Citation: *Amazon Canada Fulfillment Services, ULC*, 2026 BCLRB 241

BRITISH COLUMBIA LABOUR RELATIONS BOARD

AMAZON CANADA FULFILLMENT SERVICES, ULC

(the “Employer”)

-and-

UNIFOR, LOCAL 114

(the “Union”)

PANEL:	Andres Barker, Associate Chair
APPEARANCES:	Keith J. Murray, for the Employer Colin Gusikoski, for the Union
CASE NO.:	2026-000217
DATE OF DECISION:	August 4, 2026

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 This case involves a collective bargaining dispute between the parties regarding the negotiation of a first collective agreement. The parties disagree as to what process I should direct them to use to resolve their first collective agreement pursuant to Section 55(7) of the *Labour Relations Code* (the "Code").

2 On June 1, 2026, the Mediator issued his report under Section 55(6) of the Code (the "Report") in which he declined to recommend terms for a first collective agreement and recommended that the parties conclude a first collective agreement through arbitration by a single arbitrator.

3 The Union accepted the Mediator's recommendations. The Employer rejected the recommendations. Each party was provided the opportunity to make submissions on the appropriate direction for me to make.

II. BACKGROUND AND THE MEDIATOR'S REPORT

The Report

4 The Union served notice to bargain in October 2025. The parties met in negotiations over approximately 11 days from October 2025 to February 2026. The Mediator was then appointed under Section 55 of the Code and joined the collective bargaining sessions in March 2026. The Mediator met with the parties over five days. On May 7, 2026, the Mediator advised the parties that he could not issue recommendations to conclude a first collective agreement that he believed would likely be accepted by both parties.

5 In prefacing his recommendations, the Mediator states he would not comment on the adjudicative history between the parties, some of which was still ongoing, and would not comment on the reasonableness of the proposals. However, he states he would comment on some proposals as to their impact on the success, or failure, in achieving an environment conducive to concluding a first collective agreement. The Mediator also states that while the Union was of the opinion some Employer proposals were in violation of the Code, raising that issue at the time was not helpful as the assertions were not timely and he was not in a position to decide those arguments in his role as a mediator appointed under Section 55 of the Code.

6 In turning to the specific proposals under consideration in the Report, the Mediator highlights the various proposals and circumstances of their negotiation. I have only reproduced those most relevant to this case.

Union Security and Dues Checkoff Proposals (the "Union Security Proposals")

7 The Union proposed that all current employees would, as a condition of employment, become and remain Union members in good standing. The Employer proposed that all employees should be provided the option of Union membership but would be required to pay dues. The Mediator states that, not surprisingly, this was a contentious issue, and while there may be middle ground, to that point neither party had considered tabling an amended proposal.

Productivity, Quality, and Inactive Time Proposals (the "Productivity Proposals")

8 The Employer proposed language wherein the Union would acknowledge the reasonableness of current expectations around productivity, quality, and inactive time, and that the Employer would retain the right to modify such expectations and processes in a manner consistent with other fulfillment centres in the province. The Union rejected this and countered with its own proposal. The Mediator describes this as a contentious issue.

Attendance Management Proposals

9 The Employer's proposal was for the Union to acknowledge the current attendance management program would represent a reasonable balance between the requirement to attend work regularly and the accommodation of employees who are sometimes unable to attend work for legitimate reasons. It also provided the Employer with a further right to modify the program in a manner consistent with other fulfillment centers in the province. The Employer also proposed it would notify and discuss material changes to the attendance management program with the Union and meet to explain such changes upon request. The Union accepted the proposal subject to acceptance of its Productivity Proposal. The Mediator also describes this as a contentious issue.

Report Commentary

10 After reviewing the parties' proposals, the Mediator first discusses the various means by which parties may conduct bargaining, and notes that in the case at hand, the parties commenced full package bargaining early on in the process, with the exception of the Employer not tabling a wage proposal until "well into the process". The Mediator states that the Employer's Spokesperson asserted the Employer's approach was "normal in collective bargaining, and particularly in first contract bargaining". The Mediator expresses disagreement and notes that, in his experience, wage proposals are tabled earlier than what occurred in this case and that, until wage proposals are tabled the parties cannot cost the impact on wage sensitive benefits. The Mediator states that, to the Union's credit, it agreed to some wage-sensitive benefits without knowing the Employer's wage proposal. The Mediator states that, furthermore, before mediation commenced, he met with the parties' Spokespersons individually to ascertain the state of collective bargaining. In meeting with the Employer's Spokesperson, he

advised them to table a wage proposal, and did so on more than one occasion before they tabled it.

11 The Mediator states that, in his opinion, the delayed tabling of a wage proposal materially slowed the pace of bargaining and impeded meaningful discussions on other monetary and wage-sensitive provisions. He states that until a wage proposal was exchanged, the parties could not reasonably assess the overall economic framework of a potential collective agreement. The Report goes on to state as follows:

> In my opinion, the delayed tabling of a wage proposal materially slowed the pace of bargaining and impeded meaningful discussions on other monetary and wage sensitive provisions. Until a wage proposal was exchanged, the Parties could not reasonably assess the overall economic framework of a potential collective agreement.
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> It is not unusual for an employer with more than one location, to want to maintain consistency in the way it operates all its workplaces.
>
> It is typical for an employer to table a robust management rights clause to do so, subject to the other provisions of the collective agreement. Employers may make changes during the term of a collective agreement, relying on its management rights, arguing that the changes are not in conflict with the terms of the collective agreement. A union may challenge the change attempting to argue that the change violates management rights in some fashion.
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> In the case at hand, the Employer is essentially arguing status quo for all important policies such as productivity, quality and inactive time, and attendance management. The Employer goes even further by proposing that the Union acknowledge that the current policies are reasonable; and further that the Employer retains the right to modify them consistent with other fulfillment centres with the Union only being notified with no right to challenge them.
>
> The Employer is attempting to eliminate any challenge to the reasonableness of the policies, current and future, over and above what would typically be contained in a management rights clause. An employee’s challenge could only relate to whether the policy was applied in an inconsistent manner on a case by case basis.
>
> The Employer advised that it would “never” move off this proposal.
>
> While the Union agreed to the attendance management proposal, it has not done so for the productivity ones. It does not agree that they are reasonable.

The Employer's proposal of status quo, and having the right to amend with essentially no challenge by the Union, neuters the Union from any input into these topics even though its members apparently have issues with them. The Employer's insistence that these provisions will be driven by other fulfillment centres essentially creates arbitral immunity and forces the Union to follow whatever the Employer implements in its non-union locations.

On monetary proposals, the Employer, other than wages, is also proposing status quo.

Interestingly, when the Union proposes a wage rate, or whatever other centres receive, the Employer says it will "never" agree to such a proposal.

On the one hand the Employer wants the Union to agree to provisions that are driven by what occurs in other centres; but on the other hand, it is not prepared to take the same approach with wage rates.

How does the Parties bargaining conduct affect my recommendation?

Yarrow Lodge dictates that the parties should wherever possible be left to negotiate their own collective agreement without the intervention of a third party. The normal resolution process if impasse is reached is strike/lockout – the economic weapon to influence parties to amend their positions.

The parties have agreed on many standard collective agreement clauses.

However, in the case at hand, I conclude that the Employer has engaged in impugned conduct. Its status quo approach on so many items, especially those like the productivity ones where it wants the Union to not only agree that current policies are reasonable, but even unknown changes are as well as long as they are implemented in other centres, is an uncompromising position without a reasonable justification.

As I noted above, the typical approach would be to maintain, under management rights, the right to set standards and modify them if necessary. It would be hard for the Union to disagree with such an approach in a first collective agreement, and perhaps in any agreement.

The Employer attempts to justify the proposals by arguing that any other approach would be the "tail wagging the dog". There are many collective agreements in sectors where not all of an employer's locations are unionized and the collective agreements

> do not contain such a provision as envisioned by this Employer. The Employer has said it will "never" agree to anything different.
>
> On the other hand, when the Union proposes a comparison in wage rates to the other centres the Employer stated that it would "never" agree to such a proposal.
>
> The Employer's collective bargaining approach on these issues materially contributed to the bargaining impasse. In particular, the Employer's insistence that the Union effectively waive the ability to challenge current and future workplace standards removed any meaningful collective bargaining from some of the most important workplace issues identified by the Union. This significantly impaired the Parties' ability to bridge their differences through the normal collective bargaining process.
>
> I also conclude that the Employer's late tabling of a wage proposal in the face of being asked to do so on numerous occasions, fails to make a reasonable effort to conclude a collective agreement.
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> The Parties entrenched positions on several key issues, together with my view of the Employer's conduct in collective bargaining and the broader labour relations context arising from a remedial certification with an ongoing litigation history, leads me to recommend that the first collective agreement be resolved pursuant to Section 55(6)(b)(i) which is further mediation by a person with the power to impose the terms of the collective agreement.
>
> I conclude that the strike/lockout option is not conducive to resolving matters for the above reasons. The entrenched positions noted above and the litigious adversarial relationship after the remedial certification establishes an environment where the normal strike/lockout resolution method adopted in most cases will not be conducive to achieving the purposes of Section 55 of the Code set out above.

Prior Concluded Litigation

12 The Board certified the Union on July 10, 2025, through an order for remedial certification (*Amazon Canada Fulfillment Services, ULC*, 2025 BCLRB 131 ("*Amazon #1*"), (Employer Leave for reconsideration denied, 2025 BCLRB 155) ("*Amazon #1 Reconsideration*"), (Union Leave for reconsideration denied, 2025 BCLRB 157)).

13 The most significant finding in *Amazon #1* was that the Employer was attempting to increase the workforce through "artificial hires" to thwart the Union's organizing drive (paras. 81-82). The panel further found the Employer had engaged in a "lengthy and pervasive anti-union campaign" (para. 163) which included deploying a specialized field team which increased managerial presence and who conducted one-on-one meetings,

displaying anti-union messaging, and engaging in improper inducements (paras. 141, 143, 151, and 154).

14 In *Amazon Canada Fulfillment Services, ULC*, 2026 BCLRB 49 ("*Amazon #2*"), the panel found the Employer had deviated from its established practice of conducting an annual wage review and applying it across all sites of its business, contrary to Section 45(1)(b) of the Code. As remedy, the Board ordered the Employer to provide the Bargaining Unit employees with the same pay increases as those implemented at other sites.

III. POSITIONS OF THE PARTIES

15 The Employer submits that the parties should be directed to proceed under Section 55(6)(b)(iii) to continue to attempt to resolve the matter by direct negotiation, including permitting the parties to exercise their fundamental Code rights to strike or lockout. It states employees should have the opportunity to exercise their right to engage in a meaningful process of collective bargaining, including testing the resolve of their workplace goals through the economic test of strength through their right to strike.

16 It argues that the Mediator's assessment of the parties' conduct based on the adjudicative history between them and his opinion of the reasonableness of its proposals is contrary to law and unduly infringes on the parties' rights to free collective bargaining. The Employer says that its strategy in tabling its proposal cannot be under more scrutiny than the Union's conduct in their refusal to engage in discussion on significant topics. It argues there cannot be two sets of rules for assessing impugned conduct in bargaining depending on whether the behaviour is instigated by the Employer or the Union.

17 In responding to the Report, the Employer provides a comprehensive chronology of the bargaining history, including the timing of its proposals. This includes stating that it responded to a number of monetary items from the Union early in the process, albeit reserving its position on some monetary items, including wages. The Employer also asserts that on March 11, 2026, in a pre-mediation meeting with the Mediator, it advised that the impact and cost of the proposals the Union had remaining on the table was substantial and made it difficult for the Employer to table a wage proposal that would be productive to the process at the time. The Employer also states that the Union did not provide a counter to its last offer and declined to continue bargaining.

18 The Employer says it is also noteworthy that the parties have agreed to a number of provisions critical to the establishment of the bargaining relationship, that much of the agreement has been settled, that the parties continue to bargain, and that neither party has tabled a final "take it or leave it" offer. It says negotiations have been ongoing for approximately six months from the time notice to bargain was served and that progress was made before and at mediation. It says the failure to reach a collective agreement simply flows from a difference in good faith positions held by both parties.

19 In its submissions, the Employer reviews *Yarrow Lodge Ltd.*, BCLRB No. B444/93 ("*Yarrow Lodge*") and other cases to emphasize the Board's preference for parties to resolve a first collective agreement through allowing them to exercise their rights to strike or lockout.

20 Turning to the Report, the Employer asserts none of the impugned conduct listed in *Yarrow Lodge* is present in this case. It says bargaining has been underway since October 30, 2025, and the parties engaged in meaningful negotiations and agreed to much of the collective agreement. It says bargaining for approximately six months, in the context of a first collective agreement, is not excessive and does not reflect bitter or protracted discussions. It says that through free bargaining, the parties were able to reduce the number of outstanding proposals to a few key remaining issues. It says the parties met in a consistent manner, exchanged proposals, provided the requested information, and provided a fulsome explanation of all its positions. I note the Employer also asserted it recognized the Union through its agreement to its Union Security Proposal, though the Report and the parties' subsequent submission indicates that the Employer had not agreed to mandatory Union membership.

21 The Employer asserts that the parties are simply engaged in a classic disagreement about the final terms and conditions that should constitute this first collective agreement. It further argues that the expected timeline to bargain a collective agreement should be in line with the 12-month statutory freeze period.

22 The Employer further asserts there are no "close comparator" collective agreements that exist. It agues its business model and operating methods are unique, and it has been successful in utilizing said operating methodology that is common across North America. It says if the Union seeks to alter its operating model, it must be done at the bargaining table through the traditional power levers available under the Code, and it is not something that should be done through arbitral fiat.

23 Turning specifically to the Report, it addresses three headings which it says made up the Employer's recommendation: the timing of the Employer tabling its wage proposal, the Employer's position on productivity standards, and the Employer's position of status quo on monetary items other than wages.

24 On the matter of the wage proposal's timing, the Employer says it has taken a legitimate position on how bargaining should occur. It says it tabled some monetary items in its initial proposal and had all monetary items, except wages, on the table by February 24, 2026. Wage rates were tabled on the third day of mediation with the Mediator, notwithstanding the fact significant non-monetary proposals were still outstanding.

25 It relies on *The Greater Vancouver Hotel Employers Association*, 2023 BCLRB 78, where the panel found that a dispute over the timing of monetary proposals amounted to a dispute over protocol and was not a breach of the duty to bargain in good faith. The Employer states that the Mediator's experience of when wage proposals are tabled is not evidence of bad-faith bargaining. It says it had all monetary items on

the table except wages prior to the Mediator's involvement and it tabled wage proposals on the third day after being asked, which makes the Mediator's conclusion not rationally supported. It states that, prior to this, the parties also still had a large number of items on the table, including some of which had a significant impact on the costing of the entire proposed collective agreement. It says an Employer is perfectly entitled to try and have as many items removed or resolved before putting a wage proposal on the table. It further states that the parties had three mediation sessions with the Mediator after the monetary proposals were tabled, and it was the Union that declined to continue bargaining. It further says the alleged delay did not obstruct bargaining.

26 On the issue of the Productivity Proposals and Attendance Management Proposals, the Employer says it is not uncommon for collective agreements to have productivity standards or attendance management programs negotiated into them, and its proposals in this context are neither contrary to the Code nor an attempt to contract out of the Code provisions. The Employer states it has explained the reason for these proposals in some detail to both the Union and the Mediator, and it is not prepared to leave the reasonableness of the programs in dispute, thereby leaving the parties to litigate the reasonableness of these programs at arbitration.

27 The Employer asserts the policies and processes discussed during bargaining respecting these issues are highly sophisticated and centrally managed. It says it explained to the Mediator on several occasions that it was neither practical nor efficient to maintain materially different processes at the Bargaining Unit location. It says the statement that it did not provide justification for certain impugned proposals is therefore inaccurate.

28 It further says that the parties agreed to items where the collective agreement provisions are to remain consistent with policies and/or processes in place at other facilities in British Columbia. Therefore, the approach taken regarding the Productivity and Attendance Management Proposals is similar to what was agreed in other areas of the collective agreement including shift swaps, job transfers and promotions, Prime membership, maternity and parental leave top ups, benefits while on approved leaves, and RRSP and DPSP provisions.

29 The Employer also relies on the Union's acceptance of the Employer's Attendance Management Proposal which is structured identically to its Productivity Proposal. The Employer says it is irrational to accept the Mediator's conclusion that its Productivity Proposal constitutes "impugned conduct" when the Union resolved a number of items on this same basis. It says that, further, the Union's own wage proposal tied itself to wage increases at other sites, albeit with a minimum floor, and in this context, it cannot be reasonably concluded that the Employer's proposal was an unreasonable one without justification.

30 It further states that the Mediator did not address the Union's Productivity Proposal which the Employer explained was unworkable and at no time did the Union provide any explanation to support its proposed language.

31 Concerning the Employer's position of status quo on other monetary items other than wages, the Employer states it explained to the Mediator that it already considered its total compensation to be above market and hence provided a justification. It says it is an employer's right to say "no" in bargaining to increased compensation demands.

32 The Employer says arbitration does not get ordered because the parties are at impasse, and such a conclusion would be contrary to the Code and the fundamental right to meaningful bargaining. The Employer says it is entitled to take a bargaining position that may lead to impasse on certain topics, and this is simply hard bargaining.

33 With respect to the provisions of Section 55(7.1) of the Code, it says this is a permissive provision and there is no automatic presumption of binding arbitration. It says that, in order for pre- or post-certification conduct to be relevant under Section 55 of the Code, it must be conduct that undermines a union's ability to bargain or its ability to obtain a mandate from the bargaining unit.

34 It states the additional hires remain employed and have no bearing on the Union's ability to bargain a collective agreement, the communication campaign occurred two to three years ago, and it was not the content of the communications but the volume that resulted in the finding the Employer breached the Code. It also notes the Board ordered remedies including paid meetings with the Union in the fall of 2025. With respect to the finding it breached Section 45 of the Code in *Amazon #2*, the Employer says there was no finding of anti-union animus and the decision represents an expansion in the interpretation of that section to situations where the wage increase process had not been started at the site, decided, or announced prior to certification. It states it implemented the wage increase and this issue represented a reasonable difference in opinion over the interpretation of the Code. The Employer argues the Union cannot bootstrap these actions two years later to get through arbitration what it has not achieved through free collective bargaining.

35 The Employer also relies to the right to collectively bargain and the right to strike under the freedom of association rights enshrined in section 2(d) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982 (the "*Charter*"). It states that these *Charter*-protected rights are not trivial; they are fundamental rights that must be conscientiously considered when the Board exercises its discretion in choosing an option to resolve a dispute pursuant to Section 55 of the Code. It further argues that the limitations on the right to strike should be confined to narrowly defined circumstances in which the parties' capacity to voluntarily reach a collective agreement has been made impossible by impugned conduct, thereby creating a genuine breakdown in negotiations. It says the Board should only deviate from the default approach of allowing parties to exercise their *Charter*-protected rights to strike or lockout under truly compelling circumstances.

36 In the opening to its response, the Union states that since it initiated its organizing drive, the Employer has pursued a relentless, comprehensive, and well-resourced campaign to resist unionization by every available means which has included overtly anti-union conduct in the workplace amounting to numerous and serious

breaches of the Code. It further says the parties' negotiation history was long and arduous, and the Employer has "dragged the process out" by refusing to provide a full proposal until late in negotiations. It also says the Employer has been uncompromising on key items that it knew, or ought to have known, would not be accepted.

37 The Union recounts the adjudicative history between the parties, the relevant portions of which are mentioned in the background to this decision. The Union also points to its four outstanding unfair labour practice applications that are currently in the adjudication process at the Board.

38 Regarding the parties' bargaining history, the Union responded to the Employer's comprehensive bargaining chronology with its own, disputing many of the facts made by the Employer. For example, the Union denies it tabled a "cut and paste" proposal at the outset of bargaining and says it presented a comprehensive package in detail. It asserts, in contrast, the Employer's approach throughout bargaining was to "shoot from the hip" and delay.

39 The Union also disputes the Employer's assertions regarding its readiness to bargain and whether it actually tabled a comprehensive proposal on the second day of bargaining. It states the only item the Employer was prepared to discuss that could be "somewhat" characterized as monetary was the provision of leaves. It further asserts the proposal contained many provisions which were designed to be inflammatory and impede the collective bargaining process. This included voluntary Union membership, no seniority provisions, the non-renewal of certain contracts not being subject to the grievance and arbitration provisions, and no response to any monetary proposal.

40 The Union argues the Employer has demonstrated a desire to impede negotiations, as demonstrated by behaviour including: failing to adhere to the orders set out in *Amazon #1*; failing to respond to the Union's request for contact information immediately after the Union was certified; failing to provide a full and comprehensive response to the Union's proposal until very late in the bargaining process; a continued refusal to respond to all points raised by the Union and instead responding to limited items; failing to discuss monetary items until the very last stage of negotiations and after threats from the Mediator; failing to sign off on any agreed-to proposals, which would indicate or mark progress in bargaining; stating that the monetary proposal was contingent on the Union dropping all of its proposals to that point, thereby erasing all time and effort discussing proposals; and providing illegal proposals that would undermine a framework for advancing negotiations.

41 The Union states these issues collectively demonstrate that the Employer undertook a concerted effort to impede and/or slow down the negotiation process, which is consistent with the historic conduct of the Employer which sought to undermine the Union's effectiveness and reputation.

42 The Union also refers to two "poison pill" proposals made by the Employer that it says were introduced for the sole purpose of sabotaging the negotiation process.

43 The first is the Employer's Union Security Proposal. The Union states it proposed a typical clause requiring membership in the Union, and the Employer stated it would not agree to such a proposal because if any member was charged with conduct unbecoming of a Union member under the constitution, they would be deprived of an ability to run for Union office. The Union says the Employer has since taken this issue to impasse, and it asserts this is expected from an employer who committed such egregious and numerous proven unfair labour practices.

44 The Union states the Employer's Productivity Proposals and Attendance Management Proposals were contrary to the Code as they require the Union to agree that the Employer does not have to comply with the just and reasonable cause requirements contained in the Code. The Union argues both policies can result in employee discipline and, in the Union's view, are unreasonable and could result in an employee being disciplined without just and reasonable cause. It says the Union's view is that the Employer has taken proposals to impasse that are contrary to Sections 84(1) and (2) of the Code.

45 The Union states the Board has consistently maintained the long-held policy approach that a party cannot take a proposal to impasse that is otherwise inconsistent with the statutory scheme of the Code. It says the impugned proposals seek to eliminate the statutory protection of Section 84(1) and (2).

46 The Union states that in *United Steelworkers of America v. Radio Shack*, 1979 CanLII 817 (ON LRB), the Ontario Labour Relations Board stated that patently unreasonable contract proposals lacking any semblance of business justification may suggest an employer's desire to embarrass the union and encourage its abandonment by the employees. It says that is what is occurring in the present case with the Employer's impugned proposals.

47 In reviewing the *Yarrow Lodge* factors, the Union states all six are present. It says that the Employer: "slow walked" negotiations and adopted a strategy to impede any progress or advancement in order to drive a wedge between the Union and its membership while running the clock until employees were in a position to decertify the unit; advanced its Union Security Proposal which it knew the Union could not accept; took to impasse the Productivity Proposals and Attendance Management Proposals which are contrary to the Code; and has committed consistent and ongoing unfair labour practices.

48 The Union asserts that while the Board ought to facilitate free collective bargaining, Section 55 of the Code and the *Yarrow Lodge* factors are devoted to repairing the damage to free collective bargaining done at the behest of one party.

49 On the issue of the relevance of the remedial certification, the Union states the Board should be able to consider anything relevant to the question of whether the Employer's actions have negatively impacted a "capacity to voluntarily achieve a collective agreement". It says this does not have to be so restrained as suggested by the Employer.

50 In responding to certain specific submissions of the Employer, the Union's response states that the issue in the present case regarding wages is not a dispute about protocol. It notes the finding in the Report that the refusal to provide monetary proposals unnecessarily impeded and delayed bargaining and demonstrated that the Employer did not make a reasonable effort to conclude negotiations. It further relies on the findings in the Report regarding the Employer's late tabling of a wage proposal hampering bargaining. It further emphasizes that employers do not come out and state they are making efforts to avoid collective agreements, but rather they do what the Employer did here and make unreasonable proposals.

51 On the matter of the Employer's *Charter* values arguments, the Union states that where an administrative decision engages *Charter* protections, the case law instructs administrative tribunals to consider the impact that their decision will have on the *Charter* (*Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31). It says an administrative decision will be "reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate" (*Law Society of British Columbia v. Trinity Western University,* 2018 SCC 32 ("*TWU*"), para. 79).

52 The Union agrees a decision by the Board to impose Section 55 engages *Charter* protections. It says, however, that does not dictate that the Board cannot impose binding arbitration under Section 55 where the circumstances, and the balancing of the purposes of the Code against the *Charter* right, justify it. The Union states the policy in *Yarrow Lodge* appropriately guides the Board to engage in a balancing exercise which strikes the proper balance between the purpose of Section 55 and the *Charter* protections at stake.

53 The Union states that the Employer appears to suggest that the Employer's "right to lockout" is an essential part of a meaningful collective bargaining process. It says there is no constitutional right for an employer to lockout and an employer's right to lockout has never been recognized as a constitutional right.

54 It further cites, among other cases, *British Columbia Ferry Services Inc. and British Columbia Ferry and Marine Workers' Union*, Ministry No. A-116/16 ("*BC Ferry Services*"), where Arbitrator John Hall determined that a mediation and binding arbitration provision in a collective agreement was consistent with both the *Charter* and with the principles expressed and implied in the Code.

55 In response, the Employer generally provides its own rebuttal to the Union's version of events, including the assertions it was unprepared or unwilling to engage in substantive discussions. It further states that the Union's own communications and conduct indicate that it instigated the end to bargaining.

56 With respect to the Union's reliance on the Report, the Employer states the Report contains fundamental errors of law. It says the Mediator assessed the proposals in violation of the *Noranda* principle *(Noranda Metal Industries Limited,* BCLRB No. 151/74 (*"Noranda"*)*.* It says the Board does not evaluate "the substantive positions of

each party, to decide which is the more reasonable" (*Van-Air Holdings Ltd.,* 2024 BCLRB 179 (*"Van-Air Holdings*"), para. 89, citing *Noranda*), but did so in this case.

57 The Employer argues that it sought to maintain current policies and practices on productivity, quality, inactive time, and attendance management. It says these are cornerstones of its operation and the Employer sought in bargaining to demonstrate both the importance of these policies and their reasonableness. It says it also explained that it wished to write them into the collective agreement, rather than leaving their reasonableness open to subsequent challenge at arbitration. It says the Union also had its own proposal, and each side has a right to advance a proposal in its own interest and the other side has the right to say "no" or "never".

58 On the issue of the wage proposals, the Employer states that the Mediator made a false equivalency, as the Union proposal was not wage increases in the same amount as other facilities but rather "the better of" those facilities. It says the Union also had several economic proposals that exceeded the status quo, and it was not bad faith bargaining or inconsistent to have rejected the Union's proposal.

59 On the issue of the Productivity Proposals, the Employer states productivity standards and attendance management programs are features of many collective agreements. It says its proposals are lawful, grounded in legitimate operational needs, and were explained in detail to both the Union and the Mediator. It says the Union's own conduct in tentatively accepting its Attendance Management Proposal, which has the identical structure to its Productivity Proposal, demonstrates these proposals are not inherently unreasonable. It further asserts the proposals do not eliminate access to arbitration or just cause protections for individual discipline cases, and the Employer never suggested individual cases could not be arbitrated based on their individual circumstances.

60 On the matter of the Employer's Union Security Proposal, it states the Code does not require mandatory Union membership, and its concern was focused on membership being a "condition of employment" and not on internal union governance matters as alleged. It states that an employer does have a legitimate interest in whether membership can be required as a "condition of employment", thereby potentially allowing the Union to seek the termination of employees who breach the Union Constitution or decline to pay union fines if they cross a picket line. It states this is a perfectly legitimate bargaining topic.

61 On the matter of the relevance of the remedial certification, the Employer repeats that the provision is permissive and states the remedial certification flowed from events that occurred more than two years ago. It states there is no evidence the events leading to remedial certification have impaired the Union's current ability to bargain or obtain a mandate from its members. It says that for pre- or post-certification conduct to be relevant under Section 55, it must be conduct that undermines the Union's ability to bargain or obtain a mandate from the Bargaining Unit.

62 On the *Charter* issue, the Employer says the Union's analysis is incomplete. It states the Board must consider not only section 2(d) associational rights but also freedom of expression under section 2(b) of the *Charter*, given that a decision under Section 55(6)(b)(i) or (ii) of the Code would preclude the Employer from engaging in a lockout, completely extinguishing its free expressive activity.

63 The Employer cites *Canadian Union of Postal Workers v. Canada (Attorney General),* 2016 ONSC 418 ("*CUPW*"), where the Court found that imposed binding arbitration violated section 2(b) because it prevented the exercise of strike action, which has inherent expressive meaning. The Employer says the conclusion that imposed binding arbitration violates a union's section 2(b) right to engage in a strike applies equally to an employer's loss of the right to lockout. It says a strike and a lockout serve the same expressive purpose in the labour relations system, since both "bring the debate on the labour conditions ... into the public realm" (*CUPW*, para. 222, citing *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, para. 58).

64 The Employer further states that compelled participation in a binding arbitration process under Section 55 of the Code would require the Employer to articulate, justify, and advocate for its positions and interests before an imposed forum as a substitute for the use of the expressive levers it would otherwise employ. It says this amounts to compelled speech in recognized violation of section 2(b) of the *Charter*. It states that a union can access section 2(d) *Charter* rights because of the associational nature of their activities while Employers typically cannot. It says an employer's only recourse to challenge restrictions on lockout activity directly is section 2(b), and a lockout is an expressive activity that finds protection under section 2(b).

65 The Employer asserts the Board has an option reasonably open to it that would reduce the impact on the *Charter*-protected rights while still permitting the Board to sufficiently further the statutory objectives of Section 55: directing the parties to exercise their rights to strike or lockout under Section 55(6)(b)(iii).

66 The Employer further distinguishes the case law relied on by the Union, including *BC Ferry Services*, which it says dealt with an interest arbitration clause voluntarily agreed to by the union which it could not subsequently impugn.

IV. ANALYSIS AND DECISION

67 Section 55(6) of the Code provides that, where a first collective agreement is not concluded within 20 days of the appointment of the mediator under Section 55(1), the mediator must report to the associate chair and recommend either or both of the following:

> (a) the terms of the first collective agreement for consideration by the parties;
>
> (b) a process for concluding the first collective agreement including one or more of the following:

> (i) further mediation by a person empowered to arbitrate any issues not resolved by agreement and to conclude the terms of the first collective agreement;
>
> (ii) arbitration by a single arbitrator or by the board, to conclude the terms of the first collective agreement;
>
> (iii) allowing the parties to exercise their rights under this Code to strike or lock out.

68 Section 55(7) states as follows:

> If the parties do not accept the mediator's recommended terms of settlement or if a first collective agreement is not concluded within 20 days of the report under subsection (6), the associate chair must direct a method set out in subsection (6)(b) for resolving the dispute.

69 The law and policy of the Code with respect to the interpretation of *Yarrow Lodge* was aptly summarized in *Bee-Clean Building Maintenance Incorporated*, 2020 BCLRB 114:

> The Board's policy with respect to Section 55 is set out in its seminal decision in *Yarrow Lodge Ltd.*, BCLRB No. B444/93 ("*Yarrow Lodge*"). In *Yarrow Lodge*, the Board unequivocally stated that "the policy of Section 55 is that the terms and conditions of a first contract are to be negotiated, not arbitrated" (p. 54). It acknowledged that goal of first contract mediation [is] not to provide either party with a collective agreement, but to assist the parties to facilitate the achievement of their own collective agreement. Moreover, it recognized that the Board's intention under Section 55 is to impose as few terms and conditions as possible (p. 31).
>
> The policy reasons for the Board's strongly-expressed preference that first collective agreements be negotiated, not imposed, are set out, in part, at pages 29 and 32-33 of *Yarrow Lodge*. There, the Board not only acknowledged the importance of the "catalyst" and "cathartic" effects of job action, but recognized that direct negotiations between parties - who must ultimately govern themselves in accordance with the contract - are more likely to result in an agreement that accurately reflects their own needs.
>
> The Board nonetheless acknowledged that it may be appropriate to impose a first collective agreement in certain circumstances. Specifically, the Board indicated a willingness to impose a first collective agreement as a remedy to address the breakdown in negotiations resulting from the conduct off one of the parties (*Yarrow Lodge*, p. 35). In the Board's view, such a remedy would be appropriate where the capacity to voluntarily achieve a collective agreement has been negatively impacted, including by factors such as:

> (a) bad faith or surface bargaining;
>
> (b) conduct of the employer which demonstrates a refusal to recognize the union;
>
> (c) a party adopting an uncompromising bargaining position without reasonable justification;
>
> (d) a party failing to make reasonable or expeditious efforts to conclude a collective agreement;
>
> (e) unrealistic demands or expectations arising from either the intentional conduct of a party or from their inexperience;
>
> (f) a bitter and protracted dispute in which it is unlikely the parties will be able to reach a settlement themselves. (p. 36)

That is, the Board held the imposition of a first collective agreement will be appropriate where the breakdown in negotiations is the result of one of the impugned factors (*Yarrow Lodge*, p. 46. Also, see, for example, *Compass Group Canada*, BCLRB No. B117/2005).

Since *Yarrow Lodge*, the Board has also held that binding arbitration is an appropriate forum for resolving first collective agreement disputes in circumstances where a strike or lockout would not be effective. For example, the Board has directed parties to binding arbitration: where all of the employees in the bargaining unit are laid off (*Multicultural Society of Kelowna*, BCLRB No. B28/2003); where prolonged job action at another of the employer's operations certified to the same union has not resulted in a collective agreement (*British Columbia Automobile Association*, BCLRB No. B358/99 (Leave for Reconsideration of Letter Decision dated July 26, 1999), ("*BCAA*")); or where essential services are in issue (e.g., *Deltassist Family and Community Services*, BCLRB No. B326/2002; Everett Rest Home Ltd., BCLRB No. B117/2003; *CWS Industries (Mfg) Corp*., BCLRB No. B19/2009; *Pro Vita Care Management Inc*., BCLRB No. B206/2009; Osprey Care Inc., BCLRB No. B46/2010; *Stanford Place Holdings Ltd*., BCLRB No. B95/2011).

Yarrow Lodge also contemplates that the Board may direct parties to binding arbitration to resolve a first collective agreement dispute in the absence of any of the impugned factors or evidence a strike or lockout would be ineffective. In *BCAA,* and in a handful of cases that followed it, the Board held that its practice is to refer a dispute to binding arbitration where one of the two parties accepts the mediator's recommendations and its expectation is that the arbitrator contract will reflect those recommendations (para. 23).

> The rationale for this practice, it said, is that the mediator, having worked with the parties, is in the best position to understand the dispute and identify where a reasonable settlement lies (para. 20; see also, *Yarrow Lodge*, pp. 42-43).
>
> * * *
>
> The Board in *Yarrow Lodge* is clear that, in the absence of any of the impugned factors set out above, the recommended option for resolving the first collective agreement should invariably be strike or lockout (*Yarrow Lodge*, p. 46). Where parties have made reasonable efforts to conclude a collective agreement, and it is clear that what is in issue is simply hard bargaining (a contest of strength over what the final terms and conditions of an agreement should be), they will most often be referred to the strike/lockout option (p. 45). The Board will generally not interfere in collective bargaining which is simply and clearly and contest over what the proposed terms and conditions will be (p. 46).
>
> * * *
>
> As noted above, the Board was explicit in *Yarrow Lodge* that, absent compelling reasons otherwise, the recommended option for resolving the first collective agreement should invariably be strike or lockout. In the present case, neither party has alleged, nor would I find, any impugned conduct on the part of the other. Neither party has raised an issue as to whether a strike or lockout would be ineffective. In short, neither party has raised or established any basis on which I might find that a strike or lockout would be an inappropriate method of resolving the first collective agreement dispute. As a result, I am not persuaded there is a basis on which to deny the parties the right to strike or lockout in the circumstances.
>
> (paras. 12-16, 19, 22)

70 In discussing the factors that the Board will consider when deciding whether to impose a first collective agreement, the Board in *Yarrow Lodge* also stated as follows:

> This list is not exhaustive. The Board will monitor first contract applications to possibly refine or amend these factors in the future. (As will be evident from an entire reading of this decision, the development of the policy of first collective agreement imposition is a much more dynamic process than many other aspects of the Code. Therefore the Board will monitor the entire scope of this policy including the results of first collective agreement imposition).
>
> (p. 36)

71 Also relevant to my analysis in this case is Section 55(7.1) of the Code, which states:

> If the board certified the trade union under section 14(4.1), the associate chair may consider the parties' conduct before and after certification when directing a method set out in subsection (6)(b) of this section for resolving the dispute.

72 A similar provision exists under Section 55(6.1) in relation to a mediator's recommendation for which process under Section 55(6)(b) should be ordered by the Associate Chair.

73 Section 55(7.1) was introduced as part of the 2019 Code amendments and has not yet been discussed in a written Board decision in the context of a dispute under Section 55. What is notable about Section 55(7.1) is that it provides an express discretionary power to the Associate Chair to consider circumstances that were not, as a matter of policy or legislation, excluded from consideration prior to the introduction of this section. For example, the circumstances behind the conduct that led to a remedial certification, and an employer's conduct before and after that fact, could potentially inform all the *Yarrow Lodge* factors in some way. Despite this, the Legislature chose to emphasize the relevance of the parties' conduct before and after a remedial certification.

74 These changes, as well as changes to the remedial certification provisions of the Code, were recommended in a report to the Minister of Labour issued August 31, 2018, by a committee established pursuant to Section 3 of the Code for the purpose of making recommendations for amendments to the Code (the "2018 Section 3 Report"). The 2018 Section 3 Report stated that the rarity of remedial certifications incentivized a "hit hard, hit early" strategy of union avoidance which necessitated a new standard. As noted in *Salade Etcetera! Inc. (A Division of Vegpro International)* 2020 BCLRB 109 (Leave for reconsideration denied, 2020 BCLRB 34) ("*Salade Etcetera*"), the new statutory language did not merely slide the bar to something less rigorous than the prior standard of a union having to prove it "would likely" have obtained the support of a majority of employees but for an unfair labour practice. Instead, the Board now has the discretion to respond to an employer's unlawful actions with a remedial certification where it is just and equitable to do so (*Salade Etcetera*, para. 154).

75 The 2018 Section 3 Report, in recommending the changes to Section 55, explains how first collective agreements are often more difficult to negotiate given the certification process may have been contentious, unfair labour practices may have occurred, or the parties may have not developed a working relationship. It therefore stated that where remedial certification is ordered, the parties' conduct prior to and following remedial certification may be important considerations in determining the next step in the process (2018 Section 3 Report, p. 25).

76 This commentary in the 2018 Section 3 Report reflects the fact that a remedial certification will often result in bargaining occurring for a bargaining unit that the union was deprived of the chance to formally organize or which has experienced ongoing effects from the actions leading to a remedial certification which may have continued to impact the successful negotiation of a first collective agreement, including the union's

likelihood of obtaining a strike mandate. These circumstances may not always be cleanly incorporated into the existing *Yarrow Lodge* factors.

77 As noted in *Yarrow Lodge*, the listed factors were not exhaustive and are subject to the Board's continued monitoring and possible refinement or amendment. In considering the comments in the 2018 Section 3 Report, the existing law and policy of the Code around granting remedial certification, and the fact the Legislature expressly emphasized the consideration of an employer's conduct before and after remedial certification, I find it is appropriate to consider the circumstances around the Union's remedial certification order as a factor in itself, and not only as something to be considered within the existing *Yarrow Lodge* factors. In setting out the application of this factor, I find that where the Board has granted a remedial certification, the Board can consider whether the nature of the conduct leading to the remedial certification, either on its own or in combination with the parties' other conduct occurring before or after certification, favours a direction that a first collective agreement be determined through arbitration, either with or without further mediation.

78 I additionally find this factor should not be applied in a manner where it functions as an "added penalty" to the remedial certification already granted. Just as the commission of an unfair labour practice during organizing does not automatically result in the granting of a remedial certification, the corollary of a remedial certification order should not be an automatic direction that a first collective agreement be determined by arbitration.

<u>Remedial Certification as a Factor</u>

79 The panel in *Amazon #1 Reconsideration* was clear on the severity of the Employer's actions in engaging in additional hiring during the Union's organizing drive. The panel noted that this was a rare case where the Board received evidence to substantiate an allegation of "list padding" by which the Employer sought to frustrate the Union's organizing drive by hiring employees in order to artificially inflate the employees in the potential bargaining unit. This is why the panel stated that the Employer's actions represented the "flip side" of a union submitting fraudulent membership evidence, and further found the conduct was not merely an unfair labour practice but was an attempt to "frustrate or defeat the Code itself" (*Amazon #1 Reconsideration*, paras. 35-36).

80 At the same time, the Board found the Employer breached the Code through a "lengthy and pervasive anti-union campaign" that included anti-union messaging in various forms (*Amazon #1*, para. 163).

81 Following that, the Board found the Employer had breached the statutory freeze provisions of the Code by not engaging in its "business as usual" wage review for Bargaining Unit members, who would have understood the wage review was not being conducted as a direct result of the certification.

82 All of the above can be presumed to have affected the Union's effectiveness and reputation with the Bargaining Unit. The combined effects resulted in a remedially

certified unit whose composition had been manipulated with an intention to frustrate the Union, whose membership evidence was not subjected to the traditional threshold support requirements in a manner which would provide for the usual objective measurement of the Union's support, and which had been subjected to multiple actions of interference, including those tainted by anti-union animus that, on an objective standard, would have undermined the parties' ability to freely negotiate a first collective agreement.

83 While I acknowledge the passing of time since the Employer's actions, this must be weighed against the consequences noted above.

84 Ultimately, I find the Employer's conduct before and after certification has impacted the ability of the parties to reach a first collective agreement and this favours a direction that the first collective agreement should be determined by an arbitrator.

85 In summary, I direct that the process for concluding the first collective agreement be through arbitration by a single arbitrator.

<u>Alternative Findings</u>

86 I would have, in any event, reached the same conclusion had I applied Section 55(7.1) within one of the *Yarrow Lodge* factors. While the Union asserts all six factors are present, I find it is unnecessary to review each one as this matter can be decided on the basis that there is a bitter and protracted dispute in which it is unlikely the parties will be able to reach settlement themselves.

87 In setting out this factor, the Board in *Yarrow Lodge* stated as follows:

> The final factor arises from the Sub-committee of Special Advisor's reference to the more notorious disputes which they described as among "...the most protracted and bitter labour disputes in this province..." (p. 36). As stated earlier, industrial sanctions such as strikes or lockouts can have both a catalytic and cathartic effect, forcing parties to make necessary compromises and allowing each side to blow off steam. However, it is also true that such economic sanctions can exacerbate the existing feelings of bitterness and anger which may have developed during both the organizing drive and collective bargaining. The result can be the adoption of undesirable tactics by both sides, escalating the dispute to the point where its impact spreads to innocent third parties, and there is little hope of the parties being able to conclude the agreement without the assistance of a third party. However, in regard to this final factor, the Board will be particularly aware of the possibility of one party using this factor as a means to extricate itself from its own unsuccessful bargaining strategies.
>
> (p. 39)

88 In this respect, I again rely on the cited Employer conduct and the effect this conduct has had on the parties' relationship.

89 I further find that against this backdrop, there is a real risk that a strike or lockout is more likely to exacerbate the worst features of the parties' relationship and yield further conflict and litigation.

90 I also consider that one of the unresolved issues on which the parties have reached impasse includes a form of "open shop" clause as advanced through the Employer's Union Security Proposal. For the purposes of this decision, it is not necessary for me to decide whether such a clause can be taken to impasse or otherwise be supported with a reasonable justification. What I do accept is that it is a clause exceedingly few unions in the province would be willing to accept, and it is credible that the Union, in the context of this dispute and in light of the Employer's past conduct, has perceived it as inflammatory and designed to further undermine its reputation with the Bargaining Unit.

91 For the above reasons, I am satisfied that, under this factor, it is appropriate to give a direction that the process for concluding the first collective agreement be through arbitration by a single arbitrator.

Charter Analysis

92 Finally, with respect to the *Charter* arguments made by the Employer, it does not argue any portion of Section 55 is unconstitutional and filed a notice of constitutional challenge as per the *Constitutional Question Act*, R.S.B.C. 1996, c. 68.

93 As such, the matter concerns the process an administrative decision maker must follow when exercising its statutory discretion in an area which implicates *Charter* rights or values (*Doré v. Barreau du Quebec*, 2012 SCC 12 ("*Doré*").

94 In *Doré*, the Supreme Court of Canada confirmed that administrative decision makers must exercise their statutory discretion in a manner consistent with the values underlying the granting of discretion, including *Charter* values (*Doré*, para. 24). The Court explained:

> ... In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.
>
> (para. 7)

95 The Court in *Doré* then explained the approach for balancing *Charter* values with statutory objectives. In so doing, it stated the decision maker should first consider the

statutory objectives and then ask how the *Charter* value at issue will best be protected in view of the statutory objectives (*Doré*, paras. 55-56). The Court stated 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 (*Doré*, para. 56).

96 As it concerns the Employer's section 2(b) right to freedom of expression, the Employer asserts the ability to lockout its employees is a free expressive activity. The Employer relies on *CUPW*, which concerned a constitutional challenge to back-to-work legislation enacted in response to a series of rotating strikes by the union. The Employer also states a direction to binding arbitration compels expression through participation in a process that requires it to articulate, justify, and advocate for its positions and interests before an imposed forum as substitute for the expressive levers it would otherwise employ.

97 The Court in *CUPW* described the right to strike as a matter of free expression as follows:

> Support for this line of reasoning is found by contrasting the focus of the s. 2(*d*) analysis with the focus of the s. 2(*b*) analysis, as it relates to a restriction on strikes. The s. 2(*d*) analysis of strike action focuses on the ability of workers to use economic leverage in a collective bargaining dispute with their employers. In this way, the state's effect on the balance between these competing parties is the key consideration. On the other hand and in contrast, the s. 2(*b*) analysis is not concerned with how the state may impinge on the material and economic incentives of removing one's labour, but rather this analysis focuses on whether individual members and their union are able to use strike action to symbolically express their ideas, concerns and, most importantly, their human dignity. This ability of the strike to allow workers to express and affirm their human dignity is described by Abella J. in *SFL*, at para. 54: "The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives."
>
> Therefore, by using the rotating strikes to express particular concerns about their working conditions, with specific sites being chosen to highlight specific workplace concerns, the CUPW strike shows how a strike action may be used to advance a material purpose and a symbolic, expressive purpose.
>
> (*CUPW*, paras. 223-224)

98 I also consider the Employer's reliance on *Plourde v. Wal-Mart Canada Corp.,* 2009 SCC 54, where the Court, in considering section 2(d) of the *Charter*, considered the balance between employee and employer rights in noting that: "Care must be taken

not only to avoid upsetting the balance the legislature has struck in the Code taken as a whole, but not to hand to one side (labour) a lopsided advantage because employees bargain through their union (and can thereby invoke freedom of association) whereas employers, for the most part, bargain individually" (para. 57).

99 Ultimately, for the reasons that follow, I find that to the extent section 2(b) of the *Charter* can be interpreted to define a lock out as a form of "symbolic, expressive" act, the purpose of Section 55 in general and the facts of this case warrant a direction to first collective agreement arbitration.

100 As noted in the 2018 Section 3 Report, first collective agreements are often more difficult to negotiate given the certification process may have been contentious, unfair labour practices may have occurred, or the parties have not developed a working relationship. This underscores the purpose of the Section 55 provisions respecting first collective agreement arbitration.

101 Further, as this decision makes clear, the direction for first collective agreement arbitration in this case relates to the Employer's own actions and the effect these actions have had on the Union's ability to successfully negotiate a first collective agreement through the typical and preferred method of threatened or actual job action.

102 Against this background, I find a direction to first collective agreement arbitration represents a proportional balancing of the statutory objectives of Section 55 against the *Charter* right at issue.

103 On the matter of section 2(d) of the *Charter*, the Employer does not invoke associational rights for itself, noting that unions can access section 2(d) because of the associational nature of their activities, but employers typically cannot. However, it nevertheless relies on the constitutionally protected right to strike.

104 In assessing the employees' right to strike, I consider that the law in this area has developed in the context of legislation imposing collective agreements or back-to-work legislation on employees who actively were engaging, or desired to engage, in strike action. In this case, the Union, which is the entity through which the membership expresses their collective democratic will, is the one asserting the Board should impose first collective agreement arbitration. This does not extinguish the right at issue, and the Union does not claim as such, but it informs the proportional balancing under *Doré*. In considering this, along with the already stated reasons relating to the purpose of Section 55 and the conduct at issue in this case, I again find the direction to first collective agreement arbitration represents a proportional balancing of the statutory objectives of Section 55 against the *Charter* right to strike.

V. CONCLUSION

105 Pursuant to Section 55(7) of the Code, I direct, pursuant to Section 55(6)(b)(ii), that the parties conclude their first collective agreement through arbitration by a single arbitrator. If the parties are unable to mutually agree on an arbitrator within seven days of this decision, one will be appointed by the Board.

LABOUR RELATIONS BOARD

"ANDRES BARKER"

ANDRES BARKER
ASSOCIATE CHAIR