SUPREME COURT OF NOVA SCOTIA

Citation: Cape Breton Island Building & Construction Trades Council v. Nova Scotia Power Inc., 2010 NSSC 333

Date: 20100826
Docket: Hfx. No. 309073
Registry: Halifax

Between:

Cape Breton Island Building & Construction Trades Council, International Union of Operating Engineers, Local 721, United Association of Journeymen & Apprentices of the Plumbing, Steamfitting & Pipefitting Industry of the United States and Canada, Local 682

Applicants

v.

Nova Scotia Power Inc., International Brotherhood of Electrical Workers, Local 1928, Nova Scotia Construction Labour Relations Association Limited (Construction Management Bureau), and the Construction Industry Panel of the Labour Relations Board (Nova Scotia)

Respondents

D E C I S I O N

Judge: The Honourable Justice Suzanne M. Hood

Heard: May 11, 2010, in Halifax, Nova Scotia

Counsel:
Raymond Mitchell for the Applicants
Brian G. Johnston, Q.C. and **Richard M. Dunlop** for Nova Scotia Power Inc.
A. Robert Sampson, Q.C. and **Robert Risk** for the Respondent, International Brotherhood of Electrical Workers, Local 1928
Greig MacLeod for the N.S. Construction Labour Relations Association
Sheldon Choo for the Attorney General of Nova Scotia on behalf of the Respondent, Construction Industry Panel of the Labour Relations Board (Nova Scotia)

By the Court:

[1] The applicants seek judicial review of a decision of the Construction Industry Panel of the Nova Scotia Labour Relations Board *(the Panel)*. The decision interpreted sections of the *Trade Union Act*, R.S.N.S. 1989, c. 475. It also concluded there was an abandonment of the right to challenge or grieve with respect to s. 92(c) work performed by Nova Scotia Power *(NSP)*. The Panel also determined a jurisdictional work dispute, in the alternative.

ISSUE

Should the decision of the Panel be quashed?

INTRODUCTION

[2] The applicants are the Cape Breton Island Building & Construction Trades Council, International Union of Operating Engineers, Local 721, United Association of Journeymen & Apprentices of the Plumbing Steamfitting & Pipefitting Industry of the United States and Canada, Local 682. For ease of

reference, I will hereinafter refer to all of the applicants as the “Trades Council” recognizing that there are two other applicants.

[3] The Trades Council is made up of twelve local unions which are affiliated with unions with their international headquarters in Washington, D.C. The twelve local unions are:

1) The International Union of Bricklayers & Allied Craftworkers, Local Union 2, Sydney, N.S.;

2) United Brotherhood of Carpenters & Joiners of America, Local Union 1588, Sydney, N.S.;

3) International Brotherhood of Electrical Workers, Local Union 1852, Sydney, N.S.;

4) International Association of Heat & Frost Insulators & Asbestos Workers, Local Union 116, Halifax, N.S.;

5) International Association of Bridge, Structural, Ornamental & Reinforcing Ironworkers, Local Union 752, Halifax, N.S.;

6) Labourers’ International Union of North America, Local Union 1115, Sydney, N.S.;

7) Millwrights and Machine Erectors, Local Union 1178, Halifax, N.S.;

8) International Union of Operating Engineers, Local Union 721, Sydney, N.S.;

9) International Union of Painters & Allied Trades Local Union 1945, Halifax, N.S.;

10) United Association of Journeymen & Apprentices of the Plumbing Steamfitting and Pipefitting Industry of United States and Canada, Local Union 682, Sydney, N.S.;

11) Sheet Metal Workers' International Association, Local Union 56, North Sydney, N.S.;

12) International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 927, Halifax, N.S.

[4] The International Union of Operating Engineers, Local 721 *(Local 721)* is a bargaining unit of survey crew members employed by NSP and certified as a Part II construction union.

[5] The United Association of Journeymen & Apprentices of the Plumbing, Steamfitting & Pipefitting Industry of the United States and Canada, Local 682

(Local 682) is a Part II construction trade union. It is not certified as a bargaining unit of NSP employees.

[6] The respondents are Nova Scotia Power Inc., the International Brotherhood of Electrical Workers, Local 1928 *(Local 1928)*, Nova Scotia Construction Labour Relations Association Ltd. (Construction Management Bureau) *(the Bureau)* and the Construction Industry Panel of the Labour Relations Board (Nova Scotia).

[7] Local 1928 is an in-house bargaining unit at NSP which is a Part I non-construction trade union. The Bureau is an accredited employers' organization accredited pursuant to Part II of the *Trade Union Act* as the bargaining agent for unionized employers in the construction industry.

[8] In their Amended Notice for Judicial Review, the applicants seek review on the following grounds:

1. The Panel erred by misconceiving the effects of certification in consequence of which it erred in its interpretation of ss. 98(3) and 98(6) of the *Trade Union Act* and its conclusion that NSP was not bound by the Industrial Agreement (2002).

2. The Panel erred in its interpretation of s. 98(7) and 98(6) of the *Trade Union Act* and its conclusion that NSP was not bound by the Industrial Agreement (2002).

3. The Panel erred in its interpretation and application of the doctrine of abandonment.

4. The Panel erred in its assignment of the disputed work to Local 1928 on the basis of past practice.

5. The Panel erred by failing to conclude that NSP was bound to the Industrial Agreement (2002) by the application of ss. 41 and 100, of the *Trade Union Act.*

[9] They seek an order:

(a) setting aside the Panel's decision and declaring that the collective agreement between the applicants Cape Breton Island Building & Construction Trades Council and the Construction Management Bureau is binding on the respondents the Nova Scotia Power Inc. and the International Brotherhood of Electrical Workers, Local 1928 in consequence of which Nova Scotia Power Inc. was under a duty to engage Council members, rather than its in-house union, International Brotherhood of Electrical Workers, Local 1928, to complete the disputed work which Council members had the legal right to undertake, and

(b) awarding costs of this application.

[10] In an Amended Notice of Participation, NSP supports the decision of the Panel. In its Amended Notice of Participation, Local 1928 says the Court should not disturb the Panel's decision. In its Notice of Participation, the Bureau agrees

with the position taken by the Trades Council. The Panel is also a respondent, however, its submissions were in writing only and limited to the issue of the standard of review.

FACTS

[11] The factual background to this matter is set out in some detail in the Panel's decision. I will refer to those facts in summary form only here.

[12] In 2003, NSP concluded it was necessary to modify the waste water treatment system at Lingan in Cape Breton Island. The total project cost was $5.5 million and all but $395,000.00 was contracted out to unionized contractors which employed members of various construction trade unions. The remaining $395,000.00 was performed by members of Local 1928 and the labour pool.

[13] In chronological order, the applications filed with the Panel are as follows:

> 1. On May 5, 2003, the Council, Local 682 and Local 721 filed a grievance against NSP alleging that the latter had failed to comply with the relevant collective agreements to which NSP was bound, (or so the grievors claimed). (para. 5, decision)

> 2. This led NSP to file the Application under Section 98(8) of the Act requesting the Panel to declare that NSP was not and never had been bound by past or current collective agreements between the Bureau and construction trade unions either under Section 98(8) or section 100(1) of the Act. Moreover, NSP asserted, it was not (in 2003) and never had been a member of the Bureau and never provided to it an authorization to bargain on its behalf as section 97(8)(a) and (b) required. Alternatively, NSP asserts it was not bound by any collective agreements of the respondent unions except for Local 721 as to survey crew members while 'on-site'. (para. 5, decision)
>
> 3. On May 27, 2003 Local 1928 filed the Jurisdictional against the Council, its affiliates and members, Local 682, Local 721 and NSP pursuant to Sections 52(1) and 50 (1) (b)(ii) of the Act. (para. 6, decision)
>
> 4. On June 10, 2003, Local 1852 filed a grievance against NSP alleging that it had breached the Industrial Agreement as to Local 1852. (para. 8, decision)
>
> 5. On October 6, 2003, NSP filed the Reconsideration [File #2415] requesting the Panel to find that the Council and its affiliates and members had abandoned any bargaining rights they had to NSP. (para. 11, decision)

[14] Local 1852 is the International Brotherhood of Electrical Workers, *(Local 1852)* of Sydney, Nova Scotia. It is one of the twelve local unions which comprise the Trades Council. It is a construction industry trade union.

[15] The parties agreed to hold in abeyance the jurisdictional dispute pursuant to s. 52(1) of the *Act* until the s. 98(8) application by NSP was heard.

[16] In its decision, the Panel says its reasons "respond to three matters": 1) the s. 98(8) application by NSP; 2) an application by NSP to reconsider the accreditation order accrediting the Bureau as the sole collective bargaining agent for all unionized employers in the industrial and commercial sector of the construction industry on Cape Breton Island; 3) a jurisdictional dispute filed by Local 1928, pursuant to Section 52 (1) of the *Act*. (para. 1 of the Panel Decision)

[17] The Panel's conclusions are set out in the introductory part of the decision:

> **Therefore**
>
> the Construction Industry Panel of the Labour Relations Board determines that:
>
> 1. the Cape Breton Island Building & Construction Trades Council, ('the Council'), having never been certified as a "Council of Trade Unions" pursuant to Sections 95(6) and (7) of the Trade Union Act ('the Act') it has no legal standing as such but has standing as agent for the signatory construction trade unions;
>
> 2. Nova Scotia Power Inc. has the right pursuant to Section 98(8) of the Act to determine whether it was or is bound by any collective agreement, particularly but not limited to the Industrial Agreement made between the Construction Management Bureau ('the Bureau') and the Council as agent for the 12 - 14 signatory construction trade unions;
>
> 3. Nova Scotia Power Inc. is not subject to the Accreditation Order because of it being a party, (along with the various construction trade unions), to two (2) project agreements, viz., the Point Tupper Unit No. 2 agreement and the Wreck

Cove agreement bound by either of two project agreements, which preceeded *(sic)* the accreditation order 1977, namely the Point Tupper unit No. 2 or the Wreck Cove project.

4. Nova Scotia Power Inc. is not bound by L.R.B. No. 428C dated April 5, 1977 (the 'Accreditation Order') except with respect to the certification of the International Union of Operating Engineers, Local 721 ('Local 721') L.R.B. No. 467C dated January 11, 1978 for a unit of survey crew members only;

5. Articles 3.01, 3.02, 3.03, 23.01 and 23.02 of the Master Agreement, of which the collective agreement among the Bureau and the council as agent for Local 721 is a part, has no application to members of Local 1928 and labour pools 'A' and: B';

6. The council as agent for the various signatory construction trade unions and those construction trade unions have abandoned their 'right' to perform such part, if any, of the Disputed Work that was or may have been or is or will be in future Section 92(c) Work;

7. Despite the fact that the International Brotherhood of Electrical Workers Local 1928, ('Local 1928'), was certified under Part 1 of the Act, the Panel has jurisdiction to determine which union, that is, a Part 1 'Maintenance bargaining unit' union (Local 1928) or the various construction trade unions is entitled to perform the Disputed Work;

8. Local 1928 is not a construction trade union and thus apart from the Disputed Work and analogous work is not entitled to perform Section 92(c) Work;

9. In the event that the Panel's conclusion with respect to the application made under Section 98(8) of the Act are overturned on judicial review the agreement then, pursuant to an agreement among the parties and the Local 1928 was that the jurisdictional dispute between Local 1928 and the Council, the Bureau and the construction trade unions would require a decision, that decision is that because of a long standing area past practice the performance of the Disputed Work and any analogous work that Local 1928 members have been performing over the years is awarded to Local 1928.

THE LEGISLATIVE FRAMEWORK

[18] The relevant provisions of the *Trade Union Act* are as follows:

> **Determination of question arising before Board**
>
> 19 (1) If in any proceeding before the Board a question arises under this Act as to whether
>
> (a) a person is an employer or employee;
>
> (b) an organization or association is an employers' organization or a trade union, or a council of trade unions;
>
> (c) in any case a collective agreement has been entered into and the terms thereof;
>
> (d) a collective agreement is by its terms in full force and effect and upon whom it is binding;
>
> (e) any person has ceased to work for his employer as the result of a lockout or strike or has been dismissed by his employer contrary to this Act or to a collective agreement;
>
> (f) any party to collective bargaining has failed to comply with Section 35;

(g) a group of employees is a unit appropriate for collective bargaining;

(h) an employee belongs to a craft or group exercising technical skills;

(i) a person is a member in good standing of a trade union;

(j) an employer has sold, leased, transferred or agreed to sell, lease or transfer his business or the operations thereof or any part of either of them or has contracted out or agreed to contract out any part of the work done by his employees;

(k) an employer, employer' organization, trade union or other person is doing or has done any act prohibited by Sections 47, 48, 49, 50 or 56A,

the Board shall decide the question and the decision or order of the Board is final and conclusive and not open to question, or review, but the Board may, if it considers it advisable so to do, reconsider any decision or order made by it under this Act, and may vary or revoke any decision or order made by it under this Act.

Where work stoppage likely to occur

52 (1) Where a person has reasonable grounds for believing and does believe that a stoppage of all or any part of the work carried on by one or more employers and employees represented by one or more trade unions is likely to occur as the result of a jurisdictional dispute, the person may make a complaint to the Board.

Interpretation of Part II

92 In this Part,

(a) ‘accredited employers’ organization’ means an organization of employers that is accredited under this Act as the bargaining agent for a unit of unionized employers in the construction industry;

(c) ‘construction industry’ means the on-site constructing, erecting, altering, decorating, repairing or demolishing of buildings, structures, roads, sewers, water mains, pipe-lines, tunnels, shafts, bridges, wharfs, piers, canals or other works;

(d) ‘council of trade unions’ means a council that is formed for the purpose of representing or that according to established bargaining practice represents trade unions as defined;

(h) ‘sector’ means one of the following divisions of the construction industry:

(i) industrial and commercial ...

(j) ‘unionized employee’ means an employee on behalf of whom a trade union or council of trade unions has been certified or recognized as bargaining agent by an employer or employer’s organization in accordance with this Part, where the certification or recognition has not been revoked;

Application of Part I

93 Except where inconsistent with Part 11, the provisions of Part 1, except clause (c) of subsection (3) of Section 30 and Sections 46A, 54A and 56A apply to the construction industry and all references therein to ‘employer’ and ‘trade

union’ shall be taken to be references to ‘employers’ organization’ and ‘council of trade unions’ where appropriate. R.S., c. 475, s. 93; 1994, c. 35, s. 2; 2005, c. 61, s. 12.

Construction Industry Panel of Board

94 ...

(5) When a question arises whether a matter is a matter relating to the construction industry the question shall be finally determined by the Panel.

Application for accreditation

97 (1) An employers’ organization claiming to represent the unionized employers in a geographic area engaged in a particular sector of the construction industry may, subject to the rules of the Panel, make application in a form approved by the Panel to be accredited as the sole collective bargaining agent for all unionized employers in the sector of the construction industry and the geographic area applied for.

...

Effect of accreditation

98(1) Subject to subsection (6), upon accreditation, all bargaining rights and duties under this Act of employers for whom the accredited employers’ organization is or becomes the bargaining agent pass to the accredited employers’ organization.

(2) Upon accreditation any collective agreement in operation between a trade union or council of trade unions and any employer for whom the accredited employers’ organization is or becomes the bargaining agent is binding on the

parties thereto until the expiry date of the agreement, regardless of its renewal provisions.

(3) Where an employers' organization has been accredited, and where, after the date of the accreditation order, an employer in the sector and area covered by that accreditation order becomes subject to bargaining rights and duties with a union or council of trade unions in accordance with subsection (6), those bargaining rights and duties pass to the accredited employer's organization, whether the employer becomes a member of the accredited employer's organization or not, and the employer is bound by any collective agreement in effect or subsequently negotiated between the accredited employers' organization and that union or council of trade unions in that sector and area of the construction industry.

(4) Notwithstanding that a unionized employer's membership in an accredited employers' organization is terminated, the accredited employers' organization retains all bargaining rights and duties gained under this Section on behalf of that employer until the accreditation has been revoked.

(5) Notwithstanding anything contained in this Act, where the employees of an employer are certified in accordance with Section 24, the employer is not bound by any accreditation order.

(6) In this Part, the bargaining rights and duties of an employer under this Act that pass to an accredited employers' organization are the bargaining rights and duties of that employer in respect of a unit appropriate for bargaining with a union

(a) that has been certified in accordance with Section 95 as bargaining agent for the employees of that employer in that unit;

(b) that has been voluntarily recognized as bargaining agent for the employees of that employer in that unit, in accordance with Section 30, which voluntary recognition has not accrued as a result of a collective agreement negotiated by an employers' organization or otherwise through the agency of an employers' organization; or

(c) with which that employer has explicitly, in writing, authorized the employers' organization to bargain collectively on its behalf.

(7) For great certainty, nothing in subsection (6) precludes an accredited employer's organization and a trade union or council of trade unions from entering into a collective agreement that prohibits engaging non-union employees or non-union subcontractors in trades other than those represented by a trade union or council of trade unions that is party to the collective agreement.

(8) Where there is a dispute between a trade union or a council of trade unions and an employer or the accredited employers' organization over whether they are, were or have been bound by a collective agreement by virtue of this Section or Section 100, any of them may apply to the Panel and the Panel shall decide the issue following such investigation, hearing or other procedure, and on the basis of such evidence, as the Panel in its sole discretion considers appropriate, and may make such order as the Panel in its sole discretion considers appropriate.

(9) Subsection (8) applies to disputes not fully heard before February 3, 1994. *R.S., c. 475, s. 98; 1994, c. 35, s. 3.*

Parties bound by collective agreement

100 (1) Subject to subsection (2) of Section 98 and subsection (3) of this Section, a collective agreement entered into between an employers' organization and a trade union, trade unions or council of trade unions is binding upon the employers' organization, employers whose bargaining rights have passed to the employers' organization engaged in the construction industry in the sector and area covered by the accreditation order, the trade union, trade unions, council of trade unions and upon every employee within the scope of the collective agreement.

...

(3) Notwithstanding the accreditation of an employers' organization, no unionized employer in the sector and area covered by the accreditation order is

> bound by a collective agreement entered into by an accredited employers' organization and a trade union or council of trade unions in that area and sector unless that trade union or council of trade unions has acquired rights to bargain with that employer in accordance with subsection (6) of Section 98.

THE STEEN AMENDMENTS

[19] In its decision, the Panel said in para. 35:

> 35. Lurking in the background of the 'case' made by the Bureau and the Council, (on behalf, inter alia, of Locals 682, 721 and 1852), is the so-called Steen Amendments. ...

The Panel then continued in para. 35, quoting para. 42 of its decision in *Construction and Allied Workers Union (CLAC), Local 154 Affiliated with the Christian Labour Association of Canada, and Ledcor Communications Ltd and/or 360 Cayer Ltee*, L.R.B. No. 2086 (Nov. 3, 2000), the "CLAC case". It said that paragraph "summarized" "the primary purpose of the Steen Amendments as follows:"

> 35. ... From 1976 onwards until roughly 1988, the industry involved in accreditation - unions, employers, the Bureau and the Panel - believed that when a member of the Bureau 'ticked' a trade division (now trade classification), it did so only for the unions for which it had a duty otherwise to bargain because it had either a certification order or a voluntary recognition agreement with that union (or those unions if more than one (1) box was 'ticked'). Then through a number of cases beginning with Boyd and Garland v. [Local 721], (1988), 85 N.S.R. (2d)

> 397 and ending with International Association of Heat and Frost Insulators and Asbestos Workers, Local 116 v. Nova Scotia Minister of Labour and Manpower, [1993] N.S.J. No. 173 (N.S.C.A.), (hereafter called 'the Steen Case'), this long time 'assumption of the 'Industry' was rejected. The Court of Appeal held that the language of the then section 98(3) of the 1972 Act required the conclusion that when an employer joined the Bureau it was bound not only by the collective agreements made between the Bureau and the unions representing the trades in the trade divisions it had 'ticked' on the Membership Form of the Bureau, but by all collective agreements of all trade divisions (now classifications) of the Bureau. This decision led the Legislature to enact the Steen Amendments in 1993 (S.N.S. 1994, c-35) which reversed the Steen Case by limiting an employer's 'passing' of bargaining rights and duties to the cases set out in Section 98(6) of the Act. Thus the historical assumption was confirmed.

[20] The Panel said in para. 37:

> 37. Our point, apart from supplying clarity to the relationship between the Act and the Steen Amendments is simple. The primary purpose of the Steen Amendments was to reverse the Steen Case etc. and thus to restore the historical assumption ...

[21] The Panel continued in that para.:

> 37. ... Section 98(6) is reinforced by Sections 100(1) and (3) of the Act, which make it clear (for example) that, notwithstanding accreditation of the Bureau for the commercial/industrial sector, [section 92(h) of the Act] of the Cape Breton Island bargaining unit [section 95(2) of the Act], NSP is not bound by any collective agreement made between the Bureau and a trade union unless that union has acquired rights to bargain with NSP per Section 98(6).

STANDARD OF REVIEW

[22] The parties agree that the standard of review is reasonableness. That standard means that a review in court is to give deference to the board making the decision being reviewed. The degree of deference to be given to decisions of the Labour Relations Board has been set out in *Casino Nova Scotia v. Nova Scotia (Labour Relations Board)* 2009 NSCA 4. In that case, Fichaud, J.A. wrote in para. 26:

> 26 ... The courts have emphasized the importance of deference to the decisions of Labour Relations Boards on core issues under industrial relations legislation.

[23] In *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board),* 2005 NSCA 141, Fichaud, J.A. said in para. 25:

> 25 ... The Panel was endowed with discretion to deduce, balance and apply policies necessary to promote industrial peace in the construction industry. *U.A., Local 682 v. U.S.W.A., Local 1064* (1992), 89 D.L.R. (4th) 694 (N.S.C.A.) at pp. 701, 703-8. The *Act* assigns to the Panel 'polycentric decision-making', which 'involves a number of competing interests and considerations, and calls for solutions that balance benefits and costs among various constituencies.' *Voice Construction Ltd. v. Construction & General Workers' Union,* Local 92, [2004] 1 S.C.R. 609 (S.C.C.) at ¶ 28; *Pushpanathan* at ¶ 36.

[24] In *Casino Nova Scotia*, *supra*, the Court of Appeal gave guidance on how to apply the reasonableness standard. Fichaud, J.A. said at para. 29:

> 29 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.

[25] He continued in para. 30:

> 30 ... Justification, transparency and intelligibility relate to process (*Dunsmuir*, ¶ 47). They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes. *Wolfson, Re* 2008 NSCA 120 (N.S.C.A.), ¶ 36.

[26] The second step was described as follows in para. 31:

> 31 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 boundary of reasonableness, *Dunsmuir*, ¶ 47-49; *Lake*, ¶ 41; *PANS Pension Plan*, ¶ 63; *Wolfson, Re*, ¶ 34.

[27] I must assess whether I can understand why the Panel made the decisions it did. I must also determine if within each decision there is the "raw material" for

me to determine if the conclusion reached is within the range of acceptable outcomes. In doing that, I am to give the requisite degree of deference to the Panel's expertise. It is a body given "polycentric decision making" authority in which it balances "competing interests." It is a body which deals constantly with matters arising under Part II of the *Act*. I note in this regard the substantial number of decisions cited to me from the Construction Industry Panel. The Panel has the authority to determine public policy with respect to labour relations in the construction industry.

[28] I must only quash the decision of the Panel if I am satisfied by the applicants that the decision is not reasonable. I note in this regard that the memorandum of law submitted by the applicants and its notice for judicial review uses the words "whether the Panel erred." I raised with counsel for the applicants at the outset of the hearing my concern that he was inviting me to base my decision upon a "correctness" standard." In response, he agreed the standard is reasonableness but, throughout his submissions, referred to "errors" and "mistakes" made by the Panel in its decision and how, for example, it "misconceived" s. 98(7) of the *Act* and was "wrong" about certain things. He then concluded that, because of these things, the analysis is flawed and, therefore, the decision is unreasonable because the Panel

"misconceived" bargaining rights, "misunderstood" the concept of abandonment and "misconceived" the jurisdictional issue with respect to s. 92 (c) work. He said the decision was neither correct nor reasonable.

[29] This approach makes my review of the Panel's decision somewhat more difficult. The onus is on the applicants to satisfy me the decision is not reasonable but they have given me little assistance to guide me to come to such a conclusion. The approach of the Bureau mirrors that of the applicants. The bureau supports the position of the applicants but it too uses the words "the Panel erred."

[30] The other respondents, notably NSP, focussed on the test from *Casino Nova Scotia*. They say the reasoning in the decision is justifiable, intelligible and transparent and the result is within the range of acceptable outcomes.

[31] The applicants focussed on the issue of sectoral bargaining which they say is important for the construction industry and for which they say Part II of the *Act* provides. In "Some Labour Relations Issues in the Construction Industry," (2001) 9 C.L.R. (3d) 115, Alan Minsky, Q.C. explains the difference between employment with industrial unions and employment with construction industry unions.

> The industrial model is generally based on a fixed workplace, whether a typical plan, school, hospital, office or the like, where employees are usually engaged on an indefinite term of employment. In contrast, employment in the construction industry is sporadic and, in some cases, even seasonal in nature: tradespersons are employed in a particular aspect of the construction of a project at a site and, when their work is completed, they are either laid off or transferred by their employer to another site if work is available for them there.

[32] These decisions are recognized in legislation like Part II of the *Trade Union Act*. As Minsky says, again at p. 115:

> The history of legislative reform of construction industry provisions under the Act has evolved, in the main, through the incremental enactment of provisions, both for certification reflecting the unique nature of employment in the construction industry and for bargaining structures based on multi-employer models to encourage stable labour relations. As the court put it in *Arlington Crane Service Ltd. v. Ontario (Minister of Labour)*:
>
> > The history of legislative reform to the Labour Relations Act dealing with the construction industry has been an attempt to replace a legislative model based on individual employer labour relations with a more appropriate multi-employer model based on the unique features of the construction industry.

[33] As part of its argument about the importance of sectoral bargaining, the applicants argued that there are two methods by which an organization like the Bureau can bind employers to collective agreements. They say they are the "employee representation model" and the "union representation model." In their

written and oral submissions, they expand upon this at some length. They ask that the reviewing court interpret s. 98(6) and 98(7) as establishing these two separate models.

[34] In the conclusion of their written submissions, the applicants say:

> 133. The Applicants submit that the Panel's decision is largely extraneous because that decision did not take into account the concept of sectoral bargaining, which lies at the core of Part II of the *Trade Union Act*. The polices *(sic)* of equality and stability which underlie sectoral bargaining are reflected in s. 98(7) of the Act which allows a council of unions, like the Council herein, to bargain with an accredited employers' organization, like the Bureau, for a collective agreement, as described under Part II, which protects the rights of unions. The Panel did not give any consideration to these policies, nor the sector-wide bargaining regime they endorse. If the Panel had considered sectoral bargaining, it would have approved the sector clause and the efforts of the Applicants to have it enforced throughout the construction industry sector.

[35] It is true that these issues were not addressed in the Panel's decision. I can find no reference to employee and union models of representation. The applicants do not submit that they made these arguments at the Panel hearing. Counsel for NSP says he does not recall such a submission. The Panel decision says final submissions were made in writing. I have reviewed the written submissions of these applicants to the Panel and there is no reference to such an argument in those submissions.

[36] I conclude that this issue is not before me as it was not before the Panel and, as a result, did not form part of its decision.

[37] I therefore turn to the decision itself.

ANALYSIS

1. **S. 98(8) Application**

[38] The Panel dealt first with NSP's s. 98(8) application. The Panel had to decide if NSP was bound by a collective agreement entered into by the Trades Council and the Bureau. That agreement (hereinafter the "Industrial Agreement") is entitled Cape Breton Industrial Projects Collective Agreement 2002-2005 and is between the Construction Management Bureau Limited and the Trades Council and "Signatory Building Trade Unions," which are the twelve unions referred to above as the unions which comprise the Trades Council.

[39] The relevant provisions of that agreement are as follows:

3.01 When employees are required, the employer shall request the Unions to furnish competent and qualified workmen in the classifications listed in the Craft Schedules appended hereto and, insofar as possible, all workmen, so furnished will be recruited from the jurisdiction of the Local Union. (The referral slip system may be used at the option of the Local Union, if the referral slip is used it shall show the employee's permanent address.) If after a period of forty-eight (48) hours, excluding Saturdays, Sundays and designated holidays, from the time the request is made, the Unions are unable to supply the quantity and/or skills required, the employer may procure such men elsewhere. All employees secured from other sources will be cleared by the appropriate Union before commencing work for the employer. The provisions of Article 3.01 shall be modified according to the Trade Appendices of this Agreement.

3.02 When it is alleged that an employer has hired non-unionized employees to perform work that would normally be subject to the terms and conditions of this Collective Agreement (excluding speciality work not normally performed by members of a Trade Union signatory to this agreement), and/or when an employer sub-contracts such work to non-unionized forces, then it is agreed that the Union whose members would normally have performed such work shall have the right to refer the matter to grievance and/or arbitration, and to claim and collect damages for any violation(s) arising from a failure to employ Union members in accordance with the hiring and sub-contracting provisions of this Collective Agreement.

3.03 The employer agrees that employees employed within categories covered by the terms of this collective Agreement shall be required as a condition of continued employment to become and remain a member of the appropriate signatory Union. Forms authorizing the check-off of Union dues and initiation fee will be supplied by the Union to the employer. The employer will distribute these forms to the employee which will be affected, collect them when signed, retain the check-off authorization and forward them to the Union(s) at the proper address on file.

23.01 The employer agrees that it will not sub-contract work to any Contractor who is not under the Collective Agreement with the appropriate signatory Building Trades Council Union(s) excluding speciality contracts not normally performed by the above Trades Council Union(s).

> 23.02 When it is alleged that an employer has hired non-unionized employees to perform work that would normally be subject to the terms and conditions of this Collective Agreement (excluding speciality work not normally performed by members of a Trade union signatory to this Agreement), and/or when an employee sub-contracts such work to non-unionized forces, then it is agreed that the Union whose members would normally have performed such work shall have the right to refer the matter to grievance and/or arbitration, and to claim and collect damages for any violation(s) arising from a failure to employ Union members in accordance with the hiring and sub-contracting provisions of this Collective Agreement.

[40] It is to be noted that Local 721 (NSP's survey crew members) is a signatory to that agreement.

[41] Some of the Panel's conclusions are not disputed by the applicants. They do not dispute that the Trades Council was never certified as a bargaining agent. However, they go on to make the argument about the union representation model to which I have referred above. As I have said, that issue was not raised before the Panel.

[42] Since the application before the Panel with respect to s. 98(8) was brought by NSP, the Panel addresses its arguments first. It did so in several groupings. In the first grouping, the Panel considered NSP's arguments at ii, iii and iv in paragraph 38 of the decision:

> (ii) its past obligations of NSP to the Bureau and the Council are limited to those stemming from its certification by Local 721 for a bargaining unit of survey crew members (see L.R.B. 467C, (January 11, 1978));
>
> (iii) the collective agreement between the Bureau and Local 721 is only applicable to NSP if the Section 92(c) Work involves on-site survey work;
>
> (iv) the collective agreement between NSP and the Council, as to Local 721, is not violated by NSP if members of Local 1928 perform Section 92(c) Work;

[43] The Panel said in para. 40:

> 40. ... NSP has the right to ask the Panel under Section 98(8) to determine whether it is bound by any collective agreement, particularly the Industrial Agreement, ...

[44] The Panel then considered the argument by the Trades Council. The applicants do not challenge the Panel decision on the first of the arguments raised by NSP: that NSP did not have any certified Part II unions in 1977 and, therefore, had no bargaining rights it could pass on to the Bureau.

[45] The second argument raised by the applicants to the Panel was that, even if NSP was not bound by the Bureau's Accreditation Order, it is now bound by all agreements negotiated by the Bureau because Local 721 was certified as a

Construction Union in 1978. They say that Local 721 can negotiate a sector clause in the Industrial Agreement (such as those clauses in the agreement quoted above).

[46] The Panel decision at para. 42, however, says:

> 42. ... The flaw in this second layer argument is that Section 98(3) explicitly restricts the scope of the provision to 'any collective agreement in effect or subsequently negotiated 'between the Bureau' and that union ...'. Clearly, this provision does not permit the 'passing' of bargaining rights to unions other than one in respect to which NSP has become subject to bargaining rights and duties, i.e., to local 721 - the only trade union to gain bargaining rights against NSP.

[47] The applicants say the Panel "erred" in coming to this conclusion because it failed to appreciate the effects of certification and the nature of the bargaining rights that go with it. The applicants and the Bureau say certification determines the parties who can bargain not the terms of the bargaining. The applicants say Local 721 could negotiate a sector clause in the Industrial Agreement because it is to their benefit as part of the sectoral bargaining regime.

[48] The applicants and the Bureau say the Panel "wrongly concluded" that Local 721 had the capacity only to bargain for survey crew members (the members of Local 721) and only for agreements without a multi-lateral sector clause.

[49] The applicants say the sector clause was intended to provide for construction unions' monopoly of construction work on Cape Breton Island. They say the Panel did not say that Local 721 could not sign the Industrial Agreement as an agent for other signatory unions and, therefore, Local 721 would have the authority to enforce the Industrial Agreement for the other unions.

[50] NSP says the effect of s. 98(3) is not in fact to permit the Trades Council to monopolize construction industry work on Cape Breton Island. It says the legislation provided only three ways in which an employer can become subject to collective bargaining obligations and these are set out in s. 98(6). It says the certification of survey crew members does not amount to certification of every Trades Council union member. It says the applicants' and the Bureau's interpretation would thwart the meaning of s. 98(3) and (6) and s. 100(3). Section 100(3) provides that no unionized employer is bound to a collective agreement unless s. 98(6) applies.

[51] The Panel decision on this issue, quoted above, does not reflect the submission made by the Trades Council and the Bureau at the judicial review

hearing. The applicants' arguments to the Panel are set out in summary form at page 7 of the written submissions to the Panel at para. 22:

> 22. As for the issue whether or not Nova Scotia Power has any collective bargaining obligations to the Cape Breton Building Trades Council or any of its affiliated unions, the Cape Breton Building Trades Council take the position that Nova Scotia Power is in fact bound to the collective agreements negotiated with the Bureau for two reasons. First, is the accreditation order, LRB Decision #428C (TAB 1), and the second is the certification order in favour of the Operating Engineers, Local 721, being second LRB Decision #467C (TAB 2).

[52] The applicants elaborated on this in Part IV of the written submissions in para. 48:

> 48. In LRB Decision #428C at page 6 (TAB 1), the Bureau was accredited as the sole bargaining agent for '*all unionized employers in the industrial and commercial sector*' of the construction industry on Cape Breton Island. Attached to LRB 428C is 'Schedule A'. Schedule A indicates that the employers named in the 'List of Employers' found therein, are subject to the Accreditation Order. Listed as #80 on the list of employers is **'Nova Scotia Power Corporation, PO Box 910, Halifax, N.S.'**

The submissions continued in para. 55:

> 55. It is the submission of Cape Breton Building trades Council that by virtue of the accreditation order, Nova Scotia Power is bound to the construction industry collective agreements negotiated between the Bureau and the Cape Breton Building Trades Council.

[53] With respect to its second submission, the applicants said in para. 59:

> 59. In accordance with section 98(6) of the Act, Nova Scotia Power becomes bound to all collective agreements negotiated between the Bureau and the Cape Breton Building Trades Council pertaining to the construction industry on Cape Breton Island.

[54] These issues are set out on page 6 of the Bureau's written submissions where it says:

> Construction Management Bureau submits that the situation, then, is this:
>
> a) NSPI is effectively bound to the Collective Agreements negotiated for Cape Breton Island by Construction Management Bureau, by virtue of either L.R.B. 428C, the Accreditation order, and/or by l.R.B. 467C, the certification by Operating Engineers Local 721.

[55] The applicants cite *Kamyr Enterprises Inc. v. The United Association of Plumbers, Pipefitters and Welders, Local 682*, [1995] N.S.L.A.A. No. 3 as support for their submissions with respect to the effect of the Steen amendments. They also cited it to the Panel. They say it stands for the proposition that the Steen amendments do not limit the Bureau's power to bargain with unions which qualify under s. 98(6).

[56] The Panel addressed these arguments. Although *Kamyr* was not specifically mentioned in the Panel decision, it is clear in my view that the Panel did not accept the Union's submission that it should follow what it says is the finding in the award with respect to the Steen Amendments. The Panel decision was to the opposite effect.

[57] The conclusion of the Panel is set out clearly in para. 42. The Panel addressed itself to the argument the Trades Council and the Bureau made before the Panel. It justified its conclusion based upon the wording of s. 98(3) of the *Act* and its explanation is both intelligible and transparent. One can discern what it concluded and how and why it came to that conclusion. In my view, the explanation by the Panel is clearly within the range of acceptable outcomes. The Panel interpreted s. 98(3). The Panel's decision is to be given substantial deference. It has, as was stated in *Granite*, *supra,* polycentric decision making authority. It carefully considered the submissions of the applicants and the Bureau and, drawing on its expertise with the *Act* and labour relations matters, came to a conclusion with the acceptable range.

[58] New arguments made before me which were not made before the Panel and which allege “errors” are not helpful in deciding if the Panel’s decision meets the reasonableness standard. As I have said, the Panel addressed the issues put before it by the applicants and the Bureau and it is not for me, in reviewing its decision, to consider new submissions not made before the Panel.

[59] The third argument raised by the applicants and the Bureau was that the Industrial Agreement requires NSP to hire only construction trade union members to do s. 92(c) work and not to engage non-union workers (Bound-to-One, Bound-to-All provision). They refer to the articles of the Industrial Agreement quoted above and say s. 98(7) of the *Act* authorizes these articles.

[60] The Panel addressed this argument and concluded in para. 45:

> 45. Our conclusions then, as to NSP’s arguments raised in paragraph 38 (ii), (iii) and (iv), are firstly, that NSP was and is bound by collective agreements negotiated between the Bureau and the Council as agent for Local 721 but restricted only to on-site work by survey crew members and stemming only from its certification by Local 721 for survey crew members. Secondly, the collective agreements, past, present/or future are only binding upon NSP if and only to the extent that Section 92(c) Work is on-site survey crew work. In other words, there is no violation of the Industrial Agreement if Local 1928 members perform the disputed Work now or in future. Its obligations to the Council and the Bureau arise only in connection with on-site survey crew work performed by Local 721 members.

[61] In coming to that conclusion, the Panel dealt with NSP's responses to the submissions of the applicants and the Bureau. NSP argued that this interpretation gives "back door certification" to the eleven signatory unions to the Industrial Agreement with whom NSP does not have bargaining obligations. Its second argument is that the words used in s. 98(7) are "non-union employees" but s. 92(j) defines "unionized employee." The Industrial Agreement uses the words "non-unionized employees," a phrase which is not defined in the *Act*.

[62] The Panel concluded that the language of the Industrial Agreement most closely resembled the wording of s. 92(j) of the *Act*. It therefore concluded that the s. 98(7) prohibition is with respect to someone who is not a union member at all; that it does <u>not</u> mean: not a <u>construction</u> union member.

[63] The Panel said in para. 43:

> 43. ... In our judgement, it is clear that the language in the Articles (3.02 and 23.02) most closely resembles the language in Section 92(j). Accordingly, the language of Section 98(7) can only have the meaning of an employee who is not a member of a union as opposed to an employee who is not a member of a construction trade union. ...

Since Local 1928 members are “union members”, although not construction union members, the Articles of the Industrial Agreement do not refer to them. The result, the Panel concludes, is that NSP can use members of Local 1928.

[64] The Panel also said that it was reinforced in that conclusion by the“back-door certification” issue since the interpretation proposed by the applicants and the Bureau would not be one of the three methods set out in s. 98(6). The Panel said in para. 43:

> 43. ... We are reinforced in our view by our conclusion that the Articles, if defined differently, indirectly amount to backdoor certifications and backdoor certifications do not match the 3 methods by which an employee acquires bargaining rights and duties.

[65] The Panel also says at the end of para. 43:

> 43. ... Thus, as we interpret Section 98(7) and Articles 3.01, 3.02, 23.01 and 23.02 the usage of different terminology in the articles from that used in Section 92(j), Section 98(7) justifies us in concluding that:
>
> (a) we ought to interpret the language of these articles as having a different meaning from that used in Section 98(7), which leads us to conclude that since members of local 1928 are ‘union’ they are not ‘non-union’. Result? The articles are not applicable;

> (b) the dispute over the proper interpretation of Section 98(7) together with long-standing confusion from the beginning of Accreditation in 1977 as to its proper meaning and scope, and confusion over the effects of the Steen Amendments and, now, the articles, justify us in concluding that NSP has the right to apply under Section 98(8) in order to demonstrate what we have now concluded. Thus, this matter was not 'fully heard', in our judgement, prior to February 3, 1994. Our decision is relevant, we find, to the determination of whether the Industrial Agreement applies to NSP.

[66] The Panel expands upon its conclusion by referring in para. 44 to its broad discretion in labour relations matters as follows:

> 44. ... we are given very broad discretion therein not only to determine whether, eg., an employer is bound by the Industrial Agreement or any collective agreement owing to Section 98 or Section 100, but also, in our sole discretion, to modify such an agreement as well as to find that it is or is not binding on an employer, trade union, etc., using such evidence and procedure and conducting such investigation as the Panel 'in its sole discretion considers appropriate'. Of course, the concept of 'sole discretion' does not allow us to make decisions based upon whim or caprice or arbitrariness. Instead, it requires us to exercise this power/duty considering all relevant facts and using our knowledge and experience of the Act and of what is appropriate to achieve or maintain and foster sound, amicable and professional labour management relations in the context of the construction industry. ...

[67] The Panel continued in para. 44 to deal specifically with the Industrial Agreement. It said:

> 44. ... we confirm that the Industrial Agreement does apply to NSP and Local 721. However, as part of our remedial power given by Section 98(8), and in case we are wrong in concluding that Articles 3.01, 3.02,3.03, 23.01 and 23.02 do not apply to NSP and Local 1928, we find that, as to that particular relationship i.e., the one between NSP and Local 721, the provisions of those articles do not apply

> to NSP or Local 1928. Finally we add this to reinforce our conclusion that apart from Local 721 - as to survey crew members - NSP has no bargaining rights and duties with the other construction trade unions who were signatory to the Industrial Agreement. We regard this conclusion as irrefutable in light of Section 100(3) which in our judgement could not be clearer that NSP, as a 'unionized employer', is only bound to collective agreements 'entered into by an accredited employer's organization and a trade union ... in that area and sector unless that trade union ... has acquired rights to bargain with that employer in accordance with subsection (6) of Section 98'.

[68] The applicants say the Panel "erred" in its interpretation of s. 98(7). It says in its written submissions to the court at para. 83:

> 83. ... the Panel's interpretation of the section prizes semantics over context to defeat a sector clause in the collective agreement which legitimately provides the signatory unions with hiring preference in the industrial sector of the Cape Breton construction industry.

[69] The applicants say the Panel declared s. 98(7) "inoperative." They say that even if s. 98(6) identifies the ways in which reciprocal bargaining rights and duties arise, an employer's organization (like the Bureau) and a union or council of trade unions (like the Trades Council) may enter a collective agreement with a sector clause. That collective agreement they say would prohibit an employer (like NSP) from hiring anyone other than members of signatory unions (like the twelve which are parties to the Industrial Agreement), even if that union has not been certified for a unit of the employer's construction employees.

[70] The applicants say the Panel made its decision on the premise that their submission about s. 98(7) was a “novel means by which to bestow bargaining rights on a union” in addition to those set out in s. 98(6). They say the Panel gave no authority for this conclusion. They say, in their written submissions to the court:

> 83. ... The concern about ‘back-door certifications’ is irrelevant to the objective of the section, which is to authorize sector-wide, or sectoral, bargaining. ...

[71] The applicants say s. 98(7) is a “significant exemption” to the legislative scheme that is otherwise premised on the transfer of employers’ reciprocal bargaining rights to accredited employers organizations. The applicants and the Bureau say the proper interpretation of s. 98(7) is that it does not prevent a sector clause such as the articles in the Industrial Agreement. They say s. 98(7) operates in spite of the wording of s. 98(6). As mentioned earlier in this decision, the applicants say the s. 98(7) issue involves the union representation model. I have dealt with this issue above.

[72] The applicants say the Panel's interpretation is inconsistent with sectoral bargaining because the sector clause in the Industrial Agreement would not operate any time an employer violated the Industrial Agreement and gave construction work to a non-construction union. The applicants say in their written submissions to the court:

> 108. ... The whole policy behind Part II of the *Trade Union Act* would collapse as construction industry unions watch from the sidelines while construction industry employers assign work to non-construction industry unions. ...

[73] NSP says the Panel's interpretation of s. 98(7) does protect sectoral bargaining since NSP is an anomaly among employers as it has Part I unions and one Part II union (local 721). It says the applicants have not given any other concrete examples of other such employers. NSP says s. 92(c) work cannot be assigned to non-construction unions; if that were to occur, there would be a jurisdictional dispute that would have to be resolved.

[74] The Panel addressed these issues in its decision. It had two choices with respect to the meaning of "non-union employees." It chose the meaning put forward by NSP and not that of the applicants and the Bureau. The Panel

considered the meaning of the Steen Amendments and the factual circumstances of this matter. It came to the conclusion that the words in the Industrial Agreement "most closely resembled" the wording of s. 92(j) of the *Act*. The Panel said the meaning of the phrase "non-unionized employees" in the articles is different from the wording of s. 98(7). The Panel concluded the members of Local 1928 are "union" not "non-union" employees as those words are used in s. 98(7).

[75] The Panel is the authority with respect to such decisions. It has the power to determine what s. 98(7) means. It is the intent of the Legislature that it have that power because it vested in it the discretion to which the Panel referred to in its decision.

[76] In reaching its conclusion, the Panel justified its conclusion by referring to the arguments of NSP and then explaining how it arrived at the result it did. Its reasons are intelligible and transparent in that they explain how and why it came to the conclusion it did.

[77] There is sufficient information in the Panel's reasons for the reviewing court to determine if the result is within the range of acceptable outcomes. As I have

said above, there are two possible interpretations and the choice the Panel made is clearly one of them. The result is one consistent with fundamental principles of statutory interpretation. It is also well within the Panel's area of expertise to reach such a conclusion and within the broad powers granted to it pursuant to the *Trade Union Act*.

[78] As a check on its conclusion, the Panel went on to say that the interpretation of s. 98(7) is consistent with the intent of s. 98(6) in providing only three means by which reciprocal bargaining rights are acquired. The Panel concluded that, to accept the position of the applicants and the Bureau would be to grant "back door" certification, that is, bargaining rights acquired other than by the method set out in s. 98(6).

2. **Abandonment**

[79] NSP raised an argument about abandonment before the Panel. This was pursuant to s. 19(1) of the *Act* for reconsideration of the accreditation order, accrediting the Bureau as an employers' organization pursuant to Part II of the *Act*. It was also raised in the context of its application pursuant to s. 98(8) of the *Act* to determine whether NSP is bound by the Industrial Agreement.

[80] NSP argued that the Trades Council and the construction trade unions (except Local 721 with respect to survey work) had abandoned any collective bargaining rights they may have had with NSP. The Panel said in its decision that this argument has "merit in our judgement, based on the unique facts of this case." (para. 46) The Panel continued:

> 46. ... The basic principle rests on the expectation that a trade union, once certified or voluntarily recognized, thus gaining bargaining rights, will be subject to the expectation:
>
> > 'That it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights the union may no longer rely on them.'

> This excerpt has been taken from J.S. Mechanical v. U.A. Local 800, [1979] O.L.R.B. Rep. 110, 1979 Carswell Ont. 1067 at p. 2, paragraph 4 ('the Mechanical Case'). ...

[81] In the same lengthy paragraph, the Panel continued with a further quote from *J.S. Mechanical v. U.A. Local 800*, *supra*:

> In assessing the bargaining relationship between the union and the employer to determine whether or not a union has abandoned its bargaining rights, the Board considers various factors. Among other possible indicators, the Board looks to the length of the union's inactivity, whether it has made attempts to negotiate or renew a collective agreement, whether the union has sought to administer the collective agreement through the grievance and arbitration provisions in the collective agreement, whether terms and conditions of employment have been changed by the employer without objection from the union as well as whether there are any extenuating circumstances to explain an apparent failure to assert bargaining rights. ...

[82] The Panel (again in para. 46) referred to a previous decision of the Panel, chaired by Vice-Chair Bruce Archibald *[N.S.G.E.U. et al v. Board of Governors, University College of Cape Breton et al*, L.R.B. No. 4325 (February 23, 1996)]. The Panel said that, in that case, *J.S. Mechanical* was followed:

> 46. ... with the comment that while the principle of abandonment had been applied in Ontario since the late 1950's, it had been rejected in Nova Scotia and would not be changed without notice. ...

The Panel continued in para. 46:

> 46. ... There is no explicit authorization to the Board (or the Panel) under the Act to apply the concept, as there has been in Ontario under Section 63(19) of Ontario Labour Relations Act, 1955. ...

The Panel then said:

> 46. ... Finally we note that while the Board has rejected the concept in several cases, it has done so explicitly in only 2 cases, namely, the U.C.C.B. Case supra, and in United Brotherhood of Carpenters & Joiners of America, Local 83 and Nauss Bros. Limited, L.R.B. No. 823C, (November 7, 1984), ['the Nauss Case'. ...

[83] The Panel continued, referring to the judicial review decision of the Nauss Bros. case, at para. 46:

> 46. ... Clarke J., in dealing with the issue of abandonment raised by the employer, had this to say; (para. 21, p. 6):
>
> > The Ontario Board has interpreted its legislative authority extends to include the revocation of certification orders where a union has let its bargaining rights fall into disuse. <u>As a matter of policy, the approach taken in Ontario has considerable appeal in the context of the need for a tribunal to keep in tune and in touch with the special relationship that is created through the process of certification</u> ... . [Emphasis in Panel decision]
>
> Clarke, J. went on to acknowledge that this was not the approach used by the Board in Nova Scotia. However, the key point to us is that the implicit support for the policy of abandonment, from such a distinguished Justice with long experience as a lawyer in labour-management matters, reinforces our intention to apply the policy here. ...

[84] In paras. 47 and 48, the Panel explained why it came to that conclusion. In para. 47, the Panel said:

> 47. ... Conrod testified that from 1979-80 until 2003, no communications or grievances were filed by any construction trade union or the Council about the numerous occasions when Local 1928 members performed work that was either Section 92(c) Work clearly, or arguably. ...

[85] The Panel considered evidence to the contrary and concluded in para. 48:

> 48. ... The evidence is overwhelming, in our judgement, that, as found in paragraph 34 hereof, had the Council or the Bureau wanted either to object or determine or challenge what NSP was doing they had ample opportunity to 'build' a case against NSP. ...

[86] In para. 48, the Panel refers back to its decision in para. 34. In that para. it says:

> 34. ... We find that the Council, its members and affiliates and, particular, Locals 721, 682 and 1852 either knew or ought to have known or could easily have discovered that Local 1928 was performing some Section 92(c) Work. We find, further, that this 'knowledge' was either known or available to be learned as far back as the Lingan projects of 1979 - 1984. ...

[87] In para. 48, the Panel reviewed the evidence and said:

> 48. ... It is simply not credible, at all, to believe that no one asked or made reference to the work being done by Local 1928 members. We conclude that the Bureau and the Council and its members were satisfied with the informal arrangements which saw their construction trade union members get work in the many instances, ... when they were asked by NSP to work.

[88] The Panel limited the application of the doctrine of abandonment. It said in para. 49:

> 49. We wish to be clear on the scope of the abandonment that we find has occurred. The Bureau and the Council have lost the right to challenge or grieve about Section 92(c) Work, if any, that NSP engages in so long as NSP follows its past practices. ...

[89] It also said in para. 50:

> 50. ... we wish to make it clear to NSP that we expect good faith in its 'use' of our conclusion. Apart from other reasons whey we made our decision is a concern about the delay and uncertainty that could stem from a contrary decision. ...

[90] Then, in para. 51, the Panel discussed its general policy with respect to abandonment. It said:

> 51. As we see it, the general policy of not applying the concept of abandonment will continue unless the Panel (or the Board) reverses itself or issues a policy statement modifying (or reversing) the current stance. However, this case is

> unique, in our judgement as to the duration of the 'inaction' by the Bureau, the Council and/or the construction trade unions and as to the many opportunities these groups had to discover and react to the instances of Section 92(c) Work performed by Local 1928 members.

[91] The applicants say the Panel "erred" and the Bureau says it "misinterpreted" the Doctrine of Abandonment. The applicants also say the Panel "misconceived" and "misapplied" the Doctrine. These words are correctness standard words not reasonableness standard words in my view. I am not to determine, based upon the submissions of applicants and the Bureau, if the Panel is correct but whether its decision was reasonable.

[92] The decision that the Trades Council, the Bureau and the Trades Council member unions (except Local 721) had abandoned their right to grieve or complain about s. 92(c) is, in my view, one of the acceptable outcomes arising from the evidence before the Panel upon which it based its decision.

[93] The applicants also say there is no authority for abandonment in the *Act*. The Panel addressed this issue. It referred to Ontario cases where there was no legislative authority but the concept was applied. The Panel said in para. 46:

> 46. ... It is to be noted, however, that Ontario applied the principle since 1955, [as an implied statutory method of termination] long before explicit statutory authority was given. ...

[94] The Panel also referred to two decisions, including one from the Nova Scotia Court of Appeal, where, although the concept was rejected, there was implicit support for it in an appropriate case. The Panel concluded this was such a case because of the unusual and unique factual circumstances.

[95] The Panel's reasons for making an exception in this case are clearly set out. There is a line of reasoning which can be followed; the Panel considered the arguments made by the applicants and gave its reasons for rejecting them. They are understandable.

[96] Since the lack of legislative authority for abandonment has been raised before and was not found to be an impediment in the previous legislation in Ontario, it is well within the range of acceptable outcomes to conclude that it is not an impediment in Nova Scotia under the present legislative regime.

[97] The Bureau says in order to conclude there was abandonment in this case, the Panel "rode roughshot" over its own jurisprudence. The Panel recognized that

abandonment had not been previously applied and gave reasons for applying it here. It also limited its application in this case.

[98] In any event, the Panel (and the Labour Relations Board) are not bound by previous decisions. As the Supreme Court of Canada said in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] S.C.J. 75 at para. 94:

> **94** ... If Canadian administrative law has been able to evolve to the point of recognizing that administrative tribunals have the authority to err within their area of expertise, I think that, by the same token, a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals. Recognizing the existence of a conflict in decisions as an independent basis for judicial review would, in my opinion, constitute a serious undermining of those principles. This appears to me to be especially true as the administrative tribunals, like the legislature, have the power to resolve such conflicts themselves. The solution required by conflicting decisions among administrative tribunals thus remains a policy choice which, in the final analysis, should not be made by the courts.

[99] The Panel concluded that, in the context of this case, the Trades Council should be prevented from continuing to argue that Local 1928 was doing s. 92(c) work. Because of the Trade Council's position that NSP had collective bargaining rights with all those unions, the Panel also concluded that the concept should be applied to all the Trade Council members (except Local 721). It was reasonable

for the Panel to expect those unions to assert the rights they alleged they had against NSP to prevent it from using Local 1928 for what they said was construction work.

[100] The Panel made it clear that it was, in unique circumstances, making a limited ruling. It recognized that it had not previously been done in Nova Scotia. The Panel addressed itself in a clear and intelligible fashion to the issue that this was the first time abandonment had been found in Nova Scotia. One can easily follow its line of reasoning as it explains how it arrived at this conclusion. The Panel was alive to the possible implications of its decision and limited its future use in a number of ways.

[101] The Panel is the body designated in the legislation to make this type of decision. Its conclusion should not be interfered with lightly. It has the power to change its position and has done so in this case in limited circumstances. It is a decision well within the range of acceptable outcomes.

[102] The Bureau says the Panel had not given notice as was anticipated following the University College of Cape Breton decision. However, it is clear from the

decision that the parties did have notice that this argument was to be made by NSP. It is referred to in NSP's section 19(1) application. It is clear that both the Trades Council and the Bureau had an opportunity to address it. It is referred to in some detail in their written submissions to the Panel.

[103] I conclude this decision too is well within the acceptable range of outcomes and the Panel's reasons leading to this conclusion are justifiable, intelligible and transparent. The Panel explained its reasoning and it is clear and understandable.

[104] The applicants say that the Trades Council cannot be found to have abandoned its bargaining rights because it was never certified and the Bureau cannot be certified, only accredited. They say there are certain evidentiary matters which must be considered before abandonment can be found and they refer to *C.J.A., Local 785 v. Toronto Dominion Bank*, [1995] O.L.R.B. Rep. 686, 1995 Carswell Ont. 1542. This decision was not referred to in the Panel's decision nor was it referred to in the applicants' written submissions to the Panel. However, the decision cites *J.S. Mechanical*, *supra*, and the factors set out in it. The latter was specifically referred to in the Panel's decision, including the passage which set out the factors to be considered.

[105] The Panel considered a number of factors in concluding that there was abandonment. It referred, in para. 48, to the inactivity of the unions when it referred to the number of occasions when it was possible for the Trades Council or member unions to know that Local 1928 was "performing work similar to the Disputed Work." The Panel referred to the fact that "from 1980 onwards, no protests were received and no grievances were filed." (para. 48)

[106] The Panel considered the evidence about the history of work at Lingan Unit #1 and later at Lingan Units #2, #3 and #4. Although it did not specifically use the words, "extenuating circumstances," the Panel concluded that it was not believable that no one knew of the work Local 1928 was doing.

[107] The Bureau says this decision is a "significant extension of the doctrine of abandonment into entirely new areas." However, the Panel limited its application to this case in what it said were unique circumstances. It also limited its scope. It said in para. 49 that the Trades Council and the Bureau had lost the right only to grieve and challenge about s. 92(c) work. It also limited it to instances where NSP "follows its past practices."

[108] The Panel referred to the length of the inactivity and the fact that there was ample opportunity to "build" a case against NSP.

[109] In my view, the Panel set out its reasons for its conclusion and did so in a way that establishes it had regard to the factors relevant in this case. It is clear how the Panel arrived at its conclusion. It is within the range of acceptable outcomes, based upon this, for the Panel to have decided as it did. In its order it says:

> 6. The Council as agent for the various signatory construction trade unions and those construction trade unions have abandoned their 'right' to perform such part, if any, of the disputed work that was or may have been or is or will be in future Section 92(c) Work;

[110] The applicants also say the Panel's decision is without "clear and unequivocal evidence." They say the Panel relied on "will-says" of NSP witnesses. In response, NSP says there was an opportunity for the applicants to cross-examine on the "will-says" and to call their own witnesses.

[111] The Panel, in two lengthy paragraphs, sets out the factual bases for its conclusion. It says in para. 47:

> 47. The factual bases, upon which we make our decision to apply the principle of abandonment, flow primarily from the oral and 'Will-Say' evidence of Conrod [reinforced by the extensive evidence and 'Will-Say' statement of Michael MacDonald, ...

The Panel continues:

> ... we have reviewed all of the 'Will-Say', 'Can-Say' and 'Would-Say' statements together with the various rebuttals, and the testimony of witnesses. ...

It then makes findings of fact. In para. 48, it refers to conflicting evidence and makes further findings of fact.

[112] In this area as well, I conclude that the Panel set out its reasoning, explained it and did so in an intelligible way. It is clear how it arrived at the result it did. There is ample information for the reviewing court to conclude that the result arrived at is within the range of acceptable outcomes.

[113] The applicants also say the Panel confused the concepts of estoppel and abandonment. In *C.J.A., Local 785, supra*, the Ontario Labour Relations Board said at para. 70:

> 70 As did counsel for the employer, the Board also draws a distinction between the concept of an abandonment of bargaining rights (as set out in *J.S. Mechanical, supra, Hugh Murray, supra, Marineland, supra,* etc.) and the principle of estoppel (as referred to for example in *Steds, supra,*). The two principles may at times *appear* similar and may indeed lead to the same or similar results. As matters of legal principles however, 'abandonment' and 'estoppel' are not synonymous.

[114] In determining the reasonableness of the Panel's decision, it is useful to note that the results may not be different, although the concepts are. Since it is the result that is the focus of the reviewing court, and whether it is within the range of acceptable outcomes, the difference in the meaning of the terms is not significant with respect to the result. I have said above that the Panel stated its reasons for coming to the conclusion it did in a clear and understandable way, meeting the test for justifiability, intelligibility and transparency.

[115] The applicants also say the Panel ignored the intentions of the members of the unions which were signatories to the Industrial Agreement. The Panel specifically referred to the union members who worked alongside the members of Local 1928 and concluded they knew what work Local 1928 members were doing. The Panel, in para. 48, referred to at least twenty-nine occasions when "members of construction trade unions were working on an NSP site ... ." The Panel also

noted that “many members of Local 1928 were also members of one or other construction trade unions.” (para. 48)

[116] The intentions of the members of the union *vis-a-vis* employers can be ascertained by looking at the actions of their union of which they are members. The Panel considered what the unions had done and not done. The Panel said, based upon the evidence, that it concluded the Bureau, the Trades Council and its member unions knew what was occurring and were “satisfied” with it. The Panel therefore concluded they could no longer complain about Local 1928 and s. 92(c) work.

[117] The Panel has the authority, as part of its polycentric decision-making, the ability and expertise to conclude that there was a limited abandonment of rights. It made that decision recognizing that it had not been done before in Nova Scotia. The Panel has the right and, in appropriate cases, the responsibility to reverse itself. It did so here in a limited and thoughtful way. The Panel explained why it came to that conclusion and set out clearly how it reached the conclusion. It could have concluded there had or had not been an abandonment. It chose the former, a result

which, based on its explanations, is well within the range (a very small range) of acceptable outcomes.

[118] The applicants and the Bureau have not satisfied me that the decision is not reasonable.

3. **Disputed Work**

[119] The Panel made its decision with respect to the jurisdictional dispute as an alternate decision in the event its decision was quashed. Because I have not concluded its decision should be quashed, I do not need to deal with that alternate decision.

COSTS

[120] The respondents, NSP, Local 1928 and the Panel, have been successful and are entitled to their costs. If the parties cannot agree, I will accept written submissions on costs.

Hood, J.