NOVA SCOTIA COURT OF APPEAL

Citation: ***Cape Breton Island Building & Construction Trades Council v. Nova Scotia Power Inc.***, 2012 NSCA 111

Date: 20121101
Docket: CA 337159
Registry: Halifax

Between:

Cape Breton Island Building & Construction Trades Council, International Union of Operating Engineers, Local 721, United Association of Journeymen & Apprentices of the Plumbing, Steamfitting & Pipefitting Industry of the United States and Canada, Local 682

Appellants

v.

Nova Scotia Power Inc., International Brotherhood of Electrical Workers, Local 1928, Nova Scotia Construction Labour Relations Association Limited (Construction Management Bureau), and the Construction Industry Panel of the Labour Relations Board (Nova Scotia)

Respondents

Judges:	Hamilton, Fichaud and Beveridge, JJ.A.
Appeal Heard:	September 19, 2012, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Fichaud, J.A.; Hamilton and Beveridge, JJ.A. concurring
Counsel:	Raymond A. Mitchell, for the appellants
	Brian G. Johnston, Q.C. and Richard M. Dunlop, for the respondent Nova Scotia Power Inc.

Malcolm D. Boyle, for the respondent Nova Scotia Construction Labour Relations Association Limited (Construction Management Bureau)

A. Robert Sampson, Q.C. and Robert F. Risk for the respondent International Brotherhood of Electrical Workers, Local 1928

The respondent Construction Industry Panel of the Labour Relations Board (Nova Scotia), not appearing

Reasons for judgment:

[1] In 2003, Nova Scotia Power Inc. modified the waste water treatment system at its Thermal Treatment Plant in Lingan, Cape Breton. For part of the work, Nova Scotia Power used members of IBEW, Local 1928. Local 1928 had been certified in 1955 and has since performed maintenance work at Nova Scotia Power, in what is now characterized as a non-construction bargaining unit under Part I of the *Trade Union Act*. The Cape Breton Island Building & Construction Trades Council and its affiliates, Operating Engineers Local 721 and Plumbers and Pipefitters Local 682, took the position that this work should have been assigned to members of construction industry unions further to the provisions of the Industrial Projects Collective Agreement negotiated between the Council and its affiliates, on the one hand, and the accredited employers' organization under Part II of the *Trade Union Act*.

[2] Nova Scotia Power applied to the Construction Industry Panel of the Labour Relations Board for an order that Nova Scotia Power was not bound by Part II construction collective agreements respecting the assignment of the disputed work. Nova Scotia Power also sought a ruling that the Council and its affiliates had abandoned any bargaining rights respecting Nova Scotia Power. Local 1928 filed a complaint to the Labour Relations Board for the determination of its jurisdictional dispute with the construction Locals. The Panel determined that (1) Nova Scotia Power was not bound by any Part II construction collective agreement respecting the disputed work, (2) the Council and its affiliates, other than Local 721, had "abandoned" any rights respecting Nova Scotia Power, and alternatively (3) based primarily on past practice, the inter-union jurisdictional dispute over the disputed work should be resolved in favour of Local 1928.

[3] The Council, Locals 721 and 682 applied for judicial review. The Supreme Court of Nova Scotia dismissed their application.

[4] The Council, Locals 721 and 682 appeal further, and ask the Court of Appeal to overturn the judge's ruling and set aside the Panel's decision. The submissions in the Court of Appeal principally addressed (1) the interpretation of Part II of the *Trade Union Act,* governing the construction industry, particularly the provisions known as the "*Steen* Amendments" to the *Act*, (2) the Panel's views on labour relations jurisprudence respecting "abandonment", and (3) the

fairness of the Panel's process respecting the jurisdictional dispute. From a broader perspective, the case poses the question - How to resolve an overlap or tension between certified or accredited rights under Parts I and II of the *Trade Union Act*.

The Modifications to NSP's Facility

[5] The respondent Nova Scotia Power Incorporated ("NSP") produces and supplies electrical energy throughout Nova Scotia. NSP is the privatized successor, since 1992, to the former Nova Scotia Power Corporation, a Crown corporation. Nova Scotia Power Corporation had succeeded the still earlier Nova Scotia Light and Power Company Limited. NSP owns and operates a power production facility at Lingan, Cape Breton. That facility has four units constructed between 1979 and 1984. Each unit has a capacity of 150 megawatts. The total of 600 megawatts is about 30% of Nova Scotia's electrical production.

[6] The Lingan facility generates waste water from both the power generation process and storm water run-off. The waste water must be treated before it is released into the ocean. The treatment is to reduce the water's acidity and iron content.

[7] There has been treatment of waste water at the Lingan facility since its commissioning in 1979. NSP had modified the Waste Water Treatment System between 1979 and the 2003 modifications that are the subject of this litigation. The Panel's decision under review [L.R.B. No. 2421C, para 24] describes those pre-2003 modifications.

[8] The 2003 modifications to Lingan's Waste Water Treatment System are described in the Panel's decision, para 25, that I will paraphrase. Before 2003, waste water was pumped into an ash lagoon, where contaminants settled and lime was added before the waste water was discharged by a pipeline into the ocean. The lagoon had shrunk over the years from settlement of iron and ash laydown. This led to a risk of overflow, particularly after a heavy rainfall. The Department of Environment requested that NSP remedy the problem to satisfy the Department's effluent standards. Unless there were modifications, the Lingan facility would have been unable to continue to produce 600 megawatts without offending the regulatory requirements. The 2003 modifications involved valving

and piping to divert waste water to new treatment tanks, settlement bins and a holding pond, along with installation of compressors, air blowers, agitators and associated electrical work.

[9] The 2003 modifications cost $5.5 million. Of this, $395,000 was the cost of the work that is disputed in this proceeding. Later (para 20 ff) I will discuss which unionized workforce performed the work. First, some background on the parties and their functions in labour relations.

The Parties and the Industrial Agreement

[10] Part II of the *Trade Union Act*, R.S.N.S. 1989, c. 475, as amended ("*Act*") governs labour relations in the construction industry. Part II provides for certification of a union or a council of unions to represent employees in the construction industry and, across the table, accreditation of an employers' association to represent unionized employers in the construction industry. This generates sectoral bargaining in the construction industry.

[11] The model recognizes that in the construction industry the usually craft based, and sometimes changeable workforce moves among job sites for construction projects of different owners. Section 92(c) says that, in Part II, " 'construction industry' means the on-site constructing, erecting, altering, ... of buildings, structures, ... or other works". Part I of the *Act*, on the other hand, regulates the employer centric model of bargaining where one employer's workforce, that may include tradesmen, is dedicated to that employer's operations, or shop work. This distinction between site work and shop work was confirmed in the Labour Relations Board (Construction Industry Panel)'s 1977 Decision that accredited the construction employers' bargaining agent (quoted below, para 18).

[12] In 2009, at the date of the decision under judicial review, the Construction Industry Panel ("Panel") of the Labour Relations Board of Nova Scotia ("Board") administered Part II. Since that decision, the *Labour Board Act*, S.N.S. 2010, c. 37 has folded the administration of Part II into the jurisdiction of a unified "Labour Board". The decision under review in this litigation was issued by the former Panel. These reasons will refer to the Panel of the Labour Relations Board, not to the new Labour Board.

[13] In 1955, the respondent Local 1928 of the International Brotherhood of Electrical Workers ("Local 1928") was certified for a unit of employees employed by a corporate predecessor of NSP. Local 1928 was certified under former legislation that is equivalent to the current Part I of the *Act*. Local 1928 represents an NSP in house unit of workers who perform what, in this proceeding, has been classified generally as maintenance work. The Panel's decision, that is under review, stated:

> 13. Local 1928 was certified not under Part II - Construction Industry - but under what is now Part I of the Act. There is no dispute that Local 1928 was certified by the Board through L.R.B. No. 359 dated May 28, 1955 against Nova Scotia Light and Power Company Limited - a predecessor employer to NSP. The parties are all well aware of the history whereby Local 1928 came to represent, at all power plants of NSP, workers who fell within one or more of 4 categories, viz:
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> (a) Operators - They are power engineers and operate the plants;
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> (b) Technicians - They perform electrical instrumentation work and chemical process work;
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> (c) "Certified" Maintenance Workers - They are mechanics, welders, pipefitters, millwrights and ironworkers who hold a certification either from a college or a trade school; and
>
> (d) Utility Workers - They possess some trade skills, eg., carpenters and labourers.
>
> ...
>
> 15. We note, too, that Local 1928 has entered into collective agreements with NSP in 1968, 1974, 1975, 1976, 1977, 1978, 1980, 1983, 1984, 1986, 1989, 1993, 1995, 1998, 2001 and 2004.
>
> ...
>
> 40. Equally clearly, Local 1928 was not certified for a craft unit ...
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> [Panel's underlining]

[14] The appellant Cape Breton Island Building & Construction Trades Council ("Council") is an association of twelve construction local unions who are affiliated with international unions. Section 95 of the *Act* permits the certification of a council of trade unions to be certified as a bargaining agent for employees in the construction industry under Part II. This Council has not been certified as a bargaining agent.

[15] Among the Council's affiliates are the appellant Local 721 of the International Union of Operating Engineers ("Local 721") and the appellant Local 682 of the United Association of Journeymen & Apprentices of the Plumbing and Steamfitting and Pipefitting Industry of the United States and Canada ("Local 682").

[16] Local 721 represents employees in a construction industry bargaining unit of survey crew personnel who are employed by NSP. On January 11, 1978, by Decision LRB No. 467C ("Local 721 Certification Decision"), the Panel certified Local 721 under Part II against Nova Scotia Power's predecessor for a unit of survey workers in on-site construction on Cape Breton Island. The Panel's decision, in the present case, says:

> 3. ... Order 467C explicitly determined that NSP was a "unionized employer" per Section 92(k) [in Part II] of the Act ... as to work performed by survey crew members at Wreck Cove and Lingan. However, this Order expressly noted that this unit did not include employees "engaged in normal maintenance and development because in the opinion of the Panel, they are not employed in the construction industry."

The dispositive provision of the Panel's Local 721 Certification Decision, in 1978, said:

> THEREFORE the Construction Industry Panel of the Labour Relations Board (Nova Scotia) does hereby certify the International Union of Operating Engineers, Local 721, Lower Sackville, Nova Scotia, as the Bargaining Agent for a Bargaining Unit consisting of all employees of the Nova Scotia Power Corporation engaged as Survey Crew Members in on-site construction work on Cape Breton Island, Nova Scotia, but excluding all other employees and those employees excluded by Clauses (i) and (ii) of Paragraph (e) of Section 89 [now s. 92 - management and professional] of the Trade Union Act. Survey Crew Members include Chainmen, Rodmen, and Instrumentmen and Party Chiefs, when

> they are not exercising functions within the meaning of Clauses (i) and (ii) of Paragraph (e) of Section 89 of the Trade Union Act. This Unit does not include employees engaged in normal maintenance and development because, in the opinion of the Panel, they are not employed in the construction industry. Specifically in the case of the Nova Scotia Power Corporation normal maintenance and development includes the construction of transmission lines and sub-stations.

[17] Local 682 is a Part II construction union. It is neither certified for NSP nor voluntarily recognized by NSP.

[18] The respondent Nova Scotia Construction Labour Relations Association Limited was formerly known as the Construction Management Bureau Limited. I will refer to it as the "Bureau", for consistency, because it is so styled in the decisions of the Panel and reviewing judge. The Bureau is the accredited bargaining agent for unionized construction employers in the Industrial/Commercial sector of Cape Breton [Decision LRB # 428C of the Construction Industry Panel, dated April 5, 1977 ("Accreditation Decision")], under Part II of the *Act*. The Accreditation Decision named Local 721 among the Union parties and, in the Appendix, named Nova Scotia Power Corporation (NSP's predecessor) as # 80 in the "Employers subject to this Accreditation Order". The Accreditation Decision said:

> (2) Employers Included In and Excluded From the Bargaining Unit
>
> (a) There are many employers whose businesses have two aspects. They operate a business in the construction industry and a non-construction industry business as well. Where the construction aspect of such an employer's operation falls within the unit accredited the employer will lose to the accredited bargaining agent the right to bargain collectively with the bargaining agent of his construction employees, but his relationship with his other employees is unaffected by the accreditation order. Where there is any crossing over by employees from one group to the other provision can be made for that fact in any collective agreements involved.
>
> Closely related are the cases of employers who engage employees in both shop work and on-site construction work. The Panel is constrained by the definition of "construction industry" in Section 89 (c) [now 92(c)] of the Trade Union Act to conclude that shop work is not work in the construction industry. It follows that

> such employers will lose their bargaining rights to the Applicant [Bureau] only in respect of employees who work on-site.

[19] The Bureau, the Council and twelve signatory Locals, including Locals 721 and 682, executed a "Cape Breton Island Industrial Projects Collective Agreement" effective July 1, 2002 for a term ending June 30, 2005 ("Industrial Agreement"). That term included the period covered by the disputed work in this case. The Industrial Agreement contained what the Council describes as "sectoral" provisions, and NSP terms as "Bound to One, Bound to All Articles":

> 3.01 When employees are required, the employer shall request the Unions to furnish competent and qualified workmen in the classifications listed in the Craft Schedules appended hereto and, insofar as possible, all workmen, so furnished will be recruited from the jurisdiction of the Local Union. (The referral slip system may be used at the option of the Local Union, if the referral slip is used it shall show the employee's permanent address.) If after a period of forty-eight (48) hours, excluding Saturdays, Sundays and designated holidays, from the time the request is made the Unions are unable to supply the quantity and/or skills required, the employer may procure such men elsewhere. All employees secured from other sources will be cleared by the appropriate Union before commencing work for the employer. The provisions of Article 3.01 shall be modified according to the Trade Appendices of this agreement.
>
> 3.02 When it is alleged that an employer has hired non-unionized employees to perform work that would normally be subject to the terms and conditions of this Collective Agreement (excluding speciality work not normally performed by members of a Trade Union signatory to this Agreement), and/or when an employer sub-contracts such work to non-unionized forces, then it is agreed that the Union whose members would normally have performed such work shall have the right to refer the matter to grievance and/or arbitration, and to claim and collect damages for any violation(s) arising from a failure to employ Union members in accordance with the hiring and sub-contracting provisions of this Collective Agreement.
>
> 3.03 The employer agrees that employees employed within categories covered by the terms of this Collective Agreement shall be required as a condition of continued employment to become and remain a member of the appropriate signatory Union. Forms authorizing the check-off of Union dues and initiation fee will be supplied by the Union to the employer. The employer will distribute these forms to the employee which will be

affected, collect them when signed, retain the check-off authorization and forward them to the Union(s) at the proper address on file.

23.01 The employer agrees that it will not sub-contract work to any Contractor who is not under the Collective Agreement with the appropriate signatory Building Trades Council Union(s) excluding speciality contracts not normally performed by the above Trades Council Union(s).

23.02 When it is alleged that an employer has hired non-unionized employees to perform work that would normally be subject to the terms and conditions of this Collective Agreement (excluding speciality work not normally performed by members of a Trade Union signatory to this Agreement), and/or when an employer sub-contracts such work to non-unionized forces, then it is agreed that the Union whose members would normally have performed such work shall have the right to refer the matter to grievance and/or arbitration, and to claim and collect damages for any violation(s) arising from a failure to employ Union members in accordance with the hiring and sub-contracting provisions of this Collective Agreement.

The Work Assignments

[20] I will return now to the 2003 modifications of the Lingan Plant's waste water treatment system. The Panel's decision made the following findings as to NSP's assignment of work:

26. Who Performed the Modifications?

(a) The total cost of the Modifications was $5.5 million of which all except $395,000 was performed by unionized contractors employing members of various construction trade unions. Thus 93 % of the $5.5 million cost of the Modifications was paid to unionized contractors and only 7 % ($395,000) spent internally for work performed by members of Local 1928 and/or members of the labour pool.

27. The work performed by members of Local 1928 and/or by members of the labour pool that is claimed as Section 92(c) [ie "construction industry"] Work by the Council, the Bureau, Local 682, Local 1852 and Local 721, comprised:

(i) the mechanical installation of pipes, valves, pumps, compressors, air blowers and agitators; and

> (ii) associated electrical work, viz., the cabling between the various motor control centres to the motors in the plant together with control system wiring.
>
> We shall refer hereafter to this work as "the Disputed Work". [Panel's underlining] It was performed by members of Local 1928 who possessed and utilized welding and pipefitting skills or by members of the labour pool (who also were members of Local 1928). For the majority of the Disputed Work, according to Conrod, there were 9 members of Local 1928 who were regular employees of NSP and 16 who were from the labour pool. At its peak, a total of 36 NSP employees were involved in the Modifications, all of whom were members of Local 1928.

[21] The Panel's decision (paras 30-34) describes the "labour pool". The labour pool was in place informally at Lingan since 1980, until 1991 when it was formally embodied in the collective agreement between NSP and Local 1928. The labour pool comprises either laid off employees who belong to Local 1928, or term employees who belong to Local 1928 or "off the street" workers who pay working dues to Local 1928.

[22] As did the Panel, I will describe this work, performed by Local 1928 and the labour pool for NSP's 2003 modifications to Lingan's waste water treatment system, as the "Disputed Work".

[23] The Panel's decision (para 28) said that the remaining work for the 2003 modifications to Lingan's waste water treatment system - *i.e.* work that is not disputed because it was performed by the unionized Part II construction workforce - included: all the civil work involving carpenters, labourers, iron workers and sheet metal workers (preparation of the ground area, the exterior foundation, the holding pond, the structure, the interior floor slab, the cement bases for the tanks, construction of the tanks), installation of cables, motor control and electrical cabinets, ventilation system and tanks, and erection of mezzanine steel walkways, stairways and pipe racks.

The Dispute

[24] The Council and its affiliates held the view that NSP should have assigned the Disputed Work to construction unions. On May 5, 2003, the Council, on its

own behalf and for Locals 721 and 682, filed a grievance against NSP "for its failure to comply with the provisions of the industrial agreement at the Water Effluent construction Project at Lingan". The grievance's particulars included:

> NSPI is employing persons who are not members of the Council, and who do not belong to affiliate unions of the council, to perform construction work at the Water Effluent construction Project at Lingan, Nova Scotia. On April 17th, and 25th, 2003, the Council has attempted to persuade NSPI to cease and desist from this practice but NSPI refuses to do so. On April 25th, 2003, NSPI expressed an intention, amongst other intentions, to perform mechanical construction work remaining on the project with in-house Part I NSPI employees / IBEW 1928 union members, and to the best of the Council's information, NSPI is doing so.

[25] There followed three applications that engaged the Panel, in the proceeding that has now reached this Court.

[26] First, NSP applied to the Panel under s. 98(8) of the *Act* requesting that the Panel "declare and order that Nova Scotia Power Inc. is not and never has been bound by past or present collective agreements between the Respondent Trades Council, the Respondent Unions [Locals 721 and 682] and the Construction Management Bureau Limited". I will term this the "Section 98(8) Application". At the relevant time, s. 98(8) said:

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

[27] On June 3 and 5, 2003, the Bureau and the Council filed similarly worded Responses to NSP's Section 98(8) Application. The theory propounded in the Responses became the focus of submissions on the principal issue in the subsequent litigation before the Panel, on judicial review and in this Court (discussed below, First Issue). The Responses included:

> 2. As to paragraph 4, the Respondents state that the Applicant is bound by the Respondents' Collective Agreement by virtue of Sections 98 and 100(1) of the *Trade Union Act* for the following reasons:

- The Construction Management Bureau ("the Bureau") is accredited as the sole collective bargaining agent for all unionized employers in the industrial and commercial sector of the construction industry on Cape Breton Island, Nova Scotia, pursuant to the Accreditation Order, LRB No. 428C, April 5, 1977. The Appendix attached to the Accreditation Order provides a Schedule "A" list of employers. Therein Nova Scotia Power Corporation is listed as Employer No. 80.

- Further, by LRB No. 467C dated January 11, 1978 the IUOE, Local 721, was certified as the bargaining agent for a bargaining unit consisting of all employees of the Nova Scotia Power Corporation engaged as survey crew members in on-site construction work on Cape Breton Island, Nova Scotia, with a number of exclusions.

- Pursuant to subsection 98(1) of the *Trade Union Act*, upon accreditation, all bargaining rights and duties under the Act of employers for whom the accredited employer's organization is or becomes a bargaining agent pass to the accredited employer's organization. Pursuant to subsection (3) where an employer's organization has been accredited and thereafter an employer in the Sector and area covered by the Accreditation Order becomes subject to bargaining rights and duties with a union or council of Trade Unions in accordance with subsection (6) of Section 98, those bargaining rights and duties pass to the accredited employer's organization.

- Therefore, the Applicant is bound by the Collective Agreement between the Bureau, the Respondent Council and Signatory Building Trades pursuant to the Accreditation Order and in particular to IUOE, Local 721 by virtue of the Certification Order of the IUOE, Local 721 on January 11, 1978.

...

4. As to Paragraph 6, the Respondents' say that the Applicant is bound by the Collective Agreement between the Bureau, the Council and various Trade Unions. In the case of the IUOE, Local 721, the Applicant is bound by virtue of LRB No. 467C. In the case of the United Association, Local 682, while the Applicant is not bound to the Respondent United Association, Local 682 in accordance with subsection 98(6) of the *Trade Union Act*, the Applicant is bound to hire unionized employees or unionized subcontractors to carry out work in the Industrial Sector, including the Respondent United Association,

> Local 682, pursuant to Article 3.02 of the Industrial Agreement. The Act specifically authorizes the negotiation of articles similar to Article 3.02 in subsection 98(7).

[28] Second, on May 27, 2003, further to s. 52(1) of the *Act*, Local 1928 filed with the Board a Complaint Respecting a Jurisdictional Dispute. The Complaint named the Council, Locals 721 and 682 and NSP. The Complaint included:

> **6. The material facts upon which the Complainant proposes to rely at the hearing:**
>
> The nature of the disputed work now being carried out by Local 1928 in connection with the water effluent system, situate at Lingan is **not** work in the construction industry.
>
> **7. The relief to which the Complainant claims:**
>
> A declaration that the disputed work is not construction work and therefore falls within the jurisdiction of Local 1928.
>
> [Underlining in original]

I will call this the "Jurisdictional Application". Section 52(1) of the *Act* said that where there is reason to believe that a work stoppage may occur "as the result of a jurisdictional dispute", the Board may issue an interim order, which the Board may later confirm further to s. 52(4).

[29] Third, on October 6, 2003, NSP applied to the Panel, further to s. 19(1) of the *Act*, requesting that the Panel reconsider its Accreditation Decision (L.R.B. No. 428C) and its Local 721 Certification Decision (L.R.B. No. 467C), on the basis that the Council and its affiliates had abandoned any bargaining rights they previously had respecting NSP. I will term this the "Abandonment Application". Section 19(1) says "the Board may, if it considers it advisable so to do, reconsider any decision or order made by it under this Act, and may vary or revoke any decision or order made by it under this Act."

[30] On May 30, 2003, NSP, the Council, Locals 721, 682 and 1928, and the Bureau signed an agreement respecting the procedure for the hearing of these applications before the Panel. The agreement included the following:

WHEREAS the parties hereby agree:

1. To request the Construction Industry Panel of the Labour Relations Board (the "Panel") to hold in abeyance the issuance of an interim order under s. 52 in relation to the jurisdictional dispute complaint filed by IBEW, Local 1928.

2. To immediately submit to the Panel chaired by Darby or Archibald for its determination as soon as reasonably possible NSPI's s. 98(8) application.

3. If the Panel does not grant the relief sought by NSPI in its s. 98(8) application, then the Parties will immediately submit to the same Panel for determination, the IBEW, Local 1928 jurisdictional dispute complaint.

The Panel's Ruling

[31] The Panel, chaired by Mr. Peter Darby, conducted untranscribed conference calls, and heard testimony over many days. The pleadings, transcripts, exhibits and submissions comprise twelve volumes. On February 25, 2009, the Panel issued a Decision (L.R.B. No. 2421C). The Decision summarized its conclusions:

THEREFORE the Construction Industry Panel of the Labour Relations Board determines that:

1. the Cape Breton Island Building & Construction Trades Council, ("the Council"), having never been certified as a "Council of Trade Unions" pursuant to Sections 95(6) and (7) of the Trade Union Act ("the Act") it has no legal standing as such but has standing as agent for the signatory construction trade unions;

2. Nova Scotia Power Inc. has the right pursuant to Section 98(8) of the Act to determine whether it was or is bound by any collective agreement, particularly but not limited to the Industrial Agreement made between the Construction Management Bureau ("the Bureau") and the Council as agent for the 12 - 14 signatory construction trade unions;

3. Nova Scotia Power Inc. is not subject to the Accreditation Order because of it being a party, (along with the various construction trade unions), to two (2) project agreements, viz., the Point Tupper Unit No. 2 agreement and the Wreck Cove agreement bound by either of two project

agreements, which preceeded [sic] the accreditation order 1977, namely the Point Tapper unit No. 2 or the Wreck Cove project;

4. Nova Scotia Power Inc. is not bound by L.R.B. No. 428C dated April 5, 1977 (the "Accreditation Order") except with respect to the certification of the International Union of Operating Engineers, Local 721 ("Local 721") L.R.B. No. 467C dated January 11, 1978 for a unit of survey crew members only;

5. Articles 3.01, 3.02, 3.03, 23.01 and 23.02 of the Master Agreement, of which the collective agreement among the Bureau and the Council as agent for Local 721 is a part, has no application to members of Local 1928 and labour pools "A" and "B";

6. The Council as agent for the various signatory construction trade unions and those construction trade unions have abandoned their "right" to perform such part, if any, of the Disputed Work that was or may have been or is or will be in future Section 92(c) Work;

7. Despite the fact that the International Brotherhood of Electrical Workers Local 1928, ("Local 1928"), was certified under Part I of the Act, the Panel has jurisdiction to determine which union, that is, a Part 1 "Maintenance bargaining unit" union (Local 1928) or the various construction trade unions is entitled to perform the Disputed Work;

8. Local 1928 is not a construction trade union and thus apart from the Disputed Work and analogous work is not entitled to perform Section 92(c) Work;

9. In the event that the Panel's conclusions with respect to the application made under Section 98(8) of the Act are overturned on judicial review the agreement then, pursuant to an agreement among the parties and the Local 1928 was that the jurisdictional dispute between Local 1928 and the Council, the Bureau and the construction trade unions would require a decision, that decision is that because of a long standing area past practice the performance of the Disputed Work and any analogous work that Local 1928 members have been performing over the years is awarded to Local 1928.

In the Analysis I will review the Panel's reasons for these conclusions.

The Judicial Review

[32] The Council and Locals 721 and 682 applied to the Supreme Court of Nova Scotia for judicial review of the Panel's decision. On May 11, 2010, Justice Hood heard the application. On August 26, 2010, the judge issued a decision (2010 NSSC 333), followed by an Order on March 9, 2011. The judge dismissed the application, with costs of $6,000 to NSP and $4,500 plus disbursements to Local 1928. The judge determined: (1) the standard of review was reasonableness, (2) on NSP's Section 98(8) and Abandonment Applications, the Panel's reasons were transparent and intelligible and its conclusions occupied the range of acceptable outcomes, and (3) as NSP succeeded under s. 98(8) and with the Abandonment Application, it was unnecessary to address the judicial review of the Panel's determination of the Jurisdictional Application.

[33] The Council and Locals 721 and 682 appealed to the Court of Appeal.

Issues

[34] The Notice of Appeal lists three grounds, that were repeated in the appellants' factum:

> 1) The Honourable Justice erred in law in finding that the Construction Industry Panel of the Labour Relations Board was reasonable in its interpretation and application of Section 98(7) of the *Trade Union Act* of Nova Scotia.
>
> 2) The Honourable Justice erred in law in finding that the Construction Industry Panel of the Labour Relations Board was reasonable in applying a doctrine of abandonment to bargaining rights in the construction industry.
>
> 3) The Honourable Justice erred in law in finding that the Construction Industry Panel of the Labour Relations Board was reasonable in assigning work in the construction industry to the Respondent, International Brotherhood of Electrical Workers, Local 1928.

When I refer to the "Council's submission", I mean the submission advanced jointly by the Council, and Locals 721 and 682.

Standard of Review

[35] The Court of Appeal applies correctness to the decision of the reviewing judge on issues of law.

[36] The parties agreed, as do I, that the standard of review to the decision of the Panel is reasonableness. *Casino Nova Scotia v. Nova Scotia (Labour Relations Board)*, 2009 NSCA 4, paras 26-28, and authorities there cited.

[37] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, Justice Abella for the Court elaborated on the meaning of "reasonableness":

> [11] It is worth repeating the key passages in *Dunsmuir* that frame this analysis:
>
> > 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. [Justice Abella'a emphasis]
>
> > . . . What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in respect for governmental decisions to create administrative bodies with delegated powers" . . . . [paras. 47-48.]

...

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> [17] The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[38] Put simply, reasonableness is neither acclamation by rote nor a euphemism for the court to impose its own view. Rather the reviewing court respects the

Legislature's designation of a decision maker by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of possible outcomes.

[39] In determining whether the tribunal's decision occupies the range of possible outcomes:

> The court then assesses the outcome's acceptability 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. The reviewing court does not ask whether the tribunal's conclusion is right or preferred. Rather the court tracks the tribunal's reasoning path, and asks whether the tribunal's conclusion is one of what may be several acceptable outcomes.

Archibald v. Nova Scotia (Utility and Review Board), 2010 NSCA 27, para 22, and authorities there cited.

First Issue - Section 98(8) Application

[40] Before reviewing the Panel's reasons, I will frame the issue as presented by the submissions and review the legislative evolution that pertains to the key provisions in the *Act*.

[41] The Council's submission to the Board on the Section 98(8) Application, was set out in its Response, quoted earlier (para 27). That submission also represented the position of Locals 721 and 682, and was endorsed by the Bureau. Those parties reiterated that theory to the reviewing judge. In the Court of Appeal, the Bureau endorsed the Council's submission. The submission's essential elements are:

> 1. In April 1977, the Panel's Accreditation Decision (above para 18), under Part II, accredited the Bureau as the bargaining agent for unionized employers in the Industrial/Commercial sector of the construction industry of Cape Breton. The Accreditation Decision named Local 721 as a party and Nova Scotia Power Corporation (NSP's predecessor) as one of the "Employers subject to this Accreditation Order".

2. In January 1978, the Panel issued the Certification Decision (above para 16) that certified Local 721, under Part II of the *Act*, as the bargaining agent for survey crew employees of NSP who perform on site construction work on Cape Breton Island.

3. Because of s. 98 of the *Act* [quoted below, para 47], NSP became bound by the provisions of any collective agreement between the Council, on behalf of Local 721, and the Bureau as the accredited employers organization. The Industrial Agreement, between the Council and Local 721, among other Locals, and the Bureau was such a collective agreement that binds NSP.

4. The Industrial Agreement's sectoral provisions (above para 19) require employers to hire unionized employees. The Council submits this means members of construction unions, such as Local 682, and not Part I certified unions such as Local 1928. According to the submission, it does not matter that Local 682 has no certification for, or voluntary recognition by NSP. The Council's factum to the Court of Appeal puts it this way:

> 37. These collective agreements, and in particular the Industrial Agreement 2002 relevant to this appeal, contains [*sic*] a sectoral clause, enabled by the *Act*. The relevant articles (3.01, 3.02, 3.03, 23.01 and 23.02) of the sectoral clause require generally, that an employer bound to the agreement must use union members supplied by the appropriate construction trade union to perform any of its work in the industrial section of the construction industry on Cape Breton Island. This article promotes stability in the construction industry on Cape Breton Island.

[42] To assess this submission, and its treatment by the Panel, it is necessary to start with the legislative evolution of ss. 98 and 100 in Part II of the *Act.*

[43] Before the 1994 amendments to the *Act* [the "*Steen* Amendments"] that I will come to, ss. 98(1), 98(3) and 100(1) said:

> 98 (1) Upon accreditation, all rights, duties and obligations under this Act of employers for whom the accredited employers' organization is or becomes the bargaining agent apply to the accredited employers' organization.
>
> 98 (3) Where an employers organization has been accredited and where, after the date of the accreditation order, a union is certified for or recognized in

> accordance with Section 30 by another employer in the sector and area covered by the accreditation order, the bargaining rights, duties and obligations of that employer, whether he becomes a member of the accredited organization or not, accrue to the employers' organization and the employer is bound by any collective agreement in effect or subsequently negotiated between the accredited employers' organization and a trade union or council of trade unions in that sector. ...
>
> 100 (1) Subject to subsection 2 of Section 98, a collective agreement entered into between an employers' organization and a trade union, trade unions or council of trade unions is binding upon the employers' organization, employers whose bargaining rights have been acquired by the employers' organization engaged in the construction industry in the sector and area covered by the accreditation order, the trade union, trade unions, council of trade unions and upon every employee within the scope of the collective agreement.

[44] Under Part I, a union is certified for a unit of a named employer and signs a collective agreement with that employer. Generally the collective agreement's union security provisions protect that union for that bargaining unit with that employer. So there is limited scope for confusion whether an employer is bound by a collective agreement.

[45] But sectoral bargaining under Part II occupies a more flexible matrix, and presents a job site with a confluence of craft based units, for which the collective agreements may be negotiated by an employers' organization. Over the years, there have been varying levels of uncertainty as to when an employer in Nova Scotia's construction industry is bound by a collective agreement reached between the Bureau and the construction unions. The Panel's decision (para 35) summarized that history by incorporating a passage from an earlier decision of the Panel in *Construction and Allied Workers Union (CLAC), Local 154 affiliated with the Christian Labour Association of Canada, and Ledcor Communications Ltd. and/or 360 Cayer Ltee.*, L.R.B. No. 2086C, dated November 3, 2000, ("*CLAC*"), para 42. The Panel in *CLAC* comprised the same Chair and members as in the current case. This incorporated passage from *CLAC* said:

> 42. ... From 1976 onwards until roughly 1988, the industry involved in accreditation - unions, employers, the Bureau and the Panel - believed that when a member of the Bureau "ticked" a trade division (now trade classification), it did so only for the unions with which it had a duty otherwise to bargain because it had

> either a certification order or a voluntary recognition agreement with that union (or those unions if more than one (1) box was ticked). Then, through a number of cases beginning with Boyd and Garland v. International Union of Operating Engineers, Local 721 (1988), 85 N.S.R. (2d) 397 and ending with International Association of Heat and Frost Insulators and Asbestos Workers, Local 116 v. Nova Scotia Minister of Labour and Manpower, [1993] N.S.J. No. 173 (N.S.C.A.), (hereafter called "the Steen Case"), this long-time "assumption" of the "Industry" was rejected. The Court of Appeal held that the language of [then] Section [98(3)] of the 1972 Act required the conclusion that when an employer joined the Bureau it was bound not only by the collective agreements made between the Bureau and the unions representing the trades in the trade divisions it had "ticked" on the Membership Form of the Bureau but by all collective agreements of all trade divisions (now classifications) of the Bureau. This decision led the Legislature to enact the Steen Amendments in 1993 (S.N.S. 1994, C-35.) which reversed the Steen case by limiting an employer's "passing" of bargaining rights and duties to the cases set out in Section 98(6). Thus the historical assumption was confirmed.

The Supreme Court of Nova Scotia dismissed the application for judicial review of the Panel's decision in *CLAC - LRB 2086C*, and the Court of Appeal dismissed the further appeal: *Construction and Allied Union, Local 154 v. Nova Scotia (Labour Relations Board Construction Industry Panel)*, 2002 NSSC 2, per Hood, J., and 2002 NSCA 73, per Cromwell, J.A. for the Court.

[46] In *CLAC,* the Panel referred to the Court of Appeal's *"Steen* Decision" [*H.F.I.A., Local 116 v. Nova Scotia (Minister of Labour & Manpower)*, 1993 CarswellNS 621; 1993 N.S.J. No. 173]. In *Steen*, Justice Freeman said:

> 15 Section 100(1) binds all unionized employers in a sector to any collective agreement entered into by the accredited employers' organization. Once the organization is accredited, it becomes, by virtue of ss. 97(7) and other relevant provisions, the bargaining agent for all employers within its scope even if they never joined the organization. That is the rule. The statute creates no exceptions for particular trades, whereby an employer might agree to be bound to collective agreements with trades it has ticked but not for trades it has not ticked. While cogent arguments may be mounted in favour of giving unionized employers a means of opting out of collective agreements between the Board and unions governing trades the employer does not usually hire, no means for doing so is provided under the *Act*. The language is broad and clear. That is the stonewall encountered by arguments to the contrary.

...

> 21 In the present appeal, the respondent Steen, did not tick insulators, or include them among trades it employed, in its application to become a member of the Bureau. Ticking would have created a contractual nexus, analogous to voluntary recognition under s. 30 of the *Act*, between the employer and the union through the agency of the bureau. Under the provisions of the Act referred to above, whether or not Steen ticked insulators is not material. ...

[47] After this Court's Decision in *Steen*, the Legislature (S.N.S. 1994, c. 35) amended the *Act*, by altering the definitions in ss. 92(a) and (j), amending s. 30, replacing ss. (1), (3) and (4) of s. 98, adding ss. (6) through (9) to s. 98, amending s. 100(1), and adding ss. (3) and (4) to s. 100. These are the "*Steen* Amendments". The amended, current ss. 98(1), (3), (6) and (7), 100(1) and (3) state:

> 98 (1) Subject to subsection (6), upon accreditation, all bargaining rights and duties under this Act of employers for whom the accredited employers organization is or becomes the bargaining agent pass to the accredited employers' organization.
>
> 98 (3) Where an employers' organization has been accredited, and where, after the date of the accreditation order, an employer in the sector and area covered by that accreditation order becomes subject to bargaining rights and duties with a union or council of trade unions in accordance with subsection (6), those bargaining rights and duties pass to the accredited employer's organization, whether the employer becomes a member of the accredited employer's organization or not, and the employer is bound by any collective agreement in effect or subsequently negotiated between the accredited employers' organization and that union or council of trade unions in that sector and area of the construction industry.
>
> 98 (6) In this Part, the bargaining rights and duties of an employer under this Act that pass to an accredited employers' organization are the bargaining rights and duties of that employer in respect of a unit appropriate for bargaining with a union
>
> (a) that has been certified in accordance with Section 95 as bargaining agent for the employees of that employer in that unit;
>
> (b) that has been voluntarily recognized as bargaining agent for the employees of that employer in that unit, in accordance with Section 30, which voluntarily recognition has not accrued as a result of a collective agreement

> negotiated by an employers' organization or otherwise through the agency of an employers' organization; or
>
> (c) with which that employer has explicitly, in writing, authorized the employers' organization to bargain collectively on its behalf.
>
> 98 (7) For greater certainty, nothing in subsection (6) precludes an accredited employer's organization and a trade union or council of trade unions from entering into a collective agreement that prohibits engaging non-union employees or non-union subcontractors in trades other than those represented by a trade union or council of trade unions that is party to the collective agreement.
>
> 100 (1) Subject to subsection (2) of Section 98 and subsection (3) of this Section, a collective agreement entered into between an employers' organization and a trade union, trade unions or council of trade unions is binding upon the employers' organization, employers whose bargaining rights have passed to the employers' organization engaged in the construction industry in the sector and area covered by the accreditation order, the trade union, trade unions, council of trade unions and upon every employee within the scope of the collective agreement.
>
> 100 (3) Notwithstanding the accreditation of an employers' organization, no unionized employer in the sector and area covered by the accreditation order is bound by a collective agreement entered into by an accredited employers' organization and a trade union or council of trade unions in that area and sector unless that trade union or council of trade unions has acquired rights to bargain with that employer in accordance with subsection (6) of Section 98.

[48] The *Steen* Amendments dismantled the legislative "stonewall" mentioned by Justice Freeman in *Steen*, para 15. At the heart of the amendments is s. 98(6), stating that the "bargaining rights and duties of an employer under this Act that pass to an accredited employers' organization" are those for a unit with a "union ... (a) that has been certified" for the employees of "that employer in that unit", or (b) that has been voluntarily recognized for employees of "that employer in that unit", or (c) with which "that employer has explicitly, in writing, authorized" the employers' organization to bargain on its behalf. Section 98(6)(b) stipulates that voluntary recognition "has not accrued as a result of a collective agreement negotiated by an employers' organization or otherwise through the agency of an employers' organization".

[49] Other provisions of the *Steen* Amendments subordinate the effects of accreditation to s. 98(6). Sections 98(1) and (3) expressly subject the accredited bargaining rights to s. 98(6). Similarly, s. 100(1) says that a collective agreement is binding subject to s. 100(3). Then s. 100(3) states that "no unionized employer ... is bound by a collective agreement ... unless that trade union or council of trade unions has acquired rights to bargain with that employer in accordance with subsection (6) of Section 98".

[50] Next, we come to s. 98(7), also included in the *Steen* Amendments. Section 98(7) is the principal source of the Council's submission, and the focus of the Council's challenge to the Panel's decision. Section 98(7) says "[f]or greater certainty, nothing in subsection (6) precludes" the Bureau and a council or union "from entering into a collective agreement that prohibits engaging non-union employees or non-union subcontractors in trades other than those represented by a trade union or council of trade unions that is party to the collective agreement". The Council says that this is precisely what the Bureau, the Council and Local 721 did in the sectoral provisions of the Industrial Agreement (above para 19). So the opening words of s. 98(7) - "nothing in subsection (6) precludes" - shelter the sectoral provisions from s. 98(6), and NSP should be bound by those sectoral provisions notwithstanding anything else in the *Act* or the Steen Amendments.

[51] The Panel rejected the Council's submission. The Panel's reasons included:

> 37. ... The primary purpose of the Steen Amendments was to reverse the Steen Case etc. and thus to restore the historical assumption that when an employer in the construction industry became a "unionized employer" either by virtue of the original accreditation order or, subsequent to it, pursuant to Sections 98(1) and (3) of the Act, such employer's bargaining rights and duties that passed to the Bureau were the rights and duties in respect of a unit appropriate for collective bargaining with a union that had been certified per Section 95 of the Act or voluntarily recognized per Section 30 of the Act (but not a "recognition" that accrued through a collective agreement negotiated by the Bureau or through its agency) or with which that employer (here NSP) had "explicitly, in writing authorized the Bureau to bargain collectively on its behalf " [See Section 98 (6)]. Section 98(6) is reinforced by Sections 100(1) and (3) of the Act, which make it clear (for example) that, notwithstanding accreditation of the Bureau for the commercial / industrial sector, [section 92 (h) of the Act] of the Cape Breton Island bargaining unit [section 95(2) of the Act], NSP is <u>not</u> bound by any collective agreement made between the Bureau and a trade union unless that union has acquired rights to bargain with NSP per Section 98(6).

...

42. The second layer to the argument by the Bureau and the Council ... NSP is bound by the certification in 1978 of Local 721, with the consequence, or so it is argued by the Council and the Bureau, that NSP is bound by all of the agreements negotiated between the Bureau (for NSP) and the Council. ... The flaw in this second layer argument is that Section 98(3) explicitly restricts the scope of the provision to "any collective agreement in effect or subsequently negotiated "between the Bureau" and that union...". Clearly, this provision does not permit the "passing" of bargaining rights to unions other than one in respect to which NSP has become subject to bargaining rights and duties, i.e., to Local 721 - the only trade union to gain bargaining rights against NSP.

43. We are left, then, with the third layer of argument by the Bureau and the Council ... This branch relies on Articles 3.01, 3.02, 3.03, 23.01 and 23.02 of the Industrial Agreement, ... This provision [*i.e.,* Section 98(7) of the *Act*] is said by the Council and the Bureau to authorize Articles 3.01, 3.02, 3.03, 23.01, and 23.02. A literal reading of these articles seems to support the view of the Bureau and the Council. However, closer inspection of them raises problems. Firstly, NSP notes that, in effect, they amount indirectly, to back door certifications of the other 11 signatory construction trade unions. ... Secondly, NSP argues that, while the phrase "unionized employee" is defined in Section 92(j) of the Act ... - and "unionized forces" certainly would have the same meaning - the phrase used in 98(7) is "non-union employees". This phrase is not defined in the Act. ... In our judgment, it is clear that the language in the Articles (3.02 and 23.02) most closely resembles the language in Section 92(j). Accordingly, the language of Section 98(7) can only have the meaning of an employee who is not a member of a union as opposed to an employee who is not a member of a construction trade union. Thus, since members of Local 1928 are members of a union that, in our judgment, is not a construction trade union, it is clear that the Articles above referred to have no application to Local 1928, so that NSP is free to "engage" Local 1928 members without falling afoul of the Articles in question. We are reinforced in our view by our conclusion that the Articles, if defined differently, indirectly amount to backdoor certifications and backdoor certifications do not match the 3 methods by which an employee acquires bargaining rights and duties. ...

44. ... Finally we add this to reinforce our conclusion that apart from Local 721 - as to survey crew members - NSP has no bargaining rights and duties with the other construction trade unions who were signatory to the Industrial Agreement. We regard this conclusion as irrefutable in light of Section 100 (3) which in our judgment could not be clearer that NSP, as a "unionized employer", is only bound to collective agreements "entered into by an accredited employer's organization

> and a trade union... in that area and sector unless that trade union... has acquired rights to bargain with that employer in accordance with subsection (6) of Section 98".
>
> 45. Our conclusions then, ... are firstly, that NSP was and is bound by collective agreements negotiated between the Bureau and the Council as agent for Local 721 but restricted only to on-site work by survey crew members and stemming only from its certification by Local 721 for survey crew members. Secondly, the collective agreements, past, present / or future are only binding upon NSP if and only to the extent that Section 92(c) Work is on-site survey crew work. In other words, there is no violation of the Industrial Agreement if Local 1928 members perform the disputed Work now or in the future. Its obligations to the Council and the Bureau arise only in connection with on-site survey crew work performed by Local 721 members.
>
> [Panel's underlining]

[52] Are the Panel's conclusions reasonable? There are two aspects to the Panel's reasons - the prospect of "backdoor certification" and the meaning of "non-union employee" in s. 98(7). I will address these in turn.

[53] First - "backdoor certification".

[54] Leaving s. 98(7) aside for the moment, the point of the *Steen* Amendments was to ensure that the bargaining rights and obligations of an employer in the construction industry would not pass to the Bureau, except respecting unions who were (a) certified for that employer, or (b) voluntarily recognized by that employer, or (c) the beneficiaries of an explicit written authority from that employer. The Panel's interpretation of the legislation, to this effect, is reasonable.

[55] The Panel interpreted s. 98(7) to co-exist, rather than collide with the interpretation of the other provisions in ss. 98 and 100. That approach also is reasonable. Section 98(7) is prefixed by "[f]or greater certainty". Those words connote that s. 98(7) should be interpreted consistently with the other provisions.

[56] The Panel reasoned that the Council's submission would "indirectly amount to backdoor certifications and backdoor certifications do not match the 3 methods by which an employee acquires bargaining rights and duties" [Panel's

underlining]. This conclusion, factually and legally, occupies the range of permissible outcomes. I refer to the following:

> (a) Article 3.01 of the Industrial Agreement would require NSP to request the "Unions" - *i.e.,* all the construction Locals, not just the certified Local 721 - to furnish workmen who would be "recruited from the jurisdiction of the Local Union". If the Unions are unable to supply, then any employee "will be cleared by the appropriate Union before commencing work".
>
> (b) Article 23.01 would prohibit NSP from subcontracting work to a contractor who is not under a collective agreement with the other construction Locals, not just with the certified Local 721.
>
> (c) Articles 3.02 and 23.02 would permit all the construction Locals - not just the certified Local 721 - to grieve, arbitrate and recover damages from NSP for employing workers who are not members of those Locals. As the Council's factum puts it:
>
> > 56. ... As has already been noted, an employer will violate Article 3.01 by hiring a "non-union" employee i.e. an employee other than one represented by a signatory construction trade union. Under Article 3.02, if an employer hires such an employee, "the [signatory] Union whose members would normally have performed such work" may pursue a remedy.
> >
> > ...
> >
> > 58. ... Article 23.02 provides that in a case where an employer sub-contracts to a contractor who employs non-unionized forces the signatory union whose members who otherwise would have performed such work may take proceedings.
>
> (d) Article 3.03 would require that NSP's employees become members of all the construction Locals - not just the certified Local 721 - and that NSP check off dues to those Locals.

[57] These rights normally would flow from a collective agreement between the employer and the union who claims the right. Such a collective agreement normally would follow that union's certification for, or voluntary recognition by that employer. Yet, the Council's proposed interpretation of s. 98(7) would permit

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

[58] The Panel's conclusion - that the Council's submission amounts to "backdoor certification" of the Locals, other than Local 721, without any of the three prerequisites of s. 98(6) - is a permissible and reasonable application of the facts to the legislation.

[59] Next, the second aspect of the Panel's reasons - the Panel interpretation of "non-union employees" in s. 98(7).

[60] According to the Panel, s. 98(7) means: s. 98(6) does not preclude a provision in a collective agreement that prohibits an employer from hiring an employee who belongs to "no union whatsoever". The Industrial Agreement's sectoral articles, on the other hand, would prohibit NSP from hiring employees who do belong to a Part I certified union - Local 1928. The Panel determined that these sectoral articles were not the type of provision that s. 98(7) intended to shelter.

[61] Section 92, the definitional provision for Part II (Construction Industry Labour Relations), has several definitions that pertain to the submissions:

> 92 In this Part,
>
> ...

> (c) "construction industry" means the on-site constructing, erecting, altering, decorating, repairing or demolishing of buildings, structures, roads, sewers, water mains, pipe-lines, tunnels, shafts, bridges, wharfs, piers, canals or other works;
>
> ...
>
> (e) "employee" means a person employed in the construction industry but does not include
>
> (i) a person who performs management functions or is employed in a confidential capacity in matters relating to labour relations,
>
> (ii) a member of the architectural, engineering or legal profession qualified to practice under the laws of a province and employed in that capacity;
>
> ...
>
> (i) "trade union" or "union" means a trade union that according to established trade union practices pertains to the construction industry;
>
> (j) "unionized employee" means an employee on behalf of whom a trade union or council of trade unions has been certified or recognized as bargaining agent by an employer or employer's organization in accordance with this Part, where the certification or recognition has not been revoked".

[62] The Council points out that s. 92(i) defines "union" as a union in the "construction industry". If the definition of "union" is simply inserted into s. 98(7), as the Council urges, then "non-union employee" literally must mean an employee who does not belong to a construction union. The Council submits that the Panel's broader interpretation of "non-union employee" is unsupportable.

[63] The Panel reasoned differently. Section 92(j) defines "unionized employee" as a member of a construction union. That is clear because s. 92(j) refers to a union that is certified "in accordance with this Part". So "non-unionized employee" would mean an employee who does not belong to a construction union. Though "union" is defined, "union employee" and "non-union employee" are not defined. The Panel deduced that "non-union employee" in s. 98(7) is broader than

the defined “non-unionized employee” and means employees who belong to no union whatsoever.

[64] In my view, the Panel’s interpretation of “non-union employee” is reasonable under the standard of review. I say this for the following reasons.

[65] Section 98(7), from which the Council’s submission stems, refers to the hiring of non-union “employees”. Section 92(e) defines “employee” for Part II as “a person employed in the construction industry”. Section 92(c) defines “construction industry” as “on-site” construction. Section 98(7) would not touch Local 1928's activity other than “on-site” work in the “construction industry”.

[66] This was confirmed by the Panel’s 1977 Accreditation Decision. The sectoral provisions, upon which the Council relies, were in the Industrial Agreement that the Bureau signed for unionized employers, under the authority of the Panel’s Accreditation Decision. That Accreditation Decision (quoted above, para 18) discussed the distinction between Part I shop work and Part II site work, and the significance of that distinction to the Bureau’s authority:

> Closely related are the cases of employers who engage employees in both shop work and on-site construction work. The Panel is constrained by the definition of “construction industry” in Section 89 (c) [now 92(c)] of the Trade Union Act to conclude that shop work is not work in the construction industry. It follows that such employers will lose their bargaining rights to the Applicant [Bureau] only in respect of employees who work on-site.

[67] Did Local 1928 perform work “on-site” in the “construction industry” under Part II?

[68] Local 1928's factum summarized its position on the point:

> 16. IBEW, Local 1928 members commonly perform labour work, concrete work, carpentry, siding insulation and painting at the Lingan Power Generating Station and have done so since the initial construction of the plant. Despite the fact that this type of maintenance work could conceivably be challenged as falling within the definition of construction work as set out in Part II of the Act, the Respondent IBEW, Local 1928 is unaware of any claim ever being made to this work by the Appellants. As the then Business Agent for IBEW, Local 1928 Mike “Bulldog” MacDonald succinctly said before the Panel:

> "We don't build them and they [the construction unions] don't maintain them". This labour relations arrangement has existed at the Lingan Power Generating Station since its initial construction.

[69] The Panel found (para 13):

> 13. Local 1928 was certified not under Part II - Construction Industry, - but under what is now Part I of the Act ... The parties are all well aware of the history whereby Local 1928 came to represent, at all power plants of NSP, workers who fell within one or more of 4 categories, viz:
>
> (a) Operators - They are power engineers and operate the plants;
>
> (b) Technicians - They perform electrical instrumentation work and chemical process work;
>
> (c) "Certified" Maintenance Workers - They are mechanics, welders, pipefitters, millwrights and ironworkers who hold a certification either from a college or a trade school; and
>
> (d) Utility Workers - They possess some trade skills, eg., carpenters and labourers.
>
> ...
>
> 40. Equally clearly, Local 1928 was not certified for a craft unit ...
>
> [Panel's underlining]

[70] Local 1928's workers are certified for work in a bargaining unit that the Board has deemed appropriate under Part I. While they perform that work, it cannot just be assumed they have exited Part I to become exclusively Part II "employees" doing "on-site" construction work. The Panel, in the decision under review, said:

> 50. ... There is no bright line that distinguishes work that is maintenance from Section 92(c) Work. Nevertheless, in our view, Local 1928 is primarily a maintenance bargaining unit with some elements of Section 92(c) Work added, e.g., as to "development" (whatever that means), and the construction of transmission lines.

The Panel's 1978 Certification Decision of Local 721 - LRB No. 467C (above, para 16) - said:

> THEREFORE the Construction Industry Panel ... does hereby certify the International Union of Operating Engineers, Local 721, ... as the Bargaining Agent for a Bargaining Unit consisting of all employees of the Nova Scotia Power Corporation engaged as Survey Crew Members in on-site construction work .... This Unit does not include employees engaged in normal maintenance and development because, in the opinion of the Panel, they are not employed in the construction industry.

The Panel's decision under review (para 3) reiterated this passage from LRB No. 467C (see above, para 16).

[71] My interpretation of these passages is that, in the Panel's view, some of the Disputed Work may have occupied the gray area at the intersection of two bargaining units, one [Local 1928's unit] certified under Part I and the other [on-site construction under s. 92(c)] emanating ostensibly from the sectoral process of Part II. The issue facing the Panel was - How to deal with the gray area? Does one collective agreement just oust the other?

[72] The Council and the Bureau cite s. 98(7) with the sectoral provisions of their Industrial Agreement, and say - Yes.

[73] The Panel chose to avoid a tug of war between two Parts of the statute, opting instead for overall statutory coherence. The Panel's lever was its interpretation of "non-union employee" to mean an employee "not belonging to a union under Part I or Part II". In the context of the entire *Trade Union Act*, it would be incongruous to treat a member of a certified Part I union, working in his Board certified bargaining unit, to be "non-union" and barred from that workplace by a provision in Part II. The Panel recognized the reality that the unit descriptions of two certified or voluntarily recognized unions, one employer-centric under Part I and the other craft-based under Part II, sometimes may overlap at the margins, resulting in two collective agreements with inconsistent provisions for work assignment or union security. In the Panel's view, the resolution should not be dictated exclusively by just one of the protagonists, who tables the trump card of only its collective agreement. Rather, the solution should rest with the statutory Panel, under objective principles that emanate from the entire *Act* and the

Panel's jurisprudence - *e.g.* respecting s. 98(8), abandonment, or the resolution of jurisdictional disputes.

[74] The dispute had ramifications for certified and accredited rights under both Parts I and II. The Panel's preference for intra-statute comity was reasonable, and consistent with the accepted approach to statutory construction (*Driedger*'s "one principle") under *R. v. Sharpe*, [2001] 1 S.C.R. 45, para 33 and *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, para 27, among many other authorities.

[75] The Panel addressed a basic concept of labour relations - who is a "non-union employee" - in a complex jurisdictional dispute at the intersection of bargaining units under Parts I and II of the *Act*. Each Part has a distinct policy brand sourced in labour relations history of this Province. The Panel has authored decades of rulings on these topics. Decisions of Labour Relations Boards, balancing labour relations policy, are protected by the strictest of privative clauses. It is difficult to identify an area of administrative law that is more at the heart of the rationale for judicial deference.

[76] In summary, as to the Section 98(8) Application, the Panel determined that: (1) s. 98(7) should be interpreted to avoid what otherwise would be "backdoor certifications" of numerous construction Locals, which would contravene the labour relations policy embodied by the 1994 amendments to ss. 98 and 100 of the *Act*; and (2) "non-union employee" means "not a member of any union", an interpretation that promotes coherence, instead of conflict, between certified and accredited rights under the *Act*'s two Parts. These are polycentric issues for which the Legislature enlisted the Panel's institutional expertise: *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)*, 2005 NSCA 141, paras 23-27 and authorities there cited.

[77] In my respectful view, the Panel's reasons exhibit transparency and express justification, its conclusions occupy the range of acceptable outcomes, and its ruling on the Section 98(8) Application is reasonable under the standard of review.

[78] The reviewing judge did not err by dismissing this ground for judicial review. I would dismiss this ground of appeal.

Second Issue - Abandonment Application

[79] The Panel also ruled that the Council, as agent for the Locals, and the Locals had "abandoned" any right to perform the Disputed Work. The Panel reasoned as follows:

> 1. The Panel (para 46) said "[t]he basic principle rests on the expectation that a trade union, once certified or voluntarily recognized, thus gaining bargaining rights, will be subject to the expectation: '[t]hat it will actively promote those rights'," quoting a decision of the Ontario Labour Relations Board.
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> 2. As to the authority for the principle, the Panel noted that other Provinces, including Ontario, have a legislated foundation for "abandonment" that is absent from Nova Scotia's *Trade Union Act.* The Panel also pointed out, however, that the Ontario Labour Relations Board "applied the principle since 1955, [as an implied statutory method of termination] long before explicit statutory authority was given". The Panel also cited a comment by (then) Justice Clarke in *Nauss Bros. Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 83* (1985), 70 N.S.R. (2d) 295, 1985 CarswellNS 189 (T.D.), para 21 that endorsed the principle of abandonment. [Panel's decision, para 46]
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> 3. The Panel (paras 47-49) referred to the evidence of long-standing practice that NSP had used Local 1928 for this type of work, that the Council or its affiliates knew or should have known of this practice, and that the Council and its affiliates had neither grieved nor protested. The Panel said (para 51) "this case is unique, in our judgment as to the duration of the 'inaction' by the Bureau, the Council and/or the construction trade unions and as to the many opportunities these groups had to discover and react to the instances of Section 92(c) Work performed by Local 1928 members".
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> 4. The Panel concluded:
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> > 49. We wish to be clear on the scope of the abandonment that we find has occurred. The Bureau and the Council have lost the right to challenge or grieve about Section 92(c) Work, if any, that NSP engages in so long as NSP follows its past practices."

[80] Justice Hood dismissed the Council's application for judicial review.

[81] In the Court of Appeal, the Council says that the Panel had no legislative authority to institute an "abandonment" principle and that, under Nova Scotia's *Act,* a Union's bargaining rights may be extinguished only through decertification. Further, the Council submits that the Panel's adoption of "abandonment" is inconsistent with other decisions of the Panel, which declined to adopt that principle in Nova Scotia. Next, the Council says the Panel's ruling that the "Bureau and the Council have lost the right to challenge or grieve about Section 92(c) Work" does not even represent the principle of "abandonment of bargaining rights". Rather it resembles the separate doctrine, mentioned in Ontario Labour Relations Board jurisprudence, of estoppel from seeking the benefits of bargaining.

[82] NSP responds that the principle of abandonment is deducible from the framework of collective bargaining legislation, as was done by the Ontario Labour Relations Board before the Ontario legislation specifically incorporated the doctrine. Further, Nova Scotia's Panel is not bound by precedent from its own administrative jurisprudence, and may adjust the principles of its earlier decisions. NSP points out that there is a labour doctrine of estoppel from claiming a remedy, which the Ontario Labour Relations Board has likened to its sister principle of "abandonment": *United Brotherhood of Carpenters and Joiners of America. Local 785 v. Toronto Dominion Bank*, [1995] OLRB Rep. May 686, 1995 CanLII 9905 (ON LRB), paras 65, 70-75.

[83] The Council and NSP each cite decisions of the Ontario Labour Relations Board and Nova Scotia's Panel.

[84] It is tempting to treat this issue as moot.

[85] Either an abandonment of bargaining rights or an estoppel from seeking the benefit of bargaining assumes that there were pre-existing bargaining rights. The Panel's ruling on the Section 98(8) Application said that NSP is not bound by the Bureau's Accreditation Order, except for Local 721's survey crew unit performing on-site survey work [see Panel's conclusions # 4, quoted above, para 31]. The ruling also said that, except for Local 721's survey crew, NSP has the right to

determine whether or not it was bound by the Industrial Agreement toward the Council and the other affiliates [Panel's conclusion # 2, above para 31]. Further, the ruling said that the sectoral provisions of the Industrial Agreement do not restrict NSP's assignment of work to Local 1928 [Panel's conclusion # 5, above para 31]. In the Panel's view, outside Local 721's survey unit, the Council and the Bureau and the other construction Locals have no bargaining rights against NSP. The Panel said that the Council, being uncertified, may act for Local 721 only as an agent. [Panel's conclusion # 1, above para 31]. As for Local 721, the Panel did not find that Local 721 had abandoned its right to the on-site survey work, and NSP's factum to the Court of Appeal concedes:

> 94. NSPI does not dispute the Panel's conclusion that there was not enough evidence to justify a finding that IUOE, Local 721 had abandoned its bargaining rights with respect to NSPI's survey work. Survey work, however, was not at issue. The May 5 and June 10, 2003 Grievances asserted jurisdiction over work unrelated to survey work.

[86] Given the Panel's ruling on the Section 98(8) Application and NSP's concession respecting Local 721, I have difficulty identifying any contested pre-existing bargaining rights, or fruits of bargaining that may be assessed for abandonment or estoppel respecting the Disputed Work.

[87] Nonetheless, maybe I am missing a possible ramification of this complex situation. The Panel ruled on "abandonment" in what appears to be an alternative line of reasoning. The reviewing judge dealt with it. The parties made submissions on the merits of the issue in their factums and oral argument to this Court. So I will address the arguments.

[88] Moving, then, to the merits, it is not the role of a reviewing court to scan for symmetry, and then reconcile the administrative jurisprudence of Labour Relations Boards, either of Panel decisions within Nova Scotia or between provincial Boards. That is the Panel's job, subject only to the requirement that the Panel issue transparent reasons pointing to a conclusion that occupies the set of acceptable outcomes. This Panel's reasons were coherent. I understand them. The principle - be it "abandonment" or "estoppel" - is a rational deduction from the legislative scheme and is available in the menu of labour board jurisprudence. The Panel said this case was unique and cited the strong evidence that, over an extended time, Local 1928 performed this type of work for NSP, without protest

from the Council or its affiliates. The Panel's conclusion, factually and legally, is reasonable under the standard of review.

[89] The reviewing judge did not err in dismissing this ground for judicial review. I would dismiss this ground of appeal.

Third Issue - Jurisdictional Application

[90] The parties had agreed at the outset, in May 2003, that the Panel's ruling on the Jurisdictional Dispute would be held in abeyance, and determined only if the Panel declined to grant the relief sought by NSP in the Section 98(8) Application. The Panel was aware of this agreement, and cited it in the recitals of its eventual decision. The Panel's February 2009 Decision granted NSP's requested relief in the Section 98(8) Application. But the Panel's decision then, in the alternative, ruled on the Jurisdictional Dispute, favouring Local 1928. The Panel's decision said:

> 56. It is our opinion that based upon long - standing past practice, the Disputed Work, and any analogous work, has become the work of Local 1928. We have said on numerous occasions over the years that past practice trumps all of the other factors set forth in Labourers International Union of North America et al. v. Fred Sithers Concrete Contracting Limited, and Atlantic Concrete Limited et al.,.L.R.B. No. 239C dated February 26, 1973, ...
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> ...
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> 59. We wish to note that our initial conclusion, ie., the abandonment by the Council and the Bureau of its rights to claim such part of the Disputed Work that is or arguably is Section 92(c) Work, is our decision in this case ... The conclusions reached under paragraph 38 (vi) [the Jurisdictional Dispute] are intended as an "in case we are wrong on the issue of abandonment" approach. Should that occur, we say that, long-standing past practice awards the Disputed Work, [and all analogous work that members of Local 1928 have performed in the past], to Local 1928.

[91] The Council submits that the Panel violated principles of procedural fairness by ruling on the issue, instead of holding the matter in abeyance. The Council also disputes the Panel's ruling on its merits.

[92] Local 1928 and NSP acknowledge the 2003 "abeyance" agreement. They say that, nonetheless, the jurisdictional dispute was fully aired in evidence and argument during the lengthy proceeding that unfolded over the following years. On the merits, they submit that the Panel's decision was supported by evidence and Board jurisprudence, and was reasonable.

[93] The reviewing judge declined to comment on the Council's application for judicial review of the Panel's decision on the Jurisdictional Dispute. The judge's reason was:

> [119] The Panel made its decision with respect to the jurisdictional dispute as an alternate decision in the event its decision was quashed. Because I have not concluded its decision should be quashed, I do not need to deal with that alternate decision.

[94] I agree with Justice Hood. Given the result of the applications for judicial review to the Section 98(8) Application and Abandonment Application, the Jurisdictional Dispute is moot. The Panel's decision acknowledged that its ruling on the Jurisdictional Dispute was conditional on the Panel being overturned on the other aspects of the decision, and that condition has not materialized.

[95] The reviewing judge did not err by declining to consider the matter.

Conclusion

[96] I would dismiss the appeal and affirm the ruling of the reviewing judge that dismissed the application for judicial review.

[97] I would order the Council, Locals 721 and 682 to pay NSP a total of $2,500 costs for the appeal.

[98] Local 1928 generally adopted NSP's position on the Section 98(8) and Abandonment Issues, and focussed its submissions on the moot Jurisdictional Dispute. I would order the Council, Locals 721 and 682 to pay Local 1928 a total of $1,000 costs for the appeal.

[99] The Bureau's submissions endorsed the Council on the First and Second Issues, but took no position on the Jurisdictional Dispute, involving Local 1928, in

the Third Issue. I would order the Bureau to pay $1,000 costs to NSP for the appeal.

Fichaud, J.A.

Concurred: Hamilton, J.A.

Beveridge, J.A.