SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Public Service Commission) v. Nova Scotia Government and General Employees Union, 2012 NSSC 373

Date: 20120820
Docket: SH No. 370199
Registry: Halifax

Between:

Her Majesty the Queen in the Right of the Province of Nova Scotia, representing the Public Service Commission

Applicant

v.

Nova Scotia Government and General Employees Union and Civil Service Classification Appeal Tribunal

Respondents

Judge: The Honourable Justice Patrick J. Murray.

Heard: February 21, 2012, in Halifax, Nova Scotia

Written Decision: August 20, 2012

Counsel: Alicia L. Arana-Stirling, for the Plaintiff
Raymond F. Larkin, Q.C., for the Defendant

[1] **By the Court**:

Introduction:

[2] The Applicant is the Province of Nova Scotia, represented by the Public Service Commission. The Respondents are the Nova Scotia Government and General Employees Unions and the Civil Service Classification Appeal Tribunal. I shall refer to these parties respectively as the Province, the Union, and the Tribunal.

[3] The Province has made application for Judicial Review of a decision of the Tribunal to schedule more than one appeal per month. The Province maintains that the Union previously agreed by its conduct and correspondence (in 2008) to schedule 12 Appeals per year, or one appeal per month.

[4] It is the validity of that decision which is the subject of this review. The Tribunal's decision was given on November 4th, 2011. The Province filed it's Application for Judicial Review on December 6th, 2011.

[5] The Province in it's Application seeks to set aside the decision of the Tribunal. The Respondents, the Union and the Tribunal, maintain, the decision should stand.

[6] **The Tribunal's Decision under Review:**

[7] The Tribunal rejected the Province's (employer) submission that it did not have jurisdiction to schedule more than one (1) appeal per month or more than twelve (12) hearings per year. Further the Province also objected to the week of November 28th to December 2nd being used to hear appeals, as it was less than five (5) weeks, of November 28, 2011, the commencement of the scheduled hearing dates.

[8] As to any previous limitation on its jurisdiction the Tribunal stated:

> "The Tribunal has never received any direction from the parties that the Chair is aware of, limiting its jurisdiction to set down appeals"

[9] As to the 2008 correspondence the Tribunal stated:

> "The Tribunal first saw the letters attached to Ms. Arana-Sterling's letter of October 27, 2008 when that letter was received." (note this was in 2011). The letters are dated 2008. The provisions of the current article 43.03 creating the Tribunal have been in existence long before that, through successive collective agreements.

[10] As to its jurisdiction the Tribunal stated:

> "The Tribunal is therefore of the view that the only restriction on its jurisdiction to set the dates of the hearing and the number of appeals to be heard, is a **requirement for procedural fairness**."

[11] The Tribunal concluded it would deal "on a case by case basis with any problems a party may have in presenting it's case". The Tribunal recognized in its decision that there may be "particular circumstances where there would be procedural unfairness for a hearing to proceed".

Record:

[12] The Record of the proceedings has been entered by consent for the purposes of this Application. It was filed December 13th, 2011. This is the evidentiary record for the Judicial Review, as required by Civil Procedure Rule 7.

Background:

[13] The Tribunal is appointed under Article 43.03 of the Civil Service Master Agreement (the Agreement) to hear appeals concerning the classification of the position an employee occupies. Under that article the Tribunal is established to

"make a final and binding decision on a dispute concerning the classification of the position an employee occupies."

[14] By agreement the Province and the Union reserved a number of weeks for a Tribunal Appeal Hearings. One of the weeks reserved was November 28th, 2011 to December the 2nd, 2011. The Union proposed three (3) days of that week for one appeal, (Mr. Andrews) as it proposed to call only one witness, the Appellant. The Union then proposed several days later to hear a second appeal (Pick) on the two remaining days of that same week, December 1st and 2nd, 2011. These requests were made in writing on September 11th, and September 14th, 2011 respectively.

[15] The Province did not agree with the Union's proposal for the scheduling of these appeals. The Union wrote on October 26, 2011 to the Tribunal explaining their reasons for the request, which included the following statements:

> “"...we should schedule more than one single person appeal."
>
> "...the time needed to present the Union's case will be short, and for a few, extremely short;"
>
> "Out of the next six(6) or so appeals, five (5) are one person appeals." "The union feels strongly that we can easily schedule two (2) of these in the five (5) day spans."
>
> "...there are still about 30 outstanding appeals."
>
> "...they are still running around 2.5 years to see the Tribunal."
>
> "The ones coming up were appealled in the spring and summer of 2009."

[16] In the above letter the Union was clearly concerned about the backlog and identified as the "pressing issue", whether in a five (5) day span, more than one appeal could be scheduled. There were additional emails dealing with scheduling

groups of appeals. These were included as part of the record for this judicial review.

[17] The Province wrote in response, objecting to the Union's proposal. On October 27th, 2011, the Province's letter stated:

> "...**the agreed upon practice** has been to schedule 12 hearings a year at one appeal per month. The Public Service Commission is not agreeable to changing this practice." (emphasis added)

[18] Notably, in the same letter the Province stated:

> "It is also our position that the **Tribunal does not have jurisdiction** to amend the agreed upon practice." (emphasis added)

[19] Included as part of the record are letters exchanged in 2008 between the Province and the Union. The Province is relying on those letters to establish:

1) the agreed upon practice.

2) that the Agreement (the Collective Agreement) was amended at the time to include the practice of holding twelve (12) appeals a year or one per month.

[20] These letters are dated January 31st, 2008 from the Province and February 27th, 2008, from the Union.

[21] The Tribunal did not interpret the letters as an agreement which would prevent the Tribunal from establishing its own procedure. The content of these letters is relevant and will be addressed accordingly.

[22] The Union states that the Province spoke in its letter only in terms of “targeting” four (4) days of hearings per month. The Province however says that both letters are clear, stating in their brief at paragraph 32:

> "There is no ambiguity here. The past practice of the parties and Tribunal further lends credence to **the fact that this was the agreement**." (emphasis added)

[23] The Province disagrees and refers to the January 31st letter from Mr. Campbell (of the Province) to Mr. Tompkins (of the Union) where it says:

> "Please review the points and let me know if I have missed any of the **key items agreed upon**." (emphasis added)

[24] The Province says the Tribunal and the Union cannot have it both ways, operate under 12 appeals per year since 2008, but on the other hand say in its decision that the letters do not constitute an agreement. The Union says the orders do not preclude the Tribunal from exercising its "normal jurisdiction" to determine its own procedure, including both the **scheduling** and length of hearings.

Issues:

1. What is the appropriate standard of review?
2. Included in issue number one (1) is the issue of whether the decision of the Tribunal raises a pure question of jurisdiction?
3. Was the Tribunal's decision correct or reasonable, depending on which standard of review applies, correctness or reasonableness?
4. Did the Tribunal owe a duty of procedural fairness to the Province?
5. If so, was there a breach of that duty?

Law and Analysis:

[25] Both parties have identified as the first issue, what is the appropriate standard of review? The Province's position is that the Tribunal, in deciding the number of appeals to be scheduled was deciding a true question of jurisdiction. The standard of review for questions of jurisdiction, the Province submits, is correctness.

[26] The Union maintains that a "true"question of jurisdiction is considered a "narrow category", and that the present matter does not raise a pure question of jurisdiction, also referred to as a question of "vires".

[27] Both parties citing **Dunsmuir v New Brunswick**, [2008] S.C.J. No. 9 agree that true questions of jurisdiction are decided on a standard of correctness noting further that a full analysis is not required where previous jurisprudence has established the appropriate degree of deference, on a particular issue (paragraph 59, Dunsmuir). At paragraph 57 the Supreme Court of Canada in **Dunsmuir** stated:

> "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 [page225] standard (Cartaway Resources Corp. (Re), [2004] 1 S.C.R. 672, 2004 SCC 26). **This simply means that the analysis required is already deemed to have been performed and need not be repeated**." (bold, emphasis)

[28] In Nova Scotia, Fichaud, J.A. of the Court of Appeal in **Police Association of Nova Scotia Pension Plan v Amherst (Town)** [2008] N.S.J. No. 344, affirmed that the review analysis, may be "abridged" if, as the learned Justice noted, the search proves to be "fruitful" in selecting whether the standard should be correctness or reasonableness.

[29] Further in the Nova Scotia case of **N.S. Transportation and Infrastructure Renewal vs. NSGEU**, 2010 NSCA 85 the Nova Scotia Court of Appeal said of Ferrar J.'s decision (as he then was), at paragraph 13:

> " These reasons satisfy me that the judge followed the analysis required by **Dunsmuir** and summarized in Police Association. As he found, the question before the adjudicator was a "true question of jurisdiction or vires" **-- did his March 21, 2007 appointment give him jurisdiction to adjudicate the pay rate issue?** The

> jurisprudence makes it clear that a "true question of jurisdiction or vires" will always be reviewed on a standard of correctness **so that there is no need to engage in a standard of review analysis**; Dunsmuir, para. 59;

[30] The search for the standard of review may be shortened therefore if it can be determined whether what the tribunal decided was a pure question of jurisdiction. The guidance needed is not only in regard to when the reviewing Court may forgo (or abridge) the analysis, but instead in what might be considered a "true question of jurisdiction". It is with respect to the latter question, (which is a precondition to applying the correctness standard), where there is no relief from an exhaustive review, unless it is clear from the outset.

[31] At paragraph 59 of **Dunsmuir v New Brunswick** [2008] SCJ 9, the Supreme Court of Canada stated concerning "jurisdiction":

> "'Jurisdiction' is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power give it the authority to decide a particular matter."

[32] Notably the Court affirmed the "standard of review" when it stated at paragraph 59:

> "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."

[33] The real question, at this stage of the review, is whether the Tribunal had to decide a pure question of jurisdiction? Ultimately the real question may be, was the decision "correct" if the standard is correctness or was the decision reasonable, if the standard is reasonableness. These are the two standards of review. The answer sets the course for the remainder of the determination of whether the decision should be set aside, as is being requested by the Province.

[34] The Province submits, the nature of the question,"strongly suggests" that the issue before the Tribunal was true issue of jurisdiction. The Province argues that questions surrounding a Tribunal's authority to enter into an inquiry are properly characterized as questions of jurisdiction.

[35] In **Nova Scotia Government Employees Union vs Nova Scotia (Transportation and Infrastructure Renewal)** 2010 NSCA 85. ("Infrastructure Renewal") ; Ferrar, J. found that the Adjudicator erred in finding he had jurisdiction to determine the rate of pay for a new or substantially changed job classification created by the Province. At para 15 the court stated:

> "A full analysis is not necessary in these circumstances. The adjudicator was clearly deciding a question of jurisdiction. The adjudicator's decision involves a determination of whether the wage rate adjudication fell within his grant of jurisdiction. **There are no questions of fact or policy, and no discretions that need to be exercised.** It is clear that what he was deciding was a "true question of jurisdiction or vires." (emphasis added)

[36] In **Infrastructure Renewal** , the court was relying on , paragraph 53 of **Dunsmuir** which reads:

> **"Where the question is one of fact, discretion or policy, deference will usually apply automatically** (Mossop, at pp. 599-600; Dr. Q, at para. 29; Suresh, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated." (emphasis added)

[37] As stated the Province places emphasis on the "nature of the question", which is one of the several factors in the typical standard of review analysis. Turning once again to **Police Association of Nova Scotia Pension Plan v**

Amherst (Town) 2008 NSCA 74, Fichaud, J.A. spoke about "true questions of vires" at paragraph 42 stating:

> "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**".
> (emphasis added)

[38] In the present case, the Tribunal had to address in its decision, the question of jurisdiction, as the Province, raised it as an objection. That alone, does not make it a "true question". The Tribunal in giving its decision , was obliged to provide reasons, and so in that way the Tribunal is explicitly determining a question of jurisdiction. Something more is required than a reference in the decision to "jurisdiction'. Otherwise, one need only to 'raise" a matter as jurisdictional , to have it become a true question of vires. I think it is obvious that should not be the case.

[39] The Union has referred the Court to **Canadian Union of Public Employees, Local 963 v Port Hawkesbury (Town)**, 2011 NSCA 28 a recent case where The Nova Scotia Court of Appeal examined "true questions of jurisdiction." At paragraph 27 Fichaud, J.A. for the Court stated:

> " From Dunsmuir, I draw the following principles on jurisdictional review:
>
> (a) A "true question of jurisdiction" means "whether or not the tribunal had the authority to make the inquiry", and "whether its statutory grant of power gives it the authority to decide a particular matter" (para. 59).
>
> (c) So a truly jurisdictional question means -- **Is the door of legal authority open or shut to the tribunal's inquiry on the matter? The decisional reasoning by a tribunal within that authority is not jurisdictional**. "
> (emphasis added).

[40] Framing the question in the present case (as argued by the Union), was the door of legal authority open or shut to the Tribunal's inquiry into the matter of scheduling the appeals before it? Where a question is one of fact, discretion or policy, deference will usually apply automatically, as the presence of those matters usually mean it is not a purely jurisdictional question (see paras. 34, 35 herein).

[41] Whether the statutory grant of power gave the Tribunal here the authority to schedule the number of appeals and when they will be heard suggests that the question raised was a pure or true question of jurisdiction. If that is the case (as it was in **Infrastructure Renewal**) I am repeating to say , there would be no need for an analysis. As Fichaud, J.A. in **Port Hawkesbury**, stated:

> "Correctness applies to a truly jurisdictional question without a standard of review analysis." (Clause 27-g)

It is also clear from the jurisprudence that courts have experienced considerable difficulty in determining true questions of jurisdiction. The term has been described as "elusive", and much doubt has existed over whether matters fall within this category. It seems that "labelling" a matter as such **may not be** the clearest way forward.

[42] In **Alberta Privacy Commissioner v Alberta Teacher's Association,** 2011 SCC 61 discussed this issue in terms of the Tribunal interpreting its own statute:

> "The direction that the category of true questions should be interpreted narrowly takes on particular importance when the Tribunal is interpreting its own statute."

[43] The Supreme Court of Canada stated that in one sense anything a tribunal does that requires it interpret its own statute, involves a determination of its own authority, said simply, did the Tribunal have "jurisdiction to do what is being challenged on judicial review". The court questioned whether such a category should exist and whether it is necessary in identifying the appropriate standard of review. On this point the Court concluded at paragraph 27 as follows:

> "However in the absence of argument on the point in this case...the interpretation by the tribunal of its' own statute

> or statutes'...**should be presumed to be a question of statutory interpretation, subject to deference on judicial review.**"

[44] True questions of jurisdiction therefore, as gleaned from the authorities submitted are rare, "we have not seen one since **Dunsmuir**." They are also narrow, "experience has shown that the categories of two questions of jurisdiction is narrow indeed." Add to this Dickson J.'s often repeated warning that Courts should be alert not to "brand as jurisdictional...that which may be doubtfully so" (see paras. 33 and 34 **Alberta (Information of Privacy Commissioners v Alberta Teacher's Association,** 2011 scc 61).

[45] Next consider the Supreme Court of Canada's recent statement in **Alberta Privacy Commissioners** that the category could not be defined:

> "As I have explained, I am unable to provide a definition of what might constitute a true question of jurisdiction. The difficulty of maintaining the category of true questions of jurisdiction is that without clear definition or content to the category, the Courts will continue, unnecessarily, to be in doubt on the question"

[46] One can see readily that if a definition cannot be provided (by the SCC) , why reviewing Courts are directed to consider, when the occasion arises, whether it is necessary or helpful to have such a determination in a particular case.

[47] Still it has been said that in examining the wording of an enactment, conferring jurisdiction, "the last word on general questions of law" should be left to Judges. (Justice Binnie at para. 84 of **ATCO Gas and Pipelines Ltd. v Energy and Utilities Board (Alberta Privacy Commissioners)** [2006] S.C.J. No. 4

[48] Further, "jurisdiction" has been stated to be "without a doubt a term of art which has been both confusing and elusive." (*Regimbald Canadian Administrative Law*) It is a question of law to be examined in the nature of the question. It may be dependent on certain findings being made. If "X" is established, then the decision maker Tribunal may or shall do "Y". Whether "X" exists may consist of different elements, fact, policy or discretion.

[49] Both counsel here have referred me to the comments of Justices Binnie and Cromwell (in descent) in **Alberta Privacy Commissioners** as to the usefulness of the category or the terms "jurisdiction" or "vires". At paragraph 83 Justice Binnie emphasized the importance of whether the issue raised in the interpretation of a Tribunal's own statute is one of "general legal importance" (referring to **CHRC**).

[50] At paragraph 96 Justice Cromwell stated:

> "What matters is whether the legislature intended that a particular question be left to the Tribunal or to the Courts."

[51] As "analytical tools" Cromwell J., agreed with Rothstein, J.C.C. that "labels" need not play a part, "in the Court's everyday work of reviewing administrative action".

[52] Section 33(1) of the Civil Service Collecting Bargaining Act requires that there be a provision in the collective agreement that would resolve disputes between the parties. Under Article 43.02 this would include the right of an employee to appeal the classification of the position he or she occupies. Under 43.03 the tribunal was established to make a final and binding decision and under the same provision 43.03(f) the tribunal may hold a hearing, if either party requests one.

[53] Under 43.03(h) the Tribunal was given the power to determine its own procedure. Importantly the hearing shall take place in accordance with the procedure set out in the same article. The Province argues, among other things, there is no procedure set out. They say, therefore, there is an agreement as to scheduling which governs. Thus the Province says, the Tribunal acted without jurisdiction.

[54] In the present case it is arguable that determining one's own procedure involves a certain amount of discretion. Secondly whether the Province implicitly agreed to have the resources available to conduct appeal hearings could involve a question of policy. Thirdly whether the letters (of 2008) form part of the collective agreement, and thus conferring (or not conferring) jurisdiction, upon the Tribunal involves (at least to some degree), findings of fact or mixed law and fact by the

Tribunal. For example in its decision, the Tribunal stated: "The Tribunal first saw the letters attached to Ms. Aranda Stirling's letter of October 27, 2007, when that letter was received."

[55] All of these points would suggest that what the Tribunal decided was **not** a question of "true jurisdiction".

[56] In that event the door of legal authority would be open to the tribunal's inquiry and the references to " jurisdiction" in the Tribunal's decision would be the "judicial reasoning" within their authority.

[57] Tribunals may also decide questions of law. This we know from **Dunsmuir** and from the convenient summary of it provided in **Town of Amherst** (by Fichaud, J.A.). The notion is that it determining its own mandate or its own statute, deference and standard of reasonableness would apply to legal issues not rising to the level of a constitutional question, a question of central legal importance, or legal issues outside the level of expertise of the specialized Tribunal. As part of a larger analysis those questions most often would attract standard of correctness. (para.42 **Amherst**)

[58] The question here is whether the Tribunal had the statutory authority to decide on the number of appeals to be heard per month, and force that decision upon the parties. The decision is under review because a party, the Province says the Tribunal were not authorized to make that decision. The Tribunal therefore had to "explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter."

[59] It is helpful to consider whether that particular matter was one closely connected to its own function of determining classification appeals. Determining whether you have jurisdiction involves different considerations than whether a certain job classification is appropriate. It is also a different function from determining whether jurisdiction is limited or restricted, which may involve findings of fact, policy or discretion.

[60] At first glance the door of legal authority appears to be open to this Tribunal in that it has authority to hear appeals and in the process determine its own procedure. The ability to determine your own procedure does not mean you have

jurisdiction, per se. You must have jurisdiction before the ability to determine your procedure has any meaning.

[61] It is clear that the legislature intended for the Tribunal to be governed by the procedure it intended to prescribe in the Collective Agreement (43.03(f)). However no such procedure was set out, with respect to the manner of the hearings being set, as appears to have been intended under clause 43.03(h). Unless what exists was intended to be the extent of that procedure.

[62] Had it been clear, the door of authority may have opened. This agreement states clearly that the Tribunal has the powers to issue such orders and directives "as it considers necessary", "but in no case shall such orders or directives be contrary to the agreement". The agreement is silent on the point (the manner of conducting hearing) and the Tribunal therefore had to look elsewhere, which it did, citing the common law and making its own finding that it was "arbitration type panel". That finding was there own. It may have been based on the statute or the Collective Agreement. Any authority they had would have come from these two sources.

[63] There is a reluctance to find readily, that an issue is of true jurisdiction or vires. The jurisprudence describes the term as being narrow and exceedingly rare. Courts are told to take care not to "brand" quickly issues as jurisdictional, which ought not to be so. (As per Dixon, C.J.)

[64] The word "procedure" has been considered in words and phrases, (*Legal Mazim,* 2nd 2d. Canada) as follows:

> "The word "procedure" denotes the mode by which a legal right is enforced: it is akin to the word "practice" and means the rules that are made to regulate the classes of litigation within the court itself, and **does not involve or imply anything relating to the extent or nature of the jurisdiction of the court.**" (emphasis added)

[65] Although "labels" are unimportant, it is useful (as did the court in **Infrastructure Renewal**) to consider how the Tribunal identified the dispute before it.

> "For the reasons that follow the Tribunal rejects the submission of the employer that the Tribunal does not have jurisdiction to schedule more than one appeal per month or more than twelve hearings per year. It also rejects the submission that the November 28th, 29th, 30th and December 1st and 2nd dates cannot be used to hear appeals as it is now less than five weeks from November 28th."

[66] I conclude this issue by referring to the logic of Justice Cromwell (in dissent) in **Alberta Privacy Commissioners**. While the legislature intended the question to be decided by the Tribunal, it appears the Tribunal was not explicitly given that particular power. While I find that what remains is an issue of jurisdiction, it is not clearly and beyond doubt an issue of "true" jurisdiction, leading automatically to a correctness standard of review. Instead it is predominantly a question of law, or law of general application, usually requiring a standard of correctness or less deference, by the reviewing courts. (**P.E.I., (Department of Health and Wellness) v CUPE Local 805)**

Existing Jurisprudence:

[67] Having concluded that this classification appeal is not clearly, a true question of jurisdiction, the next question is whether existing case law has determined already, what standard of review is to be applied to a particular category of decision, in this case classification appeals.

[68] The Respondent submitted the case of **NLAAP re: Byron Baker and others v The Queen** as the authority for the category of classification appeal procedure as being largely remedial, involving two party constituencies resulting in "a somewhat deferential standard of reasonableness".

[69] On the other hand strong arguments exist that what the Tribunal was doing was deciding its own mandate, which would be rare for a legislature to permit, and that the decision has "far reaching implications" in terms of the province and its collective agreements. The latter would suggest a matter of "central legal importance" for the province in terms of the appeal procedure.

[70] A decision, no matter how reasonable is of no effect if it lacks jurisdiction. The Tribunal felt it had to decide common law, and the two sources of its authority, the statute and the collective agreement, required it not to act contrary to the collective agreement. Therefore while it was dealing with it's own statute, it was not necessarily deciding a matter closely connected to it's own function, namely whether and how a position should be classified. Questions of general law, are subject to review by the courts.

[71] I agree with the Union's position that the jurisprudence has not yet satisfactorily determined a standard of review for classification appeals. A standard of review analysis is therefore required.

[72] Accordingly, as a second step, **Dunsmuir** says to proceed with a standard of review analysis if the appropriate standard is still unclear. That will be my next step.

Standard of Review Analysis:

[73] In Regimbald ,Guy on Administrative Law (1st edition) the author comments on the process of determining questions of jurisdiction at page 165

> "Consequently, while the jurisdictional question, *per se*, is no longer identified and examined in isolation from the enabling statute as a whole, it is examined through the standard of review analysis, in the "nature of the question" part of the test. A jurisdictional question is a question of law, which will **usually lead** to a standard of review for correctness in the same way administrative decisions on constitutional interpretations are reviewed for correctness despite strong privative clauses."
> (emphasis added)

[74] I turn now to the contextual analysis which as explain as explained in **Dunsmuir**, involves consideration of the relevant factors, some of which, more than others, may determine the appropriate standard of review.

[75] I should indicate that the Province in its brief argued and presumed the standard would be correctness, based on its position that the issue was purely jurisdictional. I shall discuss the common (four (4) factors) in the following order:

(i). **Privative clause:**

Whether a privative clause is present or absent is relevant to the level of deference to be shown to the Tribunal. The presence as opposed to the absence of the privative clause indicates that some level of deference should be shown.

[76] The Civil Service Bargaining Act, contains a privative clause in section 33(1), which requires every collective agreement to contain a provision to settle all differences between the parties bound by it.

[77] The collective agreement in turn, contains a privative clause establishing the Tribunal (Article 43.03(a)), whose decision shall be "final and binding on all parties". (Article 43.03(m)). Notably under this provision no employee has grievance rights in respect of any decision of the Tribunal.

[78] The collective agreement incorporates the Arbitration Act of Nova Scotia which contains a provision at section 5 A(h) stating that the arbitrator's award shall be final and binding on the parties.

[79] The presence of these clauses suggest the Tribunal is to be accorded some amount of deference. There is not one but several clauses, calling for the parties to be "bound" by the Tribunal's decision, coupled with the word "final" in all of them.

(ii) **The Tribunal's Purpose:**

[80] The Tribunal's purpose can be derived in a couple of ways. First the purpose or object of the relevant statute, the Civil Service Collective Bargaining Act, is entirely relevant. It is apparent from a review of section 33 that the

Tribunal's purpose is to adjudicate "grievances" in respect of an employers job classification. So, the Tribunal was established in "form" to satisfy the requirement of the Collective Agreement but also in "substance" to hear appeals regarding classification . The reason for its establishment and its purpose are to an extent, synonymous. I repeat here the Collective Agreement when it says at article 43.03(a):

> "43.03 (a) A Classification Appeal Tribunal shall be established to make a final and binding decision on a dispute concerning the classification of the position of an employee occupies."

[81] Many of the Appeals discussed here were one person appeals, and thus two party hearings. Both substantive rights and procedural rights are part of what the Tribunal must decide. The Tribunal has both an adjudicative and remedial function. At its core is solving problems of classification through an appeal process. To that end it must decide procedurally when and how the appeals will be heard. There are as well "group" appeals.

[82] Depending on the nature of the appeal there could be a number of considerations, including the availability of the parties, witnesses, and backlog. These can be competing issues. The "mechanism" of the Tribunal must ensure that the statutory and contractual mandate can be met. This suggests a structure that is specialized in terms of dealing with employment issues at the government level.

[83] Once again, in **NLAPPE Re: Byron Baker and others v the Queen - Corrections** 2006 NLTD 58, the Court found that the purpose of a classification appeal procedure is "to rectify errors and avoid the destructive effects on morale or persons working side by side in identical job classifications which are improperly classified." While its functions may be described as "polycentric", similar type tribunals have been described as playing a largely remedial role, dealing with two party disputes.

[84] I see the purpose of the Tribunal as largely adjudicative. It encompasses the requirement to manage, organize the appeals . The end result of the appeal process is to remediate. The Tribunal has interpreted itself as "a type of arbitration panel". The provisions of 43.03 provide a wide range of remedies and in broad discretion.

The notions of purpose and expertise have been said to overlap. In my view, this Tribunal is fairly specialized in its creation, in its makeup, and in its area of expertise.

(iii) **The Nature of Question:**

[85] In **Atco Gas Company, [2006] 1 S.C.R. 140** the court addressed the doctrine of jurisdiction by necessary implication, in determining whether the decision under review, was correct. This doctrine may be applicable to this review, although it has not been raised in submissions. Considering **NLAAP** against the broader jurisdictional issue here I have indicated already that while that may be the primary function of the board, the jurisdictional matter in the present case is "front and centre".

[86] For the foregoing reasons I believe the question for the Tribunal, as it pertained to their own mandate was one of jurisdiction. How they decided that issue determined whether their jurisdiction was lost or exceeded (if they acted contrary to the Collective Agreement). They were interpreting their own statute (and the Collective Agreement) but the question did not relate closely to their own function (classifying positions). It related to their own authority . They were deciding whether they had the "normal jurisdiction of an arbitration panel to determine their own procedure". They determined that procedure to include "the scheduling and length of hearings".

[87] The resulting decision was to schedule more than one appeal per month. Included also was a ruling that the letters of 2008 did not form part of the Collective Agreement as an amendment or otherwise.

[88] In paragraph three (3) of its decision the Tribunal stated:

> "The Tribunal is a type of arbitration panel. At common law, arbitration panels have the jurisdiction to determine their own procedure, including the scheduling and length of hearings, subject to the requirement that the rules of natural justice are followed so that all parties are given a fair hearing. Additionally the parties may by agreement put constraints or limitations on the Tribunal or

> arbitration panel's jurisdiction. The Tribunal has never received any direction from the parties that the chair is aware of, limiting its jurisdiction to set down appeals. The Tribunal first a saw the letters attached to Ms. Arana-Sterling's letter of October 27 when that letter was received. The letters are dated 2008. The provision of the current Article 43.03 creating the Tribunal have been in existence long before that, through successive collective agreements."

[89] Jurisdiction questions, even those not pure or true questions of jurisdiction are questions of law. The Tribunal referred to the common law in its finding. In addition the Tribunal had to consider whether the 2008 letters form part of the collective agreement, under contract law.

[90] The Province states that the question of whether the Tribunal can schedule more than one hearing per month, requires an interpretation of the collective agreement, something well within an adjudicator's area of expertise.

[91] I agree with the Province generally that how the Tribunal schedules its hearings may not be of central legal importance to the legal system as a whole. I would say however that how a tribunal schedules its hearings is one that requires fairness, throughout the system to ensure that the parties are properly notified and given a full opportunity to prepare. The Province argues here that scheduling more than appeal per month affects their ability to prepare and is also unfair, as it accords with the Union, not the Employer's schedule. This is a matter best considered under the issue of procedural fairness, which the Tribunal recognized in the decision as something to be addressed. The Tribunal decided it would address procedural fairness on a case by case basis.

[92] On the one hand questions of ordinary jurisdiction and contract interpretation might suggest a standard of correctness. On the other, the Tribunal's ability to determine it's own procedure and interpret the Collective Agreement suggests a standard of deference. These latter considerations shed particular light on the level of expertise of the Tribunal.

(iv) **Expertise of the Tribunal:**

[93] In **Casino Nova Scotia v. Nova Scotia (Labour Relations Board), 2009, NSCA 4**, the Court of Appeal spoke of viewing the Tribunal's decision "through the lens of deference", having regard to the Tribunal's expertise. This the court cited, "respects the legislator's decision to leave certain choices within the Tribunal's ambit, constrained by the boundaries of reasonableness." In order to meet the **Dunsmuir** criteria, the court said, the reasons why the tribunal made it's decision, must be clear enough to allow the reviewing court to determine whether it was within "the range of acceptable outcomes", without the need to make an explicit finding on every point. The Court recognized that there may be "an alternative interpretation of the agreement provided by the arbitrator", noting that the "reasons do not have to be perfect". (Per Evans, J.A. in **Canada Post Corp. v Public Service Alliance**, 2010 FCA 56) The Tribunal must be shown to have been aware of and understood the issues at hand.

[94] Under this heading the relative expertise of the Court to the Tribunal must be considered. On matters of scheduling and statutory interpretation in general, and on matters of general law and procedure, I think it can be said that a Court's position is quite favourable, versus the Tribunal.

[95] The pertinent difference may arise however, when one considers that the Tribunal is considering its "own statute" and its "own procedure". The appointees to the Tribunal (comprising of three (3) members) are nominees, of the parties, namely the Public Service Commission and the Union. Even the third member is appointed by mutual agreement of the two parties.

[96] While a Collective Agreement is a binding contract in law, I question whether a Court has the same level of expertise as the Tribunal in dealing "en masse", with appeals as well as the grievance and other procedures which, as the Tribunal indicated, are in the nature of an arbitration.

[97] The members appointed are undoubtedly people familiar with that process, and with appropriate backgrounds.

Standard of Review/Current Trend

[98] Current administrative law accords more value to the considered opinion of the Tribunal in questions of law. In the recent case of **HRM v NS Human Right Commissions [2012], SCC 10,** the Nova Scotia Court of Appeal held (affirmed by SCC) that it was not "clear and beyond doubt", that the complaint was outside the Board's jurisdiction, and therefore the Chambers Judge had been wrong to intervene.

[99] It is well accepted that some factors, more than others may determine, in any particular case, the appropriate standard of review. Its stands to reason that a Tribunal with the ability to determine its own procedure, must be able to determine when and how appeals will be heard.

[100] The presumption in **Alberta Privacy Commissioners**, that a Tribunal interpreting its own statute is to be accorded deference is rebuttable. In my view, despite privative clauses, the nature of the question here is one which essentially determines the appropriate standard of review. The Tribunal here grappled with what they believed was a question of jurisdiction. The ability to determine one's own procedure presumes, in my view that jurisdiction exists in order to do so. Determining whether it had authority to determine the frequency and timing of the appeals, is not as close a function to the Tribunal's mandate as determining whether a position was properly classified.

[101] In **Atco Gas ,** the Supreme Court of Canada discussed distinct standards of review for each question and concluded that the Board's mandate to allocate proceeds suggested a standard of correctness , as it " goes to jurisdiction"

[102] In my view, the nature of the question calls for the application of the legal doctrine of whether the Tribunal had authority by "necessary implication". It is thus essentially a legal question. The legislation may have intended, due to the broad discretion it otherwise gave, to give the Tribunal the authority to determine its schedule, unilaterally. The statute, and the collective agreement fell short of doing so, leaving a gap.

[103] In my respectful view therefore, no matter how the question is analysed, the Tribunal was determining whether they had authority to deal with the question

before it. Therefore notwithstanding a shift to accord greater respect to legal questions made by administrative decision makers, I conclude that the correct standard here is one of correctness. The standard of review analysis has enabled me to conclude the question , more clearly as one of jurisdiction.

Was the Tribunal correct in its decision?

[104] The Province submits a number of arguments to illustrate the incorrectness of the Tribunal's decision. A summary of these is as follows:

(i) The act of scheduling an appeal (or appeals) to a specific date, requires the consent of both parties;

(ii) The power to determine one's own procedure does not include the power to determine the number of hearings to be scheduled;

(iii) The Tribunal's interpretation of the collective agreement as implying the employer agreed to provide sufficient resources was incorrect.

(iv) The exchange of letters in 2008 constituted an agreement. These same letters form part of the collective agreement and varied it accordingly;

[105] The Province advances a number of procedural fairness arguments, which will be dealt with separately. It argues that consent of both parties is required to insure availability and allow time to prepare. Procedurally these are fairness arguments as well.

[106] The Province says the Tribunal erred in opining what a meaningful appeal process looked like, and that if the parties wanted to amend the collective agreement, the union could have approached the province to renegotiate the agreement. That would have been the correct process, says the province.

[107] In terms of consent (of both parties) being required, the collective agreement, states expressly at 43.03(f) that the Tribunal may hold a hearing, if "either party....requests a hearing.." . The requirement is that the Tribunal "shall" hold a hearing if one person requests it. The agreement goes on to say that the hearing shall take place in accordance with the procedure set out in "this article". The same article at 43.03(h) then says the Tribunal may determine its own procedure.

[108] First in terms of jurisdiction the Tribunal was correct to assume jurisdiction in this matter. In **Atco Gas v Alberta Energy Board,** 2002 ABCA 171 the Supreme Court of Canada discussed the doctrine of jurisdiction by necessary implication, at paragraph 51 stating:

> "The mandate of this Court is to determine and apply the intention of the legislature (Bell ExpressVu, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see R. v. McIntosh, [1995] 1 S.C.R. 686, at para. 26; Bristol-Myers Squibb Co., at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; Bell Canada, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:"

[109] While the court rejected the doctrine as being favourable to the Appellant in that case, it did explore the "incidental powers" which could be derived from the entire context.

[110] The mandate provided by the Civil Service Collective Bargaining Act of N.S. is for the Tribunal to make "final settlement" of " all differences", by "adjudication or otherwise". In addition the Collective Agreement (43.03(h)) notes

that the Tribunal has the powers of an arbitrator under the *Arbitration Act*. Thirdly the Tribunal, as previously noted, can be required to hold a hearing and was given broad discretion in respect of procedural matters. Finally the legislation appears to have given the Tribunal the authority to conduct a hearing in accordance with the procedure set out, which may be said to include the procedure determined by the Tribunal itself.

[111] I find therefore that addressing the number and sequence of appeal hearings would by necessity fall within the jurisdiction of the Tribunal, in order to comply with their mandate to set down and hear appeals. There is nothing in the collective agreement which prevents or prescribed specifically the manner in which appeals will be set down, and no restrictions requiring for hearings by the Tribunal. Clearly the Tribunal was given the power to issue such directives as it considers necessary, to settle all differences, between the parties bound by the agreement, "concerning it's meaning" (S. 33(1)). This in my view gives it jurisdiction to decide this issue.

[112] For similar reasons I find the decision to direct the time and number of appeals was correct, as was the Tribunal's interpretation of the collective agreement that the employer agree to provide sufficient resources to allow the appeals to be dealt with.

[113] The Province argues that the Tribunal overstepped its bounds in deciding that as the employer, it agreed to provide sufficient resources to participate in an appeal process that is meaningful. The reason given for this is that the parties agreed that a meaningful appeal process by agreeing to schedule one appeal per month. The Province advances this argument under the heading of breach of procedural fairness and natural justice. The Union's reply is that the Tribunal has expertise in matters of the Collective Agreement and further, the Union should be given access to the appeal process as quickly as possible, "which includes utilizing the Tribunal's availability".

[114] It must be remembered in the absence of specific rules, a Tribunal controls its own procedure, subject to the rules of fairness (see **Naturel Ontario (Inc.) v Teamsters**, (2005) 83 L.A.C. (4th), 334). This was acknowledged by the Tribunal. The Province therefore maintains, there was an agreement on the number of appeals (one per month). The Province's position therefore is predicated upon

there being an agreement in place as to the number of appeals per month. That is the cornerstone of the Province's position on this judicial review. I turn now to consider that issue. The finding of the Tribunal was that there no such agreement.

Did the Letters of 2008, Constitute An Agreement ?

[115] The province's position as stated in its brief is that; even if the tribunal can determine it's own procedure, the agreement of 2008 prevents it from scheduling more than one appeal per month, without the consent of the parties. The Province states in its brief:

> "It is submitted that the letters of 2008 are clear. Twelve appeals a year at one per month. There is no ambiguity here."

[116] The Union's position as stated in paragraph 67 and 68 of its brief is as follows:

> "67. To come to this conclusion, the Tribunal noted that at common law, arbitration panels have jurisdiction to determine own procedures, including the scheduling of hearings, limited only by the requirement of procedural fairness. Although the parties may put limitation on this power, the Tribunal has never received direction form the parties of such a limitation."
>
> "68. The Tribunal explained that the did not find the letters between the parties to be an agreement limiting their power to determine their own procedures. In the reply letter by the Union, Mr. Tompkins noted that the Union would be in favour of increasing the number of hearing days."

[117] The Tribunal in its decision addressed the letters noting, that the parties may, by agreement put limitations on the Tribunal's jurisdiction, stating:

> “The Tribunal has never received any direction from the parties that the chair is away of, limiting its jurisdiction to set down appeal. The Tribunal first saw the letters attached Ms. Arana Stirling’s letter of October 27th when that letter was received. The letters are dated 2008. The provisions of the current article 43.03 creating the Tribunal have been in existence long before that, through successive collective agreements.”

[118] The Tribunal reviewed and interpreted the letters, noting that the January 31, 2008 letter from Mr. Campbell (of the Province) spoke of a “target of four days of hearings per month”. The Tribunal further made reference to the reply by Mr. Tompkins (on behalf of the union) while concurring in some respects, noted there were exceptions and additions. One of those exceptions was the unions desire to increase the number of hearing days and “expedite the conclusion of appeals”.

[119] The Province further argued that the past practice of the parties created an estoppel and further informs their position that there was an agreement on the number and frequency of hearings.

[120] The doctrine of estoppel is rooted in equity. In this context it would amount to stopping or preventing a party from withdrawing from or reneging on a promise made, which promise was given with the intention and knowledge that it would be relied upon by the party receiving it.

[121] The application submitted the case of **Naturel Ontario (Inc.) v Teamsters**, 83 L.A.C., 4th, 55, which dealt with a promise made to the union, “intended to affect legal relations” between they and the company. In that case the Court found that the past practice created an estoppel because the Company “by it’s conduct made the union a promise which was intended to affect legal relations between them.”

[122] The Province further cited the case of **Inergi LP and Society of Energy Professionals (2007), 166 L.A.C. 4th, 200.** In that case there was a letter of agreement signed by both parties with respect to early non-commital bargaining for a new Collective Agreement. The presence of the letter alone was sufficient to raise a “reasonable inference that the parties intended to be bound by it.” And that

is the key, can the 2008 letters here, be seen as an indication that the parties intended to be bound by the obligations set out, whatever those obligations may be.

[123] Having considered the 2008 letters I am of the view that they did not amount to a promise by the Union to the Province to hold one appeal per month, or for that matter, a binding agreement at all. There were a number of things that the parties were in agreement on, but beyond that it cannot be said with any certainty what obligation the exchange of letters were intended to create, if any.

[124] In fact the Union noted there was concurrence but with the "following exceptions and additions". One of the exceptions was in fact Union being in favour of increasing the number of hearing days and expediting the hearing of the appeals. An "addition", as the Tribunal noted in its decision was the "very important aspect...discussed but not covered in your letter" (the employer's letter) was the union's continued concern about losing hearing dates, after they are scheduled. The Tribunal mentioned this in its decision noting in particular the situation when settlements are achieved prior to the start of the hearing.

[125] If there were exceptions noted and additions added in the exchange of letters, then there could be no agreement. If something was discussed but omitted from the letter, then it cannot be agreed upon.

[126] Either there was agreement or there was not. In my respectful view, not only was there not an agreement, but there was not sufficient information upon which to reach an agreement on certain points considered crucial by the Union, in the exchange of views. This can be seen by the Union's statement where it said, "We need to know the employer's position on this point". That point was insuring both parties were ready to proceed with at least one other appeal, so as not to lose hearing dates, which in turn would increase the backlog.

[127] I therefore concur with the Tribunal's view that the letters of 2008 did not constitute a legally binding agreement that would restrict the Tribunal's jurisdiction. The Tribunal did acknowledge there was a restriction on its jurisdiction, but that had to do with procedural fairness.

Was There a Duty of Procedural Fairness?

[128] Both parties are in agreement that the Tribunal owed a duty of procedural fairness to each of the Province and the Union. They disagree on the content of that duty and whether there was a breach of the duty by the Tribunal.

Was there a Breach of the Duty of Fairness?

[129] The Province's position is that the tribunal's decision was unfair in that 1) it interferes with its ability to prepare for the appeals, 2) the decision faces the Applicant to seek an adjournment, something which cannot be guaranteed, and 3) the decision was made without consulting the Province as to their availability. With respect to the latter I have already concluded that the Tribunal had the legal authority to schedule the hearing without the consent of the parties. A decision however may be correct without necessarily being fair, procedurally or otherwise.

[130] The Union submits there is no evidence that it is procedurally unfair to the Province to deal with both appeals in one week. The Tribunal says that the Union recognized the duty and agreed to deal on a case by case basis with respect to any problems hearing the appeals would present. Beyond that the union says that the Province is over stating the requirements of procedural fairness.

[131] In terms of the standard of review for procedural fairness, the Province submitted the case of **McNaught v. Toronto Transit Commisson et al** 249 DLR (4th) 334 (2005). In McNaught the court found no evidence that the consolidation of two complaints (one from the employer and one from the employee) prevented a fair hearing.

[132] At paragraph 61 the court stated:

> ***"The board gave careful consideration to the question of consolidation on several occasions and determined that there was sufficient overlap in the issues and evidence to be adduced that the matters would be most thoroughly, efficiently and fairly deal with, if heard together."***

[133] The court noted that on the contrary it would have been difficult to decide the matters fairly, <u>without</u> hearing them together.

[134] The Province states the facts in the present case are different from **McNaught**;

> ***"Whether the appeal involves one Appellant or many Appellants the employer still frequently ends up calling management witnesses comparator witnesses and a compensation consultant. It also impacts the employers resources in providing compensation consultants for the hearing and counsel for the hearing."***

[135] The Applicant here argues the two matters, unlike **McNaught**, are completely different with different Appellants, departments and issues to be heard within one week. The Province thus argues this appears to be ignored by the Tribunal.

[136] The Tribunal had the ability to control and set its own procedure in concluding the appeal is heard. As previously stated, the word "procedure", was considered in Words and Phrases (Legal Maxim, Canada Second Edition)

> ***"... means the rules that are made to regulate the classes of litigation within the court itself, it does not involve or imply anything relating to the extent or nature of the jurisdiction of the court..."***

[137] Procedure is defined above then goes not to jurisdiction (as argued by the Applicant) but to the manner in which a proceeding is conducted. Thus, the inclusion of the words "mode" and "regulate" and the means by which "rules" are enforced and the means by which rules are enforced. In short, it does not mean substantive. Because it deals with the manner of proceeding it is closely related to procedural fairness, which focuses on the method by which a Tribunal governs its affairs and in so doing, applies the rules of natural justice.

[138] Scheduling is an everyday common occurrence, certainly for a court of law. A Tribunal hearing a large volume of appeals on a regular basis, is in no different position. Knowing generally how the appeals normally proceed, (the number and

type of witnesses) is an advantage, in being able to schedule matters for hearing, a feature which must surely be done in a fair manner to both sides.

[139] The Province argues here, it was done unfairly. In examples cited by them in its letter of October 27, 2011 is as follows:

> ***"Simply because the union will be presenting one witness, does not mean the employer will also have one witness."***

[140] The tribunal heard submissions from each side prior to making its decision. It decided the only restriction on its jurisdiction to set dates of the hearing, and the number of appeals to be heard was the requirement for procedural fairness. The tenure of the decision, I believe, is important to consider in addressing the Province's concerns. The Tribunal stated in this regard:

> ***"In that context the Tribunal will deal on a case by case basis with any problems a party may have in presenting its case."***

[141] A willingness of the Tribunal to deal with "any problems" in presenting its case is further consistent with its choice of wording in regard to appeals that were upcoming, when it stated:

> ***"It would be the Tribunals 'preference' to proceed with the Cunningham Pick Appeal on December 1 & 2, if the James Andrews Appeal is concluded in three days. However, if this is not possible, we recommend whatever remaining scheduled time be available that week be used to discuss procedures."***

[142] I turn briefly to discuss the standard of review in matters of procedural fairness. I concur with the position of the Union in its brief, that the court should decide whether there was a breach without an analysis based on the functional or procedural approach, and without deference. The content of the duty must still be determined.

[143] From a review of the authorities it seems clear that the content of the duty will depend on the circumstances of each case, the statutory authority given, the

nature of the decision and the importance to the parties. (**Baker v. Canada [Minister of Citizenship and Immigration]** 1999 2 SCR 817.)

[144] Which of these factors and whether some or all of them require more emphasis is an important consideration. As well there maybe additional factors applicable to warrant more, less or different content as the case may be.

[145] It is clear the decision was of importance to both parties and for the Province has potentially far reaching implications. I acknowledged and accept as submitted by them, that this is more than a "scheduling squabble". It is also important however to the union and clearly with what they believe and perceive as a serious back log of appeals.

[146] I note that elsewhere in the collective agreement there is a provision which provides for the situation where the parties are able and unable to schedule dates agreeable to all in greivances. (Appendix 10) .The agreement however states further that appeals are not considered grievances under Article 29.

[147] The nature of the decision is one that, in my view, lends itself to the Tribunal's, level of expertise in these types of appeals in terms of deciding what can be done fairly in setting time lines.

[148] It is obvious the Tribunal recognized this, and obvious as well, they were attempting to balance the obligation to be fair with the fair and efficient use of the time allocated, in addressing the back log.

[149] In terms of additional resources, the Province acknowledges and does not dispute that all appeals must eventually be heard and that this application is about "when" they will be heard. I cannot therefore accept that the Tribunal's decision was procedurally unfair because it will require that additional resources will be "brought to bear" by the Province.

[150] In terms of the ability to prepare and be forced to request an adjournment, the two obviously go hand in hand. While it is true that there is never a guarantee an adjournment will be granted the wording of the Tribunal's decision suggests to me that no reasonable request for an adjournment, would be refused. This of course applies to procedural fairness going forward on a case by case basis. It is on

a case by case basis, that the law essentially requires procedural fairness to be dealt. That is what the Tribunal decided.

[151] What is problematic for the Province is not that the appeals must be heard or resolved, but that they are being heard or resolved on the schedule of the Union. The Province's argument is both prospective, in relation to future appeals, and current in that their consent was not obtained for these particular appeals. Therefore, what the Province's case amounts to, in my respectful view, is whether it was procedurally fair to schedule these particular appeals, without their consent.

[152] It is my view and decision, that the Tribunal did not breach its duty of procedural fairness to schedule these appeals without the consent of both parties.

[153] Consequently, the Province's Application for Judicial Review is hereby dismissed. I will hear the parties as to costs.

Murray, J.