

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Halifax Regional Centre for Education v. Nova Scotia Union of Public and Private Employees*, 2025 NSSC 6

**Date:** 20250113

**Docket:** Hfx. No. 534708

**Registry:** Halifax

**Between:**

Halifax Regional Centre for Education

v.

Nova Scotia Union of Public and Private Employees  
and Nova Scotia Labour Board

**DECISION ON ADMISSIBILITY OF AFFIDAVITS ON JUDICIAL  
REVIEW**

**Judge:** The Honourable Justice Joshua Arnold

**Heard:** October 2, 2024, in Halifax, Nova Scotia

**Written Decision:** January 13, 2025

**Counsel:** Alex Warshick, for the Applicant  
Ronald A. Stockton, for the Respondent (Nova Scotia Union  
of Public and Private Employees)  
Edward Gores, KC, for the Respondent (Nova Scotia Labour  
Board)

## Overview

[1] The applicant employer moves to introduce the affidavit of a lawyer who attended a hearing before the Nova Scotia Labour Board to supplement the record on judicial review of the Board's decision. It says the affidavit is admissible to demonstrate that the Board made material factual findings in the complete absence of evidence, or in the absence of evidence capable of supporting its findings.

[2] The union says the proposed affidavit is not admissible. In the alternative, the union says that if the affidavit is admissible, it should be able to file its own affidavit to balance the record.

## Facts

[3] The background and procedural history are set out by counsel for the applicant:

13. The HRCE is a regional centre for education as established under the *Education Act*, SNS 2018, c.1.

14. NSUPE is the bargaining agent for a bargaining unit of HRCE employees comprised of custodial, trades and maintenance, and repair employees.

15. NSUPE made two applications to the Board under the *Trade Union Act*, RSNS 1989, c. 475 (the "Act"): one under s. 28 of the Act to exclude from this bargaining unit trades and maintenance employees and one under s. 23 of the Act to be certified as bargaining agent for the new proposed unit of trades and maintenance employees. The applications, in essence, were to have the joint effect of excluding trades and maintenance employees from the existing unit in favour of their own unit and to recognize NSUPE as the bargaining agent for this new unit.

...

16. While each of these applications was assigned its own Board file – LB-2215 for the s. 28 Application and LB-2214 for the s. 23 Application – the applications were dealt with jointly as they involved the same parties and were necessarily interrelated: the s. 23 application to certify NSUPE as bargaining agent for this new unit of trades and maintenances employees could only proceed if the s. 28 application was successful in first creating that unit.

17. HRCE opposed the s. 28 application and took no position on the s. 23 application, which would be moot if the s. 28 application failed.

18. On November 17, 2023, the Board held a hearing on the s. 28 application before a three-member Board panel. The hearing was not recorded: ... HRCE and NSUPE filed written submissions before the hearing and made oral submissions at the hearing. No post-hearing written submissions were filed.

19. On May 27, 2024, the Board rendered its decision granting the s. 28 application and ordering the s. 23 application proceed. The Decision was rendered in both Board files LB-2215 and LB-2214, with the same order and reasons, albeit under different headings and citations.

[4] The three-member panel of the Board issued a 27-paragraph decision on May 27, 2024. The entire decision was written by the Vice-chair, Eric Sloan, who wrote both the majority reasons and his own dissent.

[5] The majority decision, representing Board members Tom Patterson and Carl Gannon, sets out the background to the applications:

[1] The Union represents a bargaining unit within the Halifax school system, consisting of:

All full-time, regular part-time and casual Custodial, Maintenance and Repair Employees of the Halifax Regional School Board, but excluding Operations Department Facilitators, Custodial Supervisors, Building Superintendents, Trades Foremen, Maintenance Foreman, and those persons excluded by paragraphs (a) and (b) of subsection 2 of the Trade Union Act.

...

[3] The thrust of the two applications before the board is to carve off a bargaining unit of the trades and maintenance work from the larger unit, which includes all in school janitorial and custodial employees. The trades and maintenance workers are not based in the schools, but travel from school to school performing work as required, whereas the janitorial and custodial staff are employed exclusively in the school to which they are assigned.

[4] The number of trades and maintenance employees seeking to create this separate bargaining unit number approximately 40, whereas the custodial staff number about 550.

[5] There are 135 schools within Halifax region plus one Administrative Building in Dartmouth.

[6] It would be fair to characterize the employees in this unit as those who look after the physical plant of the schools in the region. There are other bargaining units represented by different unions who work as teachers, administrators and other support staff.

[7] The position titles sought to be excluded from the larger group, and which constitute the smaller proposed unit, are Burner/Boiler Mechanic, Carpenter, Control Technician, Electrician, General Maintainer, Locksmith, Mason, Painter, Pipefitter, Plumber, Water & Wastewater Technician.

[6] As to the procedural background, the majority said:

- [8] Technically the matter is before the board in two applications, one by the larger group under section 28 of the *Trade Union Act* to amend its certification to exclude the trades and maintenance employees, and the other under section 23 on behalf of the trades and maintenance employees to recognize the union as the bargaining agent for this new proposed unit.
- [9] Following Board procedure, a vote of the members of the proposed trades and maintenance bargaining unit was held, and the results are in abeyance pending the determination of the application to amend the description, which would in effect carve off the smaller unit and open the question of whether or not the union has the support of the employees to be certified as their bargaining agent. Only if the board permits the amendment would the results of the vote become relevant.
- [10] The Employer opposes the Union's application to amend, preferring to bargain and deal with one unit which, it argues, has been functioning well and without any work stoppages for more than two decades. The Employer takes no position on the s.23 application, conceding that those employees would have the right to choose their own representation.

[7] The majority noted that the Union had called “several witnesses” at the hearing (para. 11). The majority went on to allow the section 28 application, and to permit the section 23 application to proceed:

- [19] The majority view is that the Board should be a little more receptive to applications of this type where, as here, the trades and maintenance employees have a much stronger community of interest with each other than they do with the custodial employees. The majority believes they lack an effective voice within the larger unit, which they should be entitled to have. Their finding is that the impact on the Employer would be minimal. They note that the structure is a historical accident and is not reflected in all other Centres for Education within the province.
- [20] The majority notes that there are no discernable benefits to the trades and maintenance employees being in the larger unit. There is virtually no mobility between the groups. They have very different hours of work, and places of work (in the sense that custodial employees are assigned to one school, while the trades and maintenance employees serve all of the schools as required.)
- [21] The majority also notes that maintenance employees have significant training in trades whereas janitorial and custodial staff have minimal on the job training. They also are under different supervision and interact with different staff than the janitorial and maintenance staff. They have little or no contact with students.

- [22] The majority also notes that, in at least one of the pre-amalgamation school boards, maintenance employees had their own separate bargaining unit that apparently worked well.
- [23] The majority also note that this is an entirely friendly "divorce" in that the wishes of both units is clearly to proceed in separate units. This factor arguably distinguishes this case from *Nova Scotia Union of Public and Private Employees v Dalhousie University*, 2011 NSLB 94 (CanLII) where the wishes of the larger unit had not been clearly demonstrated.
- [24] The majority is of the view that too much emphasis has been placed on Employer inconvenience, instead of allowing the employees the full benefit of their rights to associate and collectively bargain enshrined in the *Trade Union Act*.
- [25] The majority notes that evidence was presented at the hearing by the Union, that was not contradicted by the Employer, to the effect that on two occasions, bargaining was extended as a result of issues that related only to the maintenance employees. In one case, it resulted in a 3-week strike of all members of the bargaining unit. Had the group been separated at the time, the schools without a maintenance problem could have continued to operate allowing other employees to continue to receive pay and students to continue to receive education.
- [26] In the result, the s.28 application to amend the description to exclude the trades and maintenance employees from the existing bargaining unit is allowed. The Board will continue processing the s. 23 certification application, which will include assessing the membership evidence, and (if the threshold is met), ordering a vote count. The effective date of the s.28 order to exclude the trade and maintenance employees will align with the effective date of the s. 23 application (which may either be a dismissal, or a certification).

[8] In dissent, Chair Eric Sloane wrote, on his own behalf:

- [27] The Vice-Chair of the panel respectfully dissents from the result ordered by the majority. I do not disagree with the proposition that a stand-alone unit of trades and maintenance employees is appropriate for collective bargaining. I will even concede that the proposed structure is more elegant, and were we defining units at the outset of the relationship, the proposed structure might well be the better

one. I remain unconvinced, however, that the Union has met the test articulated in several decades of jurisprudence, to the extent that an exception to the well-established policy against fragmentation should be allowed.

[9] The school board's Notice for Judicial Review sets out the grounds for review as follows:

1. The Board's decision, in particular its determination of the application made under s. 28 of the *Trade Union Act*, was unreasonable because:
  - (a) it does not contain or reveal internally coherent reasoning or a rational chain of analysis particularly when read in conjunction with the Record;
  - (b) it does not justify its conclusions such that it is possible to understand the Board's reasoning on critical points;
  - (c) it did not apply the correct legal test to its determination of the s. 28 application and, further, it erred by mixing the tests applicable to each of the applications before it;
  - (d) instead, the Board's analysis asked the wrong question and focused on irrelevant considerations;
  - (e) the Board did not answer the question it should have, namely whether there was compelling reason or circumstances that made fragmentation of the bargaining unit appropriate, and its analysis on fragmentation and the appropriateness of the bargaining unit is not logical;
  - (f) the Board did not have before it and did not refer to argument and evidence that established or could have established compelling reason or circumstances for fragmentation of the existing bargaining unit;
  - (g) the Board's decision is not justified in relation to the relevant law which constrained it, specifically:
    - i. the Board has fundamentally failed to demonstrate expertise with respect to its home statute, its policies, and its precedents and failed to justify its decision in light of these constraints;
    - ii. the Board's decision violates the statutory scheme under the *Trade Union Act* for certifications, amendment of certifications, and termination of bargaining rights;
    - iii. the previous Board decision cited in support of the majority's decision at para. 18 of the decision does not actually support the Board's decision and the Board's analysis departed from that in the cited case;
    - iv. in particular, the Board departed, without appropriate justification, from a directly analogous precedent in *Nova Scotia Union of Public and Private Employees v Dalhousie University*, 2011 NSLB 94 (CanLII) and erred in its treatment of this directly analogous precedent in its reasons;

- v. the Board departed, without justification, from well-established labour law principles recognized across Canada by labour relations boards and the Courts; and,
  - vii. the Board's decision failed to attend to the relevant factors for analysis and failed to justify its analysis with supporting authorities.
- (h) the Board's decision failed to engage the evidence before it and is not justified in relation to the relevant facts which constrained it, specifically:
- i. the Board misstated and misapprehended important facts and relied on these misstatements and misapprehensions in error;
  - ii. the Board ignored relevant evidence before it; and,
  - iii. the Board relied on irrelevant facts or placed undue weight on certain facts.
- (i) the Board failed to engage with the submissions and authorities in a meaningful way;
- (j) the Board failed to give sufficient reasons; and,
- (k) the Board's decision deviates from the purpose of the *Trade Union Act* and is contrary to public policy and good labour relations.

[10] The applicant adds that the section 23 decision would also fall as a consequence of the section 28 decision being quashed.

### *Applicant's Affidavit*

[11] The applicant wants to introduce the affidavit of Mallory Adams, an associate lawyer with McInnes Cooper. Regarding the sources of her evidence, Ms. Adams states:

- 2. I have personal knowledge of the evidence affirmed to in this Affidavit except where otherwise stated to be based upon information or belief.
- 3. I state in this Affidavit the source of any information that is not based upon my own personal knowledge and I state my belief of the source.

[12] Ms. Adams does not provide full details about the sources of her evidence, that is, whether it is from her own memory, her own notes, or otherwise. She goes on to set out her observations of what was said during the hearing, where she assisted her colleague Ian Pickard:

7. At the hearing, the HRCE elected not to call any evidence on the basis that two facts were agreed between the parties. I observed and heard Mr. Pickard state the following agreed facts before the Board panel:
  - (a) There are eight regional centres for education in the province of Nova Scotia, including the HRCE, and in each the trades and maintenance employees are in the same bargaining unit as custodial employees.
  - (b) Two of the regional centres for education have only two bargaining units of employees, Cape Breton-Victoria Regional Centre for Education and Straight Regional Centre for Education, while all other regional centres for education, including the HRCE, have four bargaining units of employees.

[13] Ms. Adams goes on to state that there were two witnesses for NSUPE, William Alguire and John Peskett. She recounts the substance of Mr. Alguire's evidence:

11. I observed and heard Mr. Alguire testify under oath as follows:
  - (a) NSUPE Local 2 is the local that represents the current bargaining unit;
  - (b) He is the president of NSUPE Local 2 and had been president for twenty-two years;
  - (c) There are about 550 custodial employees in the unit and between 38-40 maintenance or trades employees;
  - (d) In 2001, the bargaining unit went on strike. After six weeks of strike, the custodial employees had received their demands. The strike continued three more weeks to help the trades and maintenance employees achieve their demands;
  - (e) It is rare for a custodial employee to move to maintenance and trades. Mr. Alguire recalled one employee who had moved from custodial to trades, and estimated there were four general maintenance labourers who had moved from custodial work;
  - (f) As president of NSUPE Local 2, he represents and negotiates for all members of the bargaining unit;
  - (g) He does not play favourites with grievances from custodial employees versus those from maintenance employees and has never dismissed a grievance from a maintenance employee because the employee was a maintenance employee;
  - (h) NSUPE Local 2 has an executive that is usually comprised of seven positions;

- (i) One executive position is guaranteed to be a custodial employee and one executive position is guaranteed to be a trades or maintenance employee;
- (j) The remaining five positions on the executive are open to any employees in the unit;
- (k) At the time of hearing, there were six positions filled on the executive and three were held by trades or maintenance employees;
- (l) At the time of the filing of the applications, four of seven filled positions on the executive were held by trades or maintenance employees.
- (m) In the last round of collective bargaining, trades or maintenance employees comprised a majority of the NSUPE Local 2 bargaining team;
- (n) Maintenance employees regularly attended and were always active at NSUPE Local 2 membership meetings.

[14] Ms. Adams does not describe any specific evidence given by Mr. Peskett. She concludes:

- 14. There was no evidence presented at the hearing from Mr. Alguire, Mr. Peskett or by affidavit of any strike or extension of bargaining related to the maintenance employees, except for the 2001 strike as testified to by Mr. Alguire.
- 15. There was no evidence presented at the hearing from Mr. Alguire, Mr. Peskett, or by affidavit that trades and maintenance employees faced any difficulty in accessing grievance procedures

### **Attempt by the Respondent to Introduce its own Affidavit**

[15] This motion was scheduled for hearing on October 2, 2024. On September 26, 2024, the union filed a Notice of Intention to Cross-Examine on the applicant's affidavit. The applicant objected, and a virtual hearing took place on September 27, 2024. At that time, I advised the parties that because I am not the judge who will be hearing the judicial review, the weight of the evidence in the affidavit was not an issue on this motion, which is concerned only with the discrete issue of the admissibility of the affidavit.

[16] During the September 27 hearing, Mr. Stockton, counsel for the union, was directed to file any materials in support of his request to cross-examine Ms. Adams on the instant motion by October 1, 2024. The court expected written submissions

regarding the union's right to cross-examine Ms. Adams at the admissibility stage. Mr. Stockton did not advise the court that he intended to file an affidavit on this motion. Instead of filing submissions on the specific issue of cross-examination of the affiant in this context, which is what was contemplated by the court, Mr. Stockton filed his own affidavit, to which was attached the affidavit of Andrew MacFarlane. This may have been a misunderstanding on the part of Mr. Stockton regarding what I was expecting. The union did not request an adjournment of the hearing to deal with an application to file affidavits.

[17] The substance of Mr. MacFarlane's affidavit is essentially a reply to Ms. Adams's affidavit. He states:

9. I have read the Affidavit of Mallory Adams, affirmed September 9, 2024, and believe it leaves out some of Mr. Alguire's testimony that were relevant to the issues to be determined by the Board.
10. I agree with the statements at paragraph 11(a) to (n) but I believe, based on what I heard and observed, they are incomplete.
11. Mr. Alguire was cross examined by Mr. Ian Pickard, the lawyer presenting the case for the HRCE and I heard and observed that cross examination.
12. In cross examination I heard and observed Mr. Pickard's statements and questions and Mr. Alguire's responses, which included, as follows:
  - a. In response to a statement from Mr. Pickard that there was no impediment to maintenance people from trades pursuing a union position, Mr. Alguire responded that in 22 years this was the first time.
  - b. Mr. Pickard stated that Mr. Alguire had said that recently the maintenance group had a majority on the executive or 50/50 and then asked Mr. Alguire if, before that it was mainly custodial, to which Mr. Alguire responded it was.
  - c. Mr. Pickard asked Mr. Alguire if he had knowledge that the trades group decided to become more active and Mr. Alguire said they had always been active at meetings but there was always more custodial members at the meetings.
  - d. In response to another question about trades activity in the union Mr. Alguire responded that they always felt they were over shadowed.
  - e. Mr. Pickard asked if there was a lot of animosity after the 2001 strike and Mr. Alguire said there was animosity after every contract.
  - f. Mr. Pickard stated that the animosity was higher after the 2001 strike than normally, and Mr. Alguire disagreed.

- g. Mr. Alguire agreed with Mr. Pickard that after every round of bargaining there is animosity from trades and they are unhappy.
13. I agree with the statements at paragraphs 12 and 13 of the Affidavit of Mallory Adams that John Peskett testified and that no other witness testified.
14. I do not agree with the statement at paragraph 14 of the Affidavit of Mallory Adams. I heard and observed Mr. Pickard state to Mr. Alguire that at the last round of bargaining, which ended in 2023, the majority of the time taken for bargaining had to do with a pay adjustment for trades employees. Mr. Alguire agreed that was the case and the trades' request was over and above what everyone else would get.
15. I agree that there was no evidence presented indicating trades and maintenance employees had any difficulty accessing grievance procedures.

[18] Regarding the sources of his evidence, as with the affidavit of Ms. Adams, Mr. MacFarlane simply states:

2. I have personal knowledge of the evidence affirmed to in this Affidavit except where otherwise stated to be based on information and belief.
3. I state, in the Affidavit, the source of any information that is not based on my personal knowledge and I state the source of my belief.

[19] Like Ms. Adams, Mr. MacFarlane does not clearly identify the source of his evidence, that is, whether it is from his own memory, his own notes, or otherwise. Mr. MacFarlane says Ms. Adams' affidavit omits and misinterprets certain material evidence before the Board.

[20] No cross-examination on the Adams affidavit was permitted, it being irrelevant to the admissibility of her affidavit on this motion. I am not the judge who will hear the judicial review. Any assessment of the affiant's credibility and reliability should be left to that judge.

[21] The respondent's affidavits, that of Mr. Stockton attaching the affidavit of Mr. MacFarlane, are not admitted on this motion. If the respondent wishes to bring its own motion to have supplementary evidence admitted on the judicial review, it must follow the process set out in the *Civil Procedure Rules*. It cannot piggyback on the applicant's application and circumvent the process detailed in Rule 7.

### **Admission of Affidavits on Judicial Review**

[22] The law regarding the admission of supplementary affidavits on judicial review is governed by both the *Civil Procedure Rules* and decisions from this jurisdiction and others. Rules 7.10 and 7.28 state, in part:

#### **7.10 Directions for judicial review**

A judge hearing a motion for directions may give any directions that are necessary to organize the judicial review, including a direction that does any of the following:

- (a) settles what will make up the record and whether something is part of the record;
- ...
- (g) rules on the admissibility of evidence sought to be introduced at the review hearing;
- (h) provides for the introduction of admissible evidence by affidavit or otherwise, and provides for any reply affidavits, cross-examination at the hearing, or cross-examination outside court with a transcript...

...

#### **7.28 Evidence on judicial review or appeal**

- (1) A party who proposes to introduce evidence beyond the record on a judicial review or appeal must file an affidavit describing the proposed evidence and providing the evidence in support of its introduction.
- (2) An applicant for judicial review, or an appellant, must file the affidavit when the notice for judicial review or the notice of appeal is filed, and a respondent must file the affidavit no less than five days before the day the motion for directions is to be heard.
- (3) A motion for permission to introduce new evidence must be made at the same time as the motion for directions, unless a judge orders otherwise.

[23] The parties referenced the following cases on the admissibility issue: *Keeprite Workers Independent Union v. Keeprite Products Ltd.*, [1980] O.J. No. 3691 (ONCA); *Nova Scotia Union of Public and Private Employees v Dalhousie University*, 2011 NSLB 94; *Sandeson v. Nova Scotia (Attorney General)*, 2022 NSSC 170; *Hartwig v. Saskatchewan*, 2007 SKCA 74; *R. v. Northumberland Compensation Appeal Tribunal (1951)*, [1952] 1 All E.R. 122 (Eng. C.A.); *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Brady v. Nova Scotia (Minister of the Department of Health and Wellness)*, 2023 NSSC 385; *Canadian National Railway v. Teamsters Canada Rail Conference*, 2017 NSSC

10; *Sorflaten v. Nova Scotia (Environment)*, 2018 NSSC 7; *Bernard v. Canada Revenue Agency*, 2015 FCA 263; *Brookfield Lepage Johnson Controls Facilities Management Services Ltd. v. Ontario (Labour Relations Board)*, [2007] O.J. No. 490; *Nova Scotia Union of Public and Private Employees, Local 13 v. Halifax Regional Municipality*, 2021 NSSC 171.

[24] The law regarding the admission of affidavit evidence to supplement the record on judicial review was discussed by Brothers J. in *Nova Scotia Union of Public and Private Employees, Local 13 v. Halifax Regional Municipality*, 2021 NSSC 171, where she confirmed that affidavit evidence beyond the record is generally inadmissible:

[28] The *Civil Procedure Rules* do not provide guidance as to the content of a Record on judicial review. In *Sorflaten v. Nova Scotia (Environment)*, 2018 NSSC 7, Justice Boudreau made clear that affidavit evidence beyond the Record is generally inadmissible on a judicial review, which is a review of an administrative decision-maker's decision, not a re-trial or a search for some "universal truth". *Sorflaten* makes clear that introduction of affidavit evidence beyond the Record is an exception.

[29] In *Kelly v. Nova Scotia Human Rights Commission*, 2018 NSSC 173, Justice Arnold quoted with approval from Justice Stewart's decision in relation to what should constitute a Record for the purpose of judicial review:

26. In *IMP Group International Inc. v. Nova Scotia (Attorney General)* (2013), 336 N.S.R. (2d) 188, 2013 NSSC 332 (N.S. S.C.), Stewart J. provides a comprehensive overview of the meaning of "record" under the Rules:

21 The *Civil Procedure Rules* do not define the "record," but the decision-making authority is required to produce it: Rule 7.09(1). A judge hearing a motion for directions may make certain determinations about the content of the record. This provides no guidance as to how such a determination should be made. According to Sara Blake, in *Administrative Law in Canada*, 5th edn. (LexisNexis, 2011), at 202-203:

The record that was before the tribunal is the evidence on which a court bases its review of the tribunal's action or decision ... The record must include the document that initiated the proceedings before the tribunal and the tribunal order or decision. If relevant to the issues raised in the application for judicial review, the record may include the tribunal's reasons ..., interim rulings made by the tribunal, [and] the exhibits filed with the tribunal ... The record does not include communications for the purpose of settlement

nor documents protected by deliberative secrecy or privilege such as drafts of the tribunal decision ... The tribunal is not obliged to create new documents as the record contains only existing documents in the possession of the tribunal that were used in making the decision.

Blake goes on to say, at 204-206:

Only material that was considered by the tribunal in coming to its decision is relevant on judicial review because it is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court. If the issue to be decided on the application involves a question of law, or concerns the tribunal's statutory authority, the court will refuse leave to file additional evidence. Evidence challenging the wisdom of the decision is not admissible ... If the applicant alleges bias, use of statutory power for an improper purpose, fraud on the tribunal, absence of evidence to support a material finding of fact or failure to follow fair procedure, the court may grant leave to file evidence proving these allegations ...

[Emphasis added.]

[25] Justice Brothers cautioned against admitting affidavits that are based on something other than a verbatim transcription of the hearing to supplement the record:

[32] The courts have considered the question of notes forming part of a record. While made in the context of tribunal members' notes, the comments of Bryson, J.A. in *Li v. Jean*, 2012 NSCA 125, are relevant, in that he aptly points out that notes are not a verbatim account of events, as is a transcript. In *Li*, both practical and legal aspects were considered in relation to the question of whether a decision-maker's notes should be part of the record. In *Li*, the appellant was seeking to have notes taken by a member of the Labour Standards Tribunal added to the record on the grounds of alleged errors or omissions in the recording of the hearing. Justice Bryson said that one of the practical issues was that the notes of a judge or a panel member are "almost never a word-for-word record of what occurs in court. Moreover, they are not intended to be that kind of record" (para. 16).

[33] Justice Bryson went on to cite the Court of Appeal's decision in *Yorke v. Northside-Victoria District School Board*, 1992 NSCA 80:

[3] The apparent purpose in requiring notes to be delivered up as part of the record of the proceedings is the assumption that the notes are a record of the evidence taken in the absence of a certified transcript of the proceedings. In my opinion the notes of a Board member are not a proper record of the evidence as the notes are not a verbatim record of what a witness stated under oath and are therefore likely inaccurate and unreliable. Secondly, the notes may contain tentative observations of the Board member which the Board member may subsequently decide were not well founded. Therefore, the notes could be misleading. Thirdly, the notes of a Board member are personal notations of the member made during the hearing. In short, the notes are a personal and unreliable record of the evidence. As a general rule, handwritten notes would serve no useful purpose for a superior court when reviewing a Board decision. [Emphasis added in *Li*.]

[34] There is also the practical consideration of how the inclusion of such notes in the Record would affect future arbitral proceedings between these parties and others. Labour arbitration is intended to be a reasonably expeditious and inexpensive means of resolving disputes. ... If there is any likelihood that notes of the arbitrator or of one of the parties may form part of the record, the parties, or for that matter, the arbitrator, may consider it necessary to start having a court reporter attend and record arbitration hearings so as to enable the production of a formal transcript for the purposes of judicial review. This would increase formality and cost, contrary to some of the goals of the arbitral process.

#### **Reasons for Not Including the Affidavit in the Record**

[35] The notes that are the subject of this motion would neither have been before the arbitrator nor played any role in the arbitrator's decision-making. Rather, such notes would be evidence beyond the record for which permission for introduction must be obtained pursuant to Rule 7.28. Sara Blake states the following in her text, *Administrative Law in Canada*, 5<sup>th</sup> ed:

...Only material that was considered by the tribunal in coming to its decision is relevant on judicial review because it is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court....[As in *Bancroft, infra*, at para. 14, underlining removed]

[26] Brothers J. went on to comment specifically on the practical problems arising from the use of notes made by a party, rather than a decision-maker:

[44] With respect to inaccuracy and unreliability, the notes taken by a representative of a party at a hearing have the same difficulties as those taken by an arbitrator. ...

[45] Furthermore, the *Trade Union Act* does not contemplate notes of a party as being part of the Record. In fact, there is no transcript from an arbitration for a reason.

...

[47] The decision in *IBEW, supra* is instructive. In that case, the employer sought to have notes taken at an arbitration by the employer's counsel, associate, and law clerk placed before the court on judicial review. The materials were initially deemed admissible to enable the employer to argue there was a lack of evidence with respect to findings of fact. However, the reviewing court overturned the decision on grounds that included the lack of reliability of the notes, which were not verbatim (at para. 42).

[48] Further with respect to reliability, notes taken by one of the representatives of a party have an added difficulty of not having been taken by someone who can be considered neutral in the arbitral process.

[Emphasis added]

[27] While affidavits not before the original decision-maker are presumptively inadmissible, there are exceptional circumstances that would allow admission, such as a gap in the record, to provide general background, to provide evidence of a procedural defect, or to establish the complete absence of evidence to support a finding. Justice Brothers stated, in *Local 13*:

[38] In order to admit this affidavit as part of the Record, I would have to be convinced that there was an exceptional circumstance. Some exceptional circumstances are referred to in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22:

20 There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker ... Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider...

(b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness... For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.

(c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding...

...

[42] In *Canadian National Railway v. Teamsters Canada Rail Conference*, 2017 NSSC 10, CN, the applicant, on a judicial review of a labour arbitration decision, sought to introduce an affidavit led by a human resources professional who represented CN at the arbitration. Justice Smith outlined the “general background information” exception:

19 The "general background information" exception applies only to neutral, nonargumentative statements that assist the reviewing court to understand the history and nature of a case. I refer to the decision of the Federal Court of Appeal in *Delios, supra*. In that case, the Court of Appeal stated:

The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy — a that that is the role of the memorandum of fact and law — it is admissible as an exception to the general rule. (paragraph 45)

[43] After citing these governing precedents, Justice Smith ruled that the affidavit should not be admitted under any recognized exception. First, the affidavit contained materials already in the record, as well as submissions to the Board which duplicated its written submissions. The affidavit in CN was an attempt to bolster CN’s argument that there was no factual basis on which the arbitrator could have made her findings, and amounted to the HR representative offering further evidence and characterizations of the evidence that had already been placed before the Board. Justice Smith ruled that the contents of the affidavit did not constitute the kind of neutral, non-argumentative explanations permitted by the “general background” exception accepted by the Federal Court of Appeal in decisions such as *Access Copyright, supra*. She held that the affidavit was an attempt to invite a reweighing of the evidence heard by the arbitrator.

...

[46] Affidavit evidence is admissible to show an absence of evidence or demonstrate a breach of natural justice that cannot be proven by reference to the

Record (*Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.)) This is not such a case. It can also be adduced for general background information. But again, in this case that is unnecessary, and not what is being proposed.

[28] In *Brady v. Nova Scotia (Minister of Health and Wellness)*, 2023 NSSC 385, Gabriel J. described the *Keeprite* exceptions, in similar terms to those used by Justice Brothers:

[23] The law to this preliminary motion appears to be largely uncontroverted. For example, it was canvassed in *Sorflaten v. Nova Scotia (Environment)*, 2018 NSSC 7:

[15] In *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency* 2012 FCA 22:

[20] There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker... In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:

(a) Sometimes the court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review... Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider. ...

(b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfill its role of reviewing for procedural unfairness: e.g. *Keeprite Workers Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.

(c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the

administrative decision-maker when it made a particular finding: *Keeprite*, supra.

[29] The applicant says the affidavit should be admitted to establish the absence of evidence to support findings made by the Board, relying on the exception recognized in *Keeprite*. To a lesser extent, the applicant relies on the exception for general background information.

[30] The applicant says the affidavit does not contain new information, but only information that was before the Board but was not properly considered by it. It says the Board's reasons are so brief, and contain no summary of the evidence, so that the affidavit is made necessary. It says that there is no other way to establish a lack of evidence with respect to the Board's findings. The applicant identifies the following points that allegedly require clarification by means of the Adams affidavit:

11. The grounds for judicial review in this proceeding include, amongst others, arguments that the Board misapprehended and failed to engage with the evidence actually before it. HRCE argues the Board did not have evidence to meet the test for fragmentation of a bargaining unit [ground 1(f)]; it did not have evidence meriting departure from precedent [ground 1(g) v.]; and it failed to engage with the evidence and justify its decision in relation to the facts [ground 1(j)]. On this last ground, in short, HRCE argues that the Board made findings of fact without evidence or which are incapable of support on the evidence adduced before it. The Board also made a finding of fact that directly contradicts a fact agreed by the parties—which also gives rise to the aforesaid issue of fundamental justice or procedural fairness as HRCE relied on these agreed facts in deciding not to call evidence at the hearing. The Adams Affidavit goes specifically to these grounds. It also supports, as set out below, that the Board's written reasons are insufficient.

[31] The Record does not include a recording or transcription of the hearing. As noted in *Yorke* and *Li*, there is a practical consideration of how allowing the Adams affidavit to supplement the Record would affect future arbitral proceedings between these parties and others. Labour arbitration is intended to be a reasonably expeditious and inexpensive means of resolving disputes. If there is any likelihood that recollection of one of the parties may form part of the record, the parties, or for that matter, the arbitrator, may consider it necessary to start having a court reporter attend and record arbitration hearings so as to enable the production of a formal transcript for the purposes of judicial review. This would increase formality and cost, contrary to the goals of the arbitral process.

[32] The applicant also asserts that the affidavit is necessary due to the brevity of the reasons in the decision, particularly as they relate to the majority's findings of fact, which are stated in most instances without reference to specific evidence.

[33] The applicant says that, in accordance with *Nova Scotia Union of Public and Private Employees v. Dalhousie University*, 2011 NSLB 94, proof of compelling reasons to allow fragmentation should have included evidence that the breakaway unit had ceased to have a community of interest with the larger group; evidence of work disruptions; evidence that the breakaway unit had been frustrated in pursuing its interests and having its voice heard within the larger group; and evidence that the breakaway unit's members were not being properly represented, particularly with respect to grievances. The employer says the dissent amounts to a finding that the union did not meet the burden of proving compelling reasons to fragment. The applicant says the Adams affidavit is necessary to make argument on this point:

26. Understanding the evidence before the Board on this judicial review is made difficult by a number of factors. The hearing was not recorded. The Record will contain only a handful of exhibits, mostly job descriptions and the collective agreement. There are no written post-hearing submissions summarizing the evidence, only pre-hearing submissions – and submissions are not evidence in any event. Finally, there are the fairly brief reasons for the Decision, which are short of details with respect to the evidence actually before the Board.

...

28. Contrary to para. 11, NSUPE did not call “several” witnesses: it called two. These witnesses are not identified at all in the reasons. There is, in fact, no reference whatsoever to the specific content of their testimonies and no attribution of any findings of facts to the evidence of any particular witness or to any documentary evidence. HRCE submits that the reasons, as drafted, seem to give the impression of a more significant body of evidence than actually presented at the hearing where just two witnesses in all were heard in a single morning. Without the Adams Affidavit, this impression is not dispelled.

29. Most troubling, though, is that the reasons do not reveal the evidentiary basis for the majority's findings of fact. The reasons proceed, after the Vice-Chair's comment on the unusualness of the situation in paragraph 12, to a brief description of some of the legal framework (though without a clear statement of the test to be met) followed by descriptions of the majority's views, beliefs, and findings. The majority's findings of fact are contained in paragraphs 19 to 25. Except for paragraph 25, none of these paragraphs refer to any particular evidence before the Board – no specific testimony, no specific document, no identification of the information or source of information on which the finding is based. Meanwhile, as set out below, paragraph 25 refers to evidence not actually before the Board. As in the Adams Affidavit at paragraph 14, there was only evidence of *one* extension of

bargaining before the Board, not two, and the description of the evidence in the paragraph does not accurately reflect the evidence of the witness who testified to the strike.

[34] The applicant says that considering what it describes as “the evolution of the definition of reasonableness” in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the court should have a more permissible approach to supplementary affidavit evidence on judicial review. The applicant could not point to any post-*Vavilov* cases in support of this proposition. Counsel stated:

40. HRCE submits that an expanded conception of the record, and a more permissible approach to affidavit evidence of the kind contained in the Adams Affidavit, reflects this evolution. The Adams Affidavit is not “new” evidence, rather it contains statements as to evidence that was before the decision-maker. The majority of the affidavit relates to either agreed facts not apparent on the Record or observations of sworn testimony tested on cross-examination. Its content goes directly to grounds for review relating to the reasonableness of the decision-maker’s findings of fact where these findings, and the basis of these findings, cannot be reviewed with reference to a recording or transcript of the hearing.

[35] The applicant relies on *Hartwig v. Saskatoon (City) Police Assn.*, 2007 SKCA 74:

41. In *Hartwig*, some twelve years prior to *Vavilov*, the Saskatchewan Court of Appeal described the need to align the content of the record with reasonableness review as it was then understood (a standard less exacting and robust than now required under *Vavilov*):

17 This state of affairs can be contrasted with the contemporary scope of judicial review in this country. In the last 30 or so years the Supreme Court has substantially modified the law in this area. The development most significant for present purposes is that the Court has clearly established that findings of fact made by an administrative agency acting within jurisdiction, in the strict sense of that term, may be subject to review by the courts. The foundation of this approach was identified by Lamer J. in *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476 (S.C.C.) when he questioned the basis for making distinctions between errors of fact and errors of law in a legal regime which stressed the reasonableness of alleged error. As he said at p. 494, “The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than one of law”.

18 The notion that patently unreasonable findings of fact within jurisdiction were subject to judicial review was confirmed in *W.W. Lester (1978) Ltd. v. U.A., Local 740*, [1990] 3 S.C.R. 644 (S.C.C.). Since that time, there have been numerous illustrations of the Court reviewing the

evidence presented to a tribunal with a view to assessing the reasonableness of the tribunal's findings of fact. ... As Cory J. recognized in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.) at paras 47 and 48:

In order to decide whether a decision of an administrative tribunal is patently unreasonable, a court may examine the record to determine the basis for the challenged findings of fact or law ... where the arbitral findings are based upon inferences made from the evidence, it is necessary for a reviewing court to examine the evidence...

19 It is readily apparent therefore that the scope of judicial review has evolved significantly in the 55 years since the *Northumberland* case was decided. In contrast, the conception of what is properly before the court in a judicial review application has been largely static. As a result, we are currently at a point where, on one hand, the factual findings of administrative decision-makers made within jurisdiction can be reviewed from the perspective of reasonableness but, on the other hand, the evidence on which those findings are made cannot be put before the courts. This situation frequently creates serious injustices and precludes meaningful review. In my opinion, there is a pressing need to bring the law concerning the materials which can be placed before the courts in judicial review applications into line with the substance of contemporary administrative law doctrine.

42. The Court in *Hartwig* concluded on the issue as follows:

33 Thus, in all of the circumstances, the best course in this area for now is to simply recognize the right of participants in judicial review proceedings to bring forward the evidence which was before the administrative decision-maker. This may be done by way of an affidavit which identifies how the evidence relates to the issues before the court and which otherwise lays the groundwork for its admission. (. . .)

[Emphasis by applicant's counsel.]

[36] The applicant says the affidavit fits within the final *Keprite* exception because it highlights an absence of evidence for material findings; there is no verbatim record of the proceeding before the Board; the Board must reply on the evidence presented and cannot go outside of that evidence; and that evidence that was before the Board is unclear or absent, and will be otherwise missing from the record. The applicant says that by comparing the Adams affidavit to the decision, it is clear that it fits within multiple *Keprite* exceptions.

55. ... Further, those statements as to having observed testimony under oath by an NSUPE witness of uncontroverted background information about the history and

makeup of the bargaining unit and its operations also fall within the background information exception and the statement with respect to agreed facts at the hearing goes to an issue of procedural fairness and fundamental justice.

## Analysis

[37] The Nova Scotia caselaw is clear on the general non-admissibility of affidavit evidence of the kind being advanced here. The applicant provides no authority applying *Vavilov* in the manner they submit. They rely on *Hartwig*, which long pre-dates *Vavilov*. Even if *Hartwig* stood for the wide-open admissibility of counsel’s affidavits on judicial review, as the applicant suggests, it is inconsistent with the law in this province. In *IMP Group International Inc v Nova Scotia (Attorney General)*, 2013 NSSC 332, Stewart J said, “*Hartwig* may suggest a loosening of the traditional standards for admission of new evidence on judicial review. It has not been endorsed in Nova Scotia. Moreover, as the Attorney General notes, *Hartwig* involved evidence that was actually considered in the hearings that were the subject of the judicial review, not new evidence that had not been put before the relevant tribunal” (para 40).

[38] No subsequent Nova Scotia authority has addressed *Hartwig* directly. Additionally, I am not convinced that *Hartwig* can support admission of the specific form of evidence being advanced here.

[39] The court in *Hartwig* was vague as to the nature of the evidence to be introduced, but it appears that there was a transcript of the proceedings of the Commission of Inquiry under review (*Hartwig* at paras 5, 7, and 26). This was not a situation where the “evidence” being advanced was one party’s subjective recollection being recounted in an affidavit. The court said little or nothing about the frailties of such evidence as described in the Nova Scotia caselaw, presumably because such issues were not relevant to admission of a transcript. This narrower reading of *Hartwig* is consistent with Sara Blake’s citation of the case in *Administrative Law in Canada*, 7<sup>th</sup> edn (Toronto: LexisNexis, 2022), as authority for the principle that “[i]f an oral hearing was held and transcribed, the transcript may be included...” (Blake at 233; see also note 204). In discussing the composition of the record, Blake adds that a “party may not file an affidavit describing oral testimony, even if there is no transcript or tribunal summary” (233). Blake does, however, recognize the “no evidence” and “general background” exceptions (237-238).

[40] More recently, in *Fraser v Nova Scotia Barristers' Society*, 2024 NSSC 173, Hoskins J. cited (at para 218) the following passage from *Bernard v Canada (Revenue Agency)*, 2015 FCA 263, [2015] FCJ No 1396, where Stratas J.A. commented on the exceptions to the general rule against adducing evidence on judicial review. With respect to the “general background” exception, Justice Stratas said:

20 The first recognized exception is the background information exception. Sometimes on judicial review parties will file an affidavit that contains summaries and background aimed at assisting the reviewing court in understanding the record before it. For example, where there is a large record consisting of many thousands of documents, it is permissible for a party to file an affidavit identifying, summarizing and highlighting, without argumentation, the documents that are key to the reviewing court's understanding of the record.

21 In [*Delios v Canada (Attorney General)*, 2015 FCA 117], above, I put it this way (at paragraph 45):

The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy -- that is the role of the memorandum of fact and law -- it is admissible as an exception to the general rule.

22 But "[c]are must be taken to ensure that the affidavit does not go further and provide [fresh] evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": [*Association of Universities and Colleges of Canada v Access Copyright*, 2012 FCA 22] at paragraph 20; *Delios*, above at paragraph 46.

23 The background information exception exists because it is entirely consistent with the rationale behind the general rule and administrative law values more generally. The background information exception respects the differing roles of the administrative decision-maker and the reviewing court, the roles of merits-decider and reviewer, respectively, and in so doing respects the separation of powers. The background information placed in the affidavit is not new information going to the merits. Rather, it is just a summary of the evidence relevant to the merits that was before the merits-decider, the administrative decision-maker. In no way is the reviewing court encouraged to invade the administrative decision-maker's role as

merits-decider, a role given to it by Parliament. Further, the background information exception assists this Court's task of reviewing the administrative decision (i.e., this Court's task of applying rule of law standards) by identifying, summarizing and highlighting the evidence most relevant to that task.

[41] As to the exception for evidence going to the lack of evidence for the decision-maker's findings, Stratas J.A. said:

24 The second recognized exception is really just a particular species of the first. Sometimes a party will file an affidavit disclosing the complete absence of evidence on a certain subject-matter. In other words, the affidavit tells the reviewing court not what is in the record--which is the first exception--but rather what cannot be found in the record: see *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.) and *Access Copyright*, above at paragraph 20. This can be useful where the party alleges that an administrative decision is unreasonable because it rests upon a key finding of fact unsupported by any evidence at all. This too is entirely consistent with the rationale behind the general rule and administrative law values more generally, for the reasons discussed in the preceding paragraph.

[42] Finally, Stratas J.A. said, the third exception “concerns evidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud that could not have been placed before the administrative decision-maker and that does not interfere with the role of the administrative decision-maker as merits-decider” (para 25). He concluded:

28 The list of exceptions is not closed. In some cases, reviewing courts have received affidavit evidence that facilitates their reviewing task and does not invade the administrative decision-maker's role as fact-finder and merits-decider: *Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at paragraph 24. For example, in one case the applicant wished to submit that the administrative decision-maker's decision was unreasonable because it wrongly construed certain submissions made by counsel as admissions. But counsel's submissions to the administrative decision-maker were not in the record filed with reviewing court. The reviewing court admitted evidence of counsel's submissions so that it could assess whether the decision was unreasonable: *Ontario Shores Centre for Mental Health v. O.P.S.E.U.*, 2011 ONSC 358. In another case, a reviewing court admitted a partial transcript of proceedings before an administrative decision-maker. The transcript was prepared by one of the parties, not by the administrative decision-maker. In the circumstances, the reviewing court was satisfied that the partial transcript was reliable, did not work unfairness or prejudice, and was necessary to allow it to review the administrative decision: *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353, 336 D.L.R. (4th) 577.

[43] The applicant says the entire Adams affidavit is necessary due to the brevity of the majority's reasons and the lack of express references to evidence in making findings of fact. This is not a reason to supplement the record, though it may go to an argument that the reasons are insufficient. Likewise, the majority's use of "several" rather than "two" in referring to the number of witnesses is over-reach, even if the majority's language was less than ideal. I will, however, consider the admissibility of part or all of the affidavit in reference to the specific issues raised by the applicant.

***Findings of fact made in the absence of evidence***

[44] At paragraph 19 of the decision, the majority determined that the respondents "lack(ed) an effective voice within the larger unit" and that the current structure of the bargaining unit "is not reflected in all other Centres for Education within the province". The applicant says the Board made these two findings of fact in the absence of evidence, in that it is "difficult to understand how the majority...came to these findings" (Applicant's brief at para. 57).

[45] In relation to the first finding of fact, that the respondents "lack(ed) an effective voice within the larger unit", the applicant says the following:

58. There was no evidence to support, or certainly no evidence capable of supporting, the first underlined finding. The evidence of NSUPE witness William Alguire, president of NSUPE Local 2, was that the trades and maintenance employees had an outsized role in the local. Despite being only about 40 of an approximately 590-member unit (about 7%), trades and maintenances employees, at the relevant times, made up 50% or more of the local's executive and bargaining teams and were regular and active attendees at local meetings. Moreover, no evidence was adduced that trades and maintenances employees faced any impediment to pursuing grievances. This evidence or, in the latter case the lack of evidence, does not appear in the Decision or the Record and will not be before the Court without paras. 11 and 15 of the Adams Affidavit.

[As appears in original.]

[46] Paragraphs 11 and 15 of the Adams affidavit are quoted in full at paras. 13-14 above.

[47] In relation to the second finding of fact, that the current structure of the bargaining unit "is not reflected in all other Centres for Education within the province", the applicant says the Board ignored the two facts agreed on by the parties at the hearing, as described in para. 7 of the Adams affidavit:

59. The second highlighted finding of fact is particularly troubling. The majority finds as a fact that the structure of the existing bargaining unit is not reflected in the other regional centres for education in Nova Scotia. It does not refer to any evidence whatsoever on which this finding has been made. It does not explain how it came to this finding. This is especially problematic, HRCE submits, as this finding is directly contrary to two stipulated agreed facts before the Board. As set out at paragraph 7 of the Adams Affidavit, HRCE called no evidence at the hearing on the basis that two facts were agreed before the Board. These agreed facts were stated to the Board panel by counsel for HRCE, Ian Pickard. The agreed facts, as set out in the Adams Affidavit, were that that in all other regional centres for education the custodial and maintenance employees occupied the same bargaining unit and that six of eight centres have four bargaining units while two have two units. There was no evidence to support the Board’s finding; the evidence was that there was uniformity across the bargaining unit structures of the regional centres for education. HRCE submits that paragraph 7 (and the narrative to establish this paragraph) of the Adams Affidavit is necessary to this judicial review in order to reveal this issue on review. This is also an issue of procedural fairness – the Board has contradicted agreed facts without explanation and HRCE relied on these agreed facts in deciding not to call evidence.

[As appears in original.]

[48] The applicant argues that this situation fits within the *Keeprite* exception for affidavit evidence to establish an absence of evidence for a material finding.

[49] With respect to the finding that the respondents “lack(ed) an effective voice within the larger unit”, this appears to be less a complaint about “no evidence” than about the majority’s interpretation of the evidence before it. While the majority’s weighing of the evidence may be unsatisfactory, that is a different question. It remains open to the applicant to argue that the lack of explanation for the finding goes to the insufficiency of the reasons.

[50] As to the finding that the structure of the bargaining unit “is not reflected in all other Centres for Education” in the province, the applicant’s claim is that there were agreed facts that the majority ignored, and that there was no evidence that could support the finding. I am satisfied that this could fall within the “no evidence” exception. This would justify admitting para 7 of the Adams affidavit.

### ***Findings of fact regarding mobility***

[51] The applicant says the Adams affidavit is necessary because the majority’s finding that “(t)here is virtually no mobility between the groups”, was factually unsupported by the evidence called at the hearing:

60. The Board’s findings of fact continue in paragraph 20:

[20] The majority notes that there are no discernable benefits to the trades and maintenance employees being in the larger unit. There is virtually no mobility between the groups. They have very different hours of work, and places of work (in the sense that custodial employees are assigned to one school, while the trades and maintenance employees serve all of the schools as required.)

61. HRCE submits, with reference to para. 14(e) of the Adams Affidavit, that this finding does not accurately reflect the evidence before the Board. The evidence of Mr. Alguire was that there was some, albeit rare, mobility, and he gave specific examples. The account of Mr. Alguire’s evidence at para. 11. is all of a background nature – indeed there was no controversy over this evidence at the hearing and Ms. Adams presents it neutrally and without spin in her affidavit. Nothing contained in paragraph 11 (nor indeed the affidavit) is new evidence, nor is it argument or opinion.

[Emphasis added]

[52] Paragraph 11 of the Adams affidavit has already been quoted. Para. 14 states that there was “no evidence presented at the hearing from Mr. Alguire, Mr. Peskett or by affidavit of any strike or extension of bargaining related to the maintenance employees, except for the 2001 strike as testified to by Mr. Alguire.”

[53] The applicant says the majority’s finding that there was “virtually no mobility” must be corrected on judicial review by admission of Ms Adams’s evidence that Mr Alguire testified that there was “some, albeit rare, mobility.” In my view this is simply arguing for the applicant’s preferred interpretation of the evidence, not pointing to an “absence” of evidence.

***There were not two incidents of extension of bargaining***

[54] The majority stated that “evidence was presented at the hearing by the Union, that was not contradicted by the Employer, to the effect that on two occasions, bargaining was extended as a result of issues that related only to the maintenance employees. In one case, it resulted in a 3-week strike of all members of the bargaining unit” (para. 25). The applicant says there was no evidence of a second occasion of extension of bargaining:

29. ...[P]aragraph 25 refers to evidence not actually before the Board. As in the Adams Affidavit at paragraph 14, there was only evidence of *one* extension of bargaining before the Board, not two, and the description of the evidence in the

paragraph does not accurately reflect the evidence of the witness who testified to the strike.

...

63. There was no evidence before the Board of a second occasion of an extension of bargaining, as set out in the Adams Affidavit at para. 14. The only evidence of an extension of bargaining related to a 2001 strike. The Board's finding of fact with respect to the strike also does not accurately reflect the evidence before it. It was not the case that there was a three-week strike specific to the maintenance employees – but, rather, as Mr. Alguire testified, a strike was extended for three weeks in relation to specific demands made for the maintenance employees. This evidence is recounted in the Adams Affidavit at para. 11(d).

[55] Paragraph 14 of the Adams affidavit states:

14. There was no evidence presented at the hearing from Mr. Alguire, Mr. Peskett or by affidavit of any strike or extension of bargaining related to the maintenance employees, except for the 2001 strike as testified to by Mr. Alguire.

[56] The union says there was evidence during the testimony of Mr. Alguire which supports the Board's findings. However, there is no motion before the court to introduce evidence to that effect.

[57] With respect to the finding that there were two occasions of extended bargaining, I think the "no evidence" exception would apply to the extent of admitting evidence that there was no evidence of a second occasion. I do not think it would extend to admitting the evidence (referenced at para 63 of the applicant's brief) that the board misinterpreted the evidence more broadly. This would justify admitting para 14 of the Adams affidavit.

***The Board did not follow a binding precedent***

[58] The applicant says the Adams affidavit is necessary because the majority did not follow a binding precedent. HRCE says the present matter is largely analogous to the facts in *Dalhousie*:

65. Finally, the account provided by the Adams Affidavit is also necessary to ground 1. (g) v. As set out above, the *Dalhousie* decision was binding Board precedent. The facts of that case were directly analogous to the present proceeding. The majority of the Board, in para. 23., "arguably distinguishes" *Dalhousie* from the present matter on the basis that the present proceeding is supposedly a "friendly

‘divorce’”. There is no reference to any particular evidence to support this, nor is there any further analysis on distinguishing *Dalhousie* from the present matter. What the Adams Affidavit reveals, HRCE submits, is that the present matter was largely analogous to the facts in *Dalhousie*. Without the Adams Affidavit, this ground may not be meaningfully reviewed given the dearth of summary of the evidence in the reasons

[As appears in original.]

[59] *Keeprite* did not create an exception to allow a litigant to introduce supplementary affidavit evidence on the ground that a decision should have followed an allegedly binding or persuasive precedent. Although the exceptions identified in *Keeprite* can be expanded, this is not an appropriate reason to do so.

### ***The Board’s treatment of the evidence was insufficient***

[60] The applicant says that the Adams affidavit is necessary to show that the Board’s treatment of the evidence generally was insufficient:

64. Additionally, the Adams Affidavit provides a necessary account of the evidence at the hearing to meaningfully review, in light of the evidence actually before it, whether the reasons of the Board are sufficient. The insufficiency of the Board’s reasons is ground for review 1. (j). While HRCE also says the Board’s analysis, statement and application of the relevant legal test, and treatment of precedent in its reasons are all insufficient, so too is its treatment of the evidence.

[61] While many of the grounds of appeal relate to alleged insufficient reasons, “Ground (j)” explicitly claims insufficient reasons on the part of the Board. I agree that the accepted grounds to allow supplementary affidavit evidence can be expanded, but simply claiming insufficient reasons, or insufficient treatment of the evidence, is not enough. This is far too broad a category to found an exception. An allegation of insufficient reasons should not lead to the automatic admissibility of supplementary affidavit evidence. Nothing prevents the applicant from making an insufficient reasons argument in the traditional fashion.

### **Conclusion**

[62] Paragraphs 7 and 14 of the Adams affidavit are admissible in relation to the specific issues I have identified in this decision. Otherwise, the affidavit is not admissible.

[63] If the respondent wishes to introduce its own affidavit, it will have to make the appropriate motion.

Arnold, J.