NRHM | NICKERSON ROBERTS HOLINSKI & MERCER
Barristers and Solicitors

Our File No.: 90,918M and 91,001 M/DB
Your File No.:

David B. Mercer, K.C., Partner
Direct Line (780) 702-3353
Email: dmercer@nrhmlaw.com

Kim Gillard, Legal Assistant
(780) 428-0041 ext. 336
Email: kgillard@nrhmlaw.com

Reply to Edmonton Office

June 12, 2024

DELIVERED IN PERSON

International Brotherhood of
Boilermakers Lodge 146
15220 – 114 Avenue
Edmonton, AB T5M 2Z2

Attention: Mack Walker, Business Manager

Dear Mack:

RE: Summary of the Alberta Labour Relations Board Decision in *Boilermakers Local Lodge 46 v. Cessco* (CR-06065 and GE-09002)

You have requested a summary of the Alberta Labour Relations Board decision in favor of Local 146 and the continuing Cessco scenario.

This decision is a huge success for Local 146 in continuing to fight the fight against an employer who has been found to be in breach of provisions of the *Alberta Labour Code* with particular reference to hiring scabs to replace our members.

Background

As you are aware, Cessco locked out our members June 28, 2020. According to the *Labour Code* a lockout/strike expires two years if a Collective Agreement is not renewed. Our Collective Agreement was not renewed, and the expiry date was June 28, 2022. The *Labour Code* provides that if Cessco is to resume operations it must hire our members in preference to scabs.

[redacted] the members to reapply for work at Cessco which the Union assisted 19 of our members to do so on June 29, 2022. Cessco responded that it had no work but hired 7 scabs in May/June of 2023 and the Carpenters Union Local 1999 then applied to be the certified Union bargaining agent on August 10, 2023 knowing that Cessco was in a continuing dispute with Local 146.

We also had our members vote in the Certification application by the Carpenters on the basis that our members should be employed not scabs.

Local 146 filed Unfair Labour Practice complaints at the Board against Cessco for these illegal and appalling activities.

The Decision

The Board ruled that Cessco violated the right to return to work of our members and that Cessco also discriminated against our members because we exercised our rights under the *Alberta Labour Code* and issued the following directives:

- Within 21 days of the dates of this decision, Cessco must provide a letter to the 19 employees who submitted a written request to resume employment asking them to confirm whether they still wish to resume employment with Cessco. This letter should indicate that it is not an offer of employment, but an interim step taken to determine which employees may be considered for available positions. The letter should provide Local 146 members with 21 days to provide their response, and if no response is received within this timeframe, then Cessco may proceed on the basis that the employee does not wish to resume their employment. Cessco shall copy Local 146 with the Letters.

- If 7 or fewer members of Local 146 indicate they wish to resume their employment with Cessco, Cessco will take whatever steps are necessary to reinstate those employees as soon as practicable, provided that they have the necessary skills and qualifications for the positions Cessco currently has.

- If more than 7 members of Local 146 indicate that they still wish to resume their employment with Cessco, Cessco is ordered to rank the employees who express such an intention for their suitability for the existing positions. Once this process if concluded, and it must be concluded within 14 days of receiving the communications from the employees, Cessco is ordered to extend a job offer to, or otherwise reinstate, those employees as soon as practicable provided that they have the necessary skills and qualifications for the positions Cessco currently has within its operation.

- For the purposes of the vote in the certification application, any of the 7 employees of Cessco who worked on August 10, 2023 (the date of the certification application) who continue to work for Cessco after the above steps are concluded will have their vote counted in the certification application. Any members of Local 146 who are offered a position and who resume their employment with Cessco as a result of the Board's remedial orders will also have their vote counted for the certification application.

The details of this strategy will be discussed with your staff to ensure a successful result.

Congratulations on your success in this matter. Many Unions would have walked away from this dispute long ago but not Local 146. I salute you.

Yours truly,

NICKERSON ROBERTS HOLINSKI & MERCER

Per: _____
DAVID B. MERCER

DBM/kg

ALBERTA LABOUR RELATIONS BOARD

June 6, 2024

Gall Legge Grant Zwack LLP
1000 1199 West Hasting Street
Vancouver, BC V6E 3T5
Attention: Peter A. Gall K.C./
Justina Sebastiampillai
pgall@glgzlaw.com
jsebastiampillai@glgzlaw.com

United Brotherhood of Carpenters and Joiners of America, Local Union No. 1999
300, 93 Lombard Avenue
Winnipeg, MB R3B 3B1
Attention: Sam Emke
semke@ubcja.ca

Nickerson Roberts Holinski and Mercer
100, 7712 104 Street
Edmonton, AB T6E 4C5
Attention: David B. Mercer, K.C.
dmercer@nrhmlaw.com

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146
15220 114 Avenue NW
Edmonton, AB T5M 2Z2
Attention: David B. Mercer, K.C.
dmercer@nrhmlaw.com

McLennan Ross LLP
600, 12220 Stony Plain Road
Edmonton, AB T5N 3Y4
Attention: James Lingwood
jlingwood@mross.com

Cessco Fabrication & Engineering Limited
7310 99 Street
Edmonton, AB T6E 3R8
Attention: Ryan Lissel
rlissel@cessco.ca

OUR VISION…

The fair and equitable application of Alberta's collective bargaining laws.

OUR MISSION…

To administer, interpret and enforce Alberta's collective bargaining laws in an impartial, knowledgeable, efficient, timely and consistent way.

Commerce Place
Suite 640,
10155 – 102 Street NW
Edmonton AB T5J 4G8

Tel: 780-422-5926
Fax: 780-422-0970
alrb.edm@gov.ab.ca

308, 1212 - 31 Avenue NE
Calgary, Alberta
T2E 7S8

Tel: 403-297-4334
Fax: 403-297-5884
alrb.cal@gov.ab.ca

Website:
www.alrb.gov.ab.ca

RE: An application for certification as bargaining agent brought by the United Brotherhood of Carpenters and Joiners of America, Local Union No. 1999 affecting Cessco Fabrication & Engineering Limited, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union No. 720 and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 488 — Board File No. CR-06064

RE: An unfair labour practice complaint brought by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146 affecting Cessco Fabrication & Engineering Limited – Board File No. GE-09002

Enclosed is a copy of the Board's decision in the above-noted matter dated June 6, 2024.

Yours truly,

Tamara Gagné
Executive Assistant to the Chair

Enclosures (2)

CITATION: ***United Brotherhood of Carpenters and Joiners of America, Local Union No. 1999 v Cessco Fabrication & Engineering Limited,*** **2024 ALRB 59**

IN THE MATTER OF THE LABOUR RELATIONS CODE

BETWEEN:

United Brotherhood of Carpenters and Joiners of America, Local Union No. 1999

Applicant

– and –

Cessco Fabrication & Engineering Limited

Respondent

– and –

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146

Respondent

AND BETWEEN:

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146

Applicant

- and –

Cessco Fabrication & Engineering Limited

Respondent

Date of Decision: June 6, 2024

FILES NO.: CR-06064, GE-09002

BOARD MEMBERS

William J. Johnson, K.C. - Vice-Chair
Corinne Galway - Member
Trish Thibodeau - Member

APPEARANCES

For the Applicant 146: Dennis D. Buchanan (Counsel)
For the Respondent Cessco: James Lingwood (Counsel)
For the Affecting Party Local 1999: Lloyd Jacobson

REASONS FOR DECISION

[1] United Brotherhood of Carpenters and Joiners of America, Local Union No. 1999 ("Local 1999") applied to be the certified bargaining agent for a unit of employees of Cessco Fabrication & Engineering Limited ("Cessco") described as "all employees at the Edmonton shop except office, clerical, quality control, security, construction, and maintenance personnel". The Investigation Report of the Labour Relations Officer found the proposed unit to be appropriate, that there were seven employees in the bargaining unit, and at least 40% of the employees supported the application of Local 1999.

[2] Pursuant to Certificate No. RC-384-91, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146 ("Local 146") is the certified bargaining agent for a unit of employees of Cessco described as "all employees at the Edmonton shop except office and construction". Local 146 and Cessco have had a long relationship. The term of their last collective agreement expired on February 28, 2018. After a lengthy period of bargaining, Cessco served a Lockout Notice and Local 146 served a Strike Notice. The effective date for the start of lockout strike was June 28, 2020. The date for the two-year expiry of the lockout/strike pursuant to section 90(1)(c) of the *Labour Relations Code*, RSA 2000, c. L-1 (the "*Code*") was June 28, 2022.

[3] On June 27, 2022, Local 146 delivered letters from 18 of the striking employees indicating that they wished to resume work. A further letter to this effect was provided June 29, 2022. Cessco provided letters in response stating that at that time its production operations were non-existent, it had no positions of the same or similar work for the 19 individuals seeking to resume work, and that it had no replacement workers employed at that time. In May and June of 2023, Cessco hired the seven employees in the bargaining unit that Local 1999, on August 10, 2023, applied to be the certified bargaining agent for.

[4] Local 146 filed objections to Local 1999's certification application and an unfair labour practice complaint asserting violations of sections 90 and 149(1)(a)(vii) and (viii) of the *Code*. A case management meeting resulted in a direction that the two proceedings be heard together.

[5] Pursuant to a case management meeting, the Board directed a representation vote be conducted and the ballots be sealed pending the outcome of the unfair labour practice complaint and the objections to the certification application filed by Local 1999. The 19 members of Local 146 who requested to resume work were permitted to vote along with the seven employees employed as of August 10, 2023. The determination of which ballots, if any, would be counted will be carried out pursuant to the results of this decision.

[6] At the time of the application for certification by Local 1999, Local 146 and Cessco were waiting for the Board's decision on a bad faith bargaining complaint by Local 146 alleging that Cessco had violated section 60 of the *Code*. On September 21, 2023, the Board issued its decision dismissing Local 146's complaints under section 60 and 149(c), but finding a breach of section 148(1)(a)(ii). Local 146 has applied for judicial review of that decision. At the time of writing, the judicial review is scheduled to be heard in October 2025.

[7] Both matters were heard by a panel of the Board (Johnson, Galway, Thibodeau), with Board Member McGreer participating as an observer. The hearing was conducted via videoconference. Eighteen exhibits were entered. Local 146 called two witnesses: Casey Worden (picket line captain during the strike and now a business representative of Local 146) and Jeffrey Burns (former employee of Cessco who went on strike, member of the Local 146 bargaining committee and now a business representative of Local 146). Cessco also called two witnesses: Ryan Lissell (general manager for Cessco) and John Croft (former Local 146 bargaining unit employee and now Cessco production manager). Local 1999 called one witness, Lloyd Jacobson (union organizer).

[8] Local 146's objections to the certification application are as follows:

- Cessco's alleged conduct in a previously filed bad faith bargaining complaint is, in Local 146's view, a reason for of the lack of collective agreement in August 2023 when Local 1999 applied to be certified. As a result of the Board's September 21, 2023 decision dismissing Local 146's complaint under section 60, Local 146 is now seeking judicial review of that decision. Local 146 asserts that the Local 1999 application for certification should be delayed pending the outcome of the Local 146 judicial review application;

- The employees employed on August 10, 2023 (the date of the certification application) should not be permitted to vote and/or their vote should not count. Local

146 asserts that such people were hired in lieu of the employees who attempted to resume work in June 2022 and, as such, their hiring was the result of an unfair labour practice by Cessco; and

- Local 146 asserts Cessco and Local 1999 colluded together to assist Local 1999 to obtain support for its certification application.

[9] In relation to its complaints alleging a contravention of section 90 and section 149(1)(a)(vii) and (viii), Local 146 asserts Cessco, by not hiring the employees who submitted a request to resume employment and then subsequently hiring the seven individuals who were employed on August 10, 2023, violated sections 90 and 149(1)(a)(vii) and (viii) of the *Code*. For remedies for its unfair labour practice complaint, Local 146 seeks the following remedies for these complaints:

- A declaration that Cessco, by failing and refusing to reinstate its members and hiring non-members in preference to them, breached section 90 and/or section 149(1)(a)(vii) and (viii) of the *Code*;

- An order that the employees who requested to resume employment pursuant to section 90 of the *Code* are members of the bargaining unit, for the purpose of any representation vote;

- An order that those employees improperly hired in preference to those who requested resumption of employment, pursuant to section 90, are not entitled to vote in a representation vote;

- An order that Cessco offer to reinstate the Union members who requested resumption of employment, in preference to all others (including any individuals that Cessco may have improperly hired already), on terms that do not discriminate against them for having exercised rights under the *Code*; and

- Damages payable to the Union (Local 146) and the members in such amount to be determined in the circumstances.

[10] Cessco responds that it did not violate section 90 or section 149(1)(a)(vii) and (viii) of the *Code* because:

- The June 2022 requests occurred when Cessco had no work, and the June 2022 requests were limited to applications to replace workers at a time when Cessco had no workers to be replaced. As such, Section 90 of the *Code* is not applicable;

- Between May/June 2023 and August 10, 2023, no Local 146 members applied to fill the advertised positions;

- Cessco had no replacement workers when it hired the August 10, 2023 employees and as such, the August 10, 2023 employees were not replacement workers;
- As no Local 146 members testified that they wanted to return to work, the Board should make an adverse inference that none of the June 2022 applicants wanted to return to work; and
- There should be a finding of fact that the June 2022 applicants, based upon the passage of time, had ceased to be employees of Cessco.

[11] Cessco asserts it did not collude with Local 1999 to assist Local 1999 in its certification efforts.

[12] Pursuant to section 16(4)(e) of the *Code*, Cessco submits that the objections and complaints of Local 146 should be summarily dismissed.

[13] Local 1999 asserts it did not collude with Cessco in organizing its certification application.

[14] Having reviewed the evidence and arguments of the parties, the Board:

- Dismisses Local 146's objections to Local 1999's application for certification, except as otherwise noted in its decision, particularly at paragraphs 15 and 97;
- Dismisses Cessco's section 16(4)(e) application;
- Finds that Cessco violated section 90(3)(b)(ii) of the *Code*; and
- Finds that Cessco violated sections 149(1)(a)(vii) and (viii) of the *Code.*

[15] Based on the above analysis and findings, the Board issues the following directives:

- Within 21 days of the date of this decision, Cessco must provide a letter to the 19 employees who submitted a written request to resume employment asking them to confirm whether they still wish to resume employment with Cessco. This letter should indicate that it is not an offer of employment, but an interim step taken to determine which employees may be considered for available positions. The letter should provide Local 146 members with 21 days to provide their response, and if no response is received within this timeframe, then Cessco may proceed on the basis that the employee does not wish to resume their employment. Cessco shall copy Local 146 with the Letters.
- If 7 or fewer members of Local 146 indicate they wish to resume their employment with Cessco, Cessco will take whatever steps are necessary to reinstate those

employees as soon as practicable, provided that they have the necessary skills and qualifications for the positions Cessco currently has.

- If more than 7 members of Local 146 indicate that they still wish to resume their employment with Cessco, Cessco is ordered to rank the employees who express such an intention for their suitability for the existing positions. Once this process is concluded, and it must be concluded within 14 days of receiving the communications from the employees, Cessco is ordered to extend a job offer to, or otherwise reinstate, those employees as soon as practicable provided that they have the necessary skills and qualifications for the positions Cessco currently has within its operation.

- For the purposes of the vote in the certification application, any of the 7 employees of Cessco who worked on August 10, 2023 (the date of the certification application) who continue to work for Cessco after the above steps are concluded will have their vote counted in the certification application. Any members of Local 146 who are offered a position and who resume their employment with Cessco as a result of the Board's remedial orders will also have their vote counted for the certification application.

- No Damages are awarded.

[16] The Board's reasons follow.

Background

[17] The following factual background and findings are based upon the evidence before this Board.

[18] Cessco operates a steel fabrication and machining shop in Edmonton.

[19] Local 146 is the certified bargaining agent for a unit described "all employees at the Edmonton Shop except office and construction".

[20] There is no collective agreement in place between Cessco and Local 146.

[21] On June 28, 2020, Cessco commenced a lockout of all members of the bargaining unit and Local 146 issued a strike notice on Cessco also effective June 28, 2020.

[22] Local 146 and Cessco did not negotiate any end to the lockout or strike, and both were deemed to end on the date two years after the day they began by virtue of section 90(1)(c).

[23] In February/March of 2022, Cessco ceased all production work. By the first week of March 2022, Cessco had no replacement workers in its employment. As of June 2022, Cessco continued to have no replacement workers and no production work.

[24] On June 27, 2022, a representative of the Union delivered to Cessco written requests to resume employment from 18 employees.

[25] The bundle of requests delivered to Cessco were provided with a covering letter from Local 146, which stated:

> Pursuant to Section 90 of the Labour Relations Code for the Province of Alberta please find enclosed requests to resume employment on behalf of members of Lodge 146. If you have any questions or concerns, please contact Casey Worden by phone (780-451-5992 Ext. 224) or email.

[26] Each of the requests were dated between June 15, 2022 and June 27, 2022 and contained identical content except for the name, address, and contact information for the particular individual named in the request. The common language of the request letter stated:

> Please be advised, by way of this letter, that I request to resume my employment with Cessco Fabrication & Engineering Limited ("Cessco"), pursuant to section 90(1)(c) of the *Labour Relations Code*, RSA 2000, c L-1 (the "*Code*"), in preference to any employee hired by Cessco as a replacement employee during the strike/lockout, which expires on June 28, 2022.
>
> In accordance with section 90(4) of the *Code*, and pursuant to the above, I look forward to discussing the terms of my employment with you.

[27] On June 29, 2022, a further, identical request from another Local 146 member was provided to Cessco.

[28] On June 29, 2022, Cessco responded to each of the requests, including the one submitted on June 29 by email. The responses provided were identical, except for the name and contact information for the particular recipient. Below is an example of the wording contained in the response letters:

> I received a letter from you dated [June 15, 2022] asking to resume your employment relationship with Cessco in preference to any replacement workers (following the end of the strike/lockout by Boilermakers' 146/Cessco). I am personally thrilled that you are willing to resume your working relationship with

> the company and that the past two years has not soured our ability to work together.
>
> Unfortunately, the strike/lockout had a dramatic impact on Cessco's operations. Cessco no longer has any persons engaged in performing the same (or similar) work which you previously provided on our behalf before the lockout/strike and our production operations are non-existent.
>
> While I am warmed by your willingness to negotiate terms of employment with Cessco (under s. 90(4) of the Labour Code), the fact is that there is no replacement worker here for you to displace/replace.
>
> I regret that Cessco's current lack of production work (and lack of a workforce) has made us unable to fulfil your request and want to express my thanks to you for reaching out to Cessco.

[29] On December 20, 2022, nearly six months after Cessco's June 29, 2022 letter, a customer placed a purchase order with Cessco. On February 15, 2023, another customer placed a purchase order with Cessco. On July 10, 2023, a third customer placed a purchase order with Cessco.

[30] Between the placement of the purchase orders and the commencement of production in response to the orders, it was necessary to finalize details and specifications for the products to be produced. In addition, Cessco had to hire pressure welders and related workers to carry out the work.

[31] On March 13, 2023, Cessco hired Bangha Lou as a maintenance worker. As the plant had been idle for some time, Mr. Lou's initial work was to ready the plant for operation. Mr. Lou's employment agreement described his work as:

> Maintenance oversees the maintenance and certification of all fixed and mobile equipment, shop electrical, small tool repair, rigging devices and building maintenance. He is charged with the development of regular preventative maintenance schedules and the record keeping associated with maintenance and calibrations as applicable.

[32] James Croft had been a member of Local 146 and had worked in the Local 146 bargaining unit at Cessco. During the strike and lockout, Croft crossed the picket line and continued to work.

[33] As the production manager, Croft was in charge of hiring. In April, May, and June 2023, Cessco placed a sandwich board outside the premises advertising for workers. In addition, Cessco placed advertisements for workers on social media applications.

[34] Croft proceeded to hire welders, machine shop operators, vessel fitters, and a foreman/fabrication supervisor; all positions that fall within Local 146's bargaining unit. In his testimony, Croft acknowledged that from the list of the 19 employees who had applied to resume work in June of 2022, there were workers who had the skills and work experience to fill the positions for which Cessco was hiring.

[35] Croft testified that he ceased to be a member of Local 146 after he crossed the picket line. In cross-examination, it was put to Croft that he "didn't want to rehire these employees" because he had a "strained relationship with 146 and you wanted a group who were not members of 146." Counsel also put to Croft that he made a decision to hire outside the Union because he "did not want to deal with the Union." Croft acknowledged these statements were correct.

[36] In re-examination by counsel for Cessco, Croft testified that he became aware of the letters requesting to resume employment "around the time they came in." When asked why he preferred not to hire from Local 146, he referenced the lockout and the "strain on me and the organization." He stated that crossing a picket line is not easy, and that obscenities about him and his wife were yelled at him during this time, and that this affected his mental health.

[37] Croft interviewed the applicants for the positions that Cessco was hiring for in the Spring of 2023. All the employees contained in the Officer's report as being within the unit applied for by Local 1999 were people that Croft hired. The timesheets for the individuals indicated that they commenced work in May or June 2023.

[38] Cessco did not take steps to contact Local 146 or otherwise make any effort to contact those Local 146 members who, in June 2022, had requested to resume their employment. In addition, Cessco made no individual effort to contact other Local 146 members.

[39] None of the 19 Local 146 members who submitted requests to resume work in June 2022 submitted a second request for work in response to Cessco's recruitment advertisements.

[40] Jeffrey Burns, a witness for Local 146, testified that he submitted a request to resume work in June 2022. In addition, he assisted with preparing Local 146's covering letter and the corresponding member letters for the June 2022 requests to resume work. Burns further indicated that in 2023 when looking for work, he came across one of Cessco's online recruitment ads.

[41] Despite seeing Cessco's posting, Burns did not apply. Burns testified he believed that his June 2022 letter seeking to resume work was sufficient. Burns did not see the sandwich board Cessco placed outside its premises.

[42] On July 17, 2023, Burns became an employee of Local 146, in the position of business representative. Previously, Burns had been dispatched in February of 2022 to work for a different contractor.

[43] Worden, also a business representative for Local 146, saw the sandwich board advertisement. Worden reported his observations to Local 146 and indicated in his testimony that some members of Local 146 were aware that Cessco was looking for workers. However, no Local 146 members responded to Cessco's advertisement for workers.

[44] Lloyd Robertson was the organizer for Local 1999. Robertson testified as follows:

- After receiving a lead that there were employees possibly capable of being organized who were working at Cessco, he attended at Cessco's parking lot and talked to the workers after work. This first meeting occurred in late July of 2023. After receiving indications that the workers may be interested in a union, he scheduled a further meeting for early August;
- Robertson then attended Cessco's premises and approached Croft to determine if he (Robertson) could attend a meeting with the workers in the lunchroom during the lunchbreak. Croft, upon receiving confirmation from the employees that they were interested in such a meeting, authorized Robertson to attend the lunchroom during the lunchbreak. Robertson, at this meeting, received a positive indication that the employees were interested in applying for membership in Local 1999; and
- A third meeting was held on or around August 10, 2023. Again, this meeting was in the lunchroom during the lunchbreak and Robertson had obtained Croft's authorization. It was at the third meeting that Robertson signed up members with applications for membership in Local 1999.

[45] Robertson further testified that he did not speak to any employees during their work hours, and he did not discuss with management the scope of the bargaining unit.

[46] Croft testified that when some applicants asked about Local 146 during their interviews, he told them Cessco was an open shop and that Cessco was just looking for qualified workers. He stated that in authorizing Robertson to meet with the employees in the lunchroom, it was in response to a request by Robertson, and after he confirmed with the employees that they wanted the meeting. He was not present at the meetings that Robertson had with the employees. He also testified that none of the Local 146 members who requested to resume work in June 2022 submitted applications in response to Cessco's recruitment advertisements in May/June 2023.

Decision

[47] Sections 89, 90 and 149(1)(a)(vii) and (viii) are relevant to this decision, and are reproduced below for ease of reference:

> *89 No person ceases to be an employee within the meaning of this Act by reason only of the person ceasing to work as a result of a lawful lockout or a lawful strike.*
>
> **…**
>
> *90(1) When a strike or lockout ends*
>
> *(a) as a result of a settlement,*
>
> *(b) on the termination of bargaining rights of the bargaining agent, or*
>
> *(c) on the expiration of 2 years from the date the strike or lockout commenced,*
>
> *any employee affected by the dispute whose employment relationship with the employer has not been otherwise lawfully terminated is entitled, on request, to resume the employee's employment with the employer in preference to any employee hired by the employer as a replacement employee for the employee making the request during the strike or lockout.*
>
> *(2) The request of an employee under subsection (1) must be made in writing*
>
> *(a) within 14 days after the date on which the employee learns that the strike or lockout has ended and in any case within 30 days after the date on which the strike or lockout ended, if the strike or lockout*

ends in the manner referred to in clause (a) or (b) of that subsection, or

(b) forthwith, if the strike or lockout ends in the manner referred to in clause (c) of that subsection.

(3) Nothing in subsection (1)

(a) prevents the parties to a dispute from agreeing on a mechanism for an orderly return to work within a reasonable period after a strike or lockout is over, or

(b) requires an employer to reinstate an employee where

(i) the employer no longer has persons engaged in performing work the same or similar to work that the employee performed prior to the employee's cessation of work, or

(ii) there has been a suspension or discontinuance for cause of an employer's operations or any part of them, but, if the employer resumes those operations, the employer shall first reinstate those employees who have requested a resumption of employment.

(4) An employer shall, on the request of any employee returning to work at the end of a strike or lockout, where there is no collective agreement in place, reinstate the employee in the employee's former employment on any terms that the employer and the employee may agree on, and the employer in offering terms of employment shall not discriminate against the employee because of the employee exercising or having exercised any rights under this Act.

…

149(1) No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall

(a) refuse to employ or to continue to employ any person or discriminate against any person in regard to employment or any term or condition of employment because the person …

(vii) has participated in any strike that is permitted by this Act, or

(viii) has exercised any right under this Act; …

Summary Dismissal Application

[48] With respect to Cessco's application pursuant to section 16(4)(e) of the *Code* to have Local 146's complaint and its objections to the certification application summarily dismissed, the

Board, at a case management meeting, directed that the arguments for this application could be made at the start of the hearing. Cessco made no arguments at the hearing, nor did it make any arguments seeking summary dismissal at any other time prior to the end of the hearing. As Cessco opted not to pursue its summary dismissal application at hearing, the application is dismissed, and the Board will now turn to its analysis and findings based on the evidence before it.

Objections to Certification Application

[49] Local 146's first objection is that the certification application be held in abeyance until its application for judicial review of the Board's September 21, 2023 decision is decided. Without a stay of the Board's decision, which Local 146 did not seek, the Board's September 21, 2023 decision remains operable, and an objection to a certification application cannot masquerade as a stay application, especially given that the Board seeks to minimize delay in processing certification applications. This objection is dismissed.

[50] In response to Local 146's objection that Local 1999 and Cessco colluded to assist Local 1999 with its certification application, the Board finds that this objection is not supported by the evidence. In particular, the fact that Croft permitted the Local 1999 representative to meet with the employees in the lunchroom after the employees indicated they wanted to meet with the Local 1999 representative is not sufficient to establish collusion between Local 1999 and Cessco. This objection is dismissed.

[51] Local 146's third objection that the votes cast by the seven new employees Cessco hired should not be counted in the certification application is addressed in the remedy portion of this decision.

Section 90

[52] In order to determine whether Cessco has breached section 90 of the *Code,* it is necessary for the Board to interpret that provision, and in doing so, the Board is guided by the principles in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 where the Supreme Court of Canada stated at paragraphs 117, 118, and 120:

> [117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. …
>
> [118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.
>
> …
>
> [120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

[53] In addition to the above principles of statutory interpretation, the Board has also considered any interpretive guidance offered by its previous cases. The parties did not provide any jurisprudence on the interpretation of section 90(3)(b)(ii), and previous Board decisions that consider section 90 (previously section 88 of the *Code*), do so only peripherally. As such, this decision provides the Board's first opportunity to consider section 90 in detail.

[54] While the cases referenced below provide some general guidance, the bulk of the interpretive task remains before us, and we note at the outset that the crux of the interpretive exercise involves the application of section 90(3)(b)(ii).

[55] In *James Krezanoksi and Certain Employees of Zeidler Forest Industries Ltd, and Ziedler Forest Industries, Ltd.* [1993] Alta. L.R.B.R. 138, the Board considered whether the reinstatement rights contained in section 90 apply in a situation where a revocation application was brought under the *Code* that related to a strike governed by the previous *Labour Relations Act*. Determining that a remedial approach to the interpretation was appropriate, the Board held that the striking employees had recall rights under section 90 "subject to any s. 88(2) [now section 90(2)] and 88(3) [now section 90(3)] defenses" (page 157). The Board's analysis also stated that "[e]ven if a strike ends with the passage of two years, the Union remains bargaining agent" (page 156), a principle that is relevant to our analysis in this case.

[56] The Board also briefly considered section 90 in *Re Airtex Manufacturing Partnership*, [1992] Alta. L.R.B.R. 348 ("*Airtex"*) in the context of a dispute over whether employees had to obtain the Board's consent prior to bringing a revocation application during a strike (they do), and offered the following interpretation:

> We agree with the Union that s. 88 [now section 90] is sequential. Section 88(1) [now section 90(1)] defines when the right to take strike or lockout action (once lawfully commenced) ends. On the happening of that event, employees can make a request to resume employment in preference of any replacement employees. Section 88(2) [now section 90(2)] defines when the request must be made. Section 88(3) [now section 90(3)] creates two modifications to this general right of reinstatement.

[57] Chapter 30 of the Board's *Policy and Procedure Manual* also provides the following information on Strikes and Lockouts at pages 12 and 13:

> **WHEN A STRIKE OR LOCKOUT ENDS**
>
> A strike or lockout ends when a settlement agreement is reached (a new collective bargaining agreement or otherwise) or after 2 years expire from the date the strike or lockout commenced. While the strike or lockout ends after 2 years, the union's certification is unaffected and remains in place and a new notice to commence collective bargaining must be served.
>
> …
>
> ***No Return to Work Agreement***
>
> Employees may also return to work under the terms outlined in the *Labour Relations Code*. If a strike or lockout ends, Section 90 provides that an employee may request in writing to return to work within 14 days of learning

> of the end of the dispute (and within 30 days in any event). If the strike or lockout ends because two years have elapsed, such a request must be immediate.
>
> An employer is not required to reinstate employees if the employer no longer has persons engaged in performing work the same as or similar to the work performed by the employee prior to the cessation of work. For example, an employer may have automated a function during a dispute and no longer needs a particular type of employee. Similarly, the employer is not required to reinstate an employee if the employer has discontinued or suspended an operation. If the employer resumes operation, the employer must first reinstate those employees who have requested reinstatement.
>
> ***Returning When There is No Collective Agreement***
>
> Employees may return to work without a collective agreement being in place. This could be because the union has called off a strike or the strike has run longer than two years and is deemed to have ended without a new agreement being reached. It could also be that the union's bargaining rights have been revoked during the course of the strike or lockout.
>
> Employees who return to work under the provisions of the *Code* do so on terms reached by the employer and the employee. The employer may not discriminate against workers because of an employee having exercised the employee's right(s) under the *Code*.

[58] Section 90(1) states that when a strike ends on the expiration of 2 years after the date it began, any employee whose employment relationship has not otherwise been lawfully terminated is entitled to resume employment in preference to any replacement employee hired during the strike or lockout if the employee requests this.

[59] On the evidence before the Board, the seven employees Cessco hired in the spring of 2023 are not replacement employees for the purposes of section 90(1). While the *Code* contains no definition of replacement workers, the Board described them as follows in *United Nurses of Alberta and Alberta Health Services and The Alberta Union of Provincial Employees*, [2019] Alta. L.R.B.R. 262 at paragraph 75:

> Secondly, replacement workers have a different status from union members under the *Code*. Replacement workers are generally hired on a temporary basis to perform work normally performed by union workers. Replacement workers have a tenuous status in the workplace as they can be replaced by the striking workers when the strike ends: *Code*, s. 90(1). They are not considered to be part of the bargaining unit if it is likely they will be replaced by returning union

members: see *Certain Employees of Zeidler Forest Industries Ltd. v. IWA-Canada, Local 1-207*, [1993] Alta. L.R.B.R. 3 ("*Zeidler*").

[60] While we find that the seven new employees Cessco hired were not replacement workers, as they were hired after the strike concluded by virtue of section 90(1)(c) of the *Code*, that does not, as Cessco would urge us to find, end the analysis.

[61] In our view, section 90(1) not only gives bargaining unit employees a statutory right to "oust" any replacement workers the employer may have hired during the strike or lockout, provided they request that their employment resume when the strike or lockout ends, it also gives them an entitlement to resume work in specific circumstances. In some cases, that resumption of work will involve displacing replacement workers the employer has hired. But the absence of replacement workers does not erase the underlying protection inherent in the wording and purpose of section 90(1).

[62] Keeping in mind the statutory interpretation principle that the legislature does not speak in vain, if section 90(1) did not create a broad right to resume work upon request at the conclusion of a strike, it raises the question of what purpose would the qualifications on this right in section 90(3) serve.

[63] Section 90(2) speaks to when and how a request to resume employment must be made. Specifically, section 90(2)(c) requires that the request must be made in writing "forthwith" in circumstances where the strike or lockout ends on the expiry of two years from its start date under 90(1)(c). "Forthwith" is defined in the *Oxford Canadian Dictionary* as meaning "immediately." Read alongside section 90(1)(c), the wording is forthwith "on the expiration of 2 years from the date the strike or lockout commenced."

[64] Cessco argues that any requests submitted by Local 146 members before June 28, 2022 (the day they submit strike ended as a result of section 90(1)(c)) fall afoul of the timeliness requirements of this provision. They submit this provision requires employees to make this request immediately after the strike or lockout is deemed to end, and that the section does not apply in a situation where the employees submit their request before this date. We do not agree.

[65] To interpret section 90(2)(c) as disentitling employees who provide their written request a day or two early, in anticipation of the conclusion of a strike or lockout whose end date is deemed by legislation and thus easily known, would, in our view, be contrary to section 10 of the *Interpretation Act*, which states that statutes shall be construed as being remedial and shall be given a fair, large and liberal construction. When the word "forthwith" is interpreted in accordance with the context and purpose of the legislation, its aim is to deter the tardy, not to punish the proactive. The parties were well aware the day was looming: indeed, the applicable sections of the *Code* are referenced in both the employees' letters and in Cessco's response. As the purpose of section 90(1) is to create a right for employees to resume work on request upon the conclusion of a strike or lockout, depriving an employee of an entitlement as important as this because they got their request in a day or two early does nothing to advance the remedial interpretation of the legislation required by the *Interpretation Act.* Moreover, we struggle to see how an employer who receives letters from employees requesting the resumption of their employment in the days immediately leading up to the end of a strike or lockout finds itself at a disadvantage.

[66] Turning to section 90(3) in detail, this provision begins with a qualifier, "nothing in section (1)", and then, after stating that the parties may agree on a mechanism for an orderly return to work, identifies two qualifications. The first is that the employer is not required to reinstate an employee where the same or similar work is no longer being performed. The second states that the employer is not required to reinstate an employee where there has been a suspension or discontinuance of operations. However, the section does not end there; it contains a further, and in the context of this case, rather important qualifier: "but, if the employer resumes those operations, the employer shall first reinstate those employees who have requested a resumption of employment."

[67] The *Code* does not mention any timelines for the duration of this obligation. That is to say, when an employer's operations are suspended in the wake of a strike or lockout, for how long do its reinstatement obligations under section 90(3)(b)(ii) continue? That is not a question that lends itself to a one-size-fits all answer, and it is one that will necessarily depend on the context of each case. In the case before us, when the provision is considered in harmony with the context and purpose of the *Code*, the obligation seems to be less a temporal one than a

relational one. That is, where a bargaining relationship continues after a strike, as it did here as Local 146's representation rights had not been terminated when Cessco hired seven new employees, an employer who resumes its operations "shall first reinstate those employees who have requested a resumption of employment."

[68] Cessco argues that due to the passage of time, the Board should consider the employment relationship to have concluded, such that it did not have any obligations to the Local 146 members who asked to resume work. This argument does not take into account section 89 of the *Code*, which states that no person ceases to be an employee only by ceasing to work as a result of a lawful strike or lockout. When read alongside the language in section 90(1), which refers to an any employee "whose employment relationship with the employer has not been otherwise lawfully terminated," the intention of the *Code* is that, absent any steps on the part of Cessco to terminate the employment relationships, the reinstatement obligation is ongoing. Cessco's operational pause did not halt the bargaining relationship, which always remained intact, and continued to be in effect when Cessco resumed its operations months later. In addition, Cessco's June 29, 2022 letters to employees do not purport to terminate the employment relationship. Rather, they indicate that the "strike/lockout had a dramatic impact on Cessco's operations" and state that Cessco's "**current** lack of production work" makes them unable to fulfil the request to resume work (emphasis added). In these circumstances, we find that section 90(3)(b)(ii) creates an obligation of reinstatement once operations resume.

[69] In interpreting section 90, the Board is also guided by paragraph 4 of the preamble of the *Code* which states:

> WHEREAS the public interest in Alberta is served … through fair, equitable and expedient resolution of matters arising with respect to terms and conditions of employment;

[70] In the Board's view, the preamble points to an overriding statutory objective to resolve matters relating to terms and conditions of employment in a fair and equitable manner. Read alongside section 89 of the *Code,* which states that no person ceases to be an employee by reason of their participation in a legal strike or lockout, and section 90, which provides a mechanism for creating employment resumption reinstatement rights, the *Code* must be interpreted broadly, liberally and in a manner that promotes and protects those employee interests.

[71] The overall purpose of section 90 is to give employees affected by a legal strike or lockout the option of resuming their employment if they so request. If the statutory protection extends to losing their employment to replacement workers, such that they have the ability to "oust" any replacement workers upon the conclusion of a strike or lockout if they request to resume their employment, it follows that, when the provision is considered as a whole, and in the context of the *Code*, the purpose of section 90(3)(b)(ii) is to provide a similar protection in the case of a temporary operational shutdown such that if an employer resumes operations, it is first obligated to reinstate any employees who have asked to resume their employment.

[72] We find that Cessco's resumption of operations in May/June of 2023 triggered section 90(3)(b)(ii), and that, provided the employees satisfied their obligations under section 90(1) and (2), they are entitled to reinstatement if they wish to resume their employment with Cessco.

[73] In that respect, the Board finds that the June 2022 letters from the employees along with the covering letter of the Union constitute a request by the employees to resume work under section 90(1). The Board notes that the Union's covering letter did not restrict the description of a request to replace replacement workers but indicated that the employees requested "to resume employment … ." In addition, the Union's June 27, 2022 letter indicated that if Cessco had any questions or concerns, Cessco should contact Casey Worden with the Union. Cessco did not contact the Union.

[74] The Board finds that the 19 employees made requests to resume their employment under section 90. The Board concludes that in the context of this case, Cessco, upon resuming its operations, had an obligation to make inquiries of Local 146 members who submitted requests to resume employment in June 2022. When Cessco resumed its operations in the winter of 2023, it was governed by section 90(3)(b)(ii), and the seven positions it hired for should have first been offered to the employees who submitted their request to resume employment in June 2022.

Section 149

[75] With respect to Local 146's complaint that Cessco breached section 149(1)(a)(vii) and (viii) of the *Code,* the Board notes that as the 19 individuals who applied in June 2022 were members of Local 146 who had participated in the strike, and individuals who exercised a right

under the *Code* by virtue of submitting written requests to resume work, both subsections are engaged.

[76] The Board's recent decision in *United Food and Commercial Workers Union, Local No. 401 v. Cargill Limited*, [2022] Alta. L.R.B.R. 72 reiterates the well-established principle that some form of intention is required to establish a breach of section 149:

> [121] Unlike the prohibition against interference with union representation of employees set out in Section 148, the prohibitions in Section 149 require some form of intention: that employees were dismissed, disciplined or discriminated against "because" of union membership, activity or exercising a right under the *Code;* or that the Employer did "seek" to intimidate, penalize or discriminate against an employee for a protected reason or activity. Adams in *Canadian Labour Law* (2017: Looseleaf: Canada Law Book) states the requirement this way (at §10.130):
>
> > Canadian statutory provisions, barring discharge or other discriminatory treatment "because" or "for the reason that" employees are engaged in legitimate union activities, have been interpreted by courts as requiring scrutiny to see if "membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of many reasons regardless of priority" for the dismissal. Improper motive does not have to be the dominant motive. Since employers are not likely to confess to an anti-union animus, tribunals have to rely on circumstantial evidence to draw inferences about employer motivation. (…)

[77] Usually, that intention is something that the Board must infer because, as the Board has noted at paragraph 34 of *UFCW, Local 401 v Noralta Lodge Ltd.*, [2012] Alta. L.R.B.R. LD-035 (citing the principles articulated in *Devine et al v Alberta Bingo Supplies Ltd.*, [1999] Alta. L.R.B.R. 251), anti-union animus is rarely something employers expressly admit:

> Employers are unlikely to confess to being motivated by anti-union animus. Labour boards rely on circumstantial evidence to draw inferences about employer motivation. Considerations include: 1) the existence of a pattern of anti-union activity; 2) the extent of the employer's knowledge of the existence of union activity and of the employee's involvement in that activity; 3) the manner in which the employee was discharged; and 4) the credibility of witnesses.

[78] The Board need not strain to draw an inference here. Croft admitted on cross-examination that he did not want to "deal with the union". His reasons for not wanting to do so

were rooted in his negative experience during the strike when those on the picket line yelled obscenities at him.

[79] We find that this testimony is sufficient to establish an intention to refuse to employ because of participation in a legal strike or exercising a right under the *Code*. While the evidence did not speak to whether the 19 individuals who requested to resume work were those who yelled obscenities on the picket line, what is critical to this analysis is that Croft admitted he made a decision to hire "outside the Union" because he "did not want to deal with the Union." When the strike and lockout ended on June 28, 2022, the Union continued to be the certified bargaining agent for the Cessco bargaining unit. Section 89 of the *Code* indicates the employees who participated in the lawful strike had not ceased to be employees because of their having done so.

[80] While Croft's testimony in and of itself is sufficient to establish a breach because it reveals that he was refusing to hire Local 146 members "on purpose"; that is, there is deliberate action on his part that reflects anti-union animus, and the Board's finding of a breach is based on his testimony, we would also note that the views expressed in his testimony stand in stark contrast to the amicable language contained in Cessco's June 29, 2022 letters.

[81] Cessco argues that the employer did not refuse to employ Local 146 members, and that Cessco did not contravene the *Code* on the basis that no Local 146 members applied for the positions. We understand this argument to be, in effect, that an employer cannot refuse to hire someone who does not apply for a position the first place. Cessco further argues that the Board should draw an adverse inference because the Union did not lead any evidence to establish that the Local 146 members wanted to resume their employment.

[82] Sopinka, Lederman and Bryant's text the *The Law of Evidence in Canada*, (Markham: LexisNexis, 2014, 4th ed) describes the circumstances necessary to support an adverse inference:

> In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain

> it away. Such a failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it (at 6.450).

[83] While, pursuant to section 14(5)(b) of the *Code*, the Board is not bound by the law of evidence applicable to judicial proceedings, it finds the principles in the above excerpt helpful in guiding its analysis here. The question before the Board in the section 149 complaint is whether Cessco's refusal to hire the Local 146 employees who submitted work resumption requests was intentional, and rooted in their exercising a right under the *Code* or participating in a lawful strike. In making this determination, the Board is on alert for evidence of anti-union animus: that is what must be established or capable of being inferred from the evidence. To require the Union to lead evidence about whether the employees wanted to work for Cessco, or about why they did not apply, is to shift the analytical focus away from where it belongs, which is on the employer's intentions. The question of whether the employees *want* to return to work at Cessco at this juncture is an issue that becomes relevant at the remedy stage of these proceedings, particularly on the issue of damages. The question under section 90 was whether Cessco was required to offer them reinstatement in the circumstances (and we have found that it is) and the question under section 149 is whether Cessco's refusal to hire, considered in the context of its failure to attempt to contact any 146 members who expressed a desire to resume employment, was tainted by anti-union animus. For the reasons above, we have found that it is.

[84] The Board concludes that Cessco deliberately avoided hiring the June 2022 applicants, and the Board further concludes that a significant element of anti-union animus motivated Cessco's conduct. As a result, the Board concludes that Cessco violated sections 149(1)(a)(vii) and 149(1)(a)(viii) of the *Code*.

Remedy

[85] Given the Board's findings above, the Board grants Local 146's request for a declaration that Cessco violated sections 90(3)(b)(ii),149(1)(a)(vii), and 149(1)(a)(viii) of the *Code*. We now turn to consider the remaining remedies that Local 146 has requested, namely that the Board direct Cessco to offer to reinstate those employees who requested to resume their employment, and further direct that they be considered members of the bargaining unit for the purposes of the

certification vote, and that the seven employees Cessco hired not be entitled to vote. Local 146 also requests an order of damages.

[86] The scope of the Board's remedial powers is found in sections 16(8) and 17(1) of the *Code*, which state:

> 16(8) When the Board makes a decision with respect to a complaint, reference or application, the Board may by order or directive, for the purpose of ensuring the fulfilment of the purposes of this Act, in respect of any contravention of or failure to comply with any provision to which section 17 applies, in addition to or instead of any other order that the Board is authorized to make under that section, require an employer, employers' organization, employee, trade union or other person to do or refrain from doing anything that it is equitable to require the employer, employers' organization, employee, trade union or other person to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of the purposes of this Act.
>
> 17(1) When the Board is satisfied after an inquiry that an employer, employers' organization, employee, trade union or other person has failed to comply with any provision of this Act that is specified in a complaint, the Board may issue a directive to rectify the act in respect of which the complaint was made and, without restricting the generality of the foregoing and of section 16(8),
>
> …

[87] While section 17 goes on to list specific remedies that the Board may order, the Board's remedial directions in this case stem from its general powers under section 17(1) and 16(8).

[88] The Alberta Court of Appeal interpreted the Board's remedial authority under section 17 of the *Code* as follows in *United Nurses of Alberta v Alberta (Attorney-General),* 1990 ABCA 64:

> [84] … I see no reason to construe narrowly the powers of the Board. This is not penal legislation.
>
> [85] … After proof of breach of any provision of the Act, the Board had power to "issue a directive to rectify the act in respect of which the complaint is made" (s. 141(5)). At first the Act confined that to breaches of specific sections. But in 1983 before these directives, s, 141(1) was amended to cover anything under the Act. The union does not argue the contrary.

> [86] So the Board could order the union to "rectify" its breaches. The word "rectify" means:
>
> > (1) "To put or set right, to remedy (a bad or faulty condition or state of things," or "To put right, correct, amend, make good (a mistake, error, omission, etc.)."
> >
> > (2) "To put or set (a person or thing) right, in various applications of the adj.; to bring or restore to a good or normal condition; to establish in a proper manner."
> >
> > (3) (Third is a term in chemistry.)
> >
> > (4) "To correct or reform (a person, one's nature, mind, etc.) from vice or moral defect."
> >
> > (5) "To correct by removal of errors or mistakes; to amend or improve in this way."
> >
> > (6) "To put right by calculation or adjustment."
> >
> > The Oxford English Dictionary (2d ed. 1989)
>
> [87] … The Act also empowered the Board to make the wrongdoer undo the harm he had done. …
>
> [88] Furthermore, a person empowered by statute to "do or enforce the doing of any act or thing" also has "all other powers that are necessary to enable the person to do or enforce the doing of the act or thing": s. 23(2) of Alberta's *Interpretation Act.*
>
> [89] The Act gave the Board another independent power. Section 8(1)(a) of the Act allowed the Board to "make or issue any orders, decisions, notices, directives, declarations or certificates it considers necessary". I see no reason to cut down those plain words. The Act does not say that is limited to carrying out the powers already given. This paragraph also empowered the directives made here.
>
> [90] While those two sections may not expand the objects which the Board could pursue, they do clearly expand its powers. Otherwise they have no meaning.

[89] Applying the Alberta Court of Appeal's analysis above to the current matter, the task confronting the Board is to craft a remedy aimed at undoing the harm Cessco caused when it violated sections 90(3)(b)(ii), 149(1)(a)(vii), and 149(1)(a)(viii) of the *Code*. The specific nature of that harm consists of failing to "first reinstate those employees who have requested a

resumption of employment" in accordance with section 90(3)(b)(ii) and, closely linked with that breach, the refusal to employ Local 146 members for reasons motivated by anti-union animus.

[90] In our view, appropriate redress must take the form of offering to reinstate those employees who requested to resume their employment. The implementation of that remedy is, however, less than straightforward.

[91] For instance, the number of Local 146 members who asked to resume their employment (19) is more than double the number of employees Cessco hired (7) in breach of the *Code*. In other words, it is not possible to reinstate all 19 employees who submitted a request, and that may be so not only because of the limited number of positions, but also the nature of those specific positions and the skills they require.

[92] The Board's directions must also make allowances for the reality that the circumstances and wishes of the 19 Local 146 members who submitted those requests may have changed; that is, they may no longer wish to work for Cessco. There is also the further uncertainty around whether any, some, or all of those 19 individuals would satisfy the position requirements for the seven positions Cessco hired into.

[93] In our view, and recognizing the possibility that the Local 146 members who submitted letters in June 2022 may not wish to resume working for Cessco at this juncture for a variety of reasons, the first order of business is to ascertain which of the 19 employees wish to resume their employment. Once that is known, it will then be possible for Cessco to compare the list of Local 146 members who wish to return with the 7 positions it hired for.

[94] If more than 7 Local 146 members wish to resume their employment with Cessco, then Cessco will need to decide which of those employees are suitable for the 7 positions it currently has, or whether other opportunities exist.

[95] The possibility that none of the 19 Local 146 members may wish to return to Cessco reveals one of the more challenging questions on remedy in this matter, which is whether and to what extent the right to reinstatement is connected to the right to have one's vote counted in the certification application. One of the remedies Local 146 is requesting involves ensuring those

who requested to resume their employment are able to vote in the certification, and conversely, that those employees who were hired contrary to the *Code* are not.

[96] While the Board has the authority to tailor remedies in certification applications where breaches of the *Code* have been found to ensure that the true wishes of the bargaining unit are expressed in the vote, it is also the case that voter eligibility under the Board's *Voting Rules* is closely linked with who worked on the day of the application. As none of the Local 146 members was working for Cessco on the day of the certification, having their vote count in the certification application is the result of the Board's remedial intervention. While the Board believes such intervention is appropriate here, these powers are being exercised in the face of numerous contingences, such as whether or how many of the Local 146 members decide to return to work at Cessco. For this reason, we find that an appropriate and effective remedial balance is struck by ordering that only the votes of those Local 146 members who resume their employment with Cessco will be counted.

[97] Based on the above analysis and findings, the Board issues the following directives:

- Within 21 days of the date of this decision, Cessco must provide a letter to the 19 employees who submitted a written request to resume employment asking them to confirm whether they still wish to resume employment with Cessco. This letter should indicate that it is not an offer of employment, but an interim step taken to determine which employees may be considered for available positions. The letter should provide Local 146 members with 21 days to provide their response, and if no response is received within this timeframe, then Cessco may proceed on the basis that the employee does not wish to resume their employment. Cessco shall copy Local 146 with the Letters.

- If 7 or fewer members of Local 146 indicate they wish to resume their employment with Cessco, Cessco will take whatever steps are necessary to reinstate those employees as soon as practicable, provided that they have the necessary skills and qualifications for the positions Cessco currently has.

- If more than 7 members of Local 146 indicate that they still wish to resume their employment with Cessco, Cessco is ordered to rank the employees who express such an intention for their suitability for the existing positions. Once this process is concluded, and it must be concluded within 14 days of receiving the communications from the employees, Cessco is ordered to extend a job offer or otherwise reinstate those employees as soon as practicable provided that they have the necessary skills and qualifications for the positions Cessco currently has within its operation. As noted below, the Board has reserved its jurisdiction to address any issues that arise from the

implementation of this remedy, and this reserved jurisdiction includes a future order requiring Cessco to disclose the criteria it applied to its ranking decisions.

- For the purposes of the vote in the certification application, any of the 7 employees of Cessco who worked on August 10, 2023 (the date of the certification application) who continue to work for Cessco after the above steps are concluded will have their vote counted in the certification application. Any members of Local 146 who are offered a position and who resume their employment with Cessco as a result of the Board's remedial orders will also have their vote counted for the certification application.

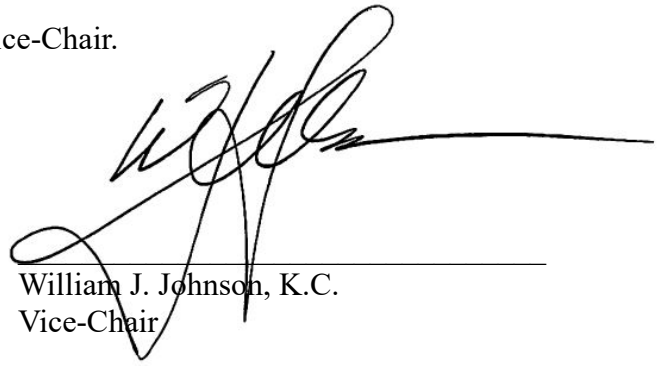
[98] Local 146 also sought damages. In Aluma Systems Inc. v International Association of Heat and Frost Insulators and Allied Workers, Local 110 and United Brotherhood of Carpenters and Joiners of American, Local Union No. 1325, [2014] Alta. L.R.B.R. 27, the Board stated at paragraph 28:

> In calculating damages in these types of circumstances, it is generally appropriate for the Board to compensate the grieving union on the basis of the *Blouin Drywall* principle, which provides damages to the union for the financial loss sustained by its members who were unemployed and available when others performed the work at issue. (See: *Re Blouin Drywall Contractors Ltd. And United Brotherhood of Carpenters and Joiners of America, Local 2486,* (1973) 4 L.A.C. (2d) 254, followed in *G & C Building Contractors Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 1325* [2005] A.G.A.A No. 61.)

[99] In order to support an award of damages, Local 146 would have needed to lead evidence that its members were willing and available to perform the work done by the new employees Cessco hired. While we stated above that such evidence was not necessary to establish the breach of section 149, it is necessary to support an award of damages. For this reason, and given the Board's remedial order provides for the opportunity of reinstatement, the Board finds an award of damages is not appropriate.

[100] For greater clarity, the remedial directives outlined above flow from the breach of either section 90 or the breach of section 149. The Board reserves jurisdiction to address any issues that arise out of its remedial orders above.

ISSUED and DATED at the City of Edmonton in the Province of Alberta this 6th of June, 2024 by the Labour Relations Board and signed by its Vice-Chair.



William J. Johnson, K.C.
Vice-Chair