Cour d'appel fédérale Federal Court of Appeal

Date: 20230505

Docket: A-162-20

Citation: 2023 FCA 93

CORAM: **BOIVIN J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

MARITIME EMPLOYERS ASSOCIATION,
MONTREAL PORT AUTHORITY
and
SHIPPING FEDERATION OF CANADA

Applicants

and

SYNDICAT DES DÉBARDEURS, LOCAL 375 OF THE CANADIAN UNION OF PUBLIC EMPLOYEES,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LA CHAMBRE DE COMMERCE DE L'EST DE MONTRÉAL,
LE CONSEIL DU PATRONAT DU QUÉBEC
and
LA FÉDÉRATION DES CHAMBRES DE COMMERCE DU QUÉBEC

Respondents

Heard at Montréal, Quebec, on September 12 and 13, 2022.

Judgment delivered at Ottawa, Ontario, on May 5, 2023.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: BOIVIN J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] This application for judicial review concerns the decision of the Canada Industrial Relations Board (the CIRB or the Board) in *Maritime Employers Association v. Syndicat des*

débardeurs, Local 375 of the Canadian Union of Public Employees, 2020 CIRB 927, 71 C.L.R.B.R. (3d) 1. The decision was rendered following an application to the Board made by the applicant, Maritime Employers Association (the MEA), under subsection 87.4(4) *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code). The MEA sought in its application to the Board to have the CIRB declare that all the work performed by all members of the respondent Syndicat des débardeurs, Local 375 of the Canadian Union of Public Employees (the Union) in the Port of Montreal must be maintained during a legal strike or lockout.

[2] The Union represents longshoring employees who are engaged in various tasks associated with loading and unloading vessels in the Port of Montreal. The MEA is their employer for purposes of Part I of the Code, having previously been designated by the CIRB as the employer under section 34 of the Code. Thus, the Union and the MEA are parties to the collective agreement applicable to the bargaining unit employees to whom the MEA's section 87.4 application pertained.

[3] In the decision that is the subject of this application for judicial review, the CIRB disagreed with the MEA's position and concluded that section 87.4 of the Code did not require that any of the work performed by bargaining unit members be maintained during a legal strike or lockout.

[4] In its judicial review application to this Court, the MEA and the other applicants seek to have the Court set aside the Board's decision and declare that all the work performed by

bargaining unit members in the Port of Montreal must be maintained during a legal strike or lockout in accordance with section 87.4 of the Code.

[5] Subsequent to the hearing before this Court, at the request of the panel, the parties submitted written representations on the issue of whether this application had become moot in light of the adoption by Parliament of back-to-work legislation in May 2021 in *Port of Montreal Operations Act, 2021*, S.C. 2021, c. 6 (the PMOA). The PMOA ended a strike that was occurring in the Port of Montreal and required all bargaining unit members to return to work. The PMOA also provided for settlement, via a mediation-arbitration process, of the collective agreement between the Union and the MEA applicable to the Port of Montreal bargaining unit.

[6] Having reviewed the parties' representations on the mootness issue, I have concluded that this application for judicial review has not been rendered moot due to a challenge to the PMOA that the Union brought and that is currently pending before the Superior Court of Quebec in *Syndicat des débardeurs, SCFP, section locale 375 c. Procureur général du Canada*, file number: 500-17-116886-212.

[7] In this challenge, the Union seeks to have the PMOA declared inoperative as an unjustifiable infringement on the freedom of association guaranteed to its members by subsection 2(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter). Should such a declaration be made, it is possible that the Union might again find itself in a legal strike position for the Port

of Montreal bargaining unit. This possibility means that the issues raised in this application for judicial review are still live ones and accordingly must be decided by this Court.

[8] As is apparent from the reasons that follow, the applicants have raised a multitude of issues before us. Many of them invite this Court to reweigh the evidence that was before the CIRB. However, that is not our role on judicial review. We cannot second-guess the CIRB's findings. Rather, we may intervene only if the CIRB failed to accord the applicants procedural fairness or rendered an unreasonable decision.

[9] For the reasons that follow, I have concluded that there is no basis to interfere with the decision of the CIRB and that this application for judicial review should be dismissed.

I. Section 87.4 of the Code

[10] It is useful to commence by reviewing section 87.4 of the Code and some of the principles regarding its application that the CIRB has set out in the more significant decisions interpreting the provision. The complete text of section 87.4 of the Code is attached in the Appendix to these Reasons. The salient features of the section may be summarized as follows.

[11] Added to the Code in 1999, section 87.4 is designed to protect the public interest. The section requires the maintenance during a legal strike or lock out of "… the supply of services, operation of facilities or production of goods to the extent necessary to prevent an immediate and serious danger to the safety or health of the public" (subsection 87.4 (1)).

[12] The provision operates by casting primary responsibility for the maintenance of such activities on the parties to the collective agreement and bargaining unit employees, who are required to ensure the maintenance of all activities necessary to prevent an immediate and serious danger to the safety or health of the public.

[13] Subsections 87.4(2) and (3) provide parties to the collective agreement with the ability to settle the terms of a maintenance of activities agreement, governing the activities to be maintained during a legal strike or lockout, and the basis upon which such activities are to be performed. If a maintenance of activities agreement is reached, it must be filed with the CIRB.

[14] Where no agreement is reached but notice to negotiate one was given, subsection 87.4(4) of the Code provides a mechanism for a party to apply to the CIRB to settle what supply of services, operation of facilities, or production of goods must be maintained during a legal strike or lockout.

[15] By virtue of subsection 87.4(5) of the Code, the federal Minister of Labour is also afforded the ability to refer such issues to the CIRB when a strike or lockout is imminent or occurring.

[16] Where an application is made under either subsection 87.4(4) or (5) of the Code, the Board is authorized to issue a maintenance of activities order under subsection 87.4(6) where it "… is of the opinion that a strike or lockout could pose an immediate and serious danger to the safety or health of the public".

[17] Where a referral is made to the CIRB within the time periods contemplated in the Code (or within such longer time period as the Board might authorize pursuant to subsection 16(m.1) of the Code), by virtue of paragraph 89(1)(e) of the Code, the parties cannot engage in a strike or lockout until the CIRB decides the maintenance of activities application. Therefore, the making of an application like the one made by the MEA to the CIRB in the present case has the effect of suspending acquisition of the right to strike or lockout.

[18] If, following an application made to it, the CIRB concludes that there are some services, facilities or production that must be maintained during a strike or lockout because their cessation could result in an immediate and serious danger to the safety or health of the public, the Board possesses broad remedial authority. Pursuant to paragraphs 87.4(6)(a) and (b) of the Code, the CIRB may settle which services, facilities or production must be maintained, which employees are prevented from striking or being locked out, and on what terms they will perform the activities that are to be maintained. By virtue of paragraph 87.4(6)(c) of the Code, the CIRB may in addition "impose any measure that it considers appropriate for carrying out the requirements of [section 87.4]."

[19] Further, where the CIRB is of the opinion that the number of employees prevented from striking or being locked out would render a strike or lockout ineffective, subsection 87.4(8) of the Code provides the Board remedial authority to order the settlement of the collective agreement via a binding process, such as third-party interest arbitration.

[20] Subsection 87.4(7) of the Code affords the Board authority to review, confirm, amend or cancel a maintenance of activities agreement or previous Board order made under section 87.4 of the Code, following an application made by one of the parties to the collective agreement or the Minister of Labour after a legal strike or lockout has commenced if the Board is of the opinion that "the circumstances warrant".

[21] In assessing what services must be maintained, the CIRB has indicated that section 87.4 of the Code is a public interest provision that requires the Board to "… balanc[e] the principles of free collective bargaining with the protection of the safety and health of the public" (*City of Ottawa*, 2009 CIRB 447, [2009] C.I.R.B.D. No. 12 at para. 34 [*City of Ottawa*]). To somewhat similar effect, in *Canadian National Railway Company*, 2005 CIRB 314, [2005] C.I.R.B.D. No. 9 at para. 27 [*CN*], the Board noted that, "[w]hen seized with a section 87.4 application, the Board's duty is to interpret and apply the Code in a way that promotes the statutory objectives of encouraging harmonious labour relations."

[22] The Board further held in *Nav Canada*, 2002 CIRB 168, [2002] C.I.R.B. No. 168 at para. 227 [*Nav Canada*], that:

> … Any restrictions on the right to strike, even though imposed in the interests of health or safety, must appropriately respect the importance of the right in the context of the *Code*. Free collective bargaining is seriously compromised if the right to strike may not be exercised by employees to counteract the employer's economic power. ...

[23] Likewise, in *Société de transport de l'Outaouais*, 2017 CIRB 849, [2017] C.I.R.B.D. No. 5 [*Société de transport*], the CIRB noted at paragraph 164 that "… any restriction of the right to

strike must be limited to what is strictly necessary and solely to ensure the health and safety of the public."

[24] That said, the Board has also stated that, where an employer establishes that there are activities carried out by bargaining unit members which must be maintained to prevent an immediate and serious danger to the health or safety of the public, "… the protection of the risk to the health of the public must be determinative" (*Atomic Energy of Canada Limited*, 2001 CIRB 122, [2001] C.I.R.B.D. No. 19 at para. 295 [*AECL CIRB*], aff'd in *Chalk River Technicians and Technologists v. Atomic Energy of Canada Ltd.*, 2002 FCA 489, [2003] 3 F.C. 313 [*AECL FCA*]).

[25] The CIRB has dealt with the onus of proof in cases arising under section 87.4 in somewhat different fashions, depending on the circumstances in the case before it.

[26] In *AECL CIRB, Nav Canada* and *CN*, the Board held that the initial onus rests on the party seeking the limitation on the right to strike or lockout to establish that there are activities that are required to be maintained in accordance with section 87.4 of the Code. However, the CIRB went on to hold that the opposite party also has an obligation to ensure the relevant facts are placed before the Board. The Board expressed these requirements at paragraph 31 of *CN* as follows:

> When the activities to be maintained are in dispute, the onus rests primarily with the employer to prove that certain services, operations or facilities must continue despite a strike or a lockout. That being said, both parties have the obligation to provide the Board with convincing evidence supporting their respective positions (*Atomic Energy of Canada Limited*, *supra*). It is imperative that the parties assist

> the Board by providing evidence that will enable it to determine whether or not the services are essential in order to protect the health or safety of the public and whether or not a strike or lockout will cause a danger (*Nav Canada*, [2002] CIRB no.168, at paragraph 168).

[27] The Board held in *Aliant Telecom Inc.*, [2003] C.I.R.B. L.D. No. 947 [*Aliant Telecom*] that a respondent union may discharge its obligation to provide relevant evidence via cross-examination of the witnesses called by the employer.

[28] In *Atomic Energy of Canada Limited*, 2015 CIRB 774, [2015] C.I.R.B.D. No. 20 [*AECL 2015*], where the CIRB had previously held that certain activities were to be maintained during a previous round of bargaining and the employer sought to argue that circumstances had changed such that employees should have the right to strike and the employer the right to lock out, the Board held that the employer bore the burden of proof. The employer was accordingly required to establish that there were no activities that were required to be maintained during a legal strike or lockout to prevent a serious and immediate danger to the health or safety of the public.

[29] The CIRB has further held that the evidence required to establish that activities should be maintained during a legal strike or lockout must be "significant" (*Fredericton International Airport Authority Inc.*, 2012 CIRB 641, 2012 CarswellNat 4350 (WL) at para. 13; see also to similar effect *Société de transport* at paras. 164, 173, 177, 182, 191).

[30] The Board has reasoned that because a maintenance of activities order limits the right to strike, which has now received a degree of protection in certain circumstances under subsection 2(d) of the *Canadian Charter of Rights and Freedoms* in the wake of the decision of the

Supreme Court of Canada in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, 380 D.L.R. (4th) 577, maintenance of activities orders should be issued only where it is shown that they are required. In *Société de transport*, the CIRB wrote as follows:

> [160] The Board is mindful that it carries out dual responsibilities when it is seized of a question concerning the maintenance of certain activities pursuant to section 87.4 of the *Code*. It must consider the public's right to protection against a danger to its safety or health while bearing in mind the preamble to the *Code*, which describes the Parliament of Canada's commitment to the practice of free collective bargaining.
>
> [161] The union argues that the Board should reassess this determination of balance and jurisprudence by prioritizing collective bargaining, in light of the constitutional recognition of the right to strike in *Saskatchewan Federation of Labour v. Saskatchewan*, *supra*.
>
> [162] The Board is of the view that it is not necessary to question this analysis because the legislative intent and the purpose of the regime for maintaining services under the *Code* specifically reflect the importance and necessity of protecting the right to strike. In *NAV CANADA*, 2002 CIRB 168, the Board stated the following in that regard:
>
>> [227] ... Any restrictions on the right to strike, even though imposed in the interests of health or safety, must appropriately respect the importance of the right in the context of the *Code*. Free collective bargaining is seriously compromised if the right to strike may not be exercised by employees to counteract the employer's economic power. ...
>>
>> [228] **Accordingly, it is the Board's view that any abridgement of the right to strike must be to the minimum level required to cautiously protect the health or safety of the public**. Accordingly, if the Board is assured that the risk or danger is not "immediate" or "serious," or if the operation of facilities, production of goods or supply of services in question can be limited or will not reasonably be necessary to protect public health or safety or to prevent an immediate and serious danger, the Board should determine such services not to be required.

[emphasis in the original]

[163] Similarly, in *Fredericton International Airport Authority Inc*., 2012 CIRB 641, the Board recognized the importance that must be given to collective bargaining. In that matter, the Board was to determine whether it would exercise its discretion to order a binding method of resolution pursuant to section 87.4(8) of the *Code*:

> [11] **The Preamble to the *Code* sets out the philosophy and values that underlie all of the statute's provisions. In particular, the Preamble reflects Parliament's support for collective bargaining as the preferred method of dispute resolution. When seized with an application under section 87.4, the Board's duty is to interpret and apply this provision in a way that promotes the statutory objectives of the *Code* (*Canadian National Railway Company*, 2005 CIRB 314).**
>
> [12] Section 87.4(8) of the *Code* creates an exception, in certain circumstances, to this commitment to free collective bargaining (see *City of Ottawa*, 2009 CIRB 447). In the Board's view, provisions such as this, which deprive the parties of their statutory rights, should be carefully and narrowly construed.
>
> [13] Superficially, one might find it reasonable to conclude that a work stoppage that presently involves only five out of seventeen active employees in the bargaining unit could have little impact on the employer's operations. However, in this case, the union vehemently denies that the strike by the members of its bargaining unit at the Fredericton airport has been ineffective, and affirms its belief that the labour dispute can still be resolved through meaningful negotiations. Whether the union's belief is well-founded or not, under these circumstances it would be contrary to the purpose and objectives of the *Code* for the Board to prevent or interfere with the prospect of a negotiated settlement. **In balancing the various rights and obligations contained in the *Code*, the Board must, to the greatest extent possible, give effect to the statutory right of employees and their employers to engage in free collective bargaining and make use of such economic sanctions as are available to them to enforce their respective demands. Accordingly, the presumption in favour of collective bargaining is a strong one and significant evidence is required to persuade the Board to remove that right**.

[emphasis in the original]

> [164] In light of the decisions cited above, any restriction of the right to strike must be limited to what is strictly necessary and solely to ensure the health and safety of the public. Moreover, the burden of proof is on the party seeking to have certain activities maintained despite a strike or lock-out, that is, the employer in the present matter.

[31] Turning to the meaning to be ascribed to the words "the extent necessary to prevent an immediate and serious danger to the safety or health of the public" in subsection 87.4 (1) of the Code, the Board has held that "the public", within the meaning of section 87.4, means "the community in general, or members of the community" (*Aéroports de Montréal*, 1999 CIRB 23, [1999] C.I.R.B. No. 23 at para. 19, citing from the *Concise Oxford Dictionary*).

[32] In terms of the immediacy of the requisite risk to justify the issuance of a maintenance of activities order, the CIRB held in *AECL CIRB* that "… while the danger must not merely be an inconvenience, it need not appear very shortly, or in French 'incessament'" (paragraph 288). This interpretation was upheld by this Court in *AECL FCA*, where Nadon, J.A., writing for the Court stated at paragraphs 62 to 65:

> … I am satisfied that what the Board actually meant when it said "the danger must not merely be an inconvenience, it need not appear very shortly, or in French [']*incessamment*[']", is that the serious danger need not appear right now or within a few days. I do not read the Board's decision as a statement that the serious danger can occur at any time in the future.
>
> A fair reading of the Board's decision shows that it concluded that the serious danger would be immediate because of its finding that it would occur in approximately 10 days, bearing in mind that within 3 days after the occurrence of a strike or lockout, AECL and Nordion would likely be unable to meet demand for their product, and that following the end of a strike or lockout, 10 days of

> production at Chalk River would be required for Nordion to resume regular shipments to its clients. Did the Board err in reaching this conclusion? Put another way, was the evidence sufficient to allow the Board to conclude that the serious danger would occur soon or within a short period of time?
>
> In my view, the answer to the latter question must be yes. On the evidence, taken as a whole, the Board could conclude that a danger occurring in ten to twelve days after the commencement of a strike or lockout, was a danger which would occur soon or within a short period of time.
>
> I am, therefore, of the view that the Board's conclusion on the immediacy of the danger cannot be characterized as unreasonable. I come to this view in light of the evidence, and having in mind the words of the statute which require the Board to form an opinion as to whether a strike or lockout **could pose** an immediate and serious danger.
>
> [Emphasis in the original.]

[33] The CIRB has adopted a case-by-case analysis of what types of activities if curtailed meet the statutory threshold of a serious danger to the safety or health, the question being largely a factual one.

[34] The CIRB has, for example, determined that the activities undertaken by all firefighters at an airport must be maintained in *Aéroports de Montréal*; that many activities performed by air traffic controllers must be maintained in *Nav Canada*; and that the production of radioisotopes used in cancer diagnosis, when the employer was the sole source of those isotopes, needed to be maintained in *AECL CIRB*, but not years later, when there were alternate sources for those isotopes in *AECL 2015*.

[35] Closer to the fact pattern in this case, the CIRB held in *Marine Atlantic Inc*., 2004 CIRB 275, [2004] C.I.R.B.D. No. 16 [*Marine Atlantic*], that all ferry services between the mainland and Newfoundland were required to be maintained during a legal strike or lockout. The evidence before the Board in that case demonstrated that "…90% of all fresh, perishable or time-sensitive goods as well as 60% of commercial traffic generally coming into Newfoundland and Labrador [were] carried on Marine Atlantic [ferries], which also [carried] back to North Sydney, fish, lobster, livestock and other products destined to Newfoundland's outside markets" (paragraph 18). In addition, the ferry service was found to be very important to health care, shipping many materials used in health care, passengers needing treatment off the island, and health care workers, employed in long-term care homes in Nova Scotia, who worked 15 days on, 15 days off. Further, there was expert evidence that the cessation of the ferry service would cause psychological stress to many Newfoundlanders. The Board noted at paragraph 21 of its decision that it:

> … heard expert general and forensic psychiatric evidence as to the immediate negative health consequences that would result from an interruption or lessening of Marine Atlantic ferry service, such consequences flowing from its economic impact, from its impact on health care, from the immediate sense of helplessness and isolation, and the behavioral disorders resulting therefrom.

[36] Importantly, for purposes of the case at bar, the evidence in *Marine Atlantic* established that the other shipping company that shipped goods to Newfoundland could not compensate for any interruption in the Atlantic Marine ferry service.

[37] Based on these facts, the CIRB determined that full ferry service needed to be maintained during a legal strike or lockout, stating as follows at paragraphs 41 to 45 of its decision:

> As stated earlier, the Board's mandate in the present matter is to designate the level of Marine Atlantic ferry service that it considers necessary to continue in order to prevent an immediate and serious danger to the safety or health of the public. Is it possible to set an acceptable level of ferry service at less than the present level? The Board is satisfied that any reduction in the ferry level service would result in an immediate and serious danger to the safety or health of the public.
>
> The ferry service is the sole actually accessible link available to a significant majority of the general travelling public, the trucking industry and its customers, as well as to the general public of Newfoundland and Labrador, for whom there is no realistic alternative means of access.
>
> Interruption or even a lessening of Marine Atlantic ferry service would immediately cause hardship to the many relying on the regularity of Marine Atlantic ferry operations. The suffering and behavioral disorders thus caused would be an immediate consequence, as demonstrated by the psychiatric evidence heard. Members of the general public and all others reliant on the regularity of Marine Atlantic ferry service would also suffer hardship, economically, emotionally or otherwise, once again with consequences on the mental and even physical well-being of those concerned. Furthermore, the transportation of medical supplies or medically-related items would be seriously impacted.
>
> Clear, uncontradicted, expert evidence was given to demonstrate that health disorders would result from the interruption or lessening of Marine Atlantic ferry service. The Board cannot set aside or disregard this compelling evidence.
>
> The Board is of the opinion, clearly, that the levels of ferry service to be continued, as proposed by the CMOU and the CAW, do not meet the test set out in section 87.4(6)(a).

[38] In application of these principles regarding the need to maintain transport of goods to Newfoundland, in a short order issued on September 1, 2010, the CIRB determined that stevedoring services provided by Union members to vessels bound to or from Newfoundland needed to be maintained in the event of a legal strike or lockout in the Port of Montreal. The order was made following an application by the Minister of Labour to the Board under

subsection 87.4(5) of the Code in the context of either a pending or ongoing employer lockout. (As is more fully discussed below, in 2010, the MEA locked out bargaining unit members in the port of Montreal for ten days, with the exception of those covered by the Board's September 1, 2010 order.) The salient portions of the order provided, on page 2:

> [TRANSLATION]
>
> … **AND WHEREAS** the Board considered the serious repercussions that a lack of or delay in goods deliveries to the people of Newfoundland and Labrador would have on the supply of essential products, such as products related to the treatment of drinking water, medical equipment, drugs and other pharmaceutical products;
>
> **AND WHEREAS** the Board also took in account the difficulty in identifying the critical goods that are intended for the people of Newfoundland and Labrador within one, several, or all of the containers headed to Newfoundland and Labrador.
>
> **THEREFORE,** after reviewing the written submissions of the parties and the evidence that was adduced at the hearing, the Board is of the opinion that a strike or a lockout that is triggered by either the union or the employer and that would result in the suspension of the transportation of essential products to the province of Newfoundland and Labrador could pose an immediate and serious danger to the safety or health of the public of Newfoundland and Labrador. …

[39] Conversely, in several other cases involving transportation undertakings, the CIRB has declined to issue maintenance of activities orders. It did not do so in *CN*. Indeed, in the railway industry, Parliament has resorted to back-to-work legislation like the PMOA following the adoption of section 87.4 of the Code (see, for example, *Railway Continuation Act, 2007*, S.C. 2007, c. 8, and *Restoring Rail Service Act*, S.C. 2012, c. 8). It has also adopted similar legislation

in respect of Canada Post (see, for example, *Postal Services Continuation Act, 1997*, S.C. 1997, c. 34, and *Postal Services Resumption and Continuation Act*, S.C. 2018, c. 25).

[40] In a somewhat similar fashion to the approach in the instant case, in *Société de transport*, the CIRB refused to issue a maintenance of activities order in respect of the bus service provided by the Société de transport de l'Outaouais and, in *City of Ottawa*, the Board refused to issue a maintenance of activities order in respect of the bus and train service provided by OC Transpo.

[41] In *City of Ottawa*, there was evidence that health care workers and patients, seeking treatment, utilized the services at issue. However, the evidence also showed that there were alternate means of transport available to these individuals, including Para Transpo services for patients. Para Transpo had expanded its services during the Amalgamated Transit Union, Local 279 strike, and the union had voluntarily agreed to have members of the striking bargaining unit provide maintenance services to the Para Transpo equipment. These alternative options led the Board to dismiss the application. In terms of the relevance of alternative services, the CIRB noted at paragraph 41 of its decision that:

> … The Board will also consider the availability of alternative services when determining whether a withdrawal of services would cause an immediate and serious danger to the health or safety of the public. In *Nav Canada*, [2002] CIRB no. 168; and 79 CLRBR (2d) 161, the Board held that alternative approaches that allow services to be obtained elsewhere can be considered, but must be demonstrably sufficient and effective in removing any danger to the health or safety of the public, if the otherwise necessary services are not to be provided. In *Nav Canada* [2007] CIRB 375; and 142 CLRBR (2d) 77, the Board held that if the services in question can be readily accomplished by others, then performance by members of the bargaining unit cannot reasonably be said to be necessary. However, the Board in the latter case added the caveat that, in making this assessment, consideration must be given to whether others experienced and competent in the provision of such services are reasonably available.

II. The Decision of the CIRB

[42] With this general background in mind, I move next to review the decision of the Board in the instant case.

[43] The CIRB held 30 days of hearing in the MEA's section 87.4 application. The Board allowed a transcript of the hearings to be prepared, which is not the norm in many labour cases but sometime is done in important CIRB cases.

[44] A review of the transcript indicates that the matter was originally scheduled for ten days, and that at the outset of the hearing the Board indicated that it had reviewed the materials filed by the parties. The chairperson of the CIRB panel also encouraged the parties to focus their evidence squarely on the relevant issues. She stated, among other things, that the Board was in particular interested in details regarding the supply of which specific products were claimed to be necessary to prevent an immediate and serious danger to the health and safety of the public because they would no longer be available in the event of a work stoppage.

[45] The dates initially scheduled by the Board proved insufficient, so the Board scheduled more dates on more than one occasion as the matter progressed. The Board eventually directed that the MEA file the evidence in chief of certain of its witnesses via affidavit, with a view to expediting the hearing.

[46] Part way through the hearings, the Union provided an undertaking to continue to maintain in the event of a strike all services for vessels bound to or from Newfoundland, similar to what had been found essential by the Board in 2010.

[47] In July of 2019, one day before the MEA was scheduled to complete its case, the MEA made a motion to the Board to have one of the panel members recuse himself, due to an alleged apprehension of bias that the MEA claimed had arisen. The Board dismissed the recusal motion on August 21, 2019, in *Maritime Employers Association*, 2019 CIRB 909, [2019] C.I.R.B.D. No. 2. The MEA then asked the Board to stay its hearings, in light of an application to this Court to judicially review the CIRB's August 21, 2019 decision. The Board refused to do so.

[48] This Court dismissed the MEA's judicial review application to set aside the Board's August 21, 2019 decision from the bench on January 29, 2020 in *Maritime Employers Association v. Lonshoremen's Union, Local 375 (Canadian Union of Public Employees)*, 2020 FCA 29, 315 A.C.W.S. (3d) 428.

[49] On August 28, 2019, the last day of hearing that was scheduled by the Board for the MEA's evidence, counsel for the MEA refused to complete his examination of Mr. Murray, the Union president, whom the MEA had called as a witness. Counsel argued that he ought not be required to complete the examination while the MEA's application for judicial review was pending. Counsel for the MEA eventually agreed to move on to call the MEA's last witness, whose testimony was completed. After a lengthy exchange with the panel during which counsel for the MEA maintained that he ought not be required to complete his examination of Mr.

Murray, the Board declared the MEA's case closed. The Union elected to call no evidence, and the remaining hearing dates were devoted to closing arguments.

[50] In the decision under review, the Board recounted the foregoing procedural history as well as several other interim decisions that it had issued. It then provided a lengthy summary of the MEA's evidence, focussing in many instances on the evidence in chief provided by the witnesses the MEA called. It is not necessary to review the CIRB's summary of the evidence in any great detail other than to note the points below.

[51] In this regard, the Board summarized the evidence of several employer witnesses who indicated that it was not possible to safely unload only some of containers on a vessel moored at the Port of Montreal or to even ascertain which containers might contain products required for the health and safety of members of the public (see, for example, paragraphs 23, 28, 29, 43 to 45 and 59 of the Board's reasons).

[52] The Board further noted that expert witnesses called by the MEA expressed the view that there was not a feasible alternative to the Port of Montreal that could receive or send all the goods shipped to or from Montreal (see, for example, paragraphs 52, 67, 83, 97, 101, 115, 116 and 118 of the Board's reasons).The Board also noted, however, that these experts identified other ports that could handle at least some of the goods shipped through the Port of Montreal, albeit with delay or increased costs (see, for example, paragraphs 108, 117 and 119 to 123 of the Board's reasons). One of these expert witnesses also testified that finished pharmaceutical and other medical products could be transported by air (see paragraph 71 of the Board's reasons).

The CIRB also summarized the evidence of many witnesses regarding the complex nature of supply chains, the role the Port of Montreal plays in those supply chains, and the “just in time” nature of supply chains that had become prevalent (see, for example, paragraphs 20 to 26, 50, 56 to 59, 61 to 66, 68 and 82 of the Board’s reasons).

[53] In terms of pharmaceutical and medical products, the CIRB noted that representatives of three pharmaceutical companies offered the view that a work stoppage in the Port of Montreal would cause an immediate and serious danger to the health and safety of the public by disrupting supply chains for medicines and medical products (see, for example, paragraphs 137, 139 and 142 to 148 of the Board’s reasons). However, none of them provided specifics as to which drugs or products would be impacted. One witness testified as to alternate arrangements that were made to replace products destined for the Canadian market when one of its factories in Puerto Rico was shuttered by a hurricane (paragraph 154 of the Board’s reasons). The Board also noted that one of the pharmaceutical companies had previously shipped its products to Canada by air, that air was still sometimes used to ship its products, and that another of the companies had factories in the United States (paragraphs 129, 136 and 159 of the Board’s reasons). The Board further noted the existence of contingency plans that one company had in place to address shortages (paragraph 153 of the Board’s reasons).

[54] The Board also detailed evidence regarding impacts of shortages in foodstuffs, in road salt and in construction and other materials that the MEA alleged would occur if there were a work stoppage of bargaining unit members (see, for example, paragraphs 24, 46, 53, 109, 110,

187 and 194 of the Board's reasons). The Board noted that road salt was shipped to other ports in Quebec, in addition to the Port of Montreal (paragraph 92 of the Board's reasons).

[55] The Board further recounted the evidence of a psychiatrist and a psychologist who testified as to the stress that a strike in the Port of Montreal would likely cause certain members of the public, and the likely tendency of some to hoard goods or medicines, which would exacerbate shortages (see, for example, paragraphs 183 to 186 and 189 to 192 of the Board's reasons).

[56] The Board next reviewed the parties' arguments and then moved on to its analysis. Given the nature and number of arguments made by the applicants, it is necessary to review the analysis section of the CIRB's reasons in some detail.

[57] The Board commenced its analysis by noting that the MEA was seeking an order for maintenance of all activities in the Port of Montreal carried on by Union members, noting that the MEA was claiming that "… in the public interest, the right to strike cannot be exercised" (paragraph 274).

[58] The CIRB then stated that it did not intend to comment on all of the likely examples of disruptions in the supply chain that a strike might cause because section 87.4 of the Code does not allow it to consider economic impacts. It noted that "[n]o evidence demonstrate[d] that a shortage of these imported commodities [like building materials, fertilizers or sugar] would endanger public health" (paragraph 277 of the Board's decision). The Board accordingly

confined its analysis to the impact of a work stoppage in the Port of Montreal to four issues, namely: (1) drugs and pharmaceutical products; (2) de-icing salt; (3) risks of congestion and safety measure in the Port; and (4) alternative solutions in the event of a strike.

[59] The CIRB then set out much of the case law set out above and moved to discuss the issue of the burden of proof. The Board dismissed the MEA's argument that the CIRB was required to accept the MEA's evidence and the conclusions proffered by its experts in the absence of any witnesses tendered by the Union. The Board found that the Union was entitled to proceed in the way it had and that the burden was on the MEA to "… present convincing evidence to justify maintaining essential services" (paragraph 297).

[60] The Board further held that the MEA failed to discharge this burden, noting that the MEA "… did not specifically identify which products it considers critical and essential to the health and safety of the public among the 39 million tons of goods that are imported and exported through the Port of Montreal every year" (paragraph 302 of the Board's reasons).

[61] The Board next set out its conclusion, namely that it was "… of the opinion that no direct evidence allow[ed] it to conclude that a strike or lockout at the Port of Montreal will deplete stocks or cause shortages to the point of creating an immediate and serious danger to the health or safety of the public" (paragraph 303 of the Board's reasons).

[62] The CIRB then proceeded to provide its reasons for this conclusion. It first noted that a lockout had occurred in 2010, and that the MEA witness who testified about the impacts of the

lockout did not specify how or why that lockout might have endangered the safety or health of the public.

[63] The CIRB next proceeded to review the testimony of the psychologist and psychiatrist, noting that both "… testified in general terms, without making reference to any specific critical goods or services, about public reactions to actual and apprehended shortages" (paragraph 306 of the Board's reasons). The Board determined that the evidence of these two witnesses was not conclusive as it was premised on the assumption that there would be a shortage of goods in the event of a strike at the Port of Montreal, but such shortage had not been established by the MEA. The CIRB further noted that neither expert specified which goods, if there were a shortage, would be likely to be cause psychological reactions, and that one of the witnesses was unaware of the Health Canada processes in place for attempting to deal with drug shortages that were detailed in a document the Union filed.

[64] The CIRB then moved on to consider drugs and pharmaceutical products. It stated that "… the industry does make significant use of the Port of Montreal, notably because of reliability, costs and the fact that it can count on a reliable supply chain to transport its products by train or truck, or export them abroad, after they arrive at the Port" (paragraph 316 of the Board's reasons). It continued by noting that none of the representatives of the pharmaceutical industry who testified "… denied that their company would be able to switch to air transportation if an emergency situation were to arise or if supply were to be disrupted" (paragraph 316 of the Board's reasons). It further noted that all the companies had manufacturing facilities throughout the world, and that little, if any, evidence was called regarding their warehousing capacity. While

one of the pharmaceutical company witnesses testified that she felt air transport would not be an option in the event of a work stoppage in the Port, the CIRB noted that evidence the Union filed showed that pharmaceuticals were among the high value merchandise transported by air.

[65] The Board then moved to discuss a document from Health Canada that the Union had filed, which detailed the processes in place that Health Canada undertakes in the event of a drug shortage. The Board quoted extensively from the document. Among other things, the document stated that Health Canada works with stakeholders during a drug shortage to coordinate information sharing and identify collaborative mitigation strategies. The Board also noted that tender documents from Sigma Santé, which coordinates drug and medical equipment supply to hospitals in Quebec, contained "… very clear provisions concerning potential drug supply chain disruptions and includes alternative solutions" (paragraph 324 of the Board's reasons).

[66] The CIRB further referred to the testimony of an expert witness who testified as to supply chains and noted that the witness confirmed that, as of 2008, air transport was used for a variety of products, including drugs, and that the trend over the past years has been toward an increased use of air freight (paragraph 325 of the Board's reasons).

[67] In light of the forgoing evidence, the CIRB concluded that:

> [326] … a drug shortage situation could occur at any time, regardless of whether there is a strike at the Port of Montreal or not. To deal with such a shortage—and the MEA has failed to make the case that one would arise in the event of a strike at the Port of Montreal—Health Canada has a certain number of tools and strategies designed to help businesses and manufacturers establish or implement alternatives. Health Canada has put in place a highly integrated and

> interdependent drug supply chain, and all of the stakeholders have an important role to play in the event of a drug shortage.
>
> [327] Moreover, the Board is of the opinion ... that air transport undeniably constitutes an option for manufacturers of pharmaceutical products or for any stakeholder in that industry, in the event that there is a shortage of a particular drug or other pharmaceutical product for one reason or another. Accordingly, in light of the evidence, the Board finds that there are alternatives and that the mechanisms put in place by Health Canada are such that the industry is able to react promptly in the event of a drug shortage.

[68] The Board distinguished the situation from that in *AECL CIRB*, where there was concrete evidence showing that, in the event of a work stoppage of AECL's reactor, there would shortly be a critical shortage of radioisotopes required for many diagnostic procedure. In the absence of similar evidence in the case before it, the CIRB concluded that the claimed shortage of pharmaceutical products did not justify the issuance of an order under section 87.4 of the Code.

[69] The CIRB next considered salt used in de-icing roads in the winter and noted that the typical supply from Goderich had been replaced when there was a strike at the Goderich mine in Ontario. The Board also noted the absence of evidence regarding the salt storage capacities of municipalities, and the fact that salt was shipped to other ports in Quebec. It concluded as follows:

> [335] In light of the evidence, the Board is not convinced that a strike at the Port of Montréal would cause a shortage of salt, considering the fact that several ports receive road salt in Quebec, not to mention the fact that the Port of Montreal is able to receive salt from overseas even in the winter. It was also demonstrated that other companies receive de-icing salt in addition to [the one that operated in the Port of Montreal], among them Cargill and Canadian Salt. The employer was unable to show… what volume of salt the municipalities would need to keep in storage in order to meet the demand in wintertime. Furthermore, the employer's

> evidence also failed to demonstrate that a shortage of de-icing salt would lead to an immediate or serious danger to the health or safety of the public.

[70] The Board therefore concluded that a potential shortage of road salt did not justify an order under section 87.4 of the Code.

[71] As concerns risks of congestion in the St. Lawrence and on the dock, the CIRB determined that the 72-hour strike notice that the Union was required to provide under paragraph 89(1)(f) and section 87.2 of the Code would alleviate any risks from congestion and allow for the safe re-routing of vessels bound for the Port of Montreal.

[72] The Board accordingly determined at paragraph 374 of its reasons that the evidence was:

> … insufficient for it to allow the employer's application for the maintenance of all longshoring services in the event of a strike at the Port of Montreal [and that] [i]n light of the evidence presented, [it was] not satisfied that it would be necessary to maintain all longshoring activities, as requested by the employer, to prevent an immediate and serious danger to the health and safety of the public.

[73] In closing, the Board took note of the Union's commitment to maintain all longshoring activities related to loading and unloading vessels to and from Newfoundland in the event of a strike. The Board also reminded the parties that "at any time and where warranted by the circumstances", the MEA, the Union or the Minister of Labour could apply under section 87.4 of the Code to have the Board amend or cancel its decision (paragraph 376 of the Board's reasons).

III. Analysis of the Applicants' Arguments

[74] I turn now to the various arguments of the applicants. They submit that the CIRB made 12 reviewable errors, any one of which would justify overturning the CIRB's decision. In discussing the issues they raise, it is convenient to group them by type as there is significant overlap between several of the issues.

[75] A couple preliminary points bear mention.

[76] First, the applicants argue that this Court should give no weight to the affidavit of Martin Lapierre, filed by the Union, which the applicants say is replete with argument and inadmissible evidence. I agree that large portions of this affidavit are inadmissible. However, the same can also be said of large portions of the affidavit Guillaume Couture, filed by the applicants.

[77] In light of the applicants' arguments and the fact that there was a transcript of the hearings before the CIRB, no evidence other than the transcript, the exhibits, other documents that were before the CIRB and, perhaps, the CIRB's interim decisions are relevant to this application for judicial review.

[78] The general rule is that evidence in a judicial review application is limited to that which was before the administrative decision-maker because the task of the reviewing court is to assess the reasonableness of the administrative decision-maker's decision and not to decide the case afresh. There are a limited number of exceptions to this rule. The exceptions allow, for example,

for the filing of general background evidence that might assist the Court, evidence relevant to a claimed violation of procedural fairness or other procedural defect, or evidence to show that there was no evidence on a particular point before the administrative decision-maker (*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 F.T.R. 297 at para. 20; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 261 A.C.W.S. (3d) 441 at paras. 13–28; leave to appeal to S.C.C. refused, 36834 (9 June 2016)).

[79] Here, large chunks of the affidavits filed by both parties go far beyond the permissible exceptions to the general rule and are in essence a re-argument of the case before the CIRB. I have given no weight to the portions of the two affidavits that are inadmissible and have instead focussed on the documents appended to the affidavits that are relevant to the issues in this application.

[80] The second preliminary point requires identification of the standard of review that this Court is to apply, about which very little need be said.

[81] The CIRB is owed no deference on issues of procedural fairness, as this Court held in *Watson v. Canadian Union of Public Employees*, 2023 FCA 48, [2023] F.C.J. No. 280 at para. 17 [*Watson*]; *Clark v. Air Line Pilots Association*, 2022 FCA 217, [2022] F.C.J. No. 1755 at para. 10 [*Clark*]; and *Canadian Airport Workers Union v. International Association of Machinists and Aerospace Workers*, 2019 FCA 263, 52 C.L.R.B.R. (3d) 1 at paras. 23–24 (citing to *Wsáneć School Board v. British Columbia*, 2017 FCA 210, 285 A.C.W.S. (3d) 170 at paras. 22–23; and

Canadian Pacific Railway Company v. Canada (Attorney General), 2018 FCA 69, 291 A.C.W.S. (3d) 8 at paras. 34–56).

[82] On the other hand, the CIRB's factual findings and interpretation of the provisions in the Code are subject to review under the deferential reasonableness standard, as was held in at *Watson* at para. 16; *Clark* at paras. 8–9; and *Grant v. Unifor*, 2022 FCA 6, 340 A.C.W.S. (3d) 227 at para. 8.

A. *Procedural Fairness Issues Raised by the Applicants*

[83] Moving on to consider the various issues raised by the applicants, three of them (issues 2, 11 and 12 in the applicant's memorandum of fact and law) allege violations of procedural fairness.

[84] The applicants allege in issue 2 that the CIRB violated their rights by improperly limiting their evidence. They point in this regard to time constraints imposed by the CIRB, to the requirement that the MEA file the evidence in chief of certain witnesses by affidavit, to the CIRB requiring the MEA to call its final witness before completing the examination of Mr. Murray, and to the Board's decision to declare the MEA's case closed when counsel refused to complete his examination of Mr. Murray. The applicants say that the curtailment of their evidence in this fashion is particularly troubling when the Board eventually premised its decision on the failure of the MEA to discharge its burden to establish that a maintenance of activities order was required.

[85] With respect, I disagree.

[86] The CIRB is master of its own procedure and is entirely entitled to make rulings like these, particularly where it is concerned about the timely completion of hearings. The oft-repeated maxim that "labour relations delayed are labour relations denied" is particularly apposite in applications like the one in the case at bar, which have the effect of suspending the right to strike or lockout, with the frequent consequence of undermining progress at the bargaining table. The overarching purpose of the Code, as recognized in its preamble, is the encouragement of free collective bargaining, which lengthy delays in hearing and deciding section 87.4 applications may well hamper.

[87] Each of the procedural decisions that the applicants impugn was determined to be necessary by the CIRB to move the case forward. Given the length of the hearing, there was certainly more than ample basis for the CIRB to have been concerned about delay.

[88] Moreover, it bears noting that the CIRB is empowered under section 16.1 of the Code to decide cases without holding a hearing at all. This Court has frequently held that a decision of the CIRB to proceed without any hearing at all is not a violation of procedural fairness (see, for example, *Watson* at paras. 50–52 (citing to *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 373 D.L.R. (4th) 167 at para. 50); *Nadeau v. United Steelworkers of America*, 2009 FCA 100, 400 N.R. 246 at paras. 3–6; *NAV Canada v. International Brotherhood of Electrical Workers*, 2001 FCA 30, 103 A.C.W.S. (3d) 966 at para. 10). If the Board can

proceed without any hearing, it stands to reason that it can require the filing of affidavits and set deadlines for completion of the evidence.

[89] I also note that the mere fact that a party commences a judicial review application does not entitle that party to a stay of proceedings before a labour board (see, for example, *Canada Post Corporation*, 2013 CIRB 697, [2013] C.I.R.B.D. No. 25 at paras. 18–23; and *Société Radio-Canada*, 2002 CIRB 193, [2002] C.I.R.B.D. No. 41 at paras. 20–34).

[90] The Board was therefore completely within its rights to insist that counsel for the MEA complete his case, and when he refused to do so, to close it for him. It was also entitled to make the other rulings regarding the filing of affidavits and completion of the evidence to which the applicants object.

[91] Thus, the arguments raised by the applicants in issue 2 of their memorandum of fact and law regarding the CIRB's alleged limiting of the MEA's right to put its case before the Board are without merit.

[92] The same is also true of their other procedural fairness arguments.

[93] The applicants' issue 11 alleges that the CIRB violated their procedural fairness rights in: (a) adopting and applying a novel standard of proof (of "direct" or "convincing" evidence) and imposing it on the MEA without notice; (b) failing to rule on several objections made by the

MEA; and (c) relying on the Health Canada document, discussed above, without forewarning the applicants that it might do so.

[94] Insofar as concerns the alleged adoption of a new standard of proof, I disagree that the CIRB did any such thing. The Board' s references to "direct" or "convincing" evidence do not differ in any meaningful way from the standard applied in earlier cases, which, as noted above, required "significant evidence" from the party seeking to limit the right to strike or lockout, establishing there would likely be an immediate and serious danger to the health or safety of the public.

[95] Moreover, when the expressions used by the Board that are impugned by the applicants are read in context, it is clear that what the CIRB meant by the terms "direct" or "convincing" evidence is simply that the MEA failed to call any evidence that would establish the claimed immediate and serious danger to the health and safety of the public. As noted by the Board, the MEA's witnesses spoke in generalities and none of them provided specifics.

[96] I accordingly conclude that the CIRB did not adopt a new standard of proof that the MEA was required to meet.

[97] Insofar as concerns the claimed failure to rule on objections, the applicants have not established any such failure. They mentioned exhibits P-51, I-23, I-30 and I-31in their memorandum of fact and law but did not refer to them in their oral submissions. It appears that these exhibits were contained in books of documents the parties filed before the CIRB and were

admitted by the CIRB, following the practice often adopted in labour cases, providing that they were subject to subsequent identification by a witness. The applicants have failed to demonstrate that these documents were not subsequently identified, and, in any event, nothing in the Board's decision turned on them.

[98] The Union's Exhibit I-33, the doctoral thesis of Dr. Amiel, one of the experts called by the MEA, was the only exhibit referred to in oral submissions before us. A review of the transcript of the hearing before the CIRB (applicant's record, vol. 34, at 7213–7226) indicates that the CIRB, in fact, did rule on the objection and admitted this document over the objection of counsel for the MEA, determining it had at least some relevance. The mention of a reserve with respect to the document was made by the chairperson of the CIRB panel to allow the MEA to argue as to weight to be given to the document, in light of the fact that it dated from 2008.

[99] Thus, contrary to what the applicants claim, they have not established that the CIRB failed to rule on an objection.

[100] As concerns the alleged failure to forewarn the applicants that it might rely on the Health Canada document, the CIRB was not obliged to do so. The Union tendered the document. It was therefore in evidence, and it was incumbent on the MEA to make any submissions it wanted or to file additional evidence if it wished to contradict the document. It cannot claim to have been taken by surprise by the document.

[101] I therefore conclude that the applicants' issue 11 provides no basis for intervention.

[102] Although framed as an issue of procedural fairness, the applicants' issue 12 is no more than a recapitulation of the other arguments it makes regarding the content of the CIRB's decision, discussed below. For the same reasons as appear in the following section of these Reasons, the issue 12 arguments are without merit and certainly do not constitute a failure of procedural fairness.

B. *Issues Raised by the Applicants Regarding the Alleged Unreasonableness of the CIRB's Decision*

[103] The remaining nine issues raised by the applicants all assert that the Board's decision was unreasonable, for similar and overlapping reasons.

[104] The applicants first say that the CIRB unreasonably refused to follow its earlier case law in: (a) unreasonably refusing to consider whether any services, fewer than the total strike ban sought by the MEA in its application, needed to be maintained under section 87.4 of the Code (issue 1); (b) unreasonably refusing to follow its precedent in the Port as there was no meaningful difference between the facts in the case at bar and those that led it to issue its order in 2010, which required maintenance of stevedoring services for ship destined to or from Newfoundland, (issue 4); and (c) unreasonably refusing to follow its precedents in *Aéroports de Montréal*, *AECL CIRB* and *Nav Canada* (issue 10).

[105] As concerns issue 1, I agree with the MEA that section 87.4 of the Code casts an obligation on the CIRB that is independent of the parties' positions. The Board has an obligation to provide for maintenance of those activities it believes could pose an immediate and serious

danger to the health or safety of the public if they were to cease or be curtailed during a strike or lockout, regardless of the positions taken by the parties. The CIRB has recognized that such is its obligation in *Aéroports de Montréal*, *AECL CIRB* and *Nav Canada.*

[106] However, this principle is of no assistance to the applicants in the present case. Here, the CIRB found that there were no activities that needed to be maintained because the evidence did not establish that there were any that, if ceased or curtailed, could cause an immediate and serious danger to the safety or health of the public. Therefore, it was not necessary for the Board to have considered whether only some of the activities needed to be maintained.

[107] Moreover, as indicated in *CN*, referred to above, the Board relies on the parties to put the relevant evidence before it; that is why an evidentiary obligation is cast on both parties. It is not inconsistent with this requirement to allow the union to discharge its evidentiary duty via cross-examination of the employer's witnesses, as the CIRB held in its letter decision in *Aliant Telecom*, referred to above. Nor is the CIRB required to engage in an inquisitorial process as the applicants suggest. Thus, issue 1 is without merit.

[108] As concerns issues 4 and 10, in the case at bar, the CIRB distinguished the precedents the applicants rely on. Notably, it found that there were no medical products shown to be akin to those at issue in *AECL CIRB*, and that there were critical factual differences from *Nav Canada*, *Aéroports de Montréal* and other cases where maintenance of activities orders were issued.

[109] The Board also distinguished the case at bar from those involving Newfoundland because in the case at bar there were alternative options that could have been utilized, including other ports and air transport for critically needed pharmaceutical products. As noted above, the absence of any such alternative was a key factor in the *Marine Atlantic* case.

[110] While it is true that the Board did not specifically mention its speaking order of September 2010 applicable to the Port of Montreal in its decision in the case at bar, given the factual difference regarding available alternatives that it noted when discussing the *Marine Atlantic* case, I do not think that this non-mention renders the decision unreasonable. As noted by the majority in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 91 [*Vavilov*]:

> … written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do “not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred” is not on its own a basis to set the decision aside: *Newfoundland* [*and Labrador*] *Nurses*[*' Union v. Newfoundland and Labrador (Treasury Board)*], [2011 SCC 62, 340 D.L.R. (4th) 17] at para. 16.

[111] Thus, contrary to what the applicants submit, the CIRB did not unreasonably fail to follow its prior case law. In its reasons, the CIRB gave a detailed, defensible explanation of why it reached a different decision from those reached in the cases the MEA relied on.

[112] Issues 1, 4 and 10 raised by the applicants accordingly provide no basis for intervention.

[113] Nor does issue 8, which mischaracterizes the Board's decision. Contrary to what the applicants assert, the Board did not give primacy to the right to strike over its obligation under section 87.4 of the Code. The CIRB in fact adopted the same approach as in previous cases, finding that it required significant evidence before issuing a maintenance of activities order. It simply found an absence of any such evidence.

[114] The remaining issues that the applicants raise (issues 3, 5, 6, 7 and 9) are factual and seek to have this Court reweigh the evidence and reach a different conclusion from that reached by the CIRB. As I have already noted, that is not the role of this Court.

[115] As held *in Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41, 432 D.L.R. (4th) 170, and *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161, [2021] F.C.J. No. 848 [*Best Buy*], in light of the development in administrative law over the past several years, paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 allows intervention in factual determinations even in the face of a privative clause such as section 22 of the Code.

[116] However, the scope for intervention is very narrow. Paragraph 18.1(4)(d) of the *Federal Courts Act* provides that erroneous factual findings may provide the basis for intervention only if a decision was based on them and if they were "… made in a perverse or capricious manner or without regard for the material before [the decision-maker]". The statutory formulation of the test before the Federal Courts for unreasonable factual determinations is akin to what the Supreme Court said about the nature of unreasonable factual findings in *Vavilov*, where the

majority noted at paragraph 126 that unreasonable factual determinations arise where the "… decision maker has fundamentally misapprehended or failed to account for the evidence before it."

[117] A finding is perverse if it is made wilfully contrary to the evidence. Findings that are capricious or made without regard to the material before an administrative decision-maker include most notably circumstances where there is no evidence to rationally support a finding or where the decision maker failed to reasonably account at all for critical evidence that ran counter to its finding (*Best Buy* at para. 123).

[118] Here, none of the factual matters that the applicants raise rise to such a level. The applicants seek to have us instead set aside the CIRB's findings and accept the conclusions advanced by their experts by calling on us to sift through all the evidence and reach a different conclusion. Indeed, they devoted the bulk of their written and oral arguments to a minute review of the evidence and urged this Court to re-evaluate it.

[119] We cannot do so. The CIRB was entitled to reject the conclusions advanced by the witnesses the MEA called for the reasons it gave. Contrary to what the applicants assert, the Board provided ample reasons for rejecting these conclusions, as the detailed review of the Board's decision, set out above, demonstrates.

[120] Thus, none of the various arguments raised by the applicants has merit.

IV. Proposed Disposition

[121] I would accordingly dismiss this application, with costs.

"Mary J.L. Gleason"
J.A.

"I agree.
Richard Boivin"

"I agree.
René LeBlanc"

Appendix

Section 87.4 of the *Canada Labour Code*, R.S.C. 1985, c. L-2, is as follows:

Maintenance of activities	**Maintien de certaines activités**
87.4 (1) During a strike or lockout not prohibited by this Part, the employer, the trade union and the employees in the bargaining unit must continue the supply of services, operation of facilities or production of goods to the extent necessary to prevent an immediate and serious danger to the safety or health of the public.	**87.4 (1)** Au cours d'une grève ou d'un lock-out non interdits par la présente partie, l'employeur, le syndicat et les employés de l'unité de négociation sont tenus de maintenir certaines activités — prestation de services, fonctionnement d'installations ou production d'articles — dans la mesure nécessaire pour prévenir des risques imminents et graves pour la sécurité ou la santé du public.
Notice	**Avis à l'autre partie**
(2) An employer or a trade union may, no later than fifteen days after notice to bargain collectively has been given, give notice to the other party specifying the supply of services, operation of facilities or production of goods that, in its opinion, must be continued in the event of a strike or a lockout in order to comply with subsection (1) and the approximate number of employees in the bargaining unit that, in its opinion, would be required for that purpose.	**(2)** L'employeur ou le syndicat peut, au plus tard le quinzième jour suivant la remise de l'avis de négociation collective, transmettre à l'autre partie un avis pour l'informer des activités dont il estime le maintien nécessaire pour se conformer au paragraphe (1) en cas de grève ou de lock-out et du nombre approximatif d'employés de l'unité de négociation nécessaire au maintien de ces activités.
Agreement	**Entente entre les parties**
(3) Where, after the notice referred to in subsection (2) has been given, the trade union and the employer enter into an agreement with respect to compliance with subsection (1), either party may file a copy of the agreement with the Board. When the agreement is filed, it has the same effect as an order of the Board.	**(3)** Si, après remise de l'avis mentionné au paragraphe (2), les parties s'entendent sur la façon de se conformer au paragraphe (1), l'une ou l'autre partie peut déposer une copie de l'entente auprès du Conseil. L'entente, une fois déposée, est assimilée à une ordonnance du Conseil.

Where no agreement entered into

(4) Where, after the notice referred to in subsection (2) has been given, the trade union and the employer do not enter into an agreement, the Board shall, on application made by either party no later than fifteen days after notice of dispute has been given, determine any question with respect to the application of subsection (1).

Absence d’entente

(4) Si, après remise de l’avis mentionné au paragraphe (2), les parties ne s’entendent pas sur la façon de se conformer au paragraphe (1), le Conseil, sur demande de l’une ou l’autre partie présentée au plus tard le quinzième jour suivant l’envoi de l’avis de différend, tranche toute question liée à l’application du paragraphe (1).

Referral

(5) At any time after notice of dispute has been given, the Minister may refer to the Board any question with respect to the application of subsection (1) or any question with respect to whether an agreement entered into by the parties is sufficient to ensure that subsection (1) is complied with.

Renvoi ministériel

(5) En tout temps après la remise de l’avis de différend, le ministre peut renvoyer au Conseil toute question portant sur l’application du paragraphe (1) ou sur la capacité de toute entente conclue par les parties de satisfaire aux exigences de ce paragraphe.

Board order

(6) Where the Board, on application pursuant to subsection (4) or referral pursuant to subsection (5), is of the opinion that a strike or lockout could pose an immediate and serious danger to the safety or health of the public, the Board, after providing the parties an opportunity to agree, may, by order,

(a) designate the supply of those services, the operation of those facilities and the production of those goods that it considers necessary to continue in order to prevent an immediate and serious danger to the safety or health of the public;

(b) specify the manner and extent to which the employer, the trade

Ordonnance du Conseil

(6) Saisi d’une demande présentée en vertu du paragraphe (4) ou d’un renvoi en vertu du paragraphe (5), le Conseil, s’il est d’avis qu’une grève ou un lock-out pourrait constituer un risque imminent et grave pour la sécurité ou la santé du public, peut — après avoir accordé aux parties la possibilité de s’entendre — rendre une ordonnance :

a) désignant les activités dont il estime le maintien nécessaire en vue de prévenir ce risque;

b) précisant de quelle manière et dans quelle mesure l’employeur, le

union and the employees in the bargaining unit must continue that supply, operation and production; and

(c) impose any measure that it considers appropriate for carrying out the requirements of this section.

Review of order

(7) On application by the employer or the trade union, or on referral by the Minister, during a strike or lockout not prohibited by this Part, the Board may, where in the Board's opinion the circumstances warrant, review and confirm, amend or cancel an agreement entered into, or a determination or order made, under this section and make any orders that it considers appropriate in the circumstances.

Binding settlement

(8) Where the Board is satisfied that the level of activity to be continued in compliance with subsection (1) renders ineffective the exercise of the right to strike or lockout, the Board may, on application by the employer or the trade union, direct a binding method of resolving the issues in dispute between the parties for the purpose of ensuring settlement of a dispute.

syndicat et les employés membres de l'unité de négociation doivent maintenir ces activités;

c) prévoyant la prise de toute mesure qu'il estime indiquée à l'application du présent article.

Révision de l'ordonnance

(7) Sur demande présentée par le syndicat ou l'employeur, ou sur renvoi fait par le ministre, au cours d'une grève ou d'un lock-out non interdits par la présente partie, le Conseil peut, s'il estime que les circonstances le justifient, réexaminer et confirmer, modifier ou annuler une entente, une décision ou une ordonnance visées au présent article. Le Conseil peut en outre rendre les ordonnances qu'il juge indiquées dans les circonstances.

Règlement du différend

(8) Sur demande présentée par le syndicat ou l'employeur, le Conseil, s'il est convaincu que le niveau d'activité à maintenir est tel qu'il rend inefficace le recours à la grève ou au lock-out, peut, pour permettre le règlement du différend, ordonner l'application d'une méthode exécutoire de règlement des questions qui font toujours l'objet d'un différend.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-162-20
STYLE OF CAUSE:	MARITIME EMPLOYERS ASSOCIATION, MONTREAL PORT AUTHORITY and SHIPPING FEDERATION OF CANADA v. SYNDICAT DES DÉBARDEURS, LOCAL 375 OF THE CANADIAN UNION OF PUBLIC EMPLOYEES, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LA CHAMBRE DE COMMERCE DE L'EST DE MONTRÉAL, LE CONSEIL DU PATRONAT DU QUÉBEC and LA FÉDÉRATION DES CHAMBRES DE COMMERCE DU QUÉBEC
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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CONCURRED IN BY:	BOIVIN J.A. LEBLANC J.A.
DATED:	MAY 5, 2023

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