

[4] After 11 days of hearings the Board issued a decision in which it determined that the working forepersons were not performing bargaining unit work for the majority of their time on the Application Filing Date (“AFD”). Thus, they were excluded from the bargaining unit. As a result of this decision, the Union was found to enjoy the support of over 55% of the employees in the bargaining unit as of the AFD, which entitled them to be certified as the bargaining agent for the unit.

[5] The Employer’s application for judicial review seeks to challenge the Board’s decision to exclude the working forepersons from the bargaining unit. In doing so, it argues that the Board made a number of factual errors in its consideration of the evidence before it; that its decision to apply the “majority-of-time” test was contrary to the established jurisprudence of the Board; that if the majority-of-time test was appropriate, the Board erred in its appreciation of the evidence which should have led to a finding that the working forepersons satisfied that test; and that the effect of the Board’s decision is to unjustifiably deny the working forepersons the opportunity to participate in choosing their bargaining representative. According to the Employer, the Board has created an untenable legal framework such that the working forepersons cannot be included in any bargaining unit.

[6] All parties agree that to succeed on this application, the Employer must establish that the decisions under review are unreasonable. For the reasons that follow, I find that the Employer has not done so and therefore the application should be dismissed.

Factual Background

[7] On February 25, 2020, the Union applied to the Board to be certified in respect of the following bargaining unit:

All employees of the responding party engaged in the operation of cranes, shovels, bulldozers, and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the responding party in all other sector of the construction industry engaged in the operation of cranes, shovels, bulldozers, and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the County of Renfrew, save and except non-working foreperson and persons above the rank of non-working foreperson.

[8] There were a number of issues between the parties, all of which were settled, except for the question of whether four working forepersons were appropriately included in the bargaining unit. This issue was litigated before the Board.

[9] On December 24, 2024, the Board released the Interim Decision [*International Union of Operating Engineers, Local 793 v. Thomas Cavanagh Construction Limited*, 2024 CanLII 137672 (ONLRB)] in which it found that the four working forepersons were excluded from the bargaining unit. In doing so, it first determined the appropriate test to apply to decide the status of the working forepersons and then, applying that test, it found that it was not satisfied on the evidence before it that the Employer had satisfied its onus of demonstrating that the working forepersons met that test.

[10] The Employer filed a request that the Board reconsider its Interim Decision. On February 27, 2025, the Board dismissed that request: *International Union of Operating Engineers, Local 793 v. Thomas Cavanagh Construction Limited*, 2025 CanLII 17259 (ONLRB) (the “Reconsideration Decision”).

[11] In a decision dated March 3, 2025 [*International Union of Operating Engineers, Local 793 v. Thomas Cavanagh Construction Limited*, 2025 CanLII 21726 (ONLRB)] the Board certified the Union as the bargaining agent for the unit in question (the “Final Decision.”).

[12] On this application the Employer seeks to set aside the Interim Decision, the Reconsideration Decision and the Final Decision.

Standard of Review

[13] All parties agree that the Decisions must be reviewed on a standard of reasonableness.

[14] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the Supreme Court of Canada instructed reviewing courts that “[r]easonableness review is an approach meant to ensure that courts intervene in administrative matters only when it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process”: at para. 13. The decision must be examined to determine if it “bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision”: *Vavilov*, at para. 99. The burden to demonstrate unreasonableness is on the party challenging the decision and the alleged flaws in the decision “must be more than merely superficial or peripheral to the merits of the decision”: *Vavilov*, at para. 100.

[15] A reviewing court cannot interfere with a decision because it would have decided the matter differently or because an alternative interpretation would have been open to the tribunal. Thus, in conducting a reasonableness review, a court must develop what has been described as a “reasons first” approach. The court starts with the reasons of the tribunal and examines them with a view to considering whether the rationale for the decision and the outcome of the decision were reasonable. It does not “conduct a *de novo* analysis or seek to determine the ‘correct’ solution to the problem”: *Vavilov*, at para. 83.

[16] The Supreme Court also found that “minor missteps” are not a proper basis to find that a decision is unreasonable. A tribunal’s decision is unreasonable only if there is no “line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived”: *Vavilov*, at para. 102.

[17] *Vavilov* holds that decisions must be read in light of the “history and context of the proceedings” including the evidence before the tribunal, the submissions of the parties, policies and past decisions of the tribunal. The Supreme Court held, at para. 94, that attention to the history and context of the proceeding:

may explain an aspect of the decision maker’s reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency.

[18] While expertise is no longer a factor in determining the applicable standard of review, it is a factor in applying it. Both before and since *Vavilov*, courts at all levels have recognized the Board’s specialized expertise in determining grievances filed under s. 133 of the *Act* and have held that the Board should be afforded the highest degree of deference in its interpretation of collective agreements.

[19] In *Electrical Power Systems Construction Association v. Labourer’s International Union of America*, 2022 ONSC 2313, [2022] O.L.R.B. Rep. 497 (Div. Ct.), the Divisional Court held, at paras. 14 and 15:

[14] In reviewing a Board, judges should remain mindful of its expertise. Labour relations is a complex and sensitive field of law. The Ontario Court of Appeal has observed that “the decisions of the Supreme Court of Canada, over the course of many decades, show an unbroken commitment to affording labour relations boards the highest levels of judicial deference on matters within their exclusive jurisdiction.” (*Maystar General Contractors Inc. v. International Union of Painters and Allied Trades, Local 1819*, 2008 ONCA 265, 90 O.R. (3d) 451, at para. 42).

[15] The interpretation of collective agreements is at the very heart of the Board’s jurisdiction. In line with *Vavilov*, labour arbitrators and boards should be afforded the highest degree of deference in their interpretation of these agreements. (cite omitted).

[20] In *Turkiewicz (Tomasz Turkiewicz Custom Masonry Homes) v. Bricklayers, Masons Independent Union of Canada, Local 1*, 2022 ONCA 780, 476 D.L.R. (4th) 421, the Court of Appeal for Ontario dealt with an appeal from a Divisional Court decision that quashed three decisions of the Board. In allowing the appeal, the Court of Appeal made the following comments about the role of expertise, at para. 61:

[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.

[21] In this case, the Board was determining who was in and who was out of a bargaining unit within the construction industry – an exercise that it performs as a regular part of its work. The Divisional Court has observed that "the Board's work within the construction industry is essentially a specialty within a specialty": *I.B.E.W. Local 894 v. I.B.E.W. First-District Canada*, 2014 ONSC 1997, [2014] O.L.R.B. Rep. 423 (Div. Ct.), at para. 34. The court has repeatedly taken note of this in dismissing applications for judicial review (see, for example, *Strasser & Lang v. Carpenter's District Council of Ontario et al.*, 2023 ONSC 2247, [2023] O.L.R.B. Rep. 362).

Issues Raised

[22] The Employer's arguments raise three issues:

1. Did the Board unreasonably apply the wrong test?
2. If the Board's choice of test was reasonable, did it act unreasonably in its application of that test? and
3. Did the Board's decisions have the result of creating an untenable legal framework in which the working forepersons cannot be included in any bargaining unit, despite being presumptively eligible to be included in such units?

The Board's choice of the test to be applied was reasonable.

The Employer's submissions

[23] According to the Employer, the Board's jurisprudence establishes that the test used by the Board, known as the "majority-of-time" test, is inappropriate for working forepersons. In making this argument the Employer highlights two decisions – a decision in this proceeding by Vice-Chair Shouldice and a past decision in another proceeding by Vice-Chair Kelly, the vice-chair who decided this case.

[24] The Employer correctly points out that an administrative decision-maker who departs from established internal authority bears the "justificatory burden of explaining that departure in its

reasons.”: *Vavilov*, at paras. 129 and 131. According to the Employer, the Board did not satisfy this burden in its reasons.

The established jurisprudence does not state that the majority- of- time test is inappropriate for working forepersons who are supervising a mixed crew.

[25] The Board gives a useful description of working forepersons in para. 90 of the Reconsideration Decision. They are workers who supervise and direct the work of crews, but they exercise no management functions. They are also “expected to, and do, work on the tools as necessary.”

[26] Crucial to the Board’s decision to apply the majority-of-time test in this case is the fact that the working forepersons were supervising a mixed crew of workers. As the Board explains in its Interim Decision:

111. The craft applied for in this case is that of operating engineers. The four Forepersons in this case supervised mixed crews of labourers and operating engineers, the one exception being Mr. Tremblay’s brief supervision of the work at the Brown’s Corner site on Ashton Station Road where the only individual employed by TCC was the bulldozer operator (an operating engineer). The Board’s task in an application for certification such as this is not to resolve a work jurisdiction issue as between two or more trades. It is not for the Board to determine whether the four individuals in issue are better positioned to be a labourer’s bargaining unit or an operating engineers’ unit. The question here is simply whether the individuals are appropriately included in the operating engineers’ craft unit. The burden of proof with respect to that question rests with the TCC as the party requesting their inclusion.

[27] Given the fact that the working forepersons in this case were supervising mixed crews (some of whom were in the ICI sector, some of whom were not), the Board decided that it had to consider the time that each working foreperson spent “working on the tools” of the bargaining unit in question on the AFD and the time that each working foreperson spent supporting the work of and giving direction to the workers who were in the craft of the bargaining unit applied for. If the foreperson spent the majority of their time on the AFD engaged in these activities, then they were eligible for inclusion in the bargaining unit. If they did not, they were not.

[28] In adopting this approach, the Board applied and followed the recent decision of the Board in *Labourers’ International Union of North America, Ontario Provincial District Council v. Cooper-Gordon Limited*, 2024 CanLII 61004 (ONLRB) (“*Cooper-Gordon*”). *Cooper-Gordon* is also a decision involving an application for certification of a bargaining unit for construction labourers in the ICI sector. One of the issues in that case was the status of a working foreperson who was overseeing a mixed crew of workers on the AFD, some of whom were in the bargaining unit being applied for and some of whom were not. At para. 57 of *Cooper-Gordon*, the Board finds

that its approach (which was to apply the majority-of-time test) was in accordance with the Board's jurisprudence.

[29] At para. 91 of the Interim Decision, the Board describes the rationale for the majority-of-time test as follows:

The rationale for doing so is related to the labour relations principle that a worker in the construction industry cannot belong to more than one construction bargaining unit on any given day.

[30] In a 2009 decision of the Board – *Labourer's International Union of North America, Ontario Provincial District Council v. Birnam Excavating Ltd.*, 2009 CanLII 66096 (ON LRB) – the Board agreed with the employer that “it does not make sense to determine which bargaining unit a working foreman falls into by making a detailed analysis of the work of the majority of the crew that he is supervising”. As put by the Board in *Birnam Excavating*:

49. I agree with counsel for the employer that it does not make sense to determine which bargaining unit a working foreman falls into by making a detailed analysis of the work of the majority of the crew that he is supervising. In a non-union road-building crew, it would not be unusual for qualified people to do a bit of operators' work and a bit of labourers' work in the same day. It would also not be surprising if the people chosen as crew leaders were skilled in the work of both of the trades whose work they supervised and coordinated. An employer would expect a road-building crew foreman to be able to both jump on a piece of machinery and to jump in a hole to keep the work moving. It would be artificial to exclude a working foreman from a labourers' bargaining unit because the crew was a mix of labourers and operators.

[31] On February 2, 2020, Vice-Chair Shouldice issued a decision in this case, known as the “*Prima Facie Decision*”: 2020 CanLII 94523, In that decision, Vice-Chair Shouldice was dealing with a motion by the Union to remove certain people from the list that the Employer had filed as being people who were eligible to be included in the bargaining unit as of the AFD without holding a hearing on the matter. Included in that list were the working forepersons that were the subject of the Interim Decision. At para. 38 of his decision, Vice-Chair Shouldice stated:

The Board's jurisprudence establishes that it is possible for an individual to be included in a bargaining unit of employees as a working foreman even if that individual did not spend the majority of his working day on the application filing date performing bargaining unit work.

[32] Thus, the status of the working forepersons proceeded to a hearing. The *Prima Facie* decision does not stand as authority for the principle that the majority-of-time test should not be applied when determining the status of a working foreperson who is supervising a mixed crew. It

simply recognizes that there is Board jurisprudence, in particular, *Birnam Excavating, supra*, where the Board did not apply that test.

[33] In *Labourers' International Union of North America v. Remo General Contracting Ltd.*, 2014 CanLII 80541 (OLRB), Vice-Chair Kelly, the same vice-chair whose decision is under review, determined an application involving the status of working forepersons on the application filing date. According to the Employer, the Vice-Chair rejected the majority-of-time test. Thus, this decision contradicts the position taken by the same Vice-Chair in the case at bar.

[34] The Employer's characterization of the *Remo General* decision is incorrect. First, at para. 39 of *Remo General*, Vice-Chair Kelly states: "In order to include them in the bargaining unit I must be satisfied that Mr. Pusey, Mr. Stanberry and Mr. Brown were engaged in construction labourers' work for the majority of the day on June 20, 2011, the date of application..." (emphasis added). Second, as the Vice-Chair notes at para. 11 of the Reconsideration Decision, the *Remo General* case did not involve a working foreperson supervising a mixed crew.

[35] It is true that at para. 41 of *Remo General*, Vice-Chair Kelly does state that he accepts the analysis in two Board cases – *Frost Refrigeration* and *Patrick Mechanical* – "that the 'majority of the day' test [which is the same as the 'majority-of-time' test] may not be useful in the assessment of a working foreperson, and that the Board would be better served by having regard to the extent to which the acting foreman is integral to the performance of the crew for which he is responsible." At paragraphs 96 to 97 of the Reconsideration Decision, the Board discusses the *Frost Refrigeration* and *Patrick Mechanical* decisions and finds that neither involve forepersons who were supervising a mixed crew. They follow the authority established in *International Union of Painters and Allied Trades v. Blastco Corp.*, 2001 CanLII 10640 (ON LRB), which is also a case where the working foreperson was not supervising a mixed crew.

[36] What these cases stand for is the proposition that a working foreperson who supervises a crew composed of workers in the bargaining unit should not be excluded from the bargaining unit simply because he does not spend the majority of the day "working on the tools" of the trade. If the foreperson's work is integral to the work of the crew, he is supervising that is sufficient. According to counsel for the Board, who appeared on this application, it may be fair to say that the established Board jurisprudence is that this is the approach that should be taken when dealing with working forepersons who supervise workers in a single trade or craft.

[37] This is a different majority of the day or majority-of-time analysis than the Board had to conduct in the case under review. In the case under review, the Board accepted that in assessing the time spent by the forepersons at issue on operators' engineer work (as opposed to labourer's work) on the AFD, the Board should count not only the work spent on the "tools of the trade", but also any work that the Employer could establish was integral to the work of the operating engineers in the crew. However, because the working forepersons at issue supervised a mixed crew, it was necessary to prove that the work they performed as operating engineers took up the majority of their day on the AFD. As noted above, the Board found that this was necessary to ensure that there was no suggestion that a working foreperson could belong to two bargaining units on the same day. This could happen if the inquiry into a working foreperson's status stops at a finding that the work of the foreperson is integral to the trades he is supervising. Under that analysis, a working

foreperson who spends ten percent of their day doing work that is integral to the operating engineers and seventy-five percent of their day doing work that is integral to the work of another bargaining unit, could potentially be members of both bargaining units.

[38] This is not to say that the Board’s application of the majority-of-time test to a working foreperson supervising a mixed crew is the established Board jurisprudence. There is clearly Board authority to the contrary, namely the Board’s decision in *Birnam Excavating*. There is also Board jurisprudence that supports the approach taken by the Board in this case, namely *Cooper-Gordon*. Thus, what we have is a conflict in the Board jurisprudence. The fact that there is a conflict in the jurisprudence does not render a decision unreasonable. As put by the Supreme Court in *Vavilov*, at para. 129:

Administrative decision-makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court stated in *Domtar*, “a lack of unanimity is the price to pay for the decision-making freedom and independence” given to administrative decision-makers, and the mere fact that some conflict exists among an administrative body’s decisions does not threaten the rule of law: p, 800.

[39] For these reasons, I find that the Employer has failed to demonstrate that the Board employed a test for the determination of the issue before it that was contrary to its established jurisprudence. Therefore, it was not unreasonable for it to use the majority-of-time test.

The Board’s application of the majority-of-time test was reasonable

[40] The Employer’s argument, on this point, essentially challenges the Board’s evaluation and weighing of the evidence before it. In assessing these arguments, it is important to keep in mind the following principles from *Vavilov*.

[125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings.

[41] However, at para. 126 *Vavilov* points out that “[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it.” Furthermore, a decision that is not based on the evidence before a decision maker may also be unreasonable.

[42] The Employer’s first submission with respect to the Board’s factual findings centres on the following paragraph in the Interim Decision:

112. None of the Forepersons who worked on February 25, 2020 themselves operated heavy equipment to dig up soil, move materials, or grade a job site, although they had on previous occasions filled in for absent operators and they routinely started up machinery in the morning or moved a piece of equipment a short

distance from one location to another. Furthermore, it cannot be reasonably asserted that the four individuals engaged in survey work as their core function. They all were issued hand-held GPS units to perform layout work, and shoot grade, and they all were well-versed in setting up lasers and receivers. Obviously, checking/shooting grade is an important aspect of these Forepersons' responsibility. However, it is not a task that is exclusively unique to operating engineers and in the absence of other factors that place these individuals in the applied-for bargaining unit, I am not inclined to find that responsibility for layout and shooting grade should lead me to conclude that the Forepersons are in the bargaining unit for the purposes of this application.

[43] In order to understand this paragraph, it is important to appreciate that the Board accepted that survey/layout work and shooting grade was work that was integral to the work of operating engineers. However, as the Board found, it is not work that is unique to operating engineers. Therefore, the Board found that it would have to look to "other factors" to determine if doing this work placed them in the operating engineers bargaining unit.

[44] The Employer submits that the Board uses the phrase "other factors", without setting out what those other factors were. Further, according to the Employer, the "nature and significance of these 'other factors cannot be inferred from the record'": Employer factum, para. 32. Since this was an essential element of the Board's decision, the Employer submits that the Board's Interim Decision fails to meet the standard of justification, transparency and intelligibility. In making this submission, the Employer points to paras. 103 and 126 of *Vavilov*, which make the point that a rational decision is one that either sets out the decision maker's chain of analysis on an essential point or where that chain of analysis can be inferred from the record.

[45] There is no merit to this submission. The point being made in para. 112 is that it is not sufficient to lead evidence as to what the working forepersons typically did. It is also not sufficient to lead evidence that the working forepersons performed tasks that were integral to the work of the operating engineers, if those tasks also supported the work of other people in the crew who were not operating engineers. In order to meet their onus, the Employer had to lead evidence as to the specific tasks that the working forepersons performed on the AFD and show that those tasks were related to the work of the operating engineers and not to the other members of the crew. At para. 113, the Board makes it clear that there was little evidence as to what the working forepersons actually did on the AFD. The forepersons themselves just recalled what they usually did on a site, but had little recollection of what they actually did on the AFD in particular. The documentary evidence in the form of timecards and daily log sheets was also of little assistance in this regard.

[46] Following these general statements, the Board immediately proceeded to analyze the evidence that was led with respect to each of the working forepersons and to show why that evidence did not meet the desired threshold. For example, with respect to Mr. Dillabaugh, while the Board accepted his estimate that he spent one hour on the AFD calculating grade, he also stated that he spent a significant amount of time "in the hole" with the other labourers on his crew who were not operating engineers. He could not say how much of his day was spent in this way and

thus, the Board could not find that he spent the majority of his time on the AFD either working on the tools of the operating engineers or supervising the work of the operating engineers. A similar analysis was performed with respect to each of the other working forepersons. The Board reviewed the particulars of the evidence led with respect to each and clearly explained why that evidence was not sufficient to satisfy the test for inclusion in the applied-for bargaining unit. Thus, contrary to the Employer's submissions, the Board's Interim Decision clearly articulates the evidence and the factors that it relied on in making its decision.

[47] The Employer also asserts that the Board failed to consider the daily work reports that each of the working foreperson prepared. Again, there is no merit to this submission. For example, at paras. 26 to 32 of the Interim Decision, the Board summarized the evidence contained in all the work reports with respect to Mr. Young's work on the AFD. At paras. 120 to 121, the Board weighed that evidence and found that it was unable to find that Mr. Young spent the majority of his day on the AFD working the tools of the operating engineers or supervising/supporting their work. With respect to Mr. Dedo, at para. 115, the Board explained why it doubted the accuracy of his daily logs. A similar exercise was performed with respect to each of the forepersons at issue.

[48] For these reasons I find that the Employer has failed to establish any exceptional circumstances that would justify this court's interference with the lengthy, detailed and thorough factual findings of the Board in relation to whether the four working forepersons satisfied the majority-of-time test on the AFD.

The Board did not create an untenable legal framework

[49] The Employer submits that the Board has created a framework where working forepersons "cannot be included in any bargaining unit despite being presumptively eligible to be included in such units".

[50] Again, this submission is without merit. First, we were given no caselaw to support the assertion that "presumptive eligibility" is a concept that is part of the Board's jurisprudence on who is to be included in a bargaining unit. The caselaw before us is clear that the onus is on the party asserting that an individual was working in the applied-for bargaining unit on the AFD to establish, based on evidence, that they ought to be included in the unit. In the case of working forepersons who are supervising a mixed crew, they can be included in the applied-for bargaining unit if the evidence demonstrates that during the majority of the AFD they either worked the tools or supervised/supporting the work of the particular trade that brought the application for certification.

Conclusion

[51] For these reasons, the application for judicial review is dismissed. In accordance with the agreement of the parties, the Employer shall pay the Union its costs of this application, fixed in the amount of \$6000 all inclusive.

Sachs J.

I agree

ACJ McWatt J.

I agree

McKelvey

Released: November 27, 2025

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DIVISIONAL COURT FILE NO.: 231/25
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ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
ACJ McWatt, Sachs and McKelvey JJ.

BETWEEN:

Thomas Cavanagh Construction Limited

Applicant

– and –

International Union of Operating Engineers, Local 793
and Ontario Labour Relations Board

Respondents

REASONS FOR JUDGMENT

SACHS J.

Released: November 27, 2025