COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Rehn Enterprises Ltd. v. United Steelworkers, Local 1-1937,* 2025 BCCA 116

Date: 20250409
Docket: CA50024

Between:

Rehn Enterprises Ltd.

Appellant

And

United Steelworkers, Local 1-1937

Respondent

Before: The Honourable Justice Dickson
The Honourable Mr. Justice Butler
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An award of an arbitrator under the *Labour Relations Code*, R.S.B.C. 1996, c. 244, dated July 4, 2024 (*Rehn Enterprises Ltd. v. United Steelworkers, Local 1-1937*).

Counsel for the Appellant:	D.W. Draht
Counsel for the Respondent (via videoconference):	S.I. Banister, K.C.
Place and Date of Hearing:	Vancouver, British Columbia March 21, 2025
Place and Date of Judgment:	Vancouver, British Columbia April 9, 2025

Written Reasons by:
The Honourable Mr. Justice Butler

Concurred in by:
The Honourable Justice Dickson
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant appeals the award of a labour arbitrator which allowed a grievance from the respondent union. The appellant argues the Court has jurisdiction to hear the appeal under s. 100 of the Labour Relations Code [Code] as the basis of the decision was the interpretation of the Personal Information Protection Act, which is a matter of general law. The respondent submits the appeal falls outside of this Court's jurisdiction, as the basis of the decision was directly tied to the collective agreement, labour relations and related determinations of fact.

The appeal also raises a unique procedural issue. After this appeal was initiated but before it was heard, the Labour Relations Board issued a final decision on the same issues under appeal. The Board determined it had jurisdiction to hear Rehn's application for review of the arbitrator's award under s. 99 of the Code and dismissed the application on the merits.

Held: Appeal dismissed. The test for determining jurisdiction under s. 100 of the Code should be modified to take into account recent amendments to s. 100. Applying this modified test, the appeal falls outside of this Court's jurisdiction. The basis of the arbitrator's decision involved applying a settled legal framework from arbitral law to the specific factual context of the workplace, which was not "unrelated to a collective agreement, labour relations or related determinations of fact" as required by the modified test under s. 100.

Regarding the procedural issue, the preferable procedure to take in these situations—where the Board has determined that it has jurisdiction and reviewed the arbitrator's decision on the merits—is to seek a reconsideration of the Labour Relations Board's decision under s. 141 of the Code, followed by judicial review. This procedure gives the reviewing court the benefit of having the administrative decision directly before it, and avoids potential abuse of process issues. As the respondent did not raise the issue of abuse of process, and the appeal can be resolved on the jurisdiction question alone, the Court did not consider abuse of process.

Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] The appellant, Rehn Enterprises Ltd. ("Rehn"), appeals the award of a labour arbitrator allowing a grievance from the respondent union, United Steelworkers, Local 1-1937 (the "Union"). The grievance concerned alleged infringements of employees' privacy caused by the installation of surveillance cameras in company trucks. Relying on s. 100 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [*Code*], Rehn argues this Court has jurisdiction to review the award because the basis of the decision is a matter of general law. The Union opposes the appeal,

arguing this Court does not have jurisdiction and that there is no merit to the substantive appeal.

[2] The circumstances of this appeal are somewhat unusual. At the same time Rehn filed its appeal in this Court, it applied to the Labour Relations Board (the "Board") to review the award pursuant to the Board's jurisdiction under s. 99 of the *Code*. Rehn asked the Board to defer consideration of its application for review of the arbitration award pending the resolution of its appeal. In a decision issued on January 6, 2025, the Board dismissed the deferral application, determined that it had exclusive jurisdiction to review the award, and dismissed Rehn's review application on the merits: *Rehn Enterprises Ltd.*, 2025 BCLRB 6 (the "Board Decision").

[3] Pursuant to s. 141(5) of the *Code*, a party has 15 days to seek leave to apply for reconsideration of a decision of the Board. At the hearing of this appeal, counsel for Rehn advised that it did not seek reconsideration of the Board Decision. Accordingly, this Court is in the unusual position of hearing an appeal of a labour arbitration award alleged to fall within this Court's exclusive jurisdiction under s. 100 when the appellant has already pursued its remedies under the *Code* and received a final decision. Given these circumstances, we asked the parties to restrict their submissions to the jurisdictional issue and the related issue of whether we should entertain the appeal.

[4] At the hearing of the appeal, both parties focused their submissions on the jurisdiction question. Neither took the position we should decline to consider that question in light of the Board Decision. In these circumstances, I propose to determine the jurisdictional issue and provide guidance on the procedure to follow should a similar circumstance arise in the future where the Board accepts jurisdiction under s. 99 and refuses to defer review of an arbitration award.

[5] In my view, the appellant's argument that this Court has jurisdiction to review the arbitration award is without merit. I am further of the view that when the Board determines it has jurisdiction to hear a review application pursuant to s. 99 of the *Code*, the preferable procedure for an appellant who wishes to challenge that

determination is to pursue reconsideration of that decision under s. 141 of the *Code*, followed by judicial review in the British Columbia Supreme Court in the usual course.

Background

[6] Rehn is a tree falling contractor for Western Forest Products ("WFP"). The Union represents Rehn's employees who do hand falling work under Rehn's contract with WFP (the "Fallers").

[7] The Fallers travel to and from their worksites in company vehicles. Total travel time is variable, but generally between two to three hours per day. Both passengers and drivers of the company vehicles are paid travel rates for time on the road.

The Grievance

[8] Around February 2023, Rehn began installing surveillance cameras inside the cabs of company vehicles. They installed both a forward-facing camera and a rear-facing camera which showed the inside of the cab, including drivers and passengers (the "Dash Cams"). The Dash Cams recorded continuously while the vehicles were operational, and the rear-facing camera also recorded audio.

[9] On March 24, 2023, the Union filed a grievance concerning the use of the Dash Cams in company vehicles, which was referred to arbitration on April 18, 2023.

[10] On September 21, 2023, Rehn held a meeting where it provided the Union and the Fallers with a five-page document titled "Dash Cameras in Company Owned or Leased Vehicles" (the "Policy"). The Policy specified that the footage captured by the Dash Cams was held by a third-party service provider, Samsara Inc. ("Samsara"). Samsara used an artificial intelligence program to determine whether the footage depicted a "safety event warning", and, if it did, would provide the relevant video footage to be viewed by Rehn's designated reviewers.

[11] The Policy also set out a list of "Authorized Uses" the footage could be used for, which included "[p]roactively preventing injuries and collisions", "[m]anaging employee performance", and "[s]afety management". It noted the rear-facing camera was targeted at distractions in the cab such as "eating, texting, smoking, [and] horseplay".

The Arbitrator's Decision

[12] The arbitrator heard the grievance in December 2023 and January 2024. She issued her decision on July 4, 2024: *Rehn Enterprises Ltd. v. United Steelworkers, Local 1-1937*, 362 L.A.C. (4th) 352, 2024 CanLII 72130 (the "Decision").

[13] Before the arbitrator, the parties agreed the material issue was "whether the Dash Cam surveillance during travel time is a reasonable exercise of management's rights, having regard to [Rehn's] stated safety purposes balanced against the Fallers' privacy interests": Decision at para. 13. The arbitrator also noted that "there [was] no dispute as to the framework for analysis" of this issue: at para. 16.

[14] The arbitrator began by reviewing the analytical framework. She noted, per s. 89 of the *Code*, that she had the authority to "consider and enforce the substantive rights and obligations in the *Personal Information Protection Act*, S.B.C. 2003, c. 63 [*PIPA*] as if they formed part of the collective agreement": Decision at para. 18. She identified an employer's obligation under *PIPA* to obtain consent before collecting certain personal information from its employees, unless "the collection is reasonable for the purposes of establishing, managing or terminating an employment relationship between the organization and the individual": *PIPA*, s. 13(2)(b).

[15] The arbitrator held that, in the labour arbitration context, it was "well-established that the reasonableness of overt surveillance involves a contextual analysis…that balances an employer's safety interests against the privacy interests of employees": Decision at para. 17. She stated that both parties relied on *Kadant Carmanah Design v. International Association of Machinists and Aerospace Workers, District 250*, 266 L.A.C. (4th) 119, 2015 CanLII 79278 [*Kadant*] for the

proper analytical framework to use in conducting this balancing exercise. *Kadant* sets out the following factors to consider (Decision at para. 19):

> a. Whether the concern for safety and/or security is *bona fide* (recognizing there will be a subjective element of whether a concern exists; and an objective element which relates to the circumstances of the workplace, but which does not require evidence of a historical problem of security or safety);
>
> b. Whether there is a direct link or nexus between the installation of the cameras and the issue of safety and/or security (i.e., whether or not there is evidence that the installation was for reasons other than safety or security);
>
> c. Whether the surveillance has been implemented and utilized in a reasonable manner (e.g., the number of cameras, place of installation, use of footage, etc.);
>
> d. Whether there are other reasonable alternatives; and
>
> e. Any other relevant circumstances in the context of the specific case.

The arbitrator observed that this framework was "consistent with the analysis required and applied under *PIPA*": Decision at para. 20.

[16] Rehn also put other authorities before the arbitrator which dealt with the use of surveillance cameras in support of its position that its use of the Dash Cams in this case was reasonable. The arbitrator distinguished these cases on the basis that their findings were highly context-specific, and therefore did not change the essence of the reasonableness inquiry as applied to the particular facts of this case:

> [26] … [these] authorities reinforce the contextual nature of the reasonableness analysis. The result of the balancing exercise in each case reflects the general and well-established arbitral approach, summarized above. Each assesses the particular facts and workplace context with an understanding that no particular element or *Kadant* factor can be viewed in isolation.

[17] Moving to the facts of the case before her, the arbitrator first identified the nature of the Fallers' privacy interests and Rehn's safety interests. She found the Fallers had a high expectation of privacy while in the company vehicles. While she accepted Rehn's position that company vehicles were workspaces, she found that while the Fallers are in those vehicles "they are not 'working' in the most common sense of the word…but are engaged in highly personal conversations and activities"

which are “analogous to off duty time in a lunchroom or lounge area”: Decision at para. 63. She distinguished the other cases Rehn relied upon on the basis none were “wholly focussed on off duty conduct”: at para. 66.

[18] Regarding Rehn’s safety interests as they related to travel time, the arbitrator found “travelling on highways and public roads have inherent risks” which are heightened on logging roads: Decision at para. 76. In this context, “safety is enhanced by safe driving practices…includ[ing] wearing seat belts, not speeding, not using a cell phone while driving, and being aware of road conditions and oncoming trucks”: at para. 76. However, she also found the evidence Rehn put before her of prior safety incidents and safety training “support[ed] the inference that the Fallers are alert to the conditions and road hazards”: at para. 77.

[19] Turning to the reasonableness analysis itself, the arbitrator found—after considering all the *Kadant* factors—that the use of the rear-facing Dash Cams was unreasonable.

[20] The arbitrator found the core purpose of the rear-facing Dash Cams was twofold: first, “to send a message to the Fallers that they are being watched…[as] a proactive tool for improving the Fallers’ driving habits and conduct in the cab”; and second, to investigate incidents of potentially risky behaviour in the cab through the AI-generated “security event warnings”: Decision at paras. 110–111. She found the use of surveillance as a proactive tool only had a “speculative and tenuous link” to safety, which did not amount to the required nexus under the second *Kadant* factor: at paras. 119–120. She differentiated other cases which found in-cab surveillance was reasonable on the basis that the Fallers were “off duty, not at work, and their informational privacy rights are at the higher end of the spectrum”: at para. 118.

[21] Regarding the second purpose for surveillance, the arbitrator acknowledged the rear-facing Dash Cams could catch potentially risky behaviours, such as the failure to wear a seat belt or cell phone use, through its “security event warning” system. She also found that these uses did have a nexus to safety. However, the lack of evidence that other, less-privacy-infringing measures had been attempted,

combined with the Fallers' high privacy interest, meant that the use of the Dash Cams for this purpose was still unreasonable.

[22] The arbitrator also rejected Rehn's argument that the Dash Cams were necessary to collect evidence about general road safety to use against WFP, the company Rehn was a contractor for. She found this was also unreasonable, as "in pursuit of this purpose, the Dash Cams [were] collecting a significant amount of personal information for a purpose unrelated to the management or termination of the employment relationship", contrary to *PIPA*: Decision at para. 137.

[23] Finally, the arbitrator found Rehn had failed to provide proper notice prior to the installation of the Dash Cams as required under *PIPA*, and that elements of the Samsara system (which stored and analyzed the recordings captured by the Dash Cams) and Samsara's related policy were unreasonable. She ordered Rehn to pay $4,000 in general damages to each Faller for breach of their privacy rights.

Legal Framework

[24] Under ss. 99 and 100 of the *Code*, both the Board and the Court of Appeal have jurisdiction to hear appeals of decisions made by labour arbitrators in certain circumstances:

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

> Appeal jurisdiction of Court of Appeal
>
> 100 On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law
>
> (a) unrelated to a collective agreement, labour relations or related determinations of fact, and
>
> (b) not included in section 99(1).

[25] The current form of s. 100, as outlined above, only came into force on May 30, 2019 by operation of s. 20 of the *Labour Relations Code Amendment Act, 2019*, S.B.C. 2019, c. 28 (the "2019 Amendment"). Prior to this amendment, s. 100 of the *Code* provided:

> On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law not included in section 99 (1).

[26] Comparing these two versions of s. 100, it is clear the 2019 Amendment imposes an additional qualification to the concept of "a matter or issue of the general law". Before this Court can assume jurisdiction, the basis of the arbitrator's decision must be a matter of general law "unrelated to a collective agreement, labour relations or related determinations of fact".

[27] As the 2019 Amendment was relatively recent, most of this Court's jurisprudence surrounding the question of its jurisdiction under s. 100 involved applying the prior version of s. 100. In *Health Employers Assn. of B.C. v. B.C. Nurses' Union*, 2005 BCCA 343, the Court aptly described the challenge posed by the application of ss. 99 and 100 of the *Code* to be "a brain teaser of the highest order": at para. 38. To resolve that challenge, the Court established a three-part test for determining whether the review of a labour arbitrator's award fell under this Court's jurisdiction, or the jurisdiction of the Board:

> [49] I would summarize what I understand to be the correct analytical approach to the application of ss. 99 and 100, based on a purposive interpretation of those sections, and the jurisprudence which has previously addressed the problem:
>
> 1. Identify the real basis of the award;

> 2. Determine whether the basis of the award is a matter of general law;
>
> 3. If the basis of the award is a matter of general law, determine whether it raises a question or questions concerning the principles of labour relations, whether expressed in the *Labour Relations Code* or another statute.
>
> [50] If the answer to the third question is affirmative, then review of the award lies within the jurisdiction of the Labour Relations Board. If it is negative, review lies within the jurisdiction of this Court.

[28] Following *B.C. Nurses' Union*, the dual jurisdiction structure continued to pose challenges in its application on appeals to this Court. In *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937 v. Taan Forest Limited Partnership*, 2018 BCCA 322 [*Taan*], Justice Dickson undertook a thorough review of the jurisprudence. She noted the *Code* provisions established "mutually exclusive, not concurrent, jurisdictions": at para. 47. Their purpose was "to restrict this Court's jurisdiction narrowly to matters of general law not specifically related to labour relations": *Taan* at para. 45. She concluded:

> [67] In my view, this body of jurisprudence, considered as a whole, illustrates that…the vast majority of arbitral decisions and awards are properly reviewable only by the Labour Relations Board. This is true even where, as here, a dispute under a collective agreement engages issues of the general law of human rights. Occasionally, extricable questions of statutory interpretation or legal principle of a general nature arise in the context of a unionized work environment and are substantially determinative of the dispute in question… However, pure questions of the general law, untethered to the facts and labour relations context of a dispute and falling outside the expertise of the *Labour Relations Board*, are rare and will only exceptionally be found to form the real basis or main constituent of the decisions and awards made by labour arbitrators. The underlying legislative intent of ss. 99 and 100 of the Labour Relations Code strictly to limit judicial intervention in labour relations matters is thus acknowledged and respected by the Court.

[29] Since the 2019 Amendment, this Court has considered s. 100 several times. In *West Fraser Mills Ltd. v. United Steelworkers, Local 1-2017*, 2021 BCCA 266 [*West Fraser*], Justice Marchand (as he then was) declined to update the three-part test from *B.C. Nurses' Union*. He determined it was clear that the real basis of the arbitrator's award was "related entirely to labour relations and was subject to the

exclusive jurisdiction of the [Board] under s. 99 of the *Code*"; accordingly, he saw no need to consider whether the test needed to be updated to take into account the 2019 Amendment: *West Fraser* at para. 51. He quashed the appeal for want of jurisdiction.

[30] In *Canadian Forest Products Ltd. v. Public and Private Workers of Canada, Local No. 18*, 2022 BCCA 89 [*Canadian Forest*], Justice Groberman, writing for the Court, also cited the *B.C. Nurses' Union* test as the "appropriate analytical approach": at para. 16. On the first step of the test, he found that the real basis of the award was the interpretation of s. 64 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113. However, he found that this interpretive exercise was tied to "rights of recall" which existed only in collective agreements; accordingly, labour relations principles were "at the heart of the current dispute" and the Board had jurisdiction: at para. 22. Regarding the recent amendment to s. 100, Justice Groberman observed:

> [23] The presence of subparagraph (a) in s. 100, in my view, facilitates the analysis and strengthens the conclusion. It cannot be said that the question of when a worker's employment is terminated is "unrelated to a collective agreement". The right of recall provisions of the collective agreement are a critical component of the analysis.

[31] Finally, in *Vancouver (City) v. Vancouver Firefighters' Union, Local 18*, 2024 BCCA 33 [*Vancouver Firefighters*], Justice Skolrood (as he then was) interpreted *Canadian Forest* as "re-affirm[ing] the three-step approach" from *B.C. Nurses' Union*: at para. 34. He also concluded, like the Court in *West Fraser*, that it was "unnecessary in the circumstances of this case to re-visit the existing three-part test because the jurisdictional issue can be resolved by reference to the first part of that test": *Vancouver Firefighters* at para. 49. He quashed the appeal for want of jurisdiction because the real basis of the arbitrator's award was "closely tied" to the collective agreement and therefore fell within the exclusive jurisdiction of the Board: at para. 57.

Positions of the Parties

[32] Rehn's position is that this Court has jurisdiction to hear this appeal, relying on the three-part test from *B.C. Nurses' Union*. It argues that the real basis of the

Decision is the arbitrator's determination that the Fallers had a high expectation of privacy, as that conclusion was central to the arbitrator's entire analysis.

[33] Rehn further argues that the arbitrator's determination of the Fallers' privacy interests was a matter of interpreting *PIPA*, not just applying it. The crux of this argument, as I understand it, is that although the arbitrator purported to apply the *Kadant* test, she did not do so—or at least did not do so as contemplated by *Kadant*. Rehn submits the *Kadant* test, although developed in the labour arbitration framework, is a matter of general law because it is derived from statutes such as *PIPA*, which are themselves general law and could be applied in a non-union workplace. Rehn also says the arbitrator's determination that the Fallers were "off duty" while travelling in company vehicles was a legal conclusion based entirely on the nature of activities and conversations occurring within company vehicles. It says this was a novel and fundamentally flawed "legal test".

[34] Accordingly, Rehn submits this Court has jurisdiction to hear the appeal under s. 100 of the *Code*. In support of its argument, Rehn relies on *United Food & Commercial Workers Union, Local 1518 v. Sunrise Poultry Processors Ltd.,* 2015 BCCA 354 [*Sunrise Poultry*]. In *Sunrise Poultry*, this Court found it had jurisdiction to hear an appeal under s. 100 of the *Code* because the true basis of the award was "the interpretation of *PIPA*": at para. 46.

[35] The Union argues this Court does not have jurisdiction to hear the appeal under s. 100, and asks this Court to modify the *B.C. Nurses' Union* test in light of the 2019 Amendment. It says this appeal falls outside the scope of s. 100, as the real basis of the arbitrator's award "was directly related to the collective agreement, labour relations and related determinations of fact". The Union argues the arbitrator did not interpret *PIPA*, but rather applied the established test for assessing the reasonableness of overt surveillance. It says the application of settled principles to specific facts does not give this Court jurisdiction under s. 100. The Union also points out that the test the arbitrator applied required a contextual analysis involving factual determinations which "cannot be separated from the labour context".

Analysis

[36] While this Court did not see a need to re-visit the *B.C. Nurses' Union* test in order to resolve the appeals in *West Fraser*, *Canadian Forest*, and *Vancouver Firefighters' Union*, I am of the view that the test should be modified to reflect the language in the amended provision. The test was developed in response to the challenge posed by the statutory language and, in particular, the difficulty in determining, under the prior version of s. 100, whether "the basis of the decision or award is a matter or issue of the general law not included in section 99(1)". In my view, the qualification to that concept provided by the 2019 Amendment should be incorporated into the analytical approach to the question of jurisdiction. As stated by Justice Groberman in *Canadian Forest*, the amended language "facilitates the analysis": at para. 23.

[37] The language of the 2019 Amendment both reflects the jurisprudence, including *B.C. Nurses Union* and *Taan*, and attempts to clarify and further narrow the limited jurisdiction of this Court. It signals a legislative intent to grant the Board jurisdiction in all but the most exceptional of cases. It is no longer enough for the basis of the award to be a matter of general law which does not raise "questions concerning the principles of labour relations": *B.C. Nurses' Union* at para. 49. Now, the award must be a matter of general law which is unrelated not only to labour relations, but also to any determinations of fact tied to labour relations.

[38] Given the clear language of the current s. 100(a), I would restate the test using that language. In other words, the question of jurisdiction is determined by asking whether the real basis of the award is a matter of general law, unrelated to a collective agreement, labour relations or related determinations of fact. If the answer is affirmative, this Court has jurisdiction; if negative, the Board has jurisdiction under s. 99. This test can also be expressed as a three-part analytical framework, similar to the one from *B.C. Nurses' Union*:

a) Identify the real basis of the award.

b) Determine whether the basis of the award is a matter of general law. If it is not, the Board has jurisdiction.

c) If the basis of the award is a matter of general law, determine whether that matter of general law is related to a collective agreement, labour relations or related determinations of fact. If it is, the Board has jurisdiction. If it is not, the Court has jurisdiction.

[39] Applying the stated test, I find that this appeal clearly falls within the exclusive jurisdiction of the Board. While the award concerns privacy interests under *PIPA*, a matter of general law, the basis of the award is directly tied to labour relations and related determinations of fact.

[40] The core issue in this case was agreed upon by the parties and clearly articulated by the arbitrator at para. 13 of the Decision: "whether the Dash Cam surveillance during travel time is a reasonable exercise of management's rights, having regard to [Rehn's] stated safety purposes balanced against the Fallers' privacy interests". The real basis for the award was her determination of this core issue; in other words, her finding that the Dash Cam surveillance was unreasonable which was arrived at through a balancing of competing rights and interests within the context of a particular workplace and labour relations environment. While the arbitrator's finding that the Fallers' privacy interests were on the higher end of the spectrum was an important factor in her ultimate determination of reasonableness, I would reject Rehn's assertion that this finding was the "real basis" of the award. That assertion ignores the contextual nature of the decision.

[41] In determining reasonableness, it is true the arbitrator applied provisions of *PIPA*. It is also true that *PIPA* is general law which applies outside of the labour relations context. However, as this Court held in *Taan*, s. 100 of the *Code* gives this Court jurisdiction "where the basis of the award is the proper interpretation of the legal principle itself, but not where the basis of the award is the application of the legal principle to the facts": at para. 55 (emphasis added). The more settled the legal principles, and the more the analysis is tied to the particular context of the case at

hand, the more likely it is that an arbitrator is merely applying general law, rather than interpreting it: *Okanagan College Faculty Association v. Okanagan College*, 2013 BCCA 561 at para. 58. These principles apply with more force following the 2019 Amendment.

[42] In this case, there was no dispute before the arbitrator as to the correct legal principles or framework of analysis to apply, which she identified as the "general and well-established arbitral approach": Decision at para. 26. In addition, her analysis was heavily steeped in the facts and labour relations context, as the arbitrator herself noted. For instance, the arbitrator's conclusion that the Fallers had a high expectation of privacy was based on evidence regarding the nature of the Fallers' work, as well as her factual findings about the type of conversations and activities which took place while the Fallers were travelling to and from worksites. Similarly, in determining the reasonableness of the surveillance, the arbitrator considered specific evidence of past safety incidents in the workplace, as well as the lack of evidence of alternative safety measures taken. This type of analysis is not "unrelated to a collective agreement, labour relations or related determinations of fact", as required by s. 100 of the *Code*.

[43] The contextual analysis required in this case is also markedly different from the analysis applied in *Sunrise Poultry*, which Rehn relies on. In *Sunrise Poultry*, the issue was whether *PIPA* prevented labour arbitrators from disclosing personal information about grievors and witnesses in their arbitration awards. This was a novel issue which could be resolved by a pure exercise of statutory interpretation. By contrast, in this case, the basis of the arbitrator's decision is not a novel exercise of statutory interpretation of *PIPA*. Instead, the core of her decision was the application of settled principles to a fact-driven balancing exercise of employer and employee rights in the labour relations context. In stating that the Fallers' time in company vehicles was "analogous to off duty time", the arbitrator was not applying a novel legal test to come to a legal conclusion as Rehn argues: Decision at para. 63. Rather, she was making a finding of fact relevant to the ultimate question of

reasonableness, which she approached under the established arbitral framework from *Kadant*.

[44] It follows that I would conclude this Court does not have jurisdiction to hear the appeal under s. 100 of the *Code*.

Bringing Dual Proceedings to this Court and the Labour Relations Board

[45] Although not determinative of this appeal, I also wish to address the unique and somewhat troubling position this Court has been put in as a result of the procedural steps taken in this case.

[46] As stated in *Taan,* ss. 99 and 100 of the *Code* establish mutually exclusive, non-concurrent jurisdictions for this Court and the Board on applications to review decisions of labour arbitrators. The existence of these parallel processes means that pending a decision on jurisdiction by this Court, it has always been possible for a party to simultaneously seek review of an award or decision before both the Board and this Court. At the hearing of this appeal, counsel advised us that prior to the 2019 Amendment, the Board would often defer hearing an application for review pending the outcome of the appeal to this Court. That practice prevented the difficulty that has arisen in this case, where the Board accepted jurisdiction under s. 99 and dismissed Rehn's review application on the merits prior to this Court hearing Rehn's appeal.

[47] As noted above, the 2019 Amendment restricts this Court's jurisdiction narrowly to matters of general law "unrelated to a collective agreement, labour relations or related determinations of fact": *Code*, s. 100(a). The clarification of the analytical approach to the dual jurisdiction conundrum will probably mean the Board is less likely to defer applications for review of an arbitration award pending resolution of the appeal to this Court. In turn, the situation faced in this appeal—where this Court hears an appeal of a labour arbitration award after the Board has already heard and determined a review of the same award—may arise more frequently.

[48] The problem posed by this situation should be evident. A party in Rehn's position is asking this Court to decide the same questions that the Board, another adjudicative body, has already determined, even though the Board's decision is not directly challenged before this Court. In the present case, the problem is compounded by the fact that Rehn has not sought leave to apply for reconsideration of the Board decision under s. 141 of the *Code*. Accordingly, the Board's decision, both on the jurisdictional and substantive issues, is final as Rehn has exhausted its administrative review procedures.

[49] Although the *Code* creates two possible avenues of review, pursuit of the appeal to this Court following a final decision of the Board raises questions about the waste of judicial resources and the prospect of inconsistent results. Permitting appeals to proceed in these circumstances could violate "such principles as judicial economy, consistency, finality and the integrity of the administration of justice": *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37. Although the Union has not taken this position, I am concerned that these circumstances could be seen to be an abuse of process.

[50] Rehn argues that this approach was endorsed in *West Fraser*, when this Court heard an appeal of a labour arbitrator's award after the Board had determined that it did not have jurisdiction to consider the application for review of that award under s. 99. With respect, I would not agree. The circumstances in *West Fraser* are not analogous to the situation before us. In *West Fraser*, the appellant only brought an appeal in this Court after the Board determined it did not have jurisdiction: at paras. 16–17. This meant there was no prospect of inconsistent results on the substantive issues. In those circumstances, the fact this Court determined its own jurisdiction after the Board's decision did not raise an issue of abuse of process.

[51] That said, I find there is no need to consider whether the Court should exercise its inherent power to prevent misuse of its proceedings in this case: *Speckling v. Local 76 of the Communications, Energy and Paperworkers' Union of Canada,* 2009 BCCA 258 at para. 45. There are three reasons for this conclusion.

First, as I already noted, the Union did not raise the issue of abuse of process. Second, the determination of the jurisdiction question is sufficient to dispose of this appeal, which avoids the possibility of inconsistent decisions on the same issue as between this Court and the Board. Finally, this particular procedural issue does not appear to have arisen before.

[52] However, it is my view that should a similar circumstance arise in the future, where the Board accepts jurisdiction and determines the review on its merits, it would be preferable for the party who sought review to pursue its administrative remedies by seeking a reconsideration of the Board's decision pursuant to s. 141 of the *Code*, rather than attempting to invoke this Court's jurisdiction under s. 100. If unsuccessful in obtaining reconsideration, that party could then pursue an application for judicial review to the British Columbia Supreme Court and, ultimately, an appeal of the judicial review into this Court. The advantage of these procedures is that the reviewing court would have the benefit of the record and decision of the Board before it. It would also guard against the potential risk of this Court declining to hear the appeal to prevent an abuse of process.

Disposition

[53] I would quash the appeal for want of jurisdiction.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"