SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia Union of Public & Private Employees, Local 13 v. Halifax Regional Municipality*, 2022 NSSC 54

Date: 20220217
Docket: *Hfx*, No. 492718
Registry: Halifax

Between:

Nova Scotia Union of Public & Private Employees, Local 13

Applicant

v.

Halifax Regional Municipality, Augustus M. Richardson, QC, Arbitrator and Attorney General for the Province of Nova Scotia

Respondents

Decision on Judicial Review

Judge:	The Honourable Justice Peter Rosinski
Heard:	February 3, 2022, in Halifax, Nova Scotia
Counsel:	Nancy Elliott, for the Applicant Justin Luddington, for the Respondents (HRM)

By the Court:

Introduction[1]

[1] "Local 13" is the certified bargaining agent for employees colloquially known as the "inside workers" of the Halifax Regional Municipality ["HRM"]. A collective agreement pursuant to the *Trade Union Act*, c. 475 RSNS 1989, as amended, governs the labour relationship between these two parties.

[2] CC was an employee of HRM at its Waverley garage for many years, and a member of Local 13.[2]

[3] In August 2016, CC and her immediate supervisor Mr. H entered mediation and resolved their ongoing discord. Mr. H relocated temporarily to another workplace. CC was aware that in the Spring of 2017, Mr. H was due to return to the workplace where CC had remained.

[1] A previous decision dealt with what should be the proper content of the Record herein - 2021 NSSC 171.

[2] To be clear, I have anonymized the names of the grievor, and her past and present immediate supervisors, including when they appear in Arbitrator Richardson's decision.

[4] On March 28, 2017, shortly before his return, CC posted an anti-bullying sticker on the outside of her office door where it could be seen by all the employees coming and going.[3]

[5] Her supervisor Mr. W directed CC to remove the sticker as he was concerned it might re-ignite the conflict that had only recently been quelled by means of mediation. CC twice refused, over a period of two days, but then relented.

[6] On April 5, 2017, a meeting was held between CC, a union representative, Mr. W, her immediate supervisor, and a human resources representative. The meeting was held to address her behaviour and resistance to removing the sticker, which required her to make answer although it involved potential disciplinary

[3] To set a context I will briefly refer to the following. In December 2016 the stickers were included with a number of materials which had been moved from the Police garage on Gottingen Street and deposited at the Waverley (Fire) garage. The materials sat there for a couple of months. CC was asked to assist in disposing of the remainder of the items that had not yet been removed. Included therein were hundreds of stickers that said: "Bullying – Just because you don't see it doesn't mean it's not going on – Call 490 – SAVE (7283) – Aliant Telecom Halifax Regional Police". The evidence before the arbitrator included a July 26, 2017 letter from Amanda Whitewood of HRM to Nancy Elliott counsel for the Union, wherein she stated: "I am writing to you in response to the grievance cited above [13–02– 2017 – step 3]… We… offer the following response.… We agree that the bullying hotline… and the associated sticker are indeed an HRM initiative through Halifax Regional Police. The initiative maintains a bullying hotline and website for parents, students and teachers dealing with bullying and cyber bullying. Mr. M [the Superintendent of Emergency Fleet who has overall responsibility for both the police and fire garages… his office is located at the Waverley garage but he also has a desk at the Gottingen Street garage.] and Mr. W recognized that the phone number and the sticker linking a caller directly to the Police could be perceived as adversarial, as the work unit has had a history of conflict and division. As such, we maintain that given the context, the sticker was inappropriate, and Mr. W was reasonable in his request that the grievor remove it from her outward facing door."

action against her. On April 24, 2017, CC was advised that no discipline was warranted in relation to her conduct.

[7] One day later, Mr. W filed a complaint against CC arising from her responses during the April 5, 2017, meeting in which she confirmed that she felt bullied and unsafe under his supervision. CC filed a response and claimed Mr. W's complaint was retaliation for her actions and statements.

[8] Augustus M. Richardson, Q.C., conducted ten days of arbitration hearings in relation to four grievances between these parties. He authored a 297 paragraphs-long written decision in which he dismissed each of the Union's grievances.

[9] Local 13 has made application for judicial review to this Court, seeking that his decisions be quashed.

[10] I have concluded that his decisions should be upheld.

Arbitrator Richardson's Decision[4]

[4] I was greatly assisted herein by the excellent briefs presented by counsel for the parties. A review of the Record herein and the legal arguments raised, reinforces how much so, labour relations arbitration is a specialized and distinct field of law. Consequently, insofar as judicial review is concerned, it has its own standard of review(s) that I must consider - see most recently: *Canada (Minister of citizenship and immigration) v Vavilov*, 2019 SCC 65.

[11] Local 13 had filed four grievances against HRM. Two of the grievances related specifically to employee CC ("the Sticker grievance", and "the Union Representation grievance"). The Union's judicial review arguments are focused on the two individual grievances, and the policy grievance in relation to HRM's Harassment Policy.[5]

[12] The Applicant Union summarized the two individual grievances as follows:

> First Grievance
>
> 1. On May 19, 2017, the Union filed a grievance that included claims that:
>
> - The direction to Ms. CC to remove the sticker from her office door was an improper exercise of management rights, discriminatory, and an act of harassment against Ms. CC;
>
> - Mr. Dunphy had not responded appropriately to Ms. CC's concerns about being required to remove the anti-bullying sticker;
>
> - Mr. W's complaint did not disclose *prima facie* harassment and that either the Employer's Harassment Policy was an invalid policy or the policy was being applied in a manner contrary to the Collective Agreement;
>
> - Mr. W's complaint against Ms. CC was retaliatory.
>
> The Union later added in a claim that there had been a violation of Ms. CC's freedom of expression under the *Charter of Rights and Freedoms*.
>
> …
>
> Second Grievance
>
> 2. On November 8, 2017, the Union filed a second grievance. It included claims that the application of HRM's Harassment Policy to Ms. CC had been unreasonable and that

[5] The written grievances can be found at pages 1 of each of Tab B2 and Tab B3 in the Record. The "Sticker grievance" was summarized at paragraph 121 by Arbitrator Richardson.

employees were unable under the policy to access a fair, impartial, and competent process.

3. On December 20, 2017, Ms. CC was advised that the investigation into Mr. W's complaint against her had determined the complaint to be unfounded.

[13] In his decision, Arbitrator Richardson stated:

"…[Grievance 13 – 02 – 2017] **the "sticker grievance"** stemmed from the Employer's decision on or about March 28, 2017 to order **CC**, the grievor, to remove a small anti-bullying sign (in reality a sticker) from the outside of her office door. **The grievor first resisted or at least questioned that order**, **but eventually obeyed it the next day**. **The Employer investigated the incident for possible insubordination but ultimately decided not to impose discipline. The grievor and the Union say the direction should not have been given in the first place, and that it violated her rights under the *Charter* and the Collective Agreement.**

[Grievance 13 – 06 – 2017] **the "Union Representation grievance"** stemmed from a decision by the Employer to investigate a formal complaint of harassment pursuant to the Employer's "Workplace Rights: Harassment Prevention Policy" (the "Harassment Policy"). **The complaint had been filed against the grievor by one of her managers Mr. W.** The investigation, which proceeded over roughly 6 months in the latter part of 2017 **eventually concluded that the complaint was not made out. The grievor and the Union say the complaint should never have been investigated in the first place.** It should have been dismissed out of hand. **They say that the decision to proceed with an investigation was a product of sexual discrimination, or retaliation, or both**. **They also say the Employer's decision to proceed as it did was evidence of systemic problems with the Harassment Policy**. The grievor and the Union allege that the grievor went off work in the Spring of 2017 because of the stress and anxiety caused by this wrongful conduct on the Employer's part. They say that the grievor should be reimbursed the vacation and sick time she took during her time off work. **The Union also says that the policy is significantly flawed, and it seeks a declaration that the Employer either scrap, or at least significantly revamp, the Policy**.'

[My bolding added]

[14] Under the title "Analysis and Award" Arbitrator Richardson concluded in relation to each of the individual grievances:

> "What we have then was an employee who not only resisted a direct order [from] her manager but went on to challenge the merits and rationality of his decision. Moreover, she insisted, at least initially, that the Employer comply with conditions that she laid down before she would comply with the direction. **All of this amounted in my view to insubordination.** None of it recognized the well-known rule in labour relations of 'obey now, grieve later'. W's [her immediate supervisor] decision to investigate the possibility that the grievor had been insubordinate was thus one that was based on a fair and reasonable assessment of the facts before him (para. 240)…

[15] For context, I insert paragraph 236 of his Decision here: "To recap, upon receiving Mr. W's direction on March 28, the grievor, in her own words,

a) laughed and said she was in the biggest bullying area in the Employer's operations;
b) said she was fearful because Mr. H was coming back to work at the garage in April;
c) told Mr. W that the Employer did nothing to help her;
d) told him she would not take the sign down until Mr. Dunphy and Mr. Dube, the Employer's CAO all, knew of Mr. W's direction."

[16] As to whether the grievor's right to "freedom of expression" pursuant to section 2(b) of the *Canadian Charter of Rights and Freedoms* protected her in the circumstances, the arbitrator stated:

> Dealing with the first question, [does section 2 (b) of the *Charter* apply to the facts of this case?] I accept that the grievor's decision to post the sticker was a form of 'expression'. However, that does not in itself mean that it was entitled to the protection afforded 'expression' pursuant to section 2 (b) of the *Charter* within the guidelines laid down by the Supreme Court of Canada in *Montréal v. 2952 – 1366 Québec Inc.,* 2005 SCC 62. The sticker was placed on the outside of an interior door that was within a privately owned workplace (the Waverley garage). Notwithstanding that the Employer's property might be called 'public' (in the sense of being owned and operated by a public government entity) the door and the garage were not in the public eye. They were not spots or areas that members of the public were accustomed to being able to view – or which commonly contain posters or flyers inviting the public gaze.… That being the case**, I was not persuaded that posting a sign on the outside of the grievor's door in the Employer's Waverley garage fell within the scope of the 'freedom of expression' protected by section 2(b) of the *Charter***. (para. 244)…

Turning to the second question [if section 2 of the *Charter* applies, did the direction [by Mr. W] breach the grievor's freedom of expression?] (which I have found it did not) then it seems clear that there would have been a breach of the grievor's freedom of expression. But that conclusion, had I drawn it, would have taken me to the third question [if there is a breach of the grievor's freedom of expression, did the Employer establish that any such breach was justified as a 'reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society' under section 1 of the *Charter*?], which I would have answered in the affirmative.

[On March 28, 2017, Mr. W] as a representative of the Employer was entitled by law and by the Collective Agreement to manage the Employer's operations. He had a valid concern, based on the history between the grievor and Mr. H, another employee who was due to return to work at that location after a mediation in 2016 had resolved interpersonal difficulties between CC and Mr. H, that the grievor's actions, in posting the sticker when and where she did, would re-ignite conflict in the workplace that had only recently been quelled by means of a mediation (and Mr. H's temporary absence from the workplace). The grievor's actions threatened the uneasy peace that had reigned since August 2016. Its removal did not threaten, diminish or erode the Employer's overall anti-bullying policy. I was satisfied then that the direction would have been a reasonable limit on the grievor's freedom of expression, had I found that the freedom had been engaged." (para 246)

…

It was shortly after this decision of Mr. W that the grievor relented and told the Union's President that she would take down the sticker. She copied the email to Mr. W, so he knew at this point that she had decided to comply with his direction… it might have gone some way to defuse the situation. Yet the grievor then decided to *up the ante*. In her email … on March 29 to Mr. Dunphy [Organization Effectiveness Specialist, who manages conflict under the Employer's Harassment Policy], copied to Ms. Pryor [Mr. W reported to her-her title is Manager of Procurement (para. 26), and "she had considered that this was a complex matter that warranted referral to an OEL specialist (i.e. Mr. Dunphy)…" para. 112] (Mr. W's report) and Ms. Chandler (the mediator from 2016) she alleged, in effect, that Mr. W's direction with respect to the sticker was 'clearly… a bullying scenario targeting **me' [bolding in original],** that the Harassment Policy applied to management and not employees like her; and that the Employer 'did not care' about its employees. These were serious allegations.… It is not surprising then that Mr. Dunphy would have replied, the next day to assure her that the policy applies to managers and employees alike. Even then the grievor did not resile from earlier comment. Instead, she stated in response that she would 'continue with my head low and work in fear as an HRM employee'. Nor is it surprising that Mr. W should have made these allegations a topic in the meeting that he asked [Human Resources] to set up with the grievor. Indeed, for him *not* to have done so would have been a dereliction of his duties as a manager. The grievor's allegations were serious. They had to be taken seriously. And Mr. W, to his credit, did. (para. 257)

All of this is to say that I was not persuaded that Mr. W's decision to initiate a meeting to discuss the grievor's conduct was anything but a fair and reasonable response of a manager – both as a manager whose direction had been refused, and as a manager who had been accused of bullying behaviour." (para. 259)

…

The Union's position here is that the Employer (and in particular, Mr. Dunphy) should never have given Mr. W's complaint sufficient credit to warrant a formal investigation of Mr. W's complaint. It says the complaint failed to meet the criteria of harassment under the Harassment Policy; or that it was retaliatory or infected with bias. Mr. Dunphy's decision, in other words, was not a fair and reasonable exercise of his discretion to make such a decision. **It further says that Mr. W's harassment complaint against her was made in retaliation to her seeking Mr. Dunphy's assistance when the former and asked her to take down the anti-bullying sticker – and that Mr. Dunphy ought to have realized that it was retaliation**"

…

To conclude that such a response was retaliatory just because it was made in response to a complaint would be to prejudge the issue of whether the grievor's complaint was accurate… But that issue had yet to be determined… Indeed, the Harassment Policy recognizes, as do most if not all such policies, the existence of such a possibility by prohibiting bad faith or vexatious complaints… All this is not to say that the grievor was not sincere in her *belief* (no matter how unfounded) that she was being harassed – but it is to say that the accuracy or merits of that belief had yet to be determined until that determination was made, the respondent (i.e. Mr. W) was equally entitled to raise questions, whether in response or in a separate complaint, about the merits and motives underlying the complaint being made against him. (para. 264)

The allegation of retaliation also highlights one of the logical faults in the grievor's reasoning.… The question in such cases is not and cannot be whether the decision ultimately proved to be the correct one. The question rather is whether the decision, at the time it was made, and based on the facts and circumstances that then existed, was a fair and reasonable one to make.

What then, was the situation Mr. Dunphy found himself in when he received Mr. W's complaint on April 25, 2017? (para. 267)

…

These facts and the questions and issues they raise would appear on a fair and reasonable analysis to meet the definition of 'complex' in the Harassment Policy and to support a decision to initiate a formal investigation. …(para. 272)

These then were the facts confronting Mr. Dunphy at the time of his decision to refer Mr. W's complaint to a formal investigation. I was not persuaded on these facts that his decision was anything other than a fair and reasonable exercise of his duties under the Harassment Policy. It may not *in retrospect based on the eventual result* have been the right decision. But that is not the test. I am satisfied that *at the time* it was a rational decision based on a fair and reasonable assessment of the situation." (para. 274)

[My bolding added except where otherwise stated]

[17] In the "Conclusion and Award", he stated:

For the foregoing facts and reasons, and with respect to the grievor's individual complaints contained within the two grievances,

a. I was not persuaded on a balance of probabilities that any of the decisions made by the Employer (and in particular of Mr. W or Mr. Dunphy) were made in an unfair and unreasonable fashion; or that they breached any of the relevant provisions of the Collective Agreement;

b. I was not persuaded on a balance of probabilities that the grievor's time off sick was caused by any conduct on the Employer's part; and accordingly

c. I dismiss those components of both grievances.

With respect to the policy component of the two grievances,

a. I was not persuaded on a balance of probabilities by the evidence before me that the representation provisions in the Harassment Policy breached the rights to Union representation set out in the Collective Agreement;

b. the Union's request for an order or declaration that the Harassment Policy required significant revision in order to be considered a policy that otherwise complies with the Collective Agreement was premature; and accordingly,

c. I dismiss the policy components of both grievances.

I accordingly dismiss Union grievance 13 – 02 – 2017 (the "Sticker grievance"). I also dismiss Union grievance 13 – 06 – 2017 (the "Union Representation grievance") subject to it being without prejudice to any future policy grievance regarding the Harassment Policy that is grounded on a different factual foundation." (para. 297)

The grounds for challenging the Arbitrator's decision

[18] Local 13 filed an Application for Judicial Review which cited the following grounds as the basis for quashing arbitrator Richardson's decision(s):

that he erred:

1. in finding there would be no infringement of the grievor's freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter"* or "*Charter of Rights*") when she was ordered by her employer to remove an anti-bullying sticker from her office door;

2. in finding that any infringement of the grievor's freedom of expression was a reasonable limit under section 1 of the *Charter*;

3. in finding that a harassment complaint made against the grievor by her manager, Mr. W, did not constitute "retaliation";

4. in not carrying out a review of the Employer's Harassment Policy [which went into effect on November 1, 2016 – para. 38 Decision] to determine whether the Policy was valid;

5. in considering evidence that he had previously determined irrelevant and inadmissible, and in drawing adverse inferences from such evidence with respect to material facts relevant to many of the issues before him.

The Union's arguments in relation to each ground of review

[19] Firstly however, I will address the dispute between the parties regarding the proper standard of review in relation to the s. 2(b) *Charter of Rights* issue herein.

1-the standard of review in relation to all issues is the one of reasonableness

[20] The parties agreed that the standard of review is reasonableness, except in relation to the standard to be applied to the s. 2(b) *Charter* argument. The Union says a "correctness" standard is appropriate in scrutinizing the arbitrator's decision on the *Charter of Rights* issues.

[21] I am satisfied that a reasonableness standard also applies to those issues.

[22] The Union says that, as *Vavilov*, 2019 SCC 65, makes clear at paragraphs 83, 86 and 96, the court must focus on both the reasoning process and the outcomes of the relevant decision-maker. I agree.

[23] The Union further relies on paragraphs 53 and 54 of *Vavilov* in support of its argument that a standard of correctness applies to the *Charter of Rights* issues. Given the importance of this issue, I will include paragraphs 53-62:

> *C. The Applicable Standard Is Correctness Where Required by the Rule of Law*
>
> 53 In our view, **respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary**: *Dunsmuir* , at para. 58.
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> 54 When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir* , at para. 50. While it should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.
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> *(1) Constitutional Questions*
>
> 55 **Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the Constitution Act, 1982, and other constitutional matters require a final and determinate answer from the courts.** Therefore, the standard of correctness must continue to be applied in reviewing such questions: *Dunsmuir* , para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.) .
>
> 56 **The Constitution — both written and unwritten — dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it.** A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

57 **Although the *amici* questioned the approach to the standard of review set out in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.) , a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the Charter** (see, e.g., *Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54, [2003] 2 S.C.R. 504 (S.C.C.) , at para. 65). **Our jurisprudence holds that an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.**

(2) General Questions of Law of Central Importance to the Legal System as a Whole

58 In *Dunsmuir* , a majority of the Court held that, in addition to constitutional questions, **general questions of law which are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" will require the application of the correctness standard**: para. 60, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.) , at para. 62, per LeBel J., concurring. **We remain of the view that the rule of law requires courts to have the final word with regard to general questions of law that are "of central importance to the legal system as a whole". However, a return to first principles reveals that it is not necessary to evaluate the decision maker's specialized expertise in order to determine whether the correctness standard must be applied in cases involving such questions. As indicated above (at para. 31) of the reasons, the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review.**

59 As the majority of the Court recognized in *Dunsmuir* , **the key underlying rationale for this category of questions is the reality that certain general questions of law "require uniform and consistent answers" as a result of "their impact on the administration of justice as a whole":** *Dunsmuir* , para. 60. In these cases, correctness review is necessary **to resolve general questions of law that are of "fundamental importance and broad applicability", with significant legal consequences for the justice system as a whole or for other institutions of government**: …[citations omitted] For example, the question in *University of Calgary* could not be resolved by applying the reasonableness standard, because the decision would have had legal implications for a wide variety of other statutes and because the uniform protection of solicitor-client privilege — at issue in that case — is necessary for the proper functioning of the justice system: *University of Calgary* , at paras. 19-26. As this shows, **the resolution of general questions of law "of central importance to the legal system as a whole" has implications beyond the decision at hand, hence the need for "uniform and consistent answers**".

60 This Court's jurisprudence continues to provide important guidance regarding what constitutes a general question of law of central importance to the legal system as a whole. For example, the **following general questions of law have been held to be of central importance to the legal system as a whole: when an administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process** (*Toronto (City)* , at para. 15); **the scope of the state's duty of religious neutrality** (*Saguenay*, at para. 49); **the appropriateness of limits on solicitor-client privilege** (*University of Calgary* , at para. 20); **and the scope of parliamentary privilege** (*Chagnon* , at para. 17). **We caution, however, that this jurisprudence must be read carefully, given that expertise is no longer a consideration in identifying such questions**: see, e.g., *CHRC*, at para. 43.

61 **We would stress that the mere fact that a dispute is "of wider public concern" is not sufficient for a question to fall into this category — nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue**: … [citations omitted] **The case law reveals many examples of questions this Court has concluded are *not* general questions of law of central importance to the legal system as a whole**. These include whether a certain tribunal can grant a particular type of compensation (*Mowat*, at para. 25); when estoppel may be applied as an arbitral remedy (*M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, 2011 SCC 59, [2011] 3 S.C.R. 616 (S.C.C.) , at paras. 37-38); the interpretation of a statutory provision prescribing timelines for an investigation (*Alberta Teachers*, at para. 32); **the scope of a management rights clause in a collective agreement** (*Irving Pulp & Paper*, at paras. 7, 15-16 and 66, per Rothstein and Moldaver JJ., dissenting but not on this point); whether a limitation period had been triggered under securities legislation (*McLean* , at paras. 28-31); whether a party to a confidential contract could bring a complaint under a particular regulatory regime (*Canadian National Railway* , at para. 60); and the scope of an exception allowing non-advocates to represent a minister in certain proceedings (*Barreau du Québec* , at paras. 17-18). As these comments and examples indicate, **this does not mean that simply because expertise no longer plays a role in the selection of the standard of review, questions of central importance are now transformed into a broad catch-all category for correctness review.**

62 In short**, general questions of law of central importance to the legal system as a whole require a single determinate answer. In cases involving such questions, the rule of law requires courts to provide a greater degree of legal certainty than reasonableness review allows.**

[My bolding added]

[24] I draw from these paragraphs that the present state of jurisprudence from the Supreme Court of Canada is to the effect that the relevant reasoning in *Dore* remains valid.

[25] Recall, as well the issues in *Dore* and what Justice Abella for the court stated:

> 1 **The focus of this appeal is on the decision of a disciplinary body to reprimand a lawyer for the content of a letter he wrote to a judge after a court proceeding.**
>
> 2 **The lawyer does not challenge the constitutionality of the provision in the *Code of ethics* under which he was reprimanded. Nor, before us, does he challenge the length of the suspension he received. What he *does* challenge, is the constitutionality of the decision itself, claiming that it violates his freedom of expression under the *Canadian Charter of Rights and Freedoms*.**
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> 3 **This raises squarely the issue of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions.** Normally, if a discretionary administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. **The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the *Oakes* test, the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.**
>
> 4 **It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each.** The way to do that is to recognize that an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? On the other hand, the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it. How then do we ensure this rigorous *Charter* protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?

> 5 We do it by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. **I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection — meaning its guarantees and values — we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.**
>
> 6 In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. **In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right.** In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.
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> 7 As this Court has noted, most recently in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.), the nature of the reasonableness analysis is always contingent on its context. **In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives.** If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.
>
> 8 In this case, the discipline committee's decision to reprimand the lawyer reflected a proportionate balancing of its public mandate to ensure that lawyers behave with "objectivity, moderation and dignity" with the lawyer's expressive rights. It is, as a result, a reasonable one.
>
> [My bolding added]

[26] Specifically, I conclude that the case at Bar is of a nature that it is analogous to one “in which it is alleged that the effect of the administrative decision being

reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*)".

[27] The standard of review in the case at Bar is reasonableness in all respects.

[28] As the Applicant, the Union has the persuasive burden to establish the arbitrator's reasoning process, or outcome, were not reasonable.

[29] I bear in mind throughout, the court's reasons in *Vavilov*, including:

> 83 **It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome.** The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. …
>
> …
>
> 86 Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir* , at paras. 47-49. In *Dunsmuir* , this Court explicitly stated that **the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes":** para. 47. **Reasonableness, according to** *Dunsmuir* **, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law":** *ibid.* **In short, it is not enough for the outcome of a decision to be** *justifiable***. Where reasons for a decision are required, the decision must also be** *justified***, by way of those reasons, by the decision maker to those to whom the decision applies.** While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
>
> 89 Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, **the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case.** This is what it means to say that **"[r]easonableness is a single standard that takes its colour from the**

context": *Khosa* , at para. 59; *Catalyst* , at para. 18; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 (S.C.C.), at para. 44; *Wilson* , at para. 22, per Abella J.; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80 (S.C.C.) , at para. 57, per Côté J., dissenting but not on this point; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293 (S.C.C.), at para. 53.

90 The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that **what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt.** The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

…

95 That being said, **reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it.** It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

96 **Where**, even if **the reasons given by an administrative decision** maker for a decision are read with sensitivity to the institutional setting and in light of the record, they **contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis,** it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. **Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome**: *Delta Air Lines* , at paras. 26-28. **To allow a reviewing court to do so** would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This **would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision**. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

[My bolding added]

[30] I will next examine the Union's argument that the arbitrator erred in considering evidence that he had previously determined irrelevant and inadmissible, and in drawing inferences from such evidence.

2-In concluding that the 2017 grievances should be dismissed, did the arbitrator "err" in relying on pre-2017 evidence he had previously determined was irrelevant and inadmissible, to draw adverse inferences against the grievor, with respect to material facts relevant to many of the issues before him?

[31] Arbitrator Richardson rendered an interim decision of November 24, 2018, in relation to evidence of the previous workplace discord between CC and Mr. H (which is a significant aspect of what the parties have referenced as "the pre-2017 evidence").

[32] It is important to set out an expansive amount of his short decision. Therein, he stated:

> 1 **This is a ruling regarding the scope of cross-examination of the grievor** by counsel for the Employer **and, collateral to that, the relevance of certain documents that were placed before me at the beginning of the hearing of this matter**.
>
> …
>
> 5 At the beginning of the hearing the parties each entered a large tabbed and paginated book of documents: Ex. U1 and E2. The documents were entered subject to being referenced during the course of testimony, and subject to any objections that might arise to individual tabs or documents in either book.
>
> 6 The Union's first witness was the grievor…. Most if not all of her testimony focused on events during the period January to May 2017 and her reaction to them. However, from time to time during her testimony she made passing references to her previous history with her

supervisor and others at her workplace. That history encompassed events in 2016 and earlier. As part of that testimony**, she was referred at one point to a 21-page letter she had provided to the Employer on February 18, 2016**… The grievor did not testify as to the contents of the letter, other than to say that she had authored it. **Counsel for the Union, in taking the grievor to that document, had indicated that she did so not for the purpose of proving the events discussed in the letter, but only to 'provide context' for what happened in 2017. I did not read the letter.**

7 **The grievor completed her direct testimony… Counsel for the Employer commenced his cross-examination.** He began to delve into the events involving the grievor and the Employer's supervisors and Human Resources staff. In doing so **it became apparent that he intended to refer to Tab 1 of Ex. E2, which appeared to include at least 213 pages of email and text correspondence dated prior to January 2017 and going back to October 2013. Counsel for the Union objected on the grounds of relevance.** She submitted that the grievance related to events in the period January – May 2017, and that anything before that was irrelevant. **Counsel for the Employer, on the other hand, submitted that it was relevant given that the grievor had in her testimony referenced her history with the Employer prior to January 2017, and given paragraph 3 of the grievance which stated that:**

> **'[w]ithin the last three years, [the grievor] has raised concerns of harassment, participated in a mediation with a male co-worker, and participated in a workplace assessment. This has made her generally aware of, and sensitive to, issues of discrimination harassment and workplace bullying'** Ex U1, Tab 2, p.2'

Counsel for the Union submitted that paragraph 3 was not intended to provide anything other than context to explain the grievor's reaction to the events of January – May 2017. As I understood it, it was there **to explain the grievor's sensitivity to what it happened in the period January – May 2017. It was not intended to open the door to evidence going to prove what had happened or been happening prior to January 2017.**

…

Analysis and Ruling

10 I have reviewed both grievances. I read them as being concerned with what happened to the grievor in the period January – May 2017; with the Employer's decisions or conduct during that period; and with the Employer's response to the grievor's request that it defer or stop the harassment complaint the supervisor had filed against her. I do not read the grievances as being a complaint about an ongoing, generalized toxic workplace. Nor do I read them as being complaints that the past events constitute harassment or bullying in their own right. That being the case, **evidence as to what did or did not happen, or what should or should not have happened, prior to January 2017 is not relevant to the proceedings before me. Hence the pre-2017 emails in the Employer's book of**

documents at pages 1– 237 in Ex. E2, Tab 1, are not relevant. Nor is the grievor's letter of February 18, 2016 and the attached mediation documents in Ex. U1, Tab 2. While I will leave them in the books (subject to the concerns of counsel) **I will not read them. Nor will I accept them as evidence relevant to the grievances before me.**

11 **I turn now to the question of the scope of cross examination of the grievor, and by extension, of any of the other witnesses who may be called. It is impossible to provide a blanket ruling… I would have to hear the question before I could rule on its relevance. However, I can make the following observations by way of guidance.**

12 These grievances are rooted in an interpersonal relationship between the grievor and a particular supervisor in the context of a particular worksite. **That relationship has a history**. That history **may be understood or interpreted in different ways by the grievor and the supervisor. And each of them may in their direct testimony offer their particular understanding of that history to explain or justify why they did or did not take a particular step. To that extent some limited cross-examination may be necessary to test the sincerity of their belief in their particular version of that history.** I emphasize, however, that **the grievances do not require me to decide as a matter of fact which of those histories is correct. That being the case the focus of cross-examination should always be on the grievor's and the Employer's actions during the period to January – May 2017; on why those actions were taken; and on whether they where appropriate.** My ruling regarding the pre- 2017 documents should guide and sharpen that focus.

13 **I accept that the grievor did make passing reference to the history of her interactions with her supervisor prior to January 2017. That being the case, it may be necessary from time to time to touch on that history during her cross-examination, or during the examination of cross-examination of her supervisor (should he testify).** But I would be loathe to let any such examination or cross-examination venture beyond the limited scope of relevance I have outlined above."

[My bolding added]

[33] Sections of the arbitrator's *final* decision are cited by the Union in its written brief in support of their position, which the Union summarized as:

> In the final award, it was evident that, contrary to what he had said in his interim award, the arbitrator had read the mediation agreement, the grievor's letter, and the excluded pages from the Employer's Book, and accepted them as highly relevant evidence.

[34] His final decision refers to and quotes from the impugned documents:

> [31] Exhibits U1 (filed by the Union) and E2 (filed by the Employer) both contained a fair amount of pre-2017 documentation. It consisted mostly of emails, together with various meeting notes and reports: Ex. UI, Tab 5; Ex. E2, Tabs 1, 3…
>
> [33] …The context provided by the pre-2017 materials suggests that the grievor and some of the other employees (and in particular, one of the mechanics) did not always adhere to these principles…
>
> [35] …The grievor agreed that there was a history of friction but believed that "the situation has been misrepresented and misconstrued to cast me in a negative and unfair light:" Ex. U1, Tab 5, p.2. **In a 21-page, single-spaced, typed letter she outlined the historical "context" from her point of view. The history went back to January 2005 and included employees other than Mr. [H].** One thread that ran through the subsequent history as recounted by the grievor concerned the lack of support she felt she had received from Mr. [W], who, in her words, "did not deal with the offending people, but merely consoled me and said things would get better:" Ex. U1, Tab 5, p.3.
>
> [36] …At the conclusion of the mediation process the grievor and Mr. [H] agreed on August 17, 2016 to the following:
>
> (1) Conversation Protcol:
> (A) work related only
> (B) no personal exchanges
> (C) practice professionalism
> (D) keep comments about each other confidential (to ourselves)
>
> (2) Overcome anticipating negativity toward each other
>
> (3) If the agreement (any part) breaks down, both parties may contact their supervisor and/or their designated Union representative: Ex. U1, Tab 5, p.27.
>
> [229] …However, the grievor and Mr [H] had entered into an agreement "to settle matters in dispute between them without resorting to the adversarial process." The parties had agreed, with the assistance of Ms Chandler, to work "to isolate points of agreement and disagreement, to identify their interests, to explore alternative solutions and to consider compromises or accommodations." And at the end of that process the two of them had agreed on August 17, 2016, to the following:
>
> (1) Conversation Protcol:

(A) work related only
(B) no personal exchanges
(C) practice professionalism
(D) keep comments about each other confidential (to ourselves)

(2) Overcome anticipating negativity toward each other

(3) If the agreement (any part) breaks down, both parties may contact their supervisor and/or their designated Union representative: Ex. U1, Tab 5, p.27.

[233] In taking this step [of posting the sticker] the grievor was contravening what she herself had promised not to do in August 2016 at the conclusion of the mediation. She was engaging in a pre-emptive personal exchange with Mr. [H]. She was not practising professionalism. She was not making any effort to "overcome anticipating negativity" toward Mr. [H]...

[234] Given that history, I do not find it surprising that Mr. [W] should have thought that the grievor was being "advers[ar]ial" as well as "a bit pre-emptive" in posting the sign. The grievor and Mr. [H] had signed a truce [the mediation agreement] in August 2016, but the grievor seemed to be making a pre-emptive strike in breach of that truce [in posting the sticker]….

[My italicization added]

[35] I am satisfied that in his interim decision, Arbitrator Richardson posited that the pre-2017 evidence could be relevant to the events of 2017:

"… **evidence as to what did or did not happen, or what should or should not have happened, prior to 2017 is not relevant**… These grievances are rooted in an interpersonal relationship between the grievor and a particular supervisor in the context of a particular worksite. **That relationship has a history.… each of them may in their direct testimony offer their particular understanding of that history to explain or justify why they did or did not take it particular step. To that extent some <u>limited</u> cross-examination may be necessary to test the sincerity of their belief in the particular version of that history**."

[My bolding added]

[36] Arbitrator Richardson used the pre-2017 history as a contextual reference point for what came later in 2017.

[37] I am satisfied that in his final decision, he did not contradict himself in a manner that would render his use of the pre-2017 evidence as unreasonable.[6]

[38] I will next examine the reasonableness of the arbitrator's decisions (both the reasoning process and outcome) in relation to the s. 2(b) *Charter* issue.

3-Section 2(b) *Charter of Rights* grounds of review[7]

[39] I conclude that the arbitrator did not "err" in finding:

1. the claimed s. 2(b) of the *Charter* protection to freedom of "expression" was not engaged on these facts – including consideration of both the location of the sticker inside the HRM fire garage and the audience to which Ms. CC's expression was addressed;

---

[6] The Union argued that the arbitrator in his interim decision had "**excluded evidence** on a key fact", and that therefore the following reasoning from Justice Rothstein (as he then was) in *Ponce De Leon v Canada (Minister of Citizenship and Immigration*, [1998] F.C.J. No. 1532: "**I think if the panel excludes evidence and then relies upon that evidence in making its decision, it will have erred by basing its decision on evidence not before it.**" There, the panel of the Immigration and Refugee Board rejected the claimants as refugees. The panel received three anonymous letters that contained information that was highly prejudicial to the applicants. The panel ruled not to admit the two letters that were the subject of argument, because they were anonymous, prejudicial, and constituted hearsay. The only issue was whether the panel relied on the two letters it ruled not to admit. Justice Rothstein stated: "Although some allegations in the letters, in a very general sense, touched on the same issues as the panel dealt with in its reasons, each and every factual finding was supported by evidence before the panel. No factual findings by the panel could only have come from the letters. Nor were the panel's reasons parallel to wording in the letters so as to betray a reliance on them. The panel concluded that the applicants were not telling the truth and the letters also accused the applicants of lying, but this does not necessarily imply that the panel was relying on the letters. The panel's conduct does not raise a reasonable apprehension of bias. Nor does it disclose any other unfairness or legal error. The judicial review must be dismissed." The circumstances in the case at Bar are distinguishable from those in *Ponce De Leon*. I note as well that the Union conceded: "It is acknowledged that there was other evidence before the arbitrator on which, without using the evidence that had been excluded, he could have come to the same conclusion regarding CC's motivation in posting the anti-bullying sticker." (para. 43)

[7] As I concluded earlier, when I reference whether the arbitrator "erred", I will be applying the "reasonableness" standard of review to this ground as well.

2. [even if there were protection to freedom of expression on these facts] there was no infringement of the grievor's freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter",* or "*Charter of Rights*") when she was ordered by her employer to remove an anti-bullying sticker from her office door;

3. if there was any infringement of the grievor's freedom of expression, that infringement was a reasonable limit under section 1 of the *Charter*.

[40] Regarding s. 2(b) of the *Charter*, I have the benefit of Justice Bourgeois' reasons for the court in *Grabher v. Nova Scotia (Registrar of Motor Vehicles),* 2021 NSCA 63, which set out the relevant principles:

> 28 As they did before the hearing judge, the parties on appeal rely upon the same legal principles and Supreme Court of Canada authorities. Section 2(b) of the Charter provides:
>
> 2. Everyone has the following fundamental freedoms:
>
> . . .
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> 29 Like the other rights and freedoms guaranteed by the Charter, a generous and purposive approach must be taken to the interpretation of s. 2 freedoms (*Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927). The meaning of "freedom" as contemplated in s. 2 is broad and encompasses the absence of constraint. It was described by Chief Justice Dickson in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 as follows:

> 95 Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. **One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint.** Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. **Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.** Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[2]
> (Emphasis added)

30 With respect to s. 2(b) specifically, in *Ford, supra* the Supreme Court noted that freedom of expression included the right to express oneself in their language of choice:

> 40. ... Language is so intimately related to the form and content of expression that **there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice**. Language is not merely a means or medium of expression; it colours the content and meaning of expression. ... [T]hat "freedom of expression" is intended to extend to more than the content of expression in its narrow sense.
> (Emphasis added)

31 Freedom of expression has also been interpreted to include the right to express oneself in "certain public locations" (*Greater Vancouver Transportation Authority v. Canadian Federation of Students-British Columbia Component*, 2009 SCC 31; *Montréal (City) v. 2952-1366 Québec Inc., 2005 SCC 62).*

32 The parties both rely upon *Montréal (City)* as confirming a three-part test to determine whether there has been an infringement of s. 2(b). That test requires consideration of:

- whether the activity in question has expressive content;

- whether the activity is excluded from s. 2(b) protection as a result of either the location or the method of expression; and

- if the activity is found to be protected, whether s. 2(b) is infringed by either the purpose or the effect of the government action.

33 It is the second prong of the above test that is at the centre of this appeal and, in particular, how it should be applied to government-owned property. As noted in *Montréal (City)*, there is no automatic application of the freedom of expression in public spaces:

> 71 We agree with the view of the majority in *Committee for the Commonwealth of Canada* that the application of s. 2(*b*) is not attracted by the mere fact of government ownership of the place in question. There must be a further enquiry to determine if this is the *type* of public property which attracts s. 2(*b*) protection. (Emphasis in original)

34 Writing for the majority, McLachlin C.J. and Deschamps J. then articulated how to determine whether public property attracts s. 2(b) protection:

> 73 We therefore propose the following test for the application of s. 2(*b*) to public property; it adopts a principled basis for method or location-based exclusion from s. 2(*b*) and combines elements of the tests of Lamer C.J. and McLachlin J. in *Committee for the Commonwealth of Canada.* The onus of satisfying this test rests on the claimant.
>
> 74 The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(*b*) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:
>
> (a) the historical or actual function of the place; and
>
> (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

35 They described the relevance of the historical and actual functioning of the space as follows:

> 75 The historical function of a place for public discourse is an indicator that expression in that place is consistent with the purposes of s. 2(*b*). In places where free expression has traditionally occurred, it is unlikely that protecting expression undermines the values underlying the freedom. As a result, where historical use for free expression is made out, the location of the expression as it relates to public property will be protected.
>
> 76 Actual function is also important. **Is the space in fact essentially private, despite being government-owned, or is it public?** Is the function of the space — the activity going on there — **compatible with open public expression**? Or is the activity one that requires privacy and **limited access**? **Would an open right to**

> **intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity?** Many government functions, from cabinet meetings to minor clerical functions, require privacy. **To extend a right of free expression to such venues might well undermine democracy and efficient governance.**
>
> 77 Historical and actual functions serve as markers for places where free expression would have the effect of undermining the values underlying the freedom of expression. **The ultimate question, however, will always be whether free expression in the place at issue would undermine the values the guarantee is designed to promote.** Most cases will be resolved on the basis of historical or actual function. However, we cannot discount the possibility that other factors may be relevant. Changes in society and technology may affect the spaces where expression should be protected having regard to the values that underlie the guarantee. The proposed test reflects this, by permitting factors other than historical or actual function to be considered where relevant.
> (Emphasis added)

36 McLachlin C.J. and Deschamps J. explained although the protections afforded in s. 2(b) are broad, the above test recognizes the appropriateness of excluding some places from *Charter* scrutiny:

> 79 Another concern is whether the proposed test screens out expression which merits protection, on the one hand, or admits too much clearly unprotected expression on the other. Our jurisprudence requires broad protection at the s. 2(*b*) stage, on the understanding that governments can limit that protection if they can justify the limits under s. 1 of the *Canadian Charter*. The proposed test reflects this. **However, it also reflects the reality that some places must remain outside the protected sphere of s. 2(*b*). People must know where they can and cannot express themselves and governments should not be required to justify every exclusion or regulation of expression under s. 1. As six of seven judges of this Court agreed in *Committee for the Commonwealth of Canada*, the test must provide a preliminary screening process.** Otherwise, uncertainty will prevail and governments will be continually forced to justify restrictions which, viewed from the perspective of history and common sense, are entirely appropriate. **Restricted access to many government-owned venues is part of our history and our constitutional tradition. The *Canadian Charter* was not intended to turn this state of affairs on its head.**
> (Emphasis added)

37 The Supreme Court of Canada returned to the application of s. 2(b) to public spaces in *Greater Vancouver v. Canadian Federation of Students, supra*. There, the question was whether policies precluding political advertising on the sides of city buses violated the guarantee of freedom of expression. The Court adopted the reasoning and test outlined in *Montréal (City)*. In considering the historical or actual functioning of the space, Justice Deschamps noted:

> [42] The question is whether the historical or actual function or other aspects of the space are incompatible with expression or suggest that expression within it would undermine the values underlying free expression. One way to answer this question is to look at past or present practice. This can help identify any incidental function that may have developed in relation to certain government property. Such was the case in the locations at issue in *Committee for the Commonwealth of Canada*, *Ramsden* and *City of Montréal*, where the Court found the expressive activities in question to be protected by s. 2(b). While it is true that buses have not been used as spaces for this type of expressive activity for as long as city streets, utility poles and town squares, there is some history of their being so used, and they are in fact being used for it at present. As a result, not only is there some history of use of this property as a space for public expression, but there is actual use — both of which indicate that the expressive activity in question neither impedes the primary function of the bus as a vehicle for public transportation nor, more importantly, undermines the values underlying freedom of expression.

38 Deschamps J. further concluded there was nothing about the public venue, the side of a city bus, that would result in undermining the purposes of s. 2(b):

> [43] The second factor from *City of Montréal* is whether other aspects of the place suggest that expression within it would undermine the values underlying the constitutional protection. TransLink submits that its buses should be characterized as *private* publicly owned property, to which one cannot reasonably expect access. This position is untenable. The very fact that the general public has access to the advertising space on buses is an indication that members of the public would expect constitutional protection of their expression in that government-owned space. Moreover, an important aspect of a bus is that it is by nature a public, not a private, space. **Unlike the activities which occur in certain government buildings or offices, those which occur on a public bus do not require privacy and limited access**. The bus is operated on city streets and forms an integral part of the public transportation system. The general public using the streets, including people who could become bus passengers, are therefore exposed to a message placed on the side of a bus in the same way as to a message on a utility pole or in any public space in the city. **Like a city street, a city bus is a public place where individuals can openly interact with each other and their surroundings.** Thus, rather than undermining the purposes of s. 2(b), expression on the sides of buses could enhance them by furthering democratic discourse, and perhaps even truth finding and self-fulfillment.
> (Italics in original; bolding added)

39 In *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, the three-part test was again reiterated. In that instance, a prohibition against journalists undertaking recordings in certain areas of a courthouse was challenged as being contrary to the s. 2(b) guarantees of freedom of the press and freedom of expression. Writing for the

Court, Justice Deschamps also re-stated the view that there are limits to the application of s. 2(b):

> [32] **This Court has noted on numerous occasions that the protection of s. 2(*b*) of the *Charter* is not without limits and that governments should not be required to justify every exclusion or regulation of a form of expression — whether it concerns the location or the means of employing that form of expression — under s. 1** (*City of Montréal*, at para. 79; *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, at para. 20; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 28; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 30). This is just as true in the context of freedom of the press. Therefore, what must be determined in the case at bar is whether the activities the media organizations want to engage in are protected by s. 2(*b*) and, if so, whether the limits on engaging in those activities that are imposed by the impugned provisions are justified.
> (Emphasis added)

40 With respect to considering whether a location should be excluded from s. 2(b) protections, Justice Deschamps observed:

> [37] **For either the method or the location of the conveyance of a message to be excluded from *Charter* protection, the court must find that it conflicts with the values protected by s. 2(b), namely self-fulfilment, democratic discourse and truth finding** (*City of Montréal*, at para. 72). The following factors are relevant in this respect: (a) the historical or actual function of the location of the activity or the method of expression; and (b) whether other aspects of the location of the activity or the method of expression suggest that expression at that location or using that method would undermine the values underlying free expression (*City of Montréal*, at para. 74). However, the analysis must not be limited to the primary function of the method of expression or the location of the activity. For example, in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, *City of Montréal* and *Greater Vancouver*, this Court found that airports, hydro poles, city streets and buses are locations where engaging in certain expressive activities is not inconsistent with the other values s. 2(b) is meant to foster even though their primary function is not expression. Although conveying messages was not of course the primary purpose of these locations, the fact that they were historically used for expression showed that neither aspects of them nor their functions made them unsuitable for exercising the right to freedom of expression.
> (Emphasis added)

[My bolding added]

[41] The parties agree that Arbitrator Richardson should have used in the 3-part test set out in *Montréal (City) v. 2952 – 13666 Québec Inc.*, 2005 SCC 62, which was referenced in *Grabher.*

[42] His decision is succinct in relation to these issues:

> 243-The Union in its submissions argues that Mr. W's direction [to take down the sticker] contravened the grievor's freedom of expression. This submission raises a three-part question:
>
> a. Does s.2(b) of the *Charter* apply to the facts of this case?
>
> b. If so, did the direction breach the grievor's freedom of expression? And
> c. If so, did the Employer establish that any such breach was justified as a 'reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society' under section 1 of the *Charter*?
>
> 244-Dealing with the first question I accept that the grievor's decision to post the sticker was a form of 'expression'. However, that does not in itself mean that it was entitled to the protection afforded 'expression' pursuant to s. 2(b) of the *Charter* within the guidelines laid down by the Supreme Court of Canada in *Montréal (Ville) v 2952 – 1366 Québec Inc.*, 2005 SCC 62.… I was not persuaded that posting a sign on the outside of the grievor's door in the Employer's Waverley garage fell within the scope of the 'freedom of expression' protected by s. 2(b) of the C*harter*. …
>
> 246-Turning to the second question, **if** the grievor's door had attracted s. 2(b) protection (which I have found it did not) then it seems clear that there would have been a breach of the grievor's freedom of expression. But that conclusion, had I drawn it, would have taken me to the third question, which I would have answered in the affirmative. Mr. W as a representative of the Employer was entitled by law and by the Collective Agreement to manage the Employer's operations. He had a valid concern, based on the history between the grievor and Mr. H, that the grievor's actions in posting the sticker when and where she did would re-ignite conflict in the workplace that had only recently been quelled by means of a mediation (and Mr. H's temporary absence from the workplace). The griever's actions threatened the uneasy peace that had reigned since August 2016. Its removal did not threaten, diminish or erode the Employer's overall anti-bullying policy. I was satisfied then

> that the direction would have been a reasonable limit on the grievor's freedom of expression, had I found that the freedom had been engaged."[8]

[43] Arbitrator Richardson's reasoning process and outcome were reasonable.

4-Did the arbitrator err with respect to the considerations to be applied when 'retaliation' is claimed (or in the outcome)?

[44] As summarized by the Applicant in its brief, the first and second grievances claimed:

> Mr. W's complaint did not disclose *prima facie* harassment and that either the Employer's Harassment Policy was an invalid policy, or the policy was being applied in a manner contrary to the Collective Agreement; Mr. W's complaint against Ms. CC was retaliatory.
>
> The application of HRM's Harassment Policy to Ms. CC had been unreasonable, and that employees were unable under the policy to access a fair, impartial and competent process.

[45] In its written brief the Union stated (para. 53):

> "The Applicant originally framed this ground of review to be that the learned arbitrator had erred in not finding Mr. W 's harassment complaint against CC to constitute harassment. However, the Applicant's submissions here are more focused on the reasoning process used than the outcome. The applicant's position is that the outcome on the issue, whether correct or not, was reached on an improper basis.
>
> …
>
> In any event, the Applicant's position is that issues of retaliation, however raised, should be dealt with in the same manner as human rights legislation. Accordingly, to establish retaliation, a complainant must show:

[8] Although he did not expressly say so, I am satisfied from a reading of paragraph 246 that Arbitrator Richardson was also necessarily mindful of the Preamble of the *Trade Union Act*, c. 475 RSNS 1989, wherein the objectives of the legislation are referenced.

1. They have made a complaint;

2. they experienced adverse treatment following the filing of their complaint from the person they filed a complaint against or any person acting on their behalf;

3. the complaint was a factor in the adverse treatment (*Dixon v Sandy Lake First Nation*, 2018 CHRT 18 para. 22)

Further:

> "Proof of intent is not required to make out a retaliation complaint. A complainant must demonstrate that the human rights complaint was a factor in the alleged adverse treatment received following the filing, based on the complainant's reasonable act perception of the incident or otherwise see *First Nations Child and Family Caring Society of Canada v. Canada (Atty. Gen.)* 2015 CHRT 14 at paras. 3– 30; see also *Tabor v Millbrook First Nation*, 2015 CHRT 18 at paras. 5-12; affirmed by the Federal Court 2016 FC 894, as in *Dixon* at para.26

And:

a. There is no strict requirement that the complainant file a complaint or application under the Code, and
b. there is no requirement that the Tribunal find the respondent did in fact violate the complainant's substantive rights to be free from discrimination (*McConaughie v. Systemgroup Consulting Inc*., 2014 HRTO 295at para. 103) [note: the test for retaliation in *McConaughie* includes a requirement to show intent, but this predated the Federal Court's decision in *Millbrook]*.

57-**The learned arbitrator took a more restrictive approach to retaliation than that set out above. First, he questioned whether a harassment complaint about or in response to a harassment complaint could be something that was considered as 'adverse treatment'…** Applicant's position is that there are, and should be, no limitation on what forms 'adverse treatment' might take… Retaliation may exist in almost any form including a harassment complaint.

58-**More problematic… is the learned arbitrator's statements that retaliation cannot be found to occur in response to a complaint until the complaint had been determined valid**:

> '264 **To conclude that such a response was retaliatory just because it was made in response to a complaint would be to prejudge the issue of whether the grievor's complaint was accurate**… All this is not to say that the grievor was not sincere in her *belief* (no matter how unfounded) that she was being harassed – but it is to say that the accuracy or merits of that belief had yet to be determined. **Until that determination was made the respondent (i.e., Mr. W) was equally entitled to**

> **raise questions, whether in response or in a separate complaint, about the merits and motives underlying the complaint being made against him**.'
>
> 59-The **Applicant strenuously disagrees with this assertion… for retaliation to be shown, there is no requirement that a complainant's original complaint of discrimination, or in this case harassment, be found to be valid**… by taking such a restrictive approach to the issue of retaliation the learned arbitrator committed an error that meets the standard of unreasonableness."
>
> [My bolding added]

[46] Arbitrator Richardson referred to the Union's position before him in part as follows:[9]

> The Union's position here is that the Employer (and in particular Mr. Dunphy) should never have given Mr. W's complaint sufficient credit to warrant a formal investigation of Mr. W's complaint. It says **the complaint failed to meet the criteria of harassment under the Harassment Policy; or that it was retaliatory or infected with bias**… It further says that Mr. W's harassment complaint against her was made in retaliation to her seeking Mr. Dunphy's assistance when the former had asked her to take down the anti-bullying sticker – and that Mr. Dunphy ought to have realized that it was retaliation."
>
> [My bolding added]

[47] "Harassment" is defined in Article 4 of the Policy. It reads, in part:[10]

> "For the purposes of this policy, harassment is conduct, considered by the Employer to be unacceptable in the workplace, in which an employee exhibits offensive behaviour to another employee, or group of employees, and where that individual knew, or ought reasonably to have known, the behaviour would cause offence or harm."

[9] On December 20, 2017, CC was advised that Mr. W's harassment complaint against her had been determined to be unfounded.

[10] The HRM Workplace Rights – Harassment Prevention Policy, effective January 1, 2017, is found at Tab B12 of the Record.

[48] The 'harassment' definition incorporates the following:

- Harassment may consist of verbal, written or physical behaviours employed directly (e.g. in person) or indirectly (e.g. via social media)
- A reasonable person would know that the harassing behaviour is unwelcome
- Harassment generally stems from a pattern of offensive behaviour; however it can result from a one-time incident if that incident is reasonably severe
- Lack of intent to harass does not alter a finding of harassment
- The person being harassed does not have to voice objections for a harassment complaint to be established
- The prohibited behaviour does not have to be directed at a specific employee; it can include the workplace in general, creating a poisoned workplace environment

[49] The Union's objections to the arbitrator's reasoning are set out above at paras. 57 and 58 of its brief. In relation to these two items and the general associated context, Arbitrator Richardson stated:

> 261 **I deal here first with the submission that Mr. W's harassment complaint was a form of retaliation against the grievor for her having complained about working in fear under him.** In making this submission the Union relies in part on the discussion in *Dixon v Sandy Lake First Nation* 2018 CHRT 18, wherein it was suggested that, at least under the *Canadian Human Rights Act* ("CHRA"), retaliation was made out where:
>
> a. The person had made a complaint under the CHRA;
>
> b. the person experienced adverse treatment following the filing of their complaint from the person they filed a complaint against, or any person acting on their behalf; and
>
> c. the complaint was a factor in the adverse treatment: see also the discussion in NB Porter, "Ending Harassment by Starting with Retaliation", (June 2018), 71 *Stanford Law Review* online 49 – 61 at pages 58 – 59.
>
> 262 The Union argues that the first condition is satisfied by the fact that the grievor made a complaint. It then says that Mr. W's complaint constituted 'adverse treatment' (condition two), and that it was made expressly in reaction to her complaint (condition three). Hence

Mr. W's complaint was clearly retaliatory, and Mr. Dunphy ought to have recognized it as such right at the start.

263 **It is not clear to me, however, that a complaint about or in response to a complaint (which in a sense is what we had here) is the type of 'adverse treatment' that one would normally consider retaliatory.** The grievor was not shunned; she was not demoted; she was not suspended; a pay raise was not denied to her. The only step that Mr. W took in response to the grievor's complaint was a step permitted of all employees under the Harassment Policy – the filing of a complaint that he himself was being harassed by the grievor when she made allegations to others (not just him) that she was working in fear under him.

264 **To conclude that such a response was retaliatory just because it was made in response to a complaint would be to prejudge the issue of whether the grievor's complaint was accurate** (that assumption is where I part company with the argument in NB Porter, 'Ending Harassment by Starting with Retaliation'…). **But that issue had yet to be determined. Not all complaints of harassment are accurate, fair or sincere**. Some merely reflect a tendency to interpret the normal interpersonal frictions of the workplace as harassment – an interpretation that sometimes expresses itself in 'dueling complaints' of harassment between employees: see for example *Canadian Union of Public Employees Local 1259 v White Hills Long-Term Care Centre* 2018 Canlii 125881(NS LA Richardson). Some reflect an attempt by a complainant to weaponize an employer's anti-harassment policy against a co-worker or a manager. Indeed, the Harassment Policy recognizes, as do most if not all such policies, the existence of such a possibility by prohibiting bad faith or vexatious complaints**… All this is not to say that the grievor was not sincere in her *belief* (no matter how unfounded) that she was being harassed – but it is to say that the accuracy or merits of that belief had yet to be determined. Until that determination was made the respondent (i.e. Mr. W) was equally entitled to raise questions, whether in response or in a separate complaint, about the merits and motives underlying the complaint being made against him.**

265 The allegation of retaliation also highlights one of the logical faults in the grievor's reasoning. She argues that Mr. Dunphy should have appreciated that Mr. W's complaint was in retaliation to her 'true and honest' statements that he bullied her and she worked in fear under his supervision. But how was Mr. Dunphy to make that determination without investigating both sides of the conflict between them? The grievor's answer appears to be no investigation was necessary. Mr. Dunphy should have preferred her version because she was a woman, or because she was a subordinate, or, in the end, simply because she was making the allegation: what she said was 'true and honest'; what Mr. W said was not. **But I was not persuaded that the grievor's answer would have constituted a fair and reasonable exercise by Mr. Dunphy of his duties and functions. Rather the fair and reasonable approach would be to investigate both sides of the story in order to determine whether the grievor's conduct constituted harassment under the Harassment Policy.** After all, if the grievor's allegations about Mr. W were not true and honest – or, even if the product of a sincerely held belief, they were not objectively

> accurate – then Mr. W's complaint might have had some substance. On the other hand, if the grievor's version was closer to the mark then Mr. W may indeed have acted in a retaliatory fashion.
>
> 266 These observations bring us back to Mr. Dunphy's decision to move forward with Mr. W's complaint. It is important here to emphasize the dangers associated with armchair-quarterbacking, particularly **when the issue is whether a person exercised his or her decision-making power in a fair and reasonable way. The question in such cases is not and cannot be whether the decision ultimately proved to be the correct one. The question rather is whether the decision, at the time it was made, and based on the facts and circumstances that then existed, was a fair and reasonable one to make.**
>
> 267 What then was the situation Mr. Dunphy found himself in when he received Mr. W's complaint on April 25, 2017?
>
> …
>
> 272 **These facts and the questions and issues they raise would appear on a fair and reasonable analysis to meet the definition of 'complex' in the Harassment Policy, and to support a decision to initiate a formal investigation**…"
>
> …
>
> 274 These then were the facts confronting Mr. Dunphy at the time of his decision to refer Mr. W's complaint to a formal investigation. **I was not persuaded on these facts that his decision was anything other than a fair and reasonable exercise of these duties under the Harassment Policy. It may not *in retrospect based on the eventual result* have been the right decision. But that is not the test. I am satisfied that *at the time* it was a rational decision based on a fair and reasonable assessment of the situation**."
>
> [My bolding added]

[50] Firstly, on a conceptual level, one must bear in mind that the labour relations process is not in nature identical to the human-rights process, nor do they share identical objectives and considerations. The jurisprudence for one may not be a perfect fit for the other in all, or even many cases.

[51] Moreover, an examination of his decision reveals that Arbitrator Richardson's reasoning and the outcome are both reasonable.

[52] In essence, he concluded that Mr. W's complaint should not be characterized as "retaliation" because:

1. Mr. W's complaint did not rise to the level of being 'adverse treatment' of CC- the arbitrator reasonably pointed out that (if seen as such) Mr. W's "counter-complaint" only engaged a process- it would not substantively effect "adverse treatment" upon CC until the complaint was determined to be valid [it was dismissed on December 20, 2017];

2. Mr. W's complaint "was a step permitted to all employees under the Harassment Policy – the filing of a complaint that he himself was being harassed by the grievor, when she made allegations to others (not just him) that she was working in fear under him" - which the arbitrator observed would only be actualized when the merits of CC's allegations against Mr. W were determined; and

3. The arbitrator reasonably concluded that the proper processes were followed in relation to CC's complaint and Mr. W's complaint

(including Mr. Dunphy engaging the processes under the Harassment Policy in relation to CC and Mr. W).

[53] Context will always play a vital role in arbitral decision-making. In a nuanced manner, his decision repeatedly references the importance of context.

[54] He did not accept that merely because Mr. W's harassment complaint followed CC's harassment complaint and was in response to her comments underlying her complaint about Mr. W, that it *must be* considered retaliatory.

[55] He did not say that a "counter-complaint" could *never* be considered "retaliatory" until the original complaint's validity had been determined-but in these circumstances an investigation was required to determine this.

5-Did the arbitrator err in not carrying out a review of the Employer's Harassment Policy to determine whether the Policy was valid?[11]

[56] The context preceding the arbitrator's decision is important. Some of the relevant questions that can provide that context include:

- What were the nature and extent of the issues placed before him for decision?
- What were the positions of the Employer and the Union in relation to those issues?

[11] This is the language that the Applicant used in its brief (p. 8) before this court.

- What is the nature and extent of the evidence placed before him to assist the arbitrator in making his decision?

  And

- How should the arbitrator's decision in relation to this issue be properly characterized?

a) What were the nature and extent of the issues placed before the arbitrator?

b) What were the positions of the Employer and the Union in relation to those issues?

c) What is the nature and extent of the evidence placed before him to assist the arbitrator in making his decision?

[57] **Grievance 13 – 02 – 2017** stated in paragraph 15:

> **"…** NSUPE 13 anticipates there would be some sort of vetting process in place of complaints made under its **Workplace Rights Harassment Prevention Policy** whereby complaints that do not amount to *prima facie* harassment are dismissed at the outset. **As mentioned above, the Union claims the policy is unreasonable and therefore an invalid exercise of management rights."**

[58] **Grievance 13 – 06 – 2017** stated under "Details":

> "… The Union filed a grievance on May 19, 2017 [**13 – 02 – 2017**] which was an individual grievance for the employee and the **policy grievance for the Union**. **The grievance claims, among other things,… that the Employer's Workplace Rights Harassment Prevention Policy ["the Policy"] under which the complaint was filed was an unreasonable policy and therefore an invalid exercise of management rights…** Prior to the current policy being adopted, HRM's practice has been to permit any union member who was either a complainant or a respondent in a harassment complaint to have union representation at all stages of the complaint and investigation.

The Union claims:

1. In attempting to question the grievor outside the grievance process about matters that are the subject of the grievance, the Employer is:

   a. failing to recognize the Union as the sole bargaining agent for the grievor, contrary to Article 2.02 of the Collective Agreement and section 27 of the *Trade Union Act;*

   b. failing to follow the grievance and arbitration process set out in Article 27 of the Collective Agreement;

   c. interfering in the representation of the grievor and the Local by the Union contrary to section 52(1)(a) of the *Trade Union Act.*

2. In not permitting the full participation of a union representative in its investigatory meetings, the Employer is in violation of Article 3.06 and 5.04(c) of the Collective Agreement.

3. The Employer is estopped by past practice from not permitting the full participation of a union representative in the investigation of a harassment complaint and in a formal investigation which could lead to discipline.

4. The investigatory process and the refusal of a full union representation set out in the Policy are unreasonable and an improper exercise of management rights such that the grievor and other respondents are unable to access their right to 'a fair and impartial and competent process to resolve complaints in a professional manner' as set out in paragraph 6.4 of the Policy. This is contrary to Article 2.01 of the Collective Agreement.

5. The application of the Policy to the grievor in all the circumstances with respect to the investigation and the refusal to permit union representation is unfair and unreasonable contrary to Article 2.01 of the Collective Agreement. This includes the circumstances of the Employer being aware of the anxiety the complaint and any meeting about the complaint is causing the grievor.

Remedy sought: Full redress, including:

1. The Employer put its investigation and questioning of the grievor on hold until the initial grievance [13 – 02 – 2017] has been heard and determined by an arbitrator.

2. All Local 13 members who are complainants or respondents in matters under the Employer's current or subsequent Harassment Policy be afforded full union representation, including the opportunity for union representatives to fully participate in any meetings held with union members under the Policy.

3. If this matter proceeds to arbitration, Orders and Declarations with respect each of the claims noted."

[59] Catherine Mullally, Director of Human Resources/Office of Diversity and Inclusion, responded by letter dated November 24, 2017:

> "I am writing in response to the Step 2/3 grievance [13 – 06 – 2017] submitted on November 20, 2017.
>
> …
>
> With respect to the employer's decision to conduct an investigation into a matter that was also the subject of grievance 13 – 02 – 2017, the employer believes that this decision was appropriate….
>
> With respect to the role of the union representative during the investigation, the employer would have allowed the Grievor to have a union representative present at any meeting that took place during the process, however no meetings took place.
>
> …
>
> … union representation has historically been, and will continue to be, offered to any employee who seeks it for any matter that is disciplinary, or could lead to discipline or dismissal as per Article 3.06 of the Collective Agreement, including where the employee is a respondent in a Workplace Rights Complaint. The grievance is denied at step 2/3."

[60] The grievances then moved to the arbitration process.

[61] Initially the Union argued that the new Harassment Policy which became effective on November 1, 2016, (para. 38 Decision) was an unreasonable and therefore invalid exercise of "management rights" powers under the Collective Agreement.

[62] Arbitrator Richardson's decision addresses jurisdiction, and the parties' positions in relation to a review of the Harassment Policy:

> 5-**The parties agreed that I had jurisdiction to hear and determine the grievances, subject to the Employer's objection** in its closing submissions **that portions of the grievance (in particular, the policy grievances) had not been validly constituted**.
>
> …
>
> 17-The last day of the hearing was February 25, 2019. Instead of making oral submissions counsel for the parties opted by agreement to file written closing submissions [the written submissions are included in the Record at Tabs in Part "E"].

[63] Arbitrator Richardson accepted that he had jurisdiction to deal with the policy grievance regarding the Harassment Policy - and he *dismissed* the policy grievance. To understand why, an examination of the Union's (Initial and Reply submissions in response to the Employer's submissions) and Employer's submissions is helpful.

A-The Union's position

[64] In the "**Outline of the Union's Position**", Tab E1, the Applicant stated:[12]

> …
>
> Issue 2–Was CC's complaint about the direction to take down the anti-bullying sign appropriately dealt with under HRM's Workplace Rights Harassment Prevention Policy?
>
> CC's complaint was not appropriately dealt [with] because it was not handled in an impartial and thorough way:
>
> 1-no consideration was given to whether the direction to remove the anti-bullying sign was an appropriate direction
>
> 2-a preliminary determination was made that about CC's complaint was not a Workplace Rights issue

[12] As noted in the index to the Record under Tab E: "[**Note** – **Presented during Union's opening**]".

> 3-the investigation that was carried out prior to a final decision being made involved input only from managers, most of whom were involved in the direction that the sign be removed.

…

Issue 7-Is HRM's Workplace Rights Harassment Prevention Policy, a valid policy?

The Policy is deeply flawed because:

> 1-there is no avenue for an employee to have a complaint dealt with in a neutral and objective manner…
>
> 2-there is no consistent process applied in the initial stages for examining the context in which the complaint arose and whether that context makes the complaint a valid or an invalid complaint…
>
> 3-the policy denies union members their right to union representation. See above.

Issue 8 – was HRM's Workplace Rights [Harassment] Prevention Policy applied in a fair and reasonable manner as required under section 2.01(d) of the Collective Agreement?

No. The difficulty with a formulaic approach to harassment complaints is exemplified by how HRM's Organizational Effectiveness and Learning business unit handled various items:

…

Issue 12 – Should CC and/or NSUPE Local 13 be provided any other remedy [beyond monetary damages]?

…

CC and NSUPE Local 13 are seeking declaratory relief and orders preventing such events from occurring in future with respect to the issues set out above."

[65] Moving next to the **Union's post-arbitration hearing written submissions**.

In its initial submissions it stated:[13]

> Issue # 10 – Validity of HRM's Workplace Rights Harassment Prevention Policy
>
> "… there must be some basic minimums met to be considered a fair, impartial and competent process. In the Union's submission, **there are serious flaws in HRM's policy in both process and substance**. These flaws include:
>
> 1-the lack of a more arm's-length and independent separation between individuals and department that handles harassment complaints and HRM managers…
>
> 2-failure to appropriately handle complaints at the initial intake stage…
>
> 3-failure to have an intake process that, insofar as possible, ensures a neutral approach to complaints…
>
> 4-failure to provide an investigatory process that takes into account the circumstances of one or both parties…
>
> 5-failure to provide for union representation in accordance with the Collective Agreement (see issue # 9 above).
>
> The *KVP* principles, which were referenced earlier, that apply to an employer rule or policy are:
>
> 1-it must not be inconsistent with the collective agreement
>
> 2-it must not be unreasonable
>
> 3-it must be clear and unequivocal
>
> 4-it must be brought to the attention of the employee affected before the company can act on it
>
> 5-the employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge

[13] While I also considered its position regarding Issue #9 – Union representation during harassment process, I focus more on issue #10 because it is broader in scope.

> 6-such rule should have been consistently enforced by the company from the time it was introduced.

In addition, the Policy must be in accordance with Article 2.01 of the Collective Agreement. In respect of the flaws noted above, the policy fails to meet all except the fourth and fifth principles in *KVP***. It is submitted that HRM's Policy requires significant revision in order to be considered a policy that complies with the Collective Agreement.**"

[My bolding added]

B- HRM's position

[66] The Employer **HRM responded**:

"The Employer notes that in the Union's opening remarks it suggested that HRM's [Harassment Policy] was being challenged as an unreasonable exercise of management rights and that it was 'beyond repair'. In its closing submissions the Union rather states the Policy requires 'significant revision in order to be considered a policy that complies with the Collective Agreement.' (p.3)

The Employer points out that the issue whether the [Harassment Policy] is an invalid exercise of management rights or an invalid policy that ought to be struck down was not properly raised in either of the two grievances. Nor was a declaration of invalidity raised in the grievance forms as a potential remedy. While the Union did mention in its step 3 submission in the 'Sticker Grievance' that, if the matter proceeded to arbitration, the Union would seek to have this policy struck down, the Employer, consistent with arbitral jurisprudence, treated the grievance correspondences as privileged settlement discussion. HRM does not view the step 3 letter as an amendment of the Sticker Grievance. It was a privileged threat of future action if the grievance was not then resolved by the Employer on terms favourable to the Union. **The Employer submits that the Board is not seized with jurisdiction to declare the [Harassment Policy] invalid or contrary to the [Collective Agreement]**.

A number of practical as well as procedural fairness considerations would arise if the validity of the [Harassment Policy] were put in issue. If NSUPE Local 13 were indeed seeking to attack the HRM-wide [Harassment Policy] and have it declared void, notice should have been provided to the five other bargaining units whose membership is subject to the Policy. No such notice was provided. Moreover, if the possibility of a declaration of nullity pronounced on such an important policy were to be put in issue before the Board, clear and express notice would have to be needed. Furthermore, the Policy has been in force in its most recent form since January 1, 2017. According to the mandatory timelines

in the Collective Agreement the time for challenging the Policy itself has passed. The Employer further notes that the issue is not seriously advanced by the Union in either evidence or argument. **The evidence of [the Local 13 President] was notable for the absence of any suggestion as to how the [Harassment Policy] could be conceived of as 'unreasonable' under the *KVP* principles**.

The Employer further notes that **in its submission the Union seems to resile from the initial assertion of invalidity, and instead argues that the Policy required significant revision. No suggestion for revision is provided."** (p. 4)

…

The point the Employer is attempting to make is that throughout both grievances the Union repeatedly attempts to rely on Article 2.01 to dissect management action.… When the Collective Agreement provides a particular right that captures a dispute between the parties, in this case Article 5.04, Article 2.01 does not provide the Union with the second kick at the can after the first kick misses. Article 2.01 is meant to be relied on by the parties when the Collective Agreement does not otherwise restrict Employer actions. **Where the Collective Agreement already specifically restricts management rights or requires particular action on the part of management, such as the harassment provisions, then that ought to be the true focus of the inquiry. Article 2.01 should not come into play in those circumstances**." (p.11)

[My bolding added]

[67] I include the complete wording of Articles 2.01 and 5.04 of the Collective Agreement [in effect November 1, 2014, to October 31, 2017]:[14]

2.01 Recognition of Employer

a) The Union recognizes that the Employer retains all rights not specifically taken away by this agreement.

b) All rights reserved to the Employer are subject to the provisions of this collective agreement and shall be exercised in a manner consistent with the provisions of this collective agreement.

[14] Arbitrator Richardson will have been aware that the Collective Agreement ended in October 31, 2017 and presumably the parties would have an opportunity to re-negotiate any aspects thereof that were considered to be of sufficient importance. He heard the arbitration from November 19, 2018 to February 25, 2019 and rendered his decision on September 3, 2019.

c) The functions of the Employer within the scope of this collective agreement shall be exercised in a fair and reasonable manner.

d) The Employer shall not discipline or dismiss an employee except for just cause.

5.04 No Personal Harassment

(a) The Employer and the Union agrees that employees have the right to a working environment which is free of personal harassment and that employees should be treated with dignity and respect. Accordingly, the Employer and the Union will not condone personal harassment and will take timely corrective action where appropriate.

(b) 'Personal Harassment' includes actions or omissions and words, written or spoken, which demean or insult an employee, which discriminate against an employee without reasonable cause, whether or not prohibited by Article 5.01, Article 5.03, human rights legislation or any other legislation, which constitute abusive conduct, which have the effect of unreasonably interfering with an employee's work performance, which creates an intimidating, hostile or offensive working environment or which may result in the loss of employment benefits.

(c) In circumstances of alleged personal harassment, the employee making the allegation shall report the harassment to the employee's supervisor, the supervisor of the employee alleged to be the source of the harassment. If the employee is not satisfied with the response of the supervisor the employee may initiate a Grievance at the Step in the Grievance Procedure which involves management higher than the supervisor to whom the complaint was made or at Step 2, whichever is further along in the grievance process. The employee shall have the right to have a Union Advocate or other Union representative at all stages of the complaint and any investigation.

(d) Notwithstanding 5.04 (a) and (b), the Union and the Employer recognize that some occupational environments may include exposure to harassing conduct which will be dealt with in an appropriate context.

(e) Where a complaint is proceeding under the Workplace Rights Policy, the Workplace Rights Coordinator or designate will provide an update to the complainant and the respondent every two months.

[68] The Employer in its brief went on to state (p.41):

Issue #9 – Union representation during harassment process

"The Union is seeking a declaratory remedy for its members. **The Employer does not agree with the breadth of the issue as stated by the Union… What the Union seems to be asking for is a declaration that its advocates in representing a witness in such a meeting can answer the Employer's questions in lieu of the witness…** [The President of Local 13 who testified] lead no evidence of any kind of practice that provides for union advocates to answer questions directed to an employee in the stead of the employee to whom the question was put… The Employer submits there is no evidence before the Board that the wording of the Policy, in particular [Section] 6.3(e) has led to or does lead to any breach of the Collective Agreement. **The Union concedes there was no breach in the particular case of CC as she had the benefit of union representation every time she met with the Employer.**

Once the Union concedes that there was no breach of the Collective Agreement regarding union representation with respect to CC, this grievance ought to fail. The Union can characterize the issue that it seeks to advance as a policy grievance, but the Collective Agreement provides no distinction between policy and the individual grievances. Article 28.03 governs union grievances and limits the filing of such grievances to 15 working days from the occurrence, cause thereof or knowledge thereof. Article 28.05 (b) states that these time limits are mandatory. The Employer states that the Union cannot identify any occurrence which lies at the root of the purported policy grievance that either exists or has been grieved in compliance with the timelines. No breach of CC's rights is alleged and no violation of anyone else's rights was pointed to by [the President of Local 13]. **There is therefore not only no past instance of a breach of the Collective Agreement, the Union can also not point to any future breach of the Collective Agreement that is imminent.**

…

Issue #10 – **Validity of HRM's [Harassment Policy]**

As indicated at the outset, the Employer does not believe that whether or not the [Harassment Policy] is a reasonable policy enacted by management or whether it should be struck down or modified is properly before the Board."

[My bolding added]

C-The Union's Reply position

[69] In its Reply, the Union stated:

The Union's position is that the Union followed the appropriate process under the Collective Agreement for raising these issues and provide a clear notice to the Employer that each of them was engaged in the grievances.

… [Citing from Brown and Beatty, *Canadian Labour Arbitration*, 4th Edition (Toronto: Thomson Reuters Canada 2006- looseleaf online current to Release number 71, February 2019)] **the Union relies on the following well accepted arbitral principles:**

- cases should be determined on their merits
- individual and policy grievances are presumed to be mutually exclusive unless there is clear language in the collective agreement stating otherwise
- any objections regarding procedural irregularities, including time limits are using the form of grievance, should be raised in a timely manner (i.e., prior to a hearing) or they will be deemed waived
- the remedial authority of an arbitrator is not restricted by whether a grievance is brought as an individual grievance or a policy grievance [see also *Trade Union Act*, ss. 43 B (2)(c) and (d); Collective Agreement Article 27.08 (a) and (b).

Process

The Union's position is that it used an appropriate process for including the validity of the Policy as being one of the issues raised in the grievances.

…

Alternatively, if there was any deficiency in the process followed, the Union claims the Employer waived such deficiency by not raising it sooner.

Notice

The Union also provided notice to HRM that the validity of the Policy and the validity of the process by which Mr. W's harassment complaint was accepted were both at issue.

…

Further notice of these issues was provided orally and in writing when the union provided an outline of its position at the outset of the arbitration hearing.

Other objections by HRM on jurisdiction and scope

The Employer also places significance on the Union having said in its opening remarks that the Policy was being challenged as an unreasonable exercise of management rights and then stating in its closing submissions of the Policy required significant revision to comply with the Collective Agreement. **Given the flaws noted, the Union's preference would be that HRM start over in drafting its policy. At the same time, it is recognized that there are parts of the Policy that the facts of the grievance did not engage (e.g., the unreasonable time limit for making a complaint which serves to act as a barrier), and parts of the Policy that could be suitable in a new or revised Policy (e.g., the Purpose set out in section 2) such that the Board may not be comfortable finding the entire Policy is contrary to the Collective Agreement.** The Union sees no significance to it having accounted for this in its closing submissions.

Notice to other Unions

… Just as there is no requirement that every collective agreement entered into by the various unions within the Employer should have the same terms and conditions and their collective agreements, there is no requirement that the Employer have an organization-wide harassment Policy. **NSUPE Local 13 is seeking a remedy regarding the validity of the Policy only with respect to its own members and its own collective agreement**, and such a remedy will not, unless the Employer chooses, affect any other bargaining unit.

…

In any event, a union may bring an anticipatory grievance where there is 'some act by the company would suggest that a breach of the collective agreement may occur'… The dispute over union representation for NSUPE Local 13 members during harassment investigations is crystallized so as to meet the definition of a grievance set out in [Article] 28.01 of the Collective Agreement and to provide a factual basis on which the Board may determine the issue.

[My bolding added]

Arbitrator Richardson's reasoning

[70] He stated:

Context: The Harassment Policy

38 The Employer's Harassment Policy came into effect on November 1, 2016. It replaced and superseded an earlier workplace-rights' policies that had been in effect. (I was not provided with a copy of the earlier policy or policies). The Harassment Policy… applied to

all employees (other than the police, who were subject to different regulation): s 4.3 (Applicability)…

…

41 Mr. Dunphy testified as to the process in practice.

…

43 Article 5 (General Provisions) of the Collective Agreement contains prohibitions against sexual harassment(5.03) and personal harassment (5.04).

…

44 Also relevant to the issue of representation is Article 3.06 [Union Advocate] which provides as follows:…

…

J-Validity of the Employer's Harassment Policy

180 [Union] Counsel acknowledged that while no process was perfect, the Harassment Policy contained serious flaws, including the following:

a. There was no arm's-length independence between the department handling such complaints and managers;

b. (complaints were not handled appropriately at the intake stage in ways already discussed);

c. an intake process that was not neutral in its approach to complaints;

d. an investigatory process that did not take into account the circumstances of the parties;

e. failure to provide for union representation.

181 As well, the Harassment Policy failed to meet the fourth and fifth principles of *Lumber and Sawmill Workers Union, Local 2537 and KVP Co. Ltd.* 1965 Carswell Ontario 618 (Arbitrator Wren) ("KVP"), in that

a. It is not brought to the attention of the employee before the employer decided to act on it; and

b. the employee is not given prior notice that breach of the rule could result in discharge.

…

183 Counsel for the Employer … submitted that the history established that the Union's complaints about the Harassment Policy were not properly raised in either of the two grievances. That being the case, I was not properly seized with jurisdiction to declare the Harassment Policy invalid or contrary to the Collective Agreement…

…

200 **Counsel for the Employer questioned the Union's ability to review management's handling of a non-bargaining unit employees' harassment complaint.** In any event, he submitted that Mr. W's complaint was handled differently from that of the grievor at least in part because he chose to file a formal complaint – the grievor declined to do so. …

…

206 **In reply counsel dealt with four issues: jurisdiction and scope of the grievances**; evidence; freedom of expression; and blaming the victim. …

…

Analysis and award

…

Issue #10-Validity of Employer's Harassment Policy

294 **With respect, I believe that this part of the Union's policy grievance is premature.** The Harassment Policy is relatively new. I have nothing to compare it with. I was not provided with a copy of the previous policy. **The only evidence as to how it works in practice is an investigation that concluded in favour of the respondent grievor even when she refused to participate in the investigation process. It would in my view be inappropriate to consider – or even require – a review of the Harassment Policy on the basis of such a limited evidentiary foundation.** In this regard I should note that the Union's reliance on the fourth and fifth principles in *KVP* is misplaced because they apply only when a breach of the company rule has resulted in discipline. That is not the case here.

…

296 **With respect to the policy component of the two grievances,**

a. I was not persuaded on a balance of probabilities by the evidence before me that the representation provisions in the Harassment Policy breached the rights to Union representation set out in the Collective Agreement;
b. the Union's request for an order or declaration that the Harassment Policy required significant revision in order to be considered a policy that otherwise complies with the Collective Agreement was premature; and accordingly

c. I dismiss the policy components of both grievances.

297 I accordingly dismiss… [Union grievances 13 – 02 – 2017 and 13 – 06 – 2017], **subject to it being without prejudice to any future policy grievance regarding the Harassment Policy that is grounded on a different factual foundation."**

[My bolding added]

The arbitrator committed no error in relation to the "Harassment Policy" grievance

[71] As I indicated earlier, an important component of my review on this issue is how should I characterize the arbitrator's decision in relation to this issue: did he "refuse" to exercise his jurisdiction, or did he "dismiss" the Union's Harassment Policy grievance?[15]

[15] I also bear in mind that the final position presented by the Union to him was: "The Employer also places significance on the Union having said in its opening remarks that the Policy was being challenged as an unreasonable exercise of management rights and then stating in its closing submissions that the Policy required significant revision to comply with the Collective Agreement. Given the flaws noted, **the Union's preference would be that HRM start over in drafting its policy**. At the same time, **it is recognized that there are parts of the Policy that the facts of the grievance did not engage (e.g., the unreasonable time limit for making a complaint which serves to act as a barrier), and parts of the Policy that could be suitable in a new or revised Policy (e.g., the Purpose set out in section 2) such that the Board may not be comfortable finding the entire Policy is contrary to the Collective Agreement.** The Union sees no significance to it having accounted for this in its closing submissions."

[72] As the Applicant, the Union bore the evidentiary and persuasive legal burden to establish its case and requested relief. Arbitrator Richardson concluded that the Union had failed to do so.

[73] I am satisfied that he did take jurisdiction; he considered the arguments of the parties in relation to the merits of the policy grievance; and he did, in his words "dismiss" this policy grievance.

[74] Regarding his statement that: "the Union's request for an order or declaration that the Harassment Policy required significant revision in order to be considered a policy that otherwise complies with the Collective Agreement was *premature*" - he was using a term of art.[16]

[16] The Union provided no arbitral or court jurisprudence in support of its criticism of the arbitrator in this regard. Nor could I find a specific reference that closely paralleled the circumstances at Bar. Nevertheless, in Brown and Beatty, *Canadian Labour Arbitration*, 5th edition we still find under Topic 2.80 the identical statement of law as in 2006: "In general, there must be a real difference between the parties before an arbitrator will proceed to determine a matter.… As well, it is reinforced by the nature of adjudication itself, namely, that the power being exercised is to resolve *existing* disputes, as opposed to providing a jurisdiction to 'make law' at large.… adjudication as to the construction of an agreement may complement collective bargaining and not be seen as a usurpation of some inappropriate power to make law. However, notwithstanding that arbitrators have recognized that a collective agreement may provide for 'policy grievances', and that declaratory relief is generally regarded as a separate and distinct remedy, arbitrators may rule a matter to be in-arbitrable and decline jurisdiction to hear it, where the issue is premature in the sense that a difference has not yet crystallized, or where the difference has disappeared either because it has been settled or the requested relief was conceded, or because the grievance in question has otherwise become moot, or where they are of the opinion that no useful purpose could be served, or it might indeed be harmful."

[75] In Brown and Beatty, *Canadian Labour Arbitration*, Third Edition, 1999, updated to Release Number 48, (March 2006) at page 2-144 under the title "Mootness and prematurity", these authors stated:

> "In general, there must be a real difference between the parties before an arbitrator will proceed to determine a matter. Any reluctance to proceed is grounded in the arbitration clause of the collective agreement or in labour relations legislation, which typically require that there be a 'difference' to arbitrate. [Footnote 1 thereto reads: "E.g., *Halifax Regional School Board* (2002) 110 LAC (4th) (Christie) where grievance can be launched over *interpretation* of collective agreement, matter not moot- notwithstanding the disputed policy not yet applied.…"]
>
> As well, it is reinforced by the nature of the adjudication itself, namely, that the power being exercised is to resolve *existing* disputes, as opposed to providing a jurisdiction to 'make law' at large. … Finally, adjudication as to the construction of an agreement may complement collective bargaining and not be seen as usurpation of some inappropriate power to make law. However, notwithstanding that arbitrators have recognized that a collective agreement may provide for 'policy grievances', and that declaratory relief is generally regarded as a separate and distinct remedy, arbitrators may rule a matter to be in-arbitrable and decline jurisdiction to hear it, where the issue is premature in the sense that a difference has not yet crystallized [footnote 8 thereto reads:" *Halifax Regional Municipality (Metro Transit)*, (2004) 128 LAC (4th) 162 (North) -employer indicated that no change would occur under current collective agreement, and issue would be addressed in negotiations for new collective agreement; not appropriate to adjudicate moot issue.], or where the difference has disappeared, either because it has been settled or the requested relief was conceded, or because the grievance in question has otherwise become moot, or where they are of the opinion that no useful purpose could be served, or it might indeed be harmful."

[76] In the simplest terms, the Union was asking Arbitrator Richardson to conclude, very much in the abstract, that it had established on evidence more likely than not, the Policy did not comply with the Collective Agreement and therefore *to that extent* needed to be "revised". The Union was asserting that the (new as of November 1, 2016), Harassment Policy was so flawed *on its face* that he ought to

have found, and declared, it so. When arbitrator Richardson stated that the Union's request was "premature", I understand him to have reasonably intended to communicate that the Union's evidentiary and legal case was sufficiently weak on this issue that it did not reach the level of a "live controversy", which he had to comprehensively address. He was simply not satisfied that the Union had shown the Policy was unreasonable and therefore in need of revision at present. Therefore, because he had jurisdiction, his only choice was to proceed and dismiss the grievance.[17]

[77] I am not satisfied that the Union has established that either his reasoning process or the outcome are unreasonable.

Conclusion

[78] I am not satisfied that the Applicant has established that Arbitrator Richardson's reasoning or outcomes herein are unreasonable.

[79] I dismiss the judicial review.

[17] In oral argument before me the Union agreed that even if Arbitrator Richardson erred regarding the review of the Policy issue, that error would not affect the validity of his conclusions in relation to the other alleged errors/grounds of review that were presented to the court.

[80] The Employer is entitled to costs against the Union. If the parties cannot agree on costs, the Court will receive the parties' written submissions on costs within twenty (20) calendar days of this decision.

Rosinski, J.