NOVA SCOTIA COURT OF APPEAL

Citation: *Labourers International Union of North America, Local 615 v. Stavco Construction Limited*, 2019 NSCA 53

Date: 20190619
Docket: CA 476299
Registry: Halifax

Between:

Labourers International Union of North America, Local 615

Appellant

v.

Stavco Construction Limited

Respondent

Judge: The Honourable Justice Joel E. Fichaud

Appeal Heard: March 20, 2019, in Halifax, Nova Scotia

Subject: Labour arbitration – Judicial review

Summary: An arbitrator awarded damages to a union for the employer's failure to employ union workers as required by the collective agreement. The dispute occurred in the construction industry. The arbitration was governed by s. 107 in Part II of the *Trade Union Act*, R.S.N.S. 1989, c. 475.
The reviewing judge set aside the arbitrator's award. The judge faulted the arbitrator's reliance on hearsay, speculation and opinion evidence, and for making findings not supported by cogent evidence. The judge characterized the arbitrator's approach as offending procedural fairness to which the judge applied correctness. The judge also said the arbitrator's damages award was punitive and unreasonable.
The Union appealed.

Issues: On appeal, the issues were whether: (1) the judge erred by not applying reasonableness to the arbitrator's fact finding; (2) the arbitrator's fact finding offended the appropriate standard of review; and (3) the arbitrator's damages award was punitive

and unreasonable.

Result: The Court of Appeal allowed the appeal and restored the arbitration award.

(1) The judge erred by not applying reasonableness. The judicial review challenged the findings of fact in the arbitration award. Those findings were the substance and end product of the arbitration. The reviewing judge was required to apply standard of review analysis and choose between reasonableness and correctness. A labour arbitrator's evidential rulings, assessment of evidence and fact finding are reviewed for reasonableness.

(2) The arbitrator's treatment of the evidence and findings of fact were reasonable.

(3) The arbitrator's damages award applied principles of damages calculation that are established in the authorities. The award was not punitive. The award was reasonable under the standard of review.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 27 pages.

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v.

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Respondent

Judges:	Farrar, Fichaud and Derrick, JJ.A.
Appeal Heard:	March 20, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed and application for judicial review dismissed, with costs, per reasons for judgment of Fichaud J.A., Farrar and Derrick JJ.A. concurring
Counsel:	Gordon N. Forsyth, Q.C., and Bettina Quistgaard, for the Appellant Nancy Barteaux, Q.C., Mary B. Rolf and (factum only) Eric Durnford, Q.C. for the Respondent

Reasons for judgment

[1] An arbitrator awarded damages for the employer's failure to employ union workers as required by the collective agreement's hiring provisions.

[2] The dispute occurred in the construction industry. Construction labour arbitrations are governed by s. 107 in Part II of the *Trade Union Act*. Part II contemplates an expeditious certification, if possible, from paper evidence presented to the Labour Board. Section 107 prescribes an accelerated arbitration, with the award to be issued within 48 hours of the arbitrator's appointment. The provisions for speedy dispute resolution were enacted to address serious concerns that arose from historical events in Nova Scotia's construction industry. The arbitrator's award cited the rationale for these provisions.

[3] The reviewing judge faulted the arbitrator's weighing of what the judge termed as hearsay, speculation and opinion evidence. In the judge's view, there was no cogent evidence to support the arbitrator's findings and the arbitrator had reversed the burden of proof. The judge characterized that concern as a matter of procedural fairness, to be reviewed for correctness, and set aside the award. The judge also held that the arbitrator's quantum of damages was punitive and unreasonable.

[4] The union appeals. The threshold issue is whether the arbitrator's approach to fact finding was reviewable for procedural fairness or reasonableness. If it is

reasonableness – was the arbitrator's fact finding unreasonable? Lastly, was the arbitrator's approach to damages unreasonable?

Background

[5] Local 615 of the Labourers International Union of North America represents labourers in the construction industry on mainland Nova Scotia.

[6] Stavco Construction Limited is a builder in the commercial sector of the construction industry. In 2016 and 2017, Stavco performed concrete form work for the erection of a high-rise apartment building on Abbington Avenue in Bedford. It built stacked concrete slabs for the floors. The work typically is done by labourers and carpenters.

[7] When Stavco began the form work, its labourers were not unionized.

[8] Labour relations in Nova Scotia's construction industry focuses on craft units. Under Part II (*i.e.* ss. 92-107) of the *Trade Union Act*, R.S.N.S. 1989, c. 475, a construction bargaining unit comprises those employees who performed "on site" work in the craft (*e.g.* as labourers) on the date the application for certification was filed. *Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd.*, 2016 NSCA 40, paras. 73-119, leave to appeal refused [2016] S.C.C.A. No. 358, explained the *Act*'s approach to construction bargaining units.

[9] On October 15, 2016, under s. 95(1) of the *Act*, Local 615 filed an application for certification with the Nova Scotia Labour Board for a bargaining unit of "[a]ll employees of Stavco Construction Limited engaged as Labourers on Mainland Nova Scotia", excepting foremen, and managerial, confidential or professional employees whom s. 92(e) excludes from the definition of "employee".

[10] Regulation 12(1)(a) of the *Trade Union Procedures Regulations*, N.S. Reg. 101/72 under the *Trade Union Act*, says that, within five days after receiving an application for certification, the employer shall file with the Labour Board a statutory declaration that lists its employees. Normally the statutory declaration identifies, from the employer's perspective, the employees in the craft for which the union seeks certification. The purpose of the filing is to enable the Labour Board, from a paper review, to identify the employees who worked on site at the date of the application of certification. Then the Board can establish the bargaining unit and, after examining the union's membership evidence, quickly determine

whether the union has the required level of support for certification under s. 95(3) of the *Act*.

[11] Section 95(3) of the *Act* says that, from the filings: if the Labour Board is not satisfied the Union has the support of 35% of the employees in the unit, the Board is to dismiss the application for certification; if there is 35% to 50%, the Board orders a vote; if over 50%, the Board certifies.

[12] Stavco's statutory declaration, dated October 24, 2016, said there were 16 "workers" on site but did not say whether any were labourers.

[13] From Stavco's ambiguous statutory declaration, the Labour Board's paper review could not determine that Stavco had any labourers on site. Consequently, on November 2, 2016, the Board dismissed Local 615's application without a hearing or vote (Decision LB-1240).

[14] Section 96(1) of the *Act* says that, after a dismissal under s. 95(3)(a), upon the Union's request the Labour Board shall conduct a hearing. Local 615 made the request. A hearing under s. 96(1) is a *de novo* proceeding where the Board receives evidence and determines whether the union's membership includes a majority of those employees who, on the day the application for certification was filed, spent most of their time working at the craft for which certification is sought.

[15] Over four days that ended on June 2, 2017, the three-person Labour Board, chaired by Vice-Chair Augustus Richardson, Q.C., heard the matter. Local 615 offered testimony from two employees who were on site on October 15, 2016, and Local 615's business manager. Stavco called three witnesses. On June 2, 2017, the Board issued an oral decision, confirmed on June 20, 2017 by a written decision (2017 NSLB 81). The written decision concluded:

> [34] Based on the above facts and reasoning the Board has concluded that of the 17 employees listed on Schedule "A" a total of 9 should be included in the proposed bargaining unit.
>
> [35] The Board accordingly revokes the previous dismissal order dated November 2, 2016 (LB-1240). It has examined the Union's membership status in respect of the nine employees and is satisfied that more than 50% of the members of the proposed bargaining unit are members of the Union. **The Union's application for certification is granted, effective November 2, 2016, being the effective date of the Board's earlier order dismissing the Union's application.**
>
> [emphasis added]

[16] The retrospective certification follows Labour Board practice. Later (paras. 99-100) I will refer to the rationale for the practice. The Board's ruling has not been challenged on judicial review.

[17] Under Part II of the *Trade Union Act*, ss. 98 and 100, a collective agreement signed by the accredited employers' organization binds the employers who are union-certified for the sector and in the area that is covered by the accreditation.

[18] The Construction Labour Relations Association Limited is accredited under s. 97, in Part II of the *Act*, to represent unionized employers in the commercial sector of Nova Scotia's construction industry.

[19] Local 615 and Construction Labour Relations Association Limited are parties to the "Labourers Collective Agreement Mainland Nova Scotia 2015-2018", dated October 26, 2015, with an effective date of September 9, 2015 and an expiry date of April 30, 2018 ("Collective Agreement"). The project on Abbington Avenue in Bedford is in Mainland Nova Scotia. Consequently, Stavco's work on that project is subject to the Collective Agreement, according to the Labour Board's certification order from November 2, 2016.

[20] The Collective Agreement included the union security and job assignment provisions that are standard in the construction industry:

> ARTICLE 2 – RECOGNITION
>
> …
>
> 2.02A The Employer recognizes the craft jurisdiction of the Union and agrees to assign all work of the Labourers' trade to the Labourers' Union Local 615.
>
> …
>
> ARTICLE 5 – UNION SECURITY
>
> 5.01 When employees are required, the Employer shall request the Union to furnish competent and qualified Union Members, and the Union shall supply, when available, competent and qualified Union Members requested. …

The Collective Agreement also set out a hiring and dispatch formula and wage rates and benefits for the union members who are assigned the labourers' work.

[21] Local 615 took the position that the Labour Board's certification bound Stavco to articles 2.02A and 5.01 of the Collective Agreement as of November 2, 2016, the effective date of certification.

[22] On June 8, 2017, Local 615 filed a grievance against Stavco:

> This is a grievance pursuant to s. 107 of the *Trade Union Act* for Stavco's failure to follow, since November 2, 2016, the union security and pay and benefit provisions of the Collective Agreement for Mainland Nova Scotia between Local 615 and the Nova Scotia Construction Labour Relations Association Limited.
>
> The Union proposes Don Murray, Q.C., as arbitrator, assuming he can hear the matter in the next two weeks.

[23] The grievance was filed under s. 107 of the *Trade Union Act*. Section 107 enacts an expedited process for arbitrations in the construction industry.

> 107 (3) When a dispute or difference arises which the parties are unable to resolve, the parties to the dispute or difference shall agree by midnight of the day on which the dispute or difference arises upon the appointment of a single arbitrator to arbitrate the dispute or difference.
>
> …
>
> (7) The decision of the arbitrator shall be rendered within forty-eight hours of the time of appointment unless an extension is agreed upon by the parties.

The process of speedy arbitration is the Legislature's response to historical events in Nova Scotia's construction industry that I will discuss later (paras. 69-70).

[24] Local 615 and Stavco did not agree on an arbitrator. On July 11, Local 615 requested the Minister of Labour appoint one. By a letter dated July 24, 2017, under s. 107(4), the Minister's delegate appointed Mr. Eric K. Slone. Arbitrator Slone held the hearing on July 25, 2017. Section 107(7) of the *Act* required the arbitrator to issue an award by July 26, 2017, unless the parties agreed to an extension. At the hearing, the parties agreed to extend the time for an award to 4:30 p.m. on July 31, 2017.

[25] The hearing on July 25 was unrecorded. There is no transcript. The record of evidence is confined to the arbitrator's reasons and the exhibits.

[26] Local 615 called three witnesses and tendered a book of documents. Many of the documents came from the Labour Board's certification hearing.

[27] Stavco called no witnesses and offered no exhibits.

[28] Arbitrator Slone's award dated July 31, 2017 found that Stavco had breached the Collective Agreement:

> [79] There is no doubt that the Employer has breached these articles, and continues to do so. It has failed to recognize the Union and has failed to follow the procedure that sets out how employees are hired, which formula ensures that all work goes to Union members, who may in some instances be persons that the Employer specifically requests. …

[29] Stavco had employed non-union employees from November 2, 2016 – the Labour Board's effective date of certification – to July 25, 2017. The arbitrator's quantum of damages was the amount that Stavco would have paid, but did not, to union labourers during that period.

[30] The arbitrator found that Stavco required nine labourers during the period and that Local 615 had nine suitable labourers available. For Stavco's requirement, the arbitrator relied on Stavco's material, such as payroll records, filed with the Labour Board for the certification hearing, re-tendered by Local 615 at the arbitration, and observational testimony of Local 615 witnesses as to Stavco's complement of labourers during the project. Nine was the number of labourers in the unit determined by the Labour Board's certification ruling. For availability, the arbitrator accepted the testimony of Local 615's business manager, Mr. Franco Callegari, that there were between 40 and 100 union labourers available for work during the period.

[31] The arbitrator calculated the damages at union rates for nine labourers during the period and ordered Stavco to pay to the Union, in trust for its members, $447,630.02.

[32] Stavco applied to the Supreme Court of Nova Scotia for judicial review. Justice Heather Robertson heard the application on January 2, 2018 and issued written reasons on April 9, 2018 (2018 NSSC 84), followed by an Order of October 17, 2018. The judge set aside the award.

[33] The judge disagreed with both the arbitrator's findings that (1) Local 615 had nine union labourers available to perform Stavco's work and (2) Stavco required nine labourers. In the judge's view, the arbitrator gave excessive weight to what the judge described as Mr. Callegari's hearsay, speculation and opinion testimony on availability. The judge faulted the arbitrator for not insisting that Local 615 adduce (1) the best evidence of available union workers – *i.e.* a written

"out of work list" that Mr. Callegari had maintained, and (2) "cogent" evidence that Stavco required nine labourers for the entire period covered by the claim. In the judge's view, the arbitrator's approach to fact finding offended procedural fairness which the judge assessed for correctness. She did not perform a standard of review analysis under *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 on that matter.

[34] The judge also determined that the arbitrator's damages award was punitive, and therefore unreasonable.

[35] The judge's disagreements with the award related to quantum of damages, not to the arbitrator's ruling that Stavco breached the collective agreement. Nonetheless, the Order set aside the award in its entirety:

> NOW THEREFORE IT IS ORDERED that the Arbitration Award herein dated July 31, 2017, of Arbitrator Eric Slone be and the same is hereby set aside with costs to be paid by the Respondent Union to the Applicant in the all inclusive amount of Three Thousand Two Hundred Dollars ($3,200.00).

[36] On May 14, 2018, Local 615 filed a Notice of Appeal to the Court of Appeal. This Court heard the appeal on March 20, 2019.

Issues

[37] The Notice of Appeal listed 47 grounds of appeal. The submissions gathered more focus and centered on three issues:

1. Did the judge err in her selection of the judicial standard of review?
2. Did the arbitrator's assessment of evidence and his findings offend the appropriate standard of review?
3. Did the judge err in her application of the standard of review to the arbitrator's damages award?

Appellate Standard of Review

[38] An appeal court determines whether the reviewing judge correctly chose and applied the judicial standard of review. This is an issue of law. If the judge erred, the appeal 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; *Labourers v. CanMar*, *supra*, para. 30 and authorities there cited.

[39] 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 the 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 LeBel J.]

First Issue – What is the Judicial Standard of Review?

[40] The reviewing judge characterized the arbitrator's fact finding as a matter of procedural fairness that she reviewed for correctness.

[41] The judge's reasons summarized Stavco's submission:

> [24] With respect to the evidence relied upon by the arbitrator, Stavco says he relied on hearsay, opinion and speculation evidence adduced by the Union instead of the best evidence available, undermining Stavco's procedural right to meaningful participation.

After reciting Stavco's particular arguments, the judge said:

> [34] In this case, there is no evidence for the basis of the arbitrator's conclusions and the arbitrator does appear to have shifted the onus of proof on to Stavco, thus allowing the court to intervene on a standard of correctness.
>
> …
>
> [55] I am in agreement with Stavco that they were denied procedural fairness based on the arbitrator's improper evidentiary rulings. He relied on hearsay evidence and did not hold the Union to account, to provide cogent evidence of the availability of competent and qualified union members. Stavco had no opportunity to meaningfully test this evidence. Nor can the arbitrator merely accept that Stavco's labour needs remained constant during the period and not require cogent evidence of this fact.

[42] In my respectful view, the judge erred by applying correctness.

[43] In *Labourers v. CanMar*, *supra*, this Court, citing authority, explained how the reviewing court should approach the choice between procedural fairness and standard of review analysis:

> [45] The judge described the issue as procedural fairness, with no standard of review. …

[46] In *T.G.* [*Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43, leave to appeal refused [2012] S.C.C.A. No. 237], 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.
>
> [emphasis in *T.G.*]

[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 the 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* [*Coates v. Nova Scotia (Labour Board)*, 2013 NSCA 52], paras. 43-45).

[emphasis in *Labourers v. CanMar*]

[48] The authorities cited by *T.G.*, para. 90, make this 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***.
>
> …
>
> [emphasis in *Labourers v. CanMar*]

[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. …
>
> [emphasis in *Labourers v. CanMar*]

> [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, 2014 scheduled the filings of written submissions on the issue. Nobody has suggested 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 the 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.***
>
> [emphasis added]
>
> [53] Given that the topic involved the Board's core function of managing a certification application, the standard is reasonableness.

[44] Nothing has changed. Those principles govern this appeal.

[45] The award set out the arbitrator's findings and cited evidence for those findings. The judge determined that the arbitrator's factual findings were supported by "no evidence". By this, it is apparent the judge meant no evidence after she had eliminated what she described as hearsay, speculation and opinion. From the premise that there was no evidence, the judge deduced that the arbitrator had shifted the burden of proof, which she characterized as an issue of procedural fairness. That characterization obviated any standard of review analysis and dusted reasonableness off the table. The judge applied correctness.

[46] That is not how it should be done. Stavco's application for judicial review challenged the arbitrator's explicit findings of fact on the merits of the grievance. Those findings, contained in the written award, were the substance and end product of the arbitration. The judge was required to apply *Dunsmuir* standard of review analysis and choose between reasonableness and correctness. There was no path to correctness with a detour that skirted *Dunsmuir*.

[47] Evidential rulings, the assessment of weight and findings of fact are core functions assigned to a labour arbitrator by ss. 43B(2)(a) through (d) and (g) of the *Trade Union Act*, the arbitrator's home statute. Those provisions entitle the arbitrator to (1) receive such evidence "as the arbitrator … deems fit, whether the evidence or information is admissible in a court of law or not", (2) "determine the arbitrator's … procedure … as the arbitrator … considers appropriate", (3)

"determine all questions of fact or law that arise out of a dispute", (4) "have regard to the real substance of a matter in dispute between the parties", and (5) "make such orders … as the arbitrator … considers appropriate to expedite proceedings".

[48] A labour arbitrator's evidential rulings and findings of fact are reviewed for reasonableness, not correctness. This is well-supported by the authorities, including: *Dr. Q*, *supra*, para. 34; *Dunsmuir*, *supra*, paras. 53 and 68; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616, paras. 36, 38-51; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, [2016] 1 S.C.R. 29, paras. 30-33; *Egg Films Inc. v. Nova Scotia (Labour Board)*, 2014 NSCA 33, para. 97, leave to appeal refused [2014] S.C.C.A. No. 242.

[49] The judge erred by not applying the reasonableness standard to the arbitrator's findings of fact. I would allow this ground of appeal.

Second Issue – Were the Arbitrator's Findings Reasonable?

[50] **The test:** What is reasonableness?

[51] The reviewing court, paying "respectful attention" to the arbitrator's reasoning, asks whether the arbitrator's analysis is understandable and leads to a conclusion that is permitted by the provisions, principles and policies of the *Trade Union Act*: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2001] 3 S.C.R. 708, paras. 11, per Abella J. for the Court.

[52] If the answer is Yes, the court upholds the award and does not ask whether the court would prefer another outcome. *Newfoundland and Labrador Nurses' Union*, paras. 11-17; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 S.C.R. 458, para. 54, per Abella J. for the majority; *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, paras. 32-33, per Moldaver J. for the majority; *Nor-Man*, *supra*, paras. 35-51.

[53] On the other hand, for an issue of law, "[w]here the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance": *McLean*, para. 38.

[54] In *Casino Nova Scotia/Casino Nouvelle Écosse v. Nova Scotia (Labour Relations Board)*, 2009 NSCA 4, this Court explained when a tribunal's finding of fact may be set aside as unreasonable:

> [44] A factual challenge on judicial review, under the reasonableness standard, **must establish that there was no evidence** capable of reasonably supporting the finding: *Lester (W.W.) 1978 Ltd. v. UAJAPPI, Local 740*, [1990] 3 S.C.R. 644, at p. 649; *Toronto Board of Education v. OSSTF, District 15*, [1997] 1 S.C.R. 487, at para. 44-51, 60, 78; *Dr. Q*, paras. 33-35, 38-41. **An applicant for judicial review may be hampered in satisfying his onus for a factual challenge when there is no transcript** of the oral testimony to the Board (see *Granite Environmental* [*International Union of Operating Engineers, Local 721 v. Granite Environmental Inc.*, 2005 NSCA 141], paras. 85-86). The Board cited evidence that the security officers' activities involved no meaningful managerial or confidential functions. I refer to my earlier comments on the evidence and the Board's findings (above, paras. 9-16, 33-38). From the summaries of the evidence in the Board's decision, the exhibits and examination on the record, in my view, the Board's findings occupy the range of inferences that may reasonably be drawn from the evidence. The Casino would recalibrate the evidentiary scale. But **it is not the reviewing court's role to reweigh evidence**.
>
> [emphasis added]

[55] Recently, in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2018] 2 S.C.R. 230, Gascon J. for the majority summarized:

> [55] … When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). **Reviewing courts must also refrain from reweighing and reassessing the evidence** considered by the decision maker (*Khosa* [*Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339], at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.
>
> [emphasis added]

[56] **The arbitrator's award:** The reviewing court is to pay "respectful attention" to the arbitrator's reasons.

[57] The award summarized the evidence on the two critical issues: Stavco's requirement for labourers and the availability of union labourers:

> [33] The Union called three witnesses. The Employer called none.

[34] The first witness called by the Union was Jamie Grant ("Grant"), a labourer who joined the Union in October 2016 during its drive to certify this Employer. …

[35] He described the bulk of the work he did as labour work, putting in place the forms (for concrete), setting up staging to allow the work to move up floor by floor, laying out the 4x4 sheets of plywood (for the carpenters to affix), lasering them. All of this work was directed to creating the concrete slabs which are the base of each floor. Once the floor slabs are all in place, it would be carpenters and other trades who would put in the elements that make up the outer structure.

…

[40] Grant described his usual hours of work as 7:30 a.m. to 5:00 p.m., Monday through Thursday, 7:30 a.m. to 4:00 p.m., Friday, and 7:30 a.m. to noon on Saturdays. This translated to 9 hours paid Monday through Thursday, 8 hours on Friday and 4.5 hours on Saturday, for a total of 48.5 hours. He was paid at the rate of $17.00 per hour, straight time, with no overtime. …

[41] Grant produced his Record of Employment which verified his hours and pay from June 2016 (when he received his initial pay) to the ending pay period of May 20, 2017. …

[42] Grant testified that there were "quite a few" labourers on site during this period, though he could not be specific. He was shown a list of names taken from financial records which the Union obtained from the Employer in the Board matter, and was able to identify most of the ones that the Union contends were labourers.

[43] Grant was cross-examined vigorously on the question of what ability he had to describe the work of others. Mr. Durnford pressed him on the point that he was mostly paying attention to what tasks he had been asked to perform. He stood his ground and stated that he had a pretty good idea of what those all around him were doing. I have no difficulty accepting his evidence that there were at all times between maybe six and ten other labourers doing similar work.

…

[51] The Union's second witness was Troy Colburn, an experienced union organizer who was involved in the certification effort here. He was present throughout the Labour Board proceeding and verified certain documents produced by the Employer in that proceeding, specifically payroll records for the period of August 1, 2016 to March 25, 2017.

…

[56] For the period of November 2, 2016 to March 25, 2017, based upon the Employer's documents produced to the Board, Mr. Colburn identified those people on the payroll who were known or believed to be labourers, and totalled up their hours. For the period March 26, 2017 to July 25, 2017, he extrapolated from

> the prior period, making the assumption that an average of 9 labourers would have worked those dates. …
>
> …
>
> [60] Mr. Colburn also based his assumption on the fact that, prior to the date of the application for certification, he was on site many times and observed the work being done. Since then, he has only observed the work from a distance a few times, and is satisfied that there are still a similar number of labourers on site doing essentially the same work as they had been doing all along.
>
> [61] The third witness for the Union was Franco Callegari, the business manager of Local 615. He has been in this position for almost two decades.
>
> [62] He explained how it would have worked if the Employer had been operating under the collective agreement all along. Under the Union Security provisions (Art. 5) the Employer would have had to request the Union to supply qualified workers who were union members. …
>
> …
>
> [66] Mr. Calligari [*sic* Callegari] testified that he maintains an "out-of-work" list of labourers who continue paying their union dues and who are ostensibly available for work, if offered. He could not say exactly how many people were on this list at the relevant times, but he estimated that there would have been as many as 100 and as few as 40 at any given time. As such he was confident that he would have had no trouble supplying the Employer with as many labourers as they could have used at any given time. He allowed for the possibility that some of these individuals may have been working elsewhere, but he would have been informed if they were working as labourers elsewhere under the collective agreement, and the fact that they kept up their union dues suggested to him that they were working at lower paid, likely non-union jobs, and would have made themselves available for a job at union rates. He also testified that, from time to time, if he cannot supply a worker from his own list he can call upon qualified labourers from other locals in the province.
>
> [67] Mr. Call[e]gari was also cross-examined vigorously on his testimony, but stood firmly by his evidence that he could have fulfilled the Employer's need for labourers from his list, had such requests come in. In this case, he was never contacted by the Employer during the months either before or after the Labour Board order, to cooperate in any way in the supply of qualified workers.

[58] To the arbitrator, Stavco submitted that both the list and Mr. Callegari's testimony were hearsay and that Local 615 should have called as witnesses the employees who would have worked as labourers.

[59] The arbitrator rejected Stavco's hearsay submission by finding that Mr. Callegari's testimony was reliable and, in the circumstances, realistically necessary:

> [68] The Employer called no evidence. I was not asked by the Union to draw any adverse inference from this tactical decision. I will observe, however, that the record before me contains nothing to directly challenge the Union's evidence. Instead, Mr. Durnford based his arguments on what he submitted was the frailty of the Union's evidence (some of it being hearsay) and especially what he regarded as the questionable and speculative nature of many of the Union's assumptions.
>
> …
>
> [72] Mr. Durnford argued that much of the Union's evidence was hearsay. As he well knows, hearsay is not inadmissible in hearings before arbitrators, whose discretion to admit is rooted in the *Trade Union Act*:
>
> > 43B (2) An arbitrator or an arbitration board may
> >
> > (a) receive and accept such oral or written evidence and information on oath, by affidavit, or otherwise as the arbitrator [or] arbitration board deems fit, whether the evidence or information is admissible in a court of law or not … .
>
> [73] In practical terms, this means that hearsay evidence will be received and afforded such weight as the arbitrator sees fit having regard to all of the facts that impact on its inherent reliability.
>
> [74] Mr. Durnford relied on several B.C. cases which stand for the proposition that hearsay should not be relied upon to establish a "crucial and central fact": see *Health Employers Association of British Columbia v. Hospital Employees' Union*, a 2003 arbitration decision of Arbitrator Hope at p. 17-8. I agree to an extent with this point. Arbitrators must be skeptical of evidence that is secondary in the sense that it is not the best evidence that might have been available. But there also must be some recognition of the fact that sometimes the best evidence available may be characterized as hearsay, to a greater or lesser extent, but is still inherently reliable. The exigencies of an expedited arbitration process may also limit the type of evidence that is available.
>
> [75] Mr. Durnford characterized much of the Union's critical evidence as hearsay. In particular he characterized as hearsay Mr. Call[e]gari's evidence to the effect that he could, at all times, have supplied Union workers. The out of work list, which was not itself introduced into evidence, Mr. Durnford argues, is unreliable hearsay and does not reliably prove that there were people available. Mr. Call[e]gari's evidence is the best evidence available. It would be unrealistic to expect the Union to call as witnesses the actual labourers who might have been available to do the work. It is Mr. Call[e]gari's job to know who of his members

> is available to take on work at any given time, and I found him to be credible on this point. I have no trouble accepting the proposition that there were at all times labourers available, had the Employer called for labourers. I also note that, even if the Union could not supply all of the needs, the Employer would have had the right to name some of its existing employees but still would have had to pay them union rates. I have no difficulty accepting the Union's position that there were at all times Union members that could have done the work in question, but who were not given the opportunity because the Employer chose to proceed in its non-union ways.

[60] On Stavco's requirement for labourers, the award found:

> [76] On the evidence before me, I am also fully satisfied that there was at all times throughout the period until March 25, 2017, a crew of anywhere between six and twelve labourers working on this project. This is consistent with the findings of the Labour Board, and fully grounded in the documentary evidence before me.
>
> [77] The period of March 26, 2017 to July 25, 2017 was calculated on an average of 9 workers, with a balance of journeymen and apprentices. The evidence supporting this assumption is not as solid as for the prior period, which is based on the Employer's own records, but we do have the evidence of Grant (including his Record of Employment) to establish that work was ongoing at the same pace (at least for him) until he left the Employer just prior to the Labour Board hearing. Mr. Durnford dismisses this projection as mere speculation, but had the Employer wished to demonstrate that such assumption was wrong, it could have come to the hearing prepared with witnesses or documents that showed otherwise.

[61] From this evidence, the arbitrator found that, for the entire period – November 2, 2016 to July 25, 2017 – Local 615 could have supplied at least nine labourers and Stavco required nine labourers. Those findings were the premise of the arbitrator's calculation of damages.

[62] Were those findings reasonable?

[63] **Availability of union labourers:** The judge disagreed with the arbitrator's use of Mr. Callegari's testimony that there were always at least nine available labourers. The judge's reasons say:

> [38] Stavco says they take no issue with the admissibility of hearsay evidence, only with the undue weight the arbitrator placed on hearsay evidence. Stavco says Mr. Callegari's evidence was not necessary because the Union could have simply produced the "out of work" list. …

…

> [45] In the instant case, the "out of work" list ought to have been produced. The arbitrator relied on Mr. Callegari's opinion that there would have been out of work labourers available, yet Mr. Callegari was merely opining in this regard and was not testifying as an expert: *CJA, Local 27 v. Wasaga Trim Supply (2006) Inc.* (2010), 101 CLAS 420, 2010 CarswellOnt 16294. His lay opinion ought to have been accorded little weight.

[64] Stavco did not suggest to the arbitrator that the list "ought to have been produced". To the contrary, at the arbitration, Stavco submitted that both Mr. Callegari's testimony and his list were hearsay, and the only appropriate evidence was testimony of the individual labourers who would have worked on the project (see Award, para. 75). The arbitrator addressed the submission that was made to him. On the judicial review, Stavco recast its submission by contending that the list ought to have been produced. I decline to fault the arbitrator for failing to anticipate Stavco's refurbished proposition to the reviewing judge: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, paras. 22-26, per Rothstein J. for the majority. I will confine myself to considering whether the arbitrator unreasonably dealt with Stavco's submission that Local 615 should have called the employees as witnesses.

[65] Section 43B(2)(a) of the *Trade Union Act* authorizes the arbitrator to "accept such oral or written evidence … as the arbitrator … deems fit, whether the evidence or information is admissible in a court of law or not". As Stavco acknowledged to both the arbitrator and the reviewing judge, Mr. Callegari's testimony was admissible. The issue was weight. The arbitrator addressed weight by assessing reliability and necessity. In this respect, the arbitrator adapted, to the labour relations climate, the principled exception to the hearsay rule.

[66] The arbitrator (paras. 74-75) found that Mr. Callegari's evidence was credible and reliable, and explained his reasons for those findings.

[67] Then there is necessity or, as the arbitrator termed it, realism. Stavco's submission was that the only proper evidence would be the testimony of the individual employees on the list.

[68] This hearing occurred the day after Arbitrator Slone's appointment. That is standard fare for construction arbitrations, given s. 107(7)'s requirement that the award issue within 48 hours of the arbitrator's appointment. It was not feasible to expect Local 615 to introduce a multitude of employees as witnesses. The

arbitrator (paras. 74-75) cited "the exigencies of an expedited arbitration process" and said such a course would be "unrealistic".

[69] The accelerated timeline does not govern Part I arbitrations outside the construction industry. The speedy arbitration under Part II stems from historical events in Nova Scotia's construction labour relations. In *Municipal Contracting Ltd. v. International Union of Operating Engineers, Local 721* (1989), 91 N.S.R. (2d) 16 (C.A.), Clarke C.J.N.S. explained:

> [5] During the mid-1960's 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 upon 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. 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.

[70] Section 107 enacts a policy that, in the reasonable exercise of the arbitrator's discretion, the arbitrator may prioritize the speedy and final resolution of a construction dispute over fidelity to a time-consuming gold standard of judicial process. The policy extends the directives in ss. 43B(2)(d) and (g) of the *Trade Union Act*, applying to arbitrations generally, that the arbitrator may "have regard to the real substance of a matter in dispute between the parties" and make orders to "expedite proceedings".

[71] A labour arbitrator is entitled to adapt legal principles to the context of labour relations. In *Nor-Man*, *supra*, Justice Fish for the Court said:

> [5] Labour arbitrators are not legally bound to apply equitable and common law principles – including estoppel – in the manner of courts of law. Theirs is a different mission, informed by the particular context of labour relations.
>
> [6] To assist them in the pursuit of that mission, arbitrators are given a broad mandate in adapting the legal principles they find relevant in the grievances of which they are seized. They must, of course, exercise that mandate reasonably, in a manner that is consistent with the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievance.

[72] When considering the criteria for the use of hearsay evidence, a labour arbitrator reasonably may consider the constraints of the expedited process in s. 107.

[73] Stavco submitted that Local 615's only course was to call as witnesses a procession of employees, instead of offering Mr. Callegari's evidence (either his list or his testimony). The arbitrator found, reasonably in my view, that Stavco's submission was "unrealistic".

[74] I return to the standard of review.

[75] A party making a factual challenge under the reasonableness standard "must establish that there was no evidence capable of reasonably supporting the finding" (*Casino Nova Scotia*, *supra*, para. 44). Mr. Callegari's testimony was evidence that reasonably could support the finding.

[76] As Gascon J., for the majority, said in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, *supra*, para. 55, "[r]eviewing courts must also refrain from reweighing and reassessing the evidence considered by the

decision maker". That is what the reviewing judge did, without a transcript to assist the endeavour.

[77] The arbitrator's finding that Local 615 could supply nine labourers during the period was supported by evidence and was reasonable.

[78] **Stavco's requirement for labourers:** For the period up to March 25, 2017, the arbitrator had Stavco's payroll documents that Local 615 had obtained from the Labour Board hearing. This was "evidence" for the arbitrator's finding (Award, para. 76). It is not for the reviewing court to assess the weight of that evidence.

[79] The dispute involves the period after March 25, 2017.

[80] Local 615 had the arbitrator issue a subpoena to Stavco for its records after March 25. The subpoena could only be issued after Arbitrator Slone's appointment. He was appointed on the day before the hearing. Local 615 could not effect service on Stavco in time for the hearing. Stavco did not authorize its counsel to accept service of the subpoena. At the arbitration hearing, Stavco chose not to introduce any evidence. The arbitrator commented:

> [53] Mr. Colburn also helped to prepare spreadsheets that attempted to quantify the claim for the period up to March 25, 2017 (when Employer documents were available) and the period from March 26, 2017 to the date of the arbitration hearing, for which no Employer documents were available.
>
> [54] It was noted that the Union had attempted to subpoena documents covering that period, but were unsuccessful in serving the Employer with the subpoenas. This is not surprising given the subpoenas could only be signed once I was appointed as arbitrator, which was less than 24 hours before the hearing. I make no inferences to the effect that the Employer was in any way evading service or trying to obstruct the Union. Section 107 cases simply present unique challenges such as this.
>
> [55] On the other hand, the Employer knew that this grievance had been filed on June 8, 2017, and could have anticipated what issues would be dealt with at arbitration. It could have come to the hearing prepared to demonstrate the precise number of labourers that it employed at all relevant times. It chose to produce no documents or witnesses.

[81] Local 615 dealt with Stavco's post-March 25 requirements with Mr. Colburn's projection that Stavco continued to require nine labourers. The projection extrapolated Stavco's work force requirement that was evidenced by its records up to March 25. It was corroborated by Mr. Grant's testimony that work

continued at the same pace (Award, para. 77). The Labour Board had determined that the unit comprised nine labourers.

[82] The arbitrator acknowledged that the post-March 25 evidence was "not as solid" as the evidence for which Stavco's records were available, but found it sufficed to infer that Stavco's requirement remained as before March 25.

[83] The reviewing judge rejected the arbitrator's inference, and suggested that the arbitrator had reversed the burden of proof:

> [50] The Union had an obligation to prove its damages and adduce some objective evidence to support its claim for damages, instead of merely guessing at Stavco's labour needs from March 26 to July 25. This guess was speculation and could not result in a properly drawn inference. I agree that the arbitrator faulted Stavco for its failure to adduce further and better evidence regarding the labour needs during the period from March 26 to July 25, in paras. 55, 71, 77 and 90 of his decision. Stavco was under no legal or evidentiary burden to do so.
>
> …
>
> [55] … Nor can the arbitrator merely accept that Stavco's labour needs remained constant during the period and not require cogent evidence of this fact."

[84] With respect, the arbitrator did not fault then punish Stavco by shifting the burden of proof. Rather, the arbitrator noted that Stavco had adduced no evidential obstacle to an inference that was available from Local 615's evidence:

> [71] The nature of civil cases and the attendant burden of proof on a balance of probabilities means that an applicant need only show that it is more probable than not that its version is correct. When met with <u>no evidence</u> (such as is the case here) its task is all the easier. [arbitrator's emphasis]

[85] "[R]eweighing and reassessing the evidence considered by the decision maker" was not open to the reviewing judge: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, *supra*, para. 55. The reviewing judge could not overturn the arbitrator's finding based on the judge's view that the evidence "could not result in a properly drawn inference".

[86] **Summary:** The arbitrator's findings as to both the availability of union labourers and Stavco's requirements were reasonable. I would allow this ground of appeal.

Third Issue – Was the Damages Award Unreasonable?

[87] The arbitrator assessed damages as the amount that Local 615 members would have earned had Stavco complied with the collective agreement.

[88] The reviewing judge said she was applying the reasonableness standard to the damages award. She held that the quantum was unreasonable. Her explanation was:

> [56] Similarly, in the assessment of damages the arbitrator recognized that the employer had to pay twice for the same work, which **he justified as being "punitive" and a "penalty".** As there was no evidence that Stavco had not "been entirely honest and accurate in responding to the Certification Application", the calculation of damages, at most, should have reflected the difference between the non-union and union rates for the individuals employed by Stavco and should not have made an order that effectively led to a double recovery. This was unreasonable.
>
> [emphasis added]

[89] With respect, the judge failed to apply the proper approach to reasonableness review. Further, she mistook the arbitrator's reasons. The arbitrator's reasons, properly understood, reasonably applied the law and policy behind the *Trade Union Act*.

[90] Reasonableness requires the reviewing court to consider whether the arbitrator's approach is a permissible application of the governing legal principles. If it is, the reviewing court must defer, despite that the judge may prefer a different outcome.

[91] As to the remedy, the arbitrator's award said:

> [80] The law concerning the remedy for a breach of a union security provision has been settled for some time now, across Canada. The governing line of authority begins with *Re Blouin Drywall* (1975), 57 D.L.R. (3d) 199, a decision of the Ontario Court of Appeal, which upheld the jurisdiction of an arbitrator to award damages for breach of the union security clause of the applicable collective agreement calculated on the basis of wages lost by union members denied the opportunity to perform the subject work. That case was explicitly accepted in Nova Scotia in *Re Landing Construction et al*. (1986), 72 N.S.R. (2d) 26. In *Landing*, the Nova Scotia Court of Appeal accepted the view of the arbitrator, Nick Scaravelli, a then well-respected arbitrator and later a justice of the Nova Scotia Supreme Court, that the employer in that case, when the certification order became effective, was obligated to dismiss its non-union employees. Having failed to do so, the employer became liable in damages, the measure of which consisted of the losses which union employees suffered as a result of not being

> hired by the employer. The net effect was that the employer paid twice for the same work, once when it paid its own employees and a second time when it had to pay the union (at collective agreement rates) for the hours that union members would have worked, had the company followed the collective agreement.

[92] The arbitrator implemented an approach to quantification that was sanctioned by the Ontario Court of Appeal in *Blouin Drywall*, a ruling that has become the leading Canadian authority on the subject and was adopted by the Supreme Court of Nova Scotia Appeal Division in *Landing Construction*. The approach is established in labour arbitral jurisprudence.

[93] The arbitrator held that Stavco breached the collective agreement. Contractual damages are quantified on the expectation premise that the non-breaching party should be placed in the position it would have been in had the breaching party followed the contract. The arbitrator (para. 87) applied that premise, citing judicial authority. The expectation principle is compensatory to the non-breaching party. That the breaching party may end up paying more than it would have, had it complied with the contract, neither jettisons the expectation premise nor renders it punitive.

[94] Had the judge applied the proper approach to reasonableness, she would have held that the arbitrator's reliance on these authorities and the expectation principle was permissible.

[95] The judge said the arbitrator "justified" the quantum "as being 'punitive' and 'a penalty' ". With respect, this misstates the arbitrator's reasoning.

[96] Stavco submitted to the arbitrator that the quantum was a retrospective penalty. The arbitrator responded to that submission as follows:

> [82] As I noted in *Dalhousie* [*Re Dalhousie University and International Brotherhood of Electrical Workers, Local 625* (Grievance re allegedly improper use of non-union subcontractor), [2000] N.S.L.A.A. No. 40] and as noted by many others, it is strange that an employer might have to pay twice for the same work. It has already paid its existing employees, and as a result of this grievance may have to pay the Union for all of the hours since November 2, 2016 that the Union members could have worked. It seems on its face to be punitive. But the flip side of the argument is that unless the employer is assessed this "penalty", the orders of the Labour Board have no teeth and employers can proceed with impunity to defy a certification order, including running out the clock until it no longer has a need for employees working in the applicable trade.

> [83] The Board's backdating of its order sends a clear message to the Employer. Had it been entirely honest and accurate in responding to the certification application, identifying precisely who were working as labourers on the date in question, and who were not, the issue of whether or not the Union had majority support would have been settled on the spot. Assuming that the Union had requisite support, the Employer would have had to adjust to the fact that it was in a collective bargaining relationship. If not, life would have gone on as before. The Employer should not be allowed to benefit from its own choice to contest the application (in the way it did) and hope to run out the clock and take advantage of some additional weeks or months of paying non-union rates.

[97] Stavco's filing with the Labour Board on October 24, 2016 said Stavco had 16 "workers" on October 15 without specifying whether any were labourers. That question-begging reply meant the certification application proceeded to a hearing. Eight months later, at the Labour Board hearing, Stavco had no difficulty identifying its labourers who worked on October 15, 2016. The Board's Decision says:

> [13] … The Employer's position was that all 16, or at very least, 14, of the employees were working as labourers.

[98] Had Stavco identified a number of labourers in its October 24 filing, the Labour Board could have determined the application for certification at that time, either by a certification, a vote or a dismissal. Construction projects have a limited time span before mootness gains a footing. The arbitrator said "[t]he Employer should not be allowed to benefit from its own choice to contest the application (in the way it did) and hope to run out the clock …".

[99] The arbitrator did not "justify" the damages "as a penalty". The arbitrator justified the damages because otherwise "the orders of the Labour Board have no teeth and employers can proceed with impunity to defy a certification order, including running out the clock until it no longer has need for employees working in the applicable trade". The arbitrator's justification cited labour relations policy that underpins provisions of the *Trade Union Act*.

[100] That justification develops the principles that the Labour Board has adopted and this Court has endorsed:

- The arbitrator's award referred to the Labour Board's practice of retroactive certifications in these circumstances:

> [28] I do not believe that my purposes as arbitrator are different from the purposes of the Labour Board. Unions do not proceed with a certification application for any purpose other than to impose collective agreement obligations on an employer. A Board order in itself is worthless. What has value is the collective bargaining relationship that is created or recognized by the order. And the effective date is important, in that it may determine whether the order has real monetary value or not.
>
> [29] So when the Board says that its order is effective November 2, 2016, it is saying in the clearest terms that the Union and the Employer are deemed to have been in a collective bargaining relationship as of November 2, 2016. Were I to act as if those obligations were in some form of suspense until such later date as I might think fair, I would be flying in the face of the Board order, and rendering its provisions toothless to a greater or lesser extent.

- In *Labourers v. CanMar*, *supra*, paras. 106-118, this Court concluded that the Labour Board's practice of retroactive certifications, in such circumstances, reasonably applied labour relations policy:

> [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 the *Trade Union Act*.

[101] A labour arbitrator may craft a remedy to serve the objectives of the labour relations statute. In *Nor-Man*, *supra*, Justice Fish for the Court explained:

> [45] … labour arbitrators are authorized by their broad statutory and contractual mandates – and well equipped by their expertise – to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.
>
> [46] This flows from the broad grant of authority vested in labour arbitrators by collective agreements and by statutes such as the [*Labour Relations Act* of Ontario], which governs here. …

> [47] The broad mandate of arbitrators flows as well from their distinctive role in fostering peace in industrial relations (*Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 ("*O.S.S.I.F., District 15*") at para. 36; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 17).
>
> …
>
> [49] Labour arbitrators are uniquely placed to respond to the exigencies of the employer-employee relationship. But they require the flexibility to craft appropriate remedial doctrines when the need arises: Rigidity in the dispute resolution process risks not only the disintegration of the relationship, but also industrial discord.
>
> [50] These are the governing principles of labour arbitration in Canada. …
>
> …
>
> [51] Reviewing courts must remain alive to these distinctive features of the collective bargaining relationship, and reserve to arbitrators the right to craft specific remedial doctrines. …

[102] In this case, the arbitrator's remedy put "teeth" in the certification process for the construction industry that is enacted by s. 95 of the *Trade Union Act*. The consideration of that policy reasonably exercised the arbitral function as described in *Nor-Man*.

[103] I would allow Local 615's ground of appeal on damages and would restore the quantum assessed by the arbitrator.

Conclusion

[104] I would allow the appeal, overturn the Order dated October 17, 2018 of the Supreme Court of Nova Scotia and restore the arbitrator's award of July 31, 2017.

[105] I would order Stavco to repay any costs (quantified by the judge's Order at $3,200 all inclusive) that Stavco has received from Local 615 for the Supreme Court hearing.

[106] I would order Stavco to pay Local 615 costs of $3,200 all inclusive for the application in the Supreme Court plus costs of $5,000 all inclusive for the appeal.

Fichaud J.A.

Concurred:

Farrar J.A.

Derrick J.A.