SUPREME COURT OF NOVA SCOTIA

Citation: *National Gypsum (Canada) Limited v. International Union of Operating Engineers, Local 721 and 721B,* 2019 NSSC 2

Date: 20190104
Docket: Hfx No. 472444
Registry: Halifax

Between:

National Gypsum (Canada) Limited

Applicant

v.

International Union of Operating Engineers, Local 721 and 721B

Respondent

Judge:	The Honourable Justice Ann E. Smith
Heard:	June 27, 2018, in Halifax, Nova Scotia
Final Written Submissions:	Additional case law provided by the Respondent's Counsel on June 28, 2018
Counsel:	James B. Green, for the Applicant Gordon N. Forsyth, Q.C.; Daniel F. Wilband, for the Respondent

By the Court:

Introduction

[1] National Gypsum (Canada) Limited ("National Gypsum" or the "Employer") applies for judicial review of the award of Arbitrator Frank E. DeMont, Q.C. issued on December 18, 2017 (the "Award"). The Award upheld a grievance brought by the International Union of Operating Engineers, Local 721 and 721B (the "Union") concerning its alleged contracting out of certain work to J. R. Eisner Contracting Ltd. ("Eisner") from March 6 to 10, 2017.

[2] At the time, the relationship between National Gypsum and the Union was governed by a Collective Agreement effective from March 21, 2015 to March 21, 2020 (the "Collective Agreement").

[3] National Gypsum seeks to have the Award quashed on the basis that the Arbitrator unreasonably interpreted and applied the relevant provisions of the Collective Agreement.

[4] The Union contests this motion. It takes the position that the Award of the Arbitrator was reasonable.

Background

[5] The Employer operates at two locations in Nova Scotia. It has a gypsum quarry and crusher facility at Milford, Nova Scotia. The gypsum rock from the quarry is loaded onto rail cars in Milford and shipped to National Gypsum's wharf at Wright's Cove, Burnside, Nova Scotia. National Gypsum ships the gypsum rock from Wright's Cove to its manufacturing facilities in the United States.

[6] The parties agree that on March 6, 2017 National Gypsum hired Eisner to dig out frozen lumps of gypsum rock from its gypsum stockpile in Burnside. The frozen lumps were too large to fit through a "hopper" located beneath the stockpile so as to enter a conveyor system used to load the gypsum rocks onto skips.

[7] The parties also agree that on March 6, 2017 an employee of Eisner used Eisner's Caterpillar ("Cat 320") Excavator to pull large pieces of frozen gypsum from the stockpile, which were then broken down to transportable pieces by the

Cat 320 and by one or two bulldozers operated by National Gypsum's unionized employees. Eisner carried out this work for four days, from March 7 to March 10, 2017.

[8] The Union grieved what it said was a contracting out of bargaining unit work on March 10, 2017. Specifically, it complained that National Gypsum had outsourced bargaining unit work to Eisner contrary to Article 8 of the Collective Agreement. National Gypsum denied the grievance on March 13, 2017. The grievance arbitration took place over three days on July 24 and 25, and September 6, 2017.

[9] The Arbitrator allowed the grievance, concluding that the work at issue was bargaining unit work and that Article 8(j)1 of the Collective Agreement prevented National Gypsum from contracting out bargaining unit work at Burnside without first offering that work to any laid off Milford worker who had the necessary skill to work in that classification. The Arbitrator ruled that a laid off employee – Taylor Adams – should have been given the work and that she was entitled to 35 hours at $23.86 per hour. Since Taylor Adam's name was no longer on the Milford Skill List, and she was possibly no longer an employee of National Gypsum, the remedy awarded was for the Employer to pay to the Union, as general damages, the wages Ms. Adams would have been entitled to receive.

[10] National Gypsum seeks judicial review of the Arbitrator's Award.

Issues

[11] The issues before the Court are as follows:

1. What is the applicable standard of review?
2. Was the Arbitrator's Award reasonable?

<u>Issue 1</u>: What is the applicable standard of review?

[12] The parties agree that the standard of review is reasonableness. Each refers in that regard to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII) (SCC) at para. 54.

[13] The Supreme Court in *Dunsmuir* said that the reasonableness standard will be met when (a) the decision-making process was justified, transparent and intelligible; and (b) the result falls within a range of reasonable outcomes: paras. 47-48.

[14] In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 (CanLII) (SCC), Justice Abella, writing for the majority, said that absent a finding that the decision based on the record is outside the range of reasonable outcomes, the decision should not be disturbed (para. 54). Justice Abella also said that the decision being reviewed "should be approached as an organic whole, without a line-by-line treasure hunt for error", citing at para. 54 the decision of the Supreme Court of Canada in a previous decision, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII) (SCC) at para. 14.

Issue 2: Was the Arbitrator's Award Reasonable?

[15] The central issue arising from the Union's grievance was whether National Gypsum was precluded by Article 8(j)1 of the Collective Agreement from contracting Eisner to perform the lump-breaking work at the Burnside location from March 7 to 10, 2017. Arbitrator DeMont identified the crux of the disagreement between the parties at page 4 of his decision:

> In particular, the parties disagree as to whether the Collective Agreement prohibits contracting out when there are laid off employees at the other National Gypsum site, Milford in this case, but while at the relevant time there are no laid off employees at the site where the contractors are working.

[16] After a description of National Gypsum's operations and the nature of the work contracted out to Eisner, Arbitrator DeMont addressed "The Classification Scheme and Skill Lists." He appeared to recognize that the classification scheme and the skill lists are separate and distinct, writing at pp. 10-11:

> In addition to the Classification scheme, there are also two "Skill Lists", one each for the Milford and the Burnside sites. … They consist of matrices cross-referencing employee's names with the various pieces of equipment, noting if the employee is qualified (marked by an "X"), potentially or partially qualified (marked with a "P"), or not qualified to operate each piece of equipment (in which case there is no mark). Every so often, the Employer updates the matrices and provides a copy to the Union. Each updated listing, subject to Union review and comment, is agreed to be the official qualifications for each of the employees. **In other words, the Skill Lists inform everyone what equipment each employee is permitted to operate.**
>
> **When an employee is assigned on the "manning chart" to operate a particular piece of equipment, that employee will receive the classification designation**

> **for that equipment for the duration of the assignment.** If the posting results in a classification that has a higher rate of pay, the employee receives the increased pay. If the employee has a regular classification on a higher paying piece of equipment but is assigned to a lower paying classification, the employee maintains the higher pay rate.
>
> **National Gypsum does not assign an employee to a piece of equipment or to a particular job unless they have the Skill List qualification for that equipment or job.** The link between the Skill List and the job assignments is the mechanism to determine what "classification" work is in.
>
> Don Dixon noted that when National Gypsum provided the Skill List, that was the Employer's "endorsement" that the people listed have the skills to carry out the work on the particular equipment noted. Ralph Wardrope, Human Resources and Safety Manager for National Gypsum agreed in his testimony that the Skill List is the employer's recognition of the respective employee's skills and recognition of their respective qualifications.
>
> [Emphasis added]

Arbitrator DeMont concluded at page 12:

> The assignment of "classification" is an important factor in determining this grievance because the language in Article 8(j) relates to "layoffs in a classification".

[17] Arbitrator DeMont reviewed Article 8 of the Collective Agreement dealing with "Seniority" and "Contracting Out" of bargaining unit work. After setting out Articles 8(a), 8(i) and 8(j)1, he wrote:

> **It is readily apparent reading Article 8(j) that National Gypsum may not contract out "bargaining unit work" if there are laid off employees in the classification of work in which the contracting out is or will take place, or if employees will be laid off as a result of the contracting out.** Layoffs arising from the contracting out is not implicated in this grievance.
>
> If there were laid off employees at Burnside, the implications are clear. Provided the employer is contracting out bargaining unit work, **and the Burnside laid off employees were in the classification implicated**, there is a violation of the Collective Agreement.
>
> **If the only laid off employees were at Milford, the analysis must go a little further.** This is so because the analysis requires interpretation and analysis of Articles 8(a) and 8(i) separating the Milford and Burnside seniority lists and establishing the proper recall considerations.
>
> The Employer argues that the Articles 8(a), 8(i), and 8(j)1, taken together do not require recall of laid off employees from the other site because recall is based on seniority, and seniority is site specific.

[Emphasis added]

[18] According to Arbitrator DeMont at p. 23 of the Award, resolution of the grievance required him to answer the following three questions:

1. Was the work "bargaining unit work"? To answer this first question in the affirmative, I must be able to identify what classification the work is in.
2. Were there any laid off workers in the identified classification at either the Burnside or Milford sites? And if only at the Milford site, do the site-specific seniority list provisions and the seniority based recall provision in the Collective Agreement apply to exclude the requirement to recall from Milford to fill a Burnside need?
3. What is the meaning of Article 3(c), and was there an "emergency" which could permit contracting out nevertheless?

[19] With respect to the first of the three questions, Arbitrator DeMont concluded that the work was bargaining unit work in the "Excavator Operator" classification.

He wrote at page 27:

> I conclude it was work properly classified as "Excavator Operator" in Schedule "A" to the Collective Agreement. This is so because of the interrelationship between the skill list and the Classification List.
>
> The Classification List, as noted above, contains two relevant classifications, Excavator Operator and Shovel Operator. The evidence was clear that "shovel" is the shorthand name for the large excavator, the Cat 374. The "Mini" is the shorthand for the small excavators, incapable of doing the large lump-breaking work, and the M322D is between the large and the small. **The M322D replaced a Cat 320 formerly owned by National Gypsum at the Milford site.**
>
> Based on the wage difference between the shovel and excavator classifications, there is a distinction between the two classifications. There is no mini excavator classification. It is not disputed (nor is it critical to this award) that the mini operators receive the "Excavator Operator" wage and regular classification.
>
> Further, it is without controversy that the Cat 374 operators get the shovel wage and classification. **The Cat 374 shovel was distinguished by all the witnesses as being in a different classification from the M322D, a Cat *that replaced the***

> ***former Cat 320*.** It is not a stretch in any way whatsoever to conclude, as I have, that the M322D and the former 320 are within the excavator classification.
>
> **I conclude that the 320 brought to Burnside by Eisner Contracting, had it been operated by IUOE members, would have been within the "Excavator Operator" classification rather than the "Shovel Operator" classification.**
>
> [Emphasis added by this Court, italics by Arbitrator DeMont]

[20] These are important passages for reasons which will become clear.

[21] Arbitrator DeMont moved on to the second question, which he divided into two parts. The first part required him to answer whether there were any Burnside employees on layoff. He wrote at page 28:

> That there were no Burnside employees on layoff was confirmed by Burnside Shop Steward Kyle MacLellan. He testified that at March 6, 2017 there were no dock employees on layoff. He was not aware if there were Milford employees in any classification on layoff.

[22] Arbitrator DeMont set out the second part of the second question at p. 28 as follows:

> Question Two, Part 2: Were there Milford employees on Layoff and if so, **were they in the relevant classification**?
>
> [Emphasis added]

[23] It is apparent from how he answers this question that Arbitrator DeMont had already concluded, without explanation or analysis, that an employee's qualifications/skills, rather than his position at the time of layoff, determine his "classification" for the purposes of 8(j)1:

> Next I turn to qualified Milford "Excavator Operators" on layoff. **Having found the distinction between the shovel and the excavator classifications, I must answer the question of whether qualification on the bigger equipment, the Shovel 374, qualifies an employee on a Cat 320. If it does, then the laid off shovel operator, Jacob Curry, could have been called back from layoff and operated either Eisner's equipment or another suitable unit found and rented**.
>
> …
>
> I therefore conclude that there is some difference in the qualifications for the 374 and the 320 otherwise there is no point listing each separately.
>
> That conclusion is not determinative of this grievance because **it is the classification in which the employee is laid off, namely the Excavator Operator**

> **classification, that governs the application of the relevant Articles in the Collective Agreement**.
>
> As noted above, one Milford employee who was on layoff on March 7, Mr. Jacob Curry, appears on the Milford Skill List dated January 16, 2017 with qualification on the Shovel 374. This 374 is an excavator that runs on tracks, not rubber tires.
>
> **Therefore, if Jacob Curry is qualified as an Excavator Operator, his layoff would have to be considered**. Jacob Curry is qualified based on the Milford Skill List as a "Shovel Operator", the higher paid classification. He has the Milford Skill List "X" under the heading "Shovel 374". Mr. Curry is not listed as having skill on the M322D or the Mini. Because there is a distinction on the Classification List, and a difference in pay, and there is no "excavator" qualification on the Milford Skill List (the skill 320 came off after National Gypsum ceased owning a 320 sometime between December 2014 and January 2016 Skill Lists), **I must conclude that Mr. Curry in the eyes of the Employer is not qualified as an Excavator Operator. Also of note, Mr. Curry's Payroll Notices at Exhibit 2, Tab 17, list him as "Shovel Operator" and "Truck Operator", but not as "Excavator Operator"**.
>
> While Mr. Curry may well have been capable of running a 320, he was not officially qualified to do so by his employer. He was not an employee in 2014 when National Gypsum had a Cat 320 so not on that Skill List, nor was [sic] listed as qualified on the M322D at Milford.
>
> He does not fall within the Excavator Operator Classification in Schedule "A" to the Collective Agreement, rather he was within the "Shovel Operator" classification. The Union argued that I should consider the wage rates to determine if there is a distinction in the classifications. Shovel operators are paid more than excavator operators, therefore, for whatever reason, by the Union's argument there must be a difference.
>
> I conclude that being qualified on the Shovel does not necessarily translate to the classification as Excavator Operator.
>
> [Emphasis added]

[24] Recall that Arbitrator DeMont had already concluded at p. 27 of the Award that there is a difference between the "Excavator Operator" classification and the "Shovel Operator" classification, and that the work performed by Eisner "would have been within the 'Excavator Operator' classification rather than the 'Shovel Operator' classification." Without any analysis of the phrase "laid off in that classification" in Article 8(j)1, nor any consideration of Jacob Curry's position at the time of his layoff (which, based on the payroll notices, could only have been Shovel Operator or Truck Operator), Arbitrator DeMont concluded that Jacob Curry should have been recalled to do the work if he was "qualified as an Excavator Operator."

[25] Had Arbitrator DeMont interpreted "laid off in that classification" in the manner proposed by the Employer, Mr. Curry's qualifications, as identified on the Skill List, would have been irrelevant. The fact that he was clearly not working as an Excavator Operator at the time he was laid off would have ended the inquiry.

[26] Arbitrator DeMont proceeded to the third question - whether there was an emergency sufficient to permit contracting out - without definitively answering the second. After concluding that there had been no emergency, he set out what he described as his "Summary and Conclusion." He again adopted an interpretation of "classification" that is based on the Skill List. Starting at p. 43, he wrote:

> Before contracting out can take place, except in the case of emergencies, the Employer must notify the Steward pursuant to Article 3(c). Furthermore, the contracting out must not result in layoffs of a worker in the classification to which the contracting relates, nor can the contracting out work in a classification result in an employee in that classification being laid off.
>
> **The Skill List is not the classification. The classification is in the Collective Agreement at Appendix "A". The impacted classification in this case is "Excavator Operator".**
>
> The Employer is not required to have a lower seniority, laid off employee at another site, "bump up" a more senior qualified employee to go to the other site and back fill with the lower seniority employee. Such a process, as suggested by the Union, would be contrary to the express language of Article 8(j). **The laid off employee must be in the classification in which the employer wishes to contract out. An Excavator Operator, in this case, would have to be laid off**.
>
> The evidence is that at Milford on March 6, 2017, Jacob Curry was on layoff. Jacob Curry is a "Shovel 374 Operator" not an "Excavator Operator". Other union members with less seniority than Mr. Curry were also on layoff at Milford. One such person was Taylor Adams, who was rated on the Milford Skill List as provisionally qualified on the Shovel 374 and also the M322D Excavator. However, Adams was also listed on the January 10, 2017 Skill List at Burnside. **On that list, Adams was qualified to operate an "Excavator" and "Mini Excavator" thus eligible to do classification work of an "Excavator Operator" at Burnside. Taylor Adams should have been offered this work prior to the Employer contracting it out**.
>
> [Emphasis added]

[27] The only other mention of Taylor Adams appears much earlier in the Award, at page 28:

> But for one employee who appears to have been on medical leave, and another, an electrician, assigned to the quarry at Milford, each listed employee was noted as

> working a full week (in some instances including overtime). Incidentally, I note that the electrician is not on the Burnside Skill List, and one employee, T. Adams, listed on the Burnside Skill List was not on the Burnside seniority list. Adams was listed as number 56 in seniority at Milford. … Adams' status will be discussed below.

[28] In support of its application for judicial review, National Gypsum filed the affidavit of Ralph Wardrope, Human Resources and Safety Manager for National Gypsum. Mr. Wardrope stated in his affidavit that there was no evidence before Arbitrator DeMont that Taylor Adams had ever been assigned to work, or had actually performed work, with any excavator for National Gypsum, or had ever been classified or paid by National Gypsum as an Excavator Operator or Shovel Operator. Mr. Wardrope said there was no evidence before Arbitrator DeMont of Ms. Adams' classification before her layoff or during the week when the lump-breaking work took place.

[29] With that review of Arbitrator DeMont's Award, I repeat that this Court's task on judicial review is to determine whether the decision is reasonable. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada defined reasonableness as follows:

> 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.

[30] Accordingly, a decision will be reasonable when: (a) the decision-making process was justified, transparent, and intelligible; and (b) the result falls within a range of acceptable outcomes. The reasonableness review is not to be conducted as a two-step process, however. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, (*supra*), Abella J., for the Court, stated:

> 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 … **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 … **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**.
>
> [Emphasis added]

[31] Although a reviewing court should seek to supplement a decision-maker's reasons before it seeks to subvert them, this does not mean that a court should "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (CanLII) (SCC), at para. 54.

[32] Counsel for the Union submits that Arbitrator DeMont interpreted the language of the Collective Agreement in a manner that it could reasonably bear. He argues in the Union's brief at page 4:

> The Arbitrator concluded that Article 8(j)1 prevented National Gypsum from contracting out bargaining unit work at Burnside without first offering that work to any laid off Milford employee who had the necessary skill, as defined by the Skill Lists, to work in that classification. Although he does not state it expressly, the necessary inference is that the Arbitrator concluded the "employees laid off in that classification", for the purpose of Article 8(j)1, are employees on layoff who have the necessary skill, as formally recognized by the Employer on its Skill Lists, to

> perform the work in question and who would be entitled to recall on that basis under Articles 8(d) and (i). …
>
> [emphasis added]

[33] However, in the reasoning path Arbitrator DeMont set out for himself at p. 23 of his Award, he recognized that his task was to first identify whether there were any laid off workers in the identified classifications at either the Burnside or Milford site. Only if the answer was "yes" with respect to the Milford site would he then consider whether the site-specific seniority list provisions and the seniority-based recall provision applied to exclude the requirement to recall a Milford employee to fulfill a Burnside need.

[34] It is not evident from the Award that Arbitrator DeMont relied on Articles 8(d) and (i) to interpret "in that classification" as meaning "eligible to do work in that classification." Even if this Court could make that inference, it remains unclear from the Award why Arbitrator DeMont would look to the recall provision to interpret the provision concerning contracting out, and how that led him to conclude that an employee's skills determine his classification for the purposes of Article 8(j)1.

[35] The Arbitrator's failure to articulate his reasoning is particularly problematic because his interpretation is inconsistent with the plain language of the provision. Article 8(j)1 states:

> 8(j)1 The employer agrees that there will be no contracting out of bargaining unit work that directly results in employees in that classification being laid off, or contracting out of bargaining unit work in a classification while there are employees laid off in that classification.

[36] Arbitrator DeMont's interpretation, in essence, reads words into the provision that are not there -- those words being "eligible to do work" in that classification. In *Collective Agreement Arbitration in Canada*, 6th ed., (Toronto: LexisNexis Canada Inc., 2017), Robert M. Snyder writes:

> 15.6 General principles have been developed to determine what classification an individual holds. The first basic principle is that an employee's classification is determined by the work actually done, and not by the assessment of one's potential skills or by an earlier classification held. Whether a person is in a classification as a matter of fact. …

> 15.7 Secondly, it is the essence of a person's work that establishes his or her classification. …

[37] If an individual's classification is normally understood in arbitral jurisprudence as being determined by the work that person actually does, rather than by her skills or earlier classifications, a plain reading of the prohibition against "contracting out of bargaining unit work in a classification while there are employees laid off in that classification" suggests that the Employer may not contract out bargaining unit work while there are employees who were actually doing that work at the time they were laid off. The Arbitrator did not identify anything in the language of the Collective Agreement to support his conclusion that the parties intended for "in that classification" to receive an alternative, and far more expansive, interpretation. In fact, the balance of Article 8(j)1, and the Collective Agreement as a whole, suggests the opposite.

[38] The words "in that classification" appear twice in Article 8(j)1, and the Arbitrator focused entirely on their second appearance. His decision does not show that he considered whether his expansive interpretation made sense when applied to the provision as a whole. The first part of Article 8(j)1 states:

> The employer agrees that there will be no contracting out of bargaining unit work that directly results in employees in that classification being laid off.…

[39] If Arbitrator DeMont's interpretation is applied to this portion of Article 8(j)1, it would prohibit the Employer from contracting out bargaining unit work that directly results in employees "eligible to do work in that classification" being laid off. But how could contracting out work in a particular classification directly result in the laying off of an employee unless that employee was working in that classification at the time he was laid off? As National Gypsum notes at p. 11 of its pre-hearing brief, both situations contemplated by Article 8(j)1 "require alignment between the classification (if any) applicable to the contracted-work, and the classification in which the employee is 'laid off in'."

[40] With respect to the Collective Agreement as a whole, at pp. 17 to 19 of its rebuttal brief, National Gypsum identifies examples from the Collective Agreement which demonstrate that where the parties intended to link a right or obligation to the criteria of an employee's "skill", they stated this expressly. National Gypsum also notes that the words "classification" and "skill" both appear in Article 10(f)2, confirming that the parties intended that the terms be ascribed <u>different</u> meanings.

[41] Unfortunately Arbitrator DeMont's reasons do not allow this Court to understand why he made his decision, and permit this Court to determine whether the conclusion is within the range of acceptable outcomes.

[42] While it can be inferred from the decision that Arbitrator DeMont interpreted "in that classification" to mean "eligible to do work in that classification", his reasons do not allow this Court to understand why he reached that conclusion. It follows that this Court is left unable to determine whether that conclusion could ever be justified based on the language of the Collective Agreement.

The Decision of Arbitrator Eric Slone

[43] Counsel for National Gypsum provided this Court with a copy of the decision of Arbitrator Eric Slone, released June 11, 2018. The Union in that case grieved four decisions concerning maintenance work performed on the railway tracks located on National Gypsum's Milford and Burnside properties. One of the grievances concerned rail maintenance work which had been contracted out at Milford. On that date, there was a bargaining unit employee laid off from work at Milford.

[44] It appears from Arbitrator Slone's decision, that the Union advanced the same interpretive argument before Arbitrator Slone which it relied upon before Arbitrator DeMont and on this judicial review, i.e., that Article 8(j)1 prevented National Gypsum from contracting out work if there were laid off employees with the skills to perform the work.

[45] The Union argued the decision under review in support of its position. Arbitrator Slone rejected the Union's interpretation, stating as follows:

> [107] …If the contracting out to Universal Rail caused a layoff, or occurred when there were employees laid off "in that classification," then article 8(j)1 arguably steps in as a specific limitation on the right to contract out.
>
> [108] It bears repeating the precise language:
>
> > The employer agrees that there will be no contracting out of bargaining unit work that directly results in employees in that classification being laid off, or contracting out of the bargaining unit in a classification while there are employees laid off in that classification.

> [109] This article is very specific about what has to occur to place a limit on contracting. There must either be a [sic] layoffs in "that classification" "directly" caused by the contracting, or employees "laid off in that classification."
>
> [110] No one suggests Mr. MacKenzie's layoff was a direct result of the contracting out. There is no evidence to support that. Moving on to the second part of the article, was he "laid off in that classification" – i.e. in the classification of maintenance labour where the contracting occurred? I do not think so. He was working in the classification of driver at the time he was laid off. He was not laid off in the classification of maintenance labour. The fact that he was qualified to do maintenance labour does not mean that he was "laid off in that classification."
>
> [emphasis added]

[46] However, Arbitrator Slone also distinguished the facts before Arbitrator DeMont in the decision under review, stating:

> [91] The basic facts of that case were that the Employer used an outside contractor with certain large excavators to break up huge frozen piles of gypsum rock stockpiled in Burnside, so that it could be loaded onto a ship due soon in port. The arbitrator found that this was unlawful, because the work was indistinguishable from work routinely done by bargaining unit members, and there were workers available in Burnside and, critically, on layoff at Milford, who were in the classification. As such, article 8(j)1 applied and contracting out was prohibited.
>
> [92] I do not in this decision propose to make any finding inconsistent with that award, as I believe the facts are quite distinguishable. As such, I do not believe the DeMont award governs the situation before me.

[47] Unfortunately Arbitrator Slone does say how he found the facts before Arbitrator DeMont to be distinguishable from those before him.

[48] The Union suggests that Arbitrator Slone found that maintenance work on the rails was not bargaining unit work and that therefore, Arbitrator Slone's comments at para. 109 and 110 of his decision are *obiter*. In that regard, the Union relies upon Arbitrator Slone's statements at para. 112:

> Put another way, on an ordinary reading of the language this article is specific in prohibiting contracting out of work that is ordinarily done by someone as part of their classification. Maintenance work on the rails is not now nor has ever been a classification for which specific employees are hired.

[49] Certainly Arbitrator Slone does not say that he disagrees with Arbitrator DeMont's interpretation which one might expect he would have, given

that the matter before him involved the same collective agreement between the same parties. He stated:

> [113] The parties could, but did not negotiate a provision that would have required the Employer to call back any employee on layoff, no matter in what classification, before they could contract out any work that is customarily done by the bargaining unit. What they negotiated is much narrower.

[50] In light of Arbitrator Slone's decision, which arrives at a different interpretation of the same provision in the same collective agreement between the same parties, this Court should consider whether Arbitrator DeMont's Award and that of Arbitrator Slone can both be reasonable.

Reasonableness and conflicting arbitration decisions

[51] Nova Scotia Courts have repeatedly held that it is possible for opposing arbitration rulings to stand if both interpretations, although contrary, are interpretations which the collective agreement can reasonably bear.

[52] In *Camp Hill Hospital v. N.S.N.U.*, 1989 CarswellNS 424 (C.A.), (leave to appeal denied [1990] S.C.C.A. No. 56), the union and the employer arbitrated the issue of when a part-time nurse should receive her first annual salary increase. The union contended that the increase should come 12 months after the nurse commenced employment. The employer submitted that the increase should come after she had worked the same number of hours that a full-time nurse worked in one year. The arbitration board found in favour of the union, and the employer applied to quash the decision.

[53] The reviewing judge, while acknowledging that the board's interpretation was one that the language could reasonably bear, quashed the award on the ground that the board failed to consider themselves bound by the decision in *Grace Maternity Hospital v. N.S.N.U*, 1986 CarswellNS 260 (C.A.). In that case, the Nova Scotia Court of Appeal restored an arbitration board ruling reaching the opposite result in a dispute over an identical provision in a substantially similar collective agreement.

[54] The majority of the Court of Appeal in *Camp Hill* held that "[w]hile consistency in arbitral jurisprudence is desirable, there is no absolute obligation on one Arbitration Board to follow the award of another, even where a similar issue is in dispute": para. 12. Chief Justice Clarke, for the majority, clarified that the ratio of the *Grace* decision was "that a trial judge should not impose his/her own

interpretation on the provisions of a collective agreement when an arbitration board has given them an interpretation the language of the collective agreement can reasonably bear": para. 17. Allowing the appeal, the Court of Appeal concluded at para. 25:

> A review of the record indicates that the arbitrators, by a majority, interpreted the language of the collective agreement in a manner that it could reasonably bear. While their interpretation may not be the only one that can be made, it cannot be said to be unreasonable. …

[55] In *Halifax Employers Assn. v. International Longshoremen's Assn., Local 269*, 2004 NSCA 101, [leave to appeal denied [2004] S.C.C.A. No. 464], Cromwell J.A., for the majority, reaffirmed that the principle of *stare decisis* does not apply to labour arbitrators:

> 82 With respect, the arbitrator was not obliged to follow "the relevant case law" developed by other arbitrators or to limit himself to "recognized criteria" or to act only on the basis of propositions for which there is "common law" support in the awards of other arbitrators. There is no principle of *stare decisis* in labour arbitration. … The arbitrator's duty is to apply the statutory test to the facts, not to adhere to what other arbitrators in other contexts have said or done. Departures from other awards do not, in themselves, make the arbitrator's award patently unreasonable.
>
> [Citations omitted]

[56] One arbitrator is not bound to follow the decision of another even where both disputes involve the same parties and the same collective agreement. In Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., (loose-leaf) (Toronto: Canada Law Book, 2017), the authors state at §1:3100:

> [A]t one time some arbitrators held themselves to be strictly bound by an earlier interpretation of the same collective agreement. Today, while agreeing generally that such an interpretation should be followed, they nevertheless claim the right not to be bound when they are of the view that the decision in the earlier award was "clearly wrong". The prevailing view has been summarized as follows:
>
> > It is not good policy for one Board of Arbitration to refuse to follow the award of another Board in a similar dispute between the same parties arising out of the same Agreement where the dispute involves the interpretation of the Agreement. Nonetheless, if the second Board has the clear conviction that the first award is wrong, it is its

> duty to determine the case before it on principles that it believes are applicable.
>
> Accordingly, in the application of such a standard, arbitrators generally feel obliged to explain in some detail the reasons for not following the earlier award.

[57] The standard of review applied by the court where arbitrators have rendered conflicting decisions on the same point or language pertaining to the same parties remains that of reasonableness. "The standard does not change to one of correctness because of the existence of a contrary arbitral decision": *Foothills Provincial General Hospital v. United Nurses of Alberta (UNA), Local 115*, (1993), 10 Alta. L.R. (3d) 254; [1993] A.J. No. 434, at para. 44. As noted by Blair J.A. in *Hydro Ottawa Ltd. v. International Brotherhood of Electrical Workers, Local 636*, 2007 ONCA 292 (OCA), at para. 59:

> In each case the issue is whether the arbitrator's interpretation of the collective agreement is supportable on the record and not patently unreasonable in that context. Lack of unanimity is the price to be paid for having independent and specialized decision-makers in the labour relations field protected by the standard of review of patent unreasonableness.

[58] The same approach applies in the reasonableness *simpliciter* context: *Public Service Alliance of Canada v. Sydney Airport Authority*, 2015 NSCA 105, at para. 29. In *Sydney Airport Authority*, the Nova Scotia Court of Appeal observed that where the language of a collective agreement is found to support multiple reasonable interpretations, the parties are free to resolve the matter at the next round of negotiations:

> 25 This dispute was referred to a consensual arbitrator as chosen by the parties. They referred the matter in the context of asking the arbitrator to determine the specific words in the Collective Agreement. As noted by Justice Moldaver in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, if there are two reasonable interpretations that is the end of the argument in relation to judicial review. If one of the parties does not like the result they are free to renegotiate the contract once it expires.

Conclusion

[59] This Court's task is to assess the reasonableness of the DeMont award. While it was open to Arbitrator Slone to decline to follow the earlier DeMont decision and reach a conflicting result, his decision to do so merely confirms that there are other possible interpretations of Article 8(j)1. It does not mean, in itself, that the DeMont decision was unreasonable. Both interpretations could in fact be reasonable.

[60] The context in which the DeMont decision was made will shape the "range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, at para. 47. That context does not include the Slone decision, which did not yet exist. It does, however, include previous arbitral jurisprudence.

[61] In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] S.C.J. No. 34, the majority of the Supreme Court referred to previous arbitral decisions as a "valuable benchmark" against which to assess the reasonableness of an arbitrator's decision: para. 6. Justices Rothstein and Moldaver (in dissent, with McLachlin C.J.C. concurring), agreed with the majority on this point:

> 78 Respect for prior arbitral decisions is not simply a nicety to be observed when convenient. On the contrary, where arbitral consensus exists, it raises a presumption - for the parties, labour arbitrators, and the courts - that subsequent arbitral decisions will follow those precedents. …

[62] I conclude that Arbitrator DeMont's conclusion that the work at issue was bargaining unit work in the Excavator Operator classification and that there was no emergency which permitted National Gypsum to contract out that work to each be reasonable.

[63] However, having fully considered that two different interpretations of Article 8(j)1 may each be reasonable, I nevertheless conclude that Arbitrator DeMont, with due respect, strayed from a transparent, intelligible, and justified reasoning path and reached an unreasonable decision.

[64] The Arbitrator's reasoning path does not show how he arrived at the conclusion that skills alone is determinative of classification. The Arbitrator's Award does not provide an interpretive analysis to support his conclusion.

[65] This Court is very cognizant of the high degree of deference which must be afforded to decisions of labor arbitrators. However, I conclude that this is one of the rare cases where judicial intervention is appropriate.

[66] For the above reasons, the Award of Arbitrator DeMont is quashed, with costs to National Gypsum.

[67] If the parties cannot agree on costs, I will receive written submissions within thirty (30) calendar days of the release of this decision.

Smith, J.