpar Industries* [2003] B.C.J. No. 2577, it can no longer be argued that in all instances, a finding of arbitral jurisdiction necessarily implies a finding of *exclusive* arbitral jurisdiction.

But in my view, the City's underlying premise is overstated. In the present case, there is no dispute that the City neglected to do certain things required of it by the applicable regulations or rules. The real controversy between the parties is how to appropriately address that situation.

When the City discovered its administrative oversight, it told the affected employees that they had three options. These can be seen by reference, for example, to the City's letter dated July 21, 2004 to Gordon Tronrud, an auxiliary employee. The letter to Mr. Tronrud opens with this paragraph:

> On a recent review of auxiliary employee's payroll files, it has come to our attention that you were eligible to participate in the Municipal Pension Plan effective August 13, 1999. Enclosed are the necessary forms for completion, whether or not you wish to enroll. Please ensure that the information on the forms is correct.

The letter then identifies the three options. The first was to choose to participate in the pension plan effective immediately but without contributing retroactively (which in Mr. Tronrud's case would have required some five years' retroactive contributions).

The second option identified by the City was to choose to participate in the plan both prospectively and retroactively. As regards this option, the City's letter went on to inform Mr. Tronrud how to obtain information about the cost to him of purchasing the prior service for which he was eligible; and states that if he does elect to purchase the prior service, the City would also be required to pay its share of the retroactive costs.

The third option identified by the City was to choose not to participate in the pension plan at all.

I earlier reproduced the elements of the "make whole" remedy sought by the union. For present purposes, I will focus on two. The first is that the City provide interest-free loans to affected employees wishing to purchase the prior service; that re-payment of the loan be by payroll deductions over a period of time equal to the time lapsed between the particular employee's eligibility date and the date of enrollment.

The second of the remedies sought that I will here mention has to do with the fact that by virtue of 9(1)(b) of the Rules, enrollment arrears must be paid on the basis of the employee's FTE salary *for the most recent month of employment*, multiplied by the number of months or fractions of months of pensionable service being retroactively purchased. If there have been wage increases during the period of arrears, that will mean that the cost to the employee (as well as to the employer) of doing a retroactive purchase of pensionable service is greater than the contributions would have been had the employee been enrolled in the plan when initially eligible and making the contributions in the ordinary course. And one of the remedies sought by the union in this proceeding is that the City indemnify the affected employees for such additional enrollment costs.

Those remedies are not ones that could be ordered by the plan administrative agent under either the JTA or the Rules. And in my view, at least to the extent of the parties' remedial controversy, there exists a dispute about how the collective agreement will be administered so as to appropriately and effectively deal with the situation created by the City's earlier oversight. Whatever the ultimate disposition of the matter, it will involve decisions as between the City and its employees covered by the collective agreement, about whether or in what manner the City ought to be accountable to the employees in respect of a matter which clearly is in relation to their employment under the collective agreement; about whether or to what extent the City's managerial identification of the three options aforesaid without other relief being offered, in the exercise by the City of its residual management rights under the collective agreement (Article 4), ought to be overlaid by remedial arbitral directions peculiar to the circumstances as a whole; and depending on what remedial decisions are made, the dispute may also be about the method and calculation of wage deductions from employees' pay cheques (and to whom those wage deductions will be payable), for purposes of the retroactive purchase of pensionable service, from wages that have been earned by the employees under the terms of the collective agreement.

It is true that labour arbitrators do not always have jurisdiction in employer-union disputes: *Morin* [2004] 2 S.C.R. 185, para. 11. But it is also the case, as observed by LeBel J. (for the majority) in *Bisaillon*, that the Supreme Court of Canada has clearly adopted a liberal position according to which grievance arbitrators have a broad jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement.

The City correctly states that the references in the collective agreement to the *Pension (Municipal) Act* are not such as to incorporate that statute (or its

subsidiary regulations), or the successor *Public Sector Pension Plans Act* or the JTA or the Rules flowing therefrom, into the parties' collective agreement so as to become part of the collective agreement itself. However, as I have already indicated, I do not regard the true gravamen of this dispute as one of statutory interpretation. To the extent it may be necessary to examine and consider any of the statutes herein cited or the JTA or the Rules in the course of resolving the parties' dispute, I simply observe that incorporation of the statute or the documents thereby authorized is not a pre-condition to a grievance arbitrator interpreting and applying them in context of a grievance properly before the arbitrator. In that connection, I refer to the following passage from the judgment of McLachlan J. (as she then was) in *Weber* [1995] 2 S.C.R. 929, para. 56:

> The appellant Weber also argues that the arbitrators may lack the legal power to consider the issues before them. This concern is answered by the power and duty of arbitrators to apply the law of the land to the disputes before them. To this end, arbitrators may refer to both the common law and statutes: St. Anne Nackawick; McLeod v. Egan, [1975] 1 S.C.R. 517. As Denning L.J. put it, "[t]here is not one law for arbitrators and another for the court, but one law for all": David Taylor & Son, Ltd. v. Barnett, [1953] 1 All E.R. 843 (C.A.), at p. 847. This also applies to the Charter: Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570, at p. 597.

I refer as well to Section 89(g) of the *Labour Relations Code* which states that:

> For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitations, may…
>
> (g) interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective

> agreement, even though the Act's provisions conflict with the terms of the collective agreement.

Given the decision in *Kinsmen Retirement Centre*, one cannot say that the PSPPA is a "labour relations" statute within the meaning of what is now Section 99(1) of the *Labour Relations Code*. However, it is properly seen, in my view, as a statute "regulat[ing] the employment relationship of persons bound by a collective agreement" within the meaning of Section 89(g) of the *Code*. Clearly, pension matters are a significant part of the employment relationship for persons working under collective agreements (as well as others), a fact recognized by Sections 5 and 8 of the PSPPA which require respectively that the British Columbia Pension Corporation and the Pension Management Board be comprised of employer representatives and union representatives in equal numbers.

The above-cited decision in *Parry Sound* was concerned in part with Section 48(12)(j) of the *Ontario Labour Relations Act* which empowers an arbitrator under a collective agreement "...to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement". (Section 89(g) of our *Labour Relations Code* was described by Newbury J.A. in the above-cited *Canpar* decision as the British Columbia "counterpart" to Ontario's Section 48(12)(j)).

As Iacobucci J. stated at the outset of his judgment in *Parry Sound*, the appeal in that case:

> ...rais[ed] questions about the application of human rights and other employment-related statutes in the context of a collective agreement. More specifically, does a grievance arbitrator have the power to enforce the substantive rights and obligations of human rights and other employment-related statutes and, if so, under what circumstances?

The conclusion reached by Iacobucci J. was that:

> ...a grievance arbitrator has the power and responsibility for enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement.

In the subsequent decision of our Court of Appeal in *British Columbia Teachers' Federation* [2005] BCCA 92, Lambert J.A., upon review of *Parry Sound*, concluded for the Court that "...it is not necessary in deciding whether [a grievance arbitrator has the power and responsibility] to apply an employment-related statute to find that the statute has been 'incorporated' in the collective agreement".

The *British Columbia Teachers' Federation* decision is particularly noteworthy because in that case the debate about arbitral jurisdiction was in relation to statutory provisions dealing with a subject (class sizes) that, by law, could not be the subject of collective bargaining and which therefore could in no way be treated as a part of a collective agreement.

The finding by the Court of Appeal was that a grievance arbitrator did indeed have the jurisdiction (in that instance, the exclusive jurisdiction) to determine whether there had been violations of the statutory provisions in question, and to interpret the collective agreement (which said nothing about class sizes) accordingly. In reaching that conclusion, Lambert J.A. said this (at paras. 37-38):

> It seems to me that it is significant that the subject of class sizes was negotiated in collective bargaining between teachers and school boards before the 2002 legislation and was clearly, in the past, regarded by the parties as a term or condition of employment. The fact that the subject of class sizes can no longer be negotiated nor have any place in the collective agreement of the parties does not

> make that subject any less a term or condition that affects the employment relationship. The legislation simply transfers those terms or conditions from negotiated determination to statutory determination. So I regard class sizes and aggregate class sizes as a significant part of the employment relationship. If the statutory determination of class sizes is violated that would surely constitute an improper application of the management rights clauses in the collective agreement, in breach of s. 76.1 of the *School Act* and the Class Size Regulation. But it would also affect other terms of the collective agreement such as a decrease in the number of teaching staff leading to dismissals or lay offs, and such as health issues arising from stress. These are only examples. The point is that such a violation is closely connected in a contextual way to the interpretation, operation, and application of the collective agreement and directly affects it.
>
> Bearing in mind the precepts that I have drawn from the Supreme Court of Canada decisions and which I have set out in Part VI of theses reasons, I believe that a flexible and contextual approach to the position that should be adopted by an arbitrator on the application of a statutory provision to the interpretation, operation, and application of a collective agreement, and to an alleged violation, does not depend on an "incorporation" of the statutory provision in the collective agreement but rather on whether there is a real contextual connection between the statute and the collective agreement such that a violation of the statute gives rise, in the context, to a violation of the provisions of the collective agreement, often, but not exclusively, a violation of the right expressed or implied in the collective agreement to set principles for management of the workforce in accordance with the laws of the Province. In short, the collective agreement must be interpreted in the light of the statutory breach.

The earlier-cited decision of our Court of Appeal in *Canpar* preceded *British Columbia Teachers' Federation*, but post-dated *Parry Sound*. At para. 48 of the majority judgment in *Canpar*, one finds the following:

> ...the Supreme Court in Parry Sound dismissed the argument that a direct conflict between the collective agreement and the Human Rights Code was necessary for a labour arbitrator to have

> jurisdiction in Ontario. The majority stated (at para. 45) that an arbitrator "must have the power to implement and enforce the substantive rights and obligations of human rights and other employment-related statutes". Implicit in this conclusion, in my view, is the principle that an express "nexus" is no longer necessary, if it ever was, before an arbitrator has the right and responsibility to apply human rights principles in a jurisdiction, such as British Columbia, in which the statutory scheme contemplates the application by arbitrators of other employment-related statutes.

As I have said more than once, I do not regard the main substance of Local 15's grievance against the City to be about the interpretation or application of the PSPPA, or of the JTA or the Rules as emanations thereof, but rather about the appropriate remedial consequences of the City's admitted oversight in relation to the pension plan thereby established, and how such remedies may fit and be handled within the administration of the parties' collective agreement. However, to the extent the PSPPA and its emanations may require arbitral attention, then applying the reasoning in *British Columbia Teachers' Federation*, and having regard to the above-quoted extract from *Canpar*, I conclude that there is at least an implicit nexus between the statutory pension scheme and the collective agreement sufficient to support a finding of arbitral jurisdiction to hear and decide Local 15's grievance on its merits.

In the result, the City's preliminary objection as to arbitrability is dismissed.

DATED THE 27th DAY OF JULY , 2006.

"DONALD R. MUNROE"
Donald R. Munroe, Q.C.