NOVA SCOTIA COURT OF APPEAL

Citation: *Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd.*, 2016 NSCA 40

Date: 20160531
Docket: CA 441370
Registry: Halifax

Between:

Labourers International Union of North America, Local 615

Appellant

-and-

CanMar Contracting Ltd., Labour Board (Nova Scotia), Sean Patrick McSween, Carlos Lopez and George Panteleios

Respondents

Judges:	MacDonald, C.J.N.S., Fichaud and Bryson, JJ.A.
Appeal Heard:	March 16, 2016, in Halifax, Nova Scotia
Held:	Appeal allowed, cross appeal dismissed and notice of contention dismissed, with costs, per reasons for judgment of Fichaud, J.A., MacDonald, C.J.N.S. and Bryson, J.A. concurring
Counsel:	Gordon N. Forsyth, Q.C. for the Appellant
	Richard M. Dunlop and Michelle Black for the Respondent CanMar Contracting Ltd.
	Bradley Proctor for the Respondents Sean Patrick McSween, Carlos Lopez and George Panteleios
	Edward A. Gores, Q.C. for the Respondent Labour Board (Nova Scotia) (watching)

Reasons for judgment:

[1] Local 615 of the Labourers International Union applied to the Labour Board to be certified for a unit of labourers employed by CanMar Contracting Ltd. CanMar claimed that membership cards signed by some employees did not represent their true wishes. But those employees didn't intervene with the Board to support CanMar's assertion. The Board held that, without an intervention by the employee whose wishes are questioned, CanMar had no standing to challenge the cards. Then, following its established policy, the Board considered the wishes of employees who were on site performing labourers' work on the day of the union's application for certification. This meant that the views of two employees, on leave that day, were not counted.

[2] The Board found that Local 615 had supplied membership evidence of over 50% of the employees in the appropriate unit, and certified Local 615 without a vote under Part II of the *Trade Union Act*. The Board's Decision in November 2014 said the certification was effective as of April 1, 2014, a date shortly after the union's application for certification had been filed.

[3] CanMar sought judicial review. The judge of the Supreme Court set aside the Board's certification order. He concluded that (1) the Board's ruling on CanMar's standing was procedurally unfair and unreasonable and (2) the Board's failure to consider the wishes of the employees on leave was unreasonable.

[4] Local 615 appeals from both conclusions. CanMar cross appeals and says the Board's backdating of the certification was unreasonable. The two employees on leave submit that the Board's failure to consider their wishes offends the values of the *Charter of Rights and Freedoms* and is disproportionate under the *Doré* principles.

[5] The issues ask – When do the Board's rules and policies that are set in practice but un-enacted by statute, fail reasonableness review?

Background

[6] Local 615 of the Labourers' International Union of North America represents labourers in Nova Scotia's construction industry.

[7] CanMar Contracting Limited is a construction contractor. In March 2014, CanMar was working on an underground parking garage for the Harbourview Apartments project in Halifax. The work began in February 2013, and was expected to finish in 2015.

[8] On March 14, 2014, Local 615 applied to the Labour Board to be certified as the bargaining agent for CanMar's labourers in mainland Nova Scotia, including those working on the Harbourview project. Part II of the *Trade Union Act*, R.S.N.S. 1989, c. 475 (ss. 92-107) governs the construction industry.

[9] Regulation 12 of the *Trade Union Procedure Regulations*, N.S. Reg 101/72 under the *Trade Union Act*, says that, after an application for certification, the employer shall file with the Board a list of its employees. On March 28, 2014, CanMar filed a statutory declaration that CanMar had employed no labourers in the construction industry on the day of Local 615's application for certification.

[10] Central to the events that followed is s. 95(3) of the *Trade Union Act*:

> 95(3) When, pursuant to an application for certification under this Part by a trade union or council of trade unions, the Board has determined the unit appropriate for collective bargaining and consistent with a geographic area established by the Board,
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> (a) if the Board is satisfied that the applicant trade union or council of trade unions has as members in good standing *less than thirty-five per cent of the employees in the appropriate unit* the Board shall dismiss the application;
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> (b) if the Board is satisfied that the applicant trade union or council of trade unions has as members in good standing *more than fifty per cent of the employees in the appropriate unit* the Board may certify the trade union or council of trade unions as the bargaining agent of the employees in the unit;
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> (c) if the Board is satisfied that the applicant trade union or council of trade unions has as members in good standing not less than thirty-five per cent and not more than fifty per cent of the employees in the appropriate unit, the Board shall forthwith order that a vote be conducted among the employees in the appropriate unit to determine whether the employees select the applicant trade union or council of trade unions to be their bargaining agent in their behalf.
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> [emphasis added]

[11] If the applicant's membership includes under 35% of the employees in the appropriate unit, then the Board dismisses the application for certification without a vote [s. 95(3)(a)]. Based on CanMar's statutory declaration that it had no labourers, on April 9, 2014 the Board dismissed Local 615's application. The dismissal order was effective as of April 1, 2014.

[12] Section 96(1) of the *Trade Union Act* provides that, after a dismissal under s. 95(3)(a), upon the Union's request, the Board shall conduct a hearing. On April 17, 2014, Local 615 requested a hearing. Its ground was that, on March 14, 2014, CanMar did employ construction labourers, a majority of whom belonged to Local 615.

[13] On June 6, 2014, CanMar filed its Reply to the Request for a Hearing. Its position was:

(1) Its employees were not working in the construction industry.

(2) If they were in construction, they were not doing labourers' work, and were outside the unit cited by Local 615's application.

(3) Local 615's application included memberships obtained while "representatives of the Applicant entertained CanMar employees at a local restaurant during which time they supplied them with, among other things, alcohol" and "membership evidence obtained in the course of the Evening does not represent the true wishes of the employees as it was obtained while the employees were under the influence of alcohol". This point invoked s. 25(11) of the *Trade Union Act*, which gives the Board discretion to dismiss an application for certification if the submitted membership information does not reflect the "true wishes of the employees" [s. 25(11) quoted below, para. 37].

[14] For the third point, CanMar's Reply requested that the Board order Local 615 to disclose copies of all membership cards that were signed by CanMar employees during the "Evening".

[15] On June 9, 2014, the Board held a case management tele-conference. Local 615 contested CanMar's standing to challenge the membership cards. The Board decided to deal with the preliminary standing issue by written submissions. The Board scheduled July 29-31, 2014 for the hearing proper under s. 96(1).

[16] After the parties had filed their submissions on the preliminary issue, the Board convened on July 14, 2014. The Board's Vice Chair, Ms. Lorraine Lafferty, Q.C., announced the Board's ruling that CanMar did not have standing to question whether the signed membership cards represented the employees' true wishes. The Vice Chair said written reasons would follow.

[17] On July 18, 2014, CanMar filed an Application for Judicial Review to set aside the Board's preliminary ruling.

[18] On July 25, 2014, the Board issued written reasons (2014 NSLB 152) for its ruling on standing ("Preliminary Decision"). The Board said that whether a signed membership card represents an employee's true wish is for the employee to contest by filing a Notice of Intervention, as provided in a Regulation under the *Trade Union Act*. Further to another Regulation, membership cards are confidential, for the Board's use only, and are not disclosed to the employer. The employer may not penetrate the curtain. This meant that CanMar could not litigate whether the signature represented the true wishes of an employee who has not stepped forward with an intervention.

[19] On July 29-31, September 2 and 17, and October 1-2, 2014, the Board conducted the hearing under s. 96(1). The Board comprised Ms. Lafferty as chair with panelists Messrs. Michael Tynes and Patrick Bourque.

[20] The Board's longstanding practice, when assessing the degree of support for a certification application in the construction industry, has been to count only those employees who performed work of the proposed unit on site at the date of the application for certification. This is known as the "date of application" or "snapshot" rule. CanMar contended that two additional employees, Messrs. George Panteleios and Carlos Lopez, should be counted. They had been on leave at the date of Local 615's certification application.

[21] On November 27, 2014, the Board issued its Decision (2014 NSLB 265) on the s. 96(1) matter ("Final Decision"). The Board overturned its earlier dismissal of April 9, 2014, held that s. 95(3)(b)'s criteria were satisfied, and granted Local 615's certification application without a vote. The Board made the certification effective as of April 1, 2014, which had been the effective date of the Board's initial dismissal order that issued on April 9, 2014. The Board followed its "date of application" rule and did not count the wishes of Messrs. Lopez and Panteleois.

[22] On December 3, 2014, CanMar filed an Application for Judicial Review of the Final Decision.

[23] On March 10, 2015, Justice Michael Wood of the Supreme Court of Nova Scotia heard CanMar's two applications for judicial review. Messrs. Lopez and Panteleios intervened.

[24] On March 26, 2015, Justice Wood issued a written decision (2015 NSSC 89) that granted CanMar's applications and set aside the Board's Preliminary and Final Decisions. The Order followed on June 17, 2015. Justice Wood held that, in the Preliminary Decision, the Board's refusal to consider CanMar's challenge to the membership evidence was procedurally unfair and unreasonable. He held that, notwithstanding the Board's date of application rule, the Board's Final Decision unreasonably refused to consider the wishes of Messrs. Lopez and Panteleois. The judge rejected CanMar's submission that the Board unreasonably back-dated the certification as of April 1, 2014. Later I will set out the judge's reasons.

[25] On July 15, 2015, Local 615 appealed to the Court of Appeal. CanMar cross appealed on the issue of back-dating the certification. Messrs. Lopez and Panteleios filed a Notice of Contention on the ground that the Board's failure to consider their wishes offended the values of the *Charter of Rights and Freedoms*.

Issues

[26] There are four issues.

[27] On Local 615's appeal:

> **(1)** Did the judge err in his choice or application of the standard of review respecting the Preliminary Decision's denial of CanMar's standing to challenge the membership cards?
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> **(2)** Did the judge err in his application of the standard of review respecting the Final Decision's use of the "date of application" rule?

[28] On CanMar's cross appeal: **(3)** Did the judge misapply the standard of review by not setting aside the Board's back-dating of the certification order to April 1, 2014?

[29] On the Notice of Contention by Messrs. Lopez and Panteleios: **(4)** Under the *Doré* principles, did the Final Decision's failure to count their wishes disproportionately offend the values that underlie s. 2(d) of the *Charter*?

Appellate Standard to the Reviewing Judge

[30] On an appeal from a judicial review, the Court of Appeal determines whether the judge correctly chose and applied the standard of review. Those are legal issues. If the judge erred, then this Court applies the appropriate standard. *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, paras. 43-44; *Cape Breton Island Building & Construction Trades Council v. Nova Scotia Power Inc.*, 2012 NSCA 111, para. 35; *Coates v. Nova Scotia (Labour Board)*, 2013 NSCA 52, para. 37.

[31] In *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, Justice LeBel for the Court summarized the appellate approach:

> [46] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247, Deschamps J. aptly described this process as " 'step[ping] into the shoes' of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision" [emphasis deleted by Justice LeBel]

Judicial Standard of Review to the Board

[32] In *Egg Films Inc. v. Nova Scotia (Labour Board)*, 2014 NSCA 33, leave to appeal denied [2014] S.C.C.A. No. 242, the majority said:

> [24] The Court first determines whether the jurisprudence has established a standard: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, para. 62. This Court has said that reasonableness governs judicial review of the Labour Board's exercise of its core functions under the *Trade Union Act*, such as determining who is an "employee" for a certification application and whether a unit is appropriate for collective bargaining [citations omitted]

[33] Sections 19(1)(g), (h) and (i) of the *Trade Union Act* say that whether a group of employees is an appropriate bargaining unit, an employee belongs to a craft, and an employee is a member in good standing of a union are for the Board, whose decision is "final and conclusive and not open to question, or review". Section 25 under Part I, and ss. 95-96 in Part II for the construction industry, authorize the Board's governance of the certification process. That includes the Board's decisions that are at issue in Local 615's application for certification.

[34] The Board's rulings here are core functions under the *Trade Union Act*, and are reviewed for reasonableness. This conclusion is subject to two points that I will discuss later – procedural fairness under the First Issue, and the *Doré* principles under the Fourth Issue.

[35] In *Egg Films*, the majority characterized reasonableness:

> [26] Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't – What does the judge think is correct or preferable? The question is – Was the tribunal's conclusion reasonable? If there are several reasonably permissible outcomes the tribunal, not the court, chooses among them. If there is only one and the tribunal's conclusion isn't it, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise discretion, or invites the tribunal to weigh policy. [citations omitted]
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> …
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> (b) Attention to Board's Reasons
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> [30] Next, the judge's "treasure hunting", "zooming in", or "tracking" of the Board's reasons. Reasonableness isn't the judge's quest for truth with a margin of tolerable error around the judge's ideal outcome. Instead, the judge follows the tribunal's analytical path and decides whether the tribunal's outcome is reasonable. *Law Society v. Ryan* [*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247], at paras. 50-51. That itinerary requires a "respectful attention" to the tribunal's reasons, as Justice Abella explained in the well-known passages from *Newfoundland and Labrador Nurses' Union* [*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708], paras 11-17.
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> [31] In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, Justice Abella for the majority reiterated:
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> > [54] The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed.

[36] In *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, Justice Moldaver for the majority unmistakably instructed reviewing courts on the application of reasonableness:

> [20] Before turning to my analysis, I pause to note that the standard of review debate is one that generates strong opinions on all sides, especially in the recent jurisprudence of this Court. However, the analysis that follows is based on this Court's existing jurisprudence – and it is designed to bring a measure of predictability and clarity to that framework.
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> …
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> [31] … The modern approach to judicial review recognizes that courts "may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work" [citation omitted]
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> [32] In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations… The question that arises, then, is *who gets to decide among these competing reasonable interpretations?*
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> [33] The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* – not the courts – to make. …
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> …
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> [40] The bottom line here, then, is that the Commission holds the interpretive upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. …
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> [Justice Moldaver's italics]

1. First Issue – Standing to Challenge Membership

[37] Section 25(11) of the *Trade Union Act* says:

> 25(11) Where, in the opinion of the Board, the applicant trade union or a representative of the trade union has contravened this *Act* or regulations made pursuant to this *Act* so that the membership information filed with the application does not represent the true wishes of the employees in the unit determined to be

> appropriate for collective bargaining, the Board may, in its discretion, dismiss the application.

[38] CanMar alleges that membership cards were signed at a restaurant where alcohol was consumed. CanMar asked the Board to dismiss Local 615's application for certification under s. 25(11) because alcohol had affected the employees' judgement, and the cards didn't represent the signators' true wishes.

[39] The respondent Mr. McSween had signed a card, and later filed a Notice of Intervention with the Board to notify the Board that he had revoked his card. So Local 615 didn't offer his card, and the Board didn't count it. No other employee filed a Notice of Intervention or notified the Board that his membership card did not represent the employee's wish.

[40] The Board's Preliminary Decision held that CanMar had no standing to raise the issue. The Board's reasons included:

> [8] The Board agrees with the Union's position that, in the absence of any employees in the proposed bargaining unit filing Notices of Intervention to oppose the Union's application (save for Mr. McSween whose Notice referring to his revoked membership card will be discussed separately), the Employer does not have standing to argue that the membership cards submitted with the Union's application do not represent the true wishes of the employees.
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> [9] It is a widely recognized principle that employees (not the employer) decide whether they wish to join a union and seek certification for that union. As previously articulated by this Board in *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts, Local 849 v. Egg Films Inc.*, 2012 NSLB 180 (at para. 21) [application for judicial review dismissed 2013 NSSC 123, appeal dismissed 2014 NSCA 33, leave to appeal refused Sept. 25, 2014 (S.C.C.], this principle "underpins the standard labour board jurisprudence in this country which limits the standing of the employer to raise the purported rights of its employees and their alleged violation, in order to defeat a certification, where the employees themselves have advanced no such claims." Critical to the Board's decision in *Egg Films, supra*, on whether employees had received adequate notice was the fact that no employees had come forward as intervenors at that hearing. The same critical fact applies in the case now before the Board. No employees whose membership cards have been relied upon by the Union have come forward to oppose the Union's application for certification. If those employees believed the membership cards they signed did not represent their true wishes, it was incumbent on them to come forward by filing Notices of Intervention, which they have not done.
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> …

> [11] The Board also notes that s. 25(11) of the *Act* does not require the Board to inquire into the legitimacy of membership cards in the way the Board would inquire into a complaint of unfair labour practice filed in accordance with the *Act*. As the Board has previously expressed in *Sheraton Nova Scotia v. NSGEU*, 1998 CarswellNS 345, 43 C.L.R.B.R. (2d) 94 (at para. 41), s. 25(11) does not confer any "vindicatable" right akin to an unfair practice complaint. Section 25(1) allows an employer to ask the Board, in its discretion, to dismiss an application for certification where a contravention of the *Act* or regulations has been shown on evidence that is properly before the Board. The Employer in this case wishes to put before the Board evidence that should properly come from the employees, not the Employer. In the *Sheraton* case, *supra*, the employers in a certification application were the complainants and the employees were casino workers. No interventions were filed by any employees of the complainants. The Board held that there was no jurisdiction to hear the employers' complaint and, in the event that conclusion was wrong, the Board held that it was "not open to the Complainants to complain on behalf of or to seek remedies for the casino workers affected by the Application." As justification for its decision, the Board referenced the *Act*'s regulation and process for employee interventions and the fact there were no employee interventions (at paras. 53-55).
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> [12] Finally, to accept the Employer's position that the Board should inquire into the alleged improper use of alcohol at the Union's organizational meeting in the absence of employees seeking to intervene would require a breach of union membership confidentiality which is ordinarily respected during the certification process. Pursuant to Procedural Regulation 9(3) of the *Act*, membership card information is for the use of the Board only and is not to be revealed to other parties involved in the certification application. …

[41] On the judicial review, Justice Wood held that the Board's denial of standing was procedurally unfair:

> [18] A decision to prevent a party from presenting evidence or argument at a hearing which may affect their interests raises questions of procedural fairness.

The judge (para. 18) then quoted *North End Community Health Assn. v. Halifax (Regional Municipality)*, 2014 NSCA 92, at 41-42, where this Court said "no standard of review analysis governs judicial review, where the complaint is based upon a denial of natural justice or procedural fairness". Still quoting from *North End*, the judge held it is for the reviewing judge to decide whether "an administrative process was unfair in light of all the circumstances".

[42] Justice Wood then held that the process before the Board offended that standard:

> [20] The Board's decision that employee intervention is a precondition to an employer being able to raise issues related to union misconduct is not found in the wording of the *Act*. It places an onus on employees who may have been mistreated to come forward as formal intervenors. However, the Board does not consider whether there may be circumstances in which employees may choose not to do so. It is easy to envision situations where employees might feel intimidated by coworkers or union members, embarrassed by their own conduct, apprehensive about participating as a party in a quasi-judicial process, concerned about the time which they might spend in conferences and hearings, etc.
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> [21] An employee may not know what union conduct is appropriate let alone be able to assess whether the *Act* has been violated within the five day intervention period. To elevate employee intervention to the point where it becomes a mandatory precondition to an employer's ability to allege union misbehaviour is both unreasonable and procedurally unfair. As a result I would grant CanMar's application for judicial review on this issue.

[43] The judge added (para 22) that the Board's concern about confidentiality of membership information "is something that can be adequately addressed during the evidentiary hearing". The judge suggested that "Mr. McSween and other employees should be able to describe the events in question without disclosing whether any particular employee signed a membership card".

[44] In my respectful view, the judge erred in his characterization of the issue, and his application of procedural fairness and the standard of review.

(a) Characterization

[45] The judge described the issue as procedural fairness, with no standard of review. The passage from the *North End* decision, cited by Justice Wood, relied on *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43, leave to appeal refused [2012] S.C.C.A. No. 237.

[46] In *T.G.*, this Court said:

> [90] A court that considers whether a decision maker violated its duty of procedural fairness does not apply a standard of review to the tribunal. ***The judge is not reviewing the substance of the tribunal's decision.*** Rather the judge, at first instance, assesses the tribunal's process, a topic that lies outside standard of review analysis: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74, per Arbour J.; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paras. 100-103, per Binnie J.; *Creager v. Nova Scotia (Provincial Dental Board)*, 2005 NSCA 9, paras. 24-25; *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27 [*Burt v. Kelly*], para. 19; *Nova Scotia*

> *(Community Services) v. N.N.M.*, 2008 NSCA 69, para. 39; *Allstate Insurance Company v. Nova Scotia (Insurance Review Board)*, 2009 NSCA 75, para. 11; *Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.*, 2010 NSCA 19, paras. 30-31.
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> [emphasis added]

[47] The reason there is no "standard of review" for a matter of procedural fairness is that *no tribunal decision* is under review. The court is examining how the tribunal acted, not the end product. If, on the other hand, the applicant asks the court to overturn a tribunal's *decision* – including one that discusses procedure – a standard of review analysis is needed. The reviewing court must decide whether to apply correctness or reasonableness to the tribunal's decision. (*e.g. Coates, supra*, paras. 43-45)

[48] The authorities cited by *T.G.*, para. 90, make this point clear.

[49] In *C.U.P.E. v. Ontario*, Justice Binnie for the majority said:

> 102 The content of ***procedural fairness goes to the manner*** in which the Minister went about making his decision, ***whereas the standard of review is applied to the end product of his deliberations.***
>
> 103 On occasion, a measure of confusion may arise in attempting to keep separate these different lines of enquiry. Inevitably some of the same "factors" that are looked at in determining the requirements of procedural fairness are also looked at in considering the "standard of review" of the discretionary decision itself. Thus in *Baker* [*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817], a case involving the judicial review of a Minister's rejection of an application for permanent residence in Canada on human and compassionate grounds, the Court looked at "all the circumstances" on both accounts, but overlapping factors included the nature of the decision being made (procedural fairness, at para. 23; standard of review, at para. 61); the statutory scheme (procedural fairness, at para. 24; standard of review, at para. 60); and the expertise of the decision maker (procedural fairness, at para. 27; standard of review, at para. 59). Other factors, of course, did not overlap. In procedural fairness, for example, the Court was concerned with "the importance of the decision to the individual or individuals affected" (para. 25), whereas determining the standard of review included such factors as the existence of a privative clause (para. 58). The point is that, while there are some common "factors", the object of the court's inquiry in each case is different.
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> [emphasis added]

[50] Similarly, in *Kelly*, Justice Cromwell said:

> [20] Given that the focus was on ***the manner in which the decision was made rather than on any particular ruling or decision made by the Board***, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty. In my respectful view, the judge did not adequately consider the first of these steps.
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> [21] The first step – determining the content of the tribunal's duty of fairness – must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step – assessing whether the Board lived up to its duty – assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for review.
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> [emphasis added]

[51] In *Creager*, paras. 24-25, and *Communications, Energy and Paperworkers Union*, paras. 30-31, cited by *T.G.*, this Court reiterated the passages from *C.U.P.E.* or *Kelly*.

[52] Here, CanMar objected to the membership cards. The Board's management conference of June 9, 2104 scheduled the filings of written submissions on the issue. Nobody has suggested that the Board unfairly managed the submissions of counsel that preceded the Preliminary Decision. The Board's Preliminary Decision determined the disputed issue, with written reasons that cited its home legislation and Labour Board authorities. CanMar's application for judicial review challenged the Board's Preliminary Decision, *i.e.* the end product of the preliminary dispute. The judge set aside the Preliminary Decision. This requires the application of a standard of review to the Board's Preliminary Decision.

[53] Given that the topic involved the Board's core function of managing a certification application, the standard is reasonableness.

(b) Procedural Fairness

[54] Before discussing reasonableness, I will comment on Justice Wood's application of procedural fairness. The judge's brief reasons do not address the factors cited by Justice Binnie in *C.U.P.E.*, para. 103, citing *Baker*, and by Justice Cromwell in *Kelly*, para. 21. There is no analysis of the statutory scheme, expertise of the Board to oversee certification, or deference to the Board's discretion to set its own procedures for certification. The judge's ruling overlooked Justice Cromwell's first step from *Kelly*, which reiterated the Supreme Court's approach from *Baker*. Rather, the judge moved directly to what *Kelly* termed as forbidden reasoning – "simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been".

(c) Reasonableness

[55] Was the Board's Preliminary Decision unreasonable?

[56] CanMar applied to the Board under s. 25(11) of the *Trade Union Act*. Section 25(11) gives the Board "discretion". The Board exercised its discretion with reference to two separate but related policies of labour relations that underlie the *Trade Union Act*.

[57] The first policy is that the choice whether to support a union is personal to the employee, and is not seconded to the employer. Section 25(11)'s phrase "true wishes of the employees" embodies this notion. The Board cited earlier Board jurisprudence (*Egg Films*, from which judicial review was denied by this Court) that the principle "underpins the standard labour board jurisprudence in this country". In *Canada Labour Relations Board v. Transair Ltd.*, [1977] 1 S.C.R. 722, at pp. 744-45, Chief Justice Laskin for the majority said:

> If there is any policy in the *Canada Labour Code* and comparable provincial legislation which is pre-eminent it is that it is the wishes of the employees, without intercession of the employer (apart from fraud), that are alone to be considered vis-à-vis a bargaining agent that seeks to represent them. The employer cannot invoke what is a *jus tertii*, especially when those whose position is asserted by the employer are not before the Court.

[58] After an employee signs his card, it is for the employee to say that his signature does not express his own true wish. This privilege accompanies a responsibility. He has introduced his signature to the fray, and should tell the Board if he withdraws it. Regulation 15(1) under the *Trade Union Act*, N.S. Reg.

101/72, O.I.C. 72-933, as amended N.S. Reg. 148/2010, O.I.C. 2010-359, permits the employee to file a simply worded Notice of Intervention for this purpose. Mr. McSween filed a Notice of Intervention on April 1, 2014, stating that he revoked his signed card. The Board then disregarded his card, without any fuss. Though Mr. McSween has chosen to remain a party to this litigation, his involvement after April 1, 2014 was unnecessary to exclude his card from the Board's calculus.

[59] The second policy is that union membership cards signed during a certification process are for the Board's use, not the employer's eyes. Regulation 9(3) under the *Trade Union Act* says that information filed with the application for certification, including the membership evidence "is for the information of the Board only and shall not be revealed to the other parties to the application".

[60] The rationale for confidentiality is obvious. Disclosure to an employer of the union's membership list, during the jostle of a certification drive, could enable the targeting of members. The prospect of disclosure may either invite a strategic challenge so the employer would obtain the cards, or dissuade employees from signing in the first place. See George W. Adams, *Canadian Labour Law*, Second Edition – looseleaf (Toronto: Thompson Reuters Canada Lt., 2013), vol. 1, para. 4-840, and Wesley B. Rayner, *Canadian Collective Bargaining Law*, Second Edition (Markham Ont.: LexisNexis Canada Inc., 2007), pp. 133-34.

[61] These policies are reasonably consistent with the wording, context, scheme and objectives of the *Trade Union Act*. The Board applied the policies to guide the exercise of its discretion under s. 25(11). As Justice Moldaver said in *McLean*, para. 33, "the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* – not the courts – to make".

[62] Justice Wood observed that the Board's concerns "can be adequately addressed at the evidentiary hearing" by having witnesses "describe the events in question without disclosing whether any particular employee signed a membership card". The scenario envisages a hearing where the employer intercedes with assertions about an anonymous employee's true wish. This represents the *jus tertii* that Chief Justice Laskin disparaged in *Transair*.

[63] The Board's ruling on standing was a permissible outcome, and was reasonable under the standard of review. I would allow Local 615's appeal from the judge's ruling that set aside the Preliminary Decision.

2. Second Issue - "Date of Application" Rule

[64] The Board applied its established practice of counting only the employees in the proposed unit who were performing unit work on site the day that Local 615 filed its application for certification. This meant that Messrs. Panteleios and Lopez, who were on leave that day, were not counted.

[65] The Board's Final Decision noted that on the date of the certification application, March 14, 2014, seven of CanMar's employees were working on site. The Board then framed the issue:

> [22] The Employer asserted that two additional employees were also eligible to be part of the bargaining unit on March 14, 2014, namely: George Panteleios and Carlos Lopez. Mr. Panteleios and Mr. Lopez worked at the Harbourview site performing work similar to the work of the other employees. They each worked on the day of before the Union's application and on the first working day after the Union's application, but neither was at work on March 14, 2014. Both were absent from work for bona fide reasons with the Employer's approval. Both retained their status as employees, notwithstanding they were not at work on the application date.
>
> [23] If the two employees are added to the bargaining unit as the Employer requests, the ratio of union members to employees for the purpose of certification will be different than if they are not added to the bargaining unit. The ratio is central to the Board's decision to certify or not certify because s. 95(3) of the [*Trade Union*] *Act* sets up the following scheme:
>
> > (a) if the Board is satisfied that the applicant trade union has as members in good standing less than 35% of the employees in the bargaining unit the Board shall dismiss the application;
> >
> > (b) if the Board is satisfied that the applicant has as members in good standing more than 50% of the employees in the bargaining unit the Board may certify the applicant as the bargaining agent; and
> >
> > (c) if the Board is satisfied that the applicant has as members in good standing not less than 35% and not more than 50% of the employees in the bargaining unit the Board shall forthwith order that a vote be conducted among the employees in the appropriate unit to determine whether the employees select the applicant trade union to be the bargaining agent in their behalf.

[66] The Board then referred to its long-standing policy that only those employees who did unit work on site at the date of the certification application

would be counted toward the ratio under s. 95(3). This is termed the "date of application" or "snapshot" rule. The Board explained:

> [24] When assessing the union member to employee ratio in s. 95(3) applications, the Board applies the "date of application" approach; that is, the Board compares the number of employees in the bargaining unit at work on the application date to the number of employees with union membership on that date. This approach to certification in the construction industry was challenged by the employer in *Gil-Son Construction Limited* CIP-3126, 2009 NSLRB 9 (Archibald, Chair). There, the Board upheld the date of application approach in the following terms (at para. 48):
>
> > The approach taken historically by the Panel, determining union membership in terms of employees working in the trade on-site at the date of application, is a rational, practical and effective way to determine the issue, which is consistent with the needs of the construction industry labour relations to be able to have certification issues determined in a predicate [*sic*], speedy and efficient manner. The general approach taken by the Panel over the years was left undisturbed by the Nova Scotia Court of Appeal in *Granite Environmental, supra*, [2005 NSCA 141] and is reflective of the process under labour relations statutes in other Canadian jurisdictions.
>
> [25] The date of application approach was more recently challenged by the employer in *Labourers' International Union of North America, Local 615 and Techno Hard Surfaces Ltd.*, LB-0412, 2013 NSLRB 33 (Richardson, Chair). The approach was again upheld. There, after considering the employer's arguments, the objects of the legislation, the legislative history, and policy rationale the Board concluded as follows (at para. 115):
>
> > All of this support a conclusion that the Date of Application rule represents a correct reading of the Board's obligations and jurisdiction pursuant to Section 95(3) of the *Act*. Section 95(3) mandates the Date of Application rule or, if it does not, allows the Board in its discretion to choose it as the appropriate date for purposes of determining the number of union members for purposes of a certification application under Part II.
>
> …
>
> [30] … It is an approach the Board has found to be appropriate for use in the construction industry and not inconsistent with the objectives of the *Act*. Whether a different approach should be taken was previously addressed by the Board in *Ainsworth Inc. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, UA Local 56*, CIP-3194, February 2011 (Slone, Chair) at para. 50:
>
> > A different system might ask what employees have worked, or might have worked, in the applicable unit within a larger, defined period of time. Such

> an inquiry might need to look at employees who were disabled, or otherwise occupied, in the applicable timeframe. It would almost certainly complicate the process, virtually guaranteeing that every application for certification under Part II would end up in a hearing requiring the Panel to determine who is, and is not, with the bargaining unit. As noted, we have adopted the snapshot approach in the interests of simplicity and certainty.
>
> [31] Whether this "snapshot" or date of application approach is mandated by s. 95(3), or is a policy choice of the Board, it has been a long-standing element of the certification process in the construction industry under Part II of the *Act* for policy reasons that are still viable. The Board was not persuaded by the Employer's evidence and arguments that there is any reason based on statutory interpretation or policy to deviate from applying the date of application approach.
> …

[67] CanMar submitted that the date of application rule offended the statutory directive that the bargaining unit comprise a "community of interest". The Board disagreed:

> [27] The Employer argued that the date of application approach offends the community of interest requirement of s. 25(14) by treating employees at work on the date of application in a different way than their fellow employees not at work that day, even though while absent from work they did not lose their status as employees under the *Act* and they worked side-by-side with their fellow employees doing similar work on the day before the application and on the first working day after the application. The Employer argued the two employees concerned, Mr. Panteleios and Mr. Lopez, should not be treated differently from the other employees at work on March 14, 2014 given their community of interest with them. The two employees themselves expressed the same view.
>
> [28] The Board did not understand the Union to say that Mr. Panteleios and Mr. Lopez did not share a community of interest with the other bargaining unit employees by virtue of their work location, hours of work, working conditions and methods of remuneration. Nor did the Board understand the Union to say these two employees would not be part of the bargaining unit should the Union's application for certification be granted. Rather, assuming the two employees have a community of interest with the other employees, had they been at work on March 14, 2014, they would have been recognized as part of the bargaining unit for the purposes of s. 95(3). Whether they met the community of interest threshold or not, they simply were not at work that day.
>
> [29] … The Board views the community of interest notion expressed in s. 25(14) as a factor relevant to determining the bargaining unit *per se*. Whether an employee is in the bargaining unit for determining certification is a different question. Under Part II, an employee may be in the bargaining unit but must be at

> work on the date of application in order to be considered for certification purposes.

[68] Justice Wood set aside the Board's certification order. He gave two reasons.

[69] First, the judge identified the only statutory criterion as "community of interest" from s. 25(14) [quoted below, para. 73]. Messrs. Panteleios and Lopez had community of interest with other labourers whose cards were counted. So the Board's use of another criterion – site work on the day of the certification application – was extraneous, unexplained and unreasonable. The judge said:

> [40] It appears that the only provision of the *Act* which mandates the Board to consider any specific factor in determining the appropriate unit for collective bargaining is s. 25(14). Having been directed by the Legislature to consider the community of interest among employees in the proposed unit, if the Board does not do so they are acting unreasonably. …
>
> [44] … The "snapshot" approach sets out a policy for defining the unit but makes no reference to employee community of interest or how it will be considered.
>
> …
>
> [50] Concerns with respect to lack of predictability and complex hearings are not borne out on the facts of this case since the status of Messrs. Lopez and Panteleios was not in dispute. A decision to consider employees on a one-day leave of absence for possible inclusion if they share a community of interest with others in the bargaining unit would not undermine the objectives of predictability or efficiency.
>
> [51] While recognizing that significant deference should be given to the Board to interpret the *Act* and develop policies and procedures, I must conclude that the failure to apply s. 25(14) or adequately explain why it chose not to do so, renders the Board's decision in this case unreasonable. …

[70] Second, Justice Wood faulted what he considered to be the Board's departure from an earlier Board decision. He said:

> [45] Policies and guidelines can be beneficial, however the Board has an obligation to decide each case before it on its particular circumstances. That is precisely what the Board did in *International Brotherhood of Electrical Workers, Local 625 and D.B. MacEachern's Electrical Company Limited*, CIP-3039 (November 16, 2006). In that case a student on a work placement was found to be an employee under Part II of the *Act* who was doing bargaining unit work on the date of the application. Under the Board's "snapshot" approach he would be included in the bargaining unit for certification purposes. The Board excluded the

> student by application of s. 25(14) because of his lack of community of interest with the other employees in the proposed unit.
>
> [46] While *D.B. MacEachern's Electrical* may be a somewhat unique circumstance, it illustrates how the community of interest principle can apply to modify the "snapshot" approach to certification. It is difficult to reconcile the Board's decision here that community of interest is irrelevant because of a longstanding policy with its application of s. 25(14) to override the same policy in this earlier decision. …

[71] The judge summarized his two points:

> [49] The difficulty with the Board's analysis is that it appears to avoid the express legislative requirement in s. 25(14) to consider employee community of interest. It is also inconsistent with the Board's earlier decision in *D.B. MacEachern's Electrical Company*, where s. 25(14) was relied on to create an exception to the Board's "snapshot" approach.

[72] In my respectful view, the judge's analysis erred in both respects, and misapplied the reasonableness standard.

(a) Community of Interest and Representation Under Part II

[73] Section 25(14), in Part I of the *Trade Union Act*, says:

> The Board in determining the appropriate unit shall have regard to the community of interest among the employees in the proposed unit in such matters as work location, hours of work, working conditions and methods of remuneration.

[74] Here, more was involved than just the community of interest factors from s. 25(14).

[75] This was an application for certification in the construction industry, for which the criteria are adjusted by the legislative scheme in Part II. That scheme reflects Nova Scotia's history of labour relations in the construction industry.

[76] To digress briefly, Part II was enacted by the *Trade Union Act*, S.N.S. 1972, c. 19. The events that precipitated the special treatment for the construction industry are discussed in the majority's decision in *Egg Films*, paras. 59-75 and *Municipal Contracting Ltd. v. International Union of Operating Engineers, Local 721 and KYDD* (1989), 91 N.S.R. (2d) 16 (C.A.), paras. 5-8. In *Municipal Contracting*, Chief Justice Clarke synopsized the history:

> [5] During the mid-1960s the province became engulfed in a series of disputes in the construction industry which threatened the economic stability of various areas of the province in particular, and to some extent the province in general. In 1967 Mr. I. M. MacKeigan, Q.C. (later Chief Justice of Nova Scotia) was commissioned to inquire into these problems with special emphasis upon the difficulties which were delaying and disrupting the construction of the Deuterium Heavy Water Plant at Glace Bay. He recommended, among others, that separate statutory recognition be given to the construction industry in Nova Scotia and, vital to the issues that prompt this appeal, that a process of "speedy arbitration" to resolve disputes be imposed on unions and employers. As a result the Legislature enacted a separate certification procedure for the construction industry. Hence the beginning of Part II designed to apply only to the construction industry. [Chief Justice Clarke's underlining] The recommendation for "speedy arbitration" was not implemented at that time.
>
> [6] The problems that made for disputes among the construction trades continued, including jurisdictional disputes over work and rights, employment of non-union labour and related matters. Wildcats, strikes and lockouts were frequent and regular occurrences. This led to the appointment of the late Professor H.D. Woods of McGill to investigate the deteriorating situation. He concluded, as had Commissioner MacKeigan, that the traditional (Part I) method of resolving disputes was inadequate to serve the special circumstances that had developed in the construction industry in Nova Scotia.
>
> [7] Professor Woods recommended, at pages 101-102 of his report, that the construction industry in Nova Scotia required a separate and special system for the resolution of its grievance disputes….
>
> [8] It was in response to these recommendations that the **Trade Union Act** was amended by S.N.S. 1970-71, c. 5, to provide for an accelerated arbitration procedure in the construction industry. The **Act** was further amended and consolidated in 1972 by c. 19. It is from this brief historical backdrop that Part II entitled **Construction Industry Labour Relations** achieved its legislative birth and statutory existence.

[77] I will summarize Part II's elements that affect union representation.

[78] The definition of "construction industry" underpins Part II. An employers' association may be accredited to represent employers in four "sectors". One is the commercial and industrial sector that includes CanMar. Section 92(h) defines the "sector" as a division of "the construction industry". Section 92(f) defines an "employer" as someone who "operates a business in the construction industry". Section 92(e) defines "employee" as "a person employed in the construction industry". Section 95(1), under which Local 615 applied, permits an application for certification "in the construction industry".

[79] Section 92(c) defines "construction industry" as "on-site" work:

> 92(c) "construction industry" means the ***on-site*** constructing, erecting, altering, decorating, repairing or demolishing of buildings, structures, roads, sewers, water mains, pipe-lines, tunnels, shafts, bridges, wharfs, piers, canals or other works;
>
> [emphasis added]

[80] The reference to "on-site" work derives from the nature of union representation and bargaining units in the construction industry.

[81] Section 92(i) defines "union" as "a trade union that according to established trade union practices pertains to the construction industry". In *Construction and Allied Workers Union (CLAC), Local 154 and 360 Cayer Ltee*, Decision #2086C, November 3, 2000, the former Construction Industry Panel explained what this means. In *Construction and Allied Union, Local 154 v. Nova Scotia (Labour Relations Board)*, 2002 NSCA 73, this Court, on judicial review, upheld the Panel's decision. Justice Cromwell said:

> [4] … After an in-depth review of relevant provisions in the **Act** and their legislative history, the Panel determined that the construction industry provisions of the **Act** contemplated that there would be one union per skilled trade or craft. It further decided that those unions are the 14 international skilled trade or craft unions which currently "occupy the field" with the result that there is "…no room for CLAC." As the Panel put it:
>
> > 22 … In our judgment, the statutory scheme reflected in Part II of the Act, *ie*, the Part dealing only with construction industry labour relations, when read in light of and in the context of the factual history of the industry prior and subsequent to the original enactment of the *Act* in 1972, leads inexorably to the conclusion that the Legislature of the Province of Nova Scotia devised a statutory scheme that called for, (even though it did not explicitly say so), a construction industry in which employers bargained with one (1) or more of fourteen (14) international skilled trade or craft trade unions all with headquarters in Washington, D.C. that, cumulatively, had the trade jurisdiction to perform all of the work defined by the phrase "construction industry" in Section 92(c) in all of the possible sectors described in Section 92(h) of the *Act*, and on the footing that there could and would be only one (1) union per skilled trade or craft.

The Panel's Decision in *CLAC* added:

> 65 … by necessary implication the statutory scheme in the Act is that there was intended and there is one trade union per craft per trade classification.

[82] As to construction bargaining units:

(1) Section 92(b) frames the issue with the Board's discretion:

> 92 In this Part,
>
> …
>
> **(a)** "appropriate unit" means a unit determined by the Board to be appropriate for collective bargaining purposes;

(2) Similarly, s. 94(1) says:

> 94(1) When a question arises as to whether a matter is a matter related to the construction industry, the question must be finally determined by the Board.

(3) Section 95(2) bounds the unit by geographic area:

> 95(2) Where a trade union or council of trade unions makes application for certification as bargaining agent of the employees in the unit, the Board
>
> (a) shall determine the unit of employees that is appropriate for collective bargaining by reference to geographic area;
>
> (b) may designate the whole or any part of the Province as a geographic area and may limit the unit to a designated geographic area; and
>
> (c) may, before certification, if it deems it appropriate to do so, include additional employees in or exclude employees from the unit.

(4) Section 93 provides that "[e]xcept where inconsistent with Part II, provisions of Part I … apply to the construction industry …". Hence the Board may consider any consistent factors from s. 25(14).

[83] Under Part II, the Board's appraisal of "community of interest" is more attenuated than for a unit under Part I. The reason is that construction bargaining units are organized by craft over a geographic area, instead of Part I's shop-centric units that list job descriptions. Under Part I, those job descriptions are analyzed for s. 25(14)'s community of interest factors. Under Part II, generally the craft embodies the community of interest. Electricians are in a craft unit represented by the International Brotherhood of Electrical Workers, carpenters by the International Brotherhood of Carpenters and Joiners, and so on. In CanMar's case,

the labourers are in a craft unit represented by the Labourers International Union of North America. As Justice Cromwell said in *Construction and Allied Union, Local 154*, quoting the Panel, the fourteen craft units, represented by their craft unions "occupy the field" under Part II.

[84] Consequently under Part II, usually the issue isn't the definition of "community of interest" *per se*. Rather it is whether the employee works in the craft of the proposed unit. Crafts may overlap, or a work assignment may straddle the boundary sufficiently to generate debate. The employee's work may change as the project's schedule progresses, or as the he moves from one project to another. One day an employee may work in one craft unit, and the next in another Part II unit. Or his assignment may turn to work that is not "construction", and would default either to a Part I unit or to unrepresented status. He may work construction at another job site for his employer outside the geographical unit of his certified craft. All this while he remains employed. Or he may be laid off after his project, to be rehired for the next one sometime later.

[85] For instance, in *Granite Environmental*, the Board considered whether most of the employees' work on the day in question was in the operating engineers' unit at the subject site or the labourers' unit at another job-site (see below, para. 92). In this case, CanMar argued to the Board: (1) its employees worked at maintenance, not "construction", and were outside the labourers' or any other Part II construction unit; and, alternatively (2) they were doing waterproofing, which CanMar said was the painters' craft, and outside Local 615's labourers' unit. The Board heard evidence and, in its Final Decision, agreed with Local 615 that CanMar's workers were labourers performing construction work.

[86] Simply put, an employee's place in a particular construction unit, day to day, isn't foreordained in the abstract merely by s. 25(14)'s "community of interest" criteria. It also depends on his site work each day. Section 92(c) of the *Trade Union Act* reflects this feature by defining "construction industry" as "on-site constructing, …".

[87] This brings us to the Board's assessment of representation. Section 95(3)(b) says the Board "may" certify. The statutory discretion enables the Board to apply a practice that reasonably emanates from the words, context, scheme and objectives of Part II.

[88] Under s. 95(3), the Board determines the union's percentage of support within the appropriate unit. Whether an employee is in the labourers' unit of the

"construction industry", turns on whether he performs "on-site" labourers work, as directed by s. 92(c). Hence the Board's insistence that there be evidence of on site labourers' work by employees whose wishes are to be counted on an application for a labourers' craft unit.

[89] The judge was of the view that the Board substituted the date of application rule for "community of interest". With respect, this misinterprets the Board's reasons. The Board (para. 28) acknowledged that, for any labourers' work, Messrs. Lopez and Panteleios had community of interest with the other labourers. Nobody questioned that, for their future site work as labourers, Messrs. Lopez and Panteleios would be in the labourers unit for collective bargaining. The Board did not, as the judge said (para. 49), "avoid" community of interest.

[90] Rather, the Board held there was a further aspect to it – namely the connection between the employee and the "on-site" work that defines "construction industry". The determination of the ratio of support under section 95(3) assumes an arithmetic certainty at a moment in time – *i.e.* a snapshot. Consequently, the Board, in a series of decisions spanning forty years, has developed a policy that achieves certainty. The "date of application rule" means that, on the day of the application for certification, the employee must be "on site", as required by the *Trade Union Act*'s definition of "construction industry", and most of his site work that day must be in the craft or trade of the proposed unit.

[91] This Court has upheld the Board's rule.

[92] In *International Union of Operating Engineers, Local 721 v. Granite Environmental Inc.*, Decision # 2287C of the Construction Industry Panel, March 18, 2003, both the Labourers International Union and International Union of Operating Engineers applied for certification of Granite Environmental Inc.'s employees who performed labourers' and operating engineers' work respectively. The Board dismissed the Labourers' application but, after a vote, certified the Operating Engineers. Professor Darby as chair, para. 6 emphasized the words "on-site constructing" in s. 92(c)'s definition of "construction industry", then continued:

> 6. … Thus, in our judgement (and this is part of the long-established policy of the Board and is also mandated by the provisions of Part II of the Act), the ONLY type of "employee" we can concern ourselves with is a person who works "on-site" performing the types of work described in Section 92(c).
>
> …

> 9. … Those two (2) cases did NOT involve – as ours does – employees who spent only part of their "working day" ON-SITE and part of it OFF-SITE. For our situation, the policy of the Panel goes back to the 1970s – as the chairperson in this and the BOEHNER CASE recalls – and is this: when an employee spends his full working day working on site, the issue is whether that employee performed work within the trade jurisdiction of the applicant trade union or AN applicant trade union (if more than one trade union applied for application [*sic* certification] on the same day and the employee performed work in both or each of several trades on that date), for more than fifty per centum (50%) of his working day. If, however, the employee spent part of his day ON-SITE and part of it OFF-SITE, (for example in our case working "at the pit" ie., the quarry), then, the issue is whether that employee performed work within the trade jurisdiction of the applicant trade union or an applicant trade union (if more than one trade union applied for certification on the same date and the employee performed work within the trade jurisdictions of both or each of several trades on that date), for more than 50% of that part of his working day that was spent performing work ON-SITE in the "construction industry". [See section 92(c)]. To be specific: if an employee's "working day" comprised a total of fourteen (14) hours of which five (5) were spent off-site and nine (9) hours on-site, then the relevant period is the nine (9) hours spent on-site. If the employee spent more than four and one-half (4.5) hours of these nine (9) hours performing work within the trade jurisdiction of, for example, the Labourers' Local 1115 and less than four and one-half (4.5) hours doing work of Op. Eng., Local 721 and the applicant trade union is the Labourers' Local 1115, then Labourers' Local 1115 would be required to include in its bargaining unit this "5 hours employee". Conversely, if the applicant trade union had been the Op. Eng. Local 721, it would NOT be entitled to claim the "4 hours employee". …
>
> [Board's capitalization]

[93] In *Granite Environmental*, a judge of the Supreme Court of Nova Scotia partially quashed the Board's certification of the Operating Engineers. The judge said that the Board's use of the rule was patently unreasonable (2004 NSSC 264). This Court allowed the Operating Engineers' appeal, and restored the Board's certification: *International Union of Operating Engineers, Local 721 v. Granite Environmental Inc.*, 2005 NSCA 141. This Court said:

> [9] As is common in the construction industry, Granite's employees did not necessarily work a full day on-site at the Margaree bridge project or their work on the project shifted between the trade jurisdictions of the Operating Engineers and Labourers Unions. To define the appropriate bargaining unit it was necessary that the Panel adopt criteria to establish the connection (a) between the employees and the construction project, and (b) between the employees and the work within the jurisdiction of the applicant union as opposed to that within the jurisdiction of other trade unions on the project.

…

> [25] The purpose of Part II of the *Act*, dealing with the construction industry, is to promote the speedy and effective resolution of labour relations disputes in the construction industry which, previously, had disrupted industrial peace in Nova Scotia. The Panel was endowed with discretion to deduce, balance and apply policies necessary to promote industrial peace in the construction industry. [citations omitted] The *Act* assigns to the Panel "polycentric decision-making", which "involves a number of competing interests and considerations, and calls for solutions that balance benefits and costs among various constituencies." *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, at para. 28; *Pushpanathan* [*Pushpanathan v. Canada (Minister of Citizenship and immigration)*, [1998] 1 S.C.R. 1222] at para. 36. It is this function which the Panel exercised in its choice of criteria to define the bargaining unit.
>
> …
>
> [58] … The *Act* defines "construction industry" as "on site" work. The Construction Industry Panel is established under s. 94(1) of the *Act* with jurisdiction under s. 92(4) respecting "any proceeding or matter relating to the construction industry". If the Panel were to adopt the definition of "bargaining unit" proposed by Granite, the Panel would be considering the number of hours the employee worked outside the construction industry and measuring the on-site construction time against the off-site non-construction time. The Panel declined to do this because, as the panel stated in para. 6, s. 92(c) means:
>
> > The ONLY "employee" we can concern ourselves with is a person who works "on-site". [Panel's capitalization]
>
> [59] There may be other rational conclusions. But the Panel's view was one rational conclusion. …

[94] Some years later, in *Egg Films*, the Board considered an application for certification under Part I of the *Act* for technicians in the film industry. The technicians' work was project specific, usually lasting only a day before they were laid off. In that respect, the technicians' occasional employment resembled construction work. The Board had to decide which technicians could vote. The Board's normal practice under Part I was to use a "double date" rule, meaning only employees who were employed on both the date of the union's application and the date of the vote could cast a ballot. In *Egg Films*, however, because of the impermanent workforce, the Board borrowed from its construction industry practice and applied a "snapshot" rule. This meant that any technician employed on the date of the Union's application for certification could vote. The employer challenged the Board's use of the snapshot rule as unreasonable. This Court upheld the Board's decision. The majority's reasons say:

> [107] Neither the "double date" nor the "snap shot" approach is legislated by statute or subordinate legislation. Either was a legally permissible choice of policy and practice to effectuate the *Trade Union Act*'s scheme and objectives. The Board composes and fine tunes its practice on these matters in its body of decisions. The snap shot approach has prevailed in Ontario Board practice for the film/entertainment industry, is the Nova Scotia practice for project specific work in the construction industry, and is consistent with an earlier decision (*Power Promotions*) of the Nova Scotia Board respecting project specific employment in the entertainment industry. The Board determined that, where project specific work is the norm, as in the film industry, the snap shot approach is preferable. The double date rule, according to the Board, could stifle the employees' access to collective bargaining.
>
> [108] The Board concluded that the Preamble's objective to encourage collective bargaining outweighed the employer's design of unadulterated business efficiency. To satisfy the Preamble's objective, the Board altered its double date rule to a snap shot rule. These conclusions are governed by *McLean*, para. 33. The choice between countervailing objectives or policy considerations, each stemming from the tribunal's home statute, is for the tribunal. The reviewing court should resist the temptation to stray into correctness analysis.

[95] The judge's decision under appeal did not mention this Court's decisions in either *Granite Environmental* or *Egg Films*.

[96] Labour Boards in other Provinces have adopted similar rules, upheld by the courts: *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd*, 2002 NBCA 27, paras. 63-64; *Jones' Masonry Ltd. v. Labourers' International Union of North America, Local 900*, 2013 NBCA 50, paras. 4-5; *Colautti Construction Ltd. v. I.U.O.E., Local 793*, [1986] O.J. No. 1211 (Div. Ct.), pp. 11-12; Rayner, *Collective Bargaining Law*, page 276 and note 91; Adams, *Canadian Labour Law*, para. 7-1080.

[97] I agree with CanMar that the Board reasonably could have crafted its date of application rule differently, for instance to include any employee who was on site sometime during a two day span from the Union's application for certification. Then Messrs. Lopez and Panteleios would have counted. But then, some other incongruity would appear. An employee who was on leave for two days could say – "Why not a three day span?" A labourer whose project ended three days earlier, could say – "I'll be back for the next job. So why not me?" A labourer who was first hired three days later could ask the same question. Someone who worked in another construction craft, or did maintenance work during the week of the certification application, but labourers' work the next week, would want to be

counted. As would a labourer who works on two projects for one employer, was at an off-unit site during the week of the union's application, but back at the subject site the next week. Bright line tests have edges that chafe at the line.

[98] The Legislature enacted Part II to inject certainty and efficiency into the previously chaotic labour relations of the construction industry. The Board has determined that an effective process under s. 95(3) requires a bright line test - an empirical standard, known in advance. The process cannot operate effectively if the rule that defines the constituency vacillates from case to case, and is only ascertained *ad hoc* after each litigated Board hearing. The Board's formulation was chosen from among alternatives, each reasonable on its own. That choice involved "policy considerations that we presume the legislature desired *the administrative decision maker* - not the courts – to make": *McLean*, para. 33.

[99] The *Trade Union Act* is a roadmap for a tangled landscape. Board policies are needed to inform the broad statutory principles that govern labour relations. Rayner, *Canadian Collective Bargaining Law*, pp. 106-7 explains:

> Canadian labour relations statutes deal with all aspects of collective bargaining from union certification to enforcement of the collective agreement, from adjudication of alleged unfair labour practices to regulation of industrial action, from supervision of bargaining to enforcement of the union's duty of fair representation. Because of their scope, labour statutes need to be skeletal in form. Otherwise, the parties would soon be ensnared in a morass of regulation. In addition, the philosophy behind the statutes is based on a free market concept. The legislation sets the rules, but the participants play the game with the government (in this context, the labour board) as referee. This philosophy dictates a statute that is skeletal and easily understood. However, a statute that is designed as a legislative framework within which the parties operate dictates that the statutory tribunal that is charged with its administration develop its own rules, policies and procedures. …

[100] And so Nova Scotia's Board has its date of application rule. I respectfully disagree with the judge that the Board's use of the rule unreasonably offended the principle of "community of interest" in s. 25(14).

(b) *D.B. MacEachern* Decision

[101] The judge said that the Board in CanMar had acted inconsistently with the Board's earlier decision in *D.B. MacEachern*. In my respectful view, there was no

inconsistency. Rather, the judge mistook the relevance of *D.B. MacEachern* to this case.

[102] In *D.B. MacEachern*, the union applied for certification for a unit of electricians under Part II of the *Trade Union Act*. The issue was whether a work term student from the Nova Scotia Community College should be in the unit, and entitled to vote. The Construction Industry Panel ruled – No, because the work term student had no community of interest with professional electricians. The Panel said:

> 3. … In essence, the Panel concludes that while the work term student is properly viewed as an employee in the construction industry, he has no community interest with the apprentices and journeymen electricians in the unit appropriate for collective bargaining properly sought by the Applicant Union. Thus, the student's vote is not to be counted in determining whether the Applicant Union has sufficient support to be certified as bargaining agent of the Respondent Employer's electricians.

The student was on site during the day of the union's application for certification. The date of application rule was not an issue.

[103] In CanMar's case, everyone agrees that, for labourers' work on site, Messrs. Lopez and Panteleios have community of interest with the other labourers. The Board discounted them for a further reason - they were not on site performing unit work during the day of Local 615's application for certification, under the date of application rule. In *D.B. MacEachern*, that point did not arise.

(c) Summary

[104] The date of application rule is a permissible policy or practice to effectuate the objectives of the *Trade Union Act*. It is consistent with the words, context and scheme of the statute, and the Legislature's objectives with Part II. The policy decision to frame the rule as the Board has done, instead of a variant, either version being reasonable, is for the Board, not the court.

[105] I would allow the appeal from the judge's ruling that set aside the Board's Final Decision.

3. Third Issue – Effective Date of Certification

[106] The Board issued its Final Decision on November 27, 2014. The Decision said that Local 615's certification was dated as of April 1, 2014. That was the effective date of the Board's earlier dismissal of Local 615's application for certification, under the Board's initial order issued on April 9, 2014. The Board explained:

> [34] The Board's usual practice following a union's successful s. 96 hearing is to backdate the certification order to the date the union's application was first dismissed. In exceptional circumstances, the Board has not backdated orders. This practice was reviewed and affirmed in *Ainsworth Inc. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, UA Local 56,* LB-0036 2011 NSLB 89 (Archibald, Chair).
>
> [35] The Union submits that consistent with Board practice if the Union is certified following this s. 96 hearing the date of certification should be the effective date of the Board's previous order dismissing the application. The Board agrees. Section 96(1) of the *Act* states the Board may revoke the original order for dismissal. The section is then silent with respect to process and date for any new order, leaving the matter to the Board's discretion. The Board finds that the discretionary practice of backdating a certification order has a practical and pragmatic function consistent with the purposes of the *Act* in that it can reduce the mischief that could ensue if employers purposely attempted to postpone the effects of certification pending a s. 96 hearing which might not conclude until many months after the date of application. In some situations a construction project might even be finished prior to a hearing date totally negating the effects of certification, a result which the Board views as contrary to the objectives of the *Act*. There are no exceptional circumstances here to warrant not backdating a certification order.
>
> …
>
> [37] The Board revokes the previous Dismissal Order dated April 9, 2014 (LB-0737) …. The Union's application for certification was successful. The effective date of the certification Order is April 1, 2014, being the effective date of the Board's earlier order dismissing the Union's application.

[107] The effective date of certification is significant. Under Part II's system of accreditation, once an employer is certified for a sector with an existing collective agreement that was signed by the accredited employers' association, the employer may be bound by its terms.

[108] CanMar asked the reviewing judge to set aside the Board's backdating of the certification. Justice Wood dismissed that aspect of CanMar's application. The judge said:

> [26] … The *Act* is silent as to whether the effective date is required to be the same day as the order is issued. I do not see any legislative prohibition on having the order become operative at some date in the future or in the past. As a result, I conclude the Board has some discretion with respect to determining that timing.
>
> [27] With the applicable standard of review I must follow the path of reasoning used by the Board and determine whether the result is within the range of reasonable outcomes. In this case the Board has chosen March 14, 2014 as the effective date for certification. They did so because of their past practice which, in part, arose from concerns that an employer might be able to frustrate the consequences of certification by delaying the hearing process. Using the date of application as the effective date appears to encourage an early hearing on the merits which should be in the interests of all parties.
>
> [28] I am unable to conclude that the Board's decision on this issue falls outside the range of reasonable outcomes. It is logical and appears to be based on appropriate policy considerations. …

[109] Justice Wood's reference to "March 14, 2014 as the effective date of certification" was a slip that should read "April 1, 2014". [See the Board's Final Decision, para. 37, quoted above, para. 106]

[110] CanMar's cross appeal reiterates its submission to Justice Wood. Its factum repeatedly urges that the *Trade Union Act*'s silence on the Board's power to backdate supports the view that the Board had no discretion to backdate.

[111] The *Trade Union Act*'s key provisions are ss. 95(3)(a) and (b) and 96(1):

> 95(3) When, pursuant to an application for certification under this Part by a trade union or council of trade unions, the Board has determined the unit appropriate for collective bargaining and consistent with a geographic area established by the Board,
>
> (a) if the Board is satisfied that the applicant trade union or council of trade unions has as members in good standing less than thirty-five per cent of the employees in the appropriate unit the Board shall dismiss the application;
>
> (b) if the Board is satisfied that the applicant trade union or council of trade unions has as members in good standing more than fifty per cent of the employees in the appropriate unit the Board may certify the

> trade union or council of trade unions as the bargaining agent of the employees in the unit;
>
> …
>
> 96(1) Where the Board issues an order dismissing an application pursuant to clause (a) or (c) of subsection (3) of Section 95 and the applicant trade union or council of trade unions requests a hearing, the Board shall hold a hearing and may revoke the order.

[112] As the Board's Final Decision noted, the Board's jurisprudence has interpreted these provisions to give the Board a discretion, after a revocation under s. 96(1), to backdate the certification order. The material filed for this appeal cites Board decisions on this practice going back over twenty years. The Board does not always backdate. It exercises its discretion pragmatically in the circumstances of each case. A cogent factor is whether the employer should benefit, to the employees' prejudice, from inaccuracies in the employer's initial filing under Regulation 12, that led to the Board's initial dismissal of the application for certification, and which were only corrected after a full hearing much later.

[113] In my view, the Board's conclusion that the *Act* affords the discretion was reasonable.

[114] Section 96(1) says that the Board "may revoke" the initial order. The Board's initial order, in this case, was under s. 95(3)(a), was issued April 9, 2014, and dismissed Local 615's certification application effective as of April 1, 2014. The initial order was premised on CanMar's statutory declaration filed March 28, 2014, that said CanMar employed no labourers in the construction industry. Had CanMar's statutory declaration listed its construction labourers in conformity with the Board's eventual findings in the Final Decision, then in late March or early April 2014 the Board likely would have certified under s. 95(3)(b).

[115] Section 95(3)(b) says the Board "may certify" - again a discretion. In *D.B. MacEachern*, *supra*, which CanMar has cited to this Court as useful, para. 26, the Construction Industry Panel said, with reference to s. 95(3) - "[n]ormally, the Panel would certify a union as of the date of application", unless there is "undue hardship". The date of Local 615's application was March 14, 2014. Had CanMar filed a correct statutory declaration then, instead of a dismissal under s. 95(3)(a) as of April 1, 2014, likely there would have been a certification under s. 95(3)(b) as of March 14, 2014. That is earlier than the effective date of April 1, 2014 used by the Board's Final Decision.

[116] The Legislature enacted the Board's discretions in ss. 96(1) and 95(3), so the Board could efficiently resolve disputes over certification in the construction industry. This means the Board's discretionary authority to grant the order includes the power to attach the conditions that are reasonably necessary to achieve an efficient resolution. Those conditions include, in appropriate circumstances, the choice of an effective date for the Board's decision. For instance, in *Transair*, page 739, Chief Justice Laskin said of the *Canada Labour Code*:

> The statute makes it clear that what is an appropriate bargaining unit is for the Board to determine. I have no doubt that it would have been open to the Board to determine the appropriate bargaining unit as of the date of the application for certification, but in fact it did not do so.

[117] The Board's conclusion, on the scope of its discretion to backdate, is a permissible interpretation of its home statute.

[118] Did the Board reasonably exercise that discretion? Not backdating would mean that the inaccuracy in CanMar's initial statutory declaration would delay the certification for eight months. The employees in the unit would be denied the benefit of collective bargaining for that period. That period is significant, given the limited life span of the Harbourview project. The Board reasonably found that outcome would frustrate the objectives of *Trade Union Act*.

[119] I would dismiss CanMar's cross appeal.

4. Fourth Issue – Charter Values and Doré

[120] Messrs. Lopez and Panteleios say that the exercise of an administrative discretion must comply with *Charter* values. Their factum submits:

> 8. The Respondents submit that by applying the Date of Application Approach and excluding the Respondents from the bargaining unit for certification purposes, the Board rendered a Decision that was inconsistent with the principles of democracy and majoritarianism, values recognized under s. 2(d) of the *Charter*.

Messrs. Lopez and Panteleios do not challenge any provision of the *Trade Union Act* or its regulations as offending s. 2(d), nor do they suggest that a particular instrument or rule is of no force or effect under s. 52(1) of the *Constitution Act, 1982*. Rather, citing *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, their factum concludes with the submission:

> 80. Relying on *Doré*, as the Board's Decision is disproportionately impairing of the s. 2(d) guarantee and the principles it recognizes, the Respondents submit that the Board's Decision to exclude the Respondents from the bargaining unit is unreasonable.

[121] What principles govern the judicial review of a discretionary administrative decision that has *Charter* implications?

[122] Justice Abella's decision for the Court in *Doré* and her reasons (for four of seven justices) in *Loyola High School v. Quebec (Attorney General)*, [2015] 1 S.C.R. 613, synthesized the proportionality test from *R. v. Oakes*, [1986] 1 S.C.R. 103 with the reasonableness standard of review from *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. Generally, if the exercise of an administrative discretion further to a statute – *i.e.* a decision that would attract reasonableness under *Dunsmuir* – engages the *Charter*'s protections, then the court determines whether the decision-maker has proportionately balanced the *Charter* values with the statutory objectives. If the balance is proportionate, the decision is upheld as reasonable. If not, the decision is unreasonable.

[123] Justice Abella's reasons in *Loyola* summarize the test:

> [4] Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter* – both the *Charter*'s guarantees and the foundational values they reflect – the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.

[124] In *Bonitto v. Halifax Regional School Board*, 2015 NSCA 80, paras. 38-50, 63-89, leave to appeal refused February 18, 2016 (S.C.C.), this Court applied *Doré* and *Loyola* to a discretionary administrative decision that engaged freedom of religion.

[125] First, under *Doré*/*Loyola*, are the *Charter* values. What are the current bearings of labour relations under s. 2(d) of the *Charter*? Over the past two decades, the trajectory has veered toward the sustenance of collective bargaining.

[126] The 1987 trilogy held that s. 2(d) did not protect collective activity: *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460. Similarly, in 1990, the Supreme Court held that freedom of association was

an individual right, and did not protect collective activity, even activity that was essential to the association's purpose: *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367, at p. 402. In 1999, the Court held that s. 2(d) did not guarantee access to collective bargaining: *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, per Bastarache, J. for the majority.

[127] Two years later, however, the Court opened the door by ruling that the exclusion of farm workers from Ontario's *Labour Relations Act* offended s. 2(d) and was not justified by s. 1: *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, per Bastarache, J. for the majority.

[128] Then, in its seminal ruling, *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391, at paras. 19 and 66, the Court held that s. 2(d) gave members of the health services labour unions the constitutional right to bargain collectively on fundamental workplace issues, with the corresponding obligation on the (government) employer to bargain in good faith. The Chief Justice and Justice LeBel for the majority said:

> 20 … interpreting s. 2(d) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values.
>
> …
>
> 80 Protection for a process of collective bargaining within s. 2(d) is consistent with the *Charter*'s underlying values. …
>
> 81 Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underlie the *Charter* [citations omitted]. All of these values are complemented and indeed, promoted, by the protection of collective bargaining in s. 2(d) of the *Charter*.
>
> …
>
> 85 Finally, a constitutional right to collective bargaining is supported by the *Charter*'s value of enhancing democracy. Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace. Workers gain a voice to influence the establishment of rules that control a major aspect of their lives [citations omitted] …

[129] In *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, paras. 101 and 117, the Chief Justice and Justice LeBel for five justices confirmed their conclusion in *Health Services*.

[130] In *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3, the Chief Justice and Justice LeBel for the majority reiterated their conclusion from *Health Services* and added:

> 71 … A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(d).
>
> …
>
> 94 … The principles of majoritarianism and exclusivity, the mechanism of "bargaining units" and the processes of certification and decertification – all under the supervision of an independent labour relations board – ensure that an employer deals with the association most representative of its employees. [citations omitted]

[131] In *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245, paras. 3-4, 51, 55, 75, 92-96, Justice Abella for the majority once more reiterated *Health Services*, then held that the right to strike was an "indispensable component" of "meaningful collective bargaining", but that the right to strike could be replaced by other "meaningful dispute resolution mechanisms".

[132] The message is - the *Charter* values that underlie s. 2(d) promote a robust and effective system of collective bargaining under the supervision of an independent labour relations board.

[133] Second, under *Doré/Loyola*, are the statutory objectives. I won't repeat the detailed genealogy of the date of application rule. To summarize:

> 1. The Board's decision not to consider the views of Messrs. Lopez and Panteleios applied a Board rule that only workers who, on the date of application, were performing unit work on site should be counted. The date of application rule was long-established in Board jurisprudence and well-known in the industry.
>
> 2. The rule's reliance on "site" work emanates explicitly from the *Trade Union Act*'s definition of "construction industry". That definition is the heart of Part II – Construction Industry Labour Relations, and is the premise for the Board's date of application rule.
>
> 3. The reference to "site" work has a purpose. Construction, with its craft system and project work over geographic units, involves more

> variable job functions than does a permanent job description in an employer-centric shop unit under Part I. The criterion of "site" work connects the construction worker to a particular unit.
>
> 4. The fractionalization that derives from craft-based units means the construction industry, if unregulated, would be prone to disruptive jurisdictional disputes. The concern is not theoretical. Before the enactment of Part II, that fractionalization caused industrial havoc in this Province. The Legislature responded by enacting Part II with the object of promoting certainty and efficiency in the resolution of differences, including certification disputes, within the construction industry.
>
> 5. The Board's date of application rule promotes certainty to encourage an efficient decision on certification. The Board's use of such rules has been approved by this Court, and is consistent with labour board practice elsewhere.

[134] Last, under *Doré/Loyola*, we come to the proportionality between the *Charter* values and statutory objectives.

[135] In my respectful view, the date of application rule is not the arbitrary affront to democracy and majoritarianism that Messrs. Lopez and Panteleois suggest. The Board certified Local 615 because the Board was satisfied that a majority of the employees in the appropriate unit or constituency had signed Local 615's membership cards. This reflects majoritarianism and democracy as the Legislature contemplated in s. 95(3)(b) of the *Trade Union Act*.

[136] Messrs. Lopez and Panteleios were outside that constituency because of the Board's date of application rule. This rule defines the appropriate unit for the purposes of measuring union support. As I have explained, that rule conforms to the wording, context and scheme of the *Trade Union Act*, and the objective of the Legislature. A known empirical standard to measure union support is a component of the robust and effective system of collective bargaining in the construction industry that is contemplated by both the *Charter*'s values under s. 2(d), and the Legislature's objective with Part II. The Board's date of application rule proportionately balances those values and objectives under *Doré* and *Loyola*.

[137] I would dismiss the ground in the Notice of Contention.

5. Conclusion

[138] I would allow Local 615's appeal, overturn the decision of the Supreme Court and restore the Board's Preliminary and Final Decisions. I would dismiss CanMar's cross appeal, and dismiss the ground of the Notice of Contention by Messrs. Lopez and Panteleios.

[139] In the Supreme Court, the judge ordered Local 615 to pay costs of $4,000 plus $841.51 disbursements to CanMar and $500 to Mr. McSween. I would overturn those costs awards. To the extent those amounts have been paid, the recipients shall reimburse Local 615.

[140] For the proceeding in the Supreme Court, I would order CanMar to pay Local 615 costs of $4,000 plus reasonable disbursements. For the proceeding in this Court, I would order CanMar to pay Local 615 costs of $5,000 plus reasonable disbursements, and Messrs. Lopez and Panteleios, jointly and severally, to pay Local 615 costs of $2,000 all inclusive.

Fichaud, J.A.

Concurred:

MacDonald, C.J.N.S.

Bryson, J.A.