IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Cape Breton (Regional Municipality) v. Canadian Union of Public Employees, Local 933, 2005 NSSC 99

Date: 20050503
Docket: S.N. No. 220888
Registry: Sydney

Between:

Cape Breton Regional Municipality

Applicant

v.

Canadian Union of Public Employees, Local 933

Respondent

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	November 4, 2004, in Sydney, Nova Scotia
Counsel:	Eric Durnford, Q.C. and Rebecca L. Pitts for the Applicant Lionel G. Clarke, Esq., for the Respondent

By the Court:

[1] The applicant seeks an Order to quash an award of Arbitrator Milton Veniot, Q.C. dated March 25, 2004.

[2] The applicant, the Cape Breton Regional Municipality (CBRM), signed a collective agreement (the collective agreement) with the respondent, the

Canadian Union of Public Employees, Local 933 (CUPE) on February 13, 2002. The collective agreement covered unionized employees for the period November 1, 2000 to October 31, 2003.

[3] Following of the signing of the current collective agreement, the respondent notified the applicant of its intention to seek an increase in wages, claiming that there had been a substantial increase in duties and responsibilities of members of the Communication Center classification unit. The Communication Center is one classification unit represented by the respondent. Its members have been members of the union as long as they have been employees of the applicant. The applicant denied the demands of the union, leading to a grievance. Milton Veniot, Q.C., was selected as a consensual arbitrator pursuant to the collective agreement and the *Trade Union Act*. He was required to determine whether Article 35.01 of the Collective Agreement could be interpreted in such a manner as to include increases in the duties and responsibilities of particular members of a classification unit from the date the unit was established.

BACKGROUND

[4] The Cape Breton Regional Municipality is an amalgamation of the city of Sydney, the towns of Glace Bay, New Waterford, North Sydney, Sydney Mines and Louisbourg, and the Municipality of the County of Cape Breton. It was established by an act of the legislature on August 1, 1995. The amalgamated municipality included three boards and commissions.

[5] The arbitrator determined that at amalgamation there was no single central dispatch centre for agencies such as fire, police and ambulance. Each municipal unit had its own local call centres. The towns and city had their own police forces and the municipality had a contractual arrangement with the Royal Canadian Mounted Police.

[6] Shortly after amalgamation management decided to set up a central communication centre to include up to 36 fire departments, with the exception of the area policed by the Royal Canadian Mounted Police. Efforts

were made to centralize the existing services. For example, the 911 system came into effect after amalgamation.

[7] As the police were the major users of the Communications Center, a number of their communication personnel were seconded to serve as supervisors for the new Communication Center. Their duty was to instruct new employees in receiving and dispatching calls. The new members of the Communication Center (CO(s)) were and are members of the Canadian Union of Public Employees (CUPE). This union was certified as the bargaining unit by the Nova Scotia Labor Relations Board on April 17, 1996. Although the members of the Communications Center were first hired in 1995, the supervisors were hired in 1998.

[8] The current complement of this classification unit consists of four teams of one supervisor and three communication officers each, for a total of 16.

[9] In a detailed analysis, Arbitrator Veniot reviewed changes in duties and responsibilities of the Communication Center since August 1995. At that time, he wrote, the “original duties were taking police calls for the seven

original municipalities which had municipal police forces, and fire department calls for the entire CBRM. Calls in the RCMP policed areas – essentially rural CBRM – were not taken by the Comm Centre.... In addition, the Comm Centre took ambulance calls for Louisbourg Ambulance...” (pp. 8-9). Among the new duties introduced after August 1995, the Arbitrator identified the following:

- introduction of the 911 emergency call–taking system;
- duties relating to the family violence intervention program;
- logging police internal investigation calls;
- duties related to the Cape Breton Regional Emergency Plan;
- duties arising from changes to the policing in the CBRM when the Cape Breton Regional Police took over policing of most of the areas previously policed by the RCMP;
- duties relating to fire mutual aid;
- medical pre-alert paging;
- reporting to school board members on road conditions;
- assisting with dispatching of certain Nova Scotia Power line crews;
- adding “Firearms Interest Person” records to the Canadian Police Information Centre (CPIC) database;
- hazardous materials (“hazmat”) calls;
- duties relating to the Intensive Support and Supervision Program;

- water rescue calls;

[10] The communications center also took over responsibility for traffic safety unit duties and engineering and public works dispatching, answering crimestoppers after hours and responding and answering elevator phones for Cape Breton regional municipality.

[11] The Arbitrator found that there had been a significant increase in the volumes of calls being made to the Center and reviewed extensive data to confirm this increase. He concluded that there had been a significant increase in duties between 1995 and February 13, 2002, but only a minor increase in the duties and responsibilities of the members of the classification unit since February 13, 2002, the date the current collective agreement became effective.

[12] Reclassification is addressed by Article 35.01 of the Collective Agreement:

> When the duties or responsibilities in any classification are substantially increased by management, or where the union alleges that an employee is incorrectly classified, or when a position not covered in Appendix “A” is established during the term of this Agreement, the rate of pay shall be subject to negotiations between the employer and the union. If the parties are unable to agree on the reclassification and/or rate of pay of the job in question, such dispute shall be submitted to grievance.

[13] The Arbitrator made the following comments on the application of Article 35.01, and specifically the three "scenarios" it describes, at pp. 58-59:

> ... Where any of these [scenarios] exists, it will trigger an obligation to negotiate a new rate of pay. These are:
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> > when the duties or responsibilities in any classification are substantially increased by management; or
>
> > where the union alleges that an employee is incorrectly classified; or
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> > when a position not covered in Appendix "A" is established during the term of the agreement.
>
> *** * ***
>
> ... the phrase "during the term of this agreement" applies only to the third scenario – the establishment of a new position – and not to the first two. The phrase is isolated by punctuation in the language describing the third Article 35.01 trigger, and I find it applies only to that instance.
>
> In this case, we do not need to consider the application of the last two scenarios. They play no part in the merits of this dispute. The union case rests solely on the existence, or not, of the first state of affairs described in Article 35.01 on whether there has been a substantial increase, by management, of the duties or responsibilities of the classifications in question.

[14] The Arbitrator stated the issues in the following terms at pp. 55-56 of the Award:

> 1. Can the whole of the evidence, including the pre-February 13, 2002 evidence, establish a breach of Article 35.01?

2. Is the employer precluded from relying on evidence on the Article 35.01 issues which predates February 13, 2002?

3. Has there been a violation of Article 35.01?

4. If there is a violation, what is the proper remedy?

[15] The Arbitrator concluded that he could consider increases in duties from the date the classification unit was established to determine if such increases were significant. Consequently, he considered all the duties and responsibilities that the applicant had introduced over the course of the three collective agreements between the parties. He noted, at p. 73:

> There is nothing in the language of the agreement which creates a barrier to considering evidence of increases in duties or responsibilities which occurred prior to February 13, 2002, the date of the signing of the present agreement. There is also no question about the relevancy of such evidence. Evidence of increases in duties or responsibilities is directly relevant to the union's case under ... Article 35.01's first scenario. In labour arbitrations such as this, an arbitration board is not bound by the rules of evidence, and may hear evidence whether it would be admissible, or not in a court of law. See: *Trade Union Act*, R.S.N.S., 1989, c. 375, sections 43(1)(b) and 16(8). Thus, relevant evidence is *prima facie* admissible and should be heard unless there is some good reason to exclude it.

[16] The arbitrator considered the applicant employer's argument that evidence preceding February 13, 2002 should not be considered because the board had no jurisdiction to hear such evidence and there was an

estoppel or waiver preventing it from relying on such evidence (pp. 76-77). The employer referred to *Re Halifax Regional Municipality and Nova Scotia Union of Public Employees, Local 13* (unreported, June 24, 2001, MacKeigan) and *Re National Gypsum (Canada) Ltd. and I.U.O.E., Loc. 721 and 721B* (1999), 80 L.A.C. (4th) 115 (Archibald). The found these decision were not binding because the arbitrator in *Re Halifax Regional Municipality* did not do a full analysis and the *National Gypsum* decision did not appear to endorse any particular position as to whether to include or exclude pre-collective agreement evidence (pp. 74-76).

[17] On the first point, the applicant asserted that the union was asking the arbitrator to resolve a breach of a previous, expired collective agreement. It claimed that the arbitrator had no jurisdiction to consider an agreement other than the one under which he had been appointed, citing *Re Goodyear Canada Inc. and United Rubber Workers, Loc. 22* (1980), 28 L.A.C. (2d) 196 (Award, p. 77). The applicant also referred to s. 1.02 of the Collective Agreement:

> The purpose of this Collective Agreement is to establish terms and conditions of employment including rates of pay, hours of work, as well as provisions for final settlement of differences between the Parties relating to the interpretation, application or administration

> of *this Collective Agreement*, or whether either party alleges that *the Agreement* has been violated. [Emphasis added by Arbitrator.]

[18] The Arbitrator referred to several arbitration awards, including *Re Selkirk General Hospital and the Canadian Union of Public Employees, Local 1601*, [1993] M.G.A.D. No. 9, 30 C.L.A.S. 10. In *Selkirk* the arbitrator considered increases in duties, inside and outside the time frame of the current agreement, but stated that any "substantial change" in duties must "have its foundation in a change or changes made during the term of the new collective agreement" (p. 79). Arbitrator Veniot drew this conclusion, at pp. 81-82:

> ... [A] Board addressing a matter such as this will have jurisdiction in one of two events. The first is where the substantial change has occurred entirely within the present agreement's term. Secondly, however, a board would have jurisdiction, in certain circumstances, where some non-substantial changes have occurred in the term of the current agreement. The jurisdiction exists where these changes, although not substantial in themselves, when added to those accreted under the previous agreement, "crystallize", within the term of the present agreement, the right to refer to the sum of the whole of the "new" and "accreted" changes as 'substantial'. If I have interpreted the Board's remarks correctly, I respectfully agree with the results the analysis generated, but not necessarily with all of its underlying reasoning...

[19] If *Selkirk* required that changes occurring under a prior agreement had to have occurred within a short time of its expiry, Arbitrator Veniot did not agree. In any event, he took the view that "it may not be materially limiting – unless the language of the agreement in question makes it so –

that the duties and responsibilities of a position may have been increased substantially in the term of a prior agreement" (pp. 81-82). He continued, at pp. 82-84:

> ... it may not be material that a grievance may have " arisen or crystallized"then, to use the Board's terms in *Selkirk Hospital, supra.* If the assumption is that a substantial change occurred under a prior agreement, and the further assumption is that a fresh change occurred in the term of the new agreement, the matter would appear to be within the jurisdiction of the Board appointed under the new agreement. This is so because *any* change which occurs in the term of the present agreement adds to an admittedly already substantial change and will, in itself, create a crystallizing event and give a fresh right, occurring under the new agreement, to grieve and allege breach.
>
> The principle enunciated in *Goodyear* would hold that the breach which occurred during the term of the previous agreement could not be adjudicated by a board appointed under the new agreement. However, it does no damage to that principle if events which occurred prior to the time of the new agreement are used to establish a breach which is alleged to have occurred in the term of the new agreement. The principle would demand, of course, that the remedy relate to the new, found breach, and be granted in accordance with applicable principles and any relevant terms of the agreement under which the board was constituted. The notion that this evidence is unavailable because of the principle in *Goodyear*, to my mind, is a mistake. To me at least, it confuses the alleged breach with the evidence by which it is to be proven. These are different matters.

[20] Arbitrator Veniot also concluded that if the current collective agreement contained a provision identical to one in a previous agreement, a breach of the earlier agreement might create a continuing grievance. An arbitration board "may have jurisdiction over an allegation of breach even if there were no fresh matters which arose in the term of the present agreement." He pointed to the wording in successive agreements addressing the addition of duties and responsibilities to point of "substantial increase." In that case, he said, the wording "will trigger a right to a review of wages, and where that point is reached, it is arguable

that every day thereafter can be said to be a day in which a recurring breach of the agreement occurs" (p. 84). He referred to the test for a continuing grievance in Brown & Beatty, *Canadian Labour Arbitration,* 3d edn. (Looseleaf) at para. 2:3128:

> ... The test most commonly used in determining whether there is a continuing violation is the one derived from contract law, namely, that there must be a recurring breach of duty, and not merely recurring damages.

[21] He cited this passage from *Goodyear* (at p. 203) at p. 85 of his Award:

> ... the jurisdictional merits are not different simply because the complaint before us may involve a continuing, uninterrupted breach of successive collective agreements. *There are numerous cases where boards of arbitration have found that they have jurisdiction to hear a grievance under a given collective agreement where the breach of the current agreement originated as a breach of identical terms of an earlier expired agreement or as a breach of the current agreement which began outside the mandatory time-limits of the grievance procedure. In those cases where the action complained of can be characterized as a continuing breach of the current agreement, as distinguished from a single and spent breach of either the expired collective agreement or the current agreement, the board of arbitration can assert jurisdiction, but only in so far as the grievance relates to ongoing breaches of the current agreement. Its remedial authority does not extend retroactively beyond the period of the collective agreement under which it is constituted* (see, e.g., *Re Parking Authority of Toronto and C.U.P.E., Local 43* (1974), 5 L.A.C. (2d) 150 ...) *and redress generally excludes any period before the grievance is brought except for the period within the time-limits in the collective agreement*: *Re U.S.W., Local 7105, and Automatic Screw machine Products Ltd.* (1972), 23 L.A.C. 396.... [Emphasis added by arbitrator.]

[22] The Arbitrator determined that in a continuing grievance, where the evidence comes from a time which predates the current agreement, its reception does not violate the principles set out in *Goodyear* because there is a "recurring breach of duty" in the term of the new agreement that translates into a "continuing breach of the current agreement." However, he concluded that there was no need to rely on the "recurring breach" argument arising from *Selkirk.* Instead, he found that there had "been a number of new duties and/or responsibilities" imposed since February 13, 2002. As a result, based on the "more modest" test set out in *Selkirk,* there was "prior agreement 'accretion', together with some events adding new duties or responsibilities which occur in the term of the present agreement and crystallize the grievance in this agreement's term" (pp. 85-87).

[23] As to the issue of estoppel or waiver, the arbitrator stated that contract language or conduct by a party might prevent a party from "going back into a time period covered by a previous agreement in a search for evidence to support a grievance which is made under the current agreement." In this instance the language of the provision led him to a contrary conclusion. The assessment of whether duties or responsibilities were substantially increased were not limited by Article 35.01 to increases "during the term of the agreement". He observed that of three scenarios in Article 35.01, only one contains language limited to occurrences within the terms of the current collective agreement. He did not regard this as an appropriate case in which to imply a term. Where the

parties wished to limit the operation of Article 35.01 to events occurring entirely within the agreement term, they did so, as in the third scenario. The fact that no such language appeared in the first two scenarios led to the conclusion that the parties agreed “that the union could, after negotiating a wage, attempt to increase it after the agreement was signed by using Article 35" (pp. 87-90).

[24] The arbitrator also stated that “with language like this, the mere fact that there has been a negotiation, and an agreement resulting from it, without more, would not bar the union claim.” Had the union agreed that the CO and COS rates “would not be the subject of an Article 35.01 application in the term of this agreement ... it might have been estopped from bringing the grievance ... or might be said ... to have waived any right to do so.” However, whether estoppel or waiver applied was a matter of evidence, and the evidence did not give rise to a finding of estoppel or of waiver (pp. 90-91).

[25] Consequently, the arbitrator found that he could consider increases to the duties and responsibilities of the CO and COS positions that occurred before February 13, 2002 (p. 91).

ISSUES

[26] The issues to be considered on this judicial review application are: (1) What is the appropriate standard of review?; and (2) Did the Arbitrator

breach of the standard of review within considering and relying upon evidence that pre-dated the signing of the collective agreement?

STANDARD OF REVIEW

The Law

[27] The Supreme Court of Canada has addressed standard of review in several recent decisions: the leading cases include *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226; and *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] S.C.J. No. 2. These decisions, in turn, are rooted in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 and the cases preceding it, which gave rise to the "pragmatic and functional analysis" in deciding on appropriate standards of review. In *Pushpanathan* Bastarache J., writing for the majority, said:

> 28 Although the language and approach of the "preliminary", "collateral" or "jurisdictional" question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of "jurisdictional questions" which must be answered correctly by the tribunal in order to be acting intra vires. But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness,

> based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.

[28] Bastarache J. went on to describe four factors to be considered in establishing the appropriate standard of review: privative clauses, expertise, the purpose of the act as a whole, and the provision in particular, and the nature of the problem (a question of law or fact) (paras. 29-38). One commentator has summarized these factors as follows:

> (i) Privative clauses and Statutory Appeals
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> "Full" privative clauses rendering decisions final and conclusive, unless other factors strongly indicate to the contrary, warrant a high level deference, while appeal rights suggest "a more searching" standard of review. Partial or equivocal privative clauses are one factor to be considered, and do not have the "preclusive" effect of a full privative clause.
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> (ii) Expertise
>
> Generally this is the most important factor to be considered, and embraces several considerations. If a tribunal has been constituted with specialized expertise related to the objectives of the legislation, then a greater degree of deference will be accorded. However, expertise is relative concept, with three dimensions: the expertise of the tribunal, the courts' own expertise relative to that of the tribunal and the nature of the specific issues involved relative to this expertise. Once a broad relative expertise is established, the patently unreasonable standard will generally be accorded even to highly generalized statutory interpretations of the tribunal's constituent legislation (including, in that case, related instruments such as treaties the legislation is to implement).

> (iii) Legislative Purpose
>
> This encompasses the purposes both of the legislation in general, and the specific provision(s) in issue. Purpose (and overlapping need for expertise) may be indicated as much by the specialized nature of the legislative structure and decision–making mechanisms as by the specific qualification of members. Where these purposes are not so much to establish rights between individual parties, but involve "delicate balancing" between "different constituencies", greater deference is necessary. Also relevant are the range of remedial powers, any public interest protection mandate, and the role in policy development of the decision–makers, which likewise warrant more rather than less deference. Similarly, if the applicable legal principles are open–textured or involve a multi-factored balancing of a large number of interlocking and interacting interests and considerations (a.k.a. "polycentric"), then courts must exercise restraint.
>
> (iv) The Nature of the Problem
>
> The more the issue involves "pure determinations" of highly generalized propositions of law removed from the core expertise of the tribunal in then absent clear legislative intent to defer to the public decision–maker, the relative expertise of the courts warrants less deference (although there is no clear line) and the correctness standard will be applicable. On the other hand, the legislative scheme, a highly specialized decision–maker, and a strong privative clause may be sufficient to require a different, more deferential standard. Generally, considerable deference is given to questions of fact unless there is "no evidence", or more generally, where the evidence viewed reasonably, is incapable of supporting the decision–maker's factual determination.
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> [See Jeff G. Cowan, "The Standard of Review: The Common Sense Evolution?" (Ontario Bar Association, Administrative Law Section, January 21, 2003) at pp. 6-7.]

[29] The "pragmatic and functional" approach allows for three standards of review: correctness, patent unreasonableness and reasonableness (see *Ryan* at para. 20 and *Dr. Q* at para. 35). Both *Dr. Q* and *Ryan* dealt with

the conclusions of discipline committees, dealing with a medical doctor and a lawyer, respectively. In *Voice Construction*, the Court extended this approach to consensual labour arbitrators. Major J. said, at para. 16:

> The pragmatic and functional approach involves the consideration of four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question – law, fact or mixed law and fact.... No one factor is dispositive....

[30] The Nova Scotia Court of Appeal summarized the analysis required by *Dr. Q and Ryan in Creager v. Provincial Dental Board of Nova Scotia*, [2005] N.S.J. No. 32 (QL), 2005 NSCA 9, at para. 15:

> ... Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a privative clause or statutory appeal; the comparative expertise of the tribunal and court on the appealed issue; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. From this, the court selects a standard of review of correctness, reasonableness, or patent unreasonableness. The functional and practical approach applies even when there is a statutory right of appeal..... The approach applies even to pure issues of law, for which the standard of review need not be correctness. The existence of the statutory right of appeal and whether the issue is one of law, are merely factors weighed with the others in the process to select the standard of review....

[31] See also *Halifax Employers Assn. v. International Longshoremen's Assn., Local 269 (Halifax Longshoremen Assn.)*, [2004] N.S.J. No. 316 (QL); 2004 NSCA 101, (per Cromwell J.A.).

[32] Cowan writes that the "contextualized basis of the functional analysis suggests that different degrees of scrutiny will be required, depending upon the issue(s) involved and the extent to which the decision-maker's reasoning is articulated" (p. 11). He continues:

> On the other hand, there may be cases where the decision turns on the interpretation of a statute or collective agreement and the court can discern whether there is a rational basis for the decision or not. The interpretation of specific provisions may not be central to the main issue(s) and overall jurisdiction of the tribunal, and may only affect the reasonableness of the decision as opposed to determining it. Other cases, particularly where the factual record is devoid of support for a central conclusion will require review of the facts (or lack of them). Perhaps the most that can be said by way of overview is that the general agreement on the analytical approach and the relative expansion of the scope of deference that has evolved ... has not resulted in the need for the court to debate internally the exact parameters of its analytical methodology.

[33] In *Voice Construction* the Court considered the standard of review in a grievance relating to hiring procedures in the construction industry. The union negotiated a collective agreement with an employers' trade association of which the respondent was a member. The union

maintained a hiring hall. A union member, who had previously worked for the respondent, was laid off for lack of work. There had been difficulties between her and the respondent, but she had not been terminated for cause. There was a notation on her record that she was not to be rehired. The respondent notified the appellant of 22 labourers, including the member, whom it did not wish to have dispatched to its job sites. The respondent subsequently requested 11 labourers. The union dispatched the member and a number of others. Although the member went through an orientation session, she was not assigned to work. Two others who had been on the “not-for-hire” list were given work.

[34] The union claimed that the respondent’s refusal of the member violated the collective agreement. It stated the respondent was required to hire the labourers dispatched by the union provided they were qualified and had not been previously terminated for cause. The arbitrator found that the collective agreement constituted an express restriction on the respondent’s right to hire and select workers and that the respondent contravened the agreement by refusing to hire the member. The reviewing court quashed the award on the basis that the arbitrator had

exceeded her jurisdiction in amending the collective agreement. Her finding of an express restriction on management's right to hire was not warranted. The court applied the standard of correctness. This decision was upheld by the Alberta Court of Appeal and appealed to the Supreme Court of Canada.

[35] Major J., writing for the majority, reviewed the relevant provisions of the of the collective agreement and the legislation:

> 18 *Dr. Q* ... confirmed that when determining the standard of review for the decision of an administrative tribunal, the intention of the legislature governs (subject to the constitutional role of the courts remaining paramount -- i.e., upholding the rule of law). Where little or no deference is directed by the legislature, the tribunal's decision must be correct. Where considerable deference is directed, the test of patent unreasonableness applies. No single factor is determinative of that test. A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard. By its nature, the application of patent unreasonableness will be rare. A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd. Between correctness and patent unreasonableness, where the legislature intends some deference to be given to the tribunal's decision, the appropriate standard will be reasonableness. In every case, the ultimate determination of the applicable standard of review requires a weighing of all pertinent factors....
>
> 19 Only after the standard of review is determined can the administrative tribunal's decision be scrutinized. It is important to recognize that the same standard of review will not necessarily

> apply to every ruling made by an arbitrator during the course of an arbitration....

[36] Major J. took the view that the reviewing judge had reversed the appropriate process:

> 20 Rather than determining the appropriate standard of review and then assessing the arbitrator's decision on that basis, the reviewing judge in this appeal appears to have reversed these steps. He first concluded that the labour arbitrator's interpretation of the collective agreement amounted to an amendment of the agreement and therefore exceeded her jurisdiction.
>
> 21 In a manner of speaking, the cart was put before the horse. The reviewing judge should have determined the standard of review before assessing the arbitrator’s reasons....

[37] Further, the reviewing court had applied the wrong standard of review in the circumstances:

> 22 Neither the reviewing judge nor the Court of Appeal conducted the analysis mandated by the pragmatic and functional approach. In a number of appeals this Court has applied a standard of patent unreasonableness to the decisions of labour arbitrators relative to the interpretation and application of collective agreements.... However, when the pragmatic and functional approach is applied here, the result mandates the less deferential standard of reasonableness.

[38] Neither the governing legislation nor the collective agreement provided a full privative clause. The Alberta *Labour Relations Code* provided that an arbitrator’s decision was “binding”; the agreement referred to it as a

"final and binding settlement" (paras. 23-25). Regarding the privative clauses and the expertise of the arbitrator, Major J. said:

> 26 Although ss. 142 and 143 of the *LRC* and art. 15.04 do not constitute full privative protection, they suggest that increased consideration be given to the decisions of labour arbitrators.... A partial privative clause, in the absence of other factors, does not bestow the greatest degree of deference. It simply requires a careful assessment of the arbitrator's role.

[39] As to the expertise of the arbitrator, Major J. said:

> 27 The arbitrator in this case was required to interpret the collective agreement. Collective agreements, although similar to, are different in some respects from other types of contracts. While interpreting contracts falls squarely within the expertise of courts, arbitrators, who function within the special sphere of labour relations, are likely in that field to have more experience and expertise in interpreting collective agreements. Consequently, this favours a certain degree of curial deference to arbitrators' interpretation and application of collective agreements.

[40] Regarding the purpose of the legislation:

> 28 The *LRC* seeks to regulate and resolve labour disputes in the most efficacious and least disruptive way. Generally, the resolution of labour relations disputes by the Labour Relations Board requires "polycentric" decision making which means it involves a number of competing interests and considerations, and calls for solutions that balance benefits and costs among various constituencies.... By contrast, proceedings before an arbitrator do not require the consideration of broad policy issues. Instead, the role of the arbitrator is to resolve a two-party dispute. In this appeal, that dispute related to the employer's obligation to hire dispatched workers. Even so, this factor suggests a deferential standard of review.

[41] Finally, Major J. described the nature of the problem:

> 29 The nature of the problem at issue is a question of law -- the interpretation of the terms of the collective agreement. The arbitrator stated at para. 18 of her decision:
>
> > I am asked to examine the provisions of this contract and determine whether the Employer has the right to refuse to hire qualified workers dispatched by the Union. In considering this matter, I am obliged to interpret the contract language as negotiated by the parties in accordance with well-accepted principles of contract interpretation.
>
> Generally speaking, questions of law are subjected to a more searching review than are other questions, and frequently require the standard of correctness. Nevertheless, the interpretation of collective agreements, as noted in para. 27, is at the core of an arbitrator's expertise and this, in turn, points to some deference.

[42] Major J. held that the arbitrator's decision was "entitled to a measure of deference, the appropriate standard of which is reasonableness" (para. 30).

[43] In *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727 an arbitrator found that, while a union member had been dismissed for non-culpable incompetence, just cause had not been shown because the employer failed to comply with requirements for dismissal of an employee on grounds of non-culpable

conduct. Rather than reinstate the employee, the Board decided that it could award damages. The Court of Appeal held that the Board did not have jurisdiction to award damages. S. 142(2) of the Alberta *Labour Relations Code* provided that if an arbitration board determined that an employee had been discharged or otherwise disciplined by an employer for cause, and the collective agreement did not contain a specific penalty for the infraction, the board could substitute some other remedy than discharge that it deemed just and reasonable in the circumstances.

[44] In reversing the Alberta Court of Appeal, the Supreme Court of Canada applied the four-part test. Iacobucci J., writing for the Court, stated that the *Labour Relations Code* did not provide a full privative clause. He addressed the standard of review for section 142:

> 16 As noted in the courts below, the relevant provisions of the Code ... and the collective agreement do not grant full privative protection to decisions of the arbitration board. The strong language of s. 145(1) of the Code and s. 63(1) of the *PSERA* is undercut by the concomitant thirty-day period of review by way of application for *certiorari* or *mandamus* in s. 63(2) of the *PSERA* and s. 145(2) of the Code. Moreover, the "final and binding" clause in Article 12.16 of the collective agreement provides only a "limited shield against judicial review" in light of this Court's review of a similar clause in *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230, at p. 264.... In general terms, the stronger the privative clause, the greater the deference due and correspondingly, the weaker the privative clause (or in the absence of one), less deference is owed.... Section 145 of the Code, ss. 44

and 63(2) of the *PSERA* and Article 12.16 of the collective agreement do not have the preclusive effect of a full privative clause. Nevertheless, the provisions continue to attract some deference to the decisions of the arbitration board.

17 The relative expertise of the board also militates in favour of some deference. Arbitrators function as labour relations gatekeepers, and the core of their expertise lies in the interpretation and application of collective agreements in light of the governing labour legislation. In this case, the arbitration board was called upon to interpret the Code, legislation intimately connected with its mandate.... Moreover, where the provisions at issue have been incorporated into the collective agreement, as in these circumstances, deference to the board is further justified.....

¶18 The analysis under the third factor of the pragmatic and functional approach must canvass the purpose of the statutory scheme as a whole and of the provisions implicated in the review.... [T]he purpose of grievance arbitration is to "secure prompt, final and binding settlement of disputes arising out of the interpretation or application of collective agreements and the disciplinary actions taken by an employer". The purpose of the provision particular to this appeal, s. 142(2) of the Code, is at once jurisdictional and remedial, conferring upon the board authority to substitute a penalty for the discharge or discipline of an employee that seems just and reasonable in all the circumstances. The jurisdictional aspect of the provision attracts less deference, as administrative bodies are entirely statutory and thus must be correct in assessing the scope of their mandate.... Its remedial nature, however, militates broadly in favour of greater deference.... On balance, an approach more deferential than exacting is suggested.

19 Of course, by itself, the interpretation of s. 142(2) of the Code is a question of law and thus militates in favour of less deference to the board. As noted by Bastarache J. in *Pushpanathan* ... at para. 38, "the generality of the proposition decided will be a factor in favour of the imposition of a correctness standard". Section 142(2) calls for statutory interpretation of a general remedy power, the scope of which is itself a legal issue. While a similar provision, s. 136*(j)* of the Code, is deemed to be included in the collective agreement governing the parties' labour relations, the essence of the query remains the same. The interpretation of s. 142(2), however, presupposes an understanding and analysis of labour law

> issues, militating in favour of deference to the board. Further, the nature of the question as one of more or less precedential value is mixed. While decisions of arbitration boards are not precedential and binding *per se*, substantial arbitral consensus does often arise with respect to particular legal developments, and where jurisdiction to interpret legislation is shared between courts and arbitrators, prior judicial decisions are regarded as binding.... The nature of this issue, namely whether arbitration boards may substitute damages in lieu of reinstatement, suggests heightened precedential value given the existence of conflicting lines of jurisprudence and widespread application, which in turn calls for less deference to the board.
>
> 20 Having generally considered the above factors, I conclude that the proper standard of review of the board's decision regarding the interpretation of s. 142 is that of reasonableness.

[45] As to the decision to substitute damages in lieu of reinstatement, the Court said, at para. 22:

> 22 The board's decision to substitute damages in lieu of reinstatement is a question of mixed fact and law, requiring the application of law to the necessary findings of fact. The nature of the question calls for greater deference given its fact intensity, as considered by this Court in *Dr. Q, supra*, at para. 34. The arbitration board's decision to substitute damages in lieu of reinstatement was based on the facts of the dispute. The board was best positioned to assess credibility and weigh evidence put before it in fashioning an appropriate remedy. As discussed by Arbour J. in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 ..., at para. 68, when reviewing the ultimate remedial decisions of administrative tribunals, courts are called upon to "pass judgment" on the tribunal's "ability to assess, weigh, and apply the evidence to a particular legal threshold while discharging its core function". The arbitration board's conclusions on such questions of mixed law and fact ought to be afforded deference, given the need for the board to exercise its function in an authoritative and binding fashion. Moreover, the lower precedential value of the board's remedial disposition further militates in favour of some deference.

[46] The Nova Scotia *Trade Union Act* provides, at section 42:

> 42(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.
>
> (2) Where a collective agreement does not contain a provision as required by this Section, it shall be deemed to contain the following provision:
>
> > Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration. If the parties fail to agree upon an arbitrator, the appointment shall be made by the Minister of Labour for Nova Scotia upon the request of either party. The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it.
>
> (3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement.

[47] The collective agreement in the present case provides:

> **11.11 Decisions of the Board**
>
> The decisions of the majority shall be the decision of the Board. Where there is no majority decision, the decision of the Chairperson shall be the decision of the Board. The decision of the Board of Arbitrators shall be final and binding and enforceable on all parties [Emphasis in original].

[48] Unlike the Alberta legislation, the Nova Scotia *Act* includes no restriction on the right to seek judicial review. In *Voice Construction* this suggested an increased consideration to the decisions of labour arbitrators (para. 26). A partial or less exacting privative clause, in the absence of other factors, does not allow for the greatest degree of deference, but requires a careful assessment of the arbitrator's role.

[49] Arbitrator Veniot had to resolve the issue of the possible obligation of the employer to pay for a substantial increase in duties and responsibilities on the part of members of the Communications Center classification unit. Although largely factual, this question involved the interpretation of a particular provision in the collective agreement. As in *Voice Construction*, this suggests a deferential standard of review.

[50] The Arbitrator reviewed previous collective agreements to determine whether Article 35.01 had been included in the previous agreements. He considered several questions of law, including the application of section 16(8) of the *Trade Union Act*, which provides that the "Board may receive and accept any evidence and information on oath, affidavit or

otherwise as in its discretion it may deem fit and proper, whether admissible as evidence in a court of law or not." As the arbitrator was interpreting a term of the collective agreement which was effectively at the core of his expertise, this suggests that more deference than the correctness standard is required. The Arbitrator was relying on his expertise in the interpretation of the collective agreement and in interpreting s. 16(8) of the *Trade Union Act*. Although not exclusive, he was in an equal position to this court to interpret this statutory provision. The respondent contends that, in deciding whether increases in duties and responsibilities were substantial, the arbitrator was deciding questions of fact for which there is no judicial review. The applicant maintains that the standard of review is correctness, given that he was making findings of law on whether or not to include increases in duties and responsibilities prior to February 13, 2002.

[51] I am satisfied that reasonableness is the proper standard of review.

APPLYING THE REASONABLENESS STANDARD

[52] The applicant argues that the jurisdiction of an arbitrator is confined to reviewing disputes arising out of the interpretation, application or administration of the collective agreement under which he or she is appointed and constituted and that there is no right to have agreements heard by an arbitrator when the cause of the grievance arose during the currency of a collective agreement which has expired: *Goodyear*. The applicant argues that this limit is based on the need to maintain peaceful labour relations and argues that the parties must know where they stand as they enter a new collective agreement. The applicant maintains that the arbitrator erred by considering evidence that pre-dated February 13, 2002 on the basis of *Selkirk.*

[53] The applicant refers to *Seven Oaks General Hospital* and *International Union of Operating Engineers, Local 827*, [1993] M.G.A.D. No. 113, where similar conclusions were reached to that in *Selkirk*. The applicant also points to the award by the same arbitrator in *Oland Breweries Ltd. v. United Food and Commercial Workers International Union (Brewery and Soft Drink Workers, Local 361)(Vacation Pay Grievance)*, [2001] N.S.L.A.A. No. 14, where he stated that he did not "have jurisdiction to

entertain this grievance to the extent that it raises claims under either of the two former agreements" (para. 91). He also referred to *Goodyear* on the point of whether an issue before the Arbitrator was different because of the allegation that the grievance raised continuing, uninterrupted breaches of successive agreements (see para. 20 above).

[54] In *Halifax Shipyard Ltd. v. Marine, Office and Technical Employees Union, Local 28*, [1996] N.S.J. No. 552 (S.C.) the Court stated that where the arbitrator was deciding a question of law outside the collective agreement, namely, whether there was right to order the production of documents, the standard of correctness applied because the issue did not go to the arbitrator's jurisdiction to interpret the collective agreement but rather to his authority to apply rules or principles of general law to a dispute not contemplated by the collective agreement. On judicial review Nathanson J. determined that a lower level of deference was appropriate. I hesitate to follow this decision, given the decision by the Supreme Court of Canada in *Voice Construction*.

[55] The applicant concedes that the reasonableness standard may apply in this instance, as in *Voice Construction*. Under the reasonableness standard, the applicant maintains that the arbitrator's reasoning also fails. The applicant states that if employer had not increased with the duties of these employees during the time of the current collective agreement, it would be impossible for the employees to grieve for an increase in duties which had occurred in the previous collective agreement time frame. The applicant maintains that a reasonable person could not attribute these intentions to the parties.

[56] On a review of *Selkirk* it is evident that there had to be a substantial increase in duties in the current agreement before one can take into account the increase in duties n the previous collective agreement or agreements. The rationale for going back into the previous agreement was that some months are ignored during the transition between agreements.

[57] The applicant argues that the Arbitrator improperly expanded the proposition that a "continuing grievance" may arise from a breach of an

article that appears in successive agreements, by stating that where successive agreements provide that the addition of duties or responsibilities to the point of "substantial increase" will trigger a right to review wages, and when that point is reached, it is arguable that every day thereafter may be a day in which a recurring breach of agreement occurs. The applicant attacks this analysis by asserting that the addition of responsibilities and duties during an earlier agreement is not a breach of article 35.01; therefore, there could not be a "continuing" breach.

[58] The applicant maintains that the arbitrator unreasonably interpreted article 35.01. The applicant claims that the arbitrator stated that there was nothing in the language of the agreement which created a barrier to considering evidence of increases in duties or responsibilities that occurred prior to February 13, 2002. The applicant says the Arbitrator failed to consider the following point made in Brown & Beatty at p. 4-59:

> ...[arbitrators] look at to the purpose of the particular provision in the collective agreement as an aid to determining the meaning intended by the parties ... give effect to this general contextual climate by requiring clear statements to alter such general expectations.
> [Emphasis added by applicant.]

[59] The applicant's fundamental argument is that, although there may be nothing in the particular provision which limits the arbitrator in considering pre–February 13, 2002 evidence, the lack of such a provision is not necessarily conclusive. The Arbitrator's jurisdiction must be based on a dispute arising within of the terms of the agreement under which he is appointed or constituted, and that he cannot consider grievances that arose under predecessor agreements. In order to alter this general statement about the law and accepted practice, the collective agreement must contain an express and specific statement. The applicant goes on to argue that "the intention of the parties was to establish February 13, 2002, as the fixed entry point for a possible future invoking of the terms of Article 35.01, i.e. if after that date the duties and responsibilities of the positions were substantially changed" [emphasis by applicant]. On this point, the applicant refers to *Re Boeing Canada Technology Ltd.*, [2001] M.G.A.D. No. 61 at para. 290.

[60] The respondent submits that it was only the moment when the applicant refused the request for reclassification – May 28, 2002, within the term of the current collective agreement – that the difference between the parties

arose. The respondent emphasizes the distinction between “violations of a previous, expired Collective Agreement, on the one hand, and evidence of factual matters that took place during the period of the previous agreement, on the other” [emphasis by respondent].

[61] The triggering event in Article 35.01, the respondent claims, is not the increase in duties in itself, but the parties’ failure to agree on a classification or rate of pay. The respondent adds the point of Article 35.01 is to provide a process for re-classification outside the collective bargaining process but during the term of the collective agreement.

[62] The respondent maintains that it was not asking the arbitrator to remedy a breach of a previous collective agreement, but asking him to award an increase in the pay rate from the date of the grievance only.

Analysis

[63] To understand the standard of reasonableness, it may be appropriate to relate it to the standards of patent unreasonableness and correctness. In

order to apply the standard of patent unreasonableness the court must determine if the alleged error is one that is obvious and immediate. If correctness is the standard, the reviewing court can invoke its own reasoning process to determine whether the decision is correct.

[64] To determine whether a decision is reasonable, on the other hand, the court is not permitted to ask whether it is correct. The fact that the reviewing court does not agree with the answer is not a sufficient basis to set aside the decision. In applying the reasonableness standard, I am guided by the comments of Iacobucci J. in *Ryan*:

> 49 This signals that the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and "look to see" whether any of those reasons adequately support the decision. Curial deference involves respectful attention, though not submission, to those reasons....
>
> 50 At the outset it is helpful to contrast judicial review according to the standard of reasonableness with the fundamentally different process of reviewing a decision for correctness. When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. In contrast, when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision-maker is merely

afforded a "margin of error" around what the court believes is the correct result.

51 There is a further reason that courts testing for unreasonableness must avoid asking the question of whether the decision is correct. Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

52 The standard of reasonableness *simpliciter* is also very different from the more deferential standard of patent unreasonableness. In [*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748] at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason".... A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

53 A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing".... Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

54 How will a reviewing court know whether a decision is reasonable given that it may not at first inquire into correctness? The answer is that a reviewing court must look to the reasons given by the tribunal.

> 55 A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere.... This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling....
>
> 56 This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

[65] Ryan involved a decision of Discipline Committee of the Law Society of New Brunswick. The Committee disbarred a lawyer, Ryan, on account of an elaborate web of deceit that included lying to clients and forging a decision of the Court of Appeal. The Court of Queen’s Bench and the Court of Appeal set aside the decision, but the Supreme Court of Canada reinstated the decision of the Discipline Committee. Throughout the review and appeal process, the accepted standard of review was reasonableness. However, the Supreme Court did not accept the manner in which the lower courts dealt with reasonableness. One author states:

> The reasonableness standard does not have variable content: it is a discrete point, with constant content, which requires the court to determine whether "after a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" While the answer this question must bear careful relation to the context of the decision, the question or standard or test remains the same....
>
> * * *
>
> ... while the Court of Appeal purported to apply the reasonableness standard, in the SCC's view it did so incorrectly when it found fault with the Discipline Committee's choice of analogous cases on the issue of penalty, and with the weight the Committee gave to mitigating factors. Because the standard of review was not correctness, the Court of Appeal should not have reweighed the evidence and imposed a different penalty. Applying the "somewhat probing examination" involved in the "reasonableness" standard, Justice Iacobucci found that the Committee's reasons were tenable, grounded in the evidence, and supported disbarment as the choice of sanction – in short, not unreasonable.
>
> [David Phillip Jones, "Notes on Dr. Q. And Ryan", Canadian Institute for the Administration of Justice, Western Roundtable, 25 April 2003, paras. 17 and 21.]

[66] Regarding the comments at paras. 50-51, Jones writes that "[t]his implies that the determination of what is 'reasonable' bears no relationship whatever to any conception of what the correct result might be, and that 'reasonableness' is determined solely by looking to the reasons given by the tribunal" (para. 18).

[67] On the basis of *Selkirk* Arbitrator Veniot found that as long as there was some evidence of increases in duties and responsibilities in the current collective agreement, he could go back into history and determine the extent to which changes in duties and responsibilities have occurred. He concluded that "in certain circumstances, where some non-substantial changes have occurred in the term of the current agreement ... [t]he jurisdiction exists where these changes, although not substantial in themselves, when added to those accreted under the previous agreement, 'crystallize', within the term of the present agreement, the right to refer to the sum of the whole of the 'new' and 'accreted' changes as 'substantial'" (pp. 81-82).

[68] The arbitrator declined to follow *Re Halifax Regional Municipality and Nova Scotia Union of Public Employees, Local 13* and *Re National Gypsum (Canada) Ltd. and I.U.O.E., Loc. 721 and 721B* because the arbitrator in *Re Halifax Regional Municipality* did not do a full analysis and the *National Gypsum* decision did not appear to endorse any particular position as to whether to include or exclude pre-collective agreement evidence (pp. 74-76). He considered that *Goodyear* did not stand for the proposition that evidence from a previous agreement could not be considered in finding a breach in the

current agreement, but rather that an arbitrator cannot arbitrate a breach of a previous collective agreement. He concluded that he was not deciding a breach of a previous agreement.

[69] Article 35.01 was carried over from previous agreements. Consequently, the Arbitrator found, a breach of an earlier article may create a continuing grievance, because every breach from the previous agreement will continue indefinitely until challenged by the union. If in fact it is deemed that there was a breach in the previous collective agreement that it is repetitious conduct in the current collective agreement.

[70] One of the major objectives of collective bargaining is to maintain management–labour relations through the collective bargaining process. Despite being internally consistent, the Arbitrator's award fails to consider the fundamental issue of the intentions of the parties in the collective bargaining process. The Arbitrator performed a detailed analysis of Article 35.01 but did not consider the impact of his decision in the context of the entire agreement. Article 35.01 must, in my opinion, be considered in the context of the entire agreement to determine whether the parties intended to

include the increases in duties and responsibilities from the beginning of the new Collective Agreement.

[71] Article 1.02 of the Collective Agreement provides:

> The purpose of this Collective Agreement is to establish terms and conditions of employment including rates of pay, hours of work, as well as provisions for final settlement of differences between the Parties relating to the interpretation, application, or administration of this Collective Agreement, or where either party alleges that the Agreement has been violated.

[72] I conclude the parties must have contemplated that the date of the analysis of whether there had been an increase in duties and responsibilities for this classification unit must have been from the beginning of the current collective agreement. I believe that it was unreasonable to go back in history to the beginning of the relationship between the parties to determine if there had been a significant increase in duties and responsibilities.

[73] In *Voice Construction* the arbitrator considered a number of provisions: Article 6.01(d), which excused an employer from hiring an unqualified worker who was dispatched by the union; Article 6.01 (e) which prevented the union from dispatching a worker who had been terminated for just cause by the employer; and Article 6.02 which provided for a name-hire regime for

20 workers on any job site, and thereafter one worker for every four hired. The arbitrator concluded that these provisions would be redundant if an employer maintained an unfettered right to select from workers dispatched by the union. Major J. stated:

> 34 There were no provisions in the collective agreement explaining how the name hire procedure was to be carried out and no evidence from the respondent with respect to the number of labourers already at the job site. The respondent submitted that the number of labourers on the site is beside the point and further stated whatever purpose art. 6.02 served, it did not restrict an employer's right to hire and select workers in any way.
>
> 35 There is a narrow line between expressly stated and necessarily implied. An "express" restriction may nonetheless be open to interpretation. The presence of the provisions referred to by the arbitrator led to a decision that, taken as a whole, is capable of withstanding a "somewhat probing examination".... Even if a more or less compelling conclusion can be drawn from the provisions of the collective agreement, that does not, on its own, render the arbitrator's interpretation unreasonable.
>
> 36 In my view, the arbitrator's conclusion that the dispatch provisions in art. 6.01 and the name hire provisions in art. 6.02 qualified the respondent's unfettered right to hire and select workers under art. 7.01 is reasonable given the terms of the agreement. The reviewing judge should not have interfered.

[74] In *Alberta Union of Provincial Employees v. Lethbridge Community College* Iacobucci J. considered the object and purpose of the statute as a whole:

> 32 The Preamble to the Code provides insight into the purposes of the statute as a whole. The primary object of the legislation is the promotion of an "effective relationship between employees and employers" through the "fair and equitable resolution of matters

> arising in respect of terms and conditions of employment". When the Code was introduced in the Alberta legislature, these two tenets of the legislation were described as "philosophical statement[s]" that "must be kept in mind when reading every section of the statute" (*Alberta Hansard*, vol. II, 21st Leg., 3rd Sess., June 7, 1988, at p. 1553). The employee-employer relationship was further described as one that "should be 'based on a common interest in the success of' an entity that both the employer and the employee are associated with" (*Alberta Hansard, supra*, at p. 1553).

[75] Iacobucci J. also said “the remedial power in s. 142(2) must be read harmoniously with the overarching requirement in s. 135 that ‘every collective agreement shall contain a method for the settlement of differences arising ... (b) with respect to a contravention or alleged contravention of the collective agreement ...’” (para. 38).

[76] On the consideration of other provisions of a collective agreement, see also *United Brotherhood of Carpenters and Joiners of America, Local 579, v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (para. 50). See also *Sisters of St. Joseph of the Diocese of London in Ontario v. Service Employees Union, Local 210* [1997] 35 O.R. (3d) 91 (C.A.) where the court stated that the arbitrator and court can interpret the agreement given its overall terms. In order to avoid jurisdictional error, the interpretation of the agreement must be one which the agreement and can bear, given its overall terms.

[77] It is important not only to look at the purpose of the supporting legislation but also the purpose of the collective agreement; see, for instance, *N.S. Employees Union v. N.S. (Minister of Human Rights)* (1996), 148 N.S.R. (2d) 368 (S.C.) at para. 29; affirmed at 155 N.S.R. (2d) 12 (C.A.).

CONCLUSION

[78] I find that the arbitrator acted unreasonably in considering increases in duties and responsibilities that occurred prior to February 13, 2002. Article 35.01 must be read with reference to the object and purpose of the collective agreement. The Arbitrator failed to consider the importance of Article 1.02. He thereby failed to consider the intentions of the parties in concluding the collective agreement, leading to a result that cannot reasonably be supported by the reasons given.

[79] Accordingly, the decision of the Arbitrator is quashed, with costs to the applicant.

[80] If the parties are unable to agree on the appropriate amount of costs, they are free to submit their written positions within three weeks.

J.