SUPREME COURT OF NOVA SCOTIA

Citation: *Lawton's Drug Stores Ltd. v. United Food and Commercial Workers Union Canada, Local 864*, 2017 NSSC 171

Date: 2017-06-29
Docket: Hfx. No. 438037
Registry: Halifax

Between:

Lawton's Drug Stores Limited

Applicant

v.

United Food and Commercial Workers Union Canada, Local 864

- and -

Labour Board (Nova Scotia)

Respondents

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	March 9, 2017, in Halifax, Nova Scotia
Written Decision:	June 29, 2017

Counsel:	Rick Dunlop, for the Applicant David Wallbridge, for the Respondent Edward A. Gores, Q.C, for the Respondent AG (Not Participating)

By the Court:

[1] The applicant in this proceeding, Lawton's Drug Stores Limited ("Lawton's") has requested judicial review of the "Direction and Decision LB-0938 made by the Nova Scotia Labour Board ("the Board") pursuant to the *Trade Union Act*, R.S.N.S. 1989 c. 475 ("the TUA"). The review that is sought relates to the reasons that were generated by the Board on July 20, 2016 and later amended on August 17, 2016. Three bases of challenge have been identified by Lawton's:

A. An allegation that there exists a reasonable apprehension of bias on the part of the Board;

B. A breach of procedural fairness or natural justice by the Board; and

C. The Board's decision is unreasonable.

[2] The antecedents to this application stretch into the past and involve other court decisions. Much of this history was reviewed by Justice Arnold in *Lawton's Drug Stores Limited v. United Food and Commercial Workers Union Canada, Local 864*, 2016 NSSC 166. Therein, at paras. 3 to 5, he noted:

> 3 The majority of the astonishing history of the dispute between Lawton's and the Union was clearly detailed by Farrar J.A. in *Lawton's Drug Stores v. United Food and Commercial Workers Union Canada*, Local 864, 2016 NSCA 14:
>
> 1 To say that the procedural background is complicated with respect to this matter would be an understatement.
>
> 2 These proceedings started with the *United Food and Commercial Workers Union Canada, Local 864* applying to the Labour Board for settlement of the provisions of a first collective agreement under s. 40A of the *Trade Union Act*, R.S.N.S. 1989, c. 475.
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> 3 The Labour Board held a hearing and received submissions from the parties on March 23 and 24, 2015. Because of the time limitations in the *Act*, on March 26, 2015, the Labour Board delivered what it called a "bottom line" decision and direction.
>
> 4 In summary, the March 26 decision of the Labour Board found that Lawton's adopted uncompromising positions with respect to the negotiation of wages, holidays and other leaves, without reasonable justification. It directed the parties to resume collective bargaining with the assistance of a conciliation officer for a period of 30 days.

5 In its decision, the Labour Board indicated it would provide "full reasons" at a later date.

6 On April 8, 2015, Lawton's filed a Notice for Judicial Review challenging the March 26 decision **(the First Judicial Review**). This was before the parties had resumed collective bargaining pursuant to the direction of the Labour Board. The parties resumed negotiations on April 11, 2015 and by April 22, 2015 they concluded the terms of a collective agreement.

7 The Motion for Directions for the First Judicial Review took place on April 22, 2015. At that motion, Lawton's requested an Interim Injunction restraining the Labour Board from issuing any further reasons pending the outcome of that judicial review. Justice Michael Wood granted the Interim Injunction.

8 On April 28, 2015, Lawton's filed a formal Motion for an Interlocutory Injunction to restrain the Labour Board from issuing any further reasons for its March 26 decision. The motion was scheduled to be heard on June 16, 2015. The motion was adjourned, by agreement, so that the parties could ask the Labour Board to decide whether it still intended to provide further written reasons for the March 26 decision. After submissions from the parties the Labour Board issued a decision on October 13, 2015, explaining why it should issue reasons for the March 26 decision.

9 On November 17, 2015, Lawton's filed a Notice for Judicial Review challenging the October 13, 2015 decision **(the Second Judicial Review)** arguing, for various reasons, that the Labour Board's decision was unreasonable.

10 On November 27, 2015, Lawton's filed another Notice of Motion that asked the Supreme Court of Nova Scotia to continue to restrain the Labour Board from issuing reasons for the March 26 decision.

11 The motion was argued before Wood, J. on January 7, 2016. In a decision released January 13, 2016 (reported 2016 NSSC 17), the motions judge denied the motion, primarily on the basis that Lawton's would not suffer irreparable harm if the Labour Board issued its reasons (para24).

12 By Notice of Appeal dated January 26, 2016, Lawton's sought leave to appeal and, if granted, would appeal the January 13, 2016 decision to this Court.

13 The Notice of Appeal alleges the motions judge erred by concluding that Lawton's had failed to establish that it would suffer irreparable harm if an interim injunction preventing the Labour Board from releasing its reasons for the March 26 decision was not issued.

14 Lawton's asks this Court to grant leave to appeal, allow the appeal, reverse the decision of the motions judge and grant its motion for an Interim Injunction.

15 The leave application and appeal are scheduled to be heard on Thursday, June 9, 2016 at 2:00 p.m.

16 Finally, by Notice of Motion filed February 4, 2016, Lawton's sought an order from this Court pursuant to Civil Procedure Rules 90.37 and 90.41, enjoining the

> respondent Labour Board from issuing reasons for its March 26 decision until the appeal from Wood, J.'s January 7, 2016 decision has been determined.
>
> 17 The motion was heard on February 18, 2016. At that time I reserved decision. For the reasons that follow, I dismiss the motion with costs to the Union in the amount of $750.00 inclusive of disbursements, in any event of the cause, payable forthwith.
>
> 4 On May 30, 2016, a Notice of Discontinuance was filed with the Nova Scotia Court of Appeal confirming that Lawton's is no longer pursuing the appeal of Wood J.'s decision of January 13, 2016, in which their motion for an interim injunction was dismissed.
>
> 5 The First Judicial Review has been adjourned without day until the Second Judicial Review has been determined. Lawton's says it will not proceed with the First Judicial Review if this court rules in their favour on the Second Judicial Review.

[3] Lawton's unsuccessfully applied to Justice Wood for an interlocutory injunction restraining the Board from issuing reasons for its "bottom line" March 26, 2015 decision, then unsuccessfully applied before Justice Arnold in the decision noted above for a review of the October 13, 2015 decision of the Board to render written reasons in support of its bottom line decision of March 26, 2015.

[4] This is Lawton's third application for judicial review. Herein, the applicant challenges the reasons generated by the Board for its bottom line decision of March 26, 2015. These written reasons were provided on July 20, 2016 and were slightly amended on August 17, 2016. Any references herein to quotes from the Board's reasons refer to the amended reasons, which are hereinafter referred to as "the decision".

A. Reasonable Apprehension of Bias

[5] Under this rubric Lawton's alleges that:

> i. The Union was permitted to submit conciliation evidence whereas Lawton's was not permitted to submit conciliation evidence.
>
> ii. The Union was not required to provide justification for its position whereas Lawton's was required to provide justification even though the Union did not challenge Lawton's justification during joint collective bargaining.

[6] The test to be applied in determining whether a reasonable apprehension of bias exists does not appear to controverted. It has been referenced in a number of cases.

[7] For example, we have the Supreme Court of Canada in *R. v. R.D.S.*, [1997] 3 S.C.R. 484, where there was agreement by the majority with the statement of Major J., at para. 11

> 11...The test for finding a reasonable apprehension of bias has challenged courts in the past. It is interchangeably expressed as a "real danger of bias," a "real likelihood of bias," a "reasonable suspicion of bias" and in several other ways. An attempt at a new definition will not change the test. Lord Denning M.R. captured the essence of the inquiry in his judgment in *Metropolitan Properties Co. v. Lannon,* [1969] 1 Q.B. 577 (C.A.), at p. 599:
>
> > [I]n considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see Reg. v. Huggins; and Rex v. Sunderland Justices, per Vaughan Williams L.J. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see Reg. v. Camborne Justice, Ex parte Pearce, and Reg. v. Nailsworth Licensing Justices, Ex parte Bird. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased." [Emphasis added]

[8] In *Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at paras. 22 and 27, it was expressed thus:

> 22 Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular

> tribunal… The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.
>
> …
>
> 27 It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile…
>
> [Emphasis added]

[9] So, too, in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R., where Justice de Grandpré, in his dissent, stated the test in a form which is frequently cited in this context. It has been recently summarized by the Ontario Superior Court in *Smith v. Brockton (Municipality)* 2016 ONSC 6781 as follows:

> 31 The test for a reasonable apprehension of bias was set out by Justice de Grandpré in his dissenting judgment in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, and the test was approved and adopted by the Supreme Court of Canada in *R. v. Valente*, [1985] 2 S.C.R. 673 and in *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484. The test is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would think that it is more likely than not that the decision-maker consciously or unconsciously would not decide the matter fairly. The information of this hypothetical observer would include knowledge of the traditions of integrity and impartiality of the judiciary. The same test is applied for administrative tribunals and adjudicators: *Terceira v. Labourers International Union of North America,* 2014 ONCA 839.
>
> 32 The test for a reasonable apprehension of bias has two elements of objectivity: (1) the measure is that of the reasonable and informed person; and (2) his or her

> apprehension of bias must be reasonable. It is to be noted that the test is not whether a party to the proceeding would reasonably apprehend bias but whether a hypothetical member of the public would apprehend impartiality. The determination of whether there is a reasonable apprehension of bias is an objective, fact-specific inquiry in relation to the facts and circumstances of a particular matter: *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)*, 2010 ONCA 47 at para. 230, leave to appeal refused [2010] S.C.C.A. No. 91.
>
> 33 An allegation of a reasonable apprehension of bias is a serious allegation that calls into question the personal integrity of the adjudicator and the integrity of the administration of justice: *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham (2000)*, 51 O.R. (3d) 97 (C.A.) at para. 131, leave to appeal refused [2001] S.C.C.A. No. 66. The party alleging bias has the onus of proving it and the threshold of proof is a high one: Lloyd v. Bush, 2012 ONCA 349 at para. 23; *Clayson-Martin v. Marti*n, 2015 ONCA 596 at paras. 70-71.
>
> [Emphasis added]

i.Lawtons was not permitted to submit conciliation evidence.

[10] The applicant alleges that the Board did not allow Lawton's to present certain evidence and/or pose certain questions to witnesses related to the conciliation process, and yet the union faced no such impediment. In its brief, Lawtons put the matter this way:

> 58. The Board did not allow Lawton's to present the following evidence and pose the following questions to witnesses relating to conciliation:
>
> (a) Evidence related to the position of the Union on bargaining terms and what the Union was seeking to resolve the items.
>
> (b) Proposals by Lawton's made to the Union through the Conciliator.
>
> (c) Justification for the proposals made during conciliation.
>
> (d) Questions to Mark Dobson, the chief negotiator for the Union, on the contents of the draft first contract provided in advance of conciliation (in response to an objection by the Union's counsel, the Board cautioned Lawton's counsel to "watch your time," which curtailed the remaining questions at the Board's urging).
>
> (e) Questions to Mr. Dobson about whether the Conciliator relayed the questions and proposals of Lawton's that the parties should focus on five (5) of the 10 remaining outstanding items during Conciliation.
>
> (f) Questions to Mr. Dobson about whether Lawtons' proposals on bereavement leave was acceptable to the Union, as Mr. Dobson said that he discussed that issue only with the Conciliator.

> (g) During my cross examination, I was not permitted to respond to a question as to why Lawton's refused to change its position on holidays and leaves after conciliation. My evidence, if I had been permitted to respond, was that the Conciliator communicated to the Lawton's bargaining team that Lawtons' position would be sufficient to address the Union's concerns. Lawtons' position was that unionized employees would have access to the company's policies and so they would be treated no differently that its non-unionized employees.

[11] Subparagraph (g) above was taken from the affidavit of Shonda Ingalls dated April 7, 2015. As will be seen, Ms. Ingalls further elaborated upon this theme in her rebuttal affidavit.

[12] In his affidavit, sworn to on November 30, 2016, Mark Dobson for the United Food and Commercial Workers Union Canada, Local 864 (hereinafter the "the Union" or "the respondent") provides the following in response:

> 9. At the beginning of the hearing, both counsel for the Union (David Wallbridge) and counsel for Lawton's (Grant Machum) made opening statements.
>
> 10. In his opening statement, Counsel for the Union raised an objection to the content the March 20, 2015 Reply of Lawton's that referenced oral communication between Lawton's and the Conciliation Officer that did not include the Union.
>
> 11. Counsel for the Union provided the Labour Board and Counsel for Lawton's, with a list of objections to certain paragraphs in the Reply of Lawton's (Supplemental Record of the Nova Scotia Labour Board, Tab 2).
>
> 12. Counsel for the Union referred to a decision of the Labour Board in a matter between NSUPE v. Canadian Blood Services as the basis for the objection of the Union.
>
> 13. Counsel for was provided an opportunity by the Board to respond to the objection of the Union and during that submission he agreed to withdraw the reference to the Conciliation Officer in paragraph 13 of Lawton's' Reply (Record of the Nova Scotia Labour Board, Volume 1 of 3, Tab 11).
>
> 14. After hearing from both the Union and, the Chair of the Board advised the parties as follows:
>
> a) The Board would allow evidence related to non-controversial matters involving the Conciliation Officer; for example, the if the Conciliation Officer was merely a conduit for information between the parties; and
>
> b) Private conversations between one party and the Conciliation Officer alone were a concern and the Board would rule on any evidence as it arises during the course of the hearing.
>
> 15. Both Lawton's and the Union called evidence at the Labour Board hearing to present their respective cases.

16. I have reviewed the Affidavit of Shonda Ingalls sworn on November 25, 2016.

17. At paragraph 11 of the Affidavit of Ms. Ingalls, it lists examples of when she alleges evidence was limited by the Board. I have reviewed the examples and state as follows:

- No specific evidence is referenced at paragraph 11(a), (b) and (c) but any evidence of private conversations between Lawton's and the Conciliation Officer alone was objected to by counsel for the Union.
- Paragraph 11(d) was in relation to lengthy questioning by Counsel for Lawton's on collective agreement articles that were agreed, were not in dispute and not part of the Application of the Union.
- Paragraph 11(e) was in relation to a question about private conversations between the Union and the Conciliation Officer alone. Counsel for the Union objected.
- Paragraph 11(f) was a question about a conversation between the Union and the Conciliation Officer alone. Counsel for the Union would have objected.
- Paragraph 11(g) relates to evidence about a private conversation between Lawton's and the Conciliation Officer. Counsel for the Union would have objected.

18. At paragraph 12 of the Affidavit of Shonda Ingalls, five instances are listed where it is alleged that the Board received evidence from me about the conciliation process. The evidence from me was elicited through cross examination and there were no objections to my answers raised by counsel for Lawton's at the hearing. [Emphasis added]

[13] Shonda Ingalls' rebuttal affidavit counters with:

8. No specific evidence is referenced at paragraphs 11(a) because the Labour Board did not allow me to give evidence as to what the Conciliator told the Lawton's bargaining team the Union considered obstacles to arriving at a Collective Agreement. The Labour Board did, however, allow the Union witnesses to give evidence as to what the Union bargaining team told the Conciliator to which Lawton's could not challenge.

9. No specific evidence is referenced at paragraph 11(b) because the Labour Board did not allow me to give evidence as to the proposals made by Lawton's through the Conciliator to the Union. These proposals were in response to what the Conciliator told the Lawton's bargaining team the Union considered to be the obstacles to arriving at a Collective Agreement.

10. No specific evidence is referenced at paragraph 11(c) because the Labour Board did not allow me to give evidence as to the justification for Lawtons' proposals that the Lawtons' bargaining team provided to the Conciliator during conciliation.

[14] It is fair observe that the applicant has not offered much specificity with respect to its allegations. Moreover, some support for how Mr. Dobson indicated that the Board had determined to treat what went on at conciliation is found in the decision itself:

> [84] Lawtons…said that going into conciliation it understood that there were five outstanding issues. But during the course of conciliation the Union tabled approximately 45 proposals it deemed to be in dispute. It was the opinion of Lawton's that the Union's actions, in this regard, were a ploy to insure [sic] the process of collective bargaining was unsuccessful so that it could bring an application before the Board.
>
> …
>
> [86] The Employer says that at conciliation the Union altered its proposal to $0.50 per hour provided Lawton's agreed to a three year term…
>
> [87] The Employer asserts that throughout collective bargaining and conciliation the Union was unable to justify its demand for the substantial wage increase. The Employer states that it had been advised by the conciliation officer that the Union was seeking an increase that would offset union dues…
>
> [88] …Lawton's submits that it was prepared to stay at the negotiating table and had indicated to the conciliator that it did not intend to lockout the employees.…
>
> [95] Lawton's said that at the conciliation session held on January 8, 2015 it explained why the$1.00 per hour increase proposed by the Union would impact Lawton's adversely…
>
> [96] Lawton's said that wages remained the primary focus of discussions at conciliation. Through the Conciliation Officer Lawton's was advised that the Union was willing to move to annual increase of $0.50 per hour provided Lawton's agree to a three year term……
>
> [105] Lawton's submits that at conciliation on January 8, 2015 there was further discussion regarding the inclusion of holidays and leaves in the collective agreement. According to Lawton's the main issue at conciliation related to the possibility of the Company changing coverage for employees resulting in employees receiving less than non-unionized employees. Lawton's submitted that on January 9, 2015, following discussion with the conciliator proposed language on holidays that leaves according to Lawton's the Union failed to respond to the proposed language.
>
> [106] …It said the parties had reached agreement on holidays and leaves. Through the conciliation officer it was also agreed that these policies would not have to be incorporated into the collective agreement……
>
> [108] …Lawton's says that these changes were fully explained to employees at the time and there was also full discussion on scheduling at conciliation.…

> [111] Lawton's submits that through the Conciliation Officer it provided reasons for why it could not accept 3 months……
>
> [113] In relation to the Health and Welfare proposals Lawton's submits that it was not one of the 10 "remaining issues" identified by the Union at conciliation……
>
> [115] It was testified on behalf of Lawton's that during conciliation the Union and Employer had agreed to language which would limit Lawton's responsibility in relation to health and welfare benefits including limitation on grievances (Article 16.02). Through the Conciliation Officer Lawton's says it was advised that the Union would be satisfied if the employees were given access to the policy and that language be included in the first contract providing that they would not get less than non-unionized employees…
>
> …
>
> [117] It is the Employer's position that the allegation in the Application that Lawton's refused to set forth the terms for eligibility is misleading. This issue was negotiated at conciliation and resolved (Article 16.02)…
>
> [Emphasis added]

[15] In light of the examples above, it is readily apparent that some evidence with respect to what happened at conciliation, including evidence proffered by Lawton's, was allowed by the Board and considered by it in the course of coming to its conclusion.

[16] The significance of this is that it would appear on the face of the record that the Board was internally consistent and followed the approach set out in para. 14 of Mr. Dobson's affidavit as referenced above. Uncontroverted evidence of what went on at conciliation was permissible. One on one conversations between the conciliation officer and a party were considered more problematic, and the Board apparently ruled on such evidence as it arose during the hearing.

[17] Additionally, I see nothing inconsistent with the above approach when considering Mr. Dobson's other assertion. He indicated that some of the evidence that was provided by him with respect to what went on at the conciliation process was "elicited through cross examination and there were no objections to my answers raised by counsel for Lawton's at the hearing". [Affidavit Mark Dobson, November 30, 2016 - para 18]". Lawton's can hardly complain if it, through counsel, asked questions on cross to which he and other witnesses responded.

[18] Moreover, the Board was right to be cautious in its approach to controverted evidence of what transpired during conciliation. This caution has a sound practical

basis, one which has consistently been viewed to hold a significance that is critical to the proper functioning and utility of the conciliation process.

[19] We can begin to consider this significance by having regard to the powers conferred upon the Board by the *Labour Board Act* ("*LBA*") S.N.S. 2010 c. 37. In particular, para. 11(1) thereof:

> 11(1) The Board and each member has the power, privileges and immunities of a commissioner under the Public Inquiries Act, including, but not so as to limit those powers, the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that the Board considers necessary to the full investigation of any matter within its jurisdiction.
>
> (2)The Board may receive and accept any evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper, whether admissible as evidence in a court of law or not.
>
> (3)The Board shall determine its own procedure, but shall, unless contrary authority appears in this Act or in another Act of the Legislature, in every case give an opportunity to all interested parties to present evidence and make representation. 2010, c. 37, s. 11.
>
> Rules and regulations
>
> 12(1) The Board may
>
> (a) make rules governing its practice and procedure in relation to matters coming before it; and
>
> [Emphasis added]

[20] Next, we consider s. 9(1) of the *LBA*, which is to the effect that the conciliation officer is not compellable before the Board. Therewith, the eminently practical and sound basis for the manner in which the Board elected to deal with the evidence (of what occurred and what was said at conciliation) manifests itself. To have done otherwise would have, in effect, allowed each party (through its witnesses before the Board) to present its' version of what was said to the conciliation officer, and what the conciliation officer said to them, without any corresponding ability on the part of the Board or the opposite party to obtain clarification from the conciliator himself.

[21] Finally, there has been a plethora of cases in other jurisdictions (some of which will be discussed further on in these reasons) which have referred to the chilling effect upon the conciliation process that would ensue if the *ex parte* communications between one party or the other to the officer (during the process), and/or the conciliator's commentary to one party or the other, were to be routinely

revealed during subsequent proceedings before the Board, after the conciliation has been unsuccessful.

ii.Requirement to provide justification.

[22] The applicant also contends that Lawton's was required "to provide a justification" with respect to its position on wages by providing "verifiable financial information" in support thereof, despite the fact that the Union had neither requested this confirmation or challenged Lawton's position on wages, and despite the fact that the Union's position was not subjected to similar scrutiny. This is further despite the fact that the Board had noted that it "does not out of hand challenge or consider [Lawton's] position [on wages] to be without merit (decision, para 156). Lawton's claims that this is evidence of bias and/or differential treatment at the hands of the Board.

[23] In consideration of this complaint, one may observe at the outset that the test which the Board applied and adopted in its interpretation of s. 40A of the *Trade Union Act* consisted of what counsel for the parties themselves had proposed. Moreover, the test itself is logical when the relevant portions of the legislation are considered:

> 40A (1) Where
>
> (a) an employer or bargaining agent for a unit is required, by notice given under Section 33 after the coming into force of this Section, to commence collective bargaining with a view to the conclusion of a first collective agreement between the employer and the bargaining agent in respect of the unit;
>
> (b) a conciliation officer appointed under Section 37 has notified the Board and the parties under subsection (3) of Section 38;
>
> (c) repealed 2013, c. 43, s. 2.
>
> and
>
> (d) the bargaining agent and the employer have not concluded a first collective agreement, the bargaining agent or the employer may apply in writing to the Board to direct the settlement of the provisions of a first collective agreement between the parties by arbitration and, where a party so applies, the Board shall as soon as practicable serve notice on the parties of receipt of the application.
>
> (2) Within ten days after being served with notice under subsection (1), the bargaining agent and employer may serve notice on the Board of

(a) the agreement of the bargaining agent and employer to conclude the first collective agreement by arbitration; and

(b) the name of a person who has agreed to act as arbitrator.

(3) Within sixty days after a notice is served on the Board under subsection (2), the arbitrator shall settle the provisions of the first collective agreement.

(4) The provisions of this Act respecting arbitration apply mutatis mutandis to an arbitrator acting under this Section.

(5) Where

(a) an application is made by an employer or bargaining agent under subsection (1);

(b) the parties do not agree to proceed by arbitration under subsection (2); and

(c) regardless of whether Section 35 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of

(i) the refusal of the employer to recognize the bargaining authority of the bargaining agent,

(ii) the uncompromising nature of any bargaining position adopted by the other party without reasonable justification,

(iii) the failure of the other party to make reasonable or expeditious efforts to conclude a collective agreement, or

(iv) any other reason the Board considers relevant, the Board, within thirty days of receiving the application, shall either

(d) direct the settlement of the provisions of a first collective

agreement by arbitration; or

(e) direct that the parties resume their efforts to conclude a first collective agreement, with the assistance of a conciliation officer, for a period of thirty days.

[Emphasis added]

[24] As indicated, the test which was employed appears to flow logically from s. 40A(5)(c)(ii) itself. It appears to have been taken verbatim from cases in other jurisdictions with either the same or a substantially similar legislative provision. As the Board noted at para. 22 of the decision:

> Consistent with the first contact arbitration provisions of the Act [both parties] presented their evidence and framed the arguments to address what both parties agreed to be the three principle questions required to be answered by the Board [as set out in USWA v. Saxum Canada Inc., [1999] OLRB Rep. 328]:

> i. Has the process of collective bargaining been unsuccessful?
> ii. If the answer is "yes" to question i, has the employer engaged in conduct which falls within any of the four subsections A to D?
> iii. If the answer is "yes" to question ii, is there a causal connection between the employers conduct and the failure of collective bargaining process?
> [Emphasis added]

[25] Because such was consistent with the authorities, this is presumably why the test which was proposed to the Board, and with which the Board agreed, was worded as it was. The Board therefore focused on the employer's conduct.

[26] After all, the union was the party which has applied under s. 40A. References in s. 40A(5)(ii) and (iii) to the "other party" must therefore refer to the employer, which is to say, the applicant, Lawton's. In focusing upon Lawton's conduct, the Board was true to the legislation itself, as well as the authorities in other jurisdictions which have interpreted the same or substantially similar worded provisions. The formulation of the test presented to the Board by the parties through their submissions correctly encompassed the criteria contained in the section. This appears to be the correct interpretation by the Board of a portion of a statute with which it has considerable expertise. At the very least, it is an eminently reasonable one.

[27] It follows that neither of the grounds advanced by Lawton's rises to the point where it would cause the hypothetical "reasonably informed bystander", "right minded person", or a "reasonable and informed person" (as various iterations of the test have expressed it) to apprehend impartiality.

[28] The first issue raised by Lawtons is accordingly without merit.

B. Procedural Fairness

[29] A helpful summary of the role of this court (in reviewing for procedural fairness) is found in *Burt et al. v. Kelly*, 2006 NSCA 27. At paras. 19 – 21, Justice Cromwell noted as follows:

> 19 The judge's concern was not that the Board improperly exercised its discretion or that any decision or ruling it made was in itself reviewable. Those are the kinds of matters that we typically think of as engaging the standard of judicial review. The standard of review is generally applied to the "end products" of the Board's deliberations, that is, to its rulings and decisions: see *C.U.P.E. v. Ontario (Minister of Labour*), [2003] 1 S.C.R. 539 at para 102. In this case, the judge was concerned that the process followed by the Board had resulted in unfairness - in other words,

> that the Board had failed in its duty to act fairly. This concern goes to the content of the Board's duty of fairness, that is, to the manner in which its decision was made: C.U.P.E. at para. 102.
>
> 20 Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty. In my respectful view, the judge did not adequately consider the first of these steps.
>
> 21 The first step - determining the content of the tribunal's duty of fairness - must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step - assessing whether the Board lived up to its duty -- assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for this review.
>
> [Emphasis added]

[30] Justice Cromwell then considered all of the individual factors cited in *Baker v. Canada*, [1999] 2 S.C.R. 817, at paras. 23 – 27. In accordance with *Baker,* He concluded that the level of procedural fairness required in a given matter is to be determined having regard to such factors as :

i. the nature of the decision;

ii. the provisions of the relevant statutory scheme;

iii. the importance of the decision to affected individuals;

v. the legitimate expectations of the party challenging the decision; and

vi. the nature of the deference accorded to the decision maker.

[31] At para. 29 of *Burt, supra,* Justice Cromwell noted (with respect to the Nova Scotia Police Review Board):

> 29 The Board in this case has been left with considerable flexibility to fashion its own procedures. It is not restricted to admitting or acting on evidence that would

> be admissible in court. Section 33 of the *Act* empowered the Board to make findings of fact and provides that the decision of the Board is final. As noted, there is a statutory right to call and cross-examine witnesses. The Regulations specify that the burden of proof is to be on the balance of probabilities, that the evidence at a hearing is to be recorded and that the Board has all the powers of a commissioner under the *Public Inquiries A*ct, R.S.N.S. 1989, c. 372: Police Reg. 101/88 as amended, ss. 28G and I. Apart from these provisions (and a few others not directly relevant here) there are no explicit directives about how the Board should conduct a hearing or what evidence it should admit. It follows that, subject to the statutory directives and the duty to be fair, the Board has wide discretion as to how it conducts its proceedings.

Consideration of the Baker Criteria

[32] Within the context of the instant case I repeat that what is conferred upon the Board (as specified in para. 11(1) of the *Labour Board Act,* S.N.S. 2010 c. 37), are the "powers, privileges and immunities of a Commissioner under the *Public Inquiries Act.* These powers include the ability to "summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath".

[33] The section also equips the Board with the power to compel production of "any documents and things that the Board considers necessary to the full investigation of any matter within its jurisdiction". Section 11(2) and (3) go on to say:

> 11.(2) The Board may receive and accept any evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper, whether admissible as evidence in a court of law or not.
>
> (3) The Board shall determine its own procedure, but shall, unless contrary authority appears in this Act or in another Act of the Legislature, in every case give an opportunity to all interested parties to present evidence and make representation. 2010, c. 37, s. 11.

[34] Section 12 of the legislation confers upon the Board the power to make rules governing practice and procedure in relation to the matters that come before it.

[35] The legislation also contains provisions as to the makeup of the Labour Board (s. 3), and further provides in ss. 9(2) and 9(3) thereof:

> 9(2)The Board shall perform the duties and functions required or authorized to be performed by the Board, and may exercise such powers as may be conferred on the Board, under this or any other Act of the Legislature or under any regulations duly enacted, including without limiting the generality of the foregoing,

> …
>
> g) The Trade Union Act
>
> (3)The Board shall perform such other duties and functions as may be required or authorized to be performed by the Board, and may exercise such other powers as may be conferred on the Board, from time to time by the Governor in Council. 2010, c. 37, s. 9; 2014, c. 37, s. 21

[36] Section 40A of the *Trade Union Act* is (still) a relatively new process in Nova Scotia. Pursuant to it, and provided certain preconditions are met, the Board may settle the terms of, and thereby impose upon the parties, a first collective agreement. The importance of such an outcome to the parties, and the process contemplated therein, is patent. This importance was not lost upon the Board, as we see from para. 11 of the decision:

> "11. Section 40A establishes a self-contained process which parties to a new collective bargaining relationship may use to settle the terms of a first collective agreement. Consistent with the Section's very specific purpose, the process it creates has unique characteristics. Two of those characteristics are particularly relevant to this matter:
>
> The inevitability that the terms of a first collective agreement will be settled once the process is engaged; and
>
> Tight and relatively rigid timelines."
>
> [Emphasis added]

[37] This is relevant to the level of "jeopardy" to which each of the parties is exposed by the process, once invoked. It is also affords a basis by which to distinguish this case from that with which Justice Cromwell dealt in *Burt, supra.* In *Burt*, the jeopardy faced by the police officer in a proceeding before the Police Review Board was considered to be disproportionately high - higher than that to which the complainant was exposed. In such a proceeding, it was noted that the police officer's career was literally "on the line", although the object of the hearing was not to provide a remedy for the complainant. Consequently, the interests of a complainant were not in play to the same extent as "the results and interests of the officer complained against".

[38] In this case, both the applicant and the respondent had significant stakes in the outcome of the proceeding. For Lawton's, it faced the prospect of being bound to a process, the end of which would surely result in its workforce being rendered subject to the terms of a collective agreement settled by the Board. The same jeopardy was

upon the Union, which faced the prospect of having the terms of a first collective agreement potentially imposed upon its membership by the Board.

[39] As the Board went about determining the issues involved, it was discharging a *quasi judicial* function. The interests of both participants in the outcome required a correspondingly high degree of procedural fairness from the Board in the exercise of its powers pursuant to the *Labour Board Act* and the *Trade Union Act.* The Board had a duty to ensure that these powers, procedural or otherwise, were exercised in a manner commensurate with such an important exercise.

Was the Board Procedurally Fair?

[40] The Board's task was to determine whether the process of collective bargaining had been unsuccessful for any of the reasons preferred to in s. 40A(5)C of the *Trade Union Act. T*he wording of that section has been referenced earlier.

[41] Essentially, Lawton's complains that it was not permitted to submit evidence on key points and/or proposed questions related to the following points. I repeat (some) of the concerns noted in the affidavit of Shonda Ingalls, paras. 14(a) - 15 thereof:

> 14. The justification provided by Lawtons [during bargaining session] for its position on wages included:
>
> (a) The wage scale was comparable to the wage scaled for non-unionized employees at other Lawtons stores in Nova Scotia;
>
> (b) There are not retention or recruitment issues at Lawtons or at Store #144;
>
> (c) Wages in the retail sector are directly related to minimum wage;
>
> (d) The 60-month/10,000-hour progression was tied to regular performance reviews for Lawtons employees;
>
> (e) The wage scale is performance based, meaning that employees must have, at minimum, a basic contribution rating;
>
> (f) Lawtons was being negatively impacted by regulatory changes in the pharmacy industry alone with increased retail competition; and
>
> (g) It was discovered during negotiations that 2-3 employees were paid outside the salary range; however, Lawtons confirmed that wages for these employees would be "red-circled" and they would not be adversely affected by the proposed wage scale.

> 15. At no time during bargaining sessions did the Union challenge or disagree with the justification of Lawtons.

[42] In paragraphs 20 – 34, Ms. Ingalls went on to describe the collective bargaining process. She concludes that description as follows:

> "During collective bargaining and conciliation Lawtons responded with full justifications to any of the concerns that the Union communicated to it both directly and to the Conciliator."

[43] Some of the applicant's concerns with respect to evidence of what went on and what was said during the conciliation process were examined earlier when its arguments in relation to bias where considered. Most significantly it will be recalled that the premise underlying this particular concern is seen to be incorrect when reference is had to the decision itself.

[44] I will not repeat the observations made earlier, save only to reiterate that under s. 9(1) of the *Trade Union Act*, the conciliator or mediator or arbitrator present during the conciliation process is not a compellable witness. The Board's decision to treat the conciliation evidence in the manner in which it did was consistent with the approach adopted by Boards in other jurisdictions.

[45] By way of example, we have *RWDSU v. Raider Industries* [1997] SaskLRBR 97, wherein the Saskatchewan Labour Relations Board noted at para. 27 that:

> "… it is a long standing practice of this board not to permit parties to give evidence as to events that occurred during the conciliation process".

[46] And again, at para. 28, quoting with approval from *RWDSU v. Westfair Foods* (1993), 93 CLLC 16,059:

> "… the inability to rely on anything which occurred during mediation might be something of a handicap to the parties. It seems important, nonetheless to protect the confidentiality of the mediation process, especially since many of the statements…could only be corroborated by the mediator himself."

[47] It is useful to recall that the Board's decision was predicated upon a finding that Lawtons had adopted uncompromising positions with respect to the negotiations of wages, holidays and other leaves "without reasonable justification". (s. 40A, TUA, ciii). It was for this reason that the Board directed that the parties resume their collective bargaining efforts with the assistance of a conciliation officer for thirty further days. This was one of the expedients available to the Board under s.

40A(5)(e). (The other option was to "direct the settlement of the provisions of the first collective agreement by arbitration" under 40A(5)(d)).

[48] However, there is no evidence that Lawtons was prevented from directly calling it's evidence before the Board itself, and thereby providing justification for the position that it took with respect to these issues. Put differently, instead of being focussed upon what it had communicated during bargaining sessions or to the conciliator that may have been relevant to the issue of "justification", Lawtons could have simply called the evidence itself when before the Board.

[49] The Board had specifically found that while the applicant's position was not "necessarily" without merit, the collective bargaining process had been unsuccessful in part because it had not provided financial information to the Board to support it's uncompromising position on wages. That information could simply have been provided. Lawtons says it provided the required information directly to the union in response to a request during conciliation:

> "The only information that the Union requested that Lawtons provide during collective bargaining was "a copy of each employee's wage rate, classification, date of hire, addresses, and phone numbers…copy of any policies, procedures and/or benefit plans currently in place for employees covered under the [certification] order…" Lawtons provided this information and provided clarification when questioned by the Union."

[50] The union says that the requested information was not produced, and that the applicant has confused or conflated "employee wage rates" (what the applicant actually produced) with "employee pay scale", which is what the union had requested and never received. Support for this position may be found in para. 148 of the Board's decision.

[51] In para. 153 of the decision, the Board goes on to make the point that it was satisfied on the evidence that Lawtons had continued to maintain it's position with respect to wages merely upon the basis of an assertion that accommodating the union's demands would make it uncompetitive. It found that the employer should have backed up it's assertions and supplied some evidentiary basis to establish it's justification for the position which it adopted. The applicant has provided nothing to suggest that it was prevented from producing the very evidence itself. Instead, it made the decision to refer to it obliquely when before the Board.

[52] The applicant was represented by experienced counsel both before the Board and before this court. They have demonstrated a very clear appreciation of the issues

that were at stake at each stage of the proceeding. The decision, for whatever reason, to refer to the "justification evidence" in an indirect manner when before the Board, does not confer upon the applicant a basis upon which to argue that it was treated in a procedurally unfair manner.

[53] So too, with respect to the holidays and leaves issue. In para. 160 of the decision the Board succinctly outlined each party's positions on the point:

> "The Employer took the position that including the actual wording of the holiday and leave policies in the collective agreement was outmoded and inconsistent with current collective agreements which are now inclined to simply refer to the policies. The Union for its part took the position that if the policies were not set out in their entirety within the Agreement or reference as to a specific point in time it would remain open to the Employer to alter the policies whenever it desired to do so. The Board, it is fair to say, found this to be an intriguing issue."

[54] At para. 163, the Board concluded:

> "The Employer contended that the trend was not to include such provisions in the agreement and Ms. Ingalls testified that to do so would make the agreement cumbersome and bulky. These arguments are not persuasive and in the opinion of the Board this matter was not of such a nature that it should have resulted in such a heightened level of disagreement. In the face of clear and repeated statements by the Union in this case that it would not agree to the limitation sought by the Employer the position taken by Lawton's is found to be uncompromising and without justification."

[55] The level of procedural fairness to which the Board must adhere in proceeding such as this, as we have earlier noted, is admittedly high. There is no question that the parties to this proceeding had a very significant stake in its outcome. That having been said, the applicant has not demonstrated that it received even distinctive treatment when the proceeding was before the Board. There is no evidence that Lawtons was prevented from marshalling the evidence that would have been required in order to deal with the issues that were before Board in the application. In fact, the Board referred specifically to the applicant's failure to do that very thing. I am not satisfied that Lawtons was treated in a procedurally unfair manner. As such, I have concluded that this issue is also without merit.

C. Was the Board's decision reasonable?

[56] "Reasonableness" in this context is a deferential standard. The parties agree that what I must require of the Board is that it's reasoning be justifiable, intelligible,

and transparent. If those criteria are met, then it matters not whether this court on review would have necessarily come to the same conclusion. It matters only whether the conclusion is one of the acceptable or reasonable outcomes that were available to the Board on the basis of its' reasoning. To borrow from Justice Fichaud's comments to the same effect, I am not to "plot [my] own itinerary, but track the tribunal's reasoning path" (*Communications, Energy and Paperworks Union of Canada, Local 1520 v. Maritime Paper Products Limited*, 2009 NSCA 60, at para. 24).

What did the Labour Relations Board actually decide?

[57] It is helpful to frame the analysis by briefly returning once again to consider what the Board decided and the legislative section that it interpreted in doing so.

[58] Recall, first, that s. 40A(5) of the *Trade Union Act* states as follows:

> **"40A(5)** Where
>
> (a) an application is made by an employer or bargaining agent under subsection (1);
>
> (b) the parties do not agree to proceed by arbitration under subsection (2); and
>
> (c) regardless of whether Section 35 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of
>
> (i) the refusal of the employer to recognize the bargaining authority of the bargaining agent.
>
> (ii) the uncompromising nature of any bargaining position adopted by the other party without reasonable justification,
>
> (iii) the failure of the other party to make reasonable or expeditious efforts to conclude a collective agreement, or
>
> (iv) any other reason the Board considers relevant, the Board, within thirty days of receiving the application, shall either
>
> (d) direct the settlement of the provisions of a first collective agreement by arbitration; or
>
> (e) direct that the parties resume their efforts to conclude a first collective agreement, with the assistance of a conciliation officer, for a period of thirty days." [Emphasis added]

[59] Second, that the application was brought by the respondent Union under 40A(5)a, and that the penultimate paragraph (para. 164) of the decision reads:

> "For the reasons set out above the Board finds that it appears that collective bargaining between the UFCW and Lawton's has been unsuccessful because of the uncompromising nature of the bargaining positions taken by the Employer without reasonable justification."

[60] The Board's crucial finding was that "Lawtons had adopted uncompromising bargaining positions with respect to wages, and holidays and leaves without reasonable justification". As a consequence, the parties were directed to resume collective bargaining with the assistance of a conciliation officer for thirty days. There was no subsequent need to trigger s. 40A(6), which would have resulted in the Board directing "provisions of a first collective agreement by arbitration", because the parties subsequently reached agreement on a first collective agreement on April 11, 2015, which was ratified by the bargaining unit members on April 19, 2015.

Legislative history.

[61] This is briefly reviewed by the Board at paras. 9 – 11 of the decision which, for ease of reference, I reproduce in their entirety:

> "9. In December 2011 First Contract Arbitration (FCA) legislation was introduced in Nova Scotia by way of an amendment to the Trade Union Act. Bill 102, An Act to Prevent Unnecessary Labour Disruptions and Protect the Economy, received Royal Assent on December 15th. Nova Scotia was not the first province to introduce such legislation as six other provinces as well as the federal jurisdiction already had FCA legislation in place. Although the legislation varies from one province to another it generally falls into one of four models: exceptional remedy or "fault", automatic access, no-fault, and mediation intensive. Nova Scotia, similar to Manitoba, had initially adopted the automatic access approach which meant that once certain stipulated timelines had passed either party could apply for first contract arbitration.
>
> 10. In December 2013 the FCA provisions were amended with the passage of Bill 19, An Act to Amend Chapter 475 of the Revised Statutes, 1989, the Trade Union Act. The 2013 amendments, which brought the legislation more in line with what is found in Ontario, removed the time limits placed on conciliation and eliminated automatic access to first contract arbitration. Under the previous legislation parties could apply to the Board to settle the provisions of a first collective agreement 120 days after the appointment of a conciliator. Absent a conciliation countdown clock an employer or bargaining agent may only apply to the Board if the conciliation officer notifies the Board that the parties, after making reasonable efforts, have been

> unable to conclude a first collective agreement. The Board must then determine whether there has been conduct by one of the parties that had led to unsuccessful bargaining and only if such conduct is found will there be first contract arbitration."

[62] It has been seen that s. 40A(5) contemplates a process whereby, upon application by one of the parties, and provided the threshold criteria are met, the Board must issue a direction pursuant to either ss. 5(d) or (e) within thirty days.

[63] These criteria consist of the following:

i. An application must be made;

ii. The parties are not in agreement to proceed by arbitration under s. 40A(2);

iii. It appears to the Board that the collective bargaining process has proven unsuccessful;

iv. Because of one of the factors enumerated in ss. 5(c)(i) to (iv).

[64] No issue has been taken with the Board's determination that conditions precedent (i) and (ii) have been established. Clearly, an application has been made by the union, and the parties were not prepared to proceed via arbitration.

[65] The main basis of the respondent's attack upon the Board's reasoning focuses upon (iii) and (iv), and the link that the Board found between the lack of success at conciliation and (one of the reasons enumerated in 5(c)(i) to (iv)) "the uncompromising nature of the bargaining position adopted" by Lawtons "without reasonable justification" (s. 40A5(c)ii, *Trade Union Act*).

Was the process of collective bargaining unsuccessful?

[66] The Board, correctly in my view, clearly answered this question in the affirmative. It was guided in its consideration of the question by the approach adopted by the Ontario Labour Relations Board in *Nepean Roof Truss Limited*. [1986] O.L.R.B. Rep. July 1005. It ultimately concluded that s. 40A of our legislation, like the correlative portion of the Ontario Legislation "contemplates a cause and effect oriented assessment" (*Nepean*, para. 17) and that the use of the word "process" in the phrase "process of collective bargaining" necessitates "an examination of the interaction between the two parties".

[67] Paras. 133 to 135 of the Board's decision summarize its findings in this respect:

> "133. It is first of all important to appreciate that this matter did not come before the Board until such time as the conciliation officer filed his report with the Minister on February 17, 2015 in accordance with Section 38(3) of the *Act*. The conciliator's report, however, is not, in and of itself, evidence for the purpose of the Board's assessment, that the process of collective bargaining has been unsuccessful.
>
> 134. In the opinion of the Board there is no one particular indicator which identifies unsuccessful collective bargaining from a situation in which it may still be possible to conclude a collective agreement. The jurisprudence from other jurisdictions, however, with legislation similar to that found in Nova Scotia has identified certain factors which may have a bearing on assessing whether the process of collective bargaining has been unsuccessful. A decision of the OLRB, which has periodically been described as the seminal case for that jurisdiction in the area of FCA, *Nepean Roof Truss Limited*, supra, urged the Board to review "the totality of the process" and to be cautious "not to examine the complaint in a factual vacuum".
>
> 135. Although numbers may not always provide a clear picture as to what may have transpired it is nonetheless a consideration to be taken into account as regards the number of bargaining sessions held by the parties. The information before the Board indicates that the parties met six times on their own and on one other occasion with the assistance and guidance of a conciliator. Although there is no "magic number" of meetings which the parties need to have attended in order to establish a lack of success in collective bargaining, a consideration of the number of meetings to date, the amount of progress made at those meetings, and the degree of conciliation involvement in those meetings, suggest to the Board that the bargaining process may not have been a successful one. Although the parties had managed to agree upon a number of items at the time of the application to the Board there were a number of key issues outstanding."

[68] The Board also reflected upon the fact that no further collective bargaining took place after the conciliation officer filed his report, and that as a consequence the process had essentially stalled thereafter. This was considered in tandem with the fact that the bargaining efforts of the parties at the time of conciliation were focussed mainly upon monetary matters, prominent among which were wages, and holidays and leaves.

[69] Since the Board had considered that the parties had moved (at most) an infinitesimal degree (my paraphrase) from their opening positions on these points, it concluded that all of the above supported the proposition that "…the bargaining

process had ground to a halt, [and] that such a situation can only reflect that the process had, to date, been unsuccessful" (decision, paras. 136 – 137).

[70] In expressing the rationale for its determination of this issue, the Board was alive to the jurisprudence. Specifically, the Board was aware that simply because the process had not resolved all of the parties' outstanding issues, did not necessarily mean that the process had been "unsuccessful". The Board concluded that, in this case, the main substantive issues from the outset were monetary ones, and, as a consequence, the lack of resolution of these particular points, without any "light at the end of the tunnel", so to speak, meant that the substantive heart of the parties' differences could not be resolved.

[71] The conciliation process was clearly unsuccessful. The Board's reasons in relation to this issue are easy to follow, the logic is clearly stated and apparent, and the conclusion is justifiable not only with respect to the rationale explicitly stated by the Board, but also by virtue of the reasons which could be mustered in support of it on the face of the record.

[72] I see no basis upon which the Board's reasoning, which led to the conclusion that the process had been "unsuccessful" within the meaning of the legislation, may be assailed.

Was the process of collective bargaining unsuccessful for any of the reasons mentioned in s. 40A(5)(c) of the *Trade Union Act*?

[73] The Board found that the process had been unsuccessful for the reasons expressed in s. 40A(5)(c)(ii). Specifically, this involved a finding that the lack of success was attributable to the:

a. Uncompromising nature;

b. Of the other party (in this case, Lawtons);

c. And that Lawtons was "without reasonable justification" for its stance.

This finding was made in relation to the applicant's position both with respect to wages, holidays and leaves.

"Uncompromising" / "Without reasonable justification"

[74] "Compromise", as defined by the Canadian Law Dictionary, means:

> "To adjust or settle differences, conflicting claims between parties. It implies of itself a mutual agreement … a coming to terms or arrangement of a dispute, by concessions on both sides…"

[75] The second edition of the online version of Blacks Law Dictionary defines it thus:

> "An arrangement arrived at, either in court or out of court, for settling a dispute upon what appears to the parties to be equitable terms, having regard to the uncertainty they are in regarding the facts, or the law and the facts together. Colburn v. Groton, 66 N.H. 151, 28 AU. 95, 22 L.R.A. 763; Treitschke v. Grain Co., 10 Neb. 358, 6 N.W. 427; Attrill v. Patterson, 58 Md. 226; Bank v. McGeoch, 92 Wis. 286, 06 N.W. 606; Rivers v. Blom, 163 Mo. 442, 63 S.W. 812. An agreement between two or more person, who, for preventing or putting an end to a lawsuit, adjust their difficulties by mutual consent in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing. Shar v. Knox, 4 La. 456.

[76] An uncompromising party, therefore, would be an inflexible one, one which has demonstrated that it is unwilling to move, in any meaningful way, from its initially adopted position upon an issue critical to, or at the heart of, the differences between the parties. Tangential support for such a definition in this context may be found in the *Formula Plastics Inc.* decision, [1987] OLRB rep, May 7, 2002, paras. 22-23:

> "22. There can be little doubt on the evidence before us that the employer's position was uncompromising. The only area of flexibility indicated by the employer was in regard to the amount of pay in lieu of notice. This did not address the union's apprehensions with respect to the job security of employees, and was essentially peripheral to the real dispute embodied in the clause. While counsel for the employer suggested that the clause might have been acceptable to the union had the payment in lieu of notice provisions been generous enough, he used as an example a figure of $50,000. We find this of little assistance where there was no evidence that the employer was prepared to agree to figures in this range which might provide a type of de facto job security. We note that the employer chose to call no evidence at all with respect to the parties' negotiations.
>
> 23. In any event, the employer maintained the same position on 8.08(b) for over two years through the course of a strike directed primarily at this clause, a bad faith bargaining complaint which had 8.08(b) as its subject, and throughout the instant proceedings which were chiefly centered around this provision. Under the circumstances, the respondent's position can be fairly characterized as uncompromising." [Emphasis added]

[77] Neither party appeared to the Board to have moved much, if at all, from its initial position with respect to these issues (decision para. 137).

[78] Having demonstrated a clear grasp of the competing arguments the Board concluded (as we have seen) that the Lawtons was "uncompromising" on the issue of wages because Lawtons' position (and for that matter, that of the Union) differed very little from their respective opening positions at conciliation (decision, para. 137).

[79] Lawton's conduct was singular, however, because the legislation imposed an obligation upon the "other party" to justify its uncompromising stance. This was discussed when the issue of procedural fairness was earlier examined. Lawtons failed/refused/neglected to present information to the Union either during collective bargaining or when before the Board "pertaining to wages, hours of work, conditions, and other benefits" (decision, para. 148). This was critical because the principal issues between the parties were monetary ones.

[80] When it came to holidays and leaves, the Board agreed with the Union to the extent that "…if the holidays are not provided for in the agreement it may create a situation where, for the unionized employees, there are no enforceable holidays…". (decision, para. 161)

[81] The Board also observed that it appears that "…the employer is attempting to eliminate the right to grieve this aspect of the agreement which…in addition to be uncompromising without reasonable justification, could also be viewed as a refusal to accept the union the recognized bargaining agent." (decision, para. 162)

[82] It was open to the Board to find that Lawtons could have provided its justification for its position on wages by turning over the pay scales earlier discussed either when the Union had requested the information, or later, before the Board itself, and had not done so. Similarly, the conclusion that Lawtons had not satisfactorily justified its position with respect to the way it wished to word the provisions relating to holidays and other leaves was an understandable and reasonable one as well, upon the evidence before the Board.

Causal Connection

[83] When the Board's process was earlier discussed, it will be recalled that Lawtons had taken exception to the fact that the Board's focus was on justification (or lack thereof) for its conduct and suggested that it was procedurally unfair for the

Board to have done so without the reciprocal requirement being imposed upon the union (again, my paraphrase).

[84] We have earlier examined the particular wording of s. 40A and discussed the significance of the fact that it was the union which made application to invoke that section. It will be further recalled that the s. 40A(5)(c)(ii) subsection contemplates a situation where "…it appears to the Board that the process of collective bargaining has been unsuccessful because of…the uncompromising nature of any bargaining position adopted by the other party without reasonable justification."

[85] However, the Board did not scrutinize Lawtons' conduct in isolation or in a vacuum. It also examined whether there was a causal connection between the employer's uncompromising conduct, without justification, and the failure of the collective bargaining process.

[86] To begin to consider the Board's reasoning with respect to same, it is helpful to return to an earlier matter. It will be recalled that, in relation to the issue of whether its' conduct was "uncompromising", Lawtons had argued in its brief that the Board was internally inconsistent for the following reasons:

> "79. (a) In accordance with the generally accepted principle the Board concluded at paragraph 153 of the Decision that an employer is not obligated to disclose information in the absence of a request: "if the parties are to engage in meaningful collective bargaining such information must be provided **if and when requested**.
>
> (b) Despite the Board's conclusion that certain information must be provided "if and when requested" at paragraph 153 of the Decision, the Board concludes at paragraph 158 of its Decision that invariably (i.e. in every case or on every occasion; always) Lawtons has a positive obligation to disclose financial information to the Union regardless of a request:
>
> > The Employer also implied that the Union was not assertive enough in its demands for financial information, whereas it had repeatedly asked the Union to justify its position. **The Employer's stance seemingly ignores the fact that information pertaining to an employer's financial situation invariably rests exclusively with the employer and, in the absence of the employer** providing the union with relevant information the union is unable to properly assess the propriety and reasonableness of the employer's position or to formulate a counter-offer based upon accurate financial information.

> (c) The Board concludes, without any supporting *viva voce* or documentary evidence, that Lawtons was **unwilling** to provide financial information during collective bargaining. The only information the Board found that Lawtons refuse to provide the Union, unreasonably in Lawtons' submission, was "information containing various pay scales."
>
> The "unwillingness" to provide financial information conclusion is consistent with the Board's response to Lawtons' argument "that the Union was no assertive enough in its demands for financial information…" If the Union did request financial information and Lawtons refused, the Board would have said so. Instead, because Lawtons never refused to provide financial information and the Board had no evidence to support such finding, the Board had to conclude that Lawtons was obliged to disclose financial information regardless of whether there was a Union request." (Emphasis in original)

[87] As noted previously, this arguement appears to be rooted in an asserted equivalence between "wage rates" and "pay scales". This is despite an acknowledgment in Lawtons' brief (para. 76, bullet points 2 and 3) that the union had pointed out to it in correspondence dated August 7, 2014 (one day after Lawtons provided the wage rate information) the lack of information regarding "pay scales" in what had just been provided. Despite lengthy argument on the topic, Lawtons makes no assertion that it ever provided the "pay scale" information either to the union, or to the Board.

[88] The difference between the two concepts is addressed by the respondent in its brief:

> 107. Lawtons inappropriately and parenthetically equates "wage rates" with "pay scales". These two concepts refer to two different documents. Whereas "wage rates" refers to the wages of individual employees, "pay scales" are the grids that would include salaries based on years of service and positions that people hold.

[89] As earlier discussed the Board appears to have understood the distinction quite well and made a finding that the union had requested pay scales, found support for that finding in the evidence of Shonda Ingalls (Lawtons' own witness) and that the employer had refused to divulge it (decision, para. 148). Lawtons had taken the position before the Board that it could not meet the union's wage demands and cited market condition, recruitment issues, wages at non-union stores and those of its competitors. Pay scale information was intergral to the position that Lawtons had adopted.

[90] It was both logical and fair for the Board to observe that such information is part of what is "intrinsic to the employer – union relationship" and/or that "if the parties are to engage in meaningful collective bargaining, such information must be provided if and when requested" (para. 148 decision).

[91] As I have noted, the Board also considered the applicant's position on holidays and other leaves. The Board heard evidence that Lawtons would agree to make it's existing policies available to employees but would not agree to incorporate any of the terms of these policies in the collective agreement itself. The applicant's entrenched position was that the wording to be included in the collective agreement on items like holidays, maternity/paternity and parental and bereavement leaves, jury/witness duty or court appearance leaves, should be that Lawtons' would "make available to employees it's policy" and that full and part time employees would receive such holidays and leave time in a manner consistent with "other (presumably non-unionized) Lawtons retail store operations." The applicant adopted a similar stance with respect to health and welfare, whereby in its final offer stated that it would "agree to make available a benefits plan to eligible employees in accordance with the company group insurance program as may be revised from time to time." The union's concern was that Lawtons would not commit to maintaining the current level of benefits during the term of the collective agreement.

[92] The Board clearly understood the union's argument, which was that, by implication, the employer's policies with respect to holidays, leaves, etc. could change from time to time and that the wording proposed by Lawtons regarding the health plan made by the possibility of change explicit. It summarized that argument as follows:

> "34. It was the Applicant's position that the Employer's proposal was unacceptable as it meant the Union, under the collective agreement, would not be able to grieve such matters as the denial of a paid holiday or a change in the holidays granted to employees. The Employer controls its policies and can therefore unilaterally change them at any time without the input of the Union. It was the Union's position that holidays constitute an important monetary item and as unionized employees do not have the protection of the *Labour Standards Code* for holidays they could be deprived of the right to any holidays if not listed in the collective agreement. Additionally, the Applicant submitted that it was important that members of the bargaining unit be able to refer to their collective agreement in order to know their rights within the workplace and in dealing with their Employer. The Applicant submits that the Employer's refusal to depart from its position was without justification.

> 41. With respect to the Health and Welfare Plan the Applicant submits that not only had the Employer refused to incorporate the Health and Wellness Plan in the collective agreement but also would not commit to maintaining the current level of benefits during the term of the collective agreement. The Union submits that its concern is very similar to the position held with respect to holidays and leaves.

Employer's Final Offer contained the following terms:

> Article 16 HEALTH & WELFARE
>
> 16.01 The Company agrees to make available a benefits plan to eligible employees in accordance with the Company group insurance program, as may be revised from time to time.
>
> 16.03 For clarity employees with receive benefits under article 16.01 consistent with other Lawton retail store locations. [Emphasis added]

[93] Then at paragraphs 101 and 102 the Board went on to summarize the employer's position with respect to holidays:

> "101. Lawton's indicated that they were in agreement with the Union as to the number of holidays and leaves full and part time employees would be entitled to receive but that the principle point of contention concerned whether they would be written into the agreement or simply referred to. Lawton's said that in response to the Union's request to include the holidays and leaves in the agreement it had explained that it was becoming common to refer to holiday and leave policies in the agreement instead of including all of the working in a collective agreement. Lawton's said they also pointed out that as leave policies tend to change regularly to meet with new legislative obligations inclusion of the extensive polices would be awkward and cumbersome in a collective agreement.
>
> 102. Ms. Ingalls testified that on October 27, 2014 Lawton's provided the Union with policies on holidays and leaves of absence. She said that Lawton's had offered to provide the employees with the same holiday and leaves as non-unionized employees and that this would include any changes to the policies. The Union was also advised that eligibility and entitlement could be grieved. Lawton's indicated that the Union had seemed to be in agreement with this approach on November 18,

> however, it changed its position in relation to policies and sought to include language that any improvement in policies would be applicable to the bargaining unit employee whereas any decreases in benefits would not be applicable."

[94] The Board demonstrated that it understood the tenor of Lawtons' arguments with respect to the health plan. At para. 113 of the decision the Board noted that:

> "…The proposal also provided that the benefit would be no less than those offered to other employees (Article 15.01 and 15.02). According to Lawton's the original proposal by the Union was precisely what was offered by Lawton's and accepted by the Union."

[95] By way of another example, from p. 116 of the decision, it was noted that:

> "Lawton's proposed language to ensure that unionized employees were not treated differently than non-unionized employees (Article 16.03). The Union, according to Lawton's failed to respond to this proposal."

[96] The Board found that, while both parties were uncompromising, Lawtons was without justification for its conduct, and the collective bargaining process had failed because of the position Lawtons adopted. To return to the parties' stances on the issue of wages, for example, since the Union could not be expected to compromise its initial bargaining position without being provided with the pay scales that it had requested (and never received) from Lawtons, the fact that the latter never produced this information, despite having been requested to do so, precipitated and prolonged the intransigence by both sides on the issue:

> "156. The effect of the Employer maintaining its position on the issue and the absence of any information in support of its position put to an end the possibility that any resolution to the wage issue could be obtained through negotiation. That being said it is important to stress that the Board does not out of hand challenge or consider the Employer's position to be without merit. <u>That does not mean, however, that the Union was under an obligation to accept the Employer's position at face value without verification</u>. In the absence of such a demonstration it is not difficult to conclude that the parties would continue to remain at loggerheads with neither side willing to budge from their position. In the opinion of the Board no amount of bargaining would be able to resolve the wage issue." [Emphasis added]

[97] So too, the Board's conclusion that the applicant's unwillingness to include any specific language on holidays and leaves in the collective agreement caused justified concern on the part of the union and led to the stalemate on that issue.

[98] As the Board explained at paras. 161 and 162 of the decision:

> "161. The Board accepts the Union's contention that the Holiday provision is a monetary issue for the parties to a collective agreement and for the bargaining unit members. Although leave provisions under the Labour Standards Code apply to unionized employees holidays in the Code do not. Consequently, if the holidays are not provided for in the Agreement it may create a situation where, for the unionized employees, there are no enforceable holidays. The Employer has countered that the bargaining unit employees would get holidays consistent with non-union employees at other stores. From the Board's perspective that slight shift does not eliminate the principle concern being that the Employer without consultation or forewarning, if it so desired, could unilaterally change holidays for all employees.
>
> 162. It appears to the Board that by presenting its proposal in this manner the Employer is attempting to eliminate the right to grieve this aspect of the Agreement which, although not framed as such by the Union, in addition to being uncompromising without reasonable justification could also be viewed as a refusal to accept the Union as the recognized bargaining agent." [Emphasis added]

[99] The causal connection between Lawtons' position, without legal justification, on these two issues, and the fact that the conciliation was unsuccessful, was made. It is worth observing that the Board only needed to make such a connection with respect to one such issue in order to provide the direction which it did under s. 40A. These connections were among the reasonable outcomes available to the Board.

[100] The Board's decision with respect to each of the criteria that was integral to its finding against Lawtons on the basis of s. 40A(5)(c)ii of the *Trade Union Act* was clearly rendered, logical, easily understood, and defensible. Moreover, the Board's conclusion flows logically from its reasons and its findings.

Conclusion

[101] I remind myself of Justice Fichaud's observation in *Delport Realty Ltd. v. Nova Scotia (Registrar General of Service Nova Scotia & Municipal Relations)*, 2014 NSCA 35:

> "[25] Reasonableness means the court respects the Legislature's choice of decision maker by analyzing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't - What is correct or preferable? The question is - What is reasonable? If there are several reasonably permissible outcomes, the tribunal, not the court, chooses among them. If there is only one and the tribunal's conclusion

> isn't it, or several and the tribunal's decision isn't among them, the decision is set aside. Law Society of New Brunswick v. Ryan, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247, paras 50-51. Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62 (CanLII), [2011] 3 S.C.R. 708, paras 7-11. McLean v. British Columbia (Securities Commission), 2013 SCC 67 (CanLII), paras 20, 31-41. Coates v. Nova Scotia, supra, para 46."

[102] While the decisions made by the Board with respect to each of the criteria stipulated by s. 40A5(c)ii of the *Trade Union Act* were not the only possible outcomes available to it, they each were certainly within "the range of reasonable outcomes" available on the basis of the Board's transparent, justifiable and intelligible reasoning path. The decision, as a whole, was "reasonable". Moreover, there is no reasonable apprehension of bias on the Board's part, nor did it treat the applicant in a procedurally unfair manner for the reasons earlier provided.

[103] Lawtons application is dismissed.

[104] If the parties are unable to agree as to costs, I will receive short written submissions within thirty (30) days.

Gabriel, J.