

Federal Court of Appeal



Cour d'appel fédérale

Date: 20260528

Docket: A-241-24

Citation: 2026 FCA 105

**CORAM: GLEASON J.A.
LOCKE J.A.
BIRINGER J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

**FEDERAL GOVERNMENT DOCKYARDS, TRADES AND
LABOUR COUNCIL (ESQUIMALT, B.C.)**

Respondent

Heard at Vancouver, British Columbia, on April 13, 2026.

Judgment delivered at Ottawa, Ontario, on May 28, 2026.

REASONS FOR JUDGMENT BY:

GLEASON J.A.

CONCURRED IN BY:

**LOCKE J.A.
BIRINGER J.A.**

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] Federal labour legislation in both the public and private sectors prohibits employees from engaging in illegal strikes and trade unions from authorizing or declaring illegal strikes. In the federal public sector, subsection 194(1) of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 [the *FPSLRA*] also specifies that officials and representatives of employee

organizations (as trade unions are termed in the *FPSLRA*) are prohibited from counselling or procuring the declaration or authorization of an illegal strike or the participation of employees in such a strike.

[2] In multi-union workplaces, strikes and lockouts pose challenges when employees in one bargaining unit engage in a legal strike or are locked out when, at the same time, other employees are not in a legal strike position. When this occurs, employees who are striking or locked out will typically set up picket lines at the employer's place of business. However, at the same time, employers generally expect other employees to report to work, and the employees who do not have the right to strike may be put in the position of being asked to cross or to attempt to cross a picket line to get to work. When these other employees are unionized, challenges may arise as trade unions generally do not condone crossing picket lines.

[3] The case law has long recognized that a collective refusal of employees who are not in a legal strike position to cross another union's picket line, in solidarity with the striking employees, constitutes an illegal strike: see, for example, *International Longshoremen's Association, Locals 273, 1039, 1764 v. Maritime Employers' Association et al.*, 1978 CanLII 158 (SCC), [1979] 1 S.C.R. 120 at pp. 138–139; *International Longshore and Warehouse Union, Canada v. British Columbia Terminal Elevator Operators' Assn.*, 2001 FCA 78 at paras. 18–19; *Port of Saint John Employers Association, Inc.*, 2011 CIRB 609 at para. 10; David J. Corry, *Collective Bargaining and Agreement* (Toronto: Thomson Reuters, 2024) [Corry] at § 9:18. And, union officials and representatives cannot authorize or declare an illegal strike or, under the *FPSLRA*, counsel employees to refuse to cross another union's picket lines in solidarity with

striking employees. Indeed, if an illegal strike is occurring, union representatives are obliged to counsel employees to return to work: see, for example, Donald J.M. Brown, David M. Beatty & Adam J. Beatty, *Canadian Labour Arbitration*, 5th ed (Toronto: Thompson Reuters Canada, 2019) at § 9:20; Corry at § 9:18; *Canadian Broadcasting Corporation*, 1999 CIRB 11 [CBC] at para. 36; *Canada Post Corp. and CUPW (CPC-10-002), Re*, 2014 CarswellNat 351, 242 L.A.C. (4th) 379 [Canada Post] at para. 2. However, individual decisions made by non-striking employees to decline to cross a picket line, especially if made because doing so might expose them to risk of violence, have been found not to constitute illegal strikes: see, for example, George W. Adams, *Canadian Labour Law*, 2nd ed (Toronto: Thompson Reuters, 2024) at § 11.3; *MacMillan Bloedel (Alberni) Ltd. v. Swanson (1972)*, 1972 CarswellBC 374, 26 D.L.R. (3d) 641 at paras. 16–20.

[4] In the present case, federal public sector employees, represented by the Public Service Alliance of Canada (PSAC), engaged in a legal strike in April 2024. The strike was one of the largest in Canadian history. PSAC raised picket lines at federal government locations across the country, including at the Department of National Defence (DND) ship repair facilities in British Columbia, where several hundred employees who were not in a legal strike position also worked. These included ship repair employees, who are unionized and represented by another bargaining agent, the Federal Government Dockyards, Trades and Labour Council (Esquimalt) (the Council).

[5] The Council is comprised of several trade unions: the Machinists, Fitters and Helpers Industrial Union, Local 3; Shipwrights, Joiners and Wood Caulkers' Industrial Union, Local 9;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 191; International Union of Operating Engineers, Local 115; Sheet Metal Workers' International Association, Local 276; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the US and Canada, Local 324; International Brotherhood of Electrical Workers, Local 230; International Association of Bridge, Structural and Ornamental Iron Workers, Shipyard Riggers, Bench Men and Helpers, Local 643; International Union of Painters and Allied Trades, Local 138, District Council 38; United Brotherhood of Carpenters and Joiners of America, Local 1598; and International Association of Machinists and Aerospace Workers, Local 456.

[6] These constituent unions represent other employees, working in the skilled trades elsewhere in British Columbia. However, at DND, it is the Council, itself, that is the certified bargaining agent for the ship repair employees in British Columbia. The Council forwent the right to strike during the contemporaneous round of collective bargaining that led to the PSAC strike, having elected to settle its collective agreement via arbitration under section 103 of the *FPSLRA*. Thus, the Council was not in a legal strike position when the PSAC strike occurred.

[7] During the PSAC strike, DND expected the ship repair employees to perform their usual duties and required them to make reasonable efforts to attempt to cross the PSAC picket lines. As things turned out, no ship repair employees crossed the PSAC picket lines.

[8] In the days leading up to the PSAC strike, the Council issued two bulletins to ship repair employees, providing them directions about what to do in the event there were PSAC picket

lines. Council representatives also made statements to the ship repair employees about crossing the PSAC picket lines. The employer believed that the conduct of the Council, notably through the bulletins and statements made by Council representatives, violated subsection 194(1) of the *FPSLRA*. The employer therefore made an application to the Federal Public Sector Labour Relations and Employment Board (the Board) for a declaration that the Council had violated that subsection.

[9] In *Treasury Board v. Federal Government Dockyards, Trades and Labour Council (Esquimalt, B.C.)*, 2024 FPSLREB 84, the Board dismissed the employer's application and found that the Council had not violated subsection 194(1) of the *FPSLRA*.

[10] The Attorney General of Canada has applied to this Court to set aside the Board's decision.

[11] Prior to the hearing before this Court, the Court advised the parties that it wished to hear from them on whether this application is moot given that the PSAC strike ended in April 2024. The Court heard the parties on the issue of mootness and took the issue under reserve. We then proceeded to hear the parties' submissions on the merits of the application in respect of which judgment was also reserved.

[12] These reasons address both the issue of mootness and the merits of the application to set aside the Board's decision.

[13] For the reasons that follow, I would find that although this application is moot, this Court should exercise its discretion and decide the application. On the merits, I would grant the application, set aside the Board's decision, and remit the employer's complaint to the Board for redetermination in accordance with these reasons, the whole with costs in the amount agreed to by the parties.

I. Mootness

[14] I turn first to the issue of mootness.

[15] Under the case law applied by courts, a case will be moot if there is no longer a live controversy between the parties: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 1989 CanLII 123 (S.C.C.) [*Borowski*] at p. 354; *International Longshore and Warehouse Union - Canada v. British Columbia Maritime Employers Association*, 2024 FCA 142 [*ILWU v. BCMEA*] at para. 59. A court has discretion to hear an otherwise moot case. Factors relevant to the exercise of that discretion include: the ongoing presence of an adversarial context between the parties; consideration of whether deciding the case accords with the proper role of the court; and any special circumstances that warrant hearing an otherwise moot case. Special circumstances encompass, among other things, situations where: (1) the case will have a practical effect on the rights of the parties; (2) the case raises reoccurring issues that are dealt with quickly and therefore seldom have an opportunity for review; or (3) hearing the case is in the public interest or raises an issue of public importance: *Borowski* at pp. 358–62; *ILWU v. BCMEA* at para. 61.

[16] In the present case, the Board considered whether the employer's subsection 194(1) application was moot because, by the time the application was filed, the PSAC strike had ended. The Board concluded that the employer's application was not moot because the situation that gave rise to the application might arise again and its decision could provide guidance to the parties in the future (at para. 108). The Board in essence determined that there was a labour relations purpose for deciding the application.

[17] This approach to mootness has been applied by the Board in other cases, where it has decided to proceed to hear cases where the events giving rise to a complaint were resolved and the only remedy sought was a declaration. In *Public Service Alliance of Canada v. Canada Revenue Agency*, 2024 FPSLRB 57, the Board explained that adopting a labour relations purpose approach to the issue of mootness is appropriate because different issues are at play in labour board cases than before a court. There, the Board stated as follows at paragraphs 72 to 76:

[72] [...] the *Borowski* test for mootness was developed for civil courts. It must be "... applied with care in the context of proceedings before administrative tribunals"; see *Teamsters Canada Rail Conference v. Canadian National Railway Company*, 2011 CIRB 572 at para. 15. The concern of courts about moot cases is a threefold balance between a court's inherent competence to resolve legal disputes, judicial economy, and the judiciary's role in law-making functions. By contrast, an administrative tribunal's competency to resolve a dispute derives explicitly from statute; it must be concerned with administrative economy instead of judicial economy (which, admittedly, are very similar things); and an administrative tribunal's law-making role is different from the role of the judiciary. On that last point, administrative tribunals are not solely adjudicative bodies; they are also regulatory bodies. The Board's role is not solely to adjudicate disputes between two parties; it is also, according to the preamble to the *Act*, to promote "effective labour-management relations".

[73] [...] the test for mootness applied by a court often becomes subsumed in the related question of whether the court should hear a case when the relief sought is a declaration. The "live controversy" test for mootness considers whether the relief sought will have any future effect on the parties (see *Professional Institute*

of the *Public Service of Canada v. Canada (Canadian Food Inspection Agency)*, 2012 FCA 19 at para. 16). The test for whether to grant a declaration is whether a court “... has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought ...” (from *Ewert v. Canada*, 2018 SCC 30 at para. 81). In light of the overlap between the two tests, it is not surprising that “... a request for declaratory relief cannot by itself avoid mootness” (from *Peckford v. Canada (Attorney General)*, 2023 FCA 219 at para. 22) — in other words, the fact that a court could issue a declaration is not enough by itself to generate a live controversy.

[74] The problem is that there are many types of cases heard by the Board in which declaratory relief is the most common form of relief granted. This includes policy grievances (see ss. 232(a) and (b) of the *Act*), staffing complaints (see the discussion in *Doucette v. Attorney General of Canada*, 2023 PESC 51 at paras. 49 to 67), unlawful strike cases (see ss. 198(1) and (2) of the *Act*), and bad-faith bargaining complaints. While the Board can grant remedies other than a declaration in those cases, a significant body of the Board’s caseload involves granting or denying applications for a declaration. Too close attention to whether the Board should hear cases in which the only relief sought is a declaration would deprive the Board of much of its work, contrary to the *Act*, which specifies in a number of places that the Board may grant declarations.

[75] Therefore, I have decided to [...] characterize the issue as whether hearing the complaint would serve a labour relations purpose.

[76] I appreciate that there is very little practical difference between the two approaches and that in most cases the result of the case would be the same after applying either approach. The conceptual difference is as follows. While the *Borowski* approach divides its approach into two stages (whether there is a live controversy, and then whether there is a practical reason to hear a case without a live controversy), the second approach telescopes those two stages into a single inquiry: whether deciding the case serves a practical labour relations purpose. A labour relations purpose is almost always served when there is a concrete dispute and remedy available (i.e., there is a live controversy in the *Borowski* test). A labour relations purpose may also be served when the only relief is a declaration, depending on whether the declaration itself will serve some labour relations purpose. These labour relations purposes have included the ongoing administration of a collective agreement (as in *Swissport Canada Handling Inc.*, and *Society of Professional Engineers and Associates v. Atomic Energy of Canada Limited*, 2001 CIRB 110) and resolving similar complaints involving the same or related parties (as in *PIPSC* 2009). These are not the only labour relations purposes that can be served, and the Board will have to address the existence of a labour relations purpose on a case-by-case basis.

[18] In the present case, the applicant concedes that its application is moot under the approach mandated by *Borowski*. The applicant submits, though, that this Court should exercise its discretion to hear the judicial review application because otherwise a party unhappy with a labour relations board decision in a moot case will be without a remedy when a board applies the labour relations purpose test for mootness.

[19] The applicant further asserts that other special circumstances exist which warrant exercising our discretion to hear the application. The first such circumstance involves a grievance submitted by the Council, challenging the employer's decision to provide unpaid as opposed to paid leave to ship repair employees for days of work missed during the PSAC strike. The Council sought to adjourn the hearing dates set for that grievance, taking the position before the Board that this Court's decision in the present application for judicial review "may be relevant to the [g]rievance".

[20] The applicant secondly says that the circumstances in the present case are likely to arise again, both between these parties and in other federal government workplaces, where there are employees working in the same premises represented by different trade unions. The applicant alleges that the Board's decision in the present case may have a practical precedential effect, even though the Board is not bound by its prior decisions. The applicant thus contends that it is important that the judicial review application be allowed to proceed as, otherwise, the employer could be prejudiced by an unreasonable precedent.

[21] The Council, for its part, takes a position contrary to that which it took before the Board in the context of its grievance and says that the present application is not relevant to the grievance. It adds that, in its view, the circumstances at issue before the Board in the employer's subsection 194(1) complaint were very fact specific and thus unlikely to arise again. The Council accordingly contends that there is no reason for this Court to exercise its discretion to hear this case.

[22] I find that the Council is estopped from asserting that this application will have no impact on its outstanding grievance in light of the position it took before the Board in support of its adjournment request. Thus, I determine that the potential impact of a decision in this case on the pending Council grievance is a factor that weighs in favour of this Court deciding this application, despite its being moot, for reasons similar to those in *ILWU v. BCMEA*. There, this Court heard and decided a judicial review application where a strike had ceased because the declaration of an illegal strike could have had an impact on an outstanding grievance or civil action the employer stated it would commence. The same is true here with respect to the Council's grievance. However, as in *ILWU v. BCMEA*, it will be for the Board to determine what effect, if any, our decision might have on the Council's outstanding grievance.

[23] In addition, I find merit to the suggestion that special circumstances exist that favour allowing a judicial review application to proceed when a labour relations board applies the labour relations purpose test for mootness. Were it otherwise, decisions made in these sorts of cases would be immune from judicial review. In short, if there is no live controversy when a labour relations board decides to hear a case, but it decides to proceed anyway because there is a

labour relations purpose to doing so, the parties generally should not by reason of mootness be deprived of the right to pursue a judicial review application from such a decision.

[24] I accordingly would exercise our discretion and would decide this application, which has been fully argued.

II. Merits of the Judicial Review Application

[25] I turn next to address the merits of this application.

[26] The applicant submits that the Board's decision is unreasonable because the Board failed to adequately consider the principal issue before it, namely, whether the Council, through its representatives, counselled ship repair employees to engage in an illegal strike. The applicant says that the Board devoted almost the entirety of its analysis to determining whether the refusal by the employees to cross the PSAC picket line was an illegal strike. However, that was not the issue before the Board. The applicant contends that union officials may be found to have counselled employees to engage in an illegal strike, in contravention of subsection 194(1) of the *FPSLRA*, when no illegal strike happens. It is the act of counselling the strike that is prohibited under the relevant portion of the subsection, according to the applicant.

[27] In support of this argument, the applicant points to evidence that it says the Board failed to adequately consider. First, it points to the two bulletins issued by the Council in which the Council stated that it did not support crossing picket lines. In the second bulletin, issued the day

before the strike, the Council stated as follows (with the bolded and underlined portions being bolded, underlined, and in large font in the original):

In the event of a picket line blocking access to the Dockyard, please follow your managers [sic] instructions regarding a muster point, attendance check-in etc. Council will be present to coordinate with our Affiliate Unions as well as local management.

To be very clear, the [Council] and our Affiliate Unions do not endorse or support the crossing of any legal picket line.

[28] The applicant also points to factual findings made by the Board. It notes in this regard that, at the Rocky Point DND location, employees stated in disciplinary interviews that the Council recommended that they not cross the picket line (at paragraph 82 of the decision). The applicant also points to the findings made by the Board at paragraph 47 of the decision, where it stated:

[47] Mr. Rogers [a Council representative] also told the [ship repair employees] that unions do not look favourably on union members crossing picket lines, wherever they are found. It could be a work situation, as was so in this case, or a shopping situation; no matter, a union member would not cross another union's legal picket line. He also spoke of the consequences of crossing a picket line; that is, being considered a scab and thus untrustworthy in the eyes of fellow union members. He then repeated that each person had to decide on their own and that the respondent could not advise them to not cross the picket line.

[29] The applicant submits that the foregoing facts required a careful and nuanced consideration by the Board of whether the actions of the Council representatives amounted to counselling employees to not cross the picket line. Instead of undertaking that analysis,

according to the applicant, the Board set out the entirety of its consideration of the issue in paragraphs 132 to 135 of the decision, where it stated:

[132] The respondent was very cognizant of s. 194 of the *Act* and was very careful not to counsel or direct a strike. It said to follow management's directions, which was exactly what was done.

[133] The applicant insisted in its argument on the fact that the respondent had counselled strike action by recommending or encouraging such action by stating in its April 18, 2023, bulletin that "... the [Council] and our 11 Affiliate Unions do not endorse or support the crossing of any legal picket line."

[134] The respondent was fully aware of its duty to not counsel strike action. Mr. Rogers repeatedly said that no one from the respondent told the [ship repair employees] not to cross the picket line.

[135] Stating the Council's and constituent employee organizations' position on picket lines is not the same as directing the members not to cross the picket line. Again, the choice was left to the individuals.

[30] The applicant argues that, in the foregoing passage, the Board failed to apply the appropriate test for determining whether the Council representatives had counselled employees to engage in an illegal strike. The applicant notes that, in paragraph 135, which is the heart of its reasoning, the Board defined "counselling" as being equivalent to "directing". However, the applicant says that this definition conflicts with both the wording of subsection 194(1) of the *FPSLRA* and the Board's case law, which provides for a much more expansive definition of "counselling". In *King v. Deputy Head (Canada Border Services Agency)*, 2010 PSLRB 125 [*King PSLRB*], a prior decision of the Board (then called the Public Sector Labour Relations Board), the Board held as follows at paragraph 188:

[188] To "counsel" is to advise or recommend. To "procure" is to bring about; to obtain by care or effort; or to prevail upon, induce, persuade a person to do

something (Shorter Oxford Dictionary, 3d edition). I do not agree with the grievor that the definition of counselling in the criminal law context should apply to the labour relations context. Labour relations statutes are not criminal law statutes. In any event, there is jurisprudence in the labour relations context that defines these terms. In *Canada (Treasury Board) v. International Brotherhood of Electrical Workers, Local 2228*, the Board stated that the **synonyms for counselling and procuring “were legion” and stated that “anyone who instructs, directs, incites, advises, recommends, encourages or induces” can be said to have counselled or procured (paragraph 24). Incitement or counselling must be established objectively and not on the basis of the interpretation of employees** (*Goyette*, at pages 20 and 21).

(emphasis added)

[31] The applicant also contends that the Board considered an irrelevant fact to justify its decision, namely, the fact that the Council was made up of several different unions, which the applicant says is not relevant to whether representatives of the Council counselled employees to refrain from crossing the PSAC picket lines.

[32] Because the Board failed to adequately consider the issue before it, departed from its previous case law without explanation, and premised its decision on irrelevant factors, the applicant submits that the Board’s decision was unreasonable.

[33] The Council for its part, argues that contrary to what the applicant asserts, the Board considered the facts the applicant points to, grappled with the relevant issues in a coherent and intelligible fashion, and reached a reasonable determination. The Council notes that, as was held by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], administrative decision-makers’ reasons need not be perfect nor resemble those of a court. The Council also attempts to distinguish the Board’s prior decision in *King PSLRB*, which arose in a disciplinary context, and relies on older decisions of a predecessor

to the Board, which held that, under a differently worded provision, a strike must have occurred before a violation by union representatives could be made out, citing *Canada (Treasury Board) and Letter Carriers' Union of Canada (Postal Operations Group (non-supervisory) – Operational Category)*, [1971] CPSSRB No 11 [*Letter Carriers' Union*] at para. 18 and *Canada (Treasury Board) and Windsor Branch (District) of the Customs and Excise Union (Public Service Alliance of Canada)*, [1971] CPSSRB No 1 [*Windsor Branch*] at para. 16.

[34] The Council thus contends that the reasons given by the Board were adequate and that the result the Board reached was reasonably open to it on the facts, especially considering that the employer tolerated the ship repair employees not attending work during the PSAC strike, thereby at least tacitly accepting their refusal to cross the PSAC picket lines. The Council accordingly says that the Board's decision was reasonable and asks us to dismiss this application for judicial review.

[35] I largely agree with the applicant's submissions and find that the Board's decision is unreasonable because it failed to adequately address the principal issue before it and failed to provide a reasonable explanation for why it did not follow its prior case law defining the sort of conduct that constitutes "counselling" employees to engage in an illegal strike in contravention of subsection 194(1) of the *FPSLRA*.

[36] In *Vavilov*, the Supreme Court of Canada held that two types of defects may result in an unreasonable decision, namely, either a failure of rationality in the reasoning process of the administrative decision-maker or where the result reached by the administrative decision-maker

is untenable in light of the relevant factual and legal constraints that bear upon the decision (at para. 101). Here, two constraints are relevant, namely, the nature of the case that was before the Board and its prior case law.

[37] On the former point, if an administrative decision fails to adequately respond to the principal arguments made by the parties, the decision is likely unreasonable.

[38] At paragraphs 127 to 128 of *Vavilov*, the majority of the Supreme Court highlighted the need for administrative decision-makers' reasons to be responsive to the principal arguments made by the parties, noting that:

[127] The principles of justification and transparency **require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties.** The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. **The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually listened to the parties.**

[128] Reviewing courts cannot expect administrative decision makers to “respond to every argument or line of possible analysis” (*Newfoundland Nurses*, at para. 25), or to “make an explicit finding on each constituent element, however subordinate, leading to its final conclusion” (para. 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, **a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it.** In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

(emphasis added)

[39] In application of these principles, this Court stated at paragraph 10 of *Canada (Attorney General) v. Public Service Alliance of Canada*, 2022 FCA 204:

[10] [...] **the reasons given by administrative decision makers must be responsive: they must “meaningfully grapple” with the key points the parties put to them.** While administrative decision makers need not “respond to every argument or line of possible analysis,” “[t]he principles of justification and transparency require that an administrative decision maker’s reasons meaningfully account for the central issues and concerns raised by the parties.” Responsive reasons are important in demonstrating that decision makers “have actually listened to the parties” (emphasis in original). They are also important in enabling litigants to understand why they have won or lost (*Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158 at paras. 8, 20). This Court has stated that “[f]ailure to engage with an important argument advanced by a party will generally render an administrative decision unreasonable” (*Barrs v. Canada (National Revenue)*, 2022 FCA 147 at para. 38).

(emphasis added)

[40] Similar reasoning has been applied by this Court in several other cases: see, for example, *Cold Lake (City) v. Canada (Attorney General)*, 2025 FCA 138 at paras. 21 and 26; *Library of Parliament v. Public Service Alliance of Canada*, 2025 FCA 42 at para. 8; *Giffen v. TM Mobility Inc.*, 2024 FCA 213 at paras. 40–42; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2024 FCA 124 at para. 9, to name only a few.

[41] In terms of the constraint of prior case law, failure of an administrative decision-maker to provide adequate reasons for departure from its prior case law will likewise generally mean that its decision is unreasonable.

[42] At paragraph 131 of *Vavilov*, the majority of the Supreme Court noted:

[131] Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker does depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. **If the decision maker does not satisfy this burden, the decision will be unreasonable.** In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, **it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified**, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

(emphasis added)

[43] In application of these principles, this Court stated at paragraph 7 of *Canada (Attorney General) v. Hanna*, 2021 FCA 219 that:

[7] [...] consistency with an administrative body's past decisions is a constraint that a reviewing court should consider when determining whether an administrative decision is reasonable. That is not to say that administrative decision makers are bound by institutional precedent; however, **if they choose to depart from a long-established line of cases, they must justify that departure.**

(emphasis added)

[44] Similar reasoning has been applied by this Court in several other cases: see, for example, *Rameau c. Canada (Procureur général)*, 2024 CAF 40 at paras. 124–125; *Turner v. Canada (Attorney General)*, 2022 FCA 192 at para. 8; *Canada (Attorney General) v. Honey Fashions*

Ltd., 2020 FCA 64 at para. 39; *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157 at para. 58, to name only a few.

[45] As the applicant rightly notes, the issue before the Board in the instant case was whether representatives of the Council counselled ship repair employees to engage in an illegal strike, not whether such a strike occurred. The Board's case law establishes that it is not essential for an illegal strike to have occurred for a union representative to have violated subsection 194(1) of the *FPSLRA* through counselling employees to engage in such a strike: *King PSLRB* at para. 215, aff'd *King v. Canada (Attorney General)*, 2012 FC 488 at paras. 133–135; *King v. Canada (Attorney General)*, 2013 FCA 131 at para. 4; application for leave refused, *John King v. Attorney General of Canada*, 2014 CanLII 3503 (SCC).

[46] The decisions in *Letter Carriers' Union* and *Windsor Branch*, on which the Council relies, are not relevant as they were decided under a much different statutory provision, which did not prohibit union representatives from counselling employees to engage in an illegal strike when no strike occurred.

[47] Paragraph 194(1)(e) of the *FPSLRA* provides:

Declaration or authorization of strike prohibited

194 (1) No employee organization shall declare or authorize a strike in respect of a bargaining unit, and no officer or representative of an employee organization shall counsel or procure the declaration

Déclaration ou autorisation de grève

194 (1) Il est interdit à toute organisation syndicale de déclarer ou d'autoriser une grève à l'égard d'une unité de négociation donnée, et à tout dirigeant ou représentant de l'organisation de conseiller ou

or authorization of a strike in respect of a bargaining unit or the participation of employees in such a strike, if

...

(e) the process for resolution of a dispute applicable to the bargaining unit is arbitration;

susciter la déclaration ou l'autorisation d'une telle grève, ou encore la participation de fonctionnaires à une telle grève :

[...]

e) si le mode de règlement des différends applicable à l'égard de l'unité de négociation est l'arbitrage;

[48] In contrast, section 102 of the former *Public Service Staff Relations Act*, S.C. 1966-67, c. 72 provided:

Declaration or authorization of strike

102 No employee organization shall declare or authorize a strike of employees, and no officer or representative of an employee organization shall counsel or procure the declaration or authorization of a strike of employees or the participation of employees in a strike, the effect of which is or would be to involve the participation of an employee in a strike in contravention of section 101.

Déclaration ou autorisation de la grève

102 Une association d'employés ne doit ni déclarer ni autoriser une grève des employés, ni aucun dirigeant ou représentant d'une association d'employés ne doit recommander ni provoquer la déclaration ou l'autorisation d'une grève des employés, ni leur participation à une telle grève, qui a ou aurait pour effet d'entraîner la participation d'un employé à une grève en contravention de l'article 101.

[49] Given the differently worded provisions in force when the *Letter Carriers' Union* and *Windsor Branch* cases were decided, they are inapplicable and irrelevant to the issue that was before the Board in the present case. Here, the central issue was whether the Council representatives counselled the ship repair employees to engage in an illegal strike and not whether such a strike occurred.

[50] I agree with the applicant that most of the Board's analysis did not address this issue and instead concerned whether the ship repair employees were acting in combination or concert when they refused to cross the PSAC picket lines and thus whether they had engaged in an illegal strike. The Board gave very little consideration to the alleged violation of whether Council representatives counselled the ship repair employees to refrain from crossing the PSAC picket lines, which could well have amounted to counselling them to engage in an illegal strike.

[51] More specifically, the Board ignored the relevance of the evidence that, at the Rocky Point DND location, Council representatives recommended that ship repair employees not cross the PSAC picket lines. Although far fewer ship repair employees worked at the Rocky Point location than at the Fleet Maintenance Cape Breton DND facility, the fact remains that there was evidence before the Board that the Council representatives recommended to ship repair employees at the smaller location that they should not cross the PSAC picket lines. In my view, the Board was required to assess whether the employer had established that these recommendations were made and, if so, whether they amounted to counselling the ship repair employees to engage in an illegal strike. The failure to undertake this analysis, in and of itself, renders the Board's decision unreasonable as a strong argument can be made that, if the Council representatives recommended to employees to not cross the PSAC picket lines, this amounts precisely to counselling them to engage in an illegal strike, the very issue the Board was required to consider.

[52] There are further flaws in the Board's reasoning. In considering what occurred at the Fleet Maintenance Cape Breton DND facility, the Board confined its analysis to considering the

subjective intent of the Council representatives and whether they directed ship repair employees to refrain from attempting to cross the PSAC picket lines. By limiting its analysis to these two points, the Board departed from both its prior case law and accepted principles applicable to the assessment of the conduct of union officials in respect of illegal strikes. Failure to provide any explanation for this departure renders its decision unreasonable.

[53] In this regard, the Board's case law under section 194 of the *FPSLRA* considering the type of conduct that may amount to counselling an illegal strike, and that of other labour relations boards considering the type of conduct that may amount to authorizing an illegal strike, recognizes that in assessing whether union officials counselled or authorized an illegal strike, what is relevant is what they said or did and not solely what they may have intended: *King PSLRB* at paras. 189–191; *CBC* at paras. 33–36. Union representatives' conduct is thus assessed, at least in part, on an objective basis.

[54] The Board's prior case law, as noted, has also held that "counselling" an illegal strike is not synonymous with directing employees to engage in such a strike and includes a much wider range of conduct: *King PSLRB* at para. 188, citing *Canada (Treasury Board) v. International Brotherhood of Electrical Workers, Local 2228*, PSSRB Files Nos. 194-02-15 and 16 (19720914) at para. 24 and *Goyette v. Treasury Board (Unemployment Insurance Commission)*, PSSRB File No. 166-02-3057 (19771027) at pp. 20–21.

[55] In the present case, the Board did not discuss the foregoing case law, let alone try to justify its departure from it when it looked only to the subjective intent of the Council

representatives and assessed only whether they had directed the ship repair employees to refrain from crossing the PSAC picket lines in evaluating whether they had counselled employees to engage in an illegal strike. As noted, failure by an administrative decision-maker to adequately explain a departure from its case law will render a decision unreasonable.

[56] Thus, for this reason, as well, the Board's decision must be set aside.

[57] I turn finally to the applicant's suggestion that the fact that the Council was a council, as opposed to a trade union, was an irrelevant consideration. I disagree in part with this suggestion. As the certified bargaining agent for the DND ship repair employees, the Council is an "employee organization" (as trade unions are called in the *FPSLRA*). By virtue of section 193 of the *FPSLRA*, acts and omissions of officers and representatives of the Council are deemed to be acts or omissions of the Council. Thus, for the purposes of determining whether subsection 194(1) of the *FPSLRA* is engaged, the fact that the Council was a council of trade unions is irrelevant.

[58] However, the fact that its constituent union members represent skilled trades employees elsewhere was a factor that was open to the Board to consider in assessing whether statements made by Council officials counselled the ship repair employees to refrain from crossing the PSAC picket lines. Pointing to the impact of being branded as a "scab" may well be relevant to whether these statements were an incitement to refuse to cross the PSAC picket lines in solidarity with the striking PSAC employees. Thus, these are facts that the Board could consider.

[59] I conclude, for the foregoing reasons, that the Board's decision was unreasonable and should be set aside. I would remit the employer's complaint to the Board for reconsideration by another Board member since the member who decided this case is no longer sitting on the Board.

[60] The parties have agreed that costs should follow the event and should be fixed in the all-inclusive amount of \$3,000.00. I agree that this is appropriate.

III. Proposed Disposition

[61] I accordingly would set aside the decision of the Board, remit the employer's complaint for reconsideration by another Board member, and award the applicant costs of this application in the all-inclusive amount of \$3,000.00.

"Mary J.L. Gleason"

J.A.

"I agree.

George R. Locke J.A."

"I agree.

Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	LOCKE J.A. BIRINGER J.A.
DATED:	MAY 28, 2026

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