IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Paladin Security Group Ltd. v. Construction General Labourers, Rock & Tunnel Workers, Local 1208*, 2023 NLSC 105
Date: July 17, 2023
Docket: 202201G2049

BETWEEN:

PALADIN SECURITY GROUP LTD.

APPLICANT

AND:

CONSTRUCTION GENERAL LABOURERS, ROCK & TUNNEL WORKERS, LOCAL 1208

FIRST RESPONDENT

AND:

NEWFOUNDLAND AND LABRADOR LABOUR RELATIONS BOARD

SECOND RESPONDENT

Before: Justice Glen L.C. Noel

On Judicial Review From: Orders of the Newfoundland Labrador Labour Relations Board File 5805 dated February 18, June 24, and July 8, 2022.

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: April 17, 2023

Summary:

The Newfoundland and Labrador Labour Relations Board issued a site-specific Bargaining Unit Order. The employer requested the Board provide reasons for its decision. The Board declined because the request had not been made within the 30-day time period stipulated in the Board's Rules of Procedure.

The employer applied for Judicial Review to quash the Bargaining Unit Order and Certification Order. The union sought dismissal of the Judicial Review Application since the Parties had negotiated a collective agreement. The Court raised whether the rule on the time stipulation was *ultra vires* the enabling legislation.

The Court held:

1.(a) It is appropriate for the Court to consider the *ultra vires* issue; and

(b) that the Board's 30-day Rule for requesting reasons is not *ultra vires* the *Act*.

2.(i) There exists a live issue in the Judicial Review Application; or alternatively,

(ii) to exercise the Court's discretion to hear the case, and to dismiss the Union's application on mootness.

3. The Standard of Review that applies to decisions and orders of the Board is reasonableness.

4. The Board's discretionary decision to deny Paladin reasons for the Bargaining Unit Order is unreasonable and set aside.

5. The Board is to provide reasons for issuance of the Bargaining Unit Order in accordance with the directions and reasons provided herein, and Paladin's application to quash the Bargaining Unit Order and Certification Order is dismissed.

There is no order as to costs.

Appearances:

Nancy F. Barteaux, KC	Appearing on behalf of the Applicant
Andrew G. Hurley	Appearing on behalf of the First Respondent
Megan S. Reynolds and Sarah Dominic	Appearing on behalf of the Second Respondent

Authorities Cited:

CASES CONSIDERED: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44; *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72; *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17; *Alvarez v. Canada (Minister of Manpower & Immigration)*, [1979] 1 F.C. 149, 22 N.R. 85 (C.A.); *Morine v. L & J Parker Equipment Inc.*, 2001 NSCA 53; *Katz Group Canada Inc. v. Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64; *Auer v. Auer*, 2022 ABCA 375; *TransAlta Generation Partnership v. Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381; *Portnov v. Canada (Attorney General)*, 2021 FCA 171; *Innovative Medicines Canada v. Canada (Attorney General)*, 2022 FCA 210; *Bienvenu v. Canada (Attorney General)*, 2023 FC 175; *Sul v. The Rural Municipality of St Andre*ws, Manitoba, 2023 MBCA 25; *Council of Independent Community Pharmacy Owners v. Newfoundland and Labrador*, 2013 NLCA 32; *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43; *Communications, Energy and Paperworkers Union of Canada v. Hibernia Management and Development Co.*, 2004 NLSCTD 80; *C.U.P.E., Locals 1289 & 1269 v. Civic Centre Corp.*, 2006 NLTD 169; *Newfoundland & Labrador (Citizens' Representative) v. Newfoundland & Labrador Housing Corporation*, 2009 NLTD 123; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Smyth v. Newfoundland and Labrador (Royal Newfoundland Constabulary)*, 2020 NLSC 83; *Lawton's Drug Stores Ltd. v. UFCW, Local 864*, 2016 NSSC 166; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699; *Taticek v. President of the Canada Border Services Agency*, 2018 FPSLREB 44; *Thompson v. Procrane Inc.*, 2016 ABCA 71; *Newman v. Newfoundland (Worker's Compensation Review Division)*, 2001 NFCA 67; *Chaffey v. Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 56; *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 740 v. Canada Fluorspar (NL) Inc.*, 2021 NLSC 104; *Andritz Hydro Canada Ltd. v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*, 2023 SKCA 69;

STATUTES CONSIDERED: *Labour Relations Act, R.S.N.L. 1990, c. L-1*; *Interpretation Act*, R.S.N.L. 1990 c. I-19

RULES CONSIDERED: *Labour Relations Board Rules of Procedure*, C.N.L.R. 745/96

TEXTS CONSIDERED: George W. Adams, *Canadian Labour Law*, 2d ed. looseleaf (Carswell: Toronto, 1993); Lorne Sossin and James Sprague, *Practice and Procedure Before Administrative Tribunals*, looseleaf (Toronto: Carswell, 1991)

REASONS FOR JUDGMENT

NOEL, J.:

INTRODUCTION

[1] The Newfoundland and Labrador Labour Relations Board declined to provide reasons for its order that determined the appropriate bargaining unit was site-specific to the Waterford Hospital, rather than all security employees of Paladin Security Group Limited (Paladin) employed at healthcare facilities throughout the Province (the "Bargaining Unit Order and/or Order").

[2] The Board's *Rules of Procedure*[1] stipulate a request for written reasons shall be received by the Board within 30 calendar days of receipt of a Board order (the "Rule"). Paladin did not make the request for reasons until after the 30 days expired because of inadvertence on the part of its counsel.

[3] Paladin's Application for Judicial Review seeks to quash both the Bargaining Unit Order and the subsequent Certification Order, and to have the Court remit the matter to a new panel of the Board for reconsideration. If Paladin's Application is successful, I must decide whether quashing the Orders is the appropriate remedy or whether an alternative discretionary remedy is warranted.

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[1] Labour Relations Board Rules of Procedure, C.N.L.R. 745/96

[4] Construction General Labourers, Rock & Tunnel Workers, Local 1208 (the "Union") filed an Interlocutory Application seeking to have Paladin's Application dismissed on the doctrine of mootness. The Union and Paladin engaged in Collective Bargaining, and Conciliation. These efforts culminated in a tentative Collective Agreement between the Parties on February 15, 2023, and subsequently ratified by the Union on March 6, 2023. Paladin, as of the hearing of this Application and on the instructions of its counsel, had not executed the Collective Agreement.

[5] Following oral submissions and consideration of case authorities, I convened a case management meeting to inquire if the Court can consider whether the Rule is *ultra vires* (beyond the Board's authority). Although Paladin did not raise the *ultra vires* issue before the Board or in its initial submissions, counsel for Paladin requested the opportunity to do so.

[6] I permitted the Parties to file written briefs[2] on the issue. Paladin submits the Rule is *ultra vires*. The Union submits Paladin was obligated to raise this issue before the Board and cannot do so now. Counsel for the Board submits that the Board has the statutory authority to make rules concerning its own process.

[7] My determination of the issues will commence with whether it is appropriate for the Court to consider and to dispose of the *ultra vires* issue. First, it is necessary to set out the pertinent background.

BACKGROUND

[8] The origin of this dispute between Paladin and the Union (the "Parties") is approaching three years.

[2] The Applicant, First Respondent, and Second Respondent filed their written submissions on May 8, May 15, and May 19, 2023, respectively.

[9] On September 21, 2020, the Union filed with the Board an application for certification seeking to represent employees at a site-specific location. The Union sought certification for "all employees of Paladin Security Group Limited working at the Waterford Hospital, St. John's operated by Eastern Health, save and except office, sales, clerical employees, manager, supervisors and those above the rank of supervisor."

[10] Paladin submitted to the Board that the proposed bargaining unit was inappropriate. Paladin instead proposed that the bargaining unit be on a province-wide basis: "security employees of Paladin Security Group Limited employed in Newfoundland and Labrador, excluding Branch Manager, Client Services Manager, Human Resources Coordinator, Site Supervisors, Security Operations Leads, Security Supervisors and any other employee excluded pursuant to section 2(1)(m) of the *Labour Relations Act*"[3] (the "*Act*").

[11] Paladin and the Union disagreed on whether 21 of the Security Officers working at the COVID-19 Drive Thru testing site at the Waterford Hospital (Covid Screeners) were included in the proposed bargaining unit. The Board conducted an investigation related to the employees in dispute at the Waterford Hospital, and provided the Parties with summaries of interviews completed with 10 of the 21 Paladin employees whose inclusion was in dispute. Paladin submits the Board did not finalize, nor did it release its findings from the investigation.

[12] The Board held case management conferences and mediation occurred without resolution. The Parties agreed there were two outstanding issues to be determined. Specifically:

a) Whether the bargaining unit applied for was appropriate in the circumstances, and;

[3] *Labour Relations Act*, R.S.N.L. 1990, c. L-1

b) Whether the Security Officers working as Covid Screeners at the Waterford Hospital were included in the proposed bargaining unit.

[13] The Parties submitted an Agreed Statement of Facts and a Joint Submission of the Issues to the Board. The Board requested, and the Parties provided, final written submissions on the appropriateness of the bargaining unit.

[14] The Board, without holding a hearing, issued the following Bargaining Unit Order on February 18, 2022:

> The appropriate bargaining unit is to be all employees of Paladin Security Group Limited working at the Waterford Hospital, St. John's, operated by Eastern Health, save and except office, sales, clerical employees, managers, supervisors and those above the rank of supervisor.

[15] The Board also stated in its Order that it would hear evidence as to the inclusions to or exclusions from the bargaining unit at a hearing scheduled in June 2022, with the new Chairperson or a Vice-Chairperson acting as Chair of the Panel.

[16] The Board sent the Order via email to the legal counsel for the Parties using their emails on file with the Board.

[17] The Order did not come to the attention of Paladin until during a pre-hearing conference with the Board on June 1, 2022. Paladin's counsel later determined they had received the order by email on February 18, 2022, and a staff member had inadvertently filed the Order electronically on the wrong file without bringing it to the attention of counsel.

[18] On June 6 and 7, 2022, the Board held a hearing into the outstanding issue of inclusions to and exclusions from the bargaining unit. The Parties resolved the matters by agreement; accordingly, on June 30, 2022, the Board sent the Certification Order to the Parties.

[19] Before issuance of the Certification Order, Paladin wrote to the Board on June 10, 2022 and requested that the Board provide written reasons for the Bargaining Unit Order. Paladin acknowledged and explained why it had not made the request for reasons within 30 days of receipt of the Board's Order.

[20] The Board wrote the Parties asking for written submissions regarding Paladin's request that the Board provide reasons for the Bargaining Unit Order. Paladin urged the Board to exercise its discretion to provide written reasons for the Board's decision to define the bargaining unit on a site-specific, rather than a province-wide basis. The Union opposed Paladin's request for reasons. The Union took the position that the Board should not exercise its discretion to waive the time limit for requesting reasons.

[21] After considering the submissions of the Parties, the Board in an order dated July 8, 2022 (the "July 8, 2022 Order"), declined to exercise its discretion to provide written reasons for the Bargaining Unit Order.

[22] On July 29, 2022, Paladin filed this Application for Judicial Review and its counsel advised the Board on September 22, 2022, of Paladin's Application.

[23] Without a request from the Parties, the Board issued a 13-page decision on November 18, 2022 (the "Decision"), in which it set out reasons for the July 8, 2022 Order declining to provide reasons for the Bargaining Unit Order.

ISSUES

[24] The following issues are engaged:

1. (a) Should the Court consider the *ultra vires* issue? And if so,

   (b) is the 30-day Rule for requesting reasons *ultra vires* the *Act*?

2. Is the Application for Judicial Review moot because of the Collective Agreement that the Union and Paladin negotiated?

3. What is the Standard of Review that applies to decisions and orders of the Board?

4. Should the Court set aside the Board's discretionary decision to deny Paladin written reasons for the Bargaining Unit Order?

5. What is the appropriate Remedy?

ANALYSIS

[25] I intend to resolve the issues, within the constraints that the law imposes on judicial review, and in a manner that is fair and just with due consideration of the practical circumstances for the Parties. I am mindful that Paladin and the Union have already negotiated a tentative Collective Agreement, and there are ongoing collective bargaining matters between them.

1.(a) Should the Court consider the *ultra vires* issue?

[26] I accept the Union's position that the *ultra vires* issue should have been advanced by Paladin before the Board. However given my conclusion below, it would serve no purpose remitting this issue back to the Board for consideration.

[27] An administrative decision maker is entitled to determine the extent of its own jurisdiction. The role of the Court in a judicial review is not to conduct a *de novo* analysis or seek to determine the "correct" answer to the issue.

[28] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, both changed and settled the law that the reasonableness standard, and not correctness review, is to be applied when reviewing "true questions of jurisdiction or *vires*" of an administrative decision maker (at para. 65). Accordingly, the Board ought to have been afforded the opportunity to decide the *ultra vires* issue. The matter could then have come before the Court on judicial review of the Board's determination and decision to be assessed on the reasonableness standard.

[29] As seen below, the law is still unsettled regarding the methodology that applies to a challenge of the *vires* of Lieutenant Governor in Council regulations.

[30] Nevertheless, with the further guidance of *Vavilov* (at para. 142), nothing would now be gained by dismissing Paladin's challenge to the Rule as premature and remitting the *ultra vires* issue to the Board for determination. This is one of those "limited scenarios" contemplated by the Supreme Court "in which remitting the matter would stymie the timely and effective resolution of matters." Furthermore, as evident by my reasoning to follow, declining to remit a matter to the Board is appropriate where "a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose."

1.(b) Is the 30-day Rule for requesting reasons *ultra vires* the *Act*?

[31] Counsel for the Board provided the Court with cogent and helpful submissions that gives me the necessary comfort to conclude the 30-day Rule is within the Board's authority and not *ultra vires* the *Act*.

Role of the Board

[32] As a preliminary matter, I must decide whether to exercise my discretion and permit the Board to make submissions on the Board's jurisdiction and *vires* of its regulations. The Board maintained an impartial position at the hearing of the Judicial Review Application. The *ultra vires* issue was only raised by the Court post-hearing.

The Court is therefore not reviewing the Board's decision on the issue, but conducting a first-instance review.

[33] The Board's role in making submissions on this issue is consistent with the principles identified by the Supreme Court in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, at paras. 57 and 59. The Court has discretion to permit the Board to make submissions when the Court is conducting first-instance review of the Board's jurisdiction. In exercising its discretion, the Court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

[34] The Board has not opined on any of the other issues before the Court, including the Union's objection to the Court hearing and adjudicating the *vires* issue.

[35] I am satisfied that the Board's expertise and familiarly with its home statute and regulations uniquely position's counsel for the Board to make submissions on the *ultra vires* issue now before me.

Board's Governing Legislation, Rules and Procedures for Issuing Decisions

[36] The *Rules of Procedure*, as subordinate legislation, derive their validity from the enabling statute. The Rule must be authorized by and be within the limits of the *Act*. If the Rule is not within the limits imposed by the statute, it is *ultra vires* or beyond the power of the Board: *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, at para. 175; and *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17, at para. 51.

[37] The Board's home statue at section 12(1) of the *Act* states: "In a matter that comes before it, the board and a panel shall give written reasons for its decision where requested to do so by the parties."

[38] The grant of authority of the Board to make rules of general application, subject to the approval of the Lieutenant Governor in Council, is authorized by statute. Section 22(1)(h) of the *Act* permits "prescribing the time … and the circumstances in which notices shall be considered to have been given or received by the board or a party or person."

[39] The Lieutenant Governor in Council is authorized by the *Act* to pass the *Rules of Procedure*, and specifically pursuant to the language under section 147(a) of the *Act*, for "prescribing the time within which anything authorized by this *Act* shall be done."

[40] Section 15(1) of the *Rules of Procedure* gives the Board the discretion to "abridge or enlarge the time prescribed by these rules for doing an act, filing a document or instituting proceedings before it."

[41] The Rule that is the central focus of the controversy is Section 16(3) of the *Rules of Procedure*. It states: "A request for written reasons of a decision shall be received by the board within 30 calendar days of receipt of a board order."

[42] The Board has an Information Bulletin entitled *Processing Applications, Complaints and References*, last updated on July 20, 2012. The Information Bulletin states:

> Issuance of Board Decisions
>
> All decisions of the Board are issued in the form of Board Orders. Where there is no hearing held, Orders are issued following Board meetings. If a party wishes to have written reasons for the Board's decision, a written request for reasons can be filed with the Board within 30 calendar days of receipt of the Board Order. Where a formal hearing has been held, written reasons for decision are generally issued together with the Board Order (section 12 of the *Act* and section 16 of the *Rules*).

The Different Methodology Approaches to the Determination of *Vires*

[43] Paladin relies on *Alvarez v. Canada (Minister of Manpower & Immigration)*, [1979] 1 F.C. 149, 22 N.R. 85 (C.A.), and the Nova Scotia Court of Appeal decision in *Morine v. L & J Parker Equipment Inc.*, 2001 NSCA 53, which cited Alvarez, in support of its position that Rule 16(3) is *ultra vires* section 12 of the *Act*.

[44] The jurisprudence has evolved regarding a challenge of the *vires* of regulations since the *Alvarez* and *Morine* decisions.

[45] In *Katz Group Canada Inc. v. Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64, the Supreme Court held (at para. 25), "[r]egulations benefit from a presumption of validity." This presumption means: (1) the burden is on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them; and (2) it favours an interpretative approach that reconciles the regulation with its enabling statute so that, where possible, the regulation is construed in a manner which renders it *intra vires*.

[46] Further, Abella J joined by all other members of the panel, including Cromwell J. who authored *Morine* and quoting from previous jurisprudence of the Supreme Court, wrote (at para. 28), that regulations "must be 'irrelevant,' 'extraneous,' or 'completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose." It takes "an egregious case" to strike down a regulation on the basis of inconsistency with the statutory purpose.

[47] In a pair of decisions from the Alberta Court of Appeal in 2022, that court addressed the question of the framework for judicial review of regulations: *Auer v. Auer*, 2022 ABCA 375,[4] and *TransAlta Generation Partnership v. Alberta (Minister*

[4] An application for leave to appeal the Auer decision was filed with the Supreme Court of Canada on January 31, 2023, but no decision, as of the date of filing of this decision, has been rendered as to whether leave is granted or denied.

of Municipal Affairs), 2022 ABCA 381. In both instances, Governor-in-Council regulations on support payments in *Auer* (at para. 7), and ministerial regulations about property taxation assessment in *TransAlta* (at para. 41), the court applied the framework set out in *Katz* rather than a reasonableness standard from *Vavilov*.

[48] By contrast, the Federal Court of Appeal in *Portnov v. Canada (Attorney General)*, 2021 FCA 171 found (at para. 20) that the reasonableness standard as set out in *Vavilov*, not *Katz*, applies to the review of regulations. Similarly, the decision of Stratas JA in *Innovative Medicines Canada v. Canada (Attorney General)*, 2022 FCA 210, (at para. 49) reaffirmed *Portnov* and applied the reasonableness standard from *Vavilov*.

[49] Additionally, the Federal Court in *Bienvenu v. Canada (Attorney General)*, 2023 FC 175, a decision rendered in February of 2023, indicated that the issue of which standard to apply is far from settled. The Federal Court applied (at para. 11) the reasonableness standard of *Vavilov* as the parties agreed, however, it noted that the outcome would not change if it applied the test in *Katz*.

[50] Most recently, the Manitoba Court of Appeal *in Sul v. The Rural Municipality of St Andre*ws, Manitoba, 2023 MBCA 25, concerning judicial review of the *vires* of legislative action taken by a municipal council in passing by-laws, made reference to the methodology in *Katz*. Because that approach had not been argued by the parties in the court below, it held (at para. 37) that "the application of either the standard of review of correctness or that of reasonableness, as argued by the parties, leads to the same result."

[51] I would also note our Court of Appeal in a decision of Rowe JA (as he then was) predating *Vavilov*, and citing Supreme Court of Canada authority before the *Katz* decision, concluded: "Whether a regulation is *ultra vires* its enabling statute is a question of law, for which the standard of review is correctness." (*Council of Independent Community Pharmacy Owners v. Newfoundland and Labrador*, 2013 NLCA 32, at para. 13).

Application of the Methodology Approaches to this Matter

[52] Paladin has not met the burden to demonstrate that Rule 16(3) is *ultra vires* section 12 of the *Act* in accordance with either the test set out in *Katz* or on the reasonableness standard articulated in *Vavilov*. Should there be any doubt that the standard of review remains correctness when considering the *vires* of a regulation, the application of correction review leads me to the same conclusion.

[53] Under *Katz*, Rule 16(3) ought to be construed in a manner that renders it *intra vires* given that the *Act*, through sections 147(a) and 22(1)(h), specifically contemplate the setting of timelines. The Rule is certainly not "irrelevant," "extraneous," or "completely unrelated" to the statutory purpose of section 12 of the *Act*. And this is not "an egregious case" to strike down the regulation on the basis of inconsistency with the statutory purpose.

[54] In *Vavilov* (at para. 117 and 188), the Supreme Court reiterated its adoption of the "modern principle" as the proper approach to statutory interpretation, whether by a court or an administrative decision maker. Legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context.

[55] I must consider, on the reasonableness standard, whether the impugned Rule is unreasonable because it exposes a party before the Board to be denied reasons if not requested within the prescribed time period.

[56] The purpose, words, and scheme of the *Act* support an expansive construction of the Board's rule-making authority.

Object of the Act

[57] The Board's rule-making authority should be interpreted in a manner that attains the objectives of the *Act* and *Rules of Procedure*, which is to provide an expedient and efficient decision-making process for employees and employers.

[58] The Legislature has given the Board regulatory powers to accomplish its public mandate in labour relations matters. The Governor or Lieutenant Governor in Council has the power to enact regulations to achieve the objectives of the statute.

[59] The Board is typically viewed as masters of its own procedure given that many procedures are in keeping with board policy and practice. The Board and its Chairs have the power to establish rules of practice and procedure governing processes and hearings.

[60] In addition to the modern principle approach to statutory interpretation, section 16 of the *Interpretation Act*, R.S.N.L. 1990 c. I-19 requires the Court to apply a remedial and liberal approach to the construction of every statutory provision "that best ensures the attainment of the objects of the *Act*, regulation, or provision according to its true meaning." The provision applies to all legislative acts regardless of subject matter: *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, held (at para. 19).

[61] This Court's own jurisprudence reflects a consistent liberal and purposive, interpretive approach to promote the timely resolution of labour disputes: *Communications, Energy and Paperworkers Union of Canada v. Hibernia Management and Development Co.*, 2004 NLSCTD 80, at para. 60; *C.U.P.E., Locals 1289 & 1269 v. Civic Centre Corp.*, 2006 NLTD 169, at paras. 46 and 27; and *Newfoundland & Labrador (Citizens' Representative) v. Newfoundland & Labrador Housing Corporation*, 2009 NLTD 123, at para. 92.

The Words in their Ordinary and Grammatical Sense

[62] The wording of the *Act* is also indicative of the breadth of the Board's authority and its rule-making power.

[63] Pursuant to section 22 and 147 of the *Act*, the Board made, and the Lieutenant Governor in Council passed, Rule 16 of the Board's Rules of Procedure, that deals with decisions of the board and the timeline within which a request for reasons must be made.

[64] Paladin argues the wording of sections 22 and 147 of the *Act* do not expressly provide for anything specifically related to requesting reasons from the Board, stating that there is no reference to a 30-day time limit, nor to any time limit whatsoever regarding a request for reasons.

[65] The Board submits that Paladin's argument is flawed for two reasons. Firstly, it disregards the proper approach to assessing the legality of the Rule. What the Court must do is determine not whether the *Act* specifically refers to this power, but whether the impugned Rule is reasonable in light of the Board's statutory mandate.

[66] Secondly, Paladin's argument is inconsistent with the purposive approach to statutory interpretation. An argument based on implied exclusion is purely textual in nature and cannot be the sole basis for interpreting a statute. The words of the statute must be considered in conjunction with its purpose and its scheme.

[67] I accept the Board's submissions that the wording of the relevant provisions do not support Paladin's argument for application of the implied exclusion rule in this case.

Scheme of the Act

[68] The scheme of the *Act* demonstrates that the Legislature vested the Board with the power (subject to approval of the Lieutenant Governor in Council) to make rules of general application governing its procedure and that of panels, including with respect to prescribing the timeline within which documents may be filed.

[69] In the *Hibernia Management* case, Green CJTD (as he then was) reviewed the *Act* and *Rules of Procedure* with respect to the ability to prescribe a time bar in relation to an application for certification. He held (at para. 65): "the legislature in this province has conferred on the Board a jurisdiction to decide whether or not to adopt a time bar and, if it does decide to adopt one, to determine its parameters."

[70] While the subsection at issue in *Hibernia Management* was section 22(1)(l), the analysis is analogous as the Legislature has conferred on the Board jurisdiction to decide whether or not to prescribe a timeframe within which a party is to send a request for written reasons to the Board, and to determine its parameters. Additionally, section 147(a) provides that the Lieutenant Governor in Council may prescribe the timeframe within which anything authorized under the *Act* shall be done.

[71] In accordance with such language and the scheme of the *Act*, it is clear that the Legislature intended and vested in the Board, subject to the approval of the Lieutenant Governor in Council, the right to create timelines, and therefore Rule 16 is *intra vires* the *Act*.

[72] Paladin has therefore failed to demonstrate that Rule is *ultra vires* on the standard of reasonableness or correctness.

2. Is the Application for Judicial Review moot because of the Collective Agreement that the Union and Paladin negotiated?

[73] I will set out the Union's position and explain why I am denying the order it is seeking to have Paladin's Application dismissed on mootness.

Union's Position

[74] The Union seeks an order dismissing the Application for Judicial Review, pursuant to Rule 58.12(1)(b) of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, based on the negotiation of the Collective Agreement. The Union submits Paladin's Application has become moot since there is no live controversy to be resolved.

[75] The Parties are in agreement that the leading case on the question of mootness is the Supreme Court of Canada decision in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. *Borowski* (at paras. 15 and 16) established a two-part test to determine whether a court should dismiss a matter due to mootness:

i. Is there still a "live issue" or has the issue become merely academic?

ii. If there is not a live issue, should the court exercise its discretion to decide the case anyways?

[76] The Union relies on this Court's decision in *Civic Centre Corp*. (at para. 75) where Orsborn J declined to address the requests of the applicant unions to remedy a breach of the duty of procedural fairness regarding the provision of reasons, as well as to set aside the decision of the Labour Relations Board as to who the "true employer" was. Both questions had become moot as the employees had recognized who their employer was and the union had entered into two collective agreements with the Civic Centre (the employer).

[77] While the Court retains a discretion to entertain a matter that is moot, the Union submits the Court ought not to exercise discretion when applying the factors set by Justice Sopinka in *Borowski* (at paras. 31–42) and adopted by Boone J (as he then was) in *Smyth v. Newfoundland and Labrador (Royal Newfoundland Constabulary)*, 2020 NLSC 83, (at para. 28). First, the Union states there are no collateral consequences for the Parties, or others with a stake in the outcome, which provide sufficient adversarial context for consideration of the issue before Court. Second, the issue that is moot between the Parties is not one that will provide necessary guidance to other litigants and the public.

Paladin's Position

[78] I accept Paladin's position that the Court should proceed to hear the judicial review on its substantive merits, and Paladin's submissions as to why.

[79] Pursuant to its obligation to do so under section 71 of the *Act*, Paladin began the process of beginning to bargain in good faith. Throughout this process, Paladin made it very clear that it intended on continuing with the judicial review, and did not accept or recognize that the bargaining unit was appropriate for collective bargaining.

[80] As negotiations continued, the Parties reached an impasse, and a Conciliator was appointed. Conciliation failed to conclude an agreement and the Conciliator filed his report. The Parties agreed to hold a meeting with the Conciliator during the countdown to strike/lock-out and a tentative collective agreement was reached subject to ratification by the members of the Union.

[81] On February 17, 2023, counsel for the Union inquired as to whether Paladin intended on withdrawing the Judicial Review Application. In response to the question, Paladin replied that it did not intend on withdrawing the Judicial Review Application and that it considered the issue still very much live and relevant. Paladin clearly indicated that it did not accept the Union's position on this judicial review and did not recognize the appropriateness of the bargaining unit. Paladin submits those issues are still live and will be part of the substantive issues to be resolved by the Court in the Judicial Review Application.

[82] Paladin notes the Union sent their February communication prior to filing their written submissions in response to the Judicial Review Application, and the Union made no mention of mootness in its submissions.

[83] After the Union ratified and signed the tentative agreement, it filed its Interlocutory Application on March 17, 2023, alleging that since the collective agreement had been finalized the judicial review proceedings were now moot.

[84] Paladin submits that the Parties' actions clearly indicate an intention for the tentative collective agreement not to be dispositive of the Judicial Review Application and so there remains a live issue. In the alternative, Paladin submits that the finalization of a collective agreement does not render a judicial review regarding a certification order moot. In the further alternative that the Court finds that there is no live issue, the Court should exercise its discretion to decide the matter given the ongoing adversarial nature of the Parties and the collateral consequences the decision would have on ongoing, almost identical, issues between the parties currently before the Board.

(i)(a) Live Issue: Actions Show Intent for Limited Effect of the Tentative Collective Agreement

[85] Paladin has not signed the tentative collective agreement, therefore it is appropriate to look to the Parties' actions to determine the nature of what they agreed to in bargaining: George W. Adams, *Canadian Labour Law*, 2d ed. looseleaf (Carswell: Toronto, 1993) at §12:2.

[86] Paladin's actions expressed an intention for the tentative collective agreement only to apply to the extent that the Union's certification status may be impacted by the decision in the judicial review proceedings. When the Union inquired as to Paladin's position and intentions on this issue, Paladin explicitly told the Union in response, "We have not withdrawn the Judicial Review … This is very much still a live issue and if successful, it may affect the certification."

[87] At no point prior to filing its Interlocutory Application did the Union express any counter-position or sentiment that the tentative agreement was intended to be final and dispositive of the Judicial Review proceedings.

[88] The Parties' actions demonstrate that the tentative agreement was meant to have only limited effect pending the resolution of the Judicial Review and any follow-up proceedings before the Board. This is a "live issue," which means that the Judicial Review Application cannot be considered moot.

(i)(b) Live Issue: Final Collective Agreement Does Not Preclude Judicial Review

[89] The jurisprudence does not support the Union's position that finalization of a collective agreement precludes judicial review.

[90] The Union cites *Civic Centre* for the principle that the conclusion of a collective agreement makes any ongoing judicial reviews between the Parties moot. The facts of that case are not at all analogous to the ones at hand. Applying the principles from *Civic Centre* to the present case leads to the conclusion that the Judicial Review Application is not moot.

[91] The issue in *Civic Centre* related to the recognition of the employer by the union and whether a judicial review on that question became moot due to the actions of the union in recognizing the employer. The Court found that the judicial review proceedings were moot but not primarily because of the finalization of a collective agreement.

[92] The recognition of the employer was made in two letters signed by a senior union executive. The fact that a collective agreement had been negotiated and agreed upon after the second letter was further proof that the union had accepted the employer. Justice Orsborn held (at para. 80) that the union could not possibly "maintain the position that there is still a live controversy as to the true employer."

[93] The mere finalization of a collective agreement was not, on its own, what made the judicial review proceedings moot. The additional factor of independent recognition before the collective agreement had been negotiated and finalized was the determining factor.

[94] As well, Orsborn J in *Civic Centre* (at para. 75) clearly differentiates the situation in that case from situations involving a judicial review regarding certification or recognition of bargaining rights: “The issue before the Board was the determination of the employer of the unionized employees at the stadium. It did not deal with certification or bargaining agent rights as such.”

[95] The situation is *Lawton's Drug Stores Ltd. v. UFCW, Local 864*, 2016 NSSC 166, is similar to the one at hand. A decision had been made by the Nova Scotia Labour Board that the employer applied to have judicially reviewed. Between the time when the judicial review application had been filed and the matter was heard by the Court, the parties negotiated a tentative collective agreement. Given that an agreement had been reached, the question of whether the judicial review proceedings became moot was raised. The Court held (at para. 53) that negotiation of a collective agreement did not render the judicial review moot.

[96] The jurisprudence requires more than just a negotiated collective agreement to render the issues to be determined on judicial review academic and therefore moot. The Union has not presented anything beyond the conclusion of negotiations for a tentative collective agreement as evidence of mootness.

[97] I am satisfied there still exists a live issue in the Judicial Review Application, and therefore dismiss the Union’s claim of mootness.

(ii) Discretion: There are Collateral Consequences to Deciding this Case

[98] Even if I had accepted the Union’s position that there is no live issue at play in the Judicial Review Application, I would nevertheless exercise the Court’s

discretion to hear the case because of the collateral impacts on ongoing proceedings between Paladin and the Union.

[99] I accept Paladin's submission that the Parties have an ongoing adversarial relationship regarding labour relations matters that are almost identical to the ones in the present case

[100] The crux of the issue regarding the Union's certification is whether it is appropriate for it to be certified to represent a single-site bargaining unit rather than all of Paladin's Newfoundland and Labrador employees employed to service its contract with Central and Eastern Health. Paladin states that same exact issue is currently before the Board in LRB File 5929 (the "Rural Application"). In the Rural Application, the Union applied for a Certification Order over a group of employees at a series of locations that are collectively referred to as the "Rural Site." Paladin opposes this application on the same basis that it continues to oppose the Waterford Application – that a single-site bargaining unit is not appropriate for collective bargaining relying in part upon the "building block" approach the Union is taking.

[101] Paladin is also aware of the fact that the Union is attempting to organize and bring Certification Applications for other single-site bargaining units such as for the employees working at St. Clare's Mercy Hospital in St. John's. Paladin filed an Unfair Labour Practice Complaint on February 3, 2023 (LRB File 5943), and the Union filed an Unfair Labour Practice Complaint on February 16, 2023 (LRB File 5944), both regarding the organizing activities and Paladin's response to same.

[102] The Record before the Court reveals, in the alternative to a Central and Eastern Health bargaining unit, Paladin argued in the Waterford Application that the Board should find that the sites located within the St. John's area be included in the geographical scope of an appropriate bargaining unit. The Waterford Application and this Judicial Review, Paladin insists, are integrally connected. The resolution of the matter of whether the Bargaining Unit and Certification Orders should be quashed and/or sent back to the Board for determination will also have an impact on the Rural Application and any other future single/multiple site certification applications that the Union brings forward.

[103] Accordingly, I am satisfied that the Judicial Review Application meets the requirement of the first of the factors identified in *Borowski* for the exercise of the Court's discretion.

3. What is the Standard of Review that applies to decisions and orders of the Board?

[104] The standard of review of Board decisions and orders is reasonableness (*Vavilov*, at paras. 16 and 30).

[105] Paladin, in its initial submissions to the Court, took the position that there is no standard of review analysis applicable to a judicial review on the grounds of procedural fairness. It claimed the Board's failure to provide procedural fairness is sufficient to have the Board's decision to refuse reasons set aside based on the criteria in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, and endorsed in *Vavilov*, at paragraph 94.

[106] In its Reply to the Union's submissions, Paladin concedes the *Rules of Procedure* and *Information Bulletin* provide the Board with the requisite authority to exercise its discretion to deny a request for reasons made after the expiry of the 30 days. However, Paladin submits the content of the Board's procedural fairness goes to the manner in which the Board went about making its decision. Accordingly, Paladin states that the Board incorrectly exercised its discretion by not providing reasons for the Bargaining Unit Order, thereby breaching its duty of procedural fairness owed to the Parties.

[107] The Board had the authority to deny reasons unless requested within 30 days. Paladin did not make the request for reasons within the prescribed 30 days. The Board was therefore exercising its discretion to deny Paladin reasons, and the reasonableness standard applies to its discretionary decision.

4. Should the Court set aside the Board's discretionary decision to deny Paladin reasons for the Bargaining Unit Order?

[108] I find the Board acted unreasonably and its decision to deny reasons must be set aside.

Procedural Fairness

[109] I do not see the Board's denial of reasons as a breach of procedural fairness per se, but rather the unreasonable exercise of discretion by the Board.

[110] The Parties were provided an opportunity to make written submissions both on the Bargaining Unit Order and the request for reasons. They were notified that the Board reserved the right to make a decision based on those submissions.

[111] The Board is granted considerable discretion under sections 18 (Powers of Board) and 22 (Rules of General Application) of the *Act* in determining its own processes and procedures for each application.

[112] The Board is not required to issue reasons for decisions in each and every situation, and section 12 of the *Act* puts the obligation on the Parties to request reasons.

[113] When the Rule that requires a request for written reasons be received by the Board within 30 calendar days is read with section 15(1) of the *Rules of Procedure*, the *Information Bulletin*, and the *Act*, it is clear the Board has discretion allowing for flexible, variable, and context-specific decision-making governing the request for reasons.

Paladin's Rationale for the Request

[114] Paladin asked that the Board consider the circumstances of its request for reasons because of the legal effect the decision had in determining the scope of the bargaining unit (a single-site versus multi-sites contract Paladin had with a single client), which in turn determined the employees forming the bargaining unit. This issue was significant and merited reasons from the Board.

[115] Paladin submits the Board's issuance of reasons for the Bargaining Unit Order would assist the Parties to further understand the basis for the Board's reasoning, thereby informing the Parties on the likely scope of future applications for certification made by the Union.

Unreasonableness of the Board's Decision to Refuse Paladin Reasons

[116] In the context of the valid rationale for requesting reasons and Paladin setting out the circumstances as to the lateness of its request, it was unreasonable for the Board to exercise its discretion to deny Paladin reasons.

Solicitor Inadvertence as the Circumstance for Lateness of Request

[117] The Board acknowledged in its written reasons (at para. 61 of the Decision) the harshness to Paladin of declining its request for reasons because of solicitor inadvertence. In my respectful view, the outcome for Paladin was not only harsh but also unfair. An unfair outcome is an unreasonable outcome.

[118] The Court has an obligation not to let an unreasonable outcome stand. To do anything less in this case would be an abrogation of the Court's oversight role that the rule of law demands (*Vavilov*, at paras. 82, 83 and 138).

[119] The Union submits that Paladin had the opportunity to exercise its procedural rights and failed to do so on a timely basis. Paladin, the Union says, must bear the consequences of its counsel's inadvertence. The Union relies on *Taticek v. President of the Canada Border Services Agency*, 2018 FPSLREB 44.

[120] In *Taticek*, the complainant filed four complaints with the Federal Public Sector Labour Relations and Employment Board (Federal Board), alleging that the Canada Border Services Agency abused its authority with respect to the application of merit in a selection process. The Federal Board considered the importance of balancing fairness to the parties, with efficiency in the administrative law context. Citing Lorne Sossin and James Sprague, *Practice and Procedure Before Administrative Tribunals*, looseleaf (Toronto: Carswell, 1991), the Federal Board stated, at paragraph 34: "the essence of administrative law is the balancing of the procedural rights to be accorded to individuals in the protection of their rights with the need of society for efficiency in administrative decision-making."

[121] The Federal Board's analysis (at paras. 50–52) was considered in the context of the respondent's actions regarding the reasons why, and the frequency of the respondent's repeated failure to meet filing deadlines, despite being granted multiple extensions by the Board.

[122] The present matter is distinguishable from the circumstances in *Taticek*.

[123] Due to an honest mistake by an employee at its solicitor's office, Paladin did not become aware of the Bargaining Unit Order. When this came to their attention during a pre-hearing conference before the Board, Paladin's counsel immediately made the Board aware of this error.

[124] This is not a case of Paladin acting with repeated, or demonstrable disregard for the Board's rules and procedures. Its request that the Board provide written reasons in advance of the Board's issuance of a Certification Order was well within Paladin's rights and reasonable in the context of its request.

[125] The Board cannot sacrifice fairness owed to a party on the altar of administrative efficiency. The Parties were only at the point of a Case Management Conference with the Board Chair confirming the issues that remained in dispute when counsel for the Union advised the Board Chair and Paladin counsel that the Bargaining Unit Order had been issued. Having the Board provide reasons for that Order would not have impacted the efficiency and expediency of the proceedings. At most, it would have resulted in a short delay of the upcoming hearing and subsequent Certification Order.

Paladin did not have Effective or Actual Notice of the Order

[126] The Board's refusal to provide reasons was unreasonable where the Record demonstrates Paladin did not have effective or actual notice of the Bargaining Unit Order.

[127] The Board failed to follow its own established practice of seeking a "Read Receipt" email confirmation to rebut any assertion that a party did not receive notification. In the circumstances of the explanation offered by Paladin's counsel as to why the email was not opened and read, coupled with the Board having no indication to the contrary, it was unreasonable for the Board to deprive a party of reasons.

Board's Attempt to Justify the Denial of Reasons is Unreasonable

[128] The Board compounded its refusal to give reasons by taking the time and making the effort to give reasons explaining why it was not giving reasons rather than simply issuing the requested reasons for the Bargaining Unit Order. This approach in the circumstances of this case I find to be unreasonable.

[129] The Board also failed to consider the true meaning of Rule 16(3), and in particular, the textual language used therein "… <u>of receipt</u> of a board order" [emphasis mine]. A reasonable interpretation of the wording "of receipt" is that it means the same as the requirement for service of a document and that a party receive actual notice of the document (*Thompson v. Procrane Inc.*, 2016 ABCA 71, at para.

12). The Board concluded, without any further analysis, that delivery to the email address of counsel of record is sufficient to constitute service and delivery of the Order. The Board was required to address and make a finding of fact whether Paladin had "actually received" the Order of the Board (*Newman v. Newfoundland (Worker's Compensation Review Division)*, 2001 NFCA 67, at para. 11).

[130] If the Board had found Paladin, in fact, had actual or effective notice of the Order and the Record demonstrated so, I would have deferred to the Board's finding. Since the Board made no such finding, the Court's oversight role justifies intervention when the reasons fail to address a critical factual element in issue (*Vavilov*, at paras. 99, 125 and 12; and *Chaffey v. Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 56, at para. 50).

[131] The Board's concerns as expressed in paragraphs 54 through 60 of its Decision are misplaced. The Decision states (at para. 54) that if the Board exercises its discretion to issue reasons not requested in a timely manner due to the inadvertence of a law firm, "it will effectively be opening the gates to having to provide further reasons in similar circumstances." The Decision (at para. 57) notes the Board often deals with self-represented parties, and "[i]f a law firm is unable to properly receive and act upon a decision of the Board, then there are presumably numerous reasons why a self-represented individual may be unable to do so."

[132] At paragraph 60, the Decision emphasizes: "The Board is very concerned about creating a precedent whereby counsel or parties can successfully request reasons in an untimely manner if they claim inadvertence, whereas diligent counsel and parties will be denied this benefit."

[133] There is a simple answer to the Board's concerns. That is, it is the Board's responsibility in each and every case where inadvertence is claimed to determine whether the party had actual and effective notice of the Board's decision or order. It did not do so in this case.

[134] To the contrary, I am satisfied Paladin demonstrated to the Board that while the Order was sent to counsel's email on file, neither counsel nor Paladin had actual

or effective notice of the Order. This was not a situation of counsel or a party ignoring or not checking email regularly. Rather, the email went unopened and misplaced by counsel's assistant in the wrong file without counsel or Paladin's knowledge.

[135] The Board unreasonably placed administrative efficiency over its statutory duty to give reasons, after Paladin duly demonstrated it did not have actual or effective notice of the issuance of the Order.

The Court's Role in Robust Reasonableness Review

[136] I have asked myself whether I am overstepping the role of the reviewing court and second-guessing the Board to substitute my view of what is fair in the circumstances. I have concluded that robust reasonableness review, as mandated by *Vavilov* (at paras. 13, 67 and 72), obligates that the Court intervene and quash a decision that undermines the fairness of the administrative process. Respectful deference cannot mean letting a manifestly wrong outcome stand.

[137] The Board has a responsibility to the Parties and the public, generally, to justify its reasons on a matter of significant importance to the rights of Parties. It was an unreasonable exercise of discretion for the Board to deny Paladin's request for reasons considering the circumstances here.

5. What is the appropriate Remedy?

[138] The appropriate remedy is not, as Paladin seeks, for the Court to quash the Bargaining Unit Order or the Certification Order; or as the Union seeks, to have the

Court proceed with a substantive reasonableness review and declare the Orders to meet the reasonableness standard.

[139] *Vavilov* (at para. 139) instructs that "the question of the appropriate remedy is multi-faceted" and it engages "great diversity of elements that may influence a court's decision to exercise its discretion in respect of available remedies."

[140] It will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the Court's reasons. In reconsidering its decision for the Bargaining Unit Order, the Board may arrive at the same, or a different, outcome (*Vavilov*, at para. 141). It must do so though in accordance with the Court's direction to articulate reasons for its issuance of the Order.

[141] I accept the Union's submissions that the task of certifying an appropriate bargaining unit is at the heart of the Board's jurisdiction, and the Board is entitled to great deference in the construction of its own home statute: (*United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 740 v. Canada Fluorspar (NL) Inc*., 2021 NLSC 104, at para. 176).

[142] However, I do not accept the Union's submission that I find the Board's Bargaining Unit Order reasonable despite the Board's failure to provide reasons because the Board chose the outcome the Union sought being one of two possible outcomes. As is clear on the Record, Paladin asked the Board to find that an appropriate unit was one which contained all sites covered in the contract between Paladin and its client and, alternatively that an appropriate unit was one that contained multi-sites within a certain geographical area that included the Waterford site. I cannot "uncover a clear rationale for the decision" by simply looking at the Record before the Board and the outcome (*Vavilov*, at para. 137).

[143] Paladin relies on my application of *Vavilov* in the *Chaffey* decision as support for the proposition that reasonable review requires assessing the adequacy of

reasons, and whether the decision is both based on internally coherent reasoning and justified in light of the legal and factual constraints that bear on the decision.

[144] Since I have concluded the Board ought to provide reasons in the circumstances of this case, and the Parties have proceeded to negotiate a Collective Agreement in good faith notwithstanding Paladin's request for reasons, this is the appropriate case for the Court to grant an order of *mandamus* requiring the Board to issue reasons for the Bargaining Unit Order.

[145] I deny Paladin's request for an order of *certiorari* quashing the Orders of the Board.

[146] I also deny Paladin's request to have the matter remitted to a differently constituted panel of the Board. There is no justification for the Court to interfere with the Board's determination on the constitution of the panel to provide reasons. This is not a situation where Paladin alleges bias on the part of the Board in general or on the part of the panel in particular (*Andritz Hydro Canada Ltd. v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179*, 2023 SKCA 69, at para. 56). Whether the matter is heard by a new panel or the same panel that heard it in first instance will be for the Board to determine.

[147] Further, it is for the panel of the Board to provide reasons for the Bargaining Unit Order to decide on how it will conduct itself on the provision of reasons. There is no obligation to hold a hearing *de nova*. It may ask the Parties to provide updated written submissions or rely on the previous written submissions of the Parties.

[148] I am reluctant to interfere with the Board's control over its own process and put a fixed time-period on the Board's obligation to issue reasons. However, given the urgency of the matter to the Parties and the ongoing collective bargaining, it is advisable that the Board prioritize the provision of its reasons as soon as practicable.

COSTS

[149] I make no order as to costs.

[150] The Union should not have to bear the cost consequences of Paladin and its counsel's inadvertence and the Board's unreasonableness in failing to provide reasons.

[151] The Union had already experienced a yearlong delay in the determination of its application before the Board. It was justifiably concerned about the timely recognition of the workers' constitutional right to unionization, and not wanting further delays in the Board's determination of its Application. It was well within its right to oppose the judicial review and, in the circumstances where Paladin and the Union had recently negotiated and then ratified a tentative collective agreement, to bring its application on the issue of mootness.

[152] Counsel did not point the Court to any jurisprudence dispositive of the issue on the Board's discretion to deny a party requesting written reasons after the Board's 30-day time rule. The novelty of this issue is therefore a further reason to exercise my discretion on making no order as to costs.

CONCLUSION AND DISPOSITION

[153] For the foregoing reasons, I have decided:

1.(a) It is appropriate for the Court to consider the *ultra vires* issue; and

(b) that the Board's 30-day Rule for requesting reasons is not *ultra vires* the *Act*.

2.(i) There exists a live issue in the Judicial Review Application, or alternatively

(ii) to exercise the Court's discretion to hear the case, and to dismiss the Union's application on mootness.

3. The Standard of Review that applies to decisions and orders of the Board is reasonableness.

4. The Board's discretionary decision to deny Paladin reasons for the Bargaining Unit Order is unreasonable and set aside.

5. The Board is to provide reasons for issuance of the Bargaining Unit Order in accordance with the directions and reasons provided herein, and Paladin's application to quash the Bargaining Unit Order and Certification Order is dismissed.

[154] There is no order as to costs.

[155] I thank all counsel for their comprehensive written and oral submissions, and for their able assistance in addressing the complexity of issues before the Court.

GLEN L.C. NOEL
Justice