



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Canada Fluorspar (NL) Inc. v. United Steel, Paper
and Forestry, Rubber, Manufacturing, Energy, Allied
Industrial and Service Workers International Union,*
Local 9220, 2022 NLCA 21

Date: April 7, 2022

Docket Number: 202101H0053 and 202101H0057

BETWEEN:

CANADA FLUORSPAR (NL) INC.

APPELLANT

AND:

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
LOCAL 9220

RESPONDENT

AND

BETWEEN:

UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING AND
PIPEFITTING INDUSTRY OF THE UNITED
STATES AND CANADA, LOCAL 740

APPELLANT

AND:

CANADA FLUORSPAR (NL) INC.

RESPONDENT

AND

THE LABOUR RELATIONS BOARD

RESPONDENT

Coram: Fry C.J.N.L, Welsh and Goodridge JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 202101G0877
(2021 NLSC 104)

Appeal Heard: January 24 and 25, 2022

Judgment Rendered: April 7, 2022

Reasons for Judgment by: Welsh J.A.

Concurred in by: Fry C.J.N.L. and Goodridge J.A.

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Authorities Cited:

CASES CITED: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *O'Rourke v. Workplace Health, Safety and Compensation Commission*, 2022 NLCA 14; *International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.*, 2020 NLCA 20; *Mount Pearl (City) v. Workplace Health, Safety and Compensation Review Division*, 2008 NLCA 69, 282 Nfld. & P.E.I.R. 14; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting*

Industry, Local 740, [1990] 3 S.C.R. 644; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Labour Relations Board (Nfld.)*, 2002 NFCA 34, 214 Nfld. & P.E.I.R. 1 (“S.E.A. Contracting”).

STATUTES CONSIDERED: *Labour Relations Act*, RSNL 1990, c. L-1, sections 93 and 94.

Welsh J.A.:

[1] On September 22, 2017, the appellant, the “Pipefitters Union”, filed an application with the Labour Relations Board seeking certification as the bargaining agent for the employees of Canada Fluorspar (NL) Inc. (the “Employer”). The respondent, the “Steelworkers Union”, applied for and was granted intervenor status in that application on the basis of its application claiming that it had successor rights as the bargaining agent for the employees.

[2] The Board dismissed both the application for certification by the Pipefitters Union, and the application by the Steelworkers Union asserting successor rights.

[3] On judicial review, the applications judge upheld the Board’s decision dismissing the application by the Pipefitters Union, but set aside the Board’s decision dismissing the claim by the Steelworkers Union to successor rights. The Employer appeals the decision regarding the Steelworkers Union, and the Pipefitters Union appeals the decision regarding its certification application.

[4] A stay of enforcement of the decision of the court appealed from pending disposition of the appeal was granted on November 3, 2021 (2021 NLCA 53).

BACKGROUND

[5] The historical background is important to the analysis in this case. The Board summarized:

[36] The first producing fluorspar mine in Newfoundland and Labrador was the Black Duck Mine which opened in 1933 and was owned by the St. Lawrence Corporation of Newfoundland Limited. Although the Black Duck Mine closed in 1941, mining continued when St. Lawrence Corporation of Newfoundland Limited transferred its operations to the Blue Beach Mine and the Iron Springs Mine.

[37] A second fluorspar mining company, Newfoundland Fluorspar Corporation also began mining in the St. Lawrence area in the 1930s, setting up operations at the Director Mine.

[38] The Aluminum Company of Canada (“Alcan”) acquired Newfoundland Fluorspar Corporation in 1940 and St. Lawrence Corporation of Newfoundland Limited in 1965, acquiring the assets of both companies’ underground mining operations in the St. Lawrence region, including the Director Mine, the Blue Beach Mine and the Tarefare Mine (collectively referred to as the “Alcan Mine”).

[39] Alcan operated until 1978, when it closed the Alcan Mine because the price of fluorspar had significantly dropped The mining sites were rehabilitated. The shafts were sealed, buildings were leveled and most evidence of the Alcan Mine’s existence was eradicated.

[40] In 1986, the Alcan Mines were reopened on a limited basis by St. Lawrence Fluorspar Limited (SLFL)

[41] When SLFL took over mining it had to build all new infrastructure. It also built the road to the Grebes Nest vein (“AGS vein”) that is now being used by the Employer.

[42] On May 18, 1988, United Steelworkers of America, Local 6480 (“Local 6480”) was certified as the bargaining agent in respect to SLFL by the Board This was the first of three historic Orders.

[43] Later that year, on October 24, 1988, the second historic Order was issued by the Board when the [Steelworkers Union], which is the Intervenor, was certified as the successor union for Local 6480. A collective agreement was then negotiated between SLFL and the [Steelworkers Union] effective January 1, 1989 for two years

[44] In 1991, SLFL abandoned its attempts to recommence operations at the Blue Beach mine and it was placed in receivership with Ernst & Young Incorporated, [which] was appointed as manager and receiver. SLFL was adjudged bankrupt later that year. The Blue Beach mine site was once again rehabilitated.

[45] By way of Application to the Board in 1991, the [Steelworkers Union] argued that there had been a transfer of business and operations such that the Certification Order and Collective Agreement applied to Ernst & Young as manager and receiver for SLFL. In an Order dated July 17, 1991, the Board agreed with the [Steelworkers Union].

[46] In 1994, the Crown cancelled the Minworth Mining Leases held by SLFL. The Crown further declared the lands previously subject to the Minworth Mining Leases ... to be exempt mineral lands under the *Mineral Act*, RSNL 1990, c. M-12

[47] Shortly thereafter, Ernst & Young assigned and conveyed all personal property of SLFL, including the mining assets and equipment to the Greater Lamaline Area Development Association (“GLADA”). ... GLADA agreed to take control of the assets until a purchaser could be found.

[48] In an Order dated November 23, 1994, the Board issued the third historic Order when it held that the Certification Order would bind GLADA, as successor to Ernst & Young, to the Collective Agreement However, neither Ernst & Young nor GLADA reopened the Alcan Mine. GLADA recognized the [Steelworkers Union] as bargaining agent and continued to apply the terms of the Collective Agreement.

...

[50] ... Burin Minerals Limited...was granted the exclusive right to obtain new mining leases over the subject lands effective April 1, 1995

[51] ... An asset purchase agreement was executed on March 22, 1996, between GLADA, [Burin Minerals] and the Crown ... whereby [Burin Minerals] acquired the mining assets of GLADA.

[52] ...From 1996 to 2000, [Burin Minerals] carried out some exploration and engineering work in the area ... However, [Burin Minerals] had difficulty raising investment funds for the exploration and the project experienced significant stalls.

[53] [Burin Minerals] approached the [Steelworkers Union] about negotiating a new collective agreement and they began bargaining in 1996 and continued into 1997 and 1998. ... [Burin Minerals] used the existing buildings and equipment left on site from SLFL, including the offices and lab building.

[54] In 2001, ... [Burin Minerals] confirmed to the [Steelworkers Union] that it would remain as the bargaining agent for the then anticipated project. The only remaining employee of the [Steelworkers Union] at the time was Jerome Slaney who had been hired for security purposes when the Alcan Mine closed.

[55] ... What followed was a decade of no contact between [Burin Minerals] and the [Steelworkers Union]. Furthermore, and since 2001, there has been no employment of any members of the [Steelworkers Union].

[56] By 2009, ... [Burin Minerals] reorganized and changed its name to Canada Fluorspar (NL) Inc., which is the Employer

[6] In 2011, in response to correspondence from the Steelworkers Union, the Employer “stated that there had been no continuity or continuum of business that would support a recognition of the [Steelworkers Union’s] previous collective bargaining rights” (decision of the Board, at paragraph 57).

[7] On September 22, 2017, the Pipefitters Union applied to the Board for certification as the bargaining agent for approximately 42 of 200 of the Employer's employees. On October 13, 2017, the Employer filed a response opposing certification of the proposed bargaining unit. On October 20, 2017, the Steelworkers Union filed a response with the Board asserting successor rights to represent the employees. On October 30, 2017, the Employer filed a further response with the Board denying the successor rights claimed by the Steelworkers Union.

[8] These issues were resolved by a decision of the Board dated August 12, 2020, in which a majority determined:

[232] The Board has concluded that:

- (i) the [Steelworkers Union] has standing in this matter but does not have successorship rights with respect to the employees of the Employer in the Application; and
- (ii) the [Steelworkers Union] has not abandoned any bargaining rights that it has but those bargaining rights have no applicability to the Application; and
- (iii) an all-employee bargaining unit is appropriate for the capital construction projects of the Employer, which is work within the industrial and commercial sector of the construction industry; and
- (iv) the Application [for certification by the Pipefitters Union] is rejected since the Union does not have the requisite employee support under the Act for the Board to order a vote.

[233] The Board is declining to provide a bargaining unit description for an all-employee bargaining unit at this time. The composition of an all-employee bargaining unit based upon a future application to the Board will depend upon the construction trades that are being employed at that time.

(Emphasis added.)

[9] On judicial review, the applications judge concluded that “the Board’s decision relating to the [denial of successor rights claimed by the Steelworkers Union] is unreasonable and should be set aside” (decision of the applications judge, 2021 NLSC 104, at paragraph 120). He dismissed the application by the Pipefitters Union, finding that the Board’s decision refusing the Union certification was reasonable.

Note: One member of the Board dissented on the application by the Pipefitters Union. This decision addresses only the majority decision, which is the decision of the Board.

ISSUES

[10] At issue is whether the applications judge erred:

- (1) In determining that the Board's decision was unreasonable in denying the application for successor rights by the Steelworkers Union; and
- (2) In determining that the Board's decision was reasonable in dismissing the application for certification by the Pipefitters Union.

ANALYSIS

Standard of Review

Analytical Approach

[11] The analytical approach to an appeal following judicial review of an administrative decision is discussed in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559. LeBel J., for the Court, explained:

[45] ... But, before I discuss the appropriate standard of review, it will be helpful to consider once more the interplay between (1) the appellate standards of correctness and palpable and overriding error and (2) the administrative law standards of correctness and reasonableness. These standards should not be confused with one another in an appeal to a court of appeal from a judgment of a superior court on an application for judicial review of an administrative decision. ...

...

[47] The issue for our consideration [on appeal] can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it correctly?

[12] In order to answer that question, the appellate court must view the matter from the perspective of the applications judge whose function is to determine whether the decision of the administrative tribunal is reviewable on a standard of correctness or reasonableness, and to apply that standard (*O'Rourke v. Workplace Health, Safety and Compensation Commission*, 2022 NLCA 14, at paragraphs 15 and 16).

[13] In this case, the applications judge was correct in concluding that the decision of the Board is subject to review on a standard of reasonableness (*International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.*, 2020 NLCA 20, at paragraphs 11 to 16). The parties agree that the issue on appeal is whether the judge erred in the application of that standard.

[14] Finally, I would add that the applications judge's decision is reviewable by this Court on a standard of correctness (*Mount Pearl (City) v. Workplace Health, Safety and Compensation Review Division*, 2008 NLCA 69, 282 Nfld. & P.E.I.R. 14, at paragraph 15).

Reasonableness

[15] Reasonableness as a standard of review is discussed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65:

[86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir* [2008 SCC 9, [2008] 1 S.C.R. 190], at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": [*Dunsmuir*, at para. 47]. ...

Successor Rights of the Steelworkers Union

The Law

[16] The effect of transfer of a business where the employees were represented by a union is addressed in section 93(1) of the *Labour Relations Act*, RSNL 1990, c. L-1:

Where an employer sells, leases or transfers or otherwise disposes of ... his or her business or the operations of the business or a part of either of them and

- (a) the employer or the purchaser, lessee, transferee or person otherwise acquiring the business is a party to or is bound by a collective agreement with a bargaining agent on behalf of employees affected by the sale, lease, transfer, disposition by other means or contract;

...

then, unless the board otherwise directs, the collective agreement ... continues in force and is binding upon the purchaser, lessee, trustee or a person otherwise acquiring the business.

(Emphasis added.)

[17] Pursuant to section 94 of the *Act*, the Board may, by order, on application by a union, “declare that the successor has or has not acquired the rights, privileges and duties under this Act of its predecessor”.

[18] In *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, an appeal from a decision of this Court, McLachlin J., for the majority, addressed the rationale for section 93 (formerly section 89 of the *Act*), at page 671:

In order to understand s. 89(1) it is necessary to examine the problem to which it and similar provisions across the country are addressed.

The basic aim of such provisions is to prevent employees from losing union protection when a business is sold or transferred or when changes are made to the corporate structure of a business. ...

The classic situation, and the first to be addressed in most provinces, arises when a business or part of a business is transferred from one company to another. The transfer may be activated by legitimate motives or as a device to oust a union and may be made between unrelated companies or arise through corporate reorganization. The effect is the same. Absent legislation, the effect of the transfer is to terminate the relationship between the union and the employer, with the result that the employees would lose their bargaining rights. To meet this problem, successorship provisions, like s. 89 of the *Newfoundland Labour Relations Act, 1977*, have been passed.

[19] Regarding application of the above provision, McLachlin J. continued, at pages 676 to 677:

To determine whether or not the business or part of the business has been disposed of, most boards examine the nature of the predecessor business, and the nature of the successor business determines if the business of the predecessor is being performed by the successor. Most boards approach the issue by examining factors like the work covered by the terms of the collective agreement, the type of assets that have been transferred, whether goodwill has been transferred, whether employees are transferred, whether the business is operating in the same location, whether there is continuity of management, and whether there is continuity of the work performed [citations

omitted]. No single factor is determinative In each case the Board must determine if, within the business context in which the transaction occurred, it can reasonably be said on the factors present that the business or part of the business has been transferred from the predecessor to the successor. Because a business is not merely a collection of assets, the vital consideration “is whether the transferee has acquired from the transferor a functional economic vehicle” [citation omitted].

(Emphasis added.)

Application of the Law

[20] In finding that the Steelworkers Union did not have successor rights, the Board considered several factors including that the Employer: was operating on an entirely new site that had not been previously mined; was using new production methods, new equipment, new structures and new technology in an open-pit mine; and had not received a transfer of employees, customers, goodwill, accounts receivable or existing contracts. The mining assets and equipment received from Ernst & Young were old and had not been used. Finally, the Board concluded that the recognition of the Steelworkers Union by Burin Minerals in 2001 did not operate to create successor rights with respect to the new open-pit mining operation carried on in a new area using new equipment in 2017.

[21] On judicial review, in concluding that the Board’s decision was unreasonable, the applications judge began the analysis with events that took place up until 2001 when Burin Minerals had acknowledged the Steelworkers Union as the collective bargaining agent for its employees. The judge found that it was “not logical” to find that, when the mine had not been operating since 1994, the Union continued to have successor rights in 2001 which did not carry forward to 2017 (decision of the applications judge, at paragraph 111). This is not a helpful approach to the analysis because the necessary, and different question is whether the Board considered appropriate factors in assessing the circumstances of the current Employer in relation to the predecessor.

[22] Regarding the fact that the mine in 2017 was located on a different site, the judge found the Board’s reasoning “baffling” since “the new location is within a few kilometers of the old location” (decision of the applications judge, at paragraph 113). In drawing this conclusion, the judge was usurping the function of the Board which is to consider all the relevant factors in context. Indeed, the Board was aware of the location of the new site and accepted the change in location as a valid consideration in deciding that the Steelworkers Union did not have successor rights.

[23] In addition, the judge stated:

[113] ... The Board's reasoning would be more understandable if [the Employer] were now operating a strawberry farm, or something else totally unrelated to mining. But that is not the case. The core business carried out by [the Employer] is exactly the same as was carried out by SLFL – the mining of fluorspar ore, refining of same and sales to potential customers worldwide.

[24] Again, the applications judge was usurping the role of the Board and imposing his view of the correct analysis rather than considering whether the Board's decision fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Vavilov*, at paragraph 86). The Board did not consider the successor rights simply by assessing the Employer's core business as the mining of fluorspar.

[25] Rather, the Board reviewed the factors discussed in *Lester*, at pages 676 to 677, which I repeat for convenience:

... factors like the work covered by the terms of the collective agreement, the type of assets that have been transferred, whether goodwill has been transferred, whether employees are transferred, whether the business is operating in the same location, whether there is continuity of management, and whether there is continuity of the work performed

[26] The Board recognized that the operation was open-pit, rather than underground, which would involve different work; the assets and equipment were new; no employees had been transferred; the mine was located on a new site; there was no continuity of management. No single factor was determinative. The Board viewed them as a whole.

[27] Again, the judge stepped outside his role in assessing the reasonableness of the Board's decision when he stated his view that:

[114] ... The methods used for the extraction of the ore are irrelevant to the inquiry concerning the applicability of successorship rights. What is relevant is the fact that [the Employer and Burin Minerals, as the Employer was previously known] were carrying on essentially the same business as their predecessor, SLFL. They were extracting fluorspar ore, processing it and selling the product. It is the same business.

[28] Again failing to address the reasonableness of the Board's decision, the judge imposed his view of the appropriate approach when he found the Board's consideration of "no transfer of customers, accounts receivable or existing contracts" to be irrelevant because the "decision ignores the Board's own

historic Orders – granting successorship rights in two transactions – Ernst & Young and GLADA – in which there was no transfer of customers, accounts receivable or existing contracts” (decision of the applications judge, at paragraph 115). Among other things, that analysis ignores the fact that the Receiver and GLADA were engaged in 1994 simply to hold the assets pending the sale to Burin Minerals in 1996. The Board did not find that information, which was referenced in its decision, to be helpful in determining whether successor rights to represent the current Employer’s employees should be accorded to the Steelworkers Union.

[29] Finally, the applications judge stated:

[119] The Board’s finding that the Steelworkers [Union] had not abandoned its rights under the Certification Order gives rise to more than a “conundrum” as characterized by the Board. It gives rise to a logical incongruity. If the Steelworkers’ rights continue then they must do so in accordance with the original Certification Order. Since that Order is silent as to the place in which those rights accrue, or the nature of the enterprise to which they attach, and since the Order covers all employees of [the Employer], there cannot be any limitation that seeks to be territorially based or be based upon the means of production.

[30] This misconstrues the analysis conducted and conclusion reached by the Board:

[140] The Board has determined that, in the circumstances, the [Steelworkers Union] did not abandon its bargaining rights as outlined in the historic Orders. That being said, and as previously noted, any bargaining rights that the [Steelworkers Union] has have no applicability to the employees of the Employer in the Application.

[141] The Board recognized that a finding that the [Steelworkers Union] does not have successorship rights in the Application yet has not abandoned its historic bargaining rights represents a possible conundrum. That is, one may ask how the [Steelworkers Union’s] bargaining rights could potentially be applied in the future.

[142] The Employer chose to purchase the mining assets of GLADA in 1996, which had been acquired by Ernst & Young from SLFL. The Employer had planned to use those assets to operate fluorspar mines in the same geographic locations that SLFL had operated using similar [underground] mining techniques. That did not come to pass.

[31] It was unnecessary to decide for purposes of the application that was before the Board whether the Steelworkers Union may have retained successor rights on a different factual basis, unlikely as that may be. For that reason, the Board left open the possibility by finding that the Union had not abandoned any bargaining rights, but held that they had no application to the Employer’s

operation at issue in this case. That is not an unreasonable decision. The judge erred in failing to consider the Board's rationale and, instead, imposing his own view.

[32] In summary, the applications judge erred by failing to apply the analytical approach set out in *Vavilov*, which is directed to ascertaining the reasonableness of the Board's decision. The judge failed to give effect to the rationale provided by the Board, which applied the factors enumerated in *Lester*. Instead, the judge relied on his own view and how he would have decided the issues. The fulsome decision of the Board satisfies the criteria of "justification, transparency and intelligibility within the decision-making process" (*Vavilov*, at paragraph 86). Further, the decision to deny the Steelworkers Union's application "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Vavilov*, at paragraph 86).

[33] In the result, I would allow the Employer's appeal regarding successor rights claimed by the Steelworkers Union, and, on that point, set aside the decision of the applications judge and restore the decision of the Board.

Application for Certification by the Pipefitters Union

[34] The Board's dismissal of the application for certification by the Pipefitters Union is based on its determination that an all-employee bargaining unit would be appropriate for the Employer's operation. Having made that decision, the Board concluded that the Pipefitters Union did not have the requisite forty percent membership support within that unit, that is, within an all-employee bargaining unit.

[35] The Union's position on judicial review and on appeal is that the Board's decision requiring an all-employee bargaining unit was unreasonable. The Union submits that the bargaining units should be trade-based, and that its application to represent 42 of the employees constituted an appropriate unit comprised of "all employees doing plumbing, pipefitting, welding, instrumentation, sprinkler work, etc. [meaning "the sub-disciplines comprising the traditional craft jurisdiction of the Union"]" (decision of the Board, at paragraphs 147 and 152).

[36] In responding to the certification application by the Pipefitters Union, the Board began with factors relevant to the analysis:

[181] The fundamental question that the Board has to answer is whether the proposed bargaining unit is appropriate. ...

[182] There are various factors that the Board must consider in determining whether a bargaining unit is appropriate. These are outlined in general in the Board's decision in *Teamsters Local 855 v. Gambo Ambulance Services Inc.*, [[2018] LRBD No. 11 (NL LRB)], at paragraph 14: (1) the community of interest between the employees comprising the unit, which may involve the nature of their work; (2) the avoidance of fragmentation caused by defining a unit too narrowly; (3) the viability of the unit for collective bargaining; (4) the wishes of the parties; and (5) the accessibility of employees to collective bargaining.

[37] The Board considered each of these factors in the context of the Employer's operation. First, those employees falling within the trade jurisdiction of the Pipefitters Union would perform similar work in an integrated fashion. The resulting community of interest would support the bargaining unit proposed by the Union. Further, by contrast, the Union emphasizes that an all-employee bargaining unit may require employees to choose a union with which they have no community of interest. In addition, the Union submits, it would be more difficult for a trade-based Union to organize in the case of an all-employee bargaining unit.

[38] However, community of interest is only one factor to be considered. The Board went on to address the remaining considerations, and concluded that community of interest was not an overriding factor in these circumstances.

[39] The Board determined that the second factor, avoidance of fragmentation, would not support the proposed bargaining unit. In particular:

[193] In this case, allowing trade-based certification would increase the potential for a number of smaller bargaining units, which would correspondingly increase the potential for labour disruption and unrest. For example, when there are multiple trade-based bargaining units jurisdictional disputes would naturally arise.

[40] The Board accepted that it "has traditionally certified bargaining units in the construction industry based upon trade jurisdiction" (decision of the Board, at paragraph 194). However,

[195] In this case the Employer is not a construction company. It is a mining company, albeit a mining company that does operate within the industrial and commercial sector of the construction industry for any capital construction projects.

[196] ... The mining operations of the Employer, separate and apart from its capital construction projects, do not fall within the industrial and commercial sector of the construction industry.

[41] The Board then summarized reasons why trade-based certification is usually used in the construction industry, and why the rationale would not apply to the Employer's operation:

[199] The sites and operations of a mining company, for example, are not dispersed geographically throughout the Province with the places of work constantly changing, nor is a mining company normally seasonal in nature with the rapid expansion and contraction of the workforce based upon the seasons.

[42] The Board described the difficulties with trade-based bargaining units in the circumstances of this Employer:

[200] There are foreseeable and serious labour relations problems that would result from a trade-based certification in this case. The Employer would have to work with at least one and potentially several trade-based bargaining units for any capital construction projects that it undertakes, no matter the magnitude. That would make the potential for work stoppages, jurisdictional disputes and labour unrest far greater.

[201] Allowing trade-based certification in these circumstances could also make the oversight and management of any capital construction projects potentially more difficult since the Employer would have to work with a number of separate trade-based bargaining units.

[43] In taking this approach, the Board referred to the decision in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Labour Relations Board (Nfld.)*, 2002 NFCA 34, 214 Nfld. & P.E.I.R. 1 ("S.E.A. Contracting"), in which Cameron J.A., for the Court, wrote:

[12] ... One of the factors considered in determining if there is a community of interest is similarity in skills, duties and working conditions. However, a consideration of community of interest also includes factors related to the employer's organization, including functional integration Community of interest is not determined in isolation of the employer's operation, nor of a consideration of the nature of the work performed by other employees not included in the proposed unit. ...

...

[15] The potential for fragmentation of the workforce into different bargaining units is a legitimate consideration for a Board charged with the task of determining if a bargaining unit is an appropriate one. ...

[44] Similarly, the Board concluded that the third factor, viability of the unit for collective bargaining, would not support the bargaining unit proposed by the

Pipefitters Union. The Board was cognizant of the changing needs of the Employer as the operation, mining in nature, developed over time:

[209] The Board accepts that construction projects for the Employer will come and go. Again, the Employer is a mining operator and not a construction company. As noted in *Adams*, [Canadian Labour Law, 2nd ed. (Toronto: Thomson Reuters Canada, 1993)], the bargaining unit has to be rational and viable.

[45] The Board referred briefly to the fourth factor, wishes of the parties:

[212] Suffice it to say, the parties in this case have not reached an agreement as to the appropriate bargaining unit.

[46] Finally, regarding access to collective bargaining by the employees, the Board explained:

[215] Smaller bargaining units do tend to support access to collective bargaining for the employees in those smaller bargaining units, but this comes at the expense of fragmented bargaining units.

[216] That being said, there can be no serious suggestion that a larger bargaining unit for all employees working on capital construction projects for the Employer would be too large or spread out over too many locations to allow for access to collective bargaining.

[217] The right of employees to seek to unionize is not being brought into question by choosing between a trade-based bargaining unit or an all-employee bargaining unit. Employees will have the right to unionize. ...

[47] In the result, the Board concluded:

[224] It does not make labour relations sense to have a smaller trade-based bargaining unit within the construction industry embedded within the otherwise non-construction operations of the Employer on an as-needed basis. This will naturally lead to labour relations disputes and labour unrest.

[48] On judicial review, the judge dismissed the application by the Pipefitters Union, having accepted that the Board's decision dismissing the Union's application for certification was reasonable. I caution that the language used by the applications judge was generally more consistent with a standard of correctness rather than reasonableness as the latter is discussed in *Vavilov*.

[49] The Pipefitters Union submits that the applications judge erred by finding the Board's decision reasonable insofar as it deviated from the

“traditional” certification of employees in the construction industry on trade-based bargaining units. That submission is not persuasive.

[50] In its decision, the Board acknowledged that trade-based organization of employees in the construction industry is the norm. However, the Board distinguished this case on the basis that the Employer’s business was a mining operation, which engaged different considerations. As discussed above, the Board addressed the issues raised by the Union, but did not accept the advocated position. The Board’s decision on this issue satisfies the criteria for reasonableness discussed in *Vavilov*. The decision provides the required justification, transparency and intelligibility in the decision-making process, and the result falls within a possible, acceptable, defensible outcome.

[51] The Pipefitters Union also submits that the applications judge erred by failing to give reasons for why he stated:

[180] The standard of review is not perfection. While the Board may have made errors in arriving at its conclusions, the standard to which they must be held is reasonableness. ...

(Emphasis added.)

[52] I agree with the Union that it was incumbent on the judge to identify the Board’s errors, if they formed part of his analysis and determination. Further, as well as failing to identify errors, the judge improperly incorporated the concept of “error” into the reasonableness analysis. Under the reasonableness analysis, a factor or consideration may render a decision unreasonable. Transparency would require the judge to give reasons by way of explanation. However, the concepts of “error” and “perfection” are not ones that fit comfortably within the reasonableness framework; such language is engaged when the correctness of a decision is at issue.

[53] That said, based on the above discussion of the Board’s decision, I am satisfied that, to the extent that the judge erred, applying the appropriate analysis, the conclusion follows that the decision of the Board was reasonable.

[54] Further, the Pipefitters Union submits that it was unreasonable for the Board to dismiss its certification application on the basis that an all-employee bargaining unit would be appropriate in the circumstances. A reading of the Board’s reasons for decision as a whole indicates that it was not the size or changing composition of the bargaining unit proposed by the Union that led to dismissal of the Union’s application. Rather, as discussed above, the Board was

satisfied that the bargaining unit proposed by the Union was not a suitable option in the circumstances of the Employer's mining operation.

[55] Finally, the Union's submission that to require a trade-based union in the construction industry to organize the Employer's entire workforce is "not a plausible solution" is not persuasive. Indeed, the Steelworkers Union did so in the past, and sought to do so in its application for successor rights.

[56] In the result, as discussed above, the applications judge erred in his analysis by straying outside the framework for assessing the reasonableness of the Board's decision. However, applying the appropriate analysis leads to the conclusion that the decision of the Board was reasonable in dismissing the application for certification by the Pipefitters Union.

DISPOSITION

[57] With respect to the appeal by the Employer regarding the claim to successor rights by the Steelworkers Union, I would allow the appeal, set aside the decision of the applications judge, and restore the decision of the Board. As the successful party, the Employer shall have its costs for one counsel in this Court and in the court appealed from on column 3 of the scale of costs as against the Steelworkers Union.

[58] I would dismiss the appeal by the Pipefitters Union regarding its application for certification as the bargaining agent for employees in a trade-based bargaining unit. As the successful party, the Employer shall have its costs for one counsel in this Court and in the court appealed from on column 3 of the scale of costs as against the Pipefitters Union.

B.G. Welsh J.A.

I concur: _____
D.E. Fry C.J.N.L.

I concur: _____
W.H. Goodridge J.A.