Federal Court of Appeal | Cour d'appel fédérale

Date: May 22, 2025

Docket: A-150-23

Citation: 2025 FCA 100

CORAM: **WOODS J.A.**
LOCKE J.A.
GOYETTE J.A.

BETWEEN:

GCT CANADA LIMITED PARTNERSHIP

Applicant

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION SHIP AND DOCK FOREMEN, LOCAL 514

Respondent

and

MARITIME EMPLOYERS ASSOCIATION

Intervener

Heard at Vancouver, British Columbia, on January 30, 2024.

Judgment delivered at Ottawa, Ontario, on May 22, 2025.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: LOCKE J.A.
GOYETTE J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

I. Introduction

[1] This is an application for judicial review of a decision of the Canada Industrial Relations Board, cited as 2023 CIRB 1068 (Decision). The applicant, GCT Canada Limited Partnership (GCT), seeks review of the Board's Decision which found that GCT had contravened a workplace health and safety obligation under Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Code).

[2] The respondent is the International Longshore and Warehouse Union Ship and Dock Foremen, Local 514 (Union), a member of which filed the initial complaint giving rise to these proceedings. In addition, intervener status has been granted to the Maritime Employers Association.

[3] GCT provides stevedoring services at two container terminals in British Columbia and is subject to health and safety obligations imposed under Part II of the Code. The substantive issue in this application is whether the Board reasonably concluded that GCT violated the inspection obligation in paragraph 135(7)(e) of the Code by failing to provide for the participation of the health and safety committee at one of its terminals in all inspections of vessels conducted at that terminal.

[4] GCT argued before the Board that this committee did not have the right to participate in inspections of vessels under paragraph 135(7)(e) because GCT does not control the vessels. The Board disagreed with this submission, however, and concluded that GCT had contravened that provision.

[5] As I will explain, I would dismiss GCT's application.

II. Background facts

[6] The underlying facts are largely uncontested. GCT operates two container terminals in British Columbia, Vanterm terminal in Vancouver (Vanterm) and Deltaport terminal in Delta (Deltaport). This matter only concerns Vanterm.

[7] Vanterm has one berth and receives approximately two vessels per week. The shipping companies that own the vessels that dock at this facility contract with GCT for stevedoring services, essentially the loading and unloading of cargo.

[8] As part of its safety protocols, GCT has developed a hazard prevention program, which is documented in the GCT Vessel Manual. The program was established pursuant to GCT's obligations under Part II of the Code and the *Maritime Occupational Health and Safety Regulations*, SOR/2010-120.

[9] Notably, the Vessel Manual requires each vessel at Vanterm to be inspected semi-annually. The process for these inspections, which is set out in the Vessel Manual, specifies that inspections are to be conducted by representatives of the health and safety committee and of management.

[10] GCT has established a health and safety committee specifically for Vanterm, with employer and employee representation (Committee).

[11] The Committee sometimes participates in vessel inspections, but not always. If an inspection is conducted on a Friday, the Committee participates because the members are normally present on these days. According to GCT, however, it is not practical to bring in Committee members for vessel inspections on other days of the week.

III. Complaint

[12] On or about January 18, 2019, a foreman employed by GCT, who was a member of the respondent Union, filed a complaint with the Labour Program of Employment and Social Development Canada pursuant to the Code (Complaint). The Complaint alleged that GCT was conducting safety inspections of vessels at Vanterm without always involving Committee members who are employees. The Complaint further stated that several requests by employee Committee members to be involved were denied.

[13] Despite referencing the Committee at Vanterm, the Complaint did not refer to subsection 135(7) of the Code, which specifies certain duties of workplace committees. Instead, the Complaint referenced a contravention of subsection 136(5). This provision pertains to the duties of a workplace health and safety representative, not a committee, and applies only for a workplace with fewer than 20 employees or for a workplace where a committee is not required. As I will explain later in these reasons, this was an error in the Complaint.

IV. Direction of the ministerial delegate

[14] After investigating the Complaint, the ministerial delegate issued a direction on November 27, 2019, finding that there was a contravention of paragraph 136(5)(g) of the Code (Direction). This section provides, *inter alia*, that a workplace health and safety representative must participate in all health and safety inspections.

[15] The delegate directed GCT "to terminate the Contravention with immediate effect and involve [the] Employee Representative … in inspections".

V. Decision of the Board

[16] GCT appealed from the Direction to the Board. The Board conducted a *de novo* hearing which included witnesses on behalf of both parties. The Board also granted intervener status to the Maritime Employers Association and the Halifax Employers Association.

[17] The Board concluded that the Direction was flawed because it referred to the wrong provision of the Code. Instead of referring to paragraph 136(5)(g), the ministerial delegate should have referred to paragraph 135(7)(e).

[18] The Board determined that it had the power to vary the Direction to correct the error. The Direction as amended referred to paragraph 135(7)(e) of the Code and determined that GCT had

contravened this provision because the Committee has a right to participate in all inspections of vessels at Vanterm.

[19] In its reasons, the Board concluded that the Committee's right to participate in vessel inspections does not depend on GCT having control of the vessels. However, the Board also concluded, in the alternative, that if the Committee's duties are limited to places under the employer's control, GCT did in fact control the vessels at Vanterm such that the Committee had the right to participate in all health and safety inspections of those vessels.

[20] Accordingly, GCT was directed to terminate the contravention of paragraph 135(7)(e) and establish a procedure with the Committee for the inspection of vessels.

VI. Analysis

[21] As mentioned, the substantive issue raised on this application is whether the Board erred in determining that GCT contravened paragraph 135(7)(e) by not permitting the Committee to participate in all vessel inspections.

[22] Before turning to an analysis of this issue, GCT has also raised a preliminary issue about whether the Board erred in varying the Direction to refer to paragraph 135(7)(e) of the Code. I will deal with this preliminary issue first.

A. *Preliminary issue: Did the Board err in varying the Direction?*

[23] Before the Board, it was not in dispute that the Direction referred to the wrong statutory provision. The Direction found a contravention of paragraph 136(5)(g) of the Code, which applies to workplaces with fewer than 20 employees or where a health and safety committee is not required. There was no dispute that neither of these criteria applied to GCT. Rather, the equivalent provision that applied to GCT is paragraph 135(7)(e) of the Code.

[24] The preliminary issue raised by GCT is whether the Board erred when it determined that it had the power to vary the Direction to refer to paragraph 135(7)(e) of the Code as the provision that had been contravened. GCT submits this exceeded the Board's authority.

[25] GCT submits that this issue is subject to correctness review. I disagree. Whether the Board erred in interpreting its enabling statute and thereby exceeded its authority is subject to reasonableness review: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*) at paras. 65-68. There is no basis to apply the correctness standard of review. In particular, this application for judicial review is not a statutory appeal and GCT has not given any grounds to think that the Board has violated its rights to procedural fairness. Therefore, I will apply the reasonableness standard of review.

[26] The relevant principles to be applied on reasonableness review are set out in *Vavilov* and are summarized below from *Little Black Bear First Nation v. Kawacatoose First Nation*, 2024 FCA 119 at paragraph 32:

(i) The "burden is on the party challenging the decision to show that it is unreasonable." "[A]ny shortcomings or flaws relied on by the party challenging the decision [must be] sufficiently central or significant to render the decision unreasonable." (*Vavilov* at para. 100);

(ii) A decision will be unreasonable if the reasoning process is not rational or logical. In particular, "a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis …" (*Vavilov* at para. 103);

(iii) A decision will also be unreasonable when the "decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it." (*Vavilov* at para. 101); and

(iv) With respect to factual determinations, generally the court must "refrain from 'reweighing and reassessing the evidence considered by the decision maker'." However, "[t]he decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them. … The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it." (*Vavilov* at paras. 125, 126).

[27] An appeal of a direction can be made by an aggrieved employer to the Board pursuant to subsection 146(1) of the Code:

146 (1) An employer, employee or trade union that feels aggrieved by a direction issued by the Head under this Part may appeal the direction to the Board, in writing, within 30 days after the day on which the direction was issued or confirmed in writing.	**146 (1)** Tout employeur, employé ou syndicat qui se sent lésé par des instructions données par le chef sous le régime de la présente partie peut, dans les trente jours qui suivent la date où les instructions sont données ou confirmées par écrit, interjeter appel de celles-ci par écrit au Conseil.

[28] If such an appeal is brought, the general power of the Board to vary a direction is provided for in subsection 146.1(1) of the Code:

146.1 (1) If an appeal is brought under subsection 129(7) or section 146, the Board shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may	**146.1 (1)** Saisi d'un appel interjeté en vertu du paragraphe 129(7) ou de l'article 146, le Conseil mène sans délai une enquête sommaire sur les circonstances ayant donné lieu à la décision ou aux instructions, selon le cas, et sur la justification de celles-ci. Il peut :
(a) vary, rescind or confirm the decision or direction; and	**a)** soit modifier, annuler ou confirmer la décision ou les instructions;
(b) issue any direction that the Board considers appropriate under subsection 145(2) or (2.1).	**b)** soit donner, dans le cadre des paragraphes 145(2) ou (2.1), les instructions qu'il juge indiquées.

[29] The question in this application concerns the Board's interpretation of the extent of its power to vary a direction. As explained below, the Board concluded that its power was broad enough to vary the Direction to correct the Code provision applicable to GCT.

[30] The Board first considered the applicable legal principles. Based on the jurisprudence, the Board concluded that it could correct the relevant Code provision if the alleged contravention was based on the same facts and circumstances (Decision at para. 41).

[31] The Board outlined its reasoning in the application of that principle. In particular, the Board found that the nature of the contravention was equivalent under either paragraph 135(7)(e) or paragraph 136(5)(g) since the content of these provisions is "substantially the same". The Board noted that the "key concern" specifically referenced in the Complaint was the fact that GCT was not inviting or allowing members of the Committee to participate in all vessel inspections. Unfortunately, both the employee who filed the Complaint and the ministerial

delegate who issued the Direction erred by citing the wrong provision of the Code. In these circumstances, the Board concluded that the reference to a wrong section "should not serve as a barrier to … the [Board's] consideration of the direction." Accordingly, the Board concluded that it had the authority to vary the Direction in these circumstances by correcting the applicable provision of the Code. (Decision at paras. 42-43).

[32] There is no dispute that the reasons of the Board were logical and coherent, and took into account the relevant factual constraints. Rather, the thrust of GCT's argument is whether the Board unreasonably failed to consider significant legal constraints that bore on the Decision (*Vavilov* at paras. 101, 105-106).

[33] As mentioned, the Board's legal analysis is set out in paragraphs 40-42 of the Decision. The principal judicial authority referred to is the Federal Court of Appeal's decision in *Martin v. Canada (Attorney General)*, 2005 FCA 156 (*Martin*). The Board identified some relevant principles emanating from *Martin* and subsequent jurisprudence interpreting *Martin*. First, an application to appeal before the Board is a *de novo* proceeding. Second, the Board may vary a direction to provide for what, in the Board's view, the ministerial delegate should have directed, or to include other contraventions that should have been identified for correction in the original. Further, there is a limitation on the power to vary in that any resulting direction "must be related to the matter under appeal and that was investigated by the ministerial delegate" (Decision at para. 40).

[34] What the Board's legal analysis fails to mention is that the jurisprudence it cites all predates amendments to the Code made shortly before GCT's appeal was heard by the Board. While these amendments did not materially alter the language in subsection 146.1(1), GCT points out that these amendments did remove the wide powers of the appeals officer previously listed in section 146.2 of the Code, such as the power to summon and enforce the attendance of witnesses. GCT argues that since these wide powers existed at the time of *Martin* and subsequent authorities referred to by the Board, it was unreasonable for the Board to rely on the above legal principles. Rather, GCT submits that if the Board had considered the recent Code amendments, it would have realized that the Board now has a narrower scope of intervention in an appeal. In particular, GCT argues, the amendments signal that the Board's authority is now "a purely appellate authority, not a *de novo* review" and, accordingly, that the Board can address only the contravention in the direction issued and has no authority to vary a direction to find a contravention of a different section of the Code.

[35] As mentioned, *Vavilov* instructs that GCT has the burden to show that the Decision is unreasonable. In this case, the question is whether GCT has shown that the Board's silence concerning the recent Code amendments renders the Decision unreasonable.

[36] Notably, GCT did not raise these arguments about the recent amendments before the Board. However, the question remains whether the Board's failure to mention the amendments on its own initiative is enough to cause a loss of confidence in the outcome reached: *Vavilov* at para. 106. Although it may have been preferable if the Board had mentioned the amendments,

perfection is not the standard and in my view this omission does not make the Decision unreasonable.

[37] Although there may be an open question about the current state of the law regarding the extent of the Board's powers on appeal, including the scope of its ability to vary a direction, it was reasonable for the Board to rely on *Martin* on the facts of this case. In *Martin*, the Federal Court of Appeal considered the relevant statutory scheme applicable to an appeal of a direction before an appeals officer. The Court concluded that an appeals officer had a very broad power to vary directions that were deficient. The circumstances considered in *Martin* are far removed from the present facts which involve a highly restrictive use of the power to vary to correct what was essentially a technical oversight in both the Complaint and the subsequently issued Direction. Accordingly, there was no reason for the Board to consider the full extent of its power to vary under the current scheme. In any event, I would underscore that the Board does not have fewer powers than the appeals officer did at the time of *Martin* as a result of the repeal of section 146.2 of the Code. This is a consequence of the existing powers that the Board has elsewhere in the Code (See, for example, section 16 of the Code). Accordingly, I reject GCT's submission that the Board's power to vary a direction is narrower than the power previously given to appeals officers.

[38] In conclusion, I find that GCT has not shown that the Board's reliance on *Martin* as the leading case was unreasonable in accordance with *Vavilov* above. Accordingly, I find that the Board did not err in determining to vary the Direction.

B. *Substantive issue: Did the Board err in determining that GCT contravened paragraph 135(7)(e) of the Code?*

[39] As mentioned, the substantive issue is whether the Board erred in finding GCT contravened paragraph 135(7)(e). This issue involves two sub-issues: (a) Did the Board err in concluding that paragraph 135(7)(e) was not limited to places that the employer controls? and (b) Did the Board err in finding that, if control is required, GCT had the requisite control over the vessels at Vanterm?

[40] On these issues, the parties agree that the standard of review is reasonableness. I also agree: *Vavilov* at para. 10. The general principles to be applied on reasonableness review were set out earlier in these reasons and need not be repeated.

[41] Section 135 provides for workplace health and safety committees. Subsection 135(1) generally requires an employer to establish a workplace health and safety committee for each workplace controlled by the employer if it has 20 or more employees:

135 (1) For the purposes of addressing health and safety matters that apply to individual work places, and subject to this section, every employer shall, for each work place controlled by the employer at which twenty or more employees are normally employed, establish a work place health and safety committee and, subject to section 135.1, select and appoint its members.	**135 (1)** Sous réserve des autres dispositions du présent article, l'employeur constitue, pour chaque lieu de travail placé sous son entière autorité et occupant habituellement au moins vingt employés, un comité local chargé d'examiner les questions qui concernent le lieu de travail en matière de santé et de sécurité; il en choisit et nomme les membres sous réserve de l'article 135.1.

[42] Subsection 135(7) of the Code sets out duties required of a workplace committee. Importantly, pursuant to paragraph 135(7)(e), a workplace committee is required, in respect of the workplace for which it is established, to participate in all health and safety inspections:

(7) A work place committee, in respect of the work place for which it is established,	**(7)** Le comité local, pour ce qui concerne le lieu de travail pour lequel il a été constitué :
…	**…**
(e) shall participate in all of the inquiries, investigations, studies and inspections pertaining to the health and safety of employees, including any consultations that may be necessary with persons who are professionally or technically qualified to advise the committee on those matters;	**e)** participe à toutes les enquêtes, études et inspections en matière de santé et de sécurité des employés, et fait appel, en cas de besoin, au concours de personnes professionnellement ou techniquement qualifiées pour le conseiller;

[43] The issue before the Board was whether the employer had contravened paragraph 135(7)(e) by failing to permit the Committee to participate in all inspections of vessels. It was clear that the employer did not always permit the Committee to participate. The focus of the dispute, therefore, was on whether the control requirement in subsection 135(1) meant that the inspection duty in paragraph 135(7)(e) applies to vessels only if they are under GCT's control.

[44] The Board determined that the Committee has the right to participate in inspections of vessels regardless of whether or not GCT controls the vessels. In the alternative, the Board determined that a vessel is a workplace controlled by GCT such that the duties of the Committee extend to that vessel (Decision at para. 159).

[45] I will first consider the Board's alternative conclusion since a finding that the vessels are controlled by GCT would be dispositive of this application. The question is whether the Board erred in finding that GCT has the requisite control over the vessels at Vanterm. As mentioned earlier, this issue is subject to reasonableness review, and GCT has the burden to show that the Decision is unreasonable.

[46] As for the legal test to be applied, the Board articulated it as follows: "[T]he notion of control should include those circumstances where the employer has the direct ability to influence health and safety outcomes because of its specific relationship with the owner of the property through contract or otherwise" (Decision at para. 149).

[47] In concluding that this is an appropriate legal test, the Board first considered the French and English versions of the relevant text: "entière autorité" and "control". The Board translated the French version as "full authority". With respect to the meanings of "autorité" and "control", the Board noted that dictionaries for both terms include the concept of "influence": for the English – "[t]o exercise power or influence over"; for the French – "influence imposed on others by virtue of privilege, social status, merit, etc." (Decision at paras. 146-147). Clearly, the Board was alive to the nuances of the French and English versions.

[48] The Board commented that "[i]t is not clear from these definitions that the terminology used at section 135(1) is as restrictive" as was suggested by GCT—having a legal right to fix a hazard, or to have it fixed, or having unrestricted or exclusive access to the area. The Board concluded that a less restrictive approach was appropriate because, otherwise, the employer

could usurp the application of provisions of the Code by demonstrating that it does not own the space or that it has access limitations (Decision at para. 143).

[49] However, the Board further commented that an overly broad interpretation of control as "influence" was likewise not contemplated by section 135. For example, the Board explained that "[t]he mere possibility of making a telephone call to a municipality for road maintenance and repair is not indicia of influence or control" (Decision at para. 149). Accordingly, the Board settled on the legal test described above and noted that applying such a test will require a close examination of the context.

[50] In applying this test to the facts of this case, the Board noted several factors which together demonstrated that GCT did have sufficient influence regarding health and safety outcomes on vessels for GCT to be said to have control over the vessels. The Board stated that it had no difficulty in reaching this conclusion (Decision at para. 159).

[51] This conclusion was largely based on facts set out in paragraphs 150-155 of the Board's Decision, which include the following:

(i) GCT has obligations on board vessels, including an obligation "to conduct inspections to ascertain whether safe working conditions are maintained."

(ii) "Although [GCT] does not perform the [safety] repairs itself, it can and does exert considerable influence on the vessel's chief officer and crew to get issues addressed to ensure a safe work environment."

(iii) There is no evidence that a vessel officer had refused to make the necessary adjustments or repairs requested by GCT.

(iv) Although individuals accessing the vessel need authorization, this is standard industry practice since the chief officer is accountable for the vessel and its contents.

(v) There was no evidence and no suggestion that GCT's representatives have ever been denied access to a vessel.

(vi) The "contractual relationship between GCT and the vessels for terminal services" allows GCT to exert significant influence over the conditions applicable to its employees while on board.

(vii) Further, GCT has a "significant say" in outcomes as it can ultimately delay or refuse to commence the stevedoring work.

[52] The Board then considered other jurisprudence, and found these other decisions to be distinguishable. The cases included *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67 (*Canada Post*) and *Rogers Communications Inc.*, 2013 OHSTC 7 (*Rogers*).

[53] Drawing on the jurisprudence, the Board emphasized that a contextual approach must be taken to each case. The Board distinguished *Rogers* since it dealt with different provisions and different factual circumstances. The Board also noted that the facts in this case are distinguishable from *Canada Post*, because "in the present matter, the employer can and does conduct health and safety inspections of the vessels. It is able to directly and considerably influence the health and safety outcomes of that workplace" (Decision at para. 159).

[54] In my view, the Board's decision on the issue of control amply satisfies the reasonableness standard of review. The analysis is coherent and logical, and the decision is not untenable in light of the relevant legal and factual constraints. GCT submits that there are

shortcomings with the decision, but any such flaws are not sufficiently central or significant to render the decision unreasonable.

[55] In light of this conclusion, it is not necessary to consider the Board's primary conclusion, which is that the inspection requirement in paragraph 135(7)(e) does not depend on whether the employer has control of the workplace. This issue touches on additional concerns, including those raised by the intervener, the Maritime Employers Association. Accordingly, this issue is best considered in a factual context in which the employer does not control the workplace.

VII. Conclusion and disposition

[56] Ultimately, I conclude that GCT has not met its burden to demonstrate that the Board erred. I would dismiss the application for judicial review, with costs.

"Judith Woods"
J.A.

"I agree.
George R. Locke J.A."

"I agree.
Nathalie Goyette J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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