Federal Court of Appeal  Cour d'appel fédérale

Date: 20140304

Docket: A-534-12

Citation: 2014 FCA 59

CORAM: **STRATAS J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

MARITIME BROADCASTING SYSTEM LIMITED

Applicant

and

CANADIAN MEDIA GUILD

Respondent

Heard at Halifax, Nova Scotia, on October 30, 2013.

Judgment delivered at Ottawa, Ontario, on March 4, 2014.

REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRING REASONS BY:	WEBB J.A.
CONCURRED IN BY:	NEAR J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] In its notice of application in this matter, Maritime Broadcasting System Limited seeks to quash a decision of the Canada Industrial Relations Board dated April 2, 2012: 2012 CIRB LD 2767. In that decision, the Board certified the respondent Guild as the bargaining agent for a

bargaining unit defined by the Board. In a reconsideration decision dated November 7, 2012, the Board reaffirmed its original decision: 2012 CIRB 663.

[2] In their written and oral submissions, the parties argued this application on the basis that both of the Board's decisions – the original decision and the reconsideration decision – were under review. These reasons shall proceed on that basis.

[3] Before the Board, the parties differed on whether the position of "Manager-Maritime News Network" should be included into the bargaining unit. In its original decision, the Board included the position. In its application for reconsideration, Maritime Broadcasting argued that the Board erred in including the position by failing to follow its established policy on this point. Maritime Broadcasting also raised, for the first time in its application for reconsideration, the existence of procedural unfairness leading up to the Board's original decision.

[4] In its reconsideration decision, the Board dismissed all of Maritime Broadcasting's procedural and substantive arguments and upheld its original decision.

[5] Before us, Maritime Broadcasting submits that the Board should have quashed its original decision because of procedural unfairness leading up to it. Maritime Broadcasting also alleges that the Board's reconsideration decision was unreasonable because it reached an outcome that was neither acceptable nor defensible on the facts and the law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47.

[6] For the reasons that follow, I would dismiss Maritime Broadcasting's application for judicial review, with costs.

A. The Board's original decision

[7] On February 21, 2012, the Guild applied to the Board under section 24 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 for an order that it be certified as the bargaining agent for a bargaining unit at Maritime Broadcasting consisting of "all employees of Maritime Broadcasting System Limited employed in its Maritime News Network operation in the city of Halifax, Nova Scotia."

[8] In response, Maritime Broadcasting contested the inclusion of a number of positions into the unit. In particular, it argued that the position of "Manager–Maritime News Network" should be excluded from the bargaining unit because the position involved managerial functions.

[9] After considering the parties' written submissions on the matter, the Board largely accepted the Guild's submissions. It certified the Guild as the bargaining agent for a bargaining unit at Maritime Broadcasting defined as "all employees of Maritime Broadcasting System Limited employed in the operation of its Maritime News Network in Halifax, Nova Scotia, excluding freelancers, unpaid interns and summer students."

[10] As seen from that definition, the Board did not exclude the position of "Manager–Maritime News Network" from the bargaining unit. In its view, that position did not involve the sort of independent decision-making authority that would warrant exclusion.

B. The Board's reconsideration decision

[11] Maritime Broadcasting applied to the Board for reconsideration of that decision under section 18 of the *Canada Labour Code*. It challenged the decision on both substantive and procedural grounds.

(1) The substantive grounds for challenge

[12] Maritime Broadcasting submitted that the Board failed to follow its established policy concerning managerial exclusions. The Board expressed this policy in its decision in *Algoma Central Marine, a division of Algoma Central Corporation*, 2010 CIRB 531.

[13] In its reconsideration decision, the Board rejected this submission. It held (at paragraph 9) that it would be wrong to apply *Algoma* blindly and fasten onto job titles. Instead, the Board had to assess the "actual duties and functions of the position…to determine whether the incumbent actually exercises managerial authority." The Board added (at paragraph 10) that it did follow the guidance in *Algoma* that managerial exclusions should be applied narrowly.

[14] Having confirmed the correctness of its approach, the Board reaffirmed the conclusions reached in the original decision. Looking at the evidence afresh, it concluded (at paragraph 10) that "the [Manager–Maritime News Network] position did not have the necessary degree of independent decision-making authority to be a manager." Instead, the position was best regarded as supervisory. Finally, the Board reaffirmed (at paragraph 14) that the position should be included in the bargaining unit of employees that were being supervised.

(2) The procedural grounds for challenge

[15] In its application to the Board for reconsideration, Maritime Broadcasting focused on the Board's alleged failure to follow the procedure it set out in its letter of February 22, 2012, a procedure mirroring that set out in the *Canada Industrial Relations Board Regulations, 2001*, SOR/2001-520 (the version of the Regulations then in force).

[16] According to Maritime Broadcasting, the Guild's reply on March 15, 2012 was supposed to have been the "last word." The Board's February 22, 2012 letter did not provide for any later submissions. Maritime Broadcasting added that this was confirmed by a paper found on the Board's website, entitled "Canada Industrial Relations Board Regulations, 2001: An Overview." It was also confirmed directly in a conversation with a Board employee.

[17] Nevertheless, contrary to all of this, the Guild filed two submissions on March 22, 2012. Maritime Broadcasting submitted that it did not have an opportunity to reply to those submissions. This mattered – the Board's original decision relied upon those improper submissions.

[18] Compounding the procedural unfairness was the Board's failure to hold an oral hearing.

[19] In its reconsideration decision, the Board rejected these submissions, offering multiple reasons. To understand fully the Board's reconsideration decision, it is necessary to describe in more detail what took place.

[20] The Guild filed its reply on March 15, 2012. According to Maritime Broadcasting, that should have ended the matter. However, the Board's initial letter of February 22, 2012 advised the parties that by March 19, 2012 an Investigating Officer would deliver a report to the parties. It also advised them that they were entitled to submit any "comments or corrections" to the Investigating Officer by March 21, 2012.

[21] Maritime Broadcasting availed itself of this opportunity – despite the fact that the Guild's reply on March 15, 2012 was supposedly the "last word" – and delivered comments to the Investigating Officer on March 21, 2012. On the following day, March 22, 2012, the Guild responded to Maritime Broadcasting's March 21, 2012 filing and added a short addendum to it later that day.

[22] In its reconsideration decision, the Board noted that Maritime Broadcasting's March 21, 2012 comments to the Investigating Officer responded to some of the matters raised by the Guild in its March 15, 2012 reply. (Details of some of these comments are set out at paragraph 42, *infra*.)

[23] Overall, given these facts, the Board on reconsideration found that there had been no breach of procedural fairness leading up to the Board's original decision.

[24] In reaching this conclusion, the Board set out (at paragraphs 18-21) its understanding of the fair hearing or *audi alteram* principle. It cited its decisions on point, such as in *Lacelle*, 2002 CIRB 166, (which adopted the words of the Supreme Court of Canada in *Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission)*, [1995] 2 S.C.R. 781 at paragraph 29) and *Kies*, 2008 CIRB 413.

[25] In its reconsideration decision, the Board also noted (at paragraph 22) that its letter of February 22, 2012 warned the parties that they needed to advance their full case in their written materials. The parties were also reminded of this by the Board's Investigating Officer. In the Board's view, this qualified the deadlines set out in its February 22, 2012 letter: at any time a party could ask to "make additional submissions if it felt that its position was not completely and accurately before the Board" (at paragraph 23). The Guild availed itself of this opportunity, but Maritime Broadcasting did not.

[26] As for the paper on the website and its employee's words to the effect that the March 15, 2012 reply filed by the Guild was supposed to be the "last word", in its reconsideration decision the Board stated (at paragraph 29) that "[a]ny general guidance provided by a [Board] employee or on its website is not binding on the Board and does not circumscribe its power to determine its own procedures." It also found (at paragraph 29) that Maritime Broadcasting failed to offer particulars of the guidance allegedly given by the Board's employee.

[27] The Board noted (at paragraph 30) that Maritime Broadcasting actually had an opportunity to address matters of concern in the Guild's March 15, 2012 reply while submitting comments regarding the Investigating Officer's report. In fact, on March 21, 2012, Maritime Broadcasting took that opportunity.

[28] In its reconsideration decision, the Board went even further. Citing one of its own decisions, *TELUS Corporation*, 2000 CIRB 94 at paragraph 12, it held (at paragraph 25) that when a party alleges unfairness arising from an inability to respond to evidence and submissions, that party must show that it had material new facts likely to affect the original decision. Maritime Broadcasting did not do this.

[29] Further, citing *Bowater Mersey Paper Co. v. C.E.P., Local 141*, 2010 NSCA 19, the Board held (at paragraph 27) that if Maritime Broadcasting was concerned about a fairness issue, it should have objected immediately to the Guild's late filing or ask for an opportunity to respond to that late filing. It did neither. The Board found Maritime Broadcasting's omission all the more telling since it did address some of the matters in the Guild's March 15, 2012 reply in its March 21, 2012 comments regarding the Investigating Officer's report. In short, had Maritime Broadcasting wanted to say more, it only had to ask.

[30] On the issue of an oral hearing, the Board noted (at paragraphs 16 and 38) that it has the power to "decide any matter before it without holding an oral hearing" and to "vary or exempt a person from complying with any rule of procedure": *Canada Labour Code, supra*, section 16.1;

Canada Industrial Relations Board Regulations, 2001, supra, section 46. In its February 22, 2012 letter, the Board warned the parties that "the Board is entitled…to decide any matter before it without holding an oral hearing."

[31] Looking at the matter afresh (at paragraph 34), the Board reaffirmed the appropriateness of deciding the matter on the basis of the parties' written submissions rather than holding an oral hearing. This, it noted (at paragraph 32), was the usual way it deals with certification applications such as the one before it. Finally, it noted (at paragraph 32) that a party wishing an oral hearing must request it and provide reasons why an oral hearing is necessary: *Canada Industrial Relations Board Regulations, 2001, supra*, paragraph 10(*g*). Maritime Broadcasting did not do this.

[32] Dissatisfied with Board's reconsideration decision, Maritime Broadcasting has now applied for judicial review to this Court.

C. Analysis

(1) Substantive grounds of review

[33] In this Court, Maritime Broadcasting acknowledges that the review of the substantive aspects of the Board's decisions is to take place on the reasonableness standard. That is, the Board's decisions may be quashed if it has reached an outcome that is outside the range of acceptability and defensibility on the facts and the law: *Dunsmuir, supra* at paragraph 47.

[34] It is now well-accepted that this range of acceptable and defensible options or margin of appreciation takes its colour from the context, widening or narrowing depending on the nature of the question and other circumstances: see *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at paragraphs 37-50, *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13-14; *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56; *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at paragraph 22; and see, to the same effect, most recently, *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paragraphs 37-41.

[35] In short, as the Supreme Court said in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-19 and 23, the range of acceptable and defensible outcomes is "flexible," depends on "all relevant factors" and "varies with…the nature of the impugned administrative act" and "the particular type of decision making involved." In *Catalyst*, the range was rather broad, as the decision-maker had a "broad discretion" involving "an array of social, economic, political and other non-legal considerations." See also *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 at paragraph 44.

[36] In this case, the Board considered whether a particular position within a particular business should be part of a bargaining unit. In considering this matter, the Board had to consider whether the position was managerial in nature. This required the Board to engage in fact-finding and apply its labour relations experience and expertise to the matter, mindful of its own jurisprudence and policy

on point. In my view, under reasonableness review, the range of acceptable and defensible options or margin of appreciation available to the Board in this case was relatively wide.

[37] In this Court, Maritime Broadcasting submits that the Board's decisions were unreasonable, advancing many of the same submissions it had made before the Board. But, as can be seen from the summary above, the Board had acceptable and defensible responses to those submissions. In particular, as summarized at paragraph 14 above, the Board made factual findings concerning the actual duties and functions of the position and concluded, based on its labour relations experience and expertise, that the position did not involve the necessary degree of independent decision-making authority to be managerial.

[38] In reaching this result, the Board on reconsideration paid close attention to its earlier decision in *Algoma*, *supra* and dealt with it in a defensible way. It cannot be said that the Board reached a result contrary to *Algoma* without explanation, giving rise to an apprehension of unreasonableness. Through full explanation, the Board showed how its result was consistent with *Algoma*.

[39] During oral argument in this Court, Maritime Broadcasting also submitted that the Board improperly drew an adverse inference against it in its original decision and, thus, was unreasonable. Maritime Broadcasting did not raise this with the Board on reconsideration and so this Court need not deal with it. However, in any event, this submission has no merit.

[40] In its submissions leading up to the Board's original decision, Maritime Broadcasting stated that the Manager–Maritime News Network imposes discipline and hires employees, two management functions. On the discipline issue, it pointed to a discipline letter signed by the Manager–Maritime News Network. On the hiring issue, it asserted, without specifics, that the position involved "interviewing, recruitment and selection of 'News Reporters' into the Maritime News Network."

[41] Responding to the discipline issue, the Guild explained that the Manager–Maritime News Network sent the discipline letter "against her own judgment" but did so on instructions from the Vice-President, Programming. The Guild backed this up by referring to specific discussions between the two. Responding to the hiring issue, the Guild pointed to two instances where the Manager–Maritime News Network hired an individual but only with the approval of the Acting Operations Manager. In another instance, the Manager–Maritime News Network recommended that a person be hired but her recommendation was rejected.

[42] Maritime Broadcasting responded to the Guild in its March 21, 2012 comment regarding the Investigating Officer's report. On the circumstances surrounding the discipline letter, it simply asserted, without referring to any specific discussions, that the facts did not show that the Manager–Maritime News Network was only acting as a conduit. On the hiring issue, Maritime Broadcasting simply asserted, without referring to any specific evidence, that the Manager–Maritime News Network "played an active role in the hiring process" and that "[i]n those hiring situations in which she was involved, she has exercised complete autonomy with respect to the decision to hire new employees."

[43] Viewing and weighing this evidence, the Board decided in favour of the Guild:

> The dismissal and discipline letters provided by [Maritime Broadcasting] have not convinced the Board that the incumbent of the disputed position exercises independent decisions-making authority. The dismissal letter clearly indicates that the decision to terminate the recipient's employment was made collectively ("We have made a business decision…") rather than by the author alone. The [Guild's] evidence was that the discipline letter was sent at the express direction of the Vice-President, Programming rather than on the initiative of the Manager-Maritime News Network; this was not denied by [Maritime Broadcasting]. While [Maritime Broadcasting] suggests that the incumbent plays an active role in the hiring process, it did not refute the three specific examples provided by the [Guild], which indicate that the hiring decisions were made by either the Acting Operations Manager or the Vice-President, Programming.

[44] Properly viewed, the Board did not draw an adverse inference from evidence that did not exist. Rather, it made a factual finding based on the state of the evidence before it. There may be cases where an administrative decision-maker makes a factual finding out of thin air or deploys reasoning that is unacceptable or indefensible. But this is not such a case.

[45] Therefore, for the foregoing reasons, the Board's decisions were reasonable.

(2) Procedural grounds of review

[46] In this Court, Maritime Broadcasting submits that the Board erred in its reconsideration decision by not recognizing the procedural unfairness that led up to the original decision. It submits that the Board's reconsideration decision should be reviewed on the standard of review of correctness. In its memorandum of fact and law, the Guild accepted that the standard of review is correctness. However, the parties' agreement on the standard of review does not bind us – we must

apply the correct standard of review: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152.

[47] During oral argument, in response to questions, the Guild altered its position. It suggested that there may be circumstances in which reasonableness would be the appropriate standard on procedural matters and, owing to the complex factual matrix in this case, this was one of them. Maritime Broadcasting disagreed.

[48] I agree with the Guild. In my view, the standard of review is reasonableness as that is understood in the current jurisprudence.

[49] The Board reconsidered the procedural fairness of its original decision without any deference. It considered the matter afresh. If we were to review the Board's reconsideration decision on the basis of correctness, we would be putting ourselves into the shoes of the Board and engaging in reconsideration of the procedural fairness of its original decision without any deference. In my view, this would be inapt.

[50] Looking at the matter from first principles, there is a case for the application of the reasonableness standard. As is often said, the concept of procedural fairness is "eminently variable and its content is to be decided in the specific context of each case" (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 21). The Board is best placed to decide this. It, not the reviewing court, is the fact-finder. It knows the circumstances in particular proceedings before it. It has expertise in the dynamics of labour relations and has policy

appreciation. Armed with these advantages, the Board is master of its own procedure, free to design, vary, apply and, in reconsideration proceedings, assess its procedures to ensure they are fair, efficient and effective: *Re Therrien*, 2001 SCC 35, [2001] 2 S.C.R. 3 at paragraph 88; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at page 685.

[51] Looking at the matter from the standpoint of the decided cases, the case for the reasonableness standard is also strong. Perhaps the best support for this is in *Dunsmuir*, *supra*, the recent authority that changed the direction of Canadian administrative law. An administrative decision-maker's decision regarding the procedures to be followed in a particular case is often a discretionary one. What does *Dunsmuir* say about discretionary decisions? Paragraph 53 of *Dunsmuir* tells us that discretionary decisions are presumptively subject to reasonableness review. Further, paragraph 54 of *Dunsmuir* tells us that where an administrative decision-maker has "developed particular expertise in the application of a general common law…rule in relation to a specific statutory context" – in the case of the Board, the common law of procedural fairness in relation to the specific statutory context of the *Canada Labour Code* – it is entitled to deference. For good measure, in paragraph 54 of *Dunsmuir*, the Supreme Court added that "[a]djudication in labour law" was a "good example of the relevance of this approach." In the case at bar, the Board's application of the law of procedural fairness to the particular facts before it is indistinguishable from any other decision where an administrative decision-maker applies law with which it is familiar, such as its home statute, to a set of facts before it: *Dunsmuir* at paragraph 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654.

[52] *Dunsmuir* is also notable for what it does not say. At paragraphs 51-64 of *Dunsmuir*, the Supreme Court set out presumptive rules for the standard of review in all manner of cases. Yet, in *Dunsmuir*, a discussion of the standard of review for procedural matters is noticeably absent. Later in *Dunsmuir*, the Supreme Court found that procedural fairness duties in public law did not apply, but said nothing about the standard of review that would apply if they did. So we are left with paragraphs 53-54 of *Dunsmuir* and the suggestion that reasonableness should be the standard of review.

[53] I note that six years have passed since *Dunsmuir* and the Supreme Court has not addressed the standard of review of an adjudicative tribunal's decision on procedural matters. I acknowledge that in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 43, the Supreme Court said in passing and in *obiter* (in a case not involving procedural fairness) that *Dunsmuir* affirmed correctness as the standard of review for procedural matters. But *Dunsmuir* did not actually do that: see the similar observation of Evans J.A. in *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 at paragraph 38. Looking only at *Dunsmuir*, paragraphs 53 and 54 stand alone.

[54] Many pre-*Dunsmuir* authorities are consistent with the position taken in paragraphs 53 and 54 of *Dunsmuir*. These pre-*Dunsmuir* authorities have never been the subject of judicial criticism and remain good law today.

[55] By my count, six of these are from the Supreme Court. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 27, the Supreme Court held that in

deciding whether an administrative decision-maker has been procedurally fair, a reviewing court must take into account and respect the particular choices made by the decision-maker: see also *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at pages 568-569. On other occasions, the Supreme Court has deferred to administrators' procedural choices: see, *e.g.*, *Deloitte & Touche LLP v. Ontario (Securities Commission)*, 2003 SCC 61, [2003] 2 S.C.R. 713 (decided at almost the same time as *C.U.P.E.*); *Bibeault v. McCaffrey*, [1984] 1 S.C.R. 176 (labour tribunal decision about participatory rights in a bargaining unit determination). The Supreme Court has also stated that "[c]onsiderable deference is owed to procedural rulings made by a tribunal with the authority to control its own process": *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 60 at paragraph 231. Even the very case that marked the birth of the modern law of procedural fairness – *Nicholson v. Haldemand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311 – suggests the appropriateness of deference. There, the Supreme Court found that Nicholson was entitled to a hearing as a matter of procedural fairness but declined to go further. It left the manner of hearing – oral or written – to the choice of the Board of Commissioners. Reviewing procedural decisions of administrative decision-makers on the basis of correctness sits uneasily with these authorities.

[56] Other authorities also support reasonableness review. Both before and after *Dunsmuir*, on occasion this Court has reviewed the procedural decisions of administrative decision-makers on a deferential standard: see *Xwave Solutions Inc. v. Public Works & Government Services Canada*, 2003 FCA 301 at paragraph 34 *per* Evans J.A. ("the Court should only intervene to prevent manifest unfairness"); *Canadian Airport Workers Union v. Garda Security Screening Inc.*, 2013 FCA 106 at paragraph 5 (the Board's decision not to disclose a report to a party "was a matter

squarely within its labour relations mandate, which, as an expert administrative body, is owed deference"). Similarly, from time to time, other appellate courts have reviewed the procedural decisions of administrative decision-makers on a deferential standard: *Syndicat des travailleuses et travailleurs de ADF-CSN c. Syndicat des employés de Au Dragon Forgé Inc.*, 2013 QCCA 793; *Ontario (Ministry of Community, Family and Children Services) v. Crown Employees Grievance Settlement Board* (2006), 81 O.R. (3d) 419 at paragraph 22 (C.A.). See also David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17 Can. J. Admin. L. Prac. 59 at pages 86-87. Reviewing procedural decisions of administrative decision-makers on the basis of correctness also sits uneasily with these authorities.

[57] Does reasonableness review undercut the ability of this Court in appropriate circumstances to enforce fundamental matters of procedural fairness? Definitely not. Reasonableness review does not take anything away from reviewing courts' responsibility to enforce the minimum standards required by the rule of law. In other words, it is not unduly deferential. Indeed, in some cases, the nature or importance of the procedural fairness issue, the severe effect of the alleged procedural defect upon the aggrieved party, the similarity of the procedures under review to court procedures, or any combination of these may severely constrain or eliminate the range of acceptable and defensible options or margin of appreciation open to the administrative decision-maker on the facts and the law (see paragraphs 34-35, above). Two pre-*Dunsmuir* Supreme Court cases, often cited as examples of correctness review, may be examples of this: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249.

[58] Further, legislative standards and legal standards worked out in the jurisprudence can constrain the range of acceptable and defensible options or margin of appreciation open to the administrative decision-maker on the facts and the law: see *Almon Equipment Limited v. Canada (Attorney General)*, 2012 FCA 318 (where a legislative recipe tended to narrow the range of options available to a tribunal in making a discretionary decision); *Abraham, supra* (where existing tax jurisprudence similarly tended to narrow the range of options available to the Minister of National Revenue in making a discretionary decision); *Canadian Human Rights Commission, supra* at paragraphs 13-14 (jurisprudence downplaying the role of comparator groups in section 15 Charter jurisprudence rendered unreasonable a tribunal decision that insisted on the presence of a comparator group). Again, *C.U.P.E.* and *Moreau-Bérubé* may be examples of this. See also *McLean, supra*, at paragraph 37-41 where the clarity of legislative wording significantly narrowed the range of acceptability and defensibility. Given the well-defined legal standards set by the existing case law on procedural fairness, the range of acceptable and defensible options or margin of appreciation open to the administrative decision-maker often will be constrained. There will be cases, however, where the nature of the matter and the circumstances before the administrative decision-maker should prompt the reviewing court to give the decision-maker a wider margin of appreciation.

[59] Before applying these principles to the facts of this case, I note the reasons of my colleague, Justice Evans, released just this week in *Re:Sound, supra*. In *Re:Sound*, Justice Evans acknowledged the "black-letter rule" that "courts review allegations of procedural unfairness by administrative decision-makers on a standard of correctness" (at paragraph 34). But, after considering some of the same authorities I have considered above – and consistent with the above

analysis – he modified the "black-letter rule" by endorsing the need for deference when reviewing procedural matters in certain circumstances (at paragraph 42):

> [W]hether an agency's procedural arrangements, general or specific, comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient decision-making on the other. In recognition of the agency's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar. [my emphasis]

[60] In that passage, I do not see Justice Evans as advocating a new standard of review, alongside correctness review and reasonableness review, called "respectful correctness" or "correctness with a degree of deference." *Dunsmuir* simplified the standard of review to two categories – a non-deferential one called correctness and a deferential one called reasonableness – and there is no room for us to introduce a new third one. Nor do I see Justice Evans as applying the correctness standard that is understood in the cases. Correctness review has always been review without any deference. "Correctness with a degree of deference" is a *non-sequitur*. It would be like describing a car as stationary but moving.

[61] I prefer to interpret Justice Evans' words in *Re:Sound* in a manner faithful to *Dunsmuir*, the later cases of the Supreme Court and the settled cases of this Court, all of which bind us (summarized in paragraphs 34-35 and 50-58 above). These cases tell us that review conducted in a manner "respectful of the agency's choices" or with a "degree of deference" to those choices is really a species of deferential review – *i.e.*, the reasonableness standard, a standard the Supreme

Court in *Dunsmuir, supra* described (at paragraphs 47-48) as the only "respectful" or "deferential" one.

[62] In *Re:Sound*, Justice Evans considered the decision-maker to be entitled to some leeway – a certain range of acceptability and defensibility – *i.e.*, the standard of reasonableness described in *Dunsmuir, supra* at paragraphs 47-48. But, in the particular circumstances of *Re:Sound*, he has allowed only a little leeway, consistent with the view of the Supreme Court and this Court that the range of acceptability and defensibility can be narrow (see paragraphs 57-58 above). In *Xwave Solutions, supra*, Justice Evans gave the decision-maker a much broader leeway. I am not inclined to call that "correctness review with plenty of deference," but rather reasonableness review in circumstances where the decision-maker has a broad range of acceptable and defensible options open to it, or a wider margin of appreciation.

[63] In my view, the case at bar is one where the Board should be given some leeway under reasonableness review. The Board understood the requirements of procedural fairness, citing two of its own decisions that were based on relevant jurisprudence from the Supreme Court of Canada. The Board's task in this case was to apply those standards in a discretionary way to the factually complex matrix before it, a task informed by its appreciation of the dynamics of the case before it and its knowledge of how its procedures should and must work, all in discharge of its responsibility to administer labour relations matters fairly, justly and in an orderly and timely way. It did so under the umbrella of legislation empowering the Board to consider its own procedures based on its appreciation of the particular circumstances of cases and to vary or depart from those procedures

when it considers it appropriate: *Canada Industrial Relations Board Regulations 2001, supra*, section 46.

[64] Maritime Broadcasting does not point to any particular misunderstanding of the Board as to the relevant legal concepts. Rather, it invites us to stand in the shoes of the Board and apply the principles in this case. As I have said, this is inapt.

[65] In my view, there are no grounds to quash the Board's procedural decision. As is seen in paragraphs 15-31 above, the Board had ample reason based on law and evidence to conclude that its original decision was procedurally fair. I would add that if I, an appellate judge with no labour relations experience, were forced to step into the shoes of the Board and assess the fairness of the Board's original decision on a correctness standard, I would have agreed with the Board largely for the reasons it gave.

[66] I have three other observations to make concerning Maritime Broadcasting's procedural fairness claim.

– I –

[67] I note that Maritime Broadcasting's procedural fairness submissions in this Court run counter to a well-established line of jurisprudence and, thus, must be rejected. An applicant must raise an alleged procedural violation at the earliest practical opportunity: *Benitez v. Canada (Minister of Citizenship and Immigration),* 2006 FC 461 at paragraph 220, aff'd 2007 FCA 199; *In*

Re Human Rights Tribunal and Atomic Energy of Canada, [1986] 1 F.C. 103 (C.A.) at page 113. The earliest practical opportunity is where "the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection.": *Benitez, supra* at paragraph 220; see also D. J. M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf) (Toronto: Canvasback, 1998) at paragraph 3:6000. A party "cannot wait until it has lost before crying foul": *Geza v. Canada (Minister of Citizenship and Immigration),* 2006 FCA 124 at paragraph 66.

[68] Had Maritime Broadcasting objected or had it asked the Board for the right to make additional submissions before the Board released its original decision, the Board might have been able to assist it. However, having failed to object or ask to make further submissions, it must be taken to have been satisfied with the matter: *Bowater, supra* at paragraph 55, a decision relied upon by the Board when it reconsidered its original decision. Accordingly, Maritime Broadcasting has waived any rights to raise the matter on judicial review.

– II –

[69] As mentioned above, Maritime Broadcasting pointed to a paper prepared by the Board and accessible on its website and words spoken by a Board employee to it as evidence that the Guild's March 15, 2012 reply was supposed to be the "last word." It is trite that administrative statements such as the Board's paper and the employee's guidance do not fetter the Board's discretion and the Board remains free to depart from such statements: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at paragraph 75. An exception is that if an

administrative decision-maker gives a "clear, unambiguous and unqualified" promise that a certain procedure will be followed in a particular case, that promise must be kept: *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504 at paragraph 68, as explained in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraphs 94-102. Maritime Broadcasting has not persuaded me that such a promise was made to it. In the case of the employee's guidance, the Board noted (at paragraph 29 of its reconsideration reasons) that the particulars concerning the employee's communications with Maritime Broadcasting are not known.

– III –

[70] Finally, as the Board observed (at paragraph 26 of its reconsideration reasons), Maritime Broadcasting has not suggested what further submissions or new evidence it might have adduced had it been afforded a right to reply to the Guild's further submissions on March 22, 2012. From the nature of the submissions made, one can surmise that nothing needed to be said in response or could have been said in response. In these circumstances, it cannot be assumed that Maritime Broadcasting's supposed inability to respond to the Guild's March 22, 2012 submissions prejudiced it in any way.

[71] Therefore, in this case, to the extent there was any breach of procedural fairness in that regard, the remedy of setting aside the Board's decision is inappropriate: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202.

[72] Overall, Maritime Broadcasting has not established any ground upon which this Court can interfere with the Board's decisions.

D. Proposed disposition

[73] For the foregoing reasons, I would dismiss the application for judicial review with costs.

"David Stratas"

J.A.

WEBB J.A. (Concurring Reasons)

[74] I agree with the disposition of this application as proposed by my colleague Justice Stratas for substantially the reasons that he has stated, however I am unable to agree with his conclusion that the standard of review for procedural matters is reasonableness. Since he has noted that even if he would have found that the standard of review for procedural matters was correctness, he would have reached the same result, this conclusion does not affect the disposition of this application.

[75] As Justice Stratas had noted, the parties, in their memorandums, had both submitted that the standard of review in relation to the procedural fairness issue was correctness. Also as acknowledged by Justice Stratas, in *Re:Sound v. Fitness Industry Council of Canada and Goodlife Fitness Centres Inc.*, 2014 FCA 48, my colleague Justice Evans stated that:

> 34. The black-letter rule is that courts review allegations of procedural unfairness by administrative decision-makers on a standard of correctness: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.

[76] Justice Evans acknowledged that the content of the duty of fairness in any particular context is nuanced and flexible (paragraph 36). He also acknowledged that "[i]n the absence of statutory provisions to the contrary, administrative decision-makers enjoy considerable discretion in determining their own procedure, including aspects that fall within the scope of procedural fairness" (paragraph 37). He also referred to *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 which are also referred to by Justice Stratas.

[77] However, Justice Evans was not persuaded that his initial position that the standard of review for procedural fairness is correctness was wrong and should be changed to reasonableness. He reiterated in paragraph 42 that:

> 42. In short, whether an agency's procedural arrangements, general or specific, comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other. In recognition of the agency's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar.

[78] In relation to the question of whether the standard of review for procedural matters is correctness it is important to review the statement of Justice Binnie in *Khosa*:

> 43 Judicial intervention is also authorized where a federal board, commission or other tribunal
>
> *(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;*
>
> No standard of review is specified. On the other hand, *Dunsmuir* says that procedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review…

[79] It seems to me that, even though these comments may have been made in passing and in *obiter*, it is a clear statement from a decision of the majority of the judges of the Supreme Court of Canada, that the standard of review applicable to procedural matters is correctness. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, Justice Binnie wrote a concurring judgment in which he stated that:

> A. *Limits on the Allocation of Decision Making*
>
> 126 It should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge. There are three basic legal limits on the allocation of administrative discretion.
>
> …
>
> 129 Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators…

[80] In *Dunsmuir* Justice Binnie acknowledged that "the requirements of 'procedural fairness' … will vary with the type of decision maker and the type of decision under review". However, in subsequently writing the reasons for the majority of the court in *Khosa*, he clearly confirmed that the standard of review for procedural fairness matters is correctness. As a result, in my view the standard of review for procedural matters is correctness. The particular requirements of procedural fairness will, however, "vary with the type of decision maker and the type of decision under review".

[81] In paragraph 65 of his reasons in this application, Justice Stratas noted that he "would have agreed with the Board largely for the reasons it gave" if he were assessing this matter on a correctness standard. I agree that assessing this matter on a correctness standard will lead to the same result, also substantially for the reasons as stated by the Board.

[82] As a result, I would also dismiss the application for judicial review with costs.

"Wyman W. Webb"

J.A.

“I agree
David G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-534-12

AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION OF THE CANADA INDUSTRIAL RELATIONS BOARD DATED NOVEMBER 7, 2012

STYLE OF CAUSE:	MARITIME BROADCASTING SYSTEM LIMITED v. CANADIAN MEDIA GUILD
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	OCTOBER 30, 2013
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRING REASONS BY:	WEBB J.A.
CONCURRED IN BY:	NEAR J.A.
DATED:	MARCH 4, 2014

APPEARANCES:

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