SUPREME COURT OF NOVA SCOTIA

Citation: *EllisDon Corporation v. International Union of Operating Engineers, Local 721*, 2017 NSSC 2

Date: 20170104
Docket: HFX446761/449153
Registry: Halifax

Between:

EllisDon Corporation

Applicant

v.

International Union of Operating Engineers, Local 721, James Beswick and the Nova Scotia Labour Board (Augustus Richardson, Q.C. Vice-Chair, Dannie MacDonald and Patrick Bourque)

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Michael J. Wood
Heard:	September 26, 2016, in Halifax, Nova Scotia
Written Decision:	January 4, 2017
Subject:	Judicial Review – Standard of Review and Statutory Interpretation Labour – Construction Industry – Union Certification and Voluntary Recognition
Summary:	Labour Board granted employee's application to revoke union certification for crane operators employed by EllisDon. Initially EllisDon became unionized by voluntary recognition agreement in 1990 which covered all operating engineers in their employ.

In 2009 union and employers' association began negotiating separate collective agreements for crane operators and earth movers. The applicant Beswick was employed as a crane operator at time of his application.

Labour Board concluded the decertification should be limited to crane operators and not include earth movers because of separate collective agreements. EllisDon asked for reconsideration and Board refused.

Issues: (1) What is the content of the reasonableness standard of review where issue primarily one of statutory interpretation?

(2) In this case were the Board's decisions reasonable?

Result: When the reasonableness standard is applied to review of a decision involving statutory interpretation court must consider language and context of legislation. If there is only one reasonable interpretation possible and tribunal does not adopt it the decision is unreasonable.

In this case the focus was s. 98(6) of the *Trade Union Act*. EllisDon argued collective agreements could not redefine scope of 1990 bargaining unit because of this section which forms part of the "Steen" amendments. EllisDon argued that the only unit in existence was the one found in 1990 VRA and decertification should cover all employees including earth movers.

Board concluded that employer's bargaining rights passed to association upon voluntary recognition in 1990 and this included ability to amend unit. Collective agreements included recognition article and were in substance voluntary recognition agreements which could redefine unit. This meant decertification should be limited to crane operators.

Court considered the *Act* as well as the context, including history of Steen amendments, in deciding that decision to revoke certification for crane operators was reasonable. This is what Beswick had applied for.

Court also noted potential ambiguity in Board order which referred to partial decertification of unit in 1990 VRA. Court said it should consider decision as a whole and not engage in line-by-line search for error. Concluded that language used in Board's order did not make otherwise reasonable decision unreasonable.

Judicial review dismissed.

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Decision

Judge: The Honourable Justice Michael J. Wood

Heard: September 26, 2016, in Halifax, Nova Scotia

Counsel: Eric Durnford, QC, and Amy Bradbury, for the Applicant EllisDon Corporation

Gordon Forsyth, QC, and Bettina Quistgaard, for the Respondent International Union of Operating Engineers, Local 721

Noella Martin, QC, and William Russell for the Respondent James Berwick

Edward Gores, QC, for the Respondent Nova Scotia Labour Board

By the Court:

Background

[1] EllisDon Corporation operates in the construction industry in the province of Nova Scotia. Labour relations in that sector are regulated under Part II of the *Trade Union Act* R.S.N.S., 1989, c.475. One aspect of this is that collective bargaining takes place with an accredited organization representing all unionized employers which is known as the Nova Scotia Construction Labour Relations Association Limited ("CLRA").

[2] A union becomes the exclusive bargaining agent for employees by making a successful application to the Labour Board for certification pursuant to the provisions of the *Act* or the employer voluntarily recognizes them as the bargaining agent. The certification or voluntarily recognition process requires the bargaining unit of employees which the union will represent to be defined.

[3] On August 27, 1990, EllisDon entered into a Voluntary Recognition Agreement ("VRA") with the International Union of Operating Engineers, Local 721 ("the Union"). The VRA was filed with the Board on September 13, 1990. This agreement defined the employees to be represented by the Union as follows:

> THAT the Company recognizes the Union as the exclusive bargaining agent for the employees of the Company engaged in the operation of cranes, bulldozers, trucks in excess of one ton capacity, and similar equipment and those primarily engaged in the repairing and maintaining of same on mainland Nova Scotia but excluding all other employees, foremen other than working foremen and those equivalent to the rank of foremen or above, office employees and those excluded by clauses (i) and (ii) of paragraph (e) of Section 92 of the *Trade Union Act*.

[4] Since the work of EllisDon fell within the construction sector the effect of the VRA was that its collective bargaining rights and duties passed to CLRA as the accredited employers organization. From that point forward collective bargaining took place between the Union and CLRA.

[5] As the VRA indicates the trade of operating engineers includes workers who operate a range of equipment including cranes, bulldozers and trucks. By 2009 the Union and CLRA decided that a single collective agreement covering all operating engineers in the construction sector was not in the interests of either the employers or the Union. As a result, the parties negotiated separate collective agreements for

workers who operate cranes and those responsible for running earth movers. These agreements included a detailed listing of the types of equipment covered by the "trades" of crane operators and earth movers. In 2012 the collective agreements each included an article entitled "RECOGNITION". For the Crane Operators Collective Agreement that article provided in part:

> 2.01 The Employer and the CLRA recognized the Union as the sole collective bargaining agent with respect to the trade for the area covered by this Agreement and for all work falling within the jurisdiction of this trade.
>
> 2.02 The Union recognizes the CLRA as the sole collective bargaining agent with respect to the trade for its members designated herein and other contractor Employers covered by Accreditation Order No. L.R.B. 392C, dated January 29, 1976.
>
> 2.03 For the purpose of this Agreement, the term "employee" shall mean all hourly rated employees employed by the Employer but does not include office and clerical workers; guards, watchmen; time checkers; material superintendents; technical personnel; superintendents; assistant superintendents; craft supervisors, or foremen, or classifications above the rank of foremen as provided for in Craft Schedules; persons transporting materials (including concrete and gravel), equipment or supplies from a point of origin outside the site to a destination inside the site or from a point or origin inside the site to a destination outside the site.

[6] The recognition article in the Earth Movers Collective Agreement was similarly worded.

[7] James Beswick is an employee of EllisDon and a member of the Union. On May 8, 2015, he made an application to the Board for revocation of the certification of the Union on the basis that it was not adequately fulfilling its responsibility to employees in the bargaining unit and no longer represented the majority of employees in the unit. The application referred to the 2012 Crane Operators Collective Agreement and said the Union was certified to represent crane operators working for EllisDon on mainland Nova Scotia. It also indicated Mr. Beswick was the only member of the bargaining unit employed by EllisDon.

[8] The Board held a hearing to consider Mr. Beswick's application for revocation of certification. It was opposed by the Union however the Board granted the application by decision dated November 25, 2015. The operative provisions of the Board's order contained in the decision are as follows:

> The Board is satisfied that the employee in the Bargaining Unit no longer wishes the International Union of Operating Engineers, Local 721, to be the Bargaining Agent on his behalf and the Board is satisfied that there is no useful purpose in conducting a representational vote in this circumstance;
>
> Effective November 13, 2015 the Labour Board revokes the certification in the Voluntary Recognition Agreement dated September 13, 1990, but only with respect to crane operators employed by the Employer.

[9] One of the issues addressed at the hearing was the scope of the proposed decertification order and, in particular, whether it should apply only to crane operators or extend to all employee classifications listed in the VRA. Both Mr. Beswick and EllisDon took the position that the bargaining unit in issue encompassed all of the trades listed in the VRA. The Union took a contrary position and said the revocation should be limited to crane operators as defined in the Crane Operators Collective Agreement.

[10] The Board agreed with the Union that the decertification should only apply to crane operators. Its explanation for this conclusion is as follows:

> [57] Section 30(1) of the *Act* deals with VRAs, and provides as follows:
>
> > 30(1) Where a trade union purports to represent employees of an employer and intends to bargain collectively on behalf of the employees, the trade union and employer may make and enter into an agreement in writing, ***which may be part of a collective agreement***, whereby
> >
> > > (a) the employer recognizes the trade union as the exclusive bargaining agent for the employees; and
> > >
> > > (b) ***the unit of employees to which the agreement extends is defined***. (Emphasis added)
>
> [58] Section 30(2) then provides as follows:
>
> > 30(2) Subject to subsection (3), ***when an agreement made pursuant to subsection (1) is filed with the Minister***, the provisions of this *Act* shall apply as though the trade union was the certified bargaining agent for the employees in the unit defined by the agreement at the time the agreement was filed. (Emphasis added)
>
> [59] In the Board's opinion the Crane Operators Collective Agreement satisfies the requirements of s.30(1) and (2). It is first of all an "agreement." Second, article 2.01 provides that the parties (that is, the CLRA as the bargaining agent for the Employer, and the Union) agree that the Union is "the sole collective bargaining agent with respect to the trade for the area covered by this Agreement and for all work falling within the jurisdiction of this trade." That fulfills the requirements of s.30(1)(a). Turning to s.30(1)(b), the title

> of the agreement, as well as its contents, make clear that the "trade" covered by the agreement is the trade of crane operators-and crane operators *only*. Article 2.01 thus constitutes an "agreement in writing" in which "the unit of employees to which the agreement extends is defined" within the meaning of s.30(1)(b). The requirements under s.30(1) for VRA are thus satisfied.
>
> [60] With respect to s.30(2), the Board notes that the collective agreement was filed with the Minister: see Ex.U2. Section 30(2) does not require any particular type of filing or registration. The Board is accordingly satisfied that the requirements of s.30(2) are satisfied as well.
>
> [61] This conclusion is in accordance with the goals and purposes set out in the preamble to the *Act*. In this case the Employer (as represented by the CLRA) and the Union worked together "to develop good relations and constructive collective bargaining practices" by agreeing to separate the trades represented by the Union into two groups. As Mr. MacLellan's evidence makes clear, there were sound reasons for that agreement that were rooted in the needs of both the employers represented by the CLRA and the members of the Union. The division of the Union's members into two groupings-one composed of crane operators, and the other falling under the rubric of earth movers-satisfied those needs. There is every reason then to recognize the Crane Operators Collective Agreement, in substance if not in form, as a VRA within the meaning of s.30 of the *Act*.
>
> [62] This conclusion is also in accordance with the application as it was framed and filed with the Board. Mr. Beswick did not define the certification to be revoked as the 1990 VRA. He instead referred to the unit in issue as being one consisting "of crane operators working on mainland Nova Scotia." He also referred expressly to the Crane Operators Collective Agreement. It would accordingly be inappropriate in the circumstances of this case to grant a revocation order that was broader than the one actually requested.

[11] Following receipt of the Board decision EllisDon made an application for reconsideration. Section 19 of the *Act* gives the Board jurisdiction to reconsider any decision if it decides it is "advisable to do so". Section 8 of the *Trade Union Procedure Regulations*, N.S. Reg.101/72, as amended, deals with reconsideration applications and provides as follows:

> 8(1) An Application for Reconsideration in accordance with Section 19 of the *Act* of any decision or order of the Board shall be made in a form approved by the Board. Subsection 8(1) amended: O.I.C. 2010-359, N.S. Reg. 148/2010.

> (2) Upon receipt of an Application for Reconsideration the Chief Executive Officer, subject to the direction of the Board, shall instruct the parties with regard to the documents to be filed with the Board.
>
> (3) An Application for Reconsideration of any decision or order of the Board made within the preceding twelve months shall not be made without leave of the Board, which will normally be granted only where it clearly appears that
>
> (a) the order or decision was made in ignorance of some material fact;
>
> (b) the order or decision was made by reason of some technical irregularity; or
>
> (c) there is similar good reason.
>
> (4) A request for leave to make an Application for Reconsideration of a decision or order of the Board made within the preceding year shall be verified by a statutory declaration of the relevant facts.

[12] EllisDon submitted there was "good reason" for the Board to reconsider the decision because the CLRA and the Union had not intended to amend the scope of the 1990 VRA by the negotiation of separate collective agreements for crane operators and earth movers. They filed an affidavit of the president of CLRA to that effect. In addition they argued that requiring employees such as Mr. Beswick to maintain union membership in order to work as earth movers but not crane operators was patently unreasonable.

[13] Mr. Beswick supported EllisDon's application and the Union opposed it. The Board was not satisfied EllisDon had met the test for leave pursuant to Section 8(3) of the *Regulations* and dismissed the application by decision dated February 4, 2016.

[14] In dismissing the application the Board said the substance of EllisDon's evidence and argument concerning the scope of the decertification order had been presented at the earlier hearing. To the extent the arguments on reconsideration may have varied from those on the decertification hearing the Board said it did not believe there would have been a different result.

[15] EllisDon now seeks judicial review of both Board decisions.

Positions of the Parties

EllisDon

[16] EllisDon says the 1990 VRA established the scope of the bargaining unit for which the Union was certified as exclusive bargaining agent. It included both crane operators and earth movers. EllisDon says the CLRA does not have the authority to change the scope of the bargaining unit by way of agreement with the Union and, as a result, the separate collective agreements had no impact on the bargaining unit established by the VRA.

[17] EllisDon argues the Board's conclusion that the separate collective agreements meant certification could exist independently for crane operators and earth movers was not a reasonable interpretation of the *Act*. Alternatively, it says the Board's decision to partially revoke the Union certification was unreasonable because it failed to take into account the resulting labour relations implications.

[18] EllisDon wants the court to quash both the original and reconsideration decisions of the Board with respect to the scope of the decertification of the Union. They ask for an order declaring the decertification to include all bargaining rights for the unit described in the 1990 VRA or, alternatively, remitting the matter back to the Board for reconsideration.

James Beswick

[19] Mr. Beswick supports the position of EllisDon however he makes some additional arguments about why the Board's interpretation of the *Act* was unreasonable. In particular he challenges the Board's opinion that the Crane Operators Collective Agreement could be considered a VRA within the meaning of Section 30 of the *Act*.

The Union

[20] The Union says the Board's interpretation of the *Act* is reasonable and entitled to deference. Some of the arguments raised by EllisDon and Mr. Beswick on the Judicial Review are said to be new ones not made to the Board. The Union says it would be inappropriate to review those issues when the Board did not have the opportunity to come to its own conclusion on them in the first instance.

[21] The overall position of the Union is that Mr. Beswick got exactly what he had applied for which was decertification of the unit described in the Crane Operators Collective Agreement. There was never any attempt to amend the application to expand it to include earth movers.

Legislative Provisions

[22] There are a number of sections of the *Act* which the parties argue are relevant to this judicial review. The starting point is Section 29 which permits the Board to consider an application for revocation of the certification of a bargaining agent. This is the provision under which Mr. Beswick made his application which lead to the decisions under review. The section reads as follows:

> Application to revoke certification
>
> 29 Where certification of a trade union as a bargaining agent has been in effect for not less than twelve months and no collective agreement is in force, or where an application can be made pursuant to subsection (4) or subsection (5) of Section 23, and the Board is satisfied that
>
> (a) a significant number of members of the trade union allege that the trade union is not adequately fulfilling its responsibilities to the employees in the bargaining unit for which it was certified; or
>
> (b) the union no longer represents a majority of the employees in the unit,
>
> the Board upon application for revocation of certification may order the taking of a vote to determine the wishes of the employees in the unit concerning revocation of the existing certification and may revoke or confirm the certification in accordance with the result of the vote. R.S., c. 475, s. 29.

[23] Section 30 is also relevant because it deals with the process whereby an employer can voluntarily recognize a union as the exclusive bargaining agent for its employees. The Board relied on this provision in concluding that the separate collective agreements for crane operators and earth movers permitted the Union and CLRA to redefine the scope of the bargaining unit because they were VRA's "in substance if not in form". The section reads as follows:

> Agreement for voluntary recognition
>
> 30(1) Where a trade union purports to represent employees of an employer and intends to bargain collectively on behalf of the employees, the trade union and employer may make and enter into an agreement in writing, which may be part of a collective agreement, whereby

(a) the employer recognizes the trade union as the exclusive bargaining agent for the employees; and

(b) the unit of employees to which the agreement extends is defined.

(2) Subject to subsection (3), when an agreement made pursuant to subsection (1) is filed with the Minister, the provisions of this Act shall apply as though the trade union was the certified bargaining agent for the employees in the unit defined by the agreement at the time the agreement was filed.

(3) This Section does not apply if

(a) the trade union that is a party to the agreement does not meet the requirements of subsection (15) of Section 25;

(b) at the time the agreement is filed, another trade union

(i) has pursuant to this Section acquired bargaining rights on behalf of any of the employees to whom the agreement extends, or

(ii) is certified as or has applied to the Board for certification as bargaining agent for any of the employees to whom the agreement extends; or

(c) the trade union does not represent a majority of the employees in the unit defined by the agreement, but the trade union is deemed to have represented a majority of those employees at all relevant times when the employer has posted a copy of the agreement made pursuant to subsection (1) in a conspicuous place or places upon the premises of the employer at which the agreement is most likely to come to the attention of the employees and thirty days have elapsed from the date of posting.

(4) If any question arises whether a trade union represents or represented a majority of the employees in the unit defined by an agreement made pursuant to this Section, the Board upon application by a trade union shall decide the question and any related question as though the question had arisen in a certification proceeding before the Board.

(5) The provisions of this Act relating to revocation of certification of a trade union as bargaining agent apply to a trade union that is a party to an agreement filed with the Minister and that has the status of a certified bargaining agent by virtue of subsection (2). R.S., c. 475, s. 30; 2010, c. 37, s. 144.

[24] Construction industry labour relations are addressed in Part II of the *Act* which starts at Section 92. The work of EllisDon falls under this part of the legislation. Section 93 is important because it incorporates the provisions of Part I to the extent

that they are not inconsistent with Part II. This applies to Sections 29 and 30. Section 93 reads:

> Application of Part I
>
> 93 Except where inconsistent with Part II, the provisions of Part I, except clause (c) of subsection (3) of Section 30, subsection (3) of Section 38 and Sections 40A, 40B, 46A, 54A and 56A apply to the construction industry and all references therein to "employer" and "trade union" shall be taken to be references to "employers' organization" and "council of trade unions" where appropriate. R.S., c. 475, s. 93; 1994, c. 35, s. 2; 2005, c. 61, s. 12; 2011, c. 71, s. 4; 2013, c. 43, s. 4.

[25] Section 98, and in particular subsection (6), was the primary focus of the parties' submissions on review. EllisDon and Mr. Beswick argued that Section 98(6)(b) prohibits the Board from considering the two collective agreements to be VRA's within the meaning of Section 30. Section 98 reads:

> Effect of accreditation
>
> 98(1) Subject to subsection (6), upon accreditation, all bargaining rights and duties under this *Act* of employers for whom the accredited employers' organization is or becomes the bargaining agent pass to the accredited employers' organization.
>
> (2) Upon accreditation any collective agreement in operation between a trade union or council of trade unions and any employer for whom the accredited employers' organization is or becomes the bargaining agent is binding on the parties thereto until the expiry date of the agreement, regardless of its renewal provisions.
>
> (3) Where an employers' organization has been accredited, and where, after the date of the accreditation order, an employer in the sector and area covered by that accreditation order becomes subject to bargaining rights and duties with a union or council of trade unions in accordance with subsection (6), those bargaining rights and duties pass to the accredited employer's organization, whether the employer becomes a member of the accredited employer's organization or not, and the employer is bound by any collective agreement in effect or subsequently negotiated between the accredited employers' organization and that union or council of trade unions in that sector and area of the construction industry.
>
> (4) Notwithstanding that a unionized employer's membership in an accredited employers' organization is terminated, the accredited employers' organization retains all bargaining rights and duties gained under this Section on behalf of that employer until the accreditation has been revoked.

(5) Notwithstanding anything contained in this *Act*, where the employees of an employer are certified in accordance with Section 24, the employer is not bound by any accreditation order.

(6) In this Part, the bargaining rights and duties of an employer under this *Act* that pass to an accredited employers' organization are the bargaining rights and duties of that employer in respect of a unit appropriate for bargaining with a union

(a) that has been certified in accordance with Section 95 as bargaining agent for the employees of that employer in that unit;

(b) that has been voluntarily recognized as bargaining agent for the employees of that employer in that unit, in accordance with Section 30, which voluntary recognition has not accrued as a result of a collective agreement negotiated by an employers' organization or otherwise through the agency of an employers' organization; or

(c) with which that employer has explicitly, in writing, authorized the employers' organization to bargain collectively on its behalf.

(7) For greater certainty, nothing in subsection (6) precludes an accredited employer's organization and a trade union or council of trade unions from entering into a collective agreement that prohibits engaging non-union employees or non-union subcontractors in trades other than those represented by a trade union or council of trade unions that is party to the collective agreement.

(8) Where there is a dispute between a trade union or a council of trade unions and an employer or the accredited employers' organization over whether they are, were or have been bound by a collective agreement by virtue of this Section or Section 100, any of them may apply to the Board and the Board shall decide the issue following such investigation, hearing or other procedure, and on the basis of such evidence, as the Board in its sole discretion considers appropriate, and may make such order as the Board in its sole discretion considers appropriate.

(9) Subsection (8) applies to disputes not fully heard before February 3, 1994. R.S., c. 475, s. 98; 1994, c. 35, s. 3; 2010, c. 37, s. 153.

[26] EllisDon also relies on Section 100(3) as further support for the argument that the Union could not obtain bargaining rights for separate units by way of the two collective agreements with CLRA. That subsection reads:

100 (3) Notwithstanding the accreditation of an employers' organization, no unionized employer in the sector and area covered by the accreditation order is bound by a collective agreement entered into by an accredited employers' organization and a trade union or council of trade unions in that area and sector

> unless that trade union or council of trade unions has acquired rights to bargain with that employer in accordance with subsection (6) of Section 98.

Standard of Review

[27] The parties agree the standard of review is reasonableness. This standard has been the subject of much judicial comment intended to define its scope and application. The Supreme Court of Canada, in the seminal case of **Dunsmuir v. New Brunswick**, 2008 SCC 9, described it in the following terms:

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

[28] Subsequently, the Supreme Court provided additional detail on how a reviewing court should approach the assessment of the reasonableness of a tribunal's decision. In **Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)**, 2011 SCC 62, the court made the following comments:

> [13] This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. That was the basis for this Court's new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*'s conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).
>
> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses -- one for the

> reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at s. 12:5330 and 12:5510). It is a more organic exercise -- the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> [17] The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[29] The Nova Scotia Court of Appeal discussed the reasonableness standard in relation to the Labour Board in **Egg Films Inc. v. Nova Scotia (Labour Board)**, 2014 NSCA 33, where it described it as follows:

> 26 Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analysing 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 does the judge think is correct or preferable? The question is - Was the tribunal's conclusion 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, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise discretion, or invites the tribunal to weigh policy. *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, paras 50-51. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras 11-17. *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, paras 20, 31-41. *Coates v. Nova Scotia (Labour Board)*, 2013 NSCA 52, para 46.

[30] **Egg Films** also raised the issue of the degree to which a reviewing judge should dissect the tribunal's decision in a search for errors. On this question the court said:

> [30] Next, the judge's "treasure hunting", "zooming in", or "tracking" of the Board's reasons. Reasonableness isn't the judge's quest for truth with a margin of tolerable error around the judge's ideal outcome. Instead, the judge follows the tribunal's analytical path and decides whether the tribunal's outcome is reasonable. *Law Society v. Ryan*, *supra*, at paras 50-51. That itinerary requires a "respectful attention" to the tribunal's reasons, as Justice Abella explained in the well-known passages from *Newfoundland and Labrador Nurses' Union*, paras 11-17.
>
> [31] In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, Justice Abella for the majority reiterated:
>
> > [54] The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. ...

[31] In this case EllisDon's submissions focused on the Board's interpretation of the *Act* and in particular Sections 30 and 98. When dealing with a review based upon a tribunal's statutory interpretation the court in **Egg Films** said as follows:

> 32 Last is what Egg Films' factum terms the "tautological ... vacuum" of introspective review. Nobody suggests that the reviewing judge should just ponder the internal circuitry of the tribunal's reasons, and disregard the statutory environment. To determine whether the tribunal unreasonably exercised its statutory authority, the reviewing judge tests the connection between the tribunal's conclusion and the statute's plain wording or ordinary meaning, context or scheme, and objectives, channelled under the accepted principles of legislative interpretation. While doing this, however, the judge doesn't drift into correctness review - *i.e.* the judge remains attentive to the range of reasonable interpretations, instead of focussing on the judge's preference among them…

[32] The proper approach to an issue of statutory interpretation in the context of a reasonableness review was considered by the Supreme Court of Canada in **McLean v. British Columbia (Securities Commission)**, 2013 SCC 67, where Justice Moldaver, writing for the Court, said:

> 33 The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* - not the courts - to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise".
>
> …
>
> 37 For the reasons that follow, I conclude that both interpretations are reasonable. Here, the statutory language is less than crystal clear. Or, as Professor Willis once put it, "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (J. Willis, "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at pp. 4-5, cited in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 30).
>
> 38 It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable - no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation - and the administrative decision maker must adopt it.
>
> 39 But, as I say, this is not one of those clear cases. As between the two possible interpretations put forward with respect to the meaning of s. 159 as it applies to s. 161(6)(d), both find some support in the text, context, and purpose of the statute. In a word, both interpretations are *reasonable*. The litmus test, of course, is that if the Commission had adopted the other interpretation - that is, if the Commission had agreed with the appellant - I am hard-pressed to conclude that we would have rejected its decision as unreasonable.
>
> 40 The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with "administer[ing] and apply[ing]" its home statute (*Pezim*, at p. 596), it is the decision maker, first and foremost, that has

> the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.
>
> 41 Accordingly, the appellant's burden here is not only to show that her competing interpretation is reasonable, but also that the Commission's interpretation is *unreasonable.* And that she has not done. Here, the Commission, with the benefit of its expertise, chose the interpretation it did. And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review - even in the face of a competing reasonable interpretation.

[33] In the present case EllisDon relies on paragraph 38 from the **McLean** decision and argues that there is a single reasonable interpretation of Section 98(6) of the *Act* and it is not the one adopted by the Board which makes their decision unreasonable.

Analysis

The Decertification Decision

[34] The Board decided Mr. Beswick had met the requirements for revocation of union certification set out in Section 29 of the *Act*. That conclusion is not challenged on this judicial review. With respect to the scope of the revocation the arguments before the Board focused on whether it should be limited to crane operators or extend to all employees covered by the 1990 VRA. The Board concluded it should be limited to the crane operators.

[35] The Board's reasoning in restricting the order to crane operators included the fact that Mr. Beswick's application did not ask for revocation of the Union's certification for all of the 1990 VRA bargaining unit but only for crane operators. His application referred to the 2012 Crane Operators Collective Agreement as the source of the Union's certification. In addition the Board noted that the two collective agreements negotiated between the CLRA and the Union met the requirements of Section 30 of the *Act* for a VRA "in substance if not in form". This had the effect of separating the original bargaining unit into two groupings – one composed of crane operators and the other earth movers.

[36] The decertification decision was based upon the Board's conclusion that the crane operators and earth movers collective agreements met the requirements for voluntary recognition under Section 30 of the *Act* and therefore created two new groups of employees with separate agreements. As required by Section 30(1)(b) the unit of employees is defined in each collective agreement. The Board's analytic path

to reach that conclusion is clearly set out in their decision. They say that a collective agreement which is sufficient to give rise to a VRA and thereby create a bargaining unit is also capable of redefining the scope of that unit. There is nothing unreasonable about that analysis or conclusion unless a proper assessment of Section 98(6) of the *Act* leads to the single reasonable interpretation proposed by EllisDon and Mr. Beswick.

[37] EllisDon applied for a reconsideration of the decertification decision and the Board's decision in response included a discussion of the basis for the initial decision. One of the arguments advanced by EllisDon in support of the reconsideration was the impact of Section 98(6) of the *Act*. The Board acknowledged that this section had not been specifically referenced in the initial hearing or decision but concluded that the substantive argument arising out of it had been included in EllisDon's submissions. In any event, the Board said the outcome would not have differed had Section 98(6) been raised earlier. Its explanation for that conclusion reinforced the basis for the decertification decision and is found in Paragraph 41:

> [41] There is nothing in s.30(1) that suggests that a VR agreement that is not part of a collective agreement can never subsequently be altered by way of a subsequent collective agreement between those parties. Indeed, s.30(1) expressly recognizes that a VR agreement "may be part of a collective agreement." Section 30(1) applies to Part II of the *Act*: see s.93(1). Hence the s.30(1) right of an employer to agree with a union to define the scope of a bargaining unit within the ambit of a collective agreement (or otherwise) is a right that, pursuant to s.98(1) and s.98(6), would pass to the CLRA. Nor is there anything in s.98(1) or s.98(6) that suggests that the employer's s.30(1) right to include within a collective agreement an agreement as to "the unit of employees to which the agreement extends is defined" was not one of the rights that passed to the CLRA.

[38] EllisDon's position is that this interpretation of the *Act* is not reasonable. They rely on the principle stated by the Supreme Court of Canada at paragraph 38 in **McLean** to the effect that where the ordinary tools of statutory interpretation lead to a single reasonable interpretation any other interpretation is necessarily unreasonable. EllisDon says that Section 98(6)(b) precludes union certification where it arises from recognition in a collective agreement negotiated by CLRA and as a result such an agreement cannot be the basis for redefining an existing bargaining unit.

[39] This judicial review must start with an analysis of the reasonableness of the Board's interpretation of the *Act*. It is not a matter of comparing the positions of the

Board and EllisDon and picking between them. If the Board was reasonable in its approach their view prevails even if EllisDon's interpretation is also acceptable.

[40] In assessing the reasonableness of the Board's statutory interpretation I am also guided by the comments of the Nova Scotia Court of Appeal in **Egg Films** at paragraph 32:

> [32] … To determine whether the tribunal unreasonably exercised its statutory authority, the reviewing judge tests the connection between the tribunal's conclusion and the statute's plain wording or ordinary meaning, context or scheme, and objectives, channelled under the accepted principles of legislative interpretation…

In my view the legislative history of Section 98(6) and related provisions provides some of the context for their interpretation. These sections are part of what are known as the "**Steen** Amendments" which were a legislative response to the so called **Steen** decision (1990 NSJ 173). That decision concluded that for work covered by Part II of the *Act* an employer who was certified for any trade was certified for all trades even though they had only agreed to recognition by one.

[41] The **Steen** Amendments were discussed by the Nova Scotia Court of Appeal in **Cape Breton Island Building & Construction Trades Council v. Nova Scotia Power Inc**, 2012 NSCA 111, where the court described their impact as follows:

> [48] The *Steen* Amendments dismantled the legislative "stonewall" mentioned by Justice Freeman in *Steen*, para 15. At the heart of the amendments is s. 98(6), stating that the "bargaining rights and duties of an employer under this Act that pass to an accredited employers' organization" are those for a unit with a "union ... (a) that has been certified" for the employees of "that employer in that unit", or (b) that has been voluntarily recognized for employees of "that employer in that unit", or (c) with which "that employer has explicitly, in writing, authorized" the employers' organization to bargain on its behalf. Section 98(6)(b) stipulates that voluntary recognition "has not accrued as a result of a collective agreement negotiated by an employers' organization or otherwise through the agency of an employers' organization".
>
> **…**
>
> [54] Leaving s. 98(7) aside for the moment, the point of the *Steen* Amendments was to ensure that the bargaining rights and obligations of an employer in the construction industry would not pass to the Bureau, except respecting unions who were (a) certified for that employer, or (b) voluntarily recognized by that employer, or (c) the beneficiaries of an explicit written authority from that employer. The Panel's interpretation of the legislation, to this effect, is reasonable.

[42] In that case the court upheld the reasonableness of a decision of the construction industry panel of the Labour Relations Board (now the Labour Board) which concluded that an agreement between an association of construction unions and the accredited employers association did not apply to Nova Scotia Power simply because it had been certified by one of the member unions for a particular bargaining unit of employees. The Panel said extension of the agreement to Nova Scotia Power would amount to "backdoor certification" which was contrary to the *Act*. For purposes of this judicial review the following comments from the Court of Appeal decision are relevant:

> [57] These rights normally would flow from a collective agreement between the employer and the union who claims the right. Such a collective agreement normally would follow that union's certification for, or voluntary recognition by that employer. Yet, the Council's proposed interpretation of s. 98(7) would permit all the construction Locals -- not just the certified Local 721 -- to enforce those Articles of the Industrial Agreement against NSP. This result would obtain despite the fact that the Council and other Locals were neither certified for NSP nor voluntarily recognized by NSP. Rather the result would follow from the Industrial Agreement negotiated by the Bureau, not by NSP. The Bureau, the Council and the construction Locals, other than Local 721, did not satisfy any of the three conditions in s. 98(6) for the passage of bargaining rights from NSP to the Bureau to govern negotiation either with those other Locals, or with the Council on behalf of the other Locals. The Council's submission effectively would convert the Bureau's signature on the Industrial Agreement into a voluntary recognition, on NSP's behalf, of the other construction Locals. That result would contravene s. 98(6)(b)'s statement that "voluntary recognition has not accrued as a result of a collective agreement negotiated by an employers' organization or otherwise through the agency of an employers' organization".

[43] Unlike the **Steen** and **Cape Breton Island Building & Construction Trades Council** decisions the application before the Board in this case did not raise any issue with respect to how or whether the Union became the bargaining agent for employees of EllisDon. That took place as a result of the 1990 VRA signed by EllisDon and the Union. As a result of that agreement Section 98(6) of the *Act* says the bargaining rights and duties of EllisDon pass to the CLRA in respect of the bargaining unit described in the VRA. The issue in this case is whether those bargaining rights and duties include the ability to enter into subsequent collective agreements which have the effect of redefining the scope of the bargaining unit. The Board said this was permissible where those agreements meet the requirements for a VRA under Section 30 of the *Act*.

[44] This is not a situation where there was an alleged “backdoor certification” of EllisDon because of an agreement to which they were not a party. At the time of the crane operators and earth movers collective agreements the Union had already been recognized as the exclusive bargaining agent for the employees of EllisDon in the unit described in the 1990 VRA. It was the employees in that unit who were separated into two new groups by the collective agreements between the Union and CLRA.

[45] When one looks at the three subparagraphs of Section 98(6) it is clear they are all referring to the manner by which the Union has obtained the right to bargain with the employer. If the Union can meet any of those criteria the employer’s bargaining rights and duties accrue to the CLRA. In this case subparagraph (b) is applicable because the Union was voluntarily recognized as the bargaining agent for the employees of EllisDon in accordance with Section 30 and that recognition arose out of the 1990 VRA and not a collective agreement negotiated by CLRA.

[46] When EllisDon recognized the Union as bargaining agent in the 1990 VRA the accreditation of CLRA resulted in the employer’s bargaining rights and duties passing to that organization by virtue of Section 98(1) of the *Act*. This included the authority to negotiate the subsequent collective agreements which have governed crane operators and earth movers employed by EllisDon. The Board decided that, once the employer rights and duties passed to CLRA, Section 98(6)(b) of the *Act* had no further application. In particular, they said that the ability to define the scope of the bargaining unit in a collective agreement was not withheld from the bundle of rights passed to CLRA upon recognition of the Union.

[47] The question raised on this review is whether the Board’s interpretation of the *Act*, and in particular, Section 98 is unreasonable. In deciding that issue I must consider the plain wording of the statute, its legislative history and objectives as well as the labour relations context. It is not an exercise in which I should impose my preferred interpretation but rather I should defer to the Board so long as their interpretation is one of the reasonable options available. As noted by the Supreme Court in **McLean**, the Board has the interpretive upper hand and their approach to the statute should only be rejected in clear cases. This is not one of them.

[48] The history of the **Steen** amendments and subsequent judicial comment shows that the purpose of Section 98(6) is to ensure that no employer becomes unionized and has their bargaining rights passed to the CLRA without their direct involvement through a VRA or certification hearing. That concern does not arise here because of

the 1990 VRA with EllisDon. The bargaining history between the Union and CLRA shows multiple collective agreements which were intended to serve the interests of both employers and the Union members. These agreements separated crane operators and earth movers for bargaining purposes. The evidence before the Board was that this met the needs of all parties.

[49] I am satisfied that the Board's decision to grant Mr. Beswick's application to revoke the Union's certification for crane operators was reasonable. Its application of the Act, and in particular Sections 30 and 98, to the facts before it falls within the range of possible acceptable outcomes.

[50] There is an additional issue that I believe should be addressed even though it was not the subject of much discussion at the review hearing and that is the ambiguity found in the wording of the Board's order. That order purported to revoke the Union's certification arising from the 1990 VRA but only with respect to crane operators who are some, but not all, of the employees in the bargaining unit defined in that agreement. Mr. Beswick's application was made under Section 29 of the *Act* which requires an assessment of the wishes of the employees in the bargaining unit for which the Union was certified. The bargaining unit identified by Mr. Beswick was for crane operators and when asked about the date of certification his application stated:

> Unknown. Employer recognized in Appendix B of 2012 Crane Operators Collective Agreement.

[51] It was the position of the Union that there cannot be more then one collective agreement for a single bargaining unit. If that is so, the agreements for crane operators and earth movers could only exist if they had the effect of creating two new bargaining units. That appears to be the approach of the Board when it relies on the voluntary recognition provisions found in Section 30 of the *Act*. Despite this, the Board's order speaks of revoking the certification of the Union but only for some of the employees in the original bargaining unit described in the 1990 VRA. Neither party suggested that such a partial decertification is possible under Section 29 nor did the Board discuss this in their decision.

[52] In light of my conclusion that the Board's decision otherwise meets the requirement for justification, transparency and intelligibility and falls within the range of acceptable outcomes, what should I do with this potentially contradictory and ambiguous language in the resulting order? I am reminded of the comments from the Supreme Court of Canada and our Court of Appeal that a review based on

reasonableness must be holistic in nature and not a "line-by-line treasure hunt for error". I am satisfied that the Board's reasoning makes it clear that they are not granting a partial revocation of certification but simply giving Mr. Beswick what he applied for – decertification of the bargaining unit described in the 2012 Crane Operators Collective Agreement. The language used in the order does not make an otherwise reasonable decision unreasonable.

The Reconsideration Decision

[53] The Board concluded that EllisDon had not met the threshold which would trigger reconsideration within 12 months from the Board's decision because they had not established any "good reason" for doing so. The two arguments advanced by EllisDon were that CLRA did not intend to affect the existing certification when entering into the separate collective agreements with the crane operators and earth movers and that Section 98(6) had not been considered by the Board.

[54] With respect to the evidence of the CLRA intention, the Board concluded that the interpretation of the agreements should be based upon the wording of those documents and not what one of the parties believed. In addition the Board concluded that the substance of the evidence was already before the Board or could have been presented by EllisDon if it had wished.

[55] The Board's analysis on this issue is clear and is entitled to significant deference in light of the discretionary nature of a reconsideration decision. There is nothing unreasonable in the approach it chose to take.

[56] On the applicability of Section 98(6) the Board found that the substance of the argument on that section had been presented on the initial hearing. It went on to indicate that even if the section has been specifically addressed the outcome would not have changed, particularly as it relates to the Board's interpretation of Section 30 of the *Act*. This analysis is primarily a repetition of the Board's initial decision. The conclusion that nothing new was being raised that would affect the outcome is reasonable and entitled to deference.

Conclusion and Disposition

[57] For the reasons outlined above I believe the decision of the Board on the decertification application of Mr. Beswick meets the standard of reasonableness as does its decision to refuse EllisDon's request for reconsideration. As a result I will dismiss the application for judicial review.

[58] If the parties wish to make written submissions on costs they may do so within one month from the date of this decision.

Wood, J.