IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Granite Environmental Inc. v. Nova Scotia (Labour Relations Board), 2004 NSSC 264

Date: 20041216
Docket: SH 206862
Registry: Halifax

Between:

Granite Environmental Incorporated

Applicant

v.

Nova Scotia Labour Relations Board and International Union of Operating Engineers Local 721

Respondent

D E C I S I O N

(certiorari application)

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	August 4, 2004 in Halifax, Nova Scotia
Written Decision:	December 16, 2004
Counsel:	**Eric Dunford, Q.C.** for the applicant **Raymond Larkin, Q.C.** and **Gordon Forsyth** for the respondent, I.U.O.E **Edward Gores** for the respondent N.S. Labour Relations Board

By the Court:

[1] The Labour Relations Board (Construction Industry Panel) certified operating engineers employed by Granite Environmental Ltd. Granite seeks to quash the decision. The International Union of Operating Engineers, Local 721, opposes the application.

ISSUE

[2] Whether the decision of the Labour Relations Board (Construction Industry Panel) should be set aside because the Panel committed a reviewable error when:

a) it included employees in a bargaining unit on the basis of spending the majority of the working day "on site" doing bargaining unit work;

b) it excluded Wayne Best from the bargaining unit on the basis that he was a managerial employee; and

c) it included Bob Dennis in the bargaining unit on the basis that the majority of his working day was spent doing bargaining unit work.

FACTS

[3] Granite is a construction company and, at the time of the application for certification, was completing a contract for construction of roadways and a bridge over the Margaree River in Cape Breton. Granite is a non-union contractor. The work was divided into two portions: 1) preparation of land around the entry point to the bridge (east side) and 2) construction of a trestle, which included preparation and driving of piles (west side).

[4] Two applications for certification were filed: 1) with respect to labourers filed July 23, 2002; and 2) with respect to operating engineers filed July 26, 2002.

[5] The Operating Engineers union represents construction workers assigned to the operation of loaders, dozers, backhoes, cranes, trucks in excess of one ton capacity and similar equipment, as well as rodmen and surveyors.

[6] Both certification applications were dismissed and a hearing was requested by both unions. The hearing with respect to both was held in January 2003. On March 18, 2003, the Panel revoked its previous order. Its reasons were released June 26, 2003. The Panel decided that only the employee's "on-site" time should be considered in determining whether he spent the majority of his working time, on the day the application was filed, doing bargaining unit work.

[7] The status of two employees is in question before me. Wayne Best was excluded from the bargaining unit by the Panel because he was a managerial employee, not a working foreman. Bob Dennis was found to have spent the majority of his "on-site" working day doing bargaining unit work.

[8] Both parties agree that the standard of review is patent unreasonableness.

<u>The Patent Unreasonableness Standard</u>

[9] *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] S.C.J. No. 2 is the most recent Supreme Court of Canada case which discussed the patent unreasonableness standard. In *Voice*, Major, J. said, with respect to patent unreasonableness, in distinguishing the three standards:

> ... By its nature, the application of patent unreasonableness will be rare. A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd.

[10] In *Nova Scotia Government and General Employees Union v. Nova Scotia (Public Service Commission)*, [2004] N.S.J. No. 144 (C.A.), the Nova Scotia

Court of Appeal dealt with the standard of patent unreasonableness. Cromwell, J.A. said at paras. 48 and 49:

> 48 'A patently unreasonable decision has been described as 'clearly irrational' or 'evidently not in accordance with reason' [citations omitted]. A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.': Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247; [2003] S.C.J. No. 17 (Q.L.) at para. 52. The hallmark of a patently unreasonable decision is the 'immediacy or obviousness of the defect': Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., [1997] 1 S.C.R. 748 at para. 57. While a reviewing judge may require a great deal of reading and thinking before being able to grasp the dimensions of the problem, if the decision is patently unreasonable, the unreasonableness will be evident once the problem comes into focus: ibid. Applying the standard is not a simple matter of measuring the extent of the deviation by the tribunal from what the Court thinks is the right result: Huron (County) Huronview Home for the Aged v. Service Employees' Union Local 210 (2000), 50 O.R. (3d) 766 (C.A.) per Sharpe, J.A. at 775. application for leave to appeal to S.C.C. dismissed [2000] S.C.C.A. 646.
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> 49 The question, therefore, is not whether I think the adjudicator was right to exercise his authority to award interest in these circumstances, but whether his decision that he had the authority to award interest in an Article 40 adjudication was patently unreasonable.

[11] In *W.W. Lester (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, McLachlin, J. (as she then was) said at para. 50:

> 50 Courts should exercise caution and deference in reviewing the decisions of specialized administrative tribunals, such as the Labour Board in this case. This deference extends both to the determination of the facts and the interpretation of the law. Only where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact, or where the interpretation placed on the legislation is patently unreasonable, can the court interfere.

[12] In *Canadian Assn. of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, La Forest, J. said at para. 19:

> ... The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result.

[13] In *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.)*, [2003] S.C.J. No. 64, LeBel, J. said at para. 78:

> 78 This Court has set out a number of definitions of 'patent unreasonableness', each of which is intended to indicate the high degree of deference inherent in this standard of review. There is some overlap between the definitions and they are often used in combination. I would characterize the two main definitional strands as, first, those that emphasize the magnitude of the defect necessary to render a decision patently unreasonable and, second, those that focus on the 'immediacy or obviousness' of the defect, and thus the relative invasiveness of the review necessary to find it.

He then went on to discuss in depth the difficulties inherent in making the distinction between reasonableness *simpliciter* and patent unreasonableness. He concluded in para. 134:

> 134 Administrative law has developed considerably over the last 25 years since CUPE v. New Brunswick Liquor Board. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

[14] The answer to the question posed by LeBel, J. has been answered, in my view, at least in part, by Justice Major in *Voice* in the passage quoted above.

The Trade Union Act: Part II

[15] Part II of the *Trade Union Act* is entitled, "Construction Industry Labour Relations". "Construction industry" is defined in s. 92(c):

> (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;

[16] Sections 95 and following deal with the certification process. Section 95(1) provides:

> 95 (1) A trade union or a council of trade unions claiming to have as members in good standing not less than thirty-five per cent of the employees of one or more employers in the construction industry in a unit appropriate for collective bargaining may, subject to the rules of the Panel and in accordance with Sections 23 and 24, make application to the Panel to be certified as bargaining agent of the employees in the unit.

Section 95(3) uses similar wording. Both describe the employees as being in a "unit appropriate for collective bargaining". "Employee" is defined in s. 92 (e):

> (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;

[17] The purpose of Part II of the *Trade Union Act* was referred to in U.A., Local 682 U.S.W.A., Local 1064 (1992), 89 D.L.R. (4th) 694 (N.S.C.A.) at pp. 705 and 706, where Clarke C.J.N.S. said:

> (iii) The purpose of the legislation – the reason for its existence
>
> Part II was enacted by the legislature to address special circumstances that had developed in the construction industry in Nova Scotia which were not contemplated when Part I was passed. In the mid 1960s disputes in the construction industry threatened the economic stability in some areas of the province, including Cape Breton Island. Some of the history that preceded the enactment of Part II was outlined by this court in Municipal Contracting Ltd. v. I.U.O.E. Local 721 (1989), 60 D.L.R. (4th) 323, 89 C.L.L.C. 14,041, 91 N.S.R. (2d) 16, beginning at p. 326. Part II was designed and intended to bring about procedures whereby disputes in the construction industry could be speedily resolved. To accomplish this objective, a Construction Industry Panel was constituted by the Act, composed of three members of the Board. Part II also provided for a process of speedy arbitration to resolve contract disputes. It is generally accepted that the legislation creating Part II has achieved its purpose and that from the time of its enactment it has assisted in bringing about industrial peace in the construction industry. This dispute over work jurisdiction in the construction industry is one of those special situations that the Part II Panel is equipped to resolve.

Labour Relations Board (Construction Industry Panel) Decision

1. ***Majority of working day "on site"***

[18] To use the words of Justice Major in *Voice,* I may only quash the decision of the Panel as a patently unreasonable one if the result "almost borders on the absurd." This is a very high standard and gives expression to the deference which the courts must give to decisions of boards such as this.

[19] In answering this question, I must look at the decision of the Panel and not decide the issue myself. As the quote above from *Lester* makes clear, deference must be given to both the Panel's determination of facts and its interpretation of the law.

[20] Under the heading "Law", the Panel said in paragraph 6:

> C. THE LAW
>
> We start with this: under Part II of the Act dealing only with the construction industry, a construction trade union may seek certification to represent employees of an employer - like the Employer - who are "employed in the construction industry" [see Section 92(e) for this definition of an employee]. The phrase 'construction industry' is defined in Section 92(c) as follows:
>
> '92(c) 'construction industry' means the ON-SITE CONSTRUCTING, erecting, altering, decorating, repairing or demolishing of buildings, structures, roads, sewers, water mains, pipelines, tunnels, shafts, BRIDGES, wharfs, piers, canals or other works.' [Emphases is [sic] ours].
>
> Thus, in our judgement (and this is part of the long-established policy of the Board and is also mandated by the provisions of Part II of the Act), the ONLY type of 'employee' we can concern ourselves with is a person who works 'on-site' performing the types of work described in Section 92(c). On our facts, the 'site' is ONLY the west side of the Margaree River site and NOT the east side 'site' because while Birmingham is a sub-contractor of the Employer, it, nevertheless, is a separate employer using its own work force and not having an interchange of employees with the Employer. Consequently, to be an employee of the Employer and eligible to be represented by a construction trade union, the employee(s) must work on-site, on the west side of the Margaree River, doing Section 92(c) work. The fact that MacDonald was the superintendent for both jobs does not change this, particularly where there was no regular interchange of employees. Here, although Blair Boutilier, ('Boutilier'), did use a company truck on July 23, 2002 to visit the east side site, (for less than one (1) hour), there is no evidence of any employee of Birmingham from the east side coming over to work on the west side - ever. Moreover, there is no evidence of any other employee of the Employer going from the west side to the east side site on the material dates, ie., July 23rd of *(sic)* July 26th. Thus, these are two (2) separate and distinct sites with two

separate work forces. We so find. Moreover, the 'site' on the west side does NOT include 'the pit' or quarry which was situated a few kilometers away. Moreover, in our practices the Panel treats work at such a location as manufacturing and not within Section 92(c) of the Act - or of Part II.

It continued in paragraph 7:

7. Next, we turn to the issue of how the Panel treats an employee who works, in a single day, performing work that falls within the trade jurisdiction of more than one trade union? Bear in mind that this issue arises ONLY with the date of filing of the Application for Certification by a trade union because, if that union fails to succeed in its Application, the Employer is as free as it was before the date of such filing to use its employees as it sees fit. If, on the other hand, the Union becomes certified, thereafter, the trade jurisdiction of the various construction trade unions determines which work is done by members of which trade union. To return to the issue when on the date of filing of a union's application for certification, an employee has done work falling within the trade jurisdiction of more than one construction trade union, our policy is clear and is spelled out at p. 2 paragraph 6 of OP. ENG. LOC. 721 V. DOUG BOEHNER TRUCKING AND EXCAVATION LTD., L.R.B. NO. 2130C dated August 1, 2001, ('the Boehner Case'):

6. The Union's position is straightforward. It asserts that, of the 22 employees, the long-standing practice of the Panel has been to consider as employees, both for the purpose of determining whether the Union had the requisite percentage of employees as members in good standing of the Union within Section 95(3) of the Act, and also for purposes of the voting constituency should the Union's percentage of members lie between 35% and 50% - as in Section 95(3)(c):

(i) only those employees who were NOT exercising management functions within the meaning of Section 2(2)(a) of the Act, (which meant that Steve McCall would be excluded because he was a non-working foreman);

(ii) only those employees who are actually at work on the date of filing of the Application, (which meant that both James Angus and David O'Brien were excluded owing to the absence from work because of illness; and also

(iii) only those employees who spent the majority of their working time on the date of filing of the Application (November 2, 2000), doing bargaining unit work, which meant that the following employees not so qualify viz, Mike Bagnell, Chris Laffin, Robert Oakley, Brent Purcell, George Weatherbee and Wilson Wight, because all of them were labourers (Purcell also did mechanic work on November 14, 2000) as well as Gregory Moore who worked as a surveyor on November 14, 2000 and who will be excluded from the bargaining unit because in

> the bargaining unit of the Union for mainland Nova Scotia, contrary to the situation in the Cape Breton Island bargaining unit, surveyors' work is NOT part of the claimed work jurisdiction of the Union."
>
> See also KIDSTON GLASS COMPANY LIMITED v. INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, L.R.B. NO. 1370C dated December 3, 1990, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 83 v. MILLWORKS INC., L.R.B. NO. 2227C dated June 10, 2002 citing UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 83 v. DURON ATLANTIC LIMITED, L.R.B. NO. 1861C dated March 6, 1998.

The Panel then stated the position of counsel for *Granite* in paragraph 8 as follows:

> 8. McLellan, on behalf of the Employer, focussed on the opening three (3) lines of sub-paragraph (iii) of paragraph 6 of the BOEHNER CASE and used it to argue that, READ LITERALLY, sub-paragraph (iii) required employees to have 'spent the majority of their working time on the date of filing of the Application (November 2, 2000) doing bargaining unit work ... .' Thus, as he argued, the question is: did the employee spend more than fifty per centum (50%) of his WORKING DAY performing work within the trade jurisdiction of the applicant trade union. In McLellan's view the question is NOT, as Pink argued, whether the employee spent more than fifty per centum (50%) of the time he spent on site performing work within the trade jurisdiction of the applicant trade union.

[21] The Panel went on in paragraph 9 to distinguish the present factual situation from that in *Boehner* and previous cases after saying:

> 9. We acknowledge that, read literally, McLellan's interpretation of the BOEHNER CASE policy is accurate.

[22] The Panel said in para 9:

> Those two (2) cases did NOT involve - as ours does - employees who spent only part of their "working day" ON-SITE and part of it OFF-SITE.

[23] The Panel continued in para 9:

> If, however, the employee spent part of his working day ON-SITE and part of it OFF-SITE, ... then, the issue is whether that employee performed work within the trade jurisdiction of the applicant trade union ... for more than 50% of that part of his working day that was spent performing work ON-SITE in the 'construction industry'.

[24] The Panel then gave two examples of employees who spent the majority of their working day on-site in the construction industry. One could be included in a bargaining unit and the other could not.

[25] In paragraph 11, the Panel dealt with a further argument by counsel for *Granite*:

> 11. McLellan raises the objection to our (and Pink's) explication of the rule concerning what constitutes working hours by asking 'what if you're on-site ONE (1) minute and the company sends you home? Does that one (1) minute count? And what if instead of going home after one (1) minute of on-site construction work, the company send the employee to 'the pit' (quarry)? McLellan argues that using the BOEHNER CASE as applied also in the KYNOCK CASE we 'might' consider the working day to be one (1) minute (when the worker is thereafter sent home) but if instead, the employee is sent to 'the pit' for the balance of the working day, then we ought NOT to count the 'one minute employee' as an employee for purposes of Part II because that employee would not have spent the majority of this working day doing on-site work in the construction industry.

[26] The Panel then said it answered that argument in paragraph 12:

> 12. We disagree with McLellan's arguments in paragraph 11. Our concern with his version of the relevant rule is that to avoid the reasonable possibility of unionization, a non-union employer could take his office staff and other off-site workers to his construction site or sites each day, have them do basic labourer's type work or work of other trades of which the particular employee has the skills for a total of one (1) or so hours each day and then if a union sought certification, defeat the Application by arguing that on the date of the filing of this application each office worker and each other off-site worker had gone to the contractor's sites A, B and C and spend forty (40) minutes at each site (for example) and then returned to finish their eight (8) or ten (10) hours working day at the office or at other off-site locations (eg., a quarry). In the result, when the test is where one worked for the majority of the working day, the union would almost always lose. Our rule which restricts the 'working day' to on-site work in the construction industry, would prevent the employer from adopting this device. If McLellan tries to turn the argument around on us and say that a 'working day' of forty (40) minutes is absurd, we have a simple answer: the employer NOT the union so allocated the workers' time and if it uses a forty (40) minutes on-site day that is its choice!

2. *Analysis*

[27] Applying the patent unreasonableness standard to this decision means that I must ask if the result almost "borders on the absurd" after carefully reviewing the Panel's reasoning.

[28] In determining if the reasoning of the Panel, in arriving at this result, stands up to some scrutiny, one must recall the purpose of Part II of the *Trade Union Act.* I have quoted above Chief Justice Clarke's words in the Local 682 case. Part II was adopted "to address special circumstances" in the construction industry.

[29] Although not bound by *stare decisis*, the Panel has, in the past, commented upon the need for certainty in determining "who is in" and "who is out" for certification applications. In *Digicon Building Control Solutions Ltd.*, L.R.B. Dec. No. 2068C (August 15, 2000), a decision of the Construction Industry Panel consisting of vice-chair, Bruce P. Archibald, and members Dannie MacLeod and James MacDonald, the Panel said it had long been the Panel's practice to have rules that create certainty. The Panel said at p. 4 of the Quicklaw version of that decision:

> ... It has long been the Panel's practice that certainty and predictability of labour relations in the construction industry require straightforward rules about how to calculate 'who is in' and 'who is out' for certification applications. Employers and Unions have come to rely on the 'doing work on site on the date of application' rule. Both sides know how the system works and are able to govern their actions accordingly.

[30] Even before that decision in *Kidston Glass Company Limited*, L.R.B. Dec. No. 1370C (December 3, 1990), the Panel, consisting of Peter E. Darby, then vice-chair, and members Daniel MacDonald and James G. MacDonald, referred to the past practice of the Panel and the test it applied. The Panel said at p. 3 of the Quicklaw version:

> ... The test it has applied is to ask whether the 'employee' works primarily in the 'construction industry'. If the employee spends the majority of his or her time in such work, he or she is an 'employee in the construction industry'.

[31] The Panel continued:

> Conversely, if he or she spends the majority of work-time doing 'non-construction' work, then the Application for Certification to represent him or her must be filed with the Labour Relations Board (Nova Scotia) under Section 23 or 25 of Part I of the Act.

[32] In *Boehner*, the Panel stated the final part of the test to be whether "the employees spent the majority of their working time on the date of filing of the Application ... doing bargaining unit work ..." (quoting from para. 6).

[33] This is the context in which, in my view, I must look at the reasoning behind the result the Panel achieved.

[34] The Panel is not bound by *stare decisis*, as I have said, but has often, in its own decisions, referred to its past practice. It has also referred to the need for certainty and has acknowledged that employees who do not work the majority of their time in the construction industry should be certified under Part 1 of the *Trade Union Act*.

[35] It is true that the Panel has the ability to set policy and there is no doubt that it is the best tribunal to do so. The courts are not to usurp that role. As La Forest, J. said in *Paccar* in paragraph 22:

> 22 I am of the opinion that the courts below did not apply the appropriate standard of review to the decision of the Board. I cannot escape the conclusion that, instead of examining the reasonableness or rationality of the Board's decision, the courts substituted their view of the appropriate result. In doing so, they became the arbiters of labour policy as can be seen from the find that, while 'The code as a whole seeks stability resulting from agreement [, this] new power creates instability resulting from unilateral action'. With respect, one cannot imagine that the Labour Relations Board did not consider the implications of a finding that the employer could unilaterally alter the terms and conditions of employment.

[36] However, when the decision is not only a policy decision but one involving interpretation, the courts have a role to play, albeit a very limited one.

[37] As Iacobucci, J. said in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247; [2003] S.C.J. No. 17(Q.L.) at para. 52:

> A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

[38] Exactly what the effect of the Panel's decision is, is difficult to determine from these paragraphs of its decision. In para. 6 of its decision, the Panel refers to the definition of "employee" under Part II of the *Trade Union Act* and refers to employers who are "employed in the construction industry". That is the statutory requirement for certification under Part II of the *Act*.

[39] The Panel then turned to the *Boehner* case to deal with the issue of employees who, like those of *Granite*, were "jacks-of-all-trades". The decision in para. 7 refers to *Boehner's* analysis of how to deal with an employee who, on the application date, has done work "within the trade jurisdiction of more than one construction trade union."

[40] In para. 9, the Panel gives an example of an employee who spent 9 hours out of a 14 hour workday working "on-site".

[41] Although nothing turns on this, in my view, the distinction drawn by the Panel between work "on-site" and work "off-site" is unnecessary. The

definition of “construction industry” in s. 92(c) includes the words “on-site”. In my view, the distinction could more clearly be drawn between work in the construction industry and other work. For example, work at “the pit” was said by the Panel in para. 6 to be treated as “manufacturing and not within Section 92(c) of the Act - or Part II.”

[42] The Panel concluded that if the employee spent more than half of the 9 hours on-site doing labourer’s work, he or she would be eligible for inclusion in the Labourers’ Local 1115 bargaining unit. However, if he or she spent only 4 hours doing one type of bargaining unit work, 4 doing another and 1 hour doing the work of a third, that “employee could not be claimed by any of the three (3) construction trade unions because there would be no majority of working time on-site.”

[43] In para 11 of the decision, the Panel sets out an argument raised by the Employer about the effect of the Panel’s decision. The Employer raised the issue of two employees who each spend one minute on-site in a given day. In one case, 100% of the employee’s time was spent doing bargaining unit work, in the other, only a small percentage. According to the employer, the second employee should not be counted as a Part II employee, following *Boehner* and *Kynock*.

[44] In argument before me, counsel for the Employer made a similar argument. He then submitted that that result, showed the “Absurd Effect” of the Panel decision (The example given is attached as a Schedule “A” to this decision).

[45] The Panel’s response to the Employer’s submission is set out in para. 12 of its decision. The decision refers to the Employer’s “version of the ... rule ...”. The Panel said that interpretation could lead to an employer successfully blocking a unionization bid.

[46] The Panel gave an example of how this could occur:

> ... a non-union employer could take his office staff and other off-site workers to his construction site or sites each day, have them do basic labourer’s type work or work of other trades of which the particular employee has the skills for a total of one (1) or so hours each day and then if a union sought certification, defeat the Application by arguing that on the date of the filing of this application each office worker and each other off-site worker had gone to the contractor’s sites A, B and C and spend [sic] forty (40) minutes at each site (for example) and then returned to finish their eight (8) or ten (10) hours working day at the office or other off-site locations (e.g. a quarry). In the result, when the test is where one worked for the majority of the working day, the union would almost always lose.

[47] The Panel continued in para 12:

> Our rule, which restricts the working day to on-site work in the construction industry would prevent the employer from adopting this device.

[48] It is unclear to me how this example makes the Panel's point. Instead, it is a further example of the point the Panel, in para. 11, said the Employer was making. According to the Panel's explanation of the Employer's argument in para. 11, the "one-minute employee" who then went to "the pit" for the balance of the day should not be counted. Similarly, it seems to me the "40 minute employees" in the Panel's example in para. 12, the Employer would argue, would not be counted, because they did not spend the majority of their working day "on-site". By that argument, it is hard to understand how the Panel concludes "the union would almost always lose."

[49] The Panel's conclusion that its interpretation of the rule would prevent this is puzzling. If the working day is limited to the time spent doing "on-site" work in the construction industry, the office staff and others would be counted. If, as the Panel seems to assume, they would not support a construction industry trade union, in this scenario the union would almost always fail to sign up the necessary 35% required by s. 95(1) of the *Act*.

[50] If what the Panel intended by paras. 9 and 12 was that first of all the person had to spend a majority of his or her working day working in the construction industry that would be reasonable. Such a person should be able to be considered for inclusion in a construction industry trade union, and could be a union member if he or she spent a majority of the construction industry work day doing work of a specific bargaining unit. In the para. 9 example, one employee could be counted by a union and the other could not.

[51] However, that does not appear to be the Panel's intent. In para. 9, the Panel said the issue was:

> Whether that employee performed work within the trade jurisdiction of the applicant trade union ... for more than 50% of that part of his working day that was spent performing work ON-SITE in the 'construction industry.'

[52] The office worker who did labourer's work for forty minutes out of an 8-10 hour day, while spending the rest of that day in the office, would have spent more than 50% of his or her "on-site" time doing the work of the labourers', bargaining unit.

[53] As further evidence that the Panel did not intend firstly that the employee spend the majority of his or her work day in the construction industry, I look to how the Panel dealt with Bob Dennis in para. 21(ii).

[54] According to para. 21 (ii), Bob Dennis worked 10 hours on July 26, 2002. Five of those hours were "on-site", which means he did not spend a majority of his work day in the construction industry. The Panel ignored that fact and considered only what he did in the 5 hours he spent on-site.

[55] According to this reasoning, the time of the "1-minute employee" and the "40-minute employee" would be treated the same as that of Bob Dennis, who worked 5 hours in the construction industry.

[56] The Panel's decision would have the effect of including in construction industry trade unions persons who spent very little time doing construction industry bargaining unit work. It has the opposite effect from that which the Panel apparently tried to achieve. Persons who should be members of Part I trade unions could become members of Part II trade unions or it could become increasingly difficult to certify the employees of a construction industry contractor. In the first case, the union membership could be diluted by members with very little connection to or interest in the construction industry. That would be contrary to the purpose of Part II of the *Trade Union Act*.

[57] Either side-effect borders on the absurd, especially in light of the Panel's apparent attempt to prevent that result.

[58] After carefully reviewing the reasoning of the Panel, I conclude that the result is patently unreasonable and this portion of the decision of the Panel is quashed.

3. *Exclusion of Wayne Best from the Bargaining Unit*

[59] The relevant paragraphs of the Panel decision dealing with Wayne Best are paragraphs 17(i) and 21(ii). The former dealt with the application by the Labourers, Local 1115 for certification as of July 23, 2002 and the latter with the Operating Engineers application as of July 26, 2002.

[60] The decision about Wayne Best with respect to the Operating Engineer's application is very brief. It refers to the decision that he was not a working foreman on July 23, 2002 and also says he "did not operate the equipment of an operating engineer for the majority of his on-site working day on July 26th." There is no reference in the decision to the work Wayne Best did on July 26. For that reason, I conclude that that part of the decision is patently unreasonable.

[61] However, the Panel gave two reasons for excluding Wayne Best. The other is that "he is a Section(2)(2) managerial exclusion." Reference is then made to the conclusion reached about his status on July 23. The Panel concluded

that his status had not changed between July 23 and July 26. The focus of my analysis of the Panel's reasoning therefore must be on paragraph 17(i) of the decision.

[62] In that paragraph, the Panel states that Wayne Best did "work with the tools". The distinction found by the Panel between Wayne Best and others was that:

> ... alone among the employees he did not fill out (or have another do it for him) a 'FOREMAN'S DAILY RECORD' (see Exhibit R-1) ... .

[63] The Panel continued:

> ... Since only Best and MacDonald did not do so, we infer that FIRSTLY, each was salaried and SECONDLY, each was viewed by the Employer as managerial employees and excluded by virtue of Section 2(2)(a) of the Act.

[64] In *Lester*, McLachlin, J. (as she then was) said in para. 94:

> ... If there is any evidence capable of supporting a finding of successorship, the Court will defer to the Board's finding even though it may not have reached the same conclusion. However, absent such evidence, the decision must fall.

[65] The decision discloses that there was some evidence upon which the Panel could conclude that Wayne Best was a managerial employee. That portion of the decision is not patently unreasonable.

4. *Inclusion of Bob Dennis in the Bargaining Unit*

[66] Bob Dennis was included in the bargaining unit because the Panel concluded he spent the majority of his on-site working day doing bargaining unit work. Since I have concluded above that the Panel's decision to only count on-site time as part of the working day was patently unreasonable, Bob Dennis should not have been included in the bargaining unit.

[67] Even if that were not the case and his working day was only to be considered his on-site working day, I conclude that the decision to include him in the bargaining unit is, nonetheless, patently unreasonable.

[68] The Panel said, with respect to Bob Dennis, in its decision at para. 21(ii):

> (ii) Bob Dennis worked a total of ten (10) hours on July 26, 2002 of which three (3) were spent on the trestle ie., 'construct and remove trestle (raft assembly)', two (2) hours on 'environment' and five (5) hours off site at the Pit (the quarry). During the five (5) hours he worked on-site, it is true he only operated the excavator for two (2) hours plus one-half (½) hour in pre-maintenance work. However, the other two and one-half (2.5) hours he spent on-

> site waiting for a task to be given to him. We concede that the evidence is not totally clear and McLellan has grounds for arguing that there was NO 'majority' of time spent on work within the trade jurisdiction of the Op Eng Local 721 (since the excavator - the 3 m781 220 Komatsu) according to its meter only operated for two (2) hours and 'pre-maintenance' was, as noted, only for one-half (.5) hours. In our view though, some waiting time can and ought legitimately, to be added to the two and one-half (2.5) hours on the excavator. Thus more than fifty per centum (50%) of Dennis' on-site, work day was spent in work within the trade jurisdiction of Op. Eng. Local 721. We so find. It is important to note that MacDonald was not in a position, (because of the two (2) 'sites' he was responsible for) to know how long and where or which T. MacNeil operated the boat. It may be unfortunate for the Employer that DesJardins' daily notes (exhibit R-7) were not more specific and detailed. However, as it stands, our conclusion is roughly consistent with the Record for July 26th. It is important not to deprive an employee of his Section 13(1) right to belong to a trade union by removing such an employee from the protection of the Act on the basis of vague evidence. We so find.

[69] The Panel said it conceded "the evidence is not totally clear." It also referred to the evidence as "vague". It said that in the context of not depriving an employee of his right to belong to a trade union. However, the Panel's test for determining "who is in" and "who is out" is based upon the employee spending a majority of this workday on the relevant date doing bargaining unit work.

[70] The Panel then added some time to the 2.5 hours doing operating engineers' work. It did so saying "some waiting time can and ought legitimately" be added.

[71] Although the Panel says "the evidence is not totally clear" and "vague", in my view, the Panel's own recitation of the facts shows it to be otherwise. Bob Dennis spent two hours operating the excavator and one-half hour in pre-maintenance work on it. The other 2.5 hours he was on-site were spent "waiting for a task to be given to him". This is very specific evidence about his time. There is no evidence that the waiting time was operating engineers' work. He was paid for all his hours on-site including the waiting time. I therefore do not find the section of the Labour Standards Code Minimum Wage Rule with respect to waiting time, which was provided to me, helpful in this regard.

[72] In *Cape Breton Development Corp. v. United Mine Workers of America, District No. 26, Local 4522 (Sectionmen)*, [1985] N.S.J. No. 396 (C.A.), the Court of Appeal addressed the issue of inferences drawn by an arbitrator. In that case, the arbitrator had said in his decision:

> ... an arbitrator is entitled to draw common sense inferences (as quoted in para. 10)

[73] Matthews, J.A. said in paras. 14 and 15:

> 14 Lord MacMillan in Jones v. Great Western Railway Company (1931), 144 L.T. 194 at p. 202 said:
>
> > The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof ...
>
> 15 With deference, the arbitrator was not drawing inferences, he was dealing with conjecture. He was not making deductions from evidence, which is the criterion for inferences. The only evidence of motive is that given by Mr. MacKenzie.

[74] As McLachlin, J. said in *Lester* (quoted above), if there is any evidence for the tribunal's finding, the Court must defer to that finding. She continued, however, that: "absent such evidence, the decision must fall."

[75] She concluded in *Lester*, at para 110:

> 110 The absence of evidence establishing a transfer or disposition under s. 89 of that Act renders the Board's decision patently unreasonable.

[76] There is no evidence upon which the Panel made its conclusion. The Panel appears to have relied on a common sense inference or conjecture. It should not have done so. On that basis, the decision with respect to Bob Dennis is patently unreasonable and is quashed.

CONCLUSION

[77] The decision of the Labour Relations Board (Construction Industry Panel) is quashed in part.

Hood, J.