IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *College of New Caledonia v. Faculty Association of the College of New Caledonia,* 2020 BCSC 384

Date: 20200316
Docket: S198814
Registry: Vancouver

Between:

College of New Caledonia

Petitioner

And

Faculty Association of the College of New Caledonia

Respondent

Before: The Honourable Madam Justice Francis

On judicial review from: An order of the Labour Relations Board, dated June 17, 2019 (*College of New Caledonia v. Faculty Association of the College of New Caledonia*, BCLRB No. B80/2019).

Reasons for Judgment

Counsel for the Petitioner:	D.G. Wong
Counsel for the Respondent:	L.B. McGrady, Q.C.
Counsel for the British Columbia Labour Relations Board:	E. Miller
Place and Date of Trial/Hearing:	Vancouver, B.C. January 23, 2020
Place and Date of Judgment:	Vancouver, B.C. March 16, 2020

Overview

[1] The petitioner applies for judicial review of a decision of the British Columbia Labour Relations Board (the "Board") dated June 17, 2019, made pursuant to s. 141 of the *Labour Relations Code,* R.S.B.C. 1996, c. 244 [the *Code*].

[2] The dispute has its origin in a grievance filed by the Faculty Association of the College of New Caledonia (the "Union"), on behalf of a faculty employee, concerning the interpretation of the collective agreement (the "Collective Agreement") between the Union and the petitioner, College of New Caledonia (the "Employer").

[3] The grievance proceeded to an arbitration before Mark Brown (the "Arbitrator") and on November 22, 2018, the Arbitrator issued a decision dismissing the grievance (the "Arbitrator's Award").

[4] Under s. 99 of the *Code*, there is a statutory right to appeal an arbitrator's decision to the Board. On December 4, 2018, the Union filed for a review of the Arbitrator's Award pursuant to s. 99. A review hearing of the Arbitrator's Award took place (the "Original Hearing"). By way of a decision dated February 12, 2019, the Board upheld the Arbitrator's Award dismissing the grievance (the "Original Decision").

[5] On March 4, 2019, the Union filed an application for leave and reconsideration of the Original Decision pursuant to s. 141 of the *Code* and the matter proceeded to a hearing (the "Reconsideration Hearing") before a panel of the Board (the "Reconsideration Panel"). By way of a decision dated June 17, 2019, the Reconsideration Panel set aside the Original Decision and the Arbitrator's Award, and remitted the matter to the Arbitrator for a fresh determination (the "Reconsideration Decision").

[6] The Reconsideration Decision, as distinct from the Arbitrator's Award or the Original Decision, is the subject of judicial review in this petition.

Background Facts

[7] While the only decision under consideration in this judicial review application is the Reconsideration Decision, some background facts with respect to the Arbitrator's Award and the Original Decision are necessary to provide context.

[8] The Arbitration concerned the question of when, under the terms of the Collective Agreement, the grievor became entitled to professional development time ("PD"). The Union argued that under the terms of the Collective Agreement, the entitlement to PD was triggered upon the first renewal of a faculty employee's employment contract (in other words, upon a faculty employee's second sessional contract with the Employer). The Employer's position was that faculty employees were only entitled to PD upon commencing a subsequent contract after the completion of a first renewal contract (in other words, upon a faculty employee's third sessional contract with the Employer). The Arbitrator agreed with the Employer's interpretation of the Collective Agreement and the Union's grievance was denied.

The Arbitrator's Award

[9] It is necessary for this Court on judicial review to examine the Arbitrator's Award not for the purpose of deciding the correctness of the Arbitrator's analysis, but to determine whether the analysis may be rationally interpreted in the manner adopted by the Reconsideration Panel: *Communications, Energy & Paperworkers' Union of Canada (Local 298) v. Eurocan Pulp & Paper Co.*, 2012 BCCA 354 at para. 31.

[10] The issue before the Arbitrator was the interpretation of Article 10.18.2 of the Collective Agreement which states in part:

> Upon achieving eligibility for the Non-Regular Seniority List, faculty employees shall be entitled to professional development time.

[11] In the Arbitrator's Award, the Arbitrator considered Article 10.18.2 in the context of another provision of the Collective Agreement, Article 6.6.1, which sets out the eligibility criteria for Non-Regular Seniority ("NRS") status:

> a. A faculty employee who has completed twenty-five (25) cumulative weeks of appointment at the same campus, who has received no unsatisfactory evaluations, and who is given a reappointment to a further position within eight (8) calendar months from the completion of the last appointment shall be entitled to the recall rights established in 6.6 […]

[12] The Arbitrator determined that the grievor was not eligible for NRS status in accordance with the terms of Article 6.6.1. Therefore, he was not entitled to PD benefits under Article 10.18.2. The Arbitrator interpreted the Collective Agreement to mean that, "after accepting and commencing the reappointment contract and achieving eligibility, PD is built into the next contract or the third contract."

[13] The Arbitrator found that his interpretation was supported by past practice evidence of the Employer paying out PD benefits on the third, and not the second, sessional contract.

The Original Hearing

[14] At the Original Hearing, the Union argued that it had been denied a fair hearing at the Arbitration. This was based on the Arbitrator's consideration of Article 6.6.1 and particularly his finding that the grievor failed to meet the third element of the NRS eligibility criteria in Article 6.6.1 (the third element consisting of the "reappointment" of the faculty employee to a further position within eight months "from the completion of the[ir] last appointment"). Specifically, the Arbitrator had found that the third element of the NRS eligibility criteria would only be satisfied upon a faculty employee's third sessional contract, and not upon their second contract. The Union took issue with this as a matter of procedural fairness because both parties before the Arbitrator had agreed that the grievor satisfied the requirements for NRS status under Article 6.6.1 and as a result, the issue of the proper interpretation of Article 6.6.1 was not argued before the Arbitrator.

[15] At the Original Hearing, the Union also argued that the Arbitrator's Award was inconsistent with the principles expressed or implied in the *Code*. This argument was directed to the Arbitrator's application of the law concerning evidence of past practice. While the Union acknowledged that the Arbitrator cited the correct legal test

for the use of past practice evidence, as set out in *I.A.M., Local 1740* v. *John Bertram & Sons Co*. (1967), 18 L.A.C. 362 (Ont. Arb.) [*John Bertram*], the Union argued that the Arbitrator erred in his application of this legal test.

[16] In the Original Decision, the Board dismissed the Union's s. 99 application for a number of reasons, including:

a) the Board concluded that the Arbitrator did not deny the Union a fair hearing; and

b) the Board found that the Arbitrator satisfied the "genuine effort" test in considering past practice evidence and therefore declined to interfere with the Award on the basis of the Arbitrator's use of past practice evidence.

The Reconsideration Decision

[17] At the Reconsideration Hearing, the Union argued that the Original Decision was inconsistent with *Code* principles on two bases:

a) the Board applied the wrong standard of deference on the matter of whether the Arbitrator denied the Union a fair hearing (the "First Issue"); and

b) the Board failed to interfere with the Arbitrator's erroneous use of past practice evidence as an aid to interpreting the Collective Agreement (the "Second Issue").

[18] On the First Issue, the parties agreed that the standard of deference did not apply to the question of whether a party had been denied a fair hearing. They also agreed that the Board had erroneously assessed the Union's fair hearing argument on a standard of deference. Therefore, on the agreement of the parties, the Reconsideration Panel reconsidered the issue of whether the Arbitrator denied the Union a fair hearing. In the Reconsideration Decision, the Reconsideration Panel found that the Arbitrator had indeed denied the Union a fair hearing by putting the

grievor's eligibility for NRS status in issue, notwithstanding the agreement of the parties that the grievor met the eligibility criteria, and by not giving the Union the opportunity to present evidence or make submissions with respect to same.

[19] On the Second Issue, the Reconsideration Panel stated:

> We find, on the language of the Arbitration Award, that the Arbitrator accepted *John Bertram* as an accurate statement of law, but then relied on the practice evidence both to establish the existence of an ambiguity and to resolve that ambiguity in the Employer's favour, despite finding the Union was unaware of the practice. We find the Arbitration Award is inconsistent with that law, without providing a rationale for departing from it in the circumstances of this case. Accordingly, the Original Decision is inconsistent with *Code* principles in this respect. Leave and reconsideration on the Union's second ground are granted in the circumstances.

[20] The Reconsideration Panel set aside the Original Decision and the Arbitrator's Award and remitted the grievance to the Arbitrator for reconsideration.

Legal Authorities

Decision under review

[21] The only decision under review is the Reconsideration Decision. While it is necessary for this Court to review the record before the Board at the Original Hearing, this Court may only judicially review the Reconsideration Decision since it is the final decision of the tribunal: *Howie v. British Columbia (Labour Relations Board)*, 2017 BCSC 1331 at para. 54.

Standard of review

[22] Sections 136 to 139 of the *Code* contain strongly worded privative terms that limit the court's jurisdiction to interfere with Board decisions. Section 136 provides that the Board has exclusive jurisdiction to hear and determine an application or complaint under the *Code*. Section 137 expressly sets out that "a court does not have and must not exercise any jurisdiction in respect of … a matter referred to in s. 136".

[23] Pursuant to s. 115.1 of the *Code*, ss. 58(1) and (2) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] apply to judicial review of Board decisions. These sections state:

> **58** (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
> >
> > (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

[24] The courts in this province have consistently recognized the deferential approach required when reviewing Board decisions. As Justice Chiasson commented with respect to the deferential standard of review in *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung,* 2011 BCCA 527 at para. 34:

> In my view, this approach to judicial review is consonant with the scheme of the legislation. It reflects the highly specialized jurisdiction of the Board and leaves the Board, rather than the court, to determine matters at the core of industrial relations.

[25] Because reviews of arbitration awards under s. 99 of the *Code* fall within the exclusive jurisdiction of the Board, in accordance with s. 58(2)(a) of the *ATA,* Board reconsideration decisions under s. 141 of the *Code* are judicially reviewed on the standard of patent unreasonableness: *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. 45-47.

[26] The petitioner does not take issue with the general proposition that the standard of patent unreasonableness applies to the judicial review of Board decisions. However, the petitioner argues that, with respect to the First Issue in the Reconsideration Decision (the Union's fair hearing argument), s. 58(2)(b) of the *ATA* is invoked because the First Issue raises the matter of procedural fairness. Specifically, the petitioner argues that the court should apply the less deferential standard under s. 58(2)(b), namely whether in all of the circumstances, the tribunal acted fairly, to the Reconsideration Panel's disposition of the First Issue.

[27] The petitioner relies on case authority in support of the proposition that the court does not owe deference to the tribunal's own assessment of whether its own procedures were fair, citing *British Columbia Nurses' Union v. Health Sciences Association of British Columbia,* 2017 BCSC 343 at para. 42.

[28] Both the Board and the Union take a different view than the petitioner. Counsel for the Board points out that s. 99(1)(a) of the *Code* confers exclusive jurisdiction on the Board to decide whether a labour arbitrator has denied a party a fair hearing. Because that question falls within the Board's exclusive jurisdiction to decide, the applicable standard of review on a decision of the Board with respect to whether a labour arbitrator has denied a party a fair hearing is patent unreasonableness.

[29] The petitioner's interpretation of s. 58(2)(b) of the *ATA* does not withstand scrutiny. This section on its face applies to questions of natural justice and procedural fairness before the tribunal whose decision is under review. In this case, it is the Reconsideration Panel's decision that is under review. Where, as here, there is no allegation that the Reconsideration Panel made its decision in a manner that was procedurally unfair, s. 58(2)(b) is not invoked.

[30] The standard of review for the Reconsideration Panel's analysis of the First Issue and the Second Issue is patent unreasonableness.

Meaning of patently unreasonable

[31] In the recent case of *Red Chris Development Company Ltd. v. United Steel Workers*, 2019 BCSC 2216 [*Red Chris*], Justice Myers offered the following description of the patently unreasonable standard:

> [51] The meaning of patently unreasonable is therefore to be taken from the case law, which has defined it as "clearly irrational", "evidently not in accordance with reason" or "so flawed that no amount of curial deference can justify letting it stand": See *Pacific Newspaper Group Inc. v. Communications*; and, *Energy and Paperworkers Union of Canada, Local 2000*, 2014 BCCA 496 at para. 39, quoting *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52.

[32] The petitioner argues that in applying the patently unreasonable standard, I should have reference to the Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]. The petitioner concedes that *Vavilov,* which constitutes a re-visitation of the common law standard of "reasonableness," does not directly impact the statutory standard of review in this case. However, the petitioner argues that *Vavilov* calls upon the courts to more generally apply a robust standard of review on both the reasonableness and the patent unreasonableness standard.

[33] I agree with counsel for the Board that *Vavilov* has not changed the law with respect to the meaning of patent unreasonableness under s. 58 of the *ATA,* just as *Dunsmuir v. New Brunswick,* 2008 SCC 65 did not affect the meaning of the statutory standard of review (see *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2014 BCCA 496 at para. 44). There is simply nothing in the *Vavilov* decision that would lead me to conclude that the decision modifies the patent unreasonableness standard in any way.

Was the Decision of the Board Patently Unreasonable?

[34] I must delve into some of the Arbitrator's analysis in order to determine whether the Reconsideration Decision was patently unreasonable. The challenge faced by reviewing judges in these circumstances was succinctly set out by Justice Ballance in *Victoria Times Colonist v. Communications, Energy and Paperworkers,* 2008 BCSC 109:

> [83] An evaluation of whether a decision is patently unreasonable cannot be carried out in a factual or contextual vacuum. In applications of this kind the reviewing court therefore often finds itself in a quandary between needing to sufficiently immerse itself in the background material in order to assess, in a meaningful way, whether the Board's reasons are irrational and, at the same time, needing to refrain from delving into excessive detail so that it ends up appraising, or appearing to appraise, the correctness of the decision itself…

[35] As such, my analysis of the Arbitrator's Award is strictly limited to an assessment of the Reconsideration Panel's reasoning to determine whether it is patently unreasonable.

First Issue

[36] The petitioner submits that if this Court does not accept that the applicable standard of review is whether the Reconsideration Panel "acted fairly" in its disposition of the First Issue, that the Reconsideration Panel's disposition of the First Issue was nonetheless patently unreasonable.

[37] The petitioner argues that the Reconsideration Panel did not expressly consider the Board's analysis in the Original Decision, which resulted in the finding that the Union had not been denied a fair hearing, and was thus patently unreasonable.

[38] In order for the petitioner to be successful on judicial review with respect to the First Issue, I must be satisfied that the Reconsideration Panel's decision was "clearly irrational", "evidently not in accordance with reason" or "so flawed that no amount of curial deference can justify letting it stand:" *Red Chris* at para. 51.

[39] The primary Collective Agreement provision that the Arbitrator was charged with interpreting was Article 10.18.2, which entitled faculty employees to PD benefits on "achieving eligibility" for the NRS list. Article 6.6.1 sets out the three requirements for NRS status. The parties agreed before the Arbitrator that the grievor satisfied all three of the requirements for NRS status in Article 6.6.1. The question before the Arbitrator was, having satisfied Article 6.6.1, when was the grievor entitled to PD benefits under Article 10.18.2?

[40] The Arbitrator interpreted Article 10.18.2 as entitling faculty employees to PD when they achieve eligibility for the NRS list, as set out under Article 6.6.1. Therefore, he framed the question as "when does the faculty member achieve eligibility for the NRS list?" To answer that question, the Arbitrator relied on his interpretation of the third eligibility criterion in Article 6.6.1, which is the faculty member's reappointment to a further position within eight calendar months from the completion of their last appointment. He found that the grievor did not meet this third eligibility criteria.

[41] The Union argued at the Original Hearing and the Reconsideration Hearing that it was denied a fair hearing before the Arbitrator because the parties had agreed that the three eligibility criteria in Article 6.6.1 were satisfied. As a result, the Union did not call evidence or make submissions about how the eligibility criteria were to be interpreted. By putting the third criteria in issue, despite the parties' agreement to the contrary, the Arbitrator found against the Union on a point that was not in dispute and as such denied the Union a fair hearing.

[42] In the Original Decision, the Board found:

> It is apparent the Employer offered a different interpretation of PD eligibility despite agreeing the Grievor met the criteria for NRS status and eligibility for the NRSL. The Arbitrator considered these competing arguments and interpretations and concluded the language of the Collective Agreement provides that staff begin receiving PD as of the subsequent contract after eligibility for the NRSL is achieved.

[43] In the Reconsideration Decision, the Reconsideration Panel held:

> Despite this agreement, the Arbitrator determined the Grievor was not "eligible'' for NRS status (and therefore not entitled to PD benefits) because he did not satisfy the third requirement of Article 6.6.1. He concluded that the third requirement for NRS status under Article 6.6.1 could only be achieved on the third sessional contract (Arbitration Award, p. 10). To this end, we agree with the Union that the Arbitrator put the third NRS eligibility criteria in issue despite the parties' agreement to the contrary.
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> If the Arbitrator intended to make a finding about the Grievor's eligibility for NRS status, which was not in dispute between the parties, it was incumbent on him to put the parties on notice and provide them with an opportunity to call evidence and make submissions on that issue: *Open Learning Agency,* BCLRB No. B320/2005; *Western Pulp Inc. Limited Partnership,* BCLRB No. B380/2004. Having failed to do so, we agree the Union was denied a fair hearing. To the extent it failed to overturn the Arbitration Award on that basis, we find the Original Decision is inconsistent with the principles expressed and implied in the Code. Reconsideration on this ground is granted accordingly.

[44] The petitioner argues that the Reconsideration Panel did not specifically address the findings and conclusions of the Board at the Original Hearing on this issue. Therefore, the petitioner argues that the decision of the Reconsideration Panel on the First Issue was patently unreasonable.

[45] The Reconsideration Panel considered that the parties to the Arbitration had agreed that the grievor met the three eligibility criteria in Article 6.6.1. They made no submissions on this before the Arbitrator because of this agreement. The Arbitrator, despite that agreement, found that the grievor did not meet the third eligibility criteria. The Reconsideration Panel held that it was unfair for the Union to be denied the opportunity to make submissions on the third eligibility criteria once the Arbitrator put it in issue by considering that the grievor may not meet the third eligibility criteria.

[46] The Arbitrator made the third eligibility criteria under Article 6.6.1 a central part of his analysis. Given that the parties to the Arbitration had agreed that the grievor met all three of the Article 6.6.1 eligibility criteria, and made no submissions on them, I find that it was not patently unreasonable for the Reconsideration Panel to determine that the Union was denied a fair hearing.

[47] I decline to grant the petitioner the relief it seeks with respect to the First Issue.

Second Issue

[48] The petitioner's argument on the Second Issue relates to the standard of review the Reconsideration Panel ought to have applied to its review of the Original Decision. The petitioner argues that the Reconsideration Panel was constrained in its review to the "genuine effort" test: if satisfied that the Arbitrator made a genuine effort to interpret the provisions of the Collective Agreement in issue, the Reconsideration Panel ought to have let the Original Decision stand. The petitioner argues that the Reconsideration Panel applied a less deferential standard of review than the genuine effort test and therefore the decision of the Reconsideration Panel with respect to the Second Issue was patently unreasonable.

[49] In support of this proposition, the petitioner relies on *Terasen Gas Inc. v. Office & Professional Employees' Union, Local 378*, 2005 BCSC 123 [*Terasen*]. I cannot agree that *Terasen* stands for the proposition that the Reconsideration Panel is restricted in its review to the genuine effort test, or that this Court may interfere with the decision of the Reconsideration Panel on the basis that it applied a different standard of review. In *Terasen,* a reconsideration panel established under s. 141 of the *Code* applied the genuine effort test to its review of an arbitrator's award. The court in *Terasen*, consistent with the deferential standard applied to judicial review of Board decisions under the *Code*, declined to interfere with the reconsideration panel's decision to apply the genuine effort test.

[50] *Terasen* stands for the proposition that this Court is limited to determining if the Reconsideration Panel's decision upon its review of the Original Decision and the Arbitrator's Award was patently unreasonable: paras. 22-24. It does not direct the standard of review that a reconsideration panel must apply to its review of an arbitrator's award.

[51] Reconsideration under s. 141 has a "broader ambit" than appeal and can be described as "a plenary independent power:" *Bakery, Confectionary and Tobacco Workers' Intl v. Labour Relations Board et al.,* 2000 BCSC 1325 at para. 11.

[52] In *Canadian Office and Professional Employees Union, Local 378 v. Lantic Inc.,* 2011 BCSC 969 [*Lantic*], Justice Masuhara considered the scope of the Board's powers on a s. 141 reconsideration:

> **30** Section 141 of the Code provides the Reconsideration Panel with a broad scope of powers. The nature of a reconsideration exceeds the ambit of an appeal by an appellate court. In *Bakery, Confectionary and Tobacco Workers' Intl. v. Labour Relations Board*, 2000 BCSC 1325 at para. 11 [*Bakery, Confectionary and Tobacco Workers'*], Madam Justice Koenigsberg described the reconsideration power as "a plenary independent power."
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> **31** At the same time, a reconsideration panel affords significant deference to the finding of facts by the original panel. It will generally only interfere with a finding of fact in the face of palpable and overriding error: *Roberts Roofing and Sheet Metal Ltd. and Sheet Metal Workers' International Association, Local No. 280,* [1994] B.C.L.R.B.D. No. 331. The Board has explained that the strictness of this test, which is essentially the one adopted by appellate courts when reviewing the findings of fact of a trial judge, might be even more appropriate and necessary in the context of the more abbreviated time frames of an administrative tribunal.
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> **32** While a reconsideration panel must generally refrain from interfering with findings of fact of the original panel, it is entitled to draw its own inferences from those facts: *United Food and Commercial Workers Union Local 1518 v. British Columbia (Labour Relations Board),* 2007 BCSC 546 at para. 89; and *Bakery, Confectionary and Tobacco Workers'* at para. 16.

[53] I cannot agree with counsel for the petitioner that a reconsideration panel under s. 141 is limited to applying the genuine effort test. Indeed such a proposition is directly contrary to the decisions in *Bakery* and *Lantic.* While a reconsideration panel may apply a "genuine effort" test on review of an arbitrator's award, as it did in *Terasen*, this Court has no basis to interfere with the Board if it adopts a different approach.

[54] On judicial review, the Court must defer to the Board's interpretation and application of its reconsideration power under s. 141 of the *Code.* The Board is free to apply and change its past law and policy as it sees fit, subject only to the requirements of procedural fairness and the fact that its decisions must not be patently unreasonable: *Bakery,* at para. 35.

[55] In *McDonald v. United Association of Journeymen*, 2008 BCSC 1212 at para. 75, Madam Justice Mackenzie stated:

> How, why, and whether the Board changes its labour relations law and policy cannot be judicially reviewed unless the reliance on, or departure from, its law and policy amounts to procedural unfairness…

[56] As such, a departure by a reconsideration panel from its prior approach to reviewing arbitrator's awards would not, in and of itself, be a matter that warranted interference by this Court on judicial review. Therefore, I am unable to agree with the petitioner that this Court should find the Reconsideration Panel's decision patently unreasonable on the basis that it failed to limit itself on reconsideration to the genuine effort test.

[57] Further, even if the petitioner were correct that the Reconsideration Panel was limited to applying the genuine effort test on its review of the Arbitrator's Award, I would not find that the Reconsideration Panel failed to apply that test in this case.

[58] The Reconsideration Panel found that the Original Decision was inconsistent with principles expressed or implied in the *Code* on the basis that the Arbitration Award was inconsistent with the law. Specifically, while the Arbitrator correctly identified *John Bertram* as the leading applicable case on the use of past practice evidence, he failed to apply the test set out in that case.

[59] Even under the highly deferential genuine effort test, an arbitration decision will not stand if it is inconsistent with *Code* principles: *Terasen*, at para. 23. Section 141 expressly states that leave for reconsideration of a Board decision may be granted if the decision is inconsistent with the principles expressed or implied in the Code.

[60] Therefore, since the Reconsideration Panel found that the Arbitrator's Award and the Original Decision were inconsistent with *Code* principles, the Reconsideration Panel had a basis for interfering with the Original Decision and the Arbitrator's Award even under the genuine effort test.

[61] On judicial review, this Court must defer to the Reconsideration Panel's determination of whether an award is consistent with the principles expressed or implied in the *Code*, as mandated in ss. 99 and 141 of the *Code*. This is consistent

with the scheme of labour legislation in this province, in which the Board, and not the court, is granted exclusive jurisdiction to determine labour law matters.

[62] The Arbitrator cited the governing legal authority on past practice evidence, *John Bertram*, but then departed from that authority without providing a rationale for doing so. I cannot find that it was "clearly irrational" or "evidently not in accordance with reason" for the Reconsideration Panel to find that this was inconsistent with *Code* principles. Therefore, I find that, with respect to the Second Issue, the Reconsideration Decision was not patently unreasonable.

[63] The Petition is dismissed. If the parties are unable to agree on costs, they may make arrangements through Supreme Court Scheduling to appear before me to make submissions on costs, but they must make such arrangements no later than 30 days from the date of this judgment.

"Francis, J."