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TAB 2a

THE SIX-MINUTE LABOUR LAWYER

CHANGES AND NEW CASE LAW UPDATE FROM THE CIRB AND OLRB

Important Legislative Changes Impacting the Canada Industrial Relations Board

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cpd Continuing Professional Development

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I. Introduction[1]

Recent papers prepared for the Six-Minute Labour Lawyer Conference have contrasted procedures and jurisprudence at the Canada Industrial Relations Board (CIRB) and the Ontario Labour Relations Board.

This year's CIRB paper will highlight some significant upcoming legislative changes[2], as well as recent key decisions.

For example, Bill C-525[3], whose short title is the "*Employees' Voting Rights Act*", will require the CIRB to hold mandatory votes in certification and revocation matters.

Similarly, Bill C-4[4], *inter alia*, will amend Part II of the *Canada Labour Code* (Occupational Health and Safety) (*Code*). While the Board has a limited role under Part II, some of the amendments impact sections it may be called upon to interpret.

The recent budget implementation legislation, Bill C-31[5], *inter alia*, will impact the work of support staff serving the CIRB and other federal tribunals. Bill C-31 creates the Administrative Tribunals Support Service of Canada (ATSSC).

This paper will reference some of these proposed changes. The parties themselves will determine how these legislative changes may impact the positions they take before the Board.

[1] The comments in this paper are of a summary nature only and do not bind the CIRB or any of its members.
[2] Comments about pending legislation are accurate as of this paper's submission date: May 22, 2014.
[3] Bill C-525, An *Act to amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act and the Public Service Labour Relations Act*, 2nd Sess, 41st Parl, 62-63 Elizabeth II, 2013-2014 (Passed by House of Commons April 9, 2014, First Reading in Senate April 10, 2014) ("Bill C-525").
[4] Bill C−4, *A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures*, 2nd Sess, 41st Parl, 2013, (SC 2013, c 40) (Royal Assent, December 12, 2013) ("Bill C-4").
[5] Bill C-31, An *Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures*, 2nd Sess, 41st Parl, 62-63 Elizabeth II, 2013-2014, (Second Reading and referral to Committee April 8, 2014) ("Bill C-31").

II. Mandatory votes in certification and decertification matters

A. Introduction

The CIRB, and its predecessor the Canada Labour Relations Board (CLRB), have always administered a membership card based certification system. The *Code* establishes when such membership evidence is sufficient for certification and when the Board is obliged to hold a representation vote.[6]

In recent decades, various provincial legislatures have changed their labour legislation either to make certification votes mandatory or to adopt a card-based system.

For example, Newfoundland recently adopted a membership card based system for a trade union which surpassed a 65% membership threshold among bargaining unit members.[7]

By contrast, Ontario adopted mandatory representation votes in 1995, but in 2005 adopted a card-based process exclusively for construction employers.[8]

B. Current CIRB Process

1. Certification

Section 28 of the *Code* establishes the process the Board follows for certification applications:

> 28. Where the Board
>
> (*a*) has received from a trade union an application for certification as the bargaining agent for a unit,

[6] Sections 28−29 of the *Code*.
[7] Section 47 of the *Labour Relations Act*, RSNL, 1990 c. L-1.
[8] *Labour Relations Act*, S.O. 1995, c.1, sections 8(2) and 128. The author thanks Ms. Lori Straznicky and Ms. Stéphanie Paquette for providing this information.

> (*b*) has determined the unit that constitutes a unit appropriate for collective bargaining, and
>
> (*c*) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,
>
> the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit.

Under section 28(*a*), the trade union initially suggests the scope of the bargaining unit it seeks to represent. While the Board has the ultimate discretion in determining the appropriate bargaining unit (section 28(*b*)), it gives significant weight to the trade union's suggested unit.

In *Viterra Inc*., 2012 CIRB 633 (*Viterra 633*), the Board commented on the importance of the trade union's proposed bargaining unit:

> [48] The Board's conclusion as mentioned at the outset does not necessarily mean it disagrees with Viterra's position that its supervisory employees, and those with the title "Assistant Manager", could be employees under section 3 of the *Code* and included in a bargaining unit. Section 27 allows the Board to consider whether to include these types of supervisory employees in a bargaining unit.
>
> [49] Similarly, the Board considered Viterra's suggestion to add office staff to the GSU's proposed production and maintenance bargaining unit. That configuration is certainly one option, among many, from which the Board could choose.
>
> [50] The Board considered Viterra's position as it evaluated the appropriateness of the GSU's proposed production and maintenance unit. **The *Code* makes explicit reference to the fact the trade union initially proposes the unit. The Board will often not intervene in the trade union's suggested bargaining unit, unless the Board concludes that it is not appropriate.**
>
> [51] While Viterra makes various arguments about what the optimum bargaining unit might be at the Mill, the Board does not find that these arguments demonstrate that the GSU's suggested unit was inappropriate.
>
> (emphasis added)

The *Code* at section 28(*c*) gives the Board the discretion to determine the appropriate date when it will consider membership wishes. Generally, the Board uses the date of the certification application.

However, in *Algoma Central Marine, a Division of Algoma Central Corporation*, 2009 CIRB 469, the Board exercised its discretion to change the date, given the seasonal aspect of the work in question:

> [7] Section 28(*c*) of the *Canada Labour Code (Part I−Industrial Relations)* (the *Code*) provides the Board with the discretion to select "such other date as the Board considers appropriate" for the purpose of determining membership support for a union**. In this case, recognizing the seasonal nature of the work in this industry, the Board determined that it was appropriate to take note of the fact that employees who would normally work during the navigation season were not at work on the date that the CMSG and the SIU filed their displacement applications. The Board concluded that, under the circumstances of this case, the wishes of all licensed marine engineer officers who had worked in the bargaining unit during the shipping season, and who had demonstrated a sufficient attachment to the bargaining unit, should be considered as well. To do otherwise in a seasonal operation such as this would permit an applicant union to delay filing its application until a date on which it knew that individuals who did not support its application were not at work,** and thereby deprive a significant number of employees of the ability to have a say as to the bargaining agent that is to represent them.
>
> [8] The Board therefore decided that it would consider the wishes of permanent and relief licensed marine engineer officers who had worked during the six-month period preceding the date of the application for certification, provided they demonstrated a sufficient attachment to the bargaining unit. This approach is similar to that adopted in *Murray Bay Marine Terminal Inc*. (1983), 50 di 163 (CLRB no. 401), where the Canada Labour Relations Board held that it had to adopt a flexible approach to take into account the nature of the industry involved. In that case, the Board set a reference period of 15 months prior to the date of the applications for certification for the purpose of ascertaining the employees' wishes, due to the irregular nature of the work in the port.
>
> (emphasis added)

In *Fedex Ground Package System*, Ltd., 2010 CIRB 522, the Board noted the importance of the application date. In that case, a trade union sought to withdraw its first certification application. It asked the Board to transfer its membership evidence to a second application, which included additional membership evidence.

Given the importance of evaluating membership evidence as of the application date, the Board did not grant the trade union leave to withdraw its first certification application:

> [29] In this case, the Teamsters' two certification applications seek to represent the identical bargaining unit. The Teamsters have asked the Board to transfer the membership evidence from the first application and add it to the membership evidence included in its second certification application.

> [30] The Board has decided not to grant leave to withdraw in the specific circumstances of this case.
>
> [31] Section 28(*c*) of the *Code* establishes the importance of the application date for any certification application [citation omitted].
>
> [32] The Board has placed great emphasis on the date of a certification application. The *Code* was amended in order to adopt explicitly the Board's policy of using the application date when evaluating a trade union's membership support. If a trade union has over 50% support as of the application date, the Board must certify it. If membership support exceeds 35% but is less than 50%, then the Board must order a representation vote (section 29(2)).
>
> [33] One of the corollaries arising from the Board's policy about the importance of the application date is that the Board will generally not accept evidence, whether by petition or otherwise, from employees who attempt to withdraw their support for the applicant trade union. Such evidence must be received prior to the application date.
>
> [34] In order to avoid a multitude of labour relations problems which could arise following the public filing of a certification application, the Board relies heavily on the application date when it analyzes membership support.
>
> [35] In the Board's view, fairness dictates that membership evidence neither be subtracted from, nor added to, after the application date. The Board can occasionally choose another date to examine membership evidence. No arguments were presented in this case suggesting the Board should use another date to evaluate support.

A trade union's membership support in the bargaining unit which is not less than 35%, but not more than 50%, obliges the Board to hold a representation vote. The Board currently has the discretion to order a representation vote in any case: Section 29(1).

In *Viterra 633*, *supra*, the Board described its general process when considering a certification application:

> [47] While certification applications, depending on the circumstances, do not always raise the same issues, the Board's analysis frequently focusses on the same questions, including:
>
> 1. Is the applicant a trade union? (sections 3 and 28(*a*));
> 2. Which individuals are "employees" under the *Code*? (sections 3 and 28(c));
> 3. Is the trade union's proposed unit appropriate for collective bargaining? (sections 24(1), 27(1) and 28(*b*));
> 4. If the proposed unit is not appropriate, what would be an appropriate unit? (sections 16(p)(v), 27(1) and 28(*b*));
> 5. Which employees, as defined under the *Code*, should be included in an appropriate bargaining unit? (sections 27(2)–(6)); and
> 6. Does the trade union have majority support, or sufficient support for a vote, in a bargaining unit the Board has found appropriate for collective bargaining? (sections 28(*c*), 29(1) and(2)).

2. Revocation

Sections 38 to 42 deal with revocation and its consequences. These provisions cover situations involving both certified and voluntarily recognized bargaining agents.

The Board allows an applicant to file its membership evidence by way of petition, but will in almost all cases hold a representation vote for revocation applications. One issue which arises frequently in the case law is whether the employer was involved in promoting or aiding the revocation application.[9]

Section 39(2) of the *Code* provides a special protection for first time bargaining agents, as well as during a strike or lockout:

> 39. (2) Where no collective agreement applicable to a bargaining unit is in force, no order shall be made pursuant to paragraph (1)(*a*) in relation to the bargaining agent for the bargaining unit unless the Board is satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement in relation to the bargaining unit.

The Board in *Butt*, 2012 CIRB 621, described the test it has traditionally applied for those limited situations to which section 39(2) might apply:

> [11] In *Leona Genge et al*., 2007 CIRB 395 (*Genge 395*), the Board reviewed the traditional analysis used by its predecessor, the Canada Labour Relations Board (CLRB), when interpreting section 39(2) (formerly section 138(2)):
>
> > [24] Given the CLRB's interpretation of the *Code*, it had no choice in *J. Phillips et al*., [(1978), 34 di 603; and (1979) 1 CLRBR 180 (CLRB no. 168)] but to reject the trade union's argument that section 39(2) applied to any bargaining situation, as long as a bargaining agent had made a reasonable effort to conclude a collective agreement:
> >
> > > The union argues for an interpretation of "in force" that would give it application in all states of union-employer relationship, even where there has been a long bargaining relationship, successive collective agreements and the employees have had the experience of the collective bargaining regime and their bargaining agent. It submits the intent is to encourage collective bargaining and to achieve this intent section 138(2) [now section 39(2)] restricts employee freedom to revoke certification but

[9] See, for example, *Robinson*, 2003 CIRB 209 and *Laidlaw Transit Ltd., carrying on business as Laidlaw Education Services*, 2005 CIRB 327.

> section 124(2) [now section 24(2)] allows for change of bargaining agents. The mischief perceived by the union is too wide. There is a sound experiential base for section 138(2) [now section 39(2)] applying in the two situations we have concluded it was intended to apply. We can see no sound policy reason for Parliament to restrict employee freedom to the extent advocated by the union in its interpretation. ...
>
> (*J. Phillips et al*., *supra*, pages 613; and 188)

[25] If section 39(2) does apply to a particular case, then *J. Phillips et al*., *supra*, and subsequent Board decisions have held that a bargaining agent will be protected as long as it demonstrates that it has negotiated with the employer and consulted/communicated with members of the bargaining unit.

[26] In short, the CLRB, in *J. Phillips et al*., *supra*, was not prepared to limit employee freedom of choice so that a reasonable effort by the bargaining agent to conclude a collective agreement would prevent any revocation application. Rather, by interpreting the *Code* and the different states of the bargaining relationship between employers and trade unions, the CLRB concluded that Parliament intended section 39(2) to apply only to a bargaining agent that was certified but had yet to conclude a collective agreement or when the parties had acquired the right to strike or lockout.

[27] The CLRB, in *J. Phillips et al., supra*, also determined that the Board examines the situation as of the date of the filing of the revocation application rather than at the date of the Board's decision, given that the parties' situation could change in the interim.

[28] This Board has accepted and applied this longstanding interpretation of section 39(2) in similar situations (see *Les Meszaros et al*., [2002] CIRB no. 188; and 95 CLRBR (2d) 124).

[29] In summary, a bargaining agent can seek the protection available under section 39(2) of the *Code* if:

1. it is negotiating a first collective agreement or if the parties have acquired the right to strike or lockout;

2. it has made a reasonable effort to enter into a collective agreement with the employer; and

3. subject to the nuances in the Board's case law, it has consulted with and kept members of the bargaining unit informed about the progress of the negotiations.

[12] When the Board applies the facts in the instant case to the three-part test in *Genge 395*, it is clear that the CEP is entitled to the protection found at section 39(2) of the *Code*. The Board will consider each element of the test separately.

C. Bill C-525 Changes

1. Certification

Bill C-525 will require mandatory votes for all certification applications. If a trade union's membership evidence demonstrates 40% support in the bargaining unit as of the date of the certification application, then a representation vote must be held.

The Board will no longer have a discretion to use a date other than the application date when evaluating if the trade union has achieved the requisite 40% support. That evaluation of employee wishes will serve only to determine if a vote takes place. The results of the vote alone govern whether the Board will grant the certification.

The following table compares the text of the current and proposed section 28:

Current section 28	**Proposed section 28**
28. Where the Board (*a*) has received from a trade union an application for certification as the bargaining agent for a unit, (*b*) has determined the unit that constitutes a unit appropriate for collective bargaining, and (*c*) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent, the Board shall, subject to	28. (1) If the Board is satisfied on the basis of the results of a secret ballot representation vote that a majority of the employees in a unit who have cast a ballot have voted to have a trade union represent them as their bargaining agent, the Board shall, subject to this Part, certify the trade union as the bargaining agent for the unit. (2) The Board shall order that a secret ballot representation vote be taken among the employees in a unit if the Board (*a*) has received from a trade union an application for certification as the

this Part, certify the trade union making the application as the bargaining agent for the bargaining unit.	bargaining agent for the unit; (*b*) has determined that the unit constitutes a unit appropriate for collective bargaining; and (*c*) is satisfied on the basis of evidence of membership in the trade union that, as of the date of the filing of the application, at least 40% of the employees in the unit wish to have the trade union represent them as their bargaining agent.

2. Revocation

The same 40% threshold in membership support required for certification will also apply to revocation applications in the amended section 38. Bill C-525 does not continue the current section 39(2), *supra*.[10]

[10] See section 5 of Bill C-525.

Current section 38	Proposed section 38 (sections 38(1) and (3) are amended)
38. (1) Where a trade union has been certified as the bargaining agent for a bargaining unit, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order revoking the certification of that trade union.	38. (1) If a trade union has been certified as the bargaining agent for a bargaining unit, any employee who claims to represent at least 40% of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order revoking the certification of that trade union.
(2) An application for an order pursuant to subsection (1) may be made in respect of a bargaining agent for a bargaining unit,	(2) An application for an order pursuant to subsection (1) may be made in respect of a bargaining agent for a bargaining unit,
(*a*) where a collective agreement applicable to the bargaining unit is in force, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24 unless the Board consents to the making of the application for the order at some other time; and	(*a*) where a collective agreement applicable to the bargaining unit is in force, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24 unless the Board consents to the making of the application for the order at some other time; and
(*b*) where no collective agreement applicable to the bargaining unit is in force, at any time after a period of one year from the date of certification of the trade union.	(*b*) where no collective agreement applicable to the bargaining unit is in force, at any time after a period of one year from the date of certification of the trade union.
(3) Where a collective agreement applicable to a bargaining unit is in force but the bargaining agent that is a party to the collective agreement has not been certified by the Board, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order declaring that the bargaining agent is not entitled to represent the employees in the bargaining unit.	(*3*) If a collective agreement applicable to a bargaining unit is in force but the bargaining agent that is a party to the collective agreement has not been certified by the Board, any employee who claims to represent at least 40% of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order declaring that the bargaining agent is not entitled to represent the employees in the
(4) An application for an order pursuant to subsection (3) may be made in respect of a bargaining agent	

for a bargaining unit, (*a*) during the term of the first collective agreement that is entered into by the employer of the employees in the bargaining unit and the bargaining agent, (*i*) at any time during the first year of the term of that collective agreement, and (*ii*) thereafter, except with the consent of the Board, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24; and (*b*) in any other case, except with the consent of the Board, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24. (5) An application under subsection (1) or (3) must not, except with the consent of the Board, be made in respect of the bargaining agent for employees in a bargaining unit during a strike or lockout of those employees that is not prohibited by this Part.	bargaining unit. (4) An application for an order pursuant to subsection (3) may be made in respect of a bargaining agent for a bargaining unit, (*a*) during the term of the first collective agreement that is entered into by the employer of the employees in the bargaining unit and the bargaining agent, (*i*) at any time during the first year of the term of that collective agreement, and (*ii*) thereafter, except with the consent of the Board, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24; and (*b*) in any other case, except with the consent of the Board, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24. (5) An application under subsection (1) or (3) must not, except with the consent of the Board, be made in respect of the bargaining agent for employees in a bargaining unit during a strike or lockout of those employees that is not prohibited by this Part.

Current section 39	**Proposed section 39**
39. (1) Where, on receipt of an application for an order made under subsection 38(1) or (3) in respect of a bargaining agent for a bargaining unit, and after such inquiry by way of a representation vote or otherwise as the Board considers appropriate in the circumstances, the Board is satisfied that a majority of the employees in the bargaining unit no longer wish to have the bargaining agent represent them, the Board shall, subject to subsection (2), by order, (*a*) in the case of an application made under subsection 38(1), revoke the certification of the trade union as the bargaining agent for the bargaining unit; or (*b*) in the case of an application made under subsection 38(3), declare that the bargaining agent is not entitled to represent the employees in the bargaining unit. (2) Where no collective agreement applicable to a bargaining unit is in force, no order shall be made pursuant to paragraph (1)(*a*) in relation to the bargaining agent for the bargaining unit unless the Board is satisfied that the bargaining agent has failed	39. If the Board has received an application for an order made under subsection 38(1) or (3) in respect of a bargaining agent for a bargaining unit, the Board shall grant the order if (*a*) it is satisfied on the basis of written evidence that, as of the date of the filing of the application, at least 40% of the employees in the bargaining unit no longer wish to have the bargaining agent represent them, and (*b*) it is satisfied on the basis of the results of a secret ballot representation vote that a majority of the employees in the bargaining unit who have cast a ballot no longer wish to be represented by the bargaining agent.

to make a reasonable effort to enter into a collective agreement in relation to the bargaining unit.	

Bill C-525's move to mandatory votes impacts not only the *Code*, but also the *Parliamentary Employment and Staff Relations Act*, R.S.C., 1985, c.33 (2nd Supp.) and the *Public Service Labour Relations Act*, S.C. 2003, c.22, s.2.

Bill C-525 has not yet received royal assent. Section 13 in Bill C-525 indicates the Act will come into force six months following the day it receives royal assent:[11]

> 13. This Act comes into force six months after the day on which it receives royal assent.

III. Changes to Part II of the *Code*: Occupational Health and Safety

A. Introduction

The Board's jurisdiction in occupational health and safety matters has ebbed and flowed over the years. From 1978 to 1986, the *Code* tasked the Board with reviewing all safety officer decisions examining whether danger existed in situations where an employee had invoked the right to refuse unsafe work.

[11] At the time of this paper's submission, the Senate has completed first reading of the Bill.

Parliament amended the *Code* in 1986 to limit Board reviews to those safety officer decisions which found that no danger had existed. After the 2000 amendments, the Board no longer had any jurisdiction to review safety officer decisions.

During this time period, the Board had jurisdiction over what have been called reprisal complaints. The Board's original jurisdiction covered situations where an employee complained about an employer's retaliation following the exercise of the right to refuse unsafe work.

After the 2000 *Code* amendments, this jurisdiction expanded to cover any alleged Part II occupational health and safety reprisals, whether arising from the right to refuse unsafe work or not.

B. The Board's role in safety complaints

The *Code* prohibits an employer from retaliating against an employee for his or her participation in a health and safety process: section 147. An employee's participation could result from giving testimony in a proceeding and/or providing information relating to a Part II matter. It also encompasses acting in accordance with, or seeking the enforcement of, Part II of the *Code*.[12]

Section 133 of the *Code* governs the complaint process. The *Code* imposes a 90-day time limit for the filing of a complaint, though the Board has the discretion to extend this time limit.[13]

The employer bears the burden of proof for those complaints arising from the exercise of the right to refuse unsafe work. For all other complaints, the complainant has the burden.[14]

In some cases, due to the wording of section 128(1) of the *Code*, an issue may arise whether an employee had "reasonable cause to believe" a danger existed. In *Court*, 2010 CIRB 498 (*Court 498*), the Board noted that an employee, while needing reasonable cause to believe in a danger, did not ultimately have to be correct in that belief:

[12] *Bazrafshan*, 2014 CIRB 707 at paragraphs 42−44.
[13] *Perron-Martin*, 2014 CCRI 719 at paragraphs 24−28.
[14] See section 133(6) of the *Code* and *Anderson* v. *IMTT-Québec Inc*., 2013 FCA 90.

> [107] **The threshold for finding a "reasonable cause to believe" is necessarily low. The issue is distinct from the question of whether danger actually existed.** The Board has applied its reasonable cause test for exceptional situations. In the vast majority of cases, the Board has found that an employee had reasonable cause, even if the evidence later shows the employee was mistaken in his or her belief about danger existing.
>
> [108] The fact the Board has determined that Mr. Court modified the Inspection Report does not necessarily mean that his initial safety concerns were fictitious. The Board has found it incongruous that Mr. Court would be asking for an air-conditioned tractor under the collective agreement when, as JGH argued, tractor 1316 had proper air conditioning. Without the benefit of the Safety Officer's investigation, the Board is deprived of the helpful objective evidence which might have illuminated whether Mr. Court was trying to create a non-existent case or instead trying to improve an already existing case that fell within the protections found at Part II of the *Code*.
>
> [109] In the circumstances, while the Board had concerns about Mr. Court's motives given what he did with the Inspection Report, **the Board has concluded that Mr. Court's report to JGH about the air conditioning issue met the low threshold which exists regarding a reasonable cause to believe under section 128(1) of the *Code*.** The Board makes no finding whether that issue could be a danger under the *Code*.
>
> (emphasis added)

Similarly, in *Alexandrov*, 2011 CIRB 602, the Board did not focus on the correctness of the employee's belief. The health and safety officer later found that no danger had existed:

> [26] **The Board is satisfied that Mr. Aleksandrov had reasonable cause to believe danger existed. The Board does not examine whether Mr. Aleksandrov was correct in his belief. Indeed, the HSO's later investigation concluded that danger as defined in the *Code* did not exist.**
>
> [27] However, the facts demonstrate that Mr. Aleksandrov had concerns that the skin rash which had forced him to see a doctor, and for which he received a medical prescription, resulted from a situation in his workplace. Moreover, Mr. Aleksandrov had asked for permission the day before to install in his truck his own mattress for those occasions when he slept in the truck when carrying out his assignments.
>
> [28] As noted in the HSO decision at section II subsection 5, Zavitz "suggested installing the new mattress **after** the assigned trip was completed" (emphasis in original).
>
> [29] Zavitz contested before the HSO, as it was entitled, whether any danger existed, but did not suggest that Mr. Aleksandrov's refusal was in any way a pretext designed to deal with some other work situation, such as an ongoing employment dispute.

> [30] Mr. Aleksandrov has met his obligation to have reasonable cause to believe there was a danger to him in the workplace. The *Code* foresees that such situations will then be properly investigated, including, if necessary, having an independent HSO review the situation.
>
> (emphasis added)

Nonetheless, the Board has found in certain cases that an employee did not have "reasonable cause". In *Isinger*, 2013 CIRB 688 (*Isinger 688*), the Board found that frustration arising from other ongoing occupational health and safety issues had motivated the work refusal:

> [89] The Board has concluded on the specific facts of this case that Messrs. Mike and Dave Isinger did not have reasonable cause to believe danger existed when they exercised their right to refuse.
>
> [90] **As was mentioned by the CLRB in *Pratt, supra*, the right to refuse is not the primary vehicle for attaining the objectives of Part II of the *Code*. In the Board's view, Mr. Mike Isinger's October 26, 2011 refusal document was an effort to bring to a head the ongoing compliance issues on which TSI, the Committee, the HSO and others had been working.**
>
> [91] The right to refuse is not an appeal mechanism to deal with frustrations arising from the *Code*'s compliance regime.
>
> [92] The Board had no doubt when listening to Mr. Mike Isinger's testimony that he, along with his brother, has a sincere interest in safety at TSI. But despite their sincerity, the overall context must be examined when determining if they had reasonable cause.
>
> [93] **Mr. Isinger's typed refusal document (Ex-2 Tab 2), rather than identifying a specific danger or dangers, instead expressed frustration with multiple ongoing compliance issues. For example, his refusal document referenced the Rail AVC. TSI, the Committee and HSO Ryan were already involved in considerable detail with the Rail AVC as part of the ongoing compliance process.**
>
> [94] Mr. Mike Isinger testified that the Committee was not making progress on these issues. While Mr. Isinger may have been frustrated that his compliance complaint which had led to the Rail AVC had not yet been resolved to his satisfaction, the right to refuse work process is not a "next step" to force matters to progress more quickly.
>
> (emphasis added)

The Board has also described the three-step analysis it applies to Part II complaints. That analysis differs slightly depending on whether the complainant exercised the right to refuse or not.

In *Paquet*, 2013 CIRB 691, the Board described its analysis for complaints which did not involve a work refusal:

> [59] In summary, the Board is not tasked with the enforcement or interpretation of most of the provisions of Part II. Allegations of non-compliance or contraventions fall to a Health and Safety Officer (HSO), if the parties themselves are unable to resolve them. Similarly, the Board does not resolve collective agreement disputes, even if they relate to Part II health and safety issues. The *Code* instead mandates the Board to consider if an employer imposed or threatened discipline, including a dismissal, because an employee participated in a Part II Process, as defined earlier.
>
> [60] This interplay of sections 147 and 133 gives rise to a three-step analysis. Each step must be passed successfully in order for the Board to find a *Code* violation.
>
> 1. Did Air Canada impose, or threaten to impose, discipline?
> 2. Were the employees participating in a Part II Process?
> 3. Did a nexus exist between the Part II Process and Air Canada's discipline?

In *Court 498*, *supra*, the Board examined its three step analysis for complaints arising from a work refusal:

> [121] As a result of the addition of section 147.1(1) of the *Code*, there can now be three steps to examine in a safety case:
>
> i) Has the employee met the low threshold of having reasonable cause to believe a danger existed?
>
> ii) Did the employer impose discipline, contrary to section 147 of the *Code*, because an employee invoked Part II safety rights? and
>
> iii) Even if the employer imposed such discipline, did it wait until after a full investigation and any appeals, and did the discipline result solely from the employee's wilful abuse of those Part II rights?
>
> [122] Given the burden of proof under section 133(6) of the Code, JGH has not convinced the Board that it disciplined Mr. Court for reasons unrelated to safety. JGH could not rely on section 147.1(1) given the absence of a full investigation under Part II. JGH violated the Code when it disciplined Mr. Court.

C. Bill C-4: Upcoming changes in Occupational Health and Safety

The Ministry of Finance provided this explanation for Bill C-4's amendments to Part II of the *Code*:[15]

[15] http://www.fin.gc.ca/pub/c4/7-eng.asp

> Division 5 amends Part II of the *Canada Labour Code*, to ensure that employees and employers remain at the forefront of resolving occupational health and safety issues.
>
> Over 80% of refusals to work in the last 10 years – from 2003 to 2013 – have been determined to be situations of no danger, even after appeals. By clarifying the definition of "danger" employees and employers will be better able to deal with health and safety issues through the Internal Responsibility System.
>
> Employees would retain their fundamental right to refuse dangerous work, while at the same time ensuring that the work refusal process is balanced and clear. The new process would enhance the internal responsibility system and ensure that work place parties assess and address occupational heath and safety issues effectively, efficiently and in a collaborative manner.
>
> By strengthening the internal responsibility system, the Government will be able to improve its focus on critical issues that affect the health and safety of Canadians in the work place.
>
> This measure also makes amendments to provide the Minister with greater enforcement oversight of the *Canada Labour Code*. This would provide health and safety officers with the additional support they need in making decisions and issuing directions, which would enhance the quality and consistency of these decisions, as well as improve the overall safety of Canadian workplaces.

Many of Bill C-4's changes do not impact the Board's jurisdiction directly. Rather, many changes delete Part II references to health and safety officers and refer instead directly to the Minister of Labour. The Minister, and those individuals she designates, as described in the new section 140(1) of the *Code*, will carry out various *Code* responsibilities:

> 140. (1) Subject to any terms and conditions specified by the Minister, the Minister may delegate to any qualified person or class of persons any of the powers, duties or functions the Minister is authorized to exercise or perform for the purposes of this Part.

Three specific Part II changes may be of interest to labour lawyers involved in Part II complaints.

1. Definition of danger

The current definition of danger in section 122, and Bill C-4's amended definition, read as follows:

Current definition of "danger"	**Proposed definition of "danger"**
"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;	"danger" means any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered;

Bill C-4 does not amend section 128(1), *supra*, which starts the work refusal process. However, the reference to the term "danger" in section 128(1) may bring into play Bill C-4's amended definition of danger in section 122.

2. Requirement for written documentation

New section 128(7.1) will require an employer to prepare a written report setting out the results of its investigation into an employee's work refusal:

> 128. (7.1) The employer shall, immediately after being informed of a refusal under subsection (6), investigate the matter in the presence of the employee who reported it. Immediately after concluding the investigation, **the employer shall prepare a written report** setting out the results of the investigation.
>
> (emphasis added)

New sections 128 (10.1), (15) and (16) reference other required written documentation for the refusal process, if an earlier resolution is not achieved:

> 128. (10.1) Immediately after concluding the investigation, the members of the work place committee designated under subsection (10) or the health and safety representative **shall provide a written report** to the employer that sets out the results of the investigation and their recommendations, if any.
>
> 128. (15) If the employer makes a decision under paragraph (13)(*b*) or (*c*), **the employer shall notify the employee in writing.** If the employee disagrees with the employer's decision, the employee is entitled to continue the refusal, subject to subsections 129(1.2), (1.3), (6) and (7).
>
> 128. (16) If the employee continues the refusal under subsection (15), the employer shall immediately inform the Minister and the work place committee or the health and safety representative of its decision and the continued refusal. **The employer shall also provide a copy of the report on the matter prepared under subsection (7.1) to the Minister along with a copy of any report referred to in subsection (10.1) or (10.2).**
>
> (emphasis added)

3. Limitation on complaints: section 133(3)

Current section 133(3)	**Revised section 133(3)**
133. (3) A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.	133. (3) A complaint in respect of the exercise of a right under section 128 or 129 may not be made unless the employee has complied with subsection 128(6) or the Minister has received the reports referred to in subsection 128(16), as the case may be, in relation to the matter that is the subject-matter of the complaint.

Bill C-4 also amends section 133(3) of the *Code*. The current section 133(3) places a restriction on complaints arising from the right to refuse. For example, section 128(6) requires an employee to report a work refusal to the employer. A complaint may not be filed if the employee has failed to meet this obligation.

The employee's obligation under section 128(6) is not onerous, as the Board mentioned in *Court 498*, *supra*:

> [58] Mr. Shepley was similarly consistent in his testimony. In cross-examination, Mr. Court asked Mr. Shepley if he knew that Mr. Court's refusal to work was because he thought it was unsafe. Mr. Shepley stated "I agree that you stated unsafe work, but in my view there was no unsafe activity involved."
>
> [59] Mr. Shepley further confirmed his view during cross-examination that Mr. Court's claim of unsafe work "was unfounded."
>
> …
>
> [61] The Board is satisfied that Mr. Court met his obligation under section 128(6) by making a report to JGH. A worker's obligation is simply to advise the employer he or she is invoking the right to refuse: *John P. Grogan* (1986), 67 di 183 (CLRB no. 594).

The current section 133(3) also refers to the obligation to notify a health and safety officer of a continued work refusal (section 128(13)).

Bill C-4 amends this second restriction in section 133(3). That section will in the future refer to the requirement for the employer to file various written reports, as noted in the new section 128(16), *supra*.

Under section 203 of Bill C-4, the amendments to Part II come into force on a date fixed by the Governor in Council. While Bill C-4 received royal assent on December 12, 2013, no date has yet been fixed for the coming into force of these provisions:

> 203. The provisions of this Division come into force on a day or days to be fixed by order of the Governor in Council.

IV. Bill C-31: The Administrative Tribunals Support Service of Canada Act (ATSSCA)[16]

A. Current CIRB situation

At the federal level, each administrative tribunal currently manages both its adjudicative functions, carried out mostly by governor in council appointees, as well as its support operations using its own permanent staff.

The *Code* in section 12.01 sets out explicitly that the CIRB Chair is the chief executive officer who supervises and directs the Board's work.

In addition to her role as the chief executive officer, the Chair also has key adjudicative responsibilities, whether acting alone or on Board panels:

> 14. (1) Subject to subsection (3), a panel of not less than three members, at least one of whom is the Chairperson or a Vice-Chairperson, may determine any matter that comes before the Board under this Part.
>
> (2) Where a panel formed under subsection (1) is composed of one or more members representing employees, an equal number of members representing employers must also form part of the panel and vice versa.
>
> (3) The Chairperson or a Vice-Chairperson may alone determine a matter that comes before the Board under this Part with respect to
>
> (*a*) an uncontested application or question;
>
> (*b*) a question referred to in paragraph 16(*p*);
>
> (*c*) a complaint made under subsection 97(1) in respect of an alleged contravention of section 37 or 69 or any of paragraphs 95(*f*) to (*i*);
>
> (*d*) a request for an extension of time for instituting a proceeding;
>
> (*e*) a preliminary proceeding; or

[16] Bill C-31 will enact the ATSSCA. This summary reflects Bill C-31 as of Second Reading on April 8, 2014. It is currently at the Committee stage.

> (*f*) any other matter, if the Chairperson determines that it is appropriate because of the possibility of prejudice to a party, such as undue delay, or if the parties consent to a determination by the Chairperson or a Vice-Chairperson.
>
> (4) A Chairperson or Vice-Chairperson making a determination under subsection (3) is deemed to be a panel for the purposes of this Part.
>
> (5) A panel has all the powers, rights and privileges that are conferred on the Board by this Part with respect to any matter assigned to the panel under this Part.
>
> (6) The Chairperson is the chairperson of any panel formed under subsection (1) or, where the Chairperson is not a member of the panel, he or she designates a Vice-Chairperson to be the chairperson of the panel.

As with many labour boards, the CIRB employs Industrial Relations Officers (IROs), as well as legal staff. The Board has an Executive Director who, in her role as Registrar, can also issue certain decisions on uncontested matters pursuant to section 3 of the *Canada Industrial Relations Board Regulations, 2012* (*Regulations*).

The CIRB, just like its predecessor the CLRB, has always operated regional offices in Dartmouth (Halifax), Montreal, Ottawa (which includes the Board's Head Office), Toronto, Winnipeg and Vancouver. Regional Directors (RDs) run the CIRB's regional offices.

IROs, along with the RDs, have extensive labour relations backgrounds which allow them to settle a high number of applications and complaints, without the need for the Board's formal adjudication process.

B. The Administrative Tribunals Support Service of Canada (ATTSSC)

The ATSSC will provide support services to various federal administrative tribunals. However, each tribunal's adjudicative side will remain governed exclusively by its constituent legislation, in the CIRB's case, the *Code*.

Section 377 of Bill C-31 lists the administrative tribunals initially impacted by the ATSSCA:

> "administrative tribunal" means any of the following:

(*a*) the Canadian Cultural Property Export Review Board;

(*b*) the Canadian Human Rights Tribunal;

(*c*) the Canada Industrial Relations Board;

(*d*) the Competition Tribunal;

(*e*) the Review Tribunal;

(*f*) the Canadian International Trade Tribunal;

(*g*) the Transportation Appeal Tribunal of Canada;

(*h*) the Social Security Tribunal;

(*i*) the Public Servants Disclosure Protection Tribunal;

(*j*) the Specific Claims Tribunal;

(*k*) the Public Service Labour Relations and Employment Board.

(emphasis added)

The ATSSC will be run by a Chief Administrator who holds office at pleasure (section 5):

5. (1) The Chief Administrator is to be appointed by the Governor in Council to hold office during pleasure for a term of up to five years.

(2) The Chief Administrator is eligible for reappointment at the end of each term of office.

The ATSSC's Chief Administrator will have responsibility for various items previously carried out internally at the CIRB and at other administrative tribunals:

a) all tribunal staff will become employees of the ATSSC (Bill C-4, Transitional Provisions, section 378(1));
b) the Chief Administrator will decide whether the ATSSC will have offices outside the National Capital Region (ATSSCA section 4(2)); and
c) legal notice for an administrative tribunal will have to be given to the ATSSC (ATSSCA section 16).

The ATSSCA also notes that the Chief Administrator's powers do not extend to those already governed by the *Code*:

> 12. The Chief Administrator's powers, duties and functions do not extend to any of the powers, duties and functions conferred by law on any administrative tribunal or on any of its members.

C. *Code* amendments resulting from Bill C-31

The enactment of the ATSSCA will amend certain *Code* provisions. For example, section 12.01 of the *Code* will change, most notably by removing from the Chair's responsibility the duties of Board staff:

Current section 12.01	**Proposed section 12.01**
12.01 (1) The Chairperson is the chief executive officer of the Board and has supervision over and direction of the work of the Board, including (*a*) the assignment and reassignment of matters that the Board is seized of to panels; (*b*) the composition of panels and the assignment of Vice-Chairpersons to preside over panels; (*c*) the determination of the date, time and place of hearings; (*d*) the conduct of the work of the Board; (*e*) the management of the Board's internal affairs; and (*f*) the duties of the staff of	12.01 (1) The Chairperson ~~is the chief executive officer of the Board and~~ has supervision over and direction of the work of the Board, including (*a*) the assignment and reassignment of matters that the Board is seized of to panels; (*b*) the composition of panels and the assignment of Vice-Chairpersons to preside over panels; (*c*) the determination of the date, time and place of hearings; (*d*) the conduct of the work of the Board; <u>and</u> (*e*) the management of the Board's internal affairs. ~~and~~

the Board. (2) The Chairperson may delegate to a Vice-Chairperson any of the Chairperson's powers, duties and functions under subsection (1). (3) The Chairperson may delegate to a member of the staff of the Board any of the Chairperson's powers, duties and functions under paragraph (1)(*e*) or (*f*).	~~(*f*) the duties of the staff of the Board.~~ (2) The Chairperson may delegate to a Vice-Chairperson any of the Chairperson's powers, duties and functions under subsection (1). ~~(3) The Chairperson may delegate to a member of the staff of the Board any of the Chairperson's powers, duties and functions under paragraph (1)(*e*) or (*f*).~~

While section 12.01(1) no longer describes the Chair as the Board's chief executive officer, section 14 of the ATSSCA emphasizes the Chair's continued responsibility for the work of the tribunal:

> 14. For greater certainty, the chairperson of an administrative tribunal continues to have supervision over and direction of the work of the tribunal.

Bill C-31 also repeals sections 13 and 13.1 which give the CIRB the discretion to establish regional offices and to appoint employees:

Current section 13 and 13.1	**Proposed section 13**
13. The head office of the Board must be in the National Capital Region as described in the schedule to the *National Capital Act* but the Board may establish any other offices else-where in Canada that the Chairperson considers necessary for the proper performance of the Board's mandate. 13.1 The employees who are necessary for the proper conduct of the work of the Board are to be appointed in accordance with the *Public Service Employment Act*.	13. The head office of the Board must be in the National Capital Region as described in the schedule to the National Capital Act.

The amended *Code* section 15.1(1) confirms that the CIRB may continue to offer the services of RDs and IROs to assist parties in resolving their disputes, prior to more formal adjudication:

Current section 15.1(1)	Proposed section 15.1(1)
15.1 (1) The Board, or any member **or employee of the Board designated by the Board,** may, if the parties agree, assist the parties in resolving any issues in dispute at any stage of a proceeding and by any means that the Board considers appropriate, without prejudice to the Board's power to determine issues that have not been settled.	15.1 (1) The Board or any member of the Board or **an employee of the Administrative Tribunals Support Service of Canada who is authorized by the Board may,** if the parties agree, assist the parties in resolving any issues in dispute at any stage of a proceeding and by any means that the Board considers appropriate, without prejudice to the Board's power to determine issues that have not been settled.

V. Recent key decisions

A. *Bernard* v. *Canada (Attorney General)*, 2014 SCC 13

While not a decision involving the CIRB directly, this Supreme Court of Canada (SCC) decision dealt with an employee's objection to an employer providing certain personal information to her trade union. The SCC found no violation of either the Privacy Act or the Charter's protection of freedom of association.

At paragraphs 21 and 22, the SCC highlighted the case's labour relations context:

> [21] It is important to understand the labour relations context in which Ms. Bernard's privacy complaints arise. A key aspect of that context is the principle of majoritarian exclusivity, a cornerstone of labour relations law in this country. A union has the *exclusive* right to bargain on behalf of *all* employees in a given bargaining unit, including Rand employees. The union is the exclusive agent for those employees with respect to their rights under the collective agreement. While an employee is undoubtedly free not to join the union and to decide to become a Rand employee, he or she may not opt out of the exclusive bargaining relationship, nor the representational duties that a union owes to employees.

> [22] The nature of the union's representational duties is an important part of the context for the Board's decision. The union must represent all bargaining unit employees fairly and in good faith. The *Public Service Labour Relations Act* imposes a number of specific duties on a union with respect to employees in the bargaining unit. These include a duty to provide all employees in the bargaining unit with a reasonable opportunity to participate in strike votes and to be notified of the results of such votes (s. 184). According to the Board, similar obligations apply to the conduct of final-offer votes under s. 183 of the *Act*.

The SCC then rejected the argument that an employer could not provide home address information to a trade union without violating either the employee's privacy rights, or the Charter's freedom of association:

> [32] The Board concluded that the union needed employee home contact information to represent the interests of employees, a use consistent with the purpose for which the government employer collected the information, namely, to contact employees about the terms and conditions of their employment. The information collected by the employer was for the appropriate administration of the employment relationship. As the Board noted, "[e]mployees provide home contact information to their employers for the purpose of being contacted about their terms and conditions of employment. *This purpose is consistent with the [union]'s intended use of the contact information in this case*": para. 168 (emphasis added).
>
> [33] In our view, the Board made a reasonable determination in identifying the union's proposed use as being consistent with the purpose of contacting employees about terms and conditions of employment and in concluding that the union needed this home contact information to carry out its representational obligations "quickly and effectively": para. 167.
>
> …
>
> [40] In the case before us, providing Ms. Bernard's home contact information to the union was reasonably found by the Board to be a necessary incident of the union's representational obligations to her as a member of the bargaining unit. Based on the Court's jurisprudence, therefore, Ms. Bernard's freedom from association claim has no legal foundation.

B. *Maritime Broadcasting System Limited* v. *Canadian Media Guild*, 2014 FCA 59

What is the appropriate standard of review for an administrative tribunal's decision on procedural matters? In a 2-1 split, the majority in the Federal Court of Appeal (FCA) applied the standard of correctness.

Mr. Justice Stratas wrote extensive reasons in support of applying the "reasonableness" standard to a tribunal's procedural decisions:

> [63] In my view, the case at bar is one where the Board should be given some leeway under reasonableness review. The Board understood the requirements of procedural fairness, citing two of its own decisions that were based on relevant jurisprudence from the Supreme Court of Canada. The Board's task in this case was to apply those standards in a discretionary way to the factually complex matrix before it, a task informed by its appreciation of the dynamics of the case before it and its knowledge of how its procedures should and must work, all in discharge of its responsibility to administer labour relations matters fairly, justly and in an orderly and timely way. It did so under the umbrella of legislation empowering the Board to consider its own procedures based on its appreciation of the particular circumstances of cases and to vary or depart from those procedures when it considers it appropriate: *Canada Industrial Relations Board Regulations 2001, supra*, section 46.
>
> [64] Maritime Broadcasting does not point to any particular misunderstanding of the Board as to the relevant legal concepts. Rather, it invites us to stand in the shoes of the Board and apply the principles in this case. As I have said, this is inapt.
>
> [65] In my view, there are no grounds to quash the Board's procedural decision. As is seen in paragraphs 15-31 above, the Board had ample reason based on law and evidence to conclude that its original decision was procedurally fair. I would add that if I, an appellate judge with no labour relations experience, were forced to step into the shoes of the Board and assess the fairness of the Board's original decision on a correctness standard, I would have agreed with the Board largely for the reasons it gave.

However, the majority, while concurring in the result, held that the standard of correctness applied:

> [74] I agree with the disposition of this application as proposed by my colleague Justice Stratas for substantially the reasons that he has stated, however I am unable to agree with his conclusion that the standard of review for procedural matters is reasonableness. Since he has noted that even if he would have found that the standard of review for procedural matters was correctness, he would have reached the same result, this conclusion does not affect the disposition of this application.
>
> …
>
> [80] In Dunsmuir Justice Binnie acknowledged that "the requirements of 'procedural fairness' … will vary with the type of decision maker and the type of decision under review". However, in subsequently writing the reasons for the majority of the court in Khosa, he clearly confirmed that the standard of review for procedural fairness matters is correctness. As a result, in my view the standard of review for procedural matters is correctness. The particular requirements of procedural fairness will, however, "vary with the type of decision maker and the type of decision under review".

The FCA came to a similar conclusion in *Cadieux* v. *Amalgamated Transit Union, Local 1415*, 2014 FCA 61.

C. *Goodwin*, 2014 CIRB 723

Must a trade union, which has just had its certification revoked, continue to represent a terminated bargaining unit member at an already scheduled arbitration?

The Board commented on this issue at paragraph 20 of its decision:

> [20] For the purposes of this decision, the Board will assume, solely for the sake of argument, that a trade union's duty of fair representation continues to exist. Can a trade union take into account the revocation of its certificate when deciding its future role in an already scheduled arbitration?

The Board declined to find a violation of the duty of fair representation after considering the factors which lead to the trade union's decision not to represent the terminated employee at arbitration:

> [24] The Board fully appreciates Mr. Goodwin's sentiment that he had paid the IBEW dues throughout his employment, but when he needed its assistance, the IBEW declined to assist him at arbitration. But the Board can also appreciate the IBEW's perspective. If members of the bargaining unit were no longer paying dues to support the IBEW's activities, it needed to consider, *inter alia*, the funding implications of Mr. Goodwin's arbitration.
>
> [25] The employees' decision to vote in favour of decertification caused the IBEW to examine what, if anything, it would do for Mr. Goodwin and his pending arbitration. The IBEW did not simply close its file on Mr. Goodwin and disappear. It considered the changed situation, including its lack of status as Mr. Goodwin's bargaining agent, and advised Mr. Goodwin of its decision. The IBEW ensured Mr. Goodwin was aware of the scheduled arbitration, advised him of his right to proceed with his own counsel and later corresponded with that counsel.
>
> [26] In the course of that correspondence, the IBEW provided Mr. Goodwin with relevant documentation.
>
> [27] The IBEW similarly demonstrated a willingness to cooperate with Mr. Goodwin. For example, counsel for the IBEW attended the opening phase of the first day of the arbitration and submitted case law concerning the arbitrability of Mr. Goodwin's grievance.
>
> [28] The issue therefore is not whether it might have been a good public relations move for the IBEW to provide Mr. Goodwin with continued assistance. No one contested that the IBEW could have volunteered to represent Mr. Goodwin at arbitration. Trade unions often assist employees, even in the absence of a certification order.
>
> [29] However, the issue is whether the IBEW, given its significantly changed circumstances, had no option but to continue with the previously-scheduled arbitration, failing which it would violate section 37 of the *Code*.

> [30] Mr. Goodwin did not satisfy the Board that the IBEW, following the revocation of its certificate, and given its efforts to provide Mr. Goodwin with the information he needed to continue with the arbitration, acted in an arbitrary, discriminatory or bad faith manner when it refused to represent him at arbitration.
>
> [31] The IBEW turned its mind to the situation, came to a justifiable conclusion and advised Mr. Goodwin of its position within a reasonable time period.
>
> [32] In the Board's view, even accepting for the sake of argument that a DFR obligation continued to apply, the IBEW's decision not to take the grievance to arbitration after the revocation of its certification did not violate the *Code*.

D. *Perron-Martin,* 2014 CIRB 719

Can an employee filed a reprisal complaint under Part II of the *Code* (Occupational Health and Safety) contesting a termination which arose from her employer's internal harassment complaint process?

Part II of the *Code* contains provisions on workplace violence, but is silent on workplace harassment. The Board concluded that an employer's internal workplace harassment policy was not a *Code* process which could give rise to a reprisal complaint:

> [37] The process in question at Symcor was connected with its anti-harassment policy.
>
> [38] In the Board's view, complaints filed pursuant to an internal anti-harassment policy do not generally constitute an occupational health and safety process for purposes of Part II of the *Code*.
>
> [39] Most employers have introduced policies to eliminate harassment and discrimination in the work place. Such policies are put in place by federally regulated employers to promote rights set out in the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6).
>
> [40] To facilitate the introduction of such a policy, the Canadian Human Rights Commission has posted a template for developing an anti-harassment policy on its Website.
>
> [41] In the Board's view, the fact that Ms. Perron-Martin participated in a process pursuant to Symcor's anti-harassment policy does not in and of itself mean that she participated in an occupational health and safety process pursuant to Part II of the *Code*.
>
> [42] There is no reference anywhere in Part II to the concept of harassment. In previous cases, such as *Grolla*, 2011 CIRB 592, the Board had the opportunity to consider Part XX of the *Canada Occupational Health and Safety Regulations* (SOR/86-304) (the *Regulations*), titled "Violence Prevention in the Work Place" (Part XX).

> [43] Part XX requires employers to develop a work place violence prevention policy (section 20.3). "Work place violence" is described as follows:
>
> > 20.2. In this Part, "work place violence" constitutes any action, conduct, threat or gesture of a person towards an employee in their work place **that can reasonably be expected to cause harm, injury or illness to that employee.**
> >
> > (emphasis added)
>
> [44] The Board notes first that the word "harassment" is never used in Part XX. Part XX appears to relate more to circumstances involving violence. This fact alone suggests to the Board that a complaint of harassment filed pursuant to an employer's internal policy is not usually an occupational health and safety process.
>
> …
>
> [50] In the Board's view, Ms. Perron-Martin was involved in harassment complaints filed pursuant to Symcor's anti-harassment policy. Symcor investigated internally in some cases and hired outside specialists to investigate in others.
>
> [51] The onus was on Ms. Perron-Martin to demonstrate that she had participated in a Part II process. She did not meet that onus with her reference to harassment complaints filed under Symcor's anti-harassment policy.
>
> (emphasis in original)

The Board also referred to a decision of the Occupational Health and Safety Tribunal Canada in *Canadian Food Inspection Agency* v. *Public Service Alliance of Canada,* 2014 OHSTC 1 which had earlier considered the issue:

> [48] A similar interpretation of Part XX was given in a recent decision, in *Canadian Food Inspection Agency* v. *Public Service Alliance of Canada*, 2014 OHSTC 1. In that case, the Tribunal distinguished between certain harassment situations and violence:
>
> > [60] In applying the definition of work place violence provided in the *Regulations* to the facts of this case, I was able to conclude that the employee's allegations of favouritism, humiliating and disrespectful behaviour such as "hand gestures, rolling of your eyes or being verbally demeaning" exhibited to the employee by the supervisor fulfills the first element of the definition set out in section 20.2 as constituting "action," "conduct" and "gesture." However, in my opinion, these allegations are not any that could reasonably be expected to cause harm, injury or illness to the employee.
> >
> > [61] **Furthermore, I believe that the definition of work place violence is not meant to apply to situations such as the case at hand, where the employee's allegations, if**

> **believed to be true, have more to do with feeling humiliated and disrespected by the behavior of the supervisor.** The definition is intended to address situations where an employee is in fear of being harmed, injured or made ill due to the conducts of another individual in the work place.
>
> (emphasis added)

[49] The Tribunal provided further clarification regarding this distinction at paragraphs 65 and 69 of its decision:

> **[65] On the contrary, if the allegations of the employee do not relate to or constitute work place violence, Part XX of the Regulations does not apply. In such a case, the employer can choose to treat the matter through other mechanisms or policies better suited to address the situation. In the present case, the employer chose to apply its *Prevention and Resolution of Harassment in the Workplace Policy* to undertake an initial review of the complaint by the regional director.**
>
> …
>
> [69] I believe that the determination of this matter rests solely on the application of the definition of work place violence set out in section 20.2. The only question I asked myself was whether the alleged conduct, gesture or manner of the supervisor met the definition of work place violence stated in the Regulations. I found that they did not, given that the actions and facts alleged could not reasonably cause harm, injury or illness to the employee. Additionally, I found that nothing precluded the employer from applying its harassment policy to address the allegations of the employee.
>
> (emphasis added)

(emphasis in original)

E. *Buckmire*, 2013 CIRB 700

The Board was asked to repeal a specific provision in its *Regulations* which described the main grounds for reconsideration applications.

The Board in *Buckmire 700*, *supra*, commented on the request to repeal section 44 from its current *Regulations*:

> [32] On December 18, 2012, section 44 of the *Regulations* was repealed, based on the recommendation of the Standing Joint Committee for the Scrutiny of Regulations (Committee). The reasons for the Committee's request to revoke section 44 were described in *Treaty Three 677, supra,* at paragraph 11:

> [11] In 2002, the Standing Joint Committee for the Scrutiny of Regulations (the Committee) questioned the purpose of section 44 of the *2001 Regulations*. In particular, the Committee was concerned that this regulatory provision could fetter the broad discretion given to the Board under section 18 of the *Code*. Ultimately, the Board agreed with the Committee and section 44 was revoked in 2012 with the coming into force of the *2012 Regulations*. While the Board retains the power to reconsider any of its decisions or orders, the grounds for such applications are clearly not limited to those contained in the former section 44. At the same time, the Board extended the time period in which a reconsideration application can be made to 30 days, to be consistent with the time limit for the filing of a judicial review application under the *Federal Courts Act*.
>
> [33] As noted in *Treaty Three 677, supra,* the previous 21-day time limit for reconsideration applications in section 45 of the *Regulations* was increased to 30 days to coincide with the time limit parties have to judicially review a Board decision.

In *Buckmire 700*, *supra*, the Board reiterated that the historical grounds for reconsideration applications continued to apply:

> [45] In summary, the main grounds for reconsideration may be described as follows:
>
> (*a*) New facts that the applicant could not have brought to the attention of the original panel and which would likely have caused the Board to arrive at a different conclusion;
>
> (*b*) Any error of law or policy that casts serious doubt on the interpretation of the Code or policy;
>
> (*c*) A failure of the Board to respect a principle of natural justice or procedural fairness; and
>
> (*d*) A decision made by a Registrar under section 3 of the *Regulations*.

The Board further emphasized the exceptional nature of its reconsideration process:

> [47] The reconsideration process as described earlier is exceptional. In normal circumstances, the Board hears a case once and, as the privative clause in section 22 of the *Code* illustrates, its decision is final.
>
> [48] Unless a properly pleaded application for reconsideration raises a strong argument, a reconsideration panel will generally summarily dismiss it. To do otherwise increases the expense of these cases for all parties and undermines the key principle of finality.
>
> [49] Lengthy reconsideration decisions which simply dismiss an application could promote the incorrect impression that the Board decides its cases twice.

F. *Great Lakes Stevedoring*, 2013 CIRB 681

Section 34 of the *Code* allows for a geographical certification for employers actively engaged in the long-shoring industry:

> 34. (1) Where employees are employed in
>
> (*a*) the long-shoring industry, or
>
> (*b*) such other industry in such geographic area as may be designated by regulation of the Governor in Council on the recommendation of the Board,
>
> the Board may determine that the employees of two or more employers actively engaged in the industry in the geographic area constitute a unit appropriate for collective bargaining and may, subject to this Part, certify a trade union as the bargaining agent for the unit.

As part of that geographic certification, the employers must name an employer representative.

This case examined whether an individual employer, as distinct from the employer representative, had the standing to bring an application or a complaint to the Board:

> [25] A review of the Board's jurisprudence with respect to section 34 indicates that the Board has always treated the appointment of an employer representative as similar to the certification of a union. For example, any collective agreement concluded by the employer representative binds all employers, whether or not they consent to be bound, just as a collective agreement concluded by a certified bargaining agent binds all employees in the bargaining unit, whether or not they voted to ratify that agreement. Just like trade unions, employer representatives are entitled to act without the unanimous consent of those they represent *(Maritime Employers' Association* (1993), 92 di 135; and 94 CLLC 16,027 (CLRB no. 1027), affirmed by the Federal Court of Appeal (*Quebec Ports Terminals Inc.* v. *Canada (Labour Relations Board)*, (1995) 1 F.C. 459; [1994] 175 N.R. 372; (1994) 29 Admin. L.R. (2d) 189; and (1994) 95 CLLC 210-010)).
>
> [26] However, despite the considerable jurisprudence that exists with respect to the geographic certification provision, it does not appear that the Board, or the predecessor CLRB, has dealt with the question of whether a longshore employer that is subject to a geographic certification, and consequently representation by a mandatory employer representative, has standing to bring an application or complaint to the Board in its own right.

The Board concluded that an individual employer, which is already represented by the employer representative, did not have the requisite standing to bring an application on its own behalf:

> [28] In the Board's view, the purpose of section 34 of the *Code* and the rationale for its existence would be completely undermined if individual employers could bring applications, such as this one, which challenge the certification order that forms the foundation of the labour-management relationship. For the Board to grant standing to an individual employer in these circumstances would risk a return to the confused and unstable collective bargaining environment that previously existed in the Port of Hamilton and therefore run contrary to Parliament's intent in enacting the geographic certification provision.
>
> [29] Accordingly, the Board finds that GLS does not have standing to bring this application under the *Code*.

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Graham J. Clarke is currently a Vice-Chair at the Canada Industrial Relations Board. A bilingual member of the Quebec and Ontario Bars since 1987, he spent two decades pleading labour and employment law cases in those jurisdictions. He is the author of *Clarke's Canada Industrial Relations Board*, published by Canada Law Book (a division of Thomson Reuters Canada Limited).

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