SUPREME COURT OF NOVA SCOTIA

Citation: Seaview Manor Corporation v. Canadian Union of Public Employees, Local 2094, 2013 NSSC 244

Date: 2013-07-25
Docket: Syd. No. 414076
Registry: Sydney

Between:

Seaview Manor Corporation

Applicant

v.

Canadian Union of Public Employees, Local 2094
and the Arbitration Board (Augustus Richardson, Q.C.,
Scott Sterns and Robert Moore)

Respondents

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: July 8, 2013, in Sydney, Nova Scotia

Counsel: Eric Durnford, Q.C., for the Applicant

Susan Coen, for the Respondent Canadian Union of Public Employees, Local 2094

Arbitration Board not participating

By the Court:

INTRODUCTION

[1] The Applicant, Seaview Manor Corporation (hereinafter "Seaview") seeks judicial review of a majority decision rendered by an Arbitration Board (hereinafter "the Board"), dated March 2, 2013. It seeks to have the decision quashed. The Respondent, the Canadian Union of Public Employees, Local 2094 (hereinafter "the Union") opposes the review and remedy sought by Seaview.

[2] The sole matter before the Board was whether a grievance brought on behalf of casual employee, Ms. Vingar, was arbitrable pursuant to the Collective Agreement governing the parties. The majority of the Board determined that the grievance fell within the Collective Agreement and thus arbitrable, with a dissenting opinion reaching a contrary conclusion.

BACKGROUND

[3] The parties filed an "Agreed Statement of Fact and Issues" with the Board. It is a succinct summary of the factual background and discrete issue placed before the Board. It provides:

> FACTS
>
> 1. Seaview Manor Corporation ("Seaview" or the "Employer") and Canadian Union of Public Employees, Local 2094 (the "Union") are parties to a Collective Agreement in effect at the relevant time covering the period from its date of signing (July 7, 2011) to October 31, 2011.
>
> 2. On October 18, 2011, Seaview terminated Ms. Vingar's employment as a casual employee in the Environmental Services Department at Seaview (see attached letter). Her pay rate at that time was $13.43 per hour.
>
> 3. On October 25, 2011, Ms. Vingar grieved the termination (see attached Grievance).
>
> 4. The Employer's position on the grievance is that it is not arbitrable because the termination of a casual employee is not covered by the provisions of the Collective Agreement.
>
> 5. The parties have agreed that the Arbitration Board convene to hear submissions from them on the preliminary issue of arbitrability only and render its decision thereon prior to any consideration of the merits of the grievance.

6. The parties have had arbitration and court proceedings relating to various aspects of casual employment during the time of the operation of three Collective Agreements:

a. November 1, 2001 - October 31, 2004;

b. November 1, 2004 - March 31, 2009;

c. July 7, 2011 - October 31, 2011

See copies of Decisions and Agreements attached.

ISSUE

Is Ms. Vingar's termination arbitrable under the Collective Agreement?

[4] The letter referenced in paragraph 2 of the Agreed facts stated:

> This letter is to inform you that your name has been removed from the casual call list effective immediately due to your unavailability for shifts at Seaview Manor. Our records show that it has been over four months since you have been actively at work or had any correspondence with your employer.
>
> Thank you for your service at Seaview Manor and we wish you the best in the future. If you have any questions, please don't hesitate to call.

[5] It may be helpful at this juncture to review several provisions of the Collective Agreement which were referenced by both the Board and the parties as being relevant to the task given to it. Article 12 is entitled "Grievance Procedure" and contains the following provisions:

> **12:02 Definition of a Grievance**
>
> Grievances shall be defined as any difference arising out of the interpretation, application, administration, or alleged violation of this Collective Agreement.
>
> **12:04 Settling of Grievances**
>
> Alleged grievances shall be dealt with in the following manner:
>
> a) The aggrieved employee or employees, with a shop steward or member of the Local Executive, shall first discuss the complaint with the Department Head within 72 hours of its occurrence.
>
> b) If the alleged grievance is not settled within 48 hours of the discussion with the employee's supervisor, the grievor (or the Union, if a general grievance), shall then

refer the grievance, stipulating the Article(s) allegedly violated, to the Administrator or his/her representative. The Administrator shall give his/her decision in writing to the Committee not later than seven (7) calendar days following the presentation to him/her of the written grievance. At this point, it is agreed that the Union Representative may act as a member of the Committee at the request of either party.

c) If the alleged complaint is not settled in accordance with section (b), it shall be referred to the Board of Directors who will meet as soon as possible and shall give its reply as soon as possible, but in no case shall more than seven (7) days elapse before a reply is received unless by mutual consent of the parties involved.

d) If the alleged grievance is not settled in accordance with section b), it may then be referred to arbitration as outlined in paragraph e) below within fifteen (15) working days of the Board's decision referred to in paragraph c).

e) If settlement is not reached in the Steps above, the matter may then be referred to an Arbitration Board of three (3) members, one (1) appointed by the Union, one (1) by the Employer, and one (1) by the other two. The third member shall act as Chair. Should the two (2) appointed members fail to agree upon a third member, he/she shall be appointed by the Minister of Labour and Workforce Development for the Province of Nova Scotia. The decision of the majority shall be the decision of the Board. Where there is no majority decision, the decision of the Chair shall be the decision of the Board.

f) The decision of the Board of Arbitration shall be final and binding and enforceable on all parties, but in no event shall the Board of Arbitration have the power to change this Agreement or to alter, modify, or amend any of its provisions. However, the Board shall have the power to dispose of any discharge or a discipline grievance by any arrangement which in its opinion it deems just and equitable.

g) Each party shall pay the fees and expenses of the Arbitrator it appoints and one-half of the fees and expenses of the Chair and any other expenses of the Arbitration Board.

h) Grievance on Safety - An employee, or group of employees, who is/are requested to work under unsafe or unhealthy conditions shall have the right to file a grievance at the Second Step of the Grievance Procedure for preferred handling.

i) A single Arbitrator may be used if mutually agreed.

j) Where a general dispute involving a question of general application or interpretation occurs, or where a group of employees in the bargaining unit have a grievance, paragraph a) of this article may be bypassed. (This is not to circumvent the regular Grievance Procedure.)

[6] Article 13 addresses the form and nature of disciplinary action to be taken in various circumstances. Article 13:01 provides:

> 13:01 In the event the Employer takes a disciplinary action against an employee who has completed the probationary period which is a suspension or the discharge of the employee, such employee shall be notified in writing of the action, and/or penalty, with a copy to the National Representative of C.U.P.E.
>
> A disciplinary action against an employee who has completed the probationary period will normally progress through the following steps:
>
> 1) A verbal warning
>
> 2) A written warning
>
> 3) Suspension
>
> 4) Discharge
>
> (Employees shall not receive a letter for the verbal warning in the first instance. In the event of a second offence, the Employer shall issue a letter with regards to the action taken which shall be a letter of warning.)

[7] The provision which has garnered the greatest amount of debate is that contained in "Article 4 - DEFINITIONS" relating to casual employees. Article 4:03 provides:

> 4:03 A "CASUAL EMPLOYEE" is one who works on a day to day basis and is not regularly scheduled. Unless a provision of this Agreement expressly states that it applies to casual employees, use of the word "employee" in this Agreement shall apply only to permanent full time employees and permanent part time employees, who are collectively referred to as "permanent employees".

THE DECISION UNDER REVIEW

The Majority decision

[8] In the Majority decision, the Board did not accept Seaview's argument that Article 4:03 of the Collective Agreement, which defines a "casual employee", when read in conjunction with Articles 12:04 and 13:01, served to preclude Ms. Vingar's grievance under the Collective Agreement.

[9] In addition to the "Agreed Statement of Facts" referenced earlier herein, the Board heard evidence from Ms. Vingar as well as Mae Smith, current Union local

president, and a member of the negotiating team with respect to the present, and previous two collective agreements. Ms. Smith's evidence related in part, to the parties' intention regarding the insertion of Article 4:03 into the Collective Agreement.

[10] The crux of the majority decision is found in paragraph 46, which provides:

> [46] First, a review of the Collective Agreement as a whole suggests that notwithstanding the definition contained in Art. 4:03 the parties must have intended and understood the word "employee" to have different meanings in different places; and that that meaning depended as much on context as it did on the definition in Art. 4:03.

[11] Clearly, in interpreting the provisions in question, the majority of the Board did not look at Articles 4:03, 12:04 and 13:01 in isolation, but rather interpreted them within the context of the entire Collective Agreement. The majority provided several examples of how the meaning espoused by Seaview would either make no sense within other provisions, or create redundancies.

[12] The majority follows with five further difficulties it identified with Seaview's position, summarized as follows in the Union's written submissions:

> **Second difficulty**: Considering the law in Nova Scotia re right to grieve a "difference" (Firefighters case), one would have expected the parties to state a denial expressly, as they did, when defining what probationary employees could or could not grieve (Article 4:02). (para 55)
>
> **Third difficulty**: If the Employer's submission were accepted, then casual employees would be unable to grieve even those rights they were expressly given. This would be contrary to the principle that there cannot be a right without a remedy. "But if casuals can grieve the rights they do have, then they can do that only because the parties in fact understood the word "employee" in Articles 12 and 13 in include casuals". (para 56)
>
> **Fourth difficulty**: The context here, in a long-term residential care facility, differs from that in Westin Harbour Castle. The fact that casuals have a seniority list suggests "both a greater attachment to the workplace and a greater interest on the part of the Union and the Employer to define and protect the interest" of such employees. (para 57)
>
> **Fifth difficulty**: The prior arbitral awards relied upon by the Employer dealt with entitlement to benefits which had a monetary cost to the employer; "It was not a struggle over whether they were entitled to grieve the denial of those benefits. Indeed, the fact that the decisions exist at all could be taken as evincing an ongoing recognition that casuals had always been entitled to grieve the denial of benefits - if not to the benefits themselves."(para 58)

> **Sixth difficulty**: The evidence of the parties' conduct with respect to the grievance was clear that both Union and Employer proceeded through the three steps of the grievance process with "no hint from the Employer that it thought that casuals lacked the right to grieve a termination under the collective agreement". The Employer's conduct, the practice and history "evince a shared understanding between it and the Union that casuals were not excluded from the grievance process because of the definition in Article 4:03. Nor was there any evidence, as there was in the Boudreau decision, that the Employer was going along with the grievance for reasons of 'good labour relations'". (para 59)

The Dissenting decision

[13] The dissenting decision, dated March 7, 2013, agrees with Seaview's position "that the grievance is not arbitrable because the termination of casual employees is not covered by the provisions of the Collective Agreement". In the dissent, significance is placed upon the change to the definition of "casual employee" from that contained in earlier agreements, stating:

> It is my respectful view that the change of the definition of a casual employee is of fundamental importance when determining this matter. The parties must have intended that the change in definition changes the rights of a casual employee. The parties are both sophisticated parties, well represented and well aware of the issues related to casual employees.

[14] In particular, it was noted that the prior definition did not purport to restrict the rights of casual employees, whereas the current Article 4:03 contains a clear limitation, which must have been added for a reason - to limit this category of employee's rights. To interpret the provisions otherwise, would serve to alter the terms of the Collective Agreement, which is expressly prohibited by Article 12.04(f).

POSITION OF THE PARTIES

Seaview

[15] The primary argument put forward by Seaview centers around Article 12:04(f), and that by interpreting the various clauses as it did, the Majority exceeded its express grant of jurisdiction contained therein. Article 12:04(f) expressly prohibits a Board of Arbitration from changing the Collective Agreement

or altering, modifying, or amending any of its provisions. By interpreting Article 4:03 as it did, Seaview asserts that the Majority Board did what is clearly prohibited - amend the Agreement by rending the definition of "casual employee" meaningless, and providing rights to casual employees which were not intended by the parties.

[16] In light of the above, Seaview submits that the standard of review to be applied by this Court is not reasonableness, but rather correctness, as the matter truly goes to whether the Majority acted within the scope of its jurisdiction. **Dunsmuir** clearly recognizes that deference is not owed to an administrative tribunal in such circumstances. It is asserted that the decision reached by the Majority Board is incorrect.

[17] Even if the Court applies a reasonableness standard, Seaview argues that the Majority decision must be found to be unreasonable on a number of grounds, including:

> - the Majority board showed a disregard for labour relation norms and a lack of awareness of its decision on the ongoing relationship between the parties;
>
> - the Majority board exceeded its express mandate by interpreting provisions of the Collective Agreement which were not part of the issue before it;
>
> - the Majority board failed to distinguish the "Halifax Firefighters" case (**IAFF, Local 268 v. Halifax (City)**, (1982) 50 N.S.R. (2d) 299, N.S.C.A.), from the circumstances involved in the matter before it;
>
> - the Majority board, without evidence, improperly concluded that "casual" employee's of Seaview had a connection to the workplace, very similar to that of permanent employees;
>
> - the Majority board, without first finding that the provisions of the Collective Agreement were unclear or ambiguous, improperly resorted to extrinsic evidence as to the intent of the parties, in particular in relation to Article 4:03.

The Union

[18] The Union does not agree that this matter engages the Board's jurisdiction, rather the issue properly framed, is whether the grievance was arbitrable. That issue clearly attracts a standard of review of reasonableness.

[19] The Union acknowledges that in light of Article 12:04(f), it would be an unreasonable outcome, if an arbitration board amended a collective agreement. It is submitted however, that the Majority decision did not infringe Article 12:04(f) in anyway, rather it did exactly what it was mandated to do - interpret the Collective Agreement in order to determine whether the grievance of Ms. Vingar was arbitrable thereunder.

[20] It is further asserted that the decision reached was "justifiable, intelligible and transparent". The "difficulties" raised in the Majority decision in relation to the Employer's arbitrability objection, as well as the ultimate conclusion reached, all fall within a range of possible conclusions and outcomes, and as such are reasonable.

ANALYSIS

Standard of Review

[21] The Supreme Court of Canada in **Dunsmuir v. New Brunswick**, 2008 SCC 9 created a new framework for judicial review, identifying two standards - reasonableness and correctness. Seaview acknowledges that generally an arbitrator's interpretation of a collective agreement will be reviewed for reasonableness, however, submits the present instance engages the Board's jurisdiction, thus requiring a correctness analysis.

[22] In **Dunsmuir, supra**, the Court addressed the standard to be applied to issues of jurisdiction as follows:

> [59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intend 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 gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D.J M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485; 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, per Bastarache J.). That case involved the decision-making powers of a

> municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[23] In **Canadian Union of Public Employees, Local 2434 v. Port Hawkesbury (Town)**, 2011 NSCA 28, our Court of Appeal very helpfully summarized the "principles on jurisdictional review" arising from **Dunsmuir, supra**, and a number of other authorities as follows:

> [27] 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).
>
> (b) The concept of decisional jurisdiction that preceded *C.U.P.E. v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227, is rejected. That former notion could stretch any error along the tribunal's reasoning path into a jurisdictional impediment to the next analytical step. Then jurisdictional review would elasticize into full appellate scrutiny. *Dunsmuir* forbids that approach.
>
> (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 with that authority is not jurisdictional.
>
> (d) A jurisdictional issue may arise by either an excess of legal authority or an erroneous refusal to exercise that authority:
>
> > "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."
>
> (e) Plotting the jurisdictional line between two or more competing specialized tribunals is similarly reviewed for correctness.
>
> (f) The court's correctness standard for a true jurisdictional issue stems from the superior court's constitutionally protected function to uphold the application of the rule of law by statutory tribunals, as explained in cases such as *Crevier v. Attorney General (Québec) et al.*, [1981] 2 S.C.R. 220.
>
> (g) Correctness applies to a true jurisdictional question without a standard of review analysis. But if the matter is not truly jurisdictional (and is not otherwise excepted from standard of review analysis as explained in *Dunsmuir* - e.g. constitutional issues), then the reviewing court must proceed to the factor-based standard of review analysis.

[24] I have also found instructive the decision of LeBlanc, J. in **Cherubini Metal Works Ltd. v. United Steelworkers of America**, 2011 NSSC 94. There, the Court was tasked with reviewing an arbitration board's decision whether a grievance was arbitrable under the provisions of a collective agreement. The applicant asserted that this function was "truly jurisdictional" as contemplated by **Dunsmuir, supra**, thus attracting a standard of review of correctness.

[25] After a careful review of several authorities, LeBlanc, J. determined that the standard of review was reasonableness, concluding:

> [50] The Local submits that each of the factors of the standard of review analysis points to deference. The Arbitrator's decision is protected by a privative clause, suggesting deference. Such deference is consistent with the purpose of labour arbitration and with the expertise of the Arbitrator. The determination of the identities of the parties to the collective agreement required the Arbitrator to interpret provisions of his "home statute", the *Trade Union Act*, as well as the Collective Agreement. These are matters well within the Arbitrator's jurisdiction, closely related to, or even subsumed within, the question of arbitrability and of whether the matters in dispute arise out of the interpretation or application of the Collective Agreement. I am not convinced that this was a "true" question of jurisdiction. The Arbitrator was not required to inquire into whether he had authority to deal with the matter. Identifying the parties to a Collective Agreement is a proper exercise of an arbitrator's jurisdiction. As such, the standard of review would be reasonableness.

[26] One of the authorities relied upon by Justice LeBlanc, **O.P.S.E.U. v. Seneca College of Applied Arts and Technology** (2006), 267 D.L.R. (4th) 509, has particular relevance in my view to the matter at hand. Quoting from that decision, LeBlanc J. notes:

> [49] Laskin, J.A. also concluded that the respondent's reasoning was inconsistent with the concept of "arbitrability". He stated, at paras. 50 - 52:
>
> > The third reason I disagree with OPSUE's position is that it seriously compromises the notion of arbitrability. Every question about whether a collective agreement gives an arbitrator authority to grant a particular remedy for an unjust dismissal can be labeled a "jurisdictional question". If "jurisdiction" in this sense - and it was the sense in which the Board used the word - means that a Board of Arbitration's answer to the question receives no curial deference, the principle that its decisions on matters of arbitrability are entitled to deference, will have little, if any, practical meaning. A "labeling approach" to determining the proper standard of review cannot be permitted to undermine or displace the pragmatic and functional approach.
> >
> > The dividing line between the nature of questions pointing to significant deference and the nature of questions pointing to little or no deference is at times a hard line to draw. If, however, doubt arises about the proper characterization of a question or

> whether the question points to more or to less deference, the wise and often-repeated caution of Dickson, J. in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 277 (S.C.C.), at 233 becomes apt:
>
> > The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.
>
> Although I do not consider the characterization difficult in this case, if necessary I would invoke Dickson, J.'s caution. In my view, in deciding whether the collective agreement inferentially gave it the authority to award aggravated and punitive damages, the Board was deciding a question of arbitrability. Its resolution of that question was therefore entitled to deference.

[27] In the present case, I do not agree with Seaview's proposition that the Board was engaged in an inquiry which invoked a "true question of jurisdiction". The Board was asked to determine whether the grievance was arbitrable, which in turn required an interpretation of the collective agreement. The Board was not tasked with deciding whether the door of legal authority was open or shut to make the inquiry - it was acknowledged that it was empowered, and in fact requested to make the arbitrability determination. As noted by Fichaud, J. in **Port Hawkesbury (Town), supra**, "The decisional reasoning by a tribunal with that authority is not jurisdictional".

[28] Seaview's submission that the Majority Board's decision is jurisdictional in nature because it is outside the authority conveyed by virtue of Article 12:04(f) is rejected. To accept this reasoning would permit every party, discontent with an arbitrator's interpretation of a collective agreement relating to arbitrability, to label such as "jurisdictional" and therefore subject to a correctness standard of review. In my view, this would be contrary to the clear endorsement of deference relating to an arbitrator's interpretation of a collective agreement developed in the jurisprudence, as well as an improper expansion of the concept of "jurisdiction" beyond the bounds contemplated in **Dunsmuir, supra.**

[29] As noted above, it has previously been determined that an arbitrator's interpretation of a collective agreement and determination of arbitrability are subject to deference. As such, it is not necessary to undertake a further analysis as contemplated by **Dunsmuir, supra**. (See also **Communications, Energy and Paperworkers' Union, Local 1520 v. Maritime Paper Products Limited**, 2009 NSCA 60.)

Is the Majority Board decision reasonable?

[30] The Supreme Court in **Dunsmuir, supra** explained the concept of "reasonableness" as follows:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[31] Our Court of Appeal has, on several occassions, provided an elaboration of what is intended in **Dunsmuir, supra**, by "reasonableness", and in particular, how a reviewing court should apply that concept. By way of example, in **Casino Nova Scotia v. NSLRB**, 2009 NSCA 4, Fichaud, J.A. writes:

> 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.
>
> 30 Several of the Casino's submissions apparently assume that the "intelligibility" and "justification" attributed by Dunsmuir to the first step allow the reviewing court to analyze whether the tribunal's decision is wrong. I disagree with that assumption. "Intelligibility" and "justification" are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to process (*Dunsmuir*, para. 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. *Nova Scotia (Director of Assessment) v. Wolfson*, 2008 NSCA 120, para. 36.
>
> 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 the boundary of reasonableness. *Dunsmuir*, para. 47-49; *Lake*, para. 41; *PANS Pension Plan*, para. 63; *Nova Scotia v. Wolfson*, para. 34.

[32] I have also found particularly helpful the direction of Fichaud, J.A. in **CEPU, Local 1520 v. Maritime Paper Products Ltd.,** 2009 NSCA 60, also a decision relating to a review of an arbitrator's interpretation of a collective agreement. After confirming "a reviewing court should apply reasonableness to an arbitrator's interpretation of the collective agreement", the Court warns against a reviewing court applying its own view of what may be a proper outcome, writing:

> 24 The reviewing judge assessing reasonableness does not plot his own itinerary, but tracks the tribunal's reasoning path. *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247 at para. 47-55; *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board),* 2005 NSCA 141 at para. 42-44; *CBRM v. CUPE* at para. 71-72. So the reviewing judge's first task is to chart the tribunal's reasoning.

And further,

> 34 In *Ryan,* Justice Iacobucci for the Court said:
>
> > 50 At the outset it is helpful to contrast judicial review according to the standard of reasonableness with the fundamentally different process of reviewing a decision for correctness. When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. *In contrast, when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been*. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result. *[emphasis added]*
>
> 35 Reasonableness tracks the tribunal's reasoning, and asks whether the tribunal's finding or conclusion inhabits the set of rational outcomes. If the answer is yes, it does not matter that there may be other rational outcomes or that the judge may prefer another interpretation of "management convenience". *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, para. 59. See also: *Ryan,* para. 51, 55; *Granite*, para. 42-44; *CBRM v. CUPE,* para. 71-72.

[33] Turning to the matter before the Court, the first inquiry which must be made is whether the Majority decision was justifiable, and intelligible with a transparent reasoning path. In my view, it was. The Majority decision reviewed the positions of the parties and clearly set out its reasoning flowing to the ultimate conclusion reached. There is no question why the Majority decision found as it did, and it provided sufficient "raw material" to proceed to the next stage.

[34] The second component of the reasonableness analysis requires the Court to consider whether the Majority decision "inhabits the range of acceptable outcomes." When assessing the reasonableness of the decision and given some concerns raised, this Court is mindful that the particular decision under review arises within the content of a labour arbitration.

[35] As recently stated by the Supreme Court in **Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals**, 2011 SCC 59, labour arbitrators are not strictly bound to common law and equitable doctrines which are applied by courts, but enjoy flexibility to use these principles based upon the unique context required in the labour relations arena. The Court writes:

> 45 On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates -- and well equipped by their expertise -- to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.

And futher,

> 48 Collective agreements govern the ongoing relationship between employers and their employees, as represented by their unions. When disputes arise - and they inevitably will - the collective agreement is expected to survive, at least until the next round of negotiations. The peaceful continuity of the relationship depends on a system of grievance arbitration that is sensitive to the immediate and long-term interests of both the employees and the employer.
>
> 49 Labour arbitrators are uniquely placed to respond to the exigencies of the employer-employee relationship. But they require the flexibility to craft appropriate remedial doctrines when the need arises: Rigidity in the dispute resolution process risks not only the disintegration of the relationship, but also industrial discord.

[36] I turn now to consider the specific concerns raised by Seaview to determine whether any render the Majority decision "unreasonable".

Inadequate regard for previous arbitral decisions

[37] Seaview submits that in rendering its decision, the Majority Board "took no account of previous arbitral decisions regarding casual employees", most notably the decision of Arbitrator MacDonald. These decisions should have been considered by the Majority Board, and followed, unless compelling reasons were provided for departing therefrom.

[38] The Union submits that the Majority Board did not "depart from previous arbitral interpretations of the same provisions", rather it considered and distinguished them from the present case. It is clear from the decision itself why the Majority Board decided differently than previous boards, and further, different conclusions can both comfortably fit within a range of reasonable outcomes.

[39] In their leading text, Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration, 4th ed*. (Canada Law Book, 2006) the authors comment as follows regarding the use of prior decisions:

> 4:2220 Prior arbitration awards, while not forming binding precedent, do form part of the general context in which a collective agreement is made. Thus, particularly if they are between the same parties, prior awards which deal with the same words or phrases are a significant source of meaning and are often resorted to as corroborative aids or as aids where the meaning of the words in the agreement admit of more than one interpretation. Similarly, judicial decisions, while not usually as directly applicable, have been used in much the same fashion to assist in the construction of collective agreements.

[40] It is clear from the Majority decision that Seaview's reliance on previous arbital decisions, most notably that of Arbitrator MacDonald, who also interpreted Article 4:03 was considered. The Majority decision carefully canvassed the MacDonald decision as well as why Seaview felt it was compelling authority in the present case. Although the Majority Board only briefly references Arbitrator MacDonald's decision in paragraph 51 of its reasons, it is abundantly clear from the review of the decision, the summary of the "Employer's" position and the contents of the decision as a whole, why the MacDonald decision was not applied in the present case.

[41] I cannot conclude that the Majority decision, as it relates to its failure to rely on prior arbital decisions, fell outside the range of reasonable outcomes.

The Majority Board interpreted provisions that were not before it

[42] Seaview submits that the Arbitration Board was asked to interpret the meaning of "casual employee" in Article 4:03 as it applied to the grievance and termination provisions. The Majority Board clearly went beyond this requested function and considered how Article 4:03 should be interpreted in light of many other provisions of the Collective Agreement. It is submitted this gives rise to an unreasonable outcome.

[43] The Union submits that the Majority Board interpreted the relevant articles by looking at the Collective Agreement as a whole, and that such an approach is a reasonable one. Further, it is submitted that the Majority decision "reasonably adheres to principles of construction", as recently discussed in **Guelph General Hospital and ONA**, (2012) 226 L.A.C. (4th) 24 where Arbitrator Stout writes:

> 20 The basic rules governing the interpretation of a collective agreement are reviewed extensively by Arbitrator Hamilton in *Re DHL Express (Canada) Limited and Canadian Auto Workers, Locals 4215, 144 and 4278, supra*, beginning at page 295 as follows:
>
> > " ... the predominant reference point for an arbitrator must be the language in the agreement... because it is primarily from the written word that the common intention of the parties is to be ascertained. Language is to be construed in accordance with its ordinary and plain meaning, unless adopting this approach would lead to an absurdity or repugnancy, but in these latter situations, arbitrators will interpret the words used in a manner so as to avoid such results. However, it must be remembered that these particular principles of interpretation are to be used in the context of the written agreement itself. It is also well recognized that a counter balancing principle is that anomalies or ill-considered results are not sufficient to cause the alteration of the plain meaning of words. Neither is the fact that one interpretation of the agreement may result in a (perceived) hardship to one party.
> >
> > ...
> >
> > It is also a well accepted principle that the provisions of the agreement are to be construed as a whole and that words and provisions are to be interpreted in context. ... Another basic principle is that there is a general assumption against redundancy. Put it another way, it is to be (initially) assumed that the parties have not agreed to superfluous or unnecessary wording in crafting the agreement.
>
> 21 I agree with the basic rules of interpretation outlined by Arbitrator Hamilton. I would add that a proper interpretation involves examining the language as a whole and in context to determine the intent of the parties. In my view, a literal meaning should not be applied to one provision where to do so would bring about an unrealistic result or a result that would not normally be contemplated by parties to a collective agreement. Where the words may bear more than one meaning, then the more reasonable meaning that conforms to the other provisions in the agreement must be preferred.

[44] In the present instance, the Majority Board did not accept that the meaning of Article 4:03 was clear on its face. To the contrary, at paragraph [52] of the Majority decision that Article, and in particular the definition of "permanent employees" contained therein, was found to be "oddly redundant". The Majority Board looked at Article 4:03 as a whole, and questioned why if "casual employees" were to be defined as submitted by Seaview, the parties would have continued in the provision to feel the need to define "permanent employees" as it did.

[45] Viewing Article 4:03 as being less than clear, was not an unreasonable conclusion to be reached by the Majority Board given its construction, and apparent redundancy. As such, the Majority Board attempting to interpret the provision by examining a wider context, namely the Collective Agreement as a whole, was not unreasonable.

Application of the "Halifax Firefighter's" case

[46] Seaview submits that the Majority Board inappropriately applied the "**Halifax Firefighter's**" case to the present matter, thus producing an unreasonable outcome. It is submitted the Supreme Court of Canada decision in **R. v. Leeming**, [1981] 1 S.C.R. 129, is more applicable to the matter at hand.

[47] In order to appreciate the arguments put forward, and more importantly the reference to the above cases contained in the Majority decision, it is important to briefly review the case authorities. Properly cited **as IAFF, Local 268 v. Halifax (City)** (1982), 50 N.S.R. (2d) 299 (N.S.C.A.), the "**Halifax Firefighter's**" case involved the dismissal of a probationary employee and whether a particular clause in the collective agreement removing a right to grieve was valid. That clause provided:

> 16.02 New employees shall be on probation for a period of one year from the date of hiring. During such probationary period, the employees shall be entitled to all rights and benefits of this Agreement, except the right to grieve dismissal. After completion of the said probationary period, seniority shall be calculated from the original date of hiring.

[48] Chief Justice MacKeigan concluded that the above provision was contrary to section 40 (now section 42) of the **Trade Union Act**, S.N.S. 1972, c. 19, and as such invalid. The Court agreed with the arbitrator's decision that the grievance was arbitrable. The provision has not changed and reads:

> 42 (1) Every collective agreement shall contain a provision for final and binding settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation, including any question as to whether a matter is arbitrable.
>
> (2) Where a collective agreement does not contain a provision as required by this Section, it shall be deemed to contain the following provision:
>
> > Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration. If the parties fail to agree upon an arbitrator, the appointment shall be made by the Minister of Labour and Workforce Development for Nova Scotia upon the request of either party. The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it.
>
> (3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement. R.S., c. 475, s. 42; 2010, c. 37, s. 145; 2010, c. 76, s. 1.

[49] As to Section 40(1) (now 42(1)) the Court writes:

> 18 Section 40(1) of the Nova Scotia Act clearly requires the parties to a collective agreement to provide in their agreement for the arbitration of "*all differences*" between the employer and the employees concerning the meaning or violation of the agreement. If the parties fail to do so, their agreement "shall be deemed" to contain the provision set forth in s.40(2). The deemed provision is equally comprehensive; it requires arbitration. …

And further,

> 21 In my opinion, any provision in a collective agreement which, like the exclusion clause in Article 16.02 of the agreement before us, purports to exclude any class of employees from their statutory right to arbitration of *all* "differences" is repugnant to the principle of mandatory arbitration proclaimed by s.40 and is therefore void. The parties have no power to evade or qualify the statutory command. They thus cannot exclude probationary employees from "the right to grieve dismissal".

[50] The Court adopts the definition of "difference" as contained in an Ontario Court of Appeal decision, **Re Toronto Hydro-Electric and C.U.P.E.** (1980), 29 O.R. (2d) 18, writing:

> 26 Mr. Justice Linden for the majority dealt with this issue as follows:
>
> > The parties cannot define what is a difference; it is the statutory meaning of that term which must prevail. Thus, since the collective agreement must provide for the resolution of all differences by arbitration, it is beyond the power of the parties to withdraw what is in fact difference from the ambit of the arbitration machinery, regardless of the language they use in an effort to bring about that result.
> >
> > Such an interpretation of s. 37 is necessitated because, if the parties could agree to exclude certain "differences" from the arbitration procedure, the legislative purpose underlying s. 37 could be subverted. The Legislature clearly meant to require arbitration of all differences between the parties arising from the agreement, not only those that the parties choose to put to arbitration. If the parties wish to avoid the arbitration of any difference concerning a certain matter, they should not include that matter in the collective agreement, for once it is dealt with there, s. 37 governs all differences that may arise therefrom.
> >
> > This, of course, does not mean that the parties cannot agree to a basis of arbitral review that would render the results of arbitration a foregone conclusion. This was not done here, but the parties might have agreed, for example, that probationary employees may be discharged on the sole discretion of the employer. This would make such a discharge almost impossible to overturn. Nevertheless, a probationary employee could attempt, through the arbitration procedure, to do so, albeit unsuccessfully.
>
> 27 I agree with Mr. Justice Linden's interpretation of "differences" and would apply it here. The imperative s. 40 compels arbitration in all cases. That command cannot be avoided by direct exclusion of classes of employees or of disputes as was attempted herein. Neither, in my opinion, should it be avoided by an artificial definition of difference, narrowing the universal scope of "all differences" in s. 40; that, however, is not a question directly in issue in this case.

[51] In reaching its conclusion, the Court considered the clause in question, as well as the whole of the collective agreement, and found:

> 29 I can find in this collective agreement no clause, other than art. 16.02, which refers directly or indirectly to probationary employees. The parties did not provide, as they could have provided if they had so agreed, any special rules for probationary employees, as are found in many agreements: such as providing for training or for standards or tests to be completed, or authorizing discharge of a probationary employee, at or before the end of the probationary period, if, in the opinion of management (sometimes expressed as "in the absolute discretion"), the employee turns out to be not

> competent -- that is what probation is all about. Such rules give management reasonable flexibility but also should give the probationary employee the protection of arbitration to remedy unfair or unreasonable breach.

[52] In **R. v. Leeming, supra**, the Supreme Court of Canada also considered the terms of a collective agreement when a probationary employee was terminated. In that instance, the collective agreement contained a provision relating to discharge providing "No employee who has completed his probationary period shall be suspended or discharged except for just cause."

[53] Further, an article relating specifically to probationary employees provided that "the employment of such employees may be terminated at any time during the probationary period without recourse to the Grievance Procedure." In reaching its conclusion, the Court found that the above provision was appropriate and served to ban a probationary employee from bringing a grievance.

[54] Before leaving the two cases, it should be noted that Chief Justice MacKeigan in the "**Halifax Firefighter's**" case distinguished **Leeming, supra**, writing as follows:

> 32 The *Leeming* case is clearly distinguishable from the present case. Here we have no clause giving the employer the right to discharge a probationary employee without just cause. And here our Act by s. 40 prohibits any bar to arbitration, unlike the *Public Service Labour Relations Act* of New Brunswick, which contains no comparable provision.

[55] So, how does the above apply to the decision of the Majority Board? As is clear from the decision, Seaview argued before the Board that Article 4.03 was not contrary to "**Halifax Firefighters**" and the exclusion of a casual employee from the grievance provisions in Article 12 fell squarely within **Leeming, supra**. The Majority Board had two difficulties with Seaview's reasoning and purported interpretation of Article 4:03, stating these as follows:

> [55] The second difficulty with the Employer's submission stems from the general reluctance of the law, in Nova Scotia at least, to permit the parties to a collective agreement to deny the right to grieve "a difference" under the collective agreement. There is some debate amongst the various jurisdictions as to whether the right to grieve is a substantive right or a procedural right, and whether or in what way it can be abrogated. In Ontario, for example, the law seems to be that employees have no procedural right to grieve the denial of a substantive right if that substantive right is denied to them under the collective agreement: see, for e.g., *Re Ontario Hydro and Ontario Hydro Employees' Union, Local 1000* (1983) 147 DLR (3d) 210 (Ont CA). In Nova Scotia, however, the position appears to be that the parties cannot expressly deny

> even a probationary employee the right to grieve a dismissal: *International Association of Firefighters, Local 268 v. City of Halifax* (1982) 50 NSR (2d) 299 (CA). That in any event has been how the Court of Appeal's decision has been understood by other arbitrators in the province: see, for e.g., *Maritime Telegraph & Telephone Co. and A.C. & T.W.U.* [1990] NSLAA No. 9 (Cotter) at para.45-56 and *Cape Breton-Victoria Regional School Board and the NSTU* [2004] NSLAA No. 3 (Kydd) at para.13. The parties to the Collective Agreement must be taken as having drafted their agreement with the law and arbitral jurisprudence of Nova Scotia in mind. Given the doubt about whether grievance and arbitration rights could be denied to employees under a collective agreement one would have expected the parties to state such a denial expressly-as they did, for example, when defining what probationary employees could or could not grieve (for which see Art.4:02 above at para.6).
>
> [56] This leads us to the third difficulty. Accepting that unions and employers can bargain away or restrict the rights of particular classes of employees does not also mean that they would or can bargain away the right to grieve whatever rights those employees do have. The Employer's submission accepts that casuals do have *some* rights under the agreement—those given to them expressly. But the Employer's submission, if accepted, also means that casuals could not grieve a difference over their entitlement to those rights. Such a result would clearly be contrary to the decision in the *Firefighters'* case (as well as, one might add, the Ontario approach). It would also be contrary to the general principle that there cannot be a right without a remedy. But if casuals can grieve the rights they do have, then they can do that only because the parties in fact understood the word "employee" in Articles 12 and 13 to include casuals.

[56] It would appear from the above that the Majority Board utilized the Court's decision in the "**Halifax Firefighter's**" case as an interpretative aid in ascertaining the intention of the parties as it related to Article 4.03 and the ability of casual employees to bring a grievance under the Collective Agreement. This is not an unreasonable approach. Further, it can be inferred from the decision itself that the Majority Board determined that the scenario before it was distinguishable from **Leeming, supra**. Such a conclusion is within the range of reasonable outcomes given the law and circumstances before the Board.

The Majority Board mischaracterized the nature of casual work

[57] From the Majority decision, it is apparent that when making its submissions before it, Seaview placed reliance upon the arbitral decision of **Westin Harbour Castle Hotel and UFCW, Local 333 (Tabas)** 197 L.A.C. (4th) 307, which provided that lesser protections can be and regularly are negotiated for casual employees. The Majority Board references a particular portion of the **Westin Harbour Castle** decision as having been emphasized by Seaview's Counsel:

> [36] It is also worth remembering that it is open to the institutional parties to bargain different rights for different categories of employees (as was the case in *Leeming*), and that is often in their *mutual interest* to do so. Accordingly, just as it is not unusual to see contractual entitlements accumulate with an employee's years of service; so, too, it is not unusual to see significant limitations on the negotiated rights of probationary or casual employees who have a much weaker attachment to the workplace. Nor is there anything surprising about that, since neither party may wish to devote a lot of time and resources to administering protections for workers who may literally be 'here today and gone tomorrow'. (emphasis in original

[58] When rendering its decision, the Majority Board stated:

> [57] Fourth, the fact that an employee is a casual does not in and of itself mean that a union and an employer would lack an interest in allocating rights (and resources) to him or her. One may accept that in principle the parties to a collective agreement may bargain to provide "different rights for different categories of employees … and that it is often in their *mutual interest* to do so:" *Westin Harbour Castle*, per Arbitrator MacDowell at p.320. One should note, however, that the nature, category and "attachment" of casual workers to a workplace will vary with the industry and local economy. So, for example, a casual banquet employee in a downtown Toronto hotel may indeed literally be "here today and gone tomorrow." It might not be surprising then that neither the union nor the employer would want to spend much time or resources on their working conditions. But the situation in a long-term residential care facility is different. The Employer must provide regular care every day of the year, not, as in the *Westin Harbour Castle* case, infrequent banquets. The nature of the Enployer's labour needs is more likely to be regular and to require (and inspire) greater commitment from "casual" employees. That in turn makes it more likely that the Union and the Employer in the case before us *would* spend "time and resources … administering protections" for casual employees. Indeed, the fact that casual employees in the instant case do have a seniority list suggests both a greater attachment to the workplace and a greater interest on the part of the Union and the Employer to define and protect the interests of such employees.

[59] Seaview argues that the above aspect of the Majority decision was unreasonable as it "did not accept that there was much difference between casual and permanent employees at Seaview Manor" and further, "in coming to the conclusion that casuals at Seaview Manor have a greater degree of commitment than casuals at other workplaces, the Majority Board was insensitive to the fundamental premise of reciprocal relationship between the Employer and permant, regular employees."

[60] With respect, I cannot conclude that the Majority Board's references to "casual employees" as outlined above can be interpreted as submitted by Seaview. The Majority Board's comments were obviously in response to Seaview's argument that the appropach utilized in **Westin Castle, supra**, towards casual

employees should be viewed as appropriate in the present case. The Majority Board drew a distinction between the nature of casual employees in the circumstances involved in **Westin Castle, supra** and those in other contexts.

[61] There is no transcript available, however, I am aware from the decision and Record, that the Board did hear evidence relating to casuals generally at Seaview, and more particularly the nature of Ms. Vingar's employment as a "casual" including the frequency of her hours of work. It is not unreasonable for the Majority Board to conclude that the casual employees at Seaview may have a greater attachment to their workplace than that of the **Westin Castle** casual employees, and that the parties may have accordingly, a different negotiating approach when considering the terms of a collective agreement.

Improper use of extrinsic evidence

[62] Seaview submits that the Majority Board, absent a finding that the Collective Agreement, or any part thereof, was unclear or ambiguous, was prohibited from allowing and considering extrinsic evidence. It is noted that the past conduct of the parties in terms of how it dealt with the grievance at earlier stages should not have been permitted.

[63] This argument cannot in my view, serve to render the Majority decision unreasonable. In their text, Brown and Beatty discuss the use of extrinsic evidence as follows:

> 3:4400 Parol or extrinsic evidence, in the form of either oral testimony or documents, is evidence which lies outside, or is separat from, the written document subject to interpretation and application by an adjudicative body. Although there are numerous exceptions, the general rule at common law is that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing. If the written agreement is ambiguous, however, such evidence is admissible as an aid to the interpretation of the agreement to explain the ambiguity but not to vary the terms of this agreement. The two most common forms of such evidence in labour arbitraitions are the negotiating history of the parties leading up to the making of a collective agreement, and their practices before and after the making of the agreement. And in addition to its use as an aid to interpretatin of a collective agreement or a settlement agreement, or to establish an estoppel, it may be adduced in support of a claim for rectification. However, for such evidence to be relied upon it must be "consensual". That is, it must not represent the "unilateral hopes" of one party. Nor can it be equally vague or asunclear as the written agreement itself.

> 3:4001 Although many arbitrators have accepted the above-mentioned common law principles and limited the introduction of extrinsic evidence accordingly, others have taken the view that legislative provisions such as s. 48(12)(f) of the Ontario *Labour Relations Act*, 1995 permit the admission of parol evidence at the discretion of the arbitrator. However, in Ontario at least, since the decision of *R. v. Barber*, it is recognized that, while extrinsic evidence may be admitted, it will be an error of law for an arbitrator to rely solely upon it in interpreting a collective agreement unless either a latent or a patent ambiguity exists.
>
> Where an ambiguity is patent, that is, where it appears on the face of the agreement, an arbitrator may resort to extrinsic evidence as an aid to its interpretation. Where an ambiguity is latent, that is, where it is not apparent on its face, an arbitrator may rely upon extrinsic evidence not only as an aid to resolve the ambiguity once it is established but also to disclose the ambiguity. However, arbitrators have had a difference of opinion as to what coconstitutes an ambiguity. One view holds that more than the arguability of different constructions of the collective agreement is necessary to constitute an ambiguity. Another view is that an ambiguity exists if there is no clear preponderance of meaning stemming from the words and structure of the agreement.

[64] Having already concluded it was not unreasonable for the Majority Board to view Article 4:03 as being unclear, it was reasonable for the extrinsic evidence to be utilized as an interpretive tool. Further, it is difficult to accept that the introduction of one form of extrinsic evidence should attract criticism, when both parties agreed to the admission of another form – the previous collective agreements between the parties.

CONCLUSION:

[65] The issue before the Board was whether a casual employee could grieve under the Collective Agreement. Having found such to not invoke the "true jurisdiction" of the Board, the appropriate standard of review is reasonableness.

[66] The Majority Board decision meets the first stage of the reasonableness analysis as it is justifiable, intelligible and discloses a transparent reasoning path. I have considered the concerns raised by Seaview and have concluded that none serve to displace the decision rendered from the range of acceptable outcomes.

[67] As such, Seaview's application is dismissed. Should the parties be unable to agree with respect to the costs arising, written submissions are to be provided within 30 days from the release of this decision.