Court of Appeal File No. CA 46700
BCSC File No: S 189318
Vancouver Registry

IN THE COURT OF APPEAL OF BRITISH COLUMBIA

BETWEEN:

INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION, PROGRESSIVE CONTRACTORS ASSOCIATION, CHRISTIAN LABOUR ASSOCIATION OF CANADA, CANADA WEST CONSTRUCTION UNION, BRITISH COLUMBIA CHAMBER OF COMMERCE, BRITISH COLUMBIA CONSTRUCTION ASSOCIATION, CANADIAN FEDERATION OF INDEPENDENT BUSINESS, VANCOUVER REGIONAL CONSTRUCTION ASSOCIATION, JACOB BROS. CONSTRUCTION INC., EAGLE WEST CRANE & RIGGING INC., LMS REINFORCING STEEL GROUP LTD., MORGAN CONSTRUCTION AND ENVIRONMENTAL LTD., TYBO CONTRACTING LTD., DAWN REBELO, THOMAS MACDONALD, FORREST BERRY, BRENDON FROUDE, RICHARD WILLIAMS, and DAVID FUOCO

APPELLANTS (PETITIONERS)

AND:

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE, THE ATTORNEY GENERAL OF BRITISH COLUMBIA (ON BEHALF OF ALL MINISTRIES IN THE PROVINCE), and ALLIED INFRASTRUCTURE AND RELATED CONSTRUCTION COUNCIL OF B.C.

RESPONDENTS (RESPONDENTS)

FACTUM OF THE APPELLANTS

Independent Contractors and Businesses Association, Progressive Contractors Association, Christian Labour Association of Canada, Canada West Construction Union, British Columbia Chambers of Commerce, British Columbia Construction Association, Canadian Federal of Independent Business, Vancouver Regional Construction Association, Jacob Bros. Construction

The Minister of Transportation and Infrastructure and the Attorney General of British Columbia (the "Provincial Respondents")

Counsel for the Provincial Respondents
Gareth Morley and Keith Evans

Ministry of the Attorney General
Legal Services Branch

Inc., Eagle West Crane & Rigging Inc., LMS Reinforcing Steel Group Ltd., Morgan Construction and Environmental Ltd., Tybo Contracting Ltd., Dawn Rebelo, Thomas MacDonald, Forrest Berry, Brendon Froude, Richard Williams, and David Fuoco (the "Appellants")

Counsel for the Appellants
Peter A. Gall, Q.C.

Gall Legge Grant & Zwack LLP
Floor 10 - 1199 West Hastings Street
Vancouver, BC V6E 3T5
Email: pgall@glgzlaw.com
Telephone: 604-891-1152
Facsimile: 604-669-5101

PO Box 9280 Stn Prov Govt
Victoria, BC V8W 9J7
Email: Gareth.Morley@gov.bc.ca
Telephone: 250-952-7644
Facsimile: 250-356-9154

Allied Infrastructure and Related Construction Council of B.C. ("AIRCC")

Counsel for the Respondent AIRCC
Charles Gordon, Q.C.

Koskie Glavin Gordon
1650 - 409 Granville Street
Vancouver, B.C. V6C 1T2
Email: cgordon@koskieglavin.com
Telephone: 604-734-8001
Facsimile: 604-734-8004

I N D E X

CHRONOLOGY OF DATES RELEVANT TO THE APPEAL

Date	Event
July 16, 2018	The BC Ministry of Transportation and Infrastructure issued a request for qualifications for the Pattullo Bridge Replacement Project, which included a tendering condition effectively requiring contractors carrying out work on the Project to obtain their workforce from the Building Trades Unions.
August 27, 2018	The Petitioners/Appellants filed their petition for judicial review challenging the Minister's decision to impose the impugned tendering condition.
February 27, 28 and March 1, 2019	The parties appeared before the Learned Chambers Judge for the hearing of preliminary applications filed by the Provincial Respondents and Building Trades Unions seeking to strike the petition.
July 23, 2019	The Learned Chambers Judge issued his decision on the preliminary applications, indexed at 2019 BCSC 1201 (the "Jurisdictional Decision").
February 3, 2020	The parties appeared before the Learned Chambers Judge again, resulting in supplementary oral reasons for judgement, dated February 3, 2020 ("Supplementary Decision"), in relation to the scope of the Jurisdictional Decision.
May 7, 2020	A case management conference was held to settle the terms of the order arising from the Learned Chambers Judge's Jurisdictional Decision and Supplementary Decision.

OPENING STATEMENT

This appeal raises fundamental issues about the availability and scope of judicial review of the exercise of a statutory power by a governmental actor.

The decision of the Court below on these issues is contrary to the constitutional role of the courts to uphold the rule of law and the constitutional rights of those affected by administrative decisions.

Specifically, the Court below held that even though judicial review was available to challenge the decision of the Minister of Transportation and Infrastructure under the *Transportation Act* to require construction workers to join and pay dues to certain unions selected by the Minister to work on designated public construction projects, the reviewing court could only perform one part of the applicable judicial review analysis in this case – that is, whether the Minister acted unreasonably by pursuing an improper purpose in imposing this tendering requirement on these projects.

The Court below held that it could *not* perform the other necessary component of the judicial review analysis in this case – that is, whether the Minister's decision proportionately balanced the furtherance of the statutory objectives of her home statute with the negative impact of this decision on *Charter* rights of construction workers.

This truncation of the judicial review analysis was based on the Learned Chambers Judge's conclusion that the Labour Relations Board had the exclusive jurisdiction under the *Labour Relations Code* to determine whether the Minister's decision to impose certain tendering conditions under the *Transportation Act* was consistent with *Charter* rights and values.

With respect, that is not correct. The Labour Relations Board has no jurisdiction to review the decision of the Minister, including to ensure that it is consistent with *Charter* rights and values. That is the exclusive role of the courts in our constitutional system.

There is no labour relations issue in this case that comes within the exclusive jurisdiction of the Labour Relations Board. The only issue is whether the Minister's decision was a reasonable exercise of her statutory discretion, which necessarily involves a consideration of its impact on the *Charter* rights of construction workers.

In addition, the Appellants submit that the Learned Chambers Judge erred in striking the claims for declaratory and injunctive relief and limiting the Petitioners to orders in the nature of *certiorari* and prohibition.

Therefore, the appeal should be allowed on both issues, and the petition remitted back to the Chambers Judge to be decided on its merits.

PART 1 – OVERVIEW OF ARGUMENT and STATEMENT OF FACTS

A. Overview

1. The Appellants applied for judicial review of a decision of the Minister of Transportation and Infrastructure (the "**Minister**") under the *Transportation Act,* SBC 2004, c.44 ("***Transportation Act***"), imposing tendering conditions on contractors seeking to perform the construction work on certain public construction projects designated by the Minister.

2. The tendering conditions require all contractors who perform work on the designated public construction projects to obtain their workforces on these projects from unions selected by the Minister.

3. The result is that all construction workers on these projects must be members of, and pay dues to, the Government chosen unions.

4. The Appellants say that this decision was an unreasonable exercise of the Minister's statutory discretion under the *Transportation Act*, because it was made for an improper purpose (the favouring of these unions) and does not proportionately balance the furtherance of the objectives of the *Transportation Act* with the impact on the *Charter* rights of construction workers.

5. As the Supreme Court of Canada recently re-emphasised, the courts have a constitutional obligation to judicially review the public decisions of administrative decision-makers, like the Minister, to ensure their decisions accord with the empowering statute, constitutional rights, and the rule of law.

6. In the judgment under appeal, the Court below declined to perform that fundamental constitutional function.

7. It held, correctly, that the Court had the jurisdiction to review whether the Minister reasonably exercised her discretion under the *Transportation Act*.

8. But it then ruled that this did not include the question of whether the decision of the Minister proportionately balanced the objectives of the *Transportation Act* with *Charter* rights and values. The Learned Chambers Judge held that this component of the review of the reasonableness of the Minister's decision was within the exclusive jurisdiction of the Labour Relations Board under the *Labour Relations Code,* RSBC 1996, c. 244 ("***Labour Relations Code***").

9. With respect, that conclusion is clearly wrong.

10. The Labour Relations Board has no jurisdiction to review this decision of the Minister, even with respect to whether the decision proportionately balances the impact on the *Charter* rights of construction workers.

11. That is the constitutional role of the courts.

12. In performing this role in this case, the Court does not have to adjudicate any labour relations issues under the *Labour Relations Code*.

13. The issue on judicial review is simply whether the Government can require construction workers to belong to unions selected by the Government to work on certain public construction projects designated by the Government. That is a matter within the exclusive jurisdiction of the courts.

14. Therefore, the Petitioners say that the appeal should be granted and the matter remitted back to the lower court to determine whether the Minister's decision to force workers to join government approved unions was a reasonable exercise of the Minister's statutory discretion under the *Transportation Act* consistent with the governing statute, the constitution, and the rule of law.

B. Procedural History

15. Section 3 of the *Transportation Act* expressly provides the Minister with the statutory power to enter into agreements for the building of public transportation and infrastructure projects.

Power to contract

3 Without limiting any other power the minister has under this or any other enactment, the minister may enter into contracts for, or otherwise provide for the carrying out of, any activity or service relating to transportation, including, without limitation, the planning, design, acquisition, holding, construction, use, operation, upgrading, alteration, expansion, extension, maintenance, repair, rehabilitation, protection, removal, closure and disposition of provincial public undertakings and related improvements.

16. The building of transportation and infrastructure projects, and the conditions under which such projects will be built, is at the very core of the Minister's statutory mandate.

17. On or around July 16, 2018, the Minister exercised this statutory power by issuing tendering conditions for the Pattullo Bridge Replacement Project ("**Project**").

18. Those tendering conditions, set out in a Request for Qualifications, required all contractors working on the designated projects to obtain their workforces from a newly created crown corporation, BC Infrastructure Benefits Inc. (the "**BCIB**"), under a collective agreement it negotiated with the Allied Infrastructure and Related Construction Council of B.C. (the "**AIRCC**"), which requires all construction workers on these projects to be members of these unions.

19. The Minister imposed these tendering conditions despite the fact that the vast majority of construction workers in the province had not chosen to be represented by the Building Trades Unions.

20. Rather, the employees of most construction contractors have either chosen not to be represented by a union, or have chosen to be represented by non-Building Trades Unions, including the Appellant Unions.

21. The purpose and effect of the Minister's decision to impose the tendering conditions was to force all construction workers to join and pay union dues to the Building Trades Unions, contrary to their freedom of expression and association rights under the *Charter*.

R. v. Advance Cutting & Coring Ltd., 2001 SCC 70;

Mounted Police Association of Ontario v. Canada (AG), 2015 SCC 1.

22. On August 27, 2018, the Petitioners (Appellants on appeal) filed a petition seeking judicial review of the Minister's decision to impose the tendering conditions under the *Transportation Act*, and seeking a range of remedies, including declarations, injunctions, *certiorari* and prohibition (the "**Petition**").

23. The Appellants allege that the Minister's decision was an unreasonable exercise of discretion under the *Transportation Act,* including that it failed to reach a proportionate balance between the Minister's statutory mandate and the *Charter* rights of construction workers.

C. The Judgment of the Court Below

24. The Respondent Minister and Attorney General of British Columbia (the "**Provincial Respondents**"), and the Respondent organization representing the Building Trades Unions, and the Respondent AIRCC, applied to strike the Petition on the following grounds:

    a. that the dispute between the parties fell within the exclusive jurisdiction of the Labour Relations Board under the *Labour Relations Code*, and

    b. that the decision to impose the tendering conditions was not amenable to judicial review because it did not involve the exercise of a "statutory power" as defined in the *Judicial Review Procedures Act,* RSBC 1996, c 241 ("***JRPA***"), but rather was a private contracting decision.

25. As set out by the Learned Chambers Judge in his *Jurisdictional Decision*, the Appellants' claim that the Minister had not properly exercised her statutory powers has two prongs:

> [38] The petitioners accept that a judicial review is not available for the adjudication of purely contractual disputes between the government and private parties. However, they say that the petitioner does not involve breach of contract or otherwise engage private law. Rather, they say the

> claim relates to an improper or unreasonable exercise by the Minister of his statutory power under the Transportation Act to enter into contracts. More particularly, they submit that the power was exercised to impose a model that prohibits contractors from using their own workforces, requires contractors to obtain their workforces from BCIB and requires workers to be members of particular unions. This, they submit, was an unlawful or unreasonable exercise of the statutory power in two respects: first, the power was exercised for an improper purpose, namely, to reward the political allies of the current government, an objective that is inconsistent with the purposes of the *Transportation Act*, and second, the petitioners submit that the power was exercised improperly or unreasonably in that the Minister failed to take into account and proportionately balance the Charter rights of contractors and workers, something the Minister was legally obliged to do. The petitioners submit that the exercise of a statutory power for an improper purpose and the failure to properly take into account and balance *Charter* rights are both matters of public law and are properly the subject matter of judicial review before this Court.
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> *Independent Contractors and Businesses Association v British Columbia (Transportation and Infrastructure)*, 2019 BCSC 1201 ("***Jurisdictional Decision***") at para 38.

26. On the jurisdictional issue, the Learned Chambers Judge ruled as follows:

> [99] The second part of the *Weber* test is whether the dispute falls within the jurisdiction of the LRB under the *Code*. This part of the test is met with respect to most issues raised in the petition but not all. The LRB clearly has jurisdiction with respect to whether a collective agreement has been entered into (139(c)), whether the employees/workers and contractors are bound by the collective agreement (139(d)), and whether the employees/workers are included in or excluded from an appropriate bargaining unit (139(l)). In addition, pursuant to s. 115.1 of the *Code*, the LRB has the jurisdiction to determine the *Charter* issues raised by the petition.
>
> [100] However, as was noted in *Weber*, at para. 67, the exclusive jurisdiction of the LRB to determine issues within its jurisdiction "is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by" the LRB. The LRB does not have jurisdiction to determine whether the Minister properly exercised the statutory powers granted under the *Transportation Act* and does not have jurisdiction to grant the claims for relief in the nature of certiorari and prohibition. These are issues which only this Court has jurisdiction to address and which I have determined are not to be struck as the claims are not bound to fail.
>
> *Jurisdictional Decision*, *supra* at paras 99-100.

27. The Learned Chambers Judge subsequently clarified his decision by stating that the Labour Relations Board had the jurisdiction to review whether the Minister proportionately balanced the achievement of the statutory objectives with the impact on *Charter* rights and values.

Independent Contractors and Businesses Association v British Columbia (Transportation and Infrastructure), Oral Reasons for Judgment of Giaschi J., dated February 3, 2020 ("**Supplementary Decision**").

28. The Learned Chambers Judge also held that the Minister's decision was not an exercise of a "statutory power" under the *JRPA,* and therefore the Petitioners could not be granted the remedies set out in section 2(2)(b) of the *JRPA,* such as declarations or injunctions. Rather, they could only seek the remedies of *certiorari* and prohibition in section 2(2)(a) of the *JRPA*, which does not require the exercise of a "statutory power" as defined in the *JRPA*.

Jurisdictional Decision, *supra* at para 52.

PART II – ERRORS IN JUDGMENT

29. The Learned Chambers Judge committed two clear errors of law that require correction on appeal.

30. First, and most fundamentally, the Chambers Judge erred in finding that the adjudication of whether the Minister reasonably exercised her statutory discretion under the *Transportation Act* in accordance with *Charter* rights and values is a matter within the exclusive jurisdiction of the Labour Relations Board.

31. Second, the Chambers Judge erred by holding that the imposition of a tendering requirement under the *Transportation Act*, which forced construction workers to join, and pay dues to, unions chosen by the Government, was not an exercise by the Minister of a "statutory power" as defined in the *JRPA*.

PART III – ARGUMENT

A. The Jurisdiction of the Court

32. As explained in *Dunsmuir* and endorsed in *Vavilov,* the courts have the constitutional obligation to judicially review the decisions of administrative decision-makers in order to ensure that they are consistent with the statute authorizing the decision, the rule of law, and the constitution:

i. *Dunsmuir v. New Brunswick*, 2008 SCC 9

> [31] The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the Constitution Act, 1867 : *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. [emphasis added]

ii. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65

> [24] Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers: Dunsmuir, at para. 27. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the Constitution Act, 1867, legislatures cannot shield administrative decision making from curial scrutiny entirely: *Dunsmuir*, at para. 31; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 236-37; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090. Nevertheless,

> respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.
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> […]
>
> [82] Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir*, at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 10; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 10.
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> […]
>
> [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. [emphasis added]

33. In performing this constitutional role, the courts must ensure that administrative decisions are made in a manner that proportionately balances any relevant *Charter* rights and values in light of the statutory mandate of the administrative decision maker.

Doré v. Barreau du Quebec, 2012 SCC 12 ("***Doré***").

34. The courts' constitutional responsibility in this respect was described as follows in *Doré*:

> [24] It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values [citations omitted]. The question then is what framework should be used to scrutinize how those values were applied?
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> (…)
>
> [55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In Lake, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the prima facie infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).
>
> [56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).

Doré, supra at paras 24, 55-56.

35. The *Doré* analysis was subsequently confirmed by majorities of the Supreme Court in *Loyola* and *Trinity Western University*, the latter of which described the required analysis as follows:

> [57] Having concluded that the LSBC had authority to consider factors outside of the competence of individual law graduates of TWU's proposed law school, the question now becomes whether the LSBC's decision to deny

> approval to TWU's proposed law school was reasonable. Discretionary administrative decisions that engage the *Charter* are reviewed based on the administrative law framework set out by this Court in *Doré* and *Loyola*. Delegated authority must be exercised "in light of constitutional guarantees and the values they reflect" (*Doré*, at para. 35). In *Loyola*, this Court explained that under the *Doré* framework, *Charter* values are "those values that underpin each right and give it meaning" and which "help determine the extent of any given infringement in the particular administrative context and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives" (para. 36, citing *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 88). The *Doré*/*Loyola* framework is concerned with ensuring that *Charter* protections are upheld to the fullest extent possible given the statutory objectives within a particular administrative context. In this way, *Charter* rights are no less robustly protected under an administrative law framework. [emphasis added]
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> *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para 57;
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> See also *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.

36. And as can be seen, in cases in which administrative decisions affect *Charter* rights and values, a court on judicial review must interpret the purposes and objects of the relevant statutory regime – in this case, the *Transportation Act* – and then determine whether the decision proportionately balances the achievement of these objectives with the impact on *Charter* rights and values.

37. The Labour Relations Board is not a superior court empowered to scrutinize the legality of the decisions of the Minister under the *Transportation Act*; rather, it is *itself* an administrative decision-maker, whose jurisdiction is limited to administering the *Labour Relations Code* and adjudicating disputes arising under that Code.

38. Specifically, the Labour Relations Board has no power under the *Labour Relations Code* to review the decisions of the Minister of Transportation to ensure that they abide by the purposes and objects of the *Transportation Act*, the *Charter* and the rule of law.

39. This review function is reserved exclusively to the courts in our constitutional system, and they cannot be lawfully delegated to an administrative decision-maker.

40. Therefore, a challenge to the legality of the decision of the Minister under the *Transportation Act* is not, and cannot be, an issue that arises expressly or inferentially under the *Labour Relation Code*.

41. Unlike in the *Millen* case relied on by the Chambers Judge, there is no issue in this case about the legality of the collective agreement, or the union membership requirement in that collective agreement.

Millen et al v Hydro Electric Board (Man), 2016 MBCA 56 ("***Millen***").

42. The Appellants are only challenging the decision of the Minister under the *Transportation Act* to force construction workers to work under the BCIB/AIRCC agreement on designated public construction projects. They say that this was an unreasonable exercise of her statutory discretion.

43. Put another way, the Appellants are not challenging the union membership requirement (or any other terms) in the BCIB/AIRCC collective agreement, which they accept as valid under the *Labour Relations Code*. Rather, they are challenging the Minister's decision to force construction workers to work under that agreement as a condition of employment on public construction projects designated by the Minister.

44. As there are no labour relations issues in this case, the Learned Chambers Judge erred in concluding that the essence of the dispute between the parties were labour relations issues under the exclusive jurisdiction of the Labour Relations Board.

B. Availability of Judicial Review

45. Notwithstanding the fact that the impugned tendering requirement was included by the Minister in the construction contracts for designated public construction projects, the Minister's decision to impose this tendering requirement as a pre-condition to bidding on the Project was the exercise of a "statutory power" under the *JRPA*, contrary to what the Learned Chambers Judge held.

46. In some cases, such as in *Eagleridge*, a party may allege that the Government has breached a contract or agreement entered into by the Government, which does not involve the exercise of a statutory power in the *JRPA*.

Eagleridge Bluffs & Wetlands Preservation Society v. H.M.T.Q., 2006 BCCA 334 ("***Eagleridge***").

47. However, there is no issue here regarding the interpretation of a contract or whether the contract has been breached by the Minister.

48. The issue is whether the Minister improperly exercised her statutory discretion in imposing the impugned tendering requirement as a pre-condition for bidding on public construction contracts.

See *Independent Contractors and Business Assn. of British Columbia v. British Columbia*, [1995] B.C.J. No. 777 (SC), 1995 CanLII 3302 (BC SC);

Murray Purcha & Son Ltd. v Barriere (District), 2018 BCSC 428.

49. That decision comes within the definition of "statutory power" in the *JRPA*, which includes any decision made under an enactment:

    a. prescribing "the legal rights, powers, privileges, immunities, duties or liabilities of a person";

    b. requiring "a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing"; or

    c. to "do an act or thing that would, but for that power or right, be a breach of a legal right of any person".

50. The Minister's decision constitutes the exercise of a statutory power, because it is specifically authorized by the *Transportation Act*, and because the impugned tendering requirement directly affects the rights:

a. of construction workers, by imposing on them an obligation to join unions chosen by the Government to work on designated public construction projects;

b. of construction contractors who, because of this tendering requirement, are not able to use their own workforces on these projects; and

c. of other unions who have collective bargaining relationships with, and hence represent the employees of, contractors who want to perform work on designated public construction projects.

51. This means that the full range of remedies on judicial review are available in this case, under both sections 2(2)(a) and 2(2)(b) of the *JRPA*, and the Court below erred in striking the declaratory and injunctive relief sought by the Petitioners on this basis.

52. Moreover, because the Minister's decision constituted the exercise of a "statutory power" under the *JRPA*, it is unnecessary in this case for the Appellants to also demonstrate that the decision is of a "sufficient public character" to be amenable to judicial review under the *Air Canada* factors.

See generally *Strauss v. North Fraser Pretrial Centre (Deputy Warden of Operations)*, 2019 BCCA 207 at paras 17-24, 39-41.

53. However, as the Court below correctly recognized, this public character test is clearly met in this case as well, for the reasons outlined in the *Jurisdictional Decision*, and for the additional reason that the Minister's decision infringes the *Charter* rights of construction workers.

Jurisdictional Decision, *supra* at paras 59-63;

See also *Wise v. Legal Services Society*, 2008 BCSC 255; *Northland Road Services (Robson) Ltd. v. British Columbia (Minister of Transportation)*, 2004 BCSC 595; *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250; *Aquatech v Alberta (Minister of Environment and Parks)*, 2019 ABQB 62; *Da'naxda'xw/Awaetlala First Nation v. British Columbia Hydro and Power Authority*, 2015 BCSC 16.

C. Conclusion

54. In summary, the Appellants respectfully submit that the Minister's decision can be challenged by way of judicial review, with all of the remedies available to it under the *JRPA*, and that the Court must consider fully the legality of the Minister's decision, which necessarily includes considering whether it strikes a proportionate balance between the Minister's statutory mandate and the *Charter* rights and values impacted by the decision.

55. There are no labour relations issues under the *Labour Relations Code* that need to be adjudicated, in that it is accepted that the collective agreement and the inclusion of construction workers under it are lawful as a matter of the *Labour Relations Code*.

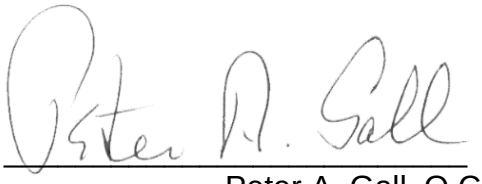
56. The issue is solely whether the Minister reasonably exercised her statutory authority under the *Transportation Act*, which comes within the exclusive jurisdiction of the courts in our constitutional system.

PART IV – NATURE OF THE ORDER SOUGHT

57. The Appellants seek orders overturning the orders of the Learned Chambers Judge striking portions of the Petition, and seek an order that the entire Petition be remitted back to the Chambers Judge to adjudicate on is merits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF THE APPELLANTS

Date: May 11th, 2020



Peter A. Gall, Q.C.
Counsel to the Appellants

LIST OF AUTHORITIES

Authority	Para #
Aquatech v Alberta (Minister of Environment and Parks), 2019 ABQB 62	53
Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65	32
Da'naxda'xw/Awaetlala First Nation v. British Columbia Hydro and Power Authority, 2015 BCSC 16	53
Doré v. Barreau du Quebec, 2012 SCC 12	33, 34, 35
Dunsmuir v. New Brunswick, 2008 SCC 9	32
Eagleridge Bluffs & Wetlands Preservation Society v. H.M.T.Q., 2006 BCCA 334	46
Independent Contractors and Business Assn. of British Columbia v. British Columbia, [1995] B.C.J. No. 777 (SC), 1995 CanLII 3302 (BC SC)	48
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R. v. Advance Cutting & Coring Ltd., 2001 SCC 70	21