IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Independent Contractors and Businesses Association v. British Columbia (Transportation and Infrastructure),* 2019 BCSC 1201

Date: 20190723
Docket: S189318
Registry: Vancouver

Between:

Independent Contractors and Businesses Association, Progressive Contractors Association, Christian Labour Association of Canada, Canada West Construction Union, British Columbia Chamber of Commerce, British Columbia Construction Association, Canadian Federation of Independent Business, Vancouver Regional Construction Association, Jacob Bros. Construction Inc., Eagle West Crane & Rigging Inc., LMS Reinforcing Steel Group Ltd., Morgan Construction and Environmental Ltd., Tybo Contracting Ltd., Dawn Rebelo, Thomas MacDonald, Forrest Berry, Brendon Froude, Richard Williams, and David Fuoco

Petitioners

And

Ministry of Transportation and Infrastructure, and The Attorney General of British Columbia (on Behalf of all Ministries in the Province)

Respondents

Before: The Honourable Mr. Justice Giaschi

Reasons for Judgment

Counsel for the Petitioners:	P. Gall Q.C. J. Sebastiampillai
Counsel for the Respondents:	G. Morley K. Evans
Counsel for Allied Infrastructure and Related Construction Council of British Columbia:	C. Gordon, Q.C.
Place and Date of Hearing:	Vancouver, B.C. February 27, 28 and March 1, 2019

Place and Date of Judgment:	Vancouver, B.C. July 23, 2019

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I. INTRODUCTION

[1] The Minister of Transportation and Infrastructure for British Columbia (the "Minister"), in a document entitled "Pattullo Bridge Replacement Project Request for Qualifications" (the "RFQ"), has imposed a requirement that all contractors wishing to qualify to work on the Pattullo Bridge Replacement Project ("Replacement Project") must source their workers exclusively from a Crown corporation, B.C. Infrastructure Benefits Inc. ("BCIB"). BCIB has, in turn, entered into a collective bargaining agreement entitled "Community Benefits Agreement" (the "CBA"), with unions affiliated with the Allied Infrastructure and Related Construction Council of B.C. ("AIRCC"), which requires that all workers working on the Replacement Project must be members of unions affiliated with AIRCC. The petitioners object to construction workers having to be members of unions affiliated with AIRCC and filed the underlying petition seeking, *inter alia*, a declaration that this requirement is an unreasonable exercise of the Minister's statutory power and infringes the *Canadian Charter of Rights and Freedoms*.

[2] These reasons relate to three applications. The main application is by the respondents for an order that the petition be struck. The other applications are by AIRCC. Its first application is for an order that it be added as a party to this proceeding or alternatively, that it be granted intervenor status. Its second application essentially duplicates the application of the respondents requesting that the petition be struck or stayed.

[3] The parties do not oppose the application by AIRCC that it be added as an intervenor, however, there is disagreement whether it should be added as a party to the petition. The parties did, however, consent to AIRCC making submissions on the applications to strike the petition.

[4] I intend to address first whether the petition ought to be struck or stayed and then address whether it is appropriate for AIRCC to be added as a party.

[5] In summary, for the reasons that follow, it is my opinion that the claims for injunctive and declaratory relief in the petition and the claims invoking the *Charter*

are to be struck or stayed. The claims for relief in the nature of *certiorari* and *prohibition* are not to be struck as they are not bound to fail and are not within the jurisdiction of the Labour Relations Board. Further, AIRCC is to be added as a respondent to the petition.

II. BACKGROUND

[6] In 2018, the Government of British Columbia incorporated the Crown Corporation BCIB with the mandate that it supply workforces on designated projects including the Replacement Project and the widening of the Trans Canada Highway from Kamloops to the Alberta border.

[7] In July of 2018, BCIB entered into the CBA with AIRCC. This agreement recognizes BCIB as the employer of all employees working under the CBA (para. 2.101), stipulates that contractors and employees are bound by the CBA (paras. 2.102 and 4.100), and recognizes AIRCC "for the purpose of collective bargaining and administration of" the CBA. This agreement is a collective bargaining agreement as indicated in the preambles:

> WHEREAS, [BCIB] has recognized [AIRCC] and has agreed to deal with [AIRCC] as the exclusive bargaining agent of the Employees and of each Affiliated Union in negotiating and administering this Community Benefits Agreement;
>
> AND WHEREAS, [BCIB] and [AIRCC], have carried on collective bargaining and [BCIB] and [AIRCC] are prepared to enter into a Community Benefits Agreement upon the terms and conditions contained herein.

[8] Article 8.101 of the CBA imposes a requirement that all employees/workers be members AIRCC affiliate unions:

> 8.101 All Employees under this Agreement, up to and including the rank of general foreperson, shall be members of or secure membership in the Appropriate Affiliate and maintain such membership in good standing as a condition of such employment.

[9] The CBA further sets out in detail the employment and working terms and conditions including management rights, grievance procedures, wages, hours of

work, safety and security, and includes provisions that there be no strikes or lockouts.

[10] Also in July of 2018, the Ministry of Transportation and Infrastructure for the Province of British Columbia issued the RFQ for the Replacement Project. The purpose of the RFQ was to "invite interested parties to submit their qualifications" for the Replacement Project. Clause 1.7.7 of the RFQ, notifies contractors interested in qualifying for the project that they will be required to obtain their workforce from and enter into a contract with BCIB. It further notifies contractors of the existence of the CBA entered into between BCIB and AIRCC. Clause 1.7.7 of the RFQ provides in full as follows:

> **1.7.7 Community Benefits Policy**
>
> The Province of British Columbia has identified the objectives for a Community Benefits Framework (the Framework") for public sector infrastructure projects. This Framework is designed to ensure that provincial infrastructure projects are delivered in a way that provides both the best outcome for the project and provides long-lasting benefits for British Columbians and their communities. This will provide for good wages, increased opportunities for apprenticeship and training, maximizing participation of Indigenous peoples and groups traditionally under-represented in the construction sector, and greater access for local residents and businesses.
>
> With regards to the Project, the Framework objectives will be implemented through a Community Benefits Agreement ("CBA"). The CBA is the labour agreement between BC Infrastructure Benefits Inc ("BCIB"), on behalf of the Province, and the Allied Infrastructure and Related Construction Council of BC ("AIRCC").
>
> The CBA sets out the employment terms and conditions for the supply of workers to be utilized by Project Co and its contractors and subcontractors on this Project. It recognizes the inclusion of community benefits for training and apprenticeship opportunities; greater access for local residents, Indigenous peoples and traditionally under-represented groups in the skilled workforce; other employment terms such as aligned wages and benefits, scheduling, health and safety; labour relations and site stability.
>
> Pursuant to the CBA as authorised by the Province, BCIB will provide the labour force and manage labour relations for Project Co and its contractors and subcontractors working on the Project. Project Co will be required to enter into a contract with BCIB for these services.
>
> [Emphasis added.]

[11] The powers of the Minister are set out in s. 3 of the *Transportation Act*, S.B.C. 2004, c. 44, as follows:

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

III. THE PETITION

[12] The petition refers to the unions affiliated with AIRCC as the "Building Trades Unions" and refers to the "requirement" that workers on the Replacement Project be members of unions affiliated with AIRCC as the "Building Trades Only Requirement". I will adopt this nomenclature to avoid confusion but I note that these terms are not used in either the RFQ or the CBA.

[13] Paragraphs 1 through 14 from the petition are an overview. In summary, these paragraphs allege:

- The Minister exercises a statutory power when entering into agreements for the construction of public works and undertakings (para. 1);
- Pursuant to this statutory power the Minister has required contractors to hire workers from "Building Trades Unions" (a term defined in the petition as unions affiliated with the British Columbia and Yukon Territory Construction Trades Council) (para. 2);
- The Building Trades Unions are political and financial supporters of the current government (para. 4);
- The stated objectives of the government are to increase training/apprenticeships, to increase the participation of indigenous peoples and other underrepresented groups in the construction industry, and to ensure fair wages for construction workers (para. 5);

- There is no logical connection between the stated objectives of the government and requiring workers to join unions favoured by the government (para. 6);

- The majority of construction work in the province is carried out by contractors and workers not affiliated with the Building Trades Unions (para. 8) and those contractors and workers are effectively excluded from government projects by the Building Trades Only Requirement (para. 9);

- The government has effectively given the Building Trades Unions a monopoly over the employment opportunities on government projects (para. 10); and

- The usual practice on large construction projects is to include the objectives as contractual requirements (paras. 12 and 14).

[14] Paragraph 18 of the petition summarizes the submissions of the petitioners as follows:

> 18. Specifically, the Petitioners submit that:
>
> (i) The imposition of the Building Trades Only Requirement in contracts for transportation infrastructure projects is irrelevant and extraneous to the purpose of the statutory grant of power to the Minister, and hence is an unreasonable and *ultra vires* exercise of that power.
>
> (ii) Further, the imposition of the Building Trades Only Requirement, in both purpose and effect, breaches the freedom of expression, freedom of association and political equality rights of construction workers who are forced by the tendering requirements to join, contribute to, and support unions favoured by the government, as a condition of working on public construction projects.
>
> (iii) As the Building Trades Only Requirement is not relevant or necessary to the achievement of a valid objective underlying the statutory authority to enter into contracts for the construction of public works and undertakings, its imposition constitutes an unreasonable exercise of statutory authority.
>
> (iv) Even if the Building Trades Only Requirement was directed at a constitutionally sound purpose tied to the statutory scheme, which

is not the case, it does not achieve a proportionate balance between the *Charter* rights of construction workers and any statutory purpose underlying the grant of authority.

(v) In addition, because any of the Government's valid purposes could be fully achieved without conditioning access to public employment on joining groups that support the current Government, this breach cannot be justified in a free and democratic society, as it limits the *Charter* rights of workers more than is necessary to achieve any valid public purpose.

[15] Paragraph 19 sets out the relief sought in the petition, including declarations that the Building Trades Only Requirement is an unreasonable exercise of the statutory power of the Minister under the *Transportation Act* and is contrary to the *Charter*, an order of *certiorari* quashing the decision imposing the Building Trades Only Requirement and an order of *prohibition* prohibiting the government from imposing the Building Trades Only Requirement on other projects:

19. The Petitioners seek the following relief:

a) A declaration that the imposition of the Building Trades Only Requirement in contracts for construction projects is an unreasonable exercise of the Minister's statutory discretion under the *Transportation Act* because it is irrelevant or extraneous to the statutory purpose underlying the statutory power;

b) A declaration that the imposition of the Building Trades Only Requirement is an unreasonable exercise of the Minister's statutory power to enter into contracts for Ministry construction projects because it fails to proportionately balance the resulting infringement of sections 2(6), 2(d) and 15 of the *Canadian Charter of Rights and Freedoms* against any justification for such infringement;

c) In the alternative, a declaration under section 24(1) of the *Canadian Charter of Rights and Freedoms* that the imposition of the Building Trades Only Requirement breaches sections 2(6), 2(d) and 15 of the *Canadian Charter of Rights and Freedoms*, and is not justified under section 1;

d) An order in the nature of *certiorari* quashing the Minister's decision to impose the Building Trades Only Requirement on the Project, on the basis that it is an *ultra vires* or unreasonable exercise of statutory authority;

e) An order in the nature of prohibition preventing the Government from imposing the Building Trades Only Requirement on other Government construction projects;

f) An interim injunction staying the implementation of the Building Trades Only Requirement, pending an adjudication of the legal issues raised in this Petition;

g) Such other orders as the Court deems to be just and appropriate; and

h) Costs.

[16] Paragraphs 20 through 121 of the petition describe the various petitioners. In summary, they are:

a) Various business associations with members that are involved in the construction industry in British Columbia and who do not have collective bargaining relationships with the Building Trades Unions (although many have collective bargaining relationships with other unions);

b) Construction trade unions, namely the Christian Labour Association of Canada and the Canada West Construction Union, that have no affiliation with any labour federations in Canada or any political parties;

c) Contractors engaged in the construction industry in British Columbia, some of whom are non-union and some of whom have collective bargaining relationships with non-Building Trades Unions; and

d) Individuals who are engaged in the construction industry in British Columbia, some of whom do not belong to a union and some of whom belong to non-Building Trades Unions.

[17] The petition then addresses the powers of the Minister at paras. 123 through 125:

> 123. The Minister is authorized to enter into agreements, contracts, and arrangements, and otherwise to do whatever is or may be necessary to plan, design, acquire, hold, or construct provincial public undertakings and related improvements, pursuant to the *Transportation Act*, SBC 2004, c. 44 ("*Transportation Act*").
>
> 124. In particular, section 3 of the *Transportation Act* authorizes the Minister as follows:

> Without limiting any other power the minister has under this or any other enactment, the minister may enter into contracts for, or otherwise provide for the carrying out of, any activity or service relating to transportation, including, without limitation, the planning, design, acquisition, holding, construction, use, operation, upgrading, alteration, expansion, extension, maintenance, repair, rehabilitation, protection, removal, closure and disposition of provincial public undertakings and related improvements.
>
> 125. The Minister's decision to enter into agreements, and the terms imposed on contractors in those agreements, constitute the exercise of a statutory power under the *Transportation Act*.

[18] Paragraphs 128 through 133 of the petition contain various facts related to the construction industry of British Columbia. Most notably, it is alleged that only approximately 15% of the construction work in British Columbia is performed by contractors who have collective bargaining relationships with the Building Trades Unions.

[19] Paragraphs 134 through 137 address the Replacement Project which is to be constructed under the statutory authority of the Minister and is alleged to have a construction cost of $1.377 billion.

[20] Paragraphs 138 through 147 address the Building Trades Only Requirement. Paragraph 138 states that on July 16, 2018 Premier Horgan announced that workers on large scale construction projects would be supplied exclusively by the Building Trades Unions.

[21] Paragraphs 140 and 141 state that the Building Trades Only Requirement was imposed by s. 1.7.7 of the RFQ.

[22] Paragraphs 142 and 143 note that the effect of the Building Trades Only Requirement is to require contractors to obtain their workforces from the Building Trades Unions and to force workers to join and pay dues to those unions.

[23] Paragraph 144 states that to implement the Building Trades Only Requirement, the government established BCIB as the entity to supply labour and BCIB entered into an agreement with the Building Trades Unions for that labour

supply. (It is noteworthy that the petition does not identify this agreement as a collective agreement.)

[24] Paragraphs 148 through 152 address the stated objectives of the government in imposing the Building Trades Only Requirement and allege that these objectives are better achieved through a more "inclusive approach".

[25] Paragraphs 153 through 157 allege that the Building Trades Unions have been significant financial contributors to and supporters of the New Democratic Party of British Columbia. It is further alleged that these financial contributions and support are funded by union dues and that the result of the Building Trades Only Requirement is to force construction workers to support and fund the New Democratic Party of British Columbia as a condition of working on public construction projects.

[26] The Legal Basis for the relief claimed in the petition is summarized as follows:

a) At para. 158, the petitioners plead and rely upon, *inter alia*, the *Judicial Review Procedure Act*, RSBC 1996, c. 241 [*JRPA*], the *Charter,* and the inherent jurisdiction of the Court;

b) At paras. 159 through 162, it is alleged that the Building Trades Only Requirement is an unreasonable and *ultra vires* exercise of the statutory power granted to the Minister by s. 3 of the *Transportation Act*; and

c) At paras. 163 through 202, it is alleged that the Building Trades Only Requirement infringes ss. 2(b), 2(d) and 15 of the *Charter* and is not justified by the government's stated objectives.

[27] Paragraph 166 of the petition is of particular importance in that it alleges the purpose of the Building Trades Only Requirement is to require all employees working on public infrastructure projects to join unions that support the current Government:

> 166. The purpose of the Building Trades Only Requirement is to require all employees working on public infrastructure projects to join unions that

> support the current Government. This is an unconstitutional purpose that is not expressly or implicitly authorized by the Transportation Act or any other statute.

[28] Paragraph 198 is to similar effect.

> 198. Supporting the current Government of British Columbia by becoming a member of and paying dues to an organization that supports, advocates and advertises in favour of the political party currently forming the government, is not necessary or relevant to carrying out construction work on publicly funded projects.

IV. ISSUES

[29] I propose to first address the two applications to strike or stay the petition and then to consider the application by AIRCC for party status. The issues to be considered therefore are:

a) Should the petition be struck under R. 9-5(1) on the grounds that the impugned decision is not subject to judicial review?

b) Should the petition be struck or stayed under R. 9-5(1)(d) on the grounds that the relief claimed, in whole or in part, falls within the exclusive jurisdiction of the Labour Relations Board?

c) Should AIRCC be added as a party respondent to the petition?

V. RULE 9-5(1) AND APPLICABLE PRINCIPLES

[30] Rule 9-5(1) of the *Rules* provides:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

> (2) No evidence is admissible on an application under subrule (1) (a).

[31] A claim will only be struck under R. 9-5(1)(a) if it is plain and obvious, assuming the facts pleaded are true, that the pleading discloses no cause of action. Put differently, a claim will be struck if it has no reasonable prospect of success. The power to strike a pleading for failure to disclose a reasonable cause of action is a valuable housekeeping tool promoting litigation efficiency. However, it is a tool that must be used with care. Novel but arguable claims should be permitted to proceed to trial: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 17-21.

[32] A challenge to a pleading on the grounds that the court lacks subject matter jurisdiction is appropriately brought as an application to strike under R. 9-5(1)(a) for failure to disclose a reasonable cause of action: *McGregor v. Holyrood Manor*, 2014 BCSC 679 at para. 114 or, where jurisdiction has been given to an administrative tribunal, under R. 9-5(1)(d) as an abuse of process: *Cimaco International Sales, Inc. v. British Columbia (Attorney General)*, 2010 BCCA 342 at paras. 41-44.

[33] In *Minnes v. Minnes* and Rees-Davies, (1962), 32 W.W.R. 112, at 122, the Court of Appeal stated that pleadings should be struck only in cases “absolutely beyond doubt”:

> 36 In my respectful view it is only in plain and obvious cases that recourse should be had to the summary process under 0. 25, r. 4, and the power given by the Rule should be exercised only where the case is absolutely beyond doubt. So long as the statement of claim, as it stands or as it may be amended, discloses some questions fit to be tried by a Judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out. If the action involves investigation of serious questions of law or questions of general importance, or if facts are to be known before rights are definitely decided, the Rule ought not to be applied.

See also: *British Columbia (Director of Civil Forfeiture) v. Flynn*, 2013 BCCA 91 at para. 13; and *Hunt v. Carey Canada Ltd.*, [1990] 2 S.C.R. 959 at 978.

[34] In *Berthin v. Berthin*, 2016 BCSC 2235 at para. 14, Justice Johnston said that the court must read the impugned pleading “in its most advantageous light” from the perspective of the pleading party.

VI. IS THE IMPUGNED DECISION SUBJECT TO JUDICIAL REVIEW?

[35] The respondents and AIRCC apply for an order striking and dismissing the petition pursuant to R. 9-5(a) and (d) of the *Supreme Court Civil Rules* on the basis that the petition fails to disclose a reasonable cause of action and is an abuse of process.

A. Submissions of the Parties

[36] The respondents submit that the issuance of the RFQ and the requirements imposed by clause 1.7.7 of the RFQ are not the exercises of a "statutory power" under the *JRPA* and, therefore, not reviewable under the *JRPA*. More generally, the respondents submit that the Crown, as a natural person, has the ability to enter into contracts separate and apart from any empowering statutes. Further, they submit that in exercising these powers to contract the Crown is not exercising a public power that is subject to judicial review but is rather exercising a private power subject to private law.

[37] The submissions of AIRCC on this issue essentially mirror those of the respondents.

[38] The petitioners accept that a judicial review is not available for the adjudication of purely contractual disputes between the government and private parties. However, they say that the petition does not involve breach of contract or otherwise engage private law. Rather, they say the claim relates to an improper or unreasonable exercise by the Minister of his statutory power under the *Transportation Act* to enter into contracts. More particularly, they submit that the power was exercised to impose a model that prohibits contractors from using their own workforces, requires contractors to obtain their workforce from BCIB and requires workers to be members of particular unions. This, they submit, was an unlawful or unreasonable exercise of the statutory power in two respects: first, the power was exercised for an improper purpose, namely, to reward the political allies of the current government, an objective that is inconsistent with the purposes of the *Transportation Act*; and second, the petitioners submit that the power was exercised

improperly or unreasonably in that the Minister failed to take into account and proportionately balance the *Charter* rights of contractors and workers, something the Minister was legally obliged to do. The petitioners submit that the exercise of a statutory power for an improper purpose and the failure to properly take into account and balance *Charter* rights are both matters of public law and are properly the subject matter of judicial review before this Court.

B. Discussion

[39] I intend to address the matters raised in the following order: first, I will consider whether judicial review is available under the *JRPA* in the circumstances of this matter; and second, I will address the more general submission of the respondents that judicial review is not available because the matters raised in the petition are private law matters that are not subject to judicial review.

1. The *Judicial Review Procedure Act*

[40] The legal basis for the relief requested in the petition is the *JRPA* and the inherent jurisdiction of the court.

[41] Section 2 of the *JRPA* provides that an application for judicial review must be made by way of petition and provides for the relief that may be granted in such applications:

> 2 (1) An application for judicial review must be brought by way of a petition proceeding.
>
> (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
>
> (a) relief in the nature of mandamus, prohibition or certiorari;
>
> (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

[42] Section 7 of the *JRPA* provides that the court, on an application for judicial review, may set aside the decision complained of:

> 7 If an applicant is entitled to a declaration that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may set aside the decision instead of making a declaration.

[43] The terms “statutory power” and “statutory power of decision” are defined terms under the *JRPA* as follows:

> "statutory power" means a power or right conferred by an enactment
>
> (a) to make a regulation, rule, bylaw or order,
>
> (b) to exercise a statutory power of decision,
>
> (c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,
>
> (d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
>
> (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability;
>
> “statutory power of decision" means a power or right conferred by an enactment to make a decision deciding or prescribing
>
> (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or
>
> (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it,
>
> and includes the powers of the Provincial Court;

[44] The respondents and AIRCC submit that judicial review is not available in the circumstances of this case under the *JRPA* because there is no exercise of a “statutory power” as defined in the *JRPA*. They submit that the only power being exercised is a private law power to contract, which is not subject to judicial review under the *JRPA*. The respondents and AIRCC rely heavily upon *BC Govt Serv. Empl. Union v. British Columbia (Minister of Health Services),* 2005 BCSC 446 [*BCGEU*], affd. 2007 BCCA 379 and *Eagleridge Bluffs & Wetlands Preservation Society v. H.M.T.Q.*, 2006 BCCA 334 [*Eagleridge*]. I will address each of these decisions.

[45] *BCGEU* involved a challenge to agreements entered into by the Minister of Health Services for the operation and administration of the Health Services Plan by a private corporation. The petitioner in that case sought a declaration under the *JRPA* that the Minister of Health Services had acted beyond his powers in entering into the agreements. Justice Melvin, the chambers judge, held at first instance that

the decision of the Minister of Health Services to negotiate and enter into a contract did not fall within the definition of statutory power under the *JRPA*:

> [26] In order to fall within s. 2(2)(b) [of the *JRPA*] the petitioner must find that there has been a failure with reference to a statutory power, although it may be argued that that portion of the petitioner's claim is based on relief in the nature of certiorari. Insofar as certiorari is an application to quash, it would be on the basis of lack of jurisdiction. In other words, lack of jurisdiction of the Minister to enter into a contract, such as in the case at bar, pursuant to the legislation which is in effect from time to time in the Province of British Columbia.
>
> [27] The definition of statutory power is restrictive. None of the language in the definition (a) through (e) in my opinion contemplates quashing of a contract. Section 3 of the *Ministry of Health Act* authorizes the Minister to enter into agreements with any person. It is pursuant to this power that the Minister has acted. The jurisdiction exercised by courts under the *JRPA* is to determine whether or not the body in question has acted within its jurisdiction. The question then may be asked in the case at bar as follows: Did the Minister (Government) have the power to enter into the contract in question? The petitioner's submission is that the contract violates the provisions in the *Medical Health Protection Act* and the *Canada Health Act* and as a result the Minister acted without jurisdiction.
>
> [28] Although it may be submitted that exercising authority to enter into an agreement (contract) pursuant to s. 3 of the *Ministry of Health Act* is the exercise of statutory power, it does not meet the criteria in the definition of that expression in the statute. I accept the submission of the respondent that a decision to negotiate and enter into a contract does not fall within the definition of statutory power. The decision involves consideration of government power regarding government services and government funds. Consequently the petitioner does not come within the provisions of the statute with reference to the relief it seeks and the petition is dismissed.
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> [Emphasis added.]

[46] Notwithstanding his holding that the decision of the Minister of Health to contract with a private entity for the operation and administration of the Health Care Services Plan was not subject to judicial review under the *JRPA*, Justice Melvin considered the substantive issues raised in the petition and ultimately determined that there had been no breach of the provisions of the applicable statutes.

[47] The decision of Justice Melvin was appealed to the Court of Appeal and reasons were rendered (2007 BCCA 379) dismissing the appeal. However, the Court of Appeal did not address the holding of Justice Melvin that the *JRPA* was not applicable.

[48] It is also to be noted that s. 3 of the *Ministry of Health Act*, R.S.B.C. 1996, c. 301, is very similar in effect to s. 3 of the *Transportation Act* in that both grant the respective ministers a general power to enter into contracts. Section 3 of the *Ministry of Health Act* provided:

> 3 The minister may, for the purposes of any Act under the minister's administration, enter into agreements with any person.

[49] *Eagleridge* concerned an application for an injunction to restrain construction of a section of the Sea to Sky Highway. The main issue was whether an environmental assessment certificate issued under the *Environmental Assessment Act*, S.B.C. 2002, c. 43 had been complied with. That issue arose because initially there was to be a single environmental management plan for the entire highway upgrade but the government and contractors later agreed to phased environmental management plans for each section as work progressed. The case is of interest because the agreements under consideration included a contract entered into by the Minister pursuant to s. 3 of the *Transportation Act* and the Attorney General raised the issue of whether a statutory power of decision had been exercised that would support relief under the *JRPA*. At para. 16, the Court of Appeal noted that s. 3 of the *Transportation Act* did not circumscribe the power of the Minister to contract:

> [16] A concession agreement is given statutory recognition by the *Transportation Act* and the *Transportation Investment Act*. Section 3 of the *Transportation Act* authorizes the Minister of Transportation to enter into contracts for transportation-related activity but does not circumscribe the Minister's power to contract. …
>
> [Emphasis added.]

[50] At para. 17, the Court of Appeal held that the "Concession Agreement", the agreement entered into by the Minister pursuant to s. 3 of *Transportation Act*, was an ordinary contract capable of being varied by the parties and immune from objections by third parties:

> [17] The appellants contend that this provision gives a statutory imprimatur to the Concession Agreement and requires Sea to Sky as concessionaire, and by extension Kiewit, to comply with higher highway standards to the extent specified in the Concession Agreement. They argue that the EMP requirement is such a higher standard. The statute, however, does not itself

> set a higher standard but allows the terms of the Concession Agreement to set standards higher than for a comparable public highway. The Concession Agreement is a contract and it is basic contract law that parties to an ordinary contract are free to vary its terms by common agreement and it is not open to third parties to object. There is no suggestion that "standards applicable to a comparable public highway" would be impaired by Phased EMPs and any higher standards are contractual matters not pre-determined by the statute. The parties were free to define those standards in the concession agreement, and under basic contract principles to vary them by common agreement. In our view, there is nothing in the statutory framework surrounding the Concession Agreement that could be seriously argued to preclude the parties' agreement to Phased EMPs.
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> [Emphasis added.]

[51] Finally, at paras. 19 and 20, the Court of Appeal held that the exercise of a power to contract is not the exercise of a statutory power that is amenable to judicial review under the *JRPA*:

> [19] In any event, we do not think that there is a serious argument that any breach of the [environmental assessment certificate] could support a remedy at the initiative of the appellants under the *JRPA*, at least in the absence of an abdication of ministerial jurisdiction amounting to bad faith, which is not alleged by the appellants. Therefore, jurisdiction under the *JRPA* is limited. It is conveniently summarized in the Attorney General's factum, quoting S. Blake, *Administrative Law in Canada* (3rd Ed.) (Markham: Butterworths, 2001), p. 161:
>
> > "Statutory power" is a defined term. It includes powers conferred by or under a statute to make a decision or perform an act that affects a person, to impose requirements on a person, or to make rules. It does not include all powers conferred by or under a statute, such as statutory powers to contract or to manage property. It does not include all actions of government, only those which involve the exercise of a statutory power.
> >
> > …
> >
> > Even then, a statutory power can be challenged [under s. 2(2(b) of the *JRPA*] only if the authorized person exercises the power, refused to exercise it, or proposes or purports to exercise it. A declaration or injunction is not available in respect of a statutory power that merely exists and has a potential to be exercised. It is the exercise or non-exercise of the statutory power that may be challenged, not its existence.
>
> [20] The Agreements involve powers to contract or to manage property not amenable to judicial review. The issuance of the EAC is not impugned and there is no other power of the Minister of the Environment under either the *EAA* or the *Environmental Management Act*, S.B.C. 2003, c. 53 that has been exercised or refused to be exercised, even if we were to overlook the

> absence of any reference to the latter statute in the petitioner's prayer for relief.
>
> [Emphasis added.]

[52] I agree with the respondents and AIRCC that *BCGEU* and *Eagleridge* stand for the proposition that decisions by a minister acting under a general statutory power to contract are not decisions made in the exercise of a statutory power within the meaning of the *JRPA*. I am further of the opinion that this conclusion flows from the definitions in the *JRPA* itself. Notably absent from the definition of "statutory power" in the *JRPA* is any reference to a power or right to make a contract. Also, the definition of "statutory power of decision" does not include either expressly or by implication a power or right to contract. To the contrary, the definition refers to the making of a decision "deciding or prescribing" the enumerated rights, liabilities, and eligibility criteria for benefits. The use of the phrase "deciding and prescribing" implies a unilateral and mandatory decision making process which is very different from the multi-lateral process that is contract negotiation and formation.

[53] However, I do not agree that this means judicial review is completely unavailable and that the entire petition must be struck. Section 2(2)(b) of the *JRPA*, which addresses claims for declaratory and injunctive relief, requires the exercise of a "statutory power" as defined in the *Act*. But, claims for relief in the nature of *certiorari* or *prohibition* are governed by s. 2(2)(a) of the *JRPA* and this subsection does not contain a requirement that there be an exercise of a statutory power as defined. Therefore, only insofar as the petition relies on s. 2(2)(b) is it liable to be struck on the authority of *BCGEU* and *Eagleridge.* The claims for relief in the nature of *certiorari* or *prohibition* are governed by other considerations, including whether public or private law is applicable.

2. Private Law v. Public Law

[54] The respondents submit that the Crown, as a natural person, has the power to enter into contracts, that such contractual decisions are subject to private law and that such private law matters are immune from judicial review except where the

contractual decision is dictated and controlled by a statute, or enactment under a statute.

[55] In *Verreault (J.E.) & Fils Ltée v. Quebec (Attorney General)*, [1977] 1 S.C.R. 41 [*Verreault*], it was held that an agent of the Crown could enter into contracts on behalf of the Crown as a natural person. The issue in the case was the validity of a contract entered into by the Minister of Social Welfare of the Province of Quebec for the construction of a home for the aged. The issue arose because of the existence of an order in council that authorized the Minister to purchase a piece of land for the home but made no reference to the negotiation or entering into of a building contract. The Supreme Court of Canada held that the contract was valid on the basis that the Crown is a natural person with the ability to enter into contracts:

> Her Majesty is clearly a physical person, and I know of no principle on the basis of which the general rules of mandate, including those of apparent mandate, would not be applicable to her. In this respect the position of ministers and other officers of the government is fundamentally different from that of municipal employees. In our system municipalities are the creatures of statute, and the ultra vires doctrine must accordingly be applied in its full rigor. I make this observation as Mr. Dussault cites in a note appended to the above quoted passage, several cases on municipal or school law.

[56] The holding of the case is aptly summarized in the headnote as follows:

> In the absence of any statutory restriction, a contract made by an agent of the Crown acting within the scope of his ostensible authority is a valid contract by the Crown.

[57] I accept that *Verreault* stands for the proposition that the Crown has the ability to enter into contracts separate and apart from any statutory authorization. However, I have difficulty with the second part of the respondents' argument, which is that contractual decisions of public bodies are subject to private law and immune from judicial review except where the contractual decision is dictated and controlled by a statute, or enactment under a statute. This submission is based on an overly restrictive reading of *Canada (Attorney General) v. Mavi*, 2011 SCC 30 [*Mavi*]. *Mavi* concerned whether and to what extent the doctrine of procedural fairness applied to administrative decisions calling upon sponsors of immigrants to satisfy contractual undertakings that had been given. The Attorneys General in the case argued, *inter*

alia, that no duty of procedural fairness existed as the claims against the sponsors were contractual in nature. The Supreme Court of Canada rejected this argument holding that "contracts closely controlled by statute" could be subject to public law:

> 48 *Dunsmuir* dealt with an employment relationship that was found by the Court to be governed by contract. The fact the contracting employee was a senior public servant did not turn a private claim for breach of contract into a public law adjudication. Here, on the other hand, the terms of sponsorship are dictated and controlled by statute. The undertaking is required by statute and reflects terms fixed by the Minister under his or her statutory power. The Attorneys General characterize sponsors as mere contract debtors but even contract debtors are ordinarily entitled to receive notice of a claim and the opportunity to defend against it.
>
> 49 The existence of the undertaking does not extricate the present disputes from their public law context. There is ample precedent for contracts closely controlled by statute to be enforced as a matter of *public* law. In *Rhine v. The Queen,* [1980] 2 S.C.R. 442, for example, the Court dealt with two appeals for breach of contract: the first was a claim to recover an advance payment under the *Prairie Grain Advance Payments Act*, and the second was a government claim to recover principle and interest owing on a student loan made pursuant to the *Canada Student Loans Act*. The defendants took the position that enforcement of a private law contract is a matter of provincial law and thus outside the jurisdiction of the Federal Court. In both appeals, the jurisdictional challenge was rejected. The contracts were creatures of statute. Laskin C.J. noted:
>
> > What we have here is a detailed statutory framework under which advances for prospective grain deliveries are authorized as part of an overall scheme for the marketing of grain produced in Canada. An examination of the *Prairie Grain Advance Payments Act* itself lends emphasis to its place in the overall scheme. True, there is an undertaking or a contractual consequence of the application of the Act but that does not mean that the Act is left behind once the undertaking or contract is made. At every turn, the Act has its impact on the undertaking so as to make it proper to say that there is here existing and valid federal law [i.e. the statute] to govern the transaction which became the subject of litigation in the Federal Court. [p. 447]

[58] In *Ferme Vi-Ber inc. v. Financière agricole du Québec*, [2016] 1 S.C.R. 1032, 2016 SCC 34, the Supreme Court of Canada noted that a contract entered into under a government scheme might be subject to judicial review. A distinction was drawn between a public law scheme, that would attract judicial review, and a merely private law matter that would not attract judicial review. The determination of whether a scheme was subject to public law or private law was said to be "a contextual exercise".

> 44 The ASRA Program can also be distinguished from certain other schemes that are subject to public law rules. One example can be seen in *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, in which the issue was the legal status of an undertaking made by a person sponsoring a relative for immigration purposes to support the sponsored relative and to reimburse the government for any amount received by the latter as social [page1058] assistance. In that case, the sponsor's undertaking was required by statute, and any person wishing to sponsor a relative had to undertake to support the relative (para. 48). This was one reason why this Court found that the undertaking made by sponsors to the government was subject to public law, not to private law (para. 49). In the instant case, in contrast, participation in the ASRA Program is voluntary. As well, in *Mavi*, the undertaking signed by sponsors was incidental to the public law scheme established by the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and had no purpose other than enabling relatives to immigrate as members of the family class under that public law scheme. The ASRA Program is not incidental to any statutory public law scheme.
>
> 45 Thus, the ASRA Program is not a public law scheme but a contract. In reaching this conclusion, we wish to be clear that our reasons relate only to the scheme under consideration in this case. <u>The determination of whether a scheme falls primarily under public law or under private law is a contextual exercise from which no extrapolation is possible. In other circumstances, it will, for example, be possible to hold, as in *Mavi*, that a contract entered into under a governmental scheme can be subject primarily, or even exclusively, to public law</u>.
>
> [Emphasis added.]

[59] In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018] 1 S.C.R. 750, 2018 SCC 26, the Supreme Court of Canada noted that not all decisions by government are subject to public law and judicial review and specifically referred to some contractual decisions as being matters not subject to judicial review. Importantly, however, the Court accepted that some contractual decisions would be subject to judicial review if "of a sufficiently public character" or if the decision involved "a power central to the administrative mandate given to it by Parliament":

> 14 <u>Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character</u>. Even public bodies make some decisions that are private in nature — such as renting premises and hiring staff — and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. <u>In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power</u>

> (*ibid.*). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.
>
> [Emphasis added.]

[60] In *Irving Shipbuilding Inc. v. Canada (Attorney General) (F.C.A.)*, [2010] 2 F.C.R. 488, 2009 FCA 116 [*Irving*], the Federal Court of Appeal also noted that decisions of a minister to enter into contracts might, in some circumstances, raise public law issues and be subject to judicial review. *Irving* concerned a challenge to the process involved in the awarding of government procurement contracts relating to submarines:

> 21 The fact that the power of the Minister, a public official, to award the contract is statutory, and that this large contract for the maintenance and servicing of the Canadian Navy's submarines is a matter of public interest, indicate that it can be the subject of an application for judicial review under section 18.1 [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27], a public law proceeding to challenge the exercise of public power. However, the fact that the Minister's broad statutory power is a delegation of the contractual capacity of the Crown as a corporation sole, and that its exercise by the Minister involves considerable discretion and is governed in large part by the private law of contract, may limit the circumstances in which the Court should grant relief on an application for judicial review challenging the legality of the award of a contract.
>
> 22 This Court reached a similar conclusion in *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694 (C.A.) (*Gestion Complexe*), at paragraphs 7–17. The Court held that the exercise by a Minister of a statutory power to call for tenders and to enter into contracts for the lease of land by the Crown could be the subject of judicial review under the former paragraph 18(1)(a) [as am. by S.C. 1990, c. 8, s. 4] of the *Federal Court Act* [R.S.C., 1985, c. F-7] as a decision of "a federal board, commission or other tribunal".
>
> 23 Although not addressing the particular issue in dispute in the present case, Justice Décary, writing for the Court, also emphasized the difficulties facing an applicant in establishing a ground of review that would warrant the Court's intervention in the procurement process through its judicial review jurisdiction. Thus, he said (at paragraph 20):
>
> > As by definition the focus of judicial review is on the legality of the federal government's actions, and the tendering procedure was not subject to any legislative or regulatory requirements as to form or substance, it will not be easy, in a situation where the bid documents do not impose strict limitations on the exercise by the Minister of his freedom of choice, to show the nature of the illegality committed by the Minister when in the normal course of events he compares the bids received, decides whether a bid is consistent with the documents or accepts one bid rather than another.

> 24 This view of the Court's jurisdiction is consistent with that generally adopted by other courts in Canada: see Paul Emanuelli, *Government Procurement*, 2nd ed. (Markham, Ont.: LexisNexis, 2008), at pages 697–706, who concludes (at page 698):
>
> > As a general rule, the closer the connection between a procurement process and the exercise of a statutory power, the greater the likelihood that the activity can be subject to judicial review. Conversely, to the extent that the procurement falls outside the scope of a statutory power and within the exercise of government's residual executive power, the less likely that the procurement will be subject to judicial review.
>
> English authorities on public contracts and judicial review are considered in Lord Woolf, Jeffrey Jowell and Andrew Le Sueur, *De Smith's Judicial Review*, 6th ed. (London: Sweet & Maxwell, 2007), at pages 138–145. Courts generally require an "additional public element" before concluding that the exercise by a public authority of its contractual power is subject to judicial review, even when the power is statutory.
>
> 25 Consequently, on the basis of both authority and principle, I agree that the award of the submarine contract by the Minister of PWGSC is reviewable under section 18.1 of the *Federal Courts Act* as a decision of a "federal board, commission or other tribunal" made in the exercise of "powers conferred by or under an Act of Parliament" (section 2).
>
> [Emphasis added.]

[61] The decision of the Federal Court of Appeal in *Air Canada v. Toronto Port Authority et al*, [2013] 3 F.C.R. 605, 2011 FCA 347, is also relevant. That decision addressed the public-private distinction and the factors to be taken into account in determining whether judicial review is available.

> [60] In determining the public-private issue, all of the circumstances must be weighed: *Cairns v. Farm Credit Corp.*, [1992] 2 F.C. 115 (T.D.); *Jackson v. Canada (Attorney General)* (1997), 7 Admin. L.R. (3d) 138 (F.C.T.D.). There are a number of relevant factors relevant to the determination whether a matter is coloured with a public element, flavour or character sufficient to bring it within the purview of public law. Whether or not any one factor or a combination of particular factors tips the balance and makes a matter "public" depends on the facts of the case and the overall impression registered upon the Court. Some of the relevant factors disclosed by the cases are as follows:
>
> > * The character of the matter for which review is sought. Is it a private, commercial matter, or is it of broader import to members of the public? See DRL Vacations Ltd. v. Halifax Port Authority, above; Peace Hills Trust Co. v. Saulteaux First Nation, 2005 FC 1364, 281 F.T.R. 201, at paragraph 61 "administrative law principles should not be applied to the resolution of what is, essentially, a matter of private commercial law".

* The nature of the decision maker and its responsibilities. Is the decision maker public in nature, such as a Crown agent or a statutorily recognized administrative body, and charged with public responsibilities? Is the matter under review closely related to those responsibilities?

* The extent to which a decision is founded in and shaped by law as opposed to private discretion. If the particular decision is authorized by or emanates directly from a public source of law such as statute, regulation or order, a court will be more willing to find that the matter is public: Mavi, above; Scheerer v. Waldbillig, [2006] 265 D.L.R. (4th) 749 (Ont. Div. Ct.); Aeric, Inc. v. Chairman of the Board of Directors, Canada Post Corporation, [1985] 1 F.C. 127 (C.A.). This is all the more the case if that public source of law supplies the criteria upon which the decision is made: Scheerer v. Waldbillig, above, at paragraph 19; R. v. Hampshire Farmer's Markets Ltd., [2004] 1 W.L.R. 233 (C.A.), at page 240, cited with approval in McDonald v. Anishinabek Police Service, [2006] 83 O.R. (3d) 132 (Div. Ct.). Matters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside of the ambit of judicial review: Irving Shipbuilding Inc., above; Devil's Gap Cottagers (1982) Ltd. v. Rat Portage Band No. 38B, 2008 FC 812, [2009] 2 F.C.R. 276, at paragraphs 45-46.

* The body's relationship to other statutory schemes or other parts of government. If the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter: Onuschak v. Canadian Society of Immigration, 2009 FC 1135, 3 Admin. L.R. (5th) 214, at paragraph 23; Certified General Accountants Association of Canada v. Canadian Public Accountability Board, [2008] 77 Admin. L.R. (4th) 262 (Ont. Div. Ct.); Regina v. Panel on Take-overs and Mergers; Ex parte Datafin Plc., [1987] Q.B. 815 (C.A.); Volker Stevin N.W.T. ('92) Ltd. v. Northwest [page630] Territories (Commissioner), [1994] N.W.T.R. 97 (C.A.); R. v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan, [1993] 2 All E.R. 853 (C.A.), at page 874; R. v. Hampshire Farmer's Markets Ltd., above, at page 240. Mere mention in a statute, without more, may not be enough: Ripley v. Investment Dealers Association of Canada, [1990] 99 N.S.R. (2d) 338 (S.C.).

* The extent to which a decision maker is an agent of government or is directed, controlled or significantly influenced by a public entity. For example, private persons retained by government to conduct an investigation into whether a public official misconducted himself may be regarded as exercising an authority that is public in nature: Masters v. Ontario (1993), 16 O.R. (3d) 439 (Div. Ct.). A requirement that policies, by-laws or other matters be approved or reviewed by government may be relevant: Aeric, above; Canadian Centre for Ethics in Sport v. Russell, 2007 CanLII 20978 (Ont. S.C.).

* The suitability of public law remedies. If the nature of the matter is such that public law remedies would be useful, courts are more

> inclined to regard it as public in nature: Dunsmuir, above; Irving Shipbuilding, above, at paragraphs 51-54.
>
> * The existence of compulsory power. The existence of compulsory power over the public at large or over a defined group, such as a profession, may be an indicator that the decision is public in nature. This is to be contrasted with situations where parties consensually submit to jurisdiction. See Chyz v. Appraisal Institute of Canada (1984), 36 Sask. R. 266 (Q.B.); Volker Stevin, above; Datafin, above.
>
> * An "exceptional" category of cases where the conduct has attained a serious public dimension. Where a matter has a very serious, exceptional effect on the rights or [page631] interests of a broad segment of the public, it may be reviewable: Aga Khan, above, at pages 867 and 873; see also Paul Craig, "Public Law and Control Over Private Power" in Michael Taggart, ed., The Province of Administrative Law (Oxford: Hart Publishing, 1997), at page 196. This may include cases where the existence of fraud, bribery, corruption or a human rights violation transforms the matter from one of private significance to one of great public moment: Irving Shipbuilding, above, at paragraphs 61-62.
>
> [Emphasis added.]

[62] The above authorities establish that the exercise of a power to contract by a Minister of the Crown can be either a private law matter, immune from judicial review, or a public law matter that is subject to judicial review. More specifically, for a contractual decision to be a public law matter subject to judicial review there must be an “additional public element” or it must be “of a sufficiently public character”. This requires a full consideration of the contract and the circumstances of the exercise of the power.

[63] For the purposes of the applications before me, I need only determine whether it is arguable the petition discloses a sufficient “additional public element” to make this a matter of public law subject to judicial review. In my view, this part of the petition is arguable. The factors that lead me to this conclusion, following the outline from *Air Canada,* are:

a) The impugned decision is of broad import to the general public. This is so because of the size of the projects affected, the fact that they are public projects, and because of the allegation that the Building Trades Only

Requirement is being imposed for an improper purpose, including, to benefit the supporters of the current government;

b) The decision maker is the Minister who is charged with public responsibilities relating to public transportation projects and the impugned decision is closely aligned with those public responsibilities;

c) The authority of the Minister to make the impugned decision is largely authorized by s. 3 of the *Transportation Act*, a public statute;

d) The Minister is more than just an agent of the government, he is a Minister of the Crown;

e) The matters raised by the petition are arguably suitable for public law remedies such as *certiorari* or *prohibition*;

f) The impugned decision is in the nature of the exercise of a compulsory power in the sense that the parties affected by it have no real choice but to comply with it;

g) The impugned decision affects the rights and interests of workers and contractors, most of whom have no affiliation or relationship with the Building Trades Unions; and

h) The impugned decision also affects the general public, given the allegations that the Building Trades Only Requirement was imposed for an improper purpose.

C. Conclusions on the Availability of Judicial Review

[64] Therefore, my conclusions on the availability of judicial review are:

a) The claims for injunctive and declaratory relief under s. 2(2)(b) of the *JRPA*, are not available and must be struck as it is plain and obvious the impugned decision of the Minister to impose the Building Trades Only

Requirement is not the exercise of a statutory power as defined in the *JRPA*; and

b) The claims for relief in the nature of certiorari and prohibition are not liable to be struck as it is not plain and obvious they are bound to fail. It is at least arguable that there is a sufficient public element making the impugned decision of the Minister to impose the Building Trades Only Requirement a matter of public law and therefore subject to judicial review.

[65] Accordingly, the application to strike the petition under R. 9-5(1)(a) is allowed only in respect of the claims for injunctive and declaratory relief.

VII. DOES THE LABOUR RELATIONS BOARD HAVE JURISDICTION?

[66] The second issue concerns whether the Labour Relations Board (the "LRB") has jurisdiction over some or all of the relief requested in the petition. There is a difference between the application of the respondents and the application of AIRCC on this issue. The application by AIRCC is for an order staying or striking the entire petition on the basis that the subject matter is within the exclusive jurisdiction of the LRB. The application of the respondents in relation to jurisdiction is more limited. The respondents seek only to strike the *Charter* claims in the petition on the grounds that those claims are within the jurisdiction of the LRB.

A. Applicable Law

1. The *Labour Relations Code*

[67] The analysis of this issue begins with a consideration of the relevant sections of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [*Code*]. Section 136 provides that the LRB has and must exercise exclusive jurisdiction in relation to any matter in respect of which it is given jurisdiction under the *Code:*

> 136 (1) Except as provided in this Code, the board has and must exercise exclusive jurisdiction to hear and determine an application or complaint under this Code and to make an order permitted to be made.

> (2) Without limiting subsection (1), the board has and must exercise exclusive jurisdiction in respect of
>
> > (a) a matter in respect of which the board has jurisdiction under this Code, and
> >
> > (b) an application for the regulation, restraint or prohibition of a person or group of persons from
> >
> > > (i) ceasing or refusing to perform work or to remain in a relationship of employment,
> > >
> > > (ii) picketing, striking or locking out, or
> > >
> > > (iii) communicating information or opinion in a labour dispute by speech, writing or other means.

[68] A non-exhaustive list of matters over which the LRB has exclusive jurisdiction is contained in s. 139 of the *Code*. These include: whether a person is an employer, whether a collective agreement has been entered into, the parties to a collective agreement, the persons bound by a collective agreement, and whether a person is included or excluded from a bargaining unit:

> 139 The board has exclusive jurisdiction to decide a question arising under this Code and on application by any person or on its own motion may decide for all purposes of this Code any question, including, without limitation, any question as to whether
>
> > (a) a person is an employer or employee,
> >
> > (b) an organization or association is an employers' organization or a trade union,
> >
> > (c) a collective agreement has been entered into,
> >
> > (d) a person is or what persons are bound by a collective agreement,
> >
> > (e) a person is or what persons are parties to a collective agreement,
> >
> > (f) a collective agreement has been entered into on behalf of a person,
> >
> > (g) a collective agreement is in full force and effect,
> >
> > (h) a person is bargaining collectively or has bargained collectively in good faith,
> >
> > (i) an employee or a group of employees is a unit appropriate for collective bargaining,
> >
> > (j) an employee belongs to a craft or group exercising technical or professional skills,
> >
> > (k) a person is a member in good standing of a trade union,
> >
> > (l) a person is included in or excluded from an appropriate bargaining unit,

> (m) an employer is included in or excluded from an accreditation,
>
> (n) a person is a dependent contractor,
>
> (o) an organization of trade unions is a council of trade unions,
>
> (p) a service is essential for the purposes of Part 6,
>
> (q) a person is described in section 68 (1),
>
> (r) a trade union, council of trade unions or employers' organization is fulfilling a duty of fair representation,
>
> (s) a site or place is a site or place of business, operations or employment of an employer,
>
> (t) a person is an ally,
>
> (u) a person is a professional,
>
> (v) a person exercises technical or professional skills, and
>
> (w) an activity constitutes a strike, lockout or picketing.

[69] The jurisdiction of this Court over matters that are within the jurisdiction of the LRB is expressly limited by s. 137 of the *Code*:

> 137 (1) Except as provided in this section, a court does not have and must not exercise any jurisdiction in respect of a matter that is, or may be, the subject of a complaint under section 133 or a matter referred to in section 136, and, without limitation, a court must not make an order enjoining or prohibiting an act or thing in respect of them.
>
> (2) This Code must not be construed to restrict or limit the jurisdiction of a court, or to deprive a court of jurisdiction to entertain a proceeding and make an order the court may make in the proper exercise of its jurisdiction if a wrongful act or omission in respect of which a proceeding is commenced causes immediate danger of serious injury to an individual or causes actual obstruction or physical damage to property.
>
> (3) Despite this Code or any other Act, a court must not, on an application made without notice to any other person, order an injunction to restrain a person from striking, locking out or picketing, or from doing an act or thing in respect of a strike, lockout, dispute or difference arising from or relating to a collective agreement.
>
> (4) A court of competent jurisdiction may award damages for injury or losses suffered as a consequence of conduct contravening Part 5 if the board has first determined that there has been a contravention of Part 5.

[70] Section 138 of the *Code* provides that a decision or order of the LRB is final and conclusive:

> 138 A decision or order of the board under this Code or a collective agreement on a matter in respect of which the board has jurisdiction is final

> and conclusive and is not open to question or review in a court on any grounds.

[71] Finally, pursuant to the combined effect of s. 115.1 of the Code, ss. 1 and 43 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*], and s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, the LRB also has jurisdiction to determine *Charter* issues. Section 115.1 of the *Code* provides that s. 43 of the *ATA* applies to the LRB. Section 43(1) of the *ATA* specifically provides that administrative tribunals, and hence the LRB, have jurisdiction to determine constitutional questions:

> 43 (1) The tribunal has jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions.

A "constitutional question" is defined in s. 1 of the *ATA* as "any question that requires notice to be given under s. 8 of the *Constitutional Question Act".* Section 8 of the *Constitutional Question Act*, requires that such notice be given whenever a "constitutional remedy" is requested and defines "constitutional remedy" as a remedy under s. 24(1) of the *Charter*. Hence, the net effect of the various provisions is to give the LRB jurisdiction to determine *Charter* issues.

2. Case Law

[72] *Columbia Hydro Constructors and Allied Hydro Council of B.C.,* BCLRB No. B36/94, 22 CLRBR (2d) 161 [*Columbia Hydro*] and *JJM Construction Ltd. and B.C. Transportation Financing Authority*, BCLRB No. B16/96, 29 CLRBR (2d) 266 [*JJM*], are two decisions by the LRB that concerned large construction projects arranged using a model similar to the one with which I am concerned. More specifically, for the projects under consideration in those cases a single employer was designated and workers were required to join particular unions. These arrangements were unsuccessfully challenged before the LRB, including by some of the petitioners in this matter.

[73] It is noteworthy that one of the issues in *JJM* was whether the agreements had been entered into for an improper purpose, an issue which was rejected by the LRB at para. 149:

> 149 We have considered the argument that the challenged arrangements were entered into for an improper purpose – namely, to circumvent existing collective bargaining rights of contractors and non-affiliated trade unions, and to ensure that work on the Vancouver Island Highway Project is only carried out by member of the Building Trades unions. Regardless of whether this allegation is true, we have found that it is not improper in the sense of constituting anti-union *animus* or bad faith. Owners are entitled under the Code to structure their projects to either exclude non-Building Trades unions, or to give non-Building Trades contractors a limited opportunity to participate (and conversely, it must follow that owners may conceivably structure projects on a non-union or non-Building Trades union basis)…

[74] It is also noteworthy that in *Columbia Hydro*, one of the complaints was that the agreements forced workers to join the designated unions and that this was an unfair labour practice, a complaint which was rejected by the LRB.

[75] *Columbia Hydro* and *JJM* are indicative that the LRB has taken jurisdiction in relation to matters similar to the one before me but they are not conclusive of the jurisdiction issue and *Charter* issues were not considered in either decision.

[76] *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, is the leading case on the jurisdiction of a labour relations board, tribunal or arbitrator and specifically considered whether a labour tribunal could provide *Charter* remedies. Justice McLachlin (as she then was), writing for the majority, held that such remedies are within the exclusive jurisdiction of a labour arbitrator provided the applicable statute empowers the arbitrator to hear the dispute and grant the remedies claimed and the essential character of the dispute arises from the collective agreement:

> 67. I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario Labour Relations Act generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. <u>The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to Charter remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed.</u> The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal. Against this background, I turn to the facts in the case at bar.
>
> [Emphasis added.]

[77] At para. 52, McLachlin J. elaborated on what is required to determine the "essential character" of the dispute:

> 52. In considering the dispute, the decision-maker must attempt to define its "essential character", to use the phrase of La Forest J.A. in Energy & Chemical Workers Union, Local 691 v. Irving Oil Ltd. (1983), 148 D.L.R. (3d) 398 (N.B.C.A.). The fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement may occur off the workplace and conversely, not everything that happens on the workplace may arise from the collective agreement: Energy & Chemical Workers Union, supra, per La Forest J.A. Sometimes the time when the claim originated may be important, as in Wainwright v. Vancouver Shipyards Co. (1987), , 38 D.L.R. (4th) 760 (B.C.C.A.), where it was held that the court had jurisdiction over contracts pre-dating the collective agreement. See also Johnston v. Dresser Industries Canada Ltd. (1990), 75 O.R. (2d) 609 (C.A.). In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less than obvious. <u>The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.</u>
>
> [Emphasis added.]

[78] Further, at para. 54, McLachlin J., clarified that the courts retained a residual jurisdiction in some cases:

> 54. This approach does not preclude all actions in the courts between employer and employee. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts: Elliott v. De Havilland Aircraft Co. of Canada Ltd. (1989), 32 O.A.C. 250 (Div. Ct.), at p. 258, per Osler J.; Butt v. United Steelworkers of America, supra; Bourne v. Otis Elevator Co., supra, at p. 326. Additionally, the courts possess residual jurisdiction based on their special powers, as discussed by Estey J. in St. Anne Nackawic, supra.

[79] I have been referred to several other cases in relation to jurisdiction that I find to not be particularly helpful except to the extent that they adopt the *Weber* test. These cases include: *Blanco-Arriba v. British Columbia,* 2001 BCSC 1557 (a case involving whether the discipline and termination of an employee was within the jurisdiction of the LRB or the courts); *Paramedical Professional Bargaining Association v. Health Employers Association of British Columbia*, 2003 BCSC 1908 affd. 2005 BCCA 42 (where it was held the LRB had exclusive jurisdiction to determine whether an employers' association had acted in bad faith by secretly

negotiating with the government); *Gateway Casinos LP v. B.C. Government and Service Employees' Union*, 2008 BCSC 821 (a case involving allegations of trespass for purposes of union certification); *Bakaluk et al v. Western Star Trucks Inc. et al.,* 2004 BCSC 417 (where a breach of the duty of fair representation was found to be within the exclusive jurisdiction of the LRB); and *Aramark Canada Facility Services Ltd. v. Hospital Employees' Union,* BCLRB No. B 173/2004 (where the LRB adjudicated a claim involving a voluntary recognition agreement).

[80] Of particular relevance to the issues raised in the applications before me is the decision in *Millen v. Hydro-Electric Board (Man)*, 2015 MBQB 91, affd. 2016 MBCA 56. The facts in *Millen* bear a strong similarity to the facts in the matter before me. As in the matter before, the tender documents in *Millen* required contractors to agree to be bound by one of two pre-arranged collective agreements. Further, as in the matter before me, the effect of the tender documents and the collective agreements was to require workers to join and pay dues to one of the unions. These facts are set out in para. 2 of the chambers judgment:

> [2] The two collective agreements that are the subject of the claim are the Burntwood Nelson Agreement (the "BNA"), which covers all major hydro-electric construction projects in northern Manitoba, and the Manitoba Hydro Contracted Transmission Line Collective Agreement (the "TLA"), which covers the proposed Bipole III project. That project will create a transmission line spanning 1,300 kilometres from northern Manitoba to southern Manitoba. Both agreements contain clauses which require individuals who work on the projects to join, and pay dues to, one of the unions that is a party to the agreement. Under the BNA, those unions are members of the Allied Hydro Council, which is named as a defendant. Under the TLA, individuals who work on the Bipole III project will be required to join either the International Brotherhood of Electrical Workers, Local 2034, or the International Union of Operating Engineers, Local 987, which are also named as defendants. The tender documents for the Bipole III project and projects covered by the BNA require contractors to agree to be bound by the TLA or BNA.
>
> [Emphasis added.]

[81] The plaintiffs in *Millen* challenged the collective agreements and the tender documents, *inter alia*, as being contrary to s. 2(b) (freedom of expression) and s. 2(d) (freedom of association) of the *Charter*, the same *Charter* sections as relied upon by the petitioners before me:

> 6 The plaintiffs say that the provisions of the collective agreements that create union shops and impose compulsory union dues on employees ("check-off") infringe s. 2(b) (freedom of expression) and s. 2(d) (freedom of association) of the *Canadian Charter of Rights and Freedoms* and cannot be justified under s. 1 of the *Charter*. They seek a declaration that those provisions, and the corresponding condition in Manitoba Hydro's tender documents that require those awarded contracts to sign on to the collective agreements, are of no force and effect.
>
> 7 The plaintiffs also seek a declaration that s. 76 of *The Labour Relations Act*, C.C.S.M. c. L10 (the "*LRA*"), which provides that all collective agreements must contain a compulsory check-off clause, does not require employees to pay dues to a union that has not been chosen to represent them according to the procedure stipulated by the *LRA*. Alternatively, they seek a declaration that if s. 76 is read to apply in such circumstances, the section infringes s. 2(b) and s. 2(d) of the *Charter*.
>
> 8 While the statement of claim seeks declarations of invalidity with respect to the union shop and check-off requirements contained in the two collective agreements and the *LRA*, the plaintiffs describe their claim as a "free-standing" *Charter* challenge to the government policy that underlies those provisions.

[82] The chambers judge applied the *Weber* test and held that the claims advanced by the plaintiff fell within the exclusive jurisdiction of the arbitrator. In doing so she rejected the attempts of the plaintiff to characterize the claim as one of government policy.

> [23] As I said, the key question in determining whether an arbitrator under the agreements has exclusive jurisdiction to hear the dispute is to determine the essential character of the dispute. Do the issues raised by the plaintiffs' claim arise under the collective agreements either explicitly or implicitly?
>
> [24] The plaintiffs argue that the essence of the dispute has nothing to do with the meaning or application of clauses in the agreements. They say that their claim is a "free standing" *Charter* challenge to the validity of the government policy to impose union shops in all major hydro projects. It is difficult to understand this argument in view of the fact that the relief claimed by the plaintiffs is directed at specific clauses of the agreements. They seek declarations that the requirements, found in specific clauses of the BNA and TLA, that employees join specified unions and pay union dues violate ss. 2(b) and 2(d) of the *Charter*. That argument necessarily involves interpreting the clauses of the agreement in light of the *Charter* and determining whether they are constitutionally applicable to the plaintiffs. It is precisely the type of issue that falls within the exclusive jurisdiction of an arbitrator under the Weber analysis.
>
> [25] While the plaintiffs seek to characterize their claim as one directed at a government policy, if there is a government policy in issue, it is a policy that

> is implemented through the terms of the collective agreements. As I said in my reasons on an earlier motion in this action:
>
> > 24 While the proposed amendments refer to the claim as a "free-standing *Charter* challenge of a government policy", it seems that the choice of the words "free-standing" was ill-advised. When one looks to the relief claimed, it is clear that the challenge is not a challenge to a policy simpliciter but a challenge to the policy as manifested in the two agreements and the tender conditions. And the policy can only be understood in that context…
>
> [Emphasis added.]

[83] The chambers judge in *Millen* expressly held that the issues raised in the claim fell within s. 142 of the Manitoba equivalent of the *Code*:

> [47] The defendants say that the essential character of the plaintiffs' claim falls within the exclusive jurisdiction of the Labour Board under subsections (d), (e), (j) and (k) of s. 142(5). I agree that the issues raised by the claim implicitly ask whether the plaintiffs are included in the bargaining unit (s. 142(5)(d)); whether the plaintiffs are bound by the collective agreements (s. 142(5)(e)); whether the plaintiffs are required to become members of the unions (s. 142(5)(j)); and whether the impugned provisions of the collective agreements are valid conditions of employment (s. 142(5)(k)).

[84] A potentially distinguishing feature of *Millen* is that the pleading in that case did not involve a challenge to the exercise of a power under a statute whereas the petition before me does include such a challenge. This is referred to in para. 55 of the chamber judge's reasons and is a matter that I will return to:

> [55] In supplemental argument, the plaintiffs submit, based on the decision of the Alberta Labour Relations Board in *Northern Alberta Institute of Technology (Re)*, [2011] Alta. L.R.B.R. LD-041, [2011] A.L.R.B.D. No. 56 (QL), that the Manitoba Labour Board cannot consider the constitutionality of a provision of a statute other than its enabling statute. They say that, as their claim involves a challenge to the exercise of power under *The Manitoba Hydro Act***,** C.C.S.M. c. H190, the statute which provides Hydro's authority for entering into contracts, the Board cannot entertain the issues raised in their claim. The short answer to this submission is that nowhere in the statement of claim is there any suggestion that the plaintiffs are challenging the provisions of *The Manitoba Hydro Act*. While the claim specifically pleads and relies on s. 76 of the *LRA* and asks for a declaration of invalidity of that section (if it is found to authorize the impugned provisions of the BNA and TLA), no similar claim is made with respect to the provisions of *The Manitoba Hydro Act*.

[85] The chambers decision in *Millen* was appealed. At paras 17 through 20 of the judgement of the Manitoba Court of Appeal the analytical steps are set out. The first step involves identifying the essential character of the dispute. The second step involves whether the dispute falls within the jurisdiction granted to the tribunal:

> [17] Whether a matter falls within the jurisdiction of a court or within the jurisdiction of an administrative tribunal is governed by the principles set out by the Supreme Court of Canada in *Weber v. Ontario Hydro*, [1995] 2 SCR 929, and the subsequent jurisprudence. See also *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 SCR 666; and *Tomchuk v University of Winnipeg Faculty Association*, 2008 MBQB 168, 229 ManR (2d) 298.
>
> [18] The motion judge correctly summarized the law on this point.
>
> [19] In order to determine whether the dispute arises out of the collective agreements or the exclusive jurisdiction of the statutory tribunal such that the court lacks jurisdiction to hear and resolve the dispute, a two-step process must be undertaken. The first step involves identifying the essential character of the dispute, taking into account all of the surrounding facts and circumstances. The legal character of the issue or the way in which the parties have framed the pleadings are not determinative of the essential character of the dispute for these purposes.
>
> [20] Where the alternative jurisdiction is a statutory tribunal, the second step is to determine whether that dispute, defined by its factual nature, falls either expressly or implicitly within the ambit of the issues designated by the statute to be decided by the statutory tribunal. Lastly, the court must consider whether the tribunal's mechanisms provide the claimant with an effective remedy.

[86] At paras. 23 and 24, the Manitoba Court of Appeal rejected the attempt by the plaintiffs to focus on the tender documents and to characterize the complaint as a challenge to government action:

> [23] The plaintiffs focus on the tender documents that require the successful bidders to require their employees to join certain unions and pay union dues. They argue that such requirements are contrary to the Charter guarantees of freedom of association (sections 2(b) and 2(d)) and are not saved by section 1 of the *Charter*. <u>They argue that this is a "stand–alone" constitutional challenge to government action. It is the governmental policy to impose union shops in all major Hydro projects which is being challenged.</u>
>
> [24] Yet, the conditions of employment with which the plaintiffs take exception are implemented, not by the tendering requirements, but by the provisions of the collective agreements as negotiated and amended from time to time.
>
> [Emphasis added.]

[87] At para. 28, the Manitoba Court of Appeal confirmed the chambers judge's holding that the essential character of the dispute was in relation to the collective agreements:

> [28] A further examination of the re-amended statement of claim confirms the motion judge's conclusion as to the essential character of the dispute. It is clear from the pleadings that it is not the tendering requirements, but the content of the collective agreements, that forms the essential character of the dispute. The re-amended statement of claim is fundamentally focussed on the collective agreement terms and the collective bargaining environment, not the tender conditions imposed as a policy of the Government of Manitoba and Hydro. The plaintiffs have named the defendant unions as parties to the action and they request *Charter* remedies against all defendants. The tender conditions in question are pled as directly linked to the collective agreements. The plaintiffs have pled that the requirement to join a union and pay dues originates in the collective agreements.

[88] Finally, at paras. 31 and 33, the Manitoba Court of Appeal held that, in the circumstances of that case, the Board had jurisdiction:

> [31] It is clear from the language of the *Act* in section 142(5) that the Board does have jurisdiction over these questions. The section grants the Board broad jurisdiction to determine any question for the purposes of the *Act*. The essential character of the claim, in which the plaintiffs object to collective agreement terms requiring employees to join a union and pay union dues, arises implicitly, if not expressly, out of the questions relating to the *Act* as set out in section 142(5). The claim implicitly, if not expressly, raises questions about whether the plaintiffs are included in the bargaining units created by the collective agreements in light of the *Charter* issues they raise (section 142(5)(d)); which employers ought to be considered bound by the collective agreements (section 142(5)(e)); on whose behalf do the unions enter into the collective agreements, in light of the *Charter* issues they raise (section 142(5)(e)); are the individual plaintiffs required to be members of a union, in light of the *Charter* issues they raise (section 142(5)(j)); and are the collective agreement articles in question valid in terms and conditions of employment, in light of the *Charter* issues raised (section 142(5)(k))?
>
> …
>
> [33] The characterization of the dispute, as articulated by the plaintiffs themselves in their re-amended statement of claim, clearly demonstrates that it arises out of the collective agreements, the *Act* and its interpretation, and issues deeply rooted in labour relations, all of which fall within the purview of the Board and which that entity is specifically authorized to adjudicate.

B. Discussion

[89] The first step of the two part test from *Weber* is whether the essential character of the dispute is in relation to the interpretation, application, administration or violation of a collective agreement. The respondents and AIRCC submit that the essence of the complaints in the petition is in relation to such matters. They characterize the claims in the petition as: who the true employer is, what the appropriate bargaining unit should be, whether those employees are bound by the CBA, and whether the collective agreement complies with the *Charter*. The respondents say that all of these issues are within the exclusive jurisdiction of the LRB as was held in *Millen*.

[90] The petitioners, on the other hand, forcefully submit that the petition challenges only the exercise of a statutory power under the *Transportation Act* and does not challenge or invoke the CBA or any other *Code* issues. The essence of the claim, they say, is whether the Minister can legally impose a particular employment model that results in contractors having to obtain their workforce from BCIB and workers having to join particular unions. The petitioners submit that the authorities to which I have been referred all concerned challenges to collective agreements and are not applicable. The petitioners therefore submit that *Millen* is distinguishable because it did not concern a challenge to a statutory power exercised under a statute other than a labour relations act. They refer to para. 55 of the reasons of the chambers judge where she expressly refused to consider whether the claim involved a challenge to the exercise of power under *The Manitoba Hydro Act***,** C.C.S.M. c. H190, because it was not pleaded.

[91] I agree with the petitioners that *Millen* did not involve a consideration of whether or to what extent a labour relations board could decide a challenge to a statutory power exercised under a statute other than a labour relations act. However, this does not mean that *Millen* should be completely disregarded. I say this, for several reasons. First, the issue of whether the LRB has jurisdiction over the exercise of a statutory power under a statute other than a labour relations act is something that is more properly addressed in the second part of the *Weber* test, as

I will do. Second, *Millen* did consider submissions that the challenge was to government action or government policy, which is, in essence, what the petitioners are saying and doing in this matter. Finally, and importantly, it has been repeatedly held that the essential character of a dispute is not to be determined by how a party frames its pleadings. This is clearly set out in *Weber* at para. 43:

> 43 Underlying both the Court of Appeal and Supreme Court of Canada decisions in St. Anne Nackawic is the insistence that the analysis of whether a matter falls within the exclusive arbitration clause must proceed on the basis of the facts surrounding the dispute between the parties, not on the basis of the legal issues which may be framed. The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one "arising under [the] collective agreement". Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it.
>
> [Emphasis in original.]

[92] The petitioners are, in my opinion, asking me to characterize the dispute based on how they have legally defined the issue rather than based on the facts of the dispute. The petitioners are saying that the essential character of the dispute is a challenge to the imposition of the Building Trades Only Requirement under the *Transportation Act* because that is how they have pleaded it. I do not agree.

[93] I accept *Millen* as a highly persuasive authority establishing that the LRB has jurisdiction over the issues raised in this petition except the claims for *certiorari* and *prohibition*, which I address below.

[94] In any event, I am of the view that the essence or essential character of the dispute is the requirement that workers on the Replacement Project, and other construction projects, join and pay dues to unions affiliated with AIRCC. This is the main complaint in the petition and I have no doubt that if this requirement did not exist there would be no petition. That this is the essence or essential character of the dispute is especially apparent from the specific allegations in the petition concerning the alleged breaches of *Charter* rights in paras. 165, 168, 172, 183, 185, and 201, which provide as follows:

> 165. As set out in the following sections, the Building Trades Only Requirement infringes the section 2(b) and 2(d) *Charter* rights of employees who are forced to join the Building Trades Unions as a condition of working on public construction projects.
>
> …
>
> 168. And even if the Building Trades Only Employment Requirement served a valid statutory purpose, which is denied, it does not appropriately balance the sections 2(b) and 2(d) *Charter* rights of construction workers or infringe those rights as little as possible given any valid government interest, and hence the imposition of the requirement is an unreasonable, disproportionate and unlawful exercise of the statutory power.
>
> …
>
> 172. The Building Trades Only Requirement additionally infringes the freedom of expression of the construction workers because of the support and expenditure of dues monies by the Building Trades Union for political parties, policies and causes that they may not support.
>
> …
>
> 183. In return for the financial and political support of the Building Trades, the Ministry has implemented a Building Trades Only Requirement on the Project, which breaches the right of construction workers not to associate with the Building Trades Unions outside of an established collective bargaining relationship between a contractor and the Building Trades Unions.
>
> …
>
> 185. In imposing this requirement, the Ministry has breached the s. 2(d) rights of all construction workers who are not presently Building Trades Union members and who do not want to join, and pay dues to, the Building Trades Unions in order to work on the Project or on other public construction projects for non-Building Trades contractors.
>
> …
>
> 201. The infringements of the *Charter* rights of constructions workers are not justified by the Government's stated objectives for imposing the Building Trades Only Requirement as a tendering condition on the Pattullo Bridge Project and other government construction projects.
>
> [Emphasis added.]

[95] It is to be noted that all of the *Charter* rights allegedly breached are the rights of workers, not contractors. Further, the complaints are that the workers are forced to join the Building Trades Unions, are forced to pay dues to them, and are forced to finance causes and political parties supported by them.

[96] The many affidavits that have been filed by the petitioners in support of the petition also clearly show that the essence of the dispute is the requirement that

workers join and pay union dues to the AIRCC affiliate unions. The affidavit of Forest Berry, sworn August 22, 2018 is typical and states:

> 29. I do not want to have to rely on being dispatched to Jacob Bros or a CLAC contractor through the Building Trades dispatch hall, which will give preference to longstanding Building Trades Union members.
>
> 30. I also strongly object to being forced by the Government to join and pay dues to the Building Trades Unions in order to be eligible to work on public projects for CLAC or CWU contractors or other contractors who do not have existing collective bargaining relationships with the Building Trades Unions.
>
> 31. I believe that the decision about union representation should be made by the employees of the contractors. It should not be made by the Government imposing membership in, and payment of dues, to the Building Trades Unions as a condition of my being able to work for non-Building Trades Union contractors on public construction projects or as a condition of those contractors getting this work.
>
> …
>
> 39. In summary, I object to being forced to join the Building Trades Union in order to obtain work on public projects for contractors who do not have collective bargaining relationships with the Building Trades Union, and to having my ability even to obtain work on these projects limited and controlled by the Building Trades Unions through their ability to control who is dispatched through their hiring hall and the limited ability of contractors to select their own employees.
>
> 40. I don't believe that the Government should decide union representation for employees with their construction employers. This decision should be made by the employees of contractors who carry out the work on public projects, and not the Government.

[97] Not only is the essence of the dispute the requirement that workers join the Building Trades Unions, or more properly put, unions affiliated with AIRCC, but it is the CBA, a collective agreement, that imposes this requirement. It is clause 8.101 of the CBA that mandates workers to be members of AIRCC affiliate unions. It is clause 8.500 of the CBA that requires workers to pay union dues. It is also the CBA that recognizes BCIB as the "employer" (clause 2.101) and stipulates that contractors and employees are bound by the CBA (clauses 2.102 and 4.100). The RFQ imposes no requirements on workers or contractors except indirectly through the CBA.

[98] Therefore, the essence of the dispute is the forcing of workers to join AIRCC affiliate unions, something which is implemented by the CBA, a collective agreement. This satisfies the first part of the *Weber* test.

[99] The second part of the *Weber* test is whether the dispute falls within the jurisdiction of the LRB under the *Code*. This part of the test is met with respect to most issues raised in the petition but not all. The LRB clearly has jurisdiction with respect to whether a collective agreement has been entered into (139(c)), whether the employees/workers and contractors are bound by the collective agreement (139(d)), and whether the employees/workers are included in or excluded from an appropriate bargaining unit (139(l)). In addition, pursuant to s. 115.1 of the *Code*, the LRB has the jurisdiction to determine the *Charter* issues raised by the petition.

[100] However, as was noted in *Weber*, at para. 67, the exclusive jurisdiction of the LRB to determine issues within its jurisdiction "is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by" the LRB. The LRB does not have jurisdiction to determine whether the Minister properly exercised the statutory powers granted under the *Transportation Act* and does not have jurisdiction to grant the claims for relief in the nature of *certiorari* and *prohibition*. These are issues which only this Court has jurisdiction to address and which I have determined are not to be struck as the claims are not bound to fail.

[101] Accordingly, it is my opinion that all of the issues raised in the petition, with the exception of the claims for relief in the nature of *certiorari* and *prohibition*, are within the jurisdiction of the LRB and are not within the jurisdiction of this Court.

VIII. SHOULD AIRCC BE ADDED AS A PARTY TO THE PETITION?

[102] The final application concerns whether AIRCC should be added as a party to the petition.

[103] The petitioners consent to AIRCC being added as an intervenor but challenge its request to be added as a party.

[104] The addition of a party to a proceeding is governed by R. 6-2(7):

> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
>
> …
>
> (b) order that a person be added or substituted as a party if
>
> (i) that person ought to have been joined as a party, or
>
> (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
>
> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
>
> (i) any relief claimed in the proceeding, or
>
> (ii) the subject matter of the proceeding
>
> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[105] The petitioners rely on *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1269, at para. 14, where Justice Dickson held that strong reasons must be shown before a person could be added as a defendant against a plaintiff's consent:

> [14] Normally the plaintiff is entitled to choose the person against whom to proceed, although a defendant may be added without the plaintiff's consent where strong reasons show that it is necessary for the proper determination of the matters involved: *Adelson v. W.E. Sherlock Co. Ltd.* (1954), 12 WWR 52 (BCSC); *Rastad v. Cienciala* (1956) 19 WWR 623; *Peter v. Anchor Transit Ltd.*, [1979] 4 WWR 150 (CA).

[106] In contrast, AIRCC says the threshold is "low" and refers me to *Lau v. Canada (Attorney General)*, 2014 BCSC 2384, at para. 136, and *Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking Commissioner*, 2016 BCSC 898, at para. 42.

[107] I do not need to resolve whether the threshold is "low" or "strong reasons" must be shown as, in my view, there are strong reasons for adding AIRCC as a party.

[108] The Court of Appeal considered the predecessor to R. 7-2(b) in *Kitimat (District) v. Alcan Inc.*, 2006 BCCA 562, at paras 28-31, as follows:

> [28] Rule 15(5)(a)(ii) applies in two circumstances, where a person "ought to have been joined as a party", or where a person's "participation in the proceeding is necessary to ensure that all matters in the proceedings may be effectually adjudicated upon". In the event that either of these tests is met, the person should be joined.
>
> [29] The chambers judge did not address the first of these two tests, whether Alcan was a party that "ought' to have been joined, and confined himself to the second branch of that subrule. The use of the word "ought" encompasses all those cases in which joining the person is a necessity and may even be broader, as noted by Madam Justice Smith in *Lawrence Construction Ltd. v. Fong* (2001), 18 C.P.C. (5th) 377 (B.C.S.C.), to include situations in which joining the person may be more than mere convenience but less than a necessity. Thus, if joining Alcan was a necessity, Alcan satisfied this arm of Rule 15(5)(a)(ii).
>
> [30] In *Morishita v. Corporation of the Township of Richmond* (1990), 44 B.C.L.R. (2d) 390 at 393 (C.A.), Madam Justice Southin said as to necessary parties:
>
> > I should note that the applicant for the permit, Steveston Waterfront Properties Inc., was not made a party to this petition. Generally, it is necessary to make a person whose direct interests might be affected by the granting of the relief sought, a respondent to a petition for judicial review and a failure to do so is fatal. …
>
> [31] Likewise in *Canadian Labour Congress v. Bhindi* (1985), 61 B.C.L.R. 85 at 94, this Court, in reference to this sub-rule's predecessor, said:
>
> > In my opinion, R. 15 of the Supreme Court Rules is not applicable to the case on appeal. It is only applicable to cases where the party sought to be added has a direct interest in the outcome of the particular action between the particular parties. It is not intended to cover cases where a person can be granted standing on the basis of being affected by the answer to the legal question in dispute, rather than being affected by the precise outcome between the parties.
>
> [Emphasis added.]

[109] In my view, the direct interests of AIRCC not only may be affected by the granting of the relief requested in the petition but will be affected, and most seriously. If the relief in the petition is granted, AIRCC will lose the entire benefit of the CBA. Therefore, there are strong reasons that it be granted status as a party respondent.

[110] Accordingly, in my opinion, it is just and convenient that AIRCC be added as a party respondent.

IX. ORDERS

[111] In summary, my conclusions on the various issues are as follows:

a) The claims for injunctive and declaratory relief in the petition are struck;

b) The claims in the petition for relief in the nature of *certiorari* and *prohibition* are not liable to be struck and are within the jurisdiction of this Court;

c) All other claims in the petition, including the claims for *Charter* remedies, are within the jurisdiction of the LRB and are to be struck or stayed; and

d) The application of AIRCC to be added as a party respondent is allowed.

[112] If necessary, counsel have leave to speak to me regarding the terms of a formal order or orders to give effect to these reasons and with respect to costs.

"Giaschi J."