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Attorney General of Canada (*Applicant*)

v.

National Police Federation (*Respondent*)

INDEXED AS: CANADA (ATTORNEY GENERAL) V. NATIONAL POLICE FEDERATION

Federal Court of Appeal, Stratas, Webb and Gleason JJ.A.—Ottawa, October 26, 2021 and May 13, 2022.

Public Service — Labour Relations — Application for judicial review seeking to set aside Federal Public Sector Labour Relations and Employment Board decision finding that employer Royal Canadian Mounted Police (RCMP) had violated statutory freeze contained in Federal Public Sector Labour Relations Act, s. 56 — Respondent applied to Board for certification as bargaining agent for bargaining unit composed of RCMP regular members, reservists — Employer made impugned change to its promotion policy while certification application still pending, certification freeze in place — Did not advise bargaining unit members or respondent of change, did not seek consent of Board — Asserted that decision to implement impugned policy change reached before onset of freeze period — Also asserted that Board required to follow Supreme Court decision in United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp. (Wal-Mart), which allows implementation of unilateral employer changes to wages, working conditions when statutory freeze in force so long as "the wheels [are] set in motion" among members of management to make change before freeze commenced or where change reasonable — Board found that decision to make impugned change made well after certification freeze commenced — Also found that Supreme Court had not changed principles applicable to statutory freeze complaints in way employer suggested — Concluded that impugned policy change could not have been reasonably anticipated by employees — Employer could not rely on business as usual exception — Board held, inter alia, that policy change significant but not urgent — Rejected employer's interpretation of Wal-Mart, applied usual approach of Canadian labour boards to situation, determined that employer had violated Act, s. 56 in making impugned change to its promotion policy — Applicant submitted that Board failed to follow Wal-Mart — Main issue whether Board's interpretation of decision in Wal-Mart reasonable — Board's decision reasonable — Board provided more than adequate reasons for its rejection of employer's argument, reasonable interpretation of Wal-Mart — Board's interpretation of Wal-Mart conformed to labour precedents — Applicant's interpretation of Wal-Mart undermining statutory freeze provisions in labour legislation, allowing employers to make unprecedented changes to employee wages, working conditions during freeze period — Supreme Court in Wal-Mart applied objective test not unlike reasonable employee expectations test — In sum, Supreme Court intended to apply, not fundamentally alter decades of labour board jurisprudence in Wal-Mart — Application dismissed.

Administrative Law — Judicial Review — Federal Public Sector Labour Relations and Employment Board finding that employer Royal Canadian Mounted Police (RCMP) had violated statutory freeze contained in Federal Public Sector Labour Relations Act, s. 56 — Employer made impugned change to its promotion policy while certification application still pending, certification freeze in place — Asserted that Board required to follow Supreme Court decision in United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp. (Wal-Mart), which allows implementation of unilateral employer changes to wages, working conditions when statutory freeze in force so long as "the wheels [are] set in motion" among members of management to make change before freeze commenced or where change reasonable — Board found that Supreme Court had not changed principles applicable to statutory freeze complaints in way employer suggested — Rejected employer's interpretation of Wal-Mart, applied usual approach of Canadian labour boards to situation — Applicant submitted that Board failed to follow Wal-Mart — Submitted that Supreme Court in Canada (Minister of Citizenship and Immigration) v. Vavilov held that failure to apply applicable precedent rendering decision unreasonable — Supreme Court did not establish bright line test in Vavilov — Approach in Vavilov to role of precedent much more nuanced, contextual — Administrative decision maker may reasonably depart from own precedents provided adequate reasons for so doing given — Focus of review must be consideration of reasons of administrative decision maker — On issues regarding impact of precedent, reviewing court's analysis must be focussed on administrative decision maker's reasons for interpreting or declining to follow precedent — Precedent at issue must be understood in context of case in which it arose — Reasons given by administrative decision maker on these points of central importance, especially where, as here, judicial precedent falling within heartland of administrative decision maker's area of expertise.

This was an application for judicial review seeking to set aside the decision of the Federal Public Sector Labour Relations and Employment Board (Board) finding that the employer, the Royal Canadian Mounted Police (RCMP), had violated the statutory freeze contained in section 56 of the *Federal Public Sector Labour Relations Act* (Act).

The freeze prevents employers from unilaterally altering the terms and conditions following the filing of an application for certification or provision of notice to bargain for the employees' bargaining unit. Canadian labour boards have long interpreted statutory freeze provisions like section 56 as requiring a dynamic as opposed to a static freeze. They accordingly have held that statutory freeze provisions permit an employer to continue to operate in accordance with its prior pattern of operations or in accordance with the way in which employees could reasonably anticipate. In 2017, the respondent applied for certification as the agent for a bargaining unit composed of RCMP regular members and reservists. While the respondent's certification application was still pending and the certification freeze was in place, the RCMP made the impugned change to its promotion policy. The employer did not advise bargaining unit members or the respondent of the change before it was made and did not seek the consent of the Board to the change. Before the Board, the employer asserted that it had reached a decision to implement the impugned policy change before the onset of the freeze period during a June 27, 2016, Senior Executive Committee meeting. The employer also asserted that the Board was required to follow the decision of the Supreme Court in *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, which required a dismissal of the respondent's application. More specifically, the employer alleged that *Wal-Mart* allows implementation of unilateral employer changes to wages and working conditions when a statutory freeze is in force so long as "the wheels [are] set in motion" among members of management to make the change before the freeze commenced or where the change is one a reasonable employer would make. The Board found that the decision to make the impugned change was made at the earliest on October 23, 2017, which was well after the certification freeze commenced. The Board also found that the Supreme Court had not changed the principles applicable to statutory freeze complaints in the way the employer suggested. The Board concluded that the impugned policy change could not have been reasonably anticipated by employees in the absence of any prior pattern of making similar changes or in the absence of any communication to them about the impending change prior to the onset of the statutory freeze. It further found that the employer could not rely on the business as usual exception in the absence of a prior practice of making similar changes or notification to employees before the freeze commenced. The Board rejected the employer's argument regarding the import of the Supreme Court's decision in *Wal-Mart*. The Board

held, *inter alia*, that the policy change was significant but not one that was urgently required. The Board also noted that it would have been reasonable for the employer to wait on making the change when it received negative feedback from supervisors about the impact it was likely to have. It also underscored that the employer could have sought the concurrence of the Board to the change but that it had declined to do so. Taken together, these factors led the Board to conclude that the change was not one a reasonable employer would have made in similar circumstances. The Board therefore rejected the employer's interpretation of *Wal-Mart*, applied the usual approach of Canadian labour boards to the situation, and determined that the employer had violated section 56 of the Act in making the impugned change to its promotion policy. The applicant made two interconnected submissions with respect to the reasonableness of the Board's interpretation of the decision in *Wal-Mart*. It first submitted that the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (*Vavilov*) held that failure to apply an applicable precedent renders a decision unreasonable and, second, that the Board failed to follow *Wal-Mart*, which it was bound to do.

The main issue was whether the Board's interpretation of the decision of the Supreme Court in *Wal-Mart* was reasonable.

Held, the application should be dismissed.

The Board's decision in the instant case was reasonable. Concerning the administrative law point, contrary to what the applicant submitted, the Supreme Court did not establish a bright line test in *Vavilov*, which would require that failure to follow a case law precedent must necessarily result in an administrative decision being set aside. Quite the contrary, the Supreme Court's approach in *Vavilov* to the role of precedent is much more nuanced and contextual. *Vavilov* dealt with the impact of a failure to follow two types of precedents, namely, those from the administrative decision maker itself, and those from the courts. The Supreme Court held that an administrative decision maker, when dealing with its own precedents, may sometimes reasonably depart from them if it provides adequate reasons for so doing. As concerns departure from judicial precedents, the Supreme Court also held that, providing adequate explanations are given, an administrative decision maker may sometimes decline to follow a decision from the courts, depending on the circumstances. Thus, if the Board failed to follow *Wal-Mart* and provided an adequate explanation for doing so, it would not necessarily render its decision in the case at bar unreasonable. In deciding when an administrative decision maker may decline to follow a judicial precedent, *Vavilov* teaches that the focus of the review must be consideration of the reasons of the administrative decision maker, where reasons are given. On issues regarding the impact of precedent, as any other issue in judicial review, the reviewing court's analysis must be focussed on the reasons the administrative decision maker gave for interpreting or declining to follow a precedent. As part of this inquiry, the precedent at issue must be understood in the context of the case in which it arose and within its place in the broader case law. In understanding this context, the reasons given by the administrative decision maker on these points are of central importance, especially where, as here, the judicial precedent falls within the heartland of the administrative decision maker's area of expertise.

The Board provided more than adequate reasons for its rejection of the employer's argument and an entirely reasonable interpretation of the decision of the Supreme Court of Canada in *Wal-Mart*. The Board's interpretation of *Wal-Mart* squarely conformed to the labour precedents decided both before and after *Wal-Mart*. This was a strong—if not decisive—indicia of its reasonableness. Indeed, were the applicant's interpretation of *Wal-Mart* to be accepted, it would largely undermine statutory freeze provisions in labour legislation and allow employers to make unprecedented changes to employee wages and working conditions during a freeze period, so long as there was a business justification for the decision that is not tainted by anti-union animus and management had reached the decision internally before the freeze commenced. The applicant took some of the comments in *Wal-Mart* out of context and placed an undue emphasis on a few of the words used by the majority of the Supreme Court. The Supreme Court found that the respondent Wal-Mart Canada Corporation in *Wal-Mart* violated the freeze because it was unreasonable for it to have closed a profitable store following certification in the absence of any prior plans to do so. In so deciding, the Supreme Court applied an objective test that is not unlike the reasonable employee expectations test. What was evaluated is whether the decision to impose a change is a reasonable one in light of the prohibition

on making unilateral change to employees' terms and conditions of employment during the period of the freeze. In other words, the Supreme Court asked whether a reasonable employer, aware and desirous of complying with the freeze provisions, would have closed the store. It answered no, in part, because so doing would have contradicted the reasonable expectations of its employees. In sum, the Supreme Court intended to apply and not fundamentally alter the decades of labour board jurisprudence in *Wal-Mart*.

STATUTES AND REGULATIONS CITED

Federal Public Sector Labour Relations Act, S.C. 2003, c. 22, s. 2, ss. 56, 107, 186(1)(2).

Federal Public Sector Labour Relations and Employment Board Act, S.C. 2013, c. 40, **s. 365**, s. 34(1).

Labour Code, C.Q.L.R. C. C-27, *S. 59.*

CASES CITED

NOT FOLLOWED:

Service d'administration P.C.R. Ltée v. Reyes, 2020 FC 659.

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653, 441 D.L.R. (4th) 1.

CONSIDERED:

United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp., 2014 SCC 45, [2014] 2 S.C.R. 323; *Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers v. Simpsons Limited*, 1985 CanLII 949 (OLRB), [1985] O.L.R.B. Rep. April 594; *Ontario Public Service Employees Union v. Royal Ottawa Health Care Group Institute of Mental Health Research*, 1999 CanLII 20151 (OLRB).

REFERRED TO:

Union of Bank Employees, Locals 2104 & 2100 v. Canadian Imperial Bank of Commerce, 1979 CarswellNat 725 (WL Can.), [1980] 1 Can. L.R.B.R. 307; *I.B. of T.C.W. & H. of A., Local 362 v. Mid-Continental Tank Lines Inc*., 1986 CarswellNat 908 (WL Can.), (1986), 12 C.L.R.B.R. (N.S.) 138; *S.P.A.T.E.A. v. Spar Aerospace Products Ltd.*, 1978 CarswellOnt 1117 (WL Can.), [1978] O.L.R.B. Rep. 859; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *National Police Federation v. Treasury Board*, 2019 FPSLREB 74; *Canada (Attorney General) v. Alexis*, 2021 FCA 216, 2021 CarswellNat 4869; *Gulia v. Canada (Attorney General)*, 2021 FCA 106, 2021 CarswellNat 1617; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121; *Public Service Alliance of Canada v. Canada Revenue Agency*, 2019 FPSLREB 110; *Canadian Association of Professional Employees v. Treasury Board (Department of Public Works and Government Services)*, 2016 PSLREB 68; *Office and Professional Employees International Union v. Canadian Helicopters Limited (Canadian Helicopters Offshore)*, *sub nom. Canadian Helicopters Limited doing business as Canadian Helicopters Offshore*, 2018 CIRB 891, affd *Canadian Helicopters Limited v. Office and Professional Employees International Union*, 2020 FCA 37; *Canadian Federal Pilots Association v. Canada (Attorney General)*, 2020 FCA 52; *Canadian Federal Pilots Association v. Department of Transport, Transportation Safety Board, and Treasury Board Secretariat*, 2018 FPSLREB 91; *Public Service Alliance of Canada v. Anishinabek Police Service*, 2018 CanLII 81987 (OLRB); *Teamsters Local Union No. 31 v. 669779 Ontario Ltd. O/A CSA Transportation*, *sub nom. 669779 Ontario Ltd. O/A CSA Transportation*, 2018 CIRB 894; *Public Service Alliance of Canada v. Canada Revenue Agency*, 2017 FPSLREB 16; *Union of Canadian Correctional*

Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board, 2016 PSLREB 47; *Public Service Alliance of Canada v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 11; *Public Service Alliance of Canada* v. Treasury Board, 2016 PSLREB 107; *Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647, affiliated with the International Brotherhood of Teamsters v. Canada Bread Company Limited*, 2016 CanLII 25094 (OLRB); *Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence)*, 2016 PSLREB 26; *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 19; *Alberta Union of Provincial Employees and Shepherd's Care Foundation*, [2016] Alta. L.R.B.R. 33, *sub nom. Shepherd's Care Foundation and AUPE, Re*, 2016 CarswellAlta 796 (WL Can.), *sub nom. Shepherd's Care Foundation (Re)*, [2016] A.L.R.B.D. No. 30 (QL); *New Brunswick (Board of Management) v. Canadian Union of Public Employees, Local 1840*, *sub nom. New Brunswick (Board of Management) (Re)*, [2014] N.B.L.E.B.D. No. 27 (QL), 252 C.L.R.B.R. (2d) 149; *Public Service Alliance of Canada v. Canada Revenue Agency*, 2019 FPSLREB 110; *Syndicat des enseignantes et enseignants de la communauté Innue de Pessamit-CSN v. Conseil des Innus de Pessamit*, *sub nom. Conseil des Innus de Pessamit*, 2016 CIRB 831; *Syndicat des enseignantes et enseignants de la communauté Innue de Pessamit-CSN v. Conseil des Innus de Pessamit, sub nom. Conseil des Innus de Pessamit*, 2017 CIRB 861; *Corporation de l'École Polytechnique de Montréal c. Association syndicale des salarié-e-s étudiant-e-s de la Polytechnique*, 2015 CanLII 13848 (Qc SAT); *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al.*, [1975] 1 S.C.R. 382; *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417; *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41, 432 D.L.R. (4th) 170; *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161.

APPLICATION for judicial review seeking to set aside the decision of the Federal Public Sector Labour Relations and Employment Board (Board) (*National Police Federation v. Treasury Board*, 2020 FPSLREB 44) finding that the employer, the Royal Canadian Mounted Police, had violated the statutory freeze contained in section 56 of the *Federal Public Sector Labour Relations Act*. Application dismissed.

APPEARANCES

Kieran Dyer and *Richard Fader* for applicant.

Christopher Rootham for respondent.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for appellant.

Nelligan O'Brien Payne LLP, Ottawa, for respondent.

The following are the reasons for judgment and judgment rendered in English by

GLEASON J.A.:

[1] Labour legislation in all Canadian jurisdictions imposes a freeze on the terms and conditions of employment of bargaining unit employees. The freeze prevents employers from unilaterally altering the terms and conditions following the filing of an application for certification or provision of notice to bargain for the employees' bargaining unit. The *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, **s. 2** (the FPSLRA) contains such statutory freeze provisions. One, in section 56, applies after an employer has been advised that an application for certification has been made. This is sometimes

called a “certification freeze”. Another, in section 107, applies after notice to bargain has been given. This is sometimes called a “bargaining freeze”.

[2] Canadian labour boards, including the Federal Public Sector Labour Relations and Employment Board and its predecessors (collectively, the Board) have long interpreted statutory freeze provisions like these as requiring a dynamic as opposed to a static freeze. They accordingly have held that statutory freeze provisions permit—and sometimes require—an employer to continue to operate in accordance with its prior pattern of operations (including by continuing to implement decisions made and announced to employees before the onset of the freeze period) or, in some instances, in the absence of such a pattern, in accordance with the way in which employees could reasonably anticipate. The case law has recognized these approaches as encompassing a “business as before” or “business as usual” test and a “reasonable employee expectation” test.

[3] Labour boards have also held that the freeze provisions are designed to provide trade unions a stable substratum of wages and working conditions from which to bargain and that the certification freeze also operates to prevent erosion of support for a trade union following certification. Thus, as noted by the respondent at paragraph 31 of its memorandum of fact and law, freeze provisions have “… a symbiotic relationship with the duty to recognize a union and bargain in good faith.”

[4] In this application for judicial review, the applicant seeks to set aside the decision of the Board in *National Police Federation v. Treasury Board*, 2020 FPSLREB 44. In that decision, the Board found that the employer had violated the statutory freeze contained in section 56 of the FPSLRA by unilaterally implementing a change in employee eligibility for promotion in circumstances where the decision to make the change was reached by the employer after the commencement of the freeze period and was communicated to employees after the onset of the freeze. In so deciding, the Board followed and applied a long line of case law of its own and from other labour boards regarding the interpretation of statutory freeze provisions.

[5] The applicant submits that in so deciding, the Board reached an unreasonable determination because the result is at odds with the decision of the Supreme Court of Canada in *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45, [2014] 2 S.C.R. 323 (*Wal-Mart*), which the applicant submits fundamentally changes the interpretation of statutory freeze provisions. The applicant says that, by virtue of the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, 441 D.L.R. (4th) 1 (*Vavilov*), the failure to follow *Wal-Mart* means that the Board’s decision is unreasonable and must be set aside.

[6] The applicant further submits that the Board improperly reversed the onus of proof and reached an unreasonable factual determination when it concluded that the decision in question was not made until after the onset of the freeze period. The applicant also says that the Board violated its procedural fairness rights in addressing this issue because the date the decision was made was not contested before the Board.

[7] I disagree with the applicant on all points, and for the reasons that follow, would dismiss this application, with costs.

I. Background and the Decision of the Board

[8] It is useful to commence by setting out the applicable statutory provisions.

[9] Section 56 of the FPSLRA (the certification freeze provision in the FPSLRA) provided as follows at the times relevant to this application:

> **Continuation of terms and conditions**
>
> **56** After being notified of an application for certification made in accordance with this Part …, the employer may not, except under a collective agreement or with the consent of the Board, alter the terms and conditions of employment that are applicable to the employees in the proposed bargaining unit and that may be included in a collective agreement until
>
> > **(a)** the application has been withdrawn by the employee organization or dismissed by the Board; or
> >
> > **(b)** 30 days have elapsed after the day on which the Board certifies the employee organization as the bargaining agent for the unit.

[10] As the Board noted in the decision under review, section 56 was subsequently amended, but these amendments are not germane to this application.

[11] The instant case was the first time the Board interpreted section 56 of the FPSLRA, which came into force in 2005. The Board had not previously been called upon to interpret section 56 of the FPSLRA, likely because there have been relatively few certification applications in the federal public sector in recent years, which has been heavily unionized for some time. However, the Board has interpreted section 107 of the FPSLRA, the bargaining freeze, in many cases prior to the decision under review. Section 107 of the FPSLRA currently provides:

> **Duty to observe terms and conditions**
>
> **107** Unless the parties otherwise agree, and subject to section 132, after the notice to bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or
>
> > (a) if the process for the resolution of a dispute is arbitration, an arbitral award is rendered; or
> >
> > (b) if the process for the resolution of a dispute is conciliation, a strike could be declared or authorized without contravening subsection 194(1).

[12] In the decision under review, the Board held that its case law interpreting section 107 of the FPSLRA was relevant under section 56 because similar principles apply to the two statutory freeze provisions (at paragraph 45).

[13] Neither party disputes the applicability of case law arising under section 107 to cases involving an alleged breach of section 56 of the FPSLRA. Indeed, other labour boards have also followed this approach and sometimes have applied their case law from bargaining-freeze cases in certification-freeze cases (see, *e.g.*, *Union of Bank*

Employees, Locals 2104 & 2100 v. Canadian Imperial Bank of Commerce, 1979 CarswellNat 725 (WL Can.), [1980] 1 Can. L.R.B.R. 307; *I.B. of T.C.W. & H. of A., Local 362 v. Mid-Continental Tank Lines Inc*., 1986 CarswellNat 908 (WL Can.), 12 C.L.R.B.R. (N.S.) 138; *S.P.A.T.E.A. v. Spar Aerospace Products Ltd.*, 1978 CarswellOnt 1117 (WL Can.), [1978] O.L.R.B. Rep. 859, as well as the reasons of the Board in this case, at paragraph 45.)

[14] The facts giving rise to this application are discussed at length in the Board's decision, and, for purposes of these Reasons, it is necessary to only briefly outline them.

[15] The dispute in this case arose between the Treasury Board (which was named as the employer before the Board) and the National Police Federation (the Federation). On April 18, 2017, the Federation applied to the Board for certification as the bargaining agent for a bargaining unit composed of Royal Canadian Mounted Police (RCMP) regular members and reservists. RCMP members were not previously unionized, having been excluded from collective bargaining prior to the amendments to the FPSLRA made in 2017 in the wake of the decision of the Supreme Court of Canada in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3.

[16] The certification freeze remained in effect until 30 days following the certification of the Federation on July 12, 2019 (see *National Police Federation v. Treasury Board*, 2019 FPSLREB 74).

[17] While the Federation's certification application was still pending and the certification freeze was in place, the RCMP made the impugned change to its promotion policy. It had previously made only one other somewhat similar change to the policy.

[18] Prior to the change at issue in the case at bar, RCMP Sergeants could apply to be promoted to the rank of Staff Sergeant and Corporals to the rank of Sergeant before completing the RCMP's Management Development Program or Supervisor Development Program. The Management Development Program and Supervisor Development Program take twelve months to complete and involve pre-class online learning, several days of in-class instruction and application in the workforce.

[19] On November 20, 2017, while the certification freeze was still in force, the RCMP amended its Career Management Manual (the promotion policy) to require Sergeants promoted after March 31, 2018, to complete the Management Development Program before applying for promotion to the rank of Staff Sergeant and Corporals promoted after March 31, 2019, to complete the Supervisor Development Program before applying for promotion to the rank of Sergeant.

[20] The employer did not advise bargaining unit members or the Federation of the change before it was made and did not seek the consent of the Board to the change. Bargaining unit members and the Federation were unhappy with the change to the promotion policy, which many felt would unfairly restrict access to promotions due to an inability to access the Management Development Program and Supervisor Development Program. This was of particular concern to specialized staff and those working in remote areas with smaller detachments, where it was less likely they could be released to participate in the Management Development Program and Supervisor Development Program courses due to operational requirements. On February 15, 2018,

the Federation filed a complaint with the Board, alleging a violation of section 56 of the FPSLRA.

[21] Before the Board, the employer made two principal arguments.

[22] First, it asserted, on a factual basis, that it had reached a decision to implement the impugned policy change before the onset of the freeze period during a June 27, 2016, Senior Executive Committee (SEC) meeting.

[23] Second, it asserted that the Board was required to follow the decision of the Supreme Court of Canada in *Wal-Mart*, which required a dismissal of the Federation's application. More specifically, the employer alleged that *Wal-Mart* allows implementation of unilateral employer changes to wages and working conditions when a statutory freeze is in force so long as "the wheels [are] set in motion" among members of management to make the change before the freeze commenced or where the change is one a reasonable employer would make. According to the employer, the Supreme Court of Canada determined in *Wal-Mart* that reasonable employee expectations are irrelevant under the business as usual approach to the freeze because the two tests are separate and distinct. Therefore, the appellant asserted that, subsequent to the decision in *Wal-Mart*, it is unnecessary that an impending change be disclosed to employees or their union before the freeze commences, even in the absence of any prior pattern of making similar changes, so long as the "wheels [were] set in motion" to make the change before the freeze started. Because it claimed that a decision to implement the change to the RCMP promotion policy had been made before the onset of the certification freeze, the employer asserted that it was free to make the change in question.

[24] The Board disagreed with the employer's arguments.

[25] It found, as a matter of fact, that the decision to make the impugned change was made at the earliest on October 23, 2017, when the change was approved, which was well after the certification freeze commenced.

[26] Contrary to what the applicant submits, the parties did join issue on the date the impugned change was made. In its application and written submissions, the Federation took the position that the impugned change to the RCMP's promotion policy was made on November 20, 2017, the date the RCMP amended its policy manual. The employer admitted that this was the relevant date in the response it filed with the Board, but in its case before the Board altered that position and called evidence to try to establish that the decision was made at the June 27, 2016, SEC meeting.

[27] While the parties' arguments before the Board appear to have focused mostly on the implications of the decision in *Wal-Mart*, the date of the impugned change was very much in issue before the Board. This is seen from the Federation's application and the written submissions it filed with the Board.

[28] On the date of the impugned change, the Board noted that the employer had declined to call any member of the SEC to testify about what was decided during the June 27, 2016, SEC meeting. It found that the documentary record of the decisions made at that meeting did not reflect a decision to require completion of the Management Development Program or Supervisor Development Program as a condition for applying

for promotion. On this point, as it was entitled to do, the Board did not accept the testimony of an employer witness who had attended the meeting. It instead relied on the documentary evidence and other evidence, which supported the conclusion that the decision to amend the RCMP's promotion policy was made after the certification freeze was in operation.

[29] In support of this finding, the Board noted that, subsequent to the June 27, 2016, SEC meeting, feedback was sought from less senior members of management about the proposed change to the promotion policy, and that much of that feedback was critical of the proposed change. The Board also noted that the change had been put on hold at one point and that no explanation was offered as to why this had happened. In addition, the Board found that the policy was drafted and re-drafted until a final text was settled on October 23, 2017. The Board further noted that, in some cases, the back and forth of re-drafting the policy amendments involved substantive issues, which continued to be debated and discussed by senior members of RCMP management over the period between June 27, 2016, and October 23, 2017. The Board thus determined that the decision to make the impugned change to the promotion policy was not reached until October 23, 2017, at the earliest, which was well after the certification freeze was in operation.

[30] On the interpretive point involving the decision in *Wal-Mart*, the Board rejected the argument advanced by the employer and found that the Supreme Court of Canada had not changed the principles applicable to statutory freeze complaints in the way the employer suggested. The Board undertook a lengthy review of the decision in *Wal-Mart*, its own case law, and the case law of several other labour boards, many of which have applied a reasonable employee expectation test in circumstances similar to those in the case at bar.

[31] Just as in those cases, the Board concluded that the impugned policy change could not have been reasonably anticipated by employees in the absence of any prior pattern of making similar changes or in the absence of any communication to them about the impending change prior to the onset of the statutory freeze. It also found that the employer could not rely on the business as usual exception in the absence of a prior practice of making similar changes or notification to employees before the freeze commenced.

[32] The Board noted that arguments like those advanced by the employer had been rejected by other labour boards. It also found that if the employer's argument were accepted, it would "…mean ignoring decades of labour board jurisprudence…" (at paragraph 74). The Board therefore rejected the employer's argument regarding the import of the Supreme Court of Canada's decision in *Wal-Mart*.

[33] The Board concluded that the employer had violated section 56 of the FPSLRA and issued remedial orders. These required the employer to:

a. allow RCMP Corporals and Sergeants to apply for promotions to the ranks of Sergeant and Staff Sergeant, respectively, without completing the Supervisor Development Program or Management Development Program;

b. identify the employees who were screened out of promotions to the ranks of Sergeant and Staff Sergeant, respectively, because they had not completed the

Supervisor Development Program or Management Development Program and reassess any such employee for that promotion, regardless of his or her completion of the Supervisor Development Program or Management Development Program;

c. complete the identification and reassessment and report the results to the Federation within 120 days; and

d. pay any employee identified as a result of that identification and reassessment who is entitled to a promotion all lost wages and benefits that the employee would have received had he or she been promoted but for the violation of section 56 of the FPSLRA.

II. Analysis

[34] The reasonableness standard of review applies to review of the Board's decisions. As for procedural fairness, while there is some debate in this Court, the most frequently expressed view at this time is that it is for this Court to determine whether the Board violated an applicant's procedural fairness rights (see, e.g., *Canada (Attorney General) v. Alexis*, 2021 FCA 216, 2021 CarswellNat 4869 (WL Can.), at paragraph 2; *Gulia v. Canada (Attorney General)*, 2021 FCA 106, 2021 CarswellNat 1617 (WL Can.), at paragraph. 8; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121, at paragraph 54).

A. *Was there a denial of procedural fairness?*

[35] I turn first to examine the alleged violation of procedural fairness arising from the determination that the impugned change to the RCMP's promotion policy was not made until after the onset of the certification freeze. In light of the allegations made in the Federation's application and written submissions, the date the impugned change was reached was very much a live issue before the Board. Thus, the applicant cannot claim to have been taken by surprise when the Board ruled on the issue. Therefore, I find there to have been no denial of procedural fairness.

B. *Did the Board reverse the onus of proof?*

[36] I turn next to the applicant's claim that the Board improperly reversed the onus of proof.

[37] The Board's case law recognizes that, in the context of a section 107 complaint, an applicant union must establish that: (1) a condition of employment existed on the day the freeze commenced; (2) the condition was changed without the consent of the bargaining agent; (3) the change was made during the freeze period; and (4) the condition is one that is capable of being included in a collective agreement. The Board has stated that the focus then shifts to any defence the employer may have offered. In *Public Service Alliance of Canada v. Canada Revenue Agency*, 2019 FPSLREB 110, the Board stated as follows at paragraph 137:

> In cases involving s. 107, the Board often conducts what is, in effect, a two-stage analysis. First, it tests whether a complainant has met its principal evidentiary burden of establishing that notice to bargain was served, that an employer subsequently changed a term and condition of employment that might have been included in a collective agreement

> and that was in force on the date notice to bargain was served, and that the complainant did not consent to that change. In the second stage, the Board considers any defence offered by the employer that despite the fact of a change in a term and condition of employment within the meaning of s. 107, its action did not comprise a violation of s. 107, most often because it was conducting "business as usual". In some cases, the Board views business as usual as an approach permitting a complainant to discharge its burden of proof by demonstrating that a term and condition of employment were in place before notice to bargain was served but subsequently was changed by the employer, in violation of s. 107.

[38] Contrary to what the applicant asserts, a fair reading of the Board's reasons demonstrates that it did not stray from these principles in the decision under review or cast the burden on the employer. Indeed, it made its evidentiary determinations based on all the evidence it heard, and the question of which party bore the onus of proof did not play any role in its decision.

[39] Therefore, I conclude that the Board did not commit a reviewable error concerning the burden of proof.

C. *Was the Board's factual determination reasonable?*

[40] I turn next to consider whether the Board's factual determination that the impugned change was not made until after the commencement of the freeze period was reasonable. Given the ample evidence before the Board upon which it relied to support its determination that the decision to implement the change was not reached until October 23, 2017, this determination was entirely reasonable.

[41] Contrary to what the applicant asserts, the Board was not required to accept the evidence from an employer witness who testified as to the nature of the decision made at the June 27, 2016, SEC meeting, and the authority of the SEC. It was open to the Board to instead rely on other evidence, which supported its conclusion that the decision to amend the promotion policy was not made until after the certification freeze had commenced.

[42] As the Board suggested at paragraph 131 of its decision, its conclusion concerning the date the decision was made, in and of itself, provided a sufficient basis for granting the complaint because the employer had not "set the wheels in motion" before the onset of the statutory freeze period. Thus, as the respondent rightly submits, my conclusion that this factual determination was a reasonable one requires that this application for judicial review be dismissed. Therefore, strictly speaking, it is not necessary to address the parties' arguments regarding the import of the *Wal-Mart* decision.

[43] Despite this, I believe it important that I do so in light of the nature of those arguments, which, if accepted, would mark a radical change in the way most labour boards have applied statutory freeze provisions over the last several decades.

D. *Was the Board's interpretation of the decision of the Supreme Court of Canada in Wal-Mart reasonable?*

[44] As noted, the applicant makes two interconnected submissions with respect to the reasonableness of the Board's interpretation of the decision in *Wal-Mart*. It first submits that the Supreme Court of Canada held in *Vavilov* that failure to apply an

applicable precedent renders a decision unreasonable and, second, that the Board failed to follow *Wal-Mart*, which it was bound to do.

[45] I disagree with both assertions.

(1) Impact of a Departure from Precedent

[46] As concerns the administrative law point, contrary to what the applicant submits, the Supreme Court of Canada did not establish a bright line test in *Vavilov*, which would require that failure to follow a case law precedent must necessarily result in an administrative decision being set aside. Quite the contrary, the Supreme Court's approach in *Vavilov* to the role of precedent is much more nuanced and contextual.

[47] In this regard, the Court in *Vavilov* dealt with the impact of a failure to follow two types of precedents, namely, those from the administrative decision maker, itself, and those from the courts.

[48] When dealing with the administrative decision maker's own precedents, the Supreme Court held that an administrative decision maker may sometimes reasonably depart from them if it provides adequate reasons for so doing. At paragraphs 131–132, the majority stated:

> Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.
>
> As discussed above, it has been argued that correctness review would be required where there is "persistent discord" on questions on law in an administrative body's decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body's decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

[49] As concerns departure from judicial precedents, the Supreme Court also held that, providing adequate explanations are given, an administrative decision maker may sometimes decline to follow a decision from the courts, depending on the circumstances. The inquiry is an inherently contextual one; the degree to which a precedent will constrain the administrative decision maker will depend on the nature of the precedent and the reasons for declining to follow it given by the administrative decision maker. The majority stated at paragraphs 112–113 of *Vavilov:*

> Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramification of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 *Alta. L.R.* 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 35 to 37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.
>
> That being said, administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable. For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context: see *Nor-Man Regional Health Authority*, at paras. 5-6, 44-45, 52, 54 and 60. Conversely, a decision maker that rigidly applies a common law doctrine without adapting it to the relevant administrative context may be acting unreasonably: see *Delta Air Lines*, at paras. 16-17 and 30. In short, whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

[50] Thus, if the Board failed to follow the decision of the Supreme Court of Canada in *Wal-Mart* and provided an adequate explanation for doing so, it would not necessarily render its decision in the case at bar unreasonable.

[51] In deciding when an administrative decision maker may decline to follow a judicial precedent, the Federation submits that the decision of the Federal Court in *Service d'administration P.C.R. Ltée v. Reyes*, 2020 FC 659 (*per* Grammond, J.) (*P.C.R. Ltée*) provides a useful analytical approach. There, the Federal Court held that, in assessing the binding nature of a precedent, the reviewing court should first assess the degree of legal constraint attaching to the precedent and then assess the reasonableness of the decision in light of the nature of that constraint. The Federal Court outlined its approach as follows at paragraph 24 of *P.C.R. Ltée*:

> … when a court analyzes a claim that an administrative decision-maker applied the "wrong test" by departing from a precedent, be it judicial or administrative, the following method is useful :
>
> 1. The Court must assess the degree of legal constraint imposed by the precedent, which involves the following factors:
>
> (a) The position of the author of the precedent in the judicial or administrative hierarchy;
>
> (b) The degree of consensus about the alleged precedent;
>
> (c) If the precedent was a decision on an application for judicial review, whether other outcomes could be deemed reasonable; and

(d) The fact that, in order to decide the question that would be governed by the precedent, the decision-maker has to weigh a range of factors;

2. The Court must then determine whether the impugned decision is reasonable, which, depending on the circumstances, may raise the following questions:

(a) If the decision maker explicitly disregarded the precedent, did they give adequate reasons?

(b) Taken as a whole, is the decision incompatible with the alleged precedent?

[52] With respect, I do not find this analytical framework a useful one to prescribe as it commences from the wrong starting point and is overly Cartesian. I also fear this formula would lead to the compartmentalization of a list of factors for a reviewing court to consider in all cases, even where this may not be necessary or appropriate. Moreover, this approach contradicts the approach mandated by *Vavilov*, where the Supreme Court held that the required analysis involves a highly context-specific determination—the antithesis of a list of factors applied in a mechanistic way. In my view, it is undesirable to prescribe an analytical methodology that will fit all cases beyond the general outlines the Supreme Court provided in *Vavilov*.

[53] *Vavilov* teaches that the focus of the review must be consideration of the reasons of the administrative decision maker, where reasons are given. At paragraphs 82–84, the majority in *Vavilov* stated:

> Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir*, at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 10; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 10.
>
> It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.
>
> As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

[54] Thus, on issues regarding the impact of precedent, as any other issue in judicial review, the reviewing court's analysis must be focussed on the reasons the administrative decision maker gave for interpreting or declining to follow a precedent. As part of this inquiry, the precedent at issue must be understood in the context of the case in which it arose and within its place in the broader case law. In understanding this context, the reasons given by the administrative decision maker on these points are of central importance, especially where, as here, the judicial precedent falls within the heartland of the administrative decision maker's area of expertise.

(2) The Board's Treatment of *Wal-Mart*

[55] With this background in mind, I turn to assess the reasonableness of the Board's treatment of the decision of the Supreme Court of Canada in *Wal-Mart* and, as directed by *Vavilov*, commence my analysis with a more detailed review of what the Board said about the *Wal-Mart* decision in its reasons. Because they are so thoughtful and so thoroughly review the relevant issues, it is worthwhile commenting at some length on the Board's reasons.

(a) *Detailed Review of the Board's Reasons*

[56] The Board commenced its consideration of the employer's argument by noting that "it has long been accepted in the jurisprudence of this and other labour boards that … some changes may be made without violating [a statutory freeze provision], if they are business as usual for the employer or if they are within the employees' reasonable expectations or both" (at paragraph 49).

[57] The Board then set out its conclusion on the employer's argument at paragraphs 50–51, stating:

> The employer argues that the two tests are distinct and that employees' expectations cannot be considered in a business-as-usual analysis. It adds that intermingling them not only runs counter to the way they developed historically but also was confirmed as wrong by the Supreme Court of Canada's approach in the *Wal-Mart* decision.
>
> I have to disagree with the employer on both counts. Jurisprudence that applies these two analytical approaches in a complementary and interconnected way is entirely in line with how they developed historically. Furthermore, I see nothing in *Wal-Mart* that changes that or that even suggests that an assessment of employees' expectations should not form part of a business-as-usual analysis.

[58] In the subsequent sections of its decision, the Board set out the reasons for this conclusion.

[59] The Board began with a historical overview of the case law interpreting statutory freeze provisions. It noted that labour boards initially developed the business-as-usual test and rejected the notion of a static freeze in recognition of employers' needs to continue to run their businesses during freeze periods, which sometimes may be lengthy. The Board went on to state that "analyzing when a change breaches a freeze provision is not an exact science" and that the "business-as-usual test has not proved helpful in every situation" (at paragraph 53). The Board noted that labour boards accordingly developed the reasonable employee expectation test, which the Board stated, "[was] not a recent development" (at paragraph 55).

[60] The Board then quoted at length from the seminal decision of the Ontario Labour Relations Board (the OLRB) in *Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers v. Simpsons Limited*, 1985 CanLII 949 (OLRB), [1985] O.L.R.B. Rep. April 594. In that case, the OLRB was required to rule on whether lay-offs undertaken during a severe recession, when there was no previous pattern of similar lay-offs, constituted a violation of the statutory freeze. In deciding that they did not, the OLRB, in the part of the passage cited by the Board, enunciated the reasonable employee expectations test, stating as follows [at paragraphs 30–34]:

> The freeze provisions catch two categories of events. There are those changes which can be measured against a pattern (however difficult to define) and the specific history of that employer's operation is relevant to assess the impact of the freeze. There are also first time events and it is with respect to that category that the business as before formulation is not always helpful in measuring the scope of employees' privileges. …
>
> … the [OLRB] considers it appropriate to assess the privileges of employees which are frozen under the statute and thereby, delimit the otherwise unrestricted rights of the employer, by focussing on the reasonable expectations of employees. The reasonable expectations approach, in the [OLRB]'s opinion, responds to both categories of events caught by the freeze, integrates the [OLRB]'s jurisprudence and provides the appropriate balance between employer's rights and employees' privileges in the context of the legislative provisions.
>
> Reasonable expectations language has appeared in a number of decisions dealing with the freeze section. [Citations omitted.] … Thus, in the [OLRB]'s view, the reasonable expectations of employees as the appropriate measure of the employees' privileges which are protected by the freeze is a common thread running through the earlier decisions. In the instant case, the [OLRB] is expressly articulating the test.
>
> The reasonable expectations approach clearly incorporates the practice of the employer in managing the operation. The standard is an objective one: what would a reasonable employee expect to constitute his or her privileges (or, benefits, to use a term often found in the jurisprudence) in the specific circumstances of that employer. …
>
> The reasonable expectations approach also integrates those cases which affirm the right of the employer to implement programmes during the freeze where such programs have been adopted prior to the freeze and communicated (expressly or implicitly) to the employees prior to the onset of the freeze: …

[61] The Board went on to note that the Board and the Canada Industrial Relations Board (the CIRB) have previously held that the business as usual and the reasonable employee expectation test are not mutually exclusive (citing to its decision in *Canadian Association of Professional Employees v. Treasury Board (Department of Public Works and Government Services)*, 2016 PSLREB 68, the decision of the CIRB in *Office and Professional Employees International Union v. Canadian Helicopters Limited (Canadian Helicopters Offshore)*, [*sub nom. Canadian Helicopters Limited doing business as Canadian Helicopters Offshore*], 2018 CIRB 891, and to the decisions of this Court in *Canadian Helicopters Limited v. Office and Professional Employees International Union*, 2020 FCA 37 and *Canadian Federal Pilots Association v. Canada (Attorney General)*, 2020 FCA 52).

[62] The Board concluded on this point by stating at paragraph 61:

> Clearly, the employees'-reasonable-expectations test developed historically as an alternative but complementary approach to determining whether a change was business as

> usual or whether it violated a statutory freeze by asking the question, "What would a reasonable employee expect to constitute his or her terms and conditions of employment or benefits in the specific circumstances of his or her employer?" A review of the jurisprudence reveals no difference in how these analytical approaches have been applied from their very beginnings some 40 years ago to the present.

[63] In the next section of its reasons, the Board highlighted the importance of a purposive interpretation of the freeze provisions, citing case law from the OLRB in support of this assertion.

[64] The Board then proceeded to discuss what the Supreme Court decided in *Wal-Mart* and held that it had not determined that "reasonable employees' expectations have no relevance to the consideration of any business-as-usual defence or that [the business as usual and reasonable employee expectation] tests must somehow be kept separate and distinct" (at paragraph 72).

[65] The Board noted that the fact pattern in *Wal-Mart* involved the closure of a profitable *Wal-Mart* store following certification in circumstances where there had not been any suggestion of closure prior to unionization. It also underscored that the Supreme Court restored the decision of the arbitrator, who had found that the closure violated the freeze provisions in the Quebec *Labour Code*, C.Q.L.R. c. C-27, s. 59.

[66] In deciding that *Wal-Mart* had not recast the law applicable to the interpretation of statutory freeze provisions in the way the employer suggested, the Board pointed to several places in the Supreme Court's reasons where employee expectations were considered, citing paragraphs 42, 95, and 96 of the majority's reasons in *Wal-Mart*. They provide:

> The condition of continued employment is implicitly incorporated into the contract of employment and need not be expressly stipulated. The essence of every contract is that it requires each party to perform its obligations as long as the other party does so and no other recognized cause of extinction of obligations occurs (art. 1458, para. 1 and art. 1590, para. 1 of the *Civil Code of Québec* ("*C.C.Q.*"), … [citations omitted]. The law applicable to contracts of employment does not stray from this principle in providing that where a contract is resiliated, a "serious reason" (art. 2094 *C.C.Q.*) or "good and sufficient cause" (s. 124 *A.L.S.*) must be shown, or reasonable notice must be given (art. 2091 *C.C.Q.* and s. 82 *A.L.S.*). Absent one of these justifications, the employer is bound by an obligation to continue employing the employee. This principle is all the more fundamental in our modern society, because the systemic importance of work means that the vast majority of employees are completely dependent on their jobs … [citations omitted]. In this context, it can be said that such employees have a reasonable expectation that their employer will not terminate their employment except to the extent and in the circumstances provided for by law.
>
> ….
>
> In discussing the "business as usual" rule and its application in this case, Arbitrator Ménard did not place an inappropriate burden of proof on the employer. In fact, it is clear from his review of the Union's evidence that the Union had shown that the store's situation did not suggest it would be closed. For example, Mr. Ménard stated early in his reasons that he was adopting the following [TRANSLATION] "additional evidence":
>
> > [TRANSLATION] [T]he Employer at no time told anyone that it intended to go out of business or that it was experiencing financial difficulties. On the contrary, it indicated that, from a perspective of five (5) years, the store was performing very

well and that its objectives were being met. [para. 2]

He then quoted a passage from the testimony of Gaétan Plourde in which Mr. Plourde revealed that the establishment's manager had indicated to him that bonuses would be paid for 2003 (para. 2).

In this context, it must be understood that the arbitrator's statement that the employer had not shown the closure to have been made in the ordinary course of the company's business was grounded in his view that the Union had *already* presented sufficient evidence to satisfy him that the change was not consistent with the employer's past management practices or with those of a reasonable employer in the same circumstances. It was in fact reasonable to find that a reasonable employer would not close an establishment that "was performing very well" and whose "objectives were being met" to such an extent that bonuses were being promised.

[67] The Board also noted that the Supreme Court nowhere in *Wal-Mart* indicated that it intended to cast aside decades of labour board case law, stating at paragraph 74 that:

… Even in the absence of any analysis considering employees' reasonable expectations, I would not conclude that the Supreme Court of Canada intended to draw an artificial boundary between two serviceable but imperfect analytical approaches, which have undeniably proven more useful in most situations when applied together. Nothing about the decision suggests that. Interpreting *Wal-Mart* in that way would mean ignoring decades of labour board jurisprudence, the vast majority of which has used the two tests to complement each other. And it would mean doing so in the absence of any suggestion from the Supreme Court of Canada that that was its intent.

[68] The Board continued by noting that the approach urged by the employer would contradict the strong statements of the majority of the Supreme Court in *Wal-Mart* about the critical role of freeze provisions and the importance of a purposive approach in interpreting them. The Board pointed to paragraphs 34 to 37, 49 and 51 of the majority's decision in *Wal-Mart*, which state:

… the purpose of [the statutory freeze provision in the Quebec *Labour Code*] in circumscribing the employer's powers is not merely to strike a balance or maintain the status quo, but is more precisely to facilitate certification and ensure that in negotiating the collective agreement the parties bargain in good faith … [citations omitted].

The "freeze" on conditions of employment codified by this statutory provision limits the use of the primary means otherwise available to an employer to influence its employees' choices: its power to manage during a critical period … [citations omitted]. By circumscribing the employer's unilateral decision-making power in this way, the "freeze" limits any influence the employer might have on the association-forming process, eases the concerns of employees who actively exercise their rights, and facilitates the development of what will eventually become the labour relations framework for the business.

In this context, it is important to recognize that the true function of [the statutory freeze provision in the Quebec *Labour Code*] is to foster the exercise of the right of association. … [citations omitted].

By codifying a mechanism designed to facilitate the exercise of the right of association, [the statutory freeze provision in the Quebec *Labour Code*] thus creates more than a mere procedural guarantee. In a way, this section, by imposing a *duty* on the employer not to change how the business is managed at the time the union arrives, gives employees a substantive *right* to the maintenance of their conditions of employment during the statutory period. This being said, it is the employees, as the holders of that right, who must ensure that it is not violated.

…

> On this point, I wish to stress that to accept the opposite argument — that the employer can change its management practices in all circumstances because it had the power to do so before the union's arrival — would be to deprive [the statutory freeze provision in the Quebec *Labour Code*] of any effect. Thus [the statutory freeze provision in the Quebec *Labour Code*] was enacted for the specific purpose of preventing the employer from [TRANSLATION] "exercising its great freedom of action at the last minute by being particularly generous or adopting any other pressure tactic" … [citation omitted]. To permit the employer to keep using its managerial powers as if nothing had changed would, when all is said and done, be to allow the employer to do that which the law is actually meant to prohibit.
>
> …
>
> An interpretation that would leave the employer with all the freedom it had before the petition for certification was filed would be contrary to s. 41 of the *Interpretation Act*, CQLR, c. I-16, which favours a broad and purposive interpretation of the provision. It seems to me that such an interpretation would also overlook the fact that the employer ceases to have sole control over labour relations in its business after the union arrives on the scene. Once the petition for certification is filed, the employer is dealing with [TRANSLATION] "the possible implementation of a new scheme of labour relations in the business, a system that is now institutionalized", and it must take this new system into account in exercising its management power … [citations omitted].

[69] The Board concluded this portion of its reasoning by commenting as follows on the employer's argument [at paragraphs 76–77]:

> I also note that the employer does not argue that employees' expectations are completely irrelevant. It simply states that they are relevant only to an employees'-reasonable-expectations test and that they cannot be used as part of a business-as-usual analysis. As indicated earlier, I see no merit in that argument; it is difficult to even conceptualize a completely separate application of these approaches. However, even if I accepted that the employees' reasonable expectations could be applied only as a separate and distinct test, in my view, it would lead to the same conclusion.
>
> The employer argued that although the Board could still apply the employees'-reasonable-expectations test (albeit separately), it would not trump the business-as-usual test. In making this argument, the employer implicitly suggests that business as usual should trump the employees' reasonable expectations. It is not at all clear what that proposition is based on, but in any event, in my view, this argument is also without merit. Neither of these complementary analytical approaches can be said to trump the other; that is simply not how they work.

[70] The Board then applied the reasonable employee expectation test. It held that, in accordance with a long line of case law of its own and of several other labour boards, to meet that test, "a change must be part of an established pattern such that the employees would reasonably expect it, or there must have been a firm decision to make the change that was communicated to the employees before the onset of the freeze period" (at paragraph 78). Because there was no such pattern or employee communication made by the RCMP, the Board determined that the impugned changes violated the freeze in section 56 in the FPSLRA.

[71] In subsequent sections of its reasons, the Board considered alternate tests that could be applied and concluded they would all come to the same result.

[72] One of these involved consideration of whether the change to the policy was the sort that could be bargained collectively and that, if unilaterally changed, would "unduly disrupt, vitiate or distort that bargaining process" (to cite one of the cases the Board quoted, the decision of the OLRB in *Ontario Public Service Employees Union v. Royal Ottawa Health Care Group Institute of Mental Health Research*, [1999] O.L.R.B. Rep. 711, 1999 CanLII 20151 (OLRB), at paragraph 89). The Board determined that the change to the RCMP's promotion policy was such a change and that, accordingly, this test would also lead to the conclusion that the adoption of the policy change after the onset of the freeze violated section 56 of the FPSLRA.

[73] The Board next examined the business-as-usual defence. In respect of it, the Board focussed on the paragraphs from *Wal-Mart*, on which the employer relied, namely paragraphs 55–57. There, the majority stated:

> Regardless of who adduced the evidence to be considered by the arbitrator, there are two ways for the arbitrator to determine whether a specific change is consistent with the employer's normal management practices. First, for the employer's decision not to be considered a change in conditions of employment within the meaning of [the statutory freeze provision in the Quebec *Labour Code*] … the arbitrator must be satisfied that it was made in accordance with the employer's *past* management practices. In the words of Judge Auclair, the arbitrator must be able to conclude that the employer's decision was made [TRANSLATION] "in accordance with criteria it established for itself before the arrival of the union in its workplace … [citations omitted].
>
> Second, the courts have held that the employer must continue to be able to adapt to the changing nature of the business environment in which it operates. For example, in some situations in which it is difficult or impossible to determine whether a particular management practice existed before the petition for certification was filed, the courts accept that a decision that is [TRANSLATION] "reasonable", based on "sound management" and consistent with what a "reasonable employer in the same position" would have done can be seen as falling within the employer's normal management practices … [citations omitted].
>
> Thus, a change can be found to be consistent with the employer's "normal management policy" if (1) it is consistent with the employer's past management practices or, failing that, (2) it is consistent with the decision that a reasonable employer would have made in the same circumstances. In other words, a change [TRANSLATION] "that would have been handled the same way had there been no attempt to form a union or process to renew a collective agreement should not be considered a change in conditions of employment to which [the statutory freeze provision in the Quebec *Labour Code*] applies" … [citation omitted].

[74] The Board first considered whether the change to the RCMP's promotion policies was in accordance with the RCMP's past management practices, the first sort of situation discussed by the Supreme Court in paragraphs 55–57 of its reasons in *Wal-Mart*. The Board held that the impugned change to the RCMP's promotion policy was not consistent with its past management practices as it had only once before made a somewhat similar change and "one previous change does not reveal an established pattern of past management practices with respect to substantive policy changes" (at paragraph 98).

[75] Although the employer was not relying on the second exception outlined in paragraphs 55–57 of *Wal-Mart*, the Board went on to consider whether the change in question was an action that a reasonable employer would take in the same situation or

represented the way the RCMP would have acted in the absence of a certification application. The Board answered both questions in the negative.

[76] In determining that a reasonable employer would not have instituted the change, the Board held that the change was significant but not one that was urgently required. In this regard, it noted that the change had been under discussion for some time before it was made and was even put on hold at one point. The Board also noted that it would have been reasonable for the RCMP to have waited on making the change when it received negative feedback from supervisors about the impact it was likely to have. It also underscored that the RCMP could have sought the concurrence of the Board to the change—an option open to employers under section 56 of the FPSLRA—but that it had declined to do so. Taken together, these factors led the Board to conclude that the change was not one a reasonable employer would have made in similar circumstances.

[77] As concerns the wording used by the majority of the Supreme Court of Canada in paragraph 57 of *Wal-Mart*—to the effect that, to be permissible, a change must be one "that would have been handled in the same way had there been no attempt to form a union or process to renew a collective agreement"—the Board held that this "notion is just another way of thinking about whether the employer managed its business as usual" (at paragraph 109).

[78] The Board firmly rejected the employer's argument that the Supreme Court had decided that "an employer [could] meet the business-as-usual test simply by showing that it would have acted the same way in the absence of a certification application", holding that "labour jurisprudence in every jurisdiction of the country has always explicitly rebuffed such a notion" (at paragraphs 110–111). The Board continued by noting that, were such a notion to be accepted, it would be tantamount to requiring there to be anti-union animus to establish a violation of a freeze violation—a proposition firmly rejected in the case law and by the Supreme Court, itself, in paragraph 38 of *Wal-Mart*, where Justice Binnie, writing for the majority wrote:

> I wish to note first that, since [the statutory freeze provision in the Quebec *Labour Code*] is not directly concerned with the punishment of anti-union conduct, the prohibition for which it provides will apply regardless of whether it is proven that the employer's decision was motivated by anti-union animus … [citations omitted]. The essential question in applying [the provision] is whether the employer *unilaterally* changed its employees' conditions of employment *during the period of the prohibition*.

[79] The Board concluded by stating that the Supreme Court in *Wal-Mart* [at paragraph 119],

> … had no intention to change and did not change the jurisprudence in any substantial way, whether to remove any consideration of employees' reasonable expectations from a business-as-usual analysis, or to suggest that an employer could establish a business-as-usual defence simply by showing that it would have acted the same way had there been no application for certification.

[80] In support of this conclusion, the Board referred to the myriad of cases, decided after *Wal-Mart*, where labour boards have continued to apply the same approaches to statutory freeze provisions as they have for several decades (citing to *Canadian Helicopters Limited doing business as Canadian Helicopters Offshore*, 2018 CIRB 891 [cited above]; *Canadian Federal Pilots Association v. Department of Transport Transportation Safety Board, and Treasury Board Secretariat*, 2018 FPSLREB 91;

Public Service Alliance of Canada v. Anishinabek Police Service, 2018 CanLII 81987 (OLRB); *Teamsters Local Union No. 31 v. 669779 Ontario Ltd. O/A CSA Transportation*, *sub nom. 669779 Ontario Ltd. O/A CSA Transportation*, 2018 CIRB 894; *Public Service Alliance of Canada v. Canada Revenue Agency*, 2017 FPSLREB 16; *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board*, 2016 PSLREB 47; *Public Service Alliance of Canada v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 11; *Public Service Alliance of Canada v. Treasury Board*, 2016 PSLREB 107; *Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647, affiliated with the International Brotherhood of Teamsters v. Canada Bread Company Limited*, 2016 CanLII 25094 (OLRB); *Canadian Association of Professional Employees v. Treasury Board (Department of Public Works and Government Services)*, 2016 PSLREB 68; *Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence)*, 2016 PSLREB 26; *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 19; *Alberta Union of Provincial Employees and Shepherd's Care Foundation*, [2016] Alta. L.R.B.R. 33 [*sub nom. Shepherd's Care Foundation and AUPE, Re*, 2016 CarswellAlta 796 (WL Can.), *sub nom. Shepherd's Care Foundation (Re)*, [2016] A.L.R.B.D. No. 30 (QL); *New Brunswick (Board of Management) v. Canadian Union of Public Employees, Local 1840*, *sub nom.*] *New Brunswick (Board of Management) (Re)*, [2014] N.B.L.E.B.D. No. 27 (QL)).

[81] The Board further underscored some cases that specifically rejected arguments similar to those made by the employer (namely, *Public Service Alliance of Canada v. Canada Revenue Agency*, 2019 FPSLREB 110; *Syndicat des enseignantes et enseignants de la communauté Innue de Pessamit-CSN v. Conseil des Innus de Pessamit*, [*sub nom. Conseil des Innus de Pessamit*], 2016 CIRB 831; *Syndicat des enseignantes et enseignants de la communauté Innue de Pessamit-CSN v. Conseil des Innus de Pessamit,*[*sub nom. Conseil des Innus de Pessamit*], 2017 CIRB 861; *Corporation de l'École Polytechnique de Montréal c. Association syndicale des salarié-e-s étudiant-e-s de la Polytechnique*, 2015 CanLII 13848 (Qc SAT)).

[82] The Board therefore rejected the employer's interpretation of *Wal-Mart*, applied the usual approach of Canadian labour boards to the situation, and determined that the RCMP had violated section 56 of the FPSLRA in making the impugned change to its promotion policy.

(b) *Was the Board's treatment of Wal-Mart Reasonable?*

[83] I turn now to the employer's assertion that the Board's interpretation of *Wal-Mart* was unreasonable.

[84] At the outset, it is worthwhile remembering that decisions like the one in the case at bar are relatively unconstrained due to their subject-matter, the statutory remit of the Board, and its specialization in discharging that remit. Thus, as a practical matter, the decisions of the Board on matters such as this receive significant deference. Interpretation of the statutory freeze lies at the centre of the setting the balance of power in labour-management relations—a matter that the legislators have left explicitly to expert labour relations boards to settle and over which they have accumulated much know-how by dealing with so many cases in this area.

[85] For well over half a century, courts in this country have consistently held that decisions of this nature cannot be lightly interfered with. That has been the approach to such decisions from the 1970's in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al.*, [1975] 1 S.C.R. 382, 1973 CanLII 191 and *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417 to the present day.

[86] The privative clause in subsection 34(1) of the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365 is a strong indication of the requirement for such deference, as this Court has held in *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41, 432 D.L.R. (4th) 170, at paragraph 34 and *Canada (Attorney General) v. Best Buy Canada Ltd*., 2021 FCA 161, at paragraphs 122–123.

[87] In the instant case, the Board provided more than adequate reasons for its rejection of the employer's argument and an entirely reasonable interpretation of the decision of the Supreme Court of Canada in *Wal-Mart*.

[88] The applicant does not take issue with the adequacy of the Board's reasons and instead focuses his argument on the assertion that its interpretation of *Wal-Mart* was one that the Board was required to follow. I disagree for several reasons.

[89] First, and perhaps most importantly, the applicant is inviting this Court to engage in something akin to a correctness analysis and to substitute our interpretation of *Wal-Mart* for that of the Board to measure the reasonableness of its interpretation against our own. However, as discussed above, that is precisely what *Vavilov* instructs must not be done.

[90] Second, the Board's interpretation of *Wal-Mart* squarely conforms to the labour precedents decided both before and after *Wal-Mart*. This is a strong—if not decisive—indicia of its reasonableness.

[91] Indeed, were the applicant's interpretation of *Wal-Mart* to be accepted, it would largely undermine statutory freeze provisions in labour legislation and allow employers to make unprecedented changes to employee wages and working conditions during a freeze period so long as there was a business justification for the decision that is not tainted by anti-union animus and management had reached the decision internally before the freeze commenced. However, there are other provisions in labour legislation that prohibit employer actions tainted by anti-union animus (in the FPSLRA, for example, in sections 186(1) and 186(2)). The applicant's interpretation would lead to the unreasonable result of rendering the freeze provisions largely superfluous by giving them much the same scope of operation as these other provisions.

[92] Third, with respect, I believe that the applicant has taken some of the comments in paragraphs 55–57 of *Wal-Mart* out of context and placed an undue emphasis on a few of the words used by the majority of the Supreme Court in those paragraphs. As noted, the fact pattern in *Wal-Mart* involved a store closure. The employer's arguments in *Wal-Mart* centred on what was asserted to be the fundamental principle that an employer cannot be required to continue in operation against its will and possesses a fundamental right to cease operations. By definition, there cannot ever be a prior pattern

of ceasing operations. Thus, the business as usual exception to the statutory freeze did not fit the situation in *Wal-Mart*.

[93] The Supreme Court found that *Wal-Mart* violated the freeze because it was unreasonable for it to have closed a profitable store following certification in the absence of any prior plans to do so. In so deciding, the Supreme Court applied an objective test that is not unlike the reasonable employee expectations test.

[94] Whether viewed from the point of view of the employer or the employees, what is evaluated is whether the decision to impose a change is a reasonable one in light of the prohibition on making unilateral change to employees' terms and conditions of employment during the period of the freeze. In other words, the Supreme Court in effect asked whether a reasonable employer, aware and desirous of complying with the freeze provisions, would have closed the store. It answered no, in part, because so doing would have contradicted the reasonable expectations of its employees.

[95] In sum, I agree with the Board that the Supreme Court intended to apply and not fundamentally alter the decades of labour board jurisprudence in *Wal-Mart*. The numerous passages from *Wal-Mart*, cited above, aptly demonstrate this.

[96] Finally, it must be borne in mind that freeze cases are inherently factual in nature. In such cases, labour boards are required to determine whether a change is a reasonable one the employer is permitted to make in light of all the relevant surrounding circumstances and a purposive interpretation of the statutory freeze provisions. Where there is evidence to support the factual conclusions reached by a labour board, a reviewing court owes deference to a labour board's assessment. At the end of the day, legislators have determined that these questions are ones for labour boards and not for reviewing courts to decide.

[97] Thus, for all these reasons, it is my view that the Board's decision in the instant case was reasonable.

III. Proposed Disposition

[98] Therefore, I would dismiss this application, with costs. These I would fix in the agreed-upon, all-inclusive amount of $2,500.00, which I find to be appropriate.

Stratas J.A.: I agree.

Webb J.A.: I agree.