# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gate Gourmet Canada Inc. v. Unite Here, Local 40,* 2024 BCSC 1528

Date: 20240822
Docket: S236872
Registry: Vancouver

Between:

**Gate Gourmet Canada Inc.**

Petitioner

And

**Unite Here, Local 40**

Respondent

Before: The Honourable Mr. Justice Brongers

On judicial review from: An order of the British Columbia Labour Relations Board, dated August 14, 2023 (*Gate Gourmet Canada Inc. v. Unite Here, Local 40,* 2023 BCLRB 128)

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioner: | G. Cameron<br>J.M. Kindrachuk |
| Counsel for the Respondent | C. Allevato |
| Counsel for British Columbia Labour Relations Board | J.M. O'Rourke |
| Place and Date of Hearing: | Vancouver, B.C.<br>May 27-28, 2024 |
| Place and Date of Judgment: | Vancouver, B.C.<br>August 22, 2024 |

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## OVERVIEW

[1] This is a petition for judicial review of a decision of the British Columbia Labour Relations Board (the "Board"). The petitioner is Gate Gourmet Canada Inc. ("Gate"). The respondent is Unite Here, Local 40 (the "Union"). The Board was also a participant in this proceeding.

[2] Gate provides catering services to airlines at Canadian airports. The Union is the certified bargaining agent for Gate's operations in Vancouver. During a strike action by the Union at the Vancouver airport, Air Canada asked Gate to cater Vancouver flights through Gate's operations at airports in Alberta and Ontario. Gate did so. The Union complained to the Board, which then heard submissions and evidence from the parties.

[3] The Board issued a declaration that Gate had committed an unfair labour practice by using prohibited replacement workers, and ordered Gate to stop. Gate asked the Board to reconsider, but this request was denied.

[4] Gate says that the Board's decision is flawed and must be set aside. Gate's primary argument is that the Board's order is constitutionally impermissible since it impacts property and civil rights outside of British Columbia. Gate's secondary argument is that the Board wrongly interpreted and applied the *Labour Relations Code,* R.S.B.C. 1996, c. 244 [*Code*] to the facts of this case.

[5] The Union denies that the grounds raised by Gate are well-founded in fact or in law, and says that the petition must be dismissed.

[6] The Board submits that unless the Court finds that the order exceeded the Board's constitutional jurisdiction or was patently unreasonable, the petition should be dismissed.

[7] I am not persuaded that the Board acted outside the limits of its constitutional authority. I also do not find the Board's assessment that Gate's actions violated the *Code* to be patently unreasonable. Gate's petition will be dismissed.

## BACKGROUND

### Factual Background

[8] Gate is the Canadian subsidiary of Gategroup, a global airline catering company headquartered in Switzerland. Gate's head office is in Mississauga, Ontario, but operates at several of Canada's international airports. They include those in Vancouver, Calgary, Edmonton, and Toronto.

[9] The Union is certified under the *Code* as the collective bargaining agent for Gate's employees at the Vancouver International Airport ("YVR"). Other unions are certified to represent Gate's employees in Alberta and Ontario under their respective provincial labour regimes.

[10] Gate provides catering services to various airlines flying in and out of YVR. These flights are either "single-catered" or "double-catered". Single catering means stocking an airplane with enough food and beverages for just an outbound flight. Double catering means stocking an airplane with enough food and beverages for both an outbound and a return flight.

[11] The collective agreement between Gate and the Union expired on July 31, 2022. The Union gave strike notice on July 27, 2022, and initiated strike action with an overtime ban effective August 1, 2022.

[12] Gate notified all of its airline customers, with the exception of Air Canada, of the Union's impending strike at YVR. Many of these customers then decided to double cater their flights at airports outside of British Columbia.

[13] Gate did not tell Air Canada about the strike because Gate felt that it could still maintain adequate service to Air Canada in spite of the labour disruption at YVR. However, Air Canada found out about the strike anyways. Air Canada then asked Gate to increase double catering of its flights originating from Alberta and Ontario that were destined for YVR. Gate agreed to do so.

[14] During the period from August 8 to 20, 2022, Gate double-catered a number of Air Canada flights destined to YVR by using Gate employees at originating airports in Alberta (Calgary and Edmonton) and in Ontario (Toronto). This occurred while the Union was engaged in its overtime ban at YVR, which only ceased on August 22, 2022.



**Legal Background**

[15] Section 68(1) of the *Code* prohibits the use of replacement workers during a lawful strike:

> 68(1) During a lockout or strike authorized by this Code an employer must not use the services of a person, whether paid or not,
>
> > (a) who is hired or engaged after the earlier of the date on which the notice to commence collective bargaining is given and the date on which bargaining begins,
> >
> > (b) who ordinarily works at another of the employer's places of operations,
> >
> > (c) who is transferred to a place of operations in respect of which the strike or lockout is taking place, if the person was transferred after the earlier of the date on which the notice to commence bargaining is given and the date on which bargaining begins, or
> >
> > (d) who is employed, engaged or supplied to the employer by another person,
>
> to perform
>
> > (e) the work of an employee in the bargaining unit that is on strike or locked out, or
> >
> > (f) the work ordinarily done by a person who is performing the work of an employee in the bargaining unit that is on strike or locked out.

[16] Section 6(3)(e) of the *Code* declares that the use of replacement workers contrary to s. 68 is an unfair labour practice:

> 6(3) An employer or person acting on behalf of an employer must not
>
> ...
>
> (e) use or authorize or permit the use of the services of a person in contravention of section 68 ...

[17] The following definitions set out at s. 1 of the *Code* are also relevant to this matter:

> 1(1) In this Code:
>
> ...
>
> "employee" means a person employed by an employer ...
>
> ...
>
> "employer" means a person who employs one or more employees or uses the services of one or more dependent contractors and includes an employers' organization;
>
> ...
>
> "person" includes an employee, employer, employers' organization, trade union and council of trade unions, but does not include, except for the purposes set out in subsection (3), a person in respect of whom collective bargaining is regulated by the *Canada Labour Code*.



[18] I am informed by counsel for the parties that British Columbia is one of only two provinces in Canada that prohibit replacement workers. The other is Quebec. Alberta and Ontario do not currently ban the use of replacement workers in those jurisdictions.

**Board Proceedings: Original Decision**

[19] On August 16, 2022, the Union filed an application with the Board alleging that Gate was committing an unfair labour practice by using replacement workers during the Union's strike action, contrary to s. 68(1) of the *Code*. The parties produced written submissions, and an evidentiary hearing was held before a single member of the Board on October 7, 2022. Five days later, the Board issued what it called a "bottom-line decision" granting the Union's application. The Board's written reasons for this decision were subsequently released on November 9, 2022. They are indexed at 2022 BCLRB 130 (the "Original Decision").

[20] The Board began its Original Decision analysis by finding that the general purpose of s. 68(1) of the *Code* is to protect the integrity and viability of the bargaining unit by restricting the use of replacement workers during a strike or lockout in certain circumstances. According to the Board, a violation of s. 68(1)(b) in particular will be shown if the following five elements are present:

(a) the timing is during a strike or lockout (the "timing" element);

(b) the employer entity involved is one regulated by the *Code* who is struck or engaged in a lockout (the "employer" element);

(c) the conduct committed by the employer is the using of services of certain persons to do certain work during a strike or lockout (the "conduct" element);

(d) the person who performed the work during a strike or lockout is one who ordinarily works at another of the employer's places of operations (the "person" element); and

(e) the work performed during the strike or lockout by the person is the work of an employee in the bargaining unit that is on strike or locked out (the "work" element).

[21] The Board then examined each of the five elements individually.

[22] The first element ("timing") was found to not be in dispute since there was no question that the conduct at issue occurred during a strike authorized by the *Code*.

[23] The second element ("employer") was found to be established as Gate is the employer for the purposes of the *Code.* In so finding, the Board rejected Gate's argument that only Gate's "operation at YVR" can be an employer under the *Code*.

[24] The third element ("conduct") was found to be established on the basis that it was Gate, and not Air Canada, that effected the double catering of the Air Canada flights destined to YVR from Gate's operations in Alberta and Ontario. Gate's argument that the conduct amounted to Air Canada permissibly engaging in "self-help" to avoid the impact of the YVR strike was rejected, as it was Gate that chose to action Air Canada's request.

[25] The Board's determination that the fourth element ("person") had been established was done in two stages. The Board first examined whether Gate's employees in Alberta and Ontario are capable of being captured by s. 68(1) of the *Code*, concluding that they are notwithstanding the territorial limits of the Board's authority. The Board then found that these out-of-province employees are persons

who ordinarily work at another of Gate's places of operations, thereby falling under s. 68(1)(b) of the *Code*.

[26] Finally, the Board found that the fifth element ("work") had been established based on the admitted facts and evidence before it. In particular, the Board held that, but for the strike, bargaining unit members at YVR would have single-catered a number of Air Canada flights that were double-catered by Gate's Alberta and Ontario employees instead. In its Original Decision reasons, these Air Canada flights are referenced as the "Admitted Flights".

[27] Accordingly, the Board issued a declaration to the effect that Gate had committed an unfair labour practice by using prohibited replacement workers. Gate was also ordered to cease and desist from this conduct. The specific wording of the Board's declaration and order is found in the Original Decision at paras. 174-176:

> [174] For the reasons above, the Application was granted.
>
> [175] As set out in the Bottom-Line Decision, I declared that Gate breached Sections 68(1) and 6(3)(e) of the Code by using the services of persons in Alberta and Ontario to double-cater the Admitted Flights.
>
> [176] I also ordered Gate to cease and desist from breaching Sections 68(1) and 6(3)(e) of the Code by using the services of persons in Alberta and Ontario to double-cater the Admitted Flights.

**Board Proceedings: Reconsideration Decision**

[28] On November 22, 2022, Gate applied to the Board for reconsideration of the Original Decision. The application was dismissed by a three-member reconsideration panel on August 14, 2023. The Board's reasons are indexed at 2023 BCLRB 128 (the "Reconsideration Decision").

[29] Gate's primary basis for seeking reconsideration was its assertion that the Original Decision order was made in excess of the Board's constitutional jurisdiction. Gate also argued that the finding in the Original Decision that s. 68(1) of the *Code* had been violated was flawed in respect of the "employer", "conduct", and "work" elements of the analysis.

[30] The Board rejected all of Gate's arguments.

[31] With respect to the constitutional question, the Board's reconsideration panel found that there is a sufficient connection between British Columbia, the *Code,* the collective bargaining relationship, and the labour dispute between the Union and Gate. In the panel's view, this sufficient connection renders it constitutionally permissible for the Board to declare that Gate had breached s. 68(1) of the *Code* by using its out-of-province employees to perform work that would have been performed by its YVR employees but for the strike. It also justifies the Board's cease and desist order notwithstanding the fact that Gate's replacement workers were located outside of British Columbia.

[32] With respect to the Board's findings of fact, interpretation of s. 68(1) of the *Code*, and application of that provision to the facts, the Board's reconsideration panel found no error in the Original Decision. First, the panel agreed that Gate is properly considered to be the "employer" for the purposes of the *Code*. The panel then turned to the "conduct" and "work" elements addressed in the Original Decision, and found that neither was wrongly dealt with either. In particular, the panel found that there was sufficient evidence before the Board that it was Gate that made use of Gate's Alberta and Ontario employees to perform work that would have been performed by Gate's YVR workers but for the strike. The panel also upheld the finding in the Original Decision that this was not a case of Gate remaining passive in the face of Air Canada engaging in self-help to avoid the effects of the strike.

**Petition**

[33] Gate filed the present petition for judicial review on October 6, 2023.

[34] The specific relief Gate seeks from the Court is not entirely clear. The petition document asks for orders that either or both of the Reconsideration Decision and the Original Decision be set aside, or alternatively that the matter be returned to the Board for further consideration, and an order for costs. At the hearing, however, counsel for Gate said that their client is now only asking that the Reconsideration Decision be set aside, with costs. The difficulty with this revised position is that such relief would leave the Original Decision in place. All of that said, I understand that

what Gate is effectively seeking is an order that would vindicate Gate's position that the Board was wrong to find that Gate had engaged in an unfair labour practice by using replacement workers during the Union's strike action in August 2022, and I will proceed accordingly.

[35] The arguments Gate raises in support of its petition are essentially the same as those it made before the Board's reconsideration panel.

[36] Gate's main argument is that the Board's order amounts to a constitutionally impermissible interference with extraterritorial labour relations and economic affairs in other provincial jurisdictions, namely, Alberta and Ontario.

[37] Gate's alternative argument is that the Board erred in finding that Gate used unlawful replacement workers to perform struck bargaining unit work. This argument has three prongs to it. First, Gate says that the Board ought to have found that the employer in this case was only Gate's British Columbia operations, and not Gate's entire corporate personality that also operates outside of the province. Second, Gate says that the Board ought to have found that it was Air Canada that chose to use Gate's catering services in Alberta and Ontario, and that Gate's facilitation and actioning of this choice does not constitute an impermissible use of replacement workers. Third, Gate says that the Board had no evidence to support the finding that the double-catering on the Admitted Flights was work that would have been done by Gate's employees at YVR but for the strike.

[38] The Union argues that the Board did not exceed its territorial jurisdiction or commit any reviewable errors by declaring that Gate had used the services of impermissible replacement workers and by ordering Gate to cease and desist from doing so. The Union asks that Gate's judicial review petition be dismissed, and that the Union be awarded its costs.

[39] The Board indicated in its response to petition that it opposes the granting of any relief to Gate. However, the Board's substantive arguments were limited to the scope of permissible judicial review, standards of review, and costs (the Board says

that costs should not be awarded to or against it). Furthermore, counsel for the Board confirmed at the hearing that she is not advancing any arguments in respect of the merits of the Board's substantive decision. As such, I find that there is no need for me to consider whether the Court should exercise its discretion to provide the Board with standing to take an active role in defending its decision: *Ontario (Energy Board) v. Ontario Power Generation Inc.,* 2015 SCC 44 at paras. 41-62. In the future, when the Board confines its participation to a discussion of the record and standards of review, as the Board did here, it would be preferable for the Board to clearly state in its response to petition that it takes no position on the substantive orders sought by the petitioner.



## ISSUES

[40] Adjudication of this judicial review requires consideration of two questions:

> Question #1: Did the Board err in finding that its order did not exceed the Board's constitutional jurisdiction?
>
> Question #2: If the answer to question #1 is no, did the Board err by finding Gate to be an employer that violated the *Code* by improperly using replacement workers to perform the work of striking employees represented by the Union?

[41] These questions will be examined after consideration of two preliminary matters: (1) mootness; and (2) standard of review.

[42] Before doing so, I also note parenthetically that the only decision under review here is the Reconsideration Decision, as it is the Board's final decision: *Howie v. British Columbia (Labour Relations Board),* 2017 BCSC 1331 at para. 54, citing *Yellow Cab Co. v. Passenger Transportation Board,* 2014 BCCA 329 at para. 40. However, this does not preclude the Court from having regard to the Original Decision in order to understand the Reconsideration Decision, as both are part of the record of proceedings: *College of New Caledonia v. Faculty Association of the College of New Caledonia,* 2020 BCSC 384 at para. 21.

## ANALYSIS

### Mootness

[43] During the hearing, counsel for the parties indicated that the underlying labour dispute between Gate and the Union has been resolved. This gives rise to the question of whether the judicial review should be dismissed summarily for mootness.

[44] Both Gate and the Union urge the Court to decide the petition in any case. They say that the new collective agreement reached following the 2022 strike action will be expiring soon, and the question of the propriety of Gate's use of its out-of-province employees to double-cater flights to YVR during a labour disruption might arise again. The Board takes no position on this issue.

[45] The two-part test to be applied when considering mootness was set out by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 at 353. First, it must be determined whether the parties' tangible and concrete dispute has disappeared such that the issue it raises is now academic. If this is the case, the court must determine whether to decide the issue regardless. The three criteria that are generally considered when making this discretionary determination are: (1) the existence of an adversarial context; (2) concern for judicial economy; and (3) avoiding intrusion into the role of the legislative branch of government.

[46] In this case, the issue of whether Gate improperly used replacement workers in August 2022 during the Union's strike action at YVR is now academic. The strike is over and a new collective agreement was reached. The only question is whether I should still exercise my discretion to review the Board's determination of this issue.

[47] In my view, I should. I reach this conclusion based on my consideration of the three discretionary factors identified above.

[48] With respect to the first factor, I accept counsel for Gate and counsel for the Union's collective assertion that an adversarial context still exists given the impending expiry of their clients' existing collective agreement, and that,

unfortunately, it is quite possible that a labour disruption similar to the one that occurred in 2022 will take place again.

[49] For the second factor, I note that this matter occupied two days' worth of Court time during which detailed and helpful submissions were provided by all counsel. Significant time and resources were also devoted to the two hearings before the Board. There would be an obvious benefit to avoiding further hearings if the parties are prepared to govern themselves by the decision of this Court (subject to it being appealed, of course).

[50] As for the third factor, to the extent that interpreting the *Code* and the constitutional limits of the Board's power amounts to "intruding" upon the Legislature's role, this has already been done by the Board. I fail to see what mischief would be inflicted if this exercise were to now be performed again by a court in the context of an application for judicial review.

[51] In sum, I will exercise my discretion to adjudicate this matter notwithstanding the fact that the original labour dispute that gave rise to it has concluded.

**Standard of Review**

[52] The starting point for ascertaining the standard of review is the applicable provincial legislation. In this case, that legislation is the *Code*.

[53] Section 115.1(m) of the *Code* provides that the standards of review set out at ss. 58(1) and (2) of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45 [*ATA*] apply to decisions of the Board. The latter provisions read as follows:

> 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.
>
> 58 (2) In a judicial review proceeding relating to expert tribunals under subsection
>
> > (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.



[54] Sections 136 to 139 of the *Code* contain privative clauses. Sections 136 and 137 provide for the Board's exclusive jurisdiction over applications and complaints under the *Code*, and prohibit the court from hearing them. Section 138 provides that Board decisions are final. Section 139 indicates that the Court has exclusive jurisdiction to decide certain questions, including whether:

(a) a person is an employer or employee (*Code,* s. 139(a));

(b) a person is described in section 68(1) of the *Code* – the provision that prohibits the use of replacement workers (*Code,* s. 139(q)); and

(c) a site or place is a site or place of business, operations, or employment of an employer (*Code*, s. 139(s)).

[55] Therefore, s. 58(2)(a) of the *ATA* requires that the patent unreasonableness standard of review be applied to Gate's challenge to the Board's findings of fact, findings of law, and exercises of discretion in respect of matters over which the Board has exclusive jurisdiction. They include the Board's findings with regard to whether, for the purposes of s. 68(1) of the *Code*: (1) Gate is an employer; and (2) any of Gate's employees are being used as replacement workers to do the work of Gate's employees who are in a bargaining unit that is on strike.

[56] The applicability of the patent unreasonableness standard of review to these matters is also fairly and properly acknowledged by Gate at para. 54 of its written submissions, as follows:

> 54. The Board's decision on the interpretation of s. 68 is a statutory interpretation question within the Board's exclusive jurisdiction, and whether an employer "used" workers to perform "bargaining unit work" for the purposes of the *Code* is a question of mixed fact and law. These matters fall

> under s. 58(2)(a) of the *ATA* and the standard of review is patent unreasonableness.

[57] The only remaining question is whether there are other aspects of the Board's decision under review to which the standard of correctness applies, under s. 58(2)(c) of the *ATA* or otherwise.

[58] Counsel for Gate says that there is one. It is the general question of whether the Board's order exceeded the Board's constitutional jurisdiction. His submission is based on the principle that constitutional questions decided by administrative tribunals must be reviewed for correctness in order to ensure maintenance of the rule of law: *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 [*Vavilov*] at para. 17.

[59] Gate therefore effectively argues that the Board's constitutional determination of the extent of its jurisdiction should be reviewed first on a standard of correctness. If the Board is found to have incorrectly answered this constitutional question, Gate's petition should be allowed and there will be no need for any further analysis. If the Board's answer to the constitutional question is correct, however, Gate says that the Court should then review the Board's statutory interpretation of s. 68 of the *Code* and its application to the facts on a patent unreasonableness standard.

[60] Counsel for the Board disagrees. Relying on *Brown Bros. Motor Lease Canada Ltd. v. Workers' Compensation Appeal Tribunal,* 2022 BCCA 20 [*Brown Bros.*], she submits that the mere fact that a tribunal considered issues of constitutional jurisdiction in relation to a matter of statutory interpretation that is otherwise within its exclusive jurisdiction to decide, does not change the applicable standard of review from patent unreasonableness to correctness. Also, without saying so expressly, counsel for the Board suggests that the reconsideration panel's determination of the constitutional question before it may have been unnecessary. This is because the Board effectively found that its cease and desist order does not apply extraterritorially. Alternatively, if the order could be said to have some

extraterritorial application, then the Board concedes that the correctness standard of review applies to the constitutional question portion of the Reconsideration Decision.

[61] Counsel for the Union adopts the Board's primary position that the applicable standard of review is patent unreasonableness. However, she adds that even if the standard were correctness, the Board's decision is correct in any event.

[62] Having reviewed the parties' submissions, I agree with Gate on this issue.

[63] The Supreme Court of Canada in *Vavilov* at para. 35 did indeed find that legislated standards such as those set out in the *ATA* only apply "within the limits imposed by the rule of law". This means that if maintenance of the rule of law requires judicial review to be conducted on a correctness standard, then this standard is to be applied even in the face of a statute that prescribes a more deferential standard of review. However, this exceptional principle only arises in cases that clearly fall under one or more of the recognized rule of law "correctness categories". The first of these is the constitutional question category: *Vavilov* at paras. 55-56.

[64] It is self-evident that the question answered by the Board in its Reconsideration Decision under the rubric "Does the order exceed the Board's constitutional jurisdiction" is a constitutional question. Therefore, judicial review of the Board's answer must be effected on a correctness standard.

[65] I also find that *Brown Bros.* is distinguishable from the case at bar. In *Brown Bros.,* the Workers Compensation Appeal Tribunal ("WCAT") decided as a matter of statutory interpretation that non-resident members of a flight crew who were in British Columbia for a mandatory overnight layover were not "workers in British Columbia" within the meaning of the *Workers Compensation Act,* R.S.B.C. 1996, c. 492. While constitutional arguments were also presented, the WCAT did not expressly decide them. The Court of Appeal found at para. 38 of *Brown Bros.* that it was unnecessary for the WCAT to go further and answer any questions of

constitutional applicability. Accordingly, the WCAT's decision was reviewed on a standard of patent unreasonableness.

[66] In its Reconsideration Decision issued in the case at bar, however, the Board did expressly answer the constitutional question before it. In fact, the reconsideration panel requested further submissions from the parties on the issue after it had been squarely raised by Gate. I am not prepared to find that it was unnecessary for the Board to decide this question, as was the case in *Brown Bros.*

[67] In sum, the question of whether the Board exceeded its constitutional jurisdiction will be reviewed on the non-deferential standard of correctness. The question of whether the Board erred in interpreting s. 68 of the *Code* and by applying it to the facts of this case will be reviewed on the highly deferential standard of patent unreasonableness.

**Issue #1: Constitutionality of the Board's Order**

***Gate's Position on Issue #1***

[68] Gate's constitutional challenge to the Board's order is founded upon the assertion that the Board's prohibition on Gate's use of its Alberta and Ontario employees as replacement workers impermissibly impacts property and civil rights outside of British Columbia. This is said to be contrary to the *Constitution Act, 1867* which limits the extent to which provincial legislation applies outside of the province in which it was enacted.

[69] In particular, Gate says that the Board's order frustrates Gate's ability to fulfill its contractual obligation to provide catering services to Air Canada in Alberta and Ontario under a commercial agreement governed by Ontario law. The order also prevents Gate's employees in Alberta and Ontario from performing bargaining unit work governed by their provincially-regulated collective agreements.

[70] Gate notes further that the extraterritorial application of the Board's order is especially problematic when it is understood that replacement workers are treated differently under the provincial labour relations regimes that apply in Alberta and

Ontario as compared to the one in British Columbia. As has already been noted, the use of replacement workers is prohibited in British Columbia, but is permitted in Alberta and Ontario. As such, the Board's order amounts to an improper infliction of a legislative choice made by the British Columbia Legislature upon persons who reside and businesses that operate in Alberta and Ontario.



### *Union's Position on Issue #1*

[71] The Union submits that the Board's order has no extraterritorial impact. The order is therefore constitutionally permissible.

[72] This is because the order only requires Gate, an employer in British Columbia, to not use the services of its employees who happen to work at places of operations that are outside of British Columbia to do the work of Gate's YVR employees while the latter are on strike. It does not order persons outside of British Columbia to cease doing anything.

[73] The Union also argues that it would defeat the purpose of s. 68(1) of the *Code* to allow employers with out-of-province operations to escape the reach of the *Code* by sending out struck work to their out-of-province employees. This would be especially unfair when such a tactic would not be available to British Columbia employers whose employees all work within the province.

### *Discussion and Conclusion on Issue #1*

[74] The issue of the extent to which a provincial tribunal may make orders that have extraterritorial effect was canvassed most recently by the Supreme Court of Canada in *Sharp v. Autorité des marchés financiers,* 2023 SCC 29 [*Sharp*]. The question before the Court on that judicial review was whether Quebec's Financial Markets Administrative Tribunal was right to conclude that it has jurisdiction over four British Columbia residents. The Court answered the question in the affirmative. It is worth noting that the Court did so after applying the correctness standard of review to this constitutional question.

[75] The Court in *Sharp* held that the test for when a provincial regulatory scheme may apply outside of the province remains the one that was set out in *Unifund Assurance Co. v. Insurance Corp. of British Columbia,* 2003 SCC 40 [*Unifund*]. The salient aspects of this "*Unifund* Test" are set out in *Sharp* at paras. 103-123. They can be summarized in this way:

(a) Provinces cannot legislate extraterritorially (as per the opening words of s. 92 of the *Constitution Act, 1867* generally, and as per s. 92(13) in relation to property and civil rights specifically).

(b) Provincial legislative schemes can, however, apply constitutionally to an out-of-province party without offending the extraterritoriality prohibition provided there is a real and substantial connection between the scheme and the party.

(c) The real and substantial connection test is organized around four principles:

(i) the territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;

(ii) what constitutes a sufficient connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation, and the individual or entity sought to be regulated by it;

(iii) the applicability of otherwise competent provincial legislation to out-of-province parties is conditioned by the requirements of order and fairness that underlie our federal arrangements; and

(iv) the principles of order and fairness, being purposive, are applied flexibly to the subject matter of the legislation.

(d) The real and substantial connection test only applies to issues of constitutional applicability, not constitutional validity. The test does not apply if the validity of the legislative scheme itself is challenged.

(e) The real and substantial connection test functions as a principle of statutory interpretation. While it means that otherwise broadly framed provincial legislation is read down so as not to transgress the limits of a province's constitutional powers, it also allows provincial statutes to be interpreted to apply to out-of-province parties without having an extraterritorial effect if the real and substantial connection test is met.

(f) The real and substantial connection test relates to prescriptive legislative jurisdiction, but not necessarily to adjudicatory jurisdiction.

(g) The real and substantial connection test is part of a family of tests which are similar but may apply differently depending on the underlying context.

[76] The first two principles of the *Unifund* Test (summarized above at paras. 75(c)(i) and (ii) of these reasons) were considered together in *Sharp* at paras. 127-130. The Court held that the first principle requires a sufficient connection, while the second identifies factors that might furnish that connection. This means that there must be an examination of the relationship among the enacting jurisdiction, the subject matter of the law, and the party sought to be regulated by it. It is done in order to decide whether that relationship is sufficient to support the applicability of the legislation to the out-of-province person.

[77] The last two principles of the *Unifund* Test (summarized above at paras. 75(c)(iii) and (iv) of these reasons) were considered together in *Sharp* at paras. 131-135. The Court held that the third principle requires a consideration of order and fairness, which functions as a mechanism to regulate extraterritoriality concerns by ensuring the security of transactions with justice. The fourth principle requires that notions of order and fairness be applied purposively and flexibly given the subject matter of the legislation and the type of jurisdiction being asserted.

[78] Simply put, *Sharp* confirms that provincial regulatory tribunals cannot issue orders that impact persons outside of their home province, unless the *Unifund* Test

is satisfied. I also adopt the reconsideration panel's succinct summary of this test set out at para. 109 of the Reconsideration Decision:

> [109] To summarize, provinces do not have the jurisdiction to *legislate* "extraterritorially", but this constitutional limitation does not mean a valid provincial legislative regime cannot apply to a person or entity who is situated outside the physical boundaries of the province. A provincial legislative regime can apply to a person or entity situated outside the province, if there is a "sufficient connection" or relationship between "the enacting territory, the subject matter of the law, and the person sought to be subjected to its regulation" (*Unifund*, para. 63). The requirements of order and fairness underlying our federal state must be respected, but those requirements "are applied flexibly according to the subject matter of the legislation" (para. 56).



[79] Turning to the case at bar, I begin by noting that I do not accept that there is any issue that the Board's order has extraterritorial application to Gate. The order applies directly to Gate under the *Code* as a provincially regulated employer with operations in British Columbia.

[80] That said, I do accept that the Board's impugned order has an extraterritorial impact on other persons and entities that reside and operate outside of British Columbia, whose rights and obligations are not directly governed by the *Code.* They are: (1) Gate's employees in Alberta and Ontario who were performing the double-catering of the Admitted Flights to YVR ("Out-of-Province Gate Employees"); and (2) Air Canada who had requested Gate to effect this double-catering.

[81] In particular, the Board's order prevented the Out-of-Province Gate Employees from double-catering the Admitted Flights to YVR. As for Air Canada, its preference for having the Admitted Flights to YVR double-catered by Gate's employees in Alberta and Ontario could no longer be accommodated as a result of the Board order.

[82] The issue then is whether the *Unifund* Test is met in relation to the Out-of-Province Gate Employees and Air Canada. I will address them separately, beginning with the Out-of-Province Gate Employees.

[83] In this case, the "enacting jurisdiction" is the Board empowered by the British Columbia Legislature to administer the *Code.* The "subject matter of the law" is the

regulation of labour relations between employers and collectively represented employees pursuant to the *Code*. In my view, when an employer subject to the *Code* has operations and employees that work both inside and outside of British Columbia, there is a sufficient connection between the Board, the *Code,* and the employer's out-of-province employees that justifies having the ***Code's*** replacement worker provisions apply to the employer's operations outside of British Columbia. I am also of the view that such an application is consistent with flexibly applied notions of order and fairness.

[84] I so find because it is evident that in order for the *Code*'s s. 68(1) prohibition on the use of replacement workers during a labour dispute to be effective, it must apply to all of the employer's operations, whether they are inside or outside of British Columbia. Otherwise, a British Columbia employer that has employees in other provinces could circumvent the prohibition by simply transferring the work to its out-of-province employees (depending on the nature of the work). This reflects the reality of modern labour relations in which many provincially regulated employers operate in more than one province (similar to the transnational nature of modern securities regulation: *Sharp* at para. 128).

[85] I also see nothing inconsistent with notions of order and fairness that employees who work for such "multiprovincial" employers in provinces outside of British Columbia may not act as replacement workers for their British Columbia colleagues if and when the latter are engaged in lawful strike action. This is particularly the case if there is no evidence of any tangible prejudice that the out-of-province employee might suffer in terms of lost wages or otherwise, if they are precluded from doing work that ordinarily would be done at the struck operation in British Columbia. This was the situation here, as I was not made aware of any evidence that the Board's order caused hardship (or potential hardship) for Gate's employees working at the Calgary, Edmonton, or Toronto airports.

[86] I also do not agree with Gate that the Board's order amounts to an impermissible interference with Alberta and Ontario's sovereignty in matters of

labour relations generally, or that it amounts to an infliction of British Columbia's legislative choice to restrict the use of replacement workers on these other jurisdictions that have made different legislative choices. To that end, I adopt the reconsideration panel's explanation for its rejection of Gate's argument at para. 118 of the Reconsideration Decision:

> [118] We are not persuaded the order interferes with the sovereignty of the Alberta and Ontario labour relations boards to regulate the relationship between Gate and its employees in Alberta and Ontario. Gate does not argue that it has a specific right under either the Alberta or Ontario labour codes to assign the struck work of its YVR employees to its Alberta and Ontario employees. The cease-and-desist order is therefore not in conflict with that legislation. Furthermore, while those labour codes may not restrict Gate from using replacement workers in response to job action by its Alberta and Ontario employees, the job action at issue is not by those employees but by its BC employees. The BC Code applies to that job action, and under Section 68(1) of the Code, Gate is restricted in its use of replacement workers in response to that dispute. The Board's ability to regulate that dispute and apply the Code to it is not truncated by the fact that Gate is using replacement workers who are located outside the province.

[87] Therefore, I conclude that the *Unifund* Test is met in respect of the Out-of-Province Gate Employees. The Board's order does validly apply to prevent them from acting as replacement workers for Gate's YVR workers represented by the Union when the latter are engaged in a lawful strike.

[88] Turning to Air Canada, I will assume for the purposes of this analysis that it is an "extraterritorial" company in the sense that some of its commercial relations with Gate are not governed by British Columbia law, at least in so far as Air Canada has a contractual right to request Gate to double-cater certain flights destined for YVR from Gate's operations in Alberta and Ontario. However, for essentially the same reasons as are set out above in relation to the Out-of-Province Gate Employees, I am also satisfied that the *Unifund* Test is met in respect of Air Canada. This means that the Board's order prohibiting Gate from using Out-of-Province Gate Employees to double-cater Air Canada flights validly applies notwithstanding its impact on Air Canada.

[89] Such application is also necessary to ensure the integrity of the *Code*'s restrictions on replacement workers, and its incidental impact on Air Canada is consistent with notions of order and fairness, flexibly applied. Furthermore, as is the case for the Out-of-Province Gate Employees, there is also no clear evidence of actual prejudice Air Canada suffered or might have suffered from the Board's order. To the contrary, there is evidence that Gate felt that it could have adequately maintained service to Air Canada during the Union's strike, and that Gate only effected the out-of-province double catering of the Admitted Flights because Air Canada asked Gate to do so.

[90] In sum, I find that the Board was correct to conclude that its order does not exceed the Board's constitutional jurisdiction.

### Issue #2: Board's Interpretation and Application of the *Code* to the Facts

#### *Gate's Position on Issue #2*

[91] The first aspect of Gate's challenge to the merits of the Board's Reconsideration Decision is directed at the Board's refusal to accept Gate's argument that it was not the "employer" for the purposes of s. 68(1) of the *Code*. Gate now says that the Board should have found the employer to be "Gate's British Columbia operations" as this is the widest possible scope that the British Columbia Legislature has the authority to regulate. Gate submits that by finding the entirety of Gate's corporate personality to be the employer, the Board rendered a patently unreasonable decision.

[92] The second aspect of Gate's challenge relates to the Board's finding that Gate "used" the services of replacement workers contrary to s. 68(1) of the *Code* because Gate acted to implement or facilitate Air Canada's out-of-province double catering request. Gate says that the evidence before the Board was to the effect that Air Canada exercised its legal right under its contract with Gate to choose where it wished to purchase catering services. As such, it was Air Canada that initiated the impugned actions that are alleged to be in violation of s. 68(1), not Gate.

[93] The third and final aspect of Gate's challenge is its argument that the Board was wrong to find that the double-catering work done by the Out-of-Province Gate Employees was "work of an employee in the bargaining unit that is on strike" for the purposes of s. 68(1) of the *Code*. Gate says that there was no evidence that this work was ordinarily performed by the striking bargaining unit at YVR, nor could there be since catering locations are often in flux.

***Union's Position on Issue #2***

[94] The Union submits first that the Board's determination that Gate is the employer is premised on the Board's finding that an "employer" for the purposes of the *Code* must be an entity such as a corporation, partnership, or an individual, and cannot be an operational division of that entity. The Union says that in so finding, the Board was interpreting its home statute and is entitled to deference in doing so.

[95] With respect to Gate's argument that it was Air Canada that decided to "use" the services of the Out-of-Province Gate Employees, the Union submits that the Board made a factual finding that this was actually Gate's decision. As this finding is not clearly irrational, it ought not to be disturbed.

[96] The Union also notes that Gate conceded before the Board that the Admitted Flights were double-catered in response to the strike. Gate's admission establishes that this is work that, but for the strike, would have been performed by the striking workers at YVR. The Board therefore did not err in finding that this was the work of Gate's employees in the bargaining unit that was on strike.

***Discussion and Conclusion on Issue #2***

[97] As has already been noted, Gate's challenge to the Board's decision brought on non-constitutional grounds is subject to review on a standard of patent unreasonableness, as per s. 58(2)(a) of the *ATA.*

[98] Since the *ATA* does not define patent unreasonableness, guidance regarding its meaning must be sought from the case law. Our Court of Appeal in *Red Chris Development Company Ltd. v. United Steelworkers, Local 1-1937*, 2021 BCCA

152 [*Red Chris*] noted at para. 29 that the standard of patent unreasonableness continues to mean what it meant when the *ATA* came into being, notwithstanding the Supreme Court of Canada's decision in *Vavilov*. At para. 30 of *Red Chris,* the Court of Appeal also adopted the explanation of patent unreasonableness originally penned by Justice Ballance in *Victoria Times Colonist v. Communications, Energy, and Paperworkers*, 2008 BCSC 109 at para. 65:

> When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the [*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.

[99] Therefore, patent unreasonableness is a highly deferential standard. The Board's decision will only be set aside on its merits if the Board's analysis is clearly irrational or so flawed that no amount of curial deference can justify letting it stand.

[100] Unlike judicial review conducted on a non-deferential correctness standard, judicial review conducted on a patent unreasonableness standard must be done by using a "reasons first" approach. This means that the reviewing court begins its analysis with the reasons of the decision-maker. The court must not start with its own perception of the merits, as doing so creates a risk that the court might inadvertently try to decide the issue itself. This is what is known as "disguised correctness review". The Supreme Court of Canada held in *Mason v. Canada (Citizenship and Immigration),* 2023 SCC 21 at paras. 58-63 that such review is impermissible when the standard of review is reasonableness. Obviously, it is also forbidden when the even more deferential standard of patent unreasonableness applies.

[101] I will therefore begin with an examination of the Board's reasons for concluding that the "employer" is Gate, and not Gate's operations in British Columbia.

[102] The salient portion of these reasons is at paras. 88-90 of the Reconsideration Decision:

> [88] Gate argues, however, that for constitutional jurisdiction reasons, only its "YVR operations" should be considered the employer for Code purposes. We will address Gate's constitutional jurisdiction argument below. In our view, that argument concerns the ability of the original panel to issue the cease-and-desist order against Gate given in the Original Decision. However, we find Gate has not established the original panel made an error of fact or law under the Code in finding Gate, not its YVR operations, is the employer of its YVR employees for Code purposes.
>
> [89] In that regard, we agree with the original panel that an "employer" for purposes of the Code must be an entity (a corporation, partnership, individual, or other legal entity) which is capable of carrying out the duties, rights and responsibilities imposed on employers by the Code. Gate does not point to any evidence that its YVR operation, as distinct from its corporate head office, has that capability, or made the employer decisions and took the employer actions at issue in this case. To the contrary, the evidence before the original panel was that all relevant employer decisions were made, and all relevant employer actions undertaken, by Gate, through its head office personnel.
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> [90] Thus, not only is Gate the employer of its YVR employees bound by the Union's certification, but Gate also carries out all the functions of the employer of those employees for Code purposes. Its YVR operation is not bound as the employer and there is no evidence it acts as such. In these circumstances, we find Gate has not established the original panel erred in finding Gate is the employer of its YVR employees for Code purposes.

[103] The reasons reveal that the Board effectively interpreted the term "employer" in the *Code* as meaning an entity (a corporation, partnership, individual, or other legal entity) which is capable of carrying out the duties, rights, and responsibilities imposed on employers by the *Code.* The Board did not expressly exclude the possibility that a division of such an entity that lacks a legal personality – such as an employer's operations at a specific location – could act as an employer for the purposes of the *Code*. However, the Board found that, in this case, the evidence showed that Gate made all of the relevant decisions and actions through its head

office, and that there was no evidence that Gate's YVR operation had the capability to do so.

[104] In my view, there is nothing clearly irrational about the Board's purposive definition of the term "employer". It is not inconsistent with either the Code's definition of that word, or its ordinary dictionary meaning. Gate also does not suggest that the Board wrongly found as a fact that it was Gate's head office, and not Gate's YVR operations, that functionally made the decisions and took the actions complained of by the Union. Furthermore, Gate's argument that the Board had to read down its definition of "employer" so as to encompass only the intraprovincial aspects of Gate's operations cannot be accepted in light of my earlier determination of the constitutional issue.

[105] Accordingly, I find that neither the Board's definition of "employer" for the purposes of s. 68(1) of the *Code* nor its application of this definition to the facts in this case are patently unreasonable.

[106] I turn now to the Board's reasons for concluding that Gate unlawfully "used" replacement workers.

[107] The salient portion of these reasons that address Gate's argument that it was Air Canada – and not Gate – that was responsible for the Out-of-Province Gate Employees effecting the double-catering of the Admitted flights is at paras. 96-97 of the Reconsideration Decision:

> [96] With respect to the question of "use", the Original Decision notes Gate argued "its customers, specifically Air Canada, engaged in self-help to mitigate against the effects of the Union's strike" (para. 105). The original panel accepted Gate's evidence that "Air Canada approached Gate's Head Office personnel, namely the Account Director, to implement double-catering in response to the strike" (para. 109). However, the original panel further found the evidence established that Gate acted to implement or facilitate Air Canada's request, and this "facilitating role puts the facts of this case outside an act of purely, hands off, self help by Air Canada" (para. 114). The original panel concluded that, by facilitating Air Canada's request for double-catering out of Alberta and Ontario, Gate "was using services as contemplated by Section 68(1) of the Code" (para. 124).

> [97] We are not persuaded the original panel made a palpable and overriding error of fact, or misapplied Board law and policy under Section 68(1) of the Code, in making this finding. We find the original panel correctly concluded these circumstances are distinguishable from those in *Westminster*, where the employer was not involved in customers' decisions to utilize a non-struck location during a strike at one of the employer's locations. Here, the evidence was that Gate facilitated and, in effect, implemented, the double-catering of flights from Ontario and Alberta in order to maintain catering services to Air Canada notwithstanding the strike. In these circumstances, we find the Original Decision correctly concludes that, in doing so, Gate made "use" of persons within the meaning of Section 68(1) of the Code.

[108] Gate argues that the Board wrongly interpreted the terms of s. 68(1) of the *Code* which state that "an employer must not use the services" of a replacement worker as encompassing not just the notion of "using" such services, but also the notions of "facilitating", "approving", and "actioning" the use of such services. This led the Board to wrongly find that Gate was responsible for the double-catering of the Admitted Flights to YVR by Gate's employees in Alberta and Ontario. Gate says that the Board ought to have concluded that this was simply a case where the customer (Air Canada) engaged in self-help by choosing to procure services at a location that had not been struck. Gate argues that the Board had found previously in *Westminster Savings Credit Union v. Canadian Office and Professional Employees Union, Local 378,* 2019 CanLII 60896 (BCLRB) [*Westminster*] that such self-help is permissible when it is initiated by the customer.

[109] I agree with Gate that the Board interpreted the word "use" in s. 68(1) of the *Code* to include the notion of facilitation in the sense of an employer approving and actioning a customer's request that services be provided by replacement workers. However, I do not agree that such an interpretation is clearly irrational. To the contrary, it reflects a purposive interpretation which ensures that the *Code*'s prohibition on replacement workers applies in all cases that they are used, even if it is the customer that requests them. Indeed, it cannot have been the Legislature's intention in enacting s. 68(1) of the *Code* that it would apply when an employer unilaterally decides to use replacement workers, but not when the customer has

some involvement in this decision by requesting, directing, or purporting to order the employer to use replacement workers.

[110] As for the Board's treatment of its *Westminster* precedent, I agree with the Board's rationale for distinguishing it. That case involved a passive employer whose customers chose to do their banking at its non-struck branches while one of its other branches was on strike. This differs from the case at bar where Gate actively diverted work from its struck operations at YVR to its non-struck operations at other airports at the request of a customer.

[111] I therefore find that neither the Board's definition of "use" for the purposes of s. 68(1) of the *Code* nor its application of this definition to the facts in this case are patently unreasonable.

[112] Finally, I turn to the Board's reasons for concluding that the Out-of-Province Gate Employees were performing "the work of an employee in the bargaining unit that is on strike". The salient portion of these reasons is at paras. 99-101 of the Reconsideration Decision:

> [99] Gate does challenge the original panel's finding that the double-catering work on the Admitted Flights was struck work ("the work of an employee in the bargaining unit that is on strike") for purposes of Section 68(1). In that regard, Gate reiterates its argument made to the original panel that "the work of employees in the Union's bargaining unit is limited to work that is requested by a customer of Gate to be performed at YVR" and that as Air Canada "did not request the catering services on the double-catered Admitted Flights to be done at YVR, [Gate] says this work cannot be the work of employees in the Union's bargaining unit" (para. 170).
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> [100] We find no error in the original panel's rejection of this argument. As the original panel noted, "Air Canada asked Gate to double-cater flights outside of YVR in response to the strike" (para. 169). In these circumstances, we find the original panel was entitled to make the factual inference on the evidence before it that "the double-catering on the Admitted [Air Canada] Flights would not have occurred, but for the strike", and that "had there been no strike, … bargaining unit members at YVR would have single-catered the Admitted Flights" (para. 171). As the Original Decision then states: "Put another way, the work done by Gate's employees in Alberta and Ontario to double-cater the Admitted Flights is work that would have been done by the bargaining unit but for the strike" (para. 171).
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> [101] We are satisfied this finding had a sufficient basis in the evidence before the original panel and was a proper factual basis in the circumstances

> for the original panel to find the double-catering work on the Admitted Flights was struck work for purposes of Section 68(1). As the original panel notes, the Board applies a "but for" test "in determining whether the impugned work is captured by Section 68(1)(e) of the Code" (para. 166). Here we are not persuaded the original panel made a palpable and overriding error of fact, or misapplied the Board's law and policy, in concluding this element of Section 68(1) was met in this case.

[113] On judicial review, Gate does not argue that the Board committed a statutory interpretation error with respect to this aspect of its analysis. Gate's argument is confined to an assertion that there was no evidence to support the Board's finding on this issue.

[114] I do not agree. As noted by the reconsideration panel, Gate conceded that the Admitted Flights were double-catered, and at para. 169 of the Original Decision it was noted that "the double-catering on the Admitted Flights accords with the [Gate] Account Director's evidence that Air Canada asked Gate to double-cater flights outside of YVR in response to the strike." I accept that this circumstantial evidence provided an acceptable basis for the Board to make an inferential finding that but for the strike, the bargaining unit members at YVR would have single-catered the Admitted Flights. Such a finding is not clearly irrational and cannot be set aside on judicial review when the patent unreasonableness standard applies.

[115] In sum, after reviewing the substance of the Board's decision, the petition record, and the parties' submissions, I conclude that the Board's decision to allow the Union's complaint and to grant consequential relief against Gate is not patently unreasonable.

## DISPOSITION

[116] For the reasons set out above, Gate's petition is dismissed.

[117] The Union has been substantially successful and shall have its costs of responding to the petition payable by Gate in accordance with Scale B.

[118] Given the nature of its participation in the petition, no costs shall be awarded to or against the Board, as it has requested.

"Brongers J."