NOVA SCOTIA COURT OF APPEAL

Citation: *United Food and Commercial Workers Union Canada, Local 864 v. Sproule Lumber*, 2024 NSCA 27

Date: 20240307
Docket: CA 521488
Registry: Halifax

Between:

United Food and Commercial Workers Union Canada, Local 864

Appellant

v.

Sproule Lumber, a division of J.D. Irving, Limited, and Augustus M. Richardson, K.C.

Respondents

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	January 25, 2024, in Halifax, Nova Scotia
Subject:	Administrative Law – Judicial Review – Reasonableness
Summary:	The arbitrator found the employer, Sproule Lumber, had breached the recognition provisions of a collective agreement through direct communication with employees. He characterized this as an "attack" on the Union and its officials, which interfered with its representational rights under the agreement and awarded damages. The employer successfully sought judicial review. The reviewing judge found the arbitrator's award to be unreasonable because of the failure to apply the same evidentiary standard used by the labour board in relation to unfair labour practice complaints.
Issues:	Was the arbitrator's award reasonable?
Result:	In applying the "reasons first" approach required by the SCC decisions in *Vavilov* and *Mason*, the award was reasonable.

The reasoning path was intelligible, transparent and justifiable. The reviewing judge erred by selecting a standard to be applied based upon labour board jurisprudence and then measuring the award against it. This amounted to a review for correctness rather than reasonableness. Appeal allowed and the arbitration award reinstated.

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Respondents

Judges:	Wood, C.J.N.S.; Scanlan and Beaton, JJ.A.
Appeal Heard:	January 25, 2024, in Halifax, Nova Scotia
Held:	Appeal allowed with costs, per reasons for judgment of Wood, C.J.N.S.; Scanlan and Beaton, JJ.A. concurring
Counsel:	David C. Wallbridge and Jason S. Edwards, for the appellant Christopher Pigott and James B. Green, for the respondent Sproule Lumber

Reasons for judgment:

[1] The appellant, United Food and Commercial Workers Union Canada, Local 864 ("the Union") was the certified bargaining agent for employees of Sproule Lumber, a division of J.D. Irving Limited ("Sproule Lumber"). The parties entered into a collective bargaining agreement effective as of July 26, 2016, which was to cover their relationship until April 15, 2023 (the "CBA").

[2] To say labour relations between the Union and Sproule Lumber did not go smoothly during the term of the CBA would be an understatement. By the fall of 2020, meetings were no longer taking place to discuss potential grievances, shop steward positions were unfilled and the communications between the parties were becoming strained. In November 2020, Sproule Lumber began writing directly to employees and criticizing the actions of certain union officials. One of the letters encouraged employees to inquire into the activities of the senior union representative and decide for themselves if his actions supported positive labour relations between the parties.

[3] In December 2020, Sproule Lumber wrote to the Union suggesting it would cease complying with its obligations under the CBA to deduct and remit union membership dues until the Union came into compliance with the CBA and began acting in good faith.

[4] In February 2021, the Union filed a grievance against Sproule Lumber alleging violations of several articles of the CBA based upon the allegedly unreasonable refusal to schedule and attend regular meetings with the Union.

[5] The grievance proceeded to an arbitration hearing following which the arbitrator, Augustus M. Richardson, K.C., issued an award dated October 7, 2021 (the "Award"). The arbitrator found Sproule Lumber's failure to attend meetings was not a breach of the CBA because the Union had failed in its obligation to provide sufficient information in advance concerning the subjects to be discussed. The arbitrator went on to find that Sproule Lumber had breached the CBA by the letters sent to the employees and the Union in November and December 2020. The arbitrator categorized these as attacks on the competence of the Union's representative and a threat to intentionally violate the CBA. He found this was a breach of the provisions requiring Sproule Lumber to recognize and respect the Union's representation of its members.

[6] Sproule Lumber initiated a judicial review proceeding in the Nova Scotia Supreme Court challenging the Award on the basis it was unreasonable. The reviewing judge, Justice Darlene Jamieson, quashed the Award and remitted the matter for a hearing before a different arbitrator (2023 NSSC 12) (the "JR Decision").

[7] The Union appeals the JR Decision arguing Justice Jamieson incorrectly applied judicial review principles established by the Supreme Court of Canada.

[8] In this matter, all parties agree the standard for review is reasonableness. When correctly applied, the Award meets that standard and should not have been set aside. I would allow the appeal.

The Reasonableness Standard

[9] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*") the Supreme Court of Canada revisited the standard to be used for review of administrative decisions. Fichaud, J.A., recently summarized the principles governing a reasonableness review in *Paladin Security Group Limited v. Canadian Union of Public Employees, Local 5479*, 2023 NSCA 86:

> [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).

[10] It is these principles and this approach which must be applied when reviewing the Award in this case.

Arbitration Award

[11] In the Award, the arbitrator identified the provisions of the CBA which were applicable to the allegations against Sproule Lumber. These were:

> [15] Art. 3 (Recognition) provides as follows:
>
> > 3.1 The Employer recognizes the UFCW Canada, Local 864 as the sole collective bargaining agency for Employees as defined in Article 2, and agrees to meet with representatives from the UFCW Canada, Local 864 for the purpose of carrying out the terms of this Agreement.
> >
> > 3.2 No change, alterations, or revision of any conditions or benefits of this Agreement may be made between the Company and individual employee. Anything related to the above must be negotiated between the Company and the Union.
>
> [16] Art. 4 (Management) provides as follows:
>
> > 4.1 The management of the Employer's business and the employment, direction and supervision of the Employees including transfers, promotion, layoffs and discharge for just cause, is vested in the Employer and management. The Employer agrees that this authority will not be used to differentiate between Employees who are members of the Union and Employees who are not members of the Union. Management rights as set out in this agreement must be exercised so as not to discriminate in violation of the Human Rights legislation of Nova Scotia and in accordance to the collective agreement.
> >
> > 4.2 Cases of disagreement will be dealt with in accordance with the grievance procedure outlined in Article 7.

[12] The arbitrator outlined the written and oral evidence presented by the parties and summarized the submissions of counsel. With respect to the Union's position the arbitrator said:

> [114] Turning to the Employer's complaint in the fall of 2020 that the Union had not appointed the additional shop stewards required pursuant to Art. 7.1, counsel submitted that the Employer was free to grieve that—but any such grievance did not relieve the Employer of its obligation to meet. He also pointed to the Employer's threat in December 2020 to stop remitting membership dues to the Union. This was a threat to breach a clear obligation under the Collective Agreement. It was also an unfair labour practice, inasmuch as it represented a

> direct attack on the Union's role as the bargaining agent for members of the bargaining unit. It was a transparent and carefully calculated attempt to pick a fight with the Union. It was not simply an exasperated outburst.
>
> [115] Counsel also noted that Mr. Green's characterization of Mr. Hosford's response to Ms. McNish was inaccurate. Mr. Hosford had not said that he would not provide meeting dates. He had said he would get back to her, as he was entitled to. His comment about there being no timelines in the Collective Agreement was factual, and nothing more. Moreover, and by way of contrast, Mr. Hosford had made a significant effort to de-escalate the growing tension between himself and the Employer by reaching out to Mr. Cameron on November 8. But that effort was not reciprocated by the Employer. Instead, Mr. Green intervened with increasingly truculent threats to Mr. Hosford and the Union.
>
> …
>
> [119] Counsel concluded by submitting that the Employer's wilful and knowing breaches of the Collective Agreement, together with its attempts to undermine the Union's role as bargaining agent, warranted an award of damages.

[13] Before the arbitrator, counsel for Sproule Lumber focused on the company's refusal to meet with the Union due to the absence of particulars concerning the subjects to be discussed. The Award does not reference any specific submissions on behalf of Sproule Lumber with respect to the alleged interference with the Union's representation of its members.

[14] The arbitrator found there was no breach of Sproule Lumber's obligation to meet with Union representatives. He came to this conclusion in light of the failure of the Union to appoint shop stewards and provide meaningful particulars of the topics for discussion which, in the arbitrator's opinion, was required before any obligation to meet arose.

[15] The arbitrator started his discussion of the alleged interference with the Union's representation of its members by saying the following:

> [152] I should say first that I did not consider it necessary to consider whether an arbitrator has the jurisdiction to deal with beaches by an employer of its obligations under the *Trade Union Act*. It was sufficient in my mind that the Employer had agreed pursuant to Art. 3.1 to recognize the Union "as the sole collective bargaining agency for Employees," and that, pursuant to Art. 4.1, its "rights as set out in this agreement must be exercised ... in accordance to the collective agreement." Any attempt by the Employer—intentional or not—that interfered with the Union's right to represent its members would constitute a breach of the former's obligations under the agreement.

[16] The arbitrator rejected the argument that the acrimonious dispute over whether particulars were required prior to meetings undermined the Union's position as representative of the employees. However, the letters sent to the Union and employees were different and, in the eyes of the arbitrator, crossed a line that breached the CBA. The arbitrator's reasoning was as follows:

> [154] The situation is different when it comes to
>
> a. Mr. Pelletier's letter of October 30, 2020 which was forwarded to employees on November 3;
>
> b. Mr. Barrow's letter of November 3rd to the employees, to which Mr. Pelletier's letter of October 30th was attached;
>
> c. Mr. Barrow's letter of November 17, 2020 to the employees; and
>
> d. Mr. Jason Green's December 8, 2020 threat to breach the Employer's obligation pursuant to Art. 5.1 to deduct and remit union dues.
>
> [155] The first three letters—all sent to members of the bargaining unit—alleged that the breakdown in relations—and in particular the handling of grievances—was a direct result of the bad faith and failure of Mr. Hosford and the Union to meet the latter's obligations under the Collective Agreement. Mr. Barrow's letter of November 17th was particularly harsh, focussing directly on what were alleged to be Mr. Hosford's personal failures as a Union representative. It escalated its attack by urging the members to themselves investigate Mr. Hosford's conduct. The Employer's comments were not simply an explanation of a difference of opinion over an offer during collective bargaining, or of the Employer's position on a particular topic. Those types of comments to a union's members may escape censure: see, for e.g., *IUOE, Local 721B v National Gypsum (Canada) Limited* 2018 NSLB 50 at paras.99-109. Here, and by way of contrast, the Employer's comments in the three letters in November 2020 represented a direct attack on the competence—personal and organizational—of the bargaining agent and in particular of Mr. Hosford—and an invitation to investigate Mr. Hosford's conduct. The message to the members of the bargaining unit was clear—your bargaining agent (and in particular Mr. Hosford) was disrupting "the labour relationship by refusing to conduct yourself in good faith." That in turn amounted to an allegation that the employees would be better off with someone else to represent them—a type of allegation similar to the one found to be an interference with a union's representation rights in the *National Gypsum* case at paras. 113-21.
>
> [156] There was no evidence that Mr. Green's letter of December 8, 2020 was sent to the membership. But it was just as serious an interference with the Union's representational rights. The letter was not just an expression of a difference of opinion over how Art. 3.1 should be interpreted or applied. It was rather notice that the Employer intended to knowingly breach its obligation under the Collective Agreement to remit union dues to the Union. It was a threat to ignore the grievance process laid down in Art. 7. It represented an assault both on the

> utility of the agreement itself (because the Employer was going to ignore it in favour of self-help), and on the Union's ability to represent its members. The two options Mr. Green proposed—to deduct dues but hold them in trust until the Union complied, or leave it to the Union to collect them directly—represented direct attacks on the Union's ability to represent its members. The first would undercut the Union's finances and hence its ability to represent its members. The second would be so administratively difficult as to amount to the same result—and would as well create tensions and confusion between the Union and its members over why the change had taken place.
>
> [157] The threat to act unilaterally in direct violation of the Collective Agreement represented a form of self-help that collective agreements are intended to prevent. The fact that the threat was not realised—no doubt because of the MOA that was reached shortly thereafter—does not diminish its seriousness. Parties to a collective agreement should not be encouraged in a belief that they can get what they want by acting outside the grievance process (to which they agreed), or by threatening to act in violation of their clear obligations. The Union here was obviously powerful enough to have been able to call the Employer's bluff (if bluff it was) if it had come to that. But smaller and weaker unions might not be in the same position—which is why threats like the one made by Mr. Green was such a serious assault on the representational rights of the Union, and why it has to be treated as such.
>
> …
>
> [159] Be that as it may, I am satisfied for the above reasons that the Employer's three letters of to the membership in November 2020, and Mr. Green's letter of December 8th, did represent a serious breach of the Union's representational rights under the Collective Agreement. The former represented a direct attack on the competence of the members' union representative (Mr. Hosford) and an invitation to investigate his conduct. The latter represented an attempt to bend the Union to the Employer's will by threatening to knowingly breach a provision important to the Union's operations. Both represented breaches of the Employer's obligations pursuant to Art. 3.1, 4.1 and 4.2. The question then becomes remedy.

[17] The arbitrator's reference to the *IUOE, Local 721B v. National Gypsum (Canada) Limited*, 2018 NSLB 50 ("*National Gypsum*") decision in para. 155 is important because it forms the basis for Sproule Lumber's argument that the decision was unreasonable. It also features prominently in the reviewing judge's conclusion to the same effect. *National Gypsum* did not involve a grievance alleging a breach of a collective agreement. It dealt with a union complaint of unfair labour practices alleging the employer breached certain provisions of the *Trade Union Act*, R.S.N.S. 1989, c. 475. There were eight specific incidents which were alleged to be "demeaning, derogatory and critical of the Union to employees".

[18] One allegation related to a video shown at a mandatory employee meeting. It included statements by a corporate vice president concerning plants in the United States which had eliminated the union and become more productive, safer and better workplaces. The other incidents involve comments by corporate managers to employees about the advantages of a non-union operation.

[19] The major concern of the union was the video shown at the employee meeting, which they said interfered with the administration of the trade union and was inherently destructive of their position. They argued it was not necessary to adduce evidence of the actual impact of the employer conduct. The employer countered that the union had not provided proof of interference within the meaning of the *Trade Union Act* and any comments were protected by the free speech provisions found in s. 58 of the *Act*.

[20] The Nova Scotia Labour Board (the "Board") focused on the alleged breach of two provisions in the *Trade Union Act*, s. 53(1)(a) and s. 53(3)(e) which provide:

> Prohibited activities of employer
>
> 53 (1) No employer and no person acting on behalf of an employer shall
>
> > (a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or
> >
> > …
>
> 53 (3) No employer and no person acting on behalf of an employer shall
>
> > …
> >
> > (e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union…

[21] The Board noted the types of conduct prohibited by the two sections were different. For s. 53(1)(a), it said proof of interference was usually required. For s. 53(3)(e), breach was established by evidence an employer sought to achieve the prohibited result. A discussion of the different ways an employer might breach s. 53 can be found in the following passage from the *National Gypsum* decision:

> [106] We agree with former Chair Darby that it would not be appropriate to punish an employer under this section for an anti-union motive in cases of employer messages including those delivered in "captive audience meetings" unless there was evidence of an actual negative effect. As he noted in *Zinck's Bus*,

there are other remedies provided under the *Act* for employer comments which exceed the scope and protection of section 58. We believe this is the correct approach even where, as we explain later, we find there was a clear anti-union animus to John Corsi's comments.

[107] As former Chair Darby explained:

> …a finding of "interference" by the Board and the consequent imposition of remedial action is really a response to the employer's motive, ie., its seeking to interfere rather than to its "interference". Since the Legislature has addressed the issue of when the "seeking" to achieve a prohibited result is an employer unfair labour practice [in Section 53(3)(e)], we do not regard it as legitimate to add to the list of prohibited conduct under Section 53(1)(a), a "seeking to interfere with the representation of employees", etc. Similarly, (by way of further illustration of this category of conduct), in light of Section 2(b) of the Charter and Section 56(2) [sic] of the Act, an employer has a right to express its views. We ought not to erase the latter in favour of employee/union freedom of association. The Charter does not accord a higher status to it than to expression - and neither should we. This is particularly true where adequate protection is accorded to employee/union rights by Section 58(2).

[108] In contrast, the Board recognized that some conduct - such as the interrogation of employees about their membership in a union; employing professional strikebreakers (as distinguished from genuine replacement workers); and employer infiltration of union meetings - is inherently destructive of a union. The Board in *Zinck's Bus* commented, and we agree, that this type of conduct "*can have no legitimate or significant employer or entrepreneurial business justification and simply cannot, as a matter of Board policy, be permitted."* The approach of the Board is these situations is to find "interference" within the meaning of Section 53(1)(a) even if there is no evidence that any employee or the Union was actually "interfered with."

[italics in original]

[22] The union had not provided evidence of any employees who were actually intimidated or threatened by the showing of the video. The Board said evidence of actual interference was required in the circumstances before it and concluded a breach of s. 53(1)(a) had not been established. It did, however, find a breach of s. 53(3)(e) for the following reasons:

> [119] In our view, the Union has met its burden. Having considered the totality of the evidence, which includes what was said; where it was said; who said it; the lack of any local messaging about the Halifax plant's safety performance; and the fact that Mr. Corsi's message was accompanied by a clear statement of an anti-union preference leads us to the conclusion that National Gypsum has contravened section 53(3)(e). In our view, Mr. Corsi's statement about safety and

> non-unionized plants constitute a "*kind of threat*" or "*other means*" used to try to achieve his preference for non-union plants.

[23] The remaining incidents relied on by the union were dismissed by the Board for the following reasons:

> [123] With respect to the remaining allegations, these mostly concerned comments and conversations which took place during a time of heightened Union sensitivity. The Union did not establish that Brandon Hutt said anything threatening or otherwise over the line when he spoke with Mr. Woodworth, in a conversation started by Mr. Woodworth, about the subcontracting situation. Mr. McLean and Kyle McLellan, had a private conversation about one employee, Andrew Woodworth. Mr. McLean was clearly frustrated with questions about the vacation. This was not a discussion about process generally nor was it intended by Mr. McLean to exclude the Union from any matters dealing with Mr. Woodworth or any other employee There were several interpretations available to Mr. McLellan and he formed the impression that Mr. McLean was trying to "freeze the Union out." There was also no evidence that Mr. Woodworth or any employee was denied any access to union representation. We similarly find nothing objectionable in the evidence with respect to the April discussion between Peter Isenor and Jeff Newton. While we find that Leonard Wright did make a couple comments negative of the Union, these did not, in the circumstances, cross the line into conduct prohibited by section 53(3)(e).

[24] The issue arising from the arguments advanced by Sproule Lumber is whether the arbitrator's reference to the *National Gypsum* decision rendered the Award unreasonable. In its simplest terms, Sproule Lumber's position is that the arbitrator had adopted the test in *National Gypsum* for a breach of s. 53(1)(a) of the *Trade Union Act* and then declined to apply it or explain why he was not doing so in assessing the alleged breach of the CBA. I will return to that argument in more detail when I discuss the JR Decision.

Judicial Review Decision

[25] Sproule Lumber's written submissions on the judicial review set out four bases on which the Award was allegedly unreasonable. These were:

- The arbitrator expanded the scope of grievance beyond the failure of Sproule Lumber to meet with the Union.
- The findings of interference with representative rights were at odds with the statutory provisions and case law which require evidence of actual interference.

- The arbitrator's interpretation of the CBA expanded its provisions beyond their wording and the scope of "analogous statutory provisions".

- The conclusion that the letters violated the union's representation rights was unreasonable in light of the factual findings and evidence concerning their actual impact.

[26] The reviewing judge dismissed the argument that the arbitrator had expanded the scope of the grievance and found this aspect of the Award to be reasonable. The remaining three issues raised by Sproule Lumber flowed from the same proposition, which was s. 53(1)(a) of the *Trade Union Act* and related labour board jurisprudence should have been applied by the arbitrator. If he had done so, he could not have found a breach of the CBA without evidence of actual interference with the Union's representation rights.

[27] After correctly identifying the content of the reasonableness standard from *Vavilov*, the reviewing judge undertook her analysis of the Award. She started by examining the criteria she would use to assess its reasonableness.

[28] The reviewing judge found that recognition clauses such as Article 3.1 of the CBA could be breached by an employer's direct communication with employees. She referred to labour board decisions involving unfair labour practices resulting from similar communications. Having concluded employer communications with employees could give rise to both unfair labour practices under trade union legislation, or grievance arbitration under a collective agreement, the reviewing judge said:

> [94] These authorities establish that recognition clauses and unfair labour practice provisions safeguard and protect the exclusivity of a trade union to represent and act as bargaining agent for all employees in a bargaining unit. Employer interference with the union's exclusive representation of employees through direct communications with employees can constitute a breach of both the recognition clause in the collective agreement and the unfair labour practice provisions. An arbitrator has the jurisdiction to consider the complaint in either case. Where the complaint is framed as a breach of the recognition clause, labour board decisions considering s. 53 will be relevant to the arbitrator's analysis. It would be nonsensical to find otherwise, as this would mean that an arbitrator could apply entirely different factors, depending on whether the grievance was considered under s. 53 of the *Trade Union Act* or under the recognition clause.

[29] After deciding labour board decisions could be relevant to an arbitration hearing considering a potential breach of a collective agreement, the reviewing

judge considered labour board jurisprudence. She concluded an unfair labour practice alleging employer communications which breach s. 53(1)(a) of the *Trade Union Act* requires proof of actual interference. She found the arbitrator did not have such evidence before finding there was a breach of the CBA:

> [100] As noted above, the *National Gypsum* decision was before Adjudicator Richardson, and indeed was referred to in his reasons. He did not, however, apply the s. 53(1)(a) analysis – in particular, the requirement for evidence of actual interference – in determining whether the Sproule letters interfered with the Union's representation rights.

[30] The reviewing judge also noted that where an unfair labour practice alleged a breach of s. 53(3)(e) of the *Act* or its equivalent, evidence of actual interference was not required:

> [103] Section 53(3)(e) prohibits an employer from "seeking" to compel a person – whether by intimidation, threat, the imposition of a penalty, or other means – to refrain from becoming or to cease to be a member, officer or representative of a trade union, or to refrain from taking certain actions under the *Trade Union Act*. Since s. 53(3)(e) prohibits an employer from "seeking" to achieve a specific result, evidence that it was actually successful in achieving that result is not necessary to find a breach. In *Amalgamated Transit Union Local 508 v. Zinck's Bus Company Limited*, NSLRB Decision 4137 Supplementary, May 2, 1994, the Labour Board explained that s. 53(1)(a) does not prohibit "seeking to interfere with the representation of employees" because "seeking" to achieve a prohibited result is already dealt with under s. 53(3)(e):
>
> > Since the Legislature has addressed the issue of when the "seeking" to achieve a prohibited result is an employer unfair labour practice [in Section 53(3)(e)], we do not regard it as legitimate to add to the list of prohibited conduct under Section 53(1)(a), a "seeking to interfere with the representation of employees", etc.

[31] The reviewing judge found great significance in the last sentence of para. 155 of the Award where, after describing the letters attacking the Union representative, the arbitrator said:

> …That in turn amounted to an allegation that the employees would be better off with someone else to represent them – **a type of allegation similar to the one found to be an interference with a union's representation rights in the *National Gypsum* case at paras. 113-21**.
>
> [emphasis added]

[32] The reviewing judge described why this sentence was important:

[104] Although the Arbitrator held that the employer's allegation in the Sproule letters that the employees would be better off with someone other than the bargaining agent to represent them was "a type of allegation similar to the one found to be an interference with a union's representation rights in the *National Gypsum* case at paras. 113-121", nowhere in these paragraphs of *National Gypsum* did the Labour Board find "an interference with a union's representation rights." It referred only to a violation of s. 53(3)(e). At paragraphs 119-120, the Board stated:

> [119] In our view, the Union has met its burden. Having considered the totality of the evidence, which includes what was said; where it was said; who said it; the lack of any local messaging about the Halifax plant's safety performance; and the fact that Mr. Corsi's message was accompanied by a clear statement of an anti-union preference leads us to the conclusion that **National Gypsum has contravened section 53 (3) (e). In our view, Mr. Corsi's statement about safety and non-unionized plants constitute a "kind of threat" or "other means" used to try to achieve his preference for non-union plants.**
>
> [120] Mr. Corsi's comments, made in the setting of the mandatory employee meeting; repeated on the television screen in the lunchroom; and repeated by Ralph Wardrope, are not protected by section 58. As we noted earlier, when considering the question of "undue influence, we are concerned with "what is likely to impair freedom of choice." A reasonable employee, as concerned about his or her personal safety as he or she is with respect to job security, should not be presented by a senior executive with the choice between unionization and having a safer workplace.
>
> [emphasis in original]

[105] The Arbitrator does not explain how the finding in *National Gypsum* of a breach of s. 53(3)(e) is relevant to his own finding that the Employer, in sending the Sproule letters, interfered with or breached the Union's representation rights. As noted earlier, evidence of actual interference is required for a finding that direct employer communication interfered with a union's representation rights under s. 53(1)(a).

[106] Assuming without deciding that seeking to interfere with a union's representation rights could amount to a violation of both s. 53(3)(e) and the representation clause in a collective agreement, the Arbitrator did not find that the Employer was "seeking" to interfere with the Union's representation rights; he found that it *did* interfere with those rights. As noted earlier, the Arbitrator summarized his conclusion on the issue as follows:

> [162] Based on the facts and reasons set out above, I
>
> …
>
> b. declare that **the Employer breached Arts. 3.1, 4.1 and 4.2 of the Collective Agreement by interfering with the Union's representational**

> **rights** when it sent the letters that it did in November and December 2020, and order the Employer to pay to the Union $5,000.00 damages for that breach.
>
> [emphasis in original]

> [107] Moreover, the Arbitrator did not address the requirement under s. 53(3)(e) for evidence of anti-union *animus*. While it is certainly clear from the Sproule letters that the Employer had *animus* toward Mr. Hosford, and felt that he was not properly discharging his obligations as Union representative, the Arbitrator did not refer to any evidence that the Employer, like the employer in *National Gypsum*, preferred a non-unionized environment. Indeed, Mr. Barrow opened the November 3 Letter by stating, "As a starting point, we want to confirm our respect for UFCW as your bargaining agent and representative." If the Arbitrator concluded that, in fact, the Employer *did* harbor anti-union *animus*, his reasons do not make that clear.

[33] The reviewing judge agreed with Sproule Lumber's assertion that the arbitrator was "required" to apply the labour board test for a breach of s. 53(1)(a) or provide a justification for why that standard ought not to be used. By failing to do either of these, the Award was found to be unreasonable. The reviewing judge treated *National Gypsum* as a precedent which had to be followed by the arbitrator.

[34] The reasoning path leading to the finding of unreasonableness is apparent from the following passages from the JR Decision:

> [109] In stating that the December 8 Letter was "not just an expression of a difference of opinion over how Art. 3.1 should be interpreted or applied", the Arbitrator appeared to apply the same standard to the December 8 Letter, which was not sent to the Union's membership, as he applied to the communications which were made directly to employees (para. 155). Leaving aside the appropriateness of this approach, the Arbitrator still did not acknowledge the requirement for actual evidence of interference. The fact that the alleged employer interference with a union's representation rights by way of employer communication is framed as a breach of the Recognition Clause rather than as a breach of the unfair labour practice provisions does not mean an arbitrator is free, without explanation, to adopt a wholly different standard for a finding of interference than that outlined by the Nova Scotia Labour Board.
>
> [110] In my view, **by not acknowledging the requirement for evidence of actual interference with a union's representation rights that applies to employer communications, nor explaining why, in his mind, there was no such requirement on the facts of this case, Arbitrator Richardson made an unreasonable decision**. His reference to paragraphs 113-121 of *National Gypsum* is puzzling. Reading between the lines, Arbitrator Richardson **appeared to find that certain statements made by employers to employees or union**

> **representatives are inherently destructive, thereby dispensing with any need for proof of actual interference. That conclusion (if it was indeed what he intended to convey) is inconsistent with the Nova Scotia Labour Board jurisprudence**. The Labour Board has consistently exempted employer messages, which can have a legitimate business purpose, from the category of inherently destructive conduct which, by its nature, "can have no legitimate or significant employer or entrepreneurial business justification and simply cannot, as a matter of Board policy, be permitted." **By not explaining his reasoning for departing from the relevant authorities (or even acknowledging that he was making such a departure), Arbitrator Richardson produced a decision that is neither based on an internally coherent and rational chain of analysis, nor justified in relation to the facts and the law that constrained him**.
>
> …
>
> [115] Taken as a whole, the decision of the Arbitrator is incompatible with the precedent in *National Gypsu*m and the other cases referenced above. The decision-maker failed to grapple with the relevant factors as established by prior jurisprudence. **The Arbitrator disregarded the precedent and failed to give any explanation for doing so.**
>
> [116] **The legal constraints imposed on the Arbitrator required that he address whether the elements necessary for a finding of a violation of the Union's representation rights were present**. His failure to do so means that his reasons did not demonstrate an internally coherent and rational chain of analysis in arriving at his decision that the Employer interfered with the Union's representation rights when it sent the letters. Where, as here, a decision-maker departs from longstanding practices or established authority, that decision-maker bears the justificatory burden of explaining that departure in its reasons (*Vavilov*, para. 131). See also *Canada (Attorney General) v. Honey Fashions Ltd.*, 2020 FCA 64 at paras. 39-40 (a reasoned explanation was not discernable for a departure from a past practice or past decision). Departures from previous administrative decisions must be justified. Here, the Arbitrator failed to offer any explanation for his departure from the requirement of evidence of actual interference. Consequently, I find the Arbitrator's decision is unreasonable. The decision lacks justification, transparency and intelligibility.
>
> [emphasis added]

Reasonableness Review of the Award

[35] The standard of review on an appeal from a judicial review is correctness. This means the reviewing judge must correctly identify and apply the standard of review to the administrative decision. The appellate court steps into the shoes of the lower court and conducts its own review of the administrative decision. The focus is on this decision and not the judicial review (*Paladin* at para. 37).

[36] This Court outlined the essential principles for reasonableness review as espoused by the Supreme Court of Canada in *Vavilov* and *Mason* in paras. 39 to 46 of *Paladin*. Before undertaking a review of the Award, there are a number of additional comments from the Supreme Court which ought to be kept in mind.

[37] The reviewing judge must refrain from deciding the issue before the decision maker. They must also avoid creating a measure against which the decision is to be evaluated. The Supreme Court in *Vavilov* said:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": para. 28; see also *Ryan*, at paras. 50-51. Instead, 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 unreasonable.

[38] The fact an administrative decision does not include all of the arguments, jurisprudence or other details the reviewing court would like to see, does not necessarily justify setting it aside. The decision may demonstrate the experience, knowledge and expertise of the decision maker and explain why an outcome that might appear counter-intuitive on its face is reasonable (*Vavilov* at para. 93).

[39] Examining the record before the decision maker is crucial since it may explain what might otherwise appear to be shortcomings in the decision (para. 94 *Vavilov*).

[40] If there are flaws in the decision, they must be assessed to determine whether they are merely superficial or peripheral to the merits. It is only shortcomings that are sufficiently central or significant which render a decision unreasonable (*Vavilov* at para. 100).

[41] The decision maker's reasoning path must be clear, logical and "add up" (*Vavilov* para. 104).

[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]

[46] In *Mason*, the Supreme Court decided the administrative decision was unreasonable because it failed to interpret and apply the relevant statutory provision in a manner that complied with Canada's international treaty obligations which Parliament had decreed must be considered (*Mason* at para. 118).

[47] With these principles in mind, I will review the Award.

[48] The arbitrator was appointed by agreement of the parties in accordance with Art. 7.2(d) of the CBA. He was asked to determine whether there was a breach of the CBA by Sproule Lumber because of their refusal to meet with union representatives until additional particulars of alleged grievances was provided. A secondary issue was raised by the Union, which was whether the letters sent by Sproule Lumber to the Union and employees in November and December 2020 breached Article 3 of the CBA.

[49] The arbitration hearing was not recorded and, therefore, we must rely on the Award to describe the witness testimony and submissions of the parties. One witness testified on behalf of the Union and two on behalf of Sproule Lumber. The arbitrator noted the primary facts were not in dispute. The Award set out the dealings between the parties from 2017 until 2021. In the first paragraph, the arbitrator provided an overview of the relationship between the parties:

> [1] What happens when parties agree to a grievance procedure that lacks time limits; fail thereafter to follow the procedures that are there; and then refuse to compromise their respective interpretations of what the agreement says those procedures are supposed to be? The result is time-consuming acrimony that erodes the harmonious labour relations that collective agreements are intended—or at least hoped—to achieve.

[50] After reviewing the evidence, the arbitrator summarized the submissions of the parties. In addition to comments on the refusal of Sproule Lumber to meet, counsel for the Union went on to discuss the conduct of Sproule Lumber in November and December 2020. The arbitrator summarized the Union's submissions on this issue as follows:

> [117] Counsel turned to s.43B(2)(a) of the *Trade Union Act* which provide that an arbitrator may "treat as part of the collective agreement the provisions of any statute of the Province governing relations between the parties to the collective agreement." This in his submission opened to[*sic*] door to a consideration of that Act's unfair labour practice provisions. Counsel submitted that the Employer's conduct—in refusing to meet, in threatening to breach its obligations under the Collective Agreement, in its attacks on Mr. Hosford—represented an attempt to under[*sic*] the Union and its ability to represent its members in the bargaining unit.
>
> [118] Counsel added that the Employer's obligation to meet even if it was unhappy with the details it had was supported by both its past practice prior to October 2020, and by the doctrine of estoppel. The Employer had in the past met with the Union even when it complained of a lack of information. And Mr.

> Hosford had testified that in all his years representing members at Sproule he had not had a problem with meetings prior to October 2020.
>
> [119] Counsel concluded by submitting that the Employer's wilful and knowing breaches of the Collective Agreement, together with its attempts to undermine the Union's role as bargaining agent, warranted an award of damages.

[51] According to the Award, Sproule Lumber did not specifically address the Union's complaints concerning the alleged interference with its representation of members. Counsel for Sproule Lumber focused on whether the company was required to meet with union representatives given the lack of particulars which had been provided concerning employee grievances.

[52] After reciting the parties' submissions, the arbitrator started his analysis with a consideration of the employer's obligation to meet with the Union. He concluded there was no breach by Sproule Lumber and dismissed that part of the grievance.

[53] With respect to the Union's suggestion the *Trade Union Act* permitted him to apply the unfair labour practice provisions to the grievance, the arbitrator declined to do so and said he would focus on whether there was a breach of the CBA. The Award describes the issue this way:

> [152] I should say first that I did not consider it necessary to consider whether an arbitrator has the jurisdiction to deal with breaches by an employer of its obligations under the *Trade Union Act*. It was sufficient in my mind that the Employer had agreed pursuant to Art. 3.1 to recognize the Union "as the sole collective bargaining agency for Employees," and that, pursuant to Art. 4.1, its "rights as set out in this agreement must be exercised ... in accordance to the collective agreement." Any attempt by the Employer—intentional or not—that interfered with the Union's right to represent its members would constitute a breach of the former's obligations under the agreement.

[54] This paragraph sets out the standard which the arbitrator intended to apply to the conduct of Sproule Lumber. The arbitrator dismissed the Union argument that Sproule Lumber's refusal to meet was a breach of the CBA. He said this dispute was contrary to the maintenance of harmonious industrial relations but did not amount to an attack on the Union's status as a representative of its members. The arbitrator said the correspondence sent by Sproule Lumber was a different situation.

[55] It is apparent the arbitrator applied his labour relations experience in interpreting the conduct of Sproule Lumber and its impact on the Union's status. He obviously felt the language used carried an extremely negative connotation and

represented an "attack" on the Union which would diminish its status in the eyes of the employees. This is demonstrated by the following comments from the Award:

> …Mr. Barrow's letter of November 17th was **particularly harsh**, focussing directly on what were alleged to be Mr. Hosford's **personal failures** as a Union representative. It **escalated its attack** by urging the members to themselves investigate Mr. Hosford's conduct…
>
> … the Employer's comments in the three letters in November 2020 represented a **direct attack on the competence personal and organizational**—of the bargaining agent and in particular of Mr. Hosford—and an invitation to investigate Mr. Hosford's conduct. The message to the members of the bargaining unit was clear—**your bargaining agent (and in particular Mr. Hosford) was disrupting "the labour relationship by refusing to conduct yourself in good faith.**"…
>
> … it was just as **serious an interference with the Union's representational rights**… It was rather notice that the Employer intended to **knowingly breach its obligation** under the Collective Agreement to remit union dues to the Union… It **represented an assault** both on the utility of the agreement itself (because the Employer was going to ignore it in favour of self-help), and on the Union's ability to represent its members…
>
> …The two options Mr. Green proposed…represented **direct attacks on the Union's ability to represent its members**.
>
> …The **threat to act unilaterally in direct violation** of the Collective Agreement represented a form of self-help that **collective agreements are intended to prevent**. The fact that the **threat** was not realised…**does not diminish its seriousness**…
>
> …The Union here was obviously powerful enough to have been able to call the Employer's bluff (if bluff it was) if it had come to that. But smaller and weaker unions might not be in the same position—which is **why threats like the one made by Mr. Green was such a serious assault on the representational rights** of the Union, and why it has to be treated as such…
>
> [emphasis added]

[56] After making the above comments, the arbitrator summarized his concerns and conclusions with respect to the conduct of Sproule Lumber:

> [159] Be that as it may, I am satisfied for the above reasons that the Employer's three letters of to the membership in November 2020, and Mr. Green's letter of December 8th, did represent a serious breach of the Union's representational rights under the Collective Agreement. The former represented a **direct attack on the competence of the members' union representative** (Mr. Hosford) and an invitation to investigate his conduct. The latter represented an **attempt to bend**

> **the Union to the Employer's will by threatening to knowingly breach a provision important to the Union's operations**. Both represented breaches of the Employer's obligations pursuant to Art. 3.1, 4.1 and 4.2. The question then becomes remedy.
>
> [emphasis added]

[57] The arbitrator made no finding that Sproule Lumber had committed an unfair labour practice by breaching s. 53 of the *Trade Union Act*. In fact, he dismissed the Union's submission that he should engage in that exercise. Instead, he focused on whether Sproule Lumber had breached its agreement to recognize the Union as representative of its members. In his award of damages, the arbitrator described the breach in the following terms:

> [161] Having considered the matter I have decided that the appropriate remedy here should include both a declaration that the Employer breached the Union's representational rights in the Collective Agreement, and an award of damages. To **emphasize the important role collective agreements play in the maintenance of labour relations peace, and the seriousness of the Employer's breach of its agreement to recognize and respect the Union's role in maintaining that peace, I think it appropriate to award damages** in the amount of $5,000.00 to the Union.
>
> [emphasis added]

[58] On its face, the Award bears the hallmarks of reasonableness. The reasoning path is intelligible and transparent. A reader is able to understand what the arbitrator decided and why. There are no apparent gaps in the analysis. The arbitrator's explanation for why he felt the conduct of Sproule Lumber was so egregious undoubtedly drew on his experience in labour relations.

[59] If a decision is internally irrational, it would be unreasonable. The Supreme Court in *Vavilov* outlined what such a decision might contain:

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

These comments do not describe the Award in this case.

[60] A party challenging a decision bears the burden of demonstrating it is unreasonable. The arguments of Sproule Lumber before the reviewing judge and on appeal arise solely from the reference to *National Gypsum* in para. 155 of the Award. They argue this comment imports the standard of proof adopted by the Board for an unfair labour practice under s. 53(1)(a) of the *Trade Union Act*. By failing to expressly apply this standard or explain why it was not doing so, Sproule Lumber says the Award is unreasonable.

[61] The submissions of Sproule Lumber, which were accepted by the reviewing judge, have no merit. On its clear wording, para. 155 of the Award does not adopt the standard of proof from *National Gypsum* for purposes of assessing the grievance. The arbitrator used this decision to illustrate examples of employer communications with employees, some of which were similar to the actions of Sproule Lumber.

[62] The arbitrator's task was to decide if Sproule Lumber breached its obligations under the CBA. He was not required to decide whether the evidence would have supported a successful complaint of unfair labour practices under s. 53(1)(a) or s. 53(3)(e) of the *Trade Union Act*.

[63] In addition, decisions of the Board are not binding, as a matter of precedent, in a grievance arbitration. The reviewing judge says jurisprudence from labour boards concerning unfair labour practices can be "relevant" for purposes of grievance arbitration. That may be so, but relevant jurisprudence does not necessarily "constrain" arbitrators as that term is used by the Supreme Court of Canada.

[64] The reviewing judge conducted a thorough review of the law relating to union representation rights and unfair labour practice complaints. Her error, flowing from the submissions of Sproule Lumber, is the one described in para. 83 from *Vavilov*. She started her analysis of the Award by determining the evidentiary standard the arbitrator should have used. Adopting this "yardstick" in her review resulted in the application of a correctness, and not reasonableness, standard.

[65] As emphasized by the Supreme Court of Canada in *Mason* (paras. 58-63), reasonableness is a "reasons first" approach and this fundamental principle must guide the judicial review analysis.

[66] I would make two other comments concerning Sproule Lumber's submissions with respect to the *National Gypsum* decision. The first is that the

Board described different ways to establish an unfair labour practice under s. 53(1)(a). One, focused on by Sproule Lumber, is where evidence of actual interference from union members is required. Another is where no such evidence is needed because the conduct is sufficiently serious that it is inherently destructive. The decision in *National Gypsum* provides examples of employer conduct but did not define the limits of what might fall into these categories.

[67] Ultimately, the question of interference with union representation is one of fact and will depend on the evidence adduced. The arbitrator applied his labour relations experience to the particular circumstances before him and explained why he concluded the CBA had been breached. I am not prepared to conclude his analysis necessarily conflicts with the principles in *National Gypsum*.

[68] My second comment with respect to the position of Sproule Lumber relates to the argument the arbitrator was required to explain why the Board jurisprudence was not being applied. It would appear, based upon the Award, the issue of whether *National Gypsum* was binding precedent was not argued before the arbitrator. The importance of understanding the record, including the submissions of the parties in conducting a reasonableness review, was emphasized by the Supreme Court of Canada in *Vavilov* (para. 94).

[69] The obligation of an administrative decision maker to respond to the submissions of the parties was described in *Vavilov* at para. 127:

> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

[70] I am satisfied the arbitrator met that standard and responded to all of the submissions made. There was no necessity to go further and explain why principles from a Board unfair practices decision should or should not be applied to the grievance arbitration before him.

[71] I am satisfied the Award is reasonable and it was an error by the reviewing judge to conclude otherwise. I would allow the appeal and reinstate the Award, with costs payable by Sproule Lumber of $4000 inclusive of disbursements.

Wood, C.J.N.S.

Concurred in:

Scanlan, J.A.

Beaton, J.A.