COURT OF APPEAL FOR ONTARIO

CITATION: Turkiewicz (Tomasz Turkiewicz Custom Masonry Homes) v. Bricklayers, Masons Independent Union of Canada, Local 1, 2022 ONCA 780
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Gillese, Trotter and Harvison Young JJ.A.

BETWEEN

Tomasz Turkiewicz, a sole proprietor c.o.b. as Tomasz Turkiewicz Custom Masonry Homes

Applicant (Respondent)

and

Bricklayers, Masons Independent Union of Canada, Local 1, Labourers' International Union of North America, Local 183, Masonry Council of Unions Toronto and Vicinity and Ontario Labour Relations Board

Respondents (Appellants/Respondent)

Paul Cavalluzzo, Stephen Moreau, and Aminah Hanif, for the appellants Bricklayers, Masons Independent Union of Canada, Local 1, Labourers' International Union of North America, Local 183 and Masonry Council of Unions Toronto and Vicinity

Marek Z. Tufman and Gregory A.P. Tufman, for the respondent Tomasz Turkiewicz

Aaron Hart and Andrea Bowker, for the respondent Ontario Labour Relations Board

Heard: May 25, 2022

On appeal from the order of the Divisional Court (Justices Nancy L. Backhouse, David L. Corbett and Sally A. Gomery), dated May 31, 2021, with reasons reported at 2021 ONSC 1259, 82 C.L.R.B.R. (3d) 1.

Gillese J.A.:

I. INTRODUCTION

[1] This appeal arises from the decision of the Divisional Court, dated May 31, 2021 (the "**Divisional Court Decision**"), quashing three decisions of the Ontario Labour Relations Board (the "**Board**" or the "**OLRB**") on the basis the decisions were unreasonable. The reasons in this appeal are being released at the same time as those in the companion case of *Enercare Home & Commercial Services Limited Partnership v. UNIFOR Local 975*, 2022 ONCA 779.

[2] Both appeals require this court to consider the Divisional Court's application of the reasonableness standard, as set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, when reviewing OLRB decisions made under s. 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A (the "***LRA***"). Section 1(4) empowers the Board to make related employer declarations.

[3] For the reasons that follow, in my view, the Divisional Court Decision runs afoul of the *Vavilov* dictates on the proper application of the reasonableness standard. Consequently, I would allow the appeal and restore the Board decisions.

II. OVERVIEW

[4] The Bricklayers, Masons Independent Union of Canada, Local 1 ("**Local 1**"), and the Labourers' International Union of North America, Local 183 ("**Local 183**"), are construction trade unions within the meaning of ss. 1 and 126. They form a council of unions: the Masonry Council of Unions Toronto and Vicinity ("**MCUTV**").

I will refer to these three parties collectively as the "**Unions**". The Unions are the appellants in this matter.

[5] The Unions have a collective agreement with an employers' group, the Masonry Contractors' Association of Toronto Inc. ("**MCAT**"). This collective agreement is known as the "**MCUTV Collective Agreement**". An employer bound by the MCUTV Collective Agreement recognizes MCUTV as the exclusive bargaining agent for its employees engaged in construction work in the residential sector of the construction industry in certain geographical areas.

[6] Local 1 and MCAT are also parties to another collective agreement, known as the "**Local 1 Collective Agreement**". The terms and conditions of the Local 1 Collective Agreement are the same as those in the MCUTV Collective Agreement except for the sector of the construction industry and geographic areas to which the Local 1 Collective Agreement applies. Together, the MCUTV Collective Agreement and the Local 1 Collective Agreement are known as the Masonry Collective Agreements ("**MCA**").

[7] The Unions filed two applications with the OLRB relating to bricklaying and masonry work being done by the respondent in this appeal, Tomasz Turkiewicz, a sole proprietor carrying on business as Tomasz Turkiewicz Custom Masonry Homes ("**TTCMH**"). One application was brought pursuant to ss. 1(4) and 69 of the *LRA* and the other was a grievance referral under s. 133.

[8] The OLRB proceedings took place in three stages: (1) the s. 1(4) application (the "**First Decision**"); (2) the first part of the grievance, which dealt with whether TTCMH was bound to the then-current version of the MCA (the "**Second Decision**"); and (3) the second part of the grievance, which dealt with whether TTCMH had violated the MCA and, if so, the quantum of damages TTCMH was to pay to the Unions (the "**Third Decision**"). I will refer to the three Board decisions collectively as the "**OLRB Decisions**".

[9] In the First Decision, the Board declared that, pursuant to s. 1(4) of the *LRA*, Brickpol Masonry Corporation ("**Brickpol**") – Mr. Turkiewicz's former business – and TTCMH are a single employer. In the Second Decision, the Board declared that TTCMH was bound by the then-current MCA. In the Third Decision, the Board found that TTCMH had violated the MCA and ordered TTCMH to pay the Unions $32,466 in damages.

[10] The Unions appeal the Divisional Court Decision. They submit that the Divisional Court erred in quashing the OLRB Decisions on the basis they are unreasonable. They also contend that the Divisional Court made findings of fact on matters not before the Board in the First Decision and then relied on those findings in quashing the OLRB Decisions. The Unions ask that the Divisional Court Decision be quashed and set aside.

[11] The OLRB made submissions on this appeal limited to the standard of review the Divisional Court was to apply when reviewing the OLRB Decisions and its application of that standard.

[12] Mr. Turkiewicz submits the appeal should be dismissed. He contends that the OLRB Decisions were patently unreasonable because they are "clearly irrational".

III. BACKGROUND

[13] In January 2001, Brickpol was incorporated by Mr. Turkiewicz and his brother to carry on a bricklaying and masonry business. Mr. Turkiewicz was a principal and director of Brickpol. Brickpol signed voluntary recognition agreements ("**VRAs**") with the Unions, binding it to the MCA. Accordingly, Brickpol was required to hire only members of the Unions to perform work described in the scope of the MCA, pay those members certain wage rates, and remit money to the Unions for pension and benefit contributions. Mr. Turkiewicz, on behalf of Brickpol, signed renewal agreements in 2004 and 2007. Mr. Turkiewicz himself did masonry and bricklaying work for Brickpol as a union member.

[14] Mr. Turkiewicz was injured in a car accident in 2007. According to Mr. Turkiewicz, as a result, he had to declare personal bankruptcy. In 2008, Brickpol notified the Unions that it was no longer performing work covered by the MCA. Mr. Turkiewicz signed the notifications. Brickpol was voluntarily dissolved in

May 2010. Mr. Turkiewicz was discharged from personal bankruptcy in December 2011.

[15] In May 2017, Mr. Turkiewicz registered TTCMH as a sole proprietorship.

[16] In October 2017, the Unions learned that Mr. Turkiewicz was performing bricklaying/masonry work in North York under the registered business name of TTCMH. Mr. Turkiewicz was no longer a union member and did not hire union members to perform the work.

[17] The Unions filed a grievance against Brickpol and TTCMH on November 17, 2017, alleging they had violated the MCA by failing to apply its terms to the work TTCMH was performing. The Unions then referred the grievance to the OLRB for arbitration pursuant to s. 133 of the *LRA*. The Unions also filed an application with the OLRB seeking a declaration that Brickpol and TTCMH are related employers pursuant to s. 1(4) of the *LRA*, and, alternatively, that there had been a sale of business within the meaning of s. 69.

[18] The OLRB adjourned the grievance pending a final decision on the s. 1(4) application.

IV. THE OLRB DECISIONS

A. First Decision: Vice-Chair Rowan, March 28, 2018

[19] Section 1(4) of the *LRA* reads as follows:

> Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not

> simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

[20] The Unions' s. 1(4) application set out the facts that are summarized above. TTCMH agreed with most of those facts and took no issue with the Board's ability to rely on them. However, it asserted several additional facts in its response, including that: Brickpol was dissolved in 2008; Mr. Turkiewicz never held a majority or controlling interest in Brickpol; and, Mr. Turkiewicz has had no employees since 2007 except for his son who gave "him a bit of help on some occasions".

[21] Vice-Chair Rowan declared that Brickpol and TTCMH are a single employer within the meaning of s. 1(4) of the *LRA*. Having regard to the undisputed material and documents that the Unions provided, and notwithstanding any of the additional facts asserted in response, she was satisfied that the two separate businesses of TTCMH and Brickpol are, or were, carried out under the common control and direction of Mr. Turkiewicz, and that they are related businesses that serve the same markets and perform work for the same type of clients. She noted that s. 1(4) does not require the two entities to carry on business simultaneously.

[22] Vice-Chair Rowan concluded that the Unions' collective bargaining rights were being eroded by Mr. Turkiewicz's decision to recommence bricklaying and

masonry work in the same market and for the same type of clients as Brickpol but on a non-union basis through TTCMH. According to the information set out in his response, Mr. Turkiewicz decided to do so after a hiatus of a number of years due to a motor vehicle accident and subsequent personal bankruptcy.

[23] The Vice-Chair found that the mischief to which s. 1(4) of the *LRA* is directed was present because the Unions' bargaining rights had been undermined by a shifting of one or more workers from one corporate vehicle to another entity without regard to the Unions' pre-existing bargaining rights. TTCMH, which was established years after the Unions acquired bargaining rights for Brickpol, does not recognize those pre-existing rights. She noted that this erosion of bargaining rights reflects "precisely the type of mischief which subsection 1(4) of the Act is meant to address".

[24] The Vice-Chair concluded that, having regard to the provisions in s. 1(4) and its purposes, it was appropriate to declare that Brickpol and TTCMH were a single employer within the meaning of the *LRA*. Accordingly, she held that TTCMH was deemed to be a signatory to the VRAs entered into between Brickpol and the Unions.

[25] Vice-Chair Rowan left the question of whether TTCMH was bound to the renewal agreements to be determined in the grievance proceeding.

B. Second Decision: Vice-Chair Kelly, August 24, 2018

[26] Vice-Chair Kelly decided the grievance referral in which the Unions alleged that TTCMH performed work that fell within the Unions' jurisdiction but failed to engage union members.

[27] The Vice-Chair relied on the findings and declaration in the First Decision, together with the findings of the interest arbitrator in an interest arbitration award dated September 5, 2017 (the "**Award**"), to conclude that TTCMH was bound by the then-current collective agreement.

[28] In the Award, Brickpol was one of the employers listed as being bound by a certain collective agreement. The Award had the effect of preserving and continuing the Unions' collective bargaining rights in respect of Brickpol. Because the s. 1(4) declaration in the First Decision found that Brickpol and TTCMH were related employers, TTCMH was also bound by the then-current MCA.

[29] The Vice-Chair viewed Mr. Turkiewicz's personal bankruptcy and the fact that TTCMH had no employees to be irrelevant to his conclusion.

C. Third Decision: Vice-Chair Kelly, November 26, 2018

[30] Vice-Chair Kelly heard the grievance with respect to TTCMH's bricklaying and masonry work in North York. TTCMH argued that collective agreements do not apply where a sole proprietor searches out work on his own behalf and performs it on his own. The Vice-Chair disagreed. He observed that the pre-cast work was "clearly bargaining unit work" and that it did not matter whether

Mr. Turkiewicz may have performed all the work on his own. It was work over which the collective agreement conferred jurisdiction on the members of the bargaining unit and the Unions lost the opportunity to have their members do the work. He concluded that TTCMH had violated the MCA and allowed the grievance.

[31] The Vice-Chair awarded damages of $32,466 to the Unions, calculated on the basis that TTCMH completed 600 hours of bargaining unit work multiplied by the total hourly compensation payable to forklift drivers in 2017 of $54.11 (600 x $54.11 = $32,466).

[32] In choosing the appropriate hourly rate, the Vice-Chair noted that bricklayers' assistants, forklift drivers, bricklayers, and foremen all may have been engaged had TTCMH's work been performed by Union members. Forklift drivers are paid more than bricklayers' assistants, but less than bricklayers and foremen. The Vice-Chair also referred to *Wasaga Trim Supply (2006) Inc*., [2010] O.L.R.D. No. 1854, at para. 21, which relied on *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 8 O.R. (2d) 103 (C.A.), leave to appeal to S.C.C. refused (November 17, 1975), for the proposition that the Board must do its best to arrive at a fair assessment because the loss to the applicant cannot be measured with certainty.

[33] Mr. Turkiewicz said he had billed the client around $90,000 for the work and contended that damages of approximately one third of that amount made no sense. The Vice-Chair said whether it made sense or not was immaterial: the

Board's concern was whether the Unions had provided a reasonable calculation of the value of the bargaining unit work. He accepted that they had.

V. THE DIVISIONAL COURT DECISION

[34] Mr. Turkiewicz brought three judicial review applications to the Divisional Court, one for each of the OLRB Decisions. The Divisional Court granted the applications and quashed the OLRB Decisions.

[35] The Divisional Court held that the Board's finding that Brickpol and TTCMH are separate entities under the common control and direction of Mr. Turkiewicz was available to the Board and reasonable. It also said that the Board's finding that the Unions' bargaining rights had been undermined "by a shifting of one or more workers from one corporate vehicle to another entity without regard to the [Unions'] pre-existing bargaining rights" was "technically correct" because Mr. Turkiewicz himself had been shifted.

[36] However, the Divisional Court stated, the Board was required to find a valid labour relations purpose before making a related employer declaration and it failed to do that. Instead, it simply made the conclusory statement that s. 1(4) was intended to address precisely the kind of circumstances found in this case. The Divisional Court said that on the Board's reasoning, if the circumstances of the case satisfy the statutory test for a related employer declaration, no matter the length of the hiatus, the reasons for it, and the effect of it, a labour relations purpose is served by making the declaration.

[37] The Divisional Court stated that a labour relations purpose is found where a related employer declaration may:

> (a) preserve or protect from artificial erosion the bargaining rights of the union;
>
> (b) create or preserve viable bargaining structures; and
>
> (c) ensure direct dealings between a bargaining agent and the entity with real economic power over the employees.

[38] It observed that this was not a case of an employer repositioning its business to avoid labour relations obligations. Rather, the case was about a man whose life and business were largely destroyed because of injuries he suffered in a collision who, many years later, tried to start again. The Divisional Court noted that "[n]othing has been transferred or redeployed from the original business, other than the man himself."

[39] The Divisional Court said that the Board jurisprudence starts from the "undeniable premise" that in cases arising in the construction industry, even a long hiatus may not preclude a s. 1(4) declaration. However, the thrust of prior Board decisions is that a hiatus does not matter at all, and even when the hiatus is long and the only common aspect of the two businesses is one key individual, the declaration should be granted if the relatedness test is met. It said, "[t]his logic, by itself, is unreasonable. It defeats the requirement to consider the hiatus and subsumes the requirement that there be a 'labour relations purpose' for a s. 1(4) declaration into the test for relatedness."

[40] Because of the transient and episodic nature of construction industry employment relationships, and the relative ease with which employers can close a business and reconstitute it in another form, related and successor employer provisions are significant in the construction industry. However, the Divisional Court noted, “the conventional indicia of a transfer of a business may not be sufficient for construction employers, which often lack significant tangible assets.” This concern led to a recognition of the concept of the “key individual”, because sometimes such an individual (usually a business’s principal) is all that is transferred.

[41] While it was “clear” that Mr. Turkiewicz would meet the test of a “key individual”, the Divisional Court said the Board did not put its mind to the nature and reason for the hiatus, nor did it seem to place weight on the length of the hiatus, which, in practical terms, was a decade.

[42] The Divisional Court concluded that the circumstances of this case do not fall within the purposes of s. 1(4). The mischief s. 1(4) is designed to prevent is the rearranging of business structures for the purpose and effect of avoiding established bargaining rights. The gap here was not a normal feature of the transitory and episodic nature of the construction industry, nor did it arise from an intent to avoid bargaining rights. The effect of the Board’s declaration was that Mr. Turkiewicz could not – after ten years away from work – re-establish himself as a bricklayer except as a union member himself. The Divisional Court asked:

"What labour relations purpose is served by requiring [Mr. Turkiewicz] to start over subject to the collective agreements?" It said that question had not been answered in the First Decision and no answer could be given to justify a declaration that he and his defunct business are "related employers". The Divisional Court said that, on the agreed facts, such a declaration was unreasonable.

[43] Because the First Decision was unreasonable, it was quashed. Because the Second and Third Decisions were based on the First Decision, they too were quashed.

[44] The Divisional Court declined to remit the First Decision to the OLRB because "the result is inevitable: the declaration does not serve the underlying purposes of s. 1(4)". It also said that Mr. Turkiewicz should not be required to face further proceedings on this issue. Further, it stated, had it not concluded that all three OLRB Decisions had to be quashed, it would have quashed the Third Decision and remitted the issue of penalty for reconsideration because the damages award was "harsh and unreasonable".

VI. THE ISSUES

[45] The Unions submit that the Divisional Court erred in finding the OLRB Decisions were unreasonable. They say the Divisional Court erred in:

1. finding the Board failed to consider whether a related employer declaration made pursuant to s. 1(4) of the *LRA* would serve a labour relations purpose;

2. finding the Board failed to properly address s. 126(3) of the *LRA* and consider the reasons for the hiatus;
3. making findings of fact not made by the OLRB;
4. finding the damages award was punitive and unreasonable; and
5. declining to remit the OLRB Decisions to the Board for a new hearing.

VII. THE STANDARD OF REVIEW

[46] Addressing the standard of review in this matter is a two-step process. The first step is to determine the standard this court is to apply when reviewing the Divisional Court Decision. The second step is to determine the standard the Divisional Court was to apply when reviewing the OLRB Decisions.

A. The standard of review on appeal

[47] The Unions submit that, on an appeal from a judicial review decision of the Divisional Court, this court must determine whether the Divisional Court identified the correct standard of review and applied that standard correctly.

[48] Mr. Turkiewicz submits that this court is to review the Divisional Court Decision on a correctness standard.

[49] I accept the Unions' submission, which reflects well-settled law. See *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-46, and *Canadian Federation of Students v. Ontario (Colleges and Universities)*, 2021 ONCA 553, 157 O.R. (3d) 753, at para. 20.

Accordingly, this court must determine whether the Divisional Court identified the correct standard of review and applied that standard correctly. To do the latter, this court must "step into the shoes" of the Divisional Court and focus on the OLRB Decisions using the appropriate standard of review: *Agraira*, at para. 46.

B. The standard of review the Divisional Court was to apply to the OLRB Decisions

[50] The Divisional Court identified reasonableness as the standard of review it was to apply to the OLRB Decisions. The Unions say that the Divisional Court was correct in that but erred in its application of the reasonableness standard. In submitting that the correct standard of review is reasonableness, the Unions rely on *Vavilov*.

[51] The OLRB agrees with the Unions that the Divisional Court correctly identified that it was to review the OLRB Decisions on a reasonableness standard but erred in its application of that standard.

[52] Mr. Turkiewicz submits that the Divisional Court was to apply a standard of patent unreasonableness when reviewing the OLRB Decisions.

[53] I accept the Unions' submission. Following *Vavilov*, there is a presumption that reasonableness is the applicable standard of review (para. 23). The presumption can be rebutted in two types of situations – where the legislature has indicated a different standard is to apply or where correctness review is required

by the rule of law (para. 32). Neither applies in this case. Accordingly, the Divisional Court was to review the OLRB Decisions on a reasonableness standard.

VIII. ANALYSIS

[54] *Vavilov* provides a revised framework for determining what standard of review applies to administrative decisions and how the reasonableness standard of review is properly applied. The applicable standard of review is dealt with above so nothing more need be said on that matter. Because the *Vavilov* directives on the proper application of the reasonableness standard are crucial to the resolution of this appeal, I will begin my analysis by setting out those directives. In the section that follows, I "stand in the shoes" of the Divisional Court and review the OLRB Decisions based on those directives. I conclude my analysis by explaining how, in my view, the Divisional Court erred in its application of the reasonableness standard to the OLRB Decisions.

A. The *Vavilov* Directives for the Proper Application of the Reasonableness Standard of Review

[55] *Vavilov* states that the reasonableness review approach is based on the following principles. Courts are to intervene in administrative matters only if it is truly necessary to safeguard the legality, rationality, and fairness of the administrative process. Such reviews start from the principle of judicial restraint and respect for the distinct role of decision makers (para. 13). The reviewing court should respect administrative decision makers and their specialized expertise,

should not ask how they themselves would have resolved an issue, and should focus on whether the applicant has demonstrated that the decision is unreasonable (para. 75).

[56] In conducting a reasonableness review, the court must focus on the decision actually made by the decision maker. The court should refrain from deciding the issues itself. It does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a *de novo* analysis, or seek to determine the correct solution. Instead, the reviewing court considers only whether the actual decision, including both the rationale for the decision and the outcome to which it led, was unreasonable (para. 83).

[57] Where reasons have been given, the reasonableness review puts those reasons first. The court must examine the reasons with respectful attention, seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion (para. 84).

[58] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that bore on the decision (para. 85). It bears the hallmarks of reasonableness – justification, transparency, and intelligibility (para. 99).

[59] Two types of fundamental flaws can render a decision unreasonable. The first is a failure of rationality internal to the reasoning process (para. 101). To be

reasonable, a decision must be based on reasoning that is both rational and logical. The reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic (para. 102).

[60] The second type of fundamental flaw arises when a decision is untenable, in some respect, in light of the relevant factual and legal constraints that bear on it (para. 101). Elements in this evaluation include: 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 parties' submissions; the past practices and decisions of the administrative body; and, the potential impact of the decision on the individual to whom it applies (para. 106). The governing statutory scheme is likely to be the most salient aspect of the relevant legal context (para. 108).

[61] I would add that the reviewing court must bear in mind the expertise of the administrative decision maker with respect to the questions before it. At para. 31 of *Vavilov*, the Supreme Court states that "expertise remains a relevant consideration in conducting [a] reasonableness review." Being attentive to a decision maker's demonstrated expertise may reveal to a court why a decision maker reached a particular outcome or provided less detail in its consideration of a given issue (para. 93). Moreover, decision makers' specialized expertise may lead them to rely, when conducting statutory interpretation, on "considerations that a court would not have thought to employ but that actually enrich and elevate the

interpretive exercise" (para. 119). As such, relevant expertise of the administrative decision maker must be borne in mind by a court conducting a reasonableness review, both when examining the rationality and logic of the decision maker's reasoning process and the decision itself, in light of the factual and legal constraints bearing on it.

B. A Reasonableness Review of the OLRB Decisions

[62] In my view, the OLRB Decisions are reasonable when assessed using the *Vavilov* directives. According to those directives, there are two steps in the reasonableness review. The first step is to focus on the actual OLRB Decisions to see if they are rational and logical. The second step is to consider whether the OLRB Decisions are untenable, in some respect, given the factual and legal constraints that bore on them.

[63] Before performing those two steps, because of the central role that s. 1(4) of the *LRA* plays in the OLRB Decisions, for ease of reference, it is set out again now.

> Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such

> relief, by way of declaration or otherwise, as it may deem appropriate.

(1) The OLRB Decisions are rational and logical

[64] As previously indicated, the focus of the first branch of the analysis is on the OLRB Decisions themselves. Accordingly, I summarize the reasoning in each decision below. I see no flaw in the overarching logic in any of them. On the contrary, each of the Decisions is based on reasoning that is rational and logical.

[65] The First Decision – the Board had the discretion to make a related employer declaration under s. 1(4) of the *LRA* because, on the undisputed facts, the preconditions in s. 1(4) for making the declaration were met: two separate businesses (Brickpol and TTCMH) are or were carried on under the common control and direction of Mr. Turkiewicz; and, the two businesses are related in that they serve the same markets and perform work for the same type of clients.

[66] The Board chose to exercise its discretion because the Unions' collective bargaining rights were being eroded by Mr. Turkiewicz having recommenced bricklaying and masonry work in the same market and for the same type of clients as Brickpol but on a non-union basis.

[67] The Second Decision – the interest arbitration Award preserved and continued the Unions' collective bargaining rights in respect of Brickpol. The First Decision declared that Brickpol and TTCMH are a single employer within the

meaning of s. 1(4). Consequently, TTCMH is deemed to be a signatory to the VRAs entered into between Brickpol and the Unions.

[68] Based on the Award and the findings and declarations in the First Decision, the Board concluded that TTCMH is bound by the collective agreements which bound Brickpol.

[69] In so concluding, the Board noted that s. 1(4) applies to associated or related businesses whether or not those businesses operate simultaneously. Thus, neither Brickpol's dissolution nor Mr. Turkiewicz's bankruptcy ended the Unions' bargaining rights or absolved TTCMH of the collective agreement obligations that Brickpol had undertaken.

[70] The Third Decision – the work TTCMH performed was bargaining unit work. TTCMH was bound by the collective agreement obligations that Brickpol had undertaken. Its failure to use union members to do the work constituted a violation of the collective agreement and, accordingly, the Unions were entitled to damages. The Unions provided a reasonable calculation of the value of the lost bargaining unit work, which the Board accepted. The damages award was $32,466, calculated using the hourly rate of compensation for forklift drivers in 2017 of $54.11 multiplied by 600 hours.

(2) The OLRB Decisions are tenable in light of the relevant factual and legal constraints

[71] Following the *Vavilov* directives, I now consider whether the OLRB Decisions are untenable, in some respect, in light of the relevant factual and legal constraints that bore on those Decisions.

(a) The Relevant Factual Constraints

[72] *Vavilov* instructs that, on a reasonableness review, three factual constraints are pertinent: the evidence before the decision maker and facts of which the decision maker may take notice; the parties' submissions; and, the potential impact on the individual to whom the decision applies.

[73] There is nothing unreasonable in the Board's handling of the first two factual constraints. In each of the OLRB Decisions, the Board clearly identified and addressed the evidence before it and the parties' submissions.

[74] As for the third factual consideration – the potential impact of the OLRB Decisions on Mr. Turkiewicz – each of the decisions reflects that the Board understood Mr. Turkiewicz's personal circumstances, the history and context of the proceedings, and Mr. Turkiewicz's submissions. Thus, in my view, in each case, the Board reasonably considered the potential impact of the Decision on Mr. Turkiewicz.

[75] Accordingly, there is nothing in the relevant factual constraints to indicate that the OLRB Decisions are untenable. On the contrary, a consideration of the relevant factual constraints reinforces their reasonableness.

(b) The Relevant Legal Constraints

[76] The relevant legal constraints include the governing statutory scheme, other relevant statutory and common law, the principles of statutory construction, and the past practices and decisions of the administrative body. For the reasons given above, I would also consider the relative expertise of the administrative decision-maker on the issues it decided. A consideration of these matters reveals nothing untenable about the OLRB Decisions.

[77] In terms of the governing statutory scheme, s. 114 of the *LRA* gives the OLRB exclusive jurisdiction to exercise the powers conferred on it and s. 116 contains a strong privative clause.[1] The OLRB is a highly specialized tribunal with considerable expertise, placing it in an elevated position to interpret its home statute.

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[1] Section 114(1): The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

Section 116: No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

[78] Section 1(4) of the *LRA* explicitly confers a broad discretion on the Board, stating that where, “in the opinion of the Board”, the preconditions are met, the Board “may” make a related employer declaration. Apart from the preconditions, s. 1(4) does not expressly require that other matters be considered.

[79] It was for the Board to assess and evaluate the evidence before it when determining if the preconditions had been met (*Vavilov*, para. 125). And, if the preconditions were found to have been met, it was for the Board to decide how to exercise the discretion that s. 1(4) confers on it.

[80] The foregoing focuses on s. 1(4) and the related employer declaration in the First Decision because the Divisional Court found that decision to be unreasonable. As a result, it quashed the First Decision and also the Second and Third Decisions, which were based on the First Decision. However, in each of the OLRB Decisions, the issues the Board had to grapple with fell squarely within its expertise and the confines of its enabling statute. And, in each case, the Board – a highly specialized tribunal with extensive expertise – was informed by decades of its jurisprudence on the issues.

[81] In my view, a consideration of the relevant legal constraints shows nothing untenable about the OLRB Decisions and offers no basis for judicial intervention. Instead, it reinforces the conclusion that those decisions are reasonable.

C. The Divisional Court Erred in its Application of the Reasonableness Standard

[82] In my view, the overarching error in the Divisional Court Decision is its failure to follow the *Vavilov* dictates on the application of the reasonableness standard to the OLRB Decisions. The Divisional Court did not show the requisite restraint and respect for the specialized expertise of the OLRB, nor did it afford the OLRB Decisions appropriate deference. Indeed, as I explain below, it committed errors that *Vavilov* specifically cautions against with respect to the proper application of the reasonableness standard.

(1) The Board did consider whether a labour relations purpose underlay the application for a related employer declaration

[83] The Divisional Court distilled the many issues Mr. Turkiewicz raised on his judicial review applications into a single question: was the Board's declaration that TTCMH and Brickpol are a single employer, pursuant to s. 1(4) of the *LRA*, reasonable? The Divisional Court concluded it was not because the Board had "failed to analyze whether a related employer declaration would serve a labour relations purpose as it was required to do."

[84] In my view, the Divisional Court erred in its application of the reasonableness standard of review in so concluding.

[85] In the First Decision, having regard to the undisputed material and documents that the Unions provided, and notwithstanding any of the additional facts asserted in response, the Board was satisfied that the two separate

businesses of TTCMH and Brickpol are, or were, carried out under the common control and direction of Mr. Turkiewicz, and are related businesses that serve the same markets and perform work for the same type of clients.

[86] The Divisional Court acknowledged that the Board's conclusion that the s. 1(4) criteria were met was reasonable – Mr. Turkiewicz and Brickpol had common ownership, common management, and were engaged in the same activities in the same markets.

[87] The Board also found that the Unions' collective bargaining rights were being eroded by Mr. Turkiewicz's decision to recommence bricklaying and masonry work in the same market and for the same type of clients as Brickpol but on a non-union basis through TTCMH. The Board found that this erosion of bargaining rights represents "precisely the type of mischief which subsection 1(4) of the Act is meant to address" because the Unions' bargaining rights were undermined by a shifting of one or more workers from one corporate vehicle to another entity without regard to the Unions' pre-existing bargaining rights.

[88] In short, in the First Decision, the Board found that the Unions' bargaining rights were being eroded because TTCMH was performing bargaining unit work on a non-union basis. Although the Board did not use the precise phrase "labour relations purpose", it is clear that it chose to exercise its discretion to grant the related employer declaration for that labour relations purpose.

[89] Accordingly, the Divisional Court erred in finding the First Decision unreasonable on the basis that the Board had failed to consider whether a valid labour relations purpose was served by making the declaration.

[90] I note in passing that the labour relations purpose, as found by the Board, falls squarely within the Divisional Court's statement that a labour relations purpose includes the preservation or protection from artificial erosion of a union's bargaining rights.

[91] It was not open to the Divisional Court to substitute its own view of what constitutes a labour relations purpose – the analysis of which centred on Mr. Turkiewicz's motives. Section 1(4) gives the OLRB the discretion to make a related employer declaration when the statutory preconditions are met. The exercise of that discretion warrants deference. Decades-old OLRB jurisprudence supports the conclusion that the erosion of a union's bargaining rights constitutes a labour relations purpose warranting a related employer declaration. *Vavilov* tells us to consider the First Decision in light of that history.

[92] The Divisional Court should have shown appropriate deference to the OLRB's specialized expertise and jurisprudence on the issues before it. In finding the First Decision to be unreasonable, in my view, the Divisional Court failed to adhere to the foundational principle underlying a reasonableness review: intervene in administrative matters only if it is truly necessary to safeguard the legality, rationality, and fairness of the administrative process.

(2) The Board properly addressed s. 126(3) of the *LRA* and the reasons for the hiatus

[93] The Divisional Court was also critical of the Board's treatment of s. 126(3) of the *LRA*.[2] It said that the Board did not expressly address s. 126 or the jurisprudence related to "key individuals" in the construction industry context. It acknowledged that Mr. Turkiewicz met the test for a key individual under s. 126 but stated that the Board failed to ask itself what sort of hiatus – its nature, length and reasons behind it – would not lead to a related employer declaration.

[94] Again, in my view, these criticisms reflect an erroneous application of the reasonableness standard of review.

[95] The Board considered the length of the hiatus, noting the dates of Brickpol's voluntary dissolution and TTCMH's registration as a sole proprietorship, as well as the fact that Mr. Turkiewicz had recommenced working after a multi-year hiatus. It noted Mr. Turkiewicz's role as a principal and director of Brickpol and a signatory on renewal collective agreements and inactive notices. The element in s. 126(3) pertaining to Brickpol's ability to carry on business without disruption after Mr. Turkiewicz (the key individual in question) left was not relevant because Mr. Turkiewicz was associated with Brickpol at the time it stopped performing work and at its dissolution.

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[2] The Divisional Court erroneously referred to this provision as s. 169 of the *LRA* (at paras. 48-49 of its decision).

[96] In any event, it is not clear to me that the OLRB was required to consider the reasons for the hiatus between Mr. Turkiewicz being a key individual with Brickpol and then with TTCMH. The only factor that s. 126(3) requires the OLRB to take into account is the length of the hiatus, which it did. OLRB jurisprudence affirms that there is no requirement for anti-union motivations to exist for a s. 1(4) declaration to be issued. The Divisional Court erred by imposing an additional factor on the OLRB that is not grounded in the *LRA* or the jurisprudence.

(3) The Divisional Court erred in its factual findings

[97] The Unions submit that the Divisional Court improperly made factual findings concerning Mr. Turkiewicz's injury, his ability to work, and the impact of his personal circumstances. I agree.

[98] Mr. Turkiewicz asserted before the OLRB on the related employer application that: he was involved in a motor vehicle accident in 2007; he became bankrupt as a result and was discharged in 2011; Brickpol was dissolved in 2008; he has no employees and had no employees since 2007; and, he was doing some work on his own in 2017, as he was able to commence that work after recovering from the accident, with his son providing help on some occasions.

[99] In the First Decision, the Board refers to Mr. Turkiewicz's assertions but does not accept them. The Board concluded that Brickpol and TTCMH were related businesses carried out under the common control of Mr. Turkiewicz "having regard to the undisputed material and documents provided by the applicant and

notwithstanding any of the additional facts asserted in the response" (emphasis added).

[100] The Divisional Court made findings of fact that the OLRB did not make, including that: Mr. Turkiewicz was unable to work because of his injuries; he had not worked for ten years; and, his life and business had been "largely destroyed" as a result of the accident.

[101] The Supreme Court affirmed in *Vavilov* that reviewing courts must not interfere with a tribunal's factual findings absent exceptional circumstances, and should refrain from reweighing and reassessing the evidence considered by the decision maker (para. 125). It explained that many of the same reasons that support an appellate court's deferring to a lower court's factual findings apply equally in the context of judicial review.

[102] The Board did not make the above-noted findings that the Divisional Court made about Mr. Turkiewicz's personal circumstances. There were no exceptional circumstances justifying the Divisional Court's departure from the general prohibition against reassessing evidence. Therefore, the Divisional Court erred in making those findings and in relying on them in concluding the OLRB Decisions were unreasonable.

(4) The Board's damages award was reasonable

[103] There is no basis on which to interfere with the damages awarded by the OLRB because that award is reasonable.

[104] TTCMH did not call any evidence to counter the Unions' estimate of the number of hours of work, which the Board accepted. The Board's calculation of damages in the Third Decision accorded with this court's guidance in *Blouin Drywall*, the leading Canadian authority, consistently followed for nearly fifty years, on calculating damages in these matters.

[105] The Divisional Court Decision does not refer to *Blouin Drywall*. Nor does it explain why it concluded the damages award was "harsh and unreasonable". I see no basis for the Divisional Court's determination that the damages award is unreasonable.

(5) The Divisional Court erred in failing to remit the matters to the Board

[106] At para. 141 of *Vavilov*, the Supreme Court instructs that where a decision is unreasonable it is "most often appropriate to remit the matter to the decision maker to have it reconsider the decision". This follows a long line of jurisprudence to the effect that a very high and "extraordinary" threshold must be reached for a court to refuse to remit the matter to the tribunal. See, for example, *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167, at paras. 14-17; *Canada (Attorney General) v. Zalys*, 2020 FCA 81, at para. 104; *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025, 148 O.R. (3d) 705, at para. 80, leave to appeal to S.C.C. refused [2020] S.C.C.A. No. 59.

[107] Accordingly, a reviewing court may only render a decision on the merits exceptionally. I see no exceptional circumstances justifying departure from that general principle. This was not a case such as that envisioned by the Supreme Court at para. 142 of *Vavilov*, where it said that the intention that the administrative decision maker decide the matter at first instance "cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations".

[108] In this case, there has been no "endless merry-go-round of judicial reviews and subsequent reconsiderations" of the OLRB Decisions. Mr. Turkiewicz's three judicial review applications were heard together, on which the Divisional Court rendered a single decision. And, there had been no prior reconsiderations of any of the OLRB Decisions.

D. Mr. Turkiewicz's other contentions

[109] I see nothing in Mr. Turkiewicz's other contentions on this appeal, which include that the Board: failed to recognize that he personally performed the work at issue and not under the "TTCMH Banner"; erroneously found that there had been a transfer of business from Brickpol to Mr. Turkiewicz; wrongly concluded that Mr. Turkiewicz was bound by current collective agreements as notice of the interest arbitration could not have been given to Brickpol; proceeded in a trifurcated manner; and, wrongly concluded that his personal bankruptcy did not terminate his obligations under the collective agreement.

[110] Mr. Turkiewicz raised these same points before the Divisional Court. That court rejected them for the following reasons:

- A sole proprietorship and its proprietor are the same legal person. There is no legal distinction between work performed by TTCMH and Mr. Turkiewicz;
- The First Decision was based on s. 1(4) of the *LRA*, not s. 69. As such, the OLRB made no finding that there had been a transfer of business from Brickpol to Mr. Turkiewicz;
- An employer cannot avoid a collective agreement by winding up a corporation and then continuing the business in another form. The argument that Brickpol could not have received notice of the interest arbitrations after dissolution is a collateral attack on the interest arbitration Award;
- The OLRB is the master of its own process and was entitled to proceed in a trifurcated manner. Each hearing was scheduled and decided promptly; and
- Bankruptcy terminates the employment of the bankrupt's employees, not the collective agreement or bargaining rights.

[111] I agree with the Divisional Court on all these points.

IX. DISPOSITION

[112] Accordingly, I would allow the appeal and set aside the Divisional Court Decision, with costs to the appellants here and before the Divisional Court. If the parties are unable to resolve the matter of these costs, they may make written

submissions on the same, to a maximum of three pages, to be filed no later than 14 days following the date of the release of these reasons.

[113] No costs are ordered in favour of, or against, the OLRB.

Released: November 16, 2022 “E.E.G.”

“E.E. Gillese J.A.”
“I agree. Gary Trotter J.A.”
“I agree. Harvison Young J.A.”