SUPREME COURT OF NOVA SCOTIA

Citation: *Grafton Developments Inc. v. Labourers International Union of North America, Local 615*, 2022 NSSC 208

Date: 20220725
Docket: Hfx No. 510919
Registry: Halifax

Between:

Grafton Developments Inc.

Applicant

v.

Labourers International Union of North America, Local 615

v.

Nova Scotia Labour Board

Respondents

Decision

Judge: The Honourable Justice Denise M. Boudreau

Heard: May 16, 2022, in Halifax, Nova Scotia

Counsel: Bradley D.J. Proctor and Alex Warshick, for the Applicant
Jillian Houlihan and Bettina Quistgaard, for the Respondent, Labourers International Union of North America, Local 615
Edward A. Gores, Q.C., for the Respondent, Nova Scotia Labour Board

By the Court:

Introduction

[1] The matter before the Court is a judicial review brought by Grafton Developments (the "applicant") of a decision (the "Decision") made by the Nova Scotia Labour Board ("the Board"). The Decision was in relation to an application by the Labourers International Union of North America, Local 615 (the "respondent"), for certification as bargaining agent for all labourers employed by the applicant in the construction industry on mainland Nova Scotia, pursuant to s. 95 of the *Trade Union Act* R.S.N.S. c. 475 (the "*Act*").

[2] As part of its response to the application, the employer (the applicant) provided a list of employees that, in its view, should be included onto the bargaining unit list. That list included, *inter alia*, six people working as cleaners at the "Jade", a downtown Halifax apartment building under construction (the "disputed workers"). The respondent did not agree with their inclusion on the list. The issue came before the Board for adjudication.

[3] In their Decision, dated October 22, 2021, the Board determined that none of the disputed workers should be included in the unit. On the basis of the reduced list, the application for certification was granted.

[4] The applicant brings a judicial review of that Decision to this Court. It is the applicant's contention that the Board erred in its conclusions about the disputed workers, and erred in excluding them from the bargaining unit.

[5] The applicant's Notice of Application provides 13 separate grounds for this review (grounds (a) to (m)). In their brief and during oral argument, counsel for the applicant helpfully grouped these grounds into three general categories, specifically:

1) that the Board applied the wrong test and analysis and relied upon irrelevant factors and findings (grounds (a) – (e));
2) that the Board failed to engage with the relevant evidence, authorities, and pleadings, and failed to give adequate reasons (grounds (f) – (j); and/or
3) that the Board reached a conclusion which is unreasonable for statutory and public policy reasons (grounds (k) – (m)).

[6] The respondent, for its part, submits that the Decision was reasonable and that none of the errors suggested by the applicant were committed here.

Facts

[7] The applicant is a construction and development business. At all material times it was engaged in the construction of two apartment buildings in downtown Halifax, the "Jade" and the "Green Lantern". At the time that the present applications were being filed, the "Jade" was in its final phases of construction.

[8] The respondent is a union that represents labourers in the construction industry on mainland Nova Scotia.

[9] The legislation governing labour relations in the construction industry is Part II of the *Act*. Pursuant to s. 95, a trade union may apply for certification as bargaining unit for certain groups of employees. The process for such applications is outlined in the section:

> 95(1) A trade union or a council of trade unions claiming to have as members in good standing not less than thirty-five per cent of the employees of one or more employers in the construction industry in a unit appropriate for collective bargaining may, subject to the rules of the Board and in accordance with Sections 23 and 24, make application to the Board to be certified as bargaining agent of the employees in the unit.
>
> (2) Where a trade union or council of trade unions make application for certification as bargaining agent of the employees in a unit, the Board
>
> (a) shall determine the unit of employees that is appropriate for collective bargaining by reference to a geographic area;
>
> (b) may designate the whole or any part of the Province as a geographic area and may limit the unit to a designated geographic area; and
>
> (c) may, before certification, if it deems appropriate to do so, include additional employees in or exclude employees from the unit.
>
> (3) When, pursuant to an application for certification under this Part by a trade union or council of trade unions, the Board has determined the unit appropriate

> for collective bargaining and consistent with a geographic area established by the Board:
>
> > (a) if the Board is satisfied that the applicant trade union or council of trade unions has as members in good standing less than thirty five percent of the employees in the appropriate unit the Board shall dismiss the application;
> >
> > (b) if the Board is satisfied that the applicant trade union or council of trade unions has as members in good standing more than fifty percent of the employees in the appropriate unit the Board may certify the trade union or council of trade unions as the bargaining agent of the employees in the unit;
> >
> > (c) if the Board is satisfied that the applicant trade union or council of trade unions has as members in good standing not less than thirty five percent and not more than fifty percent of the employees in the appropriate unit, the Board shall forthwith order that a vote be conducted among the employees in the appropriate unit to determine whether the employees select the applicant trade union or council of trade unions to be bargaining agent in their behalf.

[10] The respondent filed its certification application with the Board on April 23, 2021, seeking certification as bargaining unit for the following group:

> All employees of Grafton Developments Inc. engaged as Labourers on Mainland, Nova Scotia, but excluding all other employees, Foremen other than working Foremen, and those equivalent to the rank of Foremen, and above, office employees, and those excluded by Clauses (i) and (ii) of Paragraph (e) of Section 92 of the Trade Union Act.

[11] In response to the application for certification, the applicant provided a statutory declaration, as it was required to do, listing the 18 employees that (in its view) were a) in its employ as construction labourers on mainland Nova Scotia, and b) were at work on April 23, 2021.

[12] This requires some further background explanation. There are a number of requirements of a certification application. One requirement is that the type of work performed by each employee in the proposed unit must be shown to be within the trade jurisdiction of the applicant Union. In the present case, the relevant trade jurisdiction was "construction labourers" work.

[13] Furthermore, the type of work being done by any particular employee is to be determined by looking at one specific day only, that is, the date of application. This is known as the "snapshot" rule. Pursuant to that rule, an application for certification requires an assessment of employees/work on the date the application is filed.

[14] To put it more specifically, in order for any individual employee to be included on this list (and thereby included in an assessment of union support on an application), that employee must fulfill three criteria, all on the date of application:

1) s/he must be at work;

2) s/he must be on the construction site, performing work in the construction industry; and

3) s/he must be performing work in the relevant trade for the majority of the day.

[15] All of this is crucially important in determining the level of employee support for certification. Pursuant to the *Act*, and specifically s. 95, certification depends on the percentage of support among qualified members.

[16] In the case at bar, the Board first assessed the application in May 2021. Based on the information before it at that time (notably, the inclusion of the disputed workers on the list), the Board concluded that the respondent had less than 35 percent support for certification within the membership. The application for certification was dismissed pursuant to s. 95(3)(a) of the *Act*.

[17] The respondent then requested a hearing in the matter, as is permitted by s. 96 of the *Act*, with a view to requesting that the Board review/revoke its dismissal and grant the application. In its request, the respondent argued that there was a group of seven workers that should not have been included on the employee list. One of those seven people was voluntarily removed by the applicant at the time of the hearing. This left the six disputed workers for determination.

[18] The Board heard evidence that the disputed workers were a group of persons, of Filipino descent, who were periodically hired to do the last “finish” cleaning of the apartments, to make them ready for occupation by tenants. Two of this group, Ofelia Cawal-O and her husband Modesto Cawal-O, were already

employees of the applicant in another capacity. They lived at a different residential property and acted as that property's superintendents.

[19] Mr. and Mrs. Cawal-O performed some of this “finish” cleaning work at the Jade site. In addition, Mrs. Cawal-O had “recruited” some more cleaners for the Jade from among her own group of friends. Mrs. Cawal-O would contact certain of these individuals as needed, and arrange for them to come and perform these various cleaning tasks. She would keep track of the hours worked by these individuals and submit their hours to the applicant on handwritten sheets. The applicant would then pay Mrs. Cawal-O the entire amount, by cheque, and she would then, herself, distribute pay amongst the other workers.

[20] Ms. Cawal-O gave testimony to the Board explaining the work performed by herself and the other cleaners at the Jade. This is summarized at paras. 20-21 of the Decision:

> [20] She started working at The Jade in March 2021, cleaning up construction boxes, hallways, windows and the like. She would sweep carpets, and remove nails, drywall etc. with an industrial broom, before vacuuming. She would wipe the baseboards, dust, and use a sweeper on the wall. She would pick up things left in the unit, sweep, then mop. If she saw paint on the floor, she would remove it with a scraper, and mop again. She would use coconut oil on the floor at the end, for shine. In the kitchen, she would vacuum sawdust, and take out nails and drywall, wipe surfaces with soap and water, and remove plastic from the appliances. In the washroom she would remove things like coffee cups, vacuum, wipe surfaces with soap and water, and clean the glass with Windex. The windows have an aluminum frame which can rust, which she removes with a special product. She would also clean windows in the commercial areas.

> [21] Her work is directed by the owners or the foreman. She does not decide on her own which units to clean. The others do similar work. … (Emphasis added)

[21] The respondent argued before the Board that these disputed workers should not have been included on the employees list. First, they argued that the disputed workers did not meet the "date of application" rule (i.e., whether, on the date of application, they had performed work of construction labourers for the majority of their working day); and second, they took the position that the applicant was not the "true employer" of these disputed workers (as is required for consideration in a certification application).

[22] The Board issued its Decision on October 22, 2021. The Board noted therein that there were three issues in dispute:

> [51] The issues in dispute are whether the six cleaners in question were in fact doing the work of labourers in the construction industry, whether all or some of them were actually on site on April 23, the date of the certification application, and whether Grafton Developments is their true Employer. (Emphasis added)

[23] The analysis and findings of the Board followed. In my view, it is useful to quote them in their entirety for ease of reference, but also to better assess their reasoning:

> [52] On the first question - whether the work being done by these cleaners was within the trade jurisdiction of the Labourers' Union - several contextual factors are relevant. The company operated fairly informally. The systems for keeping track of hours is very loose, and unlike at many other construction sites, the time sheets do not note the nature or location of the work being done. The 'regular' labourers are paid by direct deposit, and the required remittances were made; this

is in sharp contrast to how this group of cleaners were paid. Ms. Cawal-O kept track of their hours, and submitted it to the Employer. She received a cheque in her own name, which she allotted to the other workers in cash. No statutory deductions were made.

[53] The point of these comments is not to chide the Employer for its payroll practices, but rather to point out the difference in treatment between the 'regular' labourers crew, and the cleaners in dispute. Further differences include the fact that the 'regulars' generally eat and take breaks together, keep the same regular hours, meet in the morning to discuss the days work, receive safety training, and wear the usual safety gear. These cleaners do not. The 'regular' labourers do a variety of tasks as required; the six cleaners sole job is to clean up the space, prior to rental, using some tools and supplies that the regular labourers would not use. There are real and significant differences between the two groups of workers.

[54] Based on all the evidence, the Board concludes that the cleaning being done by this crew was not the type of cleaning that construction labourers typically do. Mr. Soucy described it as more like professional cleaning, that is, ensuring that the completed spaces are ready for rental. We are satisfied that this constituted the bulk of the work that the six cleaners were doing, and that it does not fall within the jurisdiction of the Union.

[55] Even if the Board were wrong in this finding, we are faced with significant doubts as to whether all of the six cleaners in question were on site on April 23. Because there is no indication on any of the time records as to what work was being done, all witnesses testified from memory.

[56] The evidence concerning the key fob may suggest that Ms. Cawal-O was (sic) The Jade at some point that day, but the evidence as to the others is scant. While all of the six may have worked at the site at some point, Ms. Cawal-O testified that cleaners that she brought in were not a consistent crew, but that there could be different people there on different days. We now know that Ms. Abella, who was originally on the Schedule 'A', was not in fact there on April 23, despite Ms. Cawal-O's recollection to the contrary. Mr. MacDonald testified that he saw Mr. Cawal-O and two others at The Jade on April 23 when he was going for a break, but could not identify the "two others". (He also testified that Kyle MacDonald was there that day, which proved to be incorrect.) Mr. Soucy did not recall seeing them there on April 23, but admitted that he did not have specific recollection of that day. Mr. Gajadhar testified that he had seen "one man and a lady" doing cleaning, but could not say whether it was on April 23.

[57] Further, the discrepancies regarding the time records of the six cleaners suggest that it is as likely as not that they worked on Saturday April 24 rather than Friday April 23. We do not accept the evidence of Ms. Cawal-O that the reference in the text message on April 23 asking if they should clean "tomorrow", and the text of April 25 saying that they cleaned certain units "yesterday" indicates that they were *not* working at The Jade on Saturday April 24.

[58] The evidence supports that Mr. and Ms. Cawal-O may have been on site on April 23. In our view, there is insufficient reliable evidence to conclude that the others were there on the date of application.

[59] Finally, on the question of whether Grafton Developments was the true employer of the six cleaners, the general test applied is that in ***York Condominium*** (supra), at paragraph 10:

> In determining which of two or more parties is or are the employer(s) of certain employees, the Board has applied a series of criteria which are listed below:
>
> (1) The party exercising discretion and control over the employees performing the work. …
>
> (2) The party bearing the burden of remuneration. …
>
> (3) The party imposing discipline.
>
> (4) The party hiring the employees. …
>
> (5) The party with the authority to dismiss the employees. …
>
> (6)The party who is perceived to be the employer by the employees. …
>
> (7) The existence of an intention to create the relationship of employer and employees. …

[60] The only one of the workers in question who testified was Ms. Cawal-O. The Board accepts that the above factors support the conclusion that Grafton is her Employer. She and her husband operate as a team; one could also consider him to be an employee of Grafton. It is not so easy to reach that conclusion about the others. We have no evidence at all whether they perceive Grafton to be their employer (factor 6), or whether there was an intent to create an employer/employee relationship (factor 7). There is really no evidence of a relationship between Grafton and any of them. While the Employer does tell Ms. Cawal-O what units are to be cleaned, it is she who chooses which of her friends do the work, she who determines when the work will be done, she who in fact pays them (through a cheque from the numbered company made out to her), and she who would likely deal with disciplinary problems, though this has not arisen.

[61] It is not necessary that all of the ***York Condominium*** factors be met in order to find that an employer/employee relationship exists; while the main factor is control, the conclusion as to whether the circumstances point in favour of such a conclusion will depend on the circumstances in play. We conclude that the element of control exercised by Ms. Cawal-O over the four remaining cleaners is sufficiently significant as to make a finding that Grafton is not their true employer.

Order

> [62] The Board concludes that the workers in question were not doing work in the trade jurisdiction of the labourers on the date of application. The board therefore finds these six workers should not have been on the Schedule 'A'. …

[24] The applicant has brought a judicial review of this Decision, and expresses a number of objections to it. First, in relation to whether the disputed workers were within the trade jurisdiction of the respondent, it is the contention of the applicant that the Board misdirected itself, asked and answered the wrong question(s), and applied the wrong test in their analysis.

[25] Secondly, says the applicant, the Board failed to give adequate reasons or reference to authority for their conclusions, and did not engage with or respond to the arguments put forward by the parties.

[26] Lastly, the applicant submits that the Decision creates an unreasonable result, i.e., that the work of the disputed workers would ostensibly fall outside any trade union jurisdiction. Such, says the applicant, is contrary to the applicable legislation and public policy.

Standard of review

[27] Both parties agree that the applicable standard of review herein is reasonableness.

[28] The case of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, is at present the leading authority in this area of law. Prior to *Vavilov*, and pursuant to *Dunsmuir v. New Brunswick*, 2008 SCC 9, it was generally understood that an assessment of reasonableness required a reviewing court to assess whether an administrative decision-maker's decision was within a "reasonable range of outcomes". Such was done with deference to the administrative decision maker (assuming that their decision was one within the bounds of their home statute).

[29] However, having said that, it is important to note that such was not the only criteria for reasonableness, prior to *Vavilov*. The court in *Dunsmuir* also instructed reviewing courts to look at the reasoning in the decision itself, and seek "justification, transparency and intelligibility" within it, in order to determine its reasonableness (see para. 47 of *Dunsmuir*). An unintelligible decision, by definition, could not be reasonable.

[30] Since *Vavilov*, that requirement has been made more clear. *Vavilov* tells us that a reviewing court must carefully assess not only the decision, but also the path that led to the decision. The following paragraphs of *Vavilov* are helpful and instructive:

83 It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision makers reasoning process and the outcome. ...

84 As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision-maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision-maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, …

85 Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

…

99 A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness - justification, transparency and intelligibility - and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.

100 The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

101 What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. …

(Emphasis added)

[31] Having said all of that, the court in *Vavilov* also confirmed that a reviewing court's function is not a "line-by-line treasure hunt for error" (para. 102), and that judicial restraint remains appropriate in reviews of administrative decisions:

> 13 Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision-makers. …
>
> …
>
> 100 The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. … (Emphasis added)

[32] The decision in *Vavilov* also asks a reviewing court to approach administrative decisions in light of their particular record, and with "due sensitivity to the setting in which they were given" (paras. 91-92):

> 91 A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against the standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.
>
> 92 Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge - nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision - indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will

> not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

[33] In *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157, Justice David Stratas of the Federal Court of Appeal (an acknowledged authority in the field of administrative law) gives a helpful summary of the post-*Vavilov* reasonableness standard:

> 7 *Vavilov* did not substantially change the jurisprudence in this Court concerning the unreasonableness of outcomes reached by administrators: *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at paras. 22-37. The approach is a contextual one that considers the ambit of acceptable and defensible decision-making open to administrators or, put another way, the constraints acting upon administrators. However, *Vavilov* did change the law substantially by requiring that reviewing courts be able to discern a reasoned explanation for administrators' decisions.

[34] Further in that same decision:

> 12 *Vavilov* tells us that a reasoned explanation has two related components:
>
> Adequacy The reviewing court must be able to discern an "internally coherent and rational chain of analysis" that the "reviewing court must be able to trace" and must be able to understand. Here, an administrator falls short when there is a "fundamental gap" in reasoning, a "fail[ure] to reveal a rational chain of analysis"or it is "[im]possible to understand the decision maker's reasoning on a critical point" such that there isn't really any reasoning at all: *Vavilov* at paras. 103-104.
>
> Logic, coherence and rationality The reasoning given must be "rational and logical" without "fatal flaws in its overarching logic": *Vavilov* at para. 102. Here, the reasoning given by an administrator falls short when it "fail[s] to reveal a rational chain of analysis", has a "flawed basis", "is based on an unreasonable chain of analysis" or "an irrational chain of analysis", or contains "clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise": *Vavilov* at paras. 96 and 103-104.
>
> 13 These shortcomings must be evident on "critical point[s]": *Vavilov* at paras. 102-103. The "critical point[s]" are shaped, in part, by "the central issues and concerns raised by the parties": *Vavilov* at paras. 127-128. They are also points

> that are "sufficiently central or significant" such that they point to "sufficiently serious shortcomings in the decision": *Vavilov* at para. 100. They must be "more than merely superficial or peripheral to the merits of the decision": *Vavilov* at para. 100.

Grounds of Review

The appellant submits that the Board applied the wrong test and analysis and relied upon irrelevant factors and findings.

[35] Clearly, where a decision maker applies the wrong test and/or analysis to a question before him/her, the resulting decision could not be said to be reasonable (*Nemeth v. Canada (Justice)*, 2010 SCC 56).

[36] The parties agree that in cases where the issue before the Board is the inclusion of disputed employees on the list (in order to determine support for an application for union certification), the caselaw has repeatedly confirmed that there are two fundamental questions to be answered:

1. Whether the employer is the “true employer” of those persons; and
2. Whether the employees performed work within the jurisdiction of that trade union, for the majority of their on-site working time on the date of application.

[37] That latter requirement, as I have already indicated, is known as the "snapshot" rule; the Board must take a "snapshot" of events as they were on one day, and one day only, that being the date of application (see, for example, *Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd.*, 2016 NSCA 40).

[38] In *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)*, 2005 NSCA 141, the court noted:

> 10 The Panel, accepting the Union's submissions, articulated the following criteria to define the unit:
>
> > [9] ... If, however, the employee spent part of his working day ON-SITE and part of it OFF-SITE (for example in our case working "at the pit" ie., the quarry), then, the issue is whether that employee performed work within the trade jurisdiction of the applicant trade union or an applicant trade union (if more than one trade union applied for certification on the same date and the employee performed work within the trade jurisdictions of both or each of several trades on that date), for more than 50% of that part of his working day that was spent performing work ON-SITE in the "construction industry" …
>
> Following what it said to be its longstanding practice, the Panel made this assessment based on the employees' hours of work on the day the union filed its application for certification – July 23, 2002 for Local 1015 and July 26, 2002 for Local 721.

[39] In Nova Scotia, the "snapshot/date of application" rule appears to be strictly applied (see *CanMar*, supra; *Georgakakos v. International Brotherhood of Electrical Workers Local 625*, 2021 NSSC 128).

[40] The applicant herein notes that a proper analysis of evidence under the "snapshot rule" requires an assessment of what a worker was actually doing for the majority of this one day. The snapshot rule is not concerned with what a worker "normally" does.

[41] The applicant submits that, in the present case, the Board did not properly apply and engage this snapshot rule test. The applicant notes that the Board's decision addressed what the disputed workers *generally* did, at para. 54:

> Based on all the evidence, the Board concludes that the cleaning being done by this crew was not the type of cleaning that construction labourers typically do. … We are satisfied that this constituted the bulk of the work that these six cleaners were doing, and that it does not fall within the jurisdiction of the Union.

[42] There was, says the applicant, no analysis by the Board as to what work was performed by the disputed workers on April 23 and, furthermore, whether the work they performed on that date was within the Labourers Union jurisdiction. The applicant submits that the Decision is therefore fundamentally and irrevocably flawed.

[43] For its part, the respondent disagrees and points out the Decision includes the conclusion (at para. 58) that while there was evidence that the Cawal-Os were present on April 23, there was "insufficient reliable evidence to conclude that the [4] others were there on the date of application". In the submission of the

respondent, this conclusion demonstrates that the Board was properly addressing the "snapshot" rule, and that in relation to four of the disputed workers (i.e., excluding the Cawal-Os), the Board could not find them to have been present onsite on April 23. In those circumstances, notes the respondent, by applying the snapshot rule, they could not be on the list.

[44] Further and in any event, the respondent submits, the Board's conclusion at para. 54 (i.e., that the cleaning being performed by the disputed workers was not work within the Union's jurisdiction), was dispositive of this entire question.

[45] As is noted by the respondent, the only evidence before the Board as to the work being performed by the six disputed workers was the evidence of Ms. Cawal-O. She described the specific cleaning that was done, the circumstances of how the workers were engaged to do the work, and how they were paid. There was no evidence to suggest that any of the disputed workers ever did anything else on site at the Jade; and, in fact, it appears that they were only brought in if there was "finish" cleaning work for them to do.

[46] The respondent argues that, in those circumstances, it would have been entirely unnecessary for the Board to then go on and address the disputed workers' activities on April 23. If they were present, they only ever did one type of work.

[47] The respondent acknowledges that the Decision never uses the expression "snapshot rule". However, it notes, this does not mean that the Board did not engage the proper principles, and/or did not apply them properly. The Board's analysis starts by outlining the issues in dispute (at para. 51); such clearly included the need to assess which of the workers was present on the date of application.

[48] As I have already noted, the "date of application" rule requires two separate determinations in the case of each employee: what work was being done on that date, and whether that work was within the jurisdiction of that particular trade union.

[49] Having said that, in my view, there is no formula that is required of a Board decision. A reasonable decision, and an acceptable "path of reasoning", can take more than one form. The real question is, in looking at the Decision as a whole, whether the Board has addressed the right concepts and applied the right tests.

[50] There is no magic in the express use of the phrase "snapshot rule". Nor do I see any need for a Board to engage in the concepts in any strict particular order. A Board can be faced with a multitude of factual scenarios, and must be given the flexibility to deal with any particular scenario in the most appropriate way. Of course, whatever path of reasoning is chosen, the right test(s) must be applied.

[51] In the present case, the Board appears to be concluding that four of the six disputed workers could not be found to have been on site (at all) on April 23 (at para. 58). Assuming that this finding was meant to be dispositive of the "snapshot rule" in relation to those four people, such would be, in my view, reasonable.

[52] However, as to the remaining two disputed workers (Mr. and Mrs. Cawal-O), the Decision is less clear. It notes: "the evidence supports that [they] may have been on site on April 23" (para. 58). Assuming that to represent a finding that the Cawal-Os were present at the Jade on April 23, there was another step in the analysis which should have occurred: a determination of what the Cawal-Os were doing at the Jade on April 23. There is no finding or comment in the Decision as to that second step.

[53] As I have already indicated, the Decision must be read as a whole; therefore, the failure to specifically address that question is not necessarily fatal. It is possible that the Board concluded that this question (i.e., what the Cawal-Os were actually doing at the Jade on April 23) was a moot point. I say that because the Board went on to find that, in any event, the work that all six disputed workers did was not within the jurisdiction of the Labourers Union:

> [54] Based on all the evidence, the Board concludes that the cleaning being done by this crew was not the type of cleaning that construction labourers typically do.

> Mr. Soucy described it as more like professional cleaning, that is, ensuring that the completed spaces are ready for rental. We are satisfied that this constituted the bulk of the work that these six cleaners were doing, and that it does not fall within the jurisdiction of the Union. (Emphasis added)

[54] Paragraph 54 has, in my view, a number of possible interpretations.

[55] One interpretation is that since the cleaners exclusively did one type of work (i.e., the "finish" cleaning), and since the Board concluded that this work was not in the jurisdiction of the Union, that was dispositive of the entire matter. Therefore, there would be no need to ask any more questions about April 23. To put this another way: there would only be two possible scenarios, both of which would end the matter. Either the disputed workers were not on site (or on site but not working) on April 23; or the disputed workers were on site (and working) on April 23, but their work was not "construction labourers work" in any event.

[56] If this was, in fact, the path of reasoning of the Board, such might not be unreasonable, at least in theory. However, that is entirely unclear, as paragraph 54 has other interpretations.

[57] Paragraph 54 does not speak of "exclusive" work; it speaks of work that was "typically" done by the disputed workers. Paragraph 54 goes on to say that the finish cleaning work was the "bulk of the work" that the six cleaners were doing. Those phrases, by definition, seem to show that the Board concluded that most of

the disputed workers work was of a certain type (i.e., not construction labourers work). This would further suggest that the Board must have found other work done by these same people (albeit rarely). If that is the case, what is that work, and where would it fall in terms of jurisdiction? The Decision does not address these issues; in fact, there was no evidence of any such "other" work before them. In my view, the wording of this part of the Decision leads to uncertainty.

[58] The Decision clearly states that that finish cleaning work was "typically" the work of the disputed workers; that it was the "bulk of their work". In those circumstances, in my view, the "date of application" issue needed to be squarely addressed and could not be avoided. It would have been necessary for the Board to specifically determine which work the disputed workers were doing on April 23. They did not do so.

[59] Interestingly, given the Board's purported decision in relation to the four disputed workers (excluding the Cawal-Os) at para. 58, perhaps this is again a moot issue. If those four persons were not present on April 23, they simply should not be counted, in any event, no matter what work they did on any other day. Paragraph 54 of the Decision, however, does not make that clear; nor does the rest of the Decision.

[60] In the final analysis, this part of the Decision is unclear and problematic. I must acknowledge that I am not satisfied, as to these issues, that the Board's reasoning has provided me with an entirely "internally coherent and rational chain of analysis" that I can clearly trace and understand (as required by *Vavilov*).

[61] Having said that, and to be entirely frank, if these were the only shortcomings that existed in this decision, I would question whether they were sufficiently serious to cause a quashing of the Decision. However, the Decision suffers from further flaws, in my view.

The appellant submits that the Board failed to engage with the relevant evidence, authorities, and pleadings, and failed to give adequate reasons.

[62] It is generally accepted that a decision should address the central or important issues raised by the parties. This allows a party (or, for that matter, a reader) to understand the evidence and submissions that were put before the decision maker, and how the issues of significance were resolved. In particular, it allows an unsuccessful party to understand why they were unsuccessful and why their arguments were not accepted.

[63] In *Vavilov*, the Supreme Court of Canada noted:

> 106 …[I]n the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; …
>
> 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.

[64] Of course, a decision maker is only required to specifically address "central" or "significant" issues; there is clearly no obligation to address each and every issue raised by a party, no matter its significance:

> 128 Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para. 16). To 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. … (*Vavilov*)

[65] In the case at bar, the applicant submits that the Board failed to address a number of issues of significance.

[66] They argue that the Board did not adequately explain its departure from the snapshot (date of application) rule, as I have already described.

[67] The applicant further submits that the Board also deviated from one of its explicit written policies: that of addressing whether work is "construction" or "maintenance", as the "first" question in every case before it. On that point, the applicant has provided a document entitled "Work and the Employer in the Construction Industry / Policy Statement". That document (the "Policy") notes:

> The Construction Industry Panel of the Labour Relations Board (Nova Scotia), (the "Panel"), hereby issues the following guidelines pursuant to the Trade Union Act, R. S. N. S., 1989, c-475"
>
> In determining whether (a) work being performed by owners or employers is "maintenance" which falls outside the definition of "construction industry" in section 92(c) of the Act, and/or (b) an employer or owner is an "employer in the construction industry" under section 92(f) of the Act, the following guidelines shall apply:
>
> A. (1) The Panel has decided that, in cases under Part II of the Act, the first issue to be dealt with is whether the work involved is "maintenance" work or work covered by Section 92(c) of the Act.
>
> ….

[68] The applicant submits that as a result of this Policy, the first question the Board must deal with (in every case) is whether the work in question is "construction" or "maintenance". They did not do so here, and they did not explain why.

[69] In my view, the applicant is incorrect in its interpretation of this Policy on this point.

[70] As I read the Policy, it provides that in certain cases, where certain specific issues are being debated (that is, "whether (a) work being performed by owners or employers is "maintenance" which falls outside the definition of "construction industry" in section 92(c) of the Act, or (b) an employer or owner is an "employer in the construction industry" under section 92(f) of the Act"), then the first issue to be decided is whether the work is "maintenance", or work falling under Part II of the *Act*.

[71] I do not read this Policy as saying that, in every case before the Board, no matter the issue being debated, the first thing the Board is to do is address whether the work is "maintenance" versus "construction".

[72] Furthermore, in my view, the applicant's interpretation would not be reasonable. Presumably there are cases before the Board where the work is very clearly "construction", and no one advances any opposing arguments. There may also be cases where this distinction is not truly material to the dispute. It would not be logical for the Board to establish a policy that would require them to spend time (in each case) on potentially uncontroversial, or irrelevant, or unargued issues.

[73] In the application that was before the Board in this case, neither of the two areas of dispute noted in the preamble to this Policy were at issue. Therefore, this Policy was a non-issue in the context of this Decision.

[74] I have also reviewed the other decisions from the Nova Scotia Labour Board provided to me by counsel in this case. These decisions were in relation to various issues. In none of those decisions did the Board start their decision by specifically deciding whether the work at issue was "construction" or "maintenance" (*Labourers International Union of North America, Local 615 v. Stavco Construction Limited*, 2017 NSLB 81; *Labourers International Union of North America, Local 1115 v. Steen Contractors Limited* 1994 CanLII 176661 (NSLRB)). I also note that in the caselaw relating to judicial review of NSLB decisions, no mention is made of this Policy (*Construction and Allied Union (CLAC), Local 154 v. Nova Scotia (Labour Relations Board)*, 2002 NSSC 2; *Murphy v. Unifor Local 4606*, 2021 NSSC 323; *Georgakakos v. International Brotherhood of Electrical Workers Local 625*, 2021 NSSC 128).

[75] Lastly, as the respondent quite rightly points out, this submission (i.e., that the Board was required to make a definitive finding as to whether the work performed by the disputed workers was either "maintenance" versus "construction" in order to comply with its own policies and the *Act*) was not made before the

Board during the hearing. The Board cannot be faulted for failing to address an issue that was never raised with them. It is unfair for a party to raise a new issue on judicial review.

[76] To conclude on this point, in my view, the argument that the Board must first categorize work as either “construction” or “maintenance” in every case is entirely unpersuasive.

[77] Next, the applicant submits that there were substantive arguments made by the parties that went unaddressed in the Decision.

[78] In particular, both parties made a number of arguments to the Board in relation to the question of whether the work of the disputed workers was within the trade jurisdiction of the respondent Union. It is the submission of the applicant that the Board fundamentally failed to engage with many or most of the arguments put forward by themselves (and even some put forward by the respondent).

[79] In relation to the applicant’s arguments, the Board noted (Decision, paras. 39 and 40):

> [39] Counsel for the Employer argued that all six of the cleaning crew were doing work in the trade jurisdiction of the labourers on April 23. The Jade was a construction site, and a partial occupancy permit was issued on May 7. On April 23 the floors in question were in the final stages, awaiting inspection, for rental. Construction cleaning is traditionally labourers' work: ***Labourers International***

> ***Union of North America Local 615 v. Stavco Construction Ltd.*** 2017 NSLB 81 [Tab 10], ***Labourers' International Union of North America Local 1036 v. Ellis-Don Ltd.*** 1993 CanLII 7899 [Tab 11], ***Labourers' International Union of North America Local 1089 v. 646849 Ontario Ltd. (Magic Maid)*** 2006 CanLII 24904 (ON LRB) [Tab 12], ***Labourers' International Union of North America Local 1059 v. Mobil Services Inc.*** 2018 CanLII 37671 (ON LRB) [Tab 13], ***Labourers' International Union of North America Local 1115 v. Steen Contractors Ltd.*** 1994 CanLII 17661 (NS LRB) [Tab 20]***, Benny McCulloch and Local 615 of the Labourers' International Union of North America v. Yorkdale Drywall Ltd.*** 1988 CanLII 8415 (NS LRB) [Tab 21].
>
> [40] He noted that the employees on Schedule 'A' report their hours on the honour system, informally. None of the time records are signed by either the employee or manager/supervisor. The business is run informally. While the cleaning work of the cleaners in question is different from the type of cleaning normally done by labourers, it is a seamless part of the activity of construction. These 'finishing touches' are a component that is distinct from what some of the other labourers were doing, but is part of the continuum of construction.
>
> …

[80] The Board summarized the respondent Union's arguments as follows:

> [49] She argued that the circumstances here can be distinguished from the context in which ***Magic Maid*** *(supra)* and ***Ellis-Don*** *(supra)* were decided. The labourer work is separate from that of these cleaners, and from the construction project management. Counsel asked that the Board find these six workers were not on site on April 23, were not employed by Grafton Developments, and were not doing work in the trade jurisdiction of the labourers, and that it allow the certification.

[81] The two cases noted in that last quote had been put forward by the applicant to the Board (*Labourers' International Union of North America, Local 1036 v. Ellis-Don Limited*, 1993 CanLII 7899 (ON LRB); and *Labourers' International Union of North America, Local 1089 v. 646849 Ontario Ltd. (c.o.b. as Magic Maid Cleaning Service)*, 2006 CanLII 24904 (ON LRB)).

[82] Both of those cases (from Ontario), contained factual circumstances that were not dissimilar to the one at bar. The cleaners in those Ontario cases were performing tasks which were at least comparable to those being accomplished by the disputed workers in the present case. In both cases, the Ontario Labour Board had found that those cleaners' work was, in fact, "construction work".

[83] Here the Board concluded that the work being performed by the disputed workers was not construction work and was not within the jurisdiction of the applicant Union (see paras. 52-54 of the Decision). Interestingly, no further mention was made of the *Ellis-Don* or *Magic Maid* cases. No effort was made to distinguish them, or explain why their reasoning did not apply.

[84] The applicant submits that, in their view, the Board's assessment and analysis of these issues appears to have been largely superficial. The Board did not engage the authorities provided by the applicant, nor did it make comment as to why those authorities were distinguishable or inapplicable.

[85] The applicant also says that the Board relied upon certain irrelevant factors, without authority for doing so, and ignored other factors deemed relevant in the caselaw. The Decision noted the following:

> [52] On the first question - whether the work being done by these cleaners was within the trade jurisdiction of the Labourers' Union - several contextual factors

> are relevant. The company operated fairly informally. The systems for keeping track of hours is very loose, and unlike at many other construction sites, the time sheets do not note the nature or location of the work being done. The 'regular' labourers are paid by direct deposit, and the required remittances were made; this is in sharp contrast to how this group of cleaners were paid. Ms. Cawal-O kept track of their hours, and submitted it to the Employer. She received a cheque in her own name, which she allotted to the other workers in cash. No statutory deductions were made.
>
> [53] The point of these comments is not to chide the Employer for its payroll practices, but rather to point out the difference in treatment between the 'regular' labourers crew, and the cleaners in dispute. Further differences include the fact that the 'regulars' generally eat and take breaks together, keep the same regular hours, meet in the morning to discuss the days work, receive safety training, and wear the usual safety gear. These cleaners do not. The 'regular' labourers do a variety of tasks as required; the six cleaners sole job is to clean up the space, prior to rental, using some tools and supplies that the regular labourers would not use. There are real and significant differences between the two groups of workers.
>
> [54] Based on all the evidence, the Board concludes that the cleaning being done by this crew was not the type of cleaning that construction labourers typically do. Mr. Soucy described it as more like professional cleaning, that is, ensuring that the completed spaces are ready for rental. We are satisfied that this constituted the bulk of the work that the six cleaners were doing, and that it does not fall within the jurisdiction of the Union. (Emphasis added)

[86] It is difficult to understand if, or how, these paragraphs follow each other. At para. 52, the Board notes that “several contextual factors” are relevant to a determination of whether the work being done is construction labour work; it then appears to have entirely focused on the differences between the “regular” construction workers and the disputed workers. The differences noted include such things as hours of work, payment, gear, and breaks.

[87] None of the “contextual” factors listed in paras. 52 and 53 are in relation to the actual type of cleaning being done by the disputed workers. Therefore, the

conclusion at para. 54, which states "[T]he Board concludes that the cleaning being done by this crew was not the type of cleaning that construction labourers typically do.", cannot possibly refer to the "contextual" evidence listed at paras. 52 and 53. These paragraphs make no mention of either a) the cleaning done by the disputed workers, or b) the cleaning typically done by construction labourers. It is entirely unclear what evidence the Board relied upon in reaching its conclusion at para. 54.

[88] The applicant notes that, in some of the Ontario cases, other factors have been deemed relevant in making the determination of whether cleaning work is construction work. Those factors were not addressed by the Decision.

[89] For example, the case of *Labourers' International Union of North America, Local 1059 v. Mobil Services Inc.*, 2018 CanLII 37671 (ON LRB), was a case involving the question of whether particular cleaning work can be considered "construction" work. The Ontario Labour Relations Board engaged in a review of past cases dealing with the issue, and provided the following summary:

> 22. To summarize, the cases referenced above establish the following principles:
>
> 1. clean up of a construction site can be construction work;
>
> 2. in making this determination the nexus between the clean up and the construction activity is a key consideration;
>
> 3. This is a fact specific inquiry;
>
> 4. in describing and commenting on the nexus or connection between the clean up and the construction activity required under the second level analysis the Board has stated as follows:

> a. it is not just the kind of debris that is important (*Magic Maid*);
>
> b. if the clean up is necessary to enable the various trades on site to perform their work, then this constitutes construction work (*Magic Maid*);
>
> c. is the clean up work required in order to carry out the tasks that constitute the enumerated activity (*Catch Basin*);
>
> d. is the clean up work a necessary aspect of the construction project (*Ellis Don*);
>
> e. merely because work takes place at a construction site does not necessarily mean that such work is work within the construction industry (*Magic Maid*);
>
> f. clean up work that is done to finish a construction project so the project can be used for its intended purpose is part of the construction project (*A-1 Hydrant Services*);
>
> g. the clean up work must be done on the object under construction or to support the work being done on the work under construction (*Catch Basin*)

[90] The applicant acknowledges that this Board is not bound by Ontario Labour Board decisions, and would not necessarily have had to use or accept that Board's analyses or reasoning. However, given that a) this was one of the central issues in dispute before the Board, b) that these cases were directly on point, and c) that the applicant had made extensive submissions about these cases and the principles outlined therein, the applicant submits that it was not reasonable for the Board to have simply ignored them.

[91] The applicant further points out that although the Board ultimately agreed with the respondent's position, the actual arguments put forward by the respondent also went unaddressed. For example, the respondent had argued that since the disputed workers were paid through a numbered company (and since the building

was owned and would be operated by that numbered company), their work was not "construction work". That argument went unanswered.

[92] The applicant notes the following comments from the *Vavilov* decision:

> 102 … Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgement": R.A. MacDonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750 … at paras. 57-59.

[93] In summary, the applicant submits that the issue of whether the disputed workers were accomplishing "construction work" was a central and a determinative factor in the case before the Board. On that issue, says the applicant, we are faced with an absence of reasoning from the Board. The applicant submits that the Board only listed the parties' arguments, without "grappling" with them, and that the Board gave a decision entirely independent of, and without meaningful reference to, the arguments that had been made to them. The applicant says that the Board failed to explain why the applicant's arguments were not accepted, or why other decisions, supportive of the applicant's position, were not followed or applicable. They argue that all of this amounts to a fatal flaw.

[94] The applicant further notes that where reasoning is absent in an administrative tribunal decision, it is not open to a reviewing court to insert its own

reasoning. Such would be an inappropriate “buttressing” of the decision (see *Canadian Pacific Railway Company c. Flynn*, 2020 QCCS 983 (CanLII); *Labioui v. Canada (Citizenship and Immigration*), 2016 FC 391 (CanLII)).

[95] The respondent disagrees and points out that the Board was not required to address every issue before it. They point out that this case was a “bread and butter” case within the normal expertise of the Board, and that they were consequently not required to engage in pages and pages of analysis. They submit that the Decision, read as a whole, is “rational, transparent, justifiable, and reasonable” (para. 170).

[96] Having reviewed this Decision repeatedly, and in detail, in light of the applicable legal principles, I am left with significant concerns.

[97] It is clear that a decision-making entity is not required to discuss and agree/disagree with every argument and submission put before them. Such would be unworkable, and run contrary to the principles of efficiency and the expeditious resolution of disputes. Even the present decision, which I am writing, does not address each and every issue brought forward by the parties; only those which, in my view, are significant or material.

[98] But it is also clear that the question of whether the work performed by the disputed workers was “construction labourers work”, in the context of the

application before the Board, was a central and crucial issue. It was, in fact, the central and crucial issue. The Board's conclusion as to that particular question was likely to be (and was) dispositive of the entire matter.

[99] This is confirmed in the Decision at para. 62:

> [62] The Board concludes that the workers in question were not doing work in the trade jurisdiction of the labourers on the date of application. The Board therefore finds these six workers should not have been on the schedule "A"…

[100] I have reviewed the cases provided to me by the applicant, which had been put before the Board during the hearing (which I repeat for ease of reference): *Labourers' International Union of North America, Local 1059 v. Mobil Services Inc.*, 2018 CanLII 37671 (ON LRB); *Labourers' International Union of North America, Local 1036 v. Ellis-Don Limited*, 1993 CanLII 7899 (ON LRB); and *Labourers' International Union of North America, Local 1089 v. 646849 Ontario Ltd. c.o.b. as Magic Maid Cleaning Service* 2006 CanLII 24904 (ON LRB).

[101] While these cases were not binding on the Board, I cannot disagree that their factual circumstances were somewhat similar, to a greater or lesser degree, to the case at bar. I also see that those cases outlined some considerations, or "factors", that were considered in a circumstance involving "cleaning workers" and an application for certification.

[102] None of those cases were dealt with in the Decision, other than being summarily mentioned. None of the considerations or "factors" they list were addressed, or even mentioned, by the Board. As I have already noted, the Board chose to assess this application by examining other factors. It is unclear to me why they chose those factors, or if they relied on any authority for doing so.

[103] That is not to say that such a process was not open to them. The Board certainly had the option of distinguishing the Ontario cases, or finding that the factors listed therein were not useful or applicable, or of creating their own list of factors that, in their view, was more useful or applicable, and explaining why. But the Decision is silent as to any/all of this. It merely lists some factors which they deemed important, and a conclusion is then reached. The obvious concern lies in the legitimacy and intelligibility of their analysis.

[104] In my view, to have addressed this properly would not have required "pages and pages" of analysis, as suggests the respondent. All that would have been required would be a simple, perhaps even short, explanation.

[105] This issue was of major importance to the parties. The Board clearly had a duty to "grapple" with the arguments and authorities put forward with respect to it, in a meaningful and explanatory way. While the Board was obviously entitled to

disagree with either party's submissions, the Decision does not provide any explanation whatsoever as to how the Board dealt with the applicant's arguments and authorities.

[106] In my view, for these reasons, the Decision lacks reasonableness. In the words of *Vavilov*, I am unable to discern, trace, or understand an "internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrained the decision-maker". I also find that this is a "fundamental gap" in reasoning, as well as a "fail[ure] to reveal a rational chain of analysis on a critical point".

[107] As I noted in my earlier discussion regarding the first ground(s) of review, I have found a number of deficiencies in this Decision. Their cumulative effect is that this Decision is fundamentally lacking and, in my view, should not stand. It should be quashed and the matter returned to the Board for a new determination/decision.

[108] With a view to completeness, I will also address the last issue raised by the applicant.

The applicant submits that the Board reached a conclusion which is unreasonable for statutory and public policy reasons.

[109] The applicant argues that the Decision here creates a vacuum.

[110] They note that, for the purposes of the *Act*, work must be classified as either "construction" or "maintenance". While the Decision here concludes that the work of the disputed workers was not "construction", they did not go on to find that the work was "maintenance". Therefore, the applicant submits that the Decision creates a class of people who are in "no man's land", who ostensibly would belong to no Union. The applicant argues that such is contrary to public policy and contrary to the *Act*.

[111] Reference was made to *Construction and Allied Workers Union (CLAC), Local 154 v. 360 Cayer Itee*, 2000 CanLII 47113 (NS LRB), where a union was not certified because the group that they were proposing to represent was already contained within the existing 14 unions that represented skilled trades within the construction industry.

[112] In my view, the *CLAC* decision is not determinative of this issue. It does not stand for the general proposition that all work is either "maintenance" or "construction".

[113] In the present case, the Board decided that the disputed workers did not fit in the jurisdiction of the respondent Union (construction labourers). That is the

question that was before it. The Board did not address what other group and/or Union the disputed workers might, or should, fit into. That is because it was not asked to address this question.

[114] Whether the disputed workers fall into any other Union's jurisdiction, or whether it falls into none, was not argued or decided. The Board's Decision, quite appropriately, says nothing to that effect. Those issues remain outstanding and may, or may not ever, be decided by some other Board decision.

[115] I reject the applicant's submission as to this ground of review.

Conclusion

[116] I am satisfied that this Decision does not meet the standards of *Vavilov*. It does not demonstrate an intelligible and reasonable path of logic towards its conclusions, in particular that the work of the disputed workers was not construction labourers work and that the disputed workers were not performing such work on the date of application. The Decision fails to address relevant authorities, and references factors without explanation as to their relevance.

[117] In my view, the only appropriate remedy under the circumstances is for the Decision to be quashed and the matter to be sent back to the Board for

reconsideration. The Board will have the present decision as guidance in dealing with this matter further.

[118] I ask counsel to discuss whether agreement can be reached as to costs in relation to this application. Failing agreement, I would ask counsel to provide me with written submissions within 30 days of this decision.

Boudreau, J.