

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gate Gourmet Canada Inc. v. Unite Here, Local 40*,
2025 BCCA 246

Date: 20250714
Docket: CA50127

Between:

Gate Gourmet Canada Inc.

Appellant
(Petitioner)

And

Unite Here, Local 40

Respondent
(Respondent)

And

British Columbia Labour Relations Board

Respondent

Before: The Honourable Madam Justice Bennett
The Honourable Justice Riley
The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated August 22, 2024 (*Gate Gourmet Canada Inc. v. Unite Here, Local 40*, 2024 BCSC 1528, Vancouver Docket S236872).

Counsel for the Appellant:

G.R. Cameron
J.R. Kindrachuk

Counsel for the Respondent, Unite Here,
Local 40:

S.A. Quail
K.R. Segal

Counsel for the Respondent, British
Columbia Labour Relations Board:

J.M. O'Rourke

Place and Date of Hearing:

Vancouver, British Columbia
April 1, 2025

Place and Date of Judgment:

Vancouver, British Columbia
July 14, 2025

Written Reasons by:

The Honourable Justice Riley

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Justice MacNaughton

Summary:

The appellant, Gate Gourmet Canada Inc., appeals the dismissal of its petition for judicial review of a B.C. Labour Relations Board order requiring it to cease and desist from using out-of-province replacement workers to perform catering work that would otherwise have been done by striking employees at the Vancouver International Airport (YVR). Both the Board and the court below found that Gate Gourmet's actions contravened B.C.'s labour legislation. On appeal, Gate Gourmet argues that the Board and the chambers judge misapplied the "real and substantial connection" test, resulting in an unconstitutional extraterritorial application of B.C.'s labour legislation to out-of-province activities and entities. Gate Gourmet also argues that the chambers judge wrongly found that the B.C. labour legislation had to apply to out-of-province workers to be "effective".

Held: Appeal dismissed. The Board's review panel and the chambers judge both reached the correct legal conclusion in holding that the Board did not exceed the scope of its jurisdiction when it ordered Gate Gourmet to stop using out-of-province workers to perform "struck work" in response to a strike action by Gate Gourmet employees at YVR. On a correct application of the "real and substantial connection" test, there is a direct and compelling connection between B.C.'s labour legislation and Gate Gourmet, an employer of unionized B.C. workers working at a place of operations in B.C. Although the order applies to Gate Gourmet's extra-provincial conduct in response to the strike, it does not result in any unfairness to Gate Gourmet, nor does it offend interprovincial comity as the modern reality is that collective bargaining relationships based within one province sometimes involve conduct that is manifested in other jurisdictions.

Reasons for Judgment of the Honourable Justice Riley:**Introduction**

[1] This is an appeal from the dismissal of a petition for judicial review in a labour relations matter. The order under review by the court below was made by the British Columbia Labour Relations Board (the "Board") in respect of a strike action taken by Gate Gourmet Canada Inc.'s ("Gate Gourmet") workers in British Columbia. It required Gate Gourmet to cease using out-of-province replacement workers from its airline catering operations in Calgary, Edmonton, and Toronto to perform catering work that, were it not for a strike action, would have been performed by workers engaged in a lawful strike action at the Vancouver International Airport ("YVR").

[2] The key issue raised in the court below, and pursued on appeal, is whether the Board's decision involved an impermissible application of British Columbia's

labour relations statute to individuals and activities outside of the province. Applying the “real and substantial connection” test articulated in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 and more recently reaffirmed in *Sharp v. Autorité des marchés financiers*, 2023 SCC 29, the chambers judge found that the Board’s order was not an unconstitutional extraterritorial exercise of its jurisdiction. Gate Gourmet appeals, arguing that both the Board and the chambers judge incorrectly applied the real and substantial connection test.

[3] I would dismiss the appeal for the reasons set out below. The order directing Gate Gourmet to cease and desist in the assignment of what the Board found to be “struck work” to its employees in Calgary, Edmonton, and Toronto did not involve an impermissible extraterritorial application of British Columbia’s labour relations regime. The Board’s order involved a proper application of British Columbia’s labour relations statute to prevent an unfair labour practice undertaken in response to lawful strike action in British Columbia by Gate Gourmet’s unionized employees working in British Columbia in respect of work that would have been performed by the striking workers.

Factual Background

[4] Gate Gourmet provides catering services to airlines flying in and out of YVR, and other Canadian airports including Calgary, Edmonton, and Toronto.

[5] The respondent, Unite Here, Local 40 (the “Union”), is the certified bargaining unit for Gate Gourmet’s YVR employees. Other unions are certified under applicable provincial labour relations statutes to represent Gate Gourmet’s employees in Calgary, Edmonton, and Toronto.

[6] Gate Gourmet provides its customer airlines with the option of single-catered or double-catered service. Single-catering involves stocking an airplane with enough food and beverages for an outbound flight, while double-catering involves stocking for both an outbound and return flight.

[7] Gate Gourmet supplies catering services to multiple airlines. All but one of its customers handle their own “order control” functions. These customers determine whether to use single-catering or double-catering for particular flights, and then communicate their catering needs to Gate Gourmet.

[8] The sole exception is Air Canada, which outsources its “order control” functions to Gate Gourmet. This means that Gate Gourmet, through its order control department in Toronto, is responsible for communicating Air Canada’s catering needs to Gate Gourmet employees at the various airports where it operates, including YVR.

[9] The collective bargaining agreement between Gate Gourmet and the Union expired on 31 July 2022. Having given the required strike notice, the Union initiated an overtime ban for the YVR employees on 1 August 2022.

[10] When Air Canada learned of the strike action at YVR, its representative contacted Gate Gourmet’s account director to request that Gate Gourmet assign its employees in Calgary, Edmonton, and Toronto to double-cater flights into and out of YVR. The account director “actioned” the request, instructing the order control department to implement this out-of-province double-catering arrangement in response to the YVR strike action.

[11] In the result, Gate Gourmet employees in Calgary, Edmonton, and Toronto provided double-catering service to a considerable number of Air Canada flights into and out of YVR between 8 August and 20 August 2022. At the initial hearing before the Board, it was admitted that the double-catering for a number of these flights occurred as a result of Gate Gourmet’s decision to “action” Air Canada’s request.

[12] On 16 August 2022, the Union filed an application with the Board alleging that Gate Gourmet’s assignment of double-catering duties to out-of-province workers in response to the YVR strike action constituted an unfair labour practice, namely the use of replacement workers to perform struck work contrary to s. 68(1) of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 (the “Code”).

[13] The Union’s overtime ban ended on 22 August 2022.

Statutory Provisions

[14] Section 6 of the *Code* addresses unfair labour practices. The particular provision in issue in this appeal is s. 6(3). The operative parts read as follows:

(3) An employer or a person acting on behalf of an employer must not

...

(e) use or authorize or permit the use of the services of a person in contravention of section 68 ...

[15] Section 68 of the *Code* prohibits an employer from using replacement workers during a strike action. The operative parts read as follows:

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,

...

(b) who ordinarily works at another of the employer’s places of operations,

...

to perform

(e) the work of an employee in the bargaining unit that is on strike or locked out ...

Original Board Decision [2022 BCLRB 130]

[16] The Union’s application was heard by a Vice Chair of the Board on 7 October 2022. On 12 October 2022, the Vice Chair ruled that Gate Gourmet’s actions were an unfair labour practice contrary to s. 68 of the *Code*, with written reasons to follow. On 9 November 2022, the Vice Chair provided written reasons (the “Original Decision”).

[17] In the written reasons, the Vice Chair began his analysis by stating that the purpose of s. 68(1) of the *Code* as determined in prior Board cases was to “protect the integrity and viability of the bargaining unit by restricting the use of replacement workers during a strike or lockout”.

[18] The Vice Chair observed that in *874352 Ontario Limited (Comox District Free Press)*, BCLRB No. B87/95, the Board rejected an employer’s argument that s. 68(1)(b) of the *Code* was only intended to prohibit the employer from using replacement workers at a struck location, such that it ought not to be applied to the use of replacement workers “at another of the employer’s places of operations”. On the Board’s interpretation in *Comox District Free Press*, s. 68(1) was meant to prohibit the use of replacement workers at any of the employer’s places of operation. Applying this proposition to the circumstances before him, the Vice Chair determined that it would be a breach of s. 68(1) for Gate Gourmet to use replacement workers from another place of operations inside British Columbia to do the work of striking YVR employees. In the Vice Chair’s view, the substance of the issue before him was whether that conclusion was altered by the fact that Gate Gourmet used workers from places of operations “outside of British Columbia” to do the struck work.

[19] The Vice Chair considered the five essential elements of the statutory prohibition against the use of replacement workers during a strike action as contemplated in s. 68(1) of the *Code*, as follows:

- (a) The first element is temporal, in that the prohibition only applies to work or services performed “during a strike or lockout”. This element was easily satisfied, as it was not disputed that the impugned double-catering services were provided during a strike action.
- (b) The second element focuses on identifying the “employer” whose actions are targeted by the prohibition. The “employer” in this case was Gate Gourmet. It was not correct to consider the employer to be Gate Gourmet’s “operation at YVR”, because a corporation is a “single corporate entity”, and a specific corporate “division” or “operation” is not “capable of being an employer” for the purposes of s. 68(1). In other words, Gate Gourmet, and not its YVR “operation”, was the “juridic person” whose conduct is regulated by s. 68(1).
- (c) The third element requires an examination of whether the employer “used the services” of a person to perform replacement work. This element focuses on

the conduct that is the subject of the prohibition. In this case, it was the conduct of Gate Gourmet, and not its customer Air Canada, that led to double-catering of flights bound for YVR. The fact that Gate Gourmet acted in response to the customer request of Air Canada was not enough for Gate Gourmet to escape the application of s. 68(1). Gate Gourmet “actioned” the Air Canada request and proceeded to implement double-catering through its order control department, using its employees in Calgary, Edmonton, and Toronto to double-cater Air Canada flights into and out of YVR. This was not a case of customer “self-help” in response to a strike.

(d) The fourth element focuses on the “persons” that the employer is prohibited from using to perform replacement work. More specifically, the employer is prohibited from using the four categories of “persons” set out in ss. 68(1)(a) through (d) respectively. This particular case engaged s. 68(1)(b), which applies to the employer’s use of a person “who ordinarily works at another of the employer’s places of operations” to perform struck work. Applying s. 68(1)(b) to the facts of this case:

- i. Gate Gourmet’s employees in Alberta and Ontario were “persons” within the meaning of s. 68(1), even though they were located outside of British Columbia. This did not mean the statute was being used to regulate employment relationships outside of British Columbia, because the party who is the subject of the prohibition is the employer, not the “persons” engaged by the employer to perform the alleged replacement work. The employer, Gate Gourmet, is the only entity that could be found to have engaged in an unfair labour practice and subjected to remedial orders under s. 133 of the *Code*.
- ii. By arranging for its employees in Calgary, Edmonton, and Toronto to perform double-catering of flights to and from YVR, Gate Gourmet used the services of persons who ordinarily work at another of its “places of operations” as contemplated in s. 68(1)(b). The fact that the

other “places of operations” were outside British Columbia did not alter this conclusion. Gate Gourmet was an employer of unionized workers at YVR, and the fact that it also has “places of operations” outside of British Columbia “does not put into question [its] status as a provincially regulated employer”.

(e) The fifth element is concerned with the nature of the work. It asks whether the work performed was in fact replacement work. In particular, s. 68(1)(e) prohibits the employer from using replacement workers to perform work of “the bargaining unit” that is on strike. It was admitted at the hearing that, acting on Air Canada’s request, Gate Gourmet approved and implemented out-of-province double-catering on a number of YVR flights during the strike action. But for the strike, the work done by Gate Gourmet’s employees in Alberta and Ontario in double-catering these flights “is work that would have been done by” striking employees at YVR. Thus, s. 68(1)(e) of the *Code* applied.

[20] In the result, the Vice Chair declared that Gate Gourmet’s conduct in using employees in Alberta and Ontario to double-cater Air Canada’s YVR-bound flights during the YVR overtime ban amounted to an unfair labour practice under ss. 6(3)(e) and 68(1) of the *Code*. He ordered Gate Gourmet to cease and desist from engaging in this practice.

Reconsideration Decision [2023 BCLRB 128]

[21] Gate Gourmet sought leave for the Board to reconsider the Original Decision, on two grounds. First, Gate Gourmet argued that the Vice Chair erred in multiple ways in determining that the use of out-of-province employees to double-cater Air Canada’s YVR flights constituted a violation of s. 68(1) of the *Code*. I will refer to this as the interpretation and application issue. Second, Gate Gourmet contended that the Vice Chair exceeded the limits of the Board’s jurisdiction, by applying the *Code* extraterritorially to regulate Gate Gourmet’s operations outside British Columbia, thereby prohibiting the company from using its Alberta and Ontario employees to

fulfil customer requests for the delivery of catering services in those jurisdictions. I will refer to this as the jurisdictional issue.

[22] The reconsideration application was heard by a three-member panel of the Board. On 14 August 2023, the panel gave written reasons granting leave to reconsider, but dismissing the reconsideration application on its merits.

[23] With regard to the interpretation and application of the *Code*, the review panel was not persuaded that the Original Decision rested on any palpable and overriding error of fact, nor that it involved any incorrect application of the law or Board policy. Among other things, the review panel determined that:

- (a) There was no identifiable error in the original panel’s determination that Gate Gourmet was the employer whose conduct was regulated by s. 68(1). Gate Gourmet was a single, indivisible corporate entity responsible for carrying out the duties and obligations imposed on it as an employer under the *Code*.
- (b) There was no palpable or overriding error or error of law in the original panel’s finding that, by acting to implement a customer request for double-catering at its other operations centres in response to the strike at YVR, Gate Gourmet “used” impermissible replacement workers. Thus, the original panel did not err in rejecting Gate Gourmet’s argument that this was a case of customer “self-help” in response to a strike.
- (c) On the evidence adduced at the hearing, it was open to the original panel to conclude that the double-catering service Gate Gourmet employees in Alberta and Ontario provided for certain admitted YVR flights would not have occurred “but for the strike”. Thus, the original panel did not err in finding that this double-catering service was “struck work” captured by s. 68(1)(e) of the *Code*.

[24] Turning to the jurisdictional argument, the review panel accepted that Gate Gourmet’s submissions concerning the constitutional limitations on extraterritorial application of the *Code* raised “a serious question” as to the correctness of the

Original Decision. The panel invited submissions from the parties on the “real and substantial connection” or “sufficient connection” test for determining the constitutional applicability of provincial legislation to matters with extraterritorial dimensions, as set out in *Unifund*.

[25] The review panel cited *Unifund* for the proposition that the “territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it” [emphasis added by the review panel]. Quoting *Unifund* at para. 65, the panel explained that the real and substantial connection test requires an assessment of “the relationship between the enacting jurisdiction and the out-of-province individual or entity sought to be regulated by it in light of the subject matter of the legislation to determine if the relation was ‘sufficient’ to support the validity or applicability of the legislation in question”.

[26] Gate Gourmet submitted that the cease and desist order had extraterritorial effect because the “persons” who provided the impugned double-catering service were located outside of British Columbia. The review panel did not accept this submission. In the review panel’s view, the original panel correctly concluded that the cease and desist order applied to Gate Gourmet, not its employees in Alberta and Ontario. Consequently, there was a “sufficient connection” between Gate Gourmet as an employer in British Columbia and the *Code*, such that the original panel’s order did not exceed the Board’s jurisdiction.

[27] The review panel reasoned that the cease and desist order did not interfere with the jurisdiction of the Alberta or Ontario labour relations boards under their respective labour relations statutes. This was because the order was binding on Gate Gourmet as a British Columbia employer, not Gate Gourmet’s employees in those other provinces. The order did not prohibit Gate Gourmet’s Alberta and Ontario employees from performing work; rather, it prohibited Gate Gourmet from assigning “struck work” at YVR to replacement workers, wherever they may be located. While labour relations statutes in Alberta and Ontario do not prohibit use of replacement workers in response to job actions in those jurisdictions, the job action

in issue in this case was in British Columbia and was therefore subject to the Board’s jurisdiction over labour relations in this province.

[28] The review panel cited case law from other provinces (*Sheet Metal Contractors Assn. of Alberta v. S.M.W., Local 8*, [1986] Alta. L.R.B.R. 291; *Otis Canada Inc. v. International Union of Elevator Constructors, Local No. 82 and 130*, [1997] Alta. L.R.B.R. 486; *Atlantic Shrimp Company v. Labour Relations Board*, 2006 NLTD 121) holding that individuals or entities “do not have to be physically situated” within the province to be subject to the jurisdiction of the province’s labour board. The review panel thus reasoned that, in the labour relations context, the sufficient connection test is applied in a way that permits a labour board with jurisdiction over a particular employment relationship to regulate that relationship in its entirety, even where matters affecting that relationship extend beyond the province’s borders.

[29] The review panel concluded that “there is a sufficient connection between British Columbia, the Code, the collective bargaining relationship and the labour dispute between the Union and Gate, such that it was not constitutionally impermissible for the original panel to find that Gate had breached Section 68(1) of the Code by using out-of-province employees to perform struck work”. The Board therefore had authority to order that Gate Gourmet “cease and desist from this conduct”.

Chambers Judge’s Decision [2024 BCSC 1528]

[30] Gate Gourmet sought judicial review of the Board’s reconsideration decision (“Reconsideration Decision”) in the Supreme Court, raising the same two issues argued before the review panel in the reconsideration application. On 22 August 2024, the chambers judge gave written reasons dismissing the petition (“Reasons”).

Mootness

[31] After outlining the facts and procedural history of the matter, the chambers judge considered the question of mootness, which arose because the underlying

labour dispute between Gate Gourmet and the Union had been resolved well before the hearing of the petition. Both parties urged the chambers judge to decide the matter despite its mootness, because the lawfulness of Gate Gourmet's use of out-of-province workers to provide double-catering in response to strike action at YVR could arise in future labour disputes. Applying the mootness analysis in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the chambers judge agreed to exercise his discretion to decide the substantive issues raised in the petition.

The Jurisdictional Issue

[32] The chambers judge applied the framework in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 to determine the appropriate standard of review for the Reconsideration Decision on the jurisdictional issue. The judge concluded that, because Gate Gourmet's jurisdictional argument raised a constitutional question concerning the territorial limits on the authority of a provincial regulatory body, the Board's decision on jurisdiction was subject to review on the standard of correctness: Reasons at paras. 63–64, applying *Vavilov* at paras. 55–57.

[33] The judge observed that “the extent to which a provincial tribunal may make orders that have extraterritorial effect” was recently canvassed in *Sharp*, reaffirming and providing further guidance about the real and substantial connection test discussed in *Unifund*: Reasons at para. 74. The chambers judge reviewed the “salient aspects” of the test, largely by referencing *Sharp*'s detailed explanation of the *Unifund* organizing principles: Reasons at paras. 75–78.

[34] Applying the *Unifund* test, the chambers judge observed that the Board's cease and desist order applied to Gate Gourmet “as a provincially regulated employer with operations in British Columbia”, which, in the judge's view, did not create an issue of extraterritorial application: Reasons at para. 79. However, the order did have “an extraterritorial impact on other persons and entities” outside British Columbia, whose “rights and obligations are not directly governed by the *Code*”, namely on: (i) Gate Gourmet employees in Alberta and Ontario who provided double-catering service to flights in and out of YVR, and (ii) Air Canada, which

requested Gate Gourmet to implement double-catering in response to the YVR strike action: Reasons at para. 80. In the judge’s view, the issue was whether the test in *Unifund* was met “in relation to” Air Canada, and Gate Gourmet’s out-of-province employees: Reasons at paras. 79–82.

[35] The chambers judge found a “sufficient connection between the Board, the *Code*, and the employer’s out-of-province employees” to justify the application of the *Code*’s replacement worker provisions to “the employer’s operations outside of British Columbia”: Reasons at para. 83. In the judge’s view, this result was “consistent with flexibly applied notions of order and fairness”, considering the “reality of modern labour relations” in which many provincially regulated employers operate in more than one province: Reasons at paras. 83–84. In order for the replacement worker prohibition to be “effective”, “it must apply to all of the employer’s operations, whether they are inside or outside of British Columbia”. To hold otherwise would allow an employer to circumvent the replacement worker prohibition by transferring struck work to out-of-province employees: Reasons at para. 84.

[36] In the chambers judge’s view, the fact that this result deprived out-of-province workers of the ability to perform replacement work for striking counterparts in British Columbia was not inconsistent with the principles of order and fairness. This was particularly so given the absence of evidence that the out-of-province workers suffered any prejudice: Reasons at para. 85. The chambers judge found that the order did not intrude on the sovereignty of the labour relations regimes in Alberta and Ontario. Even though the labour statutes in those provinces do not prohibit use of replacement workers, the legislative choices in those other jurisdictions do not detract from the Board’s authority to apply the replacement worker prohibition in the *Code* to a provincially regulated employer acting in response to British Columbia strike action: Reasons at para. 86.

[37] The chambers judge further reasoned that the impact of the order on Air Canada, as a customer of Gate Gourmet, was consistent with the requirements of

order and fairness: Reasons at para. 88. In the judge’s view, this “incidental impact” was “necessary to ensure the integrity of the *Code*’s restrictions on replacement workers”. In reaching this conclusion, the chambers judge noted the lack of evidence that Air Canada suffered any “actual prejudice” as a consequence of the Board’s order: Reasons at para. 89.

[38] In the result, the chambers judge determined that the Board was correct in concluding that its order was not an unconstitutional exercise of the Board’s statutory authority: Reasons at para. 90.

Interpreting and Applying s. 68 of the *Code*

[39] Gate Gourmet did not raise the Board’s interpretation and application of s. 68 of the *Code* as a ground of appeal. Nevertheless, given the Union’s submission that the arguments advanced on appeal involve an impermissible effort to revisit the Board’s findings, it is necessary to briefly review the chambers judge’s reasoning on this point.

[40] The chambers judge determined that under the relevant provisions of the *Code* and the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, the Board was an expert tribunal whose findings of fact and law were reviewable on the highly deferential standard of patent unreasonableness (Reasons at paras. 52–56), and the Reconsideration Decision was not patently unreasonable as it was open to the Board:

- (a) to conclude that Gate Gourmet, and not its YVR operation, was the “employer” within the meaning of s. 68(1): Reasons at paras. 103–105;
- (b) to find that, even though Gate Gourmet was acting on a customer request, its facilitation of that request by arranging for out-of-province employees to double-cater YVR flights amounted to “use” of replacement workers: Reasons at paras. 106–111; and

(c) to infer that, but for the strike, Gate Gourmet's YVR employees would have catered the YVR flights, hence double-catering of those flights elsewhere was performance of "struck work" contrary to s. 68(1): Reasons at paras. 112–114.

On Appeal

[41] Gate Gourmet argues that both the Board and the chambers judge erred in holding that the Board's order did not exceed the constitutional limits of its jurisdiction. Accepting that this issue is properly determined under the real and substantial connection test discussed in *Unifund* and *Sharp*, Gate Gourmet argues that the Board and the chambers judge erred in their application of the test, thereby reaching a legally incorrect conclusion.

Mootness

[42] Before delving into the merits of the appeal, it is necessary to touch briefly on the doctrine of mootness. Neither party raised the issue, but it arises because the labour dispute between Gate Gourmet and the Union was resolved some time ago. Despite this, the parties ask this Court to decide the appeal on its merits because questions about Gate Gourmet's use of out-of-province workers to provide double-catering service for YVR flights during a strike action by its unionized YVR employees could arise in the future. On the one hand, if this conduct is not properly regulated under the *Code* because of the constitutional limits on the Board's territorial jurisdiction, then there is no reason why Gate Gourmet should be prohibited from arranging its affairs in this way in response to future strike action at YVR. On the other hand, if the Board and the chambers judge were correct in ruling that the cease and desist order was a constitutionally permissible exercise of the Board's authority in connection with a British Columbia labour dispute, then both parties should have the benefit of certainty on this point.

[43] On a consideration of the factors discussed in *Borowski*, I find — as did the chambers judge — that it is appropriate to decide the merits of this matter. The appellant has prosecuted the appeal, and the respondent has not applied to quash it

as moot. There is an adversarial context, as both parties have continued to forcefully and effectively argue the merits of their positions. Determining the appeal will not involve an inappropriate or inordinate use of judicial resources, particularly considering that the sole remaining issue is a constitutional question of some legal significance. Finally, deciding this issue on its merits will not take the Court beyond its proper law-making function, as application of the real and substantial connection test is fundamentally a matter for the courts, in delineating the proper constitutional limits of a provincial regulatory body's territorial jurisdiction.

Standard of Review

[44] I agree with the chambers judge that the Board's ruling on the territorial limits of its jurisdiction is a constitutional matter reviewable on a standard of correctness. Applying a correctness standard to decisions delineating the constitutional constraints on territorial reach of provincial statutes and decisions of administrative tribunals is necessary to produce outcomes that are "determinate, defined and consistent": *Vavilov* at paras. 55–56. This conclusion is reinforced by *Sharp*, where it was held that a Quebec securities tribunal's assertion of jurisdiction over out-of-province individuals allegedly involved in a stock manipulation scheme with ties to Quebec raised a constitutional question "reviewable for correctness under the *Vavilov* framework": *Sharp* at para. 38.

The Positions of the Parties

[45] Gate Gourmet's argument rests on four somewhat interrelated propositions. The first proposition — which might fairly be characterized as uncontroversial — is that the Board's order had "extraterritorial impacts" on parties outside of British Columbia. The second proposition is that s. 68(1) of the *Code* ought not to be "constitutionally applicable" to matters of "extra-provincial customer choice", or extra-provincial labour forces working under distinctly different labour relations schemes. The third proposition — which is in my view the core of Gate Gourmet's argument — is that on a proper application of the *Unifund* analysis, there is no "sufficient connection" between British Columbia and the matters sought to be regulated by the

Board. The fourth proposition is that it is erroneous to treat the effectiveness of British Columbia's labour relations regime as the fundamental determining factor in the *Unifund* analysis.

[46] The Union's overall position is that the Board reached the legally correct outcome in determining that the cease and desist order did not exceed the constitutional limits of provincial jurisdiction. The Union says Gate Gourmet's arguments on appeal must fail for two key reasons. First, the Union asserts that Gate Gourmet's submissions largely if not entirely overlook the Board's factual findings, which are not challenged on appeal and could not, in any event, be disturbed unless shown to be patently unreasonable. Second, the Union contends that Gate Gourmet has improperly framed the *Unifund* analysis to focus on the sufficiency of the connection between the legislative scheme, the enacting jurisdiction, and the parties affected by the order (Air Canada and Gate Gourmet's Alberta and Ontario employees), when the proper frame is to consider whether the legislative regime is sufficiently connected to the party sought to be regulated by the order (Gate Gourmet). Finally, the Union says it was not wrong for the chambers judge to consider the effectiveness of the statutory scheme in the course of the real and substantial connection analysis.

[47] I note as well that the Board took part in the appeal, but took no position on the merits or the outcome. Rather, the Board focused its submission on identifying the standard of review. The Board agreed with the parties that delineation of the *Code's* extraterritorial reach is subject to review for correctness.

The Real and Substantial Connection Test

[48] Gate Gourmet and the Union agree that the real and substantial connection test described in *Unifund* and further explained in *Sharp* is the proper analytical framework for delineating the territorial limits of the Board's jurisdiction. It is therefore useful to begin the analysis with a review of the framework developed in these two cases.

[49] In *Unifund*, the issue was whether Ontario’s vehicle insurance legislation applied to an out-of-province insurer (ICBC), where an Ontario insurer (Unifund) sought to obtain indemnification for benefits it had paid to an Ontario motorist involved in an accident in British Columbia. The Court recognized that the resolution of this issue could have important constitutional implications, because it required consideration of the territorial limits on the application of otherwise validly enacted provincial legislation to out-of-province parties: paras. 27, 50–52.

[50] The majority adapted the real and substantial connection test, originally developed to address a court’s taking of jurisdiction over an individual or transaction as contemplated in cases such as *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, to suit the somewhat different context of the “applicability of a provincial regulatory scheme to an out-of-province defendant”: paras. 54–55.

[51] Applying that test to the facts, the majority determined that the connection between the Ontario vehicle insurance scheme and ICBC was insufficient, considering that the subject collision did not occur in Ontario, and that ICBC was not authorized to, and did not, sell insurance in Ontario, nor did it pursue any benefits or deductions under the Ontario scheme: paras. 82–83. ICBC did not enter the Ontario marketplace, and therefore was not obliged to comply with Ontario’s “rules of the game”: paras. 76, 84, citing *R. v. Thomas Equipment Ltd.*, [1979] 2 S.C.R. 529 at 544. The application of the Ontario statute in these circumstances would give the legislation “impermissible extraterritorial effect”: para. 3. In the result, the Ontario regime was “constitutionally inapplicable” to the out-of-province defendant: paras. 91, 108.

[52] Justice Binnie’s majority reasons explained that the “real and substantial connection” test adapted for this particular context is organized around the following four propositions (para. 56):

1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;

2. What constitutes a “sufficient” connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;
3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;
4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.

[53] In *Sharp*, Quebec’s financial services regulator started proceedings before a Quebec tribunal responsible for overseeing the securities market against four out-of-province defendants allegedly engaged in a stock manipulation scheme with ties to Quebec. The defendants challenged the regulator’s jurisdiction over them. Applying the real and substantial connection test, the tribunal held that it had jurisdiction. That decision was upheld on judicial review, on appeal, and ultimately by the Supreme Court of Canada.

[54] In the Supreme Court, the majority confirmed that the “territorial reach” of the provincial regulatory scheme was properly determined under the *Unifund* real and substantial connection test. Chief Justice Wagner and Justice Jamal explained that “[o]ver the last two decades, courts have regularly applied the *Unifund* test when determining whether a provincial regulatory scheme constitutionally applies to out-of-province defendants”: para. 105; see also para. 110.

[55] The majority reasons in *Sharp* gave further guidance on the analytical framework, by grouping the four *Unifund* principles into two sets of related considerations, as follows:

- (a) The first two *Unifund* principles are focused on the sufficiency of the connection between the legislative scheme and the extraterritorial individuals or matters sought to be regulated by it. More specifically, the first principle articulates the requirement for “a sufficient connection”, while the second describes the nature of the “contextual inquiry” into the factors that might furnish the necessary connection: *Sharp* at para. 127.

(b) The latter two *Unifund* principles “incorporate the notions of interprovincial comity and fairness to the defendant”. The third principle calls for a consideration of order and fairness as a means of regulating extraterritoriality concerns. “Order” connotes that courts and tribunals must respect “interprovincial comity” by only assuming jurisdiction where “constitutionally appropriate”. “Fairness” is concerned with the fair treatment of out-of-province defendants. The fourth and final *Unifund* principle requires that the concepts of order and fairness be applied “purposively and flexibly given the subject matter of the legislation and the type of jurisdiction being asserted”: *Sharp* at para. 131.

Analysis

[56] In my respectful view, while the chambers judge was correct in determining that there were extraterritorial dimensions to the impugned order, the judge’s basis for doing so was erroneous because it rested entirely on, and appeared to be preoccupied with, the impact of the order on third parties, namely Air Canada and Gate Gourmet’s employees in Alberta and Ontario.

[57] To explain, the chambers judge reasoned that the order did not have extraterritorial application to Gate Gourmet itself, because the order applied to Gate Gourmet in its capacity as a British Columbia employer. The judge then reasoned that the order did have extraterritorial effects on Air Canada and on Gate Gourmet’s out-of-province employees, and proceeded to consider both the sufficiency of the connection between the regulatory scheme and these entities, and the requirements of order and fairness from the perspective of these entities. In my view, this approach caused the chambers judge to conduct the real and substantial connection analysis through the wrong lens.

[58] It is beyond question that there are extraterritorial dimensions to this case. Although the Board determined that the *Code* was being applied to Gate Gourmet in its capacity as a British Columbia employer, the fact is that Gate Gourmet operates its business both inside and outside of British Columbia, and the Board’s order

certainly affected the company's decision-making and operations in Ontario and Alberta. This is one key feature of the case that engaged the *Unifund* analysis.

[59] And while the order was not directed at and did not apply to Gate Gourmet's customer (Air Canada) or its out-of-province workers in Alberta and Ontario, it clearly affected them. The order limited Air Canada's ability to obtain double-catering service outside of British Columbia for flights going into and out of YVR, and it limited the opportunity for Gate Gourmet's Alberta and Ontario workers to provide double-catering services to those flights during the strike action.

[60] As we will see below, a contextual application of the *Unifund* analysis must take into account all of the extraterritorial implications of the Board's exercise of jurisdiction under the *Code*. However, the focus of the analysis must be on the manner in which the Board sought to regulate the conduct of Gate Gourmet, as the individual or entity "sought to be regulated". The Board's order was directed at Gate Gourmet, not its out-of-province workers, and not Air Canada. The only parties who were legally bound by the Board's exercise of jurisdiction were Gate Gourmet and the Union. The order may have had extraterritorial impacts on third parties (which impacts are certainly relevant in a contextual application of the *Unifund* analysis), but this ought not to take the focus of the analysis away from the Board's cease and desist order against Gate Gourmet. The order represents the true scope and legal effect of the Board's exercise of jurisdiction under the *Code*.

Deference Owed to the Board's Findings

[61] The application of the real and substantial connection test must take into account the Board's findings of fact, and its interpretation and application of those facts to the dispute in issue when determining that the elements of s. 68(1) of the *Code* were established. One cannot lose sight of the Board's status as an expert tribunal in the adjudication of labour disputes.

[62] It is true that the governing standard of review for the constitutional issue is correctness. It is also true, as Gate Gourmet points out by reference to *Sharp* at paras. 113–114, that the *Unifund* test functions as a principle of statutory

interpretation. Although I agree with Gate Gourmet that this Court cannot perform this interpretive exercise in the abstract, this does not give us free reign to apply the *Unifund* test without regard to the Board's findings of fact, or its interpretation and application of the relevant *Code* provisions to conclude that the elements of s. 68(1) were established.

[63] The application of the real and substantial connection test functions as an interpretive constitutional limit on the territorial jurisdiction of the Board. The Court's role is to apply that test, with due deference to the Board's findings and conclusions as to the elements of s. 68(1) of the *Code*.

[64] It follows that I find some force in the submission of the Union that many of Gate Gourmet's arguments on appeal are put forward without due regard to the Board's findings concerning the application of s. 68(1) to the facts of the case.

[65] For example, I do not accept Gate Gourmet's submission that the double-catering of YVR flights from out-of-province locations was not "YVR bargaining unit work" because, according to Gate Gourmet, catering work "is only assigned to a particular bargaining unit when the customer decides to have the services fulfilled in the location it directs". This submission is contrary to the Board's factual finding that, but for the strike action, double-catering of certain Air Canada flights into and out of YVR would not have occurred, such that this double-catering was "struck work" within the meaning of s. 68(1)(e) of the *Code*. Gate Gourmet has not directly challenged this finding on appeal, and in any event has not shown any patent unreasonableness in the Board's findings, including the "struck work" finding.

[66] Nor do I accept Gate Gourmet's contention that s. 68(1) of the *Code* ought to be found constitutionally inapplicable because what happened in this case was a matter of "customer choice" or "customer acts", or a function of the labour choices made by Gate Gourmet's Alberta and Ontario employees. The Board found that the conduct in issue was not Air Canada's request for double-catering to avoid the effects of the strike action at YVR, but rather Gate Gourmet's role in "actioning" that request and then arranging through its operations center for out-of-province double-

catering of flights into and out of YVR. Similarly, the Board’s concern was not the conduct of Gate Gourmet’s Alberta and Ontario employees in performing the double-catering work, but rather Gate Gourmet’s own conduct in arranging for those out-of-province employees to perform the double-catering work in response to the strike action at YVR.

The First and Second *Unifund* Principles: Sufficiency of Connection

[67] The real and substantial connection analysis begins with the first two *Unifund* principles. These principles require an inquiry into the sufficiency of the connection between the *Code* and the entity and activity sought to be regulated. The entity that the Board sought to regulate was Gate Gourmet. The activities the Board sought to regulate were Gate Gourmet’s actions (in response to a customer request) in arranging for out-of-province workers to perform double-catering for flights into and out of YVR in response to a strike action by YVR employees.

[68] The sufficiency of the connection between these things must take into account the relationship among “the enacting jurisdiction” (British Columbia), “the subject matter of the legislation” (labour relations, and in particular a lawful strike action regulated under British Columbia labour law), and “the individual or entity sought to be regulated by it” (Gate Gourmet, an employer of unionized British Columbia workers).

[69] *Unifund* tells us that “different degrees of connection to the enacting province may be required according to the subject matter of the dispute”: *Unifund* at para. 65. The subject matter of the dispute in this case is a strike action by Gate Gourmet’s YVR employees. In response to that strike, Gate Gourmet — a British Columbia employer subject to regulation under the *Code* — arranged for out-of-province workers to double-cater flights into and out of YVR.

[70] Gate Gourmet is critical of the chambers judge’s reasoning that to be “effective”, the *Code*’s prohibition on the use of replacement workers “must apply to all of the employer’s operations, whether they are inside or outside of British Columbia”: Reasons at para. 84. Gate Gourmet argues that the “absolute

effectiveness” of British Columbia’s labour relations scheme ought not to be relied upon as the fundamental determinant of a sufficient connection under the *Unifund* analysis.

[71] Accepting that the effectiveness of the statutory regime is not the sole determinant of sufficient connection, it is nevertheless an important consideration in the analysis. I take guidance on this point from *Sharp*. In considering the constitutional applicability of a statute intended to regulate the integrity of Quebec’s securities market, the majority held that the “sufficient connection analysis” had to take into account the “transnational nature of modern securities regulation”. To “effectively regulate” in this field, the regulator required the ability to “surmount borders where legally possible”: *Sharp* at para. 128.

[72] Applying the same reasoning here, I agree with the chambers judge that to interpret s. 68(1) as being constitutionally inapplicable to an employer’s use of out-of-province workers to perform “struck work” would undermine the efficacy of the replacement worker rule. This conclusion aligns with the perspective of the review panel, a tribunal with subject-matter expertise, that labour relations statutes are intended to regulate “collective bargaining relationships” which may be “centered in” one province, but may be acted out or spill over into other provinces. The review panel aptly described this as a “reality of collective bargaining relationships in a time when provincially regulated employers may have operations in more than one province”: *Reconsideration Decision* at para. 116.

[73] The *Code* identifies the use of replacement workers during a strike action as an unfair labour practice. I agree with the chambers judge that, to be effective in the context of modern collective bargaining relationships, the rule against an employer’s use of replacement workers ought not to stop at the provincial border. Although this is not the sole or determining factor in the *Unifund* analysis, it is relevant in assessing the degree of connection between British Columbia, its labour relations statute, and both the entity and the particular conduct over which jurisdiction is

asserted, namely Gate Gourmet's use of out-of-province replacement workers in response to a lawful strike action by unionized employees within the province.

[74] Taking all of the foregoing into account, a consideration of the first two *Unifund* principles indicates that there is indeed a direct and compelling connection between British Columbia's labour relations scheme and Gate Gourmet, as an employer of unionized British Columbia workers who were working at a place of operations in British Columbia. This was not a case of a provincial tribunal asserting jurisdiction over an extraterritorial party. Rather, it is a case of a tribunal with jurisdiction over a party under its regulatory sphere, in which some of that party's extraterritorial actions are caught by the tribunal's order. More specifically, the Board's cease and desist order applied to Gate Gourmet's conduct in actioning a customer request to implement double-catering through the company's order control center in Toronto, and in then assigning the double-catering work to employees at places of operation in Alberta and Ontario.

The Third and Fourth *Unifund* Principles: Order and Fairness

[75] The third and fourth *Unifund* principles consider order and fairness, applied purposively and flexibly, as a means of regulating extraterritoriality concerns. Here, the extraterritoriality concerns include the fact that the cease and desist order applied to Gate Gourmet's conduct in arranging through its order control department in Toronto for employees in Alberta and Ontario to provide certain double-catering services. The extraterritoriality concerns also include the impact of the Board's order on Gate Gourmet's customer (Air Canada), and Gate Gourmet's employees in Alberta and Ontario. Although these third parties are not targeted by the Board's order, in my view, the effects on them are still relevant when assessing the extraterritorial implications of the Board's exercise of its jurisdiction.

[76] I do not see the Board's assertion of jurisdiction over Gate Gourmet's conduct as disruptive of order between provinces. The Board's cease and desist order is intended to enforce the prohibition against Gate Gourmet's use of replacement workers in response to a strike action in British Columbia. The Board's order is only

enforceable against Gate Gourmet, as a provincially regulated employer under the Code. The British Columbia legislature has identified an employer's use of replacement workers (in the circumstances prescribed by s. 68(1)) as an unfair labour practice. The Board's order simply enforces s. 68(1) by prohibiting Gate Gourmet from using replacement workers not only within British Columbia, but also at its places of operations in other provinces.

[77] Gate Gourmet relies on *British Airways v. Workers' Compensation Board* (1985), 61 B.C.L.R. 1 (C.A.) for the proposition that, while work and commerce may have cross-border elements, regulators from multiple jurisdictions may not exercise jurisdiction over the same workers or employees, be it for labour relations, or other facets of the employment relationship. *British Airways* involved an attempt by WCB to apply British Columbia's workers compensation scheme to flight and cabin crews present in British Columbia from time to time, in the course of their duties on airline flights into and out of the province. These individuals were hired in the U.K., subject to U.K. employment laws, and had access to worker's compensation benefits through U.K. legislation. The board found that they were workers under the British Columbia scheme.

[78] Writing for the majority, Justice MacFarlane held that the British Columbia legislation could not be properly construed as having the reach given to it by the board. While the text of the statute was broad enough to apply to workers who did not reside in and were not employed in British Columbia, there had to be a constitutional limit to the scope of the legislation. In the course of his reasoning, MacFarlane J.A. determined that the "sufficient connection" or "sufficient presence" test was the "appropriate measure of the constitutional reach" of the statute: *British Airways* at para. 52. The statute failed the test, because the British Airways crews had "only a transitory presence in the province, and no substantial connection with it": *British Airways* at para. 60(1).

[79] *British Airways* is, in my view, a rather straightforward pre-*Unifund* example of the "sufficient connection" analysis. It is clearly distinguishable from this case and is

therefore of no assistance to Gate Gourmet. The particular employment relationship in issue — between British Airways and its airline crews — was regulated by U.K. law, and the connection between the airline crews and British Columbia was too tenuous to justify the application of this province’s workers compensation scheme. In contrast, in this case the employment relationship in issue is between Gate Gourmet and its YVR employees. The labour relations regulator for that employment relationship, and labour disputes arising from it, is the Board. The Board’s order was directed toward Gate Gourmet, as the employer in a labour dispute with its YVR employees. The impact on Gate Gourmet’s Alberta and Ontario employees was incidental. There is nothing disorderly about this outcome.

[80] In a related submission, Gate Gourmet argues that the Board’s order represents a constitutionally impermissible intrusion on the relationship between the company and its Alberta and Ontario employees. In Gate Gourmet’s submission, it is Alberta and Ontario law, not the British Columbia *Code*, that governs the company’s relationship with its employees in those other jurisdictions. I do not find this argument persuasive. Rather, I agree with the review panel that the Board’s exercise of jurisdiction in this case does not interfere with the legislative choices of governments in the other provinces in which Gate Gourmet operates. The Board exercised its jurisdiction in connection with a labour dispute between Gate Gourmet and its YVR employees. The Board’s order does not intrude upon or in any way undermine the Ontario or Alberta labour relations schemes, intended to govern labour relations between employers and unionized employees in those provinces.

[81] The fact that neither Ontario nor Alberta prohibit the use of replacement workers during labour disputes does not alter this conclusion. The rules and policy choices made by the legislatures in these other provinces apply to the regulation of labour disputes and employment relationships under their jurisdiction. Each provincial or territorial labour relations board is responsible for adjudicating disputes within its jurisdiction. Sometimes, such disputes will have effects that spill over into other provinces or territories, but this does not undermine the concept of comity.

[82] The principle of order must be applied flexibly and contextually, with a proper appreciation of the subject matter. Again, I note the review panel's expert perspective that "collective bargaining relationships" may be "centered in" one province but may be acted out or may spill over into other provinces, which is a "reality of collective bargaining relationships in a time when provincially regulated employers may have operations in more than one province": Reconsideration Decision at para. 116. In my view, the Board's assertion of jurisdiction over the extraterritorial features of this British Columbia-based labour dispute does not produce disorder in the legal system, the labour market, or the commercial marketplace.

[83] With regard to the labour market, I acknowledge that the Board's order had an effect on Gate Gourmet's Ontario and Alberta employees, but this effect was incidental and not likely to produce disorder. The effect of the order was to make unavailable to Gate Gourmet's Ontario and Alberta employees certain double-catering work which, on the Board's findings, would not have been made available to those workers but for the strike action at YVR. Apart from simply making this "struck work" unavailable to Gate Gourmet's Ontario and Alberta workers, the Board's order did not regulate, intrude upon, or alter the nature of the employment relationship between those workers and Gate Gourmet. For example, the Board's order could not have been enforced against Gate Gourmet's employees in Ontario and Alberta.

[84] With regard to the commercial marketplace, the Board's order no doubt had an effect on Air Canada as a customer of Gate Gourmet. However, there is no evidence to support Gate Gourmet's assertion that the order interfered with Gate Gourmet's contractual obligations toward Air Canada, or that it overrode Air Canada's contractual rights. There is no contract in evidence, hence no evidence as to the particulars of Gate Gourmet's contractual obligations to Air Canada. Indeed, one might question whether it would have been possible for Gate Gourmet to contract out of legal responsibilities owed to unionized employees in British Columbia, or whether any contractual obligation owed to Air Canada could lawfully

compel Gate Gourmet to disregard its legal responsibilities under the British Columbia *Code*.

[85] Accepting that the Board’s order had an effect on Air Canada, this effect was incidental, and not likely to produce any commercial disorder beyond that which would have been produced by the strike action itself. The effect of the Board’s order was merely to prevent Gate Gourmet from acting on Air Canada’s request for steps to be taken to avoid the impact of the strike action. Recall the Board’s finding that, but for the strike action, the double-catering in issue would never have occurred, with the inference being that the catering of the YVR flights would have been done by Gate Gourmet’s YVR employees. Thus, Air Canada — having contracted with Gate Gourmet for the provision of catering service for flights into and out of YVR — would have had to deal with the consequences of the strike action at YVR. It is not unduly disruptive of the marketplace for a party in Air Canada’s position to learn that its catering provider is not permitted to use out-of-province employees to avoid a legislative prohibition on the use of replacement workers to perform struck work during a strike action.

[86] For many of the reasons already discussed, the extraterritorial features of the Board’s cease and desist order do not result in any unfairness to Gate Gourmet. The company relies on a unionized British Columbia workforce to provide services to customers in British Columbia. It has availed itself of the British Columbia labour market, and is obliged to comply with the “rules of the game” in British Columbia. These rules include a prohibition against the use of replacement workers to perform “struck work”. The Board determined that on a proper interpretation of the *Code*, Gate Gourmet’s actions in facilitating a customer request to shift “struck work” to employees at its other places of operations contravened the replacement worker prohibition. The fact that the other places of operations where Gate Gourmet sought to re-assign the “struck work” happen to be located outside of British Columbia does not alter the fairness of the outcome.

Summary

[87] In summary, the review panel and the chambers judge both reached the correct legal conclusion in holding that the Board did not exceed the scope of its jurisdiction when it ordered Gate Gourmet to cease and desist from using out-of-province workers to perform “struck work” in response to a strike action by Gate Gourmet employees at YVR. There is a real and substantial connection between British Columbia, Gate Gourmet, and its impugned conduct. The Board’s assertion of jurisdiction over Gate Gourmet’s extraterritorial use of replacement workers does not offend the principles of order and fairness, bearing in mind the modern reality that collective bargaining relationships based within the province sometimes involve conduct that is manifested in other jurisdictions.

Conclusion

[88] I would dismiss the appeal.

“The Honourable Justice Riley”

I AGREE:

“The Honourable Madam Justice Bennett”

I AGREE:

“The Honourable Justice MacNaughton”