Federal Court of Appeal Cour d'appel fédérale

Date: 20240913

Docket: A-186-23

Citation: 2024 FCA 142

CORAM: **GLEASON J.A.**
BIRINGER J.A.
WALKER J.A.

BETWEEN:

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION – CANADA

Applicant

and

BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCIATION

Respondent

Heard at Vancouver, British Columbia, on March 13, 2024.

Judgment delivered at Ottawa, Ontario, on September 13, 2024.

REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	BIRINGER J.A.
	WALKER J.A.

Federal Court of Appeal Cour d'appel fédérale

Date: 20240913

Docket: A-186-23

Citation: 2024 FCA 142

CORAM: **GLEASON J.A.**
BIRINGER J.A.
WALKER J.A.

BETWEEN:

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION – CANADA

Applicant

and

BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCIATION

Respondent

REASONS FOR JUDGMENT

GLEASON J.A.

[1] The applicant, International Longshore and Warehouse Union–Canada (ILWU Canada), is the bargaining agent for approximately 7400 longshore employees who work in various ports in British Columbia, including the Port of Vancouver. The respondent, British Columbia Maritime Employers Association (the BCMEA), is the non-accredited bargaining agent for employers involved in national and international marine transportation on Canada's west coast.

ILWU Canada and the BCMEA bargain collectively with each other, primarily under long–standing voluntary recognition agreements, to settle the terms and conditions of employment for almost all of the longshore employees who work in various ports in British Columbia. A single industry–wide collective agreement applies to the employees for whom the BCMEA and ILWU Canada collectively bargain.

[2] ILWU Canada applied to this Court to set aside Order No.: 1460-NB of the Canada Industrial Relations Board (the CIRB or the Board), issued on July 19, 2023 (the Order). The Board delivered reasons for the Order on August 10, 2023, in *British Columbia Maritime Employers Association v. International Longshore and Warehouse Union-Canada*, 2023 CIRB 1088.

[3] In the Order, the CIRB declared that ILWU Canada engaged in an unlawful strike when it resumed its strike activities on July 18, 2023. The strike activities resumed shortly after ILWU Canada's Longshore Contract Caucus (an internal union committee) rejected a recommendation for settlement of the renewal collective agreement between the parties (the Terms of Settlement). Both parties' bargaining committees had agreed to present the Terms of Settlement for ratification. At the request of the Federal Minister of Labour, ILWU Canada stopped strike activities while considering the Terms of Settlement. When the Longshore Contract Caucus rejected the Terms of Settlement, ILWU Canada and its members raised their picket lines and recommenced strike activities on July 18, 2023, providing approximately an hour and a half notice of their intention to do so.

[4] The CIRB determined that, in the particular circumstances at issue, ILWU Canada was required to give the BCMEA a new 72–hour strike notice, under paragraph 89(1)(f) and subsection 87.2(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 [*Code*] before resuming strike activities. Because no such notice was given, the Board declared the strike illegal and, among other things, ordered that all strike activities cease until a new 72–hour strike notice was given to the BCMEA.

[5] Not long after this application for judicial review was filed, ILWU Canada and the BCMEA settled their collective agreement.

[6] The Court sent a Direction to the parties, requesting that they be prepared to address at the outset of the hearing whether this application was moot due to the settlement of the collective agreement, and, if so, whether the Court should nonetheless exercise its discretion to hear this application. During the hearing before this Court, the panel heard the parties' submissions on mootness and took the mootness issues under reserve. We then proceeded to hear the parties' submissions on the merits of the application.

[7] The following reasons deal with both the mootness issues and the merits of the application.

[8] For the reasons that follow, I would find that this application is moot because the substratum of the litigation disappeared once ILWU Canada members returned to work. Despite this finding, I would nonetheless exercise the Court's discretion to decide this application

because its determination may well have a practical effect on outstanding or contemplated litigation between the parties, as both parties submitted. On the merits, I would find that the CIRB did not violate ILWU Canada's right to procedural fairness and that the Board's decision is reasonable. I would therefore dismiss this application. I would make no order regarding costs because the parties have settled the issue of costs between them and have agreed that a costs order is not required.

I. The Relevant Provisions in the *Canada Labour Code*

[9] I commence by outlining the statutory and regulatory provisions that are relevant to this application.

[10] Part I of the *Code*, among other things, provides for the acquisition of unions' representational rights in the federal private sector and regulates collective bargaining in that sector. Like all labour legislation in Canada, Part I of the *Code* is modelled on the American *National Labor Relations Act*, 29 USC §151-169 (1935) [*Wagner Act*]. Under the *Wagner Act* model, a compromise regarding industrial conflict exists: strikes and lockouts are prohibited during the currency of a collective agreement but are allowed when a collective agreement is not in force and certain pre-conditions to the exercise of the right to strike or lockout are met.

[11] Section 3 of the *Code* defines strike and lockout in the following non-limiting terms:

strike includes a cessation of work or a refusal to work or to continue to	***grève*** S'entend notamment d'un arrêt du travail ou du refus de travailler, par

work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output; (*grève*)	des employés agissant conjointement, de concert ou de connivence; lui sont assimilés le ralentissement du travail ou toute autre activité concertée, de la part des employés, ayant pour objet la diminution ou la limitation du rendement et relative au travail de ceux-ci. (*strike*)
lockout includes the closing of a place of employment, a suspension of work by an employer or a refusal by an employer to continue to employ a number of their employees, done to compel their employees, or to aid another employer to compel that other employer's employees, to agree to terms or conditions of employment; (*lock-out*)	***lock-out*** S'entend notamment d'une mesure — fermeture du lieu de travail, suspension du travail ou refus de continuer à employer un certain nombre des employés — prise par l'employeur pour contraindre ses employés, ou aider un autre employeur à contraindre ses employés, à accepter des conditions d'emploi. (*lockout*)

[12] Section 91 of the *Code* provides for applications to the Board for illegal strike declarations and ancillary orders. It reads as follows:

Employer may apply for declaration that strike unlawful	**Demande de déclaration d'illégalité d'une grève**
91(1) Where an employer alleges that a trade union has declared or authorized a strike, or that employees have participated, are participating or are likely to participate in a strike, the effect of which was, is or would be to involve the participation of an employee in a strike in contravention of this Part, the employer may apply to the Board for a declaration that the strike was, is or would be unlawful.	**91(1)** S'il estime soit qu'un syndicat a déclaré ou autorisé une grève qui a eu, a ou aurait pour effet de placer un employé en situation de contravention à la présente partie, soit que des employés ont participé, participent ou participeront vraisemblablement à une telle grève, l'employeur peut demander au Conseil de déclarer la grève illégale.
Declaration that strike unlawful and strike prohibited	**Déclaration d'illégalité**
(2) Where an employer applies to the Board under subsection (1) for a declaration that a strike was, is or	**(2)** Saisi de la demande visée au paragraphe (1), le Conseil peut, après avoir donné au syndicat ou aux

would be unlawful, the Board may, after affording the trade union or employees referred to in subsection (1) an opportunity to make representations on the application, make such a declaration and, if the employer so requests, may make an order

employés la possibilité de présenter des arguments, déclarer la grève illégale et, à la demande de l'employeur, rendre une ordonnance pour :

(a) requiring the trade union to revoke the declaration or authorization to strike and to give notice of such revocation forthwith to the employees to whom it was directed;

a) enjoindre au syndicat d'annuler sa décision de déclarer ou d'autoriser une grève, et d'en informer immédiatement les employés concernés;

(b) enjoining any employee from participating in the strike;

b) interdire à tout employé de participer à la grève;

(c) requiring any employee who is participating in the strike to perform the duties of their employment; and

c) ordonner à tout employé qui participe à la grève de reprendre son travail;

(d) requiring any trade union, of which any employee with respect to whom an order is made under paragraph (b) or (c) is a member, and any officer or representative of that union, forthwith to give notice of any order made under paragraph (b) or (c) to any employee to whom it applies.

d) sommer tout syndicat dont font partie les employés touchés par l'ordonnance visée aux alinéas b) ou c), ainsi que les dirigeants ou représentants du syndicat, de porter immédiatement cette ordonnance à la connaissance des intéressés.

[13] Section 88.1 of the *Code* prohibits strikes or lockouts until the requirements of subsection 89(1) of the *Code* are met. Section 89 of the *Code* provides as follows:

No strike or lockout until certain requirements met

89(1) No employer shall declare or cause a lockout and no trade union shall declare or authorize a strike unless

Conditions relatives aux grèves et lock-out

89(1) Il est interdit à l'employeur de déclarer ou de provoquer un lock-out et au syndicat de déclarer ou d'autoriser une grève si les conditions

suivantes ne sont pas remplies :

(a) the employer or trade union has given notice to bargain collectively under this Part;

(b) the employer and the trade union

(i) have failed to bargain collectively within the period specified in paragraph 50(a), or

(ii) have bargained collectively in accordance with section 50 but have failed to enter into or revise a collective agreement;

(c) the Minister has

(i) received a notice, given under section 71 by either party to the dispute, informing the Minister of the failure of the parties to enter into or revise a collective agreement, or

(ii) taken action under subsection 72(2);

(d) twenty-one days have elapsed after the date on which the Minister

(i) notified the parties of the intention not to appoint a conciliation officer or conciliation commissioner, or to establish a conciliation board under subsection 72(1),

(ii) notified the parties that a conciliation officer appointed under subsection 72(1) has reported,

(iii) released a copy of the report to the parties to the dispute pursuant to paragraph 77(a), or

a) l’un ou l’autre a adressé un avis de négociation collective en application de la présente partie;

b) les deux :

(i) soit n’ont pas négocié collectivement dans le délai spécifié à l’alinéa 50a),

(ii) soit ont négocié collectivement conformément à l’article 50, sans parvenir à conclure ou réviser la convention collective;

c) le ministre a :

(i) soit reçu l’avis mentionné à l’article 71 et l’informant que les parties n’ont pas réussi à conclure ou à réviser la convention collective,

(ii) soit pris l’une des mesures prévues par le paragraphe 72(2);

d) vingt et un jours se sont écoulés depuis la date à laquelle le ministre, selon le cas :

(i) a notifié aux termes du paragraphe 72(1) son intention de ne pas nommer de conciliateur ou de commissaire-conciliateur, ni de constituer de commission de conciliation,

(ii) a notifié aux parties le fait que le conciliateur nommé aux termes du paragraphe 72(1) lui a fait rapport des résultats de son intervention,

(iii) a mis à la disposition des parties, conformément à l’alinéa 77a), une copie du rapport qui lui a été remis,

(iv) is deemed to have been reported to pursuant to subsection 75(2) or to have received the report pursuant to subsection 75(3);

(e) the Board has determined any application made pursuant to subsection 87.4(4) or any referral made pursuant to subsection 87.4(5); and

(f) sections 87.2 and 87.3 have been complied with.

No employee to strike until certain requirements met

(2) No employee shall participate in a strike unless

(a) the employee is a member of a bargaining unit in respect of which a notice to bargain collectively has been given under this Part; and

(b) the requirements of subsection (1) have been met in respect of the bargaining unit of which the employee is a member.

(iv) est réputé avoir été informé par le conciliateur des résultats de son intervention, en application du paragraphe 75(2), ou avoir reçu le rapport, en application du paragraphe 75(3);

e) le Conseil a tranché une demande présentée en vertu du paragraphe 87.4(4) ou a statué sur un renvoi fait en vertu du paragraphe 87.4(5);

f) les conditions prévues aux articles 87.2 et 87.3 ont été remplies.

Participation d’employés à une grève

(2) Il est interdit à l’employé de participer à une grève sauf si :

a) d’une part, il est membre d’une unité de négociation pour laquelle un avis de négociation collective a été adressé en vertu de la présente partie;

b) d’autre part, les conditions énoncées au paragraphe (1) ont été remplies pour cette unité de négociation.

[14] The provisions referred to in subsection 89(1) of the *Code* that govern conciliation (which is one of the pre-conditions to acquisition of the right to strike or lockout) are set out in the Appendix to these reasons. Also included in the Appendix are sections 105 and 107 of the *Code*, which provide the Federal Minister of Labour certain powers to promote industrial peace, and section 87.7 of the *Code*, which, among other things, prohibits strike action for those servicing grain vessels.

[15] Section 87.2 of the *Code*, which is referred to in paragraph 89(1)(f), contains requirements for a 72–hour notice to an employer of an impending strike and for a similar notice to a union of an impending lockout. In accordance with paragraph 89(1)(f) of the *Code*, compliance with the notice provisions in section 87.2 of the *Code* is a pre-condition for acquisition of the right to strike or lockout under the *Code*. Section 87.2 of the *Code* is of central importance to this application. It reads as follows:

Strike notice	**Préavis de grève**
87.2(1) Unless a lockout not prohibited by this Part has occurred, a trade union must give notice to the employer, at least seventy-two hours in advance, indicating the date on which a strike will occur, and must provide a copy of the notice to the Minister.	**87.2(1)** Sauf si un lock-out non interdit par la présente partie a été déclenché, le syndicat est tenu de donner un préavis d'au moins soixante-douze heures à l'employeur pour l'informer de la date à laquelle la grève sera déclenchée; il est également tenu de faire parvenir une copie du préavis au ministre.
Lockout notice	**Préavis de lock-out**
(2) Unless a strike not prohibited by this Part has occurred, an employer must give notice to the trade union, at least seventy-two hours in advance, indicating the date on which a lockout will occur, and must provide a copy of the notice to the Minister.	**(2)** Sauf si une grève non interdite par la présente partie a été déclenchée, l'employeur est tenu de donner un préavis d'au moins soixante-douze heures au syndicat pour l'informer de la date à laquelle le lock-out sera déclenché; il est également tenu de faire parvenir une copie du préavis au ministre.
New notice	**Nouveau préavis**
(3) Unless the parties agree otherwise in writing, where no strike or lockout occurs on the date indicated in a notice given pursuant to subsection (1) or (2), a new notice of at least seventy-two hours must be given by the trade union or the employer if they wish to initiate a strike or lockout.	**(3)** Sauf si les parties en conviennent autrement par écrit, si la grève ou le lock-out n'est pas déclenché à la date mentionnée dans le préavis donné en vertu des paragraphes (1) ou (2), le syndicat ou l'employeur qui désire déclencher une grève ou un lock-out est tenu de donner un nouveau préavis d'au moins soixante-douze heures.

[16] The *Canada Industrial Relations Regulations*, SOR/2002-54 [*CIR Regulations*] prescribe the requirements for the contents of notices under section 87.2 of the *Code*. Section 7 of the *CIR Regulations* states:

Strike or Lockout Notice	**Préavis de grève ou de lock-out**
7(1) A notice of strike or lockout given under section 87.2 of the Act shall be given in writing, be dated and signed by or on behalf of the party giving the notice, be addressed to the other party to the dispute and state	**7(1)** Le préavis de grève ou de lock-out visé à l'article 87.2 de la Loi doit être signifié à l'autre partie au litige, être daté et signé par la partie qui le donne ou en son nom et comporter les renseignements suivants :
(a) the name and address of the party giving the notice of a strike or lockout;	**a)** les nom et adresse de la partie qui donne le préavis;
(b) the number of employees in the bargaining unit that will be affected by the strike or lockout;	**b)** le nombre d'employés de l'unité de négociation qui seront touchés par la grève ou le lock-out;
(c) the date and time when the strike or lockout is to commence; and	**c)** les date et heure du début de la grève ou du lockout;
(d) whether it is a first notice under subsection 87.2(1) or (2) of the Act or a new notice under subsection 87.2(3) of the Act.	**d)** la mention qu'il s'agit d'un premier préavis prévu aux paragraphes 87.2(1) et (2) de la Loi ou d'un nouveau préavis prévu au paragraphe 87.2(3) de la Loi.
(2) A copy of the notice referred to in subsection (1) shall be given to the Minister at the same time and in the same manner as referred to in subsection (1).	**(2)** Une copie du préavis est donnée en même temps au ministre selon les modalités prévues au paragraphe (1).

[17] Another pre-condition to acquisition of the right to engage in a legal strike or legal lockout by an employer organization like the BCMEA, also prescribed by paragraph 89(1)(f) of the *Code*, is set out in section 87.3 of the *Code*. That provision requires the holding of a secret

ballot vote to authorize the strike or lockout within 60 days before the commencement of the strike or lockout. Subsections 87.3(1) and (2) provide as follows:

Secret ballot — strike vote	**Scrutin secret — grève**
87.3(1) Unless a lockout not prohibited by this Part has occurred, a trade union may not declare or authorize a strike unless it has, within the previous sixty days, or any longer period that may be agreed to in writing by the trade union and the employer, held a secret ballot vote among the employees in the unit and received the approval of the majority of the employees who voted.	**87.3(1)** Sauf si un lock-out non interdit par la présente partie a été déclenché, le syndicat ne peut déclarer ou autoriser une grève sans avoir tenu, dans les soixante jours précédents ou au cours de la période plus longue dont conviennent par écrit le syndicat et l’employeur, un vote au scrutin secret auquel tous les employés de l’unité ont eu le droit de participer et sans que la grève ait été approuvée par la majorité des votants.
Secret ballot — lockout vote	**Scrutin secret — lock-out**
(2) Unless a strike not prohibited by this Part has occurred, an employers’ organization may not declare or cause a lockout unless it has, within the previous sixty days, or any longer period that may be agreed to in writing by the trade union and the employers’ organization, held a secret ballot vote among the employers who are members of the organization and received the approval of the majority of the employers who voted.	**(2)** Sauf si une grève non interdite par la présente partie a été déclenchée, l’organisation patronale ne peut déclarer ou provoquer un lock-out sans avoir tenu, dans les soixante jours précédents ou au cours de la période plus longue dont conviennent par écrit le syndicat et l’organisation patronale, un vote au scrutin secret auquel tous les employeurs membres de l’organisation ont eu le droit de participer et sans que le lock-out ait été approuvé par la majorité des votants.

[18] Another pre-condition for acquisition of the right to strike or lockout, set out in paragraph 89(1)(e) of the *Code*, requires that the Board have decided any maintenance of activities applications or referrals under section 87.4 of the *Code*. That provision requires the maintenance during a legal strike or lockout of certain essential services, namely, those services, facilities, or

production of goods required "to prevent an immediate and serious danger to the safety or health of the public". The parties may refer unresolved questions about maintenance of activities to the Board for settlement, and the federal Minister of Labour may also refer issues regarding maintenance of activities to the Board after a notice of dispute (which commences the conciliation process) has been filed.

[19] The statutory freeze provisions contained in paragraph 50(b) and section 87.5 of the *Code* are also relevant to this application. Paragraph 50(b) provides, among other things, for the continuation of the terms and conditions of employment contained in a collective agreement after the expiry date of the previous collective agreement when the parties bargain beyond that date. The provision often comes into play because bargaining for a renewal agreement often extends past the expiry date of the previous collective agreement. Paragraph 50(b) of the *Code* provides that the statutory freeze of terms and conditions of employment extends until some (but not all) of the conditions in subsection 89(1) of the *Code* are met. Paragraph 50(b) of the *Code* reads as follows:

> **50(b)** the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.

> **50b)** tant que les conditions des alinéas 89(1)a) à d) n'ont pas été remplies, l'employeur ne peut modifier ni les taux des salaires ni les autres conditions d'emploi, ni les droits ou avantages des employés de l'unité de négociation ou de l'agent négociateur, sans le consentement de ce dernier.

[20] Section 87.5 of the *Code* provides for continuation of the freeze while the Board considers a maintenance of activities application if that consideration extends beyond the date the requirements of paragraphs 89(1)(a) to (d) of the *Code* are met. Section 87.5 states as follows:

Rights unaffected	**Maintien des droits**
87.5(1) Where the Board has received an application pursuant to subsection 87.4(4) or a question has been referred to the Board pursuant to subsection 87.4(5), the employer must not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, without the consent of the bargaining agent, until the later of the date on which the Board has determined the application or the question referred and the date on which the requirements of paragraphs 89(1)(a) to (d) have been met.	**87.5(1)** Si une demande est présentée au Conseil en vertu du paragraphe 87.4(4) ou un renvoi est fait au Conseil en vertu du paragraphe 87.4(5), l'employeur ne peut modifier ni les taux de salaire ni les autres conditions d'emploi, ni les droits ou avantages des employés de l'unité de négociation ou de l'agent négociateur, sans le consentement de ce dernier tant que le Conseil n'a pas rendu sa décision ou que les conditions prévues aux alinéas 89(1)a) à d) n'ont pas été remplies, la dernière de ces éventualités à survenir étant retenue.
Rights unaffected	**Maintien des droits**
(2) Unless the parties otherwise agree, the rates of pay or any other term or condition of employment, and any rights, duties or privileges of the employees, the employer or the trade union in effect before the requirements of paragraphs 89(1)(a) to (d) were met, continue to apply with respect to employees who are members of the bargaining unit and who have been assigned to maintain services, facilities and production pursuant to section 87.4.	**(2)** Sauf accord contraire entre les parties, les taux de salaire ou les autres conditions d'emploi, ainsi que les droits, obligations ou avantages des employés, de l'employeur ou du syndicat en vigueur avant que les conditions prévues aux alinéas 89(1)a) à d) soient remplies demeurent en vigueur à l'égard des employés de l'unité de négociation affectés au maintien de certaines activités en conformité avec l'article 87.4.
Continuation of strike or lockout	**Continuation de la grève ou du lock-out**

(3) A referral made pursuant to subsection 87.4(5), during a strike or lockout not prohibited by this Part, or an application or referral made pursuant to subsection 87.4(7), does not suspend the strike or lockout.

(3) Le renvoi prévu au paragraphe 87.4(5) — fait au cours d'une grève ou d'un lock-out non interdits par la présente partie — ou la demande ou le renvoi prévus au paragraphe 87.4(7) n'ont pas pour effet de suspendre la grève ou le lock-out.

[21] ILWU Canada relies on subsection 87.5(3) of the *Code*, which provides that where a question involving maintenance of activities is referred to the CIRB during a legal strike or lockout, the referral "… does not suspend the strike or lockout".

[22] The provision limiting the right of a competing union to file a displacement (or raid) application during a strike or lockout is also relevant to this application for judicial review. Subsection 24(3) of the *Code* governs this issue and provides as follows:

No application during strike or lockout

24(3) An application for certification under subsection (2) in respect of a unit must not, except with the consent of the Board, be made during a strike or lockout that is not prohibited by this Part and that involves employees in the unit.

Présentation en cas de grève ou de lock-out

24(3) La demande d'accréditation ne peut, sans le consentement du Conseil, être présentée pendant une grève ou un lock-out non interdits par la présente partie et touchant des employés faisant partie de l'unité en cause.

[23] Provisions giving the CIRB authority to hold hearings via teleconference (or other electronic means) and on short notice are also relevant. Paragraphs 16(a.2) and (m) of the *Code* state:

Powers of Board

Pouvoirs du Conseil

16 The Board has, in relation to any proceeding before it, power

…

(a.2) to order that a hearing or a pre-hearing conference be conducted using a means of telecommunication that permits the parties and the Board to communicate with each other simultaneously;

…

(m) to abridge or extend the time for doing any act, filing any document or presenting any evidence in connection with a proceeding;

16 Le Conseil peut, dans le cadre de toute affaire dont il connaît :

[…]

a.2) ordonner l'utilisation des moyens de télécommunication qui permettent aux parties et au Conseil de communiquer les uns avec les autres simultanément lors des audiences et des conférences préparatoires;

[…]

m) abréger ou proroger les délais applicables à l'accomplissement d'un acte, au dépôt d'un document ou à la présentation d'éléments de preuve;

[24] In addition, under section 16.1 of the *Code*, the CIRB is empowered to decide any matter before it without holding a hearing. It reads as follows:

Determination without oral hearing

16.1 The Board may decide any matter before it without holding an oral hearing.

Décision sans audience

16.1 Le Conseil peut trancher toute affaire ou question dont il est saisi sans tenir d'audience.

[25] Paragraph 14(e) and section 15 of the *Canada Industrial Relations Board Regulations, 2012*, SOR/2001-520 [*CIRB Regulations*] provide for an expedited process for illegal strike or lockout applications. Of particular relevance to this application, subsection 15(2) of the *CIRB Regulations* states as follows:

15(2) The application [for an illegal strike declaration] served on a respondent … constitutes notice to the

15(2) La signification de la demande à l'intimé [visant une déclaration de grève illégale] … tient lieu d'avis

respondents that a hearing may be held forthwith, at a time and a place to be communicated by the Board.	d'audience, celle-ci pouvant alors être tenue dès communication de la date et du lieu par le Conseil.

II. The Factual Background

[26] I move now to outline the relevant factual background to this application.

[27] In late 2022, the BCMEA gave notice to bargain for the renewal of the collective agreement between the parties, which was set to expire on March 31, 2023. The parties met and bargained, but were unable to reach an agreement. In March 2023, ILWU Canada filed a notice of dispute to commence conciliation, which, as noted, is one of the required pre-conditions for acquisition of the right to strike under paragraph 89(1)(c) of the *Code*. The federal Minister of Labour appointed two conciliation officers from the Federal Mediation and Conciliation Service (FMCS) to assist the parties and later extended the conciliation period to May 30, 2023, but no agreement was achieved. On June 1, 2023, the Minister of Labour appointed two FMCS mediators under section 105 of the *Code* to provide further assistance to the parties. On the same date, the 21-day cooling off period provided under paragraph 89(1)(d) of the *Code* commenced.

[28] On June 9 and 10, 2023, ILWU Canada held a strike vote and received overwhelming support for a strike, with 99.24 % of those who voted favouring a strike. On June 28, 2023, ILWU Canada gave the BCMEA strike notice under section 87.2 of the *Code*, advising that a strike would commence on July 1, 2023. On July 1st, ILWU Canada and its members commenced legal strike action. They established picket lines at the terminals of the BCMEA's members and dispatch halls, and all bargaining unit members, except those servicing grain

shipments and cruise ships, withdrew their labour. (As noted, under section 87.7 of the *Code*, services normally provided to ensure tie-up, let-go and loading of grain vessels at licenced terminals and transfer elevators and the movement of grain vessels must be continued during a legal strike. In addition, the parties have an understanding to continue servicing cruise ships in the event of a legal strike).

[29] ILWU Canada's strike garnered national attention and effectively shut down operations at all west coast ports. While the strike was ongoing, the two FMCS mediators appointed by the Minister of Labour continued to work with the parties in an effort to settle the collective agreement.

[30] On July 11, 2023, the Minister of Labour wrote to the Director of FMCS and requested that the senior mediator working with the parties make a recommendation within 24 hours for Terms of Settlement under subsection 105(2) of the *Code*. On the same date, the Minister of Labour wrote to the parties, advising of the request for recommended Terms of Settlement. In his letter, the Minster of Labour noted that the strike was paralyzing Canadian imports and exports. The Minister of Labour also stated in his letter that the parties would have 24 hours from receipt of the Terms of Settlement to advise whether they were willing to recommend them for ratification.

[31] On July 12, 2023, the Minister of Labour forwarded the Terms of Settlement to the parties, underlining that they had 24 hours to confirm if they would recommend them to their respective principals for ratification. In addition, the Minister requested in his letter that, if the

Terms of Settlement were acceptable to both parties, “as a sign of good faith”, ILWU Canada “suspend its strike while the voting process unfolds, and further that [the BCMEA] agree that no lockout will be imposed”.

[32] On July 12, the BCMEA responded to the Minister and advised that the BCMEA bargaining committee was recommending ratification of the Terms of Settlement. On July 13, 2023, the BCMEA ratified the Terms of Settlement.

[33] On July 13, 2023, ILWU Canada wrote to the Minister of Labour, stating that the ILWU Canada bargaining committee would “recommend to our [Longshore Contract Caucus] to send [the Terms of Settlement] to the membership”. On the same day, ILWU Canada began to take down its picket lines and its members began to return to work.

[34] The BCMEA issued an industry-wide notice that it was resuming operations on July 13, 2023. In collaboration with ILWU Canada, the BCMEA issued a notice of dispatch to employees on the same date, advising that operations would be up and running as of 4:30 p.m. and inviting employees to report to the hiring hall to resume work as of 4:30 p.m. on July 13, 2023. The employees largely did so, and the CIRB found that the strike ceased on July 13, 2023, as there was no evidence that any strike activity continued past that date. Operations in the ports on the west coast then returned to normal levels. The federal Ministers of Labour and Transport issued a joint statement on July 13, 2023, stating that the parties had reached a tentative agreement, and, on the same day, sent out Tweets, stating that the strike in the ports on the west coast was over.

[35] ILWU Canada never told the BCMEA, the mediators, the Minister of Labour, or the public that it considered a state of strike to be ongoing or that it reserved the right to recommence strike activities, without a further 72–hour notice to the BCMEA, if the Terms of Settlement were not ratified by an internal union committee. During the afternoon of July 18, ILWU Canada issued a news release, stating that its Longshore Contract Caucus had rejected the Terms of Settlement and that its members would be back on the picket lines a few hours later that same day. The longshore employees had no opportunity to vote on the Terms of Settlement before strike activities resumed.

[36] The ILWU Canada Constitution provides for contract caucuses “to develop a programme for collective bargaining as well as be a forum for strategy development in contract discussions”, to quote from Article 10 of the Constitution. In the present case, the Longshore Contract Caucus was comprised of five ILWU Canada officers and approximately 75 member delegates elected by the Longshore Locals. One of ILWU Canada’s affiants deposed that the ILWU Canada bargaining committee with whom the BCMEA bargaining committee and the FMCS mediators had been dealing was prohibited from recommending the Terms of Settlement to the membership and that it was the role of the Longshore Contract Caucus to do so. However, this requirement is not explicitly outlined in the ILWU Canada Constitution.

[37] ILWU Canada advised the BCMEA at approximately 3:00 p.m. on July 18, 2023 that its picket lines would be going up again at 4:30 p.m. that same day. At approximately 3:19 p.m. on July 18, 2023, counsel for the BCMEA called the ILWU Canada President and told him that the BCMEA considered the resumption of strike activities to be illegal due to the failure to provide a

new 72–hour notice of strike. Shortly thereafter, counsel for ILWU Canada emailed the BCMEA to say that ILWU Canada counsel were authorized to accept service of an illegal strike application to the CIRB.

[38] By 4:30 p.m. on July 18, 2023, ILWU Canada and its members had fully withdrawn labour and re-established their picket lines. Certain vessels in port were left in a condition where they could not depart because they were only partially loaded or unloaded, and certain machines were left running when employees walked off the job.

[39] At approximately 5:15 p.m. on July 18, 2023, counsel for the BCMEA filed an illegal strike application with the CIRB and at the same time served counsel for ILWU Canada with a copy of the application.

[40] The Chairperson of the Board held a conference call with counsel for the parties at approximately 6:00 p.m. on July 18, 2023, which lasted for a little over 55 minutes. During the call, counsel for the BCMEA urged the Board to convene a hearing as soon as possible, stating that it was necessary for the CIRB to hear the parties that evening given the urgency of the situation. Counsel for ILWU Canada submitted that he needed more time and expressed the preference for proceeding the next morning. The Chairperson of the Board remarked that there were “many eyes on this” and indicated that the Board was “not delaying the urgency”. Counsel for ILWU Canada responded that he “was in [the Chairperson’s] hands”.

[41] At the conclusion of the call, the Chairperson of the CIRB determined that the hearing would proceed that evening at 9:30 p.m. by teleconference. She directed the parties to have witnesses available to be questioned and to submit any documents they relied on. The parties did so. All the documents filed by the BCMEA were either public ones or ones that were already in ILWU Canada's possession. However, there are additional documents that ILWU Canada says that it would have put before the Board with more time to prepare. These are excerpts from Hansard, when section 87.2 of the *Code* was debated in the House of Commons, excerpts from Andrew C.L. Sims, *Seeking a Balance: Canada Labour Code, Part I, Review* (Ottawa: Minister of Public Works and Government Services Canada, 1995) [Sims Report], and the decision of the Alberta Labour Relations Board in *V.S. Services Ltd. v. Health Care Employees Union of Alberta*, [1990] Alta L.R.B.R. 523 [*V.S. Services*].

[42] The hearing took place between approximately 9:30 p.m. on July 18, 2023 and 1:30 a.m. the next morning. Both parties called witnesses and made submissions. At no time did ILWU Canada indicate that it needed more time to prepare or state that the union was taken by surprise by the BCMEA's evidence or arguments. ILWU Canada was represented by experienced labour counsel during the hearing before the Board. At the conclusion of the hearing, the Board took the matter under reserve. At approximately 7:30 a.m. the next morning, the CIRB issued the Order. As already noted, reasons for the Order followed approximately three weeks later.

[43] ILWU Canada issued a new strike notice on July 19, 2023, but withdrew it after the Prime Minister convened the Incident Response Group. During the week of July 21, 2023, the ILWU Canada membership voted on and rejected the Terms of Settlement. The parties thereafter

continued to bargain and ultimately reached an agreement on the terms of a renewal collective agreement, which was ratified by the ILWU Canada membership on August 4, 2023.

III. The CIRB's Reasons

[44] I turn next to outline the salient points made by the Board in its Reasons for the Order.

[45] After identifying the parties and the application, the CIRB stated at paragraph 4 of its Reasons that the key issue in the dispute "…require[d] an interpretation of section 87.2(1) of the *Code* and a determination of whether the union suspended or ended the strike when it agreed to present a recommended settlement through its ratification process". It then proceeded to review the relevant facts, most of which are set out above. Importantly, for purposes of this application, the Board found that, "… there was no evidence that any strike activity continued between July 14 and 18, 2023. On the contrary, the ports were in full operation, and the jobs dispatched were at levels comparable to those prior to the strike" (Reasons at para. 30).

[46] After reviewing the facts, the Board summarized the parties' arguments and then moved on to its analysis. At the commencement of its analysis, the CIRB once again highlighted the issue in dispute in paragraph 52 of its Reasons, stating that:

> The key issue is whether, after suspending the strike on July 13, 2023, following the agreement to recommend the senior mediator's proposal for ratification, there was an obligation on the union to serve a new notice as required under section 89(1)(f) of the *Code* prior to resuming its strike activities on July 18, 2023.

[47] The CIRB then stated that it recognized that the right to strike is a protected right under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [Charter] and that substantial interference with that right could be found to be unconstitutional. It continued, noting that, "[t]o a large extent, these constitutional values are already recognized in the Preamble to the *Code*" and that the Board's interpretation of the *Code* was "… guided by its Preamble and Parliament's desire to encourage free collective bargaining and the constructive settlement of disputes" (Reasons at para. 56). It went on to state that ILWU Canada had the right to strike and had exercised that right. It continued, stating that, "[h]owever, the *Code* establishes certain parameters on the exercise of that right that seek to balance the employees' rights with the public's interest. Those parameters are found at section 89 of the *Code* and include a 72-hour strike notice" (Reasons at para. 57).

[48] The Board then turned to analyze the relevant statutory provisions, and mentioned that section 87.2 was added to the *Code* in 1999 following the comprehensive review that culminated in the Sims Report. The Board noted that the authors of that Report stated at pages 116–17 that employers require a strike notice to ensure the orderly shutdown of operations. The CIRB continued by stating that such notice "is particularly critical for industries in the federally regulated sectors that involve key infrastructure, such as ports, airports and airlines, railways and nuclear reactors" (Reasons at para. 59).

[49] The CIRB then highlighted that subsection 87.2(3) of the *Code* requires a new 72–hour notice be given if the strike does not commence on the date set out in a previous notice. The

Board referred to its prior decision in *Canada Steamship Lines Inc.*, 2002 CIRB 201, where it canvassed why a new notice was required when a strike had not commenced on the date given in the previous notice. It then stated that:

> [61] The *Code* requires that a notice be given "indicating the date on which a strike will occur" (section 87.2(1)). It also requires a new notice when a strike does not occur on the date originally set. This new notice is required presumably to provide clarity and allow the employer to put appropriate measures in place for the shutdown of operations. **For the same reasons, it is the Board's view that, in this case, where strike activities have ceased and full operations have resumed, with no agreement or clarity between the parties on the status of the strike, a new notice is required. This is consistent with the purpose of the notice and aligns with the requirement to give a new notice when the strike does not commence on the set date**.
>
> [62] The Board is **also cognizant of the potential consequences of not requiring a new strike notice in those circumstances**. As indicated by the BCMEA's counsel, employers **could defensively implement a lockout** to avoid the consequences of a potential abrupt resumption of strike activity. **This is a compelling reason to adopt an interpretation that requires advance notice when a strike resumes after it had, for all intents and purposes, ended**. [Emphasis added.]

[50] The CIRB proceeded to distinguish many of the cases relied on by ILWU Canada.

[51] The Board first discussed its prior decision in *Canadian National Railway Company*, 2007 CIRB 398 [*CN 2007*]. That case involved a competing union that sought to displace an incumbent union at a time when back-to-work legislation was pending before Parliament and the employees had returned to work and were voting on a tentative agreement. However, unlike the present case, the incumbent union in *CN 2007* had made its intention clear to the employer that it would resume strike activities if the ratification vote failed.

[52] In *CN 2007*, the CIRB held that the displacement application of the competing union had been made "during a strike" within the meaning of subsection 24(3) of the *Code*, and thus could not proceed without the consent of the Board, which it granted in the unusual circumstances that arose in that case. In so ruling, the CIRB stated in *CN 2007* at paragraph 81 that, it "was of the view that **for the purposes of section 24(3) of the *Code***, the words 'during a strike' must be given a liberal and broad interpretation rather than a narrow restrictive one" [emphasis added]. This interpretation, according to the CIRB, was consistent with the purpose of the provision. The Board also held, with reference to its earlier decided case law, that "…the term 'strike' [in subsection 24(3) of the *Code*] refers to a 'state of economic warfare' that occurs over a certain period of time and not to the 'weapons available to one party or the other'" (*CN 2007* at para. 83). In other words, in *CN 2007*, the CIRB held that what was relevant to assessing whether a strike was ongoing for purposes of subsection 24(3) of the *Code* was the time period when the displacement application was filed and not whether strike activities were ongoing at that date.

[53] In *CN 2007*, the Board also highlighted the particularly vulnerable state an incumbent union is in when a raiding union files a displacement application when strike activities have ceased and employees are voting on a tentative agreement. It wrote at paragraph 102 as follows:

> As stated in the Sims Report and as confirmed in [other previous CIRB decisions], the requirement for consent in a section 24(3) situation "simply provides a check [by the Board], during a difficult period, on those applications that may destabilize bargaining and lack the necessary voluntary support" [citation omitted]. In other words, it allows the Board to balance the competing labour relations issues involved between an employer and a union during a challenge to the union's representation and bars unnecessary labour disruptions in the workplace during a volatile time. It prevents undue interference with the collective bargaining process at a time when the incumbent union is particularly vulnerable. During that time, the Board will normally only interfere with the

> collective bargaining process and grant consent when compelling circumstances exist and when a proper labour relations purpose is to be served.

[54] In the present case, the CIRB distinguished *CN 2007* on two bases. First, it held that the fact that *CN 2007* arose under an entirely different provision in the *Code* meant that the case did not settle the issue of whether a new strike notice was required under section 87.2 of the *Code* in the circumstances before it. The Board wrote at paragraph 68 of its Reasons as follows:

> The purpose of section 24(3) of the *Code* is very different than the purpose of a strike notice required at section 87.2 of the *Code*. In the case of a displacement application during the period of a strike, the Board concluded that the phrase "during a strike" encompasses that period during which a union and an employer are in a state of economic warfare. That period during which either party can exercise its economic leverage to obtain a collective agreement is a critical period for the union, one during which the union's challenge is to maintain the commitment of its members. It is with these policy considerations in mind that the Board gave a broad interpretation to the phrase "during a strike" for the purpose of a displacement application.

[55] Second, the CIRB distinguished *CN 2007* on a factual basis because the union in that case, unlike ILWU Canada, had made its intentions clear to the employer that it intended to resume strike activities if the ratification vote failed.

[56] The CIRB also distinguished two cases from British Columbia that ILWU Canada relied on, namely *Re Weyerhaeuser Canada Ltd. and PPWC, Local 10*, (1983) 5 C.L.R.B.R. (N.S.) 268, [1983] N.B.P.S.L.R.D. No. 5 (QL) [*Weyerhaeuser*] and *Re Sunlover Holding Co. and COOWA, Local 2001* (2014), 250 C.L.R.B.R. (2d) 123 [*Sunlover*] (upheld on reconsideration in *Re Sunlover Holding Co. and COOWA, Local 2001* (2014), 250 C.L.R.B.R. (2d) 133). The Board distinguished these cases due to the differences between the strike notice provisions

contained in the British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244 and the *Code*. The Board also highlighted factual differences in the two cases. More specifically, it noted that in *Sunlover*, unlike in the case at bar, the union had made its intention to resume its strike activities known to the employer and, like *CN 2007*, involved a displacement application. The Board also stated that the fact pattern was entirely different in *Weyerhaeuser* and involved consideration of whether an employer lockout removed the need for a strike notice.

[57] The CIRB held that the factual context before it in the instant case was "… in stark contrast to the facts in *CN 2007* and *Sunlover*" because, in the instant case, ILWU Canada gave no indication of the possibility that strike activities might resume. The Board concluded that it could not "… accept that the union's silence on the issue in the highly charged context in which the events unfolded meant that it was maintaining its immediate threat to resume strike activity" (Reasons at para. 79). Given this silence, in the face of the communications made by the Ministers and the BCMEA, as well as the fact that all strike activities had ceased as of July 13, 2023, the CIRB determined that no strike was ongoing on July 18, 2023, when strike activities resumed. The Board accordingly held that a new 72–hour strike notice was required. It concluded in paragraphs 93 and 94 of its Reasons as follows:

> Based on the evidence presented, the Board was satisfied that there was no ongoing strike activity between July 13 to 18, 2023, and that the strike had ceased. In this context, the Board found that the union was required to serve a new notice that a strike would occur to allow for the appropriate shutdown of operations.
>
> Given that the requirement to give a 72-hour notice pursuant to section 87.2(1) of the *Code* had not been met, the Board concluded that the strike that occurred on July 18, 2023, was unlawful.

IV. Mootness

[58] With the foregoing background in mind, I turn now to consider the first set of questions that arise in this application, namely, the issue of whether the application is moot and, if so, whether this Court should nonetheless exercise its discretion to decide the application as both parties have urged us to do.

[59] *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 1989 CanLII 123 [*Borowski*] is the seminal case governing mootness. There, the Supreme Court of Canada held that a case is moot if, subsequent to the commencement of the proceeding, events occur such that there is no longer a live controversy between the parties. In *Borowski*, the Supreme Court held that the substratum of the appeal in that case had disappeared because the provision the appellant was challenging had been struck down in a previous case.

[60] In the present case, there is likewise no longer a live controversy between the parties because the strike that gave rise to the Order has ended and the parties have entered into a new collective agreement. Like in *Borowski*, the substratum of the litigation has disappeared in this application because there is no longer any possibility of an ongoing strike.

[61] A court has discretion to hear an otherwise moot case. In *Borowski*, the Supreme Court of Canada held that factors relevant to the exercise of such discretion include: the ongoing presence of an adversarial context between the parties; consideration of whether deciding the case accords with the proper role of the court; and any special circumstances that warrant hearing of an

otherwise moot case. The Supreme Court noted that special circumstances would include where : (1) the case will have a practical effect on the rights of the parties; (2) the case raises reoccurring issues that are dealt with quickly and therefore seldom have an opportunity for review; or (3) hearing the case is in the public interest or raises an issue of public importance: *Borowski* at 358–62.

[62] Here, an adversarial context remains, and it is consistent with the role of this Court to decide this application. This Court routinely hears judicial review applications from decisions of the CIRB pursuant to paragraph 28(1)(h) of the *Federal Courts Act*, R.S.C., 1985, c. F-7. In addition, I am of the view that there are special circumstances that warrant our deciding the case. As both parties argued, the validity of the Order and the determination as to the illegality of the strike action taken on July 18, 2023 may be of relevance to outstanding or contemplated litigation between the parties, where the legality of the strike would be a key issue.

[63] More specifically, the BCMEA has filed a grievance seeking damages from ILWU Canada for the strike. That grievance is slated to be heard in February 2025. Damages for illegal strikes are not generally awarded by labour boards. The CIRB's remedial authority in the illegal strike context is limited to the remedies set out in subsection 91(2) of the *Code*, which do not include awarding monetary damages: see Graham J. Clarke & Sara Bennett, *Clarke's Canada Industrial Relations Board*, vol. 1 (Toronto: Thomson Reuters, 1999) (loose-leaf revision March 2024) [*Clarke*] at §3:565. Instead, damages may be sought by way of grievance, and may be awarded by a labour arbitrator when a strike occurs that violates the provisions of a collective agreement: see Donald J.M. Brown, David M. Beatty & Adam J. Beatty, *Canadian Labour*

Arbitration, vol. 1A, 5th ed. (Toronto: Carswell, 2019) (loose-leaf revision 2, 3/2024) at §9:21; *Imbleau v. Laskin*, [1962] S.C.R. 338, 1962 CanLII 3; *Shell Canada Ltd. v. United Oil Workers of Canada*, [1980] 2 S.C.R. 181, 1980 CanLII 200 at 187.

[64] In the present case, it is possible that the BCMEA's grievance, seeking damages, would be found to be inarbitrable as no collective agreement was in force when the strike occurred. However, that is a matter for determination by the arbitrator seized with the grievance.

[65] If the arbitrator were to find the BCMEA's grievance inarbitrable, counsel for the BCMEA advised the panel that his client intends to commence a civil action, seeking damages from ILWU Canada for the strike. In such an action, the legality of the strike would be a central issue, and the validity of the Order bears directly on this issue. Thus, the outcome of this application could well have a practical impact on the rights of the parties in existing or contemplated litigation. This factor militates strongly in favour of this Court deciding this application.

[66] In addition, the parties fully argued the case and filed detailed memoranda of fact and law. As such, this Court has all the input necessary to decide the case, and concerns of judicial economy or economy to the parties do not militate against deciding the case.

[67] In the circumstances, I would exercise our discretion and would decide this application on its merits.

V. Procedural Fairness

[68] I move to now consider the first of ILWU Canada's arguments on the merits, namely its contention that the CIRB violated its procedural fairness rights in holding the hearing in an expedited fashion. ILWU Canada submits that the few hours it had to prepare for the hearing meant that it was unable to bring forward all the evidence and case law that it would have submitted with more time to prepare. As noted, it points in particular to excerpts from Hansard and the Sims Report, as well as the *V.S. Services* decision of the Alberta Labour Relations Board, which it did not file with the CIRB.

[69] I agree with ILWU Canada that, generally speaking, ensuring parties have adequate notice of and time to prepare for a hearing is relevant to both a party's ability to adequately present its case and to the rule of law, which depends at least to a certain extent on parties presenting the relevant evidence and authorities to the decision-maker. To those unfamiliar with the context of illegal strike applications, the few hours notice provided by the CIRB in the instant case might seem inadequate. However, labour boards invariably proceed on very short notice in illegal strike applications, given the nature of the issues and the need for effective remedies. This is especially so for the CIRB, which has jurisdiction over undertakings that form the backbone of the Canadian economy, like railways, airlines, air traffic control, airport security screening, and the ports. In such industries, it is not unusual for the CIRB to schedule hearings very rapidly in illegal strike applications.

[70] The Board's ability to proceed in rapid fashion in illegal strike applications is contemplated by both the *Code* and the *CIRB Regulations*. The Board is empowered to abridge all time limits, by virtue of paragraph 16(m) of the *Code*, and paragraph 14(e) and subsection 15(2) of the *CIRB Regulations* provide that hearings in illegal strike applications may be held "forthwith" following service of the application on the respondent union. In addition, by virtue of section 16.1 of the *Code*, the CIRB need not hold a hearing at all. This Court has recognized the right of the CIRB, absent a compelling reason otherwise, to decide cases without holding a hearing: *Nadeau v. United Steelworkers of America*, 2009 FCA 100, 400 N.R. 246 at paras. 3–6; *Ducharme v. Air Transat A.T. Inc.*, 2021 FCA 34 at paras. 19–21; *Kiame c. Syndicat des employées et employés nationaux (Alliance de la fonction publique du Canada)*, 2024 CAF 103 at para. 13.

[71] The foregoing statutory and regulatory provisions authorize the Board to proceed in the manner it did. In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 [*Ocean Port*], the Supreme Court of Canada confirmed that, "… absent a constitutional challenge, a statutory regime prevails over common law principles of natural justice" (at para. 19). While *Ocean Port* dealt with the independence of an administrative decision-maker, the foregoing principle applies equally to other aspects of procedural fairness, including the requisite notice of hearing: see Sara Blake, *Administrative Law in Canada*, 7th ed. (Toronto: LexisNexis, 2022) (QL) at §2.05; Halsbury's Laws of Canada (online), *Administrative Law* (2022 Reissue), "Judicial Review: Requirement of Procedural Fairness: Specific Rights: Right to be Heard" (V.3.(4).(b)) at HAD-93 "Nature of right"; *Shephard v. Fortin*, 2004 FCA 254, 325 N.R. 158 at para. 27. Given the authority of the

Board, in particular, to hold hearings in illegal strike applications "forthwith" after service of an application made under section 91 of the *Code*, the CIRB was entitled to schedule the hearing on very short notice.

[72] Perhaps more importantly, ILWU Canada's procedural fairness arguments must be dismissed based on what occurred during the pre-hearing teleconference with the Board's Chairperson during the evening of July 18, 2023.

[73] It is well settled that parties must pursue procedural fairness concerns at the first available opportunity when it is reasonable to do so, and that their failure to object will disentitle them from raising procedural fairness issues in a subsequent judicial review application: see *Halton (Regional Municipality) v. Canada (Transportation Agency)*, 2024 FCA 122 at para. 38; *Maritime Broadcasting System Ltd. v. Canadian Media Guild*, 2014 FCA 59, 455 N.R. 115 at para. 67; *Taseko Mines Ltd v. Canada (Minister of the Environment)*, 2019 FCA 320, 32 C.E.L.R. (4th) 18 at paras. 45–47, leave to appeal to SCC refused, 39066 (14 May 2020). Thus, objections to a proposed course of proceeding must be raised and not abandoned before an administrative decision-maker if the party wishes to pursue them as alleged violations of procedural fairness on judicial review. Within the confines of appropriate decorum (see e.g. *Chaudhry v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 1015, 56 Admin. L.R. (4th) 114 at para. 16), it should be "…evident from the circumstances as a whole that one was not agreeing to or accepting the conduct in question" (Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters, 2021) (loose-leaf revision 2024-07) (WL) [Sossin] at §16:131). If put forward unsuccessfully, a best practice may be to advise

the decision-maker that the objection is maintained for the purposes of judicial review, although its mere raising is likely sufficient for that purpose: Sossin at §16:133.

[74] In the matter at hand, ILWU Canada's counsel said he preferred proceeding the next morning but did not press the issue or claim that his client could not proceed that evening. This falls short of objecting to proceeding that evening. Thereafter, ILWU Canada effectively abandoned whatever concerns about scheduling it might have had when counsel stated that he was in the Chairperson's hands when the schedule was further discussed. Given this, ILWU Canada cannot now successfully argue that, in proceeding as it did, the CIRB violated its procedural fairness rights.

[75] Thus, I find that the CIRB did not violate ILWU Canada's rights to procedural fairness in the present case.

VI. Reasonableness

[76] ILWU Canada next submits that the Order should be set aside because it is unreasonable for two different reasons. ILWU Canada first claims that there was a failure of rationality in the reasons the Board gave for the Order because the Board reached contradictory conclusions and held both that the strike had been suspended and ended on July 13, 2023. Second, ILWU Canada argues that the CIRB reached an unreasonable result because the Board's interpretation of section 87.2 of the *Code* is inconsistent with other provisions in the *Code* and the legislative history of section 87.2 of the *Code*. It adds that the CIRB's conclusion conflicts with the weight

of authority from other labour boards, which does not require provision of a fresh strike notice to an employer in circumstances similar to those in the present case. It also submits that the CIRB's interpretation fails to recognize the constitutionally protected nature of the right to strike.

[77] I agree with the parties that the CIRB's Order (and reasons for it) are reviewable under the reasonableness standard: *Watson v. Canadian Union of Public Employees*, 2023 FCA 48 at para. 16.

[78] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the Supreme Court of Canada confirmed that two types of defects may result in an unreasonable decision, namely, either a failure of rationality in the reasoning process of the administrative decision-maker or where the result reached by the administrative decision-maker is untenable in light of the relevant factual and legal constraints that bear upon the decision.

[79] In respect of the first type of defect involving a failure of rationality in the reasoning process, the majority in *Vavilov* held that a reasonable decision must be based on internally coherent reasoning that is both rational and logical (at para. 102). That said, "reasonableness review is not a 'line-by-line treasure hunt for error'" (at para. 102, quoting *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458 at para. 54, citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 14). Thus, shortcomings in a decision must be more than peripheral to the merits of a decision to

justify a court’s overturning the decision due to a failure of rationality in the reasoning process (*Vavilov* at para. 100).

[80] As concerns the second type of defect, focussed on the nature of the result reached by the decision-maker, the majority noted in *Vavilov* that several contextual factors may constrain a decision-maker. Those mentioned in *Vavilov* that are alleged to be relevant to the instant case are the governing statutory scheme and its legislative history, previous case law from the CIRB and other labour relations boards that interprets similar or related provisions, and jurisprudence on the right to strike and freedom of association as guaranteed by section 2(d) of the Charter.

[81] In terms of the statutory scheme, the majority in *Vavilov* held that, while administrative decision-makers are not required to engage in a formalistic statutory interpretation exercise similar to the one undertaken by courts, administrative decision-makers’ interpretations must nonetheless be consistent with the text, context, and purpose of the statutory provisions that bear upon their decisions. In addition, according to the majority in *Vavilov*, in some cases, it may be clear that “the interplay of text, context and purpose leaves room for [only] a single interpretation” (at para. 124). In its subsequent decision in *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, 485 D.L.R. (4th) 583, the Supreme Court applied this reasoning and held that the statutory provisions in question in that case could only be interpreted in the way the Supreme Court held they were to be read. It therefore overturned the decision of the administrative decision-maker that had interpreted the statutory provisions differently. As will soon be seen, ILWU Canada urges us to adopt a similar approach in this case.

[82] In terms of the impact of previous case law, as noted by the majority in *Vavilov* at paragraphs 131–32 and by this Court in *Canada (Attorney General) v. National Police Federation*, 2022 FCA 80, 107 C.L.R.B.R. (3d) 1 [*National Police*] at para. 48, administrative decision-makers are not bound by their own precedents and may depart from them if adequate reasons are provided. Nor are they bound by precedents from other similar administrative decision-makers. The principle of *stare decisis*, which applies to courts and requires them to follow binding judicial authority, is inapplicable to administrative decision-makers like the CIRB: see *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, 1993 CanLII 106 at 800–01. Thus, the CIRB was not bound to follow its own case law or cases from other labour relations boards.

[83] Likewise, administrative decision-makers need not follow judicial precedents, provided adequate reasons for departing from them are given. Nor are they required to apply common law principles in the same way a court would: *Vavilov* at paras. 112–13; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616 at para. 5; *National Police* at para. 49.

[84] I turn now more specifically to ILWU Canada's arguments.

A. *Was there a failure in rationality in the CIRB's reasoning process?*

[85] As noted, ILWU Canada first submits that the CIRB's reasons are internally inconsistent because the Board held both that the strike was suspended and that it had ended. ILWU Canada

points in particular to the comments made in paragraph 52 of the Reasons, where the Board stated that the strike had been suspended, which it says contradicts the Board's conclusion that the strike ended. In making this argument, ILWU Canada infers that the word "suspended" is synonymous with a finding that the strike was ongoing.

[86] I disagree and find, with respect, that this argument is precisely the sort of treasure hunt for error that the Supreme Court cautioned against in *Vavilov*. When the Board's reasons are read fairly in their entirety, it is clear that the CIRB was focussed on the question of whether a fresh 72–hour strike notice was required in circumstances where the strike had ceased on July 13, 2023 and ILWU Canada was mum on its intentions to resume strike activity without a further 72–hour notice if its internal union committee declined to put the Terms of Settlement to a vote. The conclusion that the strike had ceased as of July 13, 2023 is a factual determination that was open to the Board to make on the facts before it. Indeed, determinations of whether a strike has occurred or is ongoing are largely factual in nature: see e.g., *International Longshore and Warehouse Union, Canada v. British Columbia Terminal Elevator Operators' Assn.*, 2001 FCA 78, 273 N.R. 160 at para. 18; *Canada (Attorney General) v. Simoneau*, [1982] 1 F.C. 469 (F.C.A.D.) at 470; *Otis Elevator Co (Re)*, [1984] B.C.L.R.B.D. No. 5 (QL) at para. 37.

[87] The Board's finding that the ILWU Canada strike had ended as of July 13, 2023 is not changed by the fact that it used the word "suspended" in paragraph 52 of its Reasons or that the Minister of Labour had asked ILWU Canada to suspend the strike. The word "suspend" cannot be read to mean that the CIRB held that the strike was ongoing. In making this argument, ILWU

Canada has tried to elevate one word to mean something that it does not, which is the very essence of a treasure hunt for error. Thus, its first argument fails.

B. *Is the CIRB's decision unreasonable?*

[88] ILWU Canada's second argument has several prongs.

[89] In terms of statutory interpretation, ILWU Canada argues that, when read in context, the only possible interpretation of section 87.2 of the *Code* is that only one 72–hour strike notice is required provided the strike commences on the date given in the notice. In support of this argument, ILWU Canada notes several other provisions in the *Code* and the *CIR Regulations*.

[90] ILWU Canada first relies on the non-restrictive definition of "strike" in section 3 of the *Code*, which it claims supports the conclusion that a strike may be ongoing in the absence of activities falling within the statutory definition. Second, it relies on the overall architecture of the *Code*, claiming that once the hurdles to acquiring the right to strike are met, the right to strike persists. It submits that paragraphs 89(1)(a) to (f) of the *Code* are not ongoing requirements that can be revisited throughout the strike. Rather, the statutory freeze would expire at the same time as the right to strike or lockout accrues, such that the parties are then in a state of economic warfare. It further states this is consistent with its interpretation of section 87.2 of the *Code*. Third, ILWU Canada notes that the *Code* contemplates the suspension of strikes in subsection 87.5(3), which means that a strike may be suspended without its ending. Fourth, ILWU Canada submits that the requirements for a new notice in subsection 87.2(3) (when a strike does not start

on the date given in the notice) must be understood as being the only situation where a fresh 72–hour strike notice may be required. It also notes that paragraph 7(1)(d) of the *CIR Regulations* contemplates only two types of strike notices, namely, “a first notice under subsection 87.2(1)” or “new notice under subsection 87.2(3)” of the *Code*. The absence of a mention of a subsequent fresh notice, according to ILWU Canada, means that no such notice is required. Fifth, ILWU Canada submits that the removal of the obligation to provide a strike or lockout notice in subsections 87.2(1) and (2), where the opposite party has commenced a strike or lockout, demonstrates the intention that only one notice need be given. In sum, it says that “the wording and structure of the statutory scheme … make clear that the relevant notice is intended to be of the *state of economic warfare*, whether commenced by lockout or by strike, and not of any varying level or changes in the weapons used” (at para. 68 of ILWU Canada’s Memorandum of Fact and Law [emphasis in original]).

[91] ILWU Canada further relies on the Sims Report and statements from Hansard as part of the relevant context. As noted by the CIRB in its Reasons, the Sims Report was the comprehensive study that led to the suite of amendments to the *Code* that included section 87.2. In addition to the passages from the Sims Report relied on by the CIRB regarding the purpose behind the notice provisions in subsection 87.2(1) of the *Code*, ILWU Canada points to the passage stating that “[n]o new notice should be required for each variation in conduct during the strike or lockout” (Sims Report at 117). ILWU Canada also relies on the following statement made in the House of Commons by the Parliamentary Secretary to the Minster of Labour during the debate over section 87.2 of the *Code*:

> To those unions which feel that this new requirement will frustrate the right to strike, it is important to point out that Bill C-19 **will not require that a new notice be given once a strike or lockout action has commenced, even if it is temporarily suspended...** [Emphasis added.]
>
> Canada, Parliament, House of Commons Debates, 36th Parl., 1st Sess., Vol. 35, No. 104 (May 12, 1998) at 1215.

[92] The next constraint that renders the Order unreasonable according to ILWU Canada involves case law from the CIRB and other labour boards. It points to the *CN 2007* decision of the CIRB and other CIRB case law interpreting subsection 24(3) of the *Code*, which stand for the proposition that, for purposes of determining whether a raid is timely, a strike is ongoing whenever the parties are in legal strike position and the state of economic warfare exists. ILWU Canada says that these authorities are inconsistent with the Board's Order, which allows for a strike to cease even though the state of economic warfare is ongoing. ILWU Canada also points to several authorities from the British Columbia Labour Relations Board, including *Weyerhaeuser* and *Sunlover*, and from other labour boards, namely, *V.S. Services* from the Alberta Labour Relations Board and *RWDSU, Local 454 v. Bi-Rite Drugs Ltd.*, [1987] S.L.R.B.D. No. 51 [*Bi-Rite Drugs*], from the Saskatchewan Labour Relations Board. ILWU Canada argues that these cases provide that a fresh notice of strike is not required in circumstances like the present and that the CIRB is the only Board that has adopted the opposite approach, suggesting that this leads to the conclusion that the CIRB's approach is unreasonable.

[93] Finally, ILWU Canada submits that the CIRB failed to conduct any meaningful analysis of the overall purpose of the *Code* of encouraging free collective bargaining or of the values and rights at stake. It notes that the Supreme Court of Canada confirmed in *Saskatchewan Federation*

of Labour v. Saskatchewan, 2015 SCC 4, [2015] 1 S.C.R. 245 [*Saskatchewan Federation of Labour*] that the right to strike is an indispensable component of the right to collective bargaining, which is guaranteed under section 2(d) of the Charter. ILWU Canada asserts that the requirement to give an additional 72–hour strike notice was a restriction on its constitutionally-protected right to strike. It further submits that the Board failed to follow the approach taken in other cases where it recognized that the presumption in favour of free collective bargaining and the use of economic sanctions is strong when interpreting provisions in the *Code* and exercising its discretion. It cites the CIRB's decisions in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union v. G4S Secure Solutions (Canada) Ltd.*, 2012 CIRB 625, *Unifor v. Enbridge Pipelines Inc.*, 2018 CIRB 871, and *Amalgamated Transit Union, Local 0591 v. Société de transport de l'Outaouais*, 2017 CIRB 849.

[94] ILWU Canada adds that the CIRB failed to follow the case law on Charter values, which would have required the Board to engage in a proportionate balancing of the Charter interests at play. It alleges that the CIRB failed to undertake any such balancing and that its Order and Reasons are inconsistent with the constructive settlement of disputes that the *Code* is meant to foster. It also says that the CIRB's decision in the present case will discourage unions from taking down their picket lines while settlement proposals are being considered. In turn, this would allegedly decrease the likelihood of ratification in future cases, thereby undermining successful collective bargaining.

[95] Despite the able submissions of counsel for ILWU Canada, who delivered the foregoing points in their oral and written submissions in a very eloquent manner, I cannot agree that the CIRB's decision was unreasonable.

[96] Before examining each of ILWU Canada's arguments, it is worth underscoring that reasonableness review must be appropriately deferential and does not permit this Court to substitute its views for those of an administrative decision-maker. This is particularly true of the CIRB, which is charged with applying the complex provisions in the *Code* to bargaining relationships that form the backbone of the Canadian economy and which, in so doing, has acquired considerable labour relations expertise and knowledge of those relationships. The need for significant deference to decisions made by labour relations boards has been recognized for over 50 years, going back to the seminal decisions in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al.*, [1975] 1 S.C.R. 382, 1973 CanLII 191, and *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, 1979 CanLII 23. The need for deference is also recognized in the strongly-worded privative clause set out in subsection 22(1) of the *Code*. It provides as follows:

Order and decision final	**Impossibilité de révision par un tribunal**
22(1) Subject to this Part, every order or decision made by the Board under this Part is final and shall not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(a), (b) or (e) of that Act.	**22(1)** Sous réserve des autres dispositions de la présente partie, les ordonnances ou les décisions du Conseil rendues en vertu de la présente partie sont définitives et ne sont susceptibles de contestation ou de révision par voie judiciaire que pour les motifs visés aux alinéas 18.1(4)a), b) ou e) de la *Loi sur les Cours fédérales* et dans le cadre de cette loi.

[97] Commenting on a very similar provision contained in the federal public sector labour legislation (section 34 of the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365), this Court stated in *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41 at paragraph 34 that the privative clause:

> … has a vital impact, namely, to indicate that the applicable standard of review is reasonableness and to underscore the considerable deference to be accorded to the Board in respect of decisions of this nature: see *Dunsmuir* [*v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190] at para. 52. This Court and the Supreme Court of Canada have often commented that [section 34's] predecessors have precisely this impact. For example, in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at p. 962, 150 N.R. 161, the Supreme Court underlined that the privative clause is a reason "why the decisions of the Board made within its jurisdiction should be treated with deference by the court". Put into modern terms, the Board's decisions are to be reviewed on a reasonableness standard due in part to its being protected by this strict privative clause: *Exeter v. Canada (Attorney General)*, 2014 FCA 251, 465 N.R. 346; *Boshra* [*v. Canadian Association of Professional Employees*, 2011 FCA 98, 415 N.R. 77] at para. 44; *McConnell* [*v. Professional Institute of the Public Service of Canada*, 2007 FCA 142, 362 N.R. 30] at para. 14.

[98] With this caution in mind, I next discuss ILWU Canada's statutory interpretation arguments. Contrary to what ILWU Canada submits, I do not believe there is only one way of reading the provisions at issue in the *Code* and find they were reasonably interpreted by the CIRB in the present case.

[99] The fact that the statutory definition of a strike is cast in non-restrictive terms does not foreclose the CIRB's conclusion that ILWU Canada's strike ended as of July 13, 2023. It does not mean that no new strike notice could be required, nor does it equate a strike to being in a state of economic warfare. The CIRB has held that a strike occurs when there is a cessation of work or restriction in output by employees in combination or with a common understanding and

may include a wide range of activities, ranging from full work stoppages, to overtime bans, slowdowns, sick-outs, study sessions, or other similar activities taken in combination or concert to restrict output: *British Columbia Maritime Employers Association*, 2010 CIRB 518 at paras. 33–35; *International Longshoremen's Association, Locals 273, 1039, 1764 v. Maritime Employers' Association et al.*, [1979] 1 S.C.R. 120, 1978 CanLII 158 at 121; *Clarke* at §3:38–40. As noted, the requisite inquiry as to whether a strike is occurring is largely factual in nature. The breadth of the statutory definition of a strike allows the term to encompass the full range of activities employees may engage in with a common purpose that limit their normal output for the employer. The breadth of the definition does not lead to the conclusion sought by ILWU Canada and indeed begs the questions that the CIRB asked and answered in the present case, namely, whether a strike was ongoing on July 18, 2023, such that no new strike notice was required.

[100] Nor does the overall architecture of the *Code* function in the way ILWU Canada suggests. It is true that, prior to the amendments to the *Code* that enacted the requirements for strike and lockout notices and strike votes, once parties acquired the right to legally strike or lockout, they maintained that right until the new agreement was settled (or back-to-work legislation was passed or some other order was imposed that required the cessation of a strike). However, the 1999 amendments to the *Code* that enacted the requirements for strike and lockout notices and strike votes, in section 87.2 and 87.3 of the *Code*, changed this. The requirements for such notices and votes are temporal in nature. If the strike or lockout does not occur within the requisite time frame, the right to strike or lockout is lost. Thus, it is no longer true that acquisition of the right to strike is "one and done" as ILWU Canada alleges.

[101] I do not see the provisions in subsections 87.5(3) and 87.2(3) of the *Code* or paragraph 7(1)(d) of the *CIR Regulations* as having the effect ILWU Canada alleges. None of these provisions prevents the CIRB from determining that a second notice of strike must be issued in circumstances like the present and do not address the issue at all.

[102] Contrary to what ILWU Canada submits, I find that the removal of the obligation to provide a strike or lockout notice in subsections 87.2(1) and (2) of the *Code*, where the opposite party has commenced a strike or lockout, actually supports the ability of the CIRB to require a fresh notice of strike in circumstances like the present. The two subsections are contingent on the opposite party undertaking activities and not on their potential right to engage in a legal strike or lockout. In the instant case, it was the cessation of all strike activities, without any indication that the strike might resume with minimal warning, that led the CIRB to conclude that a fresh strike notice was required.

[103] Perhaps more importantly, I find it was reasonable for the Board to have relied on subsection 87.2(3) of the *Code* that requires that a new 72–hour notice be given if the strike or lockout does not commence on the date set out in a previous notice. The Board held that these requirements were enacted to provide clarity and allow appropriate measures to be put in place prior to the cessation of operations. It was entirely reasonable for the CIRB to conclude that similar concerns required the issuance of a second notice in this case, when all strike activities had ceased, ILWU Canada was mum about its intentions in the face of very public announcements that the strike had ended, and, when strike activity resumed, the cessation of work was so precipitous that vessels were left partially unloaded.

[104] Nor do I find the passages from the Sims Report or Hansard, which ILWU Canada relies on, to be instructive. Neither says anything about the circumstances that arose in this case. Rather, they speak to the situation when a strike is ongoing and there is either a variation in conduct by the striking workers or the strike is only temporarily suspended. The Board in the present case found, as a matter of fact, that neither had occurred and that the strike had ceased.

[105] As for the case law that ILWU Canada relies on, the CIRB reasonably distinguished the cases that were cited to it. The other cases that ILWU Canada now raises are not binding on the CIRB. In any event, they can also be distinguished.

[106] As concerns case law from British Columbia, there are significant differences between the federal and British Columbia strike notice provisions. As noted by the Board in its Reasons, in the British Columbia *Labour Relations Code*, there is no requirement like that in subsection 87.2(3) of the *Code*, to require a fresh notice when the strike does not occur on a date set out in the notice. In addition, there were important factual differences between the circumstances in *Sunlover* and *Weyerhaeuser* and the present case as the CIRB noted in its Reasons. The CIRB therefore provided more than adequate reasons for distinguishing *Sunlover* and *Weyerhaeuser*.

[107] While the labour legislation in Alberta and Saskatchewan more closely resembles the *Code*, there are factual distinctions between the cases relied on by ILWU Canada and the present case. More specifically, *Bi-Rite Drugs* considered whether a union was required to provide a fresh notice when it changes the form of its strike activity. The Saskatchewan Labour Relations Board was not faced with a situation like the present where all strike activity had ceased.

Similarly, in *V.S. Services*, the issue involved whether the union must give multiple strike notices in the case of rotating strike activities in the construction industry, where employees strike for a brief period and return to work. The striking employees in *V.S. Services*, unlike ILWU Canada members, also maintained an overtime ban when they returned to work. Further, both cases concerned entirely different industries. It was not unreasonable for the CIRB to reach a different result in the context of different facts and a critical industry that is depended on by many other employers and employees and that is central to a supply chain involving many moving parts.

[108] The CIRB also reasonably distinguished its prior decision in *CN 2007*. On a factual basis, the trade union in that case, unlike ILWU Canada, had made clear to the employer the possibility that it might resume strike activities without further notice if the settlement proposal were voted down. In addition, it was open to the CIRB to find that a different approach to whether a strike is ongoing needed to be taken to the facts before it in the present case as compared to assessing the timeliness of a displacement application under subsection 24(3) of the *Code* given the very different labour relations considerations at play in the two situations.

[109] Finally, as concerns the Charter right to freedom of association, the CIRB's Reasons demonstrate that it was acutely aware of the constitutional protection afforded to the right to strike, the need to minimize interference with that right, and the overarching purpose of the *Code* of fostering free collective bargaining. It reasonably explained why these principles are enshrined in the *Code* and were protected by its decision, following which, in very short order, a new collective agreement was successfully negotiated by the parties.

[110] In addition, while at least some aspects of the right to strike do receive protection under section 2(d) of the Charter, in accordance with the decision of the Supreme Court of Canada in *Saskatchewan Federation of Labour* at para. 77, the case law has not constitutionalized every facet of how the right to strike is acquired or regulated. Moreover, in *Saskatchewan Federation of Labour*, the majority of the Supreme Court of Canada held that the test for whether there has been a breach of section 2(d) of the Charter is whether "…interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining" (at para. 78. See also *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13, 491 D.L.R. (4th) 385 [*Société des casinos*] at para. 50). In *Société des casinos* at paragraphs 51–52, Justice Jamal, writing for the majority, noted factors refuting that a substantial interference occurred, such as the purpose of the legislation and the parties' ability to collectively bargain as demonstrated by the factual record.

[111] Here, the *Code* delineates and creates the right to strike and is not aimed at interfering with it. In addition, as the Board recognized, the notice provision in section 87.2 promotes clarity and allows employers to organize an orderly shutdown, which is important in many federally-regulated industries: Reasons at paras. 59–62.

[112] Further, ILWU Canada has failed to show, on the record before this Court, a substantial interference with its right to collectively bargain. ILWU Canada participated fully in the collective bargaining process, which eventually led to the successful negotiation of a new collective agreement. And, as noted by the Board, ILWU Canada exercised its right to strike before it agreed to cease its strike activities: Reasons at para. 57. I fail to see how delaying the

resumption of the strike activity by 72 hours to allow for a fresh notice of strike could ever amount to substantial interference with the right to strike. Indeed, ILWU Canada cites no case making such a finding.

[113] I therefore conclude that the CIRB's Order and Reasons were reasonable. In closing, I think it worth underscoring that, in essence, ILWU Canada has asked this Court to engage in something akin to correctness review and to interpret for itself the provisions in the *Code*. I stress that such is not our role. Conducting interpretations of the provisions in the *Code* is the very heartland of the CIRB's expertise and at the centre of the task Parliament has remitted to it. It is not a task that has been left to the courts.

VII. Proposed Disposition

[114] Thus, I would dismiss this application. The parties have agreed on the issue of costs and have advised the Court that no order is required to address costs. I would accordingly dismiss this application and make no order as to costs.

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

"I agree.
Monica Biringer J.A."

"I agree.
Elizabeth Walker J.A."

APPENDIX

***Canada Labour Code*, R.S.C. 1985, c. L-1**

…	[…]
Notice of dispute	**Notification du différend**
71(1) Where a notice to commence collective bargaining has been given under this Part, either party may inform the Minister, by sending a notice of dispute, of their failure to enter into, renew or revise a collective agreement where	**71(1)** Une fois donné l’avis de négociation collective, l’une des parties peut faire savoir au ministre, en lui faisant parvenir un avis de différend, qu’elles n’ont pas réussi à conclure, renouveler ou réviser une convention collective dans l’un ou l’autre des cas suivants :
(a) collective bargaining has not commenced within the time fixed by this Part; or	**a)** les négociations collectives n’ont pas commencé dans le délai fixé par la présente partie;
(b) the parties have bargained collectively for the purpose of entering into or revising a collective agreement but have been unable to reach agreement.	**b)** les parties ont négocié collectivement mais n’ont pu parvenir à un accord.
Copy to other party	**Remise à l’autre partie**
(2) The party who sends a notice of dispute under subsection (1) must immediately send a copy of it to the other party.	**(2)** La partie qui envoie l’avis de différend en fait parvenir sans délai une copie à l’autre partie.
Options of Minister	**Options du ministre**
72(1) The Minister shall, not later than fifteen days after receiving a notice in writing under section 71,	**72(1)** Dans les quinze jours suivant la réception de l’avis qui lui a été donné aux termes de l’article 71, le ministre prend l’une ou l’autre des mesures suivantes :
(a) appoint a conciliation officer;	**a)** nomination d’un conciliateur;
(b) appoint a conciliation commissioner;	**b)** nomination d’un commissaire-conciliateur;
(c) establish a conciliation board in accordance with section 82; or	**c)** constitution d’une commission de conciliation en application de l’article 82;
(d) notify the parties, in writing, of the Minister’s intention not to	**d)** notification aux parties, par écrit, de son intention de ne procéder à

appoint a conciliation officer or conciliation commissioner or establish a conciliation board.

aucune des mesures visées aux alinéas a), b) et c).

Idem

(2) Where the Minister has not received a notice under section 71 but considers it advisable to take any action set out in paragraph (1)(a), (b) or (c) for the purpose of assisting the parties in entering into or revising a collective agreement, the Minister may take such action.

Idem

(2) Même sans avoir reçu l'avis prévu à l'article 71, le ministre peut prendre toute mesure visée aux alinéas (1)a), b) ou c) s'il l'estime opportun pour aider les parties à conclure ou à réviser une convention collective.

Limitation

(3) The Minister may only take one action referred to in this section with respect to any particular dispute involving a bargaining unit.

Limite

(3) Le ministre ne peut prendre qu'une des mesures que prévoit le présent article à l'égard d'un différend visant une unité de négociation collective.

Delivery of notice to conciliation officer

73(1) Where a conciliation officer has been appointed under subsection 72(1), the Minister shall forthwith deliver to the officer a copy of the notice given under section 71 in respect of the dispute.

Remise de l'avis au conciliateur

73(1) Dès qu'un conciliateur est nommé en application du paragraphe 72(1), le ministre lui remet une copie de l'avis mentionné à l'article 71.

Duties of conciliation officer

(2) Where a conciliation officer has been appointed under section 72, the conciliation officer shall

(a) forthwith after the appointment, confer with the parties to the dispute and endeavour to assist them in entering into or revising a collective agreement; and

(b) within fourteen days after the date of the appointment or within the longer period that may be agreed to by the parties or allowed by the Minister, report to the Minister as to whether or not the officer has succeeded in assisting the parties in entering into or

Fonctions du conciliateur

(2) Il incombe ensuite au conciliateur :

a) de rencontrer sans délai les parties et de les aider à conclure ou réviser la convention collective;

b) dans les quatorze jours qui suivent la date de sa nomination ou dans le délai supérieur dont conviennent les parties ou que fixe le ministre, de faire rapport à celui-ci des résultats de son intervention.

revising a collective agreement.

…

Time limits

75(1) Except with the consent of the parties, the Minister may not extend the time for a conciliation officer to report, or for a conciliation commissioner or conciliation board to submit a report, beyond sixty days after the date of appointment or establishment.

Deemed reporting

(2) The conciliation officer is deemed to have reported sixty days after the date on which that officer was appointed or at the end of the extended time limit to which the parties consent, unless she or he actually reports earlier.

Deemed receipt of report

(3) The Minister is deemed to have received the report of the conciliation commissioner or conciliation board sixty days after the date on which the conciliation commissioner was appointed or the board was established or at the end of the extended time limit to which the parties consent, unless the Minister actually receives the report earlier.

…

Services to grain vessels

87.7(1) During a strike or lockout not prohibited by this Part, an employer in the long-shoring industry, or other industry included in paragraph (a) of the definition ***federal work, undertaking or business*** in section 2, its employees and their bargaining

[…]

Délai maximal

75(1) Sauf si les parties y consentent, le ministre ne peut prolonger le délai avant l’expiration duquel le conciliateur est tenu de lui faire rapport des résultats de son intervention ni le délai de remise du rapport d’un commissaire-conciliateur ou d’une commission de conciliation au-delà du soixantième jour suivant la date de la nomination ou de la constitution.

Présomption

(2) Sauf s’il fait effectivement rapport plus tôt, le conciliateur est réputé avoir fait rapport au ministre le soixantième jour suivant la date de sa nomination ou à l’expiration du délai supérieur dont conviennent les parties.

Présomption

(3) Sauf si le rapport lui est effectivement remis plus tôt, le ministre est réputé l’avoir reçu le soixantième jour suivant la date de la nomination du commissaire-conciliateur ou de la constitution de la commission, ou à l’expiration du délai supérieur dont conviennent les parties.

[…]

Services aux navires céréaliers

87.7(1) Pendant une grève ou un lock-out non interdits par la présente partie, l’employeur du secteur du débardage ou d’un autre secteur d’activités visé à l’alinéa a) de la définition de ***entreprise fédérale*** à l’article 2, ses employés et leur agent négociateur

agent shall continue to provide the services they normally provide to ensure the tie-up, let-go and loading of grain vessels at licensed terminal and transfer elevators, and the movement of the grain vessels in and out of a port.

sont tenus de maintenir leurs activités liées à l'amarrage et à l'appareillage des navires céréaliers aux installations terminales ou de transbordement agréées, ainsi qu'à leur chargement, et à leur entrée dans un port et leur sortie d'un port.

Rights unaffected

(2) Unless the parties otherwise agree, the rates of pay or any other term or condition of employment, and any rights, duties or privileges of the employees, the employer or the trade union in effect before the requirements of paragraphs 89(1)(a) to (d) were met, continue to apply with respect to employees who are members of the bargaining unit and who have been assigned to provide services pursuant to subsection (1).

Maintien des droits

(2) Sauf accord contraire entre les parties, les taux de salaire ou les autres conditions d'emploi, ainsi que les droits, obligations ou avantages des employés, de l'employeur ou du syndicat en vigueur avant que les conditions prévues aux alinéas 89(1)a) à d) soient remplies demeurent en vigueur à l'égard des employés de l'unité de négociation affectés au maintien de certaines activités en conformité avec le paragraphe (1).

Board order

(3) On application by an affected employer or trade union, or on referral by the Minister, the Board may determine any question with respect to the application of subsection (1) and make any order it considers appropriate to ensure compliance with that subsection.

Ordonnance du Conseil

(3) Sur demande présentée par un employeur ou un syndicat concerné ou sur renvoi fait par le ministre, le Conseil peut trancher toute question liée à l'application du paragraphe (1) et rendre les ordonnances qu'il estime indiquées pour en assurer la mise en œuvre

…

[…]

Mediators

105(1) The Minister, on request or on the Minister's own initiative, may, where the Minister deems it expedient, at any time appoint a mediator to confer with the parties to a dispute or difference and endeavour to assist them in settling the dispute or difference.

Médiateurs

105(1) Pour les cas où il le juge à propos, le ministre peut à tout moment, sur demande ou de sa propre initiative, nommer un médiateur chargé de conférer avec les parties à un désaccord ou différend et de favoriser entre eux un règlement à l'amiable.

Recommendations

(2) At the request of the parties or the Minister, a mediator appointed pursuant to subsection (1) may make

Recommandation

(2) À la demande des parties ou du ministre, un médiateur nommé en vertu du paragraphe (1) peut faire des

recommendations for settlement of the dispute or the difference.

…

Additional powers

107 The Minister, where the Minister deems it expedient, may do such things as to the Minister seem likely to maintain or secure industrial peace and to promote conditions favourable to the settlement of industrial disputes or differences and to those ends the Minister may refer any question to the Board or direct the Board to do such things as the Minister deems necessary.

recommandations en vue du règlement du différend ou du désaccord.

[…]

Pouvoirs supplémentaires

107 Le ministre peut prendre les mesures qu’il estime de nature à favoriser la bonne entente dans le monde du travail et à susciter des conditions favorables au règlement des désaccords ou différends qui y surgissent; à ces fins il peut déférer au Conseil toute question ou lui ordonner de prendre les mesures qu’il juge nécessaires.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-186-23
STYLE OF CAUSE:	INTERNATIONAL LONGSHORE AND WAREHOUSE UNION – CANADA v. BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCIATION
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	MARCH 13, 2024
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	BIRINGER J.A. WALKER J.A.
DATED:	SEPTEMBER 13, 2024

APPEARANCES:

Steven Rogers Rebecca Kantwerg	FOR THE APPLICANT
Ryan Copeland Andrew Nicholl Gabrielle Berron-Styan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Victory Square Law Office LLP Vancouver, British Columbia	FOR THE APPLICANT
Roper Greyell LLP Vancouver, British Columbia	FOR THE RESPONDENT