NOVA SCOTIA COURT OF APPEAL

Citation: *EMC Emergency Medical Care Inc. v. Canadian Union of Postal Workers*, 2024 NSCA 55

Date: 20240523
Docket: CA 525171
Registry: Halifax

Between:

EMC Emergency Medical Care Inc.

Appellant

v.

Canadian Union of Postal Workers, William Kaplan, Chair, and Rollie King, Employer Nominee, and Bernard Philion, Union Nominee

Respondents

Judge:	The Honourable Justice Joel Fichaud
Appeal Heard:	May 14, 2024, in Halifax, Nova Scotia
Subject:	Interest arbitration award - reasonableness
Summary:	EMC Emergency Care Inc. ("EMC") provides ambulance services across Nova Scotia. EMC and the Canadian Union of Postal Workers ("CUPW") negotiated for the renewal of their collective agreement. Their unit had 63 members. EMC and CUPW reached an impasse on wages. That issue went to interest arbitration under the *Essential Health and Community Services Act*, S.N.S. 2014, c, 2 ("*Act*"). The arbitration board said it applied the statutory criteria in s. 20(2) of the *Act* and the "replication principle". In arbitral jurisprudence, the replication principle means the award should replicate the terms that, in the arbitration board's view, would have resulted from free collective bargaining with the option of a work stoppage. The board's award adopted EMC's proposed

wage schedule, subject to an upward adjustment for one of the classifications.
CUPW applied to the Supreme Court of Nova Scotia for judicial review. The reviewing judge quashed the portion of the award that set wages. The judge said the arbitration board's analysis was unreasonable because it failed to account for CUPW's submission on the effect of inflation. The judge remitted wages to a new arbitration board with the direction that the new board consider "the specific socio-economic factor of inflation".
EMC appealed to the Court of Appeal.

Issues: Was the arbitration board's wages award unreasonable under the principles stated in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65?

Result: The Court of Appeal allowed the appeal and restored the arbitration board's award on wages. The board applied the criteria in s. 20(2) of the *Act* and the replication principle. The impact of inflation is subsumed and balanced by those criteria. Inflation is not an independent criterion under the *Act* or the jurisprudence. The board's reasoning and outcome were intelligible, transparent, justified and reasonable under *Vavilov*'s principles.

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Respondents

Judges:	Bourgeois, Fichaud and Van den Eynden, JJ.A.
Appeal Heard:	May 14, 2024, in Halifax, Nova Scotia
Held:	Appeal allowed with costs, per reasons for judgment of Fichaud J.A., Bourgeois and Van den Eynden, JJ.A. concurring
Counsel:	Chris Montigny and Emily MacDonald for the Appellant David C. Wallbridge and Jason S. Edwards for the Respondent Canadian Union of Postal Workers The Respondents William Kaplan, Rollie King and Bernard Philion not appearing

Reasons for judgment:

[1] The *Essential Health and Community Services Act*, S.N.S. 2014, c. 2 ("*Act*") governs collective bargaining for essential services. It sends the deadlocked parties to interest arbitration without a work stoppage. EMC Emergency Medical Care Inc. ("EMC") operates a province-wide ambulance service which is "essential" under the *Act*. The Canadian Union of Postal Workers ("CUPW") represents paramedics, communications officers and transfer administrators in the unit. EMC and CUPW negotiated toward a renewed collective agreement but did not agree on wages. Further to the *Act*, wages went to an interest arbitration board.

[2] The *Act* prescribes the criteria to govern the analysis by an interest arbitration board. Arbitral jurisprudence has coalesced the criteria into the "replication" principle. The principle means the interest arbitration award should replicate the terms of a collective agreement that would result from a hypothetical free negotiation with the option of a work stoppage. That endeavour is assisted by objective evidence of the terms of employment of similarly situated employees.

[3] In this case, the interest arbitration award said the board had applied the statutory criteria and replication principle. The arbitration board drew its guidance from the wage rates in two other bargaining units between EMC and unions who represent employees in similar work classifications. One unit had more employees than CUPW's unit and the other had fewer. The board found these two units were comparable for the replication principle.

[4] However, the awarded rate increases were below those proposed by CUPW. CUPW says the board paid little or no attention to the union's submission on the impact of inflation. The union sought judicial review of the award.

[5] The judge of the Supreme Court of Nova Scotia quashed the portion of the award that set wages. The judge said the arbitration board's analysis was unreasonable under *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. He faulted the arbitration board for "blindly" applying the replication principle, *i.e.* using wage rates from a comparable unit, and for its "non-existent" reasoning respecting CUPW's submission on socio-economics.

[6] EMC appeals. The issue involves the application of *Vavilov*'s standard of reasonableness to interest arbitration.

Background

[7] EMC operates ground ambulance and air medical transport, telehealth 811 communications, medical transport service and the Medical Communication Centre in Nova Scotia. The Medical Communication Centre receives all requests for ambulances in the province, including emergency, non-emergency and transfer calls, then dispatches ambulances.

[8] CUPW is a "trade union" under the *Trade Union Act*, R.S.N.S. 1989, c. 475, and is the bargaining agent for a unit of EMC's employees who work in the Medical Communication Centre. The unit has 63 members, including 49 Paramedic Communications Officers. Other classifications include Communications Officers and Transfer Administrators.

[9] EMC and CUPW are parties to a collective agreement that operated from April 1, 2014 to March 31, 2019. In May 2019, they began negotiations toward a new collective agreement. By the end of August 2019 it was apparent the parties would not agree on wages.

[10] The operation of the Medical Communication Centre is an "essential health or community service" under ss. 2(1)(f) of the *Essential Health and Community Services Act.* By s. 3(1)(ii), the *Act* applies to ambulance services.

[11] According to ss. 15(1) and 15(5)(d) of the *Act*, when collective bargaining negotiations involving an essential service are at an impasse, the Labour Board may "order that all matters remaining in dispute between the parties with respect to concluding a collective agreement be referred to an arbitration board for final and binding interest arbitration". Section 16 prohibits a work stoppage after the Labour Board has made the order. Section 17 directs the arbitration board to conduct a mediation-arbitration, unless the Minister of Labour and Advanced Education orders otherwise.

[12] On September 7, 2021, under s. 15, the Labour Board convened an interest arbitration board to resolve the outstanding issues between EMC and CUPW. The board's panel comprised the agreed chair William Kaplan, EMC's nominee Rollie King, and CUPW's nominee Bernard Philion.

[13] Section 20 of the *Act* prescribes the arbitration board's authority:

Powers and duties of board

20 (1) An arbitration board shall inquire into and decide on the matters that are in dispute and any other matters that appear to the board to be necessary to be decided in order to conclude a collective agreement between the parties, but in so doing the board shall not decide any matters that come within the jurisdiction of the [Labour] Board.

(2**)** In making a decision, the arbitration board shall consider

(a) the terms and conditions of employment negotiated through collective bargaining for employees performing the same or similar functions in the same or similar circumstances as the employees in the bargaining unit;
(b) the employer's ability to pay, in light of the fiscal situation of the Government of the Province;
(c) the employer's ability to attract and retain qualified employees; and
(d) such other matters as the board considers fair and reasonable in the circumstances.

(3) Nothing in subsection (2) limits the powers of the arbitration board.

(4) The arbitration board remains seized of and may deal with all matters in dispute between the parties until a collective agreement is in effect between them.

(5) The arbitration board shall determine the procedure for the arbitration but shall permit the parties to present evidence and submissions.

(6) The arbitration board shall begin the arbitration proceedings within 30 days after being appointed.

(7) The arbitration board shall make a decision

(a) within 90 days after being appointed; or
(b) where the parties agree to an extended time before or after those 90 days have passed, within that time.

(8) The decision of a majority of the members of the arbitration board is the decision of the board.

[14] On November 21, 2021, the arbitration board's panel met informally with the parties and successfully mediated several issues. However, wages, benefits and some classification issues remained outstanding.

[15] The parties agreed to a six year term from April 1, 2019 to March 31, 2025. The wages for the first four years were subject to the maximums set by the *Public Services Sustainability (2015) Act*, S.N.S. 2015, c. 34. Consequently, the wage rates for April 1, 2019 to March 31, 2023 were not in dispute.

[16] The wages for the final two years (April 1, 2023 – March 31, 2025) were not subject to the statutory maximum, were unresolved by negotiation and mediation, and remained for determination by the interest arbitration award.

[17] With the parties' agreement, the arbitration proceeded by written submissions with no hearing. Documents were tendered without sworn evidence. CUPW and EMC filed briefs on December 13, 2021 and replies four days later.

[18] On wages:

- CUPW proposed: (1) an increase of 2.75% on April 1, 2023, (2) an increase of 2.75% on April 1, 2024, and (3) on March 31, 2025, the rate of Paramedic Communications Officers would match that of Advanced Care Paramedics, with the same percentage increase for Communications Officers and Transfer Agents. CUPW's brief also requested: "effective April 1, 2023, pay scales for all classifications in the bargaining unit should be adjusted by deleting the bottom step from the pay scales and adding a new, top step that is 3% higher than the previous top step and moving all employees up one step".

- EMC proposed: (1) an increase of 1.5% on April 1, 2023, (2) an increase of 0.5% on March 31, 2024, (3) an increase of 1.5% on April 1, 2024 and (4) on March 31, 2025, an increase of 0.5% with an additional 3% for Paramedic Communications Officers.

[19] The period for an award under s. 20(7)(a) had expired on December 6, 2021. Further to s. 20(7)(b), the parties requested an award by January 4, 2022.

[20] On December 27, 2021, the arbitration board issued its award.

[21] The arbitration board's majority (the chair and EMC's nominee) adopted EMC's position on wages with one exception. The exception was that Paramedic Communications Officers would receive the additional increase of 3% on April 1, 2023 instead of March 31, 2025, as proposed by EMC.

[22] The dissent of CUPW's nominee would have extended the additional 3% increase to all classifications, not just the Paramedic Communications Officers.

[23] On January 28, 2022, CUPW applied to the Supreme Court of Nova Scotia for judicial review of the award. Justice Frank Hoskins heard the matter on August 10, 2022 and issued a decision on May 11, 2023. The judge held that the arbitration board's ruling on wage increases was unreasonable. He said the award failed to address the union's submission on the impact of inflation. The judge's reasons include:

> [103] Had the Majority provided some indication that they had considered the cost of living, even if they had determined it was not a deciding factor, this would have been enough of a thread of analysis for this Court to follow to be satisfied that the Majority considered objective factors, rather than blindly applying the agreement of one comparator group. While reasons need not be complex and detailed, they must allow a reviewing court to see that the board properly applied the legal principles. In addition to the lack of express reference, I am not convinced that such considerations can be implied from the reasons or record.
>
> …
>
> [105] Similarly, this Court cannot follow a chain of reasoning that is non-existent. Though comparability is an important element of the replication principle, it is not the only evidence an interest arbitrator should rely on. There is no indication that the Majority turned their minds to the socio-economic factors impacting the parties, despite the cost of living being a "basic underpinning" of interest arbitration. This is a failure to show a rational chain of analysis that would allow this court to determine why the Majority came to the conclusion that it did and renders the decision on this point unreasonable.

[24] The judge quashed the wages award and remitted that issue to a newly appointed arbitration board. He directed the new board "to reconsider the wage rate increases in light of the specific socio-economic factor of inflation" (Decision, para. 122).

[25] The Supreme Court's Order of June 19, 2023 implemented the decision and ordered EMC to pay CUPW costs of $2,000 plus disbursements.

[26] EMC appealed. We heard the appeal on May 14, 2024.

Issues

[27] EMC's factum states two issues:

1. Did the Reviewing Court err in determining the Majority Award was unreasonable?

2. If the Majority Award was unreasonable, did the Reviewing Court err by remitting the issue of wages to a newly-constituted panel?

[28] In my view, the judge erred by ruling the award was unreasonable. It will be unnecessary to consider the second issue.

Standard of Review

[29] The appeal court decides whether the reviewing court correctly identified and applied the standard of review. The appeal court " 'steps into the shoes' of the lower court" and the "appellate court's focus is, in effect, on the administrative decision": *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at para. 46; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 247; *Paladin Security Group Limited v. Canadian Union of Public Employees, Local 5479*, 2023 NSCA 86, para. 37.

[30] EMC and CUPW accept, as did the reviewing judge, that reasonableness governs the matter. Nothing rebuts the presumption of reasonableness, as discussed in *Vaviliov*, paras. 16-17, 23, 34-52.

[31] The issue is whether the reviewing judge correctly applied the reasonableness standard.

The Reasonableness Standard

[32] In *Vavilov*, the majority's decision 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 approach. In *Paladin*, paras. 40-48, this Court summarized the principles from *Vavilov* and *Mason*.

[33] Reasonableness is a "reasons first" approach. 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". Rather, 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". (*Vavilov*, paras. 83-84; *Mason*, paras. 8, 58, 60 and 62-63)

[34] Both the administrative decision's outcome and reasoning matter. The outcome always must be justifiable and, where reasons were required, the reasons must "justify" the outcome. 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)

[35] 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. Context includes 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*, paras. 61, 67, 70)

[36] In this case, the context includes the submissions of the parties. The submissions set the stage for the arbitration board's reasoning. Later, I will set out the pertinent submissions on the contested issue of wages.

[37] Here, the context also includes:

- the quasi-legislative flexibility assigned by the Act to an interest arbitration board: i.e. the board is directed to fashion terms of employment, instead of interpreting them as would a grievance arbitrator;

- the board and parties exchanged information outside this court's record during the mediation, as contemplated by the Act;

- by agreement, supporting material was submitted by counsel informally, with no hearing or sworn evidence during the arbitration;

- the time constraints set by the Act and the parties;

- the discretion given by ss. 20(2)(d) and 20(3) of the Act, i.e. the board may consider other matters "the board considers fair and reasonable in the circumstances" and "[n]othing in subsection (2) limits the powers of the arbitration board".

[38] In *Vavilov*, paras. 108-109, the majority adopted Justice Rand's statement in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, p. 140, that "there is no such thing as absolute and untrammelled 'discretion' ", as any discretion must accord with the legislative purposes for which it was given. The reasonableness standard applies to allay that concern. There is no doubt the interest arbitration board's award is subject to review for reasonableness.

[39] In the application of the standard, the breadth of the discretion afforded by the statute affects whether the decision is reasonable: *Vavilov*, paras. 88-90, 108, 110. The contextual factors bulleted above show the interest arbitration board is accorded significant flexibility to do its job.

[40] Nonetheless, the decision must satisfy *Vavilov*'s minimum standards, *i.e.* the "hallmarks of reasonableness". These are "justification, transparency and intelligibility". (*Vavilov*, paras. 99 and 103; *Mason*, para. 60)

[41] Intelligibility and transparency mean 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). A question-begging gap or incoherence on a critical point may impair intelligibility. Mere repetition of statutory language followed by a peremptory conclusion challenges transparency, "will rarely assist a reviewing court" and is "no substitute for statements of fact, analysis, inference and judgment" (*Vavilov*, para. 102; *Mason*, para. 65).

[42] In this case, intelligibility and transparency require that the reviewing court be able to understand the arbitration board's reasoning from the board's reasons, supported by the permissible contextual aids I have noted above. (*Vavilov*, paras. 88-94, 97 and 110; *Mason*, paras. 61, 67 and 70)

[43] Reviewing courts "cannot expect administrative decision makers to 'respond to every argument or line of possible analysis' [citation omitted], or to 'make an explicit finding on each constituent element, however subordinate, leading to its final conclusion' "[citation omitted]. That is because "[t]o impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice". Rather, the questions for the reviewing court are: was the decision maker "actually alert and sensitive to the matter before it", were the parties' concerns "heard", and does an omission reflect "inadvertent gaps and other flaws in its reasoning"? [*Vavilov*, para. 128; *Mason*, para. 74].

[44] The third hallmark is justification. In *Vavilov*, the majority explained:

- An outcome derived from reasoning with a significant error is unreasonable. 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]". (Vavilov, para. 102).

- On the other hand, a "minor misstep" or a "merely superficial or peripheral" shortcoming will not suffice to overturn an administrative decision. The flaw must be "sufficiently central or significant to render the decision unreasonable". (Vavilov, para. 100).

- To assess 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" and is unreasonable. (Vavilov, paras. 84-85, 99, 100-107; Mason, paras. 8, 59, 64).

- 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 statutes 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).

[45] Subject to the above, it is unnecessary that the reviewing court agree with the administrative decision. The reviewing court neither is applying correctness nor, in this case, is it the appointed interest arbitrator.

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

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

Context: The Parties' Submissions to the Arbitration Board

[48] EMC's brief of December 13, 2021 proposed replication as the guiding principle:

> **Section II – Legal Principles**
>
> 9 Interest arbitration is described as an extension of the collective bargaining process in that it is intended to replicate, to the extent possible, the agreement that would have been reached by the parties had they been able to negotiate the agreement freely using economic sanctions. As such, the guiding principles in interest arbitration are replication and comparability.
>
> 10 In order to replicate what would likely have been agreed to through bargaining, it is helpful to consider other collective agreements for comparable work. The principle of comparability entails that like work should be compensated alike. An appropriate comparator constitutes a group that shares certain similarities such as the nature of the work, skills of the employees, abilities and qualifications required and the circumstances in which they are exercised.
>
> 11 The case law on replication theory is well established, and well known by the panel, as it has guided interest arbitration across the country for decades.
>
> 12 The case law further dictates that the interest arbitration should take a fairly conservative, incremental approach.

[49] EMC's brief then cited EMC's collective agreements with the Nova Scotia Government Employees Union ("NSGEU") and the International Union of Operating Engineers ("IUOE"). The NSGEU unit includes 26 telehealth associates and counselors. The IUOE unit includes 1,200 paramedics. The NSGEU agreement was negotiated. The IUOE agreement was mostly negotiated but wages were determined by an interest arbitration award: *EMC Emergency Medical Care Inc. v. International Union of Operating Engineers, Local 727*, award dated Feb. 14, 2020 (DeMont – chair).

[50] EMC's brief summarized its position with reference to the NSGEU and IUOE wage schedules:

> 39 In summary, the wage rates proposed by the Employer are representative of those rates that were negotiated in similar bargaining units including other bargaining units involving the same Employer and other bargaining units with the same bargaining agent.

[51] CUPW's brief proposed replication, based on comparability, as the guiding principle:

> **Legal Considerations**
>
> 13. The Board does not need to be reminded of the legal principles that it is to apply in this case. The Board's objective is to replicate as best it can the results of free collective bargaining conducted by parties possessing the right to strike or lockout.
>
> 14. In order to do this, the Board is to take account of the terms and conditions of employment of employees who are similar to employees in the bargaining unit in question, in terms of the work they perform and their geographic location.

[52] CUPW's brief submitted that the rising cost of living justified its requested increases of 2.75% per annum plus an initial step-up of 3%:

> 18. The Union submits that in setting the wage rates for employees in the bargaining unit, the Board should also consider … the impact of inflation on the actual benefit employees will gain from any increase the Board may award. Taking account of recent increases in the cost of living would be fair and reasonable in the circumstances.

[53] CUPW submitted the replication principle supported its position on the impact of inflation. That was because, in a free negotiation, CUPW would have taken strike action to achieve its demands:

> 55. The wage increases proposed by the Union for the last two years of the Collective Agreement will allow the employees to recover a portion of their loss [*sic*] purchasing power. This would be a fair and reasonable outcome in the circumstances. It would also be consistent with the principle of replication. Employees who have lost ground to the cost of living to the degree experienced by employees in this bargaining unit could be expected to exercise the right to strike in order to improve their economic standing.
>
> …

> 58. It would be unreasonable to conclude that employees engaged in free collective bargaining, with the right to strike, would ignore their current economic realities and settle for terms that left them even further behind.

[54] In short, to the arbitration board:

- EMC and CUPW agreed: (1) the guiding principle for interest arbitration was "replication", (2) replication involved an assessment of the wage rates that would be reached by hypothetical free collective bargaining with a right to strike or lockout, and (3) to make that assessment, an interest arbitration board should consider the wages of similarly situated employees. Further, (4) both parties accepted the expert panelists were acquainted with the well-known principles of replication and needed no further schooling on the topic.

- EMC and CUPW diverged on the application of replication: (1) EMC submitted, under the replication model, the wage rates in the IUOE and NSGEU units were the best comparators that encompassed the impact of inflation and balanced it with other factors. (2) CUPW submitted the IUOE and NSGEU collective agreements did not sufficiently address the impact of inflation, CUPW would have taken strike action to obtain higher rates, and the replication principle should reflect that prospect.

Reasons of the Arbitration Board's Majority

[55] The Decision of the arbitration board's majority recited the background (page 1). Then it noted: (1) the board had resolved some issues by mediation, (2) the parties had agreed the adjudication would proceed by written submissions, which concluded on December 17, 2021, and (3) the parties had asked the board for an award by January 4, 2022. (pages 2-3).

[56] Next, the Decision identified the principles that guided the board's analysis: *i.e.* the statutory criteria in s. 20(2) and the replication principle:

> In determining the outstanding issues, the Board has paid careful attention to the statutory criteria that inform cases of this kind and, most important of all, replication: the replication of free collective bargaining. Insofar as replication is concerned, mention must be made of the outcomes between the employer and two

> of its other unions: IUOE Local 727, which represents 1200 Paramedics and the NSGEU, which represents 26 Telehealth Associates and Counsellors. [page 3]

[57] The Decision summarized the parties' submissions. It noted "the union insisted … that inflation be taken into account …", while "[t]he employer … took the position that the wage outcomes were definitively resolved through the application of the replication principle…". (page 3)

[58] According to the arbitration board, the best comparators were EMC's wage schedules in the IUOE's unit (1,200 paramedics) and the NSGEU's unit (26 tele-health associates and counsellors). The board's Decision said:

> In making the wage award, we have followed the legislation for the prescribed period [*i.e.* years 1-4 of the 6 year term] and replicated the IUOE/NSGEU outcomes for the remaining period of the agreed-upon term. The best evidence of appropriate wage outcomes is what was arrived at with the much larger 1200 Paramedic IUOE – a unit with the same employer, one primarily of Paramedics just like this one. [page 4]

[59] Consequently, from the IUOE and NSGEU collective agreements, the Board adopted the wage schedule proposed by EMC (1.5% plus 0.5% per annum) instead of the schedule proposed by CUPW (2.75% per annum).

[60] The board's Decision then addressed CUPW's request for an across-the-board step-up of 3%. The Decision rejected a unit-wide 3% adjustment but awarded Paramedic Communications Officers (49 of 63 employees in the unit) a 3% step-up as of April 1, 2023. Under the *Public Services Sustainability (2015) Act*, April 1, 2023 was the earliest permissible date for an adjustment to wages. The Decision explained the board's reasoning:

> Having carefully reviewed the duties and responsibilities, the demand that Transfer Agents receive the same 3% adjustment as the Paramedics in the bargaining unit is not justified based on internal (Telehealth) and external comparators. Transfer Administrators do not perform emergency work. Moreover, notwithstanding numerous points of comparison, for instance qualifications, duties and responsibilities, Transfer Administrators nevertheless receive substantially higher wages than the Telehealth Associates working for this same employer. Accordingly, and applying the replication principle, the 3% adjustment is limited to the Paramedic Communications Officers; there is no justification in the submissions of the parties that would lead us to apply this 3% adjustment to anyone else. This 3% adjustment does not, admittedly, address union demands, to give just one of a number of examples advanced by the union, for police dispatch

> parity – a comparison vigorously disputed by the employer – but is appropriate in the circumstances from a replication perspective and it also acknowledges recruitment and retention challenges that exist for Paramedic Communications Officers (not the Transfer Administrators). We have advanced the 3% payment from what was proposed by the employer. [page 4]

[61] Recruitment and retention, cited in this passage, are statutory criteria under s. 20(2)(c) of the *Act*.

[62] The Decision then reiterated that the IUOE collective agreement was the best comparator for replication:

> … Clearly, there is no basis to depart from the pattern set in the 1200-person bargaining unit and doing so would be completely inconsistent with the appropriate application of the replication principle. [page 5]

[63] The Award concluded by summarizing the outcome:

> The collective agreement settled by this award shall, therefore, consist of the unamended provisions of the previous collective agreement, the agreed-upon items (Education Allowance, Use of Disciplinary Record, Shift and Weekend Premiums & Accumulation of Vacation Leave) and the terms of this award.
>
> **Award**
>
> **Term – Agreed**
>
> April 1, 2019 to March 31, 2025
>
> **Wages – All Classifications**
>
> April 1, 2019: 0%*
> April 1, 2020: 0%*
> April 1, 2021: 1%*
> April 1, 2022: 1.5%*
> March 31, 2023: 0.5%*
> April 1, 2023: 1.5%
> March 31, 2024: 0.5%
> April 1, 2024: 1.5%
> March 31, 2024: 0.5%
>
> *Prescribed by statute

Special Adjustment Paramedic Communications Officers
April 1, 2023: 3% (*Accordingly, 1.5% + 3% = 4.5%)

Retroactivity
Retroactivity payments per collective agreement with appropriate amendments to reflect the operative dates.

[64] At the hearing in this Court, counsel agreed that the last date in the scale, "March 31, 2024", should read "March 31, 2025".

Analysis

[65] Under *Vavilov*, I will discuss first whether the board's reasoning is intelligible and transparent, then whether it is justifiable.

[66] **Intelligible and transparent?** Are the board's coherent and rational and do the "reasons read in conjunction with the record … make it possible to understand the [board's] reasoning on a critical point"? (*Vavilov*, paras. 99 and 103-104).

[67] The board's Decision said "the union insisted … that inflation be taken into account …". CUPW says this was a meagre synopsis of CUPW's submission.

[68] The Board's decision also abbreviated EMC's submission.

[69] Context matters. The parties and board had engaged in a mediation, involving a comprehensive exchange of the parties' submissions, followed by detailed arbitration memoranda. The parties acknowledged this panel did not require schooling. By agreement, the arbitration process was quick and informal to meet the time limits set by statute and the parties. The board was tasked to find an expeditious and pragmatic solution to a thorny problem involving an essential service.

[70] The board's succinct but accurate summary of the parties' submissions does not indicate the board was less than alert to the parties' arguments.

[71] The board said its analysis was governed by the factors in s. 20(2) of the *Act* and the replication principle.

[72] The factors in s. 20(2) include terms in negotiated collective agreements for similarly situated employees, the employer's ability to pay, the employer's ability to attract and retain employees and other factors the board considers as fair and reasonable.

[73] The replication principle is established in interest arbitral practice. It synthesizes the factors in Nova Scotia's s. 20(2) and similar provisions in statutes of other provinces: *e.g.* see *Scarborough Health Network v. Canadian Union of Public Employees, Local 5852*, 2020 ONSC 4577 (Div. Ct.), paras. 16-17.

[74] Both parties' briefs to the board proposed the replication principle. CUPW's brief said:

> 13. … The Board's objective is to replicate as best it can the results of free collective bargaining conducted by parties possessing the right to strike or lockout.

[75] Consequently, the arbitration board's reasons applied the replication principle.

[76] Replication is based on comparable data. CUPW's brief described the mechanics:

> 14. In order to do this, the Board is to take account of the terms and conditions of employment of employees who are similar to employees in the bargaining unit in question, in terms of the work they perform and their geographic location.

[77] The board's reasons adopted that approach.

[78] The board's reasons determined that the most comparable groups of employees were the IUOE and NSGEU units. That was because those employees were employed by the same employer (EMC) and performed basically the same work as CUPW's members. The IUOE unit had 1,200 paramedics and the NSGEU unit had 26 tele-health associates and counsellors. The numbers indicate a spread of bargaining power compared to the 63 members in CUPW's unit.

[79] The NSGEU's wages were negotiated in a collective agreement.

[80] The IUOE's collective agreement was mostly negotiated, with the wage rates set by interest arbitration. The IUOE's interest arbitration award was governed by the same criteria, *i.e.* s. 20(2) and replication, that apply to the dispute between EMC and CUPW. At the hearing in this Court, CUPW's counsel accepted that an interest arbitrated wage schedule that itself is derived from replication criteria, is available for comparison under the replication principle. To this effect see: *Victorian Order of Nurses Canada – Ontario Branch v. Ontario Nurses' Association*, 2023 CanLII 122853 (ON LA – Stout chair), paras. 17 and 20 (quoted below, para. 88) with which I agree.

[81] CUPW did not cite any comparable wage award, collective agreement, bargaining unit or group of employees with a provision that included a dedicated inflation adjustment. CUPW endorsed the replication principle but offered no meaningful material to counter the comparability of the IUOE and NSGEU units under that principle.

[82] Therefore, the EMC/CUPW arbitration board's reasons adopted the basic progression (1.5% + 0.5% per annum) from the wage schedules in the two comparable groups, *i.e.* the IUOE and NSGEU units.

[83] In response to CUPW's further submission, the board also awarded a 3% step up, but tailored it to the EMC/CUPW unit. The board gave the 3% step up to Paramedic Communications Officers only (49 of the 63 members of the unit), not to the other classifications. The board's decision explained its reasons (passage quoted above, para. 60):

- First, based on the types of work done by the classifications in this unit, the board found "there is no justification in the submissions of the parties that would lead us to apply this 3% adjustment to anyone else" except Paramedic Communications Officers.

- Second, the board said the 3% increase "is appropriate in the circumstances from a replication perspective and it acknowledges recruitment and retention challenges that exist for Paramedic Communications Officers (not the Transfer Administrators)". Recruitment and retention are criteria under s. 20(2)(c) of the *Act*. According to the material filed with the board, recruitment and

> retention had been a concern for Paramedic Communications Officers, but not the other classifications.

[84] The board timed the 3% step-up to Paramedic Communications Officers as of April 1, 2023, the earliest permissible date under the *Public Services Sustainability Act*.

[85] In short, the board applied the criteria in s. 20(2) and the replication principle, using what the board found to be the best available comparator evidence. The board's reasons are understandable and display a coherent and rational path to their outcome. They are intelligible and transparent.

[86] **Justifiable?** Is the Board's reasoning justified in relation to the facts and the law?

[87] Wesley Rayner, *Canadian Collective Bargaining Law* (Markham, Ontario: LexisNexis, 2007), 2nd ed., pp. 547-48 summarizes the replication principle:

> ***(i) The Replication of Collective Bargaining Principle***
>
> Interest awards have stressed repeatedly the importance of replicating, as much as possible what the parties would have agreed to if they had been able to negotiate freely and fully (including the use of economic sanctions). That principle has been adopted by several boards of arbitration and the British Columbia and Ontario Boards in first contract negotiation. Boards have repeatedly refused to award "breakthrough" provisions or have warned against over generous awards. …
>
> The approach would appear to reject, and rightly so, any tendency to simply split the difference between the parties' bargaining positions. …

[88] In *Victorian Order of Nurses*, the decision of the chair elaborated on the application of replication, in a passage I endorse:

> [17] The interest arbitration process is not a judicial or adjudicative process guided by one's personal sense of fairness or social justice. **Interest arbitrators (or arbitration boards) do not implement social policy** and it is not their task to determine government funding. As stated by Arbitrator Martin Teplitsky Q.C. in his August 31, 1982, award between *SEIU and a Group of 46 Participating Hospitals*, "Interest arbitrators attempt to emulate the results of free collective bargaining … Interest arbitrators interpret the collective bargaining scene. They do not sit in judgment of its results." **The collective bargaining scene includes**

> **both comparable freely negotiated settlements and awards, which are themselves based on relevant comparators.**
>
> …
>
> [19] The application of the replication principle is an objective exercise, driven using objective evidence, to assist in determining what the parties would have achieved in free collective bargaining. **The subjective posturing by either party is neither helpful nor relevant to the exercise because it is easy for either party to take a hard line and refuse to bargain when there is no threat of economic sanctions or consequences. What is found to be a fair and reasonable result in interest arbitration is determined by examining the market forces** and economic realities to determine what the parties would have agreed upon in the absence of interest arbitration being imposed upon them.
>
> [20] **The most significant objective evidence relied upon by boards of arbitration includes evidence of relevant comparators, both internal and external, either freely negotiated or imposed by arbitration.** These comparators illuminate the market forces at play in the economy, providing a guide as to the total compensation being enjoyed by similarly situated employees, both in terms of existing compensation and achievements made in the current collective bargaining environment. It is comparability that provides the objective evidence needed to apply replication or as Arbitrator Goodfellow has said, "the flesh on the bones" that is required to apply the replication principle, see *Strathroy Middlesex General Hospital and ONA*, [2012] O.L.A.A. No. 47.
>
> [21] The comparators commonly examined in interest arbitration include the terms and conditions of employment negotiated by parties in the same industry or sector, facing a similar economic and labour market environment and bargaining relationship. **The most relevant comparators involve situations that closely mirror the situation before the board of arbitration.** Collective agreements negotiated by either party for a similar period of time involving similar employees providing similar services in similar communities would be relevant to the decision maker. That being said the relevance of any given comparator is diminished the further away you move from the facts before the board of arbitration.
>
> [bolding added]

[89] The replication principle is objective. It is based on the best comparators. It is not commanded by a declaration in a party's arbitration brief that it would have triggered a work stoppage to surpass those comparators. In reply, the other party could posture it would not have budged. In the end, the arbitration board would be left to find guidance from dispassionate evidence.

[90] Replication is market driven. It is not a choice among social policies. By drawing guidance from the terms of employment in the most comparable workplaces, the board did not "blindly" disregard socio-economics, as the reviewing judge said. The board applied the governing legal principle.

[91] Section 20(2) does not cite inflation as an independent criterion. The provision subsumes and balances the effect of inflation within the listed factors. Section 20(2)(a) assumes that the terms of employment reached in comparable workplaces reflect that balance. Similarly, under s. 20(2)(c), the employer's ability to attract and retain workers channels the effect of inflation. If EMC's wages insufficiently account for inflation, the employee will move to a better paying job. This will adversely affect the employer's attraction and retention.

[92] This adverse effect on attraction and retention had occurred with EMC's Paramedic Communications Officers, for which the board awarded them an additional 3%. As it had not occurred for the other classifications, they were not awarded a 3% step-up. The outcome applies the intent of s. 20(2)(c): *i.e.* the attraction and retention of employees is a legislated criterion, while inflation *per se* is not.

[93] The replication principle makes the same assumption as does s. 20(2). Replication does not ignore inflation. It assumes the terms of employment reached in comparable groups have balanced it with other ambient market factors. For instance, according to the IUOE/EMC award, the IUOE demanded an increase of 5% per annum, higher than CUPW requested here. No doubt the IUOE's aspiration of 5% embodied some rapport with inflation. Yet, under s. 20(2) and the replication principle, the IUOE's award was a wage scale significantly lower than either its demand or the inflation rate.

[94] The criteria in s. 20(2) and the replication principle, considered by the board, blend the cost of living with other market factors. The board's decision does not have a reasoning gap where the free-standing analysis of inflationary socio-economics would belong.

[95] The board's reasoning and outcome are justified factually and legally.

[96] **Summary:** I understand the board's reasoning. The board heard and was alert to CUPW's submissions. There is no central flaw or significant gap in the

board's reasoning. The analysis is transparent, intelligible and justified, is based on a coherent chain of analysis and rationally leads from the material before it to the board's conclusion.

[97] The decision is reasonable under *Vavilov*.

Conclusion

[98] I would allow the appeal, overturn the Supreme Court's Order dated June 19, 2023 and dismiss CUPW's application for judicial review of the majority award of the interest arbitration board.

[99] I would overturn the Supreme Court's Order for costs against EMC and direct that any costs paid to date under that Order be repaid to EMC. I would order CUPW to pay EMC costs of $2,500 for the proceeding in the Supreme Court plus $4,000 costs for the appeal, both amounts all-inclusive.

Fichaud J.A.

Concurred in:

Bourgeois J.A

Van den Eynden J.A.