IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Victoria Times Colonist v. Communications, Energy and Paperworkers,*** 2008 BCSC 109

Date: 20080130
Docket: S-065961
Registry: Vancouver

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*, R.S.B.C. 1996 c. 241; AND THE *ADMINISTRATIVE TRIBUNALS ACT*, S.B.C. 2004, c. 45

— AND—

IN THE MATTER OF THE DECISION OF THE LABOUR RELATIONS BOARD B265/2005 AND THE RECONSIDERATION DECISION OF THE LABOUR RELATIONS BOARD B168/2006

BETWEEN:

VICTORIA TIMES COLONIST, DIVISION OF CANWEST MEDIAWORKS PUBLICATIONS INC.

PETITIONER

AND:

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 25-G, COMMUNICATIONS WORKERS OF AMERICA LOCAL 30403 (TNG CANADA), VICTORIA-VANCOUVER ISLAND NEWSPAPER GUILD LOCAL 30223 OF THE NEWSPAPER GUILD AND COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 2000

RESPONDENTS

Before: The Honourable Madam Justice Ballance

Reasons for Judgment

Counsel for the Petitioner:	M.H. Korbin
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Counsel for the Labour Relations Board:	E. Miller
Date and Place of Hearing:	June 27, 28 and 29, 2007 Vancouver, B.C.

I. INTRODUCTION

[1] This is a petition for judicial review brought by the Victoria Times Colonist seeking to set aside a decision of the British Columbia Labour Relations Board (the "Board") made on October 3, 2005, BCLRB No. B265/2005 (the "**Original Decision**") and the application for leave for reconsideration of it on July 21, 2006, BCLRB No. B168/2006 (the "**Reconsideration Decision**").

[2] The principal issue on review is whether it was patently unreasonable for the Board to conclude that when the respondent unions and their members refused to handle certain Telus Corporation ("Telus") advertisements due to the receipt of a hot declaration during the currency of their collective agreements with the petitioner, it did not amount to a "strike" under the ***Labour Relations Code***, R.S.B.C. 1996, c. 244 (the "***Code***").

[3] In the alternative, the petitioner submits that the Board breached the rules of natural justice and/or procedural fairness and did not act fairly in making the **Reconsideration Decision** without addressing the substance of the arguments

advanced by the petitioner in support of its position that the impugned workplace conduct constituted a "strike".

II. FACTUAL BACKGROUND

[4] The essential facts are not in dispute.

[5] The petitioner publishes a daily newspaper. The bulk of its revenue comes from advertising. Telus and its related entities regularly place advertisements with the petitioner.

[6] The petitioner has a collective agreement with each of the respondents. Their collective bargaining relationships are regulated by the ***Code***. Each of the five governing collective agreements between the petitioner and the respondents contain a provision, known colloquially as a "hot or unfair declaration" clause, which is, in all material respects, identical to the following clause found in the Newspaper Guild collective agreement:

> The Guild reserves for its members and itself the right to refuse to execute any work coming from or destined for delivery to any department of the Times Colonist, or any other newspaper, publication or wire services, or to any employer who furnishes supplies or material required for the normal operation of the Times Colonist, in any of its departments and which is involved in a lawful strike or lockout.

[7] These hot declaration clauses date back at least to the 1981-1983 collective agreement between the petitioner and the respondents, and have remained as part of the collective agreements through their many revisions and renewals. The

interpretation of these clauses is not at issue in this proceeding. The parties have agreed that for the purposes of this hearing, this Court is to assume that the clauses entitle the respondent unions to honour an unfair or hot declaration.

[8] On September 5, 2005, the British Columbia Federation of Labour issued a hot declaration against Telus print advertising in an attempt to impact collective bargaining negotiations between Telus and the Telecommunications Workers' Union. At the time, Telus and that union were engaged in a protracted labour dispute.

[9] Four days later, the respondents delivered a letter to the petitioner informing it of receipt of the hot declaration on Telus advertising and, relying on the aforementioned clause in the collective agreements, advised that effective immediately they were exercising their right to refuse to execute any work coming from or destined to Telus or its related companies.

[10] On September 12, 2005, the petitioner brought an application to the Board under ss. 133, 139, 143, and Part 5 of the ***Code*** for an order that the Telus hot declaration was of no force and effect, and that the respondents and their members be ordered to execute any work coming from or destined to Telus or any related companies. The petitioner also filed grievances against each of the respondent unions under the respective collective agreements.

[11] The petitioner's application before the Board came on for hearing on September 23, 2005. The petitioner's vice-president of advertising, sales, and

marketing testified about a number of matters at the hearing. The respondents called no evidence.

[12] On October 3, 2005, Vice-Chair Mullaly issued the **Original Decision**. Though he rejected the petitioner's chief contention that the concerted refusal to work in response to the Telus hot declaration constituted an illegal "strike" under the ***Code***, he did accede to the petitioner's alternative argument that the collective agreements between the parties did not unambiguously entitle the unions and their members to refuse to handle the Telus ads in the first place. As an interim measure, the Vice-Chair granted a cease and desist order prohibiting the unions and their members from refusing to handle Telus advertising pending the outcome of an expedited arbitration to determine the meaning to be given to the collective agreement language. The Telus labour dispute was settled before the expedited arbitration took place. That arbitration is now being held in abeyance pending the result of this judicial review.

[13] Between the time that the Telus hot declaration was issued and the issuance of the interim cease and desist order by the Board, the respondents told the petitioner that if it attempted to print Telus advertising in the newspaper, the respondents and their members would refuse to do their work, which would result in the petitioner being unable to publish and distribute its newspaper. In order to mitigate its damages, the petitioner did not print the Telus ads during this period.

[14] On October 21, 2005 the petitioner applied for leave for reconsideration of the **Original Decision** pursuant to s. 141 of the ***Code***. The parties filed extensive

submissions. The reconsideration panel granted the petitioner leave to apply for reconsideration, but ultimately dismissed its application for reconsideration.

[15] The crux of the impugned decisions of the Board in the case at hand is its conclusion that the respondents' workplace response to the Telus hot declaration does not amount to "strike". It is that fundamental conclusion that the petitioner challenges as being patently unreasonable.

III. JURISPRUDENTIAL AND LEGISLATIVE FRAMEWORK

[16] Before 1984, the definition of "strike" in the ***Labour Code,*** R.S.B.C. 1979, c. 212 (the "***1979 Code***") required that the concerted cessation of or refusal to work, or act or omission that was intended to or did restrict or limit production or services, was carried out by the employees *for the purpose of compelling their employer to agree to terms and conditions of employment*. This subjective element of the definition, which required the existence of a workplace purpose behind the employees' actions, would never be met in a hot declaration situation.

[17] In 1984, the Legislature removed the subjective component from the definition of "strike". This amendment opened the door to a spate of litigation about whether a hot declaration inspired concerted cessation of or refusal to work amounted to a strike.

[18] The issue first arose in ***Pacific Press Limited v. Vancouver – New Westminster Newspaper Guild, Local 115 et. al.***, BCLRB No. 140/85 (the "**Moore Decision**"), where the applicable collective agreement contained a provision

permitting bargaining unit members to respect hot declarations by refusing to execute work coming from or destined to the struck or locked out employer. Famous Players had locked out its employees, and the unions and employees of Pacific Press, in receipt of a hot declaration, refused to handle Famous Players advertising in the newspaper.

[19] Pacific Press argued that by refusing to perform such work, the unions and employees were engaging in a "strike" during the term of their collective agreements contrary to the ***1979 Code***. As a sub-set of the larger argument, Pacific Press contended that the new definition of "strike" was now similarly worded to the definition of "strike" found in the *Ontario Labour Relations Act* and urged that the Board embrace the restrictive definition of "strike" adopted by the Ontario and Canada Labour Relations Boards. Pacific Press also argued that the clauses in the governing collective agreements upon which the union members relied, represented an unlawful attempt to contract out of the ***1979 Code*** in that they purported to allow a strike during the terms of a collective agreement.

[20] Vice-Chair Moore disagreed. She noted that the mischief the Legislature sought to address by the new definition of "strike" was to catch political protest work stoppages of the kind that she described in her decision, including the activity of the Solidarity Coalition in the early 1980's. Vice-Chair Moore determined that it was permissible for an employer and a union to negotiate in a collective agreement activity that constitutes "work" and that those contractual terms inform whether or not there is a strike. One prong of her reasoning examined the meaning of work as contemplated within the definition of "strike":

> I cannot conclude that the Legislature intended to capture within the term "strike" a refusal to carry out duties which are specifically excluded by the collective agreement from that set of activities which the employee is required to perform. To put it another way, I am satisfied that parties to a collective agreement are entitled to define what constitutes "work". Only a refusal by employees in concert or in combination or in accordance with a common understanding to carry out work required to be performed by a collective agreement falls within the definition of "strike".
>
> Here, the respondent unions and Pacific Press have voluntarily defined what activities the employees are required to carry out during a standard work day. They have defined those activities to exclude services in connection with a person declared "unfair". The unions and Pacific Press have agreed that there is no legal obligation on employees in certain circumstances to execute work in connection with a third party which has been declared to be "unfair". (**Moore Decision**, at pp. 13-14).

[21] Vice-Chair Moore buttressed her interpretation by pointing to other provisions of the ***1979 Code*** which, in her view, legitimized hot declarations and resultant refusals to work which were based on a collective agreement hot declaration clause. Specifically, she relied on ss. 84 and 90 of the ***1979 Code*** which are now s. 64 and 70 of the **C*ode***.

[22] Section 84 (now s. 64) read:

> A trade union or other person may, at any time and in a manner that does not constitute picketing as defined in this Act, communicate information to a person, or publicly express sympathy or support for a person, as to matters or things affecting or relating to terms or conditions of employment or work done or to be done by that person.

[23] Section 90 (now s. 70) provided:

> Where, on the complaint by an interested person, the board is satisfied that a declaration by or on behalf of a trade union or employer, or an agreement or combination between one or more employers and one or more trade unions, or 2 or more trade unions, is substantially affecting

trade and commerce in a commodity or service or is substantially affecting the business, operations, or purposes of the complainant, the board may, in its discretion, issue a declaratory opinion that

(a) the declaration, agreement or combination is void for all purposes;

(b) the declaration, agreement or combination is unenforceable in specified circumstances or for a specified period of time; or

(c) the declaration, agreement or combination is valid and enforceable.

(2) Where the board issues a declaratory opinion pursuant to subsection (1)(a) or (b), it may make orders or take steps it considers advisable to ensure that persons affected by the declaration, agreement or combination are informed of the terms of the declaratory opinion.

(3) The board, in determining whether to issue a declaratory opinion under subsection (1), shall consider

(a) the extent to which the employment, business, operations, purposes or property of the complainant have been affected by the declaration, agreement or combination; and

(b) the intent and purpose of this Part and the necessity for reasonable protection and advancement of a trade union or employer.

[24] In reference to these provisions Vice-Chair Moore reasoned:

> The Legislature can hardly have contemplated that the scheme of Sections [64] and [70] might be finessed by a legal ruling that employees who have obtained at the bargaining table the explicit permission of their employer to observe certain "unfair" declarations are nevertheless illegally on strike and subject to mandatory orders to go to work. (**Moore Decision**, at p. 17)

[25] This aspect of Vice-Chair Moore's analysis has come to be referred to by the Board as the 'internal conflict' rationale. It is founded on Vice-Chair Moore's

perceived incompatibility of certain provisions in the ***1979 Code*** which would have resulted if Pacific Press' argument had carried the day. The conflict stemmed from reading the ***1979 Code*** as prohibiting a refusal to work triggered by a hot declaration as an unlawful "strike" on the one hand and, yet, at the same time in another part of the statute, giving trade unions and labour organizations the right to issue hot declarations and the Board the power to regulate their very use.

[26] In the course of her analysis, Vice-Chair Moore rejected a number of arguments made by Pacific Press. Many of those arguments were rehashed by the petitioner at the original hearing and before the reconsideration panel and were presented on this judicial review. In addition to constructing the internal conflict rationale, Vice-Chair Moore:

(a) rejected Pacific Press' argument that the Board should follow the jurisprudence of other labour boards on account of the different labour relations practices in British Columbia;

(b) held that in reading the definition of "strike" in the context of the whole of the ***1979 Code***, it did not capture concerted actions regulated by collective agreements that the parties had addressed in bargaining and, in the same vein, held that in order for there to be a "strike", there must be a refusal to carry out work required to be performed under the collective agreement;

(c) rejected Pacific Press' argument that recognition of the ability of a person to negotiate the right to refuse to carry out duties would fail to take into account the express exclusions in the definition of "strike"; and

(d) rejected Pacific Press' argument that if parties to a collective agreement are permitted to refuse to work because of, *inter alia*, hot declarations, they would be contracting out of the ***1979 Code*** which is not permitted.

[27] The reconsideration panel of the **Moore Decision** consisted of five Vice-Chairs of the Board (***Pacific Press Limited v. Vancouver – New Westminster Newspaper Guild, Local 115 et. al.,*** BCLRB No. 171/86**,** the "**Kinzie Reconsideration**"). Pacific Press essentially reiterated the same core arguments that it had delivered in the first hearing.

[28] The panel in the **Kinzie Reconsideration** surveyed the legislative regulation of hot declarations and concluded that by changing the definition of "strike" to remove the subjective component, the Legislature did not intend to make fundamental changes to the law and policy of the ***1979 Code*** concerning hot declarations. The **Kinzie Reconsideration** supported Vice-Chair Moore's interpretation of "strike" and endorsed the "internal conflict" rationale she had articulated.

[29] Pacific Press applied for judicial review of both the **Moore Decision** and the **Kinzie Reconsideration** on the basis that they were patently unreasonable. The matter went before Mr. Justice Bouck in ***Pacific Press Limited v. Vancouver-New Westminster Newspaper Guild, Local 115 et. al.***, (1987), 39 D.L.R. (4th) 139, 14 B.C.L.R. (2d) 298 (S.C.) ("**Pacific Press Judgment**").

[30] Mr. Justice Bouck framed the key question to be answered on judicial review as whether the 1984 amendments that eliminated the subjective element from the definition of "strike" were explicit enough to capture a work stoppage triggered by a hot declaration. He concluded that they were even where a collective agreement purported to allow such activity. Although he considered the **Moore Decision** to be

a "carefully framed" ruling and regarded the **Kinzie Reconsideration** as a "thoughtful and thorough analysis of the issues", Mr. Justice Bouck rejected the interpretation of "strike" endorsed by the Board, which had been premised on the view that it applied only to work that was required to be performed by a collective agreement. In considering the consequences of his finding, he did not accept the Board's "internal conflict" rationale, finding instead that ss. 84 and 90 (now ss. 64 and 70, respectively), maintained a place in the ***1979 Code*** after the 1984 amendments, although likely more constrained in their scope. Applying a standard of patently unreasonable which was tantamount to a "fraud on the law" or "something done arbitrarily or in bad faith", Bouck J. found that the Board's rulings on these matters amounted to "mere" errors of law but did not qualify as a patently unreasonable interpretation of the ***1979 Code***.

[31] Because Mr. Justice Bouck found that the **Moore Decision** and **Kinzie Reconsideration** were not patently unreasonable, there was no proper basis for the court to interfere and set them aside. No appeal was taken from his judgment.

[32] Labour turmoil erupted once again at Pacific Press less than three weeks after the pronouncement of the **Pacific Press Judgment**. On this occasion, Pacific Press was advised by the union that their members would exercise the right to refuse to handle advertising copy of Canada Post, which had been seeking replacement workers. Relying heavily on the **Pacific Press Judgment**, Pacific Press took the position that the work stoppage constituted an illegal strike. In that case, the union relied on a provision in its collective agreement similar to the one that had been present in the **Moore Decision**.

[33] In ***Pacific Press Limited v. Vancouver – New Westminster Guild, Local 115 et. al.,*** BCLRB No. 187/87 (the "**Hall Decision**"), the Board asked itself whether, in light of the **Pacific Press Judgment**, it should continue to follow its earlier jurisprudence. In this context, the Board turned its mind to the thorny issue of whether it would perpetuate an error of law by choosing to follow the rulings of the **Moore Decision** and the **Kinzie Reconsideration** in the face of Mr. Justice Bouck's finding that they were errors of law. Pacific Press' submission was that despite the failed judicial review application before Mr. Justice Bouck, the Board was bound by his judicial interpretation. In the course of its consideration, the Board took into account that its earlier decisions in **Moore** and **Kinzie** involved statutory interpretations rendered by the Chair and a total of five Vice-Chairs, revealing what it regarded as a broad consensus of the Board on the matter.

[34] Vice-Chair Hall concluded that the Board, as an expert tribunal with jurisdiction over the matter, was not bound to follow the findings of Mr. Justice Bouck. He determined that it followed from Mr. Justice Bouck's conclusion that the Board's decision was not patently unreasonable and that the Board's earlier decisions are to be regarded as reasonable or rational interpretations of the relevant statutory provisions. He stated at p. 5:

> In my opinion, the earlier Pacific Press decisions involved statutory interpretations which the Board is entitled to make within its 'jurisdictional envelope', and which the Legislature has determined should not be interfered with by the courts. If the Board's decisions are to be overturned, then that should be done expressly by the Legislature. That is particularly so where, as here, the Board's decisions involve not only an interpretation of the Labour Code, but also the legitimacy of private contractual rights which have been freely negotiated by the parties in their collective agreements. Without

> expressing any definitive opinion, it would appear that the Legislature has, in fact, chosen to alter the Board's jurisprudence through amendments contained in Bill 19. However, those amendments have not yet become part of the statutory scheme which governs labour relations in the Province.

[35] In the end, Vice-Chair Hall determined that the refusal by the unions and their members to handle the Canada Post advertising copy did not constitute an illegal strike.

[36] Relatively radical labour law reform in British Columbia was brought about by the enactment of the ***Industrial Relations Reform Act, 1987***, S.B.C. 1987, c. 24, ("***Bill 19***"), assented to on June 26, 1987, nine days after the **Hall Decision**. Among other things, ***Bill 19*** established the Industrial Relations Council in place of the Board. It also introduced s. 4.1 which specifically prohibited secondary boycotts, and a related amendment to s. 84 (now s. 64). Section 4.1 provided:

> **Secondary boycott agreements prohibited**
>
> > 4.1(1) An express or implied provision of an agreement between an employer and a trade union by which the employer ceases or refrains or agrees to cease or refrain from handling, using, buying, selling, transporting or otherwise dealing in the products of another employer or to cease doing business with another person is void.
> >
> > (2) No employer and no trade union shall include in any agreement a provision that is, under subsection (1), void.
> >
> > (3) A provision of an agreement is not void by reason only that it recognizes the right to refuse to cross a picket line.

[37] Another change introduced by ***Bill 19*** was the expansion of the "Purposes and objects" section of the statute set forth in s. 27 of the ***1979 Code***. When the

Moore Decision, Kinzie Reconsideration, **Pacific Press Judgment** and **Hall Decision** were pronounced, the statute contained only three purposes and objects to which the Board was to have regard in the exercise of its powers and performance of its duties. Until the enactment of ***Bill 19*****,** the relevant section of the ***1979 Code*** read:

> **Purposes and objects**
>
> 27 (1) The board, having regard to the public interest as well as the rights and obligations of parties before it, may exercise its powers and shall perform the duties conferred or imposed on it under this Act so as to develop effective industrial relations in the interest of achieving or maintaining good working conditions and the well being of the public. For those purposes, the board shall have regard to the following purposes and objects:
>
> (a) securing and maintaining industrial peace, and furthering harmonious relations between employers and employees;
>
> (b) improving the practices and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees; and
>
> (c) promoting conditions favourable to the orderly and constructive settlement of disputes between employers and employees or their freely chosen trade unions.
>
> (2) The board may formulate general guidelines to further the operation of this Act; but the board is not bound by those guidelines in the exercise of its powers or the performance of its duties.
>
> (3) In formulating general guidelines the board may request that submissions be made to it by any person.
>
> (4) The board shall make available in writing for publication all general guidelines formulated under this section, and their amendments and revisions.

[38] With the enactment of ***Bill 19*** in 1987, the Legislature added four new purposes to s. 27 and modified its preamble. The amended version read as follows:

> **Purposes and objects**
>
> 27(1) The council, having regard to the public interest as well as the rights of individuals and the rights and obligations of the parties before it and recognizing the desirability for employers and employees to achieve and maintain good working conditions as participants in and beneficiaries of a competitive market economy, shall exercise the powers and perform the duties conferred or imposed on it under this Act so as to achieve the expeditious resolution of labour disputes, and for these purposes the council shall have regard to the following purposes and objects:
>
> (a) securing and maintaining industrial peace and furthering harmonious relations between employers and employees;
>
> (b) improving the practices and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees;
>
> (c) promoting conditions favourable to the orderly and constructive settlement of disputes between employers and employees or their freely chosen trade unions;
>
> (d) encouraging the voluntary resolution of collective bargaining disputes;
>
> (e) minimizing the harmful effects of labour disputes on persons who are not involved in the disputes;
>
> (f) providing such assistance to employers and bargaining agents as may facilitate the making or renewing of collective agreements;
>
> (g) gathering and publishing information and statistics respecting collective bargaining in the Province.

[39] I note here that a critical premise of the petitioner's argument on this judicial review is that the addition of ss. 27(e) ("minimizing the harmful effects of labour disputes on persons who are not involved in the disputes") signalled a substantial

change to the "purposes and objects" to which the Board was required to adhere in performing its powers and duties conferred by the statute.

[40] Returning to the chronology, the next step was the reconsideration of the **Hall Decision** in ***Pacific Press Limited v. Vancouver – New Westminster Guild, Local 115 et. al.,*** BCIRC No. C6/88 (the "**Peck Reconsideration**"). Between the time the **Hall Decision** was issued and the **Peck Reconsideration** was argued, ***Bill 19*** had been enacted. The **Peck Reconsideration** was the first Board decision after ***Bill 19***. There, the employer specifically relied on the new s. 4.1 prohibition against secondary boycotts and the inclusion of the ss. 27(e) purpose to minimize the harmful effects of labour disputes on arms-length third parties. The main question posed by the employer was whether the ***Bill 19*** changes rendered the hot declaration inspired refusal to handle advertising, an illegal strike.

[41] In the **Peck Reconsideration**, the Board concluded that, but for the changes wrought by ***Bill 19***, it would have concurred with the previous decisions of the Board that the concerted refusal to handle advertising did not constitute an illegal strike. The Board also confirmed that in the absence of a provision in a collective agreement giving union members the right to respond to hot declarations, a concerted response in the workplace during the term of such an agreement would qualify as an illegal strike. The Board recognized that s. 4.1 represented a significant shift in the labour relations paradigm:

> Whatever other ramifications of section 4.1 there may be, in our view the Legislature intended to alter the Board's jurisprudence so as to render illegal those agreements between employers and trade unions whereby employees may respond to hot declarations in the workplace

> during the operation of a collective agreement with the result that the employer ceases to deal in the products of another "employer" or do business with another "person" for the duration of the boycott. (p. 10)

[42] The Board in the **Peck Reconsideration** drew a distinction between work carried out by persons whose collective bargaining was regulated by the *Canada Labour Code* and those whose bargaining was not: it held that s. 4.1 applied only to those falling within the latter category. It did not evaluate the impact of the ss. 27(e) principle aimed at protecting parties from the harmful effects of a labour dispute in which they have no involvement.

[43] The next relevant event was Pacific Press' application for judicial review of the **Hall Decision** and **Peck Reconsideration** and the appeal of that judicial review decision. In ***Pacific Press Ltd. v. Vancouver-New Westminster Newspaper Guild***, ***Local 115 et. al***., [1988] B.C.J. No. 751, the reviewing judge of this Court held that the Board's repetition of what Mr. Justice Bouck had found was an error of law did not convert that "mere" error into a patently unreasonable error so as to warrant judicial intervention. In doing so, this Court acknowledged that there can be more than one reasonable interpretation of a statute and found that the employer had misconceived the **Pacific Press Judgment** as suggesting there could only be one reasonable interpretation. The reviewing court further reasoned that Mr. Justice Bouck's finding that the Board's interpretation of "strike" was not patently unreasonable, was the law. Accordingly, it was open to the Board (then the Industrial Relations Council) "to continue to follow it until such time, if ever, as a higher court holds the interpretation to be patently unreasonable" (p. 5).

[44] On appeal in ***Pacific Press Ltd. v. Vancouver-New Westminster Newspaper Guild, Local 115 et. al.*** (1989), 34 B.C.L.R. (2d) 339 (C.A.), the Court of Appeal agreed with the reviewing judge and added at p. 341-342:

> But Mr. Justice Bouck, by holding that the board's interpretation was not patently unreasonable, should not be taken to have concluded that his construction of the statute was the only reasonable interpretation to be given to it. The effect of his finding that the board's interpretation was not patently unreasonable is that its construction can be rationally supported by the legislation. If the board's interpretation is a rational one, then it is within the jurisdiction of the board to continue to apply that interpretation. If that were not so, then the exclusive jurisdiction of the board would be illusory, and the final say on legal questions would be left to the courts. The doctrine of curial deference would be meaningless. Clearly, it is not open to the court to order that an administrative tribunal must apply the court's view of the law when there is more than one reasonable interpretation to be given to legislation.

[45] The Court of Appeal decided it was unnecessary to address the ground of appeal dealing with the application of s. 4.1 (that is, whether it only applied to persons whose collective bargaining was not regulated by the *Canada Labour Code*) because that section had not been in force at the time of the **Hall Decision** and did not apply retroactively.

[46] In 1992, ***Bill 19*** was repealed and replaced by the ***Labour Relations Code,*** S.B.C., 1992 c. 82 (the "***1992 Code***"). The ***1992 Code*** eliminated s. 4.1. It saw the same list of purposes that had been set out in s. 27 of the ***1979 Code*** moved to s. 2. In the process, the purpose laid out in ss. 27(e) was restated in ss. (2)(c). In addition, the heading of the section was renamed to "Purposes of the Code" and the preface in s. 27 was simplified to state: "The following are the purposes of the

Code." Borrowing language that had formerly appeared in the preamble to s. 27, ss. 2(2) was added and stipulated:

> (2) The board shall exercise the powers and perform the duties conferred or imposed on it under this Code having regard to the purposes set out in subsection(1).

[47] At one time, the ***Code*** contained many provisions that used the direction "shall". They were changed to read "must" with the 1996 revision and consolidation of British Columbia statutes, a massive legislative revision aimed, in part, at modernizing statutory language with the use of plain language. The 1996 revised version of ss. 2(2) of the ***Code*** replaced the word "shall" with "must":

> (2) The board **must** exercise the powers and perform the duties conferred or imposed on it under this Code having regard to the purposes set out in subsection (1).
>
> (emphasis added)

[48] A further legislative change was carried out in 2002 through the ***Labour Relations Code Amendment Act, 2002***, S.B.C. 2002, c. 47. The 2002 amendment changed the heading of s. 2 from "Purposes of the Code" to "Duties under this Code". It also added two new subsections: 2(a) (recognizing rights and obligations of employees, employers and unions) and 2(b) (fostering employment in viable businesses) and transplanted the former ss. 2(2), which referred to the performance of the Board's powers and duties, to the preamble of s. 2. In the result, s. 2 read as follows:

Duties under this Code

2. The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that

(a) recognizes the rights and obligations of employees, employers and trade unions under this Code,

(b) fosters the employment of workers in economically viable businesses,

(c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,

(d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,

(e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,

(f) minimizes the effects of labour disputes on persons who are not involved in those disputes,

(g) ensures that the public interest is protected during labour disputes, and

(h) encourages the use of mediation as a dispute resolution mechanism.

[49] Section 2 read that way at the time of the **Original Decision** and **Reconsideration Decision** and continues to do so at present.

[50] Next in the pertinent jurisprudential history were the two impugned Board decisions in this case. In the **Original Decision**, the Board rejected the petitioner's main argument that, in light of the current statutory scheme and various provisions of the ***Code***, the concerted workplace activity carried out by the respondent unions and

their members amounted to a "strike" and any interpretation of the ***Code*** and, in particular, of the word "strike" which finds otherwise, is patently unreasonable. As mentioned earlier, the Board granted leave to the petitioner to apply for reconsideration, but then dismissed its reconsideration application. Before launching into an assessment of the **Original** and **Reconsideration Decisions**, it is first necessary to identify the appropriate standard of review and address the manner in which the court is to apply that standard.

IV. THE STANDARD OF REVIEW

[51] In the case here, the Board was interpreting its home statute, as it has been entrusted to do by the Legislature, in the context of its developed jurisprudence and policy making role in labour relations.

[52] It is common ground that the matters decided by the Board were within its exclusive jurisdiction as a specialized tribunal expert in labour relations and that the standard of review is determined by s. 58 of the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45 (the "***ATA"***). Section 58 stipulates that the standard of judicial review is the most deferential standard of all, patent unreasonableness. It is the common law definition of patently unreasonable that applies: ***Canadian Office and Professional Employees' Union, Local 378 v. British Columbia Hydro and Power Authority et. al.***, 2006 BCSC 1145; ***Canadian Office and Professional Employees Union, Local 15 v. Telecommunications Workers' Union Pension Plan***, 2007 BCSC 1834.

[53] There have been a number of recent pronouncements by the Supreme of Canada clarifying what is meant by review on a standard of unreasonableness or patent unreasonableness and how those standards of review differ from each other and from review on the third and least deferential standard of correctness. In one of those leading decisions, ***Law Society of New Brunswick v. Ryan***, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 50-56 [**Ryan**], the Court stated:

> At the outset it is helpful to contrast judicial review according to the standard of reasonableness with the fundamentally different process of reviewing a decision for correctness. When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. In contrast, when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> There is a further reason that courts testing for unreasonableness must avoid asking the question of whether the decision is correct. Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.
>
> The standard of reasonableness *simpliciter* is also very different from the more deferential standard of patent unreasonableness. In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service*

> *Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City),* [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.
>
> How will a reviewing court know whether a decision is reasonable given that it may not first inquire into its correctness? The answer is that a reviewing court must look to the reasons given by the tribunal.
>
> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).
>
> This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

[54] In ***Toronto (City) v. C.U.P.E., Local 79***, 2003 SCC 63, [2003] 3 S.C.R. 77 [***Toronto (City***)], Mr. Justice LeBel, in concurring reasons, confronted the troublesome issues that have come to plague the articulation and application of the standards of review. He identified two main definitional strands of the various

definitions of "patent unreasonableness" that have been formulated by the Supreme Court of Canada. One category emphasized the magnitude of the defect required for a decision to be considered patently unreasonable. The second strand focused on the immediacy or obviousness of the defect marring the decision. LeBel J. at para. 81, viewed the characterization expressed by Iacobucci J. in ***Ryan*** of a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand", as drawing on both of the definitional strands.

[55] In the view of LeBel J., the various expressions of the patent unreasonableness measure had contributed to growing problems in its application. In his reasons, he discussed the interplay between the standards of patent unreasonableness and correctness and addressed the appropriate methodology of review called for in applying the highly deferential standard of patent unreasonableness. LeBel J. noted the difficulties caused when a reviewing court, which is to apply the patent unreasonableness test, first examines whether the decision is correct. He endorsed the alternative approach where the reviewing court does not delve into the correctness of the impugned decision and stated at para. 94 that his favoured approach was "forcefully rearticulated" by the Court at paras. 50-51 in ***Ryan***.

[56] LeBel J. cautioned at para. 99 that the practical application of the patently unreasonable standard continues to encroach into the correctness realm:

> At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any

> intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.

[57] He went on to evaluate the imprecise boundaries between patent unreasonableness and reasonableness *simpliciter*. LeBel J. pointed out that distinguishing between the two variants of reasonableness on the basis of the magnitude or severity of the defect or by emphasizing the immediacy or obviousness of the defect each posed problems and are unsatisfactory. In canvassing the difficulties flowing from an evaluation based on the immediacy or obviousness of the defect paradigm, he noted at para. 116 that ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1 [***Southam***] left some ambiguity on this point:

> As I have outlined, on the one hand, a patently unreasonable decision is understood as one that is flawed by a defect that is evident on the face of the decision, while an unreasonable decision is one that is marred by a defect that it takes significant searching or testing to find. In other places, however, *Southam* suggests that the "immediacy or obviousness" of a patently unreasonable defect refers not to the ease of its detection, but rather to the ease with which, once detected, it can be identified as severe. Particularly relevant in this respect is the statement that "once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident" (para. 57). It is the (admittedly sometimes only tacit recognition that what must in fact be evident — ie., clear, obvious, or immediate — is the defect's magnitude upon detection that allows for the possibility that in certain circumstances "it will simply not be possible to understand and respond to a patent unreasonableness argument without a thorough examination and appreciation of the

> tribunal's record and reasoning process. (see Mullan, *Administrative Law, supra,* at p. 72; see also *Ivanhoe**, supra,*** at para. 34*).*

[58] Mr. Justice LeBel acknowledged at para. 117 that while ***Ryan*** had enhanced the clarity of ***Southam*** it still reflected "a degree of ambiguity on this issue".

[59] At paras. 123-124, LeBel J. continued:

> Attempting to differentiate between these two variants of curial deference by classifying one as "somewhat more probing" in its attentiveness than the other is unlikely to prove any more successful in practice than it has proven in the past. Basing the distinction on the relative ease with which a defect may be detected also raises a more theoretical quandary: the difficulty of articulating why a defect that is obvious on the face of a decision should present more of an imperative for court intervention than a latent defect. While a defect may be readily apparent because it is severe, a severe defect will not necessarily be readily apparent; by the same token, a flaw in a decision may be immediately evident, or obvious, but relatively inconsequential in nature.
>
> On the other hand, the effect of clarifying that the language of "immediacy or obviousness" goes not to ease of detection, but rather to the ease with which once detected (on either a superficial or a probing review), a defect may be identified as severe might well be to increase the regularity with which reviewing courts subject decisions to as intense a review on a standard of patent unreasonableness as on a standard of reasonableness *simpliciter* thereby further eliding any difference between the two.
>
> An additional effect of clarifying that the "immediacy or obviousness" of the defect refers not to its transparency on the face of the decision but rather to its magnitude upon detection is to suggest that it is feasible and appropriate for reviewing courts to attempt to qualify degrees of irrationality in assessing the decisions of administrative adjudicators: i.e., this decision is irrational enough to be unreasonable, but not so irrational as to be overturned on a standard of patent unreasonableness. Such an outcome raises questions as to whether the legislative intent could ever be to let irrational decisions stand. In any event, such an approach would seem difficult to reconcile with the rule of law.

[60] LeBel J. further noted that Iacobucci J.'s comments made in relation to the reasonableness *simpliciter* standard in ***Ryan***, also apply to the patent unreasonableness test. In the end, he concluded there was little to be gained from attempting to sustain a viable distinction between the two categories of unreasonableness. Despite LaBel J.'s compelling critique, the vigour of the patently unreasonable standard has continued largely undampened.

[61] In the recent decision of the Supreme Court of Canada in ***Council of Canadians with Disabilities v. VIA Rail Canada Inc.***, 2007 SCC 15, [2007] 1 S.C.R. 650 Abella J., speaking for the majority, acknowledged that the challenging issue of differentiating between what is patently unreasonable and reasonable *simpliciter* was "persuasively canvassed" by LeBel J. in ***Toronto (City)*** and that it required no further elaboration. At para. 103, Her Ladyship stated:

> But whatever label is used to describe the requisite standard of reasonableness, a reviewing court should defer where "the reasons, taken as a whole, are tenable as support for the decision" (*Ryan*, at para. 56) or "where…the decision of that tribunal [could] be sustained on any reasonable interpretation of the facts or of the law" (*National Corn Growers Assn. v. Canada (Import Tribunal),* [1990] 2 S.C.R. 1324, at pp. 1369-70 *per* Gonthier J.). The "immediacy or obviousness" to a reviewing court of a defective strand in the analysis is not, in the face of the inevitable subjectivity involved, a reliable guide to whether a given decision is untenable or evidences an unreasonable interpretation of the facts or law.

[62] In recent years our Court of Appeal has repeatedly endorsed the notion that a reviewing court ought not focus on whether a tribunal's decision was correct as part of the determination of whether its decision was patently unreasonable. Reflecting

on this approach in ***Budgell v. Canadian Union of Public Employees, Local 15***, 2003 BCCA 605, 190 B.C.A.C 170, the Court stated at paras. 8-9:

> The task of the chambers judge was to determine whether the Board's decision was rational and reached in accordance with the rules of natural justice, not to determine the issue afresh [citations omitted].
>
> It is not appropriate for this Court, nor was it appropriate for the chambers judge, to consider whether the Board's decision was wrong. The Board is entitled to be wrong in the eyes of a court if it acts within its jurisdiction [citations omitted].

[63] This methodology was affirmed by the Court of Appeal more recently in ***United Brotherhood of Carpenters and Joiners of America, Locals 527, 1370, 1598, 1907 and 2397 v. Labour Relations Board***, 2006 BCCA 364, 272 D.L.R. (4th) 253. Among other things, the court there stated at paras. 60-61:

> The appellants' argument is essentially that the Board member did not properly apply the "modern approach" to statutory interpretation as described in ***Bell ExpressVu Limited Partnership v. Rex***, [2002] 2 S.C.R. 559, 2002 SCC 42 at para. 26, despite citing it in her reasons for judgment. The appellants say that she ignored the ordinary meaning of the words of s. 18(4)(b) and relied on broader policy goals which she found to be articulated in the ***Code***.
>
> The appellants' analysis of the Board's decision is not helpful in determining whether it is patently unreasonable. The argument would be more appropriate if the standard of review was correctness. As it is, the Board had the exclusive jurisdiction to interpret s. 18(4)(b) because of the broad privative clause in the *Code*, its specialized expertise, and the purpose of the statute. These factors underline the importance of labour relations policy considerations in every decision of the Board. As Huddart J.A. said, for the Court, in ***Office and Professional Employees' International Union, Local 378 v. Labour Relations Board (B.C.)*** (2002), 158 B.C.A.C. 1, 2001 BCCA 433 (at para. 16):
>
> > Under the ***Code***, not only does the Board perform a managing and supervisory function in the context of the highly regulated, complex field of labour relations, but as part of its broad oversight mandate the Board is

> expressly charged in s. 2 with policy responsibility and development in a polycentric context, a context that demands a delicate balancing between different constituencies with different and competing interests. Through ss.136-138, and s. 139(1)(q) in particular, the Legislature has recognized that, in discharging its oversight function, the Board is best equipped to resolve ambiguities and fill voids in the legislative language governing replacement workers in a way that makes sense in the factual context, in the context of the ***Code*** as a whole, and in the field of labour relations overall in the province.

[64] The recent authorities establish that in assessing whether a decision is unreasonable, including patently unreasonable, the role of the reviewing court is not to evaluate whether the decision under scrutiny was correct. Whether a decision is reasonable is not dependent on whether the decision is correct in the eyes of the court. Having said this, however, it is undeniable that there is a relationship between the standards correctness and patently unreasonableness in that a patently unreasonable decision will almost invariably also be incorrect. Even so, review on a standard of patent unreasonableness is a fundamentally different process from review on a standard of correctness.

[65] When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the **Ryan** formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in **Ryan**, it cannot be said to be

patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.

[66] From this, I think it follows, that the opinion of Mr. Justice Bouck as to the correct interpretation of the word "strike" in the context of work stoppage resulting from honouring a hot declaration expressed in the **Pacific Press Judgment**, is neither instructive nor of assistance in determining whether the **Original Decision** and the **Reconsideration Decision** are patently unreasonable.

V. THE DECISIONS OF THE BOARD IN THIS CASE

[67] As mentioned, the petitioner's arguments presented to the Board are, in large measure, identical to its submissions on this judicial review. The chief contention advanced was that the concerted work action by the respondent unions and their members in response to the Telus hot declaration amounted to a "strike". A related contention was that the hot declaration provisions in the collective agreements, which purport to allow the employees to refuse to handle the Telus advertising, are of no force because they conflict with the definition of "strike" in the ***Code*** and are therefore invalid by virtue of ss. 49(5) of the ***Code*** which provides:

> If there is any conflict between the provision of a collective agreement and a requirement of or under this Code***,*** the requirement of or under this Code prevails.

[68] In its ruling, the Board carefully assessed the petitioner's primary argument and the sub-components of it in the context of its previous analyses of the relevant legislation, the legislative history, including ***Bill 19***, and the subsequent repeal of s. 4.1. The Board explicitly referred to the introduction through ***Bill 19*** of the inclusion in s. 27 of the ***1979 Code*** of the purpose of minimizing the negative effects of labour disputes on strangers to the disputes. The Board turned its mind specifically to the legislative changes triggered by the amendments in 1992 and the further amendments in 2002 in relation to the "purposes and objects" provisions.

[69] Among other things, the Board noted that when the ***1992 Code*** was enacted, it did not contain (and does not now contain), an express provision equivalent to s. 4.1 of ***Bill 19***. The observation was made in order to critically evaluate the petitioner's contention that, given these legislative changes which it says mandates the Board to exercise its powers and perform its duties in a way which minimizes the impact of a labour dispute on parties who have nothing to do with the dispute, it would be patently unreasonable for the Board to continue to conclude that a hot declaration inspired refusal or cessation of work is not a strike.

[70] In addressing the pertinent jurisprudence, the Board emphasized particular lines of reasoning. For example, it looked at the "internal conflict" rationale originating in the **Moore Decision** and endorsed in subsequent decisions. The Board referred approvingly to the conclusion in the **Kinzie Reconsideration** to the effect that an internal conflict would arise if the employer's argument succeeded, and the definition of "strike" was interpreted so as to render illegal all situations in which there is a cessation of work in response to a hot declaration.

[71] The Board also considered its reasoning in the **Hall Decision** and **Peck Reconsideration** for declining to adopt the interpretation given by the court in the **Pacific Press Judgment**. Relying on its exclusive jurisdiction to decide this issue, the Board concluded that it was not obliged to accept the court's contrary view. It then referred to the dismissal of Pacific Press' application for judicial review of the **Peck Reconsideration**, and the unsuccessful appeal of that dismissal.

[72] In the **Original Decision**, the Board evaluated and followed the analysis undertaken in the **Peck Reconsideration** confirming earlier rulings (the **Moore Decision** and **Kinzie Reconsideration**) concerning the proper approach to interpreting "strike" where the impugned conduct is purportedly based on a contractual right. This line of the Board's jurisprudence has consistently held that in interpreting "strike" and the definitional components of a "cessation of work" or a "refusal of work", it is essential to take into account the parameters of the "work" that employees are contractually bound to perform by their collective agreements. In the end, the Board concluded as a matter of law and policy that it was open to it to continue to apply its interpretation, and although contrary to Mr. Justice Bouck's view about the correctness of the interpretation, the Board's construction should be maintained.

[73] The Board enumerated three main grounds for declining to accept the petitioner's principal argument.

[74] First, it concluded that the extent of the 2002 amendment was not commensurate with the impact attributed to it by the petitioner. The Board reasoned

that at the time of the amendment the Legislature must be taken to have known of the Board's longstanding interpretation of "strike", which persisted even after the introduction of the purpose in ss. 27(e) via the enactment of ***Bill 19*****.** From this it reasoned that the Legislature would have done more than simply amend s. 2 in the way that it had, if it intended that the Board should significantly alter its longstanding interpretation of "strike" in the manner urged by the petitioner. The Board determined that a more explicit legislative change would have been made and would be required in order to change the Board's interpretation.

[75] Moreover, the Board did not accept that the Legislature intended by the 2002 amendments, that it should interpret "strike" in a manner that essentially would invalidate all hot declarations acted on pursuant to express collective agreement provisions. Drawing on the analysis in the **Moore Decision,** the Board reasoned that such an interpretation was inconsistent with the fact that, as part of their bargain with the employer, the employees in such an instance are *not* required to perform the work they are *not* performing. As part of its reasoning under this first ground, the Board affirmed its jurisprudence concerning the validity of collective agreement provisions expressly defining what "work" is and when "work" does not have to be performed, provided they are not contrary to the law and policy of the ***Code.*** In this regard, the Board concluded at para. 25 of the **Original Decision**:

> Put another way, if the Legislature had intended the Board to find that employees are engaged in a 'strike' even when their collective agreement expressly provides that they are not required to perform the work they are not performing, one would have expected that it would do as it did in 1987 -- enact the equivalent of section 4.1 of the Labour Code.

[76] A premise of the first ground was that ss. 64 and 70 of the ***Code*** do not give unions and their members the right to respect hot declarations. That right must be negotiated voluntarily. Absent such a provision in their collective agreements, employees who refuse to do certain work as a result of a hot declaration during the term of their collective agreement would "unquestionably" be striking within the meaning of the ***Code*** (**Original Decision**, para. 10).

[77] The second aspect of the Board's conclusion in the **Original Decision** was founded in a cogent analysis of the scope of s. 2. The Board emphasized that the purpose of "minimizing the effects of labour disputes on persons not involved in those disputes" is only one of eight objects expressed in s. 2. It noted that, among the others, is the recognition of the rights and obligations of employees, employers and trades captured in ss. 2(a) and to encourage the practice and procedures of collective bargaining between employers and trade unions set out in ss. 2(c). The Board's view was that neither of these purposes would be served:

> …by interpreting "strike" in a way that would, without compensation, strip unions and employees of contractual rights they had bargained relying on the Board's previous longstanding interpretation of "strike". (**Original Decision**, para. 26)

[78] The final ground given by the Board for rejecting the petitioner's argument was its acceptance that an internal conflict would arise if the Board changed its interpretation of "strike" and adopted the opinion favoured as correct in the **Pacific Press Judgment**. The conclusion that there would be a conflict was based on the Board's settled view reaching back many years, that s. 70 contemplates that some hot declarations, when acted on by unions and employees, will potentially lead to

work disruption in an employer's business and that the Board has authority to regulate such disruptions. In this vein, the Board further observed that s. 70 also contemplates there will be circumstances in which the failure of employees to perform work they are not required to perform in response to a hot declaration will be justifiable and not prohibited.

[79] The petitioner applied under s. 141 of the ***Code*** for leave and for reconsideration of the **Original Decision**. Its application materials clarify that the subject of reconsideration was the rejection at the original hearing of the petitioner's principal argument, namely that the refusal to perform work due to the Telus hot declaration was a "strike", and therefore a breach of the ***Code***, regardless of the hot declaration clauses in the collective agreements. In its application, the petitioner argued and the reconsideration panel focused upon whether the Board's rejection of the petitioner's primary argument was inconsistent with the principles express or implied in the ***Code.*** By way of remedy, the petitioner sought to have the reconsideration panel set aside the **Original Decision** and substitute its own decision in its place.

[80] In the **Reconsideration Decision**, Chair Mullin accurately distilled the petitioner's arguments into three components. He described the first component as the **Pacific Press Judgment;** the second as the ***Bill 19*** amendment adding the purpose of minimizing the effect of labour disputes on unconnected persons; and the third element as the 2002 amendment to s. 2 where the "purposes" clause was renamed as a "duties" clause.

[81] The Chair noted the Board's test for permitting leave for reconsideration in such circumstances, and then granted leave.

[82] After reviewing the history and background to the legislation and the judicial findings referenced by the petitioner, Chair Mullin addressed what he referred to as the "new framework" of the ***Code*** which includes taking into account all of the s. 2 interests and the public interest overall. After some comment about Board decision-making under the current ***Code***, the chair affirmed and effectively adopted the reasoning and outcome of the **Original Decision,** concluding at paras. 29-32:

> Overall, this is a new approach to labour relations under the amendments to the Code. To date, the core interpretations and applications have been what is set out above, but it is a work in progress. It is, and needs to be, balanced, measured and incremental. It is not a light switch. In that, it stands in sharp contrast to Bill 19.
>
> It is encouraging to see that the reform of the Code is taken seriously by the Applicant, in terms of its counsel having put forward a sophisticated, thoughtful Section 2 argument.
>
> However, it should be clear from the above, that the reform of the Code since 1992 is patently not similar in process or effect to Bill 19. Nor are the overall amendments to Section 2 equivalent in intent or effect to the express amendment to the Code in Section 4.1 of Bill 19.
>
> Thus, in conclusion I do not find the Original Decision to be inconsistent with the Code. The amendments to the Code relied upon by the Employer do not equate in effect to the express, but now deleted, Section 4.1 under Bill 19. However, those amendments have had, and will continue to have, a positive, material impact on labour relations under the Code.

VI. DISCUSSION

[83] An evaluation of whether a decision is patently unreasonable cannot be carried out in a factual or contextual vacuum. In applications of this kind the

reviewing court therefore often finds itself in a quandary between needing to sufficiently immerse itself in the background material in order to assess, in a meaningful way, whether the Board's reasons are irrational and, at the same time, needing to refrain from delving into excessive detail so that it ends up appraising, or appearing to appraise, the correctness of the decision itself. This may not seem too fine an intellectual line to draw when discussing the contrasting standards of review of correctness and patent unreasonableness in the abstract; however, as was boldly addressed by LeBel J. in ***Toronto (City)***, the application in practice can pose a challenge to the reviewing judge.

[84] On this judicial review, in light of the following developments, the petitioner invites this Court to revisit Mr. Justice Bouck's finding that the "mere" error of law committed by the Board in the **Moore Decision** and **Kinzie Reconsideration** was not patently unreasonable: (i) the introduction of the purpose of minimizing the harmful effects of a labour dispute on strangers to it; (ii) the 2002 amendments to s. 2 of the ***Code***; (iii) the different standard of patent unreasonableness applied by Mr. Justice Bouck as compared to the present day test; and (iv) the modern approach to statutory interpretation.

[85] The petitioner's submissions were often punctuated by phrases such as: "the Board continues to apply its erroneous reasoning"; "the Board's conclusions are wrong in law"; and, "this Court has already determined that the Board's characterization of the concerted activity in question is wrong". The core premise underlying its submissions is that this Court ought to set aside the impugned decisions of the Board because they are, according to the **Pacific Press Judgment**,

incorrect. Many of the petitioner's arguments are presented in a manner hinting at or outright enlisting the application of a correctness analysis, and much of its written submissions were also modelled on that approach. To that extent, the petitioner's arguments are misguided.

[86] That being said, I will now turn to the arguments advanced by the petitioner in support of its contention that the **Original Decision** and **Reconsideration Decision** are patently unreasonable.

[87] The petitioner places heavy emphasis on the expansion of the "purposes and objects" of the ***Code*** brought about by ***Bill 19***, especially the added purpose of protecting third parties from the harmful effects of a labour dispute which is particularly engaged in a hot declaration situation. It says that this expansion embodied a fundamental shift in labour relations policy in this Province and was meant to shape the policy and decision making of the Board from that point forward. The petitioner stresses that at the time of the **Pacific Press Judgment**, it was not a "purpose" of the ***Code*** to minimize the harmful effects of labour disputes on persons unconnected to the disputes. It asserts that within the framework then in place it was therefore open to Mr. Justice Bouck to conclude that the Board did not run so afoul of the scheme of the ***Code*** as to amount to patent unreasonableness when it found that the hot declaration inspired concerted work activity permitted by the collective agreement did not qualify as a "strike". The petitioner says that conclusion is no longer rationally available.

[88] Throughout its argument, the petitioner characterizes the 2002 amendments as having "transformed" the "purposes" of the ***Code*** into "duties" of the ***Code.*** It contends that any interpretation of the definition of "strike" that permits the respondent unions and their members to withhold services and restrict production on account of a wholly unrelated labour conflict, fails to meet the statutory objective and discharge the Board's "statutory duty" of minimizing the harmful effects of labour disputes on arms-length third parties. It argues that the Board committed precisely the kind of error that the Legislature was trying to eradicate by enacting the 2002 amendments. In my view, this line of argument is ill-conceived.

[89] The petitioner cites ***Forest Industrial Relations Ltd.,*** **BCLRB No. B312/2003** [**FIR**] and ***BC Ferry Services Inc.***, **BCLRB No. B381/2003** [**BC Ferry**] as authority that the Board has itself recognized that in consequence of the 2002 amendment, the "purposes" set out in s. 2 became elevated to the status of "duties" and acknowledged the triggering of a new obligation with respect to s. 2 (the inference being ss. 2(f)). It is important to understand that the focus in **FIR** was whether the addition of ss. 2(b) (fostering the employment of workers in economically viable businesses), which was one of the two new provisions brought in by the 2002 amendment, was intended to alter the Board's test under ss. 59(1) which mandates collective bargaining in accordance with the ***Code.*** **FIR** had filed an application with the Board alleging that the union had failed to make every reasonable effort to conclude a collective agreement. Part of **FIR**'s argument was that the s. 2 amendments constituted a profound change which effectively converted s. 2 into a substantive provision of the ***Code.*** According to **FIR,** this meant that the

Board had a duty to ensure that collective bargaining conformed to the "duties" under s. 2 and, among other things, sought that the Board direct the union to table new proposals that were substantively consistent with ss. 2(b). In considering the issue, the Board in **FIR** did refer to the s. 2 principles as being "duties" in a general way but also described them as being "principles" and "objects". I do not regard the **FIR** case as a decision of the Board that the factors set out in s. 2 had been transformed into independent duties imposed on the Board as a result of the 2002 amendment. What the Board acknowledged in **FIR** was that this statutory development meant that it was now appropriate and necessary to review its existing interpretation of ***Code*** provisions to ensure they were consistent with the amended language. Notably the Board in **FIR** at para. 38 made clear that "reviewing existing policy to ensure its consistency with the amended s. 2 does not necessarily result in the conclusion that existing policy must be altered". Also instructive in **FIR** was the Board's observation that all parts of s. 2 were to be read together and in harmony.

[90] In **BC Ferry,** the Board merely affirmed that it had a "duty to consider" the public interest and to minimize the impact of a strike on third parties. There is a genuine distinction between having a duty to consider or to pay regard to objectives, and having an independent, positive duty to achieve each objective *per sé*.

[91] In my opinion, the simple change in the headings to s. 2 (from "Purposes of the Code" to "Duties under this Code") cannot legitimately be regarded as being of importance in any substantive sense. (See: ***Interpretation Act***, R.S.B.C. 1996, c. 238, ss. 11(a)).

[92] The petitioner also points to extractions from the surrounding legislative debates in support of its proposition that the 2002 amendments signalled a new substantive direction to the Board. It contends that the Legislature's objective in making this amendment was its perception that the Board was not giving adequate consideration to the principles laid out in s. 2. Though it is not reflected on the face of the **Original** or **Reconsideration Decisions,** in support of its contention the petitioner made reference before the Board and this Court to passages from **Hansard,** including the following:

> **Hon. Graham Bruce – Minister of Labour**
>
> (Vol. 8, No. 1)
>
> [page 3471] We must ensure that our province's Labour Code is applied in ways that reflect fundamental principles that are now duties under the code.
>
> …
>
> We must change the way we do labour relations in British Columbia in order to rebuild our economy and create more high-quality jobs for our people. These are the goals of this bill.
>
> (Vol. 8, No. 6)
>
> [page 3635] Indeed, these now-called duties under this code – which of course, as the member knows, before were entitled "purposes" – are the very essence of labour relations and labour law in British Columbia. They are the principles, as she well knows, that make up labour law in British Columbia…
>
> In respect to the legislation, what we're looking at in this regard is that it would add consistency to the decision-making process when the board is bringing forward decisions and that they would pay close attention to these principles, not just passing regard, but these are the substance of what makes up law in British Columbia.
>
> [page 3638] That's the whole point of them. The whole reason for bringing them into existence is so that there is some consistency of

> lawmaking in this province
>
> …
>
> We are being very clear that they must now exercise – that being the board – their duties keeping these eight principles in mind, rather than just having regard.

[93] The **Hansard** extracts quoted by the petitioner strike me as being equivocal on the issue. For example, at one stage, the Minister refers to "these now-called duties" yet later refers to them as "eight principles" which the Board must keep in mind. I do not consider these passages as necessarily supportive of the reading given them or significance attributed to them by the petitioner.

[94] According to the petitioner, another related weakness in the Board's reasoning was its failure to give proper effect to the various applicable purposes enumerated in s. 2. It contends that the Board overly concentrated on ss. 2(c); encouraging the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees. Citing ss. 49(4) and (5) of the ***Code,*** the petitioner observes that while the Board should, in the ordinary course, respect agreements freely negotiated between the parties, there will be circumstances where such agreements will have to be set aside because they conflict with the ***Code***. While the petitioner concedes that the Board should not strike down a collective agreement clause lightly, it challenges whether concluding that the union's response to the Telus hot declaration amounts to a "strike" would undermine that purpose or even negatively impact on the practice or procedure of collective bargaining.

[95] As part of this line of argument, the petitioner points to the fact that the collective agreement provisions at issue were negotiated before ***Bill 19*** expanded the purposes to include minimizing the effects of labour disputes on third parties. It says that it is therefore not surprising, given the dynamic nature of the ***Code***, that over time these hot declaration clauses have came to offend the ss. 2(f) purpose. The obvious flaw with this contention is the fact that, in this case, the hot declaration clauses have repeatedly been renewed in successive bouts of collective bargaining, including in the most recent round, long after this purpose was explicitly incorporated into the ***Code***.

[96] Along the same lines, the petitioner argues that the ss. 2(a) purpose (the recognition of rights and obligations of employees, employers, and trade unions under the ***Code***) favours its interpretation that the concerted work response to the Telus hot declaration amounted to a "strike". There is no question that one of the cardinal tenets of the ***Code*** is that there is to be no stoppage of work during the term of a collective agreement. The petitioner says that is fundamentally undermined when employees are permitted to refuse to work mid-contract on the strength of a hot declaration clause pertaining to another party's labour dispute. According to the petitioner, interpreting the ***Code*** as the Board has done here results in employers being deprived of their right to have no disruption during the term of a collective agreement. Especially galling to the petitioner is that they are being deprived of this right because of a labour dispute involving complete strangers. In the petitioner's submission, such an interpretation is inconsistent with ss. 2(a) of the ***Code*** and should not be countenanced. It contends also that ss. 2(d), which refers to

cooperative participation between employers and trade unions in resolving workplace issues and of promoting productivity, supports its interpretation. In this context, the petitioner frequently referred to itself as the "innocent" third party in relation to the Telus labour dispute. While this is largely a matter of semantics, "innocent" is a rather loaded word and I wish to briefly comment. Though the petitioner may be "innocent" in the sense that it had no involvement in the Telus labour dispute, by repeatedly agreeing to the inclusion of a hot declaration clause in the collective agreements, the petitioner has chosen to put itself in the position of potentially being affected by the effects of a labour dispute in which it is not directly involved.

[97] The petitioner complains that the Board's reasoning in relation to s. 2 undermines the breadth of the s. 2 amendment and argues that it amounts to an impermissible reading down of what was intended to be a sweeping and fundamental change. It contends that based on the Board's logic, the intended expansive change would have no impact because no specific issue was explicitly addressed by the Legislature. In making this argument, the petitioner once again endorses a "correctness" analysis by emphasizing that prior to ***Bill 19*** the court had already concluded in the **Pacific Press Judgment** that the Board's interpretation of "strike" was wrong in law and urges that the so-called fundamental statutory changes made since then, strengthen that conclusion. Tying these submissions to the patently unreasonable test on review, the petitioner asserts that the effect of these "significant" changes to the ***Code*** are sufficient to convert what was once considered to be a "mere error" of law into a patently unreasonable error of law.

[98] The petitioner also criticizes the Board's reasoning to the effect that had the Legislature intended to prohibit work stoppages due to hot declarations it would have said so explicitly, as it had done under ***Bill 19***.

[99] In its submissions to the Board, counsel for the respondent Guild made reference to two passages in ***Hansard*** from 1992 debates concerning the ***1992 Code*** and specifically the repeal of s. 4.1.

[100] One quotation contained the following statements made on October 28, 1992 by the Hon. Moe Sihota :

> The final and fourth outstanding issue was the matter of secondary boycotts. At the end of the day this government felt that parties should be free to negotiate those kinds of matters into their contracts should they wish. We recognize the concerns expressed by the business coalition in that regard. We have given them assurances that we will watch with great care the developments with regard to that issue; that we do not want to see any unintended consequences with regard to that issue; that there will be an ongoing monitoring of the developments as they relate to that issue. And we have assured them that given the fact that we have the advisory panel provisions in this legislation, we will take advantage of those provisions, should the need arise to review that provision of the legislation. We made that commitment to them privately, and we make that commitment to them publicly today.

[101] Also brought to the Board's attention were the following comments made on November 3, 1992, by Government member F. Randall with respect to the repeal of s. 4.1:

> Comments have also been made on the matter of boycotts of goods. This applies only where it's in a collective agreement, and I know collective agreements that have had that clause or provision in them since 1965, where the employer and the union have agreed that if there are products that are hot or unfair, or have come from behind a

> picket line or a struck operation, the workers have the right to refuse to handle them. Bill 19 eliminated that. You had to handle stuff that was coming from struck operations or anything. All this is doing is restoring what labour and management jointly agree to. It doesn't mean that certain things happen. It has to be mutually agreed between management and labour in a collective agreement that they are prepared to do certain things. So with all this stuff that's being talked about, I don't think people really understand what's going on. Nothing changes, and the collective agreements are still there. The provision will be applicable only to those that have that provision.

[102] The incorporation of the equivalent to ss. 2(f) took place in 1987 alongside the "pendulum swing" enactment of s. 4.1. Of the two amendments, it was not unreasonable for the Board to find that the enactment and repeal of s. 4.1 which explicitly prohibited secondary boycotts signalled a considerable shift in ***Code*** reform. To the extent it did so, it was also not unreasonable for the Board to attribute more significance and a different meaning to the repeal of s. 4.1 than to the impact of retaining ss. 2(f). I also think it not unreasonable for the Board to have concluded from the enactment of s. 4.1 after the **Pacific Press Judgment**, that the Legislature did not necessarily regard the **Pacific Press Judgment** as a signal that the Board's policy on the matter should change.

[103] The plain reading of s. 2 of the ***Code*** obliges the Board to exercise its powers and duties under the ***Code*** "*in a manner*" that recognizes, fosters, encourages, promotes and minimizes certain realities and/or objectives derived from policy considerations in the labour context. I do not accept that the principles laid out in s. 2 themselves impose stand-alone duties under the ***Code*** in the sense urged by the petitioner, and I consider it somewhat misleading to characterize them in that way. They are principles which must inform the exercise of powers and duties carried out

by the Board. It seems self-evident from a perusal of s. 2 that each listed principle will not necessarily arise in every exercise of a Board duty or power. It is equally clear that, in varying degrees, the principles represent competing interests or inherent tensions which require that the Board exercise a nuanced balance among those of the principles which happen to be engaged in any particular instance. The ***Hansard*** excerpts relied on by the petitioner that it put before the Board concerning the s. 2 amendments do not suggest any particular pre-occupation with ss. 2(f), nor support attributing any privileged status to the objective captured by it. Those ***Hansard*** passages indicate that the government of the day expressly noted that by the repeal of s. 4.1 it was indicating that it no longer intended to prohibit hot declaration clauses in collective agreements. Indeed, those excerpts refer to the fundamental principles in s. 2 of the ***Code***. Section 2(f) reflects but one of those objectives which, when it comes into play, must be balanced with the other objectives and without attributing any pre-ordained paramountcy to any of them. The Board engaged in precisely this balancing in the case at hand and concluded that other fundamental objectives in s. 2 would not be served by adopting the petitioner's interpretation of "strike".

[104] Periodically throughout the course of its submissions, the petitioner characterized the objective in ss. 2(f) as intending to "insulate", "protect" and "shield" third parties from the effects of unrelated labour disputes. But the direction to the Board contained in ss. 2(f) is that it perform its powers and duties in a manner that *minimizes*, that is, reduces or decreases, the effects of labour disputes, which is something different than the descriptors used by the petitioner. Implicit in the use of

the word *minimize* is the recognition that third parties may indeed find themselves affected by the labour conflict of others.

[105] The Board validly considered the relevant legislative provisions and developments, including the enactment and subsequent repeal of s. 4.1, the introduction of the objective of minimizing the effect of labour disputes on arms-length third parties and the subsequent evolution of s. 2, as well as the continued absence from the current ***Code*** of s. 4.1. There was a rationally developed basis for the Board's finding that certain of the other s. 2 objects, such as those found in ss. 2(c), would not be served by the interpretation posited by the petitioner.

[106] It was not unreasonable for the Board to consider the implications of the Legislature's decision not to revive an equivalent to s. 4.1 of ***Bill 19*** following its repeal and to infer from its absence today, that the 2002 amendments to s. 2 were not equivalent in intent or effect to s. 4.1. This is particularly the case given the Board's previous jurisprudence that the intent and effect of s. 4.1 was to convert negotiated hot declaration clauses into provisions which violated the ***Code***. I am not persuaded by the petitioner's submissions that in so doing the Board blatantly offended accepted principles of statutory interpretation so as to taint the decision as patently unreasonable. In fact, the manner in which this branch of the petitioner's argument was meant to cogently connect to the patent unreasonableness threshold was not entirely clear. It was not irrational for the Board to conclude that the petitioner overstated the importance of the statutory amendments *vis-à-vis* the interpretation of "strike" and the grounds given by the Board for doing so were perfectly reasonable. While the petitioner is free to disagree with the Board's

analysis, and obviously does so, I cannot conclude that the Board's path of reasoning in this regard was irrational, untenable or otherwise lacking in reason. The Board's reasons do not reflect a patently unreasonable construction of the provisions at issue.

[107] When Mr. Justice Bouck considered whether the Board's interpretation of "strike" was patently unreasonable, he applied a different and, what appears to be a far stricter, test than is accepted today. The concept applied by Mr. Justice Bouck was that the impugned decision had to amount to a fraud on the law or was arbitrary or made in bad faith. The petitioner submits that this different standard of patent unreasonableness is another factor that militates towards the finding that the Board's interpretation is now patently unreasonable. The crux of this argument would seem to be that had Mr. Justice Bouck applied the present day test of patent unreasonableness, he would have found that the **Moore Decision** and **Kinzie Reconsideration** qualified as such. To my mind, this is not a legitimate approach to take in assessing whether the **Original Decision** or **Reconsideration Decision** are patently unreasonable.

[108] The petitioner made additional criticisms concerning the Board's statutory interpretation along the lines of those advanced in relation to the emergence of a more relaxed test for patent unreasonableness since the **Pacific Press Judgment**. An underpinning of its argument in this area was that Mr. Justice Bouck had applied the "golden rule" of statutory construction when he made his ruling whereas that the current favoured approach to statutory construction is the "modern approach". According to the petitioner, when the modern approach is applied and the definition

of "strike" is considered within the current framework of the ***Code***, it becomes even more clear that the respondents' response to the Telus hot declaration amounts to an illegal strike. Put another way, the petitioner says that the definition of "strike" that it advocates is supported by applying the modern approach to statutory construction.

[109] The petitioner developed additional arguments concerning the statutory construction by analysing the definition of "strike":

> **"strike"** includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees that is designed to or does restrict or limit production or services, but does not include
>
> (a) a cessation of work permitted under section 63(3), or
>
> (b) a cessation, refusal, omission or act of an employee that occurs as the direct result of and for no other reason than picketing that is permitted by or under this Code,
>
> and **"to strike"** has a similar meaning.

[110] It is common ground that the union members are not entitled to strike during the term of a collective agreement. To do so is a violation of the ***Code*** (and of the collective agreements). At the time of the concerted workplace activity in this case, each of the respondent unions was party to a collective agreement with the petitioner for the term of January 2, 2005 to January 1, 2007.

[111] The petitioner asserts that what is immediately apparent from the definition of "strike", what leaps out, is that the Legislature has seen fit to enact two – and only two – exceptions to the definition. Its position is that because the concerted refusal

to handle the Telus advertising does not fall within one of the two definitional exceptions, it amounts to a "strike".

[112] The petitioner contends that these two exceptions are determinative of the issue. The first – section 63(3) – deals with a work stoppage or slowdown prompted by a safety or health concern, and instances where a collective agreement provision permits employees to refuse to work in circumstances where they are being forced to work in association with persons who are not members of their union or another union contemplated by the collective agreement. In this regard, the petitioner stresses the importance of recognizing that the Legislature has delineated the circumstances where employees may honour a collective agreement provision to refuse to perform work without that amounting to a strike. That circumstance does not include honouring a hot declaration. The petitioner argues that it follows that the Legislature did not intend to allow unions and employees the right to rely on a collective agreement provision permitting adherence to hot declarations so as to engage in a concerted work stoppage or slow down without that amounting to a strike. It contends that had the Legislature intended such a result, it would have said so expressly by carving out an additional exception to the very definition of "strike".

[113] Using the same reasoning, the petitioner says that the second exception to the definition of "strike" is equally as determinative. It deals with labour pressure in the form of picketing and permits a union and employees to engage in a concerted withdrawal of services during the term of a collective agreement by refusing to cross a lawful picket line. The exception reflects the fact that the honouring of a picket line by members of non-striking unions is a cornerstone of the ***Code***. The petitioner

repeats its assertion that had the Legislature intended to allow unions and employees the right to action a hot declaration without that amounting to a strike, it would have said so expressly as was done in the case of honouring a picket line.

[114] The petitioner argues that the effect of the impugned Board decisions is to imply a third exception into the ***Code*** and, in that sense, amends the ***Code***, an act which is beyond the purview of the Board and trespasses into the territory of the Legislature. It argues that had the Legislature intended there to be a third exception to the definition of "strike", it would have said so and relies on a maxim of statutory interpretation, *expressio unius est exclusion alterius,* meaning to express one thing is to exclude another.

[115] As is the case with a number of the petitioner's submissions, the essence of its arguments concerning the Board's statutory interpretation amount to a call for an evaluation based on "correctness, rather than validly comprising a component of the test based on patent unreasonableness.

[116] The petitioner goes on to expose what it says are further reasoning flaws in the **Moore Decision** and submits that the Board's reliance on such a defective analysis renders its decision patently unreasonable. For example, the petitioner asserts that the Board's reliance on the internal conflict rationale originating in the **Moore Decision** must be soundly rejected as was done by Mr. Justice Bouck. Having set this stage, the petitioner goes on to present its analysis as to why Mr. Justice Bouck's finding was correct and provides illustrations of how ss. 64 and 70 of the ***Code*** can meaningfully operate even if "strike" were interpreted to encompass

hot declaration inspired activity permitted by a collective agreement. What the petitioner fails to do is indicate how the Board's continued acceptance of its internal conflict rationale can be said to be patently unreasonable.

[117] In the **Moore Decision**, the Board concluded that the parties to a collective agreement could define for themselves what "work" had to be performed, and if the employees were permitted to not perform that "work" in certain circumstances, the Board reasoned that it could not be said that the employees were refusing to "work" when they exercised that right. In the **Original Decision,** the Board confirmed its acceptance of this longstanding principle. The petitioner contends that this aspect of the reasoning in the **Moore Decision** focused only on the first aspect of the definition of "strike" - a cessation of work, a refusal to work - but did not grapple with the remainder of the definition which includes the concept of a slow down or other concerted activity that is designed to or does limit production or services. It argues that based on the latter part of the definition, even where the parties have included a hot declaration clause in their collective agreement, the concerted response by employees to a hot declaration may still amount to a slow down or other concerted activity that restricts production and services and, therefore, comes within the definition of "strike". The point being made by the petitioner is a very fine one. That in itself raises concern as to the degree of searching the Court is being asked to undertake in its analysis. In any case, I share the respondents' view that there is a real question as to whether the conduct at issue in this case constitutes a "slow down" as opposed to a work stoppage or cessation of work. That aside, the petitioner's argument is rather circuitous in the sense that if the hot declaration

clause contained in the collective agreements permits the employees not to execute work in certain pre-defined circumstances, then their work duties may well not include the handling of the Telus hot goods and hence they would not be engaged in a work cessation, stoppage or slow down. The petitioner's submissions are rooted in its deep disagreement with the Board's jurisprudence that parties may contract to define what falls within "work" and thereby disqualify certain conduct as coming within the ambit of an illegal "strike". It is my opinion that there has been no legislative amendment which has the effect of now rendering such jurisprudence patently unreasonable and find that there is nothing to indicate that the Board's reasoning on this matter, including its acceptance of past jurisprudence, was patently unreasonable.

[118] In summary, I conclude that the petitioner has failed to demonstrate that the Board's reasoning in the **Original Decision** or **Reconsideration Decision** is irrational, untenable, not in accordance with reason or, on any other accepted expression of the test, is patently unreasonable. There is no proper basis for this Court, on judicial review, to disturb those decisions.

[119] I turn next to the petitioner's alternate argument.

[120] The petitioner does not dispute that the Board is an "expert tribunal" for the purposes of s. 58(1) of the ***ATA***. Accordingly, for issues involving the rules of natural justice and procedural fairness the applicable standard is whether the tribunal acted fairly. Section 58(2)(b) provides:

> questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

[121] In the recent decision of this Court, ***Local 1518 v. BC Labour Relations Board***, 2007 BCSC 546 Mr. Justice Brine considered the standard of fairness at para. 64:

> However, decisions of the Board which are challenged on the basis of a denial of natural justice are reviewable at the standard of fairness pursuant to s. 58(2)(b) of the ***ATA***. In ***Weileby v. Petisa Enterprises***, Metzger J. in Chambers surveyed authorities that have considered the standard of fairness to be applied in a natural justice and procedural fairness review:
>
> > According to s. 58(2)(b) of the *ATA*, the application of common law rules of natural justice and procedural fairness must be decided by having regard to whether, in all of the circumstances, the tribunal acted fairly.
> >
> > Cases that have specifically considered s. 58(2)(b) of the *ATA* do not provide any further guidance beyond restating that a court must look at all the circumstances of a case to determine whether the hearing was procedurally fair.
> >
> > In assessing procedural fairness, it is important to keep in mind the purpose of procedural fairness requirements as stated in *Baker v. Canada (Minister of Citizenship and Immigration)*:
> >
> > > The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision. (Emphasis Added)

[122] I do not consider as controversial the petitioner's proposition that the Board has a duty to consider and decide the petitioner's grounds for bringing its reconsideration application; surely that is one of the hallmarks of the duty of fairness.

[123] The petitioner concedes that the reconsideration panel accurately summarized its argument but says it then proceeded to decide an entirely different issue. It complains that the reasoning of the **Reconsideration Decision** demonstrates that the panel did not consider and address the substance of the petitioner's argument and, in that sense, effectively made its decision on grounds that were not advanced by the petitioner. In particular, the petitioner submits that the Board failed to grappled with its arguments on statutory interpretation.

[124] The petitioner applied for leave and reconsideration under s. 141 of the ***Code.*** The test for granting leave for reconsideration is whether the petitioner has established a good arguable case of sufficient merit that may succeed on one of the established grounds for reconsideration as set out in ***Brinco Coal Mining Corporation,*** BCLRB No. B74/93. The reconsideration panel concluded that the petitioner had presented a good arguable case and therefore granted leave. The core issue for the panel then to consider was whether the **Original Decision** was inconsistent with the principles expressed or implied in the ***Code.***

[125] The **Original Decision** dealt fully with the substance of the petitioner's primary argument. The reconsideration panel amplified the reasons as to why the Legislature could not be taken to have intended by its amendment of s. 2, the fundamental changes to the law and policy of the **Code** urged by the petitioner. In the end, the Board granted leave but not reconsideration and issued reasons for its decision. The fact that it did so does not eclipse the reasons of the original panel: the reasons in the **Reconsideration Decision** are supplemental to the **Original Decision**.

[126] Where, as here, the Board issues reasons for granting leave but not reconsideration, the Board's two decisions should be considered together in the assessment of whether the substance of the reconsideration application has been addressed.

[127] The reconsideration panel carried out a comprehensive review of the pertinent decisions in the first instance and concluded that its jurisprudence and policy did conform to the fundamental principles of the ***Code*** and thereby rejected the arguments raised by the petitioner in relation to its primary contention. On the application for reconsideration the Board answered the very questions put to it by the petitioner in the context of a reconsideration review. The chief issue for the panel to consider was whether the **Original Decision** was inconsistent with express or implied principles of the ***Code,*** and it did so fairly***.***

[128] The panel's reasons were cogent and sufficient. There was no denial of natural justice or breach of procedural fairness.

[129] As is customary, there will be no order for costs in relation to the Board. The respondents are entitled to their costs.

"The Honourable Madam Justice Balance"