SUPREME COURT OF NOVA SCOTIA

Citation: Cherubini Metal Works Ltd. v. United Steelworkers of America, 2011 NSSC 94

Date: 20110304
Docket: Hfx. No. 297596
Registry: Halifax

Between:

Cherubini Metal Works Limited

Applicant

v.

The United Steelworkers of America, The United Steelworkers of America, Local 4122

Respondents

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	November 3, 2010, in Halifax, Nova Scotia
Counsel:	George MacDonald, Q.C., and Michelle Awad, Q.C., for the applicant Raymond Larkin, Q.C., and Bettina Quistgaard, for the respondent, United Steelworkers of America, Local 4122 Robert Healey, for the respondent, United Steelworkers of America

By the Court:

[1] The applicant, Cherubini Metal Works Limited, seeks judicial review of a decision of an arbitrator. The decision under review is an interim award, dated April 19, 2008, dealing with several preliminary issues.

[2] Cherubini is a Nova Scotia company that produces steel products. It brought a grievance dated May 1, 2007, pursuant to Articles 7, 8 and 12 of the Collective Agreement seeking damages for alleged harassment by a union local, the United Steelworkers of America, Local 4122 (the Local) and its international affiliate, the United Steelworkers of America (the International). The alleged misconduct included improper grievances and occupational health and safety complaints, conspiracy to harm, breach of duty of care and intentional interference with economic interests. The Arbitrator issued an interim award dealing with several preliminary objections. The International objected to being joined as a party to the grievance, and the Local requested that its preliminary objections to the arbitrability of the grievance (specifically, that the grievance was not filed within the necessary time limits) be dealt with before the merits.

[3] The Nova Scotia Labour Relations Board certified the Local as bargaining agent for the plant and maintenance employees of Dominion Bridge Ltd. on June 1, 1948. Dominion went bankrupt in 1998, and Amherst Fabricators Ltd. acquired the facility through the receiver in bankruptcy. Cherubini, the successor employer to Amherst Fabricators, negotiated a collective agreement with the Local, dated April 24, 1999 (the Collective Agreement). The former Dominion Bridge facility closed in 2002. The Local still exists, but does not bargain for anyone. The 1999 Collective Agreement remains in force.

The Arbitrator's Award

[4] The Arbitrator noted that in the three years after the Collective Agreement, the Local "filed a large number of grievances and made several complaints to the Nova Scotia Department of Labour about occupational health and safety..." This resulted in 48 compliance orders and "a decision that Amherst Fabricators should be investigated in a Joint Evaluation by the Occupational Health and Safety Division of the Nova Scotia Department of Environment and Labour."

[5] Cherubini commenced an action in August 2002 against the Nova Scotia Attorney General, the International and the Local. The Statement of Claim alleged (as summarized by the Arbitrator) that the Attorney General "had committed the torts of abuse of public authority and negligence; that the USWA and Local 4122 had committed the tort of negligence, had committed the tort of conspiracy by conspiring together and with Attorney General ... to harass the Employer and that each of the Attorney General of Nova Scotia, the USWA and Local 4122 had committed the tort of intentional interference with the Employer's economic interests." The defendants sought summary judgment on the basis that the subject matter of the claim was under the exclusive jurisdiction of an arbitrator. The application was dismissed in Chambers (2006 NSSC 240), but an appeal was allowed (2007 NSCA 38, application for leave to appeal dismissed, [2007] S.C.C.A. No. 278). Cromwell, J.A. (as he then was), for the Court, held that Cherubini's claims arose out of the collective agreement, and that the grievance and arbitration process under the collective agreement could provide effective relief. He added that these conclusions were not displaced by the fact that the Union was not a party to the agreement.

[6] The Arbitrator concluded that the International was not a party to the Collective Agreement. He relied in part upon the comments of Cromwell, J.A. in the Court of Appeal decision on summary judgment. Justice Cromwell said, at para. 86:

> ... I conclude that the essential character of the respondent's claims against the unions arise out of the collective agreement, that this is not altered by the fact *that the respondent has sued* the Province and *the international union which are not parties to that agreement* and that the grievance process could have afforded effective redress. The complaints made by the respondent in its court action against the unions therefore fall within the exclusive jurisdiction of an arbitrator under the collective agreement. The Supreme Court has no jurisdiction to entertain the action. In light of that conclusion, it is not necessary to address any of the other grounds on which the appellants sought summary judgment. [Emphasis by arbitrator.]

[7] The Arbitrator rejected Cherubini's submission that the passage in question was *obiter dicta*. He said, at para. 34 of the Interim Award:

> ... The passages from the judgment of the Count of Appeal quoted above demonstrate that, in dealing with the issue of whether the Employer's claims against "the Appellants", that is both Local 4122 and the USWA, were within the exclusive jurisdiction of a labour arbitrator the Court was directly concerned with two questions. The first was whether in their essential character, those claims arose from the interpretation, application, administration, or alleged violation of the collective agreement. The second was whether the Employer had an effective remedy. In deciding the second question the Court directly addressed the issue of whether the USWA was party to the Collective Agreement..

[8] The arbitrator illustrated this conclusion by reference to the reasons of Cromwell, J.A., who wrote, at para. 47 of the Court of Appeal decision:

> Who the parties are and their relationships to the collective agreement are relevant considerations in determining the essential character of the dispute. However, it is the essential character of the dispute, not the identity of the parties who are being sued that remains the central consideration. This principle is in my view correctly stated in George W. Adams, *Canadian Labour Law*, 2nd ed. (Toronto: The Cartwright Group, 2006) at 12.572c: "[b]ringing an action against someone who is not a party to the collective agreement does not give a court jurisdiction if the essential character of the dispute at hand still arises under the collective agreement."

[9] Cromwell, J.A. went on to frame the issue as "whether the claims against the international union are such that the essential character of the dispute between the respondent and the unions cannot be said to arise out of the collective agreement" (para. 52). He said, at para. 54:

> ... the allegations against both unions are based firmly in the collective agreement. There are no distinctive allegations against the international union that are not based on the collective agreement. The local union is a chartered local of the international union. The respondent's unionized employees were members of the international union. The international union has defined roles under the collective agreement. ... The two unions are, for practical purposes, one entity and the respondent's claims against them are identical.

[10] Cromwell J.A. went on to find that the arbitrator's lack of jurisdiction over the International would not prevent Cherubini from obtaining effective redress

through the grievance and arbitration process. He concluded that a "grievance against the local union could have provided a real remedy in this case" (paras. 82-85).

[11] The Arbitrator concluded that the Court of Appeal had addressed the issue of whether the International Union was a party to the collective agreement, and had concluded that it was not. He further held that issue estoppel applied, and, accordingly, "the issue of whether the USWA is party to the Collective Agreement was decided by the Court of Appeal, that decision is final and the Employer, the USWA and Local 4221 were all parties to the action as they are to this preliminary proceeding before me." (Award, p. 20). Cherubini argued that the application of issue estoppel is subject to a discretion, but the Arbitrator declined to exercise such discretion.

[12] Having dealt with issue estoppel, the Arbitrator went on to find that, in any event, the International was not a party to the Collective Agreement:

> The 1999 Collective Agreement under which the Employer has brought this Grievance states on its cover page, and on its second or title page, that it is between Amherst Fabricators Limited and "United Steelworkers of America, Local 4122." In Article 2 "the Company", which is nowhere defined other than on

> those two pages, recognizes "the Union", which is also nowhere defined other than on those two pages, "as the exclusive bargaining agent" for the bargaining unit. Similarly, the "Back to Work Protocol" appended to the Collective Agreement is entitled "Letter of Agreement Between Amherst Fabricators Limited and United Steelworkers of America, Local 4122." There are references to the United Steelworkers of America, i.e. the International Union, in the Collective Agreement but none that impose any obligations upon it or give it any rights that, presumptively, it could enforce directly, although I assume Local 4122 could have grieved a failure by the Employer to comply with the Collective Agreement in respect of any of the Employer's commitments which involve the USWA. [Award, pp. 23-24.]

[13] The Arbitrator noted various references to the International in the text of the Collective Agreement. He went on, at pp. 25-26:

> ... Contrary to the Employer's submission, the word "Union" is used consistently throughout the Collective Agreement, and, except for those examples of specific reference to the International Union, the word "Union' refers consistently to Local 4122. None of those examples leads to the conclusion that the USWA is party to the Collective Agreement.
>
> Furthermore, Local 4122, and not the USWA, was certified on April 26, 1948 by the Nova Scotia Labour Relations Board as the exclusive bargaining agent for employees at this workplace, when it was owned by Robb Engineering Works Ltd. All subsequent collective agreements with Robb Engineering and with Dominion Bridge from March 16, 1991 to September 4, 1998 identified Local 4122 as "The Union" and recognized it as the exclusive bargaining agent. The Collective Agreement before me here did not change that.
>
> The Nova Scotia Labour Relations Board routinely certifies local unions, not their parent unions, as bargaining agents, and there is no evidence that the USWA was ever certified or recognized as bargaining agent for this bargaining unit. Section 27 of the *Trade Union Act* ... provides:

> 27. Where a trade union is certified under this Act as the bargaining agent of employees in employees in a unit,
>
> (a) the trade union ... shall have exclusive authority to bargain collectively on behalf of employees in the unit and to bind them to a collective agreement until the certification of the trade union in respect of the employees in the unit is revoked;
>
> ... Sections 41 and 42(3) of the Nova Scotia *Trade Union Act*, and the definition sections that are to be read with them, are also inconsistent with the notion that there can be two bargaining agents for one bargaining unit; and it is clear that the USWA and Local 4122 are separate legal entities...

[14] The Arbitrator wrote that Cherubini had not produced any authority "in which it has been held that a collective agreement between an employer and a local union, is binding on its parent national or international union, where the parent union was not explicitly a party to the Collective Agreement" (p. 26). The arbitrator accepted as good law the proposition that "a collective agreement with a local union does not bind its parent union, even though [...] a representative of the parent has acted for the local...." (p. 29). He noted that the International "does not appear anywhere in the Collective Agreement as a party, unless it is accepted that the references to 'the Union' are ambiguous and might refer to the International Union. I do not find them to be ambiguous in that respect...." He also cited the *Trade Union Act*, which appeared "to contemplate that, except in the construction industry, there can be only one bargaining agent and only one party on the union

side to a collective agreement." Moreover, he held, "the constitution of the USWA cannot override section 27 of the ... *Trade Union Act*, ... which clearly gave the certified Local Union, not the USWA, exclusive authority to make a collective agreement on behalf of the employees at Robb Engineering and its successor employers" (Award, pp. 31-32). The Arbitrator also rejected the argument that Cal Luedee, the United Steelworkers representative, had held out the International as a party to the Collective Agreement. The International could provide advice and assistance without "becoming a party to the Collective Agreement to which it was not a signatory and which it was not certified to bargain" (Award, p. 33). The Arbitrator concluded:

> The fact that the USWA was not a party to the Collective Agreement does not, of course, mean that it could not have been party to the tort of conspiracy, or any other tort, with the Local Union. It simply means that I, as arbitrator under this Collective Agreement, have no jurisdiction over it.

> The Nova Scotia Court of Appeal held that the Employer is not deprived of a remedy because the International Union, not being party to the Collective Agreement, could not be a party to this grievance arbitration. The Court held that to be so because the Employer has a clear right to grieve against the Local Union, and, if the Grievance is sustained, to be granted a remedy. I do agree with counsel for the Employer that there is an air of practical unreality about this conclusion because, as Mr. Cormier's testimony made clear, the Local Union has no assets. The result, Employer counsel submitted, is that the International Union could commit torts with impunity. That, perhaps unfortunately, is the result of the law relating to union status; just as the law of corporate status has denied many creditors of insolvent subsidiary corporations resort against their wealthy corporate parents or private owners.

> I conclude that I have no jurisdiction to treat the USWA as a party to this arbitration because that Union is not a party to the Collective Agreement under which I am acting. Furthermore, for the reasons I have already given above, I am estopped by the decision of the Nova Scotia Court of Appeal from finding that the USWA is a party to this Collective Agreement. [Award, pp. 33-34.]

[15] The Arbitrator also ordered that the matter be bifurcated as requested by the unions.

GROUNDS OF REVIEW

[16] In the Amended Notice for Judicial Review, filed May 31, 2010, Cherubini asserts that the arbitrator committed reviewable error, exceeded or declined jurisdiction or otherwise committed misconduct on about a dozen specified grounds, which, are summarized as follows in Cherubini's written submission:

> (1) What is the standard of review?
>
> (2) Is the United Steelworkers of America a proper party to the collective agreement, the grievance and the pending arbitration? (Grounds(a) through (j)).
>
> (3) Should the preliminary objection raised by the Local, alleging that the grievance is untimely, be bifurcated from the full hearing of the grievance on the merits? (Grounds (j) and (k)).

[17] After considering the applicable standards of review, I will address the bifurcation issue first, then the substantive grounds relating to the status of the International.

Collateral attack

[18] The International says Cherubini's judicial review application is a collateral attack on the Court of Appeal decision. The Unions say Cherubini admitted in the hearing before the Chambers Judge that the International was not a party to the collective agreement, and that it relied on that fact in opposing the summary judgment application and on appeal. As such, the International says, it is incorrect to characterize that fact as collateral or *obiter* to the Court of Appeal decision. It was admitted by all the parties, and was "a key consideration in the issues before the Court of Appeal," the International submits.

[19] Cherubini's position in the summary judgment proceeding was that an arbitrator lacked jurisdiction over the International. Cromwell, J.A. agreed, but held that arbitration could provide Cherubini with an effective remedy, and that the

claims against the International did not change the essential character of the dispute. The International says Cherubini could have directed the Court of Appeal's attention to the arguments upon which it now relies in support of the position that it is a party to the collective agreement, "but chose not to do so because those arguments were contrary to the theory of its case." **I am not satisfied that Cherubini's change of position is sufficient basis to dismiss the application as a collateral attack.**

The proceeding before Duncan, J.

[20] The Unions submit that the evidence and findings arising from the proceeding before Duncan, J. involving Cherubini and the Province of Nova Scotia (see 2009 NSSC 386) was not before the arbitrator, and is not properly before the court on this judicial review. It takes the position that all references to that proceeding should be disregarded. **I agree. I will not take into account the contents of Duncan, J.'s decision.**

STATUTORY AND COLLECTIVE AGREEMENT PROVISIONS

[21] Certain sections of the *Trade Union Act*, R.S.N.S. 1989, c. 475, are relevant to the following discussion. I will set them out here for convenience:

> Effect of certification
>
> 27 Where a trade union is certified under this Act as the bargaining agent of the employees in a unit,
>
> > (a) the trade union shall immediately replace any other bargaining agent of employees in the unit and shall have exclusive authority to bargain collectively on behalf of employees in the unit and to bind them by a collective agreement until the certification of the trade union in respect of employees in the unit is revoked....
> >
> > ...
>
> Parties bound by collective agreement
>
> 41 A collective agreement entered into by an employer or an employers' organization and a trade union as bargaining agent is, subject to and for the purposes of this Act, binding upon
>
> (a) the bargaining agent and every employee in the unit of employees; and
>
> (b) an employer
>
> > (i) who has entered into the agreement,

(ii) on whose behalf the agreement has been entered into, or

(iii) who has, by contract with an employer or an employers' organization, agreed to be bound by a collective agreement.

Final settlement provision

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.

Powers and duty of arbitrator or arbitration board

> 43 (1) An arbitrator or an arbitration board appointed pursuant to this Act or to a collective agreement
>
> ...
>
> (c) has power to determine any question as to whether a matter referred to him or it is arbitrable...

[22] The Collective Agreement provides, at s. 8.02, that an arbitrator "shall hear and determine the difference or allegation and shall issue a decision in an expedient manner. The decision shall be final and binding upon the parties and upon any employee affected by it." Other provisions of the Collective Agreement and the Constitution of the International may also be relevant. These will be referenced when they arise in the course of the reasons.

STANDARD OF REVIEW

[23] The leading case on determining the standard of review applicable to a decision of a tribunal such as an arbitrator is *Dunsmuir v. New Brunswick*, 2008 SCC 9. *Dunsmuir* eliminated the standard of patent unreasonableness, leaving reasonableness and correctness as the only standards of review. The majority, *per*

Bastarache and Lebel, JJ., designed a two-stage analysis. At the first stage, the court must determine whether the standard of review for the tribunal, on the particular question, has already been established in the caselaw. If it has not been previously established, at the second stage, the court proceeds “to an analysis of the factors making it possible to identify the proper standard of review” (para. 62). This analysis involves a consideration of the four components of the former "pragmatic and functional" analysis, now known as the "standard of review analysis." The majority wrote, at para. 64:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[24] Describing "reasonableness," the majority wrote, at para. 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of

> justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[25] The Court commented further on "reasonableness" in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, where Binnie, J. said, at para. 59:

> Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law".... There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[26] The majority in *Dunsmuir* emphasized the fundamental importance of deference in judicial review, at paras. 48-49:

> Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers".... We agree with David Dyzenhaus where he states that the concept of "deference as

> respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision...
>
> Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime"... In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[27] The majority went on to state that the standard of correctness remained for "jurisdictional and some other questions of law." A court applying a correctness standard "will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct" (para. 50).

[28] A standard of reasonableness requires deference to the decision-making process under review. A standard of correctness does not. It is not necessary to conduct a full analysis in every case, if one has been done before:

> An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard.... This simply means that the analysis required is already deemed to have been performed and need not be repeated. [para. 57.]

[29] The four elements of the "standard of review analysis" are (1) the presence or absence of a privative clause, (2) the purpose of the tribunal as determined by interpretation of enabling legislation, (3) the nature of the question at issue and; (4) the expertise of the tribunal. Concerning privative clauses, the majority said, at para. 52:

> The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

[30] Turning the nature of the question, the majority remarked that "[w]here the question is one of fact, discretion or policy, deference will usually apply automatically." The same standard applied to "questions where the legal and

factual issues are intertwined" and "cannot be readily separated" (para. 53). The majority continued, at para. 54:

> Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity... Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

[31] Summarizing, the majority said, at para. 55:

> A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> - The nature of the question of law. A question of law that is of "central importance to the legal system . . . and outside the . . . specialized area of expertise" of the administrative decision maker will always attract a correctness standard.... On the other hand, a question of law that does not rise to this level may be compatible

> with a reasonableness standard where the two above factors so indicate.
>
> If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[32] Tribunals must also correctly decide "true questions of jurisdiction or *vires*," with jurisdiction understood "in the narrow sense of whether or not the tribunal had the authority to make the inquiry." A question of "true jurisdiction" arises "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction." Emphasizing that such questions would be narrow ones, the majority reiterated "the caution of Dickson, J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so" (para. 59).

[33] A correctness standard would also be applied to a question "of general law ‘that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise.'" The reason for this was that

"[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers." Examples would include "the doctrines of *res judicata* and abuse of process - issues that are at the heart of the administration of justice" (para. 60).

[34] The Nova Scotia Court of Appeal has interpreted *Dunsmuir* several times. The following summary of the analysis appears in *Amherst (Town) v. Nova Scotia (Superintendent of Pensions)*, 2008 NSCA 74, 2008 CarswellNS 431, application for leave to appeal dismissed, 287 N.S.R. (2d) 400 (note), 2009 CarswellNS 39, at para. 42:

> If the existing jurisprudence is unfruitful, then the court should assess the following factors to select correctness or reasonableness (¶ 55):
>
> > (a) Does a privative clause give statutory direction indicating deference?
> >
> > (b) Is there a discrete administrative regime for which the decision maker has particular expertise? This involves an analysis of the tribunal's purpose disclosed by the enabling legislation and the tribunal's institutional expertise in the field (¶ 64).
> >
> > (c) What is the nature of the question? Issues of fact, discretion or policy, or mixed questions of fact and law, where the legal issue cannot readily be separated, generally attract reasonableness (¶

> 53). Constitutional issues, legal issues of central importance, and legal issues outside the tribunal's specialized expertise attract correctness. Correctness also governs "true questions of jurisdiction or vires", ie. "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter". Legal issues that do not rise to these levels may attract a reasonableness standard if this deference is consistent with both (1) any statutory privative provision and (2) any legislative intent that the tribunal exercise its special expertise to interpret its home statute and govern its administrative regime. Reasonableness may also be warranted if the tribunal has developed an expertise respecting the application of general legal principles within the specific statutory context of the tribunal's statutory regime (¶ 55-56, 58-60).

[35] The standard of review analysis was elaborated upon in *Casino Nova Scotia v. Nova Scotia (Labour Relations Board)*, 2009 NSCA 4, [2009] N.S.J. No. 21, at paras. 29-31 (citations omitted):

> In applying reasonableness, the court examines the tribunal's decision, first for process to identify a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion, then second and substantively to determine whether the tribunal's conclusion lies within the range of acceptable outcomes.
>
> Several of the Casino's submissions apparently assume that the "intelligibility" and "justification" attributed by *Dunsmuir* to the first step allow the reviewing court to analyze whether the tribunal's decision is wrong. I disagree with that assumption. "Intelligibility" and "justification" are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to process... They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes...

> Under the second step, the court assesses the outcome's acceptability, in respect of the facts and law, through the lens of deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime." This respects the legislators' decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness...

[36] The Court added, in *Maritime Paper Products Ltd. v. Communications, Energy and Paperworkers' Union, Local 1520*, 2009 NSCA 60, [2009] N.S.J. No. 246, that "[r]easonableness tracks the tribunal's reasoning, and asks whether the tribunal's finding or conclusion inhabits the set of rational outcomes. If the answer is yes, it does not matter that there may be other rational outcomes or that the judge may prefer another interpretation..." (para. 35).

Standard of review: issue estoppel

[37] The parties agree that the standard of review of the Arbitrator's application of the doctrine of issue estoppel is correctness. *Res judicata* is a question of general law. Arbour, J., for the majority, said the following, in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, dealing with a judicial review of an arbitrator's decision to reinstate a grievor's employment:

> [T]he reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the

> criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she must correctly answer the question of law raised...

[38] I am satisfied that the Arbitrator's decision to apply issue estoppel should be reviewed on a standard of correctness.

Standard of review: status of the International

[39] The Unions submit that reasonableness is the proper standard of review for the issue of whether the International was a party to the collective agreement. They say there is authority for the conclusion that an arbitrator interpreting a collective agreement is subject to a standard of reasonableness: *Dunsmuir*, at para. 68; *Maritime Paper Products*, *supra*, at paras. 19-20. These cases do not, however, precisely determine the standard applicable on the facts of the present circumstances. I will proceed to the second stage of the analysis: a consideration

of the four factors that determine the standard of review: privative clauses, the purpose of the tribunal, expertise and the nature of the question.

[40] Both the *Trade Union Act* (at s. 42(2)) and the collective agreement (Art. 8.02) contain privative clauses that declare the Arbitrator's decision to be "final and binding." This language has been held to be less than a "'full' privative clause" but nevertheless, "when read in the context of the purpose and scheme of the [*Trade Union Act*] and the system of collective bargaining labour relations which it regulates, indicative of a high degree of deference to an arbitrator's interpretation of a collective agreement": *Canadian Union of Public Employees, Local 933 v. Cape Breton (Regional Municipality)*, 2006 NSCA 80, [2006] N.S.J. No. 259, at para. 59.

[41] The purpose of labour arbitration is to "provide for the speedy resolution of disputes over the administration of a collective agreement with minimal judicial intervention": *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)*, [1993] 2 S.C.R. 230, [1993] S.C.J. No. 53, at para. 35.

[42] The expertise of a labour arbitrator lies in “the interpretation of collective agreements, and the resolution of factual disputes pertaining to them”: *Dayco* at para. 35. The *Trade Union Act* grants an arbitrator the “power to determine any question as to whether a matter referred to him or it is arbitrable”: s. 43(1)(c). It has been held that deference to labour arbitrators “is appropriate not only to an arbitrator when interpreting provisions of a collective agreement but may also extend to an arbitrator's interpretation of the constituent legislation intimately connected with the arbitrator's mandate”: *Halifax Employers Assn. v. International Longshoremen's Assn., Local 269 (Halifax Longshoremen Assn.)*, 2004 NSCA 101, [2004] N.S.J. No. 316, at para. 53. In this case, that would suggest that the Arbitrator’s expertise would encompass both the interpretation of the Collective Agreement and the *Trade Union Act*.

[43] The fourth factor of the standard of review analysis is the nature of the question at issue. The Local submits that the question of whether the International is a party to the collective agreement principally required the arbitrator to interpret the Collective Agreement, the *Trade Union Act* and the Labour Relations Board orders certifying the Local as the bargaining agent. According to the Local, the interpretation of the collective agreement, the *Trade Union Act*, and related

documents was a question of law "in the core of the Arbitrator's jurisdiction." Similarly, the International says the determination of the parties to a collective agreement is a question of mixed fact and law "relating to the interpretation, application or administration" of the agreement (as per s. 42(2) of the *Trade Union Act*) and is within the arbitrator's jurisdiction.

[44] Cherubini argues that the issue is one of jurisdiction. It says the Arbitrator's decision that the International was not a party to the collective agreement, and that he lacked jurisdiction over it, was a matter of jurisdiction, subject to a correctness standard. *Dunsmuir* indicates that "true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction..." (para. 59).

[45] The Unions' position is that the Arbitrator was determining arbitrability (the Local), or a question of mixed fact and law within his jurisdiction (the International), rather than a true question of jurisdiction. In *Governors of the University of Alberta v. Assn. of the Academic Staff of the University of Alberta*,

2002 ABCA 99, [2002] A.J. No. 515, the Alberta Court of Appeal said, at paras. 11-12:

> To characterize something as "jurisdictional" in nature does not automatically make it subject to a correctness standard. One must consider this issue in light of the factors identified by the Supreme Court of Canada. In other words, the task of determining arbitrability is distinct from that of determining the arbitrator's jurisdiction to rule on arbitrability. Thus, the decision of an arbitrator who has jurisdiction to determine arbitrability does not result in a jurisdictional error, if wrong...
>
> In this case, the jurisdiction of the arbitrator to rule on arbitrability has never been in issue. The arbitrator's decision on arbitrability was an exercise of his jurisdiction, not a determination of it...

[46] The distinction between arbitrability and true arbitral jurisdiction was addressed again in *O.P.S.E.U. v. Seneca College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 509, 2006 CarswellOnt 2709 (Ont. C.A.), application for leave to appeal dismissed, 2006 CarswellOnt 7214 (S.C.C.), a judicial review of an arbitration board decision that it lacked jurisdiction to award aggravated and punitive damages. The Ontario Court of Appeal held that the standard of review was patent unreasonableness, not correctness, as had been decided by the Divisional Court. Laskin, J.A. noted that labelling the issue as one of jurisdiction did not automatically impose a correctness standard (paras. 30-31). This brings to mind *Dunsmuir*'s emphasis on "true" questions of jurisdiction "where the tribunal

must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter." Laskin, J.A. went on to hold that the factors of the "pragmatic and functional approach" called for a high degree of deference. On the question of the nature of the issue before the tribunal, Laskin, J.A. distinguished *Dayco (Canada) Ltd. v. C.A.W.*, [1993] 2 S.C.R. 230, 102 D.L.R. (4th) 609, which the Divisional Court had relied upon. He said, at paras. 45-48:

> First, I do not think that the passage from *Dayco*, *supra* relied on by the Divisional Court governs the nature of the question in this case. In *Dayco*, the union had launched a grievance over the company's failure to pay retirement benefits. These benefits were promised in a collective agreement that had expired. The Supreme Court had to decide whether the arbitrator had jurisdiction to hear the grievance. However, LaForest J. distinguished between two kinds of "jurisdictional" questions: the broad question, whether a promise of retirement benefits could survive the expiry of an agreement; and the narrow question, whether the terms of the specific collective agreement between the parties provided for the vesting of retirement benefits.

[47] The passage from *Dayco* relied on by the Divisional Court concerned the broad jurisdictional question, whether a collective agreement on which to base the grievance even existed. As an agreement was the foundation of the arbitrator's jurisdiction to hear the grievance, LaForest, J. held that the question was a jurisdiction-conferring issue on which the arbitrator was not entitled to deference (at p. 620-621).

[48] However, LaForest, J. also discussed the narrower jurisdictional question: the interpretation of the specific terms of the collective agreement to determine whether a matter is arbitrable. On that question, he stated that the arbitrator would be entitled to deference:

> It is clear that an arbitrator has jurisdiction *stricto sensu* to interpret the provisions of a collective agreement in the course of determining the arbitrability of matters under that agreement. In that case the arbitrator is acting within his or her "home territory", and any judicial review of that interpretation must only be to a standard of patent unreasonableness (p. 620).

> In my view, it is in the narrower sense of jurisdiction that the Board of Arbitration concluded it had no jurisdiction to award aggravated and punitive damages. In other words, the Board was determining a question of arbitrability. It was not deciding a jurisdiction-conferring or jurisdiction-limiting issue in the broad sense. In a broad sense, the collective agreement gave the Board jurisdiction to deal with Olivo's grievance. That was not in dispute. What was in dispute was the narrower question, whether this collective agreement gave the Board the jurisdiction to award the specific damages OPSEU claimed.

[49] Laskin, J.A. also concluded that the respondent's reasoning was inconsistent with the concept of "arbitrability." He stated, at paras. 50-52:

> The third reason I disagree with OPSEU's position is that it seriously compromises the notion of arbitrability. Every question about whether a collective agreement gives an arbitrator authority to grant a particular remedy for an unjust dismissal can be labelled a "jurisdictional question." If "jurisdiction" in this sense — and it was the sense in which the Board used the word — means that a Board of Arbitration's answer to the question receives no curial deference, the principle that its decisions on matters of arbitrability are entitled to deference, will have little, if any, practical meaning. A "labeling approach" to determining the

> proper standard of review cannot be permitted to undermine or displace the pragmatic and functional approach.
>
> The dividing line between the nature of questions pointing to significant deference and the nature of questions pointing to little or no deference is at times a hard line to draw. If, however, doubt arises about the proper characterization of a question or whether the question points to more or to less deference, the wise and often-repeated caution of Dickson, J. in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.), at 233 becomes apt:
>
> > The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.
>
> ...
>
> Although I do not consider the characterization difficult in this case, if necessary I would invoke Dickson, J.'s caution. In my view, in deciding whether the collective agreement inferentially gave it the authority to award aggravated and punitive damages, the Board was deciding a question of arbitrability. Its resolution of that question was therefore entitled to deference.

[50] The Local submits that each of the factors of the standard of review analysis points to deference. The Arbitrator's decision is protected by a privative clause, suggesting deference. Such deference is consistent with the purpose of labour arbitration and with the expertise of the Arbitrator. The determination of the identities of the parties to the collective agreement required the Arbitrator to interpret provisions of his "home statute," the *Trade Union Act*, as well as the

Collective Agreement. **These are matters well within the Arbitrator's jurisdiction, closely related to, or even subsumed within, the question of arbitrability and of whether the matters in dispute arise out of the interpretation or application of the Collective Agreement. I am not convinced that this was a "true" question of jurisdiction. The Arbitrator was not required to inquire into whether he had authority to deal with the matter. Identifying the parties to a Collective Agreement is a proper exercise of an arbitrator's jurisdiction. As such, the standard of review would be reasonableness.**

Standard of review: bifurcation

[51] As to the decision to bifurcate the preliminary issue of the timeliness of the grievance from the hearing on the merits, all parties agree that reasonableness is the appropriate standard of review for an exercise of the arbitrator's discretion.

BIFURCATION

[52] According to the Award, the parties agreed that the question of bifurcation, as requested by the unions, was within the arbitrator's discretion, and that the decision should be based on "fairness to the parties, and the practicality and economy of time," as stated in *Toronto (City) v. C.U.P.E., Local 79* (2004), 128 L.A.C. (4th) 217, 2004 CarswellOnt 4325 (Ont. Arb. Bd., Kirkwood Member), at para. 6.

[53] The Arbitrator decided to bifurcate the hearing. He noted that Cherubini's grievance was based on extensive evidence and "reasonably complex legal argument" that would require "many days of hearings," and that the Unions' preliminary objection to the timeliness of the grievance would require "serious consideration." He took the view that "bifurcation could save a great deal of time and money if the preliminary objection were to be sustained," while it was "much less evident that significant time and money will have been wasted if the preliminary objection were to be disallowed." He continued:

> While it may appear simplistic in light of the sophisticated submissions the parties have made on the question of whether I should order the continuation of the hearing in this matter to be bifurcated, I must say that, in the past, when dealing with a contested request to bifurcate I have focussed on the projected length and continuity of the hearing on the merits. If it appears that both the preliminary objection and the merits will be disposed of in a matter of several days or blocks of days, which, have already been, or can be, scheduled in advance, I have usually

> decided not to bifurcate the hearing. To do so would usually mean that counsel would not agree on the days to be scheduled for the hearing on the merits until my award on the preliminary objection has been made. Serious delay will result from then trying to find hearing days in their busy schedules which fit my calendar...
>
> Where it is evident that, in any event, the hearing in an arbitration proceeding is likely to be prolonged by having to find additional days after the initially scheduled days have been used bifurcation is much less likely to result in delay. I simply use the intervening weeks or months prior to those new days to write the preliminary award. Clearly, the parties here will not be able to schedule the many days both counsel project for the hearing of the merits in this matter with any certainty, and it is likely that the hearing will be extended as the case unfolds, so bifurcation is unlikely to cause much additional delay. [Award, pp. 35-36.]

[54] The Arbitrator rejected several arguments offered by Cherubini, including the suggestion that the issues were not sufficiently severable. He concluded that most of the issues in the preliminary objection could be decided "on legal considerations quite distinct from the issues on the merits raised by the Employer's Grievance, would not involve hearing much of the evidence relevant to the merits and, if successful, would be dispositive of the whole matter of the Grievance." [Award, p. 37.]

[55] The Arbitrator reviewed six issues on which the employer proposed to lead evidence and refer to authorities: (1) whether the time limit in the collective agreement was directory or mandatory; (2) if the time limit was mandatory, whether the Local had waived it by conduct; (3) whether the time limits were void;

(4) whether the time limit should be extended because Cherubini dealt reasonably with the Unions while the plant was operating; (5) whether the time limit should be extended because Cherubini acted reasonably in attempting to secure a remedy; and (6) whether the time limit had not passed when the grievance was filed. He distinguished *Schenker Distribution and Teamsters, Local Union No. 31* (2004), 77 C.L.A.S. 386, where an arbitrator refused to bifurcate because the evidence on the preliminary issue could not be adduced separately from the merits. He said:

> [G]iven the nature of this matter, I do not think that bifurcating the hearing of the Unions' preliminary objections and the merits of the Employer's Grievance will greatly prolong the hearing in this matter if the preliminary objection is not upheld. If it is upheld, the hearing will be very much shortened. In my opinion "fairness to the parties, and the practicality and economy of time" will be best served by bifurcating the hearing in this matter.
>
> To the extent that there does prove to be an overlap in the evidence put before me for purposes of the Unions' preliminary objections and the merits, I differ from Arbitrator Hope in *Schenker Distribution and Teamsters, Local Union No. 31*. I do not hold that the fact that some of the evidence of the preliminary issue of time limits may not be able to be adduced separate and apart from the merits means I should not bifurcate the hearing. The intertwining of the evidence seems to me to be less important than the intertwining of the issues. If I could not decide on the preliminary objection without, in effect, ruling on the merits I would not bifurcate; but such is not the case here.
>
> For most of the purposes of the preliminary objections I will be able to proceed on the assumption that the Employer's allegations are factual, whatever may prove to be the case when the merits are heard. To the extent that either party will be required to prove disputed facts for purposes of the preliminary objection, I do not accept that the evidence on those facts will have to be reintroduced in the hearing on the merits; i.e. I do not accept that, as Employer counsel states, "during the

> hearing on the merits many of the same witnesses will have to testify about the same events". Bifurcated or not, the hearing before me will be of one Grievance. Subject to some very unlikely development, in ruling on the merits I will rely on any findings of fact I make based on the evidence introduced in the hearing on the preliminary objections; and I will rely my notes of evidence introduced in the hearing on the preliminary objections when I come to rule on the merits. [Award, pp. 39-40.]

[56] Cherubini says the arbitrator's decision to bifurcate the preliminary motion from the hearing of the grievance on its merits was unreasonable. The Unions argue that the decision to bifurcate was reasonable and should not be disturbed.

[57] Cherubini argues that the arbitrator applied the wrong analysis. Counsel cites the test from *Re Hiram Walker & Sons Ltd. v. Distillery Workers, Local 61*, (1973), 3 L.A.C. (2d) 203, [1973] O.L.A.A. No. 71 (Adams Arb.). The arbitrator in that case said, at para. 6:

> [I]f a bifurcation of the hearing will strengthen the integrity of the arbitral process without unduly impinging upon its function of providing "speedy relief", requests that this be done should be given serious consideration. But, they should not be acceded to unless:
>
> > (1) the party requesting the adjournment made this fact known to the other party before the hearing date to enable the other party an opportunity to refrain from having his witnesses in attendance;
> >
> > (2) the merits appear to be severable from the issue of arbitrability;

> (3) the delay will not seriously affect the availability of witnesses; and
>
> (4) no other serious prejudicial effect, uncompensable by money, will be experienced.

[58] Cherubini says that, following *Re Hiram Walker & Sons*, the Arbitrator should have concluded that bifurcation would not strengthen the integrity of the arbitration process, and that it would cause significant delay. Cherubini says that much of the evidence to be led in respect of the timeliness objection will also be relevant to the merits, and will be repeated in each of the bifurcated hearings. Further, Cherubini says, "it is likely that a significant period of time will pass between the bifurcated hearing and the merits hearing," raising the possibility that "important information will be forgotten or taken out of context by the Arbitrator." Cherubini also says the arbitrator should have followed *Schenker Distribution*. The Unions argue that the decision to bifurcate was a reasonable exercise of the arbitrator's discretion. They say the arbitrator's reasoning process was justifiable, intelligible and transparent. As noted above, he indicated that the consideration of "fairness to the parties, and the practicality and economy of time" had been agreed to in the parties' written submissions.

[59] I am satisfied that it was a reasonable exercise of the Arbitrator's discretion to bifurcate in the circumstances. He addressed Cherubini's objections, and concluded that they did not outweigh the advantages of bifurcating. His reasons are coherent, and I am satisfied that this conclusion was within a range of reasonable outcomes. As such, the decision to bifurcate survives analysis for reasonableness.

ISSUE ESTOPPEL

[60] The Arbitrator concluded that the Court of Appeal had addressed the issue of whether the International Union was a party to the collective agreement, and had concluded that it was not. He further held that issue estoppel, as defined in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, applied, and, accordingly, "the issue of whether the USWA is party to the Collective Agreement was decided by the Court of Appeal, that decision is final and the Employer, the USWA and Local 4221 were all parties to the action as they are to this preliminary proceeding before me." (Award, p. 20). Cherubini argued that issue estoppel is subject to a discretion, even where its preconditions are present, citing *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44,

and *Copage v. Annapolis Valley Band*, 2004 NSCA 147. The arbitrator distinguished these decisions on the basis that "they involve courts holding themselves estopped by the findings of administrative tribunals. Here the situation is the reverse. I am a labour arbitrator being asked to exercise my discretion to disregard findings of the Nova Scotia Court of Appeal" (Award, p. 22). In any event, he concluded that there was no basis upon which to exercise such discretion.

[61] The law governing issue estoppel is set out in *Angle v. Canada (Minister of National Revenue - M.N.R.)*, [1975] 2 S.C.R. 248, [1974] S.C.J. No. 95, and *Danyluk*, *supra*. Binnie, J., for the Court, summarized the law as follows in *Danyluk*, at para. 25:

> The preconditions to the operation of issue estoppel were set out by Dickson, J. in *Angle*, *supra*, at p. 254:
>
> > (1) that the same question has been decided;
> >
> > (2) that the judicial decision which is said to create the estoppel was final; and,

> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[62] Cherubini says the arbitrator erred in applying issue estoppel. It maintains that the Court of Appeal's comments about the status of the International Union were collateral to the decision about the fundamental nature of the dispute, and were not fully canvassed in evidence or argument. Cherubini cites *Angle*, *supra*, where the defendant took different positions in two proceedings, attempting to use issue estoppel in the second proceeding. Dickson, J. (as he then was) said, for the majority, at pp. 254-255:

> Is the question to be decided in these proceedings ... the same as was contested in the earlier proceedings? If it is not, there is no estoppel. It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment.... The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings: per Lord Shaw in *Hoystead v. Commissioner of Taxation*. The authors of Spencer Bower and Turner, *Doctrine of Res Judicata*, 2nd ed. pp. 181, 182, quoted by Megarry J. in *Spens v. I.R.C.*, at p. 301, set forth in these words the nature of the enquiry which must be made:
>
> > …whether the determination on which it is sought to found the estoppel is "so fundamental" to the substantive decision that the latter cannot stand without the former. Nothing less than this will do.

[63] In *Danyluk*, Binnie, J. wrote that "[t]he question out of which the estoppel is said to arise must have been 'fundamental to the decision arrived at' in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ('the questions') that were necessarily (even if not explicitly) determined in the earlier proceedings" (para. 24). He added, at para. 54:

> A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court.... Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common.... Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.

[64] In the Court of Appeal decision, Justice Cromwell stated that "[a]n arbitrator would not have jurisdiction over the international union and the Province, which the respondent has sued" (para. 80), and considered whether this circumstance "would have prevented the respondent from obtaining effective redress through the grievance and arbitration process" (para. 82). Cherubini says these statements appeared in a "factual void," and that the International Union's constitutional

requirement that it be a party was not raised, nor were the various factual connections between the International and the collective agreement.

[65] In determining whether the dispute arose from the collective agreement, the Court of Appeal applied the analysis originating in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. Justice Cromwell noted that the court retains a residual discretion in "exceptional cases" to "take jurisdiction even in cases in which a labour arbitrator otherwise has exclusive jurisdiction: the courts retain residual authority to provide remedies which the arbitrator is not empowered to grant' (para. 68). The Arbitrator wrote that the Court of Appeal "was directly concerned with two questions. The first was whether in their essential character, those claims arose from the interpretation, application, administration, or alleged violation of the collective agreement. The second was whether the Employer had an effective remedy." He concluded that "[i]n deciding the second question the [Court] directly addressed the issue of whether the USWA was party to the Collective Agreement" (para. 34).

[66] Cherubini says the Court of Appeal was not required to decide whether the International was a party to the collective agreement, or whether an arbitrator

would have jurisdiction over it, in order to decide the summary judgment application. All that was required was one "responding" party, that being the Local. As such, the status of the International Union was a collateral issue, and issue estoppel should therefore not apply, as indicated by *Angle* and *Danyluk*.

[67] The Unions say the Arbitrator was correct to apply issue estoppel. The parties to the summary judgment application - Cherubini, the Local and the International - are the same as the parties to the Arbitrator's interim decision; the Court of Appeal decision was final; and the same question was decided. The Unions argue that the question of whether the International was a party to the collective agreement was fundamental to the issues before the Court of Appeal, being intertwined with the issue of whether the claims against the Unions could proceed to the courts. That issue required the court to determine the essential character of the dispute, whether the dispute arose under the collective agreement and whether arbitration could provide effective redress.

[68] The Court of Appeal noted that the fact that Cherubini had sued both Unions did not change the essential character of the dispute, since all the allegations arose out of the collective agreement, and there were "no distinctive allegations against

the international union that do not arise out of the collective agreement and the relationship between the international union and the local and its members does not justify any other conclusion" (para. 53). The Court of Appeal concluded that the arbitrator's lack of jurisdiction over the International would not prevent Cherubini from obtaining effective redress through the arbitration and grievance process. As such, Cromwell, J.A. concluded, "[t]he complaints made by the respondent in its court action against the unions ... fall within the exclusive jurisdiction of an arbitrator under the collective agreement." (paras. 82-86). As such, the Local submits, the fact that the International is not a party to the Collective Agreement was material to the jurisdictional issue decided by the Court of Appeal" and was "essential to the Court of Appeal's determination that the case was appropriate for summary judgment. Had there been any material facts in dispute, the Court would not have granted summary judgment."

[69] **I am satisfied that the Arbitrator's conclusion that the technical requirements of issue estoppel are met was correct. The summary judgment application and the Interim Award involve the same parties and the same question, and the Court of Appeal decision was a final one.**

The discretion not to apply issue estoppel

[70] Alternatively, Cherubini submits that it would be unjust to apply issue estoppel. The application of issue estoppel is a matter of discretion, even when the preconditions are established: *Danyluk* at para. 33. The Court "should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice": *Danyluk* at para. 80. The majority in the *Toronto* case elaborated, at paras. 52-53:

> ... There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk, supra*, at para. 80.
>
> The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision...

[71] Cherubini says the Arbitrator applied issue estoppel mechanically, given that the Court of Appeal lacked full evidence and argument on the point, and that the result of that decision will be an injustice if Cherubini is denied a remedy against the International.

[72] The Arbitrator concluded that he should not exercise his discretion to disregard the Court of Appeal decision, distinguishing this from a situation where a court disregards a decision of an administrative tribunal. Cherubini says this was not sufficient reason not to exercise his discretion. In *Ashby v. McDougall Estate*, 2005 NSSC 148, [2005] N.S.J. No. 255, Warner, J. held that it was an error in principle not to consider the factors for or against the exercise of discretion at the second step of the analysis (para. 16). He remarked that if all of the elements of issue estoppel had been present, he would have exercised the court's discretion not to dismiss on the basis of issue estoppel arising from a previous decision of the same court. In the circumstances, this was not necessary, because the issues had been addressed in applications to strike, without factual determinations or extrinsic evidence being placed before the Chambers Judges. As such, the issues had never been determined on their merits, and issue estoppel did not apply (paras. 24-27).

[73] Cherubini says the arbitrator's determination violates the principle that there can be no right without a remedy. The Arbitrator recognized that the result of his decision was that the International might be able to commit torts with impunity. He pointed out that "the law of corporate status has denied many creditors of insolvent subsidiary corporations resort against their wealthy corporate parents or private owners." [Award, p. 33]. Cherubini disputes the analogy, arguing that the International is a separate entity that acted directly in the events giving rise to its claims. Cherubini cites the maxim *ubi juris, ibi remedium* (where there is a right, there must be a remedy): *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, 2003 CarswellNS 375, at para. 25; *R. v. Zornes*, [1923] S.C.R. 257, 1923 CarswellAlta 100, at para. 9; and *Allen v. College of Dental Surgeons (British Columbia)*, 2007 BCCA 75, 2007 CarswellBC 232 (B.C.C.A.), at para. 36. Cherubini says it has a right to have its tort and contract claims adjudicated, and to compensation if it succeeds.

[74] The Unions say there was no discretionary basis upon which to refuse to apply issue estoppel. The Local submits that the exercise of discretion is "largely, if not wholly, concerned with natural justice and the integrity of the administration of justice," and says there is no basis to find that natural justice was denied in this

case. The Local also disputes Cherubini's assertion that applying issue estoppel allows the International to commit torts with impunity. The Local says Cherubini's real dispute is with the Court of Appeal decision, which should not be attacked by arbitration or judicial review.

[75] As to Cherubini's argument that the existence of a right means there is a remedy, the Local says Cherubini has no right to sue the International for violations of the Collective Agreement by the Local, nor to grieve against the International, because the International is not a party to the Collective Agreement. Cherubini's remedy is against the Local.

[76] **I am not persuaded that this is a situation where relitigation would "enhance, rather than impeach, the integrity of the judicial system," as it was put in the *Toronto* case. The maxim that the existence of a right means there is a remedy, is a general principle, but it is subject to qualifications in situations like the present one, where the relationship between the parties is governed by a collective agreement. The International is not a party to the Collective Agreement. Cherubini's remedy is against the Local. The**

Arbitrator did not err in failing to exercise his discretion to overrule the finding of issue estoppel.

[77] **The decision on issue estoppel is sufficient to dispose of the application. I will, however, go on to address the substantive issue of the Arbitrator's consideration of whether the International was a party to the collective agreement.**

THE STATUS OF THE INTERNATIONAL

[78] Apart from applying issue estoppel, the Arbitrator also determined that the International is not a party to the Collective Agreement. Cherubini challenges this conclusion. The Unions submit that the arbitrator's decision was reasonable.

[79] The Arbitrator wrote that the proposition that "a collective agreement with a local union does not bind its parent union, even though [...] a representative of the parent has acted for the local, is not new in Canadian labour jurisprudence..." (p. 29). The authorities he cited included *S.E.IU. V. Elm Tree Nursing Home*, [1978] O.L.R.B. Rep. 984 and *Dryden Paper Co. And United Paperworkers Union*,

Locals 105 and 1323 (1976), 11 L.A.C. (2d) 337 (H.D. Brown, Chair). He distinguished *Aatlen v. Prince George Pulp and Paper Ltd.* (1968), 69 D.L.R. (2d) 31, where it was held that an agreement between an employer and an international union was a collective agreement because it bound a local:

> Aatlen was, of course, the reverse of the situation here. On its face, what is before me is [a] Collective Agreement between the certified Local Union and the Employer. The USWA does not appear anywhere in the Collective Agreement as a party, unless it is accepted that the references to "the Union" are ambiguous and might refer to the International Union. I do not find them to be ambiguous in that respect, and, like Macfarlane J., have held that they refer to the certified bargaining agent, i.e. the Local Union. I have also referred above to the provisions of the Nova Scotia *Trade Union Act* that appear to contemplate that, except in the construction industry, there can be only one bargaining agent and only one party on the union side to a collective agreement. In *Aatlen* a significant issue was whether the international union was a legal entity responsible for breaches of contract. There is no such issue here. The USWA is such a legal entity, but unlike the international in *Aatlen* and like the international in *Dryden*, it is simply not signatory to, or on any other basis a party to, the Collective Agreement under which I am acting. [Award, p. 31.]

[80] The Constitution of the International provides, at Art. XVII(1), that "[t]he International Union shall be the contracting party in all collective bargaining Agreements and all such agreements shall be signed by the International Officers." After reviewing and distinguishing the cases, the Arbitrator said:

> Quite apart from these cases, all of which are only persuasive, the constitution of the USWA cannot override section 27 of the Nova Scotia *Trade Union Act*, quoted above, which clearly gave the certified Local Union, not the USWA,

> exclusive authority to make a collective agreement on behalf of the employees at Robb Engineering and its successor employers. [Award, pp. 31-32.]

[81] Cherubini maintains that Art. XVII(1) of the constitution is sufficient reason to find that it is a party. Moreover, other provisions of the constitution appear to subordinate the Local to the International. The International issues charters to locals, containing "such provisions as the International Union may require" (Art. VII(2)). Locals are required to enforce the constitution (Art. VII(4)), which means (according to Cherubini) that the Local would have to ensure that the International was a party to the collective agreement. Cherubini argues that, while the International is a separate legal entity, the Local is nevertheless "dependent on the [International] for its existence and continuation. The control which the [International] clearly means to assert over all locals is enhanced by the requirement that the [International] be made a party to all collective agreements." In this case, John Kingston, an employee of the International - not of the Local - signed the Collective Agreement "for the Union." Cherubini says the identification of the Local as a party on the cover pages of the Collective Agreement is meaningless.

[82] The Collective Agreement does not define the term “union,” nor does it use the word consistently. Cherubini maintains that the Collective Agreement confers rights and obligations on the International. The International is entitled to receive the dues deducted by the company from earnings of bargaining unit members (Arts. 6.01-6.02). A representative of the International may be present during a grievance meeting (Arts. 7.02, 7.06). The International or the Local must approve an employee’s request for a leave of absence (Art. 11.04). An authorized representative of the International who is not an employee of the company may arrange to “speak to Local Union representatives in the Plant about a grievance or other official Union business...” (Art. 16.01).

[83] The Supreme Court of Canada has adopted “a liberal position” respecting the jurisdiction of arbitrators, holding that arbitrators have “a broad exclusive jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement”: *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666, 2006 SCC 19, at para. 33. Additionally, s. 43(1)(c) of the *Trade Union Act* provides the arbitrator with authority to “determine any question as to whether a matter referred

... is arbitrable." On the strength of these authorities, Cherubini says, the arbitrator should be held to have jurisdiction over the International.

[84] The International says this reasoning confuses jurisdiction with arbitrability. The *Trade Union Act* does not give the arbitrator jurisdiction over non-parties to the collective agreement. *Bisaillon* limits the arbitrator's *in personam* jurisdiction to the employer, the bargaining agent and potentially third parties who voluntarily submit to the arbitrator's jurisdiction.

[85] The Unions say the Arbitrator's determination that the International is not a party to the collective agreement was reasonable. The Arbitrator considered the use of the word "union" in the collective agreement, concluding that it refers consistently to the Local. He found no reason to conclude that the International was certified or recognized as a bargaining agent. In view of the *Trade Union Act* provisions indicating that the certified bargaining agent has exclusive authority to bargain, and to bind the bargaining unit to an agreement (see ss. 27(a) , 41 and 42(3)), he concluded that there could not be two bargaining agents for one bargaining unit. The Local being the certified bargaining agent, he reasoned, the International could not be a party to the agreement.

[86] Cherubini relies on *Limojet Gold Express Ltd. v. Public Service Alliance of Canada, Local 05/21081* (2006), 160 L.A.C. (4th) 314, [2006] B.C.C.A.A.A. No. 260 (D.L. Larson (Arbitrator)), as persuasive authority on the issue of whether a national union is a party to an arbitration. *Limojet* involved a damages claim by an Employer arising out of a work stoppage by members of a PSAC local. A grievance was filed against the local, "its member and representatives," alleging a breach of the collective agreement and the British Columbia *Labour Relations Code*. The employer proceeded to seek arbitration against the local, but gave the name and title of the "union's officer, official or agent" as the PSAC Regional Representative. The national PSAC union argued that it was not a proper party to the arbitration. It also argued that although the local Union was "a component of the national union," PSAC could not be a party to the collective agreement because, as a national union, it was expressly excluded from being a "trade union" under the *Labour Relations Code* (paras. 1-2). Section 48 of the Code made a collective agreement binding on "every employee of an employer who has entered into it and who is included in and affected by the agreement."

[87] The arbitrator in *Limojet* concluded that the reach of the collective agreement was "confined to the trade union, the employer and employees and because such third parties are not bound by the collective agreement, arbitrators cannot ordinarily take jurisdiction over them just because they are mentioned in the agreement and are assigned consequential rights and obligations." It was possible, following *Giorno v. Pappas* (1999) 170 D.L.R. (4th) 160 (Ont. C.A.), that "where a third party is given rights and obligations by a collective agreement and the third party acts upon them, the third party may be taken to have subscribed to the collective agreement in proper circumstances such that it can be said that a dispute involving those rights and obligations brings them within the purview of the agreement so as to give an arbitrator jurisdiction over the third party" (para. 82). The arbitrator would not "assume subscription by the mere fact that the beneficiary takes the benefit of the agreement" (para. 83). The arbitrator concluded that PSAC was a proper party to the arbitration, offering the following reasoning at paras. 109-110:

> While I am persuaded by the logic of the argument as a pure matter or principle, it is my view that whether a national or international union is a party to a collective agreement is really an issue of fact and depends upon the peculiar facts of any particular case. Certainly, one must accept the compelling logic that flows from the definition in the Code of a collective agreement that a collective agreement must be between an employer and a trade union, both of whom must be local or provincial entities who are directly amenable to provincial legislation and control,

> but I do not read that definition as precluding other parties from subscribing to the agreement and submitting to its terms. I agree that a collective agreement necessarily takes its validity from the status of the local or provincial union but that does not mean that a national or international union do not have sufficient status and cannot participate in the negotiations or join as a party to the collective agreement...
>
> That means that the PSAC has a legal status separate and apart from the Local Union and that in the ordinary course of events an arbitrator would not have jurisdiction to join it as a party to an arbitration ... except that, in the rather unique circumstances of this case the PSAC has voluntarily subscribed to the collective agreement and made itself a party to it. It is the outcome of the relationship established by the constitutional documents, which require that the PSAC shall coordinate and conduct collective bargaining for all Directly Chartered Locals and be a signatory to all collective agreements entered into between the local and an employer. In addition, the PSAC has undertaken a contractual obligation to represent members of the local at all arbitrations or adjudications consistent with its duty of fair representation, all of which amounts to an assumption of the rights and obligations of the agreement by the PSAC, which was endorsed by both the Employer and the Local Union when they each accepted the agreement. While the collective agreement is expressed to be between Limo Jet Gold Express Ltd., as the Employer, and the Public Service Alliance of Canada, Local 05/21081, as the Union, the execution page sets out only the name of the Employer with two spaces for authorized signatories and the name of the PSAC with spaces for six authorized signatories.

[88] The Arbitrator in this case considered the arbitral decision in *Limo Jet*, but held that it had little persuasive authority, having been reversed by the British Columbia Labour Relations Board on judicial review. The legislative scheme in *Limo Jet* did not permit additional parties to a collective agreement. The arbitrator found this reasoning applicable to the Nova Scotia *Trade Union Act*, under which the parties to a collective agreement are the employer and the certified bargaining agent. The B.C. Labour Relations Board held that the “tripartite model” of labour

relations embodied by the legislation was inconsistent with the arbitrator's finding that the national union had "voluntarily subscribed to the collective agreement and made itself a party to it" by its involvement in collective bargaining.

[89] The Arbitrator held that "a collective agreement with a local union does not bind its parent union, even though ... a representative of the parent has acted for the local..." (Award, p. 29). He also held that section 27 of the *Trade Union Act* "gave the certified Local Union, not the USWA, exclusive authority to make a collective agreement on behalf of the employees..." (Award, p. 32). As a result, providing assistance to the Local did not render the International "a party to the Collective Agreement to which it was not a signatory and which it was not certified to bargain" (Award, p. 33). The Unions say that Mr. Kingston, the representative of the International, signed on behalf of the Local, and that he was not an "International officer" as described in Art. XVII(1) of the International's constitution, which provides that the International "shall be the contracting party in all collective bargaining agreements and all such agreements shall be signed by the International Officers". Art. XVII(5) provides that no local union has authority to bind the International "except upon express authority having been granted therefor by this Constitution or in writing by the International President or the International

Executive Board." The arbitrator concluded that there was no evidence that Mr. Kingston signed "as an agent of the USWA rather than an agent of the Local..." (Award, p. 29).

[90] Cherubini has cited no authority other than *Limojet* for the proposition that there can be parties to a collective agreement, or to an arbitration under a collective agreement, in addition to the employer and the certified bargaining agent. In any event, Cherubini was not a party to the constitution. An alleged breach of the constitution would be a matter between the International and the Local. The International's constitution cannot override the *Trade Union Act* or the Collective Agreement.

[91] The Unions say the Arbitrator's reasoning path met the standard of reasonableness, falling within the range of acceptable outcomes. The Local cites *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] S.C.J. No. 5, a decision that post-dates the Arbitrator's Award. In *Fullowka*, the plaintiffs pursued an action for negligence arising from an explosion caused by a striking miner. Relatives of miners who died in the explosion sued the parent union, but not the local bargaining unit. The trial judge held that the national and local unions were a

single entity. However, Cromwell, J., writing for the Court, said, at paras. 118-120:

> There is no dispute that in the circumstances of this case CAW National is a legal entity capable of being sued in tort. As Iacobucci J. wrote for the Court in *Berry v. Pulley*, 2002 SCC 40, [2002] 2 S.C.R. 493, at para. 3, "unions have come to be recognized as entities which possess a legal personality with respect to their labour relations role". The question to be answered is the narrower one of whether CASAW Local 4 was a separate legal entity from CASAW National, so that on merger, CAW National did not assume CASAW Local 4's liabilities.
>
> There is no doubt that union locals may have an independent legal status and obligations separate from those of their parent national unions. Whether they do depends on the relevant statutory framework, the union's constitutional documents and the provisions of collective agreements. For example, it has been consistently held that where, as in this case, the local union is a certified bargaining agent, it and not the national union assumes the statutory and contractual duties of a bargaining agent...
>
> It is clear taking this approach that CASAW Local 4 is a legal entity capable of being sued in actions relating to its labour relations role. CASAW Local 4 was the certified bargaining agent for the mine workers at the time of the strike and explosion. This is reflected in the collective agreement between it -- and I would add only it - and Giant Yellowknife Mines Ltd. In the agreement, Giant recognized CASAW Local 4 as exclusive bargaining agent for all employees covered by the agreement (art. 2.01). The certification of CASAW Local 4 was pursuant to the *Canada Labour Code*... As the certified bargaining agent, CASAW Local 4 had "exclusive authority to bargain collectively on behalf of the employees in the bargaining unit" (s. 36(1)(a)). CASAW National was not a party to the collective agreement and had no status as a bargaining agent under the Code.

[92] The Court added that, as the exclusive bargaining agent, the local had “legal rights and obligations distinct from those of the national union” (para. 123) and

that the constitution of the national union “deals with the establishment of local unions, and its provisions underline their separate and autonomous status” (para. 124). The language of the constitution did not suggest that “the local and the national unions are simply branches of the same entity. Each has its own management structure, areas of responsibility and assets and liabilities which are treated as such consistently in both documents” (para. 126).

[93] The significance of the exclusivity of the bargaining agent was addressed in *Bisaillon*, *supra*, where Lebel, J., for the majority, discussed the effects of certification (in that case, under the Quebec *Labour Code*, R.S.Q., c. C-27). He emphasized that of all the rights provided to certified unions under the Labour Code, the most important was the “monopoly on representation. When it is certified, a union acquires the exclusive power to negotiate conditions of employment with the employer for all members of the bargaining unit with a view to reaching a collective agreement. Once a collective agreement is in place, the union's monopoly on representation also extends to the implementation and application of the agreement” (para. 24). As has been noted, Lebel, J. also addressed the scope of the arbitrator’s jurisdiction, generally limiting it to the employer and the certified union (along with the employees), but leaving the

possibility that a third party could voluntarily and expressly submit to the arbitrator's jurisdiction.

[94] I am satisfied that the Arbitrator's conclusion on the status of the International Union was a reasonable one. He considered the relevant caselaw and enactments and produced a comprehensible line of reasoning. The conclusion that the International was not a party to the collective agreement, and that the Local was the sole bargaining agent, were within the range of reasonable conclusions in the circumstances. I note in particular that I agree with his conclusion that the arbitral decision in Limojet, in addition to not binding him, should not be followed. I conclude that the Arbitrator's analysis withstands a reasonableness analysis.

CONCLUSION

[95] Accordingly, I am satisfied that the Arbitrator's decision to bifurcate the proceeding was a reasonable exercise of his discretion; that his decision to apply issue estoppel was correct; and that his conclusion on the substantive issue of the status of the International was reasonable. The application for judicial review is therefore dismissed.

[96] The parties may provide submissions on costs within 30 days of the release of this decision.

J.