IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pan Pacific Vancouver v. Unite Here, Local 40,* 2023 BCSC 594

Date: 20230414
Docket: S222312
Registry: Vancouver

2023 BCSC 594 (CanLII)

Between:

Pan Pacific Vancouver

Employer

And:

Unite Here, Local 40 and British Columbia Labour Relations Board

Respondents

Before: The Honourable Madam Justice Morellato

Reasons for Judgment
In Chambers

Counsel for the Employer:	D.J. Jordan, K.C. J. Chiang (A/S)
Counsel for the Respondent Unite Here, Local 40:	C. Allevato
Counsel for the British Columbia Labour Relations Board:	J. O'Rourke
Place and Dates of Hearing:	Vancouver, B.C. October 5-6, 2022
Place and Date of Judgment:	Vancouver, B.C. April 14, 2023

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I. INTRODUCTION

[1] The petitioner, Pan Pacific Vancouver, brings this judicial review application seeking an order to set aside the reconsideration decision of the Labour Relations Board ("Board") indexed at 2022 BCLRB 10 ("Reconsideration Decision").

[2] The petitioner, who I shall refer to as the "Employer", also seeks an order as follows:

> … that the Reconsideration Decision be substituted with a decision:
>
> (1) setting aside the Board's decision indexed as 2021 BCLRB 194 ("Original Decision"); and
>
> (2) finding the respondent union, Unite Here, Local 40 ("Union") contravened section 11 of the *British Columbia Labour Relations Code*, R.S.B.C., c. 244 ["*Code*"].

[3] The Employer alleges, first, that the Reconsideration Decision of the Board was patently unreasonable when it declined to set aside the finding of the Original Decision "on the basis that the on-call employees are not part of the bargaining unit in respect of which the Union is certified." The Employer argues that the Union had contravened s. 11 of the *Code,* committed an unfair labour practice, and bargained in bad faith, by advising the Employer that it would not include the on-call employees in the bargaining unit but then did so.

[4] Quite apart from its submission that the Union had resiled from its agreement to exclude the on-call employees from the bargaining unit, the Employer also argues the Union did not act in a manner consistent with the principles express or implied in the *Code* by violating the on-call employees' foundational right to choose whether to be represented by the Union.

[5] The Employer asserts that the on-call employees cast ballots in the representation vote but their votes were not counted. They were denied their choice of a freely chosen representative because the on-call employees were nevertheless included in the bargaining unit when the Union was certified as their exclusive bargaining agent. The Employer submits the Reconsideration Decision was patently unreasonable by including the on-call employees in the bargaining unit in these circumstances.

[6] The petitioner requests an order that the matter be remitted to the Board for "the purpose of determining the issue of remedy in relation to the substitute decision", and it seeks its costs.

[7] The Union and the Board oppose the granting of these orders submitting, first, that the Employer has misconstrued the underlying facts informing the Reconsideration Decision; and, second, that the Board exercised its specialized expertise and exclusive jurisdiction to certify the Union as required by the *Code,* consistent with its underlying principles.

[8] I will elaborate on the respective arguments of the parties further, after I review the surrounding circumstances, the appropriate standard of review, and the applicable legislative context.

II. SURROUNDING CIRCUMSTANCES

[9] The Employer operates the Pan Pacific Hotel Vancouver located at Canada Place, Vancouver, British Columbia. The circumstances surrounding this protracted dispute between the Employer and the Union dates back to the summer of 2020, in the midst of the COVID-19 pandemic. The Employer notes in its submission to the Board at that time that, as a result of the pandemic, the "vast majority" of its employees were being laid-off and "many" were being terminated.

[10] The Original Decision confirms that in August 2020 the Union applied pursuant to *Code* to be certified as the exclusive bargaining agent in respect of the following group of employees (i.e., the "bargaining unit"):

> Employees at Pan Pacific, Vancouver, 999 Canada Place #300, Vancouver, BC, except sales staff, security, managerial and clerical staff.

[11] A representation vote was conducted August 27-28, 2020, in accordance with s. 25 of the *Code*.

[12] At the time of the representation vote, approximately 440 employees were employed by the Employer. Of these, 118 were employed in a category of employees referred to as "on-call employees". The Employer describes the on-call employees as workers who were called in to work "as and when work is available,

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such as large banquet or catering events", and notes they are not eligible for employee benefits. Eighty-seven of the on-call employees cast ballots in the representation vote. The ballots were sealed, pending the outcome of the hearing of the certification application before the Board.

[13] The Employer submitted, before the representation vote was counted, that only working regular employees and working casual employees should be eligible to vote. It asserted that the on-call employees "should be excluded on the basis they do not have a sufficient continuing interest" in the bargaining unit. There were similar objections made by the Employer in regard to other groups or categories of employees, but those objections are not before me in this judicial review.

[14] In response to the Employer's position that the ballots of on-call employees should not be counted, the Union considered the matter and agreed not to count the on-call employee ballots for purposes of the representation vote. In its November 3, 2020 submission to the Board, the Union referenced the Employer's submission and stated:

> The Union does not agree that the on-call employees or employees on medical leave would not be appropriately included in the bargaining unit following certification but it is prepared to accept their exclusion for purpose of the present application.
>
> [Emphasis added]

[15] This communication appeared to be the source of some confusion on the part of the Employer as to the Union's position, which the Board addressed in its Original Decision. The Board reviewed the matter and found that, at the time of the representation vote, the Union took the position that on-call employees were to be included in the application for certification and that it did not change its position in this regard. The Board also found that, at the time of the certification hearing, the Employer stated it did not object to the appropriateness of the bargaining unit.

[16] While the Employer did not take issue with the appropriateness of the bargaining unit during the certification hearing, it took issue with whether a number of groups or categories of employees "should be eligible to vote in the certification, or be counted in determining threshold."

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[17] The chain of events surrounding the representation vote and the certification is summarized in the decision of the Board dated January 25, 2021 in *Pan Pacific and Unite Here, Local 40*, 2021 BCLRB 15 ("*Voter's List Decision*"); this decision is not being judicially reviewed, although it preceded and informed the Original Decision. In the *Voter's List Decision,* the Board addresses the dispute between the Employer and Union regarding which employee ballots should be counted for purposes of the representation vote and which should not. The Board states:

> 2. At the expedited certification hearing the Employer and the Union both made numerous challenges to employees on the tentative voter list on the grounds they should be excluded from the bargaining unit for the purposes of calculating threshold membership support and the representation vote**.** The parties agreed to have the matter heard by written submissions in accordance with a submission schedule set at the hearing, and I ordered the vote to proceed with the ballot box to be sealed pending adjudication of the challenges.
>
> 3. During the submission process the parties were able to narrow the issues in dispute. The Union confirmed for the purpose of its certification application that those employees the Employer identified as clerical, managers, on-call, on medical leave, dismissed June 18, 2020, and retired August 22, 2020 were properly excluded. The only outstanding issue was the Employer's challenge to the inclusion in the bargaining unit of what the Employer labelled "Dismissed Employees", "Non-Working Casuals", and "Non-Working Other Employees"
>
> [Emphasis added]

[18] Following the *Voter's List Decision*, the eligible ballots cast in the representation vote were counted according to the Board's determination, and the Union was certified.

[19] The Employer then filed an application under s. 11 of the *Code* alleging the Union was bargaining in bad faith by refusing to withdraw a "recall right demand proposal" for on-call employees, who the Employer maintained were not part of the bargaining unit. The Union filed a complaint under s. 6 of the *Code,* alleging the Employer committed an unfair labour practice when it refused to provide the Union with personal telephone numbers for employees, including the on-call employees, who the Union maintained are members of the bargaining unit.

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[20] These two complaints were heard together. On May 5, 2021 the Board conducted a case management conference and the parties agreed the Board would conduct a hearing into two questions:

1) Are the on-call employees included in the bargaining unit?

   If the answer to this question is "yes" the Employer will provide the Union with the information it has previously provided for the other members of the bargaining unit. If the answer is "no", the Employer's s. 11 complaint will proceed.

2) Is the Union entitled to on-call employee telephone numbers?

[21] These complaints were then heard by the Board, and it rendered its Original Decision. In the Original Decision, the Board decided that the on-call employees were within the bargaining unit. The Board dismissed the Employer's application, concluding that the Union had not bargained in bad faith.

[22] The Board allowed the Union's application for the disclosure of the on-call employees' phone numbers to the Union. The Board reasoned, in part, that employers must disclose employees' telephone numbers as part of their obligation not to interfere with the administration of a trade union; it found the phone numbers were necessary to "facilitate efficient communications between a union and the employees in the bargaining unit".

[23] The Employer applied to the Board for leave for reconsideration of the Original Decision. The application resulted in the Reconsideration Decision that is being judicially reviewed in this proceeding. In the Reconsideration Decision, the Board declined to grant leave for reconsideration on the basis that the Employer:

> …has not raised a serious question that the Original Decision is inconsistent with the principles expressed or implied in the Code or that the original panel breached the principles of natural justice in making the decision.

[24] The Employer then sought judicial review of this Reconsideration Decision.

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A. The Board's Reasons in the Original Decision

[25] For ease of reference, note that the Original Decision and the Reconsideration Decision use different defined terms for the *Voter's List Decision*. The Original Decision defines the *Voter's List Decision* as the "Original Decision", while the Reconsideration Decision defines the Voter's List Decision as "Pan Pacific #1".

[26] The Original Decision sets out the respective positions of the parties as follows:

> 12. The Employer submits the on-call employees are not included in the bargaining unit, first, because they do not have employment status having not worked since March 2020 and second, because they are not employees with a continuing interest in the bargaining unit. The Employer identifies a few occasions in the submissions on the certification application where it says it identified that the on-call employees were not "employed" and did not having sufficient continuing interest in the bargaining unit to be counted for threshold or to vote or, it submits, to be included in the bargaining unit. The Employer submits the Union is engaging in an "exercise of arithmetic" where it excluded the on-call persons from the certification process but once certified is attempting to "force these people into the unit".
>
> 13. The Union submits the certification issued by the Board clearly does not exclude on-call employees from the scope of the bargaining unit. It also submits the test for inclusion for the purposes of threshold and voting in the certification application is different than the test for inclusion in the bargaining unit. The test used by the panel in the Original Decision [referring to the *Voter's List Decision]* was to assess the sufficiency of continuing interest in a bargaining unit. In determining the appropriateness of including a category of employees in a bargaining unit, the Board considers whether there is a community of interest within the proposed unit considering the similarity in skills, interests, duties and working conditions, the physical and administrative structure of the employer, functional integration, and geography (*Island Medical Laboratories Ltd.,* BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), 19 C.L.R.B.R. (2d) 161.
>
> 14. The Employer says the Union is taking too simplistic an approach to the issue of the scope of the bargaining unit. The Employer maintains that since on-call employees have no obligation to accept shifts and the Employer has no obligation to call them, there is no "ongoing" employment status for on-call employees.
>
> 15. In evidence, the Union witness confirmed that the Employer did not challenge the appropriateness of the unit at the certification hearing, nor did it raise any issues regarding the inclusion of on-call employees in the bargaining unit.

> 16. The witness for the Employer confirmed that on-call employees have not worked since March 2020 and that layoff notice and severance is not given to on-call employees. The on-call work is related to banquets, bell, and front desk work.

[27] After considering the respective positions of the parties, the original panel reasons as follows (note that the reference to "Original and Reconsideration Decisions" is a reference to the *Voter's List Decision*, and also the reconsideration application by the Employer of the original *Voter's List Decision*, which was dismissed):

> 23. The issue of inclusion of individuals for the certification process (threshold determination and voting) was fully argued in the Original and Reconsideration Decisions [i.e., the *Voters List Decisions*] and the Employer did not challenge the appropriateness of the bargaining unit or raise any issues about inclusion of on-call employees in the bargaining unit. I find that the paragraphs of earlier submissions that the Employer reviewed in argument do not establish the Employer objected to the inclusion of on-call employees in the bargaining unit. In any event, the certification that was issued by the Board provides that the Union is the bargaining agent for employees of the Employer at the Hotel except sales staff, security, managerial, clerical staff and the spa department. It does not expressly exclude on-call employees.
>
> 24. Given the impact of the COVID-19 pandemic on the Employer, it is not surprising that many on-call employees have not worked since March 2020. The Employer has stated in argument that it does not see work for casuals in the "immediate or foreseeable future" but it has not said that it will never utilize casuals and agrees that greater staffing will be required when the Employer's business improves. While that may be a reason to negotiate certain provisions for casuals that are different than those negotiated for working employees, I do not find that is a reason to conclude they have no employment relationship with the Employer or to exclude them from collective bargaining. On-call employees would be included provided they are within the scope of the bargaining unit description (i.e., they are not in sales, security, managerial, clerical staff, and the spa department).
>
> 25. I find in these circumstances that on-call employees are properly included in the bargaining unit and the Union is not in breach of Section 11 by advancing a proposal in bargaining regarding their terms and conditions of employment.

[28] Accordingly, the original panel found the Employer had not objected to the inclusion of the on-call employees in the bargaining unit at the time of the certification hearing. Rather, the original panel found the Employer had challenged the inclusion of certain individuals for the purposes of calculating threshold support and their participation in the representation vote.

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[29] The Reconsideration Decision summarizes the original panel's findings in this regard as follows:

> 8. The original panel found the Employer did not challenge the appropriateness of the bargaining unit or object to the inclusion of on-call employees in the bargaining unit before the panel in *Pan Pacific #1* [i.e., the *Voter's List Decision]*. It noted that in *Pan Pacific #1*, the issue was whether certain individuals should be excluded for the purpose of determining threshold support and voting in the certification application. As well, the original panel noted the certification that was issued by the Board did not expressly exclude on-call employees (Original Decision, para. 23).
>
> 9. The original panel noted that given the impact of the COVID-19 pandemic on the Employer, it was not surprising that many on-call employees had not worked since March 2020. However, the original panel also noted the Employer had not said that it would never utilize on-call employees and the Employer agreed that greater staffing would be required when its business improves. The original panel stated it could not conclude that on-call employees have no employment relationship with the Employer or should be excluded from collective bargaining (Original Decision, para. 24).
>
> 10. Accordingly, the original panel found on-call employees are not excluded from the bargaining unit unless they are employed within the scope of the bargaining unit description exception (i.e., in sales, security, managerial, clerical staff, or the spa department), and the Union did not breach Section 11 by advancing a proposal in bargaining regarding their terms and conditions of employment.
>
> [Emphasis Added]

B. The Reasoning of the Board in the Reconsideration Decision

[30] The Reconsideration Decision sets out the position of the Employer in the reconsideration application as follows:

> 11. The Employer argues the parties agreed during the certification process that the bargaining unit description excluded on-call employees and the panel in *Pan Pacific #1* [*Voter's List Decision*] proceeded on that basis. The Employer says that once the Union was certified, it resiled from its agreement to exclude on-call employees from the bargaining unit and is now attempting to sweep those employees into the unit. The Employer says the original panel erred in failing to recognize the Union's agreement and in giving the Union representation rights over a group of people who had no say in the representation process.
>
> 12. The Employer says the original panel also erred in claiming the Employer did not dispute the appropriateness of including on-call employees in the bargaining unit. The Employer says it challenged the inclusion of on-call employees in the bargaining unit "in every respect of the Application for Certification". The Employer says that because the Union agreed to exclude the on-call group from the bargaining unit, there was no appropriateness issue to litigate. The Employer says the Original Decision therefore 2022

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> BCLRB 10 incorrectly relied on the fact that the Employer did not raise an appropriateness issue when there was no issue to raise.
>
> 13. The Employer argues the Original Decision is contrary to Sections 4 and 2(c) of the Code because the Union excluded the on-call employees from participating in the certification process and then imposed union representation on them without their knowledge or consent. The Employer says this is contrary to these employees' Code right to choose whether they wish to be represented by the Union.
>
> 14. The Employer also says the Original Decision is inconsistent with Section 18 of the Code because it fails to recognize that the parties intended to exclude on-call employees from the bargaining unit description. The Employer says that if the Original Decision is upheld under reconsideration, it will be a "roadmap for deception" in certification applications because parties will not be able to rely upon the representations made to a panel that certain groups of employees are to be excluded from the bargaining unit.

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[31] Notably, the Reconsideration Decision's summary of the Employer's argument in the reconsideration application, particularly at paragraph 13, corresponds to the argument made by the Employer before me in this judicial review application.

[32] The Reconsideration Decision's analysis is reproduced, in part, below:

> 16. For the reasons which follow, I find the original panel correctly concluded that the issue before the *Pan Pacific #1* panel (*Voter's List Decision*) was whether certain individuals had a sufficient continuing interest in the bargaining unit such that they should be included for the purposes of threshold and voting. It was not whether the category of on-call employees appropriately fell within the scope of the proposed bargaining unit. In my view, the material before me is clear that the Union only agreed to the former proposition (that the individuals on the list who were on-call employees should be excluded for purposes of threshold and voting on the basis they had no sufficient continuing interest in the bargaining unit), and the Employer did not raise the latter proposition during the certification process (that the proposed unit was inappropriate if it included on-call employees).

[33] In arriving at the conclusion that it did, the reconsideration panel considered, among other submissions, the written submissions of the Employer at the time of the union's certification:

> 17. The Employer attached the written submissions it made to the panel in *Pan Pacific #1* [*Voter's List Decision*] to this application, in which it expressly stated that it "[did] not object to appropriateness" (para. 3). With respect to the on-call employees on the tentative voters list, the Employer took the position they did not have a sufficient continuing interest in the bargaining unit to be eligible to vote, stating in part:

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> On Call Employees
>
> 44. The Employer challenges the inclusion of the following On-Call Employees (87) who voted for the purposes of determining threshold support and for inclusion in the representation vote on the basis that they do not have a sufficient continuing interest in the bargaining unit…
>
> 45. The Employer challenges the inclusion of the following On Call Employees (30) who did not vote for the purposes of determining threshold support on the basis that they do not have a sufficient continuing interest in the bargaining unit…
>
> …
>
> 75. As noted above, there are 118 On Call Employees challenged in total, 87 of whom voted. These employees are mainly employed in the Employer's banquets and culinary business, which has been decimated by COVID-19 due to the inability to host conferences and other large functions.
>
> 76. The Employer does not see this improving in the near future and does not foresee recalling any of these on-call employees back to work ….
>
> ….
>
> 89. None of the On-Call Employees, except one … have worked in the 7 months prior to these submissions.

[34] Having reviewed these submissions, the reconsideration panel noted that the Employer's submission at the certification hearing did not address the question of the appropriateness of the bargaining unit; rather, it addressed whether the on-call employees had a sufficient continuing interest in the bargaining unit:

> 18. In its conclusion, the Employer reiterated its position that the 117 on-call employees on the list (along with other individuals on the list) did not have a sufficient continuing interest because they had not worked at the Hotel since the start of the COVID-19 pandemic:
>
> > 210. The On-Call Employees (117), Non-Working Casual Employees (33) and Non-Working Other Employees (11) have not worked since at least March of 2020, and have no prospect of being recalled: they do not have a sufficient, continuing interest in the unit.

[35] The reconsideration panel observed, as did the original panel, that in its submissions before the original panel, the Union did not agree that the on-call employees should be excluded from the bargain unit:

> 19. In its response submissions to the *Pan Pacific #1* panel [resulting in the *Voter's List Decision*], the Union stated that it did not agree that "on-call

> employees … would not be appropriately included in the bargaining unit following certification" but was "prepared to accept their exclusion for the purpose of the present application".
>
> 20. As a result of the Union's agreement in relation to on-call employees and other individuals on the tentative voters list, the panel in *Pan Pacific #1* noted that the "only outstanding issue was the Employer's challenge to the inclusion in the bargaining unit of what the Employer labelled "Dismissed Employees", "Non-Working Casuals", and "Non-Working Other Employees" (*Pan Pacific #1*, para. 3). The panel went on to determine whether those employees should be included in the calculation of threshold and whether the ballots cast by those employees should be counted (*Pan Pacific #1*, para. 116) [*Voter's List Decision*].

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[36] The reconsideration panel accepted the Union's submission that it did not act in bad faith:

> 21. In these circumstances, I am not persuaded the Union agreed that on-call employees were not part of the bargaining unit it was seeking to represent. The Union expressly stated they were but agreed to exclude certain individuals on the tentative voters list, including those who were on-call employees, for the purposes of determining threshold support and for voting. I note it is not uncommon for parties to make such agreements in order to expedite the certification process, and find it is consistent with Code principles to give effect to such agreements, while taking care to recognize what has been agreed to.

[37] The reconsideration panel also addressed the recourse the Employer had under the *Code* if it was not satisfied with the bargain unit description:

> 22. I further note that, had the Employer believed it obtained agreement to exclude the on-call employees from the bargaining unit, it could have sought to amend the bargaining unit description to reflect that agreement. The bargaining unit description was amended to exclude employees in the spa department, but a similar amendment was not made to exclude on-call employees. In my view, this fact supports the inference that the Union did not agree to the exclusion of on-call employees from the bargaining unit.
>
> 23. Accordingly, I am not persuaded the Original Decision erred or is inconsistent with the principles expressed or implied in the Code in finding on-call employees are not excluded from the Union's bargaining unit. I further find no basis for concluding the original panel denied the Employer procedural fairness in reaching the Original Decision.

[38] The Reconsideration Panel then addressed the employer's argument that the on-call employers were denied their fundamental right to choose whether to be in the bargaining unit:

> 24. I find the Employer's argument that on-call employees have been forced into the bargaining unit without the opportunity to vote on whether they wish to be represented does not have merit. The Union sought certification for a bargaining unit which on its face included on-call employees. All employees, including on-call employees, were given an opportunity to vote, and many on-call employees did in fact cast a ballot. Subsequently, the parties agreed that certain of the votes, including those of the on-call employees, would not be counted. This agreement does not constitute "gerrymandering" or otherwise invalidate the representation vote pursuant to which the Union was certified to represent the employees in the unit described in its certification.
>
> 25. I find the Employer has not raised a serious question that the Original Decision is inconsistent with the principles expressed or implied in the Code or that the original panel breached the principles of natural justice in making the decision.

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[39] Having summarized the Reconsideration Decision and the surrounding record, I now address the appropriate standard of review.

III. LEGAL FRAMEWORK

A. The Standard of Review

[40] The application of the correct standard of review in any given case is a question of law: *United Brotherhood of Carpenters and Joiners of America, Local 527, 1370, 1598, 1907, and 2397 v. Labour Relations Board*, 2006 BCCA 364 at para. 15. Both legislation and common law shape the applicable standard of review in judicial reviews involving the Board; I discuss each below.

[41] The parties agree that the applicable standard of review, in this case, is patent unreasonableness. I find that this conclusion is borne out by the applicable enabling legislation and case law.

[42] The relevant legislative provisions informing the standard of review in this case include s. 115.1 of the *Code* which provides that ss. 58(1) and (2) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] apply to the Board. Notably, s. 115.1 of the *Code* does not incorporate s.58(3) of the *ATA.*

[43] Sections 58(1) and (2) of the *ATA* state:

> 58. (1) If the Act under which the application arises contains or incorporates 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.
>
> [Emphasis Added]

[44] The Employer does not assert a breach of natural justice. Rather, it asserts that the issue before the Court involves findings of fact and law such that s. 58(2)(a) applies. While I agree that the applicable standard of review in this case is patent unreasonableness, the Reconsideration Decision involves not only findings of fact and law, but also the exercise of discretion by the Board in respect of matters within its exclusive jurisdiction under a privative clause. As a specialized tribunal, the Board is entitled to a high degree of deference.

[45] In *Team Transport Services Ltd. v. Unifor*, *Local No. VCTA*, 2021 BCCA 211, at para. 27, our Court of Appeal confirmed that the standard of patent unreasonableness continues to apply notwithstanding recent developments in the law regarding various standards of review. That is, the standard of review of patent unreasonableness "continues to mean what it meant" when the *ATA* came into force: see also *Red Chris Development Ltd. v. United Steelworkers, Local 1-1937*, 2021 BCCA 152, at para. 29.

[46] In *Team Transport Services*, Justice Saunders reasons at para. 28:

> [28] Patent unreasonableness is the standard that is most highly deferential to the decision maker. There are many descriptions of the standard. The explanation found in *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 (aff'd *Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. v.*

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> *Communications, Energy and Paperworkers Union of Canada, Local 25-G*, 2009 BCCA 229) is useful:
>
> > [65] When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, as expressed in the *Ryan* [*Law Society of New Brunswick v. Ryan*, 2003 SCC 20] formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in *Ryan*, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.
>
> [Emphasis added]

[47] It is also important to consider specific provisions of the *Code* that affirm the Board's jurisdiction and limit the proper exercise of the Court's judicial review powers in decisions involving the highly specialized nature of the Board's expertise:

a) s. 136(1) of the *Code* provides:

> 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.

b) s. 137(1) of the *Code* provides:

> 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 s. 133 or a matter referred to in s. 136, and without limitation, a court must not make an order enjoining or prohibiting an act or thing in respect of them.

c) s. 138 of the *Code* contains a broadly worded privative clause as follows:

> A decision or order of the board under this *Code* or a collective agreement 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.

d) s. 139 provides that the Board has exclusive jurisdiction to decide certain questions:

> The board has exclusive jurisdiction to decide a question under this *Code* and on application by any person or on its

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> own motion may decide for all purposes of this *Code* any question, including, without limitation, any question as to whether
>
> …
>
> a) a person is or what persons are bound by a collective agreement;
>
> …
>
> h) a person is bargaining collectively or has bargained in good faith;
>
> i) an employee or group of employees is a unit appropriate for collective bargaining;
>
> …
>
> l) a person is included or excluded from an appropriate bargaining unit;
>
> …
>
> r) a trade union …is fulfilling its duty of fair representation; …

[48] It is clear that the legislature has created a statutory regime which confers broad adjudicative and remedial powers on the Board as a specialized tribunal entitled to a high degree of curial deference and judicial restraint.

[49] In reviewing the Board's Reconsideration Decision, I must be mindful that this specialized tribunal has developed its own policies, practices and jurisprudence, and that its expertise and authority is galvanized by a strong privative clause. Further, the law is clear that the threshold for judicial intervention is high. Only if there is no rational or tenable line of analysis supporting the Board's reasoning, or its reasoning is so clearly irrational and flawed that no amount of curial deference can justify letting the decision stand, should the Court set the decision aside as patently unreasonable: see *Communications, Energy & Paperworkers' Union of Canada (Local 298) v. British Columbia (Labour Relations Board)*, 2012 BCCA 354; leave to appeal refused [2012] SCCA 444.

[50] In addition, the authorities are clear that, in light of the exclusive jurisdiction of the Board and the standard of patent unreasonableness, this Court ought not undertake its own analysis of the issues before it. In *Law Society of New Brunswick v. Ryan,* 2003 SCC 20, the Supreme Court of Canada reasoned at para. 51:

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> Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness… Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

[51] As evident from the following reason of our Court of Appeal in *Communications, Energy & Paperworkers' Union of Canada (Local 298) v. Eurocan Pulp & Paper Co.*, 2012 BCCA 354 [*Eurocan*], curial deference may very well include a Court allowing a decision to stand even when the Court disagrees with the decision:

> [33] The approach taken by the chambers judge was perhaps understandable from the perspective of an adjudicator versed in the common law. The validity of the Original Decision, however, had to be viewed through the lens of the Board. Section 82(2) of the *Code* is clear that principles consistent with industrial relations policy must be applied, and a strict legal analysis is not binding. As Madam Justice Southin observed in *Kelowna (City) v. C.U.P.E. Local 338 et al.*, 1999 BCCA 235 at para. 9, 125 B.C.A.C. 319, the Board is not an ordinary specialized tribunal, but has developed and applies a "true body of jurisprudence on its own statute". The concept of curial deference connotes the notion that where the legislature establishes a specialized tribunal, operating within a statutory framework that includes a privative clause, and invests it with broad powers, it intends the tribunal to have the right to make decisions that judges may think to be wrong, because the tribunal better understands the subject matter: [cite omitted]
>
> [Emphasis added]

[52] Accordingly, it is necessary to confer the requisite high degree of curial deference in this case, as required by the standard of patent unreasonableness.

[53] I will now set out other provisions of the *Code* relied on by the parties that invoke the Board's jurisdiction and decision-making authority, followed by a review the parties' positions, and my determination of whether the Reconsideration Decision should be set aside as requested by the Employer.

B. The Enabling Legislation under the Code

[54] The following provisions of the *Code* must also be kept in mind, in assessing whether the Reconsideration Decision was patently unreasonable. I note that, in an effort to avoid duplication, I have not (for the most part) reproduced in this section

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the *Code's* provisions that I have either already addressed in these Reasons, or that I will refer to later when I set out the parties' respective positions.

> **Section 1**
>
> …
>
> "unit" means an employee or employee of employees, and the expression **"appropriate for collective bargaining**" or "**appropriate bargaining unit**", with reference to a unit, means a unit determined by the board to be appropriate for collective bargaining, whether it is an employer unit, craft unit, plant unit or another unit, and whether or not the employees in it are employed by one or more employers.
>
> [Emphasis in the *Code*]
>
> **2** The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that
>
> (a) recognizes the rights and obligations of employees, employers and trade unions under this Code,
>
> (b) fosters the employment of workers in economically viable businesses,
>
> (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,
>
> (d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,
>
> (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,
>
> (f) minimizes the effects of labour disputes on persons who are not involved in those disputes,
>
> (g) ensures that the public interest is protected during labour disputes, and
>
> (h) encourages the use of mediation as a dispute resolution mechanism.
>
> …
>
> **Rights of employers and employees**
>
> **4** (1) Every employee is free to be a member of a trade union and to participate in its lawful activities.
>
> (2) Every employer is free to be a member of an employers' organization and to participate in its lawful activities.

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…

Unfair labour practices

6 (1) An employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.…

...

Requirement to bargain in good faith

11 (1) A trade union or employer must not fail or refuse to bargain collectively in good faith in British Columbia and to make every reasonable effort to conclude a collective agreement.…

Duty of fair representation

12 (1) A trade union or council of trade unions must not act in a manner that is arbitrary, discriminatory or in bad faith

(a) in representing any of the employees in an appropriate bargaining unit, or

(b) ...in the referral of persons to employment

whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.

…

(3) An employers' organization must not act in a manner that is arbitrary, discriminatory or in bad faith in representing any of the employers in the group appropriate for collective bargaining.

Procedure for fair representation complaint

13 (1) If a written complaint is made to the board that a trade union, council of trade unions or employers' organization has contravened section 12, the following procedure must be followed:

(a) a panel of the board must determine whether or not it considers that the complaint discloses a case that the contravention has apparently occurred;

(b) if the panel considers that the complaint discloses sufficient evidence that the contravention has apparently occurred, it must

(i) serve a notice of the complaint on the trade union, council of trade unions or employers' organization against which the complaint is made and invite a reply to the complaint from the trade union, council of trade unions or employers' organization, and

(ii) dismiss the complaint or refer it to the board for a hearing.

(2) If the board is satisfied that the trade union, council of trade unions or employers' organization contravened section 12, the board may make an order or direction referred to in section 14 (4) (a), (b) or (d).

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[55] I have not reproduced s. 14 of the *Code*. Suffice it to says that s. 14 addresses the inquiry into an unfair labour practice, including the processes and remedies available to an employee or employees such as employees on-call, in the event they take issue with their inability to vote during a representation vote that certified a Union.

[56] The following provision of the *Code*, in place at the time of the Union's certification application, address the acquisition of the collective bargaining rights under the *Code* as follows.

> **Acquisition of bargaining rights**
>
> **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.
>
> …
>
> **Determination of appropriate unit**
>
> **22** (1) When a trade union applies for certification as the bargaining agent for a unit, the board must determine if the unit is appropriate for collective bargaining, and may, before certification, include additional employees in or exclude employees from the unit.
>
> (2) The board must
>
> (a) make or cause to be made the examination of records and other inquiries, including the holding of hearings it considers necessary to determine the merits of the application for certification, and
>
> (b) specify the nature of the evidence the applicant must furnish in support of the application and the manner of application.
>
> (3) Membership in good standing of a trade union must be determined on the basis of membership requirements prescribed in the regulations.

[57] The Board's exclusive authority to conduct representation votes for union certification and collective bargaining purposes is set out, in part, in the following provisions of the *Code,* as they existed at the time of the Union's certification:

> **Representation Vote Required**
>
> **24** (1) If the board receives an application for certification under this Part and the board is satisfied that on the date the board

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receives the application at least 45% of the employees in the unit are members in good standing of the trade union, the board must order that a representation vote be taken among the employees in that unit.

(2) A representation vote under subsection (1) must be conducted within 5 business days from the date the board receives the application for certification or, if the vote is to be conducted by mail, within a longer period the board orders.

(2.1) The representation vote may be conducted by mail only if…

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[58] The principle of "majoritarianism" to which the parties refer is reflected in the following provisions of the *Code:*

Outcome of representation vote

25 (1) When a representation vote is taken, a majority must be determined as the majority of the employees in the unit who cast ballots.

(2) If after a representation vote is taken, the board is satisfied that

(a) the majority of votes favour representation by the trade union, and

(b) the unit is appropriate for collective bargaining,

the board must certify the trade union as the bargaining agent for the unit.

(3) If after a representation vote is taken, the board is

(a) satisfied that the majority of votes are not in favour of the trade union representing the unit as its bargaining agent, or

(b) not satisfied that the unit is appropriate for collective bargaining,

the trade union may not be certified as bargaining agent for the unit.

[59] The *Code* expressly addresses the effect of certification on the collective bargaining process as follows;

Effect of certification

27 (1) If a trade union is certified as the bargaining agent for an appropriate bargaining unit,

(a) it has exclusive authority to bargain collectively for the unit and to bind it by a collective agreement until the certification is cancelled, ….

[60] As regards the powers of the Board to reconsider their decisions, the *Code* provides:

> **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.

[61] An applicant for reconsideration under s. 141 of the *Code* must meet the Board's established test before leave for reconsideration will be granted: *Brinco Coal Mining Corporation,* BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93).

C. Position of the Employer on Judicial Review

[62] The Employer advances the arguments it made before the original and reconsideration panels and elaborates on its analysis. It argues that by including the on-call employees in the bargaining unit, while denying them the right to vote, the Board has violated the rule of law by exercising its authority in a manner that has not been assigned to it under the *Code.* The Employer argues that the Union and the Board have breached the fundamental concepts of freedom of association and employee choice reflected in the *Code,* in a manner inconsistent with the duties of the Board under the *Code*. The Employer argues, accordingly, that the Board's Reconsideration Decision is inconsistent with the principles expressed and implied in this *Code*.

[63] While the Employer does not advance a claim under the *Charter of Rights and Freedoms,* it submits the Supreme Court of Canada has recognized on numerous occasions that embodied in in section 2(d) of the *Charter* is the "negative" aspect of freedom of association; that is, the freedom not to associate: *Mounted*

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Police Association of Ontario v. Canada (Attorney General), 2015 SCC 1, at para. 42.

[64] Relying on *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038 at para. 87, and *Godbout v. Longueuil (City)*, [1997] 3 SCR 844 at para. 54, the Employer also underscores that the *Charter's* role is not confined to rendering legislation inoperative; it also plays a fundamental role in the process of statutory interpretation. It submits that the Board is a statutory body which derives its power from the *Labour Code.* Moreover, legislation such as the *Code* cannot be interpreted as conferring a power to infringe the *Charter*, unless the power is expressly conferred or necessarily implied.

[65] The Employer submits that these concepts of freedom of association and employee choice are reflected in s. 4(1) of the *Code.* This provision is reproduced below for ease of reference:

> **4.** 1. Every employee is free to be a member of the trade union and to participate in its lawful activities.

[66] The Employer underscores the words "free to be a member" and says the on-call employees where not given that freedom.

[67] The Employer then underscores that this employee right is complemented by the Board's duties under s. 2(c) of the *Code* and the definition of "bargaining agent". Section 2(c) of the *Code* provides:

> **2.** The board and other persons who exercise powers and perform duties under this <u>Code must exercise the powers and perform the duties in a manner that</u>
>
> …
>
> (c) encourages the practice and procedures of collective bargaining between employers and trade unions <u>as the freely chosen representatives of employees,</u>
>
> (Emphasis added by Employer)

[68] Counsel for the Employer submits that "consistent with these foundational principles, under the *Code,* a trade union may become the bargaining agent for employees by seeking certification under ss. 24-25 of the *Code.* The Employer

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submits that, in this process of becoming the certified bargaining agent, "the affected group of employees is entitled to express their wishes regarding whether they wish the named Union to be their bargaining agent."

[69] The Employer refers to the definition of "bargaining agent" in the *Code* and submits that "the will of the legislature, reflected in the definition of 'bargaining agent' is premised upon the express relationship with the certification of an 'appropriate bargaining unit' for the purpose of certification". The Employer explains "you cannot have a 'bargaining agent' for a group of employees unless they are part of an appropriate bargaining unit and certified as such."

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[70] The definition of "bargaining agent" in the *Code* reads:

> "Bargaining agent" means
>
> (a) a trade union, certified by the board as an agent to bargain collectively for an appropriate bargaining unit, or
>
> (b) a person, or an employer's organization accredited by the board, authorized by an employer to bargain collectively on the employer's behalf.

[71] The Employer focuses on the language of paragraph "(a)" in the definition of bargaining agent. Counsel asserts that "[c]ontrary to the Board's decisions, the only rational construction of the legislation is that if employees are excluded from [voting for] the 'appropriate bargaining unit', a Union cannot become their bargaining agent."

[72] Counsel argues:

> The definition of "bargaining agent" is a paradigm example of circumstances where the Legislature has chosen to precisely circumscribe the Board's authority. Case law from the Supreme Court of Canada establishes that where a legislative body provides a clear definition, this is indication that it is not the intention of the legislator to rely upon the expertise of the tribunal to extend the reach of the definition. The Board's decision must correspond with the specific constraints imposed by the governing statutory scheme, and in particular, the statutory definition of "bargaining agent": *Canada (Attorney General) v. Public Service Alliance of Canada* [1991] at para. 28.

[73] The employer submits:

> It is only when a trade union has been certified as the bargaining agent for an appropriate bargaining unit that it as the exclusive authority to bargain for the unit. (see section 27(1))

[74] The Employer underscores that the representation vote process is how the employees express their view on the issue of whether they wish to be a member of the trade union or not, yet the on-call employees were deprived of this right. It submits:

> In this case, supported by the Board's ruling, the trade union has asserted the right to be the bargain agent for the on-call employees even though these employees' wishes have never been canvassed. Simply put, this is not possible under the scheme of the Code, using the process of certification all of which is directed towards determining whether a majority of employees in the appropriate bargaining unit have exercised their franchise on the issue of whether the Union is their "freely chosen" representative.

[75] The Employer submits that only if the on-call employees are excluded from the bargaining unit can the Board decide if the Union was entitled to be certified, consistent with the requirements of the *Charter* and the *Code*. This, it submits was the error in the Original Decision that the Employer identified in its application for reconsideration. The Employer asserts "it is not possible that, consistent with the principles expressed or implied in the *Code*, an entire category of 118 employees can be disenfranchised by not being entitled to vote yet subsequently find themselves bound by the outcome of that vote." This, it says, is patently unreasonable.

D. Position of the Union

[76] The Union opposes the granting of the orders sought on a number of grounds. First, it submits that the petitioner has mischaracterized the facts before the Board. The Union asserts that at no time did it take the position that the on-call employees should not be included the bargaining unit. It submits that the record before the Board makes that clear, as did the Board's findings: the bargaining unit proposed and certified by the Board included on-call employees. The Union submits it did not deceive or misrepresent their position as alleged; as such, there is no factual basis for the Employer's assertion in this Petition that it bargained in bad

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faith, contrary to s. 11 of the *Code*. Accordingly, says the Union, the Board's decision dismissing this ground of the Petition was clearly reasonable and not patently unreasonable.

[77] The Union points out that, in any event, it was open to the Employer to take issue, at the certification hearing, with the scope of the bargaining unit proposed by the Union, which included the on-call employees. Alternatively, the Employer could have taken issue with their inclusion in the bargaining unit, later in the process but it did not do so. That is, no application was brought to exclude on-call employees from the scope of the bargaining unit, although this was a possible avenue of recourse for the Employer, and also for any on-call employee for that matter.

[78] Second, the Union argues that the Employer has conflated the Board's determination of whether the on-call employees should be included in the representation vote with the Board's determination of whether they should be included in the appropriate bargaining unit for collective bargaining purposes. These are two distinction determinations by the Board under the *Code:* one which addresses the employees' entitlement to vote on the question of whether they wish to be represented by the Union, and the other which addresses the appropriate scope of the bargaining unit for collective bargaining purposes.

[79] The Union asserts that, as regards the representation vote, the Board accepted and considered submissions on which votes would be counted and which would not; it did so according to its usual practice, procedure and jurisprudence, and it determined which ballots in the representation vote would be counted as contemplated by ss. 24 and 25 of the *Code*. The Union also underscores that the Board's decision in this regard fell within the Board's exclusive jurisdiction under the *Code,* and was made in accordance with its specialized expertise and enabling legislation.

[80] The Union points out that its certification application sets out a bargaining unit that included all employees, including the on-call employees, with some exceptions. As such, the on-call employees voted and the votes were sealed pending the Board's determination of which ballots would or would not be counted. Prior to the

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tabulation of the votes, it was the Employer who took the position that the votes of the on-call employees should not be counted in the representation vote. The Employer argued that the on-call employees did not have the sufficient continuing interest in the bargaining unit that was required, according to Board jurisprudence, to be eligible to vote.

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[81] The Union submitted it decided not oppose the Employer's position that the on-call employee's ballots should not be counted; however, it did oppose the Employer's submission that the ballots of other groups of employees should not be counted. As a result, a hearing by written submissions ensued and the Board issued its decision in the *Voter's List Decision*.

[82] In the *Voter's List Decision*, the Board notes at paragraph 3:

> During the submission process the parties were able to narrow the issues in dispute. The Union confirmed for the purpose of its certification application that those employees the Employer identified as clerical, managers, on-call, on medical leave, dismissed June 18, 2020, and retired August 22, 2020 were properly excluded. The only outstanding issue was the Employer's challenge to the inclusion in the bargaining unit of what the Employer labelled "Dismissed Employees", "Non-working casuals", and Non-Working Other Employees."

[83] The Union points out that, in light of the fact that the Union and Employer both took the position that the votes of the on-call employees (among others) should not be counted, the Board accepted that the ballots of these employees would not be counted in the representation vote. However, the Board dismissed the Employer's arguments that other employees did not have a sufficient continuing interest in the bargaining unit to vote:

> 116 In summary, the Dismissed Employees, Non-Working Casuals, and Non-Working Other Employees have a sufficient continuing interest in the bargaining unit. <u>Based on my findings and the resolved challenges</u>, a Returning Officer of the Board will confirm if the Union continues to have threshold support for a representation vote pursuant to Sections 18 and 24 of the Code._In the event the Union continues to have threshold support, the ballot box will be unsealed and the ballots counted. I remain seized of any unanticipated disputes that may arise with respect to the finalized employee list compiled by the Returning Officer.
>
> [Emphasis added]

[84] The Union underscores that the Board put its mind to the question of which employees had a sufficient continuity of interest to vote, and accepted the "resolved challenges" that excluded the on-call employees as eligible voters.

[85] The Union emphasizes, however, that this question of whether an employee has a sufficient continuing interest in the bargaining unit in order to be eligible to participate in the representation vote (according to established Board jurisprudence), is an entirely different question than what constitutes an appropriate bargaining unit for collective bargaining purposes. This, the Union says, is the fundamental flaw in the Employer's submissions: the Employer confuses and conflates the legal analysis of whether an employee's vote can be counted in a representation vote (which focuses on whether the employee has a sufficient continuing interest in the bargaining unit), with the legal test for assessing the appropriate scope of a bargaining unit, which focuses on whether the employees in the bargaining unit have a community of interest for collective bargaining purposes. The Union relies on a number of decisions of the Board in support of this submission including: *Intercon Security Ltd and Hospital Employees Union*, BCLRB No. B104/2010; *Vancouver Island Health Authority and Hospital Employees' Union*, BCLRB No. B123/2013; *Marjorie Hamilton Ltd. and ILGUW, Local 287*, *Re*, 1986 CarswellBC 3593; *Island Medical Laboratories Ltd. v. H.S.A.B.*, 1993 CarswellBC 3610.

[86] In regard to situations where both the union and employer agree ballots should not be counted, the Union refers to the decision of the Board in *Vancouver Island Health and Hospital Employees' Union* where the Board explained its "normal practice": an individual not named in the voters list can cast a ballot subject to challenge by the parties. If both parties agree that the ballot should not be counted, it will not be included in the count. The Board explained that individuals seeking to cast a ballot could assert that they have standing in the matter as an interested party to seek to have their ballot counted.

[87] As regards the "community of interest" test for determining an appropriate bargaining unit, the Union relies on *Island Medical Laboratories Ltd.* In that case at para. 40, the Board reasons:

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> …We will therefore review *ICBC, supra, Woodward Stores supra, Canadian Kenworth, supra, and B.C. Coal, supra*. A reading of these decisions combined with the experience of this Board convinces us that on applications for certification, the "community of interest" concept is the test employed in determining the appropriate unit. On initial applications, access to collective bargaining is the most important principle to consider in determining appropriateness.

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[88] The Union asserts that Board is empowered and routinely does rewrite descriptions of unit in an attempt to provide clarity and consistency to the units certified, observing that voting in a representation vote does not mean the employee will be in the bargaining unit: *Marjorie Hamilton Ltd,* at para. 25:

[89] In response to the Employer's focus on the wishes of its employees, the Board submits first that the Union opposes the Employer's "efforts to assume standing to speak for employees." Further, the Union underscores that in *Island Medical Laboratories Ltd,* at paras. 29-30, the Board made it clear that the wishes of employees do not determine their inclusion in the bargaining unit.

[90] Finally, the Union relies on the reasons of the Supreme Court of Canada in *Mounted Police Association of Ontario,* at paras. 93-97, to support their submissions that the Employer's freedom of association argument does not make the Reconsideration Decision patently unreasonable. These passages may be summarized, in part, as follows:

(a) The Supreme Court of Canada has consistently held that freedom of association does not guarantee a particular model of labour relations. What is required is a regime that does not substantially interfere with meaningful collective bargaining and, accordingly, complies with s. 2(d) inquiries.

(b) What constitutes the accommodation of meaningful collective bargaining varies with industry culture and the workplace in question; this requires a contextual analysis;

(c) The *Wagner Act* model of labour relations upon which the *Code* is based, offers one example of how the requirements of choice and independence ensure meaningful collective bargaining. The model permits a sufficiently large sector of employees to choose to association themselves a particular trade union and, if necessary to decertify a union that fails to serve their needs;

(d) The principles of majoritarianism and exclusivity, the mechanism of "bargaining units" and the processes of

certification and decertification – all under the supervision of an independent labour relations board – ensure the employer deals with the association most representative of its employees'';

(e) The search is not for an "ideal" model of collective bargaining, but rather a model which provides sufficient employee choice and independence to permit the formulation and pursuit of employee interests in a particular workplace context at issue.

(f) Choice and independence do not require adversarial labour relations; nothing in the *Charter* prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways. That said, genuine collective bargaining can not be based on the suppression of employees' interests, where these diverge from those of the employer, in the name of a "non-adversarial" process;

(g) Whatever the model, the *Charter* does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining. Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not breach s. 2(d) where the structures that are in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance.

[91] The Union argues that its decision to agree to, rather than dispute, the Employer's position that the ballots of on-call employees should not be counted, was intended to facilitate rather than impede the collective bargaining process, noting it advanced a bargaining unit description that included the on-call employees. Further, the Union observes that it is "simply not the case" that if an employee does not vote in a representation vote, they are excluded from the bargaining unit. Again, the scope of the bargaining unit is determined according to a the "community of interest" test, not the "sufficiency of interest" which is what determines whether an employee's vote will be counted in a representation vote under the *Code.*

[92] The Union also points out, relying on the Supreme Court of Canada reasons in paras. 93-97 the *Mounted Police Association of Ontario,* that principles of majoritarianism apply under in its certification as the Union in this case; see also *Bogdanich and Summit Logistics and Retail Wholesale Union, Local 580,* BCLRB No. B74/2001.

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[93] The Union notes that the Board's decision in *Bogdanich* not only confirms the principle of majoritarianism in collective bargaining but also confirms the recourse of individual employees under the *Code*:

> The *Code* does provide a limited supervisory role for the Board *vis-à-vis* the internal functioning of unions by way of Sections 10 and 12 of the *Code*. Those provision protect individual interests within the context of majoritarian rule. Section 10 essentially ensures a union's internal processes are not inconsistent with the principles of natural justice. Section 12 protects bargaining unit members from conduct which is arbitrary, discriminatory or undertaken in bad faith.

[94] The Union emphasizes that after its certification, negotiations ensued between it and the Employer regarding the scope of the bargaining unit. The Employer requested, and the Union agreed, to exclude spa employees from the bargaining unit. The Union notes that the Employer could have requested, during these negotiations, that the on-call employees also be excluded but it did not so. Subsequently, on February 12, 2021, the Board issued a certification of the employees of the Employer at the Pan Pacific Hotel, except sales staff, managerial, clerical staff and the spa department.

E. Position of the Board

[95] The Board also opposes the orders sought by the petitioners. It clarified the record before the Court and also confirmed that the findings and reasoning of the Board in both its Reconsideration Decision, as well as the Original Decision, were consistent with those advanced by the Union in this Judicial Review.

[96] The Board affirms in its submissions that the *Code* grants it exclusive jurisdiction to decide the issues before the Court in determining: 1) which ballots are to be counted in representation votes, including how that process unfolds; and 2) the appropriate scope of the bargaining unit for collective bargaining purposes. It submits that its specialized expertise is engaged in these proceeding, underscoring the high threshold of review invoked in the standard of review of patent unreasonableness.

[97] The Board notes that the Original panel decided to exclude on-call employees, based on the representation of the Employer and the Union that their

ballots should not be counted. Both the Original Decision and the Reconsideration Decision, found there was no basis to the allegations that the Union breached s. 11 of the *Code*, and bargained in bad faith. The Employer's argument that the Union had agreed to exclude on-call employees from the bargaining unit was dismissed on the factual finding that there was no such agreement by the Union.

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[98] The Board underscores that the Reconsideration Decision expressly noted, at para. 13, the argument of the Employer to the effect that the Original Decision was contrary to s. 4 and s. 2(c) of the *Code* by imposing union representation on the on-call employees without their knowledge and consent. Although the Board considered the Employer's argument that this was contrary to these employees' *Code* right to choose whether they wished to be represented by the Union, the reconsideration panel found this argument was "without merit" (at para. 24). The Reconsideration Decision concluded that the agreement between the parties to not count the votes of certain employees, including the on-call employees, was not "gerrymandering" and did not "otherwise invalidate the representation vote pursuant to which the Union was certified to represent the employees in the unit described in its certification."

[99] The Board submits that in this light, the Employer cannot show that the Reconsideration Decision was patently unreasonable when it concluded that the Employer had not raised a serious question that the Original Decision was inconsistent with the principles expressed or implied in the *Code*.

IV. DISCUSSION AND DETERMINATION

[100] In light of the record before me and the submissions of the parties, I find the Reconsideration Decision was not patently unreasonable when it concluded that the Union did not contravene s. 11 of the *Code* by bargaining in bad faith. I also find that the Reconsideration Decision was not patently unreasonable when it dismissed the Employer's submission that not counting the ballots of the on-call employees in the representation vote, yet including them in the bargaining unit, is inconsistent with the principles expressed and implied in the *Code*.

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[101] Dealing first with the issue of whether the Reconsideration Decision was patently unreasonable in concluding the Union did not act in bad faith; that is, whether the Union misrepresented its position to the Employer regarding the scope of the bargaining unit. The Reconsideration Decision reviewed the findings of the original panel and found, at para. 16, that the original panel "correctly concluded" that the issue before the Board when it rendered its *Voter's List Decision* was whether certain individuals had a sufficient continuing interest in the bargaining unit to be included or excluded "for the purposes of threshold and voting." The Reconsideration Decision also found that the issue before the Board in determining which ballots should be counted "was not whether the category of on-call employees appropriately fell within the scope of the proposed bargaining unit" (at para. 16). I see no patently unreasonable error in this regard.

[102] More specifically, the Reconsideration Panel found there was no misrepresentation on the part of the Union to the Employer to the effect that the on-call employees would be excluded from the bargaining unit:

> ... In my view, the material before me is clear that the Union only agreed to the former proposition (that the individuals on the list who were on-call employees should be excluded for purposes of threshold and voting on the basis they had no sufficient continuing interest in the bargaining unit), and the Employer did not raise the latter proposition during the certification process (that the proposed unit was inappropriate if it included on-call employees).

[103] The Reconsideration Panel concluded:

> 21. In these circumstances, I am not persuaded the Union agreed that on-call employees were not part of the bargaining unit it was seeking to represent. The Union expressly stated they were but agreed to exclude certain individuals on the tentative voters list, including those who were on-call employees, for the purposes of determining threshold support and for voting….

[104] The Employer's factual assertion that the Union agreed to exclude the on-call employees from both the representation vote and the scope of the bargaining unit was rejected by the panel that rendered the Original Decision, and also by the panel that rendered the Reconsideration Decision. As a result, the Board found that the Union did not bargain in bad faith. This finding is precisely the sort of Board determination that should not be usurped by a reviewing court. Judicial reviews are

not hearings *de novo.* It is not my role to review or make findings of fact, or to apply those facts to Board jurisprudence and then render my own decision. Further, the Board's finding in this regard is squarely within the scope of the Board's exclusive jurisdiction and specialized expertise, subject to the highly deferential threshold of patently unreasonableness. This Court is not in any position to substitute its decision on this issue and over-ride that of the Board. The law is clear that the standard of patent unreasonableness precludes substituting my decision for that of the Board: *Law Society of New Brunswick v. Ryan,* at para. 51*; Eurocan* at para. 33. I see no principled basis for doing so, or for remitting this decision back to the Board, as the Employer has requested.

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[105] In summary, having carefully reviewed the record, I do not see any patent error of fact or law that would undermine the Board's conclusion that there was no unfair labour practice or bad faith on the part of the Union in the circumstances of this case. Put another way, applying the standard of patent unreasonableness, the Reconsideration Decision is not irrational or so flawed in this regard, such that no amount of curial deference can justify letting the decision stand.

[106] Dealing next with that aspect of the Reconsideration Decision where the Board dismisses the Employer's argument that the on-call employees were forced into the bargaining unit without an opportunity to vote. For ease of reference, a portion of the Reconsideration Decision on this point is repeated below:

> 24. I find the Employer's argument that on-call employees have been forced into the bargaining unit without the opportunity to vote on whether they wish to be represented does not have merit. The Union sought certification for a bargaining unit which on its face included on-call employees. All employees, including on-call employees, were given an opportunity to vote, and many on-call employees did in fact cast a ballot. Subsequently, the parties agreed that certain of the votes, including those of the on-call employees, would not be counted. This agreement does not constitute "gerrymandering" or otherwise invalidate the representation vote pursuant to which the Union was certified to represent the employees in the unit described in its certification.

[107] The Board decided the ballots of the on-call employees would not be counted based on the representations and agreement of the Employer and the Union in this regard. Furthermore, the reconsideration panel found that this process did not

constitute “gerrymandering” and that it did not invalidate the representation vote. The Reconsideration Decision states, at para. 21, that “it is not uncommon for parties to make such agreements in order to expedite the certification process”. Moreover, the panel concluded that “it is consistent with *Code* principles to give effect to such agreements, while taking care to recognise what has been agreed to.”

[108] Clearly, the reconsideration panel considered whether the agreement not to count the ballots of on-call workers, at the behest of the Employer and Union, was acceptable and whether it was “consistent with *Code* principles to give effect to such agreements.” The Board also expressly noted it was “taking care” to consider the nature of the agreement. In this context, the Board was exercising its exclusive jurisdiction and its specialized expertise in ruling as it did. A high degree of curial is mandated by legislative and judicial authority, as discussed earlier in these Reasons. I see no basis upon which I can reasonably conclude that the Reconsideration Decision was patently unreasonable in this regard, or that its reasoning was so fundamentally flawed that no amount of curial deference would justify letting the decision stand.

[109] I also add the following observations.

[110] The record before me does not support the conclusion that the Board has been patently unreasonable by interfering with meaningful, or principled, collective bargaining. Indeed, as the Reconsideration Panel points out, at para. 22, there are *Code* processes which would have permitted the Employer to apply to amend the bargaining unit description to exclude on-call employees if it wished to do so. It did not do so.

[111] Further, there is no principle under the *Code* that supports an employee’s entitlement to have their vote counted, irrespective of whether they satisfy the criterion that they have a sufficient continuing interest in the bargaining unit. No party has suggested otherwise, and the Employer relied on the necessity of employees satisfying this criterion before their votes could be counted. I also note that our Court of Appeal has observed that employees may vote on union representation not knowing whether they are within or outside the bargaining unit

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that may emerge from the subsequent Board decision: see *Red Chris Development Company Ltd.* at para. 4. The submission of the parties in this case make it abundantly clear that labour relations within the collective bargaining context are nuanced and complex; there is no absolute right that employee votes will be counted or that employees will be in a particular bargaining unit. These are complex matters within the exclusive jurisdiction and expertise of the Board; I see no patently unreasonable finding in the Reconsideration Decision that emerges in this context.

[112] I am mindful that, while Union representation is founded on the majoritarian principle (as noted by the Supreme Court of Canada in *Mounted Police Association of Ontario*, at para. 98), the *Code* also includes provisions whereby employees, including on-call employees who may be aggrieved because their votes were not counted, may apply to the Board for a remedy. Yet, this has not occurred. Furthermore, the *Code* is a complex legislative instrument that addresses and governs the rights of employees, union and employers through various hearing and decision-making processes, guided by specialized legislation and specialized jurisprudence. As the parties point out, there are checks and balances embodied within the *Code's* principles and processes in this regard.

[113] Utilizing a contextual analysis, the record before me simply does not suggest that the Reconsideration Decision was patently unreasonable when it placed on-call employees in a bargaining unit even though their ballots were not counted. As reasoned by the Supreme Court of Canada in *Mounted Police Association of Ontario,* at para. 83, "choice and independence are not absolute: they are limited by the context of collective bargaining." I am satisfied that the reconsideration panel was well aware of the collective bargaining context in this case; it gave effect to the agreement to exclude the ballots of on-call employees, reasoning that doing so was "consistent with *Code* principles" while "also taking care to recognize what has been agreed to."

[114] The Board's reasoning makes it very clear that what was agreed to between the Employer and the Union did not preclude the on-call employees from being included in the certified bargaining unit, distinguishing the on-call employees' right to

vote based on a "sufficient continuity of interest", from their proper inclusion in the bargaining unit based on the "community of interest" test. This clearly is an issue of board jurisprudence and practice that also falls squarely within the specialized expertise of the Board, well within its exclusive jurisdiction.

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[115] I would add, as the Court in *Mounted Police Association of Ontario* reasoned*,* choice and independence do not require adversarial labour relations. Nothing in the *Charter* or in the *Code* prevents an Employer and Union from engaging in less adversarial and more cooperative ways. Indeed, s. 2(d) of the *Code* encourages cooperative participation between employers and trade unions in resolving workplace issues. In the context of this case, I am unable to conclude that there has been a suppression of employees' interests in the name of a "non-adversarial" process or otherwise, resulting in a patently unreasonable decision.

[116] Notwithstanding the very able submissions of counsel for the Employer, I find the Reconsideration Decision is not patently unreasonable. The petition is dismissed.

[117] If the parties are unable to agree on costs, they may make arrangements with Supreme Court Scheduling to appear before me to make submissions on the issue.

"MORELLATO J."