BCLRB No. B365/95
(Reconsideration of BCLRB No. B318/94)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

BRITISH COLUMBIA'S WOMEN'S HOSPITAL AND HEALTH CENTRE SOCIETY

(the "Employer")

-and-

BRITISH COLUMBIA NURSES' UNION

(the "Union")

PANEL:	Stan Lanyon, Chair Brian Foley, Associate Chair (Mediation) Richard Longpre, Vice-Chair Maria Giardini, Vice-Chair Robert Pekeles, Vice-Chair
COUNSEL:	Thomas Roper, for the Employer John Rogers, for the Union
CASE NO.:	20298
DATE OF HEARING:	March 20, 1995
DATE OF DECISION:	March 31, 1995
DATE OF REASONS:	October 6, 1995

REASONS FOR THE BOARD'S DECISION

I. INTRODUCTION

1 The Union has applied under Section 141 of the *Labour Relations Code* seeking leave to apply for reconsideration of BCLRB No. B318/94. In that decision, the original panel dismissed the Union's application under Section 99 of the Code for a review of an arbitration award issued by Arbitrator John Kinzie. Arbitrator Kinzie dismissed the grievance of Indu Parhar, a maternity nurse, against her dismissal by the Employer.

2 On March 20, 1995, we held a hearing at which the parties were invited to present oral argument on the merits of the reconsideration application. On March 31, 1995, we issued a brief decision without reasons in which we wrote:

> The Employer had inadvertently failed to produce certain documents referred to as the Gammie charts. The Gammie charts fell within the scope of the arbitrator's order for the production of documents. Before the original panel, the Union argued that the Employer's failure to produce the Gammie charts resulted in the denial of a fair hearing. The original panel rejected that argument. In its Section 141 application, the Union argues that the original panel applied the wrong test in deciding that issue.
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> We have concluded that the Union was denied a fair hearing as a result of the Employer's failure to produce the Gammie charts.
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> In the event that the Union's Section 141 application were to be granted, the parties differed over the appropriate remedy. More particularly, the parties disagreed as to whether the matter should be remitted to arbitrator Kinzie or whether his decision should be set aside and be fully reheard by a new arbitrator. We have concluded that the matter should be remitted to arbitrator Kinzie.
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> The parties did not address what evidence arbitrator Kinzie should hear, in the event that we remitted the matter to him. Arbitrator Kinzie will decide what evidence he will need to hear arising out of the Gammie charts.
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> Full reasons for this decision will follow at a later date.

3 The present case raises an important issue of law and policy under the Code regarding the failure to comply with an Order for production of documents. We have overturned the original panel's decision. These are the reasons for our decision.

II. BACKGROUND

4 The Employer dismissed Parhar from her employment on June 15, 1992. The Employer alleged that Parhar had harshly shaken a crying newborn baby and shouted at it "will you shut up" during the early morning of June 7, 1992. This incident had been reported to the Employer by a patient named Lucy Ramsey. At all times, Parhar has denied the allegation against her.

5 All three of the other nurses working on the shift in question, Danica Ackerson, Ling Pritchard, and Viola Kan, were called to give evidence. None of them witnessed the incident testified to by Ramsey.

6 During the course of the arbitration, the Arbitrator ordered that the following documents be produced for inspection: "Complete medical charts of all patients (mothers and infants) of Arbutus Square for June 7, 1992 for the period 0100 to 0400 hours." Arbutus Square is the name of the ward in which the alleged incident took place.

7 The Arbitrator concluded that Parhar did vigorously shake and shout at a newborn baby at approximately 2:30 a.m. on June 7, 1992 (p. 23). The Arbitrator's reasons for this conclusion are set out at pp. 23-26 of his award. At p. 26 of the award, the Arbitrator stated:

> The Union also refers to the fact that Ramsey's evidence as to what she saw and heard was not corroborated by any of the other adults on the Arbutus Square ward at the time. I do not find this fact surprising as there is no evidence from either Ramsey or the grievor that any other adult was in the vicinity at the time. The evidence is that the viewing glass is quite thick so that in order for someone to be heard from the nursery in the hallway the person would have to shout. If that is what is required to hear from the hallway, I do not find it reasonable that someone in her bedroom, that much farther away, might hear it. In all likelihood, that is where Kan was at the time. In my view, the evidence does not establish that she was at the nursing station at the time the

> incident occurred. The other two nurses, Pritchard and Ackerson, were in McLean-Foreman's office with the door shut, probably dozing during their break. In these circumstances, I do not find the fact that they did not hear anything as raising an inconsistency with respect to Ramsey's evidence. In my view, the evidence does not show that any of the other adults on the floor were in a position to see or hear the events testified to by Ramsey.

8 Following the publication of the Arbitrator's award, the Union discovered as a result of other proceedings that the Employer had failed to disclose charts, referred to as the Gammie Charts, that fell within the scope of the Arbitrator's order. These were the charts of a patient named Gammie and her infant. On their face, they appear to disclose that the Gammie baby was admitted to the nursery in question at 2:25 a.m. on June 7, 1992. The parties agree that the Gammie charts tell us that an admissions nurse, whom the Union tells us is Catherine Fox, and Gammie were on the ward at around the time of the incident. The Employer submits that there is nothing to establish that they were on the ward when the incident occurred, as Ramsey was not precise as to the time. Ramsey's evidence, both counsel tell us, was that the incident took place sometime in the period from 2:25 a.m. to 2:35 a.m. The parties are further agreed that Parhar conducted an assessment of the infant Gammie in the nursery at about the same time. The Union alleges that the Gammie charts disclose that during the relevant time period, nurse Kan performed duties which required her to be in the nursery, at the nursing station adjacent to the nursery, and in Room 13 on the ward (where Gammie was admitted) which is across a hallway from the nursery. The Employer agrees that the Gammie charts place Kan in Gammie's bedroom at 2:30 a.m. The Union further alleges (and this is expressly denied by the Employer) that the charts disclose that Kan and/or Fox had direct contact with Parhar at this time. The Union alleges that either Kan or Fox would have delivered the infant Gammie to Parhar and were therefore in a position to observe Parhar's behaviour and demeanour at the time the event is alleged to have taken place. The Union alleges that the charts record that Kan checked the administration of Vitamin K to the infant by Parhar during the relevant time period.

9 We pause here to note that we do not make any concrete findings with respect to the above matters. These are matters which we leave to the Arbitrator to determine.

III. THE ORIGINAL PANEL'S DECISION

10 The original panel dismissed the Union's Section 99 application. It acknowledged that the Gammie charts fell within the scope of the Arbitrator's order for production of documents and that they were not discovered and produced until well after the arbitration hearing. It treated the issue as one of "new evidence". It held that in an application for review of an arbitration award on the basis of "new evidence" the Board must be satisfied that the new evidence goes to the heart of the issues to be determined and results in a strong probability that it will have a material and determinative effect on the original decision.

11 The original panel was not satisfied that there was a strong probability that the new evidence would have a material and determinative effect on the original decision and dismissed the Union's Section 99 application.

IV. UNION'S ARGUMENT

12 The Union argues that the original panel erred in applying a test for admissibility of fresh evidence. It emphasizes that the Employer failed to produce relevant documents despite the Arbitrator's order requiring their production. The Union argues that the appropriate test in those circumstances is whether the Employer's failure resulted in the denial of a fair hearing. It argues that the Employer's failure to produce the Gammie charts did result in the denial of a fair hearing.

13 The Union submits that the policy basis for the test with respect to new evidence is to discourage parties from either deliberately or inadvertently failing to disclose evidence at the original hearing and then subsequently relying upon that evidence as the basis for an appeal. It argues that that policy consideration does not apply in the present case, where the Employer failed to comply with the Arbitrator's order for the production of documents.

14 In those circumstances, the Board ought not to encourage a practice whereby one party can intentionally or inadvertently fail to produce documents which have been ordered produced by an arbitrator. It should be the Board's policy to discourage non-compliance with arbitrator's orders.

15 In support of its argument the Union relies upon *G. (J.P.)* v. *British Columbia (Superintendent of Family & Child Service)* (1993), 77 B.C.L.R. (2d) 204 (C.A.). We will refer at greater length to this decision in the "Analysis" section below.

16 The Union submits that as a result of the Employer's failure to produce the Gammie charts, the Union was unaware of the presence of Fox and Gammie on the ward at the time that the alleged incident is claimed to have taken place. The Union alleges that the charts disclose that Fox and Kan were either at the nursing station, in Room 13, or in the nursery itself at the time the alleged misconduct is said to have taken place. Moreover, the charts identify duties being performed by Parhar at the relevant time and the participation of Kan in at least some of them.

17 The Union argues that the credibility of Ramsey's story is key to the case. If the Union were able to establish that other individuals such as Kan, Fox or Gammie were in a position in which they would have seen or heard conduct consistent with Ramsey's allegations, and that they did not observe or hear such conduct, this would be extremely significant evidence for the Union's case.

18 As a remedy, the Union seeks to have the Board refer the matter to a new arbitrator for a full re-hearing. Among other cases, it refers to *Université du Québec à Trois-Rivières* v. *Larocque*, 93 CLLC ¶14,020 (SCC). The Union argues that a new hearing is the appropriate remedy where there has been a denial of a fair hearing. It further argues that it is unreasonable to expect that the Arbitrator will be able to re-hear the evidence to the extent which it is necessary in this case and not be influenced by his previous deliberations.

V. EMPLOYER'S ARGUMENT

19 The Employer argues that there are two competing interests at stake: on the one hand, the right to a fair hearing and on the other hand, the finality of an arbitration award. The issue in the present case is whether the non-production of the Gammie charts resulted in a denial of a fair hearing. The test to be applied is a modified "new evidence" test: modified to account for the production order and failure to produce, but still requiring the applicant to show materiality and that the document goes to the foundation of the arbitrator's decision.

20 The Employer acknowledges the B.C. Court of Appeal's statement in *G.(J.P.), supra,* that the usual rules for the admission of fresh evidence do not apply when relevant, available evidence has not been put before the hearing judge because it has not been disclosed to counsel by his or her client. The Employer argues that does not mean, however, that no rules apply. A document may be "relevant" but not of sufficient importance to conclude that there was a denial of a fair hearing. The Employer argues that the Court in *G.(J.P.), supra,* made a judgment on the quality of the evidence as did the Courts in earlier cases, where there was a deliberate withholding of or false evidence: See for example *Fullerton* v. *Matsqui* (1991), 62 B.C.L.R. (2d) 273 (C.A.); and *Lemmon* v. *Gusola* (1991), 50 CPC (2d) 154 (BCSC). The test for an inadvertent failure to produce evidence cannot be less strict than where the applicant can show a deliberate withholding of evidence or fraud. Where fraud or intentional misleading is alleged, the evidence must still relate to the foundation of the decision or be material to the case. The test should be the "new evidence test" without the requirement for due diligence.

21 Applied to the present case, the Gammie charts disclose that an admissions nurse and Gammie were on the ward at around the time of the incident. The charts also show that Parhar conducted an assessment of the infant in the nursery. The Employer argues that the charts do not tell us anything that is inconsistent with the findings made by the Arbitrator. The Arbitrator understood that Kan was at the medications counter at 2:35 a.m. and concluded that Kan may well have been in a bedroom at the time of the incident. The Gammie charts confirm that finding as they place Kan in Gammie's bedroom, where Kan performed certain admissions functions.

22 The incident described by Ramsey would have taken a matter of seconds to occur. Ramsey was not specific as to the time of the incident. Accordingly, the fact that Parhar conducted an admissions assessment on the Gammie infant in the nursery at about the same time is not inconsistent with the incident. The fact that Fox brought a patient to the ward is similarly tangential to the issue in the case. It is possible (indeed probable) that Fox was not on the ward or that she was in a room on the ward at the time of the incident.

23 The Employer argues that the Gammie charts do not go directly to the fundamental issue before the Arbitrator, nor are they inconsistent with the findings of the Arbitrator. The charts are not material, nor do they go to the foundation of the Arbitrator's award.

24 In the alternative, the Employer submits that the matter should be remitted to Arbitrator Kinzie. The Employer argues that the policy of the Board is, and should be, to remit to the arbitrator, unless on the facts of the case, a determination can be made that there is reason to believe that he has lost his neutrality. In the cases cited by the Union, there were valid reasons based on the conduct of the arbitration boards to justify remitting the matter to a new arbitration board. In the present case, the Arbitrator has made no error or in any other way indicated that he would not be able to objectively hear additional evidence. In essence, by arguing that the case should be remitted to a new arbitrator, the Union is asserting a reasonable apprehension of bias. There is no basis in this case to support that contention. The Arbitrator has not misconducted himself in any way. There is no reason to believe that the Arbitrator could not receive new evidence and fairly decide the case.

VI. ANALYSIS

25 We have concluded that the original panel's decision is inconsistent with the principles expressed or implied in the Code in applying the test which it did in the circumstances of this case.

26 In cases involving new evidence, the rationale for the Board's approach is based to a large extent on the statutory policy that labour disputes be settled expeditiously and conclusively. That policy is expressly incorporated in the Code in Sections 2(1)(d), 84(2), 89 and 138.

27 The need for finality in labour relations decision-making was well expressed by the Ontario Labour Relations Board in *Detroit River Construction Ltd.*, 63 CLLC ¶16,260 in the following terms:

> It stands to reason that when a party has gone through the ordeal, expense and inconvenience of a hearing and obtained a decision in his favour, that he should not be deprived of the benefit of that decision except for good cause. The Board ought not to encourage a practice whereby one party can remain silent throughout a hearing, and after he has discovered the weak points in his adversary's armour be permitted to exploit them by calling evidence at another and later hearing which he could and should have presented at the original hearing. If it were otherwise, the

> door would be open in any given case to ceaseless and never-ending hearings each serving as a prelude to the next *ad infinitum* and no one could ever safely rely on any decision as finally settling the rights of the parties. (p. 1117)

28 Given that underlying rationale, the Board has set certain prerequisites that a party must meet before it will be allowed to introduce new evidence following the conclusion of an original hearing or arbitration.

29 For the reasons that follow, we have concluded that a different policy ought to apply to cases involving a failure to comply with an order for the production of documents.

30 Full pre-hearing disclosure, both of particulars and relevant documents, is necessary to achieve a number of purposes of the Code set out in Section 2 of the Code and the purpose of arbitration set out in Section 82 of the Code. Full pre-hearing disclosure serves those purposes with respect to both Board and arbitration hearings. There are a number of important fair hearing and labour relations reasons for this.

31 First, full disclosure ensures fairness in the hearing process in that it enables each party to know the case that it will have to meet at the hearing. This enables each party to answer the other party's case.

32 Moreover, as stated by the Board in *B.C. Hotels Association*, BCLRB No. L116/83:

> Labour relationships are founded, at least in part, upon concepts of trust and fair dealing: Corporation of the District of Chilliwack, BCLRB No. L362/82. A "victory" for one side in a labour relations adjudication (whether it be at arbitration, or before this Board), based upon the concealment of one's "evidential resources" or exploitation of the opposing side's ignorance may, in the long run, prove Pyrrhic indeed. (p. 4)

33 Second, prior to a Board or arbitration hearing, there are usually a number of factual and legal issues dividing the parties. Full disclosure enables the parties to see more clearly what their true differences are - both factual and legal. In many cases, this will lead to settlement of the entire dispute between the parties. Even where this is not the case, full

disclosure often enables the parties to narrow the issues in dispute. This process is necessary to achieve the purposes set out in Sections 2(1)(d) and 82 of the Code which read as follows:

> 2. (1) The following are the purposes of this Code:
> (d) to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions;

and:

> 82. (1) It is the purpose of this Part to constitute methods and procedures for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.
> (2) An arbitration board, to further the purpose expressed in subsection (1), shall have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and shall apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute.

34 Settlement of some or all of the dispute by the parties themselves, without the need for third party adjudication, is of course the most "orderly, constructive and expeditious" form of settlement. Reducing the number of issues between the parties also assists arbitration boards to "have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement".

35 Third, full disclosure and the consequent narrowing of issues between the parties assists the Board in its efforts to issue decisions more expeditiously. This is of considerable importance to employers and trade unions as a large percentage of the applications before the Board must be dealt with in an expedited manner. These include applications related to strikes, lockouts and picketing; applications for certification and decertification; unfair labour practice complaints -- particularly those governed by Section 5(2) of the Code; and essential service designations. In all such applications, the Board is required to expedite both its process and its decision making. Full disclosure is necessary for the Board to achieve the statutory purpose of expeditious resolution of labour disputes.

36 Fourth, in addition to dealing with the rights and duties of the parties, the Board is charged with the responsibility "to ensure that the public interest is protected during labour disputes" (Section 2(1)(e) of the Code). This is of particular importance in labour disputes in which the Board is called upon to designate essential services, such as those involving police, fire-fighters or hospitals. Full disclosure enables the parties to more clearly present their respective positions to the Board. This in turn assists the Board to decide what the appropriate level of essential service designations ought to be. Full disclosure thereby assists the Board to ensure that the public interest is protected during labour disputes involving essential services.

37 Fifth, another purpose of the Code is "to encourage the use of mediation as a dispute resolution mechanism" (Section 2(1)(f)). The more fully each of the parties is informed of the other party's case, the more amenable will the case be for mediation as a dispute resolution mechanism. The Board's Special Investigating Officers (SIOs) serve to mediate disputes that are brought to the Board. The more fully informed the parties are (and thus the more fully informed the SIO is), the greater the likelihood that mediation will succeed.

For all of these significant fair hearing and labour relations reasons, the purposes of the Code are served by full pre-hearing disclosure both for arbitration hearings and hearings before the Board.

39 An arbitration board's authority to order the pre-hearing production of documents is therefore essential to achieving the purposes set out in Sections 2(1)(d) and 82 of the Code. To the extent that the parties do not comply with arbitrators' orders to produce documents, the purposes of Sections 2 and 82 of the Code will be frustrated.

40 In view of that, the Board in exercising its review authority of arbitration awards under Section 99 of the Code, must adopt a policy which will encourage parties to comply with arbitrators' orders to produce documents. Failure to comply with those orders should carry with it some substantial risk, to ensure both fairness to the other party and to achieve the purposes set out in Sections 2 and 82 of the Code.

41 In our view, the test applied by the original panel, namely that there must be a strong probability that the document will have a material and determinative effect on the original decision, will not achieve those statutory purposes. It will be the rare document that will have

a *strong probability* of having a *determinative* effect on the arbitrator's decision. Accordingly, the party which has failed to comply with an arbitrator's order for production, will face a very small risk for that failure. This will neither ensure fairness to the other party nor promote the achievement of the purposes set out in Sections 2 and 82 of the Code.

42 We note that in *G.(J.P.), supra,* the B.C. Court of Appeal has held that the usual rules for the admission of fresh evidence do not apply when relevant, available evidence has not been put before the hearing judge because it has not been disclosed to counsel by his or her client (p. 209).

43 In that case, the Provincial Court had granted permanent custody of four children to the Superintendent of Family and Child Service. The oldest of the four children had been interviewed by social workers, a teacher and an R.C.M.P. officer. The interviews were taped and transcripts of the interviews were prepared. It was argued that the oldest child, who at first denied any abuse, was influenced to make allegations of sexual misconduct against the father. Counsel for the parents asked counsel for the Superintendent for copies of all reports. Counsel for the Superintendent was not given copies of the interview transcripts. Consequently, they were not made available to counsel for the parents prior to the Provincial Court hearing. The interview transcripts came to light during the course of a subsequent criminal trial brought against the father. The Court of Appeal stated, "It is apparent that these transcripts might have been useful for cross-examination of the teacher and social worker who were called at the hearing" (p. 208).

44 On appeal to the B.C. Supreme Court, the interview transcripts were sought to be admitted as fresh evidence. The Supreme Court judge, without reading the transcripts, declined to admit them. The Court was prepared to assume that the oldest child had denied sexual assault in the early stages of his interviews, and on that basis, decided that the Provincial Court judge would have reached the same conclusion even if the transcripts had been made available to counsel for the parents.

45 However, the Court of Appeal held:

> With respect, it is our view that the learned appeal judge should have read the transcripts and admitted them into evidence. The usual rules for the admission of fresh evidence do not apply

> when relevant, available evidence has not been put before the hearing judge because it has not been disclosed to counsel by his or her client: *Fullerton v. Matsqui (District)* (1991), 62 B.C.L.R. (2d) 273 (C.A.)
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> *In addition, also with respect, the importance of these interviews was not just that the oldest boy had initially denied sexual abuse as assumed by the appeal judge. These transcripts also showed the extent to which that boy may have been led or influenced to make any allegations against Mr. G.* In our view, regardless of the relaxed rules which apply to protection proceedings, there is no reason why the ordinary rules governing both civil and criminal proceedings should not apply with respect to the disclosure of pertinent evidence. ... (p. 209; emphasis added)

46 As can be seen from the latter paragraph, the Court of Appeal made a judgment about the importance of the missing transcripts to the proceedings.

47 We agree with the Employer that not every failure to produce a document ordered to be produced, no matter how unimportant the document is with respect to the merits of the case, ought to result in a conclusion that there has been a denial of a fair hearing. Where should the line be drawn between those documents not produced that will result in the denial of a fair hearing and those that will not? The B.C. Court of Appeal's decision in G. (J.P.) offers some guidance. It states:

> The nature and correctness of the allegations made with respect to the oldest boy were obviously a matter of considerable importance at the hearing and considerable hearsay evidence was called in that connection. The dynamics of the hearing, at least in part, centred around this question and the conclusions reached in that respect must be considered to have had an important influence on the entire case against the parents. (p. 208)

As noted from the passage previously quoted from page 209 of the decision, the Court went on to refer to the importance of the interview transcripts.

48 The Court also stated: "We do not wish to suggest that the conclusions reached in the courts below were not correct. They may well be right." (p. 206). This last comment makes it clear that there need not be a strong probability that the document will have a determinative

effect on the original decision. On the other hand, the Court's comments as to the importance of the documents suggest that it is possible that the conclusions reached in the Courts below were not correct. Those comments suggest that the documents may have affected the correctness of the allegation of sexual misconduct against the father. The Court said "the conclusions reached in that respect must be considered to have had an important influence on the entire case against the parents."

49 To sum up, we may describe the test this way: if the document that was not produced is material to the case, in the sense that it may have affected the result of the case, then the failure to produce it will result in the denial of a fair hearing. Therefore, as already stated, the document need not have a strong probability of having a determinative effect on the arbitration award. That test will not encourage parties to comply with arbitrators' orders to produce documents and ensure fairness; nor will it promote the achievement of the purposes set out in Sections 2 and 82 of the Code.

50 On the other hand, the document needs to be more than simply relevant (every document ordered to be produced by an arbitrator will presumably be relevant). As noted at the beginning of our analysis, there is a policy set out in the Code that labour disputes should be settled expeditiously and conclusively. Thus, it would make no sense to interfere with an arbitration award where the document that was not produced could not have affected the result of the case.

51 It is our view that the test which we have adopted balances both the need for a fair hearing and the need for expedition and conclusiveness. Moreover, the party which has failed to comply with an arbitrator's order for production will face a very real risk of intervention as a result of its failure to disclose.

52 Applying the test to the circumstances of the present case, we are satisfied that the Gammie charts may have affected the result of the arbitration. The central issue before the Arbitrator was whether or not Parhar vigorously shook and shouted at a newborn baby at approximately 2:30 a.m. on the morning of June 7, 1992. Parhar has consistently denied that allegation. The potential presence of other persons, such as Kan, Fox or Gammie at a place or places where they would have seen or heard Parhar shaking or shouting at the baby, if she had done so, is significant to the central issue before the Arbitrator. Of course, where those persons were at the critical time and what opportunity they would have had to see or hear

Parhar shaking or shouting at the baby if she had done so, are factual determinations which we leave to the Arbitrator.

53 The Gammie charts may disclose that Kan and/or Fox were either at the nursing station, in Room 13 or in the nursery itself, at the time the alleged misconduct is said to have taken place. In addition to disclosing the presence of Gammie and Fox on the ward around the time of the alleged incident, the Gammie charts also indicate with considerably more precision than was available at the arbitration the whereabouts of Kan around the time of the incident. Because the charts were not produced to the Union by the Employer, the Union was not able to explore these possibilities. We are satisfied that the Gammie charts may have affected the result of the case and that the Union was therefore denied a fair hearing.

54 We hasten to add that nothing we have said above should be taken as limiting the scope of the evidence that the Arbitrator will need to hear arising out of the Gammie charts. Moreover, we leave the factual determinations in their entirety to the Arbitrator.

We now turn to the issue of remedy. The Union argued that the Arbitrator's decision should be set aside and that the matter be fully reheard by a new arbitrator. Section 99(1) of the Code provides as follows:

> 99. (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that
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> (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
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> (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.

56 As can be seen, the Legislature has expressly given the Board the discretion, among other things, to set aside the award or to remit the matters referred to it back to the arbitration board on either of grounds (a) or (b).

57 In exercising our discretion under Section 99 of the Code, the Board must bear in mind the particular circumstances of the case before it, as well as the purposes of the Code expressly set out by the Legislature. The latter is mandated by Section 2(2) which reads as follows:

> 2. (2) The board shall exercise the powers and perform the duties conferred or imposed on it under this Code having regard to the purposes set out in subsection (1).

58 For the purposes of the exercise of our discretion under Section 99, Section 2(1)(d) is particularly important.

59 The general approach that the Board has taken to the question of remedy in a successful Section 99 application was set out in *Khowutzun Pipeline Constructors Corp.*, BCLRB No. B188/94 (leave for reconsideration of BCLRB No. B252/93) in which the Board stated:

> The Board has considered the power to remit under Section 99 (formerly Section 108 of the *Industrial Relations Act*) on numerous occasions. The Board has held that, whenever possible, the panel should remit an award back to the original arbitration panel: *Pacific Communications Ltd.*, BCLRB No. 66/87.
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> A number of exceptions have been developed to the general principle. Generally, the Board has been of the view that a matter should not be remitted to the original arbitration panel where there has been some misconduct on the part of the arbitrator, either in the sense of "mala fides", or more typically, where there has been a denial of a fair hearing: *Eileen Cook and V.G.H.*, BCLRB No. L306/82 and *Peter's Ice Cream Co. Ltd.*, 2 CLLC ¶15,355 (B.C.S.C.). (pp. 7-8)

60 Thus, where the arbitrator has misconducted himself or erred such that a party has been denied a fair hearing, the Board invariably exercises its discretion to set aside the award, thereby enabling the parties to have the grievance reheard by a new arbitrator.

61 We refer to two court decisions involving arbitration awards, referred to us by counsel for the Union. In *Université du Québec à Trois-Rivières* v. *Larocque, supra*, the Supreme

Court of Canada held that by refusing to admit certain evidence an arbitrator had infringed the rules of natural justice. Chief Justice Lamer stated:

> Accordingly, in the case before the Court there is no doubt, in my opinion, that there was a breach of natural justice. The respondent wished to present evidence of the poor quality of the work of the *mis en cause* Perreault and Guilbert. It sought to show that as a consequence of the poor quality of their work it had been forced to obtain other resources in order to meet the requirements of the granting organization, and that accordingly not enough money remained from the grant to pay the salaries of the *mis en cause.* In the context of a hearing involving a dismissal due to a lack of funds, *such evidence is prima facie crucial.* Its purpose is to establish the cause of the lack of funds. (p. 12,111; emphasis added)
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> The consequence of this paradoxical position taken by the *mis en cause* arbitrator is that he found himself in the position of disposing of an extremely important point in the case before him - namely the lack of cause attributable to the employees - without having heard *any evidence whatever* from the respondent on the point, and even having expressly refused to hear the evidence which the respondent sought to present on the point. This quite clearly amounts to a breach of natural justice. (p. 12,112; emphasis in original)

62 Having concluded that there had been a breach of natural justice, Chief Justice Lamer rejected an argument that the arbitrator would have come to the same decision even if he had heard the evidence which he had refused to admit. In the course of rejecting that argument, Chief Justice Lamer stated:

> ... The application of these rules (of natural justice) should thus not depend on speculation as to what the decision on the merits would have been had the rights of the parties not been denied. I concur in this regard with the view of Le Dain J., who stated in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 661:
>
> > ... the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing

> would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. (p. 12,112)

63 We note that when the Board remits the matters referred to it back to the arbitration board, the existing decision (or in some cases, part of the existing decision) is rendered invalid. The arbitration board is then required to decide the case, or part of it, in keeping with the directions issued by the Board.

64 Having concluded that the arbitrator infringed the rules of natural justice by refusing to admit the evidence in question, the Court went on to say that: "The Superior Court therefore did not err in ordering a new arbitration." With respect to the issue of the Superior Court ordering that the new arbitration be held before another arbitrator, Chief Justice Lamer stated:

> The appellant contended that the Superior Court had erred in ordering that the new arbitration be held before another arbitrator, since there was no real, objective reason for doubting the impartiality of the *mis en cause* arbitrator.
>
> On this point, in my opinion, the appellant did not succeed in establishing that the Superior Court had erred in the exercise of its discretion so as to justify intervention by this Court. Though *he did not actually say so, Lebrun J. was probably of the view that there could quite reasonably be doubt as to the ability of a grievance arbitrator to objectively hear evidence which he already thought was so lacking in significance as to declare it irrelevant.* (p. 12,112; emphasis added)

65 What is important to note about that case is that the arbitrator himself had breached the rules of natural justice by refusing to admit certain *prima facie* crucial evidence. He had disposed of "an extremely important point in the case. ...without having heard any evidence whatever from the respondent on the point, and even having expressly refused to hear the evidence which the respondent sought to present on the point." In those circumstances, there can be no doubt that the Board would set aside the original award and have the arbitration heard by a new arbitrator. However, those are not the circumstances of the present case.

66 In *Peter's Ice Cream Co. Ltd.* v. *Milk Sales Drivers and Dairy Employees Union Local No. 464*, 61 CLLC 15,355 (B.C.S.C.), another case referred to us by counsel for the Union, a majority of the arbitration board had held that the standard of proof on the employer in a dismissal case was proof beyond a reasonable doubt and subsequently held that the dismissal was not justified. The Court set aside the award on the basis that the majority of the arbitration board had applied an improper standard of proof and held that the employer was entitled to "present its case before a Board unhandicapped by any previous decision of its own on the facts." We note two things about that decision. First, the majority of the arbitration board had made a very substantial legal error regarding the standard of proof. Second, the case was decided under a different statutory regime which did not contain Section 2(1)(d) of the current Code.

67 We turn then to the particular circumstances of the present case. For the reasons set out below, we have concluded that the matter ought to be remitted to arbitrator Kinzie.

First, and by far the most significant factor, is that the Arbitrator has not misconducted himself nor erred in any way. The success of the Union's application arises not from any misconduct, or legal error of any kind by the Arbitrator, but rather from the failure of the Employer to fully comply with the Arbitrator's order for the production of documents.

69 This case is unique in that sense. Where a party to an arbitration has been denied a fair hearing, it will most commonly be the result of some error on the part of the arbitrator. As mentioned earlier, where there has been a denial of a fair hearing as a result of an arbitrator's error, the Board exercises its discretion to set aside the award, thereby enabling the parties to have the grievance reheard by a new arbitrator.

70 Second, the arbitration in this case took seven days to complete. To have the matter reheard by a new arbitration board would cause both considerable delay and expense in the settlement of this dispute, contrary to the express statutory purpose of promoting conditions favourable to the orderly, constructive and expeditious settlement of disputes. It is precisely to promote that statutory purpose that the Board's general policy in successful Section 99 applications is to remit the matter back to the original arbitration board, whenever possible.

71 Third, the Arbitrator reached his conclusion on the basis of the evidence before him. As noted, through no error on his part, he had no opportunity to consider the evidence arising out of the Gammie charts. In those circumstances, we have not the slightest doubt that he will be able to approach the issue before him with an open mind, receptive to the new evidence and argument that will be presented to him.

72 Therefore, in all of the circumstances of this case, and in particular the fact that arbitrator Kinzie has not erred in any way, and bearing in mind the statutory purpose set out in section 2(1)(d) of the Code, we have concluded that the matter should be remitted to arbitrator Kinzie.

73 Before concluding, we note that the fact that we are remitting the matter to arbitrator Kinzie, does not preclude either party from filing a Section 99 application following the decision flowing out of the new evidence and argument that he will hear.

VII. CONCLUSION

74 For all of the above reasons, we have concluded that the Union was denied a fair hearing as a result of the Employer's failure to produce the Gammie charts and that the matter should be remitted to arbitrator Kinzie.

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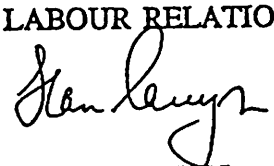

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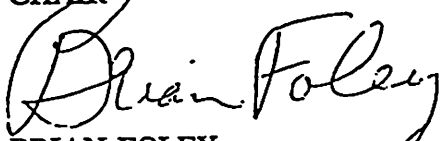

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