

BCLRB No. B395/95
(Leave for Reconsideration of BCLRB No. B221/94)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

CENTRAL SAANICH POLICE BOARD, ESQUIMALT MUNICIPAL
POLICE BOARD, THE POLICE BOARD OF THE CORPORATION
OF THE DISTRICT OF OAK BAY AND
THE VICTORIA POLICE BOARD

(the "Employers")

-and-

CENTRAL SAANICH POLICE ASSOCIATION, ESQUIMALT POLICE UNION,
OAK BAY POLICE ASSOCIATION, LOCAL 5 AND
THE VICTORIA CITY POLICE UNION

(the "Unions")

PANEL: Stan Lanyon, Chair
John B. Hall, Associate Chair (Adjudication)
Maria Giardini, Vice-Chair

COUNSEL: E.J. Harris, for the Employers
David L. Blair, for the Unions
Michael Coady, for Business Council
Andrea Zwack, for Coalition of BC Businesses

CASE NO.: 19417
DATE OF HEARING: November 3, 1994
DATE OF DECISION: July 28, 1995
DATE OF REASONS: November 3, 1995

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 This is an application by the Unions under Section 141 of the *Labour Relations Code* for
leave and reconsideration of the Board's decision in BCLRB No. B221/94.

2 At the original hearing the Unions sought a declaration that a Memorandum of Agreement
dated January 7, 1994 and a subsequent Arbitration Award dated April 30, 1994 (Ministry No.
A159/94) (the "Award") constituted a collective agreement under the Code. The Unions also
sought an order that the Employers implement the terms of that collective agreement. The
Employers objected to the Board's jurisdiction to entertain the application as they had initiated
proceedings to review the Award in the B.C. Supreme Court pursuant to the terms of the
Commercial Arbitration Act.

3 The original panel determined that the Board has exclusive jurisdiction to determine
whether a collective agreement is in effect. It ruled that the Memorandum of Agreement
constituted a collective agreement for the purposes of the Code and ordered the Employers to
immediately implement the collective agreement, the terms of which were established by the
Memorandum of Agreement and the Award. The original panel went on to note, however, that
as the Award was an interest arbitration award it was not within the Board's jurisdiction to
review the Award under Part 8 of the Code. It was therefore open to the Employers to pursue
their appeal of the Award in the B.C. Supreme Court. The original panel noted that should the
Employers be successful in either obtaining a stay or in appealing the Award, they could file a
further application with the Board to reflect the changed circumstances.

4 The Unions argue that the original panel erred in ruling that the Board lacked the
jurisdiction to review the Award. The Unions argue that it is the Board, not the Supreme Court,
which has exclusive jurisdiction to decide whether a collective agreement is in force; therefore
any challenge to the Award should have been made pursuant to the arbitral review provisions of
the Code or argued before the original panel in response to the Unions' application.

5 As the Unions' application raises issues concerning the Board's jurisdiction to review interest arbitration awards which may be of general concern to the labour relations community, the Board invited submissions from a number of intervenors. In addition to the parties, submissions were received from the Coalition of B.C. Businesses (the "Coalition"), and the Business Council of B.C. (the "Business Council").

II. BACKGROUND FACTS AND THE ORIGINAL DECISION

6 The background facts were concisely summarized in the original decision and are not disputed by the parties to this application for reconsideration. The relevant facts (which are for the most part taken from the original decision) are as follows.

7 On January 7, 1994 representatives for the Employers and the Unions signed a Memorandum of Agreement. By that Memorandum of Agreement, the parties agreed to the terms and conditions which would apply to renew their collective agreement. Those terms and conditions included the following paragraphs:

1. Previous Conditions:

All of the terms and conditions of the collective agreements commencing January, 1991 and expiring June 30, 1992 shall continue to apply except as specifically varied below:

2. Negotiated Amendments:

The parties agree that the attached negotiated revisions shall be incorporated into the appropriate revised collective agreements and this Memorandum of Agreement dated January 7, 1994, shall be appended to and shall form part of the award of the arbitrator to be appointed by this Memorandum of Agreement.

* * *

[list of 26 negotiated revisions omitted]

* * *

5. Within ten (10) work days of signing this Memorandum of Agreement the parties shall endeavour to agree on an arbitrator to resolve the outstanding issues (as set out below). In the event the parties are unable to agree the Minister of Labour shall appoint the Arbitrator. The parties agree that time is of the essence.

6. The parties agree the following are the outstanding issues to be placed before the arbitrator:

1. Term of the Renewed Collective Agreements
2. General Salary Adjustments
3. Body Vests
4. Effect of Absences on Benefits While In Receipt of Income
5. Cleaning of Clothing
6. Field Instructor Premium

8 In addition to the above provisions there was also a handwritten addition to the Memorandum of Agreement that stated "It is understood that unless otherwise specified changes will occur upon the date of the award".

9 The parties failed to agree on an arbitrator. On January 26, 1994, the Minister of Labour appointed Mark Thompson as the arbitrator of the outstanding terms of the collective agreement as set out in the January 7, 1994 Memorandum of Agreement.

10 The original panel found that this appointment was made under Section 95 of the *Industrial Relations Act* (now amended and renumbered as Section 86 of the Code). The Employers and the Coalition dispute this finding. The Employers argue that the appointment was made under the authority of the *Commercial Arbitration Act* pursuant to the terms of the Memorandum of Agreement. The arguments of the parties on this point will be set out more fully later in the decision.

11 On April 30, 1994 Arbitrator Thompson issued the Award dealing with the outstanding issues referred to in the Memorandum of Agreement. Unlike previous years, the Employers did not immediately implement the collective agreement. Unable to receive an answer as to why, the Unions filed the original application before the Board. By the date of the original hearing, the Employers had implemented at least one of the new terms - that of direct deposit of payroll, a term initially opposed by the Unions. Other terms had not been implemented.

12 Also by the date of the original hearing, the Employers had decided to appeal the Award. On May 25, 1994 the Employers made a decision to file an application for review of the Award in the British Columbia Supreme Court under Section 30 of the *Commercial Arbitration Act*. In addition, the Employers decided to apply for a stay of the Award under the same Act, pending determination of the appeal.

13 After setting out the background facts and the arguments of the parties, the original panel first determined that the Memorandum of Agreement entered into by the parties on January 7, 1994 constituted a collective agreement for the purposes of the Code. The original panel cited the Board's decision in *John Inglis Co. Ltd.*, BCLRB No. 92/74, [1974] 1 Can LRBR 481, as establishing the fundamental principles for determining whether a collective agreement is in effect. Relying on this decision the original panel concluded that whether a memorandum has the legal status of a collective agreement turns on the intention of the parties. An agreement is not treated as a collective agreement if negotiations are contemplated to continue. If no further bargaining is contemplated then the agreement does constitute a collective agreement. In this case, the original panel noted:

The Memorandum of Agreement entered into on January 7, 1994 between the parties is not subject to any conditions. It was not subject to continuing negotiations nor subject to ratification. The parties agreed under paragraph 2 of the Memorandum that the negotiated revisions to the collective agreements should be appended to and form part of the award of the arbitrator appointed by the Memorandum of Agreement. On April 30, 1994 the arbitrator concluded his Award by saying:

The attached Memorandum of Agreement incorporated into this Award and shall constitute the final and binding

resolution of all items contained in the Memorandum. (p. 23)

Bell [the Labour Relations Manager for the Unions] testified that she did not think a collective agreement became effective until the Award was issued. I do not agree. The Memorandum does not contain an "effective date" of the renewal collective agreement. Nor is the Memorandum subject to ratification. The Memorandum concludes all negotiations and as such, it must be seen to be the document that binds the parties to a renewal agreement effective the date of that agreement: January 7, 1994.

Section 1(1) [of the Code] defines a collective agreement as "a written agreement between an employer...and a trade union, providing for rates of pay, hours of work or other conditions of employment...". The Memorandum at issue is in writing, signed by representatives of the Employers and Unions and sets out many provisions as to conditions of employment. The Memorandum sets out a binding mechanism to resolve all of the outstanding issues, including those of compensation and the term of the agreement, none of which are subject to further negotiations.

* * *

In this case, the Memorandum makes clear no further bargaining is contemplated. The evidence also confirms this fact. This key factor lends weight to the Unions' claim that a collective agreement was in existence as of January 7, 1994. (pp. 6-7)

14 The original panel then went on to consider whether the Award was subject to review under the Code.

15 The original panel first rejected the Unions' argument that the Award was subject to review by the Board because it stemmed from a dispute pursuant to a collective agreement which nevertheless had the result of determining certain terms and conditions of employment:

I do not believe these cases [*District of Abbotsford*, BCLRB No. L86/81; *Aluminum Company of Canada Ltd.*, BCLRB LD Nov 8/76; and *B.C. Hydro and Power Authority*, BCLRB No. 64/81]

are of assistance to the Unions on the facts before me. The agreement to proceed to arbitration arose out of collective bargaining. It did not arise pursuant to the terms of the collective agreement. The issue before the arbitrator was the terms of the collective agreement. The Award was not issued pursuant to a collective agreement. It was issued pursuant to an agreement reached in collective bargaining. It in fact forms *part* of the collective agreement. While there may be "hybrid" cases which cast doubt on this distinction, the instant case is not such a case. The parties have chosen a mechanism for resolution of the terms of a collective agreement which does not fall within Section 99 of the Code. (p. 8)

16 The original panel then reviewed jurisprudence concerning the scope of the Board's supervisory jurisdiction under Section 99 of the Code. The panel noted that in *City of Vancouver*, BCLRB No. 88/75, [1976] 1 Can LRBR 184, the Board found that its supervisory jurisdiction under Section 108 (now Section 99) was limited to the review of grievance arbitration under a collective agreement; the Board was not authorized by Section 108 to review decisions stemming from an interest dispute arbitration.

17 The original panel also reviewed the Board's more recent decision in *Yarrow Lodge Ltd. et al*, BCLRB No. B444/93, (1994), 21 CLRBR (2d) 1. In that case, the Board suggested that the grounds of appeal found in Section 99 of the Code were equally applicable to interest arbitration. The original panel here noted, however, that those passages in the *Yarrow Lodge* decision did not indicate that the Board would undertake the review of interest arbitration generally. Rather, the decision dealt with the review of interest arbitrations arising under Section 55 of the Code, and was therefore distinguishable.

18 The original panel rejected the Unions' argument that because Arbitrator Thompson was appointed under Section 95 of the *Industrial Relations Act* he was an arbitrator under Part 8 of the current Code. The panel noted that Section 95 is an administrative vehicle for the appointment of arbitrators in an interest arbitration setting or otherwise, and does not by itself create an arbitration board appointed under Part 8 of the Code.

19 After reviewing the above authorities, the original panel concluded:

The Award, a classic interest arbitration, is thereby not subject to review under the Code. (p. 10)

20 Despite finding that the Award was not subject to review by the Board, the original panel rejected the Employers' argument that the Board therefore lacked jurisdiction to determine whether the Memorandum of Agreement and the follow-up Award constituted a collective agreement. The original panel characterized the Employers' argument as suggesting that the Board is without jurisdiction to entertain an application to determine whether a collective agreement is in effect because there is a right of appeal to another forum. In response to this argument, the original panel concluded:

I do not find this argument compelling. Under Section 139, this Board has exclusive jurisdiction to determine for the purposes of the Code whether a collective agreement is in full force and effect. The existence of an appeal to an alternate forum does not alter that jurisdiction. If an appeal is successful, either party is at liberty to apply to the Board with the appropriate application to reflect that change. (p. 10)

21 Finally, the original panel considered an application by the Employers for an adjournment of the proceedings before the Board. The Employers argued that they would be severely prejudiced if required to implement the terms of the Award prior to the court appeal of that Award. The original panel denied the adjournment request and ordered the Employer to immediately implement the terms of the collective agreement.

22 The original panel summarized its findings in the following terms:

In summary I find the Board has jurisdiction to entertain the application of the Unions. I decline to grant the adjournment of the Employers. Irremediable prejudice is not established in this case.

I find a collective agreement to be in effect as of January 7, 1994. The Award is an interest arbitration award the review of which is not covered by Part 8 of the Code. Should the Employers be successful in either a stay or the appeal of the Award, an application can be filed with the Board on the basis of this new

information. That application will be dealt with expeditiously. The Employers are ordered to immediately implement the collective agreement the terms of which are established by the Memorandum and the Award of April 30, 1994. (p. 12)

III. POSITIONS OF THE PARTIES

A. Unions' Position

23 The Unions submit that the original panel erred in ruling that the Board does not have jurisdiction to review the Award.

24 The Unions argue that any challenge by the Employers to the Award should have been made pursuant to the arbitral review provisions in Part 8 of the Code or argued before the original panel in response to the Unions' application. The Unions advance two alternative arguments in support of their position:

1. In issuing the Award, Arbitrator Thompson was acting pursuant to a collective agreement and was therefore an "arbitration board" as defined in Part 8 of the Code. The Award is therefore reviewable only pursuant to Sections 99 or 100 of the Code;

2. Alternatively, if the Arbitrator was not acting pursuant to a collective agreement, but settling one, he was not a Part 8 arbitration board but the Board still has jurisdiction to review the Arbitrator's conduct pursuant to the Board's exclusive jurisdiction described under Sections 136, and 139(c), (d) and (g) of the Code.

1. Arbitrator was a Part 8 Arbitration Board

25 The Unions submit that Arbitrator Thompson was an "arbitration board" as that term is defined in Part 8 of the Code. Accordingly, the Award he issued could only be reviewed by the Labour Relations Board under Section 99 or, where the basis of the decision or award is an issue

of general law not included in Section 99, by the Court of Appeal pursuant to Section 100 of the Code.

26 The Unions rely upon the definition of "arbitration board" found in Section 81 of the Code:

81. In this part "arbitration board" *includes*
- (a) a single arbitrator, or
 - (b) another tribunal or body appointed or constituted under this Part or a collective agreement (emphasis added)

27 The Unions argue that "arbitration board" is an inclusive, and not a comprehensive, definition. This suggests that the term should be given a wide interpretation. The definition of "arbitration board" includes "a single arbitrator" without any qualification. A single arbitrator does not have to be appointed or constituted under Part 8 or a collective agreement. In this case, the parties agreed to the appointment of a single arbitrator to settle the outstanding bargaining issues. Accordingly, the arbitrator selected was an "arbitration board" under Part 8 of the Code.

28 Alternatively, even if the Board determines that the qualifying words "appointed or constituted under this Part or a collective agreement" in the second half of the definition of "arbitration board" also apply to a single arbitrator, then the Board must determine if the Memorandum of Agreement is a collective agreement. The Unions argue that the original panel erred in deciding that the appointment of the arbitrator arose out of an agreement reached in collective bargaining and not pursuant to the terms of a collective agreement.

29 The Unions submit that agreements reached in collective bargaining are likely to be collective agreements. This is the case where the parties have nothing more to bargain about. On and after January 7, 1994 the parties here had nothing more to bargain about. It was open to them to settle a dispute that was proceeding to arbitration, but neither party could have struck or locked out after January 7, 1994. There were two types of provisions in the January 7, 1994 Memorandum of Agreement:

1. Those to be effective July 1, 1992 and which were finally quantified on January 7, 1994 by the Memorandum of Agreement; and

2. Those others which were to be effective July 1, 1992 but were not quantified until the term and quantum disputes were resolved by the Arbitrator under the agreed mechanism: i.e. by his Award of April 30, 1994.

30 The fact that some terms remained to be decided after January 7, 1994 does not mean that no collective agreement had been concluded. By reading the Memorandum of Agreement one could ascertain either what terms would apply to work performed pursuant to the collective agreement or how the terms were to be determined, namely by arbitration. The Unions argue that where parties enter into an agreement, where some of the terms are to be determined by arbitration or are contingent upon future events (e.g. COLA clauses where future wage rates are dependent upon CPI statistics generated by Statistics Canada), the agreement is still a valid and enforceable collective agreement: *Health Labour Relations Association v. Hospital Employees' Union* (1978), 78 CLLC ¶14,174 (B.C.S.C.).

31 The Unions also note that the Memorandum of Agreement satisfies the definition of a "collective agreement" in Section 1 of the Code:

1. (1) In this Code ...
"collective agreement" means a written agreement between an employer, or an employers' organization authorized by the employer, and a trade union, providing for rates of pay, hours of work or other conditions of employment ...

32 In this case, the Memorandum of Agreement satisfied this definition. First, it was a written agreement providing for rates of pay, albeit the provision for rates of pay in effect was "what the arbitrator tells us the rate of pay will be". It contained dispute resolution mechanisms as required by Section 84(2) of the Code. In fact it had two such mechanisms: one for ordinary grievances, and one to settle the six items referred to the Arbitrator for resolution.

33 Accordingly, Arbitrator Thompson was an "arbitration board" under the Code -- either because he was a single arbitrator or because he was appointed pursuant to a collective agreement. Either rationale is sufficient to fall within the definition in Section 81 of the Code. It follows that the Award must be reviewed under Sections 99 or 100 of the Code. There is no

jurisdiction in the Supreme Court to review the Award pursuant to the *Commercial Arbitration Act*.

2. Board's exclusive jurisdiction: Sections 136 and 139 of the Code

34 In the alternative, the Unions argue that even if the Arbitrator was not acting as a Part 8 arbitration board pursuant to a collective agreement, but was instead settling a collective agreement, the issue of whether a collective agreement resulted from his conduct is a question exclusively for the Board to decide. In support of this argument, the Unions refer to Sections 136 and 139(c), (d) and (g) of the Code. The relevant portions of these sections are as follows:

136.(1) Except as provided in this Code, the board has and shall exercise exclusive jurisdiction to hear and determine an application or complaint under this Code and to make an order permitted to be made.

(2) Without limiting the generality of subsection (1), the board has and shall exercise exclusive jurisdiction in respect of

(a) a matter in respect of which the board has jurisdiction under this Code...

139. The board has exclusive jurisdiction to decide a question arising under this Code and on application by any person or on its own motion may decide for all purposes of this Code any question, including, without restriction, any question as to whether

(c) a collective agreement has been entered into,

(d) a person is or what persons are bound by a collective agreement,

(g) a collective agreement is in full force and effect

35 Sections 136 and 139 establish that the Board has exclusive jurisdiction over any matter that is or may be the subject of an application under the Code and to decide *any question* necessary to make a decision under the Code.

36 Here, the Unions applied for a determination that a collective agreement was in full force and effect and for a direction for compliance. These are clearly matters to be decided under the Code (Sections 139(c) and (g)). In order for the Board to decide these questions, it is necessary

for the Board to also determine the merits of the Employers' challenge to the Award as this will affect the extent to which, if at all, the collective agreement is in force and to be complied with by the Employers. As it is *necessary* for the Board to answer the question of whether the Arbitrator misconducted himself in order to resolve the other issues, that question is also one that falls within the Board's jurisdiction.

37 The Unions submit that it is contrary to the language of the Code and common sense to find that a Board decision that a collective agreement exists and is enforceable is subject to later reversal by the Board where the Courts determine that the process that brought the agreement into force was unlawful. The Unions argue that all challenges to the existence and enforceability of collective agreements should be fully resolved by the Board before any judicial review takes place.

38 In support of their position that the issues in dispute in this case fall within the jurisdiction of the Board, the Unions note that the Court of Appeal has clearly drawn the boundary of the Board's exclusive jurisdiction. It extends to claims that there has been a breach of the Act, a collective agreement or the regulation. In this case, the issues concern both breaches of the Act (failure to abide by an agreement) and breaches of the resulting collective agreement. See *Better Value Furniture (CHWK) Ltd. et al v. General Truck Drivers & Helpers' Union, Local 31 et al*, (1981) 26 B.C.L.R. 273 (C.A.).

39 The Unions note that the courts have decided on at least two occasions that the review of consensual interest arbitrations is not a matter within the court's jurisdiction: *U.T.U., Local 1178 et al v. B.C. Rail Ltd. et al* (S.C.B.C.), July 3, 1991, Sinclair Prowse, J. (unreported), appeal dismissed for different reasons, (1992) 67 B.C.L.R. (2d) 112 (C.A.), and *Powell River (District) v. Ready*, (1993) 81 B.C.L.R. (2d) 226 (S.C.).

40 The Unions also note that although jurisdiction was not raised in the matter, the Board recently dealt with a challenge brought under Section 99 to the award of an arbitrator settling a collective agreement: *Coquitlam (District) v. District of Coquitlam Fire Fighters, Local No. 1782*, BCLRB No. B166/94.

41 The Unions further rely upon *Health Labour Relations Association, supra*, in support of

their position that the Board has jurisdiction to review the Award in this case. In that decision, a challenge to the jurisdiction to review an arbitration settling a collective agreement was only rejected because Section 7(3) of the *Essential Services Disputes Act* excluded the operation of the remaining sections of Part VI of the *Labour Code* including the operation of Sections 108 and 109 which are the sections which confer exclusive jurisdiction with respect to arbitrations on the Labour Relations Board. The court also considered the exclusivity of the Board's jurisdiction arising from Section 34 of the former Code (now Section 139). The judge dismissed that challenge only because the application was under the *Essential Services Disputes Act* and not the Code, but confirmed the exclusive jurisdiction of the Board to make decisions for the purposes of the Code. The Unions submit that that is precisely what should happen in this case.

B. Employers' Position

42 The Employers' advance two basic arguments. First, the Unions' application for leave for reconsideration should be dismissed as it fails to satisfy the test for leave. Second, in the event that leave is granted, the Employers advance a number of arguments in response to the merits of the Unions' application.

1. Leave to apply for reconsideration

43 The Employers submit that the Unions' application for leave for reconsideration should be dismissed on the grounds that the Unions have failed to demonstrate a good arguable case of sufficient merit that they may succeed on one of the established grounds for reconsideration as required by *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), (1994), 20 CLRBR (2d) 44, 93 CLLC ¶16,043.

44 The Employers submit that the Unions are simply asking the Board to revisit a legal issue, namely that of jurisdiction, which has previously been decided in numerous Board decisions. Further, the Employers submit that the Unions are asking the Board to make a different finding of fact with respect to the means by which the Arbitrator was appointed. In doing so, the Unions are simply asking the Board to use its reconsideration powers under the Code to "change its mind".

45 The Employers argue that the Unions' application does not raise any of the proper

grounds for reconsideration set out in *Brinco, supra*. Further, the Unions' application is misguided in that it seeks to review a matter which was already decided in the Unions' favour. In the original application, the Unions sought a declaration that a collective agreement was in force and an order of compliance. The original panel ruled that a collective agreement was in force and ordered the Employers to implement the terms of the agreement. In effect, the Unions achieved everything that they sought to achieve in their original application to the Board. There is nothing left to reconsider.

46 The Employers note that the original panel determined that the arbitration that resulted in the Award was a "classic interest arbitration". As well, the original panel concluded that the arbitration clause was an agreement that arose out of the course of collective bargaining not out of the collective agreement itself. As a result, the arbitration agreement was not a mechanism which fell under Section 99 of the Code. These are findings made by the original panel based on its review of the bargaining history evidence and its interpretation of the Memorandum of Agreement. The Unions disagree with the original panel's conclusions in this regard and are simply wishing to use the reconsideration process to rehash these findings and make new arguments which could have been made to the original panel. In *Brinco*, the Board specifically stated that the Board's reconsideration power was not to be used in this fashion.

2. Reply to Unions' submissions

47 In response to the merits of the Unions' application for reconsideration the Employers advance two arguments. First, they submit that the original panel erred in ruling that the Memorandum of Agreement by itself constituted a collective agreement. Second, the Employers argue that the original panel was correct in concluding that the Board does not have jurisdiction to review the Award.

a) Status of Memorandum of Agreement

48 The Employers emphasize in their argument that they are not appealing the determination by the original panel that the Memorandum of Agreement by itself constituted a collective agreement. The Employers raise the issue of the correctness of that aspect of the Award only to emphasize their submission that the Arbitrator was not acting pursuant to the terms of a collective

agreement under Part 8 of the Code.

49 In support of their argument that the Memorandum of Agreement did not constitute a collective agreement, the Employers first note that the evidence of the Unions' witness was that the purpose of the arbitration was to *create* a collective agreement. The Employers submit that given this evidence, the original panel could not logically have concluded that the Memorandum of Agreement was a collective agreement when the conclusion of the agreement, including many of its material terms, was the subject of the interest arbitration.

50 The Employers argue that a collective agreement is not deemed to have been concluded so long as issues which the parties intend to address in their collective agreement remain unresolved: *Northwest Drywall & Building Supplies Ltd.*, IRC No. C301/90 (Reconsideration of IRC No. C61/90), (1990), 10 CLRBR (2d) 180; *Pipe Line Contractors Association of Canada*, BCLRB No. 73/81 (Reconsideration of BCLRB No. 67/81), [1981] 3 Can LRBR 493. This view is consistent with the contract law doctrine of mutual mistake which has been applied by many other labour boards. This doctrine is described by George Adams in *Canadian Labour Law*, (Aurora, Ontario: Canada Law Book, 1985) in the following terms:

Arbitrators and labour boards have held that even where the extent of the mutual mistake is such that the parties were not *ad idem* on the precise meaning of legal ramifications of a particular clause or component, if a reasonable man would have inferred the existence of a contract, a collective agreement will be enforced. Hence a mutual mistake will not vitiate an otherwise valid collective agreement.

51 The Employers submit that the difficulty with finding the existence of a collective agreement where the parties have not agreed on integral provisions is that gaps will exist which the parties may not be able to bridge in the administration of the agreement.

52 The Employers argue that the original panel's finding that the Memorandum of Agreement was not "subject to any conditions" is an error of fact both on the evidence which indicated that the parties did not intend this result, and on the face of the document itself, which, in paragraphs 5 and 6, clearly set out the outstanding issues to be resolved by the arbitrator as well as the means for appointing him or her. The Employers submit that for the original panel to

declare a collective agreement to be in existence despite the absence of a provision setting out the length of the agreement, the salary adjustments for the employees, and various other outstanding issues identified in the Memorandum of Agreement, would impose a result contrary to the intentions of the parties at the time and would have left the parties in an untenable position had either attempted to exercise its collective agreement rights before the Arbitrator issued his Award.

53 The Employers argue further that it is illogical to find that the Memorandum of Agreement constituted a collective agreement where the Unions never submitted the Memorandum of Agreement to their membership for ratification and the agreement itself indicated that the changes included in the Memorandum of Agreement would not take effect until the date of the Award. Until that date, the parties may have had enforceable rights between them but they did not have a collective agreement.

54 The Employers argue that the nature of the issues referred to arbitration by the parties in this case is different than the COLA clause example relied upon by the Unions in their argument. In the case of a COLA clause the parties have a completely enforceable agreement set out within the body of the collective agreement. The COLA clause provides a mathematical formula for determining future wages and does not require arbitration to determine those wages. If there is any disagreement concerning the meaning of the COLA clause or the calculation of the wage rates, the parties have access to the grievance arbitration procedure to resolve the disagreement. The Employers acknowledge that there are some circumstances where an issue may be left by the parties to be determined after the collective agreement is executed. For instance, the parties often leave classification issues to be resolved following the signing of the collective agreement. In those cases, the parties specifically state that any dispute regarding the issues will be resolved under the grievance procedure. If there is a "wholesale" issue left outstanding, such as salary or the duration of the collective agreement, then the parties do not have a collective agreement.

55 Finally, the Employers submit that in this case the parties arguably did not have the right to strike or lockout pending the outcome of the arbitration. In effect, the parties had an enforceable agreement not to strike or lockout but they did not have a collective agreement. This is similar to the essential services designation agreements reached by employers and unions during the period that the unions were boycotting the Industrial Relations Council. While such

agreements may not have been enforceable before the Board they were enforceable in the courts.

b) Jurisdiction of Board

56 The Employers submit that the Board has not been conferred jurisdiction under the Code to review an interest arbitration award. The Employers note that Section 97 of the Code states that "The *Commercial Arbitration Act* does not apply to an arbitration under the Code". This is consistent with the Employers' position that the legislators intended to keep commercial and labour arbitrations separate.

57 The absence of jurisdiction to review interest arbitration awards is also evident from the legislative changes that occurred with the enactment of the Code. When the *Industrial Relations Act* was repealed, Sections 137.95 and 137.96 were removed from the new Code. The intention to deprive the Board of the jurisdiction to review interest arbitrations is referred to in the report by the Sub-committee of Special Advisors, *Recommendations for Labour Law Reform* (September, 1992). In the report, the recommendation was that the Code would eliminate those provisions relating to interest arbitration, leaving the parties "free to agree to interest arbitration to resolve a collective agreement dispute". The Employers submit that with this change, the legislative intent was to remove any right to appeal interest arbitrations to the Board.

58 The Employers submit that the legislative amendments are noteworthy when one considers the longstanding position of the courts in Canada that clear and apt language must be employed to oust the jurisdiction of the court, and that it cannot be ousted in the absence of plain and unambiguous words: *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government et al*, [1960] A.C. 260 (H.L.); *Registered Psychiatric Nurses, Government of British Columbia - and- Registered Psychiatric Nurses' Association of British Columbia et al* (1977), 78 D.L.R. (3d) 737 (C.A.); upheld [1978] 2 S.C.R. 434.

59 The Employers argue that even if the Board decides that it has the jurisdiction to review interest arbitration awards, the language of the Code does not support the exclusion of the court's jurisdiction to review such awards. The Employers' primary argument is simply that the Code does not deprive them of the right to seek review of the Award in the courts.

60 The Employers submit that there are a number of court authorities that support their position that any appeal of an interest arbitration should proceed by way of judicial review: *Psychiatric Nurses, supra*; *Independent ICTU v. British Columbia Transit* (1988), 31 B.C.L.R. (2d) 373 (C.A.); and *Powell River (District) v. Ready et al, supra*.

61 The Employers note that in *City of Vancouver, supra*, the Board clearly stated that interest dispute arbitration awards should not be reviewable under Section 108 of the Code (now Section 99). The Employers submit that there have been no changes since the *City of Vancouver* decision that would justify a different approach being taken by the Board in the present proceedings.

62 The Employers also rely on the decisions of the Board in *Government of British Columbia*, BCLRB No. 78/77, and *B.C. Hydro Power Authority*, BCLRB No. 64/81, as other examples where the Board has followed a similar approach in deciding that it did not have jurisdiction to review interest arbitration awards under Part 8 of the Code.

63 The Employers rely upon the Board's decision in *Ladner Private Hospital Limited et al*, BCLRB No. 17/79, [1979] 2 Can LRBR 181, as a response to the apparent incongruity of the Board having the jurisdiction to declare whether a collective agreement is in full force and effect where such a decision may be subject to modification by a subsequent decision by the courts on judicial review of the arbitration award. In that case the Board discussed the issue of its jurisdiction to hear appeals of arbitration awards made pursuant to the *Essential Services Act*. Although the Board agreed that it had jurisdiction to determine whether a collective agreement was in full force and effect, it concluded that the proper procedure for appealing the award was by way of a petition to the Supreme Court pursuant to the *Judicial Review Procedure Act*. The panel in that case noted that in the event that the court's decision had the effect of setting aside the interest arbitration award then it would be open to the parties to return to the Board for a reconsideration of the Board's original decision.

C. Coalition of B.C. Businesses' position

64 The Coalition argues that the Board should, as a matter of policy, have the jurisdiction to review any interest arbitration awards which settle, amend, vary or define the terms of a

collective agreement.

65 The Coalition makes submissions on the issues of whether the Memorandum of Agreement itself constituted a collective agreement and whether the Board has jurisdiction to review interest arbitration awards.

1. Status of Memorandum of Agreement

66 The Coalition takes no position on the actual result in this case but submits that the original panel applied the wrong test in determining whether the Memorandum of Agreement constituted a collective agreement.

67 The Coalition submits that the test for determining whether a collective agreement is in existence is not whether a memorandum of agreement concludes all negotiations; rather, the test is whether a document contains all of the terms and conditions of employment which are to govern a particular group of employees and resolves all of the issues in dispute between the parties. The Memorandum of Agreement in this case did not do that. What it did was to establish a mechanism for the resolution of unresolved issues regarding the terms and conditions of employment. The Coalition argues that there are other ways of dealing with the Unions' concern that the application of a test other than that of whether the document concludes negotiations would lead to a situation in which parties could submit the matter to binding arbitration and yet still be free to strike or lockout. For example, it is clearly open to the parties to agree, at the time that they agree to submit issues to binding arbitration or to a process of mediation/arbitration, that there will be no further strikes or lockouts.

68 The Coalition submits that the test applied by the original panel leads to an anomalous conclusion; namely, that although the Award was not issued pursuant to a collective agreement, the Memorandum of Agreement which provided for the arbitration was nonetheless a collective agreement. The Coalition asserts that this conclusion could have been avoided through application of a more appropriate test, that is, by asking whether all outstanding issues between the parties had been resolved.

2. Jurisdiction of Board

69 To repeat, the Coalition argues that the Board should, as a matter of policy, have the jurisdiction to review any interest arbitration awards which settle, amend, vary or define the terms of a collective agreement. The Coalition further submits that Part 8 of the Code can and should be interpreted as conferring such jurisdiction upon the Board.

70 The Coalition outlines a number of policy reasons why the Board ought to have the jurisdiction to review interest arbitration awards. First, as a matter of relative expertise, the review of awards settling the terms of collective agreements clearly falls within the labour relations expertise of the Board just as does the review of grievance arbitration awards.

71 Second, there is no valid policy reason for distinguishing between grievance arbitration, Section 55(6) interest arbitration, and interest arbitration outside of Section 55 (First Collective Agreement). Clearly, the Board has exclusive jurisdiction under Section 99 of the Code to review grievance arbitration awards, subject only to the limited role of the Court of Appeal as set out in Section 100 of the Code. The Board also has jurisdiction to review awards arising from interest arbitration conducted pursuant to Section 55 of the Code: *Yarrow Lodge Ltd., supra*. Particularly in the case of Section 55 interest arbitration, the subject of the arbitration award and its result are precisely the same as that which is dealt with in consensual interest arbitration outside of Section 55.

72 Third, the result in the present case demonstrates the practical problems which arise if the Board is found not to have exclusive jurisdiction in these matters. It is not to either party's benefit to have a collective agreement declared to be in force by one tribunal, while another tribunal adjudicates the issue of whether the process by which the collective agreement was reached was flawed and thereby void or ineffective. The Coalition acknowledges that the approach taken by the original panel is consistent with the approach taken by other panels, specifically the panels in *Ladner Private Hospital, supra*, and *Medical Associated Clinic, BCLRB No. 52/78*. The Coalition argues that those decisions can and should be distinguished on the basis that the collective agreement awards in those cases were, by virtue of statute, required to be made pursuant to an Act other than the *Labour Relations Code*.

73 The Coalition submits that not only should the Board have jurisdiction to review interest

arbitration awards as a matter of policy, but the provisions of Part 8 of the Code as presently enacted can be interpreted to grant this jurisdiction.

74 Clearly, the Code does not expressly provide the Board with such jurisdiction. Section 99 as well as other provisions in Part 8 of the Code suggest that the primary focus of the arbitral review jurisdiction is grievance arbitrations. Still, Part 8 does not expressly state that the Board has jurisdiction to review only those arbitral awards which determine grievances or resolve disputes under the provisions of a collective agreement. There are, in fact, indications in the Code that the jurisdiction of the Board is not so limited. The first is the ambiguous definition of "arbitration award" in Section 81 which is unclear as to whether the single arbitrator in order to be covered by Section 99, need be appointed or constituted under Part 8 or a collective agreement. Second, Section 97 states that "The *Commercial Arbitration Act* does not apply to an arbitration under this Code". It is noteworthy that Section 97 does not refer to an arbitration under "this Part" but under the Code as a whole. This lends support to the Board's decision in *Yarrow Lodge, supra*, that arbitration awards issued pursuant to Section 55(6) would be subject to review by the Board. The Coalition argues that it also supports an interpretation that, for any arbitration award dealing with a matter which falls within the purview of the Code, the jurisdiction of the court to review such an award under the *Commercial Arbitration Award* is ousted.

75 The Coalition argues that there is no previous jurisprudence of the Board which precludes the Board from ruling that it has jurisdiction to review interest arbitration awards. In reaching the conclusion that the Board lacked this jurisdiction, the original panel relied upon the Board's early decision in *Vancouver City, supra*. The Coalition argues that the passage relied upon by the original panel was *obiter dicta*. Further, the *Vancouver City* decision was rendered prior to introduction into the *Industrial Relations Act* of specific provisions governing interest arbitrations and the introduction of first contract mediation/arbitration provisions in the present Code.

76 The Coalition acknowledges that the Code is ambiguous as to the Board's jurisdiction to review interest arbitration awards. However, it submits that the Board does have jurisdiction to determine the extent of its own jurisdiction in this matter and that the principles enunciated in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, should be applied in determining the extent of that jurisdiction. That is, in determining jurisdiction, relative expertise, the impact of

the problem on the administrative scheme, and policy considerations, as well as legislative wording are to be taken into account in order to determine the likely intent of the Legislature in conferring jurisdiction. The Coalition submits that when these factors are considered the Code can properly be interpreted as conferring on the Board jurisdiction to review interest arbitration awards of the nature under consideration in the present case.

D. Business Council's position

77 The Business Council made submissions concerning two issues. First, whether the Memorandum of Agreement constituted a collective agreement and second whether the Board has the jurisdiction to review interest arbitration awards.

1. Status of Memorandum of Agreement

78 The Business Council submits that the original panel erred in deciding that the Memorandum of Agreement constituted a collective agreement.

79 The Business Council argues that the original panel applied the wrong test in determining whether the Memorandum of Agreement constituted a collective agreement. The original panel looked at the intent of the parties to determine whether they had "concluded all negotiations". According to the Business Council, the appropriate test for determining the existence of a collective agreement is:

If there are unresolved issues between the parties, did the parties intend that the resolution of those issues would follow the conclusion of a collective agreement? Or did they intend that the resolution of the issues would precede and form part of the collective agreement.

If the latter is the case, there is no collective agreement until the issues are resolved.

80 In support of this proposition the Business Council relies upon a number of Board decisions: *Pipeline Contractors Association of Canada, supra*; *Northwest Drywall & Building Supplies Ltd., supra*; *Les Elevateurs de Sorel Limitée* (1985), 61 di 18; *United Plastering Contractors Association*, [1972] OLRB Rep. (June) 1012; and *C. Marsland Engineering Limited*, [1970] OLRB Rep. (April) 133.

81 In this case there were numerous unresolved issues referred to arbitration. There is little doubt that the parties intended those issues to be resolved at arbitration and that they would form part of the collective agreement. Therefore, there was no collective agreement in existence until the Award was published.

82 The Business Council rejects the Unions' argument that if the determination of whether a collective agreement has been reached is not based upon whether negotiations have been concluded, the result will be anomalous and contrary to common sense. The Unions' argument is that an employer and union may agree upon binding arbitration as the mechanism for resolving a collective bargaining impasse, and yet have the possibility of a strike or lockout between the date of the agreement on binding arbitration and the date of the interest arbitration award. The Business Council argues that these seeming anomalies disappear upon closer examination. The Board has all the means that it requires to regulate the conduct of the parties in such a case. The Board would measure the legitimacy of the parties' conduct occurring between the date of the agreement and the date of the award by reference to the duty to bargain in good faith under Section 11 of the Code. If there had been a genuine change in circumstances requiring that negotiations be re-instituted, or even that a strike or lockout be commenced, the Board might conclude that a party initiating such action was bargaining in good faith and that a strike or lockout was lawful. If there had been no change in circumstances, the Board might well conclude that a party seeking to initiate further negotiations or to carry out a strike or lockout was acting contrary to the requirements of Section 11 and therefore subject to a cease and desist order.

83 In short, the argument of the Business Council is that, where an interest arbitration is established to determine the terms of a collective agreement, the collective agreement is the product of the interest arbitration process, not the agreement by which the process is initiated.

2. Jurisdiction of the Board to review an interest arbitration award

84 The Business Council submits that the original panel correctly decided that an interest arbitration award of the kind at issue in this case is not subject to review under Section 99 of the Code. The Business Council agrees in substance with the reasoning of the original panel that the agreement to proceed to arbitration arose out of collective bargaining rather than pursuant to the terms of the collective agreement. The Business Council takes no position on the facts in this case but argues that the original panel's conclusion seems appropriate where the parties had agreed that the terms of the Memorandum of Agreement would be incorporated into the Award (rather than the other way around) and that the "changes will occur upon the date of the award".

85 The Business Council disagrees with the Unions' argument that the phrase "arbitration board" in Section 99 of the Code includes an interest arbitrator. It refers first to sub-paragraph (b) of the definition of "arbitration board" which refers to "another tribunal or body appointed or constituted under this Part or a collective agreement...". Next, the Business Council argues that the Arbitrator in this case was not appointed under a collective agreement. Rather, he was appointed to decide the terms of a collective agreement. Further, the arbitrator could not have been appointed by the Minister under Section 95 of the *Industrial Relations Act* (again, now amended and renumbered as Section 86 of the Code) as that section applies only "where there is a failure to appoint or constitute an arbitration board under a collective agreement or under Section 93(3) [now Section 84(3)]". This argument leads back to the question of whether the Memorandum of Agreement was a collective agreement. If it was not, the Minister was without jurisdiction to appoint the arbitrator under Section 95.

86 The Business Council then refers to sub-section (a) of the definition of "arbitration board" which refers to "a single arbitrator". The Business Council argues that the arbitrator in this case was not "a single arbitrator" as that phrase is used in Section 90 of the Code. While the three words "a single arbitrator" by themselves are capable of a literal interpretation as referring to an interest arbitrator, it is clear that this is not what the phrase is intended to mean when the words are considered in their context.

87 The Business Council first considers the meaning of the phrase "a single arbitrator" in the context of the balance of the definition of "arbitration board". Sub-section (b) of the definition

refers to "*another* tribunal or body appointed or constituted under this Part or a collective agreement". If the distinction between the two sub-sections is that only the sub-section (b) tribunal or body is appointed under a collective agreement, then there would be no need to use the word "another" in sub-section (b). The fact that the word "another" is there must mean that the single arbitrator is also appointed under the collective agreement.

88 The Business Council argues that the reference to the word "another" cannot simply mean that the tribunal or body under sub-section (b) is something other than a single arbitrator, i.e. a tripartite board or other body. If that were the case, that would mean that the single arbitrator under sub-section (a) could be appointed either under a collective agreement or by some other means, while the body or tribunal under sub-section (b) could not. To put it another way, the single arbitrator in sub-section (a) can be either a rights arbitrator or an interest arbitrator. Yet the body or tribunal under sub-section (b) can only be appointed under a collective agreement. That means that the tribunal under sub-section (b) cannot be a full-fledged interest arbitration board.

89 The Business Council submits that this interpretation would make no sense. If the key to the Unions' argument is that an "arbitration board" includes a single arbitrator and that the single arbitrator does not have to be appointed under a collective agreement, and if that is the basis for finding that an interest arbitrator is an "arbitration board" under Section 99 of the Code, then it raises the issue as to the status of a three-person interest arbitration board. Is the three-person arbitration board an "arbitration board" as that phrase is used in Section 99? If not (and the Unions' interpretation leads to this conclusion) then the result is that there can be review under Section 99 of an interest award by a single arbitrator but not review under Section 99 for an interest award by a three-person arbitration board. Again, the Business Council submits that this is an absurd result. The inevitable conclusion is that the single arbitrator under sub-section (a) of the definition of "arbitration board" must also be an arbitrator appointed under a collective agreement.

90 The Business Council also considers the meaning of the phrase "arbitration board" in the context of the rest of Part 8 of the Code. In Section 82(1) the purpose of Part 8 is defined. It is to constitute methods and procedures for determining grievances and resolving disputes "under the provisions of a collective agreement...". The purpose of the Part is focused on rights

arbitrations, not constituting methods and procedures for interest arbitration. Section 82(2) then defines the heart of an arbitration board's mandate. The mandate is to "have regard to the...respective merits of the positions of the parties under the terms of the collective agreement...". An interest arbitrator cannot do that, because his or her mandate is to set the terms of the collective agreement.

91 The Business Council further argues that Section 84 of the Code sets out the basic requirement that all collective agreements have provisions for final settlement of all disputes between the parties bound by a collective agreement concerning the interpretation, application, operation or alleged violation of the agreement. This clearly defines the intent and scope of Part 8 of the Code. Section 89 of the Code is another key provision defining the powers and authority of an arbitration board. This section provides that:

...an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may...

This passage is then followed by a number of specific powers. These powers are all focused on remedies for breach of a collective agreement. The bottom line is that this section has no application to an interest arbitrator.

92 Looking at all of these sections together, the Business Council says it is apparent that interest arbitrators cannot be subject to review under Section 99 of the Code.

93 In a rights arbitration, the arbitrator's mandate is defined in the statute. The Code has meaningful things to say about how a rights arbitration board is to proceed. It is not hard to see how the Board in the exercise of its power under Section 99 can define the principles of the Code against which a rights arbitrator's reasoning should be judged. That cannot be said in the case of interest arbitration. The Code contains no definition of purpose, no arbitral mandate, no guidelines as to approach, and no arbitral powers for the interest arbitrator. With interest arbitrations, the parties themselves define the rules which will govern their decision-maker. Since the parties themselves have set the rules, as opposed to the rules being set by the statute, there is no basis for saying that the Board is in any better position than a court to enforce the rule of law in relation to the arbitrator's compliance with the rules the parties have set. The reality is

that the *Commercial Arbitration Act* goes farther than the Code in defining standards which would apply to the review of an arbitration award.

94 Finally, the Business Council argues that the Board's powers under Section 99 include the power to substitute its decision or award for that of the arbitration board. This is not the kind of power which the Board was intended to exercise in a consensual interest arbitration setting. That is just one more reason why Section 99(1) should not be construed as encompassing review of interest arbitrations.

IV. ANALYSIS

95 In Letter Decision BCLRB No. B303/95 (Leave for Reconsideration of No. B221/94) this Panel issued a brief decision in response to the Unions' application for reconsideration. That decision stated, in part:

The two issues which this panel is required to address are:

1. Whether the original panel erred in ruling that the Memorandum of Agreement signed by the parties on January 7, 1994 was a collective agreement; and
2. Whether the original panel erred in ruling that the Board does not have the jurisdiction to review an interest arbitration award.

We have concluded that the original panel erred in ruling that the Memorandum of Agreement constituted a collective agreement. However, the original panel did not err in concluding that the Board had no jurisdiction to review the interest arbitration award in issue here. Consequently, the Unions' application is dismissed. Full reasons for our conclusions will follow.

96 The following are the full reasons for our decision.

A. Leave to Apply for Reconsideration

97 The test to be satisfied by a party seeking leave to apply for reconsideration is set out in *Brinco Coal Mining Corporation, supra*. A party requesting leave must demonstrate a good arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration. The test for leave requires an applicant to go beyond establishing a *prima facie* case, by raising a serious question as to the correctness of the original decision.

98 The Employers are correct in their observation that the Unions' application for leave does not expressly state the grounds for reconsideration and that much of the Unions' application is a "rehashing" of arguments made before the original panel. The Employers also correctly note that the Unions are seeking to review a decision that was decided in their favour. This does not mean, however, that leave to apply for reconsideration should not be granted in this case.

99 In *Brinco* the Board stated:

...The Board's reconsideration power has never been used to "rehash" or augment submissions made to an original panel; nor is the reconsideration process intended to allow a party to advance new arguments which could have been made to the original panel...
(p.53)

100 The restriction on parties using the reconsideration process to simply "rehash" a submission made to an original panel does not mean that a party can never make the same argument on reconsideration as was made to the original panel. The restriction simply requires that the party, in addition to making the same argument, must also establish that the original panel's rejection of the argument resulted in a decision that was inconsistent with the principles expressed or implied in the Code. What a party is precluded from doing is simply advancing the same argument in the hope that the reconsideration panel will reach a different conclusion than the original panel, even though the original panel's decision was not inconsistent with the principles of the Code.

101 In the present case, the Unions argue that the original panel erred in concluding that the

Board did not have exclusive jurisdiction to review the Award. While not expressly stated, it is implicit from the Unions' submission that they allege that the original decision turned on a conclusion of law or general policy under the Code (namely, the extent of the Board's jurisdiction to review interest arbitration awards) which law or policy was not properly interpreted by the original panel. This is one of the recognized grounds for reconsideration: *Brinco, supra* at p. 52.

102 While the Unions' application for reconsideration substantially "rehashes" the arguments made before the original panel, it does so in support of their submissions that the original panel's decision was inconsistent with the principles of the Code. This is a legitimate use of the reconsideration process.

103 The fact that the Unions' application seeks to reconsider a matter which was already decided in the Unions' favour does not make the application "misguided" as argued by the Employer.

104 The original panel's comments concerning the Board's lack of jurisdiction to review interest arbitration awards were made in response to the Employers' defence to the Unions' application. While technically these comments were unnecessary to the panel's determination that a collective agreement was in existence, as well as the consequent Order that the Employers comply with the agreement, the comments stand out as a clear statement by the Board on a significant matter of law and policy under the Code. It is consistent with the Board's mandate under Section 2(1)(d) of the Code to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions that the Board continue to use its reconsideration power to provide clear guidance to the labour relations community where there is a dispute concerning the correctness of an original panel's decision. This important role for a reconsideration panel has been recognized by the British Columbia Court of Appeal: *Association of Universities and College Employees, Local 2 v. Simon Fraser University et al.*, (1994) 90 B.C.L.R. (2d) 338 (C.A.). Accordingly, in our view it is possible for a party to pursue reconsideration where that party continues to have disagreements concerning important matters of law and policy arising out of an original decision even though the decision was decided in that party's favour. This is especially important now that the Board no longer has the capacity under Section 141 of the Code to reconsider decisions on its own motion to ensure

the consistent development of the law and policy under the Code.

105 The original panel's comments concerning the scope of the Board's jurisdiction are also appropriately the subject for reconsideration as the comments have at least a potential impact upon the ongoing relationship between the parties to these proceedings. The original decision contemplates the continuation of the Employers' challenge of the Award in court as well as the possibility that the parties may, depending upon the outcome of the court proceedings, face further proceedings before the Board. Even if the Unions' argument succeeds the parties may very well still find themselves facing further court proceedings in the form of a judicial review of the Board's decision. In either case, it is apparent that there is a strong likelihood that the issue concerning the extent of the Board's jurisdiction over interest arbitrations will be finally determined by the courts. In recognition of this possibility it is beneficial for these parties as well as other potential parties and the court to have the Board's final views on the extent of its jurisdiction: *British Columbia Government Employees' Union v. Labour Relations Board of British Columbia et al.*, (1986) 2 B.C.L.R. (2d) 66 at 78 (C.A.); *Re Office & Technical Employees Union, Local 378 and Industrial Relations Council of British Columbia et al.*, (1988) 56 D.L.R. (4th) 140 (C.A.), at 145-146.

106 Finally, we are satisfied that the Unions have met the requirement for leave; i.e. they have raised a serious question as to the correctness of the original decision. The Employers argue that the Unions are asking the Board to revisit a legal issue that has been decided in numerous past Board decisions, starting with the early decision in *City of Vancouver, supra*. It is true that in the past the Board has consistently found that it lacked jurisdiction to review interest arbitration awards. This panel recognizes, however, that in the recent decision in *Yarrow Lodge Ltd., supra* the Board suggested in *obiter dicta* that Section 99 of the current Code applies to the review of interest arbitrations. The *Yarrow Lodge* decision was distinguished by the original panel on the basis that it dealt with interest arbitrations arising under Section 55 of the Code. This distinction does not, however, account for the *obiter dicta* in *Yarrow Lodge*. In light of the legislative amendments in the Code and the comments in *Yarrow Lodge* we are satisfied that the Unions have raised a serious question as to the correctness of the original decision. At the very least there is now an apparent inconsistency in the Board's decisions concerning this jurisdictional issue that needs to be clarified. Leave is accordingly granted and we will consider the merits of the Unions' application.

B. Merits of the Unions' Application

107 Once again, the Unions contend that the original panel erred in concluding that the Board lacks jurisdiction to review the Award because it is an interest arbitration award. The Unions argue that the Board has jurisdiction to review the Award because the Arbitrator was an "arbitration board" as defined in Part 8 of the Code. The Award is therefore reviewable only pursuant to sections 99 or 100 of the Code. Alternatively, the Unions argue that the Board has the power to review the Award, and the Arbitrator's conduct in rendering the Award, pursuant to the Board's exclusive jurisdiction under Sections 136 and 139(c), (d) and (g) of the Code. We will deal with each of these arguments in turn.

1. Arbitrator is a Part 8 Arbitration Board

108 The Board's jurisdiction to review arbitration awards is set out in Part 8 of the Code (Arbitration Procedures). Specifically, Section 99 of the Code establishes the jurisdiction of the Board to hear appeals of arbitration awards. Section 99 states:

99. (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that
- (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
 - (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.
- (2) An application to the board under subsection (1) must be made in accordance with the regulations.

109 Section 99 makes clear that the Board's jurisdiction to review an arbitration award is restricted to the review of an award issued by an *arbitration board*. The term "arbitration board" is defined in Part 8, Section 81 of the Code as follows:

81. In this Part "arbitration board" includes
(a) a single arbitrator, or
(b) another tribunal or body appointed or constituted under this Part or a collective agreement;

110 This definition is open to different interpretations. The Unions argue that the words "appointed or constituted under this Part or a collective agreement" do not modify the phrase "a single arbitrator". On this interpretation, the single Arbitrator who issued the award in this case would constitute an arbitration board under Part 8 of the Code, and the Award would be subject to review by the Board under Section 99 of the Code, regardless of whether the Arbitrator was appointed under a collective agreement or was establishing the terms of a collective agreement. By contrast, the Employers and the Business Council argue that even a single arbitrator must be appointed or constituted under Part 8 of the Code or a collective agreement in order to be an arbitration board subject to review under Section 99 of the Code. Further, they argue that even if the arbitrator is appointed or constituted under Part 8 of the Code, the arbitrator can only be a rights arbitrator as a collective agreement must already be in existence before such an appointment can be made.

111 In our view, the interpretation of the definition of "arbitration board" advanced by the Employers and the Business Council is correct. Consequently, the Board only has jurisdiction to review the award of an arbitration board appointed or constituted under a collective agreement or under Part 8 of the Code. We have reached this conclusion primarily for the reasons advanced by the Business Council in its submission to the Board.

112 First, the inclusion of the word "another" in sub-section (b) of the definition of arbitration board indicates that both the terms "single arbitrator" and "tribunal or body" are intended to be modified by the words "appointed or constituted under this Part or a collective agreement". To interpret this section in the manner proposed by the Unions would lead to the absurd results identified by the Business Council in its argument. That is, and for example, the decision of a three-person "arbitration board" appointed to decide an interest arbitration *would not* be subject to review under Section 99 of the Code, while the decision of a single arbitrator who might have been appointed to the same matter *would* be subject to review.

113 The requirement that an arbitrator or another tribunal or body be appointed under Part 8 or a collective agreement necessarily means that a collective agreement must already be in existence between the parties before a Part 8 "arbitration board" can be validly constituted. The circumstance in which an arbitration board can be appointed or constituted under Part 8 of the Code is set out in Section 86 of the Code (formerly Section 95 of the *Industrial Relations Act*). This section provides:

86. (1) Despite section 85, if there is a failure to appoint or constitute an arbitration board *under a collective agreement* or under section 84 (3), the director, at the request of either party, shall make the appointments necessary to constitute an arbitration board, and a person so appointed by the director shall be deemed appointed *in accordance with the collective agreement*, or under section 84 (3), as the case may be.
- (2) Nothing in a collective agreement shall be construed as requiring the director to constitute an arbitration board consisting of more than a single arbitrator. (emphasis added)

Clearly, even where an arbitrator is "appointed or constituted under this Part" there must be a collective agreement in existence between the parties.

114 Our interpretation of the definition of "arbitration board" is further supported when considered in the context of the other Sections in Part 8. Section 82 of the Code sets out the Purposes of Part 8:

82. (1) It is the purpose of this Part to constitute methods and procedures for determining grievances and resolving disputes *under the provisions of a collective agreement* without resort to stoppages of work.
- (2) An arbitration board, to further the purpose expressed in subsection (1), shall have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it *under the terms of the collective agreement*, and shall apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute. (emphasis added)

115 As the singularly stated purpose of Part 8 is clearly on arbitrations arising under a collective agreement, it would make no sense to interpret the definition of a Part 8 arbitration board so as to include a single arbitrator appointed to act as an interest arbitrator. An interest arbitrator's task is to settle the terms of a collective agreement, not resolve disputes under an existing agreement.

116 The other Sections in Part 8 of the Code are similarly focused on the regulation of arbitrations arising under the terms of a collective agreement. Section 84 establishes the requirement that all collective agreements contain a provision for final and conclusive settlement of all disputes between the parties to a collective agreement, and sets out an arbitration provision that is deemed to be included in any collective agreement that does not contain its own arbitration provision. Sections 85 and 86 respectively provide processes for modifying unworkable arbitration provisions and appointing an arbitration board where the parties fail to appoint one under a collective agreement. Finally, Section 89 establishes the authority of an "arbitration board":

89. For the purposes set out in section 82, an *arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement*, and without limitation, may... (emphasis added)

117 While it is clear from the opening words of Section 89 that an arbitration Board has broad general powers, it is equally clear that the exercise of those powers is restricted to the resolution of disputes *arising under a collective agreement*. This restriction is also apparent from the language used to describe the specific areas of authority enumerated in sub-sections (a) to (h) of Section 89. These sub-sections allow an arbitration board to make orders to provide a remedy for a "contravention of a collective agreement", to relieve against procedural requirements "set out in the collective agreement", and to interpret and apply any Act intended to regulate the employment relationship of the persons "bound by the collective agreement". Neither the broad general authority nor the specific enumerated areas of authority of an arbitration board referred to in Section 89 relate to an interest arbitration board constituted to establish a collective agreement between the parties.

118 It is important to recognize that the Board's jurisdiction to review arbitration awards

under Section 99 of the Code turns on the source of the arbitrator's authority (i.e. whether the arbitrator was appointed or constituted pursuant to the terms of a collective agreement), and not on the nature of the issue dealt with by the arbitrator (i.e. a "rights" as opposed to an "interest" or "hybrid" arbitration). Where an arbitrator is not appointed or constituted pursuant to the terms of a collective agreement but, rather, is appointed to settle the terms of a collective agreement (a "true" interest arbitration) the Board does not have jurisdiction to review the arbitrator's award. By contrast, where an arbitrator is appointed under the terms of a collective agreement, that arbitrator's award is subject to review by the Board under Section 99 of the Code. This is the case regardless of whether the arbitration stems from a dispute concerning the alleged violation of existing terms of a collective agreement (a "true" rights or grievance arbitration) or stems from a dispute arising under the terms of a collective agreement which may have the result of determining certain terms and conditions of employment (a "hybrid" or "intermediate" arbitration). An example of the latter form of arbitration is where the parties appoint an arbitrator under the terms of a collective agreement to settle rates of pay for new classifications. Such an arbitration establishes terms of the collective agreement and is, in that sense, similar to a "true" interest arbitration. The arbitration is different than a "true" interest arbitration, however, in that the dispute arises, and the arbitrator is appointed under the terms of an existing collective agreement. Such an arbitration falls within the Board's review jurisdiction: *B.C. Hydro and Power Authority*, BCLRB No. 64/81.

119 Our conclusion that the Board only has jurisdiction under Section 99 of the Code to review the award of an arbitration board appointed or constituted under a collective agreement or under Part 8 of the Code conflicts with the Board's statements in *Yarrow Lodge*, *supra*, that Section 99 of the Code applies to the review of interest arbitrations arising under Section 55 of the Code. Having now had the opportunity to more fully consider the scope of the Board's jurisdiction to review arbitration awards, we have concluded that the decision in *Yarrow Lodge* was wrong to the extent that it concluded that the Board could review first collective agreement arbitration awards under Section 99 of the Code. However, this does not mean that the Board is entirely without jurisdiction to review interest arbitration awards arising out of a section 55 proceeding.

120 First we note that Section 55 does not fall within Part 8 of the Code. Section 55 contemplates an arbitration to conclude the terms of the first collective agreement being

conducted in certain circumstances by either "a single arbitrator or by the board". At a minimum, where the arbitration is "by the board", the award will constitute a "decision of the board" and will be subject to reconsideration under Section 141 of the Code. It may well be that the Board also has jurisdiction under Section 141 to review an award by a private arbitrator appointed under Section 55 on the basis that the entire Section 55 process (including the arbitration) constitutes a proceeding under the Code that results in a decision of the Board. Whether the Board has jurisdiction to reconsider the award of an arbitrator so appointed is a difficult issue which we need not resolve in this decision. We will accordingly leave that issue to be decided in an appropriate case in the future. To conclude on this point, while we agree with the Coalition that the Board should, as a matter of policy, have jurisdiction under Section 99 of the Code to review an arbitration award that establishes a collective agreement, we do not find that the present language of the Code supports the existence of such a jurisdiction.

121 Having concluded that the definition of arbitration board in Part 8 of the Code includes only arbitrators appointed or constituted under the terms of a collective agreement or under Section 86 where a collective agreement exists, the next question to be determined is whether the Memorandum of Agreement constituted a collective agreement under the Code.

122 Given our finding that a Part 8 arbitration board must be appointed under a collective agreement, a determination of the parties' arguments regarding the status of the Memorandum of Agreement is essential to our decision as to whether the Board has jurisdiction to review the Award. If the Memorandum of Agreement does constitute a collective agreement and Arbitrator Thompson was appointed pursuant to the terms of the Memorandum of Agreement (as opposed to being appointed during collective bargaining) or was appointed pursuant to Section 95 of the *Industrial Relations Act*, then the Arbitrator was a Part 8 arbitration board and the Award is subject to review by the Board under Section 99 of the Code.

123 The term "collective agreement" is defined in Section 1 of the Code as meaning "a written agreement between an employer, or an employers' organization authorized by the employer, and a trade union, providing for rates of pay, hours of work or other conditions of employment...". The Memorandum of Agreement was clearly a written agreement between the Unions and the Employers. It provided that substantially all of the terms and conditions of employment set out in the expired collective agreement would continue to apply and referred all outstanding items, on

which the parties could not agree, to arbitration. Included in the outstanding items were two significant issues; namely, the term of the new agreement and the general wage adjustments. Is the fact that the Memorandum of Agreement either settled or provided a binding mechanism to settle all outstanding bargaining issues sufficient to make the Memorandum of Agreement a collective agreement under the Code? We think not.

124 The original panel relied upon *John Inglis Co. Ltd., supra*, in determining that the test for whether an interim agreement constitutes a collective agreement turns on the objectively ascertained intention of the parties as to whether negotiations are contemplated to continue.

125 We agree that the original decision correctly summarises the test set out in the *John Inglis* decision for determining whether a collective agreement exists. It must be recognized, however, that the precise characterization of the test in that case was influenced by the facts. In particular, the consideration of whether further negotiations were contemplated as part of the test for determining whether a collective agreement exists was appropriate because of the circumstances in *John Inglis*. The issue there was whether an agreement signed by the parties that purported to settle all bargaining issues was a collective agreement or was simply a "memorandum of settlement" which does not have the legal status of a collective agreement. The Board concluded that where the parties, in the course of negotiations, record terms that have been provisionally agreed, the "interim agreement" does not constitute a collective agreement so long as it is contemplated that the negotiations are to continue. In *John Inglis*, the agreement in question purported to settle all bargaining issues and accordingly was found to be a collective agreement. In those circumstances it made sense for the Board to consider whether any further negotiations were contemplated in deciding whether the agreement in question was a final collective agreement or was simply an interim agreement recording the terms of issues that had been settled up to a point in time.

126 The *John Inglis* decision did not deal with the situation in the present case; that is, there is no further bargaining contemplated but there are still unresolved bargaining issues that the parties have agreed to resolve through binding arbitration. In such a case it does not make sense to resolve the question of whether a collective agreement exists by simply considering whether further bargaining is contemplated. To take the extreme, if parties are unable to reach any agreements in collective bargaining, and decide to refer all bargaining issues to a third party for

resolution, can it be said that there is a collective agreement simply because there is no further collective bargaining contemplated? We think not.

127 In every case, all the evidence must be considered in order to objectively determine whether a collective agreement exists. This will include evidence of the scope or extent of the agreements already reached by the parties, as well as evidence of whether future "bargaining activities" are expected to take place, either further negotiations or binding arbitration. Certainly parties may agree to leave some bargaining issues, even significant issues, to be determined by an interest arbitrator and may still be found to have a collective agreement. Whether a collective agreement is found to exist in a given case of such a referral to arbitration will depend, in part, upon whether the bargaining issues already agreed upon provide a sufficient framework of the terms and conditions of employment. In addition, the Board will be interested in determining, objectively from the evidence, whether the parties intended the arbitration award to constitute the collective agreement or whether the parties' earlier agreement that included the reference to arbitration was intended to constitute the collective agreement.

128 In the present case we have concluded that the original panel erred by taking too narrow an approach to the legal test for determining whether a collective agreement exists and, consequently, by deciding that the Memorandum of Agreement, on its own, constituted a collective agreement. We note first that the Memorandum of Agreement left, among other terms to be decided by the Arbitrator, the general salary adjustments and the duration of the collective agreement. This tends to suggest that the Memorandum of Agreement itself was not intended to be a collective agreement. More importantly, and this is sufficient reason alone for our decision, express references in the Memorandum of Agreement indicate that it was the parties' intention that a collective agreement would *not* be constituted until after the arbitration Award was handed down. Clause 2 of the Memorandum of Agreement states:

The parties agree that the attached negotiated revisions shall be incorporated into the appropriate revised collective agreements and this Memorandum of Agreement dated January 7, 1994, shall be appended to and shall form a part of the award of the arbitrator to be appointed by this Memorandum of Agreement....

[list of 26 negotiated revisions omitted]

Clause 5 of the Memorandum of Agreement states in part that:

Within ten (10) work days of signing this Memorandum of Agreement the parties shall endeavour to agree on an arbitrator to resolve the outstanding issues....

129 Finally, in the handwritten addition to the Memorandum of Agreement the parties state:

It is understood that unless otherwise specified changes will occur upon the date of the award.

130 By agreeing that the "negotiated revisions" which are listed in the Memorandum of Agreement were to "form a part of the award of the arbitrator" and that the arbitrator's mandate was "to resolve the outstanding issues" it is inescapable that the parties intended the Arbitrator's Award to result in a collective agreement coming into existence, rather than the Award merely filling in the missing terms of an already existing collective agreement. This conclusion is reinforced by the parties' express written agreement that "unless otherwise specified changes will occur upon the date of the award". It is also consistent with the evidence of Diane Bell, a representative of the Unions, who testified at the original hearing that she did not think that a collective agreement became effective until the Award was issued. It is noted that the original panel disagreed with Ms. Bell's understanding of when the collective agreement became effective. In doing so, the original panel stated that "[t]he Memorandum does not contain an 'effective date' of the renewal collective agreement". It appears from this comment that the original panel did not consider the handwritten term in the Memorandum of Agreement specifying the date of the Award as the effective date for the changes to the collective agreement. Had the original panel considered this provision, we are satisfied it would have reached a different conclusion.

131 Given our finding that it was the issuance of the Award that constituted a collective agreement between the parties, it follows that Arbitrator Thompson was not appointed or constituted under Part 8 of the Code or a collective agreement. As he was not an "arbitration board" under Part 8, the Award is not subject to review by the Board under Section 99 of the Code for the reasons already expressed.

2. Board's Exclusive Jurisdiction: Sections 136 and 139 of the Code

132 The Unions' alternative argument is that if we find that the Arbitrator was not a Part 8 arbitration board subject to review under Section 99 of the Code, the Board still has the authority to review the Award pursuant to its exclusive jurisdiction and general powers described in Sections 136 and 139(c), (d) and (g) of the Code. Again, the relevant portions of these Sections provide:

136. (1) Except as provided in this Code, the board has and shall exercise exclusive jurisdiction to hear and determine an application or complaint under this Code and to make an order permitted to be made....

139. The board has exclusive jurisdiction to decide a question arising under this Code and on application by any person or on its own motion may decide for all purposes of this Code any question, including, without restriction, any question as to whether
(c) a collective agreement has been entered into,
(d) a person is or what persons are bound by a collective agreement,
(g) a collective agreement is in full force and effect...

133 None of these provisions expressly authorizes the Board to review an interest arbitration award to determine whether the arbitrator was guilty of some misconduct that should result in the Board setting aside the award and the resulting collective agreement. In advancing this alternative argument the Unions rely upon the Board's general power under Section 139 to "decide for all purposes of this Code any question...".

134 There is no doubt that Sections 136 and 139 of the Code provide the Board with exclusive jurisdiction to decide a broad range of questions. This jurisdiction includes the authority to answer questions or deal with issues not expressly set out in sub-sections (a) to (w) of Section 139. In our view, however, the general power to decide "any question" cannot be interpreted in such a way as to grant the Board broader powers than are expressly provided elsewhere in the Code. It is a well known rule of statutory interpretation that a general provision in a statute cannot be used to create jurisdiction where a specific provision in the same statute gives a

narrower jurisdiction: *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412 at 432; *British Columbia and Yukon Territory Building and Construction Trades Council v. Cairns Electric Ltd. et al* (1988), 27 BCLR (2d) 164 (S.C.); affirmed (1989), 39 BCLR (2d) 248 (C.A.).

135 In our view the Unions are asking the Board to interpret its general powers in precisely the way that the courts have said we should not. As set out in the earlier portion of this decision, Part 8 of the Code delineates the Board's jurisdiction to review arbitration awards. This Part expressly limits the Board's jurisdiction to the review of decisions of arbitration boards appointed or constituted under a collective agreement or by the director of the arbitration bureau (formerly the Minister of Labour) where there is a failure to appoint an arbitration board under a collective agreement. The Board cannot interpret and rely upon its general powers to avoid this express limitation on its jurisdiction to review arbitration awards where there is no collective agreement in existence and the purpose of the award is to settle the terms and conditions of the collective agreement.

136 The Unions rely upon a number of cases in support of their argument that it is the Board and not the Court that has jurisdiction to review interest arbitration awards. Each of these cases is distinguishable.

137 In *U.T.U. Local 1178 et al. v. B.C. Rail et al.*, *supra*, the issues were whether the Court had jurisdiction to review the decision of an Industrial Inquiry Commission appointed under Section 122 of the *Industrial Relations Act* and, if so, whether it was appropriate to exercise that jurisdiction. The Court decided that it shared concurrent jurisdiction with the Industrial Relations Council to review the decision of the Commission but declined to exercise the jurisdiction, preferring to refer the issue to the Council for resolution. The Court's decision that the Council had the jurisdiction to review the Commission's decision was dependent upon the fact that the Commission was a body created under the provisions of the Act. The Court stated:

In my view, the IRC does have jurisdiction to deal with this issue.

More particularly, although there are no provisions for review under s.122 of the *Act*, s.34 of the *Act* does provide that the IRC "has exclusive jurisdiction to decide a question arising under this

Act, and, on application by any person or on its own motion may decide for all purposes of this Act any question,..."

Pursuant to the provisions of the *Act*, the Legislature has granted the IRC the jurisdiction to review or reconsider the orders and decisions of all of [sic] decision making bodies created under the provisions of the *Act* - including the decisions of Special Officers appointed by the Minister, Arbitration Boards, Panels and the IRC itself.

As the statutory function of the Commission is advisory in nature, there is no necessity for provision pertaining to the review of orders made. Given that these provisions clearly demonstrate that the Legislature intended that all decisions made as a result of the provisions of the *Act* be reviewable by the IRC, it is in keeping with the Legislative intent to interpret s.34 as enabling the IRC to determine if an entity (created under the provisions of the *Act*) has adopted a decision making role and if so, to determine the appropriate relief to be granted...

* * *

The present case in my view is clearly distinguishable from the situation in the *B.C. and Yukon Buildings* case (*supra*), as the Commission is created under the provisions of the *Act* and s.34 of the *Act* provides that the IRC "has exclusive jurisdiction to decide a question arising under the *Act*". (pp.25-6)

138 In the present case the interest arbitration board was not created pursuant to the terms of the Code. Rather, it was a consensual arbitration board created pursuant to the agreement of the parties. The decision in *U.T.U. Local 1178 et al. v. B.C. Rail et al.*, *supra*, does not, therefore, support the Unions' contention that the Award is subject to review by the Board pursuant to the Board's exclusive jurisdiction and general powers under Sections 136 and 139 of the Code.

139 The Unions also rely on the decision in *Powell River (District) v. Ready*, *supra*, in support of their alternative argument. In that case the issue was whether the employer could unilaterally revoke its agreement to refer outstanding matters in collective bargaining to arbitration. In reaching the conclusion that the employer could not make the unilateral

revocation, the Court made the following comments:

The rationale behind the common law that a submission to arbitration could be unilaterally revoked lies in the jurisdiction of the Court. Mustill and Boyd commented on the history of arbitrations and the jurisdiction of the Courts in a footnote at p. 154 of their book:

Various reasons have been given for the rule that the parties cannot by contract "oust the jurisdiction of the Court" ... One reason which has been suggested is a simple jurisdictional jealousy. Another is an argument based on repugnancy. If the parties have agreed that a contract shall create legal rights, a clause stating that those rights shall not be enforceable in court must be rejected as inconsistent with the main intent of the agreement...Whatever the true explanation of the rule, it was established by 1799...

If one accepts the rationale as being valid (and I have my reservations in that regard), it only applies to arbitrations which serve to oust the jurisdiction of the Court; namely, arbitrations dealing with disputes that would otherwise be resolved by the Courts. The rationale does not apply to the type of arbitration involved in this case. *The subject matter of this arbitration is the resolution of certain terms of a collective agreement between the parties, and the goal of the Arbitration Board is to attempt to determine the terms to which the parties would have agreed if they had continued to negotiate. The arbitration does not involve a dispute that is capable of being resolved by the Courts.* I would not even be inclined to call it a dispute because it is more in the nature of a failure to agree on the terms of an agreement. However, the Legislature did choose to call it a dispute when enacting s.137.95(1) of the IRA which reads as follows:

Where a public sector employer and a trade union have agreed to settle a dispute between them by binding arbitration ... the parties shall make mutually agreeable arrangements for arbitration to resolve the dispute by settling the terms and conditions of a collective

agreement. (pp.235-6; emphasis added)

140 The Unions rely upon the Court's comment that "[t]he arbitration does not involve a dispute that is capable of being resolved by the Courts" as indicative that the Courts lack jurisdiction to review consensual interest arbitrations. This in turn suggests that it must be the Board that exercises such a jurisdiction.

141 In our view this is an incorrect reading of the Court's comments. Read in context, it is apparent that what the Court was saying is that the Courts are not capable of resolving the underlying "dispute" that is the subject matter of the arbitration; namely, determining the terms of the collective agreement. This is not surprising given that the inability of the parties to agree to terms of an agreement does not give rise to any cause of action capable of being adjudicated by the Courts. The Court properly recognized that the resolution of the terms of the collective agreement is to be left to the consensual interest arbitrator. The Court did not comment one way or another concerning the extent of the Court's or the Board's jurisdiction to review the outcome of the arbitration process. This was not an issue that was before the Court. Again, in our view, the decision in *Powell River (District)* simply does not stand for the proposition advanced by the Unions.

142 The *Powell River (District)* decision is instructive in another way. The arbitration in that case arose out of Sections 137.95 and 137.96 of the *Industrial Relations Act*. Those sections established a scheme of binding interest arbitration to resolve collective bargaining disputes by settling the terms and conditions of collective agreements between public sector employers and trade unions. Section 137.96(10) of the Act established a process for reviewing decisions of the interest arbitrators:

- 137.96 (10) On application to the commissioner by a party to the dispute within 7 days after it receives an arbitration award, the commissioner may review the arbitration award on the ground that
- (a) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in subsections (1), (2) and (3), or
 - (b) a party to the arbitration has been or is likely to be denied a fair

hearing.

This sub-section established a review power that was virtually identical to the power of review then found in Section 108 of the Act. In our view, the fact that the Legislature found it necessary to provide an express power to review interest arbitration awards supports a conclusion that it recognized that the provisions of the statute, including Section 108 (now Section 99), did not apply to allow review of arbitration awards settling the terms of a collective agreement. This is consistent with our conclusion in this case. Further, we note that when the current Code was enacted, Sections 137.95 and 137.96 were repealed. There are no equivalent sections in the Code. This too supports our conclusion that there is no longer any power to review "true" interest arbitration awards under the Code.

143 The next case relied upon by the Unions is *Health Labour Relations Association v. Hospital Employees Union, supra*. This case concerned an application to review the award of an interest arbitration board constituted under the *Essential Services Disputes Act*, S.B.C. 1977, c.83. The Respondent argued that the Court lacked jurisdiction to entertain the proceeding as exclusive jurisdiction to do so rested with the Board. In rejecting this argument the Court stated:

The Respondent submitted that this Court had no jurisdiction to entertain this action because exclusive jurisdiction to grant the relief sought in the petition was vested in the Labour Relations Board. The first basis for this submission was that Section 2(2) of the *Essential Services Disputes Act* brings into play all of the sections of the *Labour Code* including all those sections that I have set out earlier in these reasons and the Respondent argues that those sections vest exclusive jurisdiction in the Labour Relations Board. I would have been inclined to accept that argument were it not for the existence of Section 7(3) of the *Essential Services Disputes Act*. As I have pointed out earlier, that section specifically selects certain sections out of Part VI of the Labour Code dealing with arbitrations and makes them applicable to arbitrations under the *Essential Services Disputes Act*. In my view by so doing the Legislature must be taken to have excluded the operation of the remaining sections of Part VI of the Labour Code including the operation of Sections 108 and 109 [now sections 99 and 100] which are the sections which confer exclusive jurisdiction with respect to arbitrations on the Labour Relations Board. (p. 19)

144 The Unions argue that the rationale relied upon by the Court in *H.L.R.A. v. H.E.U.* to support the Court's jurisdiction does not apply in the present case. The present application does not concern the review of a consensual interest arbitration arising under legislation that excludes the operation of Section 99 of the Code. Therefore, the Board must have exclusive jurisdiction to review the Award.

145 In our view the decision in *H.L.R.A. v. H.E.U.* is not determinative of the present case. While on its face the above passage might be read to support the Unions' argument, we note that the inapplicability of Section 108 of the former Code [now Section 99] to the review of interest arbitrations does not appear to have been argued before the Court. Also, as the Court's decision was premised on the fact that Section 108 was excluded from the *Essential Services Disputes Act* it was unnecessary for the Court to consider the precise scope of the Section. The Court simply recognised that the only section conferring jurisdiction on the Board with respect to arbitrations had been excluded from the legislation governing the proceedings before the Court. Whatever the scope of Section 108 was, it did not apply to oust the Court's jurisdiction in that case.

146 Finally, the Unions note that in the recent decision of the Board in *Coquitlam (District) v. District of Coquitlam Firefighters, Local No. 1782*, BCLRB No. B166/94, the Board dealt with a challenge brought under Section 99 to the award of an arbitrator settling a collective agreement. In advancing this argument the Unions correctly note that in that case the issue of the Board's jurisdiction to review the arbitration in question was not raised. To the extent that this decision stands for the proposition that the Board has jurisdiction to review interest arbitration awards pursuant to Section 99 of the Code, we decline to follow it.

V. SUMMARY AND CONCLUSIONS

147 The Board's jurisdiction to review an arbitration award is restricted to the review of an award issued by an *arbitration board* as that term is defined in Section 81 of the Code. Consequently, the Board may only review an award where the arbitration board was appointed or constituted under a collective agreement. Additionally, the Board has jurisdiction where the appointment is made by the director of the arbitration bureau pursuant to Section 86 of the Code

(previously by the Minister of Labour under Section 95 of the *Industrial Relations Act*). This limitation on the Board's review jurisdiction applies whether the arbitration board is a "single arbitrator" or "another tribunal or body". Contrary to the statements made in *Yarrow Lodge, supra* the Board does not have the jurisdiction, under Section 99 of the Code, to review an arbitration award that concludes the terms of a collective agreement, including the terms of a first collective agreement issued under Section 55 of the Code. If an arbitration under Section 55 is "by the board", then the award is a decision of the Board and is subject to reconsideration under Section 141 of the Code. If an arbitration under Section 55 is by a private arbitrator, the award may also be subject to reconsideration under Section 141 of the Code, but this question is left to be decided in a suitable case.

148 In the present case, Arbitrator Thompson was appointed under the terms of a Memorandum of Agreement, to settle the terms and conditions of employment in a renewal collective agreement not otherwise agreed upon by the parties under the Memorandum of Agreement. Accordingly, the Board only had jurisdiction to review Arbitrator Thompson's Award if the Memorandum of Agreement was a collective agreement under the Code.

149 In determining whether a settlement agreement between the parties in a given case constitutes a collective agreement, the primary focus of the Board is on the intention of the parties as determined objectively from their words and conduct. In every case all the evidence must be considered in order to objectively determine the intention of the parties. This includes evidence of the scope or extent of the agreements already reached by the parties, as well as evidence of whether future "bargaining activities" are expected to take place, either further negotiations or binding arbitration. In the case of a referral to binding arbitration, the Board will consider whether the bargaining issues already agreed upon provide a sufficient framework of the terms and conditions of employment and will look for objective evidence of whether the parties intended the arbitration award, or the earlier agreement that included the reference to arbitration, to constitute the collective agreement.

150 In the present case we have concluded that the original panel erred by taking too narrow an approach to the legal test for determining whether a collective agreement exists and in concluding that the Memorandum of Agreement constituted a collective agreement. Applying the principles set out above we are satisfied that the Memorandum of Agreement was not intended by

the parties to constitute a collective agreement. The Memorandum of Agreement left significant terms (including general salary adjustments and duration of the agreement) to be decided by the Arbitrator. Further, express references in the Memorandum of Agreement indicated that it was the parties' intention that a collective agreement would not be constituted until after the Arbitrator issued his Award.

151 Given our finding that the Memorandum of Agreement was not a collective agreement, it follows that Arbitrator Thompson was not appointed or constituted under Part 8 of the Code or a collective agreement. As he was not an "arbitration board" under Part 8, the Award was not subject to review under section 99 of the Code. Further, the Board cannot rely upon its exclusive jurisdiction and general powers under Sections 136 and 139(c), (d) and (g) of the Code as authority to review the Award. The Board cannot interpret its general powers so as to create a jurisdiction to review arbitration awards that is broader than the narrower jurisdiction to review arbitration awards specifically set out in Part 8 of the Code. Accordingly, we find that the original panel correctly decided that the Board lacks jurisdiction to review the Award.

152 The Unions' application for reconsideration is accordingly dismissed.

LABOUR RELATIONS BOARD

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