KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 120**

Date: **2024 06 21**
Docket: KBG-RG-01014-2023
Judicial Centre: Regina

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

APPLICANT

- and -

SASKATCHEWAN GAMING CORPORATION

RESPONDENT

- and -

JOHN COMRIE, K.C.

RESPONDENT

Counsel:

Morgan Rowe	for the Public Service Alliance of Canada
Daniel Kwochka	for Saskatchewan Gaming Corporation

JUDGMENT
June 21, 2024

BROWN J.

INTRODUCTION

[1] The employer, Saskatchewan Gaming Corporation [SGC], is a Crown corporation which owns and operates Casino Regina and Casino Moose Jaw [Casinos], both located in the province of Saskatchewan.

[2] The Public Service Alliance of Canada [PSAC] is a union within the definition of ss. 6-1(1)(p) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [*SEA*] and is the certified bargaining agent for Casino employees in the table games, guest services, bank, slots, security, and maintenance departments.

[3] SGC and PSAC were parties to a Collective Agreement, dated January 1, 2013 to December 31, 2016, until July 2020 [CBA 1] at which time the parties signed a new Collective Agreement, with a December 31, 2021 expiry date [CBA 2] collectively [Collective Agreements].

[4] At issue in the grievance arbitration was whether SGC contravened the Collective Agreements when it engaged in two mass lay-offs of bargaining unit members in March 2020 and December 2020 as a result of the COVID-19 pandemic. In the two instances in issue SGC laid off between 140 and 230 bargaining unit members. This was done without prior consultation between SGC and PSAC.

[5] In both instances SGC also provided all affected employees with six to nine days' written notice of lay-off. PSAC argues this was inconsistent with the notice and pay in lieu of notice on lay-off provisions under the Collective Agreements which were dealt with by Article 40 of CBA 1 and Article 42 of CBA 2.

[6] The Collective Agreements also provided that a Joint Union Management Representative Workforce Committee [JUMRWC] would be assembled and consulted prior to any lay-off occurring. With respect to other lay-off protections, Article 40 of CBA 1 stated:

> ARTICLE 40 - LAYOFF AND RECALL
>
> 40.01 Employees may be laid off due to lack of work.
>
> 40.02 The Joint Union Management Representative Workforce Committee
>
> (JUMRWC) will be assembled prior to any lay off proceedings to determine what impact, If any, these proceeding will have on the units' representative workforce. When the (JUMRWC) determines that the proceedings will Impact the units' representative workforce in a negative manner, the JUMRWC members agree to consult with their principals to discuss alternate workforce adjustment plans to ensure a representative workforce is maintained.
>
> 40.03 Employees who are laid off may exercise their seniority to retain

employment by bumping junior employees providing they have the necessary knowledge, skills and ability to do the job being bumped into and providing Article 40.02 has not been enacted. Employees will have a time period of two (2) days to decide whether they want to exercise this right.

40.04 Employees so displaced may exercise their seniority to retain employment by bumping junior employees providing they have the necessary knowledge, skills and ability to do the job being bumped into and providing Article 40.02 has not been enacted. Employees will have a time period of two (2) days to decide whether they want to exercise this right.

40.05 Where an employee has been in continuous service of SGC for at least three (3) consecutive months, SGC shall not layoff the employee without giving the employee at least the following notice or pay in lieu thereof:

a) one weeks' written notice when his/her period of employment is more than three months but less than one year;

b) two week's written notice where her/his period of employment is one year or more but less than three years;

c) four weeks' written notice where his/her period of employment is three years or more but less than five;

d) six weeks' written notice where his/her period of employment is five year or more but less than ten years;

e) eight weeks' written notice where her/his period is ten years plus.

40.06 (a) When recalling employees, the same shall be done on the basis of seniority within an employee's classification.

(b) If SGC recalls all available employees within the classification and still has vacancies, SGC shall recall laid off employees from other classifications if they possess the necessary knowledge, skills and ability to do the job. 40.07 When SGC recalls an employee who has been laid off, SGC shall attempt to notify the employee by phone. If contact cannot be made by telephone, SGC shall notify the employee by registered letter addressed to that employee's last known address. Employees recalled shall report to the Casino and submit availability information, as required.

It is the employee's responsibility to keep telephone and address information current. Failure to respond to a recall within seven (7) calendar days will constitute an end to SGC-employee relationship

> and the employee will be removed from the recall list.

March 2020 Lay-offs and the 2020 Grievance

[7] On March 16, 2020, SGC announced its intention to temporarily suspend operations and close the Casinos, in response to capacity restrictions on public indoor gatherings announced by the government as a result of COVID-19.

[8] Between March 17, 2020 and March 19, 2020, a number of statutory amendments and public health orders were passed, which provided additional powers to the Chief Medical Health Officer and others to issue and enforce public health orders.

[9] On March 18, 2020, the Government of Saskatchewan declared a provincial state of emergency which required that all persons comply with any lawful orders made by the Minister of Health and the Chief Medical Health Officer and with lawful directions of the Saskatchewan Public Safety Agency. On March 19, 2020, the Chief Medical Health Officer ordered the closure of all recreational and entertainment facilities, including casinos.

[10] On March 19, 2020, SGC circulated a memorandum committing to paying employees for another two weeks, to April 2, 2020, and stating that further information respecting compensation would be shared as soon as it was available.

[11] The lay-off provisions of CBA 2, while found in Article 42, were in essence the same as Article 40 of CBA 1.

[12] Also on March 19, 2020 *The Employment Standards (Public Emergencies) Amendment Regulations, 2020*, were proclaimed by Order In Council 105/2020 and made effective the same date [*SEA Emergency Regs*], the lay-off provisions of the *SEA* were modified by a regulation passed pursuant to section 2-99 of the *SEA*. This regulation provided that, during periods declared to be public emergencies by the Chief Medical Health Officer:

44.2 …

> (a) subject to clause (c), employers and employees are exempt from the provisions of, and employees are not entitled to the protections provided by, sections 2-60 and 2-61 of the Act respecting layoffs;
>
> (b) employers are exempt from the provisions of the Act requiring notice to employees with respect to a layoff if the layoff period is 12 weeks or less in a 16-week period; and
>
> (c) if an employer lays off employees for one or more periods that are more in total than 12 weeks in a 16-week period, the employees:
>
> > (i) are deemed to be terminated; and
> >
> > ((ii) are entitled to pay instead of notice in accordance with sections 2-60 and 2-61 of the Act to be calculated from the date on which the employer laid off the employees.

[13] On March 27, 2020, SGC formally announced the lay-off of employees. SGC further advised that lay-off notices would be sent by mail to affected employees and that the lay-off would be effective April 3, 2020.

[14] Of the approximately 250 employees in PSAC's bargaining unit, 229 members received letters dated March 27, 2020 informing them of their lay-off effective April 3, 2020. At the grievance hearing there was no dispute that the notice period of six days did not comply with the notice requirements under Article 40 of CBA 1. The March 2020 lay-offs occurred without prior consultation with PSAC. PSAC filed Grievance #2020-PSAC-05 on April 6, 2020 under CBA 1.

December 2020 Lay-Offs and the 2021 Grievance

[15] In April 2020, the Saskatchewan government began a phased re-opening plan. On May 13, 2020 *The Employment Standards (Public Emergencies) Amendment Regulations, 2020* (No. 2), were proclaimed by Order in Council 225/2020 [*SEA Emergency Regs 2*]. Further regulation pursuant to s. 2-99 of the *SEA* was promulgated,

which provided:

> **44.3**(1) During a public emergency period, employers and employees are exempt from the provisions of, and employees are not entitled to the protections provided by, sections 2-60 and 2-61 of the Act respecting layoffs.
>
> (2) After the date on which the public emergency period is no longer in force, an employer continues to be exempt from the provisions of sections 2-60 and 2-61 of the Act respecting layoffs for a further period of two weeks.
>
> (3) After the expiry of the two-week period mentioned in subsection (2):
>
> (a) the employer must schedule any laid off employees to work with the employer;
>
> (b) if any employees have not been scheduled to work with the employer, the employees:
>
> (i) are deemed to be terminated; and
>
> (ii) are entitled to pay instead of notice in accordance with sections 2-60 and 2-61 of the Act to be calculated from the original date on which the employer laid off the employees; and
>
> (c) if any employees have been scheduled to work with the employer but do not return to work, the employees are deemed to have resigned.

[16] On July 3, 2020, SGC announced that it would be re-opening the Casinos on July 9, 2020 and subsequently began the gradual recall of employees. By December 1, 2020, approximately 141 members of PSAC's bargaining unit had been recalled. However, on December 14, 2020, the Chief Medical Health Officer issued a new public health order. As a result, on the same day, SGC advised all employees that the Casinos would again be closing effective December 19, 2020.

[17] On December 16, 2020, SGC advised PSAC that the temporary closure of the Casinos would result in lay-offs effective December 28, 2020, and that wages for affected employees would continue to be paid until December 27, 2020. The parties met on December 17, 2020 to discuss the Casino closures. During this meeting, SGC

confirmed its decision to lay-off members of PSAC's bargaining unit.

[18] The lay-offs were communicated to affected employees on December 18, 2020 and commenced on December 28, 2020. A total of 143 PSAC members received letters informing each of their temporary lay-off. At the grievance hearing, there was no dispute that the nine-day notice period did not meet the notice requirements provided for in Article 42 of the CBA 2. There was also no dispute that the JUMRWC was not assembled and consulted prior to SGC's decision to engage in lay-offs.

[19] PSAC filed its second grievance respecting the December lay-offs on January 11, 2021 as Grievance #2021-PSAC-01 under the CBA 2.

ARBITRATOR'S AWARD

[20] In his decision, dated January 25, 2023 found at *Public Service Alliance of Canada, Local 40005 (Collectively PSAC) v Saskatchewan Gaming Corporation (Casino)*, 2023 CanLII 52584 (Sask LA) [*Arbitrator's Decision*], the Arbitrator commenced his analysis with an overview of the constitutional and administrative law underpinnings of unions generally, and PSAC specifically, in Saskatchewan. In this respect, the Arbitrator indicated at para. 104 that s. 6-3 of the *SEA*, which provides that a union is deemed to be a person for the purposes of the *SEA*, is a fundamental starting point to understanding PSAC's capacity and legal powers in Saskatchewan.

[21] Based on this premise, the Arbitrator went on to conclude that PSAC was, effectively, a creature of statute, established and provided authority via the *SEA*, and that CBA 1 and CBA 2 therefore similarly existed only by virtue of the *SEA*.

[22] The Arbitrator went on to consider the interaction between lay-off provisions within collective agreements and the minimum lay-off notice in the *SEA*, stating:

> [109] The manner in which the current regime of temporary layoffs in collective agreements came to exist is completely dependent on statutory regimes like the SEA. The SEA gives Saskatchewan unions first of all the capacity to negotiate on behalf of employees and then, the statute imposes requirements on employers to provide minimum notice periods.
>
> ...
>
> [115] Unions also typically negotiated provisions that recognized first of all the right of an employer to "lay-off" an employee for lack of work. At the same time Employers were required to comply with a set of notice requirements. These notice requirements would be incorporated directly into the respective collective agreement in a form often identical to the legislation. That is the case in this proceeding where the notice provisions in CBA 1 and 2 are substantively identical to the notice requirements of section 2-60 of the SEA. In some cases, employers will negotiate notice terms for their laid off employees which exceed the minimum statutory requirements. In such cases, the statute is seen as a floor.

[23] The Arbitrator considered the interpretation of the emergency regulations within this context, noting that the emergency regulations provide that employees were "not entitled to the protections provided by ss. 2-60 and 2-61 of the [*SEA*]" during public emergency periods. He then considered the text of ss. 2-60 and 2-61 of the *SEA* prior to the modifications introduced by the emergency regulations. The unmodified provisions provided:

> Notice required
>
> 2-60 (1) Except for just cause, no employer shall lay off or terminate the employment of an employee who has been in the employer's service for more than 13 consecutive weeks without giving that employee written notice for a period that is not less than the period set out in the following Table:
>
> **Table**
>
> | **Employee's Period of Employment** | **Minimum Period of Written Notice** |
> |---|---|
> | more than 13 consecutive weeks but one year or less | one week |

more than one year but three years or less	two weeks
more than three years but five years or less	four weeks
more than five years but 10 years or less	six weeks
more than 10 years	eight weeks

(2) In subsection (1), "period of employment" means any period of employment that is not interrupted by more than 14 consecutive days.

(3) For the purposes of subsection (2), being on vacation, an employment leave or a leave granted by an employer is not considered an interruption of employment.

(4) After giving notice of layoff or termination to an employee of the length required pursuant to subsection (1), the employer shall not require an employee to take vacation leave as part of the notice period required pursuant to subsection (1).

Payments in case of layoffs or terminations

2-61 (1) If an employer lays off or terminates the employment of an employee, the employer shall pay to the employee, with respect to the period of the notice required pursuant to section 2-60:

(a) if the employer is not bound by a collective agreement that applies to the employee, the greater of:

(i) the sum earned by the employee during the period of notice; and

(ii) a sum equivalent to the employee's normal wages for that period; or

(b) if the employer is bound by a collective agreement that applies to the employee, the entitlements provided for in the collective agreement.

(2) For the purposes of subsection (1), if the wages of an employee, not including overtime pay, vary from week to week, the employee's normal wages for one week are deemed to be the equivalent of the employee's average weekly wage, not including overtime pay, for the 13 weeks the employee worked preceding:

(a) the date on which the notice of layoff or termination was given; or

> (b) if no notice of the layoff or termination was given: (1) the date on which the employee was laid off or terminated; or (il) a date determined in the prescribed manner.
>
> (3) If an employer lays off or terminates the employment of an employee at a remote site, the employer shall provide transportation without cost for the employee to the nearest point where regularly scheduled transportation services are available.

[24] The Arbitrator concluded that the regulations suspended the operation of all lay-off provisions in collective agreements due to the reference to "the entitlements provided for in the collective agreement" in ss. 2-61(1)(b) of the *SEA* when applying the emergency regulations to s. 2-60 and 2-61 of the *SEA*. He wrote:

> [127] When the provisions are put beside each other and stripped of irrelevant language while maintaining only the language applicable to situations where there is a collective agreement, then the clarity and obviousness of this answer is made manifest:
>
> > 2-61 of the SEA says: "If an employer lays off... an employee, the employer shall pay to the employee, with respect to the period of notice required pursuant to section 2-60... the entitlements provided for in the collective agreement."
> >
> > - and then -
> >
> > 44.3(1) of the Emergency Regs says: "During a public emergency period... employees are not entitled to the protections provided by, sections 2-60 and 2-61 of the Act respecting layoffs."
>
> [128] What more needs to be said?... The above wording is explicit - what is being suspended is "the entitlements provided for in the collective agreement".
>
> [129] This language clearly covers whatever "protections" are contained in the CBA 1 or 2 - and it should be noted that the language is not limited to just the minimum notice requirements, but to any "protections... respecting layoffs." …

[25] Turning to the applicant's argument that the lay-off protections of CBA 1 and 2 could not be affected by the emergency regulations because, pursuant to s. 2-7 of the *SEA*, the Collective Agreements provisions were "more favourable" than the lay-off provisions of the emergency regulations or the *SEA*, the Arbitrator determined that:

> [153] … After giving effect to the Emergency Regs, the SEA provisions are the same as CBA 1 and 2 - the provisions on notice and pay in lieu in both instruments has been suspended and are therefore identical to each other.
>
> [154] Regardless, the Union says that after the Emergency Regs have been adopted, the protections in sections 2-60 and 2-61 have been eviscerated leaving the provisions of CBA 1 and 2 as "more favourable". ...
>
> [155] …However, because the Emergency Regs actually suspended the protections of CBA 1 and 2 on layoffs, this argument fails.

[26] The Arbitrator also found that it was not necessary to compare the full bundle of lay-off rights contained within CBA 1 and CBA 2 to the provisions of the emergency regulations and the *SEA* when assessing favourability. Section 2-7 of the *SEA*, he found, listed only four factors which were to be considered in assessing favourability and that benefits which were not "directly involved" in one of the listed factors should not be considered, and could not be preserved, pursuant to s. 2-7 of the *SEA*. On this basis, the Arbitrator intimated that not only were all of the notice period provisions of CBA 1 and 2 suspended by the emergency regulations but so were the broader suite of lay-off protections in the Collective Agreements, such as the preservation of seniority, bumping rights, the right to recall, and the right to severance pay.

[27] In determining whether the SGC breached its consultation obligations under the Collective Agreements, the Arbitrator accepted at para. 34 that "the Union was not consulted about either Layoff No. 1 or Layoff No. 2 prior to SGC’s decision to effect the lay-offs." He determined that there was nonetheless no material impact due the Employer's lack of compliance with its consultation obligation and therefore no breach. In this regard he wrote:

> [170] According, there is no real issue under this heading as to whether any lack of compliance with Articles 40.02 and 42.02 somehow invalidated the layoffs and entitled the Laidoff Employees to collect payments in lieu of notice under CBA 1 or 2. Even if there was some lack of compliance, there was no material impact on the workforce

> that would justify pay in lieu of notice. Moreover, the JUMRW Committee is "advisory" only and had it met and given its advice, there was no obligation on the Employer to follow such advice. There is also no suggestion that the outcome on the layoffs from a government mandated forced shutdown would be different in any way.
>
> [171] This is not to say that that these consultation obligations should somehow be ignored or in the future should be considered as anything but serious obligations that both parties should endeavour to meet and satisfy. An important social obligation of the Casinos has been to preserve a representative workforce and nothing in this Award should be taken to undermine that commitment. However the issue of consultation with an advisory committee in the circumstances of COVID-19 restrictions where whole facilities were shut down cannot be relevant to the issues in this dispute.

ISSUES

[28] The issues in the present application:

(a) What is the standard of review?

(b) Was the *Arbitrator's Decision* unreasonable?

[29] For the reasons that follow I conclude that the *Arbitrator's Decision* is not unreasonable.

Relief Sought

[30] The applicant seeks an order:

(a) Quashing the *Arbitrator's Decision* dismissing the grievances;

(b) Remitting the matter back to the Arbitrator for reconsideration; and

(c) Costs.

ISSUE

[31] The issue in this matter is whether the Arbitrator acted reasonably in

concluding that the grievance was properly disallowed. This is further narrowed to being a question of whether his conclusion that the provisions of the emergency legislation suspended obligations and rights with respect to the Collective Agreements and not just the statutory provisions of the *SEA* is reasonable.

STANDARD OF REVIEW

[32] Both parties agree that the standard of review is to be viewed in accordance with what was set out in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*]. Here, that means the standard of reasonableness ought to be applied to the *Arbitrator's Decision*. There is no reason it should be otherwise, and therefore the reasonableness standard will be applied. *Mason v Canada Citizenship and Immigration),* 2023 SCC 21, 485 DLR (4th) 583 [*Mason*], is also to be considered. It does not change the result; reasonableness is still the standard to be employed here.

STANDARD OF REVIEW APPLIED

[33] *Vavilov* as confirmed and refined through *Mason* sets in place the terms of a judicial review such as this. To summarize the approach set out there, the focus of a reasonableness review is to be on the decision made including the justification offered for it and not on the conclusion the court would have reached if put in the decision-maker's place. Both the reasoning process and the outcome are to be taken into account. The reasons provided are to be read in light of the record which exists.

[34] A preliminary analysis considering the text, context and purpose of the issues, whether they be legislative or otherwise, so as to understand "the lay of the land" is not appropriate before examining an administrative decision such as this. Paragraph 8 of *Mason* is worth setting out here;

> [8] *Vavilov* also explained how a court should conduct reasonableness

> review. This Court stressed that reasonableness review and correctness review are methodologically distinct (para. 12). Reasonableness review starts from a posture of judicial restraint and focusses on "the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place" (paras. 15 and 24). When an administrative decision maker is required to provide reasons for its decision, reasonableness review requires a "sensitive and respectful, but robust" evaluation of the reasons provided (para. 12). A reviewing court must take a "reasons first" approach that evaluates the administrative decision maker's justification for its decision (para. 84). An administrative decision will be reasonable if it "is based on an internally coherent and rational chain of analysis and ... is justified in relation to the facts and law that constrain the decision maker" (para. 85). This Court also affirmed "the need to develop and strengthen a culture of justification in administrative decision making" (para. 2).

[35] The purpose of a reasonableness review was reiterated at para. 57 of *Mason* being to uphold the rule of law while according deference to the decision. Paragraph 60 affirms that the starting or focal point for the conducting of truly deferential reasonableness review should be the reasons provided by the decision maker.

[36] It is important to keep in mind that the decision-maker may not necessarily utilize the same approach that a lawyer or judge might use in coming to a conclusion and that alone is not a reason to find the conclusion unreasonable. Rather, a reasonable decision is one that is “justified, transparent and intelligible”. The decision under review must always be considered within the appropriate legal context considering the relevant facts and the other pertinent issues that might impact such a decision. As noted in *Mason* at para 61 the reasons given must not be assessed against a standard of perfection and need not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred.

[37] Nor is the “reasons first” approach to be used as a rubber stamp used to shelter administrative decisions from accountability. Rather, it is to be a robust form of review. A court should not engage in a disguised correctness review and should

generally refrain from deciding the issue itself. As our Court of Appeal noted in *AlumaSafway Inc. v The International Association of Heat & Frost Insulators and Asbestos Workers, Local 119*, 2022 SKCA 99 at paras 35-36, [2023] 6 WWR 74:

> [35] In *Service Employees International Union—West v Saskatchewan Health Authority,* 2020 SKCA 113, Barrington-Foote J.A., dissenting but not on this point, summarized the principles from Vavilov that establish the framework for a reasonableness review:
>
> > [102]...In...[*Vavilov*], the majority confirmed the reasonableness standard requires the reviewing court to answer two questions; that is, "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir* [2008 SCC 9], at paras. 47 and 74; *Catalyst*, [2012 SCC 2] at para. 13" (at para 99). For analytical purposes, the Court described two kinds of fundamental flaws as a convenient way to discuss the issues that may show a decision to be unreasonable (at para 101). First, is there "a failure of rationality internal to the reasoning process"? Second, is the decision "in some respect untenable in light of the relevant factual and legal constraints that bear on it"? (at para 101). The Court emphasized that in order to justify setting aside a decision, the flaws must be "sufficiently central or significant", not superficial or peripheral (at para 100).
> >
> > [103] The first category of flaws reflects the principle that a reasonable decision must be based on internally coherent reasoning; that is, reasoning that is both rational and logical. As the majority put the matter, "the reviewing court must be able to trace the decision-maker's reasoning without encountering any fatal flaws in its overarching logic" (*Vavilov* at para 102). A decision will be unreasonable if it fails to reveal a rational chain of analysis or exhibits an irrational chain of analysis. While administrative decision makers must not be held "to the formalistic constraints and standards of academic logicians", a decision may be unreasonable if it exhibits "clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise" (*Vavilov* at para 104).
> >
> > [104] As to the second category, "a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision ... Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers"

> (*Vavilov* at para 105). The relevant constraints depend on the facts. In *Vavilov*, the majority discussed what they characterized as "a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies" (at para 106). The Court cautioned that these elements are not a checklist and vary in significance depending on the context.
>
> [105] I would finally note that reasonableness is a deferential standard and must be sensitive and respectful of the role of the delegated decision maker. It is not a "line-by-line treasure hunt for error" (*Vavilov* at para 102). The court's function is to "ensure the legality, the reasonableness and the fairness of the administrative process" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 28, [2008] 1 SCR 190). However, reasonableness review must also be robust. ...
>
> [36] As set out in Barrington-Foote J.A.'s summary, a review for reasonableness is concerned with three main aspects of an administrative tribunal's decision: justification, transparency, and intelligibility. These are, to use the terminology of *Vavilov* the "hallmarks" of reasonableness. Before an administrative tribunal's decision can be set aside as unreasonable, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). This means that any identified flaws in the administrative tribunal's decision must be more than trifling or superficial. Before interfering with an administrative tribunal's decision, a reviewing "court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100; see also *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*, 2022 SKCA 30 at paras 23-24).

[38] PSAC submits that the *Arbitrator's Decision* in this case was unreasonable in that it is not based on an internally coherent and rational chain of analysis that is defensible in relation to the relevant facts and the law in several respects. In particular the submission from the applicant's brief is:

> 32. First, the Arbitrator unreasonably held that the Union and the

> parties' Collective Agreements were solely the creatures of the SEA, such that provisions of the SEA could be presumed incorporated into the Collective Agreements and to have application to the parties' workplace, despite the absence of any such language. This error directly led to the Arbitrator's erroneous interpretation of the Emergency Regulations as suspending the Collective Agreement lay-off requirements, despite such a conclusion being unsupported by the language of the Regulations. Second, building off the first error, the Adjudicator erred in his analysis of section 2-7 of the SEA by presuming that the Emergency Regulations suspended the provisions of the Collective Agreements and by failing to apply the relevant legal principles regarding the interpretation and application of section 2-7. Finally, the Arbitrator's conclusion that there was no breach of the mandatory pre-lay-off consultation obligations under the Collective Agreements ignored the case law regarding such requirements and fundamentally undermined the substantive rights contained within the consultation provisions, despite his own recognition that the required consultation did not occur.
>
> 33. Separately and in combination, these errors demonstrate critical flaws in the Adjudicator's analysis, such that the decision on these grievances cannot stand.

[39] In response SGC says the only genuine issue in this matter is whether SGC was entitled to lay-off its employees without triggering the notice and severance provision set out in the applicable collective agreements. SGC goes on to submit that the grievances were founded upon the proposition that the union members were entitled to severance pay as a result of each of the two lay-off periods because the notice provisions were contained in the Collective Agreements as opposed to the *SEA* or were not affected because the Collective Agreements contained more favorable provisions.

[40] To summarize, it is readily apparent that the steps taken by the Government of Saskatchewan were intended to suspend the lay-off and notice provisions of Collective Agreements throughout the province. The province of Saskatchewan, as was all of Canada and indeed most countries in the world, was reacting to an imminent and never-before encountered crisis being the initial months of the COVID-19 pandemic. The political response to the uncertainty of implications regarding the spread of the virus was to suspend public gatherings which could spread the virus endangering the health of significant numbers of Saskatchewan residents and

visitors to the province.

[41] PSAC's argument is necessarily premised on an interpretation that is either:

(a) the Province tried to override the layoff and notice provisions of the CBA but erroneously used language which technically did not have the desired effect, or

(b) the Province wanted to treat the casino workers differently than other unionized employee in the province by allowing only them to retain the layoff and notice rights in their CBA during the extraordinary measures taken to respond to the pandemic, but did so in a complicated and unclear way.

Neither of these underpinnings is sustainable in the circumstances and the Arbitrator made no reviewable errors in concluding this in the way he did.

The Factual and Legislative Backdrop

[42] On March 18, 2020, the Government declared a state of emergency pursuant to *The Emergency Planning Act*, SS 1989-90, c E-8.1 which required all persons to comply with any lawful orders made by the Minister of Health, the Chief Medical Health Officer, lawful directions of the Saskatchewan Public Safety Agency and which authorized the Royal Canadian Mounted Police and all police services to enforce such orders or directions.

[43] On March 19, 2020 the Chief Medical Officer issued a Public Health Order which ordered the closure of all recreational and entertainment facilities in Saskatchewan inclusive of the casinos.

[44] Also on March 19, 2020, the *SEA Emergency Regs* were proclaimed, the

material parts of which read as follows:

> **"Definition for Part**
>
> **44.1** In this Part, **'public emergency period'** means the period during which an order of the chief medical health officer issued pursuant to subsection 2-59.1(2) of the Act, or an emergency declaration ordered pursuant to *The Emergency Planning Act*, is in force.
>
> **Certain Provisions do not apply during public emergency period**
>
> **44.2** During a public emergency period:
>
> (a) subject to clause (c), employers are exempt from the provisions of, and employees are not entitled to the protections provided by sections 2-60 and 2-61 of the Act respecting layoffs;
>
> (b) employers are exempt from the provision of the Act requiring notice to employees with respect to a layoff if the layoff period is 12 weeks or less in a 16 week period; and
>
> (c) if an employer lays off employees for one or more periods that are more than 12 weeks in a 16 week period, the employees:
>
> (i) are deemed to be terminated; and
>
> (ii) are entitled to pay instead of notice in accordance with sections 2-60 and 2-61 of the Act to be calculated from the date on which the employer laid off the employees.
>
> [Emphasis in original]

[45] On March 27, 2020, SGC's CEO, Ms. Susan Flett, advised all Saskatchewan Gaming [SaskGaming] employees that employees whose work was not required during the period of closure would be temporarily laid off effective April 3, 2020. Employees were further advised that during the "Public Emergency Period", employers were authorized to lay off employees for up to 12 weeks in a 16 week period without notice or pay in lieu of notice. SaskGaming further advised that it would be voluntarily continuing group benefit coverage during the closure. A total of 229 PSAC members received letters dated March 27, 2020 informing each of their temporary lay-

off.

[46] On April 6, 2020, PSAC filed Grievance 2020-PSAC-05.

[47] On May 14, 2020, the *SEA Emergency Regs 2* were proclaimed which repealed the lay-off limitation of 12 weeks in a 16 week period and replaced it with provisions which exempted employers from the requirements of notice and pay in lieu of notice set out in ss. 2-60 and 2-61 of the *SEA* for the duration of the emergency declaration or order of the Chief Medical Health Officer and for two weeks thereafter. The material portions of the *SEA Emergency Regs 2* read as follows:

> **"Definition for Part**
>
> **44.2** In this Part, **'public emergency period'** means the period during which an order of the chief medical health officer issued pursuant to subsection 2-59.1(2) of the Act, or an emergency declaration ordered pursuant to *The Emergency Planning Act*, is in force.
>
> **"Certain Provisions do not apply during public emergency period**
>
> **44.3**(1) During a public emergency period, employers and employees are exempt from the provisions of, and employees are not entitled to the protections provided by, sections 2-60 and 2-61 of the Act respecting layoffs.
>
> (2) After the date on which the public emergency period is no longer in force, an employer continues to be exempt from the provisions of section 2-60 and 2-61 of the Act respecting layoffs for a further period of two weeks.
>
> (3) After the expiry of the two-week period mentioned in subsection (2):
>
> (a) the employer must schedule any laid off employees to work with the employer;
>
> (b) if any employees have not been scheduled to work with the employer, the employees:
>
> (i) are deemed to be terminated; and
>
> (ii) are entitled to pay instead of notice in accordance with sections 2-60 and 2-61 of the Act to be calculated from the original date on which the employer laid off

> the employee; and
>
> (c) if any employees have been scheduled to return to work with the employer but do not return to work, the employees are deemed to have resigned.

[48] On April 23, 2020, the government announced a graduated five phase re-opening plan called 'Re-Open Saskatchewan'. On July 6, 2020, phase four was announced which permitted casinos to re-open on July 9, 2020. Numerous union members were recalled to work effective June 18, 2020 and the balance of employees were recalled effective July 8, 2020 and continuing thereafter as the Casinos gradually re-opened on July 9, 2020.

[49] As a result of a resurgence of COVID-19 cases, the government again introduced restrictions beginning in October 2020. On December 14, 2020, the government again ordered that casinos close effective December 19, 2020. Employees whose work was not required were again laid off effective December 28, 2020. A total of 143 PSAC members received letters informing each of their temporary lay-off although their group benefit coverage was again continued.

[50] On January 11, 2021, PASC filed Grievance 2021-PSAC-01.

[51] On June 20, 2021, the government relaxed its restrictions which initially permitted casinos to operate with maximum capacities of 150 persons. On July 11, 2021, all capacity limits were lifted and by August 2021, all employees who wished to return to work were recalled.

[52] PSAC takes the position that the amendments to the *SEA* have no effect on the applicable Collective Agreements because:

(a) the Collective Agreements are contractual provisions separate and apart from the *SEA* and;

(b) the terms of the Collective Agreements are more favourable within

the meaning of s. 2-7 of the *SEA* and are therefore unaffected by the *SEA* amendments.

[53] To put a fine point on the issue, the question is whether s. 44.2 of the *SEA*, which states that it suspends rights and obligations granted and imposed pursuant to the statutory provisions ss. 2-60 and 2-61 of the *SEA* can include the provisions of the Collective Agreements here. Is there a reasonable interpretation which concludes it does?

> 2-61 (1) If an employer lays off or terminates the employment of an employee, the employer shall pay to the employee, with respect to the period of the notice required pursuant to section 2-60:
>
> (a) If the employer is not bound by a collective agreement that apples to the employee, the greater of:
>
> (i) the sum earned by the employee during the period of notice; and
>
> (ii) a sum equivalent to the employee's normal wages for that period; or
>
> (b) If the employer is bound by a collective agreement that applies to the employee, the entitlements provided for in the collective agreement.
>
> (2) For the purposes of subsection (1), If the wages of an employee, not Including overtime pay, vary from week to week, the employee's normal wages for one week are deemed to be the equivalent of the employee's average weekly wage, not Including overtime pay, for the 13 weeks the employee worked preceding:
>
> (a) the date on which the notice of layoff or termination was given; or
>
> (b) If no notice of the layoff or termination was given: (1) the date on which the employee was laid off or terminated; or (il) a date determined in the prescribed manner.
>
> (3) If an employer lays off or terminates the employment of an employee at a remote site, the employer shall provide transportation without cost for the employee to the nearest point where regularly scheduled transportation services are available.

[54] Applying the emergency regulations to ss. 2-60 and 2-61 of the *SEA*, the Arbitrator concluded that the regulations suspended the operation of all lay-off provisions in collective agreements due to the reference to "the entitlements provided for in the collective agreement" in ss. 2-61(1)(b) of the *SEA* as already noted above at paras. 127-129 of the *Arbitrator's Decision*.

[55] That this is an appropriate conclusion is self-evident. It can be determined on the face of the provisions in the context of the situation at issue. The government intended to suspend the provisions of both statutory lay-off rights and obligations and those which are provided for by collective bargaining agreements. It said this in the legislation by suspending ss. 2-61 and 2-62 of the *SEA*. The Arbitrator found it said this plainly within the legislation. I find no room for this to be an unreasonable interpretation by the Arbitrator.

[56] PSAC argues additionally that the more favourable terms *provisos* overturn this logic. Turning to PSAC's argument that the lay-off protections of CBA 1 and CBA 2 could not be affected by the emergency regulations because, pursuant to s. 2-7 of the *SEA*, the Collective Agreements provisions were "more favourable" than the lay-off provisions of the emergency regulations or the *SEA*, the Arbitrator determined that because the emergency regulations actually suspended the protections of CBA 1 and CBA 2 on layoffs, this argument fails, as noted earlier in this decision.

[57] As noted earlier, the Arbitrator did not find it necessary to compare the full bundle of lay-off rights contained within CBA 1 and CBA 2 to the provisions of the emergency regulations and the *SEA* when assessing favourability but concluded four factors were to be considered in assessing favourability. He concluded that all of the notice period provisions of CBA 1 and CBA 2 and the broader group of lay-off protections were similarly suspended.

[58] Also as noted previously the Arbitrator accepted that although PSAC was not consulted about either Layoff prior to the Employer's decision there was nonetheless no material impact and therefore no breach (see again paras. 170 and 171 of the *Arbitrator's Decision*).

[59] The Arbitrator here did not act unreasonably. In the process of concluding as he did, he did not ignore important considerations. He did not fail to give consideration to the specific facts. He considered the Collective Agreements provisions in some detail, and took a deliberate, considered and informed view of the entire situation.

[60] The Arbitrator carefully set out the chain of logic based on his approach. While one may debate the issue of whether all collective bargaining agreement rights emanate from the *SEA*, that was a fallback explanation and not the central basis to the conclusions reached. The central basis to the conclusions reached was that Saskatchewan intended to suspend rights and obligations deriving from either the *SEA* statutory provisions or the Collective Agreements which governed the scenario. This it did in clear language. Finding so was reasonable and his train of logic is easily followed.

[61] Insofar as his conclusion that PSAC is a creature of statute and therefore the argument that the Collective Agreements operate outside of and independent to the *SEA*, it is clear this is not a valid point of criticism of the *Arbitrator's Decision*. As noted in many cases including *International Association of Machinists and Aerospace Workers v Perks* (1986), 62 Nfld & PEIR 69 (Nfld SC):

> [26] 6. A trade union is a creature of statute and is bound by the same duties and liabilities as the general law would impose upon a private individual doing the same thing. This statement of law emanates from the case of the *International Brotherhood of Teamsters v. Therien*, (1960), 22 D.L.R. (2d), page 1 (S.C.C.) where a union made threats to an independent contractor that their common employer would terminate its business relationship with him. The contractor thereupon sued the union in tort for damages for conspiring to procure his

dismissal in circumstances where a collective agreement with a closed shop provision was in effect. The issue of whether the union was a legal entity was addressed by the court. Locke, J. said at page 11:

> "Were it not for the provisions of the Trade-unions Act and the Labour Relations Act if the union was simply an unincorporated association of workmen, it would not, in my opinion, be an entity which might be sued by name, and what was said by Duff J. and by Anglin J. (with whom Brodeur J. agreed) in *Local Union v. Williams* above referred to would apply. Such an unincorporated body not being an entity known to the law would be incapable of entering into a contract (*Canada Morning News Co. v. Thompson* [1930] 3 D.L.R. 833, S.C.R. 338). That, however, is not the present case.
>
> "I agree with the opinions expressed by the learned Judges of the Court of Appeal in the cases to which I have above referred. The granting of these rights, powers and immunities to these unincorporated associations or bodies is quite inconsistent with the idea that it was not intended that they should be constituted legal entities exercising these powers and enjoying these immunities as such. What was said by Farwell J. in the passage from the judgment in the *Taff Vale* case which is above quoted appears to me to be directly applicable. It is necessary for the exercise of the powers given that such unions should have officers or other agents to act in their names and on their behalf. The Legislature, by giving the right to act as agent for others and to contract on their behalf, has given them two of the essential qualities of a corporation in respect of liability for tort since a corporation can only act by its agents.
>
> "The passage from the judgment of Blackburn J. in delivering the opinion of the Judges which was adopted by the House of Lords in *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93 at p. 110, referred to by Farwell J. states the rule of construction that is to be applied. In the absence of anything to show a contrary intention -- and there is nothing here -- the Legislature must be taken to have intended that the creature of the statute shall have the same duties and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing. Qui sentit commodum sentire debet et onus.
>
> ...

[62] Similarly, in *Blake v University Health Network*, 2021 ONSC 7139, 74 CPC (8th) 32, it was recognized that unions do not exist apart from the statute which

enables their existence at law.

> [9] The Supreme Court has also described as "one of the fundamental principles" of labour relations law the "monopoly that the union is granted over representation": *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39 (CanLII), [2001] 2 SCR 207 at para. 41. While often described as the "collective bargaining agent", the "agency" of the union is in reality a creature of statute. It is a unique type of agency since it is one conferred by statute following certification of the union over the bargaining unit and which can be neither revoked nor altered by an individual employee.

[63] See also *Newfoundland Association of Public Employees v Drake* (2002), 209 Nfld & PEIR 330 (CanLII) (Nfld SC) at para 10.

[64] Thus, the Arbitrator's conclusion that the provisions in issue must have application to the Collective Agreements here is not unreasonable. The process used as set out in the reasons is also indicative of a reasonable conclusion. In the course of the 43 page decision the arbitrator carefully laid out the factual background, the arguments of each party, and then set about addressing the basis for his conclusions. He determined that Collective Agreements do not operate separately from the empowering legislation that creates unions and specifies their powers, obligations and responsibilities.

[65] Therefore the inclusion of ss. 2-60 and 2-61 as the effected provisions sufficed to include all statutory and collectively bargained rights in the emergency provisions of the *SEA* was completely covering the waterfront. It is clear that inclusion of the phrase "during a public emergency period ... employees are not entitled to the protections provided ..." (*SEA Emergency Regs 2*, ss 44.3(1)) was intended to, and did, have the effect the arbitrator ultimately found it did.

[66] This is a reasonable conclusion. It is sensible on its face. It is supported by the analysis provided. There is nothing erroneous about the analysis or the conclusion.

[67] In relation to the second argument; that the Collective Agreements

contained more favourable terms than the legislation and therefore the rights were not suspended by the emergency measures, the Arbitrator also provided a sound analysis and a reasonable conclusion. It is a matter of basic logic to conclude, as did the Arbitrator that the operative portions of the suspending legislation creates a situation where the Collective Agreements and the legislative lay-off rights are both still identical in that they were both suspended equally and identically.

[68] Finally, the Arbitrator's reference to and interpretation of arbitrator Dan Ish's conclusion on the subject in *Regina (City) v Regina Civic Middle Management Association*, 2017 CanLII 89164 (Sask LA) as requiring a balanced approach which is not too isolated or too broad is appropriately applied to this situation. His conclusion that it falls into a middle ground which is about vacation pay etcetera was an accurate description. Application of the Regina Civic Middle Management decision does not necessarily drive the conclusion that PSAC wants.

[69] In relation to the third argument whether the employer breached its consultation obligations and if so what the consequences are again the Arbitrator properly came to the conclusion that there was no breach in the first lay-off but there was in the second. However, PSAC failed to argue what the result of that breach was and therefore the request that they had made to the Arbitrator could not be completed on the basis of this suggestion. Thus, while there was a breach it reasonably does not lead to the type of relief that PSAC requested here and that decision is appropriate.

[70] The Arbitrator approached and applied current Canadian jurisprudence to reasonably interpretation of legislation. His description of the evidence was appropriate and his conclusion dismissing the grievances is not unreasonable.

CONCLUSION

[71] I find the Arbitrator's conclusion regarding the application of the

requisite statutory provisions in the context of the Collective Agreements at issue here in the beginnings and midst of the COVID-19 pandemic was readily understandable, intelligible, and within the realm of reasonable.

[72] The Arbitrator's award has rationale, internal consistency, logically applies the relevant provisions within the framework of the affected legislation and Collective Agreements within the *milieu* of the COVID-19 pandemic, the relationship of the parties and properly chose the appropriate facts to focus on within that context to ascertain that conclusion. He provided a rational chain of analysis in considering the legislation and collective bargaining agreements as a whole, its language, the fact that it applied to all unions in Saskatchewan including PSAC.

[73] The Arbitrator's conclusions are justified with reference to the reasons he gave. The overarching logic relied upon is laid out clearly and understandably and has no leaps or gaps. It is transparent, it is intelligible and adds up quite readily when considered in light of the facts.

[74] My task is not to decide the matter and measure the *Arbitrator's Decision* against my own. Rather it is to consider the reasons provided, paying respectful attention to what was written, seeking to understand the process. In applying a wholistic and contextual assessment I find no such problem with the *Arbitrator's Decision*. His logic, including with respect to the scope given to the legislative provisions within the context of the COVID-19 pandemic and the specific circumstances of this workplace is the most logical and most readily defensible and therefore reasonable interpretation and decision.

[75] The *Arbitrator's Decision* is justified in light of the legal and factual context before him. It is reasonable. I do not find that the *Arbitrator's Decision* suffers from any core fundamental defects. The conclusion he arrives at considers the various possible interpretations within the context of the parties, those affected, and the terms

of the Collective Agreements. He applied the correct legal approach and applied relevant authorities accurately. His decision is justified in relation to the applicable law and the facts relevant to his task.

[76] The review of the *Arbitrator's Decision* brought by PSAC is dismissed.

COSTS

[77] SGC is entitled to its costs calculated on column 2.

J.
D.J. BROWN