IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *BC Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.,* 2019 BCSC 732

Date: 20190510
Docket: Vancouver
Registry: S175858

Between:

BC Ferry and Marine Workers' Union

Petitioner

And

British Columbia Ferry Services Inc.

Respondent

And

British Columbia Labour Relations Board

Respondent

Before: The Honourable Madam Justice Choi

On judicial review from: An order of the Labour Relations Board, dated April 21, 2017 (BCLRB No. B68/2017).

Reasons for Judgment

Counsel for the Petitioner:	J. Rogers, Q.C. C. Bavis
Counsel for the Respondent British Columbia Ferry Services Inc.:	P. Fairweather
Counsel for the Respondent British Columbia Labour Relations Board:	E. Miller
Place and Date of Trial/Hearing:	Vancouver, B.C. November 28-30, 2018 January 18, 2019

Place and Date of Judgment:	Vancouver, B.C. May 10, 2019

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Introduction

[1] The BC Ferry and Marine Workers' Union ("Union") filed a petition seeking to quash two decisions of the Labour Relations Board ("Board") and an arbitration award ("Arbitration Award"), which interpreted a provision in its collective agreement with its employer. The respondent Board and the respondent British Columbia Ferry Services Inc. ("Employer"), argue that this Court may only judicially review the most recent Board decision, BCLRB No. B68/2017 ("Reconsideration Decision").

[2] The Reconsideration Decision dismissed the Union's application for leave and reconsideration, concluding that the application did not present a "good arguable case" for reconsideration.

[3] The respondents argue that the only issue on this judicial review is whether the Reconsideration Decision is patently unreasonable. As I understand it, the Union argues that the issue is broader and requires this Court to consider factors such as whether the collective agreement was interpreted properly, whether the Arbitration Award was consistent with the principles expressed or implied in the *Labour Relations Code,* R.S.B.C. 1996, c. 244 [*Code*], and whether common law authorities and the *Charter of Rights and Freedoms* [*Charter*] were appropriately considered.

[4] The substantive disagreement between the Union and the Employer, at its core, is about the interpretation of Article 34.02 of their collective agreement and specifically whether the article prohibits the Union from strike action. The respondents argue that this Court's role is not to interpret the article nor to review whether the interpretation of the article by the arbitrator was correct.

Background

[5] To provide context for this judicial review, I will summarize the background and procedural history. Where I refer to the "parties", I refer to the Union and the Employer given that the Board was an administrative decision maker in the underlying proceedings, not a party itself.

[6] The provincial government appointed Vince Ready on December 1, 2003, as a special independent mediator after the parties were unable to negotiate a new collective agreement after their previous agreement expired on October 31, 2003. The parties agreed to refer their outstanding issues to him for final and binding arbitration. At page 2 of his March 8, 2007 award ("Ready Award"), Arbitrator Ready described his role as, "to assist the parties in what must be described as one of the most difficult labour relations disputes in a lifetime of dealing with demanding disputes".

[7] The Ready Award established a new bargaining structure, which included a permanent collective bargaining dispute resolution panel ("DRP"). Where the parties were at an impasse for 14 days or more during collective bargaining, the DRP would decide the issue(s) for them in final and binding arbitration. Arbitrator Ready appointed three panel members and provided that the parties could change a panel member by mutual agreement.

[8] The bargaining structure and DRP established by the Ready Award was largely incorporated into the parties' collective agreement and became Article 34.02. The parties have subsequently engaged in two rounds of successful collective bargaining, amending their collective agreement in 2011 and renewing it in 2015. The main amendment to the DRP related to how panel members were to be appointed**.** Article 34.02 provides:

> ***34.02 – Notice to Bargain***
>
> (a) A permanent collective bargaining dispute resolution panel shall be established.
>
> (b) The members of the panel are to be appointed in the following manner:
>
> 1. Each party shall appoint one panel member,
>
> 2. The two panel members will jointly agree on the appointment of a third panel member who shall sit as the Chair of the panel.
>
> (c) No later than three (3) months before the expiry of their collective agreement, the parties shall exchange bargaining proposals and no later than fifteen (15) days thereafter, the parties shall begin collective bargaining.
>
> (d) During collective bargaining, the parties may call upon a member of the panel to provide assistance.

(e) If the parties reach impasse, the parties shall enter into mediation with one or more members of the panel.

(f) If the impasse persists for fourteen (14) days after mediation commences, or beyond any other date mutually agreed by the parties, all impasse items shall be submitted to the panel for final and binding arbitration.

(g) In reaching its decision, the panel shall take into consideration:

1. The compensation, benefits and working conditions for employees as compared with the public and private sector employees in relevant comparable employment, including in states along the west coast of the U.S., including Alaska, and within B.C. in comparable positions;
2. The economic realities of the marketplace in terms of recruitment and retention of a skilled and qualified workforce;
3. Prevailing economic conditions in the Province;
4. The economic viability of the Employer;
5. The interests of the users of the ferry system;
6. Historical bargaining patterns;
7. Cost of living;
8. Such other factors which the panel deems relevant.

(h) The decision of a majority of the panel is the decision of the panel but, if there is no majority decision, the decision of the chair is the decision of the panel.

(i) The decision of the panel is binding on the parties who must comply in all respects with the decision.

[9] The Union and Employer disagreed on the interpretation of Article 34.02 during their 2015 collective bargaining, some years after it was incorporated as a term of the parties' collective agreement. The parties disagreed on when the panel members must be appointed during the collective bargaining process and whether Article 34.02 prohibits the Union from strike action.

[10] When the Union refused to appoint its panel member as requested by the Employer, the Employer filed a grievance on August 14, 2015. Arbitrator John Hall was appointed to arbitrate the grievance. Arbitrator Hall's award is dated November 3, 2016 ("Arbitration Award").

Arbitration Award

[11] Arbitrator Hall was tasked with determining whether the Union had contractually agreed to waive its statutory right to strike, since Article 34.02 contemplates the establishment of a permanent collective bargaining DRP. The Union argued it never would have agreed to such a term.

[12] Arbitrator Hall reviewed the history of Article 34.02 following the deeply acrimonious labour relations dispute. Arbitrator Hall reviewed authorities including *Bradburn v. Wentworth Arms Hotel Limited* (1978), [1979] 1 S.C.R. 846; *Ontario Nurses' Association v. Haldimand-Norfolk (Region) Health Unit*, [1983] 2 S.C.R. 6 [*Ontario Nurses*]; and *CUPE, Local 1041 v. Hamilton (City)*, [2012] O.L.R.D. No. 3625 [*Hamilton*].

[13] The Union argued that a collective agreement may only strip union members' of their right to strike with the "clearest possible language", per *Bradburn*, and the language of Article 34.02 did not meet that standard. Arbitrator Hall concluded:

> There is admittedly no language in Article 34.02 which expressly restricts the Union's right to strike in support of its position in collective bargaining… But this overlooks the inherent nature of a reference to 'final and binding arbitration': interest arbitration is, by definition, an alternative to the statutory mechanisms of strikes and lockouts…
>
> The Union's submission before me is seemingly the antithesis of what Arbitrator Ready contemplated. It runs counter as well to what is evident from the plain language of Article 34.02 of the current Collective Agreement. As emphasized in final argument, the Union's position ultimately makes participation in the collective bargaining dispute resolution process a 'voluntary' exercise. This result effectively removes any meaning from the contractual language …

[14] The Union relied on the *Charter* in its argument that the constitutional recognition of the right to strike in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 [*SFL*] has bearing. Arbitrator Hall distinguished the facts of this matter from *SFL*. He concluded that *SFL* reinforces that interest arbitration is a valid alternative to resolving collective bargaining disputes. He stated that it has been accepted since *Ontario Nurses* that "parties can agree to, or an

interest arbitrator can order, the inclusion of an interest arbitration provision for the determination of future collective bargaining differences."

[15] Arbitrator Hall concluded that "by committing to submit 'all impasse items' to the [DRP] 'for final and binding arbitration', the Union has contractually agreed to not engage in strike activity during those negotiations."

Original Decision

[16] The Union disagreed with the Arbitration Award and applied under s. 99 of the *Code* for a review. The Board set out its reviewing authority by quoting a previous decision, *British Columbia Public School Employers' Association (Re),* [1999] B.C.L.R.B.D. No. 73, BCLRB Decision No. B73/99 at paras. 7-8:

> 7 Under a Section 99 application the Board's scope of review is limited to determining whether a party was denied a fair hearing, or whether the award is inconsistent with the principles expressed or implied in the Code. Section 99 is not a full-fledged avenue for appeal: … The Board does not review an award to determine whether it agrees with the arbitrator's interpretation or not. Rather, the Board will give an award a sympathetic reading and will review an arbitrator's interpretation of a collective agreement on the basis of whether the arbitrator made a genuine effort to interpret the collective agreement provision in dispute: …
>
> 8 To proceed beyond the Board's narrow scope of review would be at odds with one of the purposes of the Code out in Section 2(1)(d), which is "to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions". The Board's limited new review process does not allow parties to re-argue their case in order to achieve a more desirable result … The Board will defer to an arbitrator's decision as long as it does not violate the narrow grounds for review under Section 99.
>
> [Emphasis added and citations omitted.]

[17] The Board went on to review the arbitrator's analysis and concluded that Arbitrator Hall considered the case authorities submitted by the parties, including *Bradburn* upon which the Union heavily relied, understood the issues and arguments before him, and made a genuine effort to interpret Article 34.02. The Board dismissed the Union's arguments, finding that "it has not been demonstrated that it was inconsistent with Code principles for the Arbitrator to reach an interpretation of the Collective Agreement on [his analysis of] … the application of *Bradburn*." The

Board also dismissed the Union's argument that Arbitrator Hall denied it a fair hearing. The Union did not pursue that argument before the reconsideration panel.

Reconsideration Decision

[18] The Union then applied under s. 141 of the *Code* for leave and reconsideration. It asked the reconsideration panel to "make a declaration that Article 34.02 does not eliminate the Union's right to strike as long as the statutory preconditions to such a strike are followed."

[19] Section 141 allows the Board to grant leave for reconsideration if the applicant satisfies the Board that:

> 141 (2) …
>
> (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.

[20] The Union's leave application sets out that in *Bradburn*, the Supreme Court of Canada held that where a decision maker interprets a collective agreement as including a restriction on the union members' right to strike, that restriction must have been set out "in the clearest possible language". The Union quoted from *Bradburn* at 858-859, 861:

> There are serious consequences for the participants in the field of labour relations were a court to construe the provisions of The Labour Relations Act and the collective agreement in such circumstances as now before us, in such a way as to cause the establishment of a perpetual collective agreement terminable only on the execution of a new collective agreement by the parties. Where not barred by the statute the parties of course can, by unambiguous language, bring about results which others might consider to be improvident. In such circumstances the courts may not properly interfere. … A court therefore should not be quick to place a meaning on a term of a collective agreement which would put that clause in conflict with the general philosophy of labour relations as established under the applicable statute. Such should be the case only where the contract by its clearest intent and provisions dictates otherwise. I do not find such to be the case here.
>
> …
>
> … When the alternative to settlement on new proposals is the infinite application of the existing agreement, collective bargaining, as the term is

> understood in labour relations, will not function. It would take the clearest possible language in my view to drive a court to an interpretation which would find the parties voluntarily stripping themselves of the opportunity to call to their aid the provisions of the statute to change a collective agreement, and to substitute for those proceedings so traditional now in the labour relations of our community, a permanent agreement continuing until both parties agree upon a replacement agreement.

[21] The Union's position was "that a statutory and indeed now clearly constitutionally protect[ed] right to strike cannot be eliminated by inference." Further, the Union referred to paras. 26-77 of the Supreme Court of Canada's more recent decision of *SFL* and provided, "[t]he right to strike by trade unions is now clearly constitutionally protected as a fundamental tool for Unions and employees to address the inequality between employers and employees in the collective bargaining relationship." The Union quoted para. 75 of *SFL* in support of its position:

> [75] … s. 2(*d*) has arrived at the destination sought by Dickson C.J. in the *Alberta Reference*, namely, the conclusion that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement. Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals. …

[22] The Board denied leave and dismissed the application for reconsideration, finding that neither the Arbitration Award nor the Original Decision was in conflict with *Bradburn* or *Hamilton*. The Reconsideration Decision states at para. 9:

> [9] … The Union says the core of its challenge to the Award is that the Award failed to apply the express direction in *Bradburn*. The Union says it has not argued that the parties cannot agree to binding arbitration as an alternative to the rights of strike or lockout. Instead, what the Union has submitted is that this cannot be a matter of inference or implication, but, as stated in *Bradburn*, can only be done by the clearest possible language. …

[23] The Reconsideration Decision continues at paras. 14-17:

> [14] First, in respect to the different circumstances in *Bradburn* and *Hamilton*, the facts in *Bradburn* are exceptional ... The collective agreement provisions at issue in *Bradburn*, as interpreted by the courts below, gave rise to "the establishment of a perpetual collective agreement terminable only on the execution of a new collective agreement by the parties". It was in the

> context of an interpretation of the collective agreement that precluded access to statutory dispute resolution mechanisms to resolve collective bargaining impasses, including strikes and lockouts, that the Court in *Bradburn* understandably established a requirement for "the clearest possible language"…
>
> [15] Thus *Bradburn* dealt with the exceptional prospect of there being "the infinite application of the existing agreement", in respect to which "collective bargaining, as the term is understood in labour relations, will not function".
>
> [16] In contrast, *Hamilton* dealt with a collective agreement interest arbitration clause which would allow a party to submit matters remaining in dispute to arbitration if bargaining was unsuccessful. Those facts, in a critical sense, are the opposite of the facts in *Bradburn*…
>
> [17] …[C]ontrary to the potentially perpetual collective agreement at the insistence of either party in *Bradburn*, in *Hamilton* either party would have the ability to ensure that collective bargaining impasses were resolved through interest arbitration. In that regard the facts in *Hamilton* are similar to the facts in the present matter, whereas the facts in *Bradburn* are clearly distinguishable. And, of course, in *Hamilton* the interest arbitration provision in the collective agreement was upheld and found not to be inconsistent with the strike/lockout provisions in the *Ontario Labour Relations Act*.
>
> [References omitted.]

[24] The reconsideration panel noted the following in its conclusion:

> [21] Further, in the facts of the present matter is it in our view worthy of note that the parties have engaged in collective bargaining since the imposed Ready Award and have amended, but not removed, the interest arbitration provision in their collective agreement.

Analysis

[25] The Union's petition seeks orders quashing:

a) the Reconsideration Decision,

b) the Original Decision, and

c) the Arbitration Award.

[26] It also seeks an order that the grievance underlying the Award "be dismissed with the direction" that *Bradburn* "applies to the interpretation of the Collective Agreement, and in particular, to whether the Collective Agreement eliminates the right of the Petitioner's members to engage in strike action; and that Article 34.02 of

the Collective Agreement does not eliminate the Petitioner's statutory right to strike". Alternatively, the Union asks that the matter be remitted to the Board "to be heard afresh by a different panel, with directions from the Court".

[27] The respondents argue the only decision that this Court may review is the Reconsideration Decision. I agree with the respondents.

[28] It is settled law that this Court may not review the Arbitration Award or the Original Decision: see *Zakreski v. British Columbia Public School Employers' Association*, 2017 BCSC 1038 at paras. 25-26, aff'd 2018 BCCA 43; *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung*, 2011 BCCA 527; *Northstar Lumber v. United Steelworkers of America, Local No. 1-424*, 2009 BCCA 173; and *Stark v. Vancouver School District No. 39,* 2006 BCCA 124 at para. 7.

[29] Consequently, this Court will only review the Reconsideration Decision. The relief sought in the petition relating to the Arbitration Award and the Original Decision is dismissed.

Standard of Review

[30] This review is based on the record that was before the reconsideration panel. A judicial review is not a rehearing of a case on its merits; it is a review of the administrative tribunal's decision on the appropriate standard. The Reconsideration Decision may be reviewed on one of two standards: correctness or patent unreasonableness.

[31] The Union asserts that the standard is correctness, while the respondents argue the standard is patent unreasonableness.

[32] The Union seeks a correctness standard, in part because it asserts the reconsideration panel decided matters outside the scope of its exclusive jurisdiction. The Union submits the reconsideration panel addressed issues of general law from common law authorities, including those that interpret the *Charter*.

[33] The respondents emphasized ss. 84, 99, 100, 101, 115.1, 136, 137(1), 138, 139, and 141 of the *Code*. They also relied on s. 58(2) of the *Administrative Tribunals Act,* S.B.C. 2004 c. 45 [*ATA*].

[34] The *Code* contains a number of privative clauses, including ss. 101 and 138:

> 101 Except as provided in this Part, the decision or award of an arbitration board under this Code is final and conclusive and is not open to question or review in a court on any grounds whatsoever, and proceedings by or before an arbitration board must not be restrained by injunction, prohibition or other process or proceeding in a court and are not removable by certiorari or otherwise into a court.
>
> …
>
> 138 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.
>
> [Emphasis added.]

[35] Section 58(2) of the *ATA* applies to the *Code* pursuant to s. 115.1(m) and provides:

> 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.]

[36] Section 99 of the *Code* allowed the Union to seek a review of the Arbitration Award to the Board. The Board's original panel was only empowered to set aside the

award, remit the matter, stay the proceedings, or substitute the Arbitration Award on the ground that:

> 99 (1) …
>
> (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
>
> (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.

[37] The Union did not argue that it was denied a fair hearing.

[38] Where a party is of the view that an arbitrator erred on a point of general law, meaning something outside of the Board's exclusive jurisdiction, it is open to the party to bypass the Board entirely and, instead, appeal directly to the Court of Appeal pursuant to s. 100. The Union chose not to do so.

[39] The Board's original panel upheld the Arbitration Award. The Union then applied for a reconsideration of the Original Decision pursuant to s. 141, which provides for very narrow grounds of review.

[40] The reconsideration panel dismissed the Union's application on April 17, 2017, concluding that the Original Decision was not "inconsistent with the principles expressed or implied in the *Code* or any other Act dealing with labour relations" (referring to s. 141(2)(b) of the *Code*).

[41] The respondent Board submits that the *Code's* privative clauses and s. 58 of the *ATA* mandate that the standard of review is patent unreasonableness. The Board submits that any decisions made under ss. 99 and 141 of the *Code* are matters falling within the exclusive jurisdiction of the *Code*. This is because they only allow the Board to consider whether the decision under review is inconsistent with labour relations principles.

[42] The Union argues the Reconsideration Decision is in error by:

a) failing to follow a direction of the Supreme Court of Canada that the elimination of the right to strike in a collective agreement must be stated in the "clearest possible language";

b) finding that a dispute resolution mechanism in a collective agreement can eliminate the right to strike by implication;

c) failing to consider that striking is a *Charter*-protected activity; and

d) relying upon the parties' renewal of Article 34.02 in collective bargaining.

[43] Before addressing the standard of review broadly, I will first address the general applicability of the *Charter*.

Applicability of the *Charter*

[44] Section 32(1) provides that the *Charter* applies to the protection of rights from state action. The *Charter* does not apply to relationships between private individuals.

[45] Section 2(d) guarantees freedom of association and, as held in *SFL*, the right to strike is essential in realizing the values and objectives of s. 2(d) through a collective bargaining process: para. 54.

[46] While the Union repeatedly referred to its members' "*Charter*-protected right to strike" in its oral and written arguments, it did concede in reply that the *Charter* does not directly apply to its collective agreement. The parties agree that neither the Union nor the Employer is a state actor. The collective agreement is, thus, a contract between private parties. Consequently, I will not undertake any analysis of *Charter* rights in this decision.

[47] The Union does not challenge any legislation or any other actions of a government body, pursuant to the *Charter*. There is no constitutional challenge to legislation. Rather, the Union argues that the previous decisions failed to appropriately consider applicable *Charter* values. The respondents argue that the

Union's *Charter* values argument was considered by the reconsideration panel and that such an argument does not impact the standard of review analysis.

[48] The law is clear that a *Charter* values analysis is distinct from a *Charter* rights analysis: see *Doré v. Barreau du Québec,* 2012 SCC 12 at paras. 35-40; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 95.

Applicable Standard of Review

[49] Returning to the standard of review analysis more generally, given the Union appealed pursuant to s. 99 and then to s. 141, rather than pursuant to s. 100, the Board was confined to considering any inconsistencies in the decision with "the principles expressed or implied in [the] Code or in any other Act dealing with labour relations."

[50] The Union also argues that correctness is the appropriate standard because:

a) interpreting judicial cases engages an "issue of the general law" taking the decision outside of the Board's exclusive jurisdiction; and

b) the Board erred its in analysis of *Bradburn* and *Hamilton*.

[51] Where a party takes issue with an administrative decision maker's failure to consider fundamental *Charter* values in making their decision, correctness is rarely the appropriate standard: *Doré* at paras. 35, 43-54. Deference is owed because "[e]ven where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values *on the specific facts of the case*": para. 54 (emphasis in original).

[52] This Court and the Court of Appeal have repeatedly agreed that the standard of review for a decision made under s. 141 is patent unreasonableness: see *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 7884 v. Teck Coal Ltd.*, 2017 BCSC 758 at paras. 45-46; *British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.*, 2013 BCCA 497 at para. 47.

[53] The Court of Appeal in *BC Ferry and Marine Workers' Union* stated that it is not the court's role on judicial review to "engage in an analysis of Board policy, to determine whether there has been compliance with Board jurisprudence, and to dip into an interpretation of both the collective agreement and the *Code*", because such matters are "assigned *exclusively* to the Labour Relations Board" to decide (para. 55; emphasis in original).

[54] At para. 54, the Court of Appeal characterized the patent unreasonableness standard as follows:

> [54] In considering the Board's two decisions at issue in this appeal, and giving considerable deference as required, the issue is whether the result (not the reasons) is "openly, clearly, evidently unreasonable". One way of describing this, found in *British Columbia Automobile Assn. v. O.P.E.I.U., Local 378*, 2001 BCCA 433, is whether anything "leaps" out that indicates a lack of reason.

[55] Madam Justice Ballance in *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109, aff'd 2009 BCCA 229, described the patently unreasonable test as follows:

> [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.

[56] In *Communications, Energy & Paperworkers' Union of Canada (Local 298) v. Eurocan Pulp & Paper Co.*, 2012 BCCA 354, the Court of Appeal cautioned that chambers judges must confine themselves to limited examination when judicially reviewing Board decisions on the patent unreasonableness standard.

[57] The reasons provide at para. 32:

> [32] … Instead of focussing on the basis of the Review Panel's analysis, [the chambers judge] undertook his own reasoning process to decide on the correct interpretation of the Award, and then permitted that interpretation to inform the balance of his decision. In doing so, he strayed to a correctness analysis. He assumed his was the only correct interpretation of the Award, and rejected Eurocan's argument that it was not open to him to decide if the Review Panel's interpretation of the Award was "correct". He then measured the reasonableness of the Review Panel's decision by its conformity to his interpretation, instead of conducting a search for a tenable explanation of the arbitrator's analysis in that decision. While the chambers judge acknowledged the expertise and exclusive jurisdiction of the Review Panel in determining when arbitrators place inappropriate emphasis on the common law, I am persuaded his analysis failed to provide the curial deference the Panel deserved. …

[58] The court continues at para. 33:

> [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… 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: *Health Sciences Assn. of British Columbia v. British Columbia (Industrial Relations Council)* (1992), 67 B.C.L.R. (2d) 250 (C.A.) at 260, 13 B.C.A.C. 183.

[59] In *Construction, Maintenance and Allied Workers Bargaining Council v. Construction Labour Relations Association of British Columbia*, 2016 BCSC 704, Justice Greyell held:

> [38] Courts have long acknowledged that legislatures, in various provincial labour codes, and federally, have delegated labour relations matters to labour relations boards exercising specialized knowledge and experience in dealing with the often turbulent arena of labour relations and that such tribunals are due a considerable amount of deference.
>
> …
>
> [45] It is well-settled law that when a tribunal is interpreting its home statute, the tribunal is entitled to judicial review based on a determination of the reasonableness, or in this case, the patent unreasonableness, of its decision. This standard of review was recently confirmed in *Commission*

> *scolaire de Laval c. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at para. 32: …

Conclusion

[60] In my view, the Reconsideration Decision does not engage questions of general law. Given the level of curial deference the Board is entitled to, as made clear by the privative clauses that protect Board decisions and the jurisprudence, the standard of paten unreasonableness applies. I accept that the Board's decisions are afforded a high degree of deference.

[61] I must consider whether the Reconsideration Decision is patently unreasonable. The substance of the decision is some six pages single spaced. It noted some of the history and addresses the Union's argument that the Original Decision failed to apply *Bradburn* and *Hamilton*. The Reconsideration Decision reproduced part of the Union's submissions; having considered these arguments, the Board was "not persuaded". The Board also considered the relevant *Charter* values impact of the cases.

[62] The Board did not conduct a fulsome *Charter* values analysis. However, that was not patently unreasonable. The Board was aware that the issue was considered by Arbitrator Hall and the original panel, given the record. The Board was able to determine which principles of law, including the fundamental right to freely associate, were germane and relevant to the decision it had to make within its narrow scope of review granted by s. 141. The Board concluded that the interest arbitration clause at issue is a legitimate dispute resolution mechanism consistent with the principles expressed and implied in the *code*.

[63] Nothing "leaps out" as patently unreasonable respecting the reconsideration panel's review of the Original Decision. The decision is not "clearly irrational" or "so flawed that no amount of curial deference can justify letting it stand" (*Victoria Times*

Colonist at para. 65). My analysis must end here. The Union's application is dismissed.

"Choi J."