

SUPREME COURT OF NOVA SCOTIA

Citation: Halifax (Regional Municipality) v. Nova Scotia Union of Public and Private Employees, Local 13, 2009 NSSC 283

Date: 20090928
Docket: Hfx. No. 297466
Registry: Halifax

Between:

Halifax Regional Municipality

-and-

Nova Scotia Union of Public and Private Employees, Local 13

LIBRARY HEADING

Judge: The Honourable Justice Robert W. Wright

Heard: May 14, 2009 in Halifax, Nova Scotia

Written

Decision: September 28, 2009

Subject: Judicial review of labour arbitration award.

Summary: HRM operated a call centre staffed by approximately 25 members of the Union to handle telephone inquiries from the general public covering various municipal services. In 2007, HRM implemented a call recording system whereby all such incoming calls were recorded for a range of customer relations management purposes, particularly, staff training and quality control (personal calls made by the call centre agents on a secondary line were not recorded).

In response, the Union filed a policy grievance objecting to the installation of the call recording system on the basis that it constituted an unreasonable exercise of management rights and thereby violated the collective agreement. More particularly, the Union maintained that the call recording system was an unreasonable invasion of privacy of the call centre agents, which violated not only the employer's duty under

the collective agreement to act fairly and reasonably, but also violated the privacy provisions contained in the **Municipal Government Act** (which were imported from FOIPOP).

The sole arbitrator appointed to hear the grievance upheld it, finding that the establishment and operation of the call recording system violated both the privacy provisions of the **Act** and the management rights clause contained in the collective agreement. HRM applied for judicial review of both findings.

Issues:

- (1) What is the standard of review to be applied in respect of each issue?
- (2) In applying the appropriate standard of review, do the findings and outcome which the arbitrator reached in his award warrant the intervention of this court on judicial review?

Result: The standard of review to be applied with respect to the arbitrator's interpretation of the privacy provisions of the **Municipal Government Act** was that of correctness. The court found that the arbitrator was incorrect in his statutory interpretation in holding that the voice recording of incoming calls to call centre agents was "personal information" within the statutory definition thereof (the collection, use and disclosure of which was highly restricted), irrespective of the content of such calls. The finding of the arbitrator on this first issue was therefore set aside.

The standard of review to be applied with respect to the arbitrator's interpretation of the management rights clause in the collective agreement was that of reasonableness. Although the court was not in agreement with the arbitrator's finding that the implementation of the call recording system was an unreasonable exercise of management rights or that it constituted a breach of the "fair and reasonable" language found in the collective agreement, the arbitrator's findings and path of reasoning was nonetheless intelligible and transparent and fell within the range of the possible legal outcomes available. Accordingly, his award survives the reasonableness standard of review on the second issue and does not warrant judicial intervention.

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Counsel: Counsel for the Applicant - Terry Roane, Q.C.
Counsel for the Respondent - Nancy Elliott

Wright J.

INTRODUCTION

[1] Halifax Regional Municipality (“HRM”) has applied for judicial review of a labour arbitration award rendered by Milton J. Veniot, Q.C. on April 17, 2008 following his consensual appointment as a sole arbitrator to hear a policy grievance filed by the respondent, Nova Scotia Union of Public and Private Employees, Local 13 (the “Union”). The policy grievance related to the management rights clause contained in the collective agreement between the parties in effect at the time.

[2] The facts underlying this policy grievance are not contentious. Briefly by way of background, HRM for some time has operated a call centre which is staffed by approximately 25 members of the Union. On January 26, 2007 HRM provided notice to the Union that it had purchased and would soon be implementing a system of call recording technology that would record all customer calls. The introduction to the notice reads as follows:

The Call Centre has recently purchased and will soon be implementing our Call Recording technology. This will allow us to record all customer calls for quality purposes, retrieve and play back calls for coaching and to resolve customer disputes. Like many other organizations, this is a standard practice that allows the recording of telephone calls for a range of customer relations management purposes, for example - - staff training and quality control. Many call centres in particular monitor calls as an essential method of maintaining service standards.

[3] In response, the Union filed a policy grievance on behalf of its call centre

agents on February 19, 2007 objecting to the installation of the call recording system. The Union took the position that this action constituted an unreasonable exercise of management rights, thereby violating Article 2.01 of the Collective Agreement. More particularly, the Union maintained that employees have a reasonable expectation of privacy, that the call recording would constitute a loss of privacy, and that the loss of privacy was not proportional to the benefits gained by HRM in recording the calls.

[4] It should be noted at the outset that the call centre system involved the operation of two separate telephone lines. One is the so-called “Primary Line” which is used exclusively to receive incoming calls from the public. As noted by the arbitrator, the responding call centre agent provides callers on the Primary Line directly with information on such things as transit service times, tax bills, by-laws, parking information, municipal services, and so on.

[5] The other telephone line, known as the “Secondary Line”, allows the call centre agents to make internal calls elsewhere in HRM in connection with calls received on the Primary Line. Again as noted by the arbitrator, use of the Secondary Line typically arises when an agent needs to put a customer on hold and dial out to another HRM business unit. Common instances of such occasions are when there is an escalation on a call, when more information is required for the caller or when the agent wants to transfer the caller to another HRM business unit.

[6] Initially, HRM developed a plan that would record all incoming calls to the call centre agents on both the Primary Line and the Secondary Line. However,

after recognizing that employees sometimes use the Secondary Line for personal calls, it ultimately decided to record calls on the Primary Line only.

[7] This step by HRM had two ameliorative effects. First, it eliminated the recording of any personal calls made by the agents on the Secondary Line. Secondly, it eliminated the recording of some business calls as well. In the result, the reach of the call recording system as implemented was to record all incoming calls from the public on the Primary Line. The system records the entirety of those calls and maintains those recordings for a period of one year, after which they were to be destroyed.

[8] Even with these changes, the parties were unable to resolve their differences. The Union continued to maintain that the automatic recording of all incoming calls from the public on the Primary Line was an invasion of the privacy of its call centre agent members. The Union therefore decided to pursue its policy grievance which resulted in the consensual appointment of Mr. Veniot as sole arbitrator under the *Trade Union Act*.

OVERVIEW OF THE AWARD

[9] In his award, the arbitrator upheld the policy grievance and by way of remedy, ordered that the recording of calls cease, that all recorded conversations retained by HRM be destroyed, and that none of the stored recordings be used or disclosed.

[10] In arriving at that result, the arbitrator dealt with issues raised under both the

Municipal Government Act, S.N.S. 1998 , c. 18 (“MGA”) and the Collective Agreement. The relevant segment of the MGA is Part XX which is not only entitled *Freedom of Information and Protection of Privacy*, but which contains the same pertinent statutory provisions as found in the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, ch. 5 (“FOIPOP”).

[11] These two discrete issues were globally framed by the arbitrator as follows:

1. Does the establishment and operation of the call recording system violate the MGA?
2. Does the establishment and operation of the call recording system violate the Collective Agreement?

[12] In upholding the grievance, the arbitrator decided both these questions in the affirmative. HRM now seeks the intervention of this court by judicial review of the arbitrator’s award on both issues.

ISSUE 1 - VIOLATION OF MGA

Standard of Review

[13] Counsel for both parties agree that the appropriate standard of review to be applied by this court in respect of the first issue is that of correctness. I agree, for the following reasons.

[14] The law pertaining to the selection of the appropriate standard of review was recently revised by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*

2008 SCC 9. In its wake, the Nova Scotia Court of Appeal has conveniently summarized the *Dunsmuir* principles in *Police Association of Nova Scotia Pension Plan v. Amherst (Town)* 2008 NSCA 74 at paras 39-42:

39. Correctness and reasonableness are now the only standards of review (para. 34). The court engages in "standard of review analysis", without the "pragmatic and functional" label (para. 63).

40. The ultimate question on the selection of an SOR remains whether deference from the court respects the legislative choice to leave the matter in the hands of the administrative decision maker (para. 49).

41. The first step is to determine whether the existing jurisprudence has satisfactorily determined the degree of deference on the issue. If so, the SOR analysis may be abridged (para. 62, 54, 57).

42. If the existing jurisprudence is unfruitful, then the court should assess the following factors to select correctness or reasonableness (para. 55):

- (a) Does a privative clause give statutory direction indicating deference?
- (b) Is there a discrete administrative regime for which the decision maker has particular expertise? This involves an analysis of the tribunal's purpose disclosed by the enabling legislation and the tribunal's institutional expertise in the field (para. 64).
- (c) What is the nature of the question? Issues of fact, discretion or policy, or mixed questions of fact and law, where the legal issue cannot readily be separated, generally attract reasonableness (para. 53). Constitutional issues, legal issues of central importance, and legal issues outside the tribunal's specialized expertise attract correctness. Correctness also governs "true questions of jurisdiction or vires", ie. "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter". Legal issues that do not rise to these levels may attract a reasonableness standard if this deference is consistent with both (1) any statutory privative provision and (2) any legislative intent that the tribunal exercise its special expertise to interpret its home statute and govern its administrative regime. Reasonableness may also be warranted if the tribunal has developed an expertise respecting the application of general legal principles within the specific statutory context of the tribunal's statutory regime (para. 55-56, 58-60).

[15] Both counsel also acknowledge that there is no case authority in the existing jurisprudence in Nova Scotia that is determinative of the degree of deference to be applied in the situation where a labour arbitrator has interpreted a statute which falls outside his or her area of expertise such as the privacy provisions contained in the MGA. That being so, the court is required to assess the factors identified in paragraph 42 above quoted to select either the correctness or reasonableness standard.

[16] Although the first two of these factors point towards deference (having regard to s.42 of the *Trade Union Act*), the final factor compellingly indicates the appropriate standard of review here to be that of correctness. That is because the application of Nova Scotia's privacy legislation to management of the work place is both a legal issue of central importance and a legal issue outside the arbitrator's specialized area of expertise.

Was the arbitrator correct in his interpretation of the MGA and in his conclusion that the MGA was violated by the establishment and operation of the call recording system?

[17] In his award, the arbitrator first addressed the preliminary issue of his jurisdiction to construe and apply the MGA. He concluded that he had such jurisdiction, based on both the provisions of s. 43(1)(e) of the *Trade Union Act* and the Supreme Court of Canada decision in *MacLeod et al. v. Egan et al.* (1974) 46 D.L.R. (3d) 150. In my view, the arbitrator was correct in determining that he had jurisdiction to construe and apply the statute and indeed, there does not appear to have been any contest about that point between the parties.

[18] The primary focus of the statutory interpretation to be made in this case is whether the recording of the voices of call centre agents for incoming calls from the public constitutes “personal information” within the meaning of Part XX. If it does, further statutory interpretation must be made of the sections of Part XX that restrict the collection, use and disclosure of such personal information.

[19] The arbitrator found that the recording of incoming calls to the call centre agents did constitute “personal information” as defined in Part XX and then went on to find that its collection, use and disclosure by HRM violated the restrictive provisions found in sections 483 and 485. The question for this court to decide on judicial review is whether the arbitrator was correct in his interpretation and application of the subject provisions.

[20] “Personal information” is a defined term under s.461(f) of Part XX. It reads as follows:

461(f) "personal information" means recorded information about an identifiable individual, including

- (I) the individual's name, address or telephone number,
- (ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,
- (iii) the individual's age, sex, sexual orientation, marital status or family status,
- (iv) an identifying number, symbol or other particular assigned to the individual,
- (v) the individual's fingerprints, blood type or inheritable characteristics,
- (vi) information about the individual's health-care history, including a physical or mental disability,
- (vii) information about the individual's educational, financial, criminal or employment history,

- (viii) anyone else's opinions about the individual, and
- (ix) the individual's personal views or opinions, except if they are about someone else;

[21] There is no further definition within Part XX of the meaning of the term “recorded information”, nor have counsel been able to find any case law interpreting those words in s. 461(f). However, the term “record” is defined in s.461(h) as follows:

(h) "record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;

[22] Essential to the task at hand is a close examination of the stated legislative purpose of Part XX. That is set out in s.462, which reads as follows:

462 *The purpose of this Part is to*

(a) *ensure that municipalities are fully accountable to the public by*

(I) giving the public a right of access to records,

(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,

(iii) specifying limited exceptions to the rights of access,

(iv) *preventing the unauthorized collection, use or disclosure of personal information by municipalities, and*

(v) providing for an independent review of decisions made pursuant to this Part;

(b) provide for the disclosure of all municipal information with necessary exemptions, that are limited and specific, in order to

(i) facilitate informed public participation in policy formulation,

(ii) ensure fairness in government decision-making, and

(iii) permit the airing and reconciliation of divergent views; and

(c) *protect the privacy of individuals with respect to personal information about themselves held by municipalities* and to provide individuals with a right of access to that information. 1998, c. 18, s. 462 (emphasis added by arbitrator).

[23] In approaching the task of statutory interpretation, the arbitrator recognized and set out the applicable principles of construction of statutory language. He first made reference to s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c.235 which deems every enactment to be remedial and to be interpreted to ensure the attainment of its objects. He then made reference to the singular rule in modern statutory interpretation set out in the well-known *Driedger* text on *Construction of Statutes* (3rd ed.) and its recital with approval by the Supreme Court of Canada in *Rizzo and Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27 and more recently by the Nova Scotia Court of Appeal in *QEII Health Sciences Centre v. N.S.G.U.* (1998) 166 N.S.R. (2d) 194. From the latter case, the arbitrator included the following quote:

The Nova Scotia Interpretation Act, R.S.N.S. 1989 c. 235 contains the same provisions Iacobucci J. quoted from the Ontario Act. The principles he stated have been called the "words in total context approach". (See *Barrett v. Crabtree* (1993), 150 N.R. 272 (S.C.C.)) I do not consider this to be in conflict with the "modern rule" of interpretation set out by Professor Sullivan in the third edition of *Driedger* at p. 131:

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

[24] The arbitrator also quoted at length from the decision of the Nova Scotia Court of Appeal in *Department of Health v. Dickie* (1999) 176 N.S.R. (2d) 333.

That case is of particular interest because the court gave specific consideration to the definition of “personal information” as contained in the FOIPOP statute. As noted earlier, FOIPOP contains the same statutory definition of “personal information” as found in Part XX of the MGA.

[25] In writing the judgment for the court, Justice Cromwell first observed, having regard to the title of the statute and its detailed statement of purpose, that it is concerned with striking a balance between access to information and personal privacy. He then went on to discuss the meaning of the term “personal information” in a factual context where all of the documents sought for disclosure related to the investigation and decision-making by management with respect to the allegation of work-related misconduct by an employee of the Department of Health.

[26] Justice Cromwell treated the defining words “recorded information about an identifiable individual” as being broad, clear and simple. He concluded that the several examples listed as being included in the definition were just that, examples, that illustrate but do not limit the breadth of the definition set out in the opening words.

[27] Justice Cromwell also made reference to the decision of the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 403 in which the similar definition of “personal information” under the federal *Privacy Act* was said to be “undeniably expansive”. Briefly, *Dagg* was decided in the context of a

request filed with the Department of Finance for copies of logs with names, identification numbers and signatures of employees entering and leaving the workplace on weekends (which logs were kept by security personnel for safety and security reasons and not for the purpose of verifying overtime claims).

Interestingly, the Supreme Court split 5-4 on the issue of whether the information contained in the logs constituted “personal information” within the meaning of its definition in the *Privacy Act*.

[28] With that direction to interpret “personal information” expansively, and taking an expansive view of the purpose of Part XX, the arbitrator concluded that the recording of incoming calls on the Primary Line at the call centre constituted the collection of “personal information” within the meaning of Part XX. In reaching that conclusion, he had this to say (at page 27 of the award):

A person’s voice is a source of information about that person. The voice can provide information on the person’s race, national or ethnic origin, colour, sex or age. While that is probably sufficient to dispose of the matter on the ground that the call recording results in “recorded personal information about an identifiable individual”, I do note that subclauses (ii) and (iii) of section 461(f) actually specify all of these items as being included in the definition of the term “personal information”.

[29] The arbitrator observed in his award that counsel were unable to provide any case decided under FOIPOP or Part XX which dealt with the phrase “personal information” as it might relate to voice recordings. He therefore considered it useful to take a look at cases decided under federal privacy legislation which contained similar statutory definitions of the term “personal information”, namely, the *Dagg* decision under the federal *Privacy Act* and a number of decisions under the *Personal Protection and Electronic Documents Act* (“PIPEDA”) which largely dealt with workplace surveillance situations. A review of these decisions

reinforced the arbitrator's conclusion that the recording of incoming telephone calls on the Primary Line constituted the collection of personal information within the meaning of s.483 of Part XX.

[30] That finding lead the way to a consideration by the arbitrator of whether the collection of such personal information is authorized by s.483 and whether the information collected could be used or disclosed under s.485. In the final result, the arbitrator found that HRM violated the s.483(1)(c)restriction against the collection of personal information when it established the call recording system. He found as well that in the absence of consent to its use or disclosure, it also violated ss. 485(1)(b) and 485(2)(b) respectively. He ruled that none of the permitted exceptions to these legislative restrictions were met by HRM.

[31] It should be recognized that the arbitrator correctly identified the principles of statutory interpretation to be applied. His lengthy award in applying those principles is very thorough and very analytical. However, with all due respect, I find that the arbitrator was incorrect in interpreting the statutory definition of "personal information" so broadly as to encompass the spoken work product of HRM call centre agents in the performance of their duties to receive incoming calls from the public about municipal services. I agree with the submission of counsel for HRM that the arbitrator failed to give proper consideration to the purpose and intent of the Legislature in enacting Part XX and, as well, to the factual context in which the statutory interpretation was to be made.

[32] The factual context in which requests for information are usually made

under such legislation is in respect of someone concerned with accessing recorded information either about themselves or about some identifiable third party individual. The requests are directed at the content of the information.

[33] What makes the present case so novel is that we are here dealing with the recording of the spoken work product of the call centre agents, irrespective of content.

[34] I do not agree with the arbitrator's conclusion, in the context of this case, that a person's voice is a source of information about that person. It may well be so in other factual contexts, for example, voice print recognition technology for security purposes dealt with in *Turner v. Telus Communications Inc.* (2005) 284 F.T.R. 38 decided under the PIPEDA legislation, but not in the case at bar. A caller cannot, merely from hearing a voice at the other end, gather any definitive information about the person's race, national or ethnic origin, colour or age. Granted, the responding call centre agent is an identifiable individual since they are required to give their name when they answer the telephone; but that is as far as it goes.

[35] More importantly, callers are not concerned with either divulging or obtaining personal information about themselves, the call centre agents or any other identifiable individual. As for the employer, any personal information or personal characteristics about call centre agents of the sort listed in s. 461(f) are

already well-known to HRM supervisors by virtue of their employment.

[36] It cannot be over emphasized that the recording of calls made to the call centre agents on the Primary Line is of a non-personal nature. The call centre agents answer inquires from the public about various municipal matters. There is no component of personal information in that. It is not recorded information about an identifiable individual within the meaning of s.461(f). Rather, the content of the calls, as earlier noted, is about such routine inquires as transit service times, tax bills, by-laws, parking information and municipal services. In my view, the question of whether voice recording in the fact situation at hand constitutes “personal information” cannot be decided irrespective of the content of those calls. Here, the content of those calls is undoubtedly of a non-personal nature made in the course of the performance of the job duties of these employees.

[37] As noted earlier, no cases have been found in Nova Scotia where our courts have considered whether an individual’s voice is “personal information” under either FOIPOP or the MGA. I generally find the cases referred to under federal privacy legislation to be of limited assistance where they entail different fact situations and were decided in different contexts. Of all those referred to, the case which offers the most assistance in interpreting the term “personal information” is *Canada (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board)* [2006] F.C.J. No. 704.

[38] In that case, the records sought for disclosure contained communications recorded by the Safety Board relating to four air occurrences which were subject to

investigation. In each case, the requesters sought access to recordings and transcripts of air traffic control communications which were under the control of the Safety Board. At issue was whether the requested information was “personal information” within the meaning of the federal privacy legislation.

[39] In ordering the Safety Board to disclose the requested records, the Federal Court of Appeal commented as follows (at paras. 52-54):

52. Privacy thus connotes concepts of intimacy, identity, dignity and integrity of the individual.

53. The information at issue is not "about" an individual. As found by the application judge (at para. 18 of her reasons) the content of the communications is limited to the safety and navigation of aircraft, the general operation of the aircraft, and the exchange of messages on behalf of the public. They contain information about the status of the aircraft, weather conditions, matters associated with air traffic control and the utterances of the pilots and controllers. These are not subjects that engage the right to privacy of individuals.

54. The information contained in the records at issue is of a professional and non-personal nature. The information may have the effect of permitting or leading to the identification of a person. It may assist in a determination as to how he or she has performed his or her task in a given situation. But the information does not thereby qualify as personal information. It is not about an individual, considering that it does not match the concept of "privacy" and the values that concept is meant to protect. It is non-personal information transmitted by an individual in job-related circumstances.

[40] Similarly, the call centre recordings in the present case are limited in their content to information of a business and non-personal nature. They convey information to customers inquiring about a variety of HRM’s services. Such content obviously does not itself engage the call centre agents’ right to privacy. Indeed, whatever expectation of privacy the call centre agents might reasonably

have should be placed at the lower end of the spectrum since the subject matter is non-personal information transmitted by them in the performance of their job.

[41] It is also worth noting, as did the arbitrator in his award, that prior to the introduction of the call recording system, HRM performed “live monitoring” of call centre employees. In other words, call centre supervisors could listen to an agent’s calls at any given time for quality assurance, training, health and safety purposes. There does not appear to have been any prior controversy over that practice as an invasion of privacy.

[42] This is another dimension of the job routine which informs the analysis of what should be regarded as “personal information”. It begs the question in terms of privacy expectations of why, if live monitoring of calls was a regular practice, it cannot be done by way of a mechanical recording system for greater efficiency of supervisors. There is no suggestion of any impropriety on the part of HRM in implementing the call recording system. Indeed, the arbitrator in his award accepted as genuine the employer objectives in implementing the call recording system and was satisfied that there was no hidden agenda nor any allegations of bad faith on the part of HRM.

[43] Having regard to the purpose of the legislation and the factual context at hand, I conclude that it was not the intention of the Legislature to have Part XX operate so as to encompass the spoken work product of municipal call centre agents within the definition of “personal information” and its ancillary provisions. Here, HRM attempted in good faith to introduce a call recording system as a new

working condition for its call centre agents. I cannot conceive that it was the intention of the Legislature for Part XX to have the reach of serving to prohibit such a working condition across the board. The introduction of such working conditions is better left to be dealt with as a labour relations matter in the workplace.

[44] Neither does it make sense to ascribe to the Legislature an intention to extend the reach of the MGA so as to prohibit call centre recording in municipal government workplaces when the practice of call recording is known to be widespread elsewhere in other sectors. Indeed, the HRM notice to the Union referred to in paragraph 2 of this decision refers to it as a standard practice, like many other organizations, that allows the recording of telephone calls for a range of customer relations management purposes. There is no rationale for singling out municipal workplaces for the prohibition of such a working condition.

[45] Neither would it make sense for the legislation to carve out the spoken work product of call centre agents for protection under the privacy legislation from those same employees' written work product (such as e-mails, correspondence and memos) which are available for supervisors to review.

[46] For all of the foregoing reasons, I find that the arbitrator was incorrect in his interpretation of the relevant provisions of Part XX in holding that the voice recording of incoming calls on the Primary Line to call centre agents was "personal information" within the meaning of s.461(f) irrespective of the content of such calls. That, in my view, is beyond the intended reach of that legislation. The

finding of the arbitrator on this first issue is therefore set aside, there being no need to give further consideration to his interpretation of ss. 483 and 485 on the collection, use and disclosure of personal information .

ISSUE 2 -WHETHER THE ESTABLISHMENT OF THE CALL RECORDING SYSTEM VIOLATED THE COLLECTIVE AGREEMENT

[47] In his introduction to the second issue, the arbitrator acknowledged that if there were to be a judicial review of his decision on his interpretation of the MGA, it would be reviewed on a test of correctness. Because of that, he considered that the arbitration process would be better served to go on to consider the Union's alternate argument that the establishment and operation of the call recording system violated the collective agreement, rather than run the risk of having the grievance remitted by the court for decision on that issue later on. He was then confronted with the argument of HRM that the Union's grievance under Article 2.01 was not arbitrable and that the arbitrator therefore had no jurisdiction to proceed.

Whether grievance arbitrable under Article 2.01

[48] The arbitrator noted at the outset of his award that the hearing of the grievance was held by consent, that there were no preliminary or jurisdictional matters, and that the parties agreed that the Board was properly constituted and had power to hear and decide the grievance. In respect to the second issue, however,

HRM advocated the position that the grievance must fail because no violation of any term of the collective agreement, implied or expressed, had occurred.

[49] The collective agreement is completely silent on the subject of the establishment and operation of a call centre recording system. It is therefore Article 2.01, which is the general Recognition of Employer clause, that requires an interpretative analysis to decide this second issue. Its relevant provisions reads as follows:

2.01 RECOGNITION OF EMPLOYER:

- (a) The Union recognizes that the Employer retains all rights not specifically taken away by this agreement.
- (b) All rights reserved to the Employer are subject to the provisions of this collective agreement and shall be exercised in a manner consistent with the provisions of this collective agreement.
- (c) The functions of the Employer within the scope of this collective agreement shall be exercised in a fair and reasonable manner.

[50] The main thrust of HRM's argument on this point is that since there is an express retention of employer rights, and an express provision that it is only the functions of the employer within the scope of the agreement that must be exercised in a fair and reasonable manner, the arbitrator therefore had no jurisdiction to adjudicate on employer rights outside the scope of the agreement (given the prohibition from altering, adding to or amending its provisions). HRM's view of

the language of Article 2.01, as summarized by the arbitrator, is that the installation and operation of the call recording system involves the exercise of an unfettered management right; something which is simply outside the purview of the agreement. HRM therefore maintains that the grievance under Article 2.01 is not arbitrable.

[51] The Union, on the other hand, advocates a much more expansive interpretation of Article 2.01. It argues that the Recognition of Employer clause encapsulates any number of rights not specifically spelled out in the collective agreement, including one of a reasonable expectation of privacy which it says is invaded by the installation of the call recording system. In the Union's view, the installation and operation of the call recording system violates Article 2.01 because HRM is thereby acting in a manner that is not "fair and reasonable" within the meaning of subclause (c).

[52] As the arbitrator recognized in his award, the question to be asked is whether the introduction and operation of the call recording system falls within the meaning of the phrase "functions of the employer within the scope of this agreement" in Article 2.01(c) so as to trigger the employer's duty to act "in a fair and reasonable manner".

[53] The adjudicator answered this question in the affirmative for two distinct reasons. In first construing the phrase "functions of the employer within the scope of this collective agreement" the arbitrator found that the installation of the call recording system was the imposition by the employer, in the exercise of its retained

right to run its enterprise and direct the workforce, of a working condition on the call centre agents. With this finding, the arbitrator concluded that the employer action in installing and operating the call recording system was brought squarely within the phrase “functions of the employer within the scope of this collective agreement”. He reasoned that it therefore accrues the application of the “fair and reasonable manner” language contained in Article 2.01(c).

[54] Secondly, the arbitrator found that the installation and operation of the call recording system was to be regarded as an instance of unilaterally promulgated employer rule. That qualified, in the arbitrator’s view, as a “function of the employer within the scope of this collective agreement” and as such, the employer action must conform to the “fair and reasonable manner” standard contained in Article 2.01(c).

[55] The arbitrator then went on to say that if he was wrong in his construction of Article 2.01, he would find that the employer’s action in establishing and operating the call recording system is subject to arbitral review on the grounds of its reasonableness. The arbitrator cited two cases in support of that finding, namely, *K.V.P. Co. Ltd.* (1965), 16 L.A.C. 73 and *Nova Scotia (Civil Service Commission) v. N.S.G.E.U.* (1993) 123 N.S.R. (2d) 217 (better known as *Wexler*). He concluded from his review of these two cases that when introducing and operating the call recordings system as a unilaterally promulgated employer rule, there was a duty on the employer to act reasonably.

[56] Having decided that this issue was thus subject to arbitral review, the

arbitrator went on to engage in a balancing of interests analysis and ultimately reached a conclusion in favour of the Union.

Standard of Review

[57] As was recently affirmed by the Nova Scotia Court of Appeal in *Maritime Paper Products Ltd. v. Communications, Energy and Paperworkers' Union, Local 1520* [2009] N.S.J. No. 246 (at para 20), the court on judicial review should apply the standard of reasonableness to an arbitrator's interpretation of a collective agreement. Both counsel acknowledge that general principle to apply here. However, counsel for HRM, in pursuing its argument that this grievance is not properly subject to arbitral review, argues that this becomes a jurisdictional point which attracts a standard of review of correctness. Counsel for the Union, on the other hand, submits that the arbitrator was thereby engaged in the exercise of interpreting Article 2.01 of the collective agreement which attracts a reasonableness standard of review.

[58] I accept the submissions of counsel for the Union on this point. The arbitrator was essentially engaged in an interpretation of Article 2.01 in deciding whether the matter was subject to arbitral review. His conclusion that the grievance under Article 2.01 was subject to arbitral review was eminently reasonable. Indeed, even if this were to be properly characterized as a jurisdictional question attracting a standard of correctness, I would nonetheless find that his conclusion on this preliminary point is correct. I am reinforced in this conclusion by the following passage from the well-known text *Canadian Labour Arbitration* (4th ed.) by Brown and Beatty at p.4-65:

Where the action by management is the promulgation of a rule or policy, such a rule will generally be subject to arbitral review for its reasonableness whether or not there is an express proviso in the agreement requiring that management make only reasonable rules. As well, even in the absence of an express requirement of reasonableness, if the decision is made pursuant to an express discretionary power, usually that decision will be subject to some level of arbitral review. Indeed, whenever management makes a decision or takes an action in connection with directing its workforce or having an impact on working conditions, it is quite likely that an arbitrator will conclude that a collective agreement provision is affected, and he or she will review that decision for reasonableness, or on the basis that it not be “discriminatory, arbitrary, or in bad faith”, or that it further a “legitimate business interest”.

Does the arbitrator’s finding that HRM violated Article 2.01 of the collective agreement meet the standard of reasonableness?

[59] The application of the reasonableness standard has been thoroughly reviewed by the Nova Scotia Court of Appeal in two recent cases, namely, *Casino Nova Scotia v. NSLRB* 2009 NSCA 4 and *Maritime Paper Products, supra*. In the latter case, the following summary appears:

23. *In Casino Nova Scotia, this court elaborated on Dunsmuir's reasonableness test:*

[29] In applying reasonableness, the court examines the tribunal's decision, first for process to identify a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion, then second and substantively to determine whether the tribunal's conclusion lies within the range of acceptable outcomes.

[30] Several of the Casino's submissions apparently assume that the "intelligibility" and "justification" attributed by Dunsmuir to the first step allow the reviewing court to analyze whether the tribunal's decision is wrong. I disagree with that assumption. "Intelligibility" and "justification" are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to process (Dunsmuir, para. 47). They mean that the reviewing

court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes. Nova Scotia (Director of Assessment) v. Wolfson, 2008 NSCA 120, para. 36.

[31] Under the second step, the court assesses the outcome's acceptability, in respect of the facts and law, through the lens of deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime." This respects the legislators' decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. Dunsmuir, para. 47-49; Lake, para. 41; PANS Pension Plan [Police Association of Nova Scotia Pension Plan v. Amherst (Town), 2008 NSCA 74, leave to appeal denied by SCC Jan. 22, 2009], 2008 S.C.C.A. No. 442 para. 63; Nova Scotia v. Wolfson, para. 34.

24. The reviewing judge assessing reasonableness does not plot his own itinerary, but tracks the tribunal's reasoning path. Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247 at para. 47-55; Granite Environmental Inc. v. Nova Scotia (Labour Relations Board), 2005 NSCA 141 at para. 42-44; CBRM v. CUPE at para. 71-72. So the reviewing judge's first task is to chart the tribunal's reasoning.

[60] The arbitrator in the present case began his analysis with a discussion of privacy rights of employees in the bargaining unit. His view was that while a collective agreement does not create a right to privacy, that right exists nonetheless so that its exercise can be regulated by a collective agreement. The arbitrator stated that every employee comes into the bargaining unit with the right to some privacy, and that there is an accompanying right to protect it. The question, as he posed it, is how and on what basis the employer can argue that any portion of that

right has been surrendered by an employee in some manner.

[61] The arbitrator then noted the requirement for employer justification, meaning that the onus is on the employer to establish that its business interest outweighs the employees' privacy interest. He then referred to the interconnected proportionality criterion. Proportionality, he said, is a tool to assist in the assessment of whether justification has been made out and calibrates the intrusion to the interest protected. The more serious the intrusion, the heavier the burden will be, and *vice versa*. He expressly acknowledged that a privacy interest is a relative one.

[62] The arbitrator then proceeded to consider HRM's decision to install and operate the call recording system, both on the footing of the language of Article 2.01 of the collective agreement and, alternatively, the reasonableness tests in *Wexler* and *K.V.P.*

[63] In considering the breach or observance of Article 2.01, the arbitrator had no difficulty in finding that the installation and operation of the call recording system did invade the privacy of the call centre agents. Moreover, the arbitrator characterized the call recording system as a form of employer surveillance of its employees. Accordingly, he found that the employer was required to justify the infringement.

[64] Because the collective agreement contains no express provisions whatsoever with respect to call recording, the justification arguments by the employer were left to be made solely on the more general language of the agreement. The arbitrator framed the question for determination as being whether the invasion of privacy occasioned by the installation and operation of the call recording system represents an exercise of the rights reserved to management which is carried out in a fair and reasonable manner.

[65] The arbitrator then reviewed the arguments of justification made by HRM which he summarized as follows:

- It is the occupation of call centre agents to be on the telephone which is the main instrument by which they perform their duties;
- Because the customer service provided by call centre agents in taking the telephone calls is their job, those conversations are their work product;
- The installation and operation of the call recording system arises out of a need to supervise that work product;
- It is a management right and responsibility of HRM to ensure that its call centre agents are doing the work of HRM in a proper fashion;
- Because of the nature of their employment, the call centre agents have a sharply reduced expectation of privacy in their workplace.

[66] The arbitrator regarded these arguments of justification by HRM as intelligible and proper in all respects. He accepted that all of the employer objectives in installing the call recording system were genuine and was further satisfied that there was no hidden agenda nor bad faith on the part of HRM. The

arbitrator also conceded that HRM made a valid point about the nature of these employment positions and he appreciated that what they do has some impact on the level of privacy they reasonably can expect when answering calls on the Primary Line. The arbitrator further conceded that employees, by becoming call centre agents, voluntarily put themselves in a position where the employees' work product will be observed and monitored to some degree.

[67] In the end, however, the arbitrator was not persuaded by HRM's arguments of justification. In his view, those arguments failed to address, in an adequate way, the balancing exercise which comes with reconciling competing values. He considered that the call centre recording system was a disproportionate intrusion on the privacy interests of the call centre agents.

[68] The arbitrator then addressed his second difficulty with the justification arguments of HRM. He wrote that for the employer to succeed, there must be a business case of a weight sufficient to support the conclusion that the employer's action meets the "fair and reasonable manner test" of Article 2.01(c). On his view of the evidence, there could be no conclusion that the installation and operation of the system was either fair or reasonable.

[69] With respect to the fairness requirement, the arbitrator held that HRM failed to provide reasonable notice to the Union of its intention to install and operate a call recording system. He attributed that failure to HRM as a breach of the Article 2.01(c) duty of fairness (which I will address later in this decision).

[70] The arbitrator then went on to assess the reasonableness of the exercise of management rights in implementing the call recording system, having regard to its overall operation, the relevant surrounding circumstances, its effect, and its connection with legitimate employer purposes. In so doing, the arbitrator acknowledged that the call recording system as implemented was not as intrusive as it might have been, considering that only calls on the Primary Line were to be recorded. That eliminated the recording of personal calls made by the call centre agents on the Secondary Line, as well as some business calls. Moreover, the surveillance was not covert, and occurs only in the workplace.

[71] After engaging in this balancing of interests approach between the employer's legitimate business objectives and the nature and degree of the intrusion into the employees' privacy, the arbitrator concluded as follows:

However, all of that being said, these considerations are simply overwhelmed by the reach of the call recording system itself. The call recording system as operated is permanent, mandatory and intrusive in the extreme. All calls on the Primary Line are recorded, in permanent form, all of the time, during the [call centre agents] entire workday, every day. To a very real extent, the [call centre agents] have become not only a permanently watched population, but a permanently recorded population, for most of their functions, for the whole of every work day. Justifying such a system of such thoroughgoing intrusion as reasonable requires strong evidence. It just isn't there in this case.

I have assessed the business case for this system and have commented in detail on it, on what it was designed to do and how it has operated; I repeat those comments here.

Looking at the whole of the evidence, and weighing it as best I can, I have concluded that the installation and operation of the [call centre] recording system cannot meet the article 2.01(c) test, which requires that management

act in “a fair and reasonable manner”. On the facts, in operation and in prospect, it is an invasion of the [call centre agents] privacy which is significantly out of proportion to any benefit, potential or actual, gained or to be gained, by the employer. The installation and operation of the call recording system, in very substantial respects, on the facts I have found, was a solution without a problem. I therefore find it to be a violation of the Article 2.01 duty.

[72] Following this passage, the arbitrator stated that if he was wrong in his construction of the language of Article 2.01, he would base his finding on the alternative grounds that HRM had not met the reasonableness tests established respectively by *Wexler* and *K.V.P.* and thereby violated the agreement. The result of this finding was that the grievance, insofar as it alleged a violation of the agreement, was allowed.

[73] In the final outcome, having found that the installation and operation of the call recording system violated both Part XX of the MGA and Article 2.01(c) of the collective agreement (as well as the common law reasonableness requirement), the arbitrator ordered, by way of remedy, that the recording of calls at the call centre cease, that all recorded conversations retained by HRM be destroyed, and that none of the stored recorded conversations be used or disclosed.

[74] In reviewing an arbitrator’s decision for reasonableness, the inquiry by the court must extend to both the reasons given and the outcome. As Justice Fichaud summarized it in *Maritime Paper*, referring to *Dunsmuir*, the first step relates to process, not outcome. The reviewing court asks whether it can understand how the tribunal reached its conclusion, and whether the tribunal’s decision affords the raw material for the reviewing court to perform its second function of assessing

whether the tribunal's conclusion occupies the range of reasonable outcomes.

[75] I will first review the arbitrator's finding that HRM breached the Article 2.01(c) duty of fairness by its failure to provide the Union with reasonable notice of the implementation of the call recording system.

[76] HRM's notice of that intention was provided to the Union on January 26, 2007 which lead to the subject grievance being filed on February 19, 2007. The call recording system was not actually implemented until August 3, 2007.

[77] It appears from the arbitrator's award that he thought the implementation of the system took place in April, 2007. This would have made for less than three months' notice being given to the Union when in fact, the Union was given more than six months' notice by HRM. This misapprehension of the facts makes the arbitrator's finding of a breach of the Article 2.01(c) duty of fairness unreasonable. From a process point of view, a period of notice in excess of six months cannot reasonably be said to have been unfair.

[78] It is the arbitrator's treatment of the reasonableness issue that gives the court much more difficulty on judicial review. I am satisfied that the arbitrator followed the proper approach in engaging in a balancing of interests of the employer and employees, comparing as he did the nature and degree of the intrusion into the employees' privacy with the legitimacy of HRM's business objectives in implementing the call recording system (see *Brown and Beatty, supra*, at section 7:3625). After engaging in that analysis, the arbitrator found that HRM's business

case for the call recording system was outweighed by the infringement of the privacy rights of the call centre agents to the point where it violated the “fair and reasonable” language of Article 2.01. Inherent in that finding was his characterization of the call recording system as a form of surveillance that was permanent, mandatory and intrusive in the extreme.

[79] The difficulty facing the court is that I am not in agreement with the arbitrator’s finding that HRM’s implementation and operation of the call recording system was an unreasonable exercise of management rights in the circumstances of this case or that it constituted a breach of the “fair and reasonable” language of Article 2.01. I recognize that the court ought to be circumspect about re-engaging in its own balancing of interests analysis because it is not the standard of correctness to be applied but rather the standard of reasonableness. The difficulty lies in the question of when an interpretation of a collective agreement that a judge on judicial review does not agree with, becomes an unreasonable one.

[80] In answering that question in the present case, I am drawn to the recent decision of the Alberta Court of Appeal in *United Nurses of Alberta, Local 301 v. Capital Health Authority (University of Alberta)* [2009] A.J. No. 569. On a judicial review in that case, the Chambers judge clearly disagreed with the interpretation of the collective agreement made by the arbitration board and ultimately set aside its award. On appeal, the Court commented as follows (at para 9):

It is obvious from her carefully crafted decision that the chambers judge was wrestling with the difficult issue of when a matter of interpretation of a collective agreement

warrants judicial intervention. Or put another way, when does an incorrect interpretation (in a reviewing judge's view) become an unreasonable one? Guidance from the Supreme Court of Canada in *Dunsmuir and Khosa* reminds us that the relevant inquiry is not whether the reviewing judge agrees with the interpretation but whether the interpretation given was reasonable; that is, were the reasons intelligible and transparent and the result one of the possible legal outcomes available, not necessarily the most likely.

[81] Earlier in this decision, I have charted at some length the arbitrator's path of reasoning in reaching the conclusion that he did in his interpretation of Article 2.01. Although his reasoning analysis in balancing the privacy interests of the employees over the legitimate business interests of the employer is, in my view, less compelling than the alternative result, it is at the same time intelligible and transparent and falls within the range of the possible legal outcomes available. Accordingly, his award survives the reasonableness standard of review on the second issue and does not warrant judicial intervention.

CONCLUSION

[82] The arbitrator was incorrect in finding that the implementation and operation of the call centre recording system constituted a violation of the privacy provisions in Part XX of the MGA.

[83] The arbitrator's finding that the implementation and operation of the call centre recording system was an unreasonable exercise of management rights and constituted a breach of the "fair and reasonable" language of Article 2.01 survives the reasonableness standard of review which therefore does not warrant judicial

intervention in the overall result.

[84] There shall be no costs awarded on this judicial review as agreed by counsel.

J.

