BRITISH COLUMBIA LABOUR RELATIONS BOARD

COMPASS GROUP CANADA (HEALTH SERVICES) LTD./GROUPE COMPASS CANADA (SERVICES DE SANTE) LTEE

("Compass")

-and-

SODEXHO MS CANADA LIMITED

("Sodexho")

-and-

ARAMARK CANADA FACILITY SERVICES LTD.

("Aramark")

-and-

HOSPITAL EMPLOYEES' UNION

("HEU")

-and-

HEALTH EMPLOYERS ASSOCIATION OF BRITISH COLUMBIA

("HEABC")

-and-

HEALTH SCIENCES ASSOCIATION

("HSA")

-and-

HEALTH SERVICES AND SUPPORT - COMMUNITY SUBSECTOR BARGAINING ASSOCIATION

("CSBA")

PANEL:	Brent Mullin, Chair Michael Fleming, Associate Chair, Adjudication Philip Topalian, Vice-Chair
APPEARANCES:	David Duncan Chesman, Q.C., for Compass J. Najeeb Hassan, for Sodexho Graeme M. McFarlane, for Aramark Chris Buchanan, for HEU Adriana F. Wills, for HEABC Stephen Hutchison, for HSA Kenneth R. Curry, for CSBA
CASE NO.:	59232
DATE OF DECISION:	September 25, 2009

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 HEU applies under Section 141 of the *Labour Relations Code* (the "Code") for leave and reconsideration of BCLRB No. B72/2009 (the "Original Decision" or "Compass Decision").

2 Although it was not a party to the original proceedings, HEABC also sought leave and reconsideration of the Original Decision. As will be explained below under the heading "Procedure", HEABC's submissions have been considered within the present matter.

II. BACKGROUND

3 The Original Decision considered what it referred to as the "interplay" between Sections 68 and 72 of the Code: Original Decision, paras. 30 and 31. That issue arose in the context of the Board designating essential services for Compass, Sodexho and Aramark at worksites certified by the HEU: Original Decision, para. 1. In that context, Compass argued that the Board does not have jurisdiction under Section 72 and Part 6 of the Code to order Compass under an essential services designation to use managers prohibited by subsection 68(1) of the Code.

4 The Original Decision accepted that argument. It concluded

> ...that Section 68(1) is clear and unambiguous. Section 68(1) sets out a prohibition against certain employees performing bargaining unit work during a dispute. Sections 133 and 134 of the Code do not grant the Board the jurisdiction to order an employer to contravene the Code. (Original Decision, para. 39)

5 Shortly after the HEU and HEABC had filed their leave and reconsideration applications in respect to the Original Decision, the Board rendered its determination in *Emergency and Health Services Commission (British Columbia Ambulance Service),* BCLRB No. B93/2009 (the "Paramedics Decision"). The Paramedics Decision also considered Sections 68(1) and 72 of the Code within an essential services designation context. The Paramedics Decision came to the conclusion that the Original Decision is "clearly wrong" in its view of the interplay between Sections 68(1) and 72 of the Code. Essentially, the panel in the Paramedics Decision found that the restrictions in subsection 68(1) of the Code did not apply to the Board's designation of essential services under Section 72 of the Code.

6 Compass sought leave and reconsideration of the Paramedics Decision. Its application was dismissed on a standing basis in BCLRB No. B116/2009 (Leave for Reconsideration of BCLRB No. B93/2009). However, it was expressly noted in the decision that, from a practical perspective, Compass would have the opportunity to make all of the arguments it wished to make regarding the Paramedics Decision in the present leave and reconsideration application in respect to the Original Decision: para. 6. As a result, the merits of the issue and the different determinations in the Paramedics Decision and the Original Decision could be fully argued within the present application.

III. PROCEDURE

7 In order to obtain the benefit of the parties' and the community's views on the issues raised by the Original Decision and the Paramedics Decision, a liberal, but practical, approach was taken to standing and procedural matters. As a part of that, the parties accepted a process within which HEABC, HSA, and CSBA were granted intervenor standing with the corresponding right to make submissions. Within that context, HEABC's application for leave and reconsideration of the Original Decision was considered as a submission within the submission process in the present matter. That submission process also provided a right of reply where appropriate.

IV. ISSUE

8 The issue is whether subsection 68(1) of the Code, which prohibits employers' use of persons described in it to do bargaining unit work during a legal strike or lockout, applies in the context of an essential services designation by the Board under Section 72 of the Code.

V. POSITIONS OF THE PARTIES

9 We will set out the parties' positions basically following the order of the submissions within the procedure referenced above. In doing so, we note that the HEU and HEABC applications for leave and reconsideration of the Original Decision were filed with the Board prior to the issuing of the Paramedics Decision. Our summary of the HEABC application will be included with the other HEABC submissions filed within the order of proceedings which was established.

1. HEU's Application for Leave and Reconsideration of the Original Decision

10 HEU says that the essential services regime in Part 6 of the Code does not contemplate or provide for the applicability of Section 68 of the Code to essential services disputes. If the Original Decision is correct, it would lead to the absurd result that there would be labour disputes in which essential services simply could not be maintained. HEU says that it cannot be the intention of the Legislature in Section 72 of the Code that there would be situations in which essential services could not be maintained, resulting in the Board being powerless under the Code to protect the public from the ensuing harm.

11 HEU says that the Original Decision is inconsistent with the principles expressed or implied in the Code on two bases. First, it errs in failing to apply the principle in *Chantelle Management Ltd*., BCLRB No. B345/93, (1994), 20 C.L.R.B.R. (2d) 293 ("*Chantelle Management")* that Part 6 of the Code and Sections 133 and 134 of the Code supersede or supplant the provisions of Section 68 of the Code, including subsection 68(1). The Board's comments in *Chantelle Management* were meant to apply generally to the relationship between Sections 68 and 72 of the Code. There is also no rational distinction that can be drawn between subsection 68(2), which was at issue in *Chantelle Management*, and subsection 68(1), at issue in the present matter.

12 If the Original Decision is allowed to stand and is followed, it will likely lead to chaos in the provision of essential services. Under its rationale, after-hired bargaining unit employees, as well as managers, would be excluded from performing essential services work. That, along with the turnover which occurs in the workforce and the extremely high levels of essential services which are needed in healthcare, will lead to an inability to provide sufficient workers for the essential services to be performed. That would not be consistent with the public policy in Sections 68, 72, 133 and 134 of the Code.

13 The second basis upon which the Original Decision is inconsistent with the principles expressed or implied in the Code is that it errs in concluding that persons ordered to perform bargaining unit work under an essential service designation are replacement workers under subsection 68(1) of the Code. As set out in *Chantelle Management*, under an essential service designation it is the Board which designates the essential service work. As a result, the services of the persons working are being used by the Board, not the employer: *Chantelle Management*, p. 306. That principle

has been applied in other contexts as well: *G.R. Baker Memorial Hospital v. Hospital Employees' Union*, Ministry No. A-316/00, [2000] B.C.C.A.A.A. No. 459.

14 In a similar way, the after-hires who are performing essential services work are not performing the work of an employee in the bargaining unit that is on strike, rather they are performing the essential services work ordered by the Board.

2. Compass' Response

15 Compass' core position, based upon Sections 68(1), 6(3)(e), 133, 134 and Part 6 of the Code, is that the Board does not have jurisdiction to order what the Code expressly prohibits in subsection 68(1). Put another way, the Board does not have jurisdiction to order the commission of an unfair labour practice contrary to subsections 68(1) and 6(3)(e) of the Code.

16 Compass says the Original Decision is correctly decided. It is consistent with the language of the Code and the Board's jurisprudence interpreting the Code.

17 Compass further says that the Paramedics Decision is wrongly decided. In the Paramedics Decision, the Board has attempted to create by policy what the Legislature has declined to enact. In doing so, the Board has improperly exceeded and ignored the actual language of the Code, as chosen by the Legislature, in order to reach a preferred policy outcome.

18 In sum, Compass says that the HEU's Section 141 application is an invitation to the Board to wrongly engage in policy making and legislating contrary to the express language of the Code and relevant jurisprudence. As a result, the application should be dismissed.

19 In particular, Compass relies upon the limits to the Board's interpretation to the Code in the decisions of the British Columbia Supreme Court and Court of Appeal in *Government of British Columbia (Ministry of Health),* BCLRB No. C82/87 (Appeal of BCLRB No. 117/87), (1988), 23 B.C.L.R. (2d) 306 (S.C.B.C.) ("*Verrin Judicial Review*"); aff'd (1988), 33 B.C.L.R. (2d) 1 (B.C.C.A.) ("*Verrin Appeal*") ("*Verrin*") and the decision of the BC Supreme Court in *Cairns Electric Ltd.,* IRC No. C76/90 (Reconsideration of No. C8/89), 10 C.L.R.B.R. (2d) 80 *("Cairns Electric").* In both the *Verrin* and *Cairns Electric* cases, the Courts found that the Board's reconsideration decisions had gone beyond proper interpretation of the Code in a manner which was patently unreasonable and in effect legislating.

20 Compass also cites Board decisions which have similarly noted this limitation in respect to the Board's interpretation of the Code: *Canadian Mini-Warehouse Properties Limited*, BCLRB No. B293/95 (Reconsideration of Letter Decision dated June 30, 1995) ("*Canadian Mini-Warehouse*"); *Zero Downtime Inc.,* BCLRB No. B374/2004 (Leave for Reconsideration denied in BCLRB No. B22/2005, affirmed 2005 BCSC 1864, affirmed 2006 BCCA 364) ("*Zero Downtime*"); *Nancy Bourdon*, BCLRB No. C205/91 (Reconsideration of IRC No. C120/90 ("*Nancy Bourdon*").

21 Compass next notes the plain language interpretation that the Board has given Section 68 of the Code: *Canadian Mini-Warehouse* and *Woolworth Canada Inc.,* BCLRB No. B5/94 (Leave for Reconsideration of BCLRB No. B411/93) ("*Woolworth Canada*"). Compass also notes that the prohibitions in Section 68 of the Code are strengthened by the breach of them being made an unfair labour practice under Section 6(3)(e) of the Code. The unfair labour practice provisions in the Code are one of the three essential components to all labour legislation modelled on the *Wagner Act*: *Cardinal Transportation*, 34 C.L.R.B.R. (2d) 1, para. 186. It requires express statutory language to overcome the applicability of such an unfair labour practice provision: *Nanaimo Senior Village Partnership*, BCLRB No. B221/2005 (Leave for Reconsideration denied in BCLRB No. B297/2005), para. 133.

22 Compass submits there are three statutory interpretation principles which must be applied: the Board must apply the plain meaning of the Code under subsection 68(1), the Board may not legislate by adding language to the Code, and the Board does not have the jurisdiction to overrule an unfair labour practice provision in favour of another provision in the Code in the absence of express language directing or authorizing same.

23 As held in the Original Decision, the language of subsection 68(1) is clear and unambiguous. It prohibits use of the replacement workers defined in its subsections and supports that by making the breach of Section 68 an unfair labour practice under subsection 6(3)(e) of the Code. As well, subsection 68(1) of the Code could easily have been made expressly "subject to Part 6" of the Code, but it was not. Further, the Board's jurisdictional powers in Sections 133(1)(a) and (b) and 136 do not provide for the Board ordering a person to do an act in contravention of the Code. That would include the commission of an unfair labour practice contrary to subsections 68(1) and 6(3)(e) when authorizing an essential services strike/lockout.

24 Compass submits that the Paramedics Decision resulted from a flawed process which did not have a sufficiently adversarial context given the relationship between CUPE and HEU. Within that context, the Paramedics Decision reached an outcome based upon a policy preference in paragraphs 81, 82 and 84 of the decision which is not consistent with the express statutory provisions of the Code. Compass further says the reasoning in paragraphs 81 and 82 is not logical and that the overall result is to reach an outcome beyond the limitations on the Board's powers to interpret the Code recognized in *Canadian Mini-Warehouse, Woolworth Canada Inc.,* and *Nancy Bourdon.*

25 In the last part of its submission, Compass provides a detailed response to HEU's application. Some of the key submissions are that, in Compass' view, HEU is requesting the Board to prefer the policy of the imprecise language in Part 6 of the Code to the clear and unambiguous language of subsection 68(1). That is beyond the jurisdiction of the Board.

26 As well, concerns regarding the comparative positions of the parties and leverage on them to settle the dispute as a result of the Board's decisions cannot be a basis for the interpretation of the Code. Again that would be beyond the jurisdiction of

the Board. If there are legitimate policy concerns regarding the statutory language, Compass says that should be brought to the attention of the Minister of Labour or the Legislature as a matter of public policy. The remedy lies with the Legislature, not with the Board.

27 Compass goes on to join issue with HEU on each and every point, including the interpretation of *Chantelle Management*.

28 In conclusion, Compass summarizes its position as follows:

> There is no language in the *Code* authorizing the Board to make orders compelling the breach of Section 68(1) in the furtherance of Part 6.
>
> The proposition advanced by HEU is that the Board has the "implicit" jurisdiction to legislate policy by ordering the commission of an unfair labour practice in the furtherance of Part 6. Stated another way, the Board has the "implicit" jurisdiction to prefer the policy purposes of Part 6 to the fundamental policy/purpose of the *Code*, access to collective bargaining, by ordering the breach of unfair labour practice provisions which ensure that fundamental *Code* policy.
>
> Such a proposition is wholly untenable as contrary to the *Code* and Court and Board jurisprudence.

3. Sodexho's Response

29 Like Compass, Sodexho says that the Board cannot disregard the clear language in subsection 68(1) of the Code simply because the matter falls within Part 6 of the Code. Among other difficulties, this would ignore the fact that during essential service disputes the Board deals with the parties' conduct in respect of other types of unfair labour practices under Sections 6, 9 and 11 of the Code. Sodexho says that subsection 68(1) and subsection 6(3)(e) should be accorded no less respect.

30 Sodexho also notes that Section 6(4) of the Code sets out the only exception to Section 6(3) and it does not provide an exception to Section 6(3)(e). As a result, in the absence of an express provision authorizing the Board to order an employer to do something that would otherwise amount to a contravention of Section 6(3)(e), the Board does not have jurisdiction to do so. As well, the Board has applied subsection 68(1) in the essential services context: *V.I. Care Management Ltd. (Sunnyside Manor),* BCLRB No. B112/93.

31 Sodexho too finds the reasoning in paragraph 82 of the Paramedics Decision unconvincing. It says that if essential services are not being maintained in accordance with the Board's order, that does not mean that the strike or lockout is unauthorized, it simply means that one or the other party is in violation of the Board's order. The strike or lockout remains "authorized by the Code".

32 Sodexho notes the history leading to the establishing of the Board's standard global order in healthcare in *Health Employers' Association of B.C.,* BCLRB No. B73/96, (1996), 40 C.L.R.B.R. (2d) 120 ("*HEABC*, *B73/96*"). That standard order includes a restriction on the use of replacement workers. Sodexho calls this "one of the keystones" of the Board's standard global order and says it is consistent with the understanding that subsection 68(1) of the Code applies in essential service disputes.

33 The Board has consistently strictly applied the clear and unambiguous language of Section 68 of the Code: *Vancouver Police Board*, BCLRB No. B291/94 and *Lakes District Maintenance Ltd*., BCLRB No. B198/2007.

34 Sodexho also says that there is no evidence that the Original Decision will plunge the essential service regime into chaos or that there is a high turnover of employees within healthcare.

35 Like Compass, Sodexho says there is a meaningful distinction between the restrictions in subsections 68(1) and 68(2) of the Code and interprets *Chantelle Management* differently than HEU.

36 In respect to the submission that under Section 72 it is the Board that requires the use of persons to satisfy essential service designations, rather than the employer, Sodexho calls this submission "creative" but says it does not accord with the facts on the ground in which it is the parties to the dispute who are deploying the individuals.

37 Sodexho notes that if HEU is correct, then employers will have no restrictions on the use of replacement workers in an essential services context.

38 Sodexho further says that the Original Decision correctly dealt with the clear and unambiguous language in subsection 68(1) of the Code. It did not rest on a balancing of the parties' interests in the dispute. In contrast, the Paramedics Decision wrongly focussed on outcomes, rather than the clear and unambiguous language of the Code. Like Compass, Sodexho says that such policy concerns are a matter for the Legislature, not the Board.

39 Aramark supports the submissions of Sodexho.

4. The Submissions of HEABC, CSBA, and HSA

40 As noted above, HEABC, CSBA, and HSA were granted intervenor standing in this matter. They were given a right of submission following upon the submissions of Compass, Sodexho, and Aramark.

41 HEABC says that if managers, but more importantly, bargaining unit members hired after notice to bargain is given are not permitted to perform essential services under an application of subsection 68(1) of the Code, that would undermine the clear legislative intent of Section 72 of the Code, which is to protect the public interest regardless of the interests of the parties to the labour dispute.

42 HEABC's concern in this regard is not limited to the number of individuals available. Healthcare employers rely on highly trained and qualified individuals with specialized knowledge in respect to such critical matters as operating diagnostic computers during surgery, work in laboratories, and specialized therapies. HEABC's concern is that there will be inadequate access to these specially trained and qualified employees.

43 Restricting Section 72 under subsection 68(1) would also affect the mediative approach to setting essential service levels. That approach commences well before notice to bargain is given. If the approach in the Original Decision is followed, the mediative approach to setting essential service levels would not be able to commence until after notice to bargain is given, when the available employees will be known.

44 HEABC further says that the Original Decision errs by failing to ensure that the statutory objectives in Section 72 of the Code are met and by interpreting and applying subsection 68(1) in a manner which contradicts and will potentially nullify those objectives. That is inconsistent with the law and policy developed by the Board regarding the balance to be achieved in public sector strikes through the designation of essential services.

45 HEABC submits that Part 6 of the Code contains imprecise language. However, it says that what is not in doubt is that the Legislature intended to ensure that the safety, health and welfare of the citizens of British Columbia be protected. It says that the Board is provided with the jurisdiction to ensure that under the provisions in Part 6 of the Code.

46 In HEABC's submission, any reading of subsection 68(1), or any part of Section 68 of the Code, which would negate or interfere with the objectives in Part 6 of the Code is incorrect. HEABC cites the Minister of Labour from *Hansard* in 1992, where he states, "...Section 68 can't be used to frustrate the intent of Section 72".

47 HEABC references the Board's decision in *Health Employers Association of British Columbia on behalf of 15 Home Support Agencies*, BCLRB No. B145/95 in which it was found that it would be "inappropriate to find a breach of Section 68" in an essential services designation context.

48 HEABC says that persons hired after the date in which notice to bargain is given in the context of an essential service designation do not cause the harm or mischief addressed by Section 68 of the Code. Rather, when they work under an essential services designation they are complying with Board orders to provide the statutory safety net to protect the health, safety, and welfare of the residents of British Columbia.

49 HEABC submits there is no meaningful distinction between the restrictions in subsections 68(1) and 68(2) and that *Chantelle Management* established that a Section 72 direction is at the instance of the Board, it is not the parties using the services of persons contrary to subsection 68(1).

50 HEABC says the Paramedics Decision is correct and that it is in fact obvious in light of that decision that it could not have been the intention of the Legislature to permit subsection 68(1) of the Code to apply in a manner which would conflict with the concern for the health, safety and, welfare of the residents of British Columbia in Section 72 of the Code.

51 In response to the assertion that there has never been a reported instance of an insufficient number of employees due to a limitation on the use of post-notice employees in an essential service designation, HEABC notes that there is similarly no report of any party ever taking the position, such as occurred with Compass leading to the Compass Decision, that post-notice hired employees or managers cannot be used to deliver essential services.

52 CSBA relies upon the principles of statutory interpretation set out by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.,* [1998] 1 S.C.R. 27 ("*Rizzo & Rizzo Shoes*"), at paragraph 21. CSBA says that the Original Decision repeated the same mistake as the Ontario Court of Appeal in *Rizzo & Rizzo Shoes*. That mistake is to not pay sufficient attention to the overall scheme of the Code, its object and the intention of the Legislature, along with the context of the words in issue. While on a strict, literal interpretation the Original Decision appears correct, as seen in this broader light within the proper approach to statutory interpretation it neglects the objects of the Code and how such a strict, literal interpretation of subsection 68(1) in the circumstances affects Section 72 of the Code.

53 CSBA notes two improper effects of the Original Decision. The first is to remove a key pressure point that unions have in essential services, forcing managers to work 60 hour work weeks. That pressure is removed if after-hired managers cannot work in an essential service designation under subsection 68(1) of the Code.

54 Secondly, if essential service designation levels cannot be met because of the operation of subsection 68(1) of the Code, there are two possible results. Either the health, safety, and welfare of the residents of British Columbia will be jeopardized or the union could be ordered to end the strike. While the former is directly contrary to Section 72 of the Code, the latter would lead to an absurd result, namely, that an important provision of the Code, Section 68, that was meant in part to stop employers from resisting and prolonging strikes, could be used to that very end.

55 HSA submits that subsection 68(1) and Part 6 of the Code are not necessarily inconsistent with each other. However, there may be factual situations that would bring them into conflict. HSA says that there was a strong indication that was the circumstance in the Paramedics Decision. In that kind of case, subsection 68(1) must necessarily give way to the obligations in Section 72 and 73 of the Code, but it is only then that the Board should exercise its broad powers under Section 72 to allow the use of after-hired persons. HSA says this result is compelled in particular by subsection 72(8) of the Code.

5. Compass' Reply to the Submissions of HEABC, CSBA, and HSA

56 Compass says that HEABC and CSBA, along with HEU, have taken an untenable position, that Part 6 of the Code ought to trump subsections 68(1) and 6(3)(e) of the Code "...in the absence of any facts or allegation that the prohibition of Compass' use of post-notice managers pursuant to Section 68(1) would, in any way, pose a threat to the 'health, safety or welfare' of the Province".

57 Compass disputes HEABC's reliance on *Hansard*, including the use for which it is cited and the interpretation of the Minister's comments, noting the context in which they occurred and later comments by the Minister.

58 Compass goes on to rely on the report to the Minister in 1992: *Recommendations for Labour Law Reform: A Report to the Honourable Moe Sihota, Minister of Labour* (submitted by the Sub-committee of Special Advisors: John Baigent, Vince Ready and Tom Roper), September 1992 (the "Report"). Compass says the Report is of particular significance because Section 68 and Part 6 of the Code resulted from and are based upon the Report. Compass notes that the three Sub-committee members did not agree on Section 68 of the Code and, in particular, that Mr. Baigent drafted a replacement worker provision which expressly excluded the application of it to the designation of essential services under Part 6 of the Code. While the Legislature enacted most of what Mr. Baigent recommended, it deleted the portion expressly stating that it would not apply to disputes authorized under Part 6 of the Code. Compass submits that confirms that the clear and unambiguous language adopted by the Legislature intended subsection 68(1) to apply to the designation of essential services under Part 6 of the Code.

59 As well, the Legislature went on to make the breach of Section 68 of the Code an unfair labour practice under Section 6(3)(e) of the Code, which was not recommended by Mr. Baigent. This too emphasized the importance the Legislature was placing upon Section 68 of the Code.

60 Compass disagrees with the interpretation of *Chantelle Management* put forward by HEABC. In particular, it notes that *Chantelle Management* did not order an employer to commit an unfair labour practice under the Code.

61 In responding to CSBA, Compass again notes the language the Legislature adopted in subsections 68(1) and 6(3)(e) in contrast to the language recommended by Sub-committee member Baigent. Compass submits that clearly demonstrates the Legislature's intention that these are fundamental provisions in the Code which cannot be overruled absent express statutory language, citing the authorities in respect to statutory interpretation it had put forward earlier. Lastly, in response to CSBA, Compass submits that the specific, clear and unambiguous language of subsection 68(1) prevails over the imprecise and general language in Part 6 of the Code.

62 On the same statutory interpretation bases, Compass submits that HSA's position must be incorrect. As well, Compass notes that if HSA's position is accepted,

the Original Decision must be upheld as there was no suggestion before the original panel that the health, safety or welfare of the Province was at issue in the facts of the case.

6. Sodexho's Reply to the Submissions of HEABC, CSBA, and HSA

63 While Sodexho agrees that Section 72 of the Code provides the Board with broad discretionary powers, those powers do not trump every other section of the Code, including the clear and unambiguous language in subsection 68(1) of the Code. Sodexho says that HEABC is asking the Board to read down that clear and unambiguous language in Section 68 of the Code and that if the Board did so, there could never be a breach of Section 68 or the standard global order under Section 72 of the Code, both of which prohibit the "use" of replacement workers by the employer. Sodexho submits the Board has in fact found a breach of Section 68 on numerous occasions in the context of an essential services dispute.

64 Lastly, in response to HEABC, Sodexho says that it stretches the meaning of the word "use" beyond recognition to submit that it is not the employer which is using the services of the employees in an essential services designation. While the Board determines which services and how many employees are required to provide the services, it is the employer that is clearly using the services of the employees.

65 Like Compass, Sodexho notes in response to HSA that if HSA's position is correct, the Original Decision must be upheld.

66 Sodexho agrees with CSBA that the provisions of the Code must be read in context, but says that does not provide a basis upon which to read words into subsection 68(1) that are not there. Sodexho says that there is no language exempting or limiting Section 68's application and to make Section 68 inoperable in respect to essential service designations would require express language to that effect.

67 Sodexho also says that CSBA's submission regarding maximizing pressure on the employer in a labour dispute is not an appropriate interpretive guide to the statutory construction matter at issue.

68 Once again, Aramark supports Sodexho's submissions.

7. HEU's Reply

69 HEU commences its final reply submission by noting that this matter raises a critically important issue, namely the interplay between the essential service provisions in Part 6 of the Code and whether, or how, Section 68 applies to such disputes. HEU says that the Board should adopt the reasoning in the Paramedics Decision and reject the reasoning in the Compass Decision.

70 HEU also notes that the Original Decision "...has done something that rarely happens: it has brought the health care unions and the HEABC together to speak in

essentially one voice on the proper interpretation of the essential services provisions and replacement workers provisions of the Code."

71 HEU says the question is whether the Legislature intended Section 68 of the Code to apply to essential services disputes, with the consequence that the maintenance of essential services may not be able to be maintained.

72 In respect to the principles of statutory interpretation relied upon by Compass, HEU says that the first and third principles are not accurate statements of the law and the second principle is trite.

73 The first principle is incorrect in its assertion that the Board must apply the plain, ordinary meaning of the words at issue. In *Office and Professional Employees' International Union, Local 378 v. B.C. (LRB),* 2001 BCCA 433, [2002] CLLC, para. 220-009 ("*OPEIU*"), the BC Court of Appeal gave considerable latitude to the Board's ability to interpret Section 68 of the Code contextually, addressing policy concerns, and bringing to bear "a large measure of labour relations judgment into a question falling within its exclusive area of jurisdiction".

74 In respect to the hierarchy of Code provisions asserted by Compass, HEU says this submission has missed the importance of essential services legislation in respect to the Code, even prior to its formal incorporation into the Code in Part 6 of the Code.

75 Regarding the non-inclusion of a portion of the draft Section 68 language by Sub-committee member Baigent, HEU says that the drafters of legislation will not include such language when they believe, for instance, that the intent is sufficiently clear without such express wording. That would include the importance of maintaining essential services in the present matter.

76 HEU disputes Compass' challenges to the Paramedics Decision. In contrast to Compass' submission that the original panel in the Paramedics Decision had simply followed its own policy preference, HEU says that the panel had properly addressed the intent of the Legislature in the words of the Code, the purposes and specific provisions of the Code, the duties imposed upon the Board under Section 2 of the Code, and the presumption of coherency: Paramedics Decision, para. 83. Compass disputes as well that the Paramedics Decision found that subsection 68(1) would apply at times to essential services designations but not at other times: Paramedics Decision, para. 86.

77 HEU says that the interpretation in the Original Decision would result in essential services not being able to be maintained, a concern which was triggered in the Paramedics Decision. This is not a "policy" consideration. Rather, it goes to the likelihood of the differing possible interpretations of the intention of the Legislature in the Code.

78 HEU says that subsections 68(1) and (2) both contain a restriction on the employer, the former in respect to whether an employer can "use" the services of a person, the latter in respect to whether an employer can "require" work to be done.

They are similar restrictions and both thus fall within the rationale and determination in *Chantelle Management*.

79 HEU supports HEABC's use of *Hansard* and disputes Compass' use of the Report.

80 HEU further says that Compass has it backwards: Sections 72 and 73 of the Code are specific provisions dealing with the particular circumstances of an essential services dispute, whereas Section 68 is a general provision in the Code. As a result, if there is a conflict, the specific provisions of Sections 72 and 73 should trump the general provision in Section 68.

81 Principles of statutory interpretation also do not require that there be ambiguity in a specific provision, in order for it to be read contextually in light of the statute as a whole. Consequently, the HEU says that if it is correct that Section 72 excludes the operation of Section 68, or that under Section 72 the employer is not using the services of a person and the work is not bargaining unit work, the Board would not be ordering an employer to contravene the Code.

82 Lastly, HEU submits that Sodexho's view based on the scheduling of the employees under an essential services designation is simplistic. That is because even though the scheduling is done by someone else, it is the Board that has ordered that the work be done.

VI. ANALYSIS

83 We find that the present Section 141 application discloses a good, arguable case of reviewable error in respect to the Original Decision and, accordingly, leave is granted: *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), 20 CLRBR (2d) 44, 93 CLLC ¶16,043.

84 At the heart of the issue before us is a question of statutory interpretation, what the Original Decision referred to as the "interplay" between Sections 68 and 72 of the Code: Original Decision, paras. 30-31.

85 In respect to issues of statutory construction, we accept the submission of the CSBA, and believe it is beyond dispute, that the approach to be followed is that set forth by the Supreme Court of Canada ("Court") in *Rizzo & Rizzo Shoes*. Within that approach, we are looking for the legislative intent in the provisions at issue in the Code.

86 In *Rizzo & Rizzo Shoes*, the Court dealt with the entitlement of employees under the Ontario *Employment Standards Act* to termination pay in the context of a bankruptcy. Writing for the Court, Mr. Justice Iacobucci noted that the Ontario Court of Appeal had focussed upon the plain meaning of the provisions at issue in the statute. He explained as follows:

> At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete. (para. 20)

87 Iacobucci J. then went on to set out what would be a proper and complete approach to the statutory interpretation at issue:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Coté, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Recent cases which have cited the above passage with approval include: R. v. Hydro-Québec, [1997] 3 S.C.R. 213; Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; Verdun v. Toronto-Dominion Bank, [1996] 3 S.C.R. 550; Friesen v. Canada, [1995] 3 S.C.R. 103.
>
> I also rely upon s 10 of the Interpretation Act, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".
>
> Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues. (paras. 21-23)

88 In proceeding to apply this approach, the Court noted, among other matters, the "objects" and "purposes" of the statutory provisions at issue (para. 25), noting

incompatibility of the Court of Appeal's interpretation "with both the object of the Act and with the object of the termination and severance pay provisions themselves" (para. 27). The Court went on to explain:

> It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Coté, supra., an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, Construction of Statutes, supra. at p. 88).
>
> The trial judge properly noted that, if the ESA termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.
>
> If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the ESA would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result. (paras. 27-29)

89 The Court ultimately overturned the Ontario Court of Appeal's decision. In doing so, it moved from what it described as the Court of Appeal's approach, which was consistent with "the plain meaning of the words of the provisions here in question" (para. 20), to the broader approach set out in the above passages. That approach includes looking at the overall scheme of the statute, its purposes, and the context of the particular provisions in issue (see, in particular, para. 22). It also includes avoiding absurd or arbitrary consequences, as they cannot be taken to be the intention of the Legislature (see paras. 27 and 29).

90 In following this approach in the present matter, we are also guided by the decision and reasons of the British Columbia Court of Appeal in *OPEIU*. That case dealt with the interpretation of Section 68 of the Code. In the disposition of the matter, the Court of Appeal overturned the Chambers Judge's decision and restored the decisions of the Board.

91 There were concurring reasons, which basically differed on the question of whether Section 68 of the Code was ambiguous or simply produced a difficult question of interpretation. Madam Justice Huddart found that the provision was ambiguous, while Madam Justice Southin found that it was simply a difficult question of interpretation. Madam Justice Ryan agreed with both sets of reasons.

92 In restoring the decision of the Board, Madam Justice Huddart observed:

> Where a provision in the Code leaves room for construction, it seems entirely appropriate that the Board should be free to interpret the provision in accordance with labour relations policy considerations. As Madam Justice Wilson noted in National Corn Growers Association v. Canada (Canadian Import Tribunal), [1990] 2 S.C.R. 1324 at 1336-7:
>
> > [i]nterpreting a statute in a way that promotes effective public policy and administration may depend more upon the understanding and insight of the frontline agency than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law. Administration and interpretation go hand in glove".
>
> Under the Code, not only does the Board perform a managing and supervisory function in the context of the highly regulated, complex field of labour relations, but as part of its broad oversight mandate the Board is expressly charged in s. 2 with policy responsibility and development in a polycentric context, a context that demands a delicate balancing between different constituencies with different and competing interests. Through ss. 136-138, and s. 139(1)(q) in particular, the Legislature has recognized that, in discharging its oversight function, the Board is best equipped to resolve ambiguities and fill voids in the legislative language governing replacement workers in a way that makes sense in the factual context, in the context of the Code as a whole, and in the field of labour relations overall in the province. (paras. 15-16)

Madam Justice Huddart went on to place the issue in that case within the broader approach and context just noted.

93 That approach and context, consistent with *Rizzo & Rizzo Shoes*, includes looking at the statute as a whole and in effect considering the consequences of the

interpretation at issue in terms of both the policy responsibilities in Section 2 of the Code in the "polycentric context ... of labour relations overall in the province" (para. 16), and seeking to promote "effective public policy and administration" (see the quote in para. 15).

94 Along with avoiding absurd or arbitrary consequences (*Rizzo & Rizzo Shoes*), we are, therefore, to consider the matter at issue within our policy responsibilities under Section 2 of the Code, the thrust of the Code overall, and the complex context of labour relations in the province.

95 Applying the above approach to the present matter, we begin by noting that we have the benefit of the submission process in this matter which has produced a fuller and broader range of submissions than was before either original panel leading to the Original Decision and the Paramedics Decision.

96 Next, although the primary statutory provisions at issue are familiar, for convenience we will set them out here. Section 72 sets forth the unique approach to essential services designations in the Code:

> 72. (1) If a dispute arises after collective bargaining has commenced, the chair may, on the chair's own motion or on application by either of the parties to the dispute,
>
> (a) investigate whether or not the dispute poses a threat to
>
> (i) the health, safety or welfare of the residents of British Columbia, or
>
> (ii) the provision of education programs to students and eligible children under the *School Act*, and
>
> (b) report the results of the investigation to the minister.
>
> (2) If the minister
>
> (a) after receiving a report of the chair respecting a dispute, or
>
> (b) on the minister's own initiative
>
> considers that a dispute poses a threat to the health, safety or welfare of the residents of British Columbia, the minister may direct the board to designate as essential services those facilities, productions and services that the board considers necessary or essential to prevent immediate and serious danger to the health, safety or welfare of the residents of British Columbia.

(2.1) If the minister

(a) after receiving a report of the chair respecting a dispute, or

(b) on the minister's own initiative

considers that a dispute poses a threat to the provision of educational programs to students and eligible children under the *School Act*, the minister may direct the board to designate as essential services those facilities, productions and services that the board considers necessary or essential to prevent immediate and serious disruption to the provision of educational programs.

(3) When the minister makes a direction under subsection (2) or (2.1) the associate chair of the Mediation Division may appoint one or more mediators to assist the parties to reach an agreement on essential services designations.

(4) A mediator appointed under subsection (3) must report to the associate chair of the Mediation Division within 15 days of his or her appointment or within any additional period agreed on by the parties.

(5) The board

(a) must within 30 days of receiving the report of a mediator, designate facilities, productions and services as essential services under subsection (2) or (2.1), and

(b) may, in its discretion, incorporate any recommendations made by the mediator into the designation under that subsection.

(6) If the minister makes a direction under subsection (2) or (2.1) before a strike or lockout has commenced, the parties must not strike or lock out until the designation of essential services is made by the board.

(7) If the minister makes a direction under subsection (2) or (2.1) after a strike or lockout has commenced, the parties may continue the strike or lockout subject to any designation of essential services by the board.

(8) If the board designates facilities, productions and services as essential services, the employer and the trade union must supply, provide or maintain in full measure those facilities, productions and services and must not restrict or limit a facility, production or service so designated.

> (9) A designation made under this section may be amended, varied or revoked and another made in its place, and despite section 135 the board may, in its discretion, on application or on its own motion, decline to file its order in a Supreme Court registry.

97 Section 68 of the Code is also unique in terms of usual *Wagner Act* based labour relations legislation. It provides:

> 68. (1) During a lockout or strike authorized by this Code an employer must not use the services of a person, whether paid or not,
>
> (a) who is hired or engaged after the earlier of the date on which the notice to commence collective bargaining is given and the date on which bargaining begins,
>
> (b) who ordinarily works at another of the employer's places of operations,
>
> (c) who is transferred to a place of operations in respect of which the strike or lockout is taking place, if he or she was transferred after the earlier of the date on which the notice to commence bargaining is given and the date on which bargaining begins, or
>
> (d) who is employed, engaged or supplied to the employer by another person,
>
> to perform
>
> (e) the work of an employee in the bargaining unit that is on strike or locked out, or
>
> (f) the work ordinarily done by a person who is performing the work of an employee in the bargaining unit that is on strike or locked out.
>
> (2) An employer must not require any person who works at a place of operations in respect of which the strike or lockout is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the consent of the person.
>
> (3) An employer must not
>
> (a) refuse to employ or continue to employ a person,
>
> (b) threaten to dismiss a person or otherwise threaten a person,

> (c) discriminate against a person in regard to employment or a term or condition of employment, or
>
> (d) intimidate or coerce or impose a pecuniary or other penalty on a person,
>
> because of the person's refusal to perform any or all of the work of an employee in the bargaining unit that is on strike or locked out.

98 Lastly, in terms of the statutory provisions we will set out, Section 2 of the Code is unique as well in that it makes it a duty of the Board to consider in every decision it renders the eight concerns set forth in subsections (a) through (h):

> 2. The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that
>
> (a) recognizes the rights and obligations of employees, employers and trade unions under this Code,
>
> (b) fosters the employment of workers in economically viable businesses,
>
> (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,
>
> (d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,
>
> (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,
>
> (f) minimizes the effects of labour disputes on persons who are not involved in those disputes,
>
> (g) ensures that the public interest is protected during labour disputes, and
>
> (h) encourages the use of mediation as a dispute resolution mechanism.

While it is now the duty of the Board under Section 2 to consider (a) through (h) in respect to the Board's tasks under the Code, some of the concerns may be more pronounced than others in any particular situation depending on the matter(s) at issue and the context.

99 The Original Decision concluded ”that Section 68(1) is clear and unambiguous" (para. 39). However, as in *Rizzo & Rizzo Shoes*, we find that view incomplete. We do so on two bases. The first is in respect to the need to consider the other provisions in the Code and the purposes of the Code overall. The second is in respect to the consequences of such a determination in respect to the intention of the Legislature in the Code.

100 With the benefit of the fuller submissions before us, it is apparent to us that the interpretation and application of subsection 68(1) in relation to Section 72 of the Code is not clear and unambiguous. To paraphrase Madam Justice Southin in *OPEIU*, it is at least a difficult question of interpretation. As well, we find that the interpretation of Sections 68 and 72 of the Code in relation to each other is ambiguous, as that term was used by Madam Justice Huddart in *OPEIU*.

101 The ambiguity arises in the "interplay" between the two sections of the Code. In and of themselves, both would seem to provide a full, definitive prescription for the circumstances they address. Section 68 defines who will be a replacement worker and cannot be used in certain circumstances. Section 72 sets out how the question of essential services designations are to be addressed. The interpretive problem does not necessarily arise in respect to either provision in and of itself, although we note that Huddart J. in *OPEIU* found Section 68 to be ambiguous in respect to the circumstances and issue in that case and there seems to be little dispute among the parties before us that the concern for the "health, safety or welfare of the residents of British Columbia" in Section 72 of the Code is "imprecise", thus calling upon a labour relations judgment by the parties concerned and the Board.

102 Nevertheless, regardless of the nature of the provisions separately in and of themselves, certainly the "interplay" between the two sections is ambiguous in terms of what is the intention of the Legislature when the two circumstances overlap or collide. That becomes particularly apparent in the circumstances of the Paramedics Decision. In that case, the Original Panel noted that the "principal concern" before it was "whether, without the use of post notice hires, essential service levels can be maintained at all" (para. 72).

103 In their submissions to us, the parties have respectively talked of either Section 72 "trumping" Section 68 in the essential services context or, conversely, the Board not having jurisdiction to consider the consequences of a Section 68 determination in an essential services context. However, we are not comfortable with either of these approaches as they do not, in our view, meet the guidance set out by the courts in *Rizzo & Rizzo Shoes* and *OPEIU*.

104 In applying the approach set out by the courts, we will start with the two provisions most immediately at issue and then proceed to the other matters noted in the courts' decisions. Starting with the two provisions themselves, we find that Section 68 is general in nature, as opposed to the specific nature of Section 72 which deals only with the specific, defined essential services contexts of whether a dispute under the Code poses a threat to the health, safety or welfare of the residents of British Columbia or the

provision of educational programs to students and eligible children under the *School Act*: Section 72(1)(a)(i) and (ii). The statutory interpretation principle of the specific applying over the general thus favours the application of Section 72 in contexts where there is conflict, ambiguity, or difficulty.

105 In looking at the Code overall, we find that our responsibilities under the provisions in Section 2 of the Code again would favour an application of Section 72 in circumstances where there is conflict, ambiguity, or difficulty. In particular, the proper interpretation and application of Sections 68 and 72 of the Code must address and protect in an essential service such as healthcare the health, safety, and welfare of the residents of British Columbia. The health, safety, and welfare of the residents of British Columbia is a larger, societal concern which transcends the collective bargaining focus and concerns of most of the rest of the Code. Those larger, societal concerns are reflected in particular in subsections (f) and (g) of Section 2 of the Code, which require that the Board address these matters "…in a manner that…(f) minimizes the effects of labour disputes on persons who are not involved in those disputes, [and] (g) ensures that the public interest is protected during labour disputes…". The "larger, societal perspective which must be brought to bear" in circumstances triggering concerns regarding the providing of healthcare, such as is the case in the present matter, were noted by the Board under the amended Section 2 in *Health Employers' Association of British Columbia (Fraser Health Authority and Burnaby Hospital),* BCLRB No. B334/2002 (Leave for Reconsideration of BCLRB No. B228/2002) ("*Burnaby Hospital*"), para. 52.

106 There is also a significant public interest in ensuring that collective bargaining within the essential services context is as efficacious as possible. The sensitive balancing that must occur within that system and context is well explained in the Original Decision:

> Employers and unions covered under Section 72 of the Code have the right to strike or lockout. Section 72, in conjunction with Sections 2(f) and (g), ensures the protection of health, safety or welfare of the public during any strike or lockout. The Board is charged with the task of creating an environment where the public interest is protected, while at the same time exerting maximum pressure on the employer and the union to resolve the dispute as quickly as possible. This objective is achieved by continuing essential services to the public by deploying managers to work extended hours (creating pressure on the employer) and reducing the number of hours worked by bargaining unit members (creating pressure on the union). This is the essence of the "controlled strike" contemplated by the Code. (para. 29)

The efficacy of the collective bargaining in this essential services, "controlled strike" context triggers concerns regarding subsections (c) through (e) of Section 2 of the Code. Through those subsections, the Board must approach its duties under the Code in a manner that:

> (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,
>
> (d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity, [and]
>
> (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes, … .

107 This is "…a context that demands a delicate balancing between different constituencies with different and competing interests", as noted by Madam Justice Huddart in *OPEIU*, para. 16. As well, in the critical context of essential services in healthcare, the Board needs to be seeking to promote "effective public policy and administration", as noted by Madam Justice Wilson in the quotation in the previous paragraph of Madam Justice Huddart's decision in *OPEIU*. The resolution of collective bargaining disputes in healthcare in British Columbia is a matter of significant public interest.

108 It is also inherently a tricky, or "delicate" (*OPEIU*, para. 16), task. The nature of the task was well described in *Burnaby Hospital*:

> Our labour relations scheme, unlike a number of other jurisdictions in Canada, recognizes there is a public interest in the right of employees working in essential services sectors to engage in limited strike activity. The competing aspect of the public interest is the protection of the health, safety and welfare of the public. The balance struck between those two involves a limitation on the right to strike while permitting some impact on the public within a lawful strike and picketing context. The integrity of that balance must be properly superintended in order that the system does not come into disrepute. (para. 53)

109 As also noted in *Burnaby Hospital*, in approaching that task "the Board expends tremendous resources in ensuring that patient health care and safety is properly preserved under essential service designations in respect to lawful strike and picketing activity" (para. 58). As was submitted by HEABC, the labour relations parties in healthcare also do so through their extensive mediative efforts in setting essential service levels through mediated agreements in the vast array of unionized healthcare services in the province. The ability and willingness of the parties to mediate resolutions through the complex essential services process is a large accomplishment and contribution to the public interest, in terms of ensuring the health, safety, and welfare of the residents of British Columbia respecting the provision of healthcare services.

110 And it has not always been thus, as noted by Sodexho in its submission regarding the development of the standard global orders in respect to essential services in healthcare. Protecting the ability and developed culture of the parties in healthcare to resolve essential services designations through mediation, thus addresses a further critical concern of the Code, this time in terms of subsection (h) of Section 2 of the Code, under which the Board is to encourage "the use of mediation as a dispute resolution mechanism". Absent the ability and willingness of the parties to mediate and resolve essential service levels through mediation, an immensely cumbersome, time-consuming, complex, and expensive task would be left to the blunt and much less suitable tool of adjudication: see *HEABC*, para. 5.

111 All of this was perhaps best summarized by Chair Kelleher (as he then was) in *Health Employers Association of British Columbia*, BCLRB No. B125/2001 (Leave for Reconsideration of BCLRB No. B118/2001) ("*HEABC, B118/2001*"):

> Much has been written about the nature and dynamics of an essential services dispute: see, for example, *HEABC,* BCLRB No. B73/96; *The Crown in Right of Ontario Represented by Management Board of Cabinet - Essential and Emergency Services*, [1995] O.L.R.D. No. 2240 (OLRB); *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union* (1997), 146 D.L.R. (4th) 329 (B.C.S.C.); Weiler, *Reconcilable Differences*, (Toronto: Carswell Company Limited, 1980), at 235. On the one hand, employees at, in this case, public health care facilities have the right to engage in meaningful collective bargaining, which includes the right to engage in strike activity. On the other hand, it is critical that a strike not jeopardize the health, public safety and welfare of the residents of this province. Accordingly, the Code provides for the designation of the facilities, productions and services necessary to meet this objective. These two countervailing rights cannot co-exist without considerable tension. The body responsible for ensuring that tension is played out in a way that achieves both objectives is the Labour Relations Board. As put by the Board, "the primary function of the Board is to foster meaningful collective bargaining with a view to enabling the parties to achieve a realistic collective agreement while at the same time minimizing harm on the public" (*HEABC,* BCLRB No. B73/96, para. 7). (para. 19)

Chair Kelleher went on to explain the efforts which had taken place over "some 25 years" in this context which has "tremendous potential for harm":

> The Board's mandate in this area is not an easy one to fulfill, but it is one that has been in place for some 25 years. A number of strikes have occurred in health care since the essential services provisions were first enacted. The Board has been responsible for ensuring essential services have been in place not only in each dispute where there has been actual strike activity, but also for each round of collective bargaining where the potential of strike activity has not been realized. Given the potential risks, it is a

> challenging and difficult task. Nevertheless, despite the tremendous potential for harm, the Board, working with the parties and utilizing both its mediation and adjudication divisions, has ensured that the process has worked. Employees working in health care and their unions have achieved collective agreements. Where strike action has been necessary, the health and safety of the patients and residents has not been jeopardized.
>
> . . .
>
> The result of 25 years of this type of experience with essential services in health care has, as the Board has acknowledged, produced a well-refined process involving "sophisticated, capable and mature" parties (*HEABC, supra,* para. 6). (*HEABC, B118/2001*, paras. 20 and 23)

112 In *HEABC B73/96*, the Board set out the extensive efforts of the labour relations community and the Board to develop the finely tuned balance in the existing regime, giving effect to the legislative intention in Section 72 of the Code.

113 It is within this context that we consider the application of Section 68 of the Code. In the form of the specific instances set out in subsections (1)(a) through (1)(d), Section 68 restricts the use of replacement workers to do bargaining unit work during a strike or lockout.

114 The Board has had considerable occasion to deal with Section 68 since it was brought into the Code. The Board has determined that the legislative intent or purpose of Section 68 "is...to protect the integrity and viability of the bargaining unit by prohibiting the use of certain classes of replacement workers set out in Section 68(1)(a) to (d)": *British Columbia Automobile Association*, BCLRB No. B247/99, para. 24 ("*British Columbia Automobile Association*").

115 We find Section 68 thus addresses more generally the collective bargaining process under the Code, giving rise to the Section 2(c) through (e) concerns we have noted above. It has less to do with the overriding public health and safety concerns that we have noted in respect to Section 72 of the Code, which give rise to the larger, societal concerns reflected in subsections (f) and (g) of the Code. In sum, the "policy considerations" (*OPEIU*, para. 15) in the essential services context of Section 72 of the Code are both more specific contextually and larger societally than those in Section 68 of the Code.

116 As noted above, the Court in *Rizzo & Rizzo Shoes* explained, "It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences" (para. 27). Citing Sullivan, the Court further explained that "…a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspects of it pointless or futile…" (*ibid*.). In its analysis, the Court in effect also concluded that the Legislature should not be taken to have intended arbitrary results (para. 29).

117 We find that the interpretation of Sections 72 and 68 in the Original Decision runs afoul of these proscriptions. In the type of circumstances presented in the Paramedics Decision, applying the interpretation in the Original Decision to those circumstances would "defeat the purpose of [the] statute or render some aspect of it pointless or futile". In those circumstances, the application of Section 68 would have two possible results, both of which are clearly contrary to the legislative intention in the Code.

118 The first possible result is that in respect to a strike or lockout occurring in a collective bargaining dispute in an essential services context, the "health, safety or welfare of the residents of British Columbia" could not be protected. That would be because there are not enough individuals, or specially trained and qualified individuals in the healthcare context, falling outside the restrictions in Section 68 to do the work required. That is contrary to what we see as the clear intention of the Legislature in Section 72 of the Code, which we have found to be an overriding, larger, societal concern in respect to the provision of essential healthcare services in the province.

119 The other possible result is that because the Section 72 requirement of protecting the health, safety, and welfare of the residents of British Columbia cannot be met, a strike or lockout would not be allowed as it could not meet this critical requirement in Section 72 of the Code. That would effectively remove the critical strike and lockout mechanisms in the Code, which are used to assist resolution of collective bargaining disputes which are otherwise not able to reach a conclusion. That, too, would undermine a fundamental purpose of the statute and render critical aspects of it "pointless or futile", including the legislative intent in Section 68 of the Code "...to protect the integrity and viability of the bargaining unit": *British Columbia Automobile Association*, para. 24. Not allowing a union the ability to strike to further its collective bargaining position and interests would undermine "the integrity and viability of the bargaining unit".

120 The latter possibility would also produce an arbitrary result. As in *Rizzo & Rizzo Shoes*, this result would only arise in certain circumstances. Thus on an arbitrary basis, the critical mechanism of a "controlled strike" in the essential services context would be unavailable. That should not be taken to be the intention of the Legislature in the statute: *Rizzo & Rizzo Shoes*, para. 29.

121 In our conclusion, therefore, we in effect agree with the determination in *Chantelle Management* that

> ...the work which excluded personnel are required to perform [under an essential services designation] is no longer <u>simply</u> "work of an employee in the bargaining unit that is on strike" (s.68(2)). It is work that has been deemed to be an essential service." (p. 306, emphasis added)

For the reasons we have given, in our view Section 68 was not intended to apply to the work being performed in this unique and critical essential service context.

122 In sum, in respect to Section 68, we find it was not the intention of the Legislature to impact or undermine in any way the critical essential services context and processes which had long existed under the Code. As Chair Kelleher noted, this is a context with "tremendous potential for harm": *HEABC*, *B118/2001*, para. 20. Given its "potential risks", it is a context which produces "a challenging and difficult task": *ibid*. Nonetheless, "[t]he result of 25 years...of experience with essential services in health care has, as the Board has acknowledged, produced a well-refined process involving "sophisticated, capable and mature" parties ...": *ibid*., para. 23. This is a critical context the Legislature can be taken to be well aware of when it introduced Section 68 into the Code in 1993. In that context, we are not prepared to conclude that the Legislature intended to introduce into the Code a provision which may negatively impact and in some circumstances even compromise this sensitive essential services context and its evolved processes. We are buttressed in that conclusion having regard to the purpose of Section 68 of the Code.

123 On the above bases, we find that it is not the intention of the Legislature in Sections 68 and 72 of the Code, and the Code overall, that Section 68 should operate so as to affect or impinge upon the setting of essential services designations under Section 72 of the Code.

124 We also note, as did the Court in *Rizzo & Rizzo Shoes*, that the conclusion we have reached is consistent with the statements made by the Minister of Labour at the time Section 68 was brought forward as an amendment to the Code: see *Rizzo & Rizzo Shoes*, paras. 33-35. We note this on the basis of the only specific comments of the Minister put before us from *Hansard,* which were that "…Section 68 can't be used to frustrate the intent of Section 72": see the submission of HEABC, para. 46 above.

125 Having considered *Hansard* in the limited manner of the Court in *Rizzo & Rizzo Shoes*, we see no meaningful reason why Compass' position based on the Report should not also be considered. Compass noted that Sub-committee member Baigent had drafted proposed language for Section 68 of the Code and that, to a great extent, his draft language was subsequently followed in the actual amendment. However, critically says Compass, his specific wording excluding the operation of Section 68 in respect to Section 72 of the Code was not included. Compass says this is further evidence of the policy importance the Legislature was attributing to the replacement worker provision in Section 68 of the Code and ultimately further evidence in support of the legislative intention that Section 68 should operate in relation to Section 72 of the Code in the manner concluded in the Original Decision.

126 We find that the point Compass has raised on the basis of Mr. Baigent's draft language would not overcome our analysis and conclusion above based on the courts' approach to statutory interpretation in *Rizzo & Rizzo Shoes* and *OPEIU*.

127 As well, Section 68 was one of the few matters on which the Sub-committee members did not agree. Mr. Baigent's suggested language was, as a result, only his. The other two Sub-committee members did not agree with it. Partly as a result of those

circumstances, we would accord greater weight to the differing comments of the Minister in *Hansard* in any event.

128 Should the matter need to be addressed more purely from a drafting perspective, we would agree with the submission of counsel for HEU that given the nature of the concerns in Section 72, it was unnecessary to put into Section 68 express wording which would not allow the operation of Section 68 to undermine the critical essential services concerns in Section 72. As counsel in effect submitted, given the overriding nature of the concerns in Section 72 of the Code, it would be unnecessary to include such an express provision in Section 68 as drafters are not to include unnecessary words in the legislation they are drafting.

129 In light of our above analysis, we conclude the Compass Decision errs in determining that subsection 68(1) applies in the context of Section 72 and must be set aside on this basis.

130 In concluding that subsection 68(1) does not apply in the context of Section 72 of the Code, we thus do not accept HSA's position in this matter.

131 It is our understanding that there is no longer a live issue to be remitted to the Original Panel and accordingly no further remedy beyond this declaration is required. We affirm the correctness of the conclusion in the Paramedics Decision that subsection 68(1) does not apply in the context of a strike or lockout controlled by Section 72 of the Code.

VII. CONCLUSION

132 Leave and reconsideration of the Compass Decision are granted and under Section 141(7) of the Code the decision is set aside. The conclusion reached in the Paramedics Decision, that subsection 68(1) does not apply in context of strikes or lockouts controlled by Section 72, is affirmed.

LABOUR RELATIONS BOARD

"BRENT MULLIN"

BRENT MULLIN
CHAIR

CONCURRING REASONS OF THE ASSOCIATE CHAIR, ADJUDICATION

133 I concur with the conclusion reached by Chair Mullin for the reasons he gives and also for the following reasons.

134 Section 72 deals with the setting of essential service levels in the context of a labour dispute that has been found to "pose a threat to the health, safety or welfare of the residents of British Columbia". The Board has consistently found that the Section 2 purpose of particular relevance in interpreting Section 72 is Section 2(g), ensuring that the public interest is protected during labour disputes. Other duties under Section 2 are also relevant. However, it has long been recognized that the overriding duty of the Board when interpreting and applying the essential service provision in the Code is ensuring that the public interest is protected.

135 For example, in *The Board of School Trustees of School District No. 54 (Bulkley Valley)*, BCLRB No. B147/93, a panel led by then-Chair Lanyon stated:

> Collective bargaining is, as a matter of public policy, thought to be a public good. It is the extension and enhancement of legal rights to individuals in their workplace. Collective bargaining is also seen as consistent with our economic values and goals – the freedom to contract. However, contained within these premises are also the limits of collective bargaining. When it is demonstrably obvious that an economic dispute between an employer and a union will, for instance, affect the health and safety of individuals, then obvious restraints must be placed upon that economic dispute. In the health care sector, of which this Board has the most experience with regard to the setting of essential services, it is clear that health care workers do not have the absolute right to strike. What they have is a right to a "controlled strike".
>
> No employer or union should be allowed to impose unacceptable harm on the general public in its efforts to win a dispute. As important a value as collective bargaining is in our society, the imposition of limits upon it, is a simple recognition that ultimately there are more important values. (pp. 18-19)

136 The Code's essential service provision is intended to give effect to the value of collective bargaining to the extent possible in light of the need to protect the public interest where a labour dispute affects the provision of essential services. This was explained by a different panel of the Board (but one also chaired by Chair Lanyon) in *Health Employers Association of B.C.*, BCLRB No. B73/96 ("*HEABC*"):

> This Province, along with other jurisdictions, has long ago determined that employees of government and public institutions should have access to meaningful collective bargaining with respect to the terms and conditions of their employment. One result of this policy decision is the tension created between the efforts of employees striving to advance their interests to a

> successful conclusion through collective bargaining means, including work disruption, the efforts of institutions to resist a strike, and the maintenance of essential services to protect the health, public safety and welfare of citizens during the course of such collective bargaining. In some jurisdictions the collective bargaining process for public servants and employees of public institutions has been limited by a total restriction on the right to strike and mandatory interest arbitration, while in others, legislatures have opted for the policy of a "controlled strike". In British Columbia, the legislature selected the latter option.
>
> In this jurisdiction, a strike is controlled by the designation of certain services as essential to preserve the health, safety and welfare of the residents of British Columbia and by the allocation of employee resources to the levels required to maintain those services. This device serves two goals: it protects the citizens by ensuring the continuation of essential services and, coincidentally, protects the meaningful nature of collective bargaining. (paras. 2-3)

137 In *HEABC*, the panel goes on to note that, although the Board had in the past successfully designated essential services, "the community at large recognizes that the process can nevertheless be painful and can generate anxiety and tension for the parties, the Board and the public whose safety it is designed to preserve" (para. 4). They continue:

> One of the more tension-filled essential service exercises for the Board occurred recently in the spring of 1992 on the eve of a strike in the health care industry. Applications to the Board were made some two weeks before the strike was due to commence and the Board was faced with the prospect of designating essential services in some 150 hospitals in a virtually impossible time frame. (para. 5)

138 The panel describes how this situation "forced the Board to experiment with innovative means of conducting hearings and issuing orders to achieve, within that very short time frame, the goal of declaring essential services and maintaining a controlled strike once it began" (para. 5). However, the panel continues:

> One of the lessons learned from that experience was that the parties are sophisticated, capable and mature enough to settle most issues on their own or with the assistance of mediation, and at the end of the day comparatively little adjudication may be required. The result was that mandatory mediation was incorporated as part of the essential service regime in the Code as a first step before coming before the Board for adjudication. (para. 6)

139 The panel notes that the "sophistication and understanding of the community was one of the factors which led to an essential services designation conference co-

designed by parties in the community and the Board" (para. 8). At that conference, representatives of a variety of industries "candidly explored a whole host of issues in relation to essential service designations" (*ibid.*).

140 After the conference, HEABC and the unions with whom it bargained were able to meet with the Board's mediation division and reach agreement on most of the terms of a "standard" or "global" essential services order, with only a few unresolved issues requiring adjudication (para. 9). Among the matters that the parties were able to agree to was a term of the standard or global order (as it came to be known) that the employer "will not hire replacement employees" (see para. 9 of *HEABC*, setting out the agreed provisions of the Global Order).

141 The standard or global order approved in *HEABC* became the template for essential service designations in contexts other than the health care sector. This was described as follows in subsequent Board decision, BCLRB No. B70/97:

> At the outset, it is important to explain the Board's approach to disputes over the standard order that are referred to adjudication. The purpose of the essential service provisions of the Code is to ensure the maintenance of the health and safety of the public in the event of a labour dispute. In furtherance of that goal, the Board engaged in a process designed to avoid the adjudication difficulties that occurred in 1992: See BCLRB No. B73/96 [*HEABC*]. The result of that process was the development by the parties and the Board of the standard order. The standard order was intended to apply to global issues arising from the designation of essential services in the event of a dispute in the health care industry. As a result, the standard order will prevail and apply unless one of the parties persuades the Board that the application of the standard order to a particular area, in this case, the community sub-sector, does not further the interests of the essential service provisions in the Code and there is a distinct need for a change. (para. 4)

142 Generally, the standard order has prevailed and been applied in a wide variety of essential services context outside the confines of the health care industry where it was first developed. Notwithstanding the development of a standard order, it is still necessary to determine how it will apply in the context of any given essential service labour dispute. Under Section 72, the parties must first mediate the application of the global order before the Board will adjudicate any outstanding issues. As the Board noted in *University of British Columbia*, BCLRB No. B505/99:

> Even though the parties in health care had a great deal of experience in the essential service designation process, the Board went further in *HEABC, supra,* and ordered the parties to commence essential service designation discussions not later than twelve weeks before the expiry of the subsequent collective agreement. The process ordered by the Board results in the designation process being conducted in a more efficient manner separate from the tension of collective bargaining.

> The legislation also obligates the parties to engage in a mediation process. Given the seriousness of the situation because of the impact a strike may have on the health, safety or welfare of the public, mediation is a critical stage of the designation process. The parties themselves are more knowledgeable than the Board on the services provided by an employer. The parties should be able to agree upon essential service levels that guarantee the provision of essential services while still putting maximum pressure on the parties in a controlled strike. If the parties approach the mediation process with realistic positions, the need for adjudication will be an exception not the norm. (paras. 7-8)

143 Over time, the process has evolved to the point where most parties have either approached Section 72 essential mediation with realistic positions, or been persuaded to agree to realistic positions during mediation. Therefore, overall, the need for adjudication has been the exception, not the norm. That is not to say, however, that the task of fulfilling the mandate set by Section 72 has been easy. As noted by a panel chaired by Chair Kelleher (as he then was) in *Health Employers Association of British Columbia*, BCLRB No. B125/2001 (Leave for Reconsideration of BCLRB No. B118/2001) ("*HEABC 2001*"):

> The Board's mandate in this area is not an easy one to fulfill, but it is one that has been in place for some 25 years. A number of strikes have occurred in health care since the essential services provisions were first enacted. The Board has been responsible for ensuring essential services have been in place not only in each dispute where there has been actual strike activity, but also for each round of collective bargaining where the potential of strike activity has not been realized. Given the potential risks, it is a challenging and difficult task. Nevertheless, despite the tremendous potential for harm, the Board, working with the parties and utilizing both its mediation and adjudication divisions, has ensured that the process has worked. Employees working in health care and their unions have achieved collective agreements. Where strike action has been necessary, the health and safety of the patients and residents has not been jeopardized. (para. 20)

144 One issue that required adjudication arose in 1993 and was addressed in the Board's decision in *Chantelle Management Ltd.*, BCLRB No. B345/93 ("*Chantelle*"). In that case, it was argued that the Board did not have jurisdiction under Section 72 to require that excluded management personnel perform essential service work, if they chose to exercise the right given them under Section 68(2) not to consent to perform "work of an employee in the bargaining unit that is on strike or is locked out".

145 The Board in *Chantelle* concluded that it did have the jurisdiction under the essential services provisions of the Code (Part 6, Sections 72 and 73) to restrict the rights of excluded management personnel from exercising their rights under Section 68(2) of the Code (p. 19).

146 In reaching that conclusion, the Board noted first that the "public's right to the maintenance of essential services would be undermined if the people responsible for the day to day management of the facility were entitled to exercise rights under Section 68(2) and to refuse to work as deemed necessary by the Board" (p. 15). Second, the Board noted that there is a balance between restricting the right to strike of employees in the bargaining unit and restricting the right of excluded staff to rely on Section 68 of the Code: "Both may be necessary in order to ensure that the fundamental purpose of an essential service Order is achieved; that is, the elimination of an immediate and serious danger to the health, safety or welfare of the residents of British Columbia" (p. 15).

147 Finally, the Board noted that in *Beacon Hill Lodges (1984) Ltd. v. Labour Relations Board* (1987), 12 B.C.L.R. (2d) 273, the Court of Appeal concluded that the Board had jurisdiction to determine what orders, terms or conditions are necessary to ensure the objects of Section 72, as long as a rational connection exists between the objects of the Code and the conditions imposed. The Board then stated:

> The rational connection between compelling managers to work and limiting the length of the work stoppage is obvious. As discussed in *Beacon Hill*, *supra*, pressure on both parties is a critical element to the resolution of any labour dispute; it is particularly important that the Board preserve that pressure in a "controlled strike". If management's resources are not stretched, there will be less pressure on the employer to seek innovative solutions to outstanding issues. Equally important, as the number of managers that are scheduled to work decreases, the number of striking employees required to work increases.... (p. 15)

148 The Board in *Chantelle* went on to note (at p. 16) that in an earlier Board decision, *Beacon Hill*, BCLRB No. 2/86, the panel had stated that, in the context of essential service designations, the Board "is entitled to protect the public interest by taking such steps necessary to shorten the duration of a labour dispute by proceeding in a manner which places maximum economic pressure on the employees and the employer so that both parties will seek ways of concluding the labour dispute thus minimizing the negative impact the dispute necessarily has on the public interest" (*Beacon Hill*, *supra*, at p. 20).

149 In *Chantelle*, it was noted that the Board had been given very broad powers under Part 6 to regulate essential service labour disputes, including the power under Section 73(2) of the Code to amend the existing collective agreement between the parties "to the extent necessary to implement the designation of essential services". The Board concluded that, consistent with this broad jurisdiction to regulate essential service disputes, the Board had jurisdiction to restrict managers' rights under Section 68(2) to decline to perform bargaining unit work.

150 In coming to this conclusion, the Board further noted that Section 68(2) restricts an employer from requiring a manager to perform the work of a striking or locked out employee. It found that, with the issuance of an essential service designation order

under Section 72, "it is not the employer who is requiring the person to perform the work of an employee in the bargaining unit. Rather, it is the Board, pursuant to its obligations under Part 6, determining what services shall be supplied or provided" (p. 18). The Board continued:

> Furthermore, the work which excluded personnel are required to perform is no longer *simply* "work of an employee in the bargaining unit that is on strike..." (Section 68(2). It is work that has been deemed to be an essential service. Whatever specific rights excluded personnel had under Section 68(2) falls under the broad and mandatory obligation of the Board to direct what services are essential. (p. 18, emphasis added).

151 As noted earlier, the Hospital Employees' Union ("HEU") and others argue that the Board concluded in *Chantelle* that Section 68(2) does not apply in the context of a Section 72 essential services labour dispute. They submit that the reasoning by which the Board reached this conclusion applies equally to Section 68(1), the provision at issue here, and that the logical conclusion is that Section 68 was not intended to apply in the context of a dispute regulated by Part 6 of the Code.

152 In response to this argument, Compass and others do not suggest that *Chantelle* was wrongly decided. Rather, they submit that the reasoning is distinguishable because Section 68(1) says that an employer "must not use the services of a person...", whereas Section 68(2) says that an employer "must not require any person...to perform any work...". Also, they note that, under Section 6(3)(e), it is an unfair labour practice for an employer to "use or authorize or permit the use of the services of a person in contravention of section 68", a provision which they submit applies to Section 68(1) but not 68(2).

153 I am not persuaded that the reasoning in *Chantelle* is distinguishable on this basis. In that decision, the Board concluded, in essence, that the Legislature intended to give the Board broad powers to regulate and control essential service disputes under Part 6 to ensure that the public interest was protected. The public interest is protected by the Board's powers under Section 72 to ensure not only that essential service levels are maintained during a controlled strike or lockout, but also that the duration of a controlled strike or lockout is not prolonged by the absence of pressure on the union and the employer to resolve their dispute.

154 Pressure is brought to bear on both parties by the Board ensuring that, in the provision of services deemed essential under Section 72, the use of excluded management personnel to do bargaining unit work in place of bargaining unit employees is "stretched", or maximized. Under the global order in health care, managers and other excluded personnel are expected to work a 60-hour work week. For example, as the Board described in *City of Vancouver*, BCLRB No. B138/2007:

> The origin of management and excluded personnel working sixty hours per week is in health care. As in all essential service disputes the essential service order is designed in three stages.

> First, the nature and extent of essential services is determined. Second, qualified management and excluded personnel are deployed to perform bargaining unit work and the essential components of their own job. Third, bargaining unit members are assigned to the balance of essential services. (p. 4)

155 The 60-hour workweek is expressly intended to create pressure by stretching management resources, although not to the point of posing a danger to the public. As the Board noted when confirming in *HEABC* that the requirement for managers to work 60 hours would be a term of the standard or global order under Section 72:

> At a minimum, the Unions ask that excluded personnel work sixty hours per week. The Unions refer to a number of oral orders given by the Board in the past where the sixty hour figure was adopted, and to *Chantelle Management Ltd.*, BCLRB No. B345/93, (1993), 20 CLRBR (2d) 293, 94 CLLC 16,041, where a three-member panel of the Board recognized that stretching management resources is a legitimate process to achieve the objective of shortening the duration of the labour dispute. The Union say that while the Board has traditionally erred on the side of caution, the sixty hours has not been an issue in the past and has never been connected to a problem with safety.
>
> However, HEABC expresses concern over excessive fatigue that may be caused by having excluded personnel working long hours. HEABC says this is a legitimate safety concern. HEABC further says that the pressure being brought to bear on the Employers is because of the job action and not because of managers being forced to work sixty hour weeks.
>
> We accept the basic premise that managers and excluded personnel must be prepared to work longer hours. We find that the sixty hours per week is, at least initially, not unreasonable having regard to both the issues of safety and fatigue. ... (paras. 31-33)

156 The Board in *HEABC* went on to find that, while the Board would require employers to schedule managers to work 60 hours during a controlled strike, employers could apply for relief from that requirement where the strike is prolonged and the "fatigue factor" escalates to the point of becoming a safety issue (para. 34). Subject to that caveat, the requirement for managers and excluded personnel to work 60 hours per week during a controlled strike was made a term of the global order (*ibid.*).

157 Thus, in *Chantelle*, the Board found that if managers were able to exercise the right given under Section 68(2) to refuse to do the work the Board assigns to them under Section 72, the purpose and intended operation of that provision would be thwarted. Accordingly, it found Section 68(2) was not intended to apply in the context of an essential services labour dispute. Taking a purposive and contextual approach to the interpretative issue before it, the Board concluded that Section 68(2) applies where the *employer* requires a person to work. Under Section 72, it is the Board, not the

employer, who requires the work to be done, and accordingly Section 68(2) has no application in that context. Additionally, Section 68(2) applies to "work of an employee in the bargaining unit". However, where the Board has designated under Section 72 that the performance of certain bargaining unit work is an essential service, then it is no longer simply "the work of an employee in the bargaining unit", within the meaning of Section 68(2).

158 As noted earlier, the Board's purposive and contextual interpretation of Section 68(2) in *Chantelle* is not alleged to be erroneous, and in any event I do not find it to be so. Moreover, I find the approach taken to the interpretation of Section 68(2) in *Chantelle* in terms of its application in the context of essential services disputes is equally relevant to Section 68(1). I am not persuaded there is any reason to distinguish the applicability of these two provisions in the context of strikes and lockouts controlled by Part 6 of the Code.

159 As HEU, the Community Sub-sector Bargaining Association and others have argued, applying Section 68(1) in the context of a dispute regulated by Section 72 of the Code thwarts the purpose of that provision in the same way that applying Section 68(2) was found to do in *Chantelle*: by lessening the pressure that can be brought to bear on the parties through the stretching of management resources. HEABC argues that there is a further reason why Section 68(1) cannot have been intended to apply in that context: in some circumstances, essential service levels could not be met.

160 I am satisfied that this concern is not mere speculation; I find that it is realistic based on the Board's experience with designating essential services. It is not unusual for essential service levels to be set at or near 100%, requiring virtually all bargaining unit employees and excluded personnel to continue working during the strike. I find it inevitable that there will be circumstances where essential services cannot be maintained throughout a strike or lockout without the use of employees or managers hired or engaged after notice to bargain was given. This is particularly the case in health care, given that, as HEABC argues, individuals with specialized skills and knowledge may be needed to perform certain essential services.

161 I find that an interpretation of these provisions which would preclude the Board from maximizing pressure on the parties during a controlled strike or lockout while at the same time ensuring that essential service levels are maintained is an interpretation that leads to absurd results, contrary to the fundamental purpose of Section 72 of protecting the public interest during an essential services labour dispute. I find that these are not results that the Legislature would have been intended in enacting Section 68.

162 Section 68 was enacted in 1993, when changes to the Code were made based largely on the recommendations contained in the 1992 Report. Whether to recommend the enactment of a replacement worker provision was one of the few points on which the three authors of the Report did not agree. In advocating for a replacement worker provision, Member Baigent stated (in Appendix 5 to the Report):

> The rationale for prohibiting the use of replacement workers during a work stoppage is straightforward. Labour legislation is designed to encourage collective bargaining. When collective bargaining reaches an impasse the theory behind the legislation is that the economic hardships suffered by both sides will force a compromise. When an employer continues to work during a strike or lockout the dynamic of collective bargaining is frustrated and the employer's incentive to negotiate is removed. Beyond that, work stoppages are lengthened and picket line violence is often inevitable as employees witness replacement workers filling "their" jobs and removing pressure from their employer to settle the dispute. A prohibition against the use of replacement workers is consistent with a social policy that encourages collective bargaining: the use of strikebreakers is inconsistent with such a policy. (p. 1 of Appendix 5)

163 In Appendix 5, Member Baigent recommended draft language for a replacement worker provision which is similar to the language of Section 68 enacted the next year. Compass notes that the recommended language includes the phrase "other than a strike or lockout in which there has been a designation of essential services under Part 6", and further notes that this language is not found in Section 68. From this omission, it submits, it can be inferred that the Legislature intended Section 68 to apply in the context of Section 72 essential service disputes.

164 I am not persuaded that it must necessarily be inferred from the omission of this phrase that the Legislature intended Section 68 to apply to disputes regulated under Part 6. I agree with HEU that another reasonable inference is that the omitted language was seen as redundant. It was unnecessary to say that Section 68 does not apply in that context, as the mischief at which the provision is aimed, and the purposes for which it was intended, do not arise in that context.

165 None of these concerns or issues noted by Member Baigent in recommending the passage of a replacement worker provision arise in the context of a "controlled" strike or lockout regulated by Part 6 of the Code. In that context, managers performing bargaining unit work do not assist the employer to withstand a strike or lockout. On the contrary, requiring managers to work long hours in place of bargaining unit employees, doing as much of the essential bargaining unit work as is safely possible, is the primary mechanism by which a controlled strike or lockout is prosecuted.

166 Accordingly, I am of the view that the Legislature did not intend Section 68 to apply in the context of strikes and lockouts regulated by Part 6 of the Code. Applied in this context, it does not serve the purposes for which it was intended, and undermines the purposes for which the Legislature enacted Section 72.

167 This interpretation of these provisions also avoids the absurd result that the Board itself would be committing an unfair labour practice under Section 6(3)(3) if it

were to "use or authorize or permit the use of the services of a person in contravention of Section 68" by ordering under Section 72 that, for example, a critical care nurse or nurse manager hired after notice to bargain was given, perform bargaining unit work during a strike or lockout in order to ensure essential service levels are maintained.

168 I recognize that, on occasion, the Board has accepted complaints of a breach of Section 68 in the context of a strike or lockout regulated by Part 6. However, in those decisions the issue of whether Section 68 was in fact intended to apply in that context was not raised or addressed. Now that the issue has been raised and submissions have been sought on this issue, I find that Section 68(1), like Section 68(2), as found in *Chantelle*, is not intended to apply in this context.

169 Compass and Sodexho note that the Board's standard or global order for essential service designations contains a provision by which the employer agrees not to use "replacement employees". They submit that this indicates that Section 68 does apply in this context. However, I find that the provision in the global order is not based on the language of Section 68. The term had a recognized labour relations meaning prior to the introduction of Section 68, and it is that meaning, as it applies in the context of the Part 6 global order in which it appears, which I find the Board and the parties intended when that provision was agreed to and included in the global order.

170 Accordingly, for these reasons and those given by Chair Mullin, I find the Original Decision erred in concluding that Section 68(1) applies in the context of Section 72 essential orders. I agree with the conclusion in the Paramedics Decision that the Legislature did not intend Section 68(1) to have application in that context. I therefore concur that the application for reconsideration should be allowed, and the Original Decision is set aside.

"MICHAEL FLEMING

MICHAEL FLEMING
ASSOCIATE CHAIR, ADJUDICATION

171 I concur with the conclusion reached by the Chair and the Associate Chair, Adjudication, for the reasons given by both of them.

"PHILIP TOPALIAN"

PHILIP TOPALIAN
VICE-CHAIR