COURT OF APPEAL FOR ONTARIO

CITATION: Enercare Home & Commercial Services Limited Partnership v. UNIFOR Local 975, 2022 ONCA 779
DATE: 20221116
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Gillese, Trotter and Harvison Young JJ.A.

BETWEEN

Enercare Home & Commercial Services Limited Partnership,
Ganeh Energy Services Ltd. and
Beaver Energy Services Ltd.

Applicants (Respondents)

and

UNIFOR Local 975 and
Ontario Labour Relations Board

Respondents (Appellant/Respondent)

Michael A. Church and Sukhmani Virdi, for the appellant UNIFOR Local 975

John Craig and Cameron Fynney, for the respondents Ganeh Energy Services Ltd. and Beaver Energy Services Ltd.

Richard J. Charney and Samantha Cass, for the respondent Enercare Home & Commercial Services Limited Partnership

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 David L. Corbett, Todd Ducharme and Cynthia Petersen), dated March 26, 2021, with reasons reported at 2021 ONSC 606.

Gillese J.A.:

I. OVERVIEW

[1] Enercare Home & Commercial Services Limited Partnership ("**Enercare**") and UNIFOR Local 975 ("**Unifor**") are in a collective bargaining relationship. Unifor asked the Ontario Labour Relations Board (the "**Board**" or the "**OLRB**") to declare that Enercare, Ganeh Energy Services Ltd. ("**Ganeh**"), Beaver Energy Services Ltd. ("**Beaver**"), and Perras Mechanical Services Ltd. ("**Perras**") were related employers within the meaning of s. 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A (the "***LRA***").

[2] On June 6, 2017, the Board declared that Enercare, Ganeh, and Beaver were related employers, but Perras was not (the "**Board Decision**").

[3] In reasons dated March 26, 2021, the Divisional Court quashed the Board Decision on the basis it was unreasonable (the "**Divisional Court Decision**").

[4] Unifor appeals the Divisional Court Decision.

[5] These reasons are being released at the same time as those in the companion appeal of *Turkiewicz (Tomasz Turkiewicz Custom Masonry Homes) v. Bricklayers, Masons Independent Union of Canada, Local 1*, 2022 ONCA 780. Both appeals raise the same central question: did the Divisional Court run afoul of the legal principles in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 ("**Vavilov**"), when reviewing an OLRB decision made pursuant to s. 1(4) of the *LRA*?

[6] For the reasons that follow, in my view, the Board Decision is reasonable and the Divisional Court breached the *Vavilov* dictates in finding otherwise. Consequently, I would allow the appeal and restore the Board Decision.

II. THE KEY LEGISLATIVE PROVISION

[7] Section 1(4) of the *LRA* is the key legislative provision in this matter. It reads as follows:

> **1.(4)** 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.

III. BACKGROUND

[8] Enercare sells, rents, installs, and services residential water heaters and heating, ventilation and air conditioning ("HVAC") systems. The OLRB certified Unifor as the exclusive bargaining agent for all Enercare employees, including HVAC technicians, service technicians, maintenance technicians, installers, helpers, plumbers, duct cleaners, and clerical staff. Unifor and Enercare (and their respective predecessors) have been in a collective bargaining relationship since the 1980s.

[9] Enercare provides services through a combination of unionized employees and independent contractors. On average, 20-30% of all work done by Enercare is performed by independent contractors. Its practice of using independent contractors is longstanding and the collective agreement with Unifor expressly permits such contracting out.

[10] The use of independent contractors enables Enercare to respond to variations in customer demand, which fluctuates significantly. For example, summer months are busy with air conditioning issues. Enercare employees often take vacations in the summer, reducing Enercare's available resources. Customer demand also increases at night and on weekends but the collective agreement limits the number of Enercare employees assigned to work evenings and weekends.

[11] Enercare and Unifor entered into settlements and letters of understanding related to contracting out. In May 2006, a settlement clarified the scope of the bargaining rights of several unions, including Unifor's predecessor. At that time, Unifor's predecessor did not attempt to expand its bargaining rights to include Enercare's independent contractors.

[12] In April 2010, Enercare and Unifor entered into Letter of Understanding ("**LOU**") #3, which is part of the collective agreement. LOU #3 provides that Enercare "shall not sub-contract work that is presently being performed by

employees covered by this agreement that would by so doing result in lay off of regular Bargaining Unit Employees". LOU #2, which is also part of the collective agreement, provides that Enercare "is committed to successfully growing its competitive sales and services business with our own employees in our franchise area."

[13] Ganeh and Beaver are two of the 90 independent contractors used by Enercare. Ganeh was founded in 2003 by a former manager of an Enercare predecessor. Enercare's predecessor wanted a reliable independent contractor to perform some of its work and suggested to Ganeh's owner that he should create a business for that purpose. Beaver was founded in 2008 and is owned by the son of Ganeh's owner. Ganeh performs HVAC servicing and maintenance whereas Beaver performs HVAC installation. Ganeh and Beaver are operationally integrated and share staff.

[14] Ganeh and Beaver are virtually entirely economically dependent on Enercare. Enercare contracts form 100% of Ganeh's business and 95-98% of Beaver's business.

[15] Between December 2011 and March 2012, Unifor brought applications to the OLRB for declarations that Enercare and its contractors Ganeh, Beaver, and Perras, were "related employers" within the meaning of s. 1(4) of the *LRA* and, alternatively, that there had been a transfer of business within the meaning of s. 69.

[16] The Board declared, pursuant to s. 1(4), that Enercare, Ganeh, and Beaver were related employers, but Perras was not.

IV. THE BOARD DECISION

[17] The Board hearing ran for more than twenty hearing days. The Board Decision is 391 paragraphs in length, excluding appendices. Vice-Chair Wacyk heard from witnesses for Enercare, Ganeh, Perras, and Unifor. She also received voluminous documentary evidence from the parties. In the end, the Vice-Chair found there was little dispute on the essential facts. Those facts are set out above and so are not repeated here.

[18] The Vice-Chair noted that Board decisions made pursuant to ss. 1(4) and 69 of the *LRA* are essentially "fact-driven". She viewed generic evidence on Enercare's utilization of independent contractors as contextually important. Where appropriate, and in the absence of evidence to the contrary, she understood those generic practices to apply to Enercare's contractual relations with Ganeh, Beaver, and Perras. However, her focus was primarily on the evidence regarding Enercare's relationship with those entities.

[19] Unifor argued that Enercare's contracting out was a violation of LOU #2, which expressed Enercare's commitment to growing its business with its own employees. Enercare relied on the settlements made in May 2006 and April 2010 to argue that Unifor should be precluded from so arguing. It noted that when

Unifor's predecessor entered into the former settlement, it did not attempt to expand its bargaining rights to independent contractors utilized by Enercare. Enercare also relied on its long history of openly and transparently contracting out, the fact that Unifor had not filed a grievance alleging violations of the settlements or the collective agreement, and the fact that Unifor had not attempted to negotiate further contracting out protections.

[20] The Vice-Chair observed that collective agreement provisions and settlements reflect parties' respective bargaining power. However, ss. 1(4) and 69 address trade unions' legislated bargaining rights, which engage an analysis separate and distinct from contracting out rights under a collective agreement. Relying on prior Board decisions, she said she had not considered any provisions in the collective agreement or the referenced settlements in interpreting ss. 1(4) and 69.

[21] The Vice-Chair noted that the parties disagreed on whether Enercare's use of independent contractors had increased. She said the issue was not whether there was more or less contracting out than had historically been the case. Rather, the issue was "whether that work is conducted under common direction or control, and results in the mischief addressed by subsection 1(4)."

[22] She stated the "well established" purpose of s. 1(4) is to prevent the erosion of a trade union's bargaining rights. If that occurs, or if there is a reasonably

foreseeable erosion of bargaining rights, the relief available pursuant to s. 1(4) is a related employer declaration. However, the purpose of s. 1(4) is not to extend a trade union's bargaining rights.

[23] The Vice-Chair stated that four criteria must be met for a related employer declaration to be made: (1) there must be more than one entity involved; (2) the business activities of the entities must be associated or related; (3) the entities must be under common control or direction; and, (4) there must be a labour relations reason for granting the declaration.

[24] The first and second criteria were easily satisfied in this case. There was no dispute that Enercare, Ganeh, Beaver, and Perras are separate entities and that, pursuant to their contractual relationships, they all carry out the same related business activities, namely, servicing Enercare's customers.

[25] The Vice-Chair concluded that the third criterion – common control or direction – was also met. She recognized that a degree of functional interdependence is inevitable and implicit in many subcontracting arrangements. However, citing Board jurisprudence, she said that the greater the functional coherence and interdependence among related activities and businesses, the more probable it is that the Board will conclude the entities carrying on the activities should be treated as one employer.

[26] Based on Board jurisprudence, the Vice-Chair listed several elements as being relevant to the third criterion of common control and direction, noting that not all elements must be engaged for a finding that the third criterion is met. A summary of the elements, and her findings on them, follows.

- Common ownership or financial control: While Ganeh, Beaver, and Perras are distinct corporate entities, Ganeh and Beaver are economically dominated by Enercare. They work only for Enercare and are entirely reliant on their continued relationship with Enercare. Their functional economic dependency on Enercare leads to Enercare having effective indirect control over them.
- Common management: Enercare retains a significant role in managing the work sent to Ganeh, Beaver, and Perras. With regard to service work, through its planners, Enercare determines where, how, and by whom the services are provided. With regard to installation, Enercare planners book, prioritize, and assign the calls, determining when, where, how, and which contractors will perform the installation. However, the contractors determine the individual technician.
- Interrelationship of operations: Ganeh, Beaver, and Perras technicians are part of, and integrated into, Enercare's daily bank of resources and Enercare's dispatch system. Service work is dispatched directly to Ganeh and Perras service technicians by Enercare planners. The names of

Ganeh/Beaver and Perras are integrated with the names of Enercare installers in the system governing the assignment of installation work. Enercare owns and provides the equipment to be installed and delivers it to Ganeh/Beaver and Perras premises. Ganeh/Beaver and Perras management are integrated into Enercare's communication system and dispatch system. Enercare's relationship with Ganeh has been in place for over 10 years and with Beaver for almost 10 years. This suggests a permanency to the relationships which, in turn, suggests that Ganeh and Beaver are essentially an integral functional and economic part of Enercare's business activities.

- Representation to the public as a single, integrated enterprise: Enercare exercises considerable control to ensure the contractors' technicians are seen as an extended but integrated aspect of Enercare's business. At Enercare's direction, Ganeh, Beaver, and Perras technicians identify themselves to the outside world and Enercare customers by wearing Enercare "colours", shirts and other clothing items with decals, and driving vehicles identifying them as Enercare-authorized. The result is that their identity as Ganeh, Beaver, and Perras technicians is subsumed in that of Enercare when they perform Enercare work. Ganeh and Beaver arguably have no other public identity. This is consistent with their lack of advertising for the past 10 years. The result is, particularly in the case of Ganeh and

Beaver, a representation to the public as a single integrated enterprise with Enercare.

- Centralized control of labour relations: Enercare has no formal role in the labour relations of Beaver, Ganeh, or Perras. However, the practical reality is different. In the case of Perras (and probably Ganeh and Beaver), Enercare determines whether the HVAC technicians are sufficiently skilled to perform Enercare's work. If Enercare is not happy with the services of a particular contractor technician, that technician would no longer perform Enercare work. In the case of Ganeh and Beaver, such a decision would be determinative of that technician's ability to continue to perform any work for Ganeh or Beaver.

[27] Based on the above, the Vice-Chair concluded that Enercare has not divested fundamental control and direction over the work performed for it by Ganeh, Beaver, and Perras. Rather, she found the evidence established that Enercare and those entities share common control and direction over the activities which they carry on as part of Enercare's core business activities.

[28] Having found that the s. 1(4) preconditions were met, the Vice-Chair then considered whether there was a labour relations reason for issuing a related employer declaration.

[29] Relying on Board jurisprudence, the Vice-Chair explained that s. 1(4) is intended to address “mischief” that includes the erosion of bargaining rights. She found that Unifor’s bargaining rights are eroded or undermined by the diversion of what would normally be work performed by Unifor members to one of the responding parties.

[30] The Vice-Chair made the related employer declaration in respect of Ganeh and Beaver for reasons that include the following:

- Ganeh and Beaver did not exist before they were established at the request of what is now Enercare;
- Ganeh and Beaver now employ 60-70 subcontractors who exclusively perform the core activities of Enercare’s business operations on a daily basis;
- The number of Ganeh and Beaver employees is increasing, while the number of bargaining unit members has remained stagnant at best;
- If Ganeh and Beaver were not providing a livelihood for its employees, the bargaining unit (whose rights attach to the work performed by the subcontractors), would have grown significantly in the areas of service and installations;
- Ganeh and Beaver essentially comprise a parallel Enercare workforce, performing the same core work performed by Unifor’s bargaining unit but unencumbered by the accompanying bargaining unit entitlements;

- By meeting its customer needs through Ganeh and Beaver, Enercare is able to avoid its bargaining unit obligations and artificially erode Unifor's bargaining unit; and
- Enercare's current arrangement with Ganeh and Beaver has the potential to further erode Unifor's bargaining rights because future growth in Enercare's business could be absorbed by Ganeh or Beaver, inhibiting the natural growth of Unifor's bargaining unit.

[31] Despite having found that Enercare and Perras share common control and direction, the Vice-Chair declined to make a related employer declaration in respect to Perras. The reasons she gave include:

- Enercare work constitutes, at most, 30% of Perras' business. It has no input or involvement in the other 70% of Perras' business;
- Perras was an established viable commercial entity before its relationship with Enercare, with its own employee complement;
- Perras advertises itself as a full-service provider, offering services to a variety of clients of which Enercare is only one;
- Perras competes with Enercare for furnace and air conditioning installations;
- While there is a degree of functional and economic dependency, Perras is not effectively dominated or controlled by Enercare, economically or otherwise;

- If the intent of the related employer declaration was to capture all Perras employees, that would extend rather than preserve Unifor's bargaining rights because Unifor does not currently have any bargaining rights regarding any Perras employees;
- If the related employer declaration was intended to apply to only some Perras employees, that would be problematic because it would fragment the bargaining unit;
- The increase in Perras' work with Enercare over time primarily relates to plumbing work and nothing suggested there would be more bargaining unit plumbers if Perras was not performing that work; and
- There was an absence of clear evidence of the mischief s. 1(4) was intended to avoid, namely, erosion of Unifor's bargaining rights.

[32] The Vice-Chair addressed the submission that a s. 1(4) declaration could lead to unforeseen consequences and labour relations problems with respect to Ganeh and Beaver technicians, who are subcontractors. She noted that, according to the general manager for Ganeh and Beaver, their technicians are mostly individuals with a truck who are usually available for the daily assignment of Enercare work. In her view, this gave rise to fewer concerns relating to the consequences of issuing a s. 1(4) declaration than would be the case in more conventional subcontracting relationships. Relying on Board jurisprudence, she also explained that when making a determination under either s. 1(4) or s. 69, the

impact of any finding on the responding parties is not an issue because those provisions are concerned with protecting bargaining rights and not with the effect that their invocation might have on the corporate entities involved.

V. THE DIVISIONAL COURT DECISION

[33] The Divisional Court concluded that the Board's analysis leading to it declaring Enercare, Ganeh, and Beaver to be related employers was unreasonable because it failed to take into account the parties' bargaining history, the collective agreement, and the relevant LOUs addressing Enercare's longstanding contracting out practices. It said that this unreasonable analysis led the Board to analyse other issues without regard for the proper context in which those issues arose.

[34] After setting out the background and the parties' positions, the Divisional Court considered the legislative purpose of, and context for, s. 1(4). It then reviewed OLRB jurisprudence on s. 1(4), valid labour relations purposes for making a related employer declaration, and contracting out. The Divisional Court observed that the OLRB has generally not found contracting out to be a basis for a related employer declaration. The Board declined to consider the collective agreement, bargaining history, or the parties' agreements respecting contracting out when considering Enercare's contracting out to Ganeh, Beaver, Perras and others, based on OLRB jurisprudence. The Divisional Court said the OLRB

jurisprudence the Board relied on did not stand for the proposition that the terms of the collective agreements, bargaining history, and agreements between the parties are not relevant context on a s. 1(4) application. The court concluded that, by failing to take that history into account, the Board analysis was unreasonable and led it to fail to place the issues before it in a proper context. This, in turn, led to a "decontextualized analysis" of other issues, rendering the Board analysis unreasonable throughout.

[35] The Divisional Court acknowledged the Board's finding that the work Enercare contracts out to Ganeh and Beaver erodes Unifor's bargaining rights because it is all work that could be performed by unionized employees but, instead, is performed by independent contractors. However, it said, the Board's findings had not been placed within the context of Enercare's longstanding contracting out practices or the history of this issue in the parties' collective agreement and LOUs, and assessing whether an employer is "related" requires full consideration of the labour relations context, "something that did not happen in this case."

[36] The Divisional Court was also critical of the Board's analysis on the basis that it conflated contracting out generally with contracting out to Ganeh and Beaver. It said that Enercare's history of contracting out was necessary context to appreciate the reasons Ganeh and Beaver came into existence and why they operate as they do, and in assessing Enercare's "control" over Ganeh and Beaver.

[37] The Divisional Court saw many factors as casting doubt on the reasonableness of the Board finding that Ganeh and Beaver are related employers to Enercare, including:

- Ganeh and Beaver do not have common ownership with Enercare;
- The businesses of Ganeh/Beaver and Enercare do not have common management or common control over labour relations bargaining and decisions;
- No Enercare employees were laid off and then hired by Ganeh or Beaver;
- Enercare's longstanding contracting out practice reflects the uneven demand for its services;
- Ganeh and Beaver have performed Enercare work for approximately a decade;
- Beaver and Ganeh are only two of 90 Enercare contractors, and their relationship with Enercare is no different than the relationship Enercare has with its other contractors; and
- The parties have entered into two LOUs that directly address the limits on Enercare's ability to contract out work.

[38] The Divisional Court also questioned the validity of the Board's distinction between Ganeh/Beaver and Perras. It said the distinction was drawn on the basis that virtually all of Ganeh/Beaver's business is with Enercare while only roughly

30% of Perras' business is. It said that this distinction does not affect the bargaining relationship between Enercare and Unifor. It added that nothing prevents Ganeh/Beaver from performing other work and it is solely a management decision on their part to work almost exclusively for Enercare.

[39] After quashing the Board Decision, the Divisional Court remitted the matter to the OLRB for a fresh determination.

VI. THE STANDARD OF REVIEW

[40] On this appeal, the court must determine whether the Divisional Court identified the correct standard of review and applied that standard correctly: *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. To do the latter, this court must "step into the shoes" of the Divisional Court and focus on the Board Decision using the appropriate standard of review: *Agraira*, at para. 46.

[41] The Divisional Court applied the reasonableness standard of review when considering the Board Decision. The parties are agreed that the Divisional Court correctly identified the applicable standard of review. I agree.

[42] 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 correctly identified reasonableness as the applicable standard for reviewing the Board Decision.

VII. THE ISSUES

[43] Unifor's overarching submission is that the Divisional Court misapplied the reasonableness standard of review to the Board Decision and was "overly interventionist". Specifically, it submits that the Divisional Court erred in finding the Board Decision was unreasonable because the Board:

1. did not consider the parties' bargaining history, collective agreement, and LOUs;
2. conflated Enercare's contracting out generally with its contracting out specifically to Ganeh and Beaver; and
3. treated Ganeh and Beaver's economic dependence as a relevant factor.

VIII. ANALYSIS

[44] The *Vavilov* directives for the proper application of the reasonableness standard are fully discussed in *Turkiewicz*, the companion case, and will not be repeated here.

[45] In the analysis that follows, I first "stand in the shoes" of the Divisional Court and review the Board Decision to determine whether, in accordance with the

Vavilov directives, it is reasonable. Thereafter, I explain how, in my view, the Divisional Court erred in its application of the reasonableness standard to the Board Decision.

[46] For ease of reference, s. 1(4) of the *LRA* is set out again now.

> **1.(4)** 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.

A. A Reasonableness Review of the Board Decision

[47] *Vavilov* states that two types of fundamental flaws can render an administrative decision unreasonable. The first type of fundamental flaw 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). 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).

[48] Accordingly, my reasonableness review of the Board Decision proceeds in two steps. First, I set out a summary of the Board Decision to see if its reasoning is rational and logical, and whether it suffers from any fatal flaw in its overarching logic. Second, I consider whether the Board Decision is untenable, in some respect, in light of the factual and legal constraints that bore on it.

[49] As directed by *Vavilov*, my analysis is infused by an appreciation of the OLRB's relevant expertise, 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.

(1) The Board Decision is rational and logical

[50] The Board Decision can be summarized as follows.

[51] The three statutory preconditions in s. 1(4) are met for Enercare, Ganeh, Beaver, and Perras. First, there is more than one entity – Enercare, Ganeh, Beaver, and Perras are separate entities. Second, the business activities of the entities are associated or related. Pursuant to their contractual relationships, all the entities carry out the related business activity of serving Enercare's customers. Third, Ganeh, Beaver, and Perras are under Enercare's common control or direction.

[52] There was no dispute before the Board that the first two criteria were met.

[53] The Board found the third criterion of common control or direction was met and that Enercare had not divested fundamental control and direction over the work performed for it by Ganeh, Beaver, and Perras. In so finding, in accordance with OLRB jurisprudence, the Vice-Chair considered five elements in conjunction with her factual findings that bore on them.

- Common ownership or financial control – Ganeh and Beaver are economically dominated by Enercare and entirely reliant on it. 100% of Ganeh's business is from Enercare; almost 100% of Beaver's business is from Enercare. Their "functional economic dependency" on Enercare leads to Enercare having effective indirect control over them.
- Common management – Enercare retains a significant role in managing the work it sends to Ganeh, Beaver, and Perras. Enercare determines when, how and by whom the service work is provided and it does the same in respect of installation.
- Interrelationship of operations – Ganeh, Beaver, and Perras technicians are part of, and integrated into, Enercare's daily bank of resources and dispatch system. Service work is dispatched directly to Ganeh and Perras service technicians by Enercare planners. Enercare owns and provides the equipment to be installed and delivers it to Ganeh, Beaver, and Perras. Ganeh, Beaver, and Perras management are integrated into Enercare's communication and dispatch systems.

Enercare's relationship with Ganeh has been in place for over 10 years and with Beaver for almost 10 years, indicating that Ganeh and Beaver are an integral functional and economic part of Enercare's business activities.

- Representation to the public as a single, integrated enterprise – As a result of Enercare's direction, the identity of Ganeh, Beaver, and Perras technicians is subsumed into that of Enercare when performing Enercare work. Ganeh and Beaver have no public identity apart from Enercare.
- Centralized control of labour relations – Although Enercare has no formal role in Ganeh, Beaver, and Perras labour relations, the practical reality is otherwise. For example, if Enercare is not happy with the services of a particular contractor technician, that technician would no longer perform Enercare work, which would be determinative of the technician's ability to continue to work for Ganeh or Beaver.

[54] Having found that the preconditions to the exercise of discretion under s. 1(4) were met, the Board chose to exercise its discretion and make the related employer declaration in respect of Enercare, Ganeh, and Beaver because Unifor's bargaining rights are being eroded or undermined by the diversion of what would normally be work performed by Unifor members to Ganeh and Beaver. Moreover, Enercare's current arrangement with Ganeh and Beaver has the potential to further erode Unifor's bargaining rights because future growth in Enercare's business

could be absorbed by Ganeh or Beaver, inhibiting the natural growth of Unifor's bargaining unit.

[55] The Board declined to make a related employer declaration in respect of Perras because the evidence did not show that the relationship between Enercare and Perras had eroded Unifor's bargaining unit. Unlike Ganeh and Beaver, Enercare does not effectively dominate or control Perras; at most, Enercare work constitutes 30% of Perras business; and, the increase in Enercare work at Perras has been primarily through plumbing work, and the evidence did not indicate there would be more bargaining unit plumbers if Perras were not performing that work.

[56] In my view, the Board's reasoning is internally coherent, rational, and logical. I see no fatal flaw in its overarching logic. On the contrary, the Board Decision bears the hallmarks of reasonableness – justification, transparency, and intelligibility (*Vavilov*, at para. 99).

(2) The Board Decision is tenable in light of the relevant factual and legal constraints

(a) The Relevant Factual Constraints

[57] Three factual constraints are pertinent on a reasonableness review: 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 (*Vavilov*, at para. 106).

[58] There is no question that these factual constraints are met in the Board Decision. The Vice-Chair clearly identified the evidence before her and the facts upon which she relied in making the related employer declarations. She also set out the parties' submissions.

[59] As for the third factual constraint, the Vice-Chair considered the submission that a s. 1(4) declaration could lead to "unforeseen consequences and labour relations problems" for Ganeh and Beaver technicians, who are all subcontractors. She referred to the evidence that those technicians are mostly individuals with a truck who are available for the daily assignment of Enercare work and said that such relationships give rise to "fewer concerns regarding unforeseen consequences and labour relations problems than would more conventional subcontracting relationships." Relying on Board jurisprudence, she also explained that the impact of a s. 1(4) finding on the responding parties is not an issue because those provisions are concerned with protecting bargaining rights and not their effect on the corporate entities involved.

[60] The Vice-Chair also considered the potential impact of a s. 1(4) declaration on Perras. One reason she refused to make the declaration was her concern for the potential impact on the Perras workforce, including problems with fragmenting the bargaining unit.

[61] Nothing in the relevant factual constraints indicates the Board Decision is not tenable.

(b) The Relevant Legal Constraints

[62] 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 (*Vavilov*, at para. 106). The governing statutory scheme is likely to be the most salient aspect of the relevant legal context (para. 108).

[63] The discussion of the relevant legal constraints in *Turkiewicz* applies equally on this appeal. Rather than repeating that discussion, the following brief summary is sufficient to show that a consideration of the relevant legal constraints gives no indication that the Board Decision is untenable.

[64] The governing statutory scheme gives the OLRB exclusive jurisdiction to exercise the powers conferred on it and contains a strong privative clause.[1] The OLRB is a highly specialized tribunal with considerable expertise, placing it in an

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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.

elevated position to interpret its home statute. The issues with which the Board had to grapple, including the scope of bargaining rights, are squarely within the OLRB's core jurisdiction and the confines of its enabling statute.

[65] Section 1(4) applications are matters within the Board's exclusive mandate. That provision 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.

[66] Further, in reaching its decision, the Board was informed by a significant body of its jurisprudence with respect to the interpretation and application of s. 1(4), including a well-recognized, multi-factor test for determining whether the third criterion of common control or direction was met.

[67] I address below the Divisional Court's determination that the Board Decision is unreasonable because it made the s. 1(4) declaration without taking into account the provisions in the collective agreement and LOUs relating to Enercare's longstanding contracting out practices. Suffice to say at this point that when the Board's determination of that matter is approached in accordance with the *Vavilov* principles, it does not render the Board Decision unreasonable.

[68] Consequently, I see nothing unreasonable about the Board's Decision in light of the legal constraints that bore on it.

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

[69] In my view, the overarching error in the Divisional Court Decision is its failure to follow the *Vavilov* framework for conducting a reasonableness review of an administrative decision. Further, the Divisional Court did not start from the principle of restraint and respect for the distinct and specialized role of the OLRB nor did it afford the Board Decision appropriate deference. These failings led it to commit the errors described below.

Issue #1: The Divisional Court erred in finding the Board Decision unreasonable because the Board did not consider the parties' bargaining history, collective agreement, and LOUs

[70] The Board Decision declared that Enercare, Ganeh, and Beaver are related employers within the meaning of s. 1(4) of the *LRA*. The Divisional Court found the Board Decision unreasonable primarily because the Board had failed to take into consideration the full "labour relations context". The Divisional Court acknowledged the Board's findings that the work Enercare contracts out to Ganeh and Beaver erodes Unifor's bargaining rights because it is work that could be performed by unionized employees but, instead, is performed by independent contractors. However, the Divisional Court said, those findings had not been placed within the context of Enercare's longstanding contracting out practices and the history of that matter in collective bargaining, including the terms of the collective agreement and the LOUs.

[71] The Divisional Court Decision runs afoul of two core *Vavilov* directives.

[72] First, a reasonableness review requires an initial consideration of the Board Decision as a whole, to determine if the decision bears the requisite level of intelligibility, transparency, and justification. The reviewing court must consider only whether the decision – both the rationale for it and the outcome to which it led – is unreasonable (*Vavilov*, at paras. 84-86). It is not to undertake a *de novo* analysis but, rather, it must "examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached" (para. 116).

[73] The Divisional Court did not follow this approach when it reviewed the Board Decision. Instead, it considered the legislative history of s. 1(4) and the OLRB jurisprudence on it and came to its own determination of what was required for the Board to make a related employer declaration. Its view was that it was necessary for the parties' bargaining history, collective agreement, and other agreements respecting contracting out to be considered when determining whether the s. 1(4) preconditions to a declaration had been met. Because the Board had not done that, according to the Divisional Court, the Board Decision was unreasonable. However, as the Federal Court of Appeal aptly put it, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, at para. 28; *Vavilov*, at para. 83. Instead of following the *Vavilov* approach,

the Divisional Court made its own yardstick and measured the Board Decision against it.

[74] Second, before deciding that the Board had unreasonably excluded considerations of the collective agreement and LOUs, the Divisional Court had to look at the Board's reasons for so doing, determine if the Board's approach accorded with the purposes and practical realities of s. 1(4), and was reasonable given the consequences and operational impact of the decision (*Vavilov*, at para. 93). Moreover, the Divisional Court's review was to reflect an appropriate degree of restraint rooted in an appreciation of the Board's demonstrated expertise and lengthy experience in deciding s. 1(4) applications, a matter within its exclusive jurisdiction. The Divisional Court erred in failing to follow this approach.

[75] At paras. 271-276 of the Board Decision, the Board gives its reasons for declining to consider the provisions in the collective agreement and the referenced LOUs in interpreting s. 1(4). It explains that disputes arising from the provisions of collective agreements and settlements (including LOUs) are matters within the exclusive jurisdiction of an arbitrator and that collective agreements and settlements reflect the parties' respective bargaining power. Section 1(4), on the other hand, addresses trade unions' legislated bargaining rights, which "engages an analysis separate and distinct from contracting out rights under a collective agreement." The Board relied on OLRB jurisprudence that supported this approach.

[76] *Vavilov* addresses how a reviewing court is to consider an administrative decision maker's conduct of statutory interpretation. It states that the specialized expertise and experience of such decision makers may sometimes lead them to rely, in interpreting a statutory provision, "on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise" (para. 119). In my view, the Board's explanation for why it would not consider the parties' collective agreement and settlements exemplifies this.

[77] The Board's determination that it would not consider the collective agreement and LOUs when interpreting and applying s. 1(4), when reviewed in accordance with *Vavilov*, was not unreasonable. It is internally coherent, rational, and logical. There is no flaw in its overarching logic. Moreover, the Board's explanation shows that it brought its institutional expertise to bear in interpreting s. 1(4).

[78] *Vavilov* provides a framework for a reviewing court to use when conducting a reasonableness review. The Divisional Court did not follow that framework when reviewing the Board Decision. As I explain above, when conducting the reasonableness review of the Board Decision following the *Vavilov* principles, there is no basis to find it to be unreasonable.

Issue #2: The Divisional Court erred in finding the Board Decision unreasonable because the Board conflated Enercare's contracting out generally with its contracting out specifically to Ganeh and Beaver

[79] The Divisional Court concluded that the Board erroneously conflated Enercare's general practice of contracting out with contracting out work specifically to Ganeh and Beaver. In reaching this conclusion, the court contrasted the Board's treatment of Ganeh/Beaver, on the one hand, with its treatment of Perras, on the other, and asked why the former were declared to be related employers with Enercare but the latter was not. It said a single distinction drove the Board's differential treatment: the amount of Enercare work that the entity performed. Enercare is Ganeh's only customer so 100% of its business comes from Enercare; Enercare work makes up virtually all of Beaver's work (between 95 and 98%); but, a maximum of 30% of Perras' work comes from Enercare.

[80] The Divisional Court erred in two ways in reaching its conclusion.

[81] First, it is simply incorrect to say that the Board distinguished Perras from Ganeh/Beaver solely on the amount of Enercare work each performed. The Board made numerous critical factual findings that distinguished Ganeh/Beaver from Perras, including:

- Ganeh and Beaver are economically dependent on Enercare whereas Perras is not;

- Ganeh and Beaver's economic dependence on Enercare leads to it having effective indirect control over them whereas Perras is not effectively dominated by Enercare;
- Ganeh and Beaver did not exist before they were established at the request of what is now Enercare whereas Perras was an established viable commercial entity before its relationship with Enercare;
- Perras employees serve a variety of clients of which Enercare is only one whereas Enercare is basically Ganeh and Beaver's sole client;
- Ganeh and Beaver have no public identity independent of Enercare. Enercare controls the way in which Ganeh and Beaver technicians identify themselves to the outside world and to Enercare customers so that their identity is subsumed in that of Enercare. Perras has an identity outside of its Enercare work; and
- Enercare indirectly controls Ganeh and Beaver technicians because it can effectively dictate whether they remain employed by Ganeh and Beaver.

[82] In ignoring these Board findings and focusing only on the amount of Enercare work that each entity performed, the Divisional Court improperly engaged in a reweighing of the evidence that was before the Board. As the reviewing court, the Divisional Court was not to interfere with the Board's factual findings and had to refrain from reweighing and reassessing the evidence considered by the Board, absent exceptional circumstances (*Vavilov*, at para. 125). There were no

exceptional circumstances justifying the Divisional Court's departure from this general principle.

[83] Second, the Divisional Court's conclusion overlooks the Board's analysis on whether a s. 1(4) labour relations purpose would be served by making a related employer declaration in respect of Ganeh/Beaver and Perras. In this regard, the Board again made critical factual findings that distinguished Ganeh/Beaver from Perras.

[84] The Board found that Ganeh and Beaver essentially comprise a parallel Enercare workforce, performing the same core work performed by Unifor's bargaining unit but unencumbered by the accompanying bargaining unit entitlements. It reasoned as follows. Ganeh and Beaver now employ 60-70 subcontractors who exclusively perform the core activities of Enercare's business operations on a daily basis. The number of Ganeh and Beaver employees is ever increasing, while the number of Unifor bargaining unit members has remained stagnant at best. If Ganeh and Beaver were not providing a livelihood for its employees, the bargaining unit (whose rights attach to the work performed by the subcontractors), would have grown significantly in the areas of service and installations. By meeting its customer needs through Ganeh and Beaver, Enercare is able to avoid its bargaining unit obligations and artificially erode Unifor's bargaining unit. And, Enercare's current arrangement with Ganeh and Beaver has the potential to further erode Unifor's bargaining rights because future growth in

Enercare's business could be absorbed by Ganeh or Beaver, inhibiting the natural growth of Unifor's bargaining unit.

[85] By contrast, the Board found that a s. 1(4) labour relations purpose would not be served by making a related employer declaration in respect of Perras. It reasoned as follows. Not all Perras employees perform work of the Unifor bargaining unit, so declaring Perras to be a related employer would in effect extend Unifor's bargaining rights, rather than preserving them, as s. 1(4) intends. Because a different union already represents some Perras employees, if a related employer declaration were made, Unifor could potentially encroach on that other union's existing bargaining rights. And, importantly, there was no evidence of the mischief that s. 1(4) is intended to avoid, namely, erosion of Unifor's bargaining unit. The increase in Enercare work at Perras has been primarily through plumbing work and nothing suggested there would be more bargaining unit plumbers if Perras was not performing that work.

Issue #3: The Divisional Court's treatment of Ganeh and Beaver's economic dependence on Enercare

[86] Contrary to Unifor's submission, in my view, the Divisional Court did not find the Board Decision unreasonable because of its treatment of Ganeh and Beaver's economic dependence on Enercare. Rather, the Divisional Court accepted that economic dependence could be a factor for consideration on a s. 1(4) application but viewed the Board's use of that factor to be flawed because it failed to consider

it within the context of the parties' bargaining history, their collective agreement, and the relevant LOUs. As I explain in my analysis of Issue #1, the Board Decision was not unreasonable because it decided the s. 1(4) application without taking into consideration the provisions of the collective agreement and relevant LOUs.

[87] Further, in my view, the Divisional Court erred in its approach to reviewing the Board's determination that the third precondition in s. 1(4) – whether the entities were under common control or direction – had been met. In my view, its approach to that issue is contrary to the *Vavilov* principles governing a reasonableness review.

[88] *Vavilov* is clear: the Divisional Court was not to interfere with the Board's factual findings that underlay its determination of common control or direction nor was the Divisional Court to reweigh or reassess the evidence the Board relied on for that determination "absent exceptional circumstances" (para. 125). There were no exceptional circumstances justifying intervention.

[89] The Board was deciding a s. 1(4) application – a fact-driven matter over which it had a broad discretion and which fell squarely within the OLRB's exclusive jurisdiction. The Board is highly specialized with considerable experience and expertise in labour relations, including the scope of bargaining rights. The factors that the Board used in determining whether the entities were under common control or direction – the key point the Divisional Court found to be unreasonable

– were drawn from a significant body of Board jurisprudence on the interpretation and application of s. 1(4). It made factual determinations after hearing extensive evidence, both oral and documentary, and its analysis was conducted in accordance with a well-established OLRB test for the determination of common control or direction.

[90] Instead of reviewing the reasonableness of the Board's determination of common control or direction, the Divisional Court measured the Board determination against its view of the legislation and its analysis of the OLRB jurisprudence. In proceeding in that way, the Divisional Court effectively decided the issue of common control or direction *de novo*, something which *Vavilov* expressly prohibits (at paras. 83, 116).

[91] Because the Divisional Court was conducting a reasonableness review of the Board Decision, it was to consider the Decision and the reasons for it, with respectful attention to the Board's demonstrated expertise, to see if the Board Decision accords with the purposes and practical realities of s. 1(4) and represents a reasonable approach given the consequences and operational impact of the decision (*Vavilov*, at para. 93). That approach is not limited to an assessment of the Board Decision as a whole. It is also the approach to be taken when considering individual components of the Board Decision, including its determination that the statutory condition of common direction or control had been met.

[92] On the *Vavilov* approach, in my view, the Board reasonably determined that the third criterion of common direction or control had been satisfied.

IX. DISPOSITION

[93] For these reasons, I would allow the appeal, set aside the Divisional Court Decision, and restore the Board Decision.

[94] The parties have advised that the matter of costs does not need to be spoken to. Therefore, I would make no order as to costs of the appeal or before the Divisional Court.

Released: November 16, 2022 GRS

G.R. Gillese J.A.

I agree. K.E. Feldman J.A.

I agree. Harvison Young J.A.