**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Halifax Regional Centre for Education v. Nova Scotia Union of Public and Private Employees*, 2025 NSSC 168

**Date:** 20250612
**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 JUDICIAL REVIEW**

---

| | |
|---|---|
| **Judge:** | The Honourable Justice Joshua Arnold |
| **Heard:** | April 23, 2025, in Halifax, Nova Scotia |
| **Written Decision:** | June 12, 2025 |
| **Counsel:** | Alex Warshick, for the Applicant (Halifax Regional Centre for Education)<br>Ronald A. Stockton, for the Respondent (Nova Scotia Union of Public and Private Employees)<br>Edward Gores, KC, for the Respondent (Nova Scotia Labour Board) |

## Overview

[1] The Nova Scotia Union of Public Employees made application under s. 28 of the *Trade Union Act*, R.S.N.S. 1989, c. 475, to amend its description to exclude trades and maintenance employees from the existing bargaining unit. The majority of the Board allowed the application, however, the Chair dissented. A concurrent application under s. 23 of the *TUA* was also allowed to proceed. The dissenting Chair wrote the entire decision, for both the majority and his dissent.

[2] The Halifax Regional Centre for Education has applied for judicial review alleging numerous grounds of review of the majority decision. While multiple issues were raised, the only issue necessary to dispose of this judicial review is whether the majority's justification of its decision to allow union fragmentation under s. 28 of the *Trade Union Act* was justified under the *Vavilov* test for reasonableness. I conclude that the majority's reasons do not meet the test for justification and for the reasons that follow the application is allowed and the matter is ordered to be heard *de novo* by a new panel of the Board.

## Background

[3] The Board decision under review consists of a 26-paragraph majority decision and a one-paragraph dissent, both composed by the Vice-Chair, who was also the dissenting member (para 12). The Union brought applications under ss. 23 and 28 of the *Trade Union Act*. Describing the background to the application, and the issue for decision, the majority said:

> [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.
>
> [2] It is a matter of common knowledge that what was formerly known as the Halifax Regional School Board is now the Halifax Regional Centre for Education. The Halifax Regional School Board itself was created in the late 1990s by a merger of the Halifax, Dartmouth, Bedford and Halifax County School Boards.

> [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.
>
> [Emphasis added.]

[4] After addressing the composition of the existing bargaining unit (paras 4-7), the majority set out the specifics of the applications before the Board in more detail:

> [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.

[5] Section 28(1) of the *TUA* and provides that "[w]here a trade union is certified under this Act, an application may be made to the Board to amend the certification to ... (c) exclude specific classifications of employees from the unit..." Section 23(1) allows a union "claiming to have as members in good standing not less than forty per cent of the employees of one or more employers in a unit appropriate for collective bargaining" to apply "to the Board to be certified as bargaining agent of the employees in the unit." In this case, a subsequent decision on the s. 23 application would be required only if the s. 28 application was allowed, thereby removing the trades and maintenance employees from the existing bargaining unit.

[6] HRCE opposed the s. 28 application, "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" (para 10).

[7] In setting out the governing legal framework, the majority described the matter before the Board as one that raised "the familiar question of when ought the Board to allow a bargaining unit to be divided into two or more smaller units, over the objection of the Employer" (para 13). After setting out the text of s. 28, the majority said:

> [15] Such applications have been considered and rejected by Labour Boards across the country, and federally, for decades. Occasionally, in what are considered to have been extraordinary cases, such a move has been permitted.
>
> [16] Much has been written in cases before this and other Boards about the desirability of larger inclusive units, so long as they are "appropriate for collective bargaining." In no case brought to our attention has a Board allowed a unit to splinter off simply on the basis that the proposed unit or units are more appropriate or offer a more elegant model.
>
> [Emphasis added.]

[8] The majority went on to list several cases that it had considered (para 17), but only discussed one prior decision in any detail, that being *Professional Association of Police Officers v Glace Bay (Town)*, 1989 CanLII 8346 (NS LRB). In that case – which will be reviewed in more detail below – the Board allowed the "fragmentation" of a bargaining unit in the "unique, (or virtually so), work environment" of a police force, with a "critical factor" in decision being the fact that the employer did not object to the proposed fragmentation. The Board repeatedly emphasized that the "general policy" against fragmentation continued to govern, and that "this relaxation is not to be regarded as an invitation to other disaffected minorities within existing appropriate bargaining units to seek a separate existence."

[9] Having cited these passages from the *Glace Bay* decision, the majority set out its reasons for allowing fragmentation in this case:

> [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.
>
> [Emphasis added.]

[10] As such, the majority allowed the s. 28 application. The Vice-Chair, dissenting, would have dismissed the application:

> [27]... 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.
>
> [Emphasis added.]

## Pre-Hearing Applications

[11] HRCE brought an application to introduce the affidavit of Mallory Adams, a lawyer for McInnes Cooper, who attended a hearing before the Nova Scotia Labour Board on behalf of the HRCE, to supplement the record on judicial review of the Board's decision. Paragraphs 7 and 14 of the Adams affidavit were ruled admissible to allow HRCE 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 (2025 NSSC 6). Paragraphs 7 and 14 of the Adams affidavit state:

> 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.
>
> …
>
> 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.

[12] NSUPE made a similar motion to supplement the record and include the affidavit of William Alguire Sr., an employee of HRCE and the president of NSUPE Local 2, which consists of all maintenance and custodial employees. McDougall J. allowed the motion; the relevant paragraphs include:

> 5. I attended a proceeding before the Nova Scotia Labour Board (the "**Board**") on November 17, 2023 at which NSUPE requested the existing bargaining unit at the HRCE, consisting of all casual, part-time and full-time custodial, maintenance and repair employees be amended to exclude

the classifications in the maintenance department and to certify NSUPE as the bargaining agent for those excluded employees in a new bargaining unit of trades and maintenance employees.

6. I testified at the hearing, including both direct and cross examination.

7. During cross examination it was stated to me by HRCE's lawyer, Ian Pickard of the Law firm McInnes Cooper, that in the latest round of bargaining, the issue that took up a majority of the time was a pay adjustment for trades. I agreed with that statement and said that it was over and above what everyone else would get. Mr. Pickard then stated that it was a major bump and I agreed.

## Issues

[13] As noted above, HRCE's Notice for Judicial Review sets out numerous 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. the Board's decision departed, without appropriate justification, from its own body of precedent and its longstanding policy against fragmentation;

v. 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;

vi. 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.

[14] HRCE adds that the s. 23 decision would also fail as a consequence of the s. 28 decision being quashed.

[15] The parties agree on the issues as framed by HRCE. This decision is concerned with the first issue – specifically, the first sub-issue of issue 1 – namely, whether the majority's decision was unreasonable by virtue of the failure to justify its departure from the Board's practice and precedent. This issue can be framed as: Was the majority's decision to allow union fragmentation justified under the *Vavilov* test for reasonableness?

**Issue 1 - Was the majority's decision to allow union fragmentation justified under the *Vavilov* test for reasonableness?**

***Board precedents on fragmentation***

[16] The determinative issue here is whether the majority's decision to allow union fragmentation was justified. Therefore, a close look at previous cases on fragmentation is necessary. The Board's policy on fragmentation of bargaining units was set out in *IMP Manufacturing Employees Association v IMP Group Limited*, 1979 CanLII 3315, where the proposed new bargaining unit consisted of 35 employees of IMP's manufacturing division at its Hammonds Plains site, who were then part of a bargaining unit that also included about 225 employees in the employer's repair and overhaul division at the Halifax International Airport. The unanimous Board said at p.3:

> The Board finds that the bargaining unit applied for is not appropriate. We have considered the factors set out in S. 24 (14) of the *Trade Union Act* and have reached this conclusion despite the fact that employees in the bargaining unit sought by the Applicant have a different work location from the other employees in the unit in which they are now included. The Board will not balkanize an existing unit unless there are compelling reasons to do so. We are in general agreement with the views of the Canada Labour Board in *Trade of Locomotive Engineers and Canadian Pacific Limited* [1976] 1 Canadian L.R.B.R. 361. Were the employees affected by this application unrepresented for purposes of collective bargaining we might well have decided that the unit applied for here was appropriate, but it is unnecessary to consider that question.
>
> [Emphasis added.]

[17] The Board expanded on this reasoning in *Nova Scotia Union of Public and Private Employees v Dalhousie University*, 2011 NSLB 94. The union in that case represented a bargaining unit consisting of about 323 "operational support"

employees of Dalhousie University. The bargaining unit had existed (under two different unions) since 1997, when Dalhousie and the Technical University of Nova Scotia merged. In 2011 the union applied under ss. 23 and 28 of the *Trade Union Act*, with the intended combined effect being to create a second bargaining unit by certifying a separate unit of "certified, ticketed and technical trades" (para 5). The union took the position that the bargaining unit was "not appropriate for collective bargaining" and that members of the relevant trades allegedly had "a different community of interest and focus than the other members of the bargaining unit", which included "custodial, grounds, trucking, mailroom, security and trades support workers", who had been in a separate bargaining unit before 1997 (para 5). The Board stated that the union had called evidence "hoping to demonstrate that the bargaining unit as it exists has become dysfunctional. Whereas once members of the trades played an active role in the affairs of the Union, and generally provided a disproportionate amount of its leadership, they have become disaffected and have withdrawn much of their involvement" (para 10). Specifically, the union pointed to alleged disaffection of trades members arising from the union's ratification of a 2010 collective agreement and the existence of provisions which "either only apply to trades, or disproportionally affect trades" (paras 11-12). In evaluating this evidence, the Board said:

> 14.While not doubting the sincerity of counsel nor the democratic sensibilities of the Union, we do note that there is no real indication as to how all of the other members of the bargaining unit feel about this proposed splitting of their unit. It appears that meetings were held which were restricted to, or at least aimed at, the trades people, in the sense that no one other than trades were specifically invited. While there are signed form letters and petition signatures from many of the tradespeople, there is nothing from the other 223 workers who would be affected by this proposed change to their bargaining structure. Their voice is absent, except to the extent that we are asked to assume that the Union can speak on their behalf.
>
> 15.The Employer points to the fact that there have been four Collective Agreements negotiated over 14 years, with no work stoppages, as evidence that the current system is working. The Employer also produced evidence to demonstrate that from a wage perspective the trades group has done a little better than average. In other rounds of negotiations, not all classifications were offered the same increases for each of the years covered by the agreements, and where there were differences more often than not the trades did better than others.
>
> 16.There are, as mentioned, clauses in the Collective Agreement that address the specific circumstances of trades employees. The evidence of the Employer witnesses was also to the effect that trades employees have had their grievances brought forward by the union (both the applicant and its predecessor), as

> diligently and responsibly as for any other employees in the group. The Employer maintains that it has always been open to negotiation on issues that uniquely affect the trades.

[18] The Board noted that the "[w] little authority there is, and it is all more than thirty years old, was cited by the Employer and appears to support the view that bargaining units should not be subdivided unless for compelling reasons" (para 20). The Board referred to Ontario authority indicating that in these circumstances the applicant group must "demonstrate that it had made a diligent effort to advance its interests through the existing union", failing which the Board would not disturb the existing arrangements (paras 21-22). The Board went on to cite the statement in *IMP* that it "will not balkanize an existing unit unless there are compelling reasons to do so" (paras 23-24).

[19] The Board referred at length to *Trade of Locomotive Engineers and Canadian Pacific Limited*, [1976] 1 CLRBR 361, which was expressly endorsed in *IMP*. In that order, the Canada Labour Relations Board, referring in turn to *Re Canadian Pacific*, [1976] 1 CLRBR 361, set out the principles, *inter alia*, that a single bargaining unit is presumptively preferable, and that fragmentation requires "compelling reasons", such as "diverging communities of interest as between various groups of employees" where "the distinctive needs of special groupings of employees are strong enough to outweigh the practical arguments in favour of one all-employee bargaining unit" (para 25).

[20] The Board in *Dalhousie University* drew several principles from the authorities and from the *Trade Union Act*, including the following:

> A. There is a preference for all-employee units, because they have several advantages including:
>
> i. administration efficiency (i.e. one agreement to administer rather than two or more);
>
> ii. convenience in bargaining (i.e. one set of negotiations);
>
> iii. the promotion of lateral mobility for employees (allowing employees to move up to other classifications within the same unit);

iv. The prospect of fewer work disruptions.

B. Once there is an all-employee unit in place, there is a strong bias against the notion of "balkanizing" (dividing) that existing unit.

C. A Board will nevertheless consider such an application if there is a strong case that the smaller group does not have, or has ceased to have, a community of interest with the larger group.

D. Section 28 of the *Trade Union Act* would appear to be an appropriate statutory foundation for such an application, subject to the provisions of s.24.

E. A breakaway group, if it is to be considered as a new unit, must demonstrate compellingly that it has made diligent efforts to pursue its interests through the existing bargaining structure, and that its efforts have not succeeded.

F. It will be difficult for such a group to obtain its own unit in the face of a structure that has had success in reaching reasonable collective agreements and a history of properly representing all members - such as in the area of grievances.

G. Section 24 of the *Trade Union Act* would cause the Board to look more favourably on an application for a trade or craft unit, where the application was being made by a Union with specialized experience representing that trade or craft.

[21] Based on those principles, the Board concluded that there was "very little evidence" supporting the application:

27. ... All of the benefits of a single agreement are currently being enjoyed, and the Employer is understandably loath to give those up. The Union and its members have shared in those benefits, with a string of Collective Agreements to their credit and no work stoppages. There is no evidence that the trades group has been discriminated against, in the sense that their interests appear to have been advanced through the grievance process and the Collective Agreement contains provisions specific to their needs.

28. Furthermore, until recently trades members were very active within the Union leadership and only recently withdrew some of their involvement. There

> is not a shred of evidence that suggests that they could not step up and again play a more active role in the Union, if they wanted to.
>
> 29. The trades have not ceased to have a community of interest with the other members, simply because they are unhappy with how their interests were treated in the last set of negotiations.

[22] The Board went on to reject "the attempt to characterize what this Union is doing on behalf of the trades as 'democratic'", noting that "the minority must try to have its views adopted in the next round (or vote) through debate, advocacy and demonstration of leadership. Attempting to split off and form a new body politic is activity of a different stripe" (paras 31-32). Accordingly, the Board refused "to split up this very viable and successful bargaining unit, which remains appropriate for collective bargaining" (para 34).

[23] The Court of Appeal took note of the Board's view that "fragmentation of an all-employee bargaining unit should only happen in compelling cases" in *EllisDon Corp v International Union of Operating Engineers*, Local 721, 2018 NSCA 36, at para 121, holding that, although the context was different in the case before the court, "these principles, particularly the first and second, were worthy of some reflection by the Board. However, these concepts are not apparent in the Board's reasons" (para 123). As such, the Court of Appeal found there was a valid ground of appeal.

[24] The principal authority cited in support of the majority's reasoning was *Professional Association of Police Officers v Glace Bay (Town)*, 1989 CanLII 8346. In that case, the Board stated the test under s. 24(4) and (14) – now s. 25(4) and (14) – which govern certification of a bargaining agent on an application under s. 23. The Board said at p. 3:

> The burden of satisfying the Board that this carved-out segment of the larger unit is "appropriate for collective bargaining" within the meaning of sub-sections (4) and (14)" of Section 24 of the Trade Union Act, S.N.S., 1972, C. 19, as amended, (hereafter called the "Act") rests on the applicant and it is a heavy one. The reason for this is that the Board, in common with others across Canada, has attempted to strike a balance between the right of employees, on the one hand, to belong to the union of their choice, as mandated by section 12(1) of the Act, and the conflicting right of the employer, on the other to insist, in the interest of costs, efficiency and administrative convenience, upon some reasonable limit to the number of bargaining units it will be obligated to deal with. In general, labour boards have struck the balance by certifying fewer over many, and larger over

> smaller, bargaining units unless strong reasons justified a different treatment. Moreover, in deciding how many units were appropriate, labour boards applied a generalized standard: is this proposed unit conducive, owing to the centripetal forces of shared community of interests and of other factors drawing the group together, to meaningful collective bargaining that should lead to the attainment of a collective agreement without the need for a strike or lockout.
>
> [Emphasis added.]

[25] The words "appropriate for collective bargaining" appear in s. 24(4) (now 25(4)) of the *Trade Union Act*. Subsection 24(14) (now 25(14)) provided that "[t]he Board in determining the appropriate unit shall have regard to the community of interest among the employees in the proposed unit in such matters as work location, hours of work, working conditions and methods of remuneration." The issue in the present case, however, is not whether the proposed bargaining unit is appropriate, but whether fragmentation is justified. On this point, the Board in *Glace Bay* said at p. 3:

> ... [U]nless particular reasons exist to justify a smaller "grouping" - as for example would exist if the effect of insisting on the one group or fewer "groupings" was to preclude any effective opportunity to organize the employees - the "fewer and larger" policy is applied. In a sense, this general policy is against the fragmentation of a potentially viable larger unit into smaller ones without compelling reasons. The policy against fragmentation must be kept in perspective. It is no more than a prediction of appropriateness. However, once a history of viable and meaningful collective bargaining is demonstrated through the signing of several collective agreements with no or minimal strife, (and an apparent continuity of internal coherence), the prediction of viability of appropriateness is replaced by certainty and the issue of then "carving-out", or fragmenting, this existing bargaining unit becomes problematic. "If it ain't broke, don't fix it", is a succinct summation of labour board policy towards change...
>
> [Emphasis added]

[26] As to the circumstances where the Board should deviate from this policy, the Board noted in *Glace Bay*, *inter alia*, that "[a]ny minority within a bargaining unit runs the risk of being disadvantaged by the voting strength of a majority which has different goals. No Board in Canada has entertained applications based only on the perception, (or the reality), that a minority has not gotten its wishes adopted because the majority voted for other matters" (p 4). In *Glace Bay*, however, the Board accepted several factors that supported fragmentation in the circumstances, including the "para-military" structure of a police service, at p. 4:

> ... Nevertheless, owing to the unique nature of the police department, [with its paramilitary form of organization and line of command, with its "obey now question later" traditions, which compels the NCO's not only to "supervise" constables, albeit only to a degree we would equate with the role of a "lead-hand", but also to perform such quasi-disciplinary functions as, for example, insisting on compliance with the regulations respecting proper dress and cleanliness or correcting the mistakes made by constables], the Board ought, at least, to treat these facts as evidence of such a lack of community of interest with constables as to justify their severance from the existing PANS unit and their formation of a separate appropriate bargaining unit entitled to separate representation in collective bargaining...

[27] In *Glace Bay,* there was also an issue of perceived threats by constables in the existing union to vote a certain way on health and disability plan issues "in order to dissuade NCO's from exercising their quasi-managerial/disciplinary functions vis-a-vis some constables" (pp. 4-5). Finally, the Board considered it a "critical factor" that the employer did not object to the proposed fragmentation (p. 5). As a result, the Board found the proposed affiliation to be appropriate, with the following caution, at p. 5:

> ... We wish to emphasize that this relaxation is not to be regarded as an invitation to other disaffected minorities within existing appropriate bargaining units to seek a separate existence. Our general policy continues to apply. This decision is to be seen for what it is intended: an unusual response to an unusual set of circumstances, (including the lack of objection to fragmentation by the Employer), in a unique, (or virtually so), work environment, namely the historical paramilitary structure and traditions of police forces.
>
> [Emphasis added]

## Positions of the Parties

### *Applicant*

[28] HRCE submits that the Board has a "strong preference" against "fragmenting" an existing bargaining unit, particularly where there continues to be a "community of interest" between the members of the existing bargaining unit and "there have been no serious collective bargaining and representation issues within the existing units." There have been no serious labour disruptions since 2001, and the parties have negotiated several collective agreements, most recently the one ratified in June 2023. HRCE says the relevant question is not whether the existing bargaining unit is appropriate for bargaining, but whether fragmentation is appropriate, displacing the strong presumption against it. HRCE says the majority

did not justify its departure from its own past practice, rendering the decision unreasonable.

***Respondent***

[29] NSUPE does not deny that the Board has "resisted fragmentation" as an established practice but points out that fragmentation was permitted in the 1989 *Glace Bay* decision. NSUPE says the *Trade Union Act* does not "dictate the bargaining unit make-up of regional education centre employees." NSUPE compares the Board to the Supreme Court of Canada, which has also "deviated from its precedent to allow ... law and practices to evolve."

[30] NSUPE maintains that "the Board" (*sic*) simply accepted its argument the prior Board decisions showed a "bias towards employer concerns to the exclusion of employee wishes", as reflected in the majority's statement that "too much emphasis has been placed on Employer inconvenience" as opposed to employees' right to collective bargaining.

[31] NSUPE says justification for "the Board's" (*sic*) decision to depart from precedent can be found in various aspects of its reasons":

- The majority stated that past practice overemphasized employers' convenience over employees' rights. This was the majority's conclusion. It is precisely this conclusion that required justification if the majority proposed to depart from the Board's own well-established precedents. Simply re-stating it does not justify it.
- The majority found that the impact on the employer of an additional bargaining unit would be "minimal." The majority did say this. The majority gave no indication of what evidence this finding rested on.
- The majority found that the maintenance employees lack an effective voice in the bargaining unit. The majority gave no indication of what evidence this finding rested on.
- The majority found "significant differences in community of interest" respecting lack of mobility between groups, hours and places of work, training, supervision, and (ambiguously) "those they interact with." It is true that the majority found that the two groups were distinct, and that they considered the existing arrangement to be an "historical accident."

- Counsel also refers to the two (*sic*) occasions when bargaining was extended on account of maintenance employees' issues. According to the Adams affidavit, the evidence only disclosed a single such incident.
- Finally, counsel says, unlike in the *Dalhousie* case, all employees in the bargaining unit had been canvassed and agreed with the proposed fragmentation. This fact does not appear in the reasons.

[32] In summary, HRCE says the majority "made a significant departure in relaxing its approach to fragmentation, without adequate explanation or support for doing so." NSUPE maintains that the majority adequately justified its departure from established practice and precedent.

**Reasonableness under *Vavilov***

[33] To be reasonable, the decision's outcome ***and*** reasoning must be justified. The majority in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, placed the concept of reasonableness in perspective:

> [85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.
>
> [86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see [*Dunsmuir v New Brunswick*, 2008 SCC 9], at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by

> intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[34] The majority emphasized that justification for the purpose of reasonableness review must be found in the reasons:

> [84] ... [W]here the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a 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...

[35] Among the "legal and factual constraints" that limit a decision-maker's range of lawful decisions, the majority said, are its own prior decisions. While administrative decision-makers "are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*", they said, this does not render prior decisions irrelevant:

> [129] ... Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

[36] As noted by Wood C.J. (for the Court), in *United Food and Commercial Workers Union Canada*, 2024 NSCA 27 (quoting *Vavilov*):

> [42] In addition to examining the reasoning path, reasonableness requires the decision to be justified in light of the legal and factual constraints that bear on it.
>
> [43] A constraint is something which restricts or limits discretion. This is consistent with the Supreme Court's use of that term. For example, in discussing the application of the governing statutory scheme, the Supreme Court in *Vavilov* said:
>
> > [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by

> Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.
>
> [Emphasis added]

[44] Similarly when describing the role of precedent, the Supreme Court said:

> [112] Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramifications of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 *Alta. L.R.* 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 35 to 37), it would clearly not be reasonable for the tribunal to

> adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.
>
> [Emphasis added]

> [45] Decisions of the same administrative body may not be binding precedent as that term is used in the judicial sphere. However, they might constrain the decision maker if they give rise to reasonable expectations which ought to be respected. The Supreme Court put it this way:
>
> > [131] Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.
> >
> > [Emphasis added]

## Analysis

[37] The presumption against fragmentation without compelling reasons is well-established in the Board's decisions, as acknowledged by both the majority and the dissent in the present case. *Vavilov* indicates that a departure from those principles would be reasonable only if justified by the reasons. In this case, the majority acknowledged that "[s]uch applications have been considered and rejected by Labour Boards across the country, and federally, for decades. Occasionally, in what are considered to have been extraordinary cases, such a move has been permitted." (para. 15)

[38] The majority admitted that they were aware of no precedent where a board had "allowed a unit to splinter off simply on the basis the proposed unit or units are more appropriate or offer a more elegant model" (emphasis by majority) (para. 16).

[39] The majority reaffirmed the established analysis, stating that their "views ... can perhaps best be supported by quoting from one of the few cases that have

allowed such an application", namely *Glace Bay* (para. 18). The passages of that decision the majority quoted confirm the heavy burden on an applicant seeking fragmentation, and the general policy against fragmentation, in no uncertain terms.

[40] Having reaffirmed the general policy, the majority declared that the Board should be "a little more receptive" when a sub-group's members have "a much stronger community of interest" with each other than with other members of the broader bargaining unit. They went on to find – with little reference to specific evidence – that the proposed new arrangement would be preferable to the existing one (paras. 19-23). The majority stated 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*" (para. 24).

[41] The Board's existing view of fragmentation as set out in *IMP*, *Dalhousie University*, and *EllisDon*, while not binding in the manner of *stare decisis*, obliged the majority to be attentive to the "general consistency" of the Board's decisions (See *Vavilov* at para. 129). As HRCE points out, and as suggested by the dissent in the present case, whether the proposed new bargaining unit was appropriate is irrelevant if such reasons are not established.

[42] The *Glace Bay* decision – the only authority referred to in detail by the majority, and one that the majority indicated they agreed with – does not support the majority's decision to be "a little more receptive" to fragmentation requests. The passage the majority cites refers to a "heavy" burden and references the need to balance the interests of the union and the employer. As HRCE argues, *Glace Bay* emphatically does not change the governing framework; rather, the Board in that case regarded the situation before it as virtually unique on its facts and placed critical emphasis on the fact that the employer did not object to the proposed fragmentation. Neither of these points was addressed by the majority in the present case. In short, the majority cited *Glace Bay* but did not apply it.

[43] In reference to the *Vavilov* requirement for a decision that "departs from longstanding practices or established internal decisions" to be justified in order to be reasonable, NSUPE says the majority's decision "clearly states the differences in interests and the denial of employees' legislated rights in justification of its decision." The majority "found it worthy of note" that in the *Dalhousie* and *IMP* cases there had not been votes of the entire bargaining units. In fact, the majority's reasons say nothing about the specific outcome of any vote, remarking only that

*Dalhousie* was distinguishable on the basis that it did not involve a "friendly 'divorce'"; the majority did not distinguish *IMP* (para. 23).

[44] In any event, NSUPE submits, the Board is not bound by its previous decisions, because "[t]he world changes, the nature of employment changes, labour relations change, employees' rights to associate individually and collectively change... Only time will tell if this is an exception or if the Board's practice will evolve to be more responsive to the wishes and rights of employees." However, *Vavilov* does not suggest that the lack of true *stare decisis* makes an administrative tribunal's prior decisions irrelevant. The majority had the power to depart from the Board's well-established practice – if that was their intention – but was obliged to explain and justify why it was doing so. Counsel for NSUPE suggested that the majority was indeed trying to make a systemic change to the Board's approach to fragmentation. If this was the case, justification was required, but was not provided in the manner required by *Vavilov*.

[45] Connected to the claim that the Board is not bound by its prior decisions, NSUPE suggests that if the employer wanted to resist fragmentation, it should have led evidence to support its position rather than expecting the Board to follow its own established precedent. However, the burden on the application before the Board was on NSUPE, not HRCE. Moreover, evidence was admitted on the judicial review hearing through the Adams affidavit that HRCE had not called evidence on the basis of certain facts being agreed, including the fact that in each of Nova Scotia's eight centres for education, trades and maintenance employees are in the same bargaining unit as custodial employees. This directly contradicts the majority's statement, made in the present tense (so not referring to historical school boards as suggested by NSUPE) that the existing structure "is a historical accident and is not reflected in all other Centres for Education within the province."

[46] It also appears clear that the majority blended the s. 23 analysis, which was not at issue in this decision, with its s. 28 analysis. Section 23 is concerned with whether the union has established that there is "a unit appropriate for collective bargaining..." The Vice-Chair, in dissent, agreed that the proposed fragmented unit would be appropriate for collective bargaining, but disagreed that the union had "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" (para 27).

**Conclusion**

[47] The majority's reasons do not adequately justify the order the majority made. Having reaffirmed the Board's historic approach to fragmentation as described in *Glace Bay* – with a heavy burden on the proponent, more likely to be met where the employer does not object – the majority went on to allow fragmentation on the basis that the proposed new arrangement was simply preferable to the existing one. This was accompanied by statements that implied a broader systemic change to the Board's approach to fragmentation, effectively making it available simply on the basis that the bargaining unit requests it and can demonstrate some benefits. In the result, it is now unclear what position the Board takes on fragmentation.

[48] The majority failed to meet the requirement for justification set out in *Vavilov*: the reasons do not explain the result on the application before the Board in the context of the existing precedents, but they do create confusion as to whether the traditional approach to fragmentation still governs, or whether the majority has rejected it and imposed a new policy. As such, the majority's decision was unreasonable.

[49] HRCE says that the matter should be set down for a new Board hearing before a new panel. NSUPE says that if a new hearing is ordered, it should be set down before the original panel. In my opinion, because of the scope and nature of the failure to provide a reasonable decision, the matter should be set down for a new Board hearing before a fresh panel.

[50] The parties will have 30 days to determine the issue of costs, and if they cannot come to an agreement, we will schedule a further hearing.

Arnold, J.