NOVA SCOTIA COURT OF APPEAL

Citation: *Paladin Security Group Limited v. Canadian Union of Public Employees, Local 5479,* 2023 NSCA 86

Date: 20231213
Docket: CA 521779
Registry: Halifax

Between:

Paladin Security Group Limited

Appellant

v.

Canadian Union of Public Employees, Local 5479 and
Nova Scotia Labour Board

Respondents

Judge:	The Honourable Justice Joel Fichaud
Appeal Heard:	November 30, 2023, in Halifax, Nova Scotia
Subject:	Judicial review of Decision of the Labour Board – *Trade Union Act*, RSNS 1989, c. 475, ss. 25, 55-58.

Summary: Paladin Security Group Limited provides security services to the Nova Scotia Health Authority. Local 5479 of the Canadian Union of Public Employees applied to the Nova Scotia Labour Board for certification for Paladin's employees. The Board held a vote of employees in the unit.

During the representation campaign, Local 5479 had distributed to the employees a pamphlet saying Local 5479 would "work hard to make workers employees of the Health Authority". Paladin filed a Complaint with the Labour Board that this message was a coercive "unfair practice" contrary to s. 58(1) of the *Trade Union Act*. The Complaint asked the Board to dismiss the application for certification. Paladin's written submission also requested the Board to dismiss the

application for certification under s. 25(10) of the *Act* because the vote did not represent the employees' "true wishes".
The Board held that, according to the wording of the *Trade Union Act*, the Board had no authority to treat an infringement of s. 58(1) as an unfair practice. The Board also found the Union's conduct did not satisfy the requirements of s. 25(10). The Board dismissed Paladin's Complaint respecting s. 58(1) and rejected Paladin's request under s. 25(10).
Paladin applied to the Supreme Court of Nova Scotia for judicial review. The Court dismissed the application.
Paladin appealed to the Court of Appeal.

Issues: Was the Labour Board's Decision respecting either s. 58(1) or s. 25(10) of the *Trade Union Act* unreasonable?

Result: The Court of Appeal dismissed the grounds respecting s. 58(1) but allowed the appeal in part respecting s. 25(10).
Respecting s. 58(1), the Board's reasons and ruling were internally consistent, followed a rational chain of analysis sourced in the *Trade Union Act* and satisfied the reasonableness standard of review.
Respecting s. 25(10), the Court of Appeal expressed no view whether or not the outcome of the Board's Decision was unreasonable. However, the Board's Decision failed to explain its reasoning path in a manner that satisfied the reasonableness standard. The Court remitted the issue of s. 25(10) to the Board with a direction that the Board issue supplementary reasons to explain its ruling.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 20 pages.

NOVA SCOTIA COURT OF APPEAL

Citation: *Paladin Security Group Limited v. Canadian Union of Public Employees, Local 5479*, 2023 NSCA 86

Date: 20231213
Docket: CA 521779
Registry: Halifax

Between:

Paladin Security Group Limited

Appellant

v.

Canadian Union of Public Employees, Local 5479 and
Nova Scotia Labour Board

Respondents

Judges: Wood C.J.N.S., Fichaud and Van den Eynden, JJ.A.

Appeal Heard: November 30, 2023, in Halifax, Nova Scotia

Held: Appeal allowed in part without costs per reasons for judgment of Fichaud J.A., Wood C.J.N.S. and Van den Eynden J.A. concurring

Counsel: Nancy F. Barteaux, K.C. and Michael Conway for the Appellant
Michael Bourgeois for the Respondent Canadian Union of Public Employees, Local 5479
The Respondent Nova Scotia Labour Board not appearing

Reasons for judgment:

[1] Paladin Security Group Ltd. provides security services to the Nova Scotia Health Authority. Local 5479 of the Canadian Union of Public Employees applied to the Labour Board for certification for a unit of Paladin's employees. The Board held the vote and sealed the ballots. During the representation campaign, Local 5479 had distributed a pamphlet that said Local 5479 would "work hard to make workers employees of the Health Authority". Paladin filed a Complaint with the Labour Board that this message was a coercive unfair practice, contrary to s. 58(1) of the *Trade Union Act*. The Complaint asked the Board to dismiss the application for certification.

[2] Citing the Board's precedents on the issue, the Labour Board held that, given the wording of the *Trade Union Act*, the Board cannot treat an alleged infringement of s. 58(1) as an unfair practice. In the Board's view, in the context of a representation vote, the pertinent provision is s. 25(10) of the *Act*. Section 25(10) says the Board may dismiss the application for certification when a contravention of the *Act* resulted in the representation vote not reflecting the "true wishes of the employees". The Board's Decision found "the conduct of the Union in this situation does not satisfy the requirements of s. 25(10)" and dismissed Paladin's Complaint.

[3] Paladin applied for judicial review. The judge of the Supreme Court of Nova Scotia dismissed Paladin's application.

[4] Paladin appealed to the Court of Appeal. The first issue is whether the Labour Board unreasonably interpreted the Board's authority to apply s. 58(1). The second is whether the Board's reasons intelligibly explained its ruling under s. 25(10). For both issues, the standard of review is reasonableness.

Background

[5] Paladin Security Group Ltd. provides contract security services to the Nova Scotia Health Authority. On July 21, 2021, Local 5479 of the Canadian Union of Public Employees applied for certification for Paladin's employees who perform these services anywhere in the Province. Local 5479 filed the application with the Nova Scotia Labour Board further to the *Trade Union Act*, RSNS 1989, c. 475. Between July 24 and 28, 2021, the Board held a vote of employees in the proposed

unit. The vote was sealed and, at the date of the Board's Decision under review, not counted.

[6] On July 30, 2021, Paladin filed a "Complaint of Unfair Practice Before the Labour Board". The Complaint alleged Local 5479 had infringed s. 58(1) of the *Trade Union Act*. Section 58(1) prohibits anyone from using "intimidation or coercion to compel a person to become or refrain from becoming a member of a trade union or employer's organization". The Complaint did not allege an infringement of any other provision in the *Act*.

[7] The coercion or intimidation alleged by Paladin was that Local 5479 had distributed to Paladin's employees a pamphlet saying the Union would "work hard to make workers employees of the Health Authority". Paladin's Complaint said, if Local 5479 was certified, Local 5479 "would bargain with Paladin and not the Nova Scotia Health Authority" and "there is no mechanism by which [Local 5479] could cause these workers to become employees of the Nova Scotia Health Authority". The Complaint claimed the pamphlet was "false and misleading" and "contrary to Section 58(1)". As a remedy, the complaint sought "dismissal of [Local 5479]'s application for certification".

[8] I will set out the relevant provisions of the *Trade Union Act*.

[9] The *Act*'s scheme for processing complaints of unfair practices is:

- Sections 53 through 58 appear in the Part of the *Act* titled "Unfair Practices".
- The *Act* lists prohibited unfair practices of an employer in s. 53 and a union in ss. 54 and 54A. Sections 54 and 54A do not include the proscription stated in s. 58.
- Section 55(1) says:

> **55** **(1)** Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has failed to comply with Section 53 or 54 or subsection (3) of Section 54A.

- Section 56 says "upon receipt of a complaint made under Section 55", the Board is to resolve or rule upon that complaint.

- Section 57 says "[w]here, under section 56, the Board determines that a party to a complaint has failed to comply with Section 53 or 54", the Board may issue a remedy.
- In short, sections 55 through 57 process complaints of unfair practices under ss. 53, 54 and 54A, but do not mention infringements of s. 58.
- Section 58 says:

> **Intimidation respecting union membership**
> **58** **(1)** No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union or an employers' organization.
>
> **(2)** Nothing in this Act shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats or undue influence.

[10] Section 25 is in the Part of the *Trade Union Act* titled "Acquisition of Bargaining Rights – Certification". Section 25(10) provides that, in the context of a certification application, the Board may consider an infringement of the *Act*'s provisions, including s. 58(1), and dismiss an application for certification if, in the Board's opinion, the vote does not reflect "the true wishes of the employees in the unit". Section 25(11) states the same condition for membership information that impairs employees' "true wishes".

> **Certification of bargaining agent**
>
> …
>
> **25** **(10)** Where, in the opinion of the Board, the applicant trade union or a representative of the trade union has contravened this Act or regulations made pursuant to this Act in so significant a way that the representation vote does not reflect the true wishes of the employees in the unit determined to be appropriate for collective bargaining, the Board may, in its discretion, dismiss the application.
>
> **(11)** Where, in the opinion of the Board, the applicant trade union or a representative of the trade union has contravened this Act or regulations made pursuant to this Act so that the membership information filed with the application does not represent the true wishes of the employees in the unit determined to be appropriate for collective bargaining, the Board may, in its discretion, dismiss the application.

[11] The Part of the *Trade Union Act* titled "Enforcement and Penalties" includes the following sanctions for contravention of the *Act*:

> **Order when Act contravened**
>
> **78** Notwithstanding any other provision of this Act, where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act, it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing, may include, notwithstanding the provisions of any collective agreement, any one or more of
>
> (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
>
> (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or omission complained of; …
>
> **Offence and penalty for contravention of Act**
>
> **82** Every person, trade union or employers' organization who does anything prohibited by this Act or who refuses or neglects to do anything required by this Act to be done by him is guilty of an offence and, except where some other penalty is by this Act provided for the act, refusal or neglect, is liable on summary conviction
>
> (a) if an individual, to a fine not exceeding one thousand dollars; or
>
> (b) if a corporation, trade union or employers' organization, to a fine not exceeding ten thousand dollars.

[12] To resume the chronology, by a letter dated August 3, 2021, Local 5479 responded to the Complaint. Local 5479 said the pamphlet was "entirely true" and:

> The Employer is wrong when it claims there is "no mechanism". Of course there is a mechanism – an entirely lawful mechanism – albeit not at the bargaining table with Paladin. Most certainly the Union can promise to fight for this – as CUPE and many of its locals typically do when it comes to services that should (in its view) be public – not private – services. A plethora of information about CUPE's commitment to fight for public services can be seen at www.cupe.ca/privatization.
>
> …

> … The Union never said, let alone promised, that certification would result in these workers becoming NSHA employees. The Union said it would fight for these workers, which it certainly will, and is entirely entitled to do.
>
> … The Union says that no violation occurred. …

[13] Paladin's reply of August 9, 2021 said the pamphlet "had a coercive effect on voters" and "[t]he only logical conclusion is that such a statement was made to sway employees to vote in favour of certification and clearly amounts to an unfair labour practice".

[14] On August 30, 2021, the Board held a case management conference. The Board's letter of September 1, 2021 to counsel confirmed that, at the conference, Paladin's counsel requested "the unfair practice complaint (LB-1953) [be] dealt with and heard separately from the certification matter". Under Paladin's requested approach, the Board would consider the unfair practice Complaint independently of the certification issues prescribed by s. 25, such as whether the vote represented the employees' "true wishes" under s. 25(10).

[15] Further to Paladin's request, the Board scheduled October 1, 2021 to hear Paladin's unfair practice Complaint.

[16] Paladin's pre-hearing brief of September 21, 2021, paras. 37 and 44 and 48 reiterated its position that the distribution of the pamphlet was "coercive" and "is an unfair labour practice".

[17] The Union's pre-hearing brief of September 24, 2021 included:

> 15. The Union made no inaccurate, false or untrue representations. The Hand-Out truthfully referred to CUPE's goal to bring contracted jobs back under government employ.
>
> …
>
> 17. … Historically, CUPE pursues deprivatization through political means – public campaigns and advocating to municipal and provincial governments to negotiate to bring jobs under direct public control. CUPE and its locals have had successes pursuing deprivatization through political means. If certified, the Union will negotiate in good faith with Paladin to achieve a collective agreement but it will also advocate in the public, to Nova Scotia Health, and to government for the Health Authority to hire its own security guards, the Union's members.
>
> ` …

> 20. The second reason the Hand-Out cannot be said to be untruthful is that it plainly does not guarantee any specific outcome, except the Union would purse [*sic*] an agenda and part of the agenda would be deprivatization. The language provides that the Union will "fight hard to become regular employees of the Health Authority".
>
> …
>
> 37. The representation that is the subject of the Complaint does not approach "intimidation or coercion". The representation – the Union will "fight hard to become regular employees of the Health Authority" – is in no way threatening, pressuring, or unduly compelling. It is an accurate representation of the Union's goals and aspirations. It did not undermine the efficacy of the representation vote. Rather, it was additional information for Paladin employees to consider when making their choice how to vote….

[18] On October 1, 2021, the Labour Board's three-member panel, chaired by the Board's Vice Chair Susan Ashley, heard Paladin's unfair practice complaint. The hearing included testimony. There is no transcript. The Board's practice is not to transcribe a hearing unless one of the parties requests it and pays for the transcription. Neither in the Board's later Decision nor anywhere else in the record is there a summary of what was said on October 1, 2021.

[19] On November 1, 2021, the Board wrote to the parties, stating:

> … the Board has identified concerns about its ability to consider a complaint filed solely through Section 58(1) of the Trade Union Act (for further information, please see Nova Scotia Government Employees Union v. Sheraton Nova Scotia, 1998 CanLlI 28797 (NS LRB), https://canlii.ca/t/j6b5r and International Union of Operating Engineers, Local 721B v. National Gypsum (Canada) Limited, 2018 NSLB 50 (CanLlI), https://canlii.ca/t/hrjvk).

[20] These Decisions of the former Labour Relations Board in *Sheraton* (Darby - Chair) and the current Labour Board in *National Gypsum* (Hollett - Chair) had held that an alleged infringement of s. 58 does not engage the Board's process for hearing unfair practice complaints or its remedial powers under ss. 55-57. The Board's letter of November 1, 2021 proposed a case management conference with counsel on November 3, 2021 to discuss the matter.

[21] The Board's Chair and counsel convened on November 3, 2021. There is no transcript. On November 4, 2021, the Board's Senior Labour Board Officer sent counsel a letter that summarized the discussion. The letter included:

> Thank you for participating in the Case Management Conference (CMC) held on Wednesday November 3, 2021 at 1:30 p.m., before Vice-Chair Susan Ashley, with respect to the above noted matter. This letter serves as a summary of what was discussed and agreed to during the CMC.
>
> …
>
> Vice-Chair Ashley noted that **with the consent of the parties, one option would be to** have the LB-1953 matter withdrawn by way of a letter decision, and **have** the evidence and arguments led by the parties in **that matter considered** by the same panel as if the matter were raised in the certification application (LB-1940) by Paladin **as a request for the application to be dismissed pursuant to ss. 25(10)** because of the breach of s. 58(1). This option could avoid the same case being led twice and potential jurisdictional issues. **Ms. Barteaux** [counsel for Paladin] **noted that her client was not interested in this path and sought for the parties to be able to make submissions as to the jurisdictional issues raised by ss. 58(1).** Vice-Chair Ashley sought Mr. Edwards' [counsel for Local 5479] views. Mr. Edwards advised that his client would also seek the ability to make submissions as to the jurisdictional issue, and did not want the hearing dates for the certification application (LB-1940) to be delayed.
>
> [bolding added]

[22] The parties then filed submissions to address what the Board's letter termed the "jurisdictional issue".

[23] Local 5479's letter of November 12, 2021 submitted that, according to *Sheraton* and *National Gypsum*, a violation of s. 58(1) neither authorizes a complaint of unfair practice under s. 55 nor permits a remedy under s. 57.

[24] Paladin's letter of November 12, 2021 submitted *Sheraton* and *National Gypsum* were "wrongly decided", the Board could determine that Local 5479 committed an "unfair practice" and, as a remedy, the Board should dismiss the application for certification.

[25] However, Paladin's submission went beyond the jurisdictional issue. Paladin also submitted that the breach of s. 58 meant the representation vote did not reflect the employees' true wishes and the Board should exercise its discretion under s. 25(10) to dismiss Local 5479's application for certification. Paladin made its merits submission under s. 25(10), despite that Paladin had not pleaded it and despite having informed the Board on November 3, 2021 that Paladin "was not interested in this path".

[26] On March 18, 2022, the Board issued its Decision and Order (2022 NSLB 17).

[27] The Board's Decision dismissed Paladin's application. As for s. 58(1), the Board adopted the reasoning of the former Labour Relations Board in *Sheraton* that an application under s. 55 is available only for an unfair practice itemized by ss. 53, 54 and 54A, but not for an alleged infringement of s. 58. The Board concluded:

> [36] We do not agree that the Board's jurisprudence on Section 58 is wrongly decided. On the contrary, in our view, that jurisprudence is well-developed and makes good sense.

[28] The Board also rejected Paladin's submission that Local 5479's application for certification should be dismissed under s. 25(10). The Decision said:

> [38] The Board has the discretion under section 25(10) to dismiss a certification application where a union has contravened the *Act* "in so significant a way that the representation vote does not reflect the true wishes in the bargaining unit". We find, on the basis of the jurisprudence and the information before us, that the conduct of the Union in this situation does not satisfy the requirements of section 25(10). We decline the Employer's invitation to dismiss the certification application.

[29] On April 26, 2022, Paladin filed a Notice of Application for Judicial Review in the Supreme Court of Nova Scotia. Paladin asked that the Board's Decision of March 18, 2022 be overturned.

[30] On January 10, 2023, Justice Jamie Campbell heard the application. Paladin submitted that the Board's approach to s. 58 was unreasonable under *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 and the Board's ruling under s. 25(10) denied procedural fairness by providing insufficient reasons.

[31] Justice Campbell issued a Decision on February 10, 2023 (2023 NSSC 48), dismissing Paladin's application for judicial review.

[32] Justice Campbell held the Board's ruling on s. 58 followed a line of earlier Board jurisprudence. He noted:

> [37] The Board decided to follow its own jurisprudence. The issue then is whether it was unreasonable for the Board to do that. That would require a finding that the

> jurisprudence that the Board relied upon was in some way unreasonable, so that it was unreasonable to continue to apply it. The Board did not simply defer to its existing jurisprudence but went on to provide the reasons why the former Board took the position it did. To imply that a remedy can be granted for a breach of Section 58 would amount to legislating where the Legislature had decided not to legislate. …

The judge concluded (para. 39) the Board's reasons were "logically coherent and there is a chain of logical reasoning that contains no fundamental flaws".

[33] As for Paladin's submission under s. 25(10), Justice Campbell's Decision said:

> [59] The Board provided logical and intelligible reasons why the certification application should not be dismissed under section 25(10).

[34] On March 6, 2023, Paladin appealed to the Court of Appeal.

Issues

[35] Paladin's factum lists three issues. To quote:

> a) Did the JR Decision err in finding that it was reasonable for the Board Decision to hold that subsection 58(1) of the Trade Union Act is incapable of independent breach?
>
> b) Did the JR Decision err in finding that it was reasonable for the Board Decision to find it had no jurisdiction to grant a remedy in the event of a breach of subsection 58(1) of the Trade Union Act?
>
> c) Did the JR Decision err in finding that the Board Decision's reasons why the Certification Application could not be dismissed under subsection 25(10) were reasonable?

[36] I will discuss Paladin's (a) and (b) together as – "First Issue: Was the Board's ruling on s. 58(1) reasonable?", followed by – "Second Issue: Was the Board's ruling on s. 25(10) reasonable?"

Standard of Review

[37] On an appeal from a judicial review, the appellate court decides whether the reviewing court correctly identified and applied the standard of review. The appellate court must " 'step into the shoes' of the lower court" and the "appellate

court's focus is, in effect, on the administrative decision": *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, para. 46; *MERCK Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 247.

[38] The legislation does not prescribe a standard of review to the Labour Board, there is no statutory right of appeal from the Board's Decision and the *Trade Union Act* has a strong privative clause. The presumption of reasonableness, discussed in *Vavilov*, paras. 16-17, 23, 34-52, is not rebutted. Both parties accept, as did the reviewing judge, that reasonableness governs the issues on appeal.

The Reasonableness Standard

[39] In *Vavilov*, the majority's judgment set out the principles of reasonableness review. In *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, Justice Jamal for the majority reiterated *Vavilov*'s ruling. I will summarize the principles from *Vavilov* and *Mason*.

[40] Reasonableness is a "reasons first" approach. The reviewing court "must begin its inquiry into the reasonableness of the decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion". "Reasons first" means the reviewing court does not start with its view, *i.e.* it does not fashion its "own yardstick … to measure what the administrator did", and then proceed with "disguised correctness review". (*Vavilov*, paras. 83-84. *Mason*, paras. 8, 58, 60 and 62-63).

[41] Both the administrative decision's outcome and its reasoning matter. The outcome must be justifiable and, where reasons for the decision were required, the outcome must be "justified" by the reasons. The reviewing court "must consider only whether the decision made by the administrative decision maker – including both the rationale for the decision and the outcome to which it led – was reasonable". (*Vavilov*, paras 86-87. *Mason*, paras. 58-59)

[42] Reasonableness is "a single standard that accounts for context". Reviewing courts are to analyze the administrative decisions "in light of the history and context of the proceedings in which they were rendered". The history and context may show that, after examination, an apparent shortcoming is not a failure of justification. History and context include the evidence, submissions, record, the policies and guidelines that informed the decision-maker's work and past decisions. Context also includes the administrative regime, the decision maker's

institutional expertise, the degree of flexibility assigned to the decision maker by the governing statute and the extent to which the statute expects the decision maker to apply the purpose and policy underlying the legislation. (*Vavilov*, paras. 88-94, 97, 110; *Mason*, para. 61, 67, 70. See, for instance, *Labourers' International Union, Local 615 v. Grafton Developments Inc.*, 2023 NSCA 25, paras. 104-108, for how these factors affect the Nova Scotia Labour Board.)

[43] The "hallmarks of reasonableness" are "justification, transparency and intelligibility". Consequently, a decision will be unreasonable where "the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point". (*Vavilov*, paras. 99 and 103; *Mason*, para. 60)

[44] More specifically, the reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that 'there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived' [citation omitted]". A question-begging gap on a critical point may impair intelligibility. Mere repetition of the statutory language, followed by a peremptory conclusion "will rarely assist a reviewing court" and is "no substitute for statements of fact, analysis, inference and judgment". (*Vavilov*, para. 102; *Mason*, para. 65)

[45] A "minor misstep" or a "merely superficial or peripheral" shortcoming will not suffice to overturn an administrative decision. Rather, the flaw must be "sufficiently central or significant to render the decision unreasonable". To determine whether there is a sufficiently central or significant flaw, the reviewing court asks whether the administrative decision "is based on an internally coherent and rational chain of analysis and … is justified in relation to the facts and law that constrain the decision maker". If yes, "[t]he reasonableness standard requires that a reviewing court defer to such a decision". If no, the decision "fails to provide a transparent and intelligible justification for the result" and is unreasonable. (*Vavilov*, para. 84-85, 99, 100-107; *Mason*, paras. 8, 59, 64).

[46] *Vavilov*, paras. 105-135, and *Mason*, paras. 65-76 elaborated on the factors that "constrain the decision maker", under this test, and their utility in a particular case: the governing statutory scheme, other statutory or common law, principles of statutory interpretation, evidence before the decision maker, submissions of the parties, past practices and decisions, and the impact of the decision on the affected

individuals. The factors are "not a checklist" and will vary in application and significance from case to case (*Vavilov*, para. 106; *Mason*, para. 66).

[47] As to the remedy, when the administrative decision has "a fundamental gap or an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision". The reviewing court may not "disregard the flawed basis for a decision and substitute its own justification for the outcome". (*Vavilov*, para. 96). Rather, the court should remit the matter to the decision maker. However, where "the interplay of text, context and purpose leaves room for a single reasonable interpretation … it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker", and the reviewing court may end the matter (*Vavilov*, para. 124 and to the same effect para. 142; *Mason*, paras. 71, 120-22).

[48] This "robust" standard of reasonableness is meant to "strengthen a culture of justification in administrative decision-making" (*Vavilov*, para. 12; *Mason*, para. 63).

First Issue: Was the Board's Ruling on s. 58(1) Reasonable?

[49] The Board's Decision reasoned as follows:

- The Board, para. 3, said Paladin had filed a complaint that alleged a breach of s. 58 and did not cite any other provision of the *Trade Union Act*.
- The Board, para. 5, noted that, after the hearing, the Board had raised the issue whether the Board could hear this complaint as an unfair practice under s. 55, given the Board's earlier ruling under *Sheraton*. In *Sheraton*, the former Labour Relations Board (Darby - chair) had held that an alleged infringement of s. 58 is not subject to the Board's unfair practice process under s. 55.
- The Board, paras. 6-9, quoted the pertinent provisions of the *Trade Union Act*.
- The Board summarized the submissions of Local 5479 (paras. 10-16) and Paladin (paras. 17-22), and their rebuttals (paras. 23-29), including:

  - Local 5479 submitted that, under the plain wording of the statute, an alleged breach of s. 58(1) may not be litigated by an unfair practice complaint under s. 55 because "[t]he section 55 complaint

procedure is reserved for the alleged violation of section 53, 54 (and s. 54A(3))". Local 5479 cited *Sheraton*, *National Gypsum* and *United Rubber v. Michelin Tires (*Canada*) Ltd.* 1979 CanLll 3311 (NSLRB – Christie-Chair) and *Amalgamated Transit Union Local 508 v. Zinck Bus Company Ltd.*, 1994 CanLll 17662 (NSLRB – Darby-Chair). Local 5479 noted s. 58(1) may be enforced by the *Trade Union Act*'s general prosecution provision.

-Paladin reiterated the Board could hear its Complaint as an alleged unfair practice for which the remedy was dismissal of the application for certification. Paladin submitted *Sheraton* and *National Gypsum* were "wrongly decided".

- The Board, para. 30, said that precedent "has clearly articulated the purpose of Section 58, particularly in the context of the unfair practice provisions of the *Act*". The Board quoted the following passage from *Sheraton*:

> … It is NOT a violation of ANY provision of the act that triggers the right of "any person or organization" to seek redress, it is the violation ONLY of Section 53 or 54. This redress is begun by the filing of a "complaint" pursuant to s. 55(1) which alleges a violation NOT of the Act, generally, or of ANY provision, but ONLY of Sections 53 or 54. Moreover, the remedy section – Section 57 – is VERY specific in empowering the Board to provide remedies. FIRSTLY, the Board must hold a hearing pursuant to s. 56(1)(b). Then, it must find a party to the complaint has "failed to comply with Section 53 or 54". Only then, can it "require the party to comply with the appropriate section" – obviously referring, in our opinion, to Section 53 or 54 – or to make such other remedy(ies) available as are outlined in Section 57. It is to be noted that all of these remedies are explicitly tied in to particular provisions within Section 53 or 54 and NOT to any other section of the Act or of the regulations. …
>
> Clearly though, the Legislature could have incorporated in Section 54 provisions that would cover – as unfair practices – the conduct under Section 58(1) which is caught by Sections 53(1)(a) and 53(3)(e). It chose not to do so. …
>
> [capitalization by the Board in *Sheraton*]

- The Board, para. 32, noted that, in *National Gypsum*, the current Labour Board had followed the former Nova Scotia Labour Relations Board's ruling in *Sheraton*.

- The Board rejected Paladin's suggestion that *Sheraton* and *National Gypsum* were wrongly decided. The Board said:

> [35] The Employer has made a number of arguments to suggest that *Sheraton* (*supra*) and *National Gypsum* (*supra*) were wrongly decided. While the *Labour Board Act* [S.N.S. 2014, c. 37] made a number of changes to the Board's structure as well as powers over various Boards and Tribunals, it did not change the Board's ability to ignore or extend its statutory powers under the *Act*. …
>
> [36] We do not agree that the Board's jurisprudence on Section 58 is wrongly decided. On the contrary, in our view, that jurisprudence is well-developed and makes good sense. …

[50] Is the Board's Decision internally coherent, based on a rational chain of analysis and justified in relation to the facts and governing law?

[51] In *Vavilov*, para. 108, the majority said "the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision".

[52] Here, the governing statutory scheme is the *Trade Union Act*. The *Act* prescribes the Board's authority to entertain an unfair practice complaint in s. 55. Section 55 is expressly restricted to the unfair practices listed in ss. 53, 54 and 54A. The plain wording of section 55 does not encompass an application for an alleged infringement of s. 58(1). As the Board in *Sheraton* noted, that is due to the Legislature's choice. In our case, the Board said the reasoning from *Sheraton* "makes good sense".

[53] Paladin disagrees. It says *Sheraton* was "wrongly decided". Paladin's factum explains:

> 29. The Board Decision agrees with this principle that the legislature intended to include a provision in the Act that cannot be independently breached and in effect is of no practical force or effect.
>
> …
>
> 32. Paladin's position was, and remains, that the Board Decision is deficient. The Board's conclusion that subsection 58(1) of the Act cannot be breached is a misinterpretation of the Act.
>
> …

> 41. … A conclusion that subsection 58(1) of the Act cannot be independently breached is entirely unreasonable. …
>
> 46. … The conclusion that there are no actions which, on their own, could breach the subsection 58(1) prohibition is very clearly an unreasonable interpretation of the legislation. Yet, that was the conclusion reached in the Board Decision and then upheld as reasonable in the JR Decision. …

[54] Paladin's premise is that the Board ruled s. 58(1) "cannot be breached", meaning a breach of s. 58(1) has "no practical force or effect". It says such an outcome would be irrational, unjustified and unreasonable under *Vavilov*.

[55] I respectfully disagree with the premise. There are several avenues by which it may be determined that s. 58(1) has been breached, giving the provision its practical effect:

- Section 25(10) says where the Board is of the opinion that the union "has contravened this Act or regulations made pursuant to this Act in **so significant a way that the representation vote does not reflect the true wishes of the employees in the bargaining unit** determined to be appropriate for collective bargaining, the Board may, in its discretion, dismiss the application". [bolding added]
- Section 25(11) repeats this condition for faulty membership evidence. It says where the Board holds the opinion that a union has contravened the *Act* "so that the membership information filed with the application does not reflect the true wishes of the employees in the unit determined to be appropriate for collective bargaining, the Board may, in its discretion, dismiss the application".
- Section 78 says where the Board is satisfied someone, including a union, has contravened the *Trade Union Act*, the Board may order the offender to cease and rectify the contravention.
- Section 82 says a contravention of the *Trade Union Act* is punishable on summary conviction. Section 80 says no private prosecution may be instituted without the written consent of the Minister of Labour and Workforce Development.

[56] Paladin and Local 5479 were in the midst of a certification campaign. At the time of the Board's Decision, the representation vote had been taken and sealed. Consequently, s. 25(10) is the most apposite signal of the Legislature's intent

respecting the effect of this alleged breach of s. 58(1). That was the Board's reason, at the case management conference of November 1, 2021, for the Board's suggestion that Paladin re-characterize its application under s. 25(10).

[57] Under the *Trade Union Act*'s scheme, during the certification process the Board's primary responsibility is to ascertain the true wishes of the employees in the unit. Section 25(10)'s condition, bolded above, implements that statutory objective.

[58] Without that condition, the Board could *dismiss* the certification application despite the Board's view, in a particular case, that a vote *favouring* certification *did reflect* the true wishes of the employees in the unit. Such a counter-intuitive outcome would discourage access to free collective bargaining. "[T]he encouragement of free collective bargaining" is a statutory objective in the preamble to the *Trade Union Act*. The *Act* expects the Board to implement the statute's objectives. Hence, the condition in s. 25(10). That contextual factor bears on reasonableness.

[59] In the Board's view, expressed in *Sheraton* and adopted in our case, the Legislature chose not to enforce s. 58(1) as a *per se* unfair practice under s. 55. Rather, the Legislature opted to give s. 58(1) practical effect through other means. After a representation vote, an alleged infringement of s, 58(1) may result in the dismissal of the certification application only if the Board concludes the infringement was "so significant … that the representation vote does not reflect the true wishes of the employees in the bargaining unit". The Board's approach, as stated in *Sheraton* and adopted in this case, defers to the Legislature's policy choice.

[60] The Board's reasoning is internally consistent and follows a rational chain of analysis that is sourced in the *Trade Union Act*. Both the reasoning and outcome are justified in relation to the facts and the law that govern the issue.

[61] I agree with Justice Campbell's conclusion that the Board's Decision is reasonable in this respect and would dismiss the grounds of appeal related to s. 58(1).

Second Issue: Was the Board's Ruling on s. 25(10) Reasonable?

[62] The Board's entire reasons respecting s. 25(10) were:

> [38] The Board has the discretion under section 25(10) to dismiss a certification application where a union has contravened the *Act* "in so significant a way that the representation vote does not reflect the true wishes of the employees in the bargaining unit". We find, on the basis of the jurisprudence and information before us, that the conduct of the Union in this situation does not satisfy the requirements of s. 25(10). We decline the Employer's invitation to dismiss the certification application.

[63] Paladin says the Board did not explain itself, which offends both rules of procedural fairness and *Vavilov*'s requirement that the outcome be intelligible and justified by an internally coherent and rational chain of analysis.

[64] This Court's review is not confined to the Board's para. 38. The Decision is to be analyzed "in light of the history and context of the proceedings". The contextual factors include the submissions and record of proceedings.

[65] The submissions and record suggest three possible bases for the Board's dismissal of Paladin's submission under s. 25(10):

- **First:** Paladin's Complaint claimed Local 5479 committed an "unfair practice" and requested that the certification application be dismissed. Section 55 sets out the Board's authority to consider allegations of unfair practices. Section 55 does not apply to alleged infringements of s. 58(1). Paladin's Complaint did not cite s. 25(10). At the case management conference of November 3, 2021, the Board's chair pointed out this "jurisdictional" obstacle and suggested Paladin re-plead its complaint under s. 25(10). The Board's chair said this could be done "with the consent of the parties". Paladin's counsel replied that Paladin "was not interested in this path". As there was neither consent nor re-pleading, the Board would have no "jurisdiction", as the Board termed it, over Paladin's Complaint.

- **Second:** A condition of s. 25(10) is "[w]here, in the opinion of the Board, the applicant trade union or a representative of the trade union has contravened this Act". The initial submissions of counsel, filed before the case management conference of November 1, 2021, addressed whether or not the pamphlet was a "coercive" contravention of s. 58(1). The Board's para. 38 may mean the Board accepted Local 5479's submission that its conduct was not "coercion or intimidation" and did not contravene s. 58(1). Consequently, the condition of s. 25(10) – that "the trade union has contravened this Act" – would not be satisfied.

- **Third:** Section 25(10) says the Board may dismiss the application for certification if the contravention had the effect that "the representation vote does not reflect the true wishes of the employees in the bargaining unit". The Board's para. 38 may mean that, in the Board's view, the distribution of the pamphlet did not impair the "true wishes" of the employees in the unit.

[66] Which of these bases applies makes a difference. The first is procedural, meaning Paladin could raise s. 25(10) during the later certification hearing under s. 25. The second and third are substantive rulings on elements of s. 25(10) and would issue estop a renewed submission during the later certification hearing.

[67] At the hearing in this Court, counsel for both parties were asked which basis embodied the Board's reasoning under s. 25(10). Both replied they did not know.

[68] In the Supreme Court, Justice Campbell appeared to interpret the Board's Decision as adopting the first basis. The judge's Decision cited s. 25(10), then concluded:

> [52] The Board found that it did not have jurisdiction to make the kind of finding that Paladin argued. Paladin had based its case on Section 58(1) and assertion the Union had intimidated and coerced the employees. The Board held that it could not make a finding about a breach under Section 58(1). It could not find that the conduct of the Union satisfied the requirements of Section 25(10).
>
> …
>
> [56] … The Board concluded that it lacked jurisdiction to make a finding of a breach of Section 58(1). That was the basis of Paladin's complaint. Without the unfair practice there was then no conduct alleged on the part of the Union to satisfy the requirements of Section 25(10).

[69] With respect, I do not share the judge's interpretation of the Board's para. 38. The Board's para. 38 said "the *conduct of the Union* in this situation does not satisfy the requirements of s. 25(10)" [emphasis added]. Hence the Board's conclusion was based on its assessment of Local 5479's conduct. The first basis mentioned above, *i.e.* the "jurisdictional" obstacle, arose from *Paladin*'s pleading its Complaint as an "unfair practice" instead of under s. 25(10). Paladin's choice of pleading was not "conduct of the Union".

[70] In my view, the Board's para. 38 likely referred to the third basis. Immediately before its finding, the Board quoted from s. 25(10) the criterion that the Union must contravene the *Act* "in so significant a way that the representation

vote does not reflect the true wishes of the employees in the bargaining unit". The Board quoted these words for a reason. In my view, that was to highlight the basis for its finding in the next sentence.

[71] Whatever interpretation of the Board's para. 38 is correct, the Board's terse ruling has prompted puzzlement among the lawyers and reviewing judges as to the Board's reasoning path to its ruling under s. 25(10).

[72] The Board's reasons leave unanswered questions:

- On November 3, 2021, the Board's chair told the parties that, to avoid a "jurisdictional" obstacle, Paladin should re-plead under s. 25(10), which needed "the consent of the parties". Paladin declined to consent and did not re-plead. Nonetheless, it appears the Board ruled on the merits of the "true wishes" issue in s. 25(10). What happened to the "jurisdictional" obstacle? The Board does not explain.
- How did the Board conclude that the pamphlet did not impair the employees' "true wishes"? The Decision cites no evidence, identifies no inference, and recites no standard or process, if there is one, to measure "true wishes". There is no transcript and the Board's Decision omits even a summary of the evidence it heard on October 1, 2021. This Court does not know who testified or what was said. I am not saying the Board's conclusion on "true wishes" is unreasonable. But *Vavilov* and *Mason* make it clear that the decision maker's outcome and analysis must both be reasonable. The Board's Decision does not provide the reviewing court with the resources to assess its analysis.
- Apparently, the Board did not count the vote before its Decision. Should the Board count the vote before ruling whether the employees' "true wishes" were impaired? A landslide spread between the tallies of "yes" and "no" votes may prompt a different analysis than a narrow squeaker. After the hearing in the Court of Appeal, at the Court's request, the parties submitted further argument on whether the vote should be counted before the Board makes a ruling about "true wishes" under s. 25(10). Those submissions offered conflicting views, each citing earlier rulings of the Board. The Board's Decision, in our case, does not address the issue.

[73] The Board's para. 38 recited the statutory language followed by a peremptory conclusion. *Vavilov*, para. 102, says that practice "will rarely assist a

reviewing court" and is "no substitute for statements of fact, analysis, inference and judgment".

[74] If "the interplay of text, context and purpose" shows there is only "room for a single reasonable outcome", the reviewing court can end the matter, despite the shortcoming in the tribunal's analysis (*Vavilov*, paras. 124 and 142; *Mason*, paras. 71, 120-21). However, without either a transcript of the testimony of October 1, 2021 or a summary of that evidence in the Board's Decision, this Court does not have the contextual wherewithal to assess whether there is only one reasonable outcome. The Court cannot act on instinct. This means the Board's ruling on s. 25(10) must be remitted (*Vavilov*, para. 96).

[75] I would allow the ground of appeal involving s. 25(10) with the direction that the Board issue supplementary reasons to explain its reasoning. This is not a ruling that the outcome of the Board's Decision on s. 25(10) is unreasonable. The direction is that the Board explain its path to the outcome.

Conclusion

[76] I would dismiss the grounds of appeal that relate to s. 58(1).

[77] I would allow the ground involving s. 25(10) because of the Board's insufficient reasons and remit that issue to the Board to explain its ruling.

[78] As success is divided, the parties should bear their own costs.

Fichaud J.A.

Concurred: Wood C.J.N.S.

Van den Eynden J.A.