

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the matter of Section 2 of *the Judicial Review Procedure Act*,
R.S.B.C. 1996, c. 241, and British Columbia Labour Relations Board
Decision No. B235/2007

Citation: *Allied Hydro Council v. Construction,
Maintenance and Allied Workers
Bargaining Council, Local 2300*,
2008 BCSC 1660

Date: 20081202
Docket: S078458
Registry: Vancouver

Between:

Allied Hydro Council

Petitioner

And

**Construction, Maintenance and Allied Workers Bargaining Council, Local
2300, British Columbia Provincial Council of Carpenters and the British
Columbia Labour Relations Board**

Respondents

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

(In Chambers)

Counsel for the Petitioner

D.B. Stevenson and
D.M. Aaron

Counsel for the Respondents Construction,
Maintenance and Allied Workers Bargaining
Council, Local 2300

B. Laughton, Q.C

Counsel for the Respondent British Columbia
Labour Relations Board

E. Miller

Counsel for the Respondent British Columbia
Provincial Council of Carpenters and the
United Brotherhood of Carpenters and
Joiners of America and the United
Brotherhood of Carpenters and Joiners of
America, Local 1370

R.J. Randall Hordo, Q.C. and
Daniel G. Fetterly

Counsel for Columbia Hydro Constructors
Ltd.

T.A. Roper, Q.C.

Counsel for United Association of
Journeymen and Apprentices of the
Plumbing and Pipefitting Industry of the
United States and Canada, Local 170,
International Union of Painters and Allied
Trades, Local No. 138, International Union of
Elevator Constructors, Local Union No. 82
and I.U.P.A.T. Glaziers, Architectural Metal
Mechanics and Glassworkers Union,. Local
1527

T. Arsenault

Counsel for United Brotherhood of
Carpenters and Joiners of America,
Floorlayers' Local No. 1541, Millwrights,
Machine Erectors and Maintenance Union
Local 2736, United Brotherhood of
Carpenters and Joiners of America, Local
1598, and United Brotherhood of Carpenters
and Joiners of America, Local No. 2404 (Pile
Drivers, Bridge, Dock and Wharf Builders

A.P. Berry

Counsel for International Association of
Bridge, Structural, Ornamental and
Reinforcing Iron Workers, Local No. 97,
International Association of Bridge,
Structural, Ornamental and Reinforcing Iron
Workers, Operative Plasters' and Cement

Masons' International Association of the
United States and Canada, Sheet Metal
Workers' International Association, Local No.
280, Sheet Metal Workers' International
Association, International Union of
Bricklayers and Allied Craftworkers, Local 2
and International Union of Bricklayers and
Allied Craftworkers

D. Thompson

Counsel for Construction and Specialized
Workers' Union Local 1611

K. Blakely

Counsel for Teamsters Local 213

B.W. Savage

Counsel for the Attorney General of British
Columbia

N. Sharma

Date and Place of Hearing:

May 28 -30 and June 3, 2008
Vancouver, B.C.

Introduction

[1] This is an application by the petitioner Allied Hydro Council ("AHC") for judicial review of a decision of the Labour Relations Board made on October 16, 2007, BCLRB No. B235/2007 (the "Reconsideration Decision"). In that decision, the Board held that it had jurisdiction under s. 142 of the **Labour Relations Code**, R.S.B.C. 1996 c. 244 (**Code**) to vary the AHC's poly-party certification for employees of Columbia Hydro Constructors Ltd. ("CHC") without the consent of AHC's constituent members. Applying s. 142 of the **Code**, the Board varied the AHC certification by deleting the British Columbia Provincial Council of Carpenters

("BCPC") and adding the Construction, Maintenance and Allied Workers Bargaining Council, Local 2300 ("CMAW").

[2] The Reconsideration Decision reversed the decision of Vice-Chair Mullaly made on March 8, 2007, BCLR No. B44/2007 (the "Original Decision"). By its Original Decision, the Board had dismissed CMAW's application under s. 18 of the Code for certification with respect to CHC to represent carpenters then represented by the United Brotherhood of Carpenters and Joiners of America, Local 2458, and by BCPC on behalf of its constituent locals. CMAW's certification application was opposed by CHC, the AHC, and its other constituent members. The Board, in its Original Decision, followed its earlier decisions in ***C.A.E. Machinery Ltd.***, BCLRB No. L25/79 ("***C.A.E.***") and ***Simon Fraser University v. U. A., Local 516***, IRC No. C 53/92 ("***S.F.U.***"). The Board held that ***C.A.E.*** and ***S.F.U.*** required that all of the unions named in a poly-party certification originally granted pursuant to s. 20 of the **Code** must consent to any change in the composition of the jointly certified unions.

[3] By its Amended Petition for Judicial Review, filed May 7, 2008, AHC applies for orders setting aside the Reconsideration Decision and reinstating the Original Decision of the Labour Relations Board. The petitioner's three grounds for relief are as follows:

1. The decision of the Labour Relations Board, BCLRB No. B235/2007 (Leave For Reconsideration of BCLRB No. B44/2007), dated October 16, 2007, be set aside on the ground that the decision was not within the authority of the Labour Relations Board to make, and was accordingly, patently unreasonable and incorrect;

2. The decision of the Labour Relations Board, BCLRB No. B235/2007 (Leave For Reconsideration of BCLRB No. B244/2007), dated October 16, 2007, be set aside on the ground that the Labour Relations Board acted contrary to principles of natural justice;

3. The decision of the Labour Relations Board, BCLRB No. B235/2007 (Leave For Reconsideration of BCLRB No. 244/2007), dated October 16, 2007, be set aside on the ground that the Labour Relations Board violated Section 2(d) of the Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982; ...

Background

[4] The early history of CHC and the AHC is conveniently summarized at para. 3 of the Original Decision, where the Board cites the following passage from its previous decision in **Columbia Hydro Constructors v. Allied Hydro Council of British Columbia**, BCLRB No. B36/94, 22 C.L.R.B.R. (2d) 161, 94 C.L.L.C. 16,065, (“**Columbia Hydro**”):

... CHC is a wholly owned subsidiary of the British Columbia Hydro and Power Authority (“Hydro”). It is certified by a poly party certification listing 34 trade unions as the bargaining agent. AHC is a voluntary council of trade unions and international trade unions.

CHC and Hydro have an agreement in which CHC agrees, among other things, to supply a labour force for all contractors and subcontractors engaged in the construction of certain hydro-electric power projects undertaken by Hydro. Construction contractors who wish to bid on projects undertaken by Hydro must agree, as a condition of tendering, to be bound by the Agreement negotiated between CHC and AHC.

The [34] trade unions collectively are known as the Allied Hydro Council of British Columbia. AHC, as stated in the agreed statement of facts, is a council of local trade unions and international trade unions. It was formed on October 4, 1961 to secure collective agreements on hydro-electric power projects on the Peace River and the Columbia River. The constitution and by-laws were adopted and approved on that date. The membership in AHC is comprised of 17 international unions and 14 building and construction trade unions and three non-traditional construction trade unions. There is one representative of AHC from each international union and one from each local union or group of local unions of each international union.

On July 10, 1962, a certification was issued for 15 local unions. On August 21, 1962, the certification was amended to add an additional 15 local unions. The certification has been amended from time to time, both adding and deleting trade unions from the certification.

A certification was issued in the name of AHC on September 15, 1989 respecting the Kemano Completion Project. This is in contrast to the certification for CHC which refers to an appended list of trade unions: "...the trade unions listed on the reverse hereof". We will comment later on this fact. AHC has negotiated four collective agreements and several letters of understanding on behalf of its members. (pp. 162, 181-182).

[5] AHC's constitution provides that its members have "appointed this Council's officers as its agent to handle all matters pertaining to certification and collective agreements", and that a collective agreement negotiated by the Council's officers must be approved by a two-thirds vote of the members of the Council.

[6] The certification held by AHC with respect to CHC provides that the Board:

Hereby certifies the trade unions listed on the reverse hereof as the bargaining agent for the employees in a unit composed of employees in British Columbia except those excluded by the Code, employed by Columbia Hydro Constructors Ltd.

[7] At present, there are twenty-six unions listed on the AHC certification.

CMAW's Certification Application

[8] On September 26, 2006, CMAW applied to the Board for certification of carpenters currently represented by BCPC on behalf of its constituent locals.

[9] CMAW brought its certification application pursuant to s. 18(1) of the **Code** which provides:

18(1) If a collective agreement is not in force and a trade union is not certified as bargaining agent for a unit appropriate for collective bargaining, a trade union claiming to have as members in good standing not less than 45% of the employees in that unit may at any time, subject to the regulations, apply to the board to be certified for the unit.

[10] On September 27, 2006, the Board provided notice of CMAW's certification application to CHC, AHC, and to each of the 26 unions listed in the then current poly-party certification. In that notice, the Board indicated that it would conduct a hearing into CMAW's s. 18(1) application on October 3, 2006.

[11] At the outset of the hearing, Mr. Arnold Berry, counsel for the United Brotherhood of Carpenters and Joiners of America ("UBCJA"), Local 1541 advised the Board that he was also seeking standing for the international union, UBCJA, on the grounds that it was a member of AHC and wished to make submissions regarding the dispatch of carpenters to Hydro projects.

[12] Counsel for CMAW opposed the UBCJA's application for standing on the basis that the international union was not a trade-union within the meaning of the **Code**. The Board established time-lines for the exchange of submissions concerning UBCJA's standing on the certification application. Those time-lines provided for the exchange of submissions commencing October 11 and concluding October 25, 2006.

[13] Also at the hearing of October 3, 2006, the Board determined that it would invite submissions from the parties on the question of whether the Board's previous decisions in **C.A.E.** and **S.F.U.** governed CMAW's certification application. Mr. Berry has deposed that he and counsel for CMAW agreed that the issue of UBCJA's standing need not be addressed, pending the determination of the legal question posed by the Board concerning its prior decisions in **C.A.E.** and **S.F.U.**

[14] On October 4, 2006, the Board wrote to the interested parties inviting written submissions on the question of whether **C.A.E.** and **S.F.U.** governed CMAW's certification application.

[15] On October 13, 2006 CHC filed written submissions arguing that it was beyond the jurisdiction of the Board to allow CMAW's application without the consent of AHC and its constituent members.

[16] On November 3, 2006, Mr. Berry, on behalf of both UBCJA and UBCJA Local 1541, made a submission to the Board adopting the submissions of CHC.

The Original Decision

[17] On March 8, 2007 the Board made its Original Decision, concluding that its prior jurisprudence established that the Board could not replace a member union of a voluntary poly-party certification with another union, absent the consent of the other unions named in the certification. In the result, the Board dismissed CMAW's certification application without determining UBCJA's application for standing on that application.

CMAW's Reconsideration Application

[18] On March 22, 2007, CMAW applied pursuant to s. 141 of the **Code** for leave and reconsideration of the Original Decision. CMAW contended that the Original Decision was inconsistent with **Code** principles, and unnecessarily fettered the Board's ability to respond to changes in the construction industry.

[19] In its application for reconsideration, CMAW argued that s. 142 of the **Code** provided the Board with the statutory authority necessary to grant its application, that s. 142 applied to a poly-party certification, and that "the Board may, on its own motion, vary such certifications".

[20] Sections 141 and 142 of the **Code** provide:

Reconsideration of decisions

141(1) On application by any party affected by a decision of the board, the board may grant leave to that party to apply for reconsideration of the decision

(2) Leave to apply for reconsideration of a decision of the board may be granted if the party applying for leave satisfies the board that

- (a) evidence not available at the time of the original decision has become available, or
- (b) the decision of the board is inconsistent with the principles expressed or implied in this Code or in any other Act dealing with labour relations.

...

Variation and continuation of certification or accreditation

142 The board, on application by any party or on its own motion, may vary or cancel the certification of a trade union or the accreditation of an employer's organization.

[21] On April 24, 2007, the Board gave notice to CHC, AHC, and to all of the trade unions then listed in the poly-party certification of CMAW's application for reconsideration, and requested full written submissions. The notice advised the parties that the Board might decide the application without an oral hearing and invited the parties to provide submissions which comprehensively set out the facts and arguments they wished the Board to consider in making its decision.

[22] The CHC, AHC and the other member unions of the poly-party certification who opposed CMAW's application filed written submissions arguing that the Board did not have the jurisdiction to vary the poly-party certification under s. 142 ,or

alternatively, if the Board had that authority, it ought not to do so in the circumstances of this case.

[23] Mr. Berry, on behalf of UBCJA, Local 1541 filed a submission on May 3, 2007 in which he argued that s. 142 did not provide the Board with jurisdiction to grant CMAW's application.

[24] The UBCJA did not apply for interested party standing on CMAW's reconsideration application.

[25] The AHC did not raise before the Board any constitutional argument asserting that its rights to freedom of association under s. 2(d) of the **Charter** would be violated if the Board allowed CMAW's application.

The Reconsideration Decision

[26] In response to the submissions of CHC and the unions opposing the reconsideration that CMAW either could not, or should not be permitted to raise s. 142 for the first time at reconsideration, the Board held at para. 30 of the Reconsideration Decision:

Although the Applicants now rely on Section 142 rather than (or in addition to) Section 18, the nature of their application and the arguments they make in support of it have not fundamentally changed. CHC and the Respondents have had a full opportunity before this panel to respond to the Applicants' arguments that the application should be allowed pursuant to Section 142. In these circumstances, we are not prepared to dismiss this matter on the basis that the Applicants cannot now rely on Section 142. If necessary, we would

rely on the Board's power to apply Section 142 "on its own motion". We find this power can be exercised in the context of a Section 141 application.

[27] The Board then turned to the two fundamental objections raised to CMAW's application under s. 142: first that the Board did not have jurisdiction to vary the AHC certification without the consent of the other members of the AHC; and second, if the Board did have jurisdiction, it should not do so for reasons of labour relations policy.

[28] Addressing the first objection, the Board held at para. 33 of the Reconsideration Decision that the AHC certification was a "certification" within the meaning of s. 142, and the Board therefore had the jurisdiction to vary or cancel it on its own motion under that section. The Board held at para. 40 that, before certification, an initial grouping of unions who apply under s. 20 of the **Code** for a poly-party certification "may determine their own composition or membership". However, upon certification "membership in the poly-party is determined by the certification order".

[29] The Board also rejected AHC's argument that CMAW's application was beyond the jurisdiction of the Board because it sought to vary the constituency of AHC itself, rather than to vary a decision or order of the Board. The Board found that the application sought the variation of the AHC certification, which was a decision or order of the Board. At para. 42 of the Reconsideration Decision, the Board noted that the *effect* of varying the AHC certification so as to add or delete constituent members of the poly-party would also inevitably affect the constituency

of the AHC itself. However, that effect did not mean that the applicants were not requesting a variance or order of the Board under s. 142.

[30] In response to the submissions of AHC and CHC that the legislature did not intend to give the Board authority to vary a poly-party certification without the consent of all the member unions, the Board said at paras. 45 through 47:

The CAE and SFU decisions reflect the arguments of CHC and the Respondents that the Code evinces a legislative intent not to give the Board authority to vary a poly-party certification in the absence of the consent of the other constituents of the poly-party. They point out that a poly-party union formed by application under Section 20 can be contrasted with a council of trade unions formed under Section 41. Section 20 poly-party unions come together voluntarily, and the unions themselves determine the initial membership of the poly-party. By contrast, under Section 41 the Board has the power, on direction of the Minister, to certify a council of trade unions and to “vary a certification by substituting for the trade union or trade unions named in it a council of trade unions as bargaining agent for that unit”: Section 41(3)(b).

While we find the language and intent of Section 41 and Section 20 are different, we are not persuaded that the language of Section 20 evinces a legislative intent that the Board shall not, in any circumstances, exercise its authority to vary certifications under Section 142 in respect to a Section 20 certification without consent of the other constituent members. Section 20 states in its entirety:

20. Two or more trade unions claiming to have together as members in good standing a majority of employees in a unit appropriate for collective bargaining may join in an application under this Part, and the provisions of this Code relating to an application by one trade union, and all matters or things arising from it, apply to the application and those trade unions as if one trade union were applying.

On its face, in our view, Section 20 does not suggest that Section 142 does not apply to Section 20 certifications. On the contrary, it suggests that it does apply, because Section 142 is a provision of the Code which applies to certification arising from an application by “one trade union”, and Section 20 says that such provisions apply to Section 20 certifications. We therefore reject the submission that Section 20 is a specific provision which overrides the general Section 142 power.

[31] The Board also rejected the argument that CMAW, rather than seeking an order from the Board to vary the AHC certification under s. 142, was really seeking an order to create an entirely new bargaining agent in the form of an AHC which did not include BCPC, but did include CMAW as a constituent member. The Board stated at para 58:

The labour relations reality is that all parties have recognized that adding or deleting constituent members from the AHC Certification does not result in the creation of an entirely new bargaining agent; it simply varies the existing certification, and consequently the existing bargaining agent, in terms of its constituent members. The CHC and the Respondents do not argue that the Board has no authority to vary the AHC Certification by adding or deleting members, only that it has no jurisdiction to do so without consent. We find that characterizing the request to add CMAW to the AHC Certification is seeking to have the Board create an entirely new bargaining agent does not reflect past and present labour relations realities, and that it is more accurate, from both a practical and a statutory perspective, to characterize the request as an application to vary the existing AHC Certification.

[32] After concluding that it had jurisdiction to vary the AHC certification under s. 142, the Board then considered whether it should do so in the circumstances of this case.

[33] After referring to a background to the formation of CMAW, and BCPC's role in that process, the Board held, at paras. 68 to 70:

In our view, given that BCPC does not oppose and in fact supports CMAW replacing BCPC on the AHC Certification, the Applicants' application should be granted unless we are persuaded otherwise by the objections raised by those opposing their application.

The strongest objection to CMAW replacing BCPC on the AHC Certification is simply the fact that the application is opposed by members of the AHC and the AHC itself. While we have rejected the argument that as a matter of jurisdiction the Board cannot grant the application to add CMAW to the AHC Certification without the consent of the other constituent members of the AHC, we accept the argument that, as a matter of policy, in the past the Board has declined such applications where they are opposed, simply on the basis that consent should be required because of the "voluntary" nature of poly-party unions certified under Section 20.

To the extent that CAE and SFU stand for the proposition that, as a matter of policy, the consent of the constituents of a poly-party is always required for the addition of a union, we disagree. In our view, that approach fetters the Board's broad discretionary authority under Section 142 of the Code which includes considering all the circumstances of a case. We do accept that the absence of consent (and in this case the opposition) of AHC and some of its members is a relevant consideration.

[34] The Board then identified and weighed two competing concerns. It noted that on one hand, there was merit to the argument that where a poly-party union is formed voluntarily, the Board should give weight to the wishes of the constituent members of the poly-party with respect to adding or replacing members, and should

not be quick to force a new member on that entity. On the other hand, there was also considerable merit to the argument that AHC should not be permitted to overrule the wish of one of its constituent members, BCPC, to be replaced by another entity, CMAW, when that result flowed from a transformation undertaken as a means of dealing with significant economic and labour relations challenges (at para. 71).

[35] After weighing those competing concerns, the Board concluded, at para. 83:

In the circumstances of this case, we are not persuaded to deny CMAW and BCPC's application. The application reflects the wishes of employees who voted to have CMAW represent BCPC as their bargaining agent in order to deal with the challenges in the construction industry. In order not to unduly restrict the opinion CMAW represents, we grant the application to have CMAW replace BCPC in the AHC Certification.

[36] The Board varied the AHC certification under s. 142 by deleting BCPC and adding CMAW. The Board stated that the variance was made either as a result of granting CMAW's application under s. 142 or as a result of the Board's own motion under that provision. Finally, the Board dismissed CMAW's s. 141 application for leave and reconsideration of the Original Decision on the basis that it had been rendered moot by the decision under s. 142.

Discussion and Analysis

[37] The petitioner submits that the central issue raised in this case is whether the Board has jurisdiction under the **Code** to vary the AHC certification without the

consent of the members of AHC. According to the petitioner, that issue not only raises a question of law concerning the Board's jurisdiction to intervene in the internal affairs of a trade union, but also raises a true question of jurisdiction.

[38] A true question of jurisdiction arises where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter: **Dunsmuir v. New Brunswick** 2008 SCC 9, [2008] 1S.C.R. 190, at para. 59.

Standard of Review

[39] The petitioner submits that because the Board's interpretation of s. 142 of the **Code** raises a true question of jurisdiction, it is reviewable on a standard of correctness.

[40] Section 58 of the **Administrative Tribunals Act**, SBC 2004, c.45 (**ATA**), which applies to the Labour Relations Board by operation of s. 115.1 of the **Code**, provides:

58(1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

(b) 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, and

(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

[41] The petitioner acknowledges that the Board is an expert tribunal within the meaning of s. 58(1) of the **Code**, and says that under s. 58(2)(c) of the **ATA**, the applicable standard of review is correctness.

[42] In the alternative, the petitioner argues that if s. 58(2)(a) of the **ATA** applies, then it must now be read as incorporating the standard of reasonableness articulated by the Supreme Court of Canada in **Dunsmuir** at para. 47, which at common law replaces the former standards of "patent unreasonableness" and "reasonableness *simpliciter*".

[43] CHC also submits that the question of the Board's jurisdiction to vary AHC's certification and membership is reviewable on the standard of correctness under s. 58(2)(c) of the *ATA*. In addition to relying upon *Dunsmuir* at paras. 36, 50 and 128, CHC refers to *Canadian Pacific Air Lines Ltd. v. C.A.L.P.A.*, [1993] 3 S.C.R. 724 at para. 7 and *Kindersley & District Co-Operative Ltd. v. R.W.D.S.U.* (1998), 172 Sask. R. 114, 167 D.L.R. (4th) 410 at para. 30 (C.A.). In *Canadian Pacific* the Court found that the interpretation of s. 118 (a) of the *Canada Labour Code*, which authorized the Canada Labour Relations Board to compel witnesses to attend and give evidence, involved a question of jurisdiction reviewable on the standard of correctness. In *Kindersley*, the Saskatchewan Court of Appeal considered the provincial Labour Board's jurisdiction to extend the application of a collective agreement to a non-union operation acquired by a unionized employer. The court held, at para. 30, that the relevant legislation was a "jurisdiction conferring provision" reviewable on a standard of correctness:

30. In my opinion s. 42 requires the Board to decide upon jurisdiction. It is a jurisdiction-conferring provision. It concerns the power of the Board to respond to, among other things, an application to amend a certification order. In contrast to s. 5, s. 42 contains no specific powers or limits on its powers. The Board is required to determine the extent of its remedial power under the *Act* with respect to the order to amend. It, in my opinion, confers jurisdiction and like Beetz J., I consider it "manifest" that the interpretation of these provisions raises a question of jurisdiction about which the Board cannot err without committing an excess of jurisdiction. A simple error of interpretation will result in an excess of jurisdiction. The standard of review is correctness.

[44] Neither court in **Canadian Pacific** or **Kindersley** applied the pragmatic and functional approach to the determination of the standard of review.

[45] The respondent CMAW submits that s. 138 of the **Code** confers jurisdiction on the Board to hear and determine applications under the **Code**, and that the determination of an application under s. 142, including the Board's jurisdiction to invoke that section, is a matter falling within the exclusive jurisdiction of the Board. CMAW argues that the Board's Reconsideration Decision is subject to review on the statutory standard of patent unreasonableness under s. 58(2)(a) of the **ATA**. CMAW submits that the judgment of the Court of Appeal in **United Brotherhood of Carpenters and Joiners of America, Locals 527, 1370, 1598, 1907 and 2397 v. Labour Relations Board**, 2006 BCCA 364, 55 B.C.L.R. (4th) 325 [**"Local 527"**], which addressed the Board's exclusive jurisdiction in relation to an application for certification by a council of trade unions under s. 18(4)(b) of the **Code**, is equally applicable to s. 142.

[46] The Board argues that the Court may find that the proper interpretation of s. 142 of the **Code** is a "finding of law" within the Board's exclusive jurisdiction and that therefore under s. 58(2)(a) of the **ATA**, the standard of review is patent unreasonableness. Counsel for the Board relies upon **HEU v. BCLRB, Nanaimo Senior Village Partnership and Well-Being Seniors Services Ltd.**, 2006 BCSC 1879, where Baker J. stated at para. 45:

In my view, the issues posed by the application of the HEU for certification of certain of the employees of Nanaimo Seniors Village are

also the type of issues that the Legislature intended the LRB to decide. The question of whether the ss. 33(10) time bar applied in the circumstances, and whether to abridge the bar, or decline to do so are not matters going to jurisdiction, in my view, but matters falling squarely on exclusivity within the jurisdiction of the LRB. Accordingly, this Court may only interfere if the decisions are shown to be patently unreasonable.

[47] Similarly, in ***Hospital Employees' Union v. British Columbia (Labour Relations Board)***, 2006 BCSC 1334 [***BMETS***], Sigurdson J. held at para. 78 that the issue of the interpretation of the labour relations provisions of the ***Health Authorities Act***, R.S.B.C. 1996, c.180 was a specific and narrow labour relations issue, which involved a matter that the Board was given the exclusive jurisdiction to determine.

[48] The Board also submits that ***Dunsmuir*** has not changed the law with respect to determining the appropriate standard of review. If the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to the tribunal on the particular category of question before it, then an exhaustive inquiry is not required. Where a standard of review analysis is necessary, it will be contextual, and will take into account the same factors as the pragmatic and functional approach, including the presence or absence of a privative clause; the purpose of the tribunal as determined by interpretation of enabling legislation; the nature of the question at issue; and the expertise of the tribunal: ***Dunsmuir*** paras. 62, 64.

Discussion

[49] Sections 136 through 138 of the **Code** address the Board's jurisdiction and contain strong privative clauses:

136 Jurisdiction of board

(1) Except as provided in this Code, the board has and must exercise exclusive jurisdiction to hear and determine an application or complaint under this Code and to make an order permitted to be made.

(2) Without limiting subsection (1), the board has and must exercise exclusive jurisdiction in respect of

(a) a matter in respect of which the Board has jurisdiction under this Code or regulations, and

(b) an application for the regulation, restraint or prohibition of a person or group of persons from

(i) ceasing or refusing to perform work or to remain in a relationship of employment,

(ii) picketing, striking or locking out, or

(iii) communicating information or opinion in a labour dispute by speech, writing or other means.

137 Jurisdiction of court

(1) Except as provided in this section, a court does not have and must not exercise any jurisdiction in respect of a matter that is, or may be, the subject of a complaint under section 133 or a

matter referred to in section 136, and, without limitation, a court must not make an order enjoining or prohibiting an act or thing in respect of them.

(2) This Code must not be construed to restrict or limit the jurisdiction of a court, or to deprive a court of jurisdiction to entertain a proceeding and make an order the court may make in the proper exercise of its jurisdiction if a wrongful act or omission in respect of which a proceeding is commenced causes immediate danger of serious injury to an individual or causes actual obstruction or physical damage to property.

(3) Despite this Code or any other Act, a court must not, on an application made without notice to any other person, order an injunction to restrain a person from striking, locking out or picketing, or from doing an act or thing in respect of a strike, lockout, dispute or difference arising from or relating to a collective agreement.

(4) A court of competent jurisdiction may award damages for injury or losses suffered as a consequence of conduct contravening Part 5 if the Board has first determined that there has been a contravention of Part 5.

138 Finality of decisions and orders

A decision or order of the board under this Code, a collective agreement or the regulations on a matter in respect of which the Board has jurisdiction is final and conclusive and is not open to question or review in a court on any grounds.

[Emphasis added]

[50] In addition, s. 139 of the **Code** provides that the Board has exclusive jurisdiction to decide a question arising under the **Code**, and that on application by any person or on its own motion the Board may decide for all purposes of the **Code**

any question, including, without limitation, the matters set out in ss. (a) through (w) of s. 139.

[51] Because the Board's enabling legislation contains privative clauses, it is "an expert tribunal" within the meaning of s. 58(1) of the **ATA**.

[52] Here, the question to be answered is whether the Board's interpretation of its powers under s. 142 was "in respect of a matter over which it has exclusive jurisdiction under a privative clause". If so, then the Board's decision on the interpretation and application of s. 142 is reviewable under s. 58(2)(a) of the **ATA**, on a standard of patent unreasonableness. If not, then it is reviewable under s. 58(2)(c) of the **ATA** on the standard of correctness.

[53] The Supreme Court of Canada has cautioned that reviewing courts should be wary before finding that empowering provisions of statutes creating administrative tribunals are jurisdictional in nature, and thereby increasing the likelihood that their jurisdiction will be unnecessarily limited: ***International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd.***, [1996] 2 S.C.R. 432, 135 D.L.R. (4th) 385, at para. 20. [***I.L.W.U. v. Local 514***].

[54] In ***I.L.W.U., Local 514***, the Court applied the pragmatic and functional approach to find that the Canada Labour Relations Board had jurisdiction to determine the appropriate bargaining unit, and that the Board's decision was reviewable on a standard patent unreasonableness.

[55] The determination of whether or not the Board's interpretation and application of s. 142 is within its exclusive jurisdiction calls for the application of the pragmatic and functional approach in the context of the provisions and purposes of the Board's enabling statute, the **Code**.

[56] "The goal is to determine whether the legislature intended that the question in issue be ultimately decided by the tribunal, rather than the courts": **Canadian Broadcasting Corp. v. Canada (Labour Relations Board)**, [1995] 1 S.C.R. 157, 121 D.L.R. (4th) 385 at para. 29.

[57] The decision of the Supreme Court of Canada in **Dunsmuir** has not changed this approach. Although the Court has adopted the term "standard of review analysis" in place of the "pragmatic and functional approach", the analytical framework remains the same: **Dunsmuir** at paras. 62 – 64.

[58] As the Court noted in **Dunsmuir** at para. 62, where the jurisprudence has already identified the proper degree of deference with respect to the particular category of question, a full standard of review analysis is not required. For the reasons that follow, I accept the submissions of CMAW and the Board that the decision of the Court of Appeal in **Local 527** determines the standard of review applicable to the Board's jurisdiction on questions of certification generally, and is directly applicable to the Board's jurisdiction to interpret and apply s. 142 of the **Code** in this case.

[59] The issue in **Local 527** was whether the Board had jurisdiction to consider the application by a council of trade unions for certification under s. 18(4)(b) when only one of its constituent union members was a party to a collective agreement with an employer in respect of which the application was made. Section 18(4)(b) of the **Code** provides:

18(4) Despite this section and section 19

...

(b) a council of trade unions comprised of trade unions that are parties to collective agreements may apply to be certified at any time in place of those trade unions.

[60] The Board decided that a council of trade unions could apply under s. 18(4)(b) where at least one of its members was a party to the collective agreement.

[61] In **Local 527**, the central question before the Court of Appeal was whether the interpretation of s. 18(4)(b) was a matter over which the Board had exclusive jurisdiction under s. 58(1) of the **ATA**, in which case the standard of review was patent unreasonableness. The Court of Appeal applied the pragmatic and functional approach to determine whether the Board's decision was within its exclusive jurisdiction.

[62] The Court of Appeal began by considering the first factor in the pragmatic and functional approach, the presence or absence of a privative clause. Levine J.A. explained at para. 49 that although the exclusive grant of jurisdiction to the Board under ss. 136(1) and 139 does not specifically include the interpretation of s.

18(4)(b), it does raise other aspects of issues raised by that section and by certification applications generally. The broad wording of the privative clauses in sections 136 to 139 indicated that the legislature intended the Board to have the exclusive jurisdiction to decide questions arising under the **Code**.

[63] Section 142 gives the Board the power, on application by any party or on its own motion, to vary or cancel the certification of a trade union. The interpretation of s. 142 is not expressly included in s. 139. However, the powers of the Board enumerated under s. 139 to address issues relating to certification applications generally - including what persons are bound by or parties to a collective agreement, whether a group of employees is an appropriate bargaining unit, and whether an organization of trade unions is a council of trade unions - would also apply to applications to vary or cancel a certification. A decision by the Board to vary a certification under s. 142 is protected by the Board's privative clauses and is clearly a question arising under the **Code**, for which the legislature intended the Board to have exclusive jurisdiction.

[64] Turning to the second factor, the expertise of the tribunal, the court in **Local 527** at para. 50 adopted the chambers judge's characterization of the Board as a "long established specialized tribunal". That conclusion clearly applies to the case at bar.

[65] With respect to the third factor in the pragmatic and functional approach, the purpose of the **Code** and s. 18, Levine J.A., in **Local 527** at para. 51 said:

51. The chambers judge referred to the purpose of the legislation and of ss. 18 and 19 of the *Code* in particular (at paras. 13 and 16). He noted that s. 18 is one of the provisions of the *Code* that gives the Board jurisdiction to certify bargaining units in a variety of circumstances, and that ss. 18 and 19 govern the timing of applications for certification, “with the obvious intention of creating a relative peace or harmony within the parameters of collective agreements”. These provisions reflect the duties of the Board set out in s. 2 of the *Code*, which include encouraging “the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees” (s. 2(c)), and encouraging “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” (s. 2(d)). I agree with the chambers judge, who concluded (at para. 17) that the Legislature intended the Board to interpret the *Code* in making decisions relating to certification.

[Emphasis added]

[66] The conclusion of the Court of Appeal that the legislature intended the Board to interpret the **Code** in making decisions relating to certification applies with equal force to the interpretation of s. 142 on an application to vary or cancel a certification. Such an application engages the statutory duties of the Board under s. 2 of the **Code**. Those duties include recognizing “the rights and obligations of employees, employers and trade unions under this Code” (s. 2(a)), and encouraging “co-operative participation between employers and trade unions in resolving work place issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity” (s. 2(d)).

[67] With respect to the fourth factor, the nature of the question, the court found in **Local 527** at para. 52 that the interpretation of the **Code** involves a question of law. Although a tribunal decision on a question of law is generally considered to be

entitled to less deference, in **Local 527** the other three factors led the Court of Appeal to the conclusion that the interpretation of s. 18(4)(b) of the **Code** was, in the terms of s. 58(2)(a) of the **ATA**, a “finding of ... law ... in respect of a matter over which [the Board] has exclusive jurisdiction under a privative clause [which] must not be interfered with unless it is patently unreasonable”.

[68] Following the reasoning of the Court of Appeal in **Local 527**, I find that the interpretation of s. 142 also involves a question of law falling within the exclusive jurisdiction of the Board that is subject to review under s. 58(2)(a) of the **ATA** on a standard of patent unreasonableness.

The Interpretation of “Patently Unreasonable” in s. 58(2)(a) of the ATA

[69] The legislature has expressed its intention in s. 58(2)(a) of the **ATA** that decisions of expert tribunals such as the Board on questions of law within their exclusive jurisdiction are to be reviewed on the deferential standard of patent unreasonableness. The definition of “patently unreasonable” in s. 58(3) applies only to the review of discretionary decisions. In the absence of an applicable statutory definition, the legislature must have intended the term “patently unreasonable” in s. 58(2) to take its meaning from the common law in effect when the **ATA** was enacted.

[70] The Supreme Court of Canada described the standard of patent unreasonableness in **Law Society of New Brunswick v. Ryan**, [2003] 1 S.C.R. 247, 2003 SCC 20 at para. 52:

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.

[71] In **CAIMAW, Local 14 v. Paccar Canada Ltd.**, [1989] 2 S.C.R. 983, 62 D.L.R. (4th) 437 at p. 453, La Forest J., with Dickson C.J.C. concurring, described the focus of the court’s inquiry on a review for patent unreasonableness:

Where, as here, an administrative tribunal is protected by a privative clause, this court has indicated that it will only review the decision of the board if that board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function: see *CUPE, Local 963 v. N.B. Liquor Corp.* (1979), 97 D.L.R. (3d) 417, [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237. The tribunal has the right to make errors, even serious ones, provided it does not act in a manner so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review” (p. 425). The test for review is a “severe test”: see *Blanchard v. Control Data Canada Ltd.* (1984), 14 D.L.R. (4th) 289 at p. 302, [1984] 2 S.C.R. 476, 84 C.L.L.C. para 14,070. This restricted scope of review requires the courts to adopt a posture of deference to the decisions of the tribunal. Curial deference is more than just a fiction courts resort to when they are in agreement with the decisions of the tribunal. Mere disagreement with the result arrived at by the tribunal does not make that result “patently unreasonable”. The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result. Privative clauses, such as those contained in ss. 31-34 of the Code, are permissible exercises of legislative authority, and to the extent that they restrict the scope of curial review within their constitutional jurisdiction, the court should respect that limitation and defer to the board.

[72] In *Dunsmuir*, the Supreme Court of Canada revisited the common law standards of review. The Court collapsed patent unreasonableness and reasonableness *simpliciter* into a single standard of “reasonableness”. The result is a common law system of judicial review based on two standards only: correctness and reasonableness. The Court in *Dunsmuir* defined reasonableness at para. 47:

47. Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[73] AHC submits that s. 58(2)(a) must now be read as incorporating the *Dunsmuir* standard of reasonableness.

[74] During argument, counsel referred me to two decisions of this court touching upon the impact, if any, of *Dunsmuir* on the statutory standards of review under the *ATA*.

[75] In *Howe v. 3770010 Canada Inc.* 2008 BCSC 330 at paras. 17-19 [*“Howe”*], Gerow J., after noting that one must look to the common law for the definition of patently unreasonable in s. 58(2)(a) of the *ATA*, applied the *Dunsmuir* standard of review of reasonableness. In *Carter v. Travelex Canada Ltd.* 2008 BCSC 405 at

paras. 13 and 14, Hinkson J. on a judicial review of a decision of the B.C. Human Rights Tribunal under s. 59 of the **ATA**, and without the benefit of Gerow J.'s reasons in **Howe**, held that despite **Dunsmuir**, three standards of judicial review (including patent unreasonableness) remain applicable in British Columbia, depending upon the nature of the question.

[76] This issue has received further judicial consideration in **Lavigne v. British Columbia (Workers Compensation Review Board)**, 2008 BCSC 1107, **British Columbia Securities Commission v. Burke**, 2008 BCSC 1244, **Evans v. University of British Columbia**, 2008 BCSC 1026 [**Evans**], and **Brown v. Residential Tenancy Act**, 2008 BCSC 1538 [**Brown**].

[77] In **Evans**, Macaulay J. considered the application of **Dunsmuir** to s. 59 of the **ATA**, which sets standards of review for administrative tribunals whose enabling legislation contains no privative clause. Macaulay J. held at paragraphs 6 and 8 that the clear legislative intent of section 59 is “to codify the applicable standard of review”, and that **Dunsmuir** does not address legislative standards of review. In the face of a clear expression of legislative intent, he was not prepared to import the new definition of reasonableness into the **ATA**.

[78] Most recently, Hinkson J., in **Brown** at para.37, after reviewing all of the authorities on this point, held that the logic of **Evans** applied equally to section 58 of the **ATA**, and that despite **Dunsmuir**, three standards of review continue to apply to judicial review in British Columbia.

[79] When it enacted s. 58(2)(a) of the **ATA**, the legislature made a choice to apply to expert tribunals including the Labour Relations Board the most deferential standard of review of patent unreasonableness. Following **Evans** and **Brown**, I find that Section 58 of the **ATA**, rather than **Dunsmuir**, determines the standard of review in this case. The standard of patent unreasonableness as that term was judicially defined when the **ATA** was enacted, continues to apply.

Is The Reconsideration Decision Patently Unreasonable?

[80] For the reasons that follow, I have concluded that the Reconsideration Decision is not patently unreasonable.

[81] If I am wrong, and the Board's decision is reviewable on the **Dunsmuir** standard of reasonableness, I am satisfied that it falls within the range of outcomes that are defensible on the facts and the law.

[82] The petitioner argues that of the Board ignored its previous jurisprudence in **CAE** and **SFU**, mischaracterized the foundation of those decisions as mere policy, and exceeded its powers by interfering in the internal affairs of AHC and its constituent members, and by imposing a new council of unions without the consent of the member unions. The petitioner says that the Board's reasons for the Reconsideration Decision are illogical.

[83] Supporting the petitioner, the respondents UA Local 170, IUPAT Local 139 and Glaziers Local 1527 argue that where a variance changes the composition of the council, it has the legal effect of establishing a new and different bargaining

agent. They argue that the Board exceeded its powers by imposing a variance under s. 142 when it could only create or vary a joint council of unions without consent pursuant to s. 41 of the **Code**. Under that section, the minister may in limited circumstances direct the Board to consider whether in a particular case a council of trade unions would be an appropriate bargaining agent. By s. 41(3)(b) the Board may vary a certification by substituting for the trade union or trade unions named in it a council of trade unions as bargaining agent for that unit. It is common ground that the Board did not purport to act under s. 41, and that it was not applicable to this case.

[84] In order to succeed, the petitioner must show that the Reconsideration Decision was clearly irrational, or evidently not in accordance with reason.

[85] At paras. 26 to 36 of these Reasons, I have already summarized the Reconsideration Decision. There, I set out portions of that decision showing how the Board analyzed and then answered first, the question of law of whether it had jurisdiction to vary the AHC certification without consent, and second, the question of whether, as a matter of labour relations policy, it should do so.

[86] The petitioner attacks the Board's statement, at para. 39 of the Reconsideration Decision that membership in the AHC depends upon being listed in the AHC certification and that "while many aspects of the AHC are controlled by, or determined under, the AHC constitution, membership – that is, *who belongs to the AHC* – is not determined by the AHC constitution once the AHC has been certified. It is determined by the AHC Certification." The petitioner says the Board was

obviously wrong, since AHC's constitution provides for membership and representation on its council by international unions that are not certified under the **Code**. Further, the petitioner argues that the Board's conclusion that the certification, rather than the constitution, determines membership amounts to interference, in excess of the Board's jurisdiction, in the internal affairs of AHC and its constituent members.

[87] The Board's discussion of membership in AHC being dependent upon the certification forms part of its consideration of the AHC constitution and the consequences of certification for the purposes of the **Code**. At para. 38 of the Reconsideration Decision, the Board states:

Beginning with this last point, the AHC, the AHC constitution and the AHC Certification are separate and distinct legal entities. For the purposes of the Code, the AHC constitution is the required constitution, and the AHC Certification is the document issued by the Board pursuant to the Code which grants exclusive bargaining authority and makes the AHC subject to all the provisions of the Code to which trade unions certified under the Code are subject....

[Emphasis added]

[88] In this context, the Board's statements in para. 39 of the Reconsideration Decision about membership in AHC being dependent upon certification may fairly be read as a discussion of the consequences of certification for membership in the AHC by the local and provincial trade unions certified under the **Code**. Viewed in that light, the Board's reasons are not clearly irrational, or even controversial.

[89] The Board rejected AHC's submission that CMAW's application was beyond the Board's jurisdiction because it was not asking the Board to vary a decision or order, but rather to vary the constituency of the AHC by removing BCPC and imposing CMAW. The Board held that CMAW had applied to vary a decision or order of the Board, the AHC certification. While the effect of varying the AHC certification to add or delete constituent members of the poly-party would inevitably affect the constituency of AHC that, in the Board's analysis, did not mean that CMAW was not requesting a variance of an order of the Board under s. 142.

[90] In its Reconsideration Decision, the Board did not, as the petitioner contends, ignore or mischaracterize its previous decisions in **C.A.E.** and **S.F.U.** At para. 48, the Board acknowledged that these decisions provided some jurisprudential support for the proposition that the Board does not have jurisdiction to vary a poly-party certification, absent the consent of the constituent members of the poly-party union. At para. 50, the Board stated that to the extent that **C.A.E.** and **S.F.U.** interpret the **Code** as "not giving the Board *jurisdiction* to amend a certification issued under Section 20, except with consent, with respect, we are not persuaded that this is a correct interpretation of the Code". The Board then went on to explain its reasons for not following **C.A.E.** and **S.F.U.** Section 20 of the **Code** applies to joint applications for certification by two or more trade unions. Section 20 provides that "the provisions of this Code applying to an application by one trade union, and all matters or things arising from it, apply to the application and those trade unions as if one trade union were applying". The Board reasoned that s. 142 applies to certifications arising from an application by one trade union. The Board found that s.

142 of the Code granted the Board an unfettered ability to vary a poly-party certification just as it has an unfettered ability to vary the certification of any trade union certified under the **Code**. At para. 56 of its Reconsideration Decision, the Board found this interpretation to be consistent with the express language of s. 20, and with s. 142 which does not exempt s. 20 poly-party certifications from its reach.

[91] Finally, the Board rejected the argument that what CMAW sought was not an order to vary the AHC certification under s. 142, but rather an order to create an entirely new bargaining agent, namely an AHC, which did not include BCPC, but did include CMAW as a constituent member. The Board did acknowledge that this was one way of characterizing CMAW's application. However, as the Board noted, the AHC certification had been varied in the past by adding or deleting constituent members without any suggestion that an entirely new bargaining agent resulted. At para. 58 of the Reconsideration Decision, the Board found that characterizing the request to add CMAW to the AHC certification as an attempt to have the Board create an entirely new bargaining agent did not reflect past and present labour relations realities. It was more accurate, from both a practical and a statutory perspective, to characterize the request as an application to vary the existing certification.

[92] In support of its submissions that the Board, by deleting BCPC and adding CMAW, was creating a new and differently constituted bargaining agent, the petitioner refers to ***United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Local 170)***

v. British Columbia (Ministry of Labour and Citizens' Services), 2007 BCSC 1518. That case was a judicial review of the Minister's power under s. 41(1) of the **Code** to direct the Labour Relations Board to consider whether there should be a revision to membership of the Bargaining Council of British Columbia Building Trades Unions by substituting CMAW for BCPC. In the course of dismissing the petition, Gerow J. commented, *obiter*, at para. 31 that the addition of another trade union to the bargaining council "would, in effect, be creating a different 'trade union' for the purposes of the **Code**".

[93] As the Board observed in its Reconsideration Decision, there were two ways of characterizing CMAW's application. The characterization advanced by the petitioner is not, in my view, obviously correct. The Board was acting within its jurisdiction when it made its decision to vary the poly-party's certification by deleting BCPC and adding CMAW. There was a rational basis for the Reconsideration Decision, which the Board reached through a careful and logical analysis.

[94] The petitioner has not demonstrated that the decision under review was patently unreasonable.

Procedural Fairness

[95] The prayer for relief in AHC's Amended Petition includes an application for an order that the reconsideration decision be set aside on the grounds that the Board acted contrary to the principles of natural justice. However, the petitioner makes no allegation of any breach by the Board of its rights to natural justice or procedural

fairness during the reconsideration process. Rather, the petitioner defers to UBCJA, UBCJA, Local 1370 and BCPC, all of whom are represented on this application by Mr. Hordo. For convenience, I will refer to their submissions collectively as the submissions of UBCJA.

[96] UBCJA submits that the Board failed to act fairly in purporting to exercise powers it determined it had under s. 142 in circumstances where no application had been brought by any party under s. 142, and no notice had been issued by the Board of an intention to act on its own motion under that section.

[97] As UBCJA correctly submits, under s. 58(2)(b) of the **ATA**, the procedural fairness question is reviewable on the standard of whether, having regard to all the circumstances, the Board acted fairly: **Weileby v. La Fleur**, 2006 BCSC 1852 at paras. 26-28.

[98] UBCJA submits that CMAW never brought an application under s. 142 because CMAW's original certification application did not invoke that section; the reconsideration application stated that it was brought pursuant to s. 141; the Board's notice to interested parties of the reconsideration application did not refer to s. 142; and ultimately, the Board dismissed the reconsideration application.

[99] Therefore, says UBCJA, the Board could only have been acting on its own motion when it varied the poly-party certification pursuant to s. 142. However, the Board's determination to act on its own motion did not relieve it of the obligation to provide notice of its intention to do so and to ensure procedural fairness: **Northern**

Taxi Ltd. v. Manitoba (Labour Board), (1958), 18 D.L.R. (2d) 122, 27 W.W.R. 12, p. 17 - 20 (Man. Q.B.); **Construction Labour Relations Association of British Columbia**, B.C.L.R.B. No. 315/84 at paras. 3-5; **Nazko Resource Management Ltd., and Nazko Indian Band and IWA Canada, CLC, Local Union Number 1-424**, [1993] B.C.L.R.B. No. 437 at para. 2.

[100] UBCJA submits that because its members would lose the ability to be dispatched to Hydro projects following the Board's decision to replace BCPC with CMAW, it was clearly an interested party, and that this should have been apparent to the Board.

[101] CMAW argues that the breach of natural justice argument ought not to be heard because it is brought not by the petitioner, who has standing to make the argument, but by UBCJA, a respondent to AHC's application for judicial review. CMAW submits that a failure to observe the rules of natural justice renders a decision voidable only at the instance of the aggrieved party: **Harelkin v. University of Regina**, [1979] 2 S.C.R. 561.

[102] CMAW contends that because UBCJA has not brought its own application for judicial review of the Reconsideration Decision, and appears on this application as a respondent, it is not an aggrieved party. Further, CMAW argues that UBCJA, by making the procedural unfairness argument as a respondent, is attempting to avoid the long-expired 60 day time limit under s. 57 of the **ATA** for bringing an application of its own for judicial review of the Reconsideration Decision

[103] Alternatively, CMAW submits that there was no breach of natural justice or procedural fairness because UBCJA had notice of the reconsideration application, was aware that CMAW was invoking the Board's jurisdiction under s. 142 and was aware of the submissions made by other parties regarding s. 142. CMAW argues that despite this knowledge, UBCJA chose not to apply to be added as an interested party on the reconsideration application, or to make submissions with respect to s. 142. Having abandoned its right to participate, UBCJA waived the right to challenge the Reconsideration Decision: ***Violette v. New Brunswick Dental Society***, 2004 NBCA 1, 10 Admin. L.R. (4th) 1.

[104] Finally, CMAW argues that the Board met its statutory duty under s. 126(1) of the **Code** to give full opportunity to the parties to the proceeding to present evidence and make submissions by providing notice to all of the trade unions listed on the poly-party certification. CMAW argues that the Board was not required to give notice to UBCJA because as an international trade union holding no certifications and representing no employees in British Columbia, it was not a recognized trade union under the **Code**: ***Re: Stearns Catalytic Ltd.*** BCLRB No. 112/85; ***United Brotherhood Carpenters v. BC Carpenters***, 2003 BCSC 432, 1 Admin. L.R. (4th) 132 at para. 20. However, CMAW says that if UBCJA had concerns regarding the relief sought on CMAW's reconsideration application, then it should have applied to the Board for interested party status on that application.

[105] Although CMAW's submission that UBCJA, as a respondent, lacks standing to bring the breach of natural justice argument in this case has some merit, rather

than determine the procedural fairness issue on the basis of a preliminary objection, I will address the substance of the matter.

[106] In essence, UBCJA contends that the Board breached the requirements of natural justice and procedural fairness by failing to give notice of its intention to proceed on its own motion under s. 142, and as a result, denied UBCJA the opportunity to make submissions on that issue. However, the facts of this case demonstrate that the Board did provide notice to all interested parties that CMAW was inviting the Board to vary the certification pursuant to s. 142; that the Board requested submissions from all interested parties; and that UBCJA, through its counsel, Mr. Berry, had notice of these matters.

[107] On March 27, 2007, CMAW filed its reconsideration application under s. 141. The reconsideration application contained extensive references to s. 142. One ground for the application was that “the original panel appears to have been under a misapprehension as to the flexibility that the Code gives to the Board under s. 142”. CMAW expressly submitted that s. 142 of the **Code** provided the Board with the statutory authority to grant its application, and that “there can be no question that s. 142 is applicable to a poly-party certification”. CMAW concluded its submission by stating that “the Board clearly has the statutory authority under s. 142 to create a result which accords with the duties described in s. 2 of the Code”.

[108] On March 23, 2007, the Board informed the interested parties of CMAW’s reconsideration application. The Board’s distribution list included UBCJA Locals 1541, 2404 and 2458 as well as Mr. Berry’s firm, Schroeder & Company, who

represented UBCJA and Local 1541 before the Board on the original certification application.

[109] On April 24, 2007 the Board invited submissions on CMAW's reconsideration application from the respondent employer and any interested party. The addressees included the UBCJA locals and counsel for UBCJA.

[110] On May 2, 2007, CHC filed written submissions in response to CMAW's reconsideration application. Those submissions included an extensive argument in answer to CMAW's submissions on s. 142. Among those copied with CHC's submission was Mr. Berry.

[111] On May 3, 2007 Mr. Berry filed a written submission in response to CMAW's reconsideration application on behalf of UBCJA Local 1541. This submission included an argument that CMAW's s. 142 argument should be rejected by the Board because it was not raised before the original panel, and an argument that s. 142 did not provide the Board with jurisdiction to grant CMAW's application.

[112] On May 11, 2007 CMAW made a reply submission to the Board, reiterating its reliance on s.142.

[113] On May 16, 2007, AHC requested additional time to make submissions on three matters arising from CMAW's final submission. One of these was an analysis of the jurisprudence interpreting s.142 of the **Code**.

[114] On July 18, 2007 the Board granted AHC and any other respondent who wished to make submissions additional time until July 31, 2007 to respond to the

matters raised by AHC. UBCJA Local 1541 and its counsel, Mr. Berry, were copied with the Board's letter.

[115] On September 14, 2007 the Board extended the time to respond until September 25, 2007.

[116] On September 24, 2007, AHC made further submissions to the Board in answer to CMAW's reliance on s. 142.

[117] From the foregoing chronology, it is apparent that UBCJA, through its counsel Mr. Berry, had notice of CMAW's reliance on s. 142 of the **Code** and the Board's intention to consider the submission that it could and should vary the poly-party certification pursuant to s. 142. Mr. Berry made submissions on behalf of UBCJA Local 1541 and received copies of the various submissions relating to s. 142 filed by CHC and other interested parties. UBCJA had the opportunity to apply for interested party status on the reconsideration application, but did not do so.

[118] I find that the Board's process in this case satisfied the requirements of natural justice and procedural fairness. The Board provided notice to all interested parties that CMAW was inviting it to invoke s. 142, and sought submissions from all interested parties before determining the reconsideration application. Furthermore, where UBCJA received notice through its counsel, and chose not to apply for interested party status, it waived any right to challenge the Reconsideration Decision for breach of procedural fairness.

The Constitutional Question

[119] The petitioner argues that the Reconsideration Decision violated AHC's right to freedom of association, protected by s. 2(d) of the **Canadian Charter of Rights and Freedoms** (the "**Charter**"), and that the violation cannot be justified under s. 1 of the **Charter**.

[120] On May 7, 2008, the petitioner delivered its Notice of Constitutional Question which states the constitutional issue as follows:

3. The Labour Relations Board has interfered with the freedom of association guaranteed by Section 2(d) the Charter by changing the membership constituency of the Allied Hydro Council ("AHC"), a voluntary poly party trade union, receiving United Brotherhood of Carpenters and Joiners of America, the British Columbia Provincial Council of Carpenters ("BCPC") and all of BCPC local trade unions from membership in AHC and adding the Construction, Maintenance and Allied Workers Bargaining Council, Local Unit Number 230 to membership in AHC without the consent of, and in face of opposition by, AHC and several of its constituent members; and

4. The Labour Relations Board has interfered with the freedom of association guaranteed by Section 2(d) the Charter by nullifying rights and benefits accruing to all of the BCPC local trade unions and their members under the collective agreement between Columbia Hydro Constructors Ltd. and AHC and assigning those rights and benefits to Construction, Maintenance and Allied Workers Bargaining Council, Local Unit Number 2300 and its members without the consent of, and in fact of opposition by, AHC and several of its constituent members.

[121] The petitioner submits that s. 2(d) of the **Charter** protects the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining: **Health Services and Support – Facilities Sub-**

Sector Bargaining Assn. v. British Columbia, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 87 [**Health Services**].

[122] AHC argues that the protected activity is the right of employees to band together to achieve particular work-related objectives: **Health Services** para. 89.

[123] As a poly-party union formed voluntarily under s. 20 of the **Code**, the petitioner argues that AHC is the “quintessential example” of banding together for the protected activity under s. 2(d) of the **Charter**.

[124] The petitioner contends that the Board's decision substantially interfered with the protected constitutional right by forcing CMAW onto the AHC council of unions against the will of its constituent members, and that this detrimentally affects the ability of AHC and its members to exercise their collective rights to good faith negotiation and consultation.

[125] The petitioner has led no evidence to show how the Reconsideration Decision has substantially impaired its ability to engage in good faith bargaining with the employer.

[126] The respondents CMAW and the Board both submit that the court should decline to hear a **Charter** argument which lacks a proper evidentiary foundation, and is raised for the first time on judicial review.

[127] Laws or actions alleged to violate s. 2(d) of the **Charter** must substantially interfere with freedom of association. The inquiry in every case is contextual and fact-specific: **Health Services** at para. 92.

[128] In this case, the petitioner has provided no evidentiary foundation in support of its submissions that the Reconsideration Decision either has had, or is likely to have, a significant adverse impact upon its rights of association.

[129] **Charter** decisions must not be made in a factual vacuum: **Mackay v. Government of Manitoba**, [1989] 2 S.C.R. 357.

[130] Further, the reviewing court should have the benefit of the tribunal's factual record and informed view on the issues raised in a constitutional challenge: **Nova Scotia (Workers' Compensation Board) v. Martin**, 2003 SCC 54, [2003] 2 S.C.R. 504; **British Columbia Teachers' Federation v. British Columbia (Attorney General)**, 2003 BCSC 534.

[131] The Board has jurisdiction to consider constitutional questions: **ATA**, s. 43 and **Code** s.115.1.

[132] The petitioner challenges the Board's decision, and states in its Notice of Constitutional Question that it is not asking the court to strike down any provision of the **Code**. However, as the Board submits, the implications of the petitioner's **Charter** argument may be broader than a constitutional challenge to the Board's decision in this case. The petitioner's constitutional argument potentially calls into question the application of s. 142 to poly-party certifications under s. 20 of the **Code**.

[133] The constitutional question posed in this case might also give rise to questions regarding the constitutionality of s. 41 of the **Code**, which provides for the involuntary formation of councils of trade unions.

[134] The petitioner's **Charter** argument, and the labour relations implications that it raises, are matters which properly should be addressed at first instance on a factual record by the Board rather than the court.

[135] The petitioner has provided no satisfactory explanation as to why the constitutional question could not have been raised before the Board. AHC argues that it had no opportunity to raise the **Charter** issue and that there was no basis for doing so before October 16, 2007, when the Board, on its own motion, made its decision under s. 142 of the **Code** to vary the poly-party certification, without the consent of AHC and its constituent members.

[136] As I have already found, on April 24, 2007, the Board invited submissions from all interested parties on CMAW's reconsideration application, which clearly raised s. 142 of the **Code**, and the potential for a variation of the certification without the consent of AHC.

[137] The petitioner bases its constitutional challenge on the judgment of the Supreme Court of Canada in **Health Services**, released June 8, 2007.

[138] The Board continued to receive submissions on CMAW's reconsideration application until September 24, 2007, and did not issue its Reconsideration Decision until October 16, 2007. There was nothing to prevent the petitioner from delivering to the Board, the Attorney General, and the other parties, a Notice of Constitutional Question during July, August, or September, 2007, with a request that the Board

hear the constitutional challenge before finally disposing of CMAW's reconsideration application.

[139] The lack of any satisfactory explanation as to why the constitutional issue was not raised before the Board militates against the petitioner raising a new **Charter** issue on judicial review: **Waters v. British Columbia (Director of Employment Standards)** 2004 BCSC 1570, 40 C.L.R. (3rd) 84, at paras. 27-38.

[140] For all of these reasons, I am persuaded that the petitioner is barred from raising the constitutional question without evidence of substantial interference with the asserted right and as a new issue on judicial review. It is therefore unnecessary to consider the submissions of the petitioner, the Attorney General, or any other party on the merits of the constitutional question.

Conclusion and Disposition

[141] I conclude that there are no grounds raised in the Amended Petition that would support the Court setting aside the reconsideration decision on judicial review. Accordingly, the Amended Petition is dismissed.

Pearlman J.