NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia Government and General Employees Union v. Metro Community Living Support Services Ltd.*, 2017 NSCA 15

Date: 20170208
Docket: CA 452460
Registry: Halifax

Between:

Nova Scotia Government and General Employees Union

Appellant

v.

Metro Community Living Support Services Ltd. and
Labour Board (Nova Scotia)

Respondents

Judges:	MacDonald, C.J.N.S.; Saunders and Bourgeois, JJ.A.
Appeal Heard:	December 6, 2016, in Halifax, Nova Scotia
Held:	Appeal allowed with costs, per reasons for judgment of MacDonald, C.J.N.S.; Saunders and Bourgeois, JJ.A. concurring
Counsel:	Gordon N. Forsyth, Q.C., Jillian Houlihan, and Balraj Dosanjh, for the appellant Chris S. Montigny and Emily MacDonald, for the respondent, Metro Community Living Support Services Ltd. Edward A. Gores, Q.C. for the respondent, Labour Board (Nova Scotia)

Reasons for judgment:

[1] For over a decade now, the respondent employer has been operating under various collective agreements with the appellant union. The union recently convinced the Labour Board to add a new employee classification to the bargaining unit. The employer then convinced the Supreme Court of Nova Scotia to quash that decision. The union now asks us to restore the Board's order.

BACKGROUND

[2] The original certification dates back to 2004 and covered (subject to standard exclusions) all "full-time" and "regular part-time" employees.

[3] In their first collective agreement (expiring on October 31, 2007), the parties agreed to exclude casuals, defined as those "hired on a day-to-day basis as required". That would not be unusual. Apparently there were no part-time employees at that time, since only "permanent full time employees and term employees" were recognized, with parties agreeing:

> 2.04 Part-time Employees
>
> If the Employer should employ on a part-time basis, the Employer and the Union will negotiate the terms and conditions of the employment.

[4] These provisions carried into the next agreement (expiring on October 31, 2010).

[5] Things changed with the third agreement (expiring on October 31, 2012). For reasons best known by the parties and despite the terms of the original certification, not all regular part-time employees would be in the bargaining unit. Instead, only those scheduled for at least 20 hours per week made the cut. Those scheduled for fewer than 20 hours would be excluded. This was accomplished by changing various definitions. For example, all "permanent employees" would be recognized. They would include two categories: namely, all "full time" employees and those "part time" employees meeting the 20 hour requirement according to this definition:

> (ii) A "Part Time Employee" who is a member of the bargaining unit and is employed to work on a regularly scheduled and recurring basis at least twenty (20) hours per week but less than the standard hours of work for Full Time Employees as set out in Article 14.01, and who has completed the probationary

> period. The Part Time Employee shall be entitled to all the benefits of the collective agreement on a pro rata basis except where expressly provided otherwise.

[6] Part-timers not making the 20 hour cut would be lumped in with the "casuals", where they would be expressly excluded from the bargaining unit:

> "Casual" is a person who is not a Permanent Employee or Term Employee and who works on a day to day basis as required. Casuals are not covered by the collective agreement and are not in the bargaining unit.

[7] This manoeuvre and the confusion it has generated lie at the heart of this appeal. Elaborating on the confusion, it is incongruent to label regular employees "casuals"(regardless of their hours). Instead casuals, as the name suggests are simply called in as needed. In fact, they are the opposite of regular employees. For that reason, it would not be uncommon to see them excluded from the bargaining unit (as was the case with the parties' original collective agreement). On the other hand, it would be much less common to see regular employees excluded, even those working part time on limited hours. That was evident from the original certification order.

[8] In any event, when the next round of collective bargaining rolled around, the union tried to negotiate these orphaned part-timers back into the bargaining unit. The employer refused. The union signed a new agreement without its proposed changes.

[9] Instead, the union turned to the Board for relief, asking it to amend the certification order to include all part-time employees. By the time of the hearing, the union had tweaked its request by specifically identifying the 36 subject employees. The employer objected, maintaining that it was a back-door attempt to amend the collective agreement it had signed in good faith.

[10] The Board agreed with the union and granted the request by amending the certification to include "all regular part-time employees, including those 36 incorrectly characterized as 'casual'…".

[11] The employer, asserting that the Board's decision was unreasonable, asked Justice Suzanne Hood of the Supreme Court of Nova Scotia to quash the order.

[12] Justice Hood agreed with the employer, reasoning:

> [69] …It is not clear how the Board concluded it could add additional part-time employees to the bargaining unit since part-time employees were included in the original certification and were defined and included in succeeding collective agreements.
>
> [70] Saying that the voluntary recognition clause in the collective agreement is no longer valid because casuals are not included as part-time employees does not explain how the Board concluded it has the authority to add these employees to the bargaining unit.
>
> [71] The Board decision was reasonable when it concluded that there is no difference between the word "classification" in s. 28(1) and the word "category". There is no path of reasoning that explains how that gives it the authority under that subsection to add part-time employees (incorrectly characterized as "casuals") to the bargaining unit. The Board does not say that, because of the prior incorrect classification, these employees are either a new "classification" or new "category" which is the basis upon which the Board can amend the certification order or the "deemed" certification order.
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> [72] It is true this is not an amendment to the collective agreement which the Board admits it has no authority to make. The Board in para. 49 says it will not do so, but instead says the parties will have "an opportunity to re-negotiate their collective agreement to recognize that the certification must include the casuals which have been found to be permanent or regular part-time …."
>
> [73] I cannot conclude that the Board has given a justifiable, intelligible and transparent explanation of its decision in this regard. Nor, because of this, does it fall within the range of possible outcomes. Accordingly, the decision is quashed.

[13] The union now asks us to restore the Board's decision.

[14] For the reasons that follow, I would allow the union's appeal and restore the Board's order.

ANALYSIS

[15] It would be helpful to begin with this reminder. Reviewing courts owe significant deference to specialized decision-making bodies like the Labour Board. We have come to rely on them greatly to resolve an endless host of disputes emanating from government policy. If these matters were left to the courts to resolve, they would crumble under their own weight in no time.

[16] Guy Regimbauld in *Canadian Administrative Law*, 2nd edition (Markham: LexisNexis, 2015) describes this reality (at page 2):

> These bodies, often populated by experts in the area, provide specialized and technical resolutions to different situations, ensure greater innovation, flexibility and efficiency in the delivery of government programs and strategies, provide an informal and rapid forum for public hearings (thereby minimizing time and costs related to litigation before ordinary courts) and relieve politicians from what might be otherwise very sensitive political issues.
>
> The reality is such that without these administrative bodies, government would be paralysed, and so would the courts.

[17] As these tribunals grew in prominence, the courts have been engaged in an ongoing struggle to strike the appropriate level of deference. Much depends on the context. For example:

- What issue was the tribunal grappling with?
- Did that issue fall within their expertise?
- Or was it a question better suited for the courts to resolve?
- Was the board being accused of trespassing beyond its statutory jurisdiction?
- Was there a statutory right of appeal, and if so on what grounds?
- Or did their enabling legislation contain a privative clause rendering the decision final (subject only to the court's limited supervisory role)?

[18] Over the years, depending on the issue at play, our categories for deference have varied. For example, with some purely legal issues, the Board would have to be correct, meaning we could impose our own views of the law. For other issues, we would interfere only if the decision were unreasonable. At one stage, we had a "patently" unreasonable standard to justify court interference. Then we had to adopt appropriate definitions for "reasonable" and "patently unreasonable".

[19] Fortunately, we have now settled on only two categories: *correctness* and *reasonableness*. While context still dictates which one will apply, there are now clearer guidelines. *Correctness* remains easy enough to apply. There is no deference; therefore, the impugned decision would have to be correct. In other words, if the reviewing court disagreed, it would simply supplant its views. And the parameters for *reasonableness* are now pretty well settled. The leading case is *Dunsmuir v. New Brunswick*, 2008 SCC 9 where the Supreme Court of Canada

invites reviewing courts to consider reasonableness in the context of: (a) the Board's decision-making process and (b) the outcome. The former must reflect "justification, transparency and intelligibility" while with the latter, the result must fall "within a range of possible, acceptable outcomes":

> [45] We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards — correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.
>
> [46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?
>
> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> …
>
> [50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[20] Our role as a Court of Appeal is to make sure the reviewing judge correctly chose and applied the appropriate standard of review for each issue under consideration. In other words, we apply a correctness standard. This means that, if we disagree with either the standard of review she selected or how she applied it, we would supplant our views. See *Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd*., 2016 NSCA 40 (CanLII) at ¶ 30 and *Coates v. Nova Scotia (Labour Board)*, 2013 NSCA 52 at ¶ 37.

[21] Here, the reviewing judge selected the *reasonableness* standard for the two related issues under consideration, namely: (a) the reasonableness of the Board's decision that it had jurisdiction to and should amend the certification as requested (the jurisdictional question); and (b) whether, instead, arbitration should have been the appropriate course for the union to pursue (the arbitration question).

[22] The parties agree, as do I, that the judge was correct to choose the reasonableness standard.

[23] However, I respectfully disagree with the reviewing judge's application of this standard to the two noted issues. Instead, when I apply the *Dunsmuir* criteria, I see: (a) "justification, transparency and intelligibility" in the decision making process; and (b) results that fall "within the range of possible, acceptable outcomes." As I will now explain, this applies to each of the employer's two issues presented to the Board, namely: the jurisdiction question and the arbitration question.

The Jurisdiction Question

The Process – Justification, Transparency and Intelligibility

[24] My colleague, Justice Fichaud, in *Casino Nova Scotia/Casino Nouvelle Écosse v. Nova Scotia (Labour Relations Board)*, 2009 NSCA 4, offers this apt description of the first *Dunsmuir* criterion:

> [30] Several of the Casino's submissions apparently assume that the "intelligibility" and "justification" attributed by *Dunsmuir* to the first step allow the reviewing court to analyze whether the tribunal's decision is wrong. I disagree with that assumption. "Intelligibility" and "justification" are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to process (*Dunsmuir*, ¶ 47). They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its

> second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes. *Nova Scotia (Director of Assessment) v. Wolfson*, 2008 NSCA 120 (CanLII), ¶ 36.

[25] Here, the Board articulated a reasoning path that I can understand. First, it identified the employer's three concerns about the Board's jurisdiction to grant the amendment:

> [10] The Respondent Employer submissions on its preliminary motion essentially contained three arguments:
>
> > (1) that the Board does not have jurisdiction to "amend the parties' previously negotiated collective agreements";
> >
> > (2) any amendment of the initial certification order from 2004 would be "moot", since that order is now "spent" in light of the parties' subsequently agreed recognition clauses; and
> >
> > (3) in addressing these issues the Board's approach must be to respect the purposes and outcomes of free collective bargaining.

[26] In response to the employer's first concern, the Board adopted the union's submissions, highlighting the uniqueness of the Nova Scotia legislation:

> [14] The Board is generally in agreement with the lengthy submissions from the Union which support the assertion that the Board has the jurisdiction to "amend the certification" under Section 28 of the *Act*. The Board also concurs with the Union's assessment of the Employer's position, at paragraph 16 of its written response on the preliminary jurisdictional issue, which reads:
>
> > With the exception of *Canadian Union of Public Employees, Local 1089 and Town of Windsor*, November 29, 2005, LRB-6015, which is dealt with below, the cases cited by the Employer do not deal with the question of a labour board's *jurisdiction* to determine an application to amend. Rather, the cases reflect the different policy approaches taken by labour boards in other Canadian jurisdictions. These cases must be understood within the particular legislative context of each jurisdiction. Cases from the Ontario Labour Relations Board and the Canada Industrial Relations Board, in particular, are distinguishable given the lack of any express authority to amend a certification in those jurisdictions. None of those cases, moreover, suggest that the labour boards in those provinces lack jurisdiction to order such an amendment, but merely that they may decline to do so.
>
> Rather than summarize the Applicant Union's position, with which it agrees, the Board will simply state in short compass why it has jurisdiction to proceed with this application.

> [15] The question the Board faces in this application relates to the scope of its authority under Section 28 of the *Act* to regulate the continuing shape of bargaining units which have been established either by the Board through the process of certification or by the parties through their private bargaining processes. Unlike some other Canadian jurisdictions, such as Ontario or the federal jurisdiction, the Nova Scotia legislature has seen fit to clothe this Board with authority to amend certifications in the following terms:
>
> > 28(1) Where a trade union is certified under this *Act*, an application may be made to the Board to amend the certification to
> >
> > (a) change the name of the union or employer where the name of the union or employer has been changed;
> >
> > (b) include specific additional classifications of employees in the unit;
> >
> > (c) exclude specific classifications of employees from the unit; or
> >
> > (d) combine previous certification orders into one order.
> >
> > (2) The application shall be filed with the Board in the form approved by the Board duly verified by a statutory declaration made by a person or persons permitted to sign an application under Section 5. R.S., c. 475, s. 28.
>
> This Section, like all others in the *Act*, must be interpreted purposively in the light of the constitutional right to collective bargaining as aspects of freedom of association under Section 2(d) of the *Charter Of Rights And Freedoms*, and the statement in the preamble to the *Act* that the legislation is designed "… for the promotion of common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes."

[27] The Board then buttressed its position by highlighting the need to interpret the governing legislation purposively:

> [16] By virtue of the scheme of the *Act*, it is the role of the Board to maintain the general institutional framework for collective bargaining and to resolve disputes relating to the operation of that framework in individual cases. On the other hand, it is normally the role of the parties to establish the specific content of their labour relations arrangements through collective bargaining, and to resolve disputes in relation to the interpretation, application or administration of their collective agreements through mediators or arbitrators (see Sections 42 and 43 of the *Act*). The Nova Scotia *Trade Union Act* allows for the creation of collective bargaining relationships through either one of two ways:
>
> > (i) certification of a Union as exclusive bargaining agent for employees in a bargaining unit through a process of application to this Board (Section 23); or

(ii) voluntary recognition of the Union as the sole bargaining agent for unit of employees by a written agreement between the Employer and the Union (Section 30).

The latter section provides that once filed with the Minister, the voluntary recognition agreement allows the provisions of the *Act* to apply "as though the Trade Union was the certified bargaining agent". However, even in the context of a voluntary recognition, the Board has a residual regulatory role: if it is alleged that the voluntarily recognized Union is employer dominated, has discriminatory membership rules, does not represent a majority of the employees in the unit, or is attempting to operate where another Union has bargaining rights in relation to the employees in question, the Board may declare the purported voluntary recognition agreement to be a nullity. In other words, while "free collective bargaining" and its "advancement of common well-being" are the purposes of the *Act*, there is a public interest in ensuring that the foundational rules of the general framework for collective bargaining are applied fairly in accordance with constitutional principles and provisions of the *Act*.

[17] The residual regulatory role for the Board is found in other critical functions. The provisions of the *Act* relating to unfair labour practices (Sections 53 and 54) give authority to the Board to ensure that unfair tactics are not employed by either employers or unions in certification or accreditation campaigns. Although it is important to note that the Board may defer to arbitrators in the resolution of such unfair labour practice disputes where there is a relevant collective agreement in force [Section 56(2)]. The sections of the *Act* imposing on the parties (either certified or voluntarily recognized) a duty to make every reasonable effort to conclude and sign a collective agreement (Section 35), and the special rules on first collective agreement negotiation (Sections 40A and 40B), give the Board remedial authority to intervene in the collective bargaining process under certain precise conditions. Similarly, where there is the transfer or sale of a business which is the subject of bargaining rights held by a union, the *Act* gives the Board broad regulatory authority to ensure that "relevant questions or problems" central to the framework for collective bargaining can be resolved by directions or orders from the Board. Furthermore, the Board has a regulatory role to play where employees seek to have a certification revoked because the union is not adequately fulfilling its responsibilities or no longer represents a majority of the employees in a unit (Section 29). It is in this context, of the Board's residual regulatory role in ensuring that basic ground rules of collective bargaining must be respected, that the meaning of Section 28 concerning the Board's jurisdiction to amend certifications is to be interpreted.

[18] The appropriateness of the composition of the bargaining unit is one of the basic ground rules for the system of collective bargaining established under the *Act*. Section 23(1) allows Unions to apply for certification as bargaining agent for "a unit appropriate for collective bargaining" and Section 25(4) states that "the Board shall determine whether the unit applied for is appropriate for collective bargaining." Moreover, that section also says the Board "may, before

> certification, if it deems it appropriate to do so, include additional employees in or exclude employees from the unit." However, the alternative route to certification is voluntary recognition where the parties themselves establish the composition of the bargaining unit, subject to potential scrutiny by the Board under Section 30(3) and (4) as mentioned above. What is not clear from the wording in Section 30(1), that voluntary recognition shall be in the form of "an agreement in writing", is that the voluntary recognition may be found not just in a "pre-bargaining agreement", but rather in the form of "recognition clause" in a complete collective agreement. In fact, in most Canadian jurisdictions, this latter situation is the norm. And indeed, that is the situation in the case before us: the collective agreement between the Applicant Union and the Respondent which expired on October 31, 2012 "was a written agreement" which contained a recognition clause in Article 2, and which constituted the recognition of the union as the exclusive bargaining agent for a unit of employees which differed from the unit as described in the Board's original certification order of August 26, 2004. That collective agreement, the parties agreed, was duly filed with the Minister and therefore constituted a voluntary recognition of a newly described bargaining unit for the purposes of Section 30 of the *Act*. At the time of the filing, not surprisingly, no one challenged this new voluntary recognition of a different bargaining unit under Section 30(3). That agreement was "perfected" by the passage of time, from nullity proceedings under the rules of Section 30.

[28] Then the Board addressed the employer's second concern that the subject certification order is "spent" and, therefore, not subject to amendment. It explained that the original order lives through the subsequent collective agreements:

> [19] But what is the status of this new voluntary recognition clause? By virtue of Section 30(2): "… when a [voluntary recognition] agreement is filed with the Minister, the provisions of this *Act* shall apply <u>as though the Trade Union was the certified bargaining agent for the employees in the unit defined by the agreement at the time the agreement was filed</u>." One of the "provisions of this *Act* which applies" is surely Section 28 concerning amendments. Thus, for the purposes of Section 28, which authorizes the Board to "amend the certification", the "certification" in question and subject to amendment is the recognition clause in the collective agreement, filed with the Minister in the form of Article 2 of that document. In this sense, the wording of the original certification order of August 26, 2004 is "spent", although the collective bargaining relationship which it spawned continues to operate. That relationship has not been abandoned (though the scope of that notion under the *Act* has not been comprehensively explored in this jurisdiction), but on the contrary the collective bargaining relationship has been reinvigorated through a new collective agreement - indeed a number of collective agreements - since the original certification. But, and this is the key point, each subsequent recognition clause filed in a collective agreement with the Minister (as required under Section 46 of the *Act*), constitutes a new

> "certification" for the purposes of the operation of Section 28 on amendment. The Board thus has jurisdiction to exercise its discretion to amend the "deemed" certification orders, in the four specified ways where the particular factual circumstances and sound labour relations principles warrant it.

[29] As to the employer's related third concern, calling for respect for collective bargaining, the Board concluded that it could accede to the union's request and still respect the collective bargaining process by deferring its order until the expiration of the existing collective agreement. As the Board had explained, this was the approach taken in an earlier Board decision [*City of Sydney, L.R.B. 3524 (1989)*], which also recognized a residual discretion to amend certification orders:

> [23] … In addition to these pithy remarks about the Board's residual discretionary role in regulating the framework for collective bargaining under Section 28, the Board under Professor Darby clearly stated that as a matter of procedure it would intervene to place a new position or classification (Secretary to the Chief of Police) in the bargaining unit, but would delay the effective date of this inclusion to the expiration of the current collective agreement in order to allow free collective bargaining with respect to the impact of this change for a subsequent collective agreement. In retrospect, this decision can be seen as the embodiment of a positive role for the Board in the purposive interpretation of Section 28 to ensure respect for the constitutional rights to collective bargaining under charter Section 2(d) in the light of the preamble which describes the objects of the *Act*, and which recognizes that the Board must ensure that the framework principles and rules concerning bargaining unit determination are vindicated when seriously distorted by problematic outcomes caused by collective bargaining.

[30] The Board concluded its jurisdictional analysis by distilling three guiding principles as to when to exercise its residual discretion:

> [24] The upshot of this analysis of the Nova Scotia Board's practice, in the interpretation and application of Section 28 of the *Act* concerning the addition or exclusion of classifications, might be described in the following principles:
>
> 1) the Board must exercise its discretion with respect to adding or excluding classifications under Section 28 of the *Act* in accordance with its generally recognized principles and practices governing bargaining unit determination under the Act and regulations;
>
> 2) in exercising its discretion to add or exclude classifications by way of amendment, the Board must be sensitive to the needs of stability in collective bargaining and give due deference in the circumstances to the previous recognition agreements and to the results of previous rounds of collective bargaining between the parties; and

> 3) in the timing of the effective date for the implementation of the addition or exclusion of classifications by amendment, and in relation to other procedural issues, the Board must be mindful of the collective bargaining exigencies which will necessarily flow to the parties as a result of such changes.
>
> These principles are surely no more than re-statement of the central concerns of the jurisprudence from this Board and from others which have similar amendment provisions in their governing legislation: see for example, the *City of Sydney, supra, Town of Windsor, supra,* and *CUPE Local 1188 v. Town of Sackville* [1999] NBLEBD No. 36 (Kuttner).

[31] Then the Board turned its attention to the merits of the union's application – whether to amend the certification to include the 36 employees in the bargaining unit. It began with the employer's contention that these employees did not represent a distinct classification of workers. The Board dismissed this as semantics:

> [28] When the parties argued this case in May of 2014, they did not have the benefit of this Board's recent decision in *CUPE Local 4184* v. *High-Crest Springhill Home for Special Care,* 2015 NSLB 54 (Douglas Ruck, Chair). There the Union sought to amend a certification order to include "casual employees" in several classifications, and the employer resisted the application through a preliminary motion on the ground, among others, that "casual employees" were not "specific additional classification of employee" but rather mere "category." The Board there concluded it could "… find no rational justification to distinguish between the terms classification and category"… under Section 28, and that making the distinction would be "contrary to the purposive approach" which the Board takes when applying the *Act*. The context for this purposive analysis, of course, is the establishing of a unit appropriate for collective bargaining in an exercise which is analogous to certification where the Board, under Section 25(4) of the *Act* is authorized to include or exclude additional "employees". Whether the Board is dealing with "classifications", or "categories", "groups of employees" or "positions", the over-arching issue is, to use the language of Section 25(14), whether there is "…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". It is to that question of principle which we now turn, having concluded that the semantic issue raised by the Respondent concerning a narrow interpretation of the word "classification" is without merit.

[32] The Board then made the important fundamental finding that these workers enjoyed a community of interest with others in the bargaining unit. Despite their label, they were regular employees and not "casuals" in the conventional sense. As such, they should be included in the bargaining unit.

> [45] Part of the confusion in this case, which has led the parties in some senses to argue at cross-purposes, is that in the definitions section, Article 1 of their collective agreement, *supra*, paragraph 6 defines "casual employee" as a residual category by explaining who is not a casual, while defining a "part-time employee" as someone regularly scheduled for more than 20 hours of work per week. In the result, casuals who are regularly scheduled for significant hours to something below the 20 hour threshold, but who may work up to or more than full-time hours on a frequent basis, are excluded from the bargaining unit. This situation is clearly inconsistent with the Board's long-term practice of defining regular part-time employees as employees who regularly receive scheduled hours in a three month test period, and who have a reasonable expectation of continuing employment with the employer, despite the fact that they do not have full-time status. Ms. Adams was clear in her evidence that the Respondent Employer relies upon its "casual" employees to fill in its needs on a scheduled basis. The documents clearly demonstrate this. Moreover, Ms. Adams was also clear that "casual" employees are not dropped from the list if they cannot work scheduled hours because of illness or personal emergencies. She said casuals have the qualifications, been trained by MCL to do their CRW work, and are literally too valuable to the employer to be discarded for justifiable attendance problems. In other words, the vast majority of so-called "casuals" are indeed regular part-time employees in everything but name. They are scheduled to work and often get additional hours, and by the Respondent Employer's own evidence are shown to have a reasonable expectation of continuing employment. These employees clearly meet the Board's traditional test for inclusion in the bargaining unit as regular part-time employees. These employees have a community of interest, and in substance thus meet the Board's test moreover, these employees meet the parties' own recognition clause definition of "part-time" employees. Their inclusion in the unit will certainly not jeopardize the stability in the collective bargaining relations between the parties.

[33] Then, to respect the collective bargaining process, the Board delayed the amendment to coincide with the expiration of the existing collective agreement:

> [49] This leads to the problem in relation to these facts of the final sentence which deals with "effective dates". It is not clear in the circumstances what it might mean for the Board's amendment order to "take effect immediately" unless it were to simply mean the "date of the Board order". This brings us back to the proposition made at the outset of this decision, that under Section 28 the Board does not have authority to amend collective agreements per se. It only has the authority to amend "certifications" as described above. Like the situation in the *City of Sydney* case, the Board is of the view that the current Collective Agreement should remain in force until its expiration on October 31, 2015. This will give the parties an opportunity to re-negotiate their Collective Agreement to recognize that the certification must include the "casuals" which have been found to be permanent or regular part-time by virtue of their regularity and continuity of

> employment, scheduling and so on. However, it may be that the parties will want to create a category of "true casuals" or otherwise address the prospect of the inclusion of the 36 employees into the bargaining unit who, contrary to the Board's general policy and this decision, are mis-labelled "casuals" when they are clearly "regular part-time" employees who have a right to be in the Bargaining Unit.
>
> [50] The Board hereby orders that the 36 employees on Exhibit 2 put in evidence by consent during the hearing in this matter shall be included in the certified bargaining relationship between the parties. This transfer shall be effective as of October 31, 2015, unless agreed to be done earlier by the parties. The Board shall hereby retain jurisdiction to give the parties clarification or assistance in the implementation of this decision up until October 31, 2015 at which time the new bargaining unit description will formally take effect and set the parameters for their continuing collective bargaining relationship.

[34] In light of the above, I have no problem understanding the Board's reasoning path. It interpreted its governing legislation to include a residual discretion to amend certification orders in appropriate circumstances. It found that the original certification order (as amended through successive collective agreements) was still alive for the purposes of exercising this discretion. It then turned to the merits of the union's request, finding an identifiable classification that shared a community of interest with other bargaining unit members. It then exercised its discretion to see them included. Its decision making process was justified, transparent and intelligible.

Within the Range of Acceptable Outcomes?

[35] In my respectful view, this aspect of the Board's decision also fell within the range of acceptable outcomes. The Board took a purposive approach when interpreting its home statute. That is not just acceptable. It is prudent. Through this approach, it found it had a residual authority to amend the certification order in appropriate circumstances. That is a perfectly acceptable outcome. It then formulated guiding principles. That too is prudent. Applying those principles, it made factual findings supporting the proposed amendment. This included the important unassailable community of interest finding. That is entirely acceptable. The outcome is well within range.

The Arbitration Question

Justification, Transparency and Intelligibility

[36] I have no problem understanding the Board's logic in rejecting arbitration as an alternative to the union's request. Here is their explanation:

> [40]…It was also suggested by the Respondent Employer that the question of whether certain employees under the Collective Agreement were casual CRW's or part-time "permanent" CRW's should go to an arbitrator. But this question would be determined by the arbitration rules in the Collective Agreement. In the standard provision, Article 23.13 of the Collective Agreement between the parties it states, in part,"… The (arbitration) Board shall not have the power to change, alter, modify or amend any of the provisions of this Agreement". What the Applicant Union seeks is a new bargaining unit membership configuration which is at odds with the recognition clause. It would appear that an arbitrator or arbitration Board would not be able to provide the Applicant Union with the remedy which it seeks under a Section 28 certification amendment from this Board.

[37] I understand the Board's logic. An arbitrator would have to act according to the term of a collective agreement. Yet, asking an arbitrator to include employees, who by the collective agreement were expressly excluded, would be tantamount to amending the agreement. That is something, by all accounts, an arbitrator could not do. The decision making process was justified, transparent and intelligible.

Within the Range of Acceptable Outcomes?

[38] The employer argues that this proposition flies in the face of the Board's jurisdiction decision. In essence, it asks these rhetorical questions. If including these employees through arbitration would be tantamount to amending the collective agreement, then surely including them by Board order would be no different. In other words, is the Board not being asked to amend the collective agreement – something it acknowledges it ought not do?

[39] I do not share the employer's concern. Here the Board was asked to amend the certification order. Doing so might have the effect of amending the existing collective agreement. However, the Board was careful to delay the implementation of its order until the collective agreement expired, to prevent that very thing. There is also this additional concern not raised by the Board. Would the subject employees even have standing to bring the matter to arbitration, considering they

are not in the bargaining unit and, therefore, not captured by the collective agreement.

[40] For all these reasons, this result is within the range of acceptable outcomes.

CONCLUSION AND DISPOSITION

[41] In my view, the Board's decision is reasonable in every aspect and should not be disturbed. The reviewing judge's contrary opinion is, respectfully, incorrect.

[42] I would allow the appeal, restore the Board's order, reverse the costs ordered by the reviewing judge, and direct costs on appeal of $2,000.00, inclusive of disbursements.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Bourgeois, J.A.