SUPREME COURT OF NOVA SCOTIA

Citation: *Canadian Union of Public Employees Local 108 v. Nova Scotia Police Review Board*, 2020 NSSC 190

Date: 20200624
Docket: Hfx No. 480843
Registry: Halifax

Between:

Canadian Union of Public Employees Local 108

Applicant

v.

Nova Scotia Police Review Board, Halifax Regional Municipality, Christopher Mosher, The Attorney General of Nova Scotia, Halifax Regional Police Association

Respondents

Decision

Judge:	The Honourable Justice John P. Bodurtha
Heard:	May 27, 2019, in Halifax, Nova Scotia
Final Written Submission:	December 19, 2019
Written Release:	June 24, 2020
Counsel:	Susan Coen, for the Applicant Sheldon Choo, for the Respondent, the Attorney General of Nova Scotia and the Nova Scotia Police Review Board Randolph Kinghorne and Duncan Read for Halifax Regional Municipality Michael Murphy and Alex Warschick, for Christopher Mosher and Halifax Regional Police Association

Overview

[1] The applicant, CUPE Local 108 ("CUPE") seeks to have the Court set aside a Police Review Board ("PRB") Consent Order issued August 31, 2018. In this Consent Order, the PRB accepted and approved an agreed upon settlement between the Halifax Regional Municipality ("HRM"), the Halifax Regional Police Association ("HRPA") and Christopher Mosher ("Mosher").

[2] The Consent Order annexed two agreements. They were:

(a) the confidential Memorandum of Agreement (the "MOA") between Mosher, his employer, HRM, and the HRPA signed on August 21, 2018; and

(b) the Disability Accommodation Agreement (DAA) between Mosher and HRM signed on August 21, 2018.

[3] CUPE was not a party to either of these agreements nor did they receive notice prior to either of these agreements being signed. HRM and Mosher, without notice to CUPE, asked the PRB to accept and approve the agreed upon settlement. This included the MOA which would see Mosher re-employed with HRM in a DAA job position as a labourer in the bargaining unit represented by CUPE. The PRB accepted and approved the Consent Order and issued it on August 31, 2018.

[4] HRM states that CUPE's objections relate to the disability accommodation of Mosher and not to the disciplinary matters underlying the PRB's hearing. It submits that the disability accommodation issues fall under the dispute resolution scheme contemplated by the *Trade Union Act,* R.S.N.S., c. 475, and are not justiciable because the issues are to be dealt with exclusively according to the grievance/arbitration procedure under the Collective Agreement between HRM and CUPE.

[5] CUPE takes issue with the fact that the Consent Order and annexed agreements were entered into without CUPE's knowledge and subsequently accepted and approved by the PRB. CUPE argues that the failure to provide it with notice to participate in the PRB process before the Consent Order was issued placing Mosher in CUPE's bargaining unit is a violation of procedural fairness and natural justice. Ultimately, the question posed by CUPE and never effectively responded to by the Respondents is, "Can any administrative tribunal in Nova Scotia…endorse a Consent Order by certain parties (here the employer HRM and union HRPA) premised upon a purported legal obligation of another party (here

CUPE) and impacting that other party, without the knowledge of, or opportunity for, that other party to have its say?"

[6] CUPE says the answer is no. I agree, for the following reasons.

Background

[7] Mosher was a police officer and a member of the Halifax Regional Police Association. Mosher was charged with sexual assault and was placed on a leave of absence pending the completion of his criminal proceedings. While on this leave of absence, Mosher engaged in several activities that were inconsistent with his employment as a police officer. Mosher was eventually acquitted of the sexual assault charges. The HRP conducted an internal investigation of Mosher and the various internal disciplinary complaints made against him. As a result of the findings, the HRP terminated his employment effective February 15, 2017.

[8] Mosher filed a Notice of Review under the *Police Act*, SNS 2004, c. 31, to have the PRB review the decision of the Halifax Regional Police which resulted in his termination.

[9] The PRB is a statutory tribunal pursuant to section 18 of the *Police Act* and its duties and functions are as follows:

> Functions and duties of Review Board
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> 18 The Review Board shall perform the functions and duties assigned to it by this Act, the regulations, the Minister or the Governor in Council and, without limiting the generality of the foregoing, the Review Board shall:
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> (a) conduct investigations and inquiries in accordance with this Act; and
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> (b) conduct hearings into complaints referred to it by the Complaints Commissioner in accordance with this Act or the regulations. 2004, c. 31, s. 18.

[10] Section 79 sets out the powers of the PRB at a hearing under the *Police Act*. In making a decision, the board must provide written reasons and forward those reasons to the parties. A decision of the board is final. Section 79 reads:

> 79 (1) At a hearing under this Act, the Review Board may:
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> (a) make findings of fact;
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> (b) dismiss the matter;

> (c) find that the matter under review has validity and recommend to the body responsible for the member of the municipal police department what should be done in the circumstances;
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> (d) vary any penalty imposed including, notwithstanding any contract or collective agreement to the contrary, the dismissal of the member of the municipal police department or the suspension of the member with or without pay;
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> (e) affirm the penalty imposed;
>
> (f) substitute a finding that in its opinion should have been reached;
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> (g) award or fix costs where appropriate, including ordering costs against the person making the complaint, where the complaint is without merit;
>
> (h) supersede a disciplinary procedure or provision in a contract or collective agreement.
>
> (2) The decision of the Review Board must be in writing and provide reasons and shall be forwarded to the parties.
>
> (3) The decision of the Review Board is final.
>
> …

[11] Unlike a civil complaint which can be withdrawn, the PRB once seized of an internal disciplinary matter has control over the proceeding until it decides the matter is concluded. The PRB can refuse to accept a settlement or other discontinuance for various reasons, including that the result is contrary to public policy such as human rights legislation or inconsistent with the provisions of the *Police Act*.

[12] Mosher was a member of the HRPA. The HRPA provided representation for him in disciplinary matters during and up to the conclusion of the PRB hearing. However, the HRPA was not a party to the PRB proceeding and was not entitled to be provided with notice of the hearing pursuant to section 54(3) of the *Police Act*.

[13] The HRPA is a recognized trade union representing approximately 660 full-time equivalent employees in the HRP. CUPE is a recognized trade union representing approximately 300 full-time employees and 60 seasonal employees in the Transportation & Public Works and Parks & Recreation business units.

[14] The hearing before the PRB was adjourned after a couple of days at the request of counsel for HRM and Mosher to allow for settlement efforts. HRM, Mosher, and HRPA worked towards finding an alternate resolution for the

termination of Mosher's employment with HRP and addressed the related HRPA accommodation issues.

[15] Mosher, with the HRPA acting on his behalf, reached a formal written settlement with HRM of his PRB review application. The settlement was conditional upon the PRB approval and consisted of three documents:

1) The Order eventually dated August 31, 2018 – this was presented to the PRB as a Consent Order between Mosher and HRM. They were the only two parties at the PRB review. The Order states that "the Board accepts and approves the settlement agreed upon between the parties [HRM and Mosher]" and concludes the PRB proceeding.

2) The Memorandum of Agreement ("MOA") dated August 21, 2018 – this is an agreement between HRPA, HRM, and Mosher intended to bring the proceeding to an end. HRM recognizes Mosher's disability and commits to affording Mosher with all disability accommodation rights that he is entitled to under the *Human Rights Act,* R.S.N.S., c. 214 ("*HRA*").

3) The Disability Accommodation Agreement ("DAA") dated August 21, 2018 – this is a standalone agreement addressing the mutual obligations between Mosher and HRM. This includes a provision where HRM commits to provide accommodated work to Mosher in a different bargaining unit than he had been in previously. Mosher's new employment in this bargaining unit, CUPE, would be governed by the provisions of the Collective Agreement between HRM and CUPE.

[16] Under the HRM/CUPE Collective Agreement, HRM has management rights to create or do away with job positions (see articles 2 and 27). Acting pursuant to these articles and to fulfill its DAA obligations, HRM created a new overstaffed position in the CUPE bargaining unit for Mosher.

[17] CUPE alleges that the PRB erred by not providing CUPE notice of the PRB proceeding and by accepting the settlement. The HRM submits that the Collective Agreement, as required pursuant to the *Trade Union Act*, provides for a mandatory grievance/arbitration process for disputes between CUPE and HRM related to the interpretation and application of the Collective Agreement (see articles 15 and 16) and CUPE's remedy, if any, lies there.

[18] CUPE's response is that the PRB should have provided notice to CUPE and adjourned the hearing so that the Collective Agreement could be arbitrated. The

parties could then have put forth a Consent Order, should there still be an agreement to submit to the PRB for resolution.

[19] CUPE was not privy to, nor a participant in, negotiating any of these agreements. The Consent Order was filed with the PRB on August 28, 2018. On August 29, 2018, HRM brought members of CUPE to a meeting and informed them that HRM had created an over-staffed position in CUPE to accommodate Mosher in a full-time permanent position. This is considered an overstaffed position in CUPE which would not exist but for the DAA, and should Mosher vacate or be removed from the position, the position would no longer exist, it would be eliminated.

[20] This was the first time CUPE had heard anything about the hearing involving Mosher and his placement within their bargaining unit. No one on behalf of CUPE had been notified formally, or informally, of the PRB proceeding or had any discussions with HRM, HRPA, and Mosher about his eventual placement in their bargaining unit.

[21] On August 31, 2018, the PRB issued its order incorporating the MOA and DAA and discontinuing the PRB review proceeding. On that same date, HRM legal services provided Todd McPherson, CUPE National Representative, Atlantic Regional Office, with an unsigned PRB order with attachments. Mosher commenced re-employment as a labourer with HRM in CUPE shortly before September 10, 2018.

[22] On September 10, 2018, CUPE filed a grievance under the provisions of the *Trade Union Act* alleging that the job placement of Mosher was in violation of the terms of the Collective Agreement between CUPE and HRM.

[23] On October 1, 2018, CUPE filed an application with the Court seeking judicial review of the PRB decision.

Issue

Whether the order of the PRB issued on August 31, 2018 should be quashed?

[24] The Applicant raises several other issues for the Court's consideration:

1. Standing
2. Collateral attack/abuse of process
3. Grounds of review:

a. denial of procedural fairness/natural justice
b. jurisdiction
c. lack of evidence

Standard of review

[25] The Applicant provided the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*"), which was released on December 19, 2019, for the Court's consideration. I have reviewed the decision and its application to this particular case is minimal other than confirming the factors from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 ("*Baker*"), that inform the content of the duty of procedural fairness (see para. 77 from *Vavilov*).

[26] In reviewing the applicable standard of review for procedural fairness/natural justice issue, I refer to *Sampson v. Nova Scotia (Human Rights Commission)*, 2019 NSSC 29. In this decision, Justice Arnold recapped the two-step process in determining whether there has been a breach of procedural fairness at paras. 47-51:

> 47 On the issue of review for procedural fairness, Fichaud J.A. said, in *Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd.*, 2016 NSCA 40:
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> > [45] The judge described the issue as procedural fairness, with no standard of review. The passage from the *North End* decision, cited by Justice Wood, relied on *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43 (CanLII), leave to appeal refused [2012] S.C.C.A. No. 237.
> >
> > [46] In *T.G.*, this Court said:
> >
> > > [90] A court that considers whether a decision maker violated its duty of procedural fairness does not apply a standard of review to the tribunal. <u>The judge is not reviewing the substance of the tribunal's decision</u>. Rather the judge, at first instance, assesses the tribunal's process, a topic that lies outside standard of review analysis: ...
> > >
> > > *[emphasis by Fichaud J.A.]*
> >
> > [47] The reason there is no "standard of review" for a matter of procedural fairness is that no tribunal decision is under review. The court is examining how the tribunal acted, not the end product. If, on the other hand, the applicant asks the court to overturn a tribunal's decision -- including one that discusses procedure -- a standard of review analysis is needed. The reviewing court must decide whether to apply correctness or

> reasonableness to the tribunal's decision. (e.g. *Coates, supra*, paras. 43-45)

48 On judicial review where there is a complaint regarding procedural fairness, the analysis should be conducted according to a two-stage process. In *Tessier v. Nova Scotia (Human Rights Commission*, 2014 NSSC 65, LeBlanc J. stated:

> [34] The Commission serves a screening or gate-keeping function in determining which complaints to dismiss and which complaints to refer to a Board of Inquiry: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 (CanLII), at para 20. A decision by the Commission to dismiss a complaint under section 29(4) of the *Act* is an administrative decision to which specific rules of procedural fairness apply: *Grover v. Canada*, 2001 FCT 687 (CanLII), at para 52.
>
> [35] Questions of procedural fairness are questions of law that are to be reviewed on a standard of correctness. No deference is due to the decision-maker. The task of this Court is to isolate specific requirements of procedural fairness and determine whether they have been met in the circumstances of the case at bar. The decision-maker will either be found to have complied with the content of the duty of fairness applicable in the circumstances, or to have breached this duty: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 (CanLII), at para. 53.
>
> [36] In the context of human rights investigations, complainants are owed a duty of procedural fairness by both the investigator gathering the evidence and crafting a report, and by the Commission in reaching its decision

49 In *Whitty v. Nova Scotia (Human Rights Commission)*, 2007 NSSC 233, Kennedy C.J. restated the test as follows:

> [29] As to the suggestion that more information should have been gathered; Mr. Whitty was specific about what some of that information should have been. That is a claim that would always be available. The proper question I think is this, was the information that was before the Commission sufficient, complete enough to provide a reasonable basis for such a decision?

50 Therefore, when examining a matter that involves how the Commission acted, rather than its decision, there is no standard of review *per se*, as the court is to examine how the tribunal acted, not the end product.

51 In *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Hyson*, 2017 NSCA 46, Bourgeois J.A., in the context of explaining the analysis to be undertaken by the Court of Appeal, explained the two-step analysis to be undertaken by a court in determining whether there has been a breach of procedural fairness:

> [25] ... [I]n *Burt v. Kelly*, 2006 NSCA 27 (CanLII), the task this Court is to undertake was described as follows:
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> > [20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty. In my respectful view, the judge did not adequately consider the first of these steps.
> >
> > [21] The first step -- determining the content of the tribunal's duty of fairness -- must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step -- assessing whether the Board lived up to its duty -- assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for this review.
>
> [26] There is no dispute that the Board owed Ms. Hyson a duty of procedural fairness. Both parties further agree that the duty is a "high" one. What remains to be determined is whether the reviewing judge correctly ascertained the content of that duty and was correct in finding it was breached.

[27] As stated above in *Kelly*, the court must pay careful attention to the context of the particular proceeding when determining the content of the tribunal's duty of fairness. The Supreme Court of Canada has outlined several factors to consider when determining the content of the duty of procedural fairness (see *Vavilov* at para. 77 and *Baker* at paras. 23-27):

1. Nature of the decision in the decision-making process;
2. Provisions of the relevant statutory scheme;
3. Importance of the decision to the individuals affected by it;
4. Legitimate expectations for the party challenging the decision; and
5. The nature of the deference accorded to the decision-maker.

[28] Applying these factors to the context of the case before me, the content of the duty of fairness is similarly high as in *Kelly*. An analysis of the factors is as follows:

1. *Nature of decision and decision-making process*

   The Order from the PRB falls under the second purpose of the *Police Act*: protection of police officers from unwarranted disciplinary action. In this instance, the PRB hearing was adjourned to allow the parties to engage in settlement discussions, which were successful.

   The parties filed a Consent Order with the Board for it to accept and approve. The PRB did not complete a hearing or render a decision on the merits. There is nothing in the record to indicate that the PRB turned its mind to the content of the Consent Order or that the PRB had any materials relating to the *Collective Agreement* between HRM and CUPE or any information as to whether CUPE should be, or had been, consulted (see *Canadian Union of Public Employees (CUPE) Local 108 v. Nova Scotia Police Review Board*, 2019 NSSC 54, for similar comments at footnote 12). It is possible the PRB presumed that CUPE had been notified of, or was involved in, the creation of the Consent Order presented to it. However, there is no evidence to support this possibility.

2. *Provisions of the relevant statutory scheme*

   In *Attorney General for Nova Scotia and Nova Scotia Police Review Board and Randall Walter Moore*, 1999 CanLII 2849, at pp. 8 and 10, the Court found that the *Police Act* and *Regulations*, N.S. Reg 230/2005, are designed to fulfill two purposes: public protection from abuse of police power, and protection of police officers from unwarranted disciplinary action.

   Section 79, previously addressed, sets out the powers of the PRB and these powers are tied to the collective agreements covering police at section 80. Section 80 reads as follows:

   > 80 (1) No member of a municipal police department is subject to reduction in rank, to dismissal or to any other penalty for breach of the code of conduct except after proceedings have been taken in accordance with this Act and the regulations.
   >
   > (2) Nothing in subsection (1) affects action taken against a member of a municipal police department in accordance with a collective agreement other than for breach of the code of conduct prescribed by regulation.

3. *Importance of the decision to the individuals affected by it*

   This decision affects and is important to Mosher and to CUPE and its members.

4. *Legitimate expectations of the party challenging the decision*

   CUPE fundamentally challenges the decision on the basis that it was never notified of the agreed upon settlement until after it had been reached. The settlement between Mosher, HRM, and HRPA impacts

   and purports to bind CUPE without CUPE's knowledge and participation in the making of the agreement. The initial proceeding was between Mosher and HRM, the documents and Consent Order involved Mosher, HRM and HRPA but not the CUPE bargaining unit Mosher was being placed in. CUPE legitimately should expect any tribunal considering endorsement of a settlement that affects its interests to notify it or inquire whether it had notice of the Agreement. An opportunity to be heard is a legitimate expectation.

5. *The nature of the deference accorded to the decision-maker*

   A PRB decision on discipline is final (see section 79(3) of the *Police Act*). Mosher's termination stood because he withdrew his review application.

[29] The issue was raised about utilising a "reasonableness" standard when reviewing procedural fairness and whether it was appropriate in the circumstances (see *Halifax (Regional Municipality) v. 3230813 NS Ltd.*, 2017 NSCA 72, at paras. 17-18). I find a "reasonableness" standard is not applicable because this case is not about procedural aspects or choices such as adjournments, cross-examination, and disclosure. This case involves a consideration of the "minimum standards required by the rule of law" (see, *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, at para. 57).

[30] In *Jono Developments Limited v. North End Community Health Association*, 2014 NSCA 92, the Court of Appeal applied a correctness test when determining whether an administrative process was unfair considering all the circumstances (see para. 42). This was recently applied in *Halifax (Regional Municipality) v. Tarrant*, 2019 NSCA 27, at para. 20 which states:

> The appeal court applies correctness to both the reviewing judge's analysis of the content of a duty of procedural fairness and determination of whether it was breached.

Standing

[31] Initially, CUPE was not a party before the PRB, but once CUPE was implicated in the proposed Consent Order, CUPE was entitled to party status.

[32] Section 77(e) of the *Police Act* reads:

> 77 At a hearing of the Review Board,
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> …
>
> (e) any person who can demonstrate a personal interest in the proceedings;
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> …
>
> are entitled to be parties to the proceedings

[33] If CUPE had received notice of the PRB proceeding, CUPE on behalf of itself and/or its membership would have been entitled to party status under s. 77(e) of the *Police Act*.

[34] CUPE poses a valid question to the Respondents being, "how can Mosher reconcile his argument that the PRB could endorse the Consent Order without CUPE's knowledge due to an assumed human rights obligation to accommodate Mosher's placement in CUPE (see Notice of Participation at para. 2), with his claim that CUPE had neither a direct, nor indirect, interest in the subject matter of his appeal '…and was therefore not entitled to notice of the proceeding.'" (see Notice of Participation at para 3)?

[35] I find that HRM, HRPA and Mosher could have, and should have, reached out to CUPE when negotiating the DAA. A proposed MOA and DAA could and should have been shared with CUPE between July 19th and August 21st, and before sending the Consent Order to the PRB on August 28th. HRM, HRPA, and Mosher knew or ought to have known that CUPE had a direct or indirect interest in the subject matter of Mosher's appeal and was entitled to party status.

Privity of contract

[36] This doctrine provides that a contract can neither confer rights nor impose obligations on third parties (see, for example, *Fraser River Pile & Dredge Limited v. Can-Dive Services Ltd.*, [1999] 3 SCR 108, at para 22.) Based on privity of contract, the PRB endorsed a Consent Order that would otherwise be unenforceable against CUPE.

Personal Interest in the Matter

[37] CUPE's interests are further affected by the impact of the Consent Order on its members and the DAA usurping its role as the exclusive bargaining agent. CUPE clearly has a personal interest in the matter given the impact the Consent Order has on it and its members and the alleged violations of the Collective Agreement. The Consent Order impacted the number of available permanent full-time positions. CUPE was not provided the opportunity to present evidence and argument, request disclosure, or attempt to ensure that the HRPA, HRM and Mosher

fulfilled their duty to accommodate (i.e. determining first whether it was possible for an accommodation within Mosher's own bargaining unit, represented by the HRPA, based upon appropriate evidence). The same result may have occurred with Mosher placed in CUPE, but all placements would have been explored.

[38] The DAA is an agreement between HRM and Mosher that purportedly binds CUPE. The DAA ostensibly usurps CUPE's role as the exclusive bargaining agent. The DAA purports to bind CUPE to a "last-chance" agreement for Mosher where grievances over the future discipline of Mosher are foreclosed. Examples of this intrusion are:

a) CUPE was not privy to the agreement between HRM, HRPA, and Mosher;

b) the DAA at para. 13 appears to bind the parties by saying should Mosher violate the "last-chance" agreement he "will not request any arbitrator seized of the matter to substitute a lessor[sic] penalty." However, CUPE would be the applicant at arbitration, not Mosher; and

c) HRM has the sole discretion to terminate Mosher for failing to comply with the "last-chance" agreement (see para. 14 of the DAA). This would have to be agreed to with CUPE.

[39] I find that the MOA and the DAA both impact CUPE in fulfilling its duty of fair representation under the *Trade Union Act* and its obligations under the *Human Rights Act*. It is clear based on these facts that CUPE should have been granted party status before the PRB, and at a minimum the chance to seek party status.

[40] HRM submits that, looking at it in context, the objection of CUPE is that it has in some way been impacted by HRM's *Human Rights Act* accommodation of Mosher. HRM submits unions such as CUPE have a duty to facilitate the

accommodation to the extent they are not caused undue hardship (see *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970) and the expectation should be that the union will facilitate and accommodate *HRA* rights even if it results in minor inconveniences.

[41] I agree with the proposition regarding the duty to accommodate, but it applies in situations where the unions are actually involved in the negotiation or the proceeding. This was not the case in the proceeding before the PRB. Following *Renaud*, the union with the initial duty to accommodate in this case would be HRPA--not CUPE. HRPA would have had to pursue accommodation in its own unit to the point of undue hardship before looking elsewhere. CUPE should have been able to raise and explore HRPA's accommodation before the PRB.

[42] The DAA was presented to the PRB as part of a settlement package that was conditional on the PRB's acceptance and approval, and in this context is in the nature of a suggestion to the PRB of how the dispute between Mosher and HRM could be settled. HRM argues that the PRB was cognisant of the reality that Mosher and HRM could have continued with the DAA whether the PRB approved it or not. I agree that if the DAA had not gone before the PRB, the contract between HRM and Mosher was still valid, CUPE's argument regarding notice would not apply and its remedy would clearly be under the Collective Agreement. However, placing the DAA before the PRB and seeking its acceptance and approval triggered the notice provision to CUPE as an affected party under the *Police Act*.

Private Interest Standing

[43] *Canadian Elevator Industry Education Program v. Nova Scotia (Elevators and Lifts)*, 2016 NSCA 80, sets out the test for private interest standing at paragraphs 25 and 39-43:

> 25 … Consideration of the parties' legal rights or obligations is appropriate when assessing their potential interest in a proceeding. It is the most common ground sustaining private interest standing. But the analysis is not confined to legal rights and obligations …
>
> …
>
> 39 … It is significant that in Friedmann the Supreme Court described a party who is "aggrieved or may be aggrieved" as someone who is "... threatened with, any form of harm prejudicial to his interests, whether or not a legal right is called into question ..." …

> 40 Likewise, the Trustees rely upon this Court's decision in *Ogden Martin Systems of Nova Scotia Ltd. v. Nova Scotia (Minister of the Environment)* (1995), 146 N.S.R. (2d) 372 (N.S.C.A.) describing private interest standing:
>
> > [11] A review of these authorities indicates that the trend of the courts has been to be more generous in according private interest standing to persons to challenge the decisions of the public authorities in the courts. The approach favours granting standing wherever the relationship between the plaintiff and the challenged action is direct, substantial, immediate, real, more intense or having a nexus with such action as opposed to being a contingent or indirect connection. [...]
>
> 41 In *Ogden*, the applicant was given standing because the impugned administrative action of the Minister of the Environment could have prejudicially affected Ogden's existing contractual relationship with a third party. The potential for harm to Ogden was clear. No such harm is apparent to the Trustees.
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> 42 In contrast to the Trustees, the Province refers to the following factors described by Sarah Blake in her text *Administrative Law in Canada*, 5th ed (Markham: LexisNexis, Canada 2011), that should be considered when determining private interest standing:
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> > (a) Statutory purposes;
> >
> > (b) The subject matter of the proceeding;
> >
> > (c) A person's interest in the subject;
> >
> > (d) The effect that decision might have on that interest.
>
> 43 The considerations proposed by the Province are more comprehensive and better capture the discussions in the jurisprudence. Importantly, the "merits" of the case are not a consideration. …

[44] Once the PRB considered a Consent Order that imposed legal obligations on CUPE, CUPE met the test for private interest standing. CUPE's interest in the PRB hearing was direct, substantial, immediate and certainly real.

[45] There is no need to address public interest standing as CUPE has not sought such a remedy.

Alternative Remedy

[46] The Respondents submit that CUPE's remedy is through the Collective Agreement and the arbitral process. They submit that a PRB review is disciplinary and the subject matter does not involve CUPE. That is true. However, when parties come before the PRB with a settlement agreement that affects a non-party, that party must be given notice and an opportunity to speak to the impact of the proposed Consent Order. This was not done. The PRB, after

providing notice to CUPE, could have pursued other options, such as adjourning the proceeding to allow the parties to use the arbitral process to answer the question as to whether HRM has the authority to place Mosher within CUPE. It was incumbent upon the PRB, in reviewing the settlement agreement, to determine whether the respective, affected parties had some involvement in developing and/or discussing the Consent Order presented to it. The PRB may assume, perhaps as it did in this situation, that the third party, CUPE, was involved in the Consent Order, but now that it is apparent it was not, this Court must rectify that fundamental error regarding procedural fairness.

[47] HRM's argues that nothing in the Consent Order precludes CUPE from pursuing its concerns regarding the placement of Mosher by way of the Collective Agreement grievance/arbitration procedure. The alternative remedy of the arbitral process is not adequate. It ignores the fact that CUPE was never provided notice of the PRB hearing and in essence allows HRM to infringe the rights of a third party without providing notice to that party under the guise that the third party can exercise an agreed-upon procedure to seek an alternative remedy. An arbitrator faced with an Order from the PRB might decline jurisdiction or feel constrained by the Order. The Respondents have failed to answer the question, to my satisfaction, of whether an arbitrator could ignore the PRB Order and hear a grievance with full remedies as if the PRB Order did not exist. Unless this question can be answered unequivocally, then CUPE should be able to seek judicial review of the PRB's Order because arbitration is not an adequate alternative remedy.

Grounds of review

(a) Procedural Fairness

[48] Procedural fairness is a "cornerstone of modern Canadian administrative law…" *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para 79. In *Canadian Union of Public Employees v. Canadian Broadcasting Corp.*, [1992] 2 SCR 7, at page 9, the Court said:

> "… those to be significantly affected by the arbitration should receive notice of the proceedings. Fairness and natural justice require no less…"

[49] In *Rogers v. McCarthy*, 1991 CanLII 4220 (NSSC), Justice Kelly stated at pp. 5-6 and 8:

> Taking into consideration the scope of the legislation and the function of the board created thereby, it seems neither inconvenient nor unjust to require that all parties be notified of the 'Application' to extend the investigation and to be given an opportunity to comment.…
>
> Natural justice means nothing more than fair play, and it is an element of natural justice that a person be made aware of a situation that might affect him or her and be given an opportunity to respond.

[50] The PRB should have made inquiries of the parties when it received the proposed Consent Order where HRM, HRPA and Mosher agreed to resolve the hearing by placing Mosher in CUPE, and yet CUPE was not a signatory to the MOA or the DAA.

[51] In *Nova Scotia (Human Rights Commission) v. Charlton*, 2017 NSCA 55, at paragraphs 38(2) and 38(4)(e), Justice Fichaud commented on how a tribunal should defer to a settlement

> 38 2…. A settlement agreement is a contract….
>
> …
>
> 4(e) There are limited legally-recognized bases to vitiate a contract – e.g. fraud misrepresentation, undue influence, duress, mistake. Simple fairness or reasonableness and generic public interest are not among them. The Board may satisfy itself that those legally recognized grounds of vitiation do not exist. This is not an invitation for the Board to conduct a free-ranging evidential inquiry every time a settlement is presented under s. 34(5). The Commission has participated in the negotiation to safeguard the process. When the Agreement recites the Commission's sanctions, as this one does, the Board should defer unless there is some reason for suspicion that justifies a deeper inquiry.

[52] The agreement presented to the PRB had no approval or endorsement by CUPE or on CUPE's behalf as referred to in *Charlton*. The Agreement presented should have raised suspicion that justified a deeper inquiry. In *Bernard v Canada (Attorney General*, 2014 SCC 13, [2014] 1 S.C.R. 227, a tribunal's adoption of a Consent Order was set aside even where privity of contract was present. The Court said at paras. 8-9, 11 and 13:

> 8 On the question of remedy, the Board was clearly alive to the privacy issues canvassed in the Privacy Commissioner's opinion and indicated that it did not have a sound basis upon which to address those issues. The Board asked for more information about several privacy-related issues, including: what information the union required for its representational obligations; what employee contact information the employer had in its possession and its accuracy; and whether the employer could meet its obligation to provide

> information in a way that reasonably addressed any concerns under the *Privacy Act*. The Board directed the parties to consult in order to determine whether they could agree on disclosure terms, failing which the Board would hold a further hearing to address the question of remedy.
>
> 9 The parties did in fact reach an agreement about the remedy and gave the Board a draft consent order, which the Board incorporated into an order on July 18, 2008.
>
> …
>
> 11 The employer and the union also agreed that they would jointly advise employees as to what information would be disclosed prior to its disclosure, and agreed on the text of that notice. An email was accordingly sent to all bargaining unit members on October 16, 2008, including Ms. Bernard, who responded by seeking judicial review of the consent order, claiming that (a) the Board's order required the employer to violate the *Privacy Act* by disclosing her personal information without her consent; (b) the Board must defer to the Office of the Privacy Commissioner and in particular its 1993 disposition of her complaint; (c) she ought to have been given notice of the proceedings before the Board; and (d) the Board's order breached her *Charter* right not to associate with the union.
>
> …
>
> 13 The Federal Court of Appeal concluded that the Board should have considered the application of the *Privacy Act* to the disclosure of home contact information under the *Public Service Labour Relations Act*, rather than simply adopting the agreement arrived at by the parties. It therefore remitted the matter to the Board for redetermination, and directed that the Office of the Privacy Commissioner and Ms. Bernard be given notice of the redetermination proceedings and an opportunity to make submissions. It did not deal with Ms. Bernard's freedom of association argument.

[53] In *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v Pharma Plus Drugmarts Ltd et al [Indexed as: National Automobile v Pharma Plus Drugmarts Ltd]*, 2011 ONSC 4188, a settlement was set aside between a union and an employer when it potentially impacted another union that had not received notice. The Court said at paras. 64, 65, 66, 69, 70, 72, 82, 83, 89, 90, 92, 95 and 96:

> Procedural fairness and the question of notice
>
> [64] The Board concluded, in accordance with the submissions of the Employers and UFCW, that CAW must have a direct interest in the matter before the Board on April 7, 2009 to trigger an obligation to provide notice of the approval of the settlement. The Board in sparse reasons cited no authority for its conclusions. The Board required CAW to have established bargaining rights for Rexall employees to be entitled to notice and to have the right to participate as intervenor to reopen the s. 1(4) related employer application.

[65] There does not appear to be any precedent directly on point dealing with the approval of a settlement by the Board between an employer and a union, which has by agreement "bumped" the potential future rights of a competitor union.

[66] We return then to basic principles.

…

[69] The courts have recognized a requirement that basic procedural norms of fairness be respected in labour proceedings and arbitrations. This includes a general rule that all interested parties be able to participate, and that third parties whose rights could be adversely impacted by an award be given notice beforehand: Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., looseleaf (Aurora, Ont.: Canada Law Book, 2011), 1:5220, 3:1200, 3:1210.

[70] The right to notice in a proceeding, be it a lawsuit, an administrative proceeding or a labour proceeding, is a fundamental principle of fairness. Notice is part of the core of natural justice, the requirements of which will depend upon the [page109] circumstances of the case. In each case, the court must determine whether the party claiming the right to notice had a sufficient interest in the proceedings such that notice was required by the audi alteram partem principle: see, e.g., *T.W.U. v. Canadian Radio-Television & Telecommunications Commission*, [1995] 2 S.C.R. 781, [1995] S.C.J. No. 55, at para. 6; *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735, [1980] S.C.J. No. 99, at para. 27; *Canadian Transit Co. v. Canada (Public Service Staff Relations Board)*, [1989] F.C.J. No. 527, [1989] 3 F.C. 611 (C.A.), at paras. 9-10.

…

[72] If based upon reason, common sense and fairness, a party ought to have been advised of matters that may impact upon their interests as the party may be significantly affected, or directly and necessarily affected, by the decision, then the party will be entitled to notice: *C.U.P.E. v. Canadian Broadcasting Corp.*, [1990] O.J. No. 772, 70 D.L.R. (4th) 175 (C.A.), affd [1992] 2 S.C.R. 7, [1992] S.C.J. No. 47; *Weston Bakeries Ltd. v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647*, supra.

…

[82] As in *Hoogendoorn*, the Court of Appeal in *C.U.P.E.* was of the view that "the union members in the present case should have been entitled to notice and the opportunity to prevent loss [page113] of employment without the necessity of further proceedings" (para. 12).

[83] Although C.U.P.E. is distinguishable on its facts, we are of the view that the Court of Appeal's comments on procedural fairness in arbitrations are also applicable in the particular facts of this case, where the Board has approved a settlement that could impact another union, which outcome could not have been achieved through the adversarial resolution of the root applications, and where the proceeding in fact became adversarial when CAW objected.

> …
>
> [89] The settlement affected the rights of third parties and is enforceable as a Board order. The Board recognized the right of the Beaverwood store employees to notice and participation given their timely objection, but curiously failed to recognize the right of CAW to receive notice and to participate in the proceeding.
>
> [90] We conclude that it was not a prerequisite that CAW actually represent Rexall employees to have a sufficient interest to be entitled to notice. There can be no doubt that CAW is significantly affected or directly and necessarily affected by the April 7, 2008 Decision granting UFWC rights to represent all Rexall employees in the Ottawa region.
>
> …
>
> [92] The repercussions of the UFCW-Employer agreement are to bump CAW from representing in the future Rexall employees [page115] in stores opened in the Ottawa region, and to benefit UFCW by enabling it to expand in the Ottawa/Carleton region, which was previously exclusive CAW terrain.
>
> …
>
> [95] We conclude that the requirement of the Board that CAW actually represent Rexall employees to be entitled to notice is unreasonable and does not accord with the case law or principles of natural justice and basic fairness.
>
> [96] Once the Board contemplated expanding the related employer applications to include the Ottawa region, CAW was entitled to notice. CAW became an interested party entitled to notice as its contractual advantages were likely to be directly affected by an adjudicative proceeding (using the language in *Bradley* and relied upon in *C.U.P.E.* (C.A.), at para. 11) or as an entity that the result of the arbitration could have a significant effect upon (in the language of the Supreme Court in *C.U.P.E.*). We conclude that the practical impact of the April 7, 2009 Decision upon CAW, and basic principles of fairness, mandate CAW's involvement as intervenor in the related employer applications.

[54] Applying reason, common sense, and fairness to the facts before me leads to the conclusion that CUPE would have been immediately and directly impacted by the PRB Consent Order, and was entitled to notice.

Notice of the Settlement Agreement

[55] The Respondents submit that CUPE was given notice of the settlement agreement prior to its issuance on August 31st. The chronology is as follows:

a) The Consent Order was sent to the PRB on August 28th;

b) The PRB informed the parties on August 29th that the Order had been reviewed and approved and was being circulated for signature;

c) On or about August 29, 2018 representatives of the HRM met with the CUPE executive and presented CUPE the signed DAA dated August 21, 2018 indicating that Mosher was being accommodated into a full-time, permanent, overstaffed position in the CUPE bargaining unit;

d) On August 30, 2018, HRM responded that they would not release the Order until Mosher's lawyer provided his position on disclosing the Order. On August 31, 2018 at 4:04 pm by email HRM attached a copy of the Order. The email said:

> …I note that the Order is not yet signed by the Board. The PRB had previously advised us that the Board has reviewed and approved the order, but that it is being circulated to an out of town member for signature. That is the hold up. We will send an issued order once in receipt of same.
>
> Supplemental Record, Tab 2

[56] Of significance in the DAA, it erroneously stated in the recitals on page 1 that HRM "*in compliance with an Order* of the Nova Scotia Police Review Board, HRM wishes to hire Mosher in an accommodated employment position with HRM outside of the Halifax Regional Police business unit;" [italics added]. There was no Order from the PRB at that time. The DAA was not in compliance with a PRB Order because it had yet to be signed and issued. Given that the DAA was already in effect on August 21st, the notice to CUPE on August 29th was after the fact.

[57] For all intents and purposes, it was a done deal. HRM showed CUPE a signed DAA which incorrectly stated it was in compliance with an Order from the PRB. HRM followed up two days later with an email indicating the Order was not yet signed but they had been advised that it had been reviewed, approved, and was being circulated for signature.

[58] HRPA's submission that CUPE's failure to make any representations to the PRB while knowing that the Order was imminent constitutes a waiver of its rights to now seek judicial review of the PRB's Order, or to complain that it did not receive notice of the proceeding, has no merit in my opinion. Based on the chronology of events, nothing indicates to the Court that CUPE acted unreasonably in presuming the Order was finalised.

Notice in general

[59] HRM argues that at the conclusion of the PRB hearing where the settlement agreement between HRM and Mosher was placed before the PRB, there was still no basis to provide notice to CUPE because at that time the PRB was merely accepting and approving the settlement of the PRB proceeding as not being contrary to the provisions of the *Police Act* – the PRB did not consider the status of the settlement relative to the *Trade Union Act*. This argument would have more weight if the agreement that was put before the PRB did not include HRPA, a third party, which was not involved at the PRB hearing prior to its adjournment.

[60] HRM should not have asked the PRB to endorse a Consent Order accepting the settlement agreement without notifying CUPE. HRM could have asked the PRB to adjourn the hearing pending resolution of the Collective Agreement disagreement through grievance arbitration. This would have entitled CUPE to receive notice before HRM sought to have the Consent Order endorsed by the PRB.

[61] In evaluating procedural fairness, one cannot assume what was in the mind of the PRB. The only evidence before the Court is that the PRB approved and accepted the agreement without providing any notice to CUPE. It may have turned its mind to undue hardship, the obligations of the HRPA, privity of contract, the genuine interest of CUPE as bargaining agent, or whether arbitration remained a viable option. However, even if the PRB had considered these issues, the Court would still find CUPE was entitled to notice.

[62] In Brown and Evans, *Judicial Review of Administrative Action in Canada*, (Thomson Reuters, 2017) Volume 2 at paras. 9:1200 and 9:1400, the authors state:

> … The notice must be adequate in all circumstances in order to afford to those concerned a *reasonable* opportunity to present proofs and arguments, and to respond to those presented in opposition.
>
> …
>
> … Because the person's knowledge of the proceeding or basis for the decision may be incomplete or inaccurate, it will only be in exceptional cases that a court will conclude that the person concerned was not prejudiced by the agency's failure to give notice.

[63] These statements support CUPE's position that it was entitled to but did not receive notice.

[64] The PRB argues that if the Court grants judicial review on the basis of the content of a Consent Order, the consequence would be that evidence would have to be called in any future Consent Order before the Board (or other tribunal or court), even if the Consent Order was silent as to its terms. Without such evidence a board cannot know if any of the terms, express or otherwise were valid. The failure to call evidence on a Consent Order is not a jurisdictional or procedural error.

[65] Whether the PRB would have to call evidence on any future Consent Orders would depend on the facts of that specific case. It is not a reason to deny notice to an affected party. In this case, the facts demonstrate the Consent Order would impact a non-signatory, CUPE, would place legal obligations upon that non-signatory, and would foreclose certain future actions of the non-signatory. In this case, CUPE was entitled to notice. There is sufficient guidance from *Charlton, supra*, *PharmaPlus, supra* and *Bernard, supra* to ensure tribunals do not accept Consent Orders blindly.

Conclusion

[66] Once there was discussion of an accommodation which might implicate CUPE during or after the hearing, CUPE should have been notified by the parties. The PRB, upon receiving the Consent Order, in particular the DAA, which included the signature of one non-party, HRPA, relieving it of its obligations and placing those obligations upon the third-party CUPE, should have been alerted to the absence of the impacted non-party CUPE.

[67] CUPE should have been provided notice by the PRB at the time it became apparent that CUPE's rights were going to be affected. CUPE's right to notice is a fundamental principle of procedural fairness; CUPE was not afforded this right. Based on this finding that CUPE was denied procedural fairness, it is not necessary to consider the remaining issues.

[68] The Applicant's motion is granted with costs. The Court sets aside the Order of the PRB and remits the matter to a reconstituted panel of the PRB. If the

parties are unable to agree to costs, I will receive submissions from the parties within 30 days of today's date.

[69] I would ask that the Applicant prepare the order.

Bodurtha, J.