

**Date: 20060727**

**Docket: 06/07**

**Citation: 2006 NLCA 42**

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR COURT OF  
APPEAL

**BETWEEN:**

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR,

represented by TREASURY BOARD,

and

NEWFOUNDLAND AND LABRADOR HEALTH BOARDS ASSOCIATION,

On behalf of EASTERN REGIONAL INTEGRATED HEALTH AUTHORITY

APPELLANTS

**AND:**

NEWFOUNDLAND AND LABRADOR NURSES' UNION

RESPONDENT

Coram: Cameron, Roberts and Mercer, JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador

Trial Division, 200501T8022

Appeal Heard: June 12, 2006

Judgment Rendered: July 27, 2006

Reasons for Judgment by Roberts J.A.

Concurred in by Cameron and Mercer, JJ.A.

Counsel for the Appellants: Augustus Lilly, Q.C.

Counsel for the Respondent: David Conway

**Roberts, J.A.:**

[1] The appellants (the employer) appeal a decision of the Trial Division of this Court wherein an applications judge set aside an Arbitration Board award in their favor. The majority of the Arbitration Board (the Board) had ruled that the employee nurses (the employees), members of the respondent Union (the Union), already on maternity leave on July 22, 2002, when a new Collective Agreement with improved maternity leave benefits came into effect, were not entitled to those benefits; rather, the affected employees had to content themselves with the lesser benefits given by the earlier Collective Agreement. The new Collective Agreement allowed for maternity leave to a maximum of fifty-two weeks, the old one to a maximum of thirty-three weeks.

[2] The appeal raises the questions of whether the applications judge engaged the appropriate standard of review and, if he did, whether he applied it correctly in the circumstances of this case.

**Facts**

[3] The essential facts are as set out in paras. 11-16 of the Agreed Statement of Facts submitted to the Board:

11. As per an amendment to the *Labour Standards Act*, RSNL, 1990, c. L-2, which came into force on December 31, 2000, employers are required to allow 52 weeks of combined maternity and parental leave. Prior to the coming into force of this amendment, employers were required to provide 29 weeks of combined maternity and parental leave.
12. As of July 22, 2002, various RNs employed by the HCCSJ were on maternity leave under Article 20 of the 1999 Collective Agreement. These RNs continued to be on maternity leave after the 2002 Collective Agreement was signed.
13. Following July 22, 2002, the HCCSJ continued to apply Article 20.06 of the 1999 Collective Agreement to RNs who had already commenced maternity leave as of July 21, 2002. That is, the HCCSJ extended 33 weeks of maternity leave benefits under Article 20.06 for RNs who had already commenced their maternity leave as of July 21, 2002.
14. The NLNU, on behalf of all employees in NLNU bargaining units under the jurisdiction of the HCCSJ, filed a policy/group grievance dated August 2, 2002, in opposition to the HCCSJ's interpretation of the 2002 Collective Agreement. This grievance is attached as Schedule "A" and the parties agree that this is the grievance to be considered in deciding this matter.

15. The parties agree that once the policy aspect of this grievance, as described below in paragraph 16, is decided by this board, the parties will assess the group aspect of this grievance as well as other similar grievances and attempt to resolve those grievances based upon this board's decision.
16. The policy aspect of this grievance, and the issue the parties have agreed to currently put before the board can be summarized as follows:

After July 22, 2002, were RNs [registered nurses] who were granted maternity leave under the 1999 Collective Agreement and who were still on maternity leave when the 2002 Collective Agreement became effective, entitled to maternity leave benefits as stated in the 1999 Collective Agreement (maximum of 33 weeks) or as stated in the 2002 Collective Agreement (maximum of 52 weeks)?

For the period after July 22, 2002, the parties disagree on whether these RNs are entitled to maternity leave benefits as per the 1999 Collective Agreement or as per the 2002 Collective Agreement.

### **The Findings of the Board**

#### **- *the majority***

[4] The majority was satisfied that those who were on maternity leave prior to July 22, 2002, the date the 2002 Collective Agreement came into force, were entitled to a maximum of thirty-three weeks of leave under Art. 20.01(d) of the 1999 Collective Agreement. This, they said, although not a vested right, was, nevertheless, an entitlement of those who had commenced maternity leave under the earlier provision.

[5] The majority placed much emphasis on Art. 20.01(a) of the 1999 Collective Agreement which read:

An employee shall be eligible for and shall be permitted to commence maternity leave at the beginning of the 6th month of pregnancy. Permission to commence maternity leave shall not be unreasonably denied. [Board's emphasis.]

[6] Based on this language, the majority wrote, those employees who had already commenced maternity leave under the 1999 Collective Agreement could not "re-commence" maternity leave under the similar Art. 20.01(a) of the 2002 Collective Agreement; furthermore, in addressing retroactivity in Art. 49, the parties made no mention of maternity leave.

[7] In short, according to the majority, if the parties had intended to confer any additional benefits to employees on maternity leave in the new Collective Agreement, their intent should have been clearly stated; without explicit language the Board had no jurisdiction to extend such a benefit.

#### **- *the minority***

[8] The Union nominee on the Board underscored that it is a fundamental principle of labour law that only one collective agreement at a time can apply to a bargaining unit. He cited in support **Hémond v. Coopérative fédérée du Québec**, 1989 CanLII 46 (S.C.C.), [1989] 2 S.C.R. 962. He also stressed that the parties had, in fact, directed their minds to dates, other than the date of signing, when certain articles of the 2002 Collective Agreement were to take effect, and listed eight examples.

[9] The Union nominee's conclusion was that Art. 20.06 of the 2002 Collective Agreement did not create any distinction between employees who commenced maternity leave before July 22, 2002 and those who commenced their leave on or after that date. Furthermore, he wrote, if the parties had intended to create such a distinction they could have done so. The plain meaning and only reasonable interpretation of Art. 20.06 of the 2002 Collective Agreement was that it was to apply to all affected employees without exception.

### **The Decision of the Applications Judge**

[10] The applications judge accepted that the standard of review of the Board's award was reasonableness. Counsel for both parties were in agreement, and they are likewise on appeal.

[11] The applications judge found that the Board, in concentrating on Art. 20.01(a) rather than on Art. 20.06 of the 2002 Collective Agreement, was in error. In oral reasons given on November 16, 2005, the day on which the application was heard, the applications judge said:

The board, unfortunately, does not address foursquare the actual interpretation of Clause 20.06. They do not refer to the words used in 20.06, and this is the clause that was in question. And looking at that clause it simply says, "While on maternity leave an employee shall continue to accumulate benefits" etcetera, "up to a maximum of 1950 hours." So the preconditions to the entitlement to the maximum, up to the maximum are that one be an employee and that one be on maternity leave, which is a question of status. The wording of the clause does not say subject to 20.01(a), it does not say while on maternity leave which has commenced under this agreement. It simply leaves it at employee and at on maternity leave, which is a question of status. ...\_

(Transcript of Proceedings, p. 80)

[12] Concerning retroactivity, the applications judge made these comments:

The board relies for its conclusion on the absence of any retroactivity clause and it points out the fact that there's a retroactivity clause for salaries. In my view the interpretation of 20.06 and its application to employees on maternity leave has nothing whatsoever to do with retroactivity. It has everything to do with the present status of an employee and the prospective relationship between the employee and the employer. It's simply a go forward benefit based on status, it does not require anything to be done- - it does not require anything to be done retroactively at all.

(Transcript of Proceedings, p. 82)

[13] The applications judge held that there can only be one collective agreement. He also found that the Board, in interpreting the Collective Agreement as it did, had created two levels of employees and two different types of benefits. This, he said, was certainly contrary to normal expectation and to normal practice.

[14] The conclusion of the applications judge was that the award could not stand up to a somewhat probing examination and was not reasonable "given the very clear wording of the collective agreement and given the consequences of a ruling [which related] back to an expired collective agreement first for a level of a benefit and by creating a separate category of employees that was not contemplated by the collective agreement. ..."

## **Relevant Legislative and Collective Agreement Provisions**

[15] **The Public Service Collective Bargaining Act**, RSNL 1990, c. P-42:

Interpretation

2. (1) In this Act

(e) "collective agreement" means a written agreement entered into under this Act between the employer and a bargaining agent containing provisions respecting rates of pay and working conditions for the employees in a unit, and which binds the employer, the bargaining agent and the employees in the unit;

Renewal, revision, etc. of collective agreement

14. (1) Within a period of not more than 60 and not less than 30 days immediately before the date of expiration of the term of a collective agreement or a judgment, either party to the collective agreement or affected by the judgment may by written notice require the other party to start collective bargaining with a view to the renewal or revision of an existing collective agreement or the conclusion of a new collective agreement.

(2) Where a collective agreement provides for a period of notice to start collective bargaining that is different from the period provided for in subsection (1), the provision in the collective agreement shall apply.

Arbitration provisions

39. (1) A collective agreement which does not contain provisions for final settlement, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, where those differences arise out of the interpretation, application, administration or alleged violation of the collective agreement, including a question as to whether a matter is arbitrable, shall be considered to contain those provisions set out in subsection 86(2) of the *Labour Relations Act*, but the reference in that subsection to the Minister of Employment and Labour Relations shall, for the purposes of this section, be a reference to the chairperson.

Decision of arbitration board

40. (1) The decision of a majority of the members of an arbitration board is an award of that board, and where there is no majority decision, the decision of the chairperson is the award of that board.

.....

(3) Every party to and every person bound by a collective agreement shall be bound by and comply with

(a) a provision for final settlement of a difference contained, or considered to be contained in the agreement; and

(b) an award made with respect to the agreement.

(4) An arbitration board shall not make an award which would amend or change a collective agreement, a judgment or an earlier award.

**Labour Relations Act**, RSNL 1990, c. L-1

Arbitration provision

86. (1) A collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, where those differences arise out of the interpretation, application, administration or alleged violation of the agreement or a question as to whether a matter is arbitrable.

(2) Where a collective agreement does not contain the provision required by subsection (1) the agreement shall be considered to contain the following provision:

.....

(e) the arbitration board named under this provision shall hear relevant evidence and argument relating to the difference or allegation by the parties or counsel on behalf of either or both of them and make a decision on the difference or allegation and the

decision is final and binding upon the parties and upon a person on whose behalf this agreement was made;

#### **Arbitration Act, RSNL 1990, c. A-14**

##### Remission to arbitrator

12.(1) In all cases of reference to arbitration the court may remit all or any of the matters referred for the reconsideration of the arbitrators or umpire.

(2) When an award is remitted under subsection (1), the arbitrators or umpire shall, unless the order otherwise directs, make their award within 3 months after the date of the order.

.....

##### Setting aside of award

14.(1) Where an arbitrator or umpire has misconducted himself or herself, or an arbitration or award has been improperly procured, the court may set the award aside.

(2) An application in respect of an arbitration or award referred to in subsection (1) may be made to the Trial Division within 60 days of the receipt of that arbitration or award by the parties to the application.

.....

##### Award final

36. The award made by arbitrators or an umpire is final and binding on the parties and persons claiming under them.

#### **Labour Relations Code, S.A. 1988, c. L-1.2**

**142** The award of an arbitrator, arbitration board or other body is binding

- (a) on the employers and the bargaining agent,
- (b) in the case of a collective agreement between a bargaining agent and an employers' organization, on the bargaining agent, the employers' organization and employers bound by the agreement who are affected by the award, and
- (c) on the employees bound by the agreement who are affected by the award,

and the employers, employers' organization, bargaining agent and employees shall do or abstain from doing anything, as required of them by the award.

**143**(1) Subject to subsection (2), no award or proceeding of an arbitrator, arbitration board or other body shall be questioned or reviewed in any court by application for judicial review or otherwise, and no order shall be made or process entered or proceedings taken in any court, whether by way of injunction, declaratory judgment, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain the arbitrator, arbitration board or other body in any of his or its proceedings.

(2) A decision, order, directive, declaration, ruling or proceeding of an arbitrator, arbitration board or other body may be questioned or reviewed by way of an application for judicial review seeking an order in the nature of certiorari or mandamus if the originating notice is filed with the Court no later than 30 days after the date of the proceeding, decision, order, directive, declaration or ruling or reasons in respect thereof, whichever is later.

#### **1999 Collective Agreement**

##### Article 20 – Maternity/Adoption/Parental Leave

###### 20.01

###### (a) Request for Maternity Leave

An employee shall be eligible for and shall be permitted to commence maternity leave at the beginning of the 6th month of pregnancy. Permission to commence maternity leave shall not be unreasonably denied.

.....  
20.05 Period of Protection

An employee's position as defined in 21.01, will be protected for the total period of her maternity/adoption/parental leave.

20.06 Service While on Maternity/Adoption/Parental Leave

While on maternity/adoption/parental leave, an employee shall continue to accumulate service for seniority, annual leave, severance pay and step progression to a maximum of 1237.5 hours [33 weeks]. Should an employee change employment status at the employee's request (i.e. full time to part time or part time to full time) prior to or during the period of leave under this Article, the benefits outlined above will be credited on the basis of the new hours of work effective the date of the change in status.

**2002 Collective Agreement**

Article 15 – Grievance Procedure

15.01 Prompt Procedure

It is of mutual interest to both the Employer and the Union that any grievances arising over the application, interpretation, administration or alleged violation of any of the terms of this Agreement be settled as expeditiously as possible in accordance with the procedure set forth hereunder.

.....  
.....

Article 16 - Arbitration

16.03 Decision of the Board

Arbitration awards shall be final and binding and communicated to the parties in the form of a signed copy.

16.04 Jurisdiction of the Board

An arbitration board may not alter, modify or amend any provisions of this agreement but shall have the power to set aside or modify a decision of the Employer. No arbitration board shall make an award which would amend or change a collective agreement, a judgment or an earlier award.

.....

Article 20 – Maternity/Adoption/Parental Leave

20.01(a) Request for Maternity Leave

A employee shall be eligible for and shall be permitted to commence maternity leave at the beginning of the 6th month of pregnancy. Permission to commence maternity leave shall not be unreasonably denied.

.....

(d) The maximum leave allowed under this clause shall be fifty-two (52) weeks in total. However, the Employer may grant leave without pay when an employee is unable to return to duty after the expiration of leave under this clause, during which the employee shall earn service for seniority purposes.

.....

20.05 Period of Protection

An employee's position as defined in 21.01, will be protected for the total period of her/his maternity/adoption/parental leave.

20.06 Service While on Maternity/Adoption/Parental Leave

While on maternity/adoption/parental leave, an employee shall continue to accumulate service for seniority, annual leave, severance pay, sick leave and step progression to a maximum of 1950 hours [52 weeks]. Should an employee change employment status at the employee's request (i.e. full time to part time or part time to full time) prior to or during the period of leave under this Article, the benefits outlined above will be credited on the basis of the new hours of work effective the date of the change in status.

**Analysis**

- **standard of review**

[16] The appropriate standard of review of an arbitrator's award interpreting a collective agreement was the focus of the Supreme Court of Canada's decision in **Voice Construction Ltd. v. Construction and General Workers' Union, Local 92**, 2004 SCC 23 (CanLII), [2004] 1 S.C.R. 609, where Major J., for a majority of seven judges, distilled and summarized the current law. He concluded that the appropriate standard of review was reasonableness and restored the arbitrator's award. LeBel J. and Deschamps J. concurred with the result and agreed that reasonableness was, indeed, the appropriate standard of review, but would have gone further and scrapped the "patently unreasonable" standard of review altogether. LeBel J. wrote, at para. 40:

... it is time for this Court to reevaluate the appropriateness of using the patent unreasonableness and reasonableness *simpliciter* standards. Patent unreasonableness is an inadequate standard that provides too little guidance to reviewing courts, and has proven difficult to distinguish in practice from reasonableness *simpliciter*. This difficulty persists despite the many permutations it has gone through ... . With respect, adding yet another definition of patent unreasonableness would not make its application any easier nor its conceptual validity more obvious.

[17] LeBel J. was of the opinion that the approach that a decision will not stand if it cannot be rationally supported by the relevant legislation should apply to judicial review on any reasonableness standard.

[18] **Voice Construction** began as a grievance after the company had refused to give work to a union member dispatched from the union's hiring hall; the union claimed that the company's refusal to put the member to work constituted a breach of the collective agreement. The arbitrator found that the collective agreement's "name hire" and "dispatch" provisions constituted an express restriction on the company's broad right to "hire and select workers" and, given that the dispatched member was both qualified and had not been previously terminated for cause, the member should have been hired.

[19] The company applied for judicial review under s. 143(2) of the Alberta **Labour Relations Code**, S.A. 1988, c. L-1.2. The reviewing judge held that the arbitrator, in finding an express restriction on management's right to hire and select, had exceeded her jurisdiction. He applied a standard of correctness and quashed the award. A majority of the Alberta Court of Appeal upheld his decision ((2002), 317 A.R. 214).

[20] Major J. began his analysis in **Voice Construction** at para. 15:

Canadian jurisprudence is plain that in assessing an arbitrator's ruling, the reviewing judge should adopt a pragmatic and functional analysis to determine the appropriate standard of review; *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (S.C.C.), [1988] 2 S.C.R. 1048; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (S.C.C.), [1998] 1 S.C.R. 982; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36 (CanLII), [2001] 2 S.C.R. 100, 2001 SCC 36; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226, 2003 SCC 19; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247, 2003 SCC 20; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77, 2003 SCC 63. The purpose is to ascertain the extent of judicial review that the legislature intended for a particular decision of the administrative tribunal: *Pushpanathan, supra*, at para. 26; *Dr. Q, supra*, at para. 21; *C.U.P.E., Local 79, supra*, para. 13.

He continued, at paras. 16 – 18:

The pragmatic and functional approach involves the consideration of four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question – law, fact or mixed law and fact: *Pushpanathan, supra*, at paras. 29-38; *Dr. Q, supra*, at para. 26; *Ryan, supra*, at para. 27. No one factor is dispositive: *Mattel, supra*, at para. 24.

Three standards of review have been recognized – patent unreasonableness, reasonableness and correctness: *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (S.C.C.), [1997] 1 S.C.R. 748, at para. 30; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817, at para. 55; *Ryan, supra*, at para. 24.

*Dr. Q., supra*, confirmed that when determining the standard of review for the decision of an administrative tribunal, the intention of the legislature governs (subject to the constitutional role of the courts remaining paramount – i.e., upholding the rule of law). Where little or no deference is directed by the legislature, the tribunal's decision must be correct. Where considerable deference is directed, the test of patent unreasonableness applies. No single factor is determinative of that test. A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard. By its nature, the application of patent unreasonableness will be rare. A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd. Between correctness and patent unreasonableness, where the legislature intends some deference to be given to the tribunal's decision, the appropriate standard will be reasonableness. In every case, the ultimate determination of the applicable standard of review requires a weighing of all pertinent factors: see *Pushpanathan, supra*, at para. 27.

[21] The pragmatic and functional analysis which Major J. conducted in **Voice Construction** resulted in a conclusion that the appropriate standard of review was reasonableness. The legislation under review, as noted above, was the Alberta **Labour Relations Code**, which contained a privative clause precluding judicial review of an arbitrator's award (s. 143(1)). That provision, he wrote, is expressly subject to the next following provision providing for judicial review, where the application for judicial review is brought no later than thirty days after the date of the award (s. 143(2)). The **Code** also provides that an award is only binding upon the parties. The collective agreement in issue, as required by the **Code**, contained a provision for referral of a dispute to arbitration for final and binding settlement (Art. 15.04).

[22] Major J. described the arbitrator's role, at para. 27, and in the following paragraph distinguished it from that of the role of a labour relations board:

The arbitrator in this case was required to interpret the collective agreement. Collective agreements, although similar to, are different in some respects from other types of contracts. While interpreting contracts falls squarely within the expertise of courts, arbitrators, who function within the special sphere of labour relations, are likely in that field to have more experience and expertise in interpreting collective agreements. Consequently, this favours a certain degree of curial deference to arbitrators' interpretation and application of collective agreements.

The LRC seeks to regulate and resolve labour disputes in the most efficacious and least disruptive way. Generally, the resolution of labour relations disputes by the Labour Relations Board requires "polycentric" decision making which means it involves a number of competing interests and considerations, and calls for solutions that balance benefits and costs among various constituencies: see *Pushpanathan*, at para. 36. By contrast, proceedings before an arbitrator do not require the consideration of broad policy issues.

Instead, the role of the arbitrator is to resolve a two-party dispute. In this appeal, that dispute related to the employer's obligation to hire dispatched workers. Even so, this factor suggests a deferential standard of review.

[23] Major J., at para. 29, identified the problem at issue in **Voice Construction** as a question of law, i.e., the interpretation of the terms of a collective agreement, and then concluded his standard of review analysis:

Generally speaking, questions of law are subjected to a more searching review than are other questions, and frequently require the standard of correctness. Nevertheless, the interpretation of collective agreements, as noted in para. 27, is at the core of an arbitrator's expertise and this, in turn, points to some deference.

Taking into account all these factors, the arbitrator's decision in this appeal is entitled to a measure of deference, the appropriate standard of which is reasonableness.

[24] Turning to the relevant legislation and collective agreement provisions in the case on appeal (see para. 15 above), the similarity between them and those considered in **Voice Construction** is readily apparent. An arbitration award is deemed to be binding by the **Public Service Collective Bargaining Act** (ss. 39 and 40), final and binding by the **Labour Relations Act** (s. 86(2)(e)), final and binding by the **Arbitration Act** (s. 36), and final and binding by the 2002 Collective Agreement (Art. 16.03). There is also a statutory right of judicial review for "misconduct" or "improper procurement of an award", provided the same is sought within sixty days of receipt of the award by the parties (**Arbitration Act**, s. 14); "misconduct" and "improper procurement of an award", Green, C.J.T.D. held in **O'Reilly's Irish Bar Inc. v. 10385 Nfld. Ltd.**, (2003), 231 Nfld. & P.E.I.R. 29, simply encompasses the normal attributes of judicial review and are not limiting. I wholly agree. The Chief Justice wrote, at para. 51:

The notions of misconducting oneself and of improper procurement of an award encompass, in the modern parlance of judicial review, absence of procedural fairness, acting in excess of jurisdiction and committing reviewable error on rulings of fact or law made within jurisdiction.

[25] Section 40(3) of the **Public Service Collective Bargaining Act** is similar to s. 142 of the Alberta **Labour Relations Code**, discussed by Major J. at para. 26:

Although ss. 142 and 143 of the *LRC* and art. 15.04 do not constitute full privative protection, they suggest that increased consideration be given to the decision of labour arbitrators: ... . A partial privative clause, in the absence of other factors, does not bestow the greatest degree of defence. It simply requires a careful assessment of the arbitrator's role.

Likewise, the collective agreement privative clause in Art. 15.04 of the collective agreement in **Voice Construction**, prescribed by s. 136(g) of the Alberta **Labour Relations Code**, is comparable to the collective agreement privative clause in Art. 16.03 of the 2002 Collective Agreement, prescribed by s. 39(1) of the **Public Service Collective Bargaining Act** and s. 86(2)(e) of the **Labour Relations Act**.

[26] Also, the Board in this case, like the arbitrator in **Voice Construction**, was interpreting the terms of a collective agreement which, while a question of law, "is at the core of an arbitrator's expertise" and "points to some deference".

[27] Thus, the reasoning in **Voice Construction** applies with equal validity in the present appeal on all four relevant factors, namely, the privative clause, arbitral expertise,

the purpose of the legislation and the nature of the question. The applications judge was correct in his adoption of the reasonableness standard of review.

[28] In light of the reasoning in **Voice Construction**, reinforced subsequently in **Alberta Union of Provincial Employees v. Lethbridge Community College**, 2004 SCC 28 (CanLII), [2004] 1 S.C.R. 727<sup>[1]</sup>, the normal standard of review for labour arbitration tribunals interpreting collective agreements will henceforth be reasonableness. This contrasts with the patently unreasonable standard generally applied hitherto. I refer, in particular, to **Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)**, 1996 CanLII 190 (S.C.C.), [1996] 2 S.C.R. 3, where Major J. wrote, at para. 12:

... It is a generally accepted principle that a decision of a properly constituted labour arbitration board in the interpretation of a collective agreement should not be interfered with by a court unless it is patently unreasonable. ...

[29] Notwithstanding this change, the reviewing judge will continue to carry out a pragmatic and functional analysis in each case to determine what, in fact, the standard of review should be. I repeat what Major J. said in para. 18 of **Voice Construction**:

In every case, the ultimate determination of the applicable standard of review requires a weighing of all pertinent factors.

- ***was the applications judge correct in holding that the Board's award was unreasonable***

[30] In **Law Society of New Brunswick v. Ryan** (above, at para. 20), Iacobucci J. explained, at para. 55, that a decision will be unreasonable

... only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79). [Emphasis added.]

In the following paragraph in **Ryan**, Iacobucci J. said it is not necessary for every element of the tribunal's reasoning to pass the reasonableness test. The question is, rather, whether the reasons as a whole support the decision.

[31] A labour law fundamental is that there can only be one collective agreement in operation at a time. Furthermore, the *prima facie* rule is that a collective agreement will come into effect at the time of signing.<sup>[2]</sup> Both of these principles are confirmed in the 2002 Collective Agreement. Articles 40.01 and 50.01 state:

**40.01 Complete Agreement**

This Agreement is the entire Agreement of the parties hereto terminating all prior agreements and practices with respect to those matters specifically provided for herein and concluding all collective bargaining during the term of this Agreement.

**50.01 Duration**

Except as otherwise provided in clause 49.01, this agreement shall be effective from the date of signing and remain in full force and effect until

June 30, 2004, and thereafter, from year to year unless either party gives notice in writing of its desire to change or amend this agreement not more than one hundred and twenty (120) calendar days and not less than thirty (30) calendar days prior to the date of expiration. [Emphasis added.]

[32] The clause 49.01 referred to in Art. 50.01 deals with retroactivity and reads:

49.01 Retroactivity

Salaries are retroactive to July 1, 2001.

[33] The principle of one collective agreement at a time was discussed in **Re DeHavilland Aircraft of Canada Limited** (1950), 2 L.A.C. 465, where the grievance concerned the effect of a wage increase in a new collective agreement. The Arbitration Board, chaired by Gale J. (later Chief Justice of the Ontario Court of Appeal), wrote, at p. 467:

The Board cannot accede to the proposition that following the first of September, 1948, the employee could continue to enforce contractual rights created by the Agreement which expired on the first of July, 1948. It is plain that the second Agreement was intended to supersede the earlier one and it would be a startling proposition that all rights and obligations brought into existence by the earlier Agreement remained alive after the new Agreement had been executed unless those rights and obligations were expressly nullified by the provisions of the new Contract. The very purpose of the new Agreement was to set up the Contract between the Company, the Union and the individual employees and it is perfectly apparent that it was intended to displace any Contract or Contracts which had theretofore existed. If it were otherwise, all parties would be constantly in doubt as to whether they were bound by the terms of Contracts apparently no longer in force. It is our view that the whole theory of collective bargaining demands that the current Collective Agreement is to contain and represent the whole Agreement between the parties. Accordingly, we have all come to the conclusion that Mr. McGregor was not entitled to an automatic raise of five cents on the 9th of September by reason merely of what had been contained in the former Contract. ...

[34] A more recent authority is **Hémond v. Coopérative fédérée du Québec** (see para. 8 above). In **Hémond**, the affected workers were promoted to positions of foreman and, as such, were excluded from the bargaining unit. When they were later demoted and rejoined the unit, seniority rights under the then current collective agreement were weaker than when they left. The workers contended that their seniority rights should be calculated in accordance with the collective agreement at the time they were promoted. Gonthier J., writing for the court, stated, at page 972:

If one were to conclude that the problem raised by respondents is one of applicability (and that the Superior Court thus has jurisdiction) this would mean that more than one collective agreement applies to the same bargaining unit. That would imply that a collective agreement which had otherwise expired would regulate the method used to calculate the seniority of certain employees (here respondents), while the text of the most recent collective agreement would regulate that of certain other employees. This would amount to saying that a collective agreement can be divided and may not govern certain members of a bargaining unit. In light of the legislation and fundamental principles in the field of labour law, this in my opinion would be an untenable conclusion.

[35] The principle of one collective agreement for all members of a bargaining unit is confirmed by s. 84(1) of the **Labour Relations Act**:

84.(1) A collective agreement is binding upon

- (a) the bargaining agent and the employees in the unit of employees that the bargaining agent represents; and
- (b) an employers' organization and employer who has entered into the agreement or on whose behalf the agreement has been entered into.

.....

[36] Notwithstanding the language of the 2002 Collective Agreement, s. 84(1) of the **Labour Relations Act** and the jurisprudence referred to [3], the Board saw fit to apply the provisions of the expired 1999 Collective Agreement to nurses who happened to begin their maternity leave before July 22, 2002. They did that by focusing on Article 20.01(a) and the word "commence". The Board wrote at p. 14:

Based on this language which the parties chose, those employees who had already commenced maternity leave under the 1999 Collective Agreement could not re-commence maternity leave under Article 21.01(a) when the July 22, 2002, Collective Agreement came into force. Furthermore, the parties addressed retroactivity in Article 49 of the July 22, 2002, Collective Agreement and decided that salaries were to be retroactive to July 1, 2001. If the parties had intended that the maternity leave benefit under Article 20.01(d) was to be increased from thirty-three (33) weeks maximum to fifty-two (52) weeks maximum for all those who had already commenced maternity leave when the new collective agreement came into force on July 22, 2002, the parties should have so stated in Article 21 or in Article 49, the retroactivity clause. In short, there is no language in the July 22, 2002, Collective Agreement to confer an additional benefit on those already on maternity leave when the new agreement came into force on July 22, 2002. Furthermore there is no language in the 1999 Collective Agreement to address such a circumstance. If the parties had intended to confer any additional benefit to employees on maternity leave, that intention should have been clearly stated in language of the July 22, 2002, Collective Agreement. For reasons best known to themselves the parties chose not to do this. Without explicit language this Board of Arbitration has no jurisdiction to extend such a benefit from the thirty-three (33) week maximum to the fifty-two (52) week maximum for employees whose grievance is the subject of this arbitration.

[37] With respect, the Board completely disregarded Art. 40.01, where the parties stated that "[t]his Agreement is the entire Agreement ..." and Art. 50.01 where, except for specific retroactivity for salaries, they said that the Agreement was to be effective from the date of signing. How much clearer could the wording be? If the parties had wanted maternity leave benefits for nurses on leave before July 22, 2002 to be excluded from the clear intent of Art. 50.01, they would have said so, as they did in Art. 49.01 for salaries. The Board engaged in linguistic analysis when there was no need to do so.

[38] The combined provisions are, indeed, so obvious in their meaning that it would require specific language to exclude affected employees from the extended maternity benefits. It seems to me that reason and fairness would also demand such specific language. Otherwise, as an example, a nurse commencing her maternity leave in the week before July 22, 2002 would be deprived of the extra nineteen weeks that a companion nurse would be entitled to commencing her maternity leave in the week following.

[39] I wholly agree with the applications judge that the Board neglected to "address foursquare" Art. 20.06, which was the article they were asked to interpret. I also agree with the applications judge that the interpretation of Art. 20.06 had nothing to do with retroactivity and everything to do with present status and the prospective relationship between the employees and the employer.

[40] The language of the Collective Agreement, the language of s. 84(1) of the **Labour Relations Act** and the cases referred to all support the one agreement principle. Starting with that principle, which one must, the clear language of a collective agreement prevails unless there is equally clear language that it is not to apply. In other words, if the parties here had meant to create two classes of employees for maternity benefit purposes, they should have done so. It is not the other way around, as the employer has argued, i.e., that because there was no specific language saying that Art. 20.06 would apply to those nurses already off, then they must be covered by the previous Agreement's thirty-three week provision, even though by Art. 40.01 of the 2002 Agreement the previous Agreement had been terminated.

[41] The employer relies, in great part, on two particular arbitration awards, **Penty and Treasury Board (Health and Welfare Canada)**, [1982] C.P.S.S.R.B. No. 116 (Canada Public Service Staff Relations Board, D.G. Pyle, Adjudicator) (QL), and **Re Falconbridge Nickel Mines Ltd. and Sudbury Mine, Mill & Smelter Workers, Local 598** (1973), 3 L.A.C. (2d) 409 (Arbitration Board, J.F.W. Weatherill, Chairman).

[42] The facts in **Penty** were that Ms. Penty commenced maternity leave without pay on March 2, 1981. She applied for Unemployment Insurance (U.I.) benefits on March 30 and, after a two week waiting period, she began receiving U.I. benefits on April 19. On May 8, she applied to her employer for an allowance for two weeks based on the amount she was then receiving from the U.I. Commission. She was told that she was not eligible for such payment. Ms. Penty grieved. Her grievance was denied on the grounds that the clause in the then current collective agreement, on which she was relying (cl. 20.06), had not come into effect until after she had begun her maternity leave. She appealed to the Board.

[43] Clause 20.06, which was quoted and relied upon by the Adjudicator, stated:

An employee granted maternity leave without pay under this clause and who is subject to a waiting period of two (2) weeks before receiving Unemployment Insurance maternity benefits, shall receive an allowance during this two (2) week waiting period. This allowance shall be in the same amount as the employee receives in benefits for two (2) weeks from the Unemployment Insurance Commission.

[44] The Adjudicator also quoted Clause 36.02:

Unless otherwise expressly stipulated the provisions of this Agreement shall become effective on the date it is signed.

[45] The Adjudicator, in denying the appeal, wrote, at para. 16:

I find nothing ambiguous in the provisions of the collective agreement as they relate to the issue before me; hence there is no need to rely upon the Memorandum as extrinsic evidence to determine their meaning. If anything, the Memorandum reinforces the interpretation that Ms. Penty was not eligible to receive the two weeks allowance. The new provision, clause 20.06 has been identified as "new" and the parties have agreed that the provisions of the new agreement would be effective, unless otherwise stated, on the date the agreement was signed. The agreement was signed on March 20, 1981, or a matter of several weeks after Ms. Penty commenced her maternity leave. [Emphasis added.]

[46] The Adjudicator concluded, at para. 20:

In conclusion Ms. Penty was granted maternity leave of absence for the period indicated pursuant to clause 21.04 of the previous agreement and was not granted such leave pursuant to clause 20.06 of the current collective agreement. It follows that she was not entitled to the allowance provided for in paragraph (c) of clause 20.06 of the current collective agreement (exhibit 1).

[47] In **Falconbridge**, the grievance was that the employee had not been paid the \$30.00 bonus fee for his week of vacation beginning August 22, 1972. Again, two collective agreements were in play. Article 14:08 of the old 1969 agreement provided for a bonus fee of \$30.00 for each week of vacation taken between November 1 and April 30. Article 14:08 in the new August 21, 1972 agreement was changed to give a \$30.00 bonus for each week of vacation, no matter when taken. The grievor took two weeks vacation in August 1972 and was claiming the \$30.00 bonus for the second week which, he contended, was covered by the new provision. Chairman Weatherill, for the majority of the Board, wrote, at p. 411:

... The second week of the two-week vacation period began, in our view, on Sunday, August 20th. It was after the commencement of this second week of the greivor's vacation that the new collective agreement came into effect. The grievor's claim is that under the provisions of art. 14:08 of the new collective agreement, he was entitled to the bonus payment in respect of this second week of his two-week vacation period.

In our view, art. 14:08 of the 1972 agreement does not support the grievor's claim. That article provides for a bonus payment in respect of "... each week of vacation granted and taken under this Article...". The grievor's 1972 vacation was not, however, taken under art. 14 of the agreement which became effective August 21, 1972, but rather under art. 14 of the 1969 agreement. It was a vacation calculated, both as to length and as to pay, as of January 1, 1972. It had "vested" in the grievor and it would take the clearest language of any subsequent agreement to alter his entitlement to it. [Emphasis added.]

[48] The employer argues that **Penty** and **Falconbridge** developed a "concept of entitlement" which when applied in the present case, as it suggests it should be, would result in the nurses who began maternity leave before July 2002 getting the benefits they were entitled to under the 1999 Collective Agreement.

[49] The grievors in both **Penty** and **Falconbridge** were seeking benefits under new collective agreements for which they were not eligible. In Ms. Penty's case, the Adjudicator looked at the new agreement to see if she was covered and, recognizing that the parties had agreed that the provisions of the new agreement would become effective on the date the agreement was signed unless stated otherwise, concluded that she was not. The provisions of the new collective agreement, which was the only agreement the Adjudicator could and did consider, did not cover Ms. Penty's claim.

[50] In **Falconbridge**, the grievor was looking for a bonus for a week of vacation which had begun, the Board found, before the new agreement came into effect. The Board also found, as indicated above, that "[i]t was a vacation calculated, both as to length and as to pay, as of January 1, 1972", and that it had "vested".

[51] The Employer argued before the Board that, similar to **Falconbridge**, the maternity leave benefits for those nurses who had begun their leave before July 22, 2002 had "vested" and, therefore, could not be altered without clear language to that effect. The Board rejected the "vested" argument, but found, based on Art. 20.01(a), that the maternity leave "was nonetheless an entitlement of those who had commenced maternity leave under Article 20 in the 1999 Collective Agreement".

[52] The claim of the nurses in the present case, unlike the claims in **Penty and Falconbridge**, is covered by the new Collective Agreement. Article 20.06, which speaks as of July 22, 2002, begins, "While on maternity leave, an employee shall continue to accumulate ... to a maximum of 1950 hours ...". The Board incorrectly focused on Art. 20.01(a) and, in particular, on the word "commence". I completely agree with the applications judge that

[t]he wording of the clause [Art. 20.06] does not say subject to 20.01(a), it does not say while on maternity leave which has commenced under this agreement. It simply leaves it at employee and at on maternity leave, which is a question of status.

### **Summary**

[53] The applications judge was correct in concluding that the standard of review in the present case is reasonableness. He was also correct in finding that the reasons of the Arbitration Board could not stand up to a somewhat probing examination. Having regard to the various considerations noted above, the Board's conclusion that nurses on maternity leave prior to the coming into force of the 2002 Collective Agreement were entitled only to benefits under the previous Agreement was not a reasonable one.

### **Disposition**

[54] The appeal is dismissed with taxed party and party costs to the Union.

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D.M. Roberts, J.A.

I Concur: \_\_\_\_\_

M. A. Cameron, J.A.

I Concur: \_\_\_\_\_

K. J. Mercer, J.A.

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[1] See also **Newfoundland & Labrador (Treasury Board) et al. v. Newfoundland & Labrador Association of Public and Private Employees** (2006), 254 Nfld. & P.E.I.R. 195, per Barry J.

[2] See Earl Edward Palmer and Bruce Murdoch Palmer, **Collective Agreement Arbitration in Canada**, 3rd ed. (Toronto: Butterworths, 1991) at p. 106.

[3] See also **Brink's Canada Limited**, [1994] C.L.R.B. Decision No. 1083, and **Specialty Foods Division Multi Foods Inc. v. United Food and Commercial Workers International Union, Local 1129**, [1995] O.J. No. 1159 (Ont. Gen. Div.) (QL).