Canada Industrial Relations Board ● Conseil canadien des relations industrielles
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Reasons for decision

Grain Workers Union, Local 333 C.L.C.,

applicant,

and

Prince Rupert Grain Ltd.,

respondent,

and

British Columbia Terminal Elevator Operators' Association

respondent.

Board File: 23207-C
CIRB/CCRI Decision no. **389**
July 25, 2007

The Board was composed of Mr. Stan Lanyon, Q.C., Vice-Chairperson, sitting alone pursuant to section 14(3)(f) the *Canada Labour Code (Part I – Industrial Relations)* (the *Code*). A hearing was held in Vancouver on February 13, 14, 15, 16, 17, April 20, and May 18, October 20, 23, 24, November 1, 2, 2006, January 17, 31 and February 2, 2007.

Appearances

Mr. Charles Gordon, for Grain Workers Union, Local 333 C.L.C.;

Mr. R. Alan Francis and Ms. Koml Kandola, for Prince Rupert Grain Ltd.;

Messrs. Geoffrey J. Litherland and Chris Leenheer, for the British Columbia Terminal Elevator Operators' Association.

I - Nature of the Application

[1] The Grain Workers Union, Local 333 C.L.C. (the union) filed a section 35 application seeking a declaration that Prince Rupert Grain Ltd. (PRG) and the British Columbia Terminal Elevator Operators' Association (the BCTEOA) are a single employer for all purposes under Part 1 of the *Code*.

[2] PRG and the BCTEOA deny they constitute a single employer. They state that the union has failed to meet not only its evidentiary onus, but also the legal requirements to establish the following four factors: that they are under common control and direction; that the BCTEOA is a business as defined under section 35 of the *Code*; that they are involved in associated and related activities; and finally, even if all the above criteria are satisfied, there is no legitimate labour relations purpose to issue such a declaration.

[3] At the conclusion of the union's case, PRG and the BCTEOA made a "no evidence" non-suit motion seeking to have the matter dismissed for lack of evidence. The Board considered the motion and concluded that sufficient evidence had been put forth to establish a *prima facie* case on certain of the criteria. Accordingly, it dismissed the motion (see *Prince Rupert Grain Ltd. and British Columbia Terminal Elevator Operators' Association* (2006), as yet unreported CIRB decision no. 361) and proceeded to hear the remainder of the evidence and argument.

II - Facts

[4] The parties prepared a Statement of Agreed Facts, which is reproduced here, as follows:

> 1. Except to the extent they are modified by other facts agreed to in this Statement of Agreed Facts, the parties adopt the Canada Labour Relations Board's findings of fact in the following decisions:
>
> *Saskatchewan Wheat Pool*, (1977), 21 di 388
> *Prince Rupert Grain*, (1984), 59 di 87
> *Prince Rupert Grain*, (1986), 67 di 104
> *Prince Rupert Grain*, (1988), 75 di 13
> *Prince Rupert Grain*, (1994), 93 di 164
> *Prince Rupert Grain and BCTEOA*, (1996), 101 di 1.

2. Five companies operate licensed terminal elevators under the Canada Grain Act in the Port of Vancouver with the following ownership structure at the time the Grain Workers Union, Local 333 (the "Union") filed single employer applications in 2000 [*sic* 2001] and 2002:

Cascadia Terminal, a joint venture of Cargill Limited (50%) and Agricore United (50%);
Pacific Elevators Limited, wholly owned by Agricore United;
Agricore United, a publicly owned company;
Saskatchewan Wheat pool, a publicly owned company;
James Richardson International Ltd., a privately owned company.

3. The grain companies operating terminals in the Port of Vancouver have engaged in coordinated collective bargaining with the Union and have negotiated successive industry collective agreements for all grain terminals in the Port of Vancouver since 1951. There were separate but jointly executed collective agreements for each company from 1964 to 1975, and single jointly executed agreements after that. The Vancouver grain companies negotiated through the B.C. Terminal Elevator Operators' Association (the "Association").

4. On March 28, 1977, the Association and its five members adopted a new constitution and bylaws.

5. In 1977 the Canada Labour Relations Board designated the Association as the employer of the employees at the five terminals operated by the Association's five member grain companies pursuant to what was then section 131 of the *Code*, now section 33. The Board also certified the Union for a single bargaining unit of all employees of those five companies (*Saskatchewan Wheat Pool*, (1977), 21 di 388).

6. The Association and the Union negotiated a preferential hiring clause which was in the industry collective agreement in 1977. This clause gave laid off members the right to preferential hiring at another terminal. It did not provide for recognition of seniority, but the laid off employee retained recall rights at the terminal from which he or she was laid off. The preferential hiring clause was removed from the BCTEOA Agreement in the 2002 round of bargaining.

7. In about 1980, Prince Rupert Grain was formed and incorporated by a consortium of six grain companies (Alberta Wheat Pool, Saskatchewan Wheat Pool, United Grain Growers, James Richardson International, Cargill and Manitoba Pool Elevators) to take over the federal government's aging grain terminal in Prince Rupert and to build a modern replacement for it. United Grain Growers, Alberta Wheat Pool and Manitoba Wheat Pool are all now a single entity called Agricore United.

8. The land on which the Prince Rupert Grain terminal is situated is owned by the National Harbours Board and leased to the Alberta Wheat Pool, Cargill Grain Company Limited, Manitoba Pool Elevators, James Richardson and Sons Limited, Saskatchewan Wheat Pool and United Grain Growers Limited as co-tenants (the "Co-Tenants"), collectively referred to as the "Co-Tenancy" or Prince Rupert Grain Consortium (the "Consortium").

9. Under a co-tenancy agreement entered into in 1980, the Co-Tenants agreed to constitute a trust to hold the lease and the assets of the Prince Rupert Grain terminal that was subsequently built on the leased property. Ridley Grain Ltd. ("Ridley") was appointed as the trustee under the co-tenancy agreement. Ridley continues to hold the lease and to own the assets of the terminal, in trust for the Co-Tenants.

10. Prince Rupert Grain Ltd. was incorporated by the Consortium, which operates the terminal under an Operating Agreement and a Shipping Agreement, both with the Co-Tenants, entered into in 1980.

11. In 1980, the Union was certified for a separate bargaining unit of operations employees of Prince Rupert Grain.

12. Also in 1980, Prince Rupert Grain became a member of the Association and the Association negotiated on its behalf in the same negotiations and in the same manner as it did for its other members until 2001. However, Prince Rupert Grain was not included as part of the s. 33 certification.

13. Prince Rupert Grain was included in the industry collective agreement until 1984.

14. From 1980, when Prince Rupert Grain first became a member of the BCTEOA, to the present time, the BCTEOA and the GWU have concluded one collective agreement (in 1987) without legislation, conciliation or arbitration.

15. In 1984, a dispute between Prince Rupert Grain and the Union over technological change at the new grain terminal (*Prince Rupert Grain*, (1984), 59 di 87) became involved in industry collective bargaining. As a result of proceedings before it, the Canada Labour Relations Board ruled that a collective agreement had been concluded between the Union and the Association with respect to the other five members of the Association, but that no collective agreement had been concluded with respect to Prince Rupert Grain (*Prince Rupert Grain*, (1986), 67 di 104).

16. A strike by the Union was later brought to an end by legislation that imposed the industry collective agreement on the Union and Prince Rupert Grain except for certain items that were referred to binding interest arbitration. Prince Rupert Grain was included in every industry collective agreement since that time until the one that expired on December 31, 2000.

17. In 1987, Prince Rupert Grain and the Association applied to the Board for a variance of the 1977 industry certification to include Prince Rupert Grain. The Board granted this variance in *Prince Rupert Grain*, (1988), 75 di 13. That decision was quashed in 1989 by the Federal Court of Appeal (*Grain Workers Union* v. *Prince Rupert Grain*; (1989), 101 N.R. 105). This judgment was not appealed further.

18. As a result, the Canada Labour Relations Board rescinded the certification it had issued including Prince Rupert Grain in the section 33 bargaining unit, and restored it to a separate bargaining unit. The Union has continued to hold a separate certification for a separate bargaining unit of Prince Rupert Grain employees since 1980.

19. In 1994, the Canada Labour Relations Board considered a certification application by ILWU, Local 514 for a bargaining unit of Prince Rupert Grain supervisors. The Board ruled that the only appropriate bargaining unit of supervisors would be one including supervisors employed by all six grain companies. It dismissed the certification application on the basis that the unit applied for was not appropriate (*Prince Rupert Grain*, (1994), 93 di 164).

20. The Board's decision was quashed by the Federal Court of Appeal later in 1994 (*ILWU* v. *Prince Rupert Grain*; 94 CLLC 14,042).

21. Following the issuance of the Federal Court's Decision in 1994, Prince Rupert Grain applied to the Canada Labour Relations Board for a declaration that Prince Rupert Grain and the Association were one employer, and requested that the ILWU certification application be deferred until a decision was made on the single employer application. The Board declined to defer and issued the certification. (*Prince Rupert Grain and BCTEOA*, (1996), 101 di 1).

22. The Board later heard the single employer application. Prince Rupert Grain had asserted and the Union had not disputed that the various statutory prerequisites to a declaration were met,

and the Board accepted that. However, the Board declined to exercise its discretion to issue the requested declaration (*Prince Rupert Grain and British Columbia Terminal Elevator Operators' Association*, (1996) 101 di 1).

23. The 1994 decision of the Federal Court of Appeal was overturned later by the Supreme Court of Canada (*Prince Rupert Grain* v *ILWU and GWU*, [1996] 2 S.C.R. 432). The original Board decision was restored and the certification that had been granted to ILWU was vacated.

24. During the 1990's the volume of grain shipments through B.C. has generally declined due to a number of factors. The volume of grain shipments through Prince Rupert Grain's terminal declined substantially after 1990 with the result that receiving and shipping operations at the terminal have been stopped entirely for periods of time during each year, and the number of shifts has been reduced during other periods.

25. In the Spring of 1997, Prince Rupert Grain and the other grain terminals in B.C. commenced operating on the "continuous operations" schedule set out in the collective agreement. This schedule entailed operating seven day per week with either two or three shifts per day.

26. In May of 1998, Prince Rupert Grain reverted to a five day per week operation. Grain shipping and receiving operations were further reduced in late June of 1998 and forty employees were laid off. Grain shipping and receiving operations were discontinued with further layoffs in late July. They did not resume until late October, and did not return to three shifts, five days per week until mid November. The reduction and hiatus in operations were due to a lack of grain shipments to Prince Rupert.

27. Prince Rupert Grain's operations were reduced to two shifts, five days per week in mid January, 1999, and one shift at the beginning of March, 1999. Grain receiving and shipping operations ceased at the end of May due to a lack of grain shipments to Prince Rupert. They did not resume until mid September, 1999 when one shift was recalled, and returned to a five day three shift operation at the end of September.

28. Prince Rupert Grain's grain receiving and shipping operations were similarly discontinued for approximately four months from June to September inclusive and limited to one shift during October and November in 2000. They were discontinued in early June of 2001 and resumed November 2001.

29. Prince Rupert Grain's grain receiving and shipping operations were again discontinued in May of 2002 due to a lack of grain shipments to Prince Rupert.

30. The Association's constitution and bylaws since 1977 have provided for withdrawal from membership upon one month's written notice. The applicable bylaw at the time provided:

> "1.04 Any member not indebted to the Association shall be at liberty to withdraw on giving to the President one month's notice in writing. Provided, however, that no member shall be entitled to withdraw during any period in which collective bargaining is being conducted by the Association on that member's behalf or two months thereafter."

31. As a result of corporate acquisitions since 1980, the Co-Tenants at the time of filing of the single employer applications (the "Applications") by the Grain Workers Union, Local 333 (the "Union") in 2000 [*sic* 2001] and 2002 and their respective interests in the Consortium, were:

Agricore United	45.4%
Cargill Limited	14.7%

James Richardson International Ltd.	12.6%
Saskatchewan Wheat Pool	27.3%.

As of August 2005, the Co-Tenants and their respective interests in the Consortium were:

Agricore United	42.3%
Cargill Limited	17.0%
James Richardson International Ltd.	15.8%
Saskatchewan Wheat Pool	24.9%.

32. The members of the Board of Directors of Prince Rupert Grain Ltd. at the time the 2002 application was filed were:

Ian Strang (Government of Alberta)
Brian Hayward (Agricore United)
Chris Martin (Agricore United)
Murdoch MacKay (Agricore United)
Will Hill (Saskatchewan Wheat Pool)
Mike McCord (Saskatchewan Wheat Pool)
Kerry Hawkins (Cargill)
Curt Vossen (James Richardson International Ltd.)

As of August 2005, the members of the Board of Directors of Prince Rupert Grain were:

Art Froehlich (Government of Alberta)
Brian Hayward (Agricore United)
Chris Martin (Agricore United)
Murdoch MacKay (Agricore United)
Fran Malecha (Saskatchewan Wheat Pool)
Paul Duguid (Saskatchewan Wheat Pool)
Kerry Hawkins (Cargill)
Curt Vossen (James Richardson International Ltd.)

33. The officers of the B.C. Terminal Elevator Operators Association (the "Association") at the time the 2002 application were filed were:

Flavio Campaner, President (Saskatchewan Wheat Pool)
Dave Kushnier, Vice President (Cascadia Terminal)
Gerry Skura, Secretary-Treasurer (James Richardson International).

Effective August 1, 2001 until July 31, 2002, the officers of the Association were:

Dave Kushnier, President (Cascadia Terminal)
Al Graham, Vice President (United Grain Growers)
Phil Hulina (James Richardson International).

34. On September 15, 2000, Jeff Burghardt, General Manager of Prince Rupert Grain sent a letter to the Association stating that it was withdrawing from membership and would no longer participate in any joint collective bargaining with the remaining Association members and the Union.

35. On September 18, 2000, the Union gave notice to bargain to the Association.

36. On September 20, 2000, the Association met and the members agreed to the withdrawal by Prince Rupert Grain from membership. This was recorded in minutes of the meeting issued on October 5, 2000.

37. Mr. Burghardt attended the September 20, 2000 meeting of the Association as the representative of Prince Rupert Grain. The next meetings of the Association were held on October 19, November 17, and December 20, 2000. No one from Prince Rupert Grain was present at any of those meetings.

38. On September 21, 2000, the President of the Association notified Prince Rupert Grain that the Association had accepted Prince Rupert Grain's withdrawal of membership and acknowledged that Prince Rupert Grain would no longer participate in joint bargaining.

39. On October 11, 2000, the Union gave Prince Rupert Grain formal notice to commence collective bargaining.

40. On October 13, 2000, Prince Rupert Grain notified the Union that it was no longer a member of the Association and would not be participating in joint bargaining. It also indicated that it would soon serve notice to bargain on the Union.

41. On October 20, 2000, the Union sent a letter to Prince Rupert Grain taking the position that Prince Rupert Grain was still a member of the Association.

42. On October 30, 2000, Prince Rupert Grain gave the Union formal notice to commence collective bargaining and requested that the Union contact Prince Rupert Grain to discuss meeting formats, agendas and schedule.

43. On or about November 21, 2000, Prince Rupert Grain sent a notice to the following persons advising them that Prince Rupert Grain was no longer part of the Association:

Canadian Wheat Board	Chamber of Shipping	Canadian National Railway
Canadian Grain Commission	Vancouver Port Authority	Pacific Blue Cross
Pacific Pilotage Authority	Vancouver Grain Exchange	Vince Ready
The Co-operators	Transport Canada	William Mercer Ltd.
Coles Hewitt	B.C. Maritime Employees Association	Human Resources Development Canada

44. No collective bargaining occurred between the Association and the Union during September or October, 2000.

45. The first bargaining session between the Association and the Union occurred on February 14, 2001. The Association advised the Union that it did not represent Prince Rupert Grain in collective bargaining.

46. On February 22, 2001, the Union filed an application under section 35 of the *Code* for a declaration that Prince Rupert Grain and the Association were a single employer.

47. Over the period from February through July of 2001, the Association and the Union exchanged proposals and met in approximately nineteen bargaining sessions. Prince Rupert Grain did not attend any of those sessions.

48. On March 21, 2002, the Canada Industrial Relations Board issued its decision dismissing the Union's 2001 single employer application.

49. The Association commenced a complete lockout at all of the Vancouver grain terminals at midnight on August 25, 2002.

50. On September 3, 2002 Prince Rupert Grain re-opened following discussions with the Canada Wheat Board.

51. The Union filed its second single employer application on September 6, 2002.

52. The Association and Prince Rupert Grain each conducted their own separate round of collective bargaining with the Union.

53. Prince Rupert Grain and the Union negotiated in Prince Rupert on August 26 and 27; September 30; October 1 and 2, 2002. These dates had been arranged prior to the lockout.

54. After those sessions, the Minister of Labour appointed Bill Lewis and Elizabeth McPherson as Conciliation Officers. They convened bargaining sessions in Prince Rupert on October 29, 30 and 31; and November 19 and 20, 2002. Prince Rupert Grain and the Union concluded a separate collective agreement in the early hours of November 21, 2002. There was no strike or lockout.

55. The term of the agreement between Prince Rupert Grain and the Union was January 1, 2001 to December 31, 2004.

56. The lockout by the Vancouver grain terminals ended on or about December 13, 2002 with an agreement to submit the remaining unresolved bargaining issues to interest arbitration by Arbitrator Vince Ready. The final Vancouver collective agreement was set out in the subsequent award of Arbitrator Ready. The term of that agreement expires on December 31, 2005. The expiry date was not settled in negotiations and was awarded by Arbitrator Ready.

57. In the Fall of 2004, Prince Rupert Grain and the Union conducted their second round of collective bargaining in Prince Rupert. There were twelve bargaining sessions starting on October 7, 2004 and ending on January 28, 2005, all held in Prince Rupert.

58. On January 28, 2005, Prince Rupert Grain and the Union concluded their second collective agreement. The term of the agreement is from January 1, 2005 to December 31, 2008.

59. In the Fall of 2005, the BCTEOA and the Union conducted collective bargaining. A tentative agreement was reached, subject to ratification by members of the Union. The term of that tentative agreement was from January 1, 2006 to December 31, 2010. In December 2005 the membership of the Union rejected the proposed agreement.

Agreed and dated February 2, 2006 at Vancouver B.C.

[5] In addition to this Statement of Agreed Facts, all parties adduced additional evidence.

[6] Robert MacPherson is the President of the union, which has approximately 500 members – 420 are in Vancouver and 80 are in Prince Rupert. He has participated in the last four rounds of collective bargaining. His evidence concerned primarily the last two rounds of bargaining: 2001 – 2002, and the more recent round of bargaining in 2005 – 2006.

[7] Mr. MacPherson acknowledged that although the BCTEOA bargains the standard agreement between the union and the grain companies, the union and the individual grain companies have also executed separate Letters of Understanding that apply only to those individual companies. Further, grievances under either agreement are handled between the individual companies and the union. The sole exception to this practice are policy grievances, which are processed by the BCTEOA and the union under the standard agreement.

[8] The 2001 – 2002 round of bargaining began in February 2001 (there was a pre-bargaining meeting in January 2001, which was concerned with the state of the industry at that time) and proceeded until August 25, 2002, when the employer locked out the union in Vancouver. In the fall of 2000, the union had received notice that PRG had withdrawn from the BCTEOA. The union was unhappy with PRG's withdrawal from the BCTEOA and filed a section 35 single employer application on February 21, 2001. This application was dismissed by the CIRB on March 21, 2002.

[9] Mr. MacPherson described the 2001 – 2002 negotiations as "hard bargaining"; there was "hardly any give and take." The union was concerned about its laid-off members. The employer wanted increased flexibility, especially in regard to scheduling. Mr. MacPherson stated that because the farmers were facing a "drought" the "crops were not going to be there, [it was] a good time to stick it to us." He also testified that after the dismissal of the union's section 35 application, the employer's bargaining position hardened – "their way or no way."

[10] In August 2002, just prior to the lockout imposed by the employer, mediator Vince Ready had issued recommendations. Mr. MacPherson stated that these recommendations were turned down by the union. A lockout was instituted on August 25, 2002, and less than a week later on August 29,

2002, the union learned that PRG would be re-opening. It did so on September 3, 2002. In the past several years, PRG had been considered an "overflow terminal." It was only open an average of six months a year – October to March. Mr. MacPherson stated that, because farmers were faced with the "smallest crop in years," it became clear to everyone that "all the grain could be handled in Prince Rupert."

[11] Mr. MacPherson testified that after the union had turned down Mr. Ready's recommendations, it attempted to resume bargaining with the BCTEOA. However, he stated that the BCTEOA refused "to discuss contractual matters until the union accepted its [the employer's] offer." He concluded from this that the BCTEOA had decided that there was "no reason to re-open negotiations because PRG was open."

[12] It was also in August 2002 when PRG and the union commenced negotiations for the renewal of their collective agreement (the union had made a decision not to bargain with PRG while its section 35 application was outstanding – February 2001 to March 2002). Mr. MacPherson stated that the union was aware at this time that grain would be redirected from Vancouver to Prince Rupert – "it didn't surprise us"; and for that reason, the union "sent picketers to PRG" (the British Columbia Supreme Court ordered the pickets down; however, the British Columbia Court of Appeal later overturned that decision).

[13] Mr. MacPherson stated that the union's strategy in regard to bargaining with PRG was to "shutdown Prince Rupert and force the Government to get involved." However, an alternative strategy was to "get a good contract and present it to Vince Ready in the Vancouver negotiations." Mr. MacPherson stated that the "union got what it wanted at Prince Rupert." He admitted that the union took a hard position in regard to PRG, stating to the company: "this is what we want or we are gone." Mr. MacPherson acknowledged that the employer had put forward bargaining proposals that would have enhanced its ability to obtain more grain from the Canadian Wheat Board (CWB) – "more or less, yes."

[14] In September 2002, the union filed this second and current section 35 application. When Mr. MacPherson was asked what the purpose of the section 35 application was, he stated that he

"wanted the BCTEOA to represent everyone and the union to represent everyone (employees)"; that he did not want "the employer to whipsaw us" and that the BCTEOA had "locked us out for four months and operated Prince Rupert Grain." He added that he thought the "employer and the union could bargain more fairly together"; and that with the PRG terminal open, the union's bargaining position was weakened because they could not bring economic and political pressure on the employer; that the union was "unable to generate political and third party intervention." Finally, he stated that "PRG has better conditions than we [Vancouver] do"; he added: "what makes them better than us; everyone is sucking the same dust; and that is not good for a happy work place." However, Mr. MacPherson also acknowledged that in the past the parties had managed to settle only one contract without a third party.

[15] Mr. MacPherson went on to say that with PRG open there is "no economic pressure on the companies because the grain is being moved." He further assumed and believed that the "withdrawal of PRG was a deliberate strategy by the Vancouver companies to weaken the union's bargaining power." He stated that the "key" was that the "product was being moved." This made the "farmers happy" and the "government happy." He stated that it was the union's preference to "roll the dice with a third party arbitrator because the arbitrator listens and agrees with some of it."

[16] The second part of Mr. MacPherson's testimony concerned the negotiation between the union and the BCTEOA in 2005 for the renewal of the Vancouver collective agreement. Mr. MacPherson stated that one of the primary demands of the union was for a three-year contract that had the same expiry date as the PRG collective agreement. In addition, the terms and conditions that the union had been able to achieve with PRG were better than those they had obtained in Vancouver. The Vancouver membership, therefore, wanted terms and conditions similar to those obtained by their fellow union members at PRG.

[17] Mr. MacPherson stated that the reason the union sought the same expiry date as the PRG agreement was "not rocket science; we wanted the same end date so that we could get bargaining together." Ultimately, the union agreed to a five-year agreement and was unsuccessful in obtaining the same expiry date as the PRG agreement. The tentative agreement reached was recommended by both the Bargaining and Policy Committees of the union; however, at the ratification meeting in

December 2005, the membership defeated the proposed settlement by a narrow margin – 129 to 120. Mr. MacPherson stated that the defeat of the tentative agreement was because the membership "wanted what Prince Rupert has." He stated that the membership felt that what the companies could "afford to give Prince Rupert, they could afford to give in Vancouver"; and that the common refrain amongst the membership became "Prince Rupert or nothing."

[18] In cross-examination, Mr. MacPherson agreed that he wanted to force PRG back into the BCTEOA in order to get what he called "a fair agreement." He stated that was the reason why the union had picketed PRG – "even though we had a collective agreement in force at PRG"; and further "that's why we want the expiry dates the same." He further admitted this was one of the reasons for the section 35 proceeding and that the union was determined not "to let the companies lock us out again." Finally, when asked whether the union's strategy of attempting to use the PRG deal to obtain a similar deal in Vancouver amounted to "whipsawing," he replied that it may "appear like that but we took our best bargaining strategy forward." He further agreed that in regard to negotiations, the union would use "the government for whatever we can do best."

[19] PRG called three of its own management witnesses: Jeff Burghardt, Mark Newberry and Adrian Donders.

[20] Jeff Burghardt is the President and Chief Executive Officer of both PRG and Ridley Grain Limited. He has occupied these positions since 2002. Prior to that, he was the Terminal Manager for 13 years. As the CEO, he is responsible for "all facets and all activities" of the grain terminal. He participates in all Board meetings.

[21] Mr. Burghardt testified that his corporate goal is to "maximize the throughput" of grain and thus maximize earnings. In his attempt to maximize throughput at PRG, Mr. Burghardt stated that there is "vigorous competition with Vancouver." This is because there is a "finite pie of grain" that is exported from the West Coast. Added to this is the "excess capacity" of grain facilities on the West Coast. As a result, any amount of grain that is shipped through PRG means that there is less grain shipped through Vancouver.

[22] There is one railway to PRG and that is the CNR. PRG has a large rail yard that is at least three times larger than the largest rail facility in Vancouver. The functions performed at the PRG facility are to unload, clean, weigh, grade, store and then load the grain onto ships for export.

[23] Mr. Burghardt explained that the single largest component in the delivery of grain to customers is the "rail transportation cost." In 1996, the Federal Government repealed the *Western Grain Transportation Act*, which had established the parity of freight rate structures between Vancouver and Prince Rupert (Crow Nest rates). The purpose of this policy was to encourage a new rail corridor to Prince Rupert. However, the repeal of the Act resulted in freight rates increasing substantially. At the time of the repeal this amounted to six dollars and fifty cents ($6.50) per tonne premium, an increase of approximately 15 – 20% over the rates to Vancouver. At the time of the lockout in 2002, the difference was still approximately two dollars ($2.00) to two dollars and fifty cents ($2.50) per tonne.

[24] As Mr. Burghardt explained, the Canada Wheat Board, on behalf of farmers, sends grain to the corridor with the lowest cost. Thus "too little grain was made available by Canada Wheat Board to PRG." This increase in freight costs resulted in PRG, as was admitted by all parties, amounting to no more than an "overflow terminal." It became a part-time operation and was only open between the months of October to March of each year.

[25] Further compounding the railway costs is the fact that the CNR is the only rail line to Prince Rupert. Both CNR and CPR run into Vancouver. However, rail lines in Western Canada are generally split along geographical lines – CNR in the north and CPR in the south. The transportation of grain usually follows this geographical split – all grain grown in the north is shipped via CNR, all grain grown in the south is shipped via CPR. The quality and quantity of grain grown in the south is usually greater than that grown in the north. Among the country elevators in Western Canada, less than 20% have access to both rail lines. Thus, PRG not only has less access to the grain market, but in addition, any grain that is shipped via CPR, and destined to PRG, will come with additional interchange fees charged when one railway receives the cars of another.

[26] Mr. Burghardt testified that 90 to 95% of the grain shipped through its facility is wheat from the Canada Wheat Board (about 70 – 75% of the grain shipped through Vancouver is Canada Wheat Board grain; the remaining grain is under the direction and control of the Grain Companies). The elevator terminals act as agents for the CWB and take direction from it. The total amount of CWB grain that is shipped to the West Coast amounts to approximately 20 to 25% of the entire grain shipped. It is the CWB that makes the decision as to which corridor the grain is sent to. The informal practice is that the terminal from which the grain originates (i.e., a Saskatchewan Wheat Pool elevator in Alberta) will generally receive the grain at its terminal in Vancouver. PRG has no such elevators or terminals.

[27] Mr. Burghardt explained that there are seven directors on the PRG Board (two for Agricore, two for Saskatchewan Wheat Pool, one for James Richardson International, one for Cargill and one for the Province of Alberta). The Province of Alberta director does not have a vote. He stated that in 2000, none of the directors lived or worked in British Columbia. He explained that no individual company had a controlling interest in the operation of the PRG. As well, regardless of the number of directors, it was one company one vote. All the decisions of the Board must be "unanimous." The Board operates by consensus and therefore each company has a "veto." All the co-tenants are "independent" of one another and act as "competitors." The Board meets four (4) times a year.

[28] Mr. Burghardt stated that the "one primary decision" that the PRG Board is required to make is to "review and accept the operating budget that management [of PRG] puts forward." The Board then "monitors" the performance of PRG management in relation to this budget. Further, the Board acts as a "resource for advice," and local management "takes advantage of the collective experience of the Board." Finally, the Board has a fiduciary duty to its lenders, shareholders and co-tenants to see that the terminal is operated in a reasonable manner.

[29] However, Mr. Burghardt explained that all day-to-day operations are made by "local management" for which Mr. Burghardt, as the CEO, is "accountable." Mr. Burghardt stated that this includes the opening and closing of the terminal. However, he acknowledged that this may have not been the case in the past when the Board of Directors were much more involved in the operation of PRG.

[30] Mr. Burghardt explained the role of the director appointed by the Province of Alberta. First, as previously stated, this director does not have a vote. However, this director does monitor the performance of PRG to ensure it is being "properly managed."

[31] He stated that the origins of PRG lay in the Alberta Government's determination to have "two viable corridors" for its own exports from the West Coast. Alberta is "landlocked" and 70% of the Province's products are exported. This additional corridor was to ensure that the Province of Alberta was able to "lessen its dependence on one gateway from the Coast." This goal of Alberta remains a "strong influence at the table" and is reflected in how "serious" Alberta is in wanting these "two corridors to be successful." Mr. Burghardt stated that the Trust Agreement gives the Alberta director the right to monitor PRG, especially in regard to "throughput and financial data." Mr. Burghardt stated that he visits the Alberta Government several times a year to "review budget and operating plans" and that the PRG facility is visited "by the Alberta Government representative on a regular basis."

[32] Mr. Burghardt testified that "the single most significant cost in a year" is the debt to the Alberta Government. He stated that it "dominates everything." He outlined "two components for extinguishing the debt"; first, ensuring "a strong flow of grain to the facility – in the range of four to six million tonnes a year." However, "even at this rate of tonnage" PRG could not extinguish the debt by 2015 – the date that the loans mature. The second component is the renegotiation of the Alberta loan. He stated that this requires a "new debt instrument" with a "different set of terms," including a "new retirement date." This involves introducing "new lenders to the facility."

[33] Mr. Burghardt stated that these two strategies – more grain through the facility and a new debt instrument - were "linked to getting out of the Association." This was a direct reference to PRG's membership in the BCTEOA (Association). PRG had been a member of the BCTEOA since 1980. Mr. Burghardt has been active in the BCTEOA, serving on the Executive Board, including the role of President in 1998 – 1999. Though PRG was separately certified to the union, its membership in the BCTEOA meant that it was included in the industry standard collective agreement.

[34] Mr. Burghardt stated that "PRG is different than anything going on in Vancouver." PRG has, as previously mentioned, no direct access to grain because it owns no elevators. It operates as a "stand alone, single purpose business." The two parties that influence whether grain is shipped through PRG are the CWB, which has the sole authority to originate grain shipments, and the CNR. Further, he stated that PRG was "not making progress on labour relations issues within the Association context." One issue that stood out in this regard was the 1996 contract settlement which implemented a "continuous schedule" – a seven-day operation. Mr. Burghardt stated that in large crop years this would be a possible advantage in the processing of grain. However, in small crop years it would prove a disadvantage as it would provide no flexibility and substantially increase costs. Mr. Burghardt stated that he argued that it was "premature" to implement a continuous schedule not knowing what the "levels of grain would be." However, he stated that the BCTEOA decided that "all would implement the schedule." PRG then attempted to opt out of the continuous operations schedule but the union resisted this initiative not wanting different schedules at different terminals. Mr. Burghardt stated that when the schedule was finally implemented it resulted in "higher costs" for PRG – "not a good situation." In the fall of 1998, when PRG received a limited quantity of grain, it attempted to implement a five-day operation. The union filed a grievance; however, this grievance was not pursued.

[35] Mr. Burghardt stated that from 1998 to 2001, PRG's withdrawal from the BCTEOA became an "active strategy." One of the primary reasons was the implementation of the continuous operation schedule. Mr. Burghardt stated that PRG needed more "certainty" around work schedules. He felt that "being outside the Association would assist on being independent on the issues of continuous operation." In addition, he stated that he did not receive "much comfort from the Association" in regard to these problems.

[36] In March 2000, the issue of continuous operation was once again raised and a committee was set up amongst the members of the BCTEOA to examine the issue. Some members of the BCTEOA wanted work schedules to be tailored to their specific operations. Once again, the union resisted. When no progress had been made by the continuous operation committee towards more flexible scheduling, Mr. Burghardt became more convinced that he needed to withdraw from the BCTEOA.

At the June 2000 PRG Board meeting, Mr. Burghardt stated he had made a decision to leave the BCTEOA.

[37] Mr. Burghardt explained that his goal was to demonstrate to the PRG Board that "PRG management had a strategy to improve the financial picture of the company"; that it had "a proper operating structure and a proper debt structure in place"; and that its goal was "to build a better workforce." He said that this was the linkage between leaving the BCTEOA, reorganizing the debt structure, and demonstrating to potential new lenders that PRG had a "credible business plan." Further, that the "best strategy" to present to these potential new lenders was to "demonstrate complete control over the labour front." By presenting this option to the PRG Board in June 2000, he could give adequate notice in the fall of 2000 to the BCTEOA.

[38] Mr. Burghardt testified that the response of the PRG directors was "supportive" and that it was "the right move for PRG." However, the directors asked that "he advise and speak to the Association prior to leaving" so that the "Association could assess their position in relation to the upcoming bargaining." He agreed to do this.

[39] At the BCTEOA's meeting in August 2000, Mr. Burghardt advised of PRG's intention to leave the BCTEOA. In the discussion that followed, Mr. Burghardt stated that "some members wanted to understand PRG's reasoning." Given the BCTEOA's small membership he explained that the withdrawal of any member could possibly affect the "stability" of the BCTEOA. That raised "questions about the effectiveness of the Association" causing others to potentially "consider" leaving the BCTEOA. Finally, he noted that the BCTEOA always treated PRG as an independent and separate employer.

[40] On September 15, 2000, Mr. Burghardt wrote the BCTEOA withdrawing from its membership and stated that PRG "will no longer be participating in any joint collective bargaining" with Local 333 of the union. The BCTEOA replied on September 21, acknowledging that PRG had withdrawn from its membership. On October 13, 2000, Mr. Burghardt notified the union stating that it had withdrawn from the BCTEOA and that it would no longer be participating in joint bargaining. He wrote that he was prepared to enter into new discussions with the union and to structure a "new

working agreement." The existing collective agreement at that time expired on December 31, 2000. The union responded on October 20, 2000, stating that "it is the position of the union that you are still a member of the BCTEOA" and that Prince Rupert Grain was bound by "a current collective agreement and you will be bound by the successor agreement."

[41] The following February 13, 2001, Mr. Burghardt made a presentation to the co-tenants in Winnipeg. It was, in summary, "an evaluation of PRG and its competitors in Vancouver" that was intended to "demonstrate the superior productivity of the PRG facility" and to "address and resolve the financing issue completely." His goal was to "maximize grain throughput" in order to "attract investment and lending." This meant "more competition with Vancouver facilities" in order that PRG could obtain "greater market share" and therefore "reasonable lending rates."

[42] Also in February 2001, Mr. Burghardt made a similar presentation to the union taking them "through the business state of PRG both short and long term." He argued that the new relationship with PRG meant "long term benefits to employees." However, he stated that the union did not accept PRG's withdrawal from the Association. On February 23, 2001, the union filed a single employer application pursuant to section 35 of the *Code*. This application was eventually dismissed on March 21, 2002. However, during the entire period that this application was outstanding, the union refused to negotiate with PRG.

[43] In a document entitled "Prince Rupert Grain Ltd. Re-Financing Project," dated January 16 and 17, 2002, an "Action Plan" was set out to restructure PRG debt. The Alberta Government First Mortgage Bonds would be settled for a specified sum of money. The owners would insert approximately half of this sum into PRG and the rest would be raised by either "private placement or bank financing." Under the plan, the owners were to provide a "volume or cash equivalent" commitment to third parties, that at a minimum, would meet PRG debt requirements, but additionally, they would make a commitment of volumes of throughput that would allow "PRG to operate profitably and to generate superior returns to owners."

[44] In a draft "Offering Memorandum," in conjunction with Ernst & Young, in February 2002, PRG was planning to raise "private placement in the amount of $90 million to retire the Alberta debt."

The executive summary describes the "PRG Terminal as an integral part of each of the co-owners grain operations..."

[45] Bargaining did not begin between PRG and the union until late July 2002. Mr. Burghardt stated that he had attempted to move to an interest-based negotiation, wanting to set out the business goals for PRG. However, the following month, August 25, 2002, the BCTEOA instituted a lockout against the Vancouver local. Mr. Burghardt stated that he had no advance notice of the BCTEOA's lockout nor had he had any discussions with the BCTEOA about their "bargaining strategies"; and in particular, there had been no discussions about "using PRG as the Association's leverage in its bargaining strategy with the union."

[46] On August 29, 2002, some four days after the lockout began, Mr. Burghardt wrote a memo to the Board of Directors stating that "the Canadian Wheat Board has finally approached us about receiving and shipping grain for them." PRG agreed to begin processing grain on September 3, 2002. Mr. Burghardt stated that he had actually approached the CWB earlier, but they had resisted discussions about opening PRG. He stated that the PRG Board of Directors had "no discussions about PRG handling grain in the context of a work stoppage." Further, he stated that he did not "seek the approval of the Board to open the facility," but rather he "made the decision to operate the facility." He negotiated with CWB over the terms of the opening, obtaining a minimum of 12 weeks of grain handling. Mr. Burghardt also issued a memo to all employees, dated August 29, 2002, which reads in part as follows:

> … We have been approached by the Canadian Wheat Board to offer receiving and shipping services to them. This request is because of the current labour dispute in Vancouver. As you all know now, we have recalled all employees back to work because of this request.
>
> We are hopeful of creating an operating opportunity beyond that time frame. The determinant of how long PRG is able to operate will not depend exclusively on the status of the Vancouver labour dispute.
>
> The crop size in Western Canada this year is a complete disaster. Current estimates call for the total West Coast export program to be 6.5 to 7.0 million tonnes. That figure is a total for both the ports of Prince Rupert and Vancouver. Last year's total was approximately 11.0 million tonnes. The five-year average would be closer to 16.0 million tonnes. With crop sizes and sales programs this small the case can certainly make for one facility to efficiently process all of the export program.

[47] Mr. Burghardt reiterated more than once that the opening and closing of the facility was a decision of "local management." He stated that it was basically an operational decision consistent with PRG's overall business plan. Further, he testified that in regard to operational matters, the Board of Directors are "passive" and "give tremendous latitude to the management at PRG." Moreover, he explained that "there are no restraints placed on PRG by co-tenants for PRG to compete"; and that PRG management "operates the facility to obtain as much tonnage as it can."

[48] In cross-examination, Mr. Burghardt acknowledged that in the past there had been "director-led shutdowns and openings" of the PRG facility, but that his authority to open and close the facility had "evolved over time." Further, he denied stating to Mr. Hoyes that he required the "blessings of the shareholders" to open the PRG facility, stating that he "didn't use those words," and once again repeating that the Board is "not involved" in the opening and closing of the PRG facility.

[49] Moreover, Mr. Burghardt testified that he had the sole responsibility for PRG's relationship with the Canada Wheat Board and CNR. He said that no limitations were placed on him by the Board of Directors in regard to his discussions with either the Canada Wheat Board or CNR. He testified that any "confidential matters" that arise between CNR and the CWB are "not shared with the Board of Directors." He explained that the Board of Directors are "aware of this and remain hands off." Finally, he stated that he spent the last number of years attempting to persuade the CWB to "send more product to PRG"; and that this larger share is directly "detrimental" to the Vancouver facilities. Further, because of the shrinking pie in regard to the grain crop, the competition against the five Vancouver terminals is "much more fierce."

[50] During the lockout, the union decided to picket the PRG facility. The BC Supreme Court removed the pickets; however, the BC Court of Appeal subsequently affirmed the right of the union to picket PRG. In cross-examination, Mr. Burghardt acknowledged that during the lockout in Vancouver, PRG relied on the communication and PR resources of the Integrated Grain Companies, because it had no such resources in Prince Rupert.

[51] Next, the union applied for conciliation during bargaining at PRG and two conciliators were appointed. A collective agreement was finally concluded on November 21, 2002. Mr. Burghardt

participated in reaching the collective agreement. He called it the "first made in PRG collective agreement." He testified that one of the primary gains for PRG was its success in obtaining a "unique operating schedule for PRG," and, as a result, continuous scheduling would "remain dormant" for the life of the collective agreement.

[52] In cross-examination, Mr. Burghardt stated that he understood that the union's initial strategy was either to get into a "strike position as quickly as possible or reach an agreement at PRG to use in Vancouver." However, he concluded that he was willing to "pay a little more to get a settlement because it was in the long-term interest to PRG." He also stated that it was "always important to keep PRG open."

[53] Mr. Burghardt testified that in the next round of collective bargaining, for a second "stand alone" agreement, a new collective agreement was reached on January 28, 2005 (January 1, 2005, to December 31, 2008). He said that the PRG Board of Directors was not involved in PRG's development of bargaining proposals, nor was their approval required or sought in regard to concluding this collective agreement. He commented that he had "sole authority to conduct and conclude a collective agreement on both occasions" – referring to both the 2001 – 2004 and the 2005 – 2008 collective agreements. He said that this agreement was entirely reached by the parties themselves and did not involve any third parties. Mr. Burghardt explained that in this second round of collective bargaining he was able to achieve the removal of preferential hiring clauses, a reference to the fact that under the BCTEOA collective agreements, PRG was required to hire any laid off employees from Vancouver. He stated that this enabled PRG to "take complete control of its hiring."

[54] In cross-examination, Mr. Burghardt explained that PRG and the union had reached "two contracts without government intervention" and that PRG had a "much more stable operating relationship with the union than we did in the Association." He commented that the relationship with the union is better than in the past and that there is currently a "better work environment." He noted that local employees better understand the "business plan" of PRG.

[55] Finally, he said that as of August 1, 2006, he was "able to announce freight rates that are lower than in Vancouver." This fact, combined with the capacity of PRG's freight yards (its two to five-

day car cycle) gives PRG a "competitive advantage" over the Vancouver terminals. He noted that he has a "good relationship with CNR" and that CNR now views PRG as the "first choice" for the shipment of grain. In addition, PRG has not closed for the past thirty-six (36) months, and over the last two years, there has been more grain to move – the "pie is bigger," as Mr. Burghardt commented.

[56] Mark Newberry is the Maintenance Superintendent of PRG. His responsibilities include the maintenance of all infrastructure at the terminal. He is also responsible for administering the collective agreement. He takes instructions he stated only from Mr. Burghardt, to whom he reports, and not from the Board of Directors, nor from the BCTEOA.

[57] In the 2002 round of collective bargaining, he was the spokesperson for PRG. He stated that his "mandate came purely from Jeff." That mandate included a more efficient and effective operation, along with establishing a better relationship with the union. Mr. Burghardt stated to him that he wanted to demonstrate that "stand alone collective bargaining could work; that PRG could negotiate a collective agreement."

[58] Mr. Newberry explained that a specific issue that PRG wanted to address was the issue of continuous scheduling. Mr. Burghardt made clear to him that he wanted to maintain a "5 x 2" schedule and "not to revert to a continuous operation schedule." He stated that his instructions also included adopting a process of "interest-based bargaining" in order to "let the union know all the challenges the Company was undergoing."

[59] Finally, PRG did not want a collective agreement that expired at the same time as the Vancouver collective agreement because "we did not want to be in a labour dispute at the same time as Vancouver." His goal therefore was to achieve a "made in Prince Rupert agreement." In response to a question as to whether or not he had received instructions from either the Board of Directors, members of the Association or a grain company in relation to collective bargaining, he replied "absolutely not."

[60] Adrian Donders is the Chief Financial Officer of Prince Rupert Grain Limited (PRG) and Ridley Grain Limited. He explained the corporate structure under which the Grain Companies operate

Prince Rupert Grain. Ridley Grain Limited is a bare trust and owns all the assets of the Prince Rupert Terminal. The trustees are the four grain companies (Agricore United, Cargill, James Richardson International Ltd. and Saskatchewan Wheat Pool) (originally six). Under the Co-Tenancy Agreement entered into in 1980, the co-tenants agree to constitute a trust to hold the lease and assets of PRG Terminal that is built on leased land owned by the National Harbours Board. PRG was incorporated by the co-tenants and it is PRG that operates the terminal under an Operating Agreement and Shipping Agreement.

[61] There is a Deed of Trust and Mortgage (Trust) executed on September 30, 1981, between Ridley Grain Limited, the Government of Alberta, the original six (6) grain companies (as co-tenants) and Prince Rupert Grain Limited. The Government of Alberta loaned money for the construction of a new terminal: a Class A bond in the amount of $106,000,000 provided part of the financing. The co-tenants also put up $50,000,000 for the construction of the new terminal. The co-tenants under the Trust are required to "use their best efforts to effectively utilize the terminal." Under article 6.01, the Trust sets out the order of priority for the distribution of the cash flow: first, the shipper's return; second, interest on the bonds; third, payments on the principal; fourth, interest on the notes; and fifth, participation in the residual cash flow. Article 6.02 sets out a schedule that increases the rate of the shipper's return as the annual throughput of grain increases.

[62] Article 5.13 prohibits the disposal of assets of any significant value. Article 5.14.9 requires the Government of Alberta's approval for any capital expenditure in excess of $500,000.00. Article 5.16 requires PRG to give to Alberta an annual certificate of compliance with the Trust; and articles 5.14(12)(13) require disclosure of audited financial statements to the Government of Alberta.

[63] The interest on the bond is 11% compounded semi-annually. In regard to the bond in the amount of $106,250,000, the current amount owing in 2006 was considerably higher. The total debt now owing to the Province of Alberta has grown to a substantially higher amount. The co-tenants have received no money back on the $50,000,000 invested originally. Mr. Donders stated that under article 4 of the Trust, if there is a failure to make payments, then the only recourse that Government of Alberta has is against the facility itself and not against the individual tenants; in other words, the grain companies have not guaranteed the loans.

[64] Mr. Donders stated that PRG has "very seldom reached the principal payment, very seldom even been able to make a full interest payment; that is because the revenue generated has been insufficient."

[65] Mr. Donders testified that in the year of the lockout, 2002 – 2003, the shipper's return to the grain companies was approximately $2,500,000, i.e., $1.13 per tonne. In addition, the Grain Companies were able to collect a larger amount in shipper's return for outstanding shipper's returns owed from the past. And a large sum was paid towards interest on the debt of PRG in 2003. During that grain year, PRG received the highest volume of the years 1998 and 2005. It received more than twice the average of that seven-year period. Finally, Mr. Donders stated that if the PRG facility fails to achieve at least a million tonnes of throughput in a given year, the co-tenants will be required to "put in cash in order for PRG to meet its obligations.

[66] Two witnesses were called (by the union) on behalf of the Canada Wheat Board: Ward Weisensel and Sandy Hoyes.

[67] Ward Weisensel is the Chief Operating Officer of the CWB. At the time of the August – December 2002 lockout, he was Vice-President of Transportation and Country Operations at CWB. In this position, he was responsible for the loading of all CWB grain onto ships on the West Coast. The CWB markets some 18 – 24 million tonnes of grain worth approximately $4 - $6 billion dollars. It is responsible for the marketing and export of this grain to some 70 different countries. Its purpose is to attempt to achieve the best return to farmers minus actual costs.

[68] Mr. Weisensel described the Standard Bulk Export contract. This contract defines the point at which title transfers from the CWB to a grain company. It also specifies the quality and quantity of grain, the delivery time, and the designated port from which the grain will be loaded. An additional provision of this standard contract is known as the "event of delay" clause, which extends the time period for delivery in the case of a strike or lockout. Mr. Weisensel explained that under the force majeure clause, the CWB is obligated to mitigate; however, when this "strike/lockout clause" is invoked, it hurts the reputation of the CWB among its customers.

[69] He described the grain companies' activities as operating elevators, acting as agents for the CWB and also acting as accredited exporters. He stated that they store grain, clean it, and load it.

[70] Mr. Weisensel testified that the members of the BCTEOA in August 2002 "kept him informed" of the negotiations in Vancouver. When the "conciliation report was rejected by both parties," he stated that he started to get "the contingencies in place." He testified that "Prince Rupert was the logical alternative to Vancouver; and that nothing else was available." He understood the situation was "serious" and that it would adversely affect "shipping" and "farmers." He instituted an inquiry into railway rates, and most important, he had to "determine which contracts would be affected by event of delay." Also important were the potential increase in shipping costs and the possibility of future demurrage costs.

[71] Mr. Weisensel stated that the CWB has the authority to determine the port of destination for the grain. However, it has no authority in regard to whether an individual terminal is opened or closed; that is the decision of the company that owns the terminal.

[72] The cost of shipping to Prince Rupert was higher than it was to Vancouver ($2.50 per tonne) at the time of the lockout. However, Mr. Weisensel stated that the CWB decided that Prince Rupert was "the only viable alternative for West Coast shipping." The CWB entered into discussions with Mr. Burghardt, General Manager of PRG, to explore the possibility of opening the Prince Rupert terminal. Mr. Burghardt stated that he wanted a commitment of at least 12 weeks in order to cover the costs of opening. Mr. Weisensel explained that other ports had "significantly higher costs than PRG." In cross-examination, when asked if customers were anxious at this time, he replied, "absolutely, very anxious." Mr. Weisensel stated that once an agreement had been reached with PRG, the CWB attempted to get "as much grain there as possible." He commented that as they went through the fall of 2002 "it became clear that PRG could handle all the volumes of the West Coast Shipping program." Mr. Weisensel noted that the CWB has an "obligation" to deliver grain and to "mitigate" as much as possible.

[73] Sandy Hoyes is the Assistant Manager of the CWB in Vancouver. His primary responsibility is to oversee the loading of grain at the ports of Vancouver and Prince Rupert. In August 2002, he was keeping close track of the negotiations between the union and the BCTEOA in Vancouver and Prince Rupert. On approximately August 15, 2002 he had lunch with Al Graham of Agricore United. A subsequent memo that he wrote on the same date "reflects his views at that time"; particularly, he stated, his "Gut feel":

> 2002-03 CWB total exports West Coast will range from an extreme low of 3.5 to a high of 5.0 million tonnes
> - Gut feel is Rupert will not open ! > unless the principals push for it, but if it did open extremely detrimental to Vancouver.
> - Contingency plans in place in case of job action West Coast.South American shipments thru Churchill and or T.Bay> St Lawrence. Some to PNWEST, and some to the Gulf.More options available to-day than years ago a/c ability to clean to export/unit train loading/ CGC official inspection at source/ rail cars available plus USA BIZ IS SLOWER SO CAN OFFER SOME CAPACITY UP TO CANADIAN BIZ!

[74] On August 23, 2002, Mr. Hoyes stated that he had a telephone conversation with Mr. Burghardt to see if he was "prepared to open the elevator for us":

> Just talked [to] Jeff Mr. Burghardt and he is prepared to open his elevator for us. He says he has the blessing of his shareholders to do so. Hev [*sic*] also says that the union cannot refuse to work as his elevator is under a separate contract and that he is prepared to go to court if necessary.

[75] In regard to Mr. Burghardt's comment that he required the "blessing of shareholders" to open the terminal, he said that Mr. Burghardt "said something to that effect." In cross-examination, he acknowledged that he did not know whether Mr. Burghardt actually required permission of his directors to open the terminal, but that was his "interpretation of the conversation." However, he also stated that in making that interpretation he "doesn't believe he was wrong," and, further, he "wouldn't have put it in if Mr. Burghardt hadn't said it."

[76] The parties called two past members of the PRG Board of Directors – Gordon Cummings on behalf of the union, and Ian Strang on behalf of PRG.

[77] Gordon Cummings was the Chief Executive Officer for Alberta Wheat Pool from 1995 until 1998, and Chief Executive Officer for Agricore United from November 1998 to October 2001.

During this entire period, from 1995 to 2001, he also sat on the Board of Directors of PRG. He stated that it was the "senior executives" of each of the founding grain companies that occupied the Board of PRG. He stated that the directors of PRG had a dual role: first, they had a "fiduciary responsibility" to PRG, and second, they were also "representatives" of their respective companies. He stated that although each of the companies had "varying interests," the PRG Board was neither "contentious" nor "fractious"; and because no individual company had a majority of interest in PRG, the Board of Directors had to operate by consensus. He stated that the Board of Directors did not "try to operate the terminal" nor did it involve itself in the "day to day operational decisions"; rather, Mr. Burghardt would give comprehensive operational reports. As a result, Mr. Cummings "felt comfortable" that he was "adequately informed" of the terminal's operations. Mr. Cummings stated that the Board of Directors primarily concerned itself with "strategic decisions" such as the "opening and closing of the terminal." Mr. Cummings also stated that the PRG Board had "nothing to do with labour relations issues"; "nothing at all."

[78] Mr. Cummings testified that the Board of Directors had "a high regard for Jeff, and gave him a lot of freedom," which he felt was "well justified." He further stated that it was Mr. Burghardt who first raised the issue of PRG leaving the BCTEOA – "absolutely came from Jeff." The reasons given by Mr. Burghardt, for leaving the BCTEOA, was that Mr. Burghardt felt that it was in the "best business interest of PRG." Mr. Cummings further stated that PRG leaving the BCTEOA was never a part of any coordinated strategy by the BCTEOA itself; that it was "never thought of and never raised as a suggestion." At PRG Board meetings, he explained that he had some reservations about PRG's withdrawal from the BCTEOA because "it would weaken our [employer] bargaining strategy." This was because in the past "one off deals" had "come back to haunt us" and that "by dividing the employer group the union could play one off against the other." Finally, Mr. Cummings stated that there was no discussion of the impact that PRG's withdrawal from the BCTEOA would have on the 2002 collective bargaining negotiations.

[79] An important issue that arose during Mr. Cummings tenure on the PRG Board, and one in which he took a leading role, was to address PRG's debt load. From his perspective, PRG was "technically insolvent" because its debts far exceeded its assets. He referred to it as PRG's "debt mountain" that had to be dealt with "before it ran away with us." This debt was owed to the Province

of Alberta. For many years, only the interest on the debt had been paid; and in some years PRG was unable even to meet the interest payments.

[80] Mr. Cummings concluded that the companies who owned PRG had two options: first, they could guarantee the debt; or second, they could guarantee a certain amount of grain "put through" to the PRG terminal. The first turned out not to be an option because many of the companies had gone into debt in order to replace older wooden elevators with newer structures. Therefore, discussions centered on guaranteeing a certain amount of grain to PRG in order to service the debt. In Mr. Cummings view, the PRG terminal had value only if grain was being put through it; with no grain, the elevator had no value. The figure of three million tonnes was arrived at as the amount of grain that had to be shipped through PRG in order to service the mounting debt.

[81] However, guaranteeing the delivery of grain to PRG raised additional difficulties. Mr. Cummings stated that PRG had in the past years been "largely an overflow terminal." This was because it provided "the lowest returns to the owners" (approximately one quarter of the return in Vancouver). Mr. Cummings testified that a "tonne of grain through Vancouver was cheaper than the same tonne of grain through PRG; Vancouver was more profitable." Second, diverting grain to Prince Rupert meant less volumes for Vancouver and this had the potential result of closing less efficient terminals in Vancouver (i.e., Pacific Elevators Ltd.). Thus, there was not only the critical issue of profitability, but there was the further problem of how to "rationalize volumes in Vancouver if PRG were to get more grain." Third, two other players would have to be involved in order for this option of diverting grain to Prince Rupert to work – CNR and the CWB. CNR had an interest in PRG obtaining more grain because it had railway tracks to Prince Rupert. One suggestion provided by CNR was that their shipping cost could be reduced if the CWB would provide a contractual guarantee to send a certain amount of grain to Prince Rupert. The hope was that "CWB [would] not fight to have it [grain] sent to Vancouver." Thus, in order to guarantee volumes of grain being sent to Prince Rupert, the CWB "tie in" was important.

[82] Ian Strang was the Independent Director appointed by the Government of Alberta between the years 1997 – 2004. He is currently retired and resides in New Zealand. For 30 years, he was a Chartered Accountant and a Senior Vice-President of the Insolvency Group with Ernst Young. He

entered as a full-time consultant in 1996, and was appointed to the Board of Directors of the Vancouver Port Authority, as well as to the PRG Board.

[83] During the hearing of this matter, he was paid as a consultant by PRG at the rate of $500 per day for each day he attended the hearing.

[84] As a director of PRG, he stated that he had two primary interests: first, his fiduciary duty as a Director on the Board of PRG and second, his representative role on behalf of the Government of Alberta, who is the primary lender to PRG.

[85] Mr. Strang's professional specialty has been in the insolvency area. He had previously assisted the Alberta Government in regard to the Gainor's Meat Packing financial crisis. One of his mandates in regard to PRG was to assist the Alberta Government to "extricate" itself from its loan to PRG. He was to work with PRG "to achieve this." He therefore saw it as his responsibility to "assist PRG in its refinancing." His other primary task was to ensure that PRG was complying with the Trust Agreement. He stated that PRG at the time of construction was a "state of the art facility in all of North America." It was his role to ensure that "PRG maintained the status of this facility." The third important factor was to ensure that the PRG was "run as an independent company." The Government of Alberta followed these three issues closely. A typical letter from the Alberta Treasury reminds the directors of their duty to ensure that PRG receives an equitable share of grain and that it should maintain the facility. It was sent on the recommendation of Mr. Strang. It reads as follows:

> In reviewing Prince Rupert Grain's (PRG) financial statements, we note that annual maintenance expenditures since 1996 have been significantly lower than in previous years. Section 5.14(15) of the Deed of Trust and Mortgage (First Mortgage Bonds) states "The Company and PRG will maintain and keep the Project and every part thereof in as good order and condition as a prudent owner would do and shall promptly make repairs and replacement, structural or otherwise, necessary to enable the Project to ship grain." Please provide us with PRG's assessment of its compliance with section 5.14(15) of the Deed of Trust and Mortgage (i.e. including any available reports on maintenance requirements identified and projects approved).

> In addition, we note the Deed of Trust and Mortgage in section 5.14(5) states "The Shippers agree, subject to Canadian export policy and the equitable use of terminal facilities existing from time to time to use their best efforts to effectively utilize the Terminals." Given the low throughput at PRG last year and its significantly lower share of West Coast exports compared to prior years, please provide us with the Shippers [*sic*] assessment of their compliance with Section 5.14(5) of the Deed of Trust and Mortgage.

[86] Mr. Strang stated that after each Board meeting, he would report to the Alberta Government. He also noted that the Province of Alberta had discussions with the CWB about "the sharing of grain" to ensure that PRG was getting its "equitable share [of] West Coast grain."

[87] Mr. Strang commented that none of the other Directors lived in British Columbia or were involved in the day-to-day operations of elevator terminals in Vancouver. He stated that all the directors were competitors and that no one company "controlled the Board of PRG." He was familiar with the Co-tenancy Agreement, which required "unanimity." This was problematic because when there was dissent it became a "major frustration because there was no mechanism to deal with it." He stated that at his second meeting at the PRG Board of Directors he asked, "where was the business plan?"; and that he further commented to the directors that they all "had a duty to ensure that PRG was run in its own best interest."

[88] Mr. Strang testified that Mr. Burghardt was an "exceptional leader" and that the Board of Directors "very quickly gained confidence in him." He stated that in his view, the "Board should not be running the Company"; and that a Board gets into trouble when they "micro-manage the Company." He testified that the PRG Board of Directors was clear in its message to Mr. Burghardt and that was "you' re in charge of the Company, you manage it." He stated that the Board expected Mr. Burghardt to run PRG "independently and profitably." The Board was therefore not involved in the day-to-day operations.

[89] Mr. Strang stated that Mr. Burghardt "never showed a reluctance to compete with the Vancouver terminals." He stated that "Jeff and local management made decisions as to when to open and close the terminal"; and that this specific decision was dependent upon the "flow of grain, crop size and the CWB." He further commented that he personally "encouraged Jeff to develop a relationship with the senior people at the CWB and CNR." In addition, he advised Mr. Burghardt

to "move forward, be aggressive, develop relationships with the CWB and railway and be independent of the other companies." He stated that Mr. Burghardt's goal of "increasing the throughput of grain and keeping it [the terminal] open as long as possible clearly placed him in competition with the terminals in Vancouver."

[90] In regard to the grain industry as a whole, Mr. Strang explained that one of the primary problems from "day one" was the "overcapacity" on the West Coast. He stated that as to the PRG Board, this became a question of "who was going to take the pain?"; was it going to be a "shared pain or was one company going to take the pain?" He stated that what was required was the "shutdown of an elevator or two in Vancouver." He noted that "with the requirement for unanimity, [they] couldn't get there." He testified that he continually argued for "restructuring" on the Coast, but he had concluded that the "industry was dysfunctional as a whole."

[91] Mr. Strang stated that Mr. Burghardt first raised the issue of leaving the BCTEOA in December 1999. He testified that Mr. Burghardt said that he was "seriously thinking of it." The reasons noted by Mr. Burghardt were that the "operational issues" at Prince Rupert were "different than in Vancouver." In particular, Mr. Strang stated that Mr. Burghardt wanted greater control of labour relations issues, that he wanted to address freight rates and that he wanted to obtain more grain throughput. He also recalls Mr. Burghardt stating that continuous operations scheduling "doesn't work in Prince Rupert."

[92] Mr. Strang explained that the Board of Director's initial response to withdrawal from the BCTEOA was their concern about the potential "impact on bargaining." Later, when Mr. Burghardt declared his intention to separate from the BCTEOA, the Board's response was to ask him to inform the BCTEOA members so that they were not "blindsided." Mr. Strang stated that, in the end, the Board concluded that it was in the "best interest of PRG" to separate from the BCTEOA. He said that Mr. Burghardt had the authority to separate from the BCTEOA, but that he approached the directors because he wanted to ensure that "the Board was on side."

[93] Mr. Strang recalls Mr. Burghardt linking the need to separate from the BCTEOA to the potential refinancing of PRG. He, like Mr. Burghardt, had concluded that in order for PRG to refinance, it needed to have "a greater volume of grain"; and as well, PRG needed to be "cost competitive." PRG had to be in a more "competitive position to receive grain – especially in relation to the CNR and the CWB." He also recalls the link between refinancing and cost competitiveness in regard to PRG obtaining control of the scheduling of its own employees; thus, Mr. Burghardt's desire to eliminate the continuous operation scheduling.

[94] Mr. Strang testified that he learned of the lockout of employees in Vancouver on August 25, 2002, in a conference call. He stated that Mr. Burghardt saw the lockout as an opportunity for PRG to receive grain and that Mr. Burghardt also saw it as an opportunity to "deal directly with CWB and CNR." He said that Mr. Burghardt "did not receive or seek permission from the Board to open the terminal"; nor did Mr. Burghardt "seek advice from the Board on the terms of opening the terminal."

[95] Mr. Strang explained that, ultimately, the debt restructuring failed because "one of the co-tenants decided they wouldn't do the deal after it was struck." He stated that the deal "had the approval of the Alberta Government." He commented that the stumbling block was once again the "overcapacity issue in Vancouver."

[96] Finally, Mr. Strang stated that when Mr. Burghardt was involved in negotiations in the fall 2002, he did not "seek direction" in regard to either "bargaining proposals or the terms of settlement." He further stated that the Board was not involved in collective bargaining and was simply informed of the result. Further, the Board was given no details of the negotiations and did not receive any "confidential information about collective bargaining."

[97] The BCTEOA called two management witnesses from Agricore United: David Carefoot and Alistair Graham.

[98] David Carefoot is the Chief Financial Officer of Agricore United. He oversees the "finances related to terminal grain operations." He stated that Agricore United has a "non-controlling interest" in PRG. He testified that PRG has never made payments on either the principal or the interest on the

loans (notes to the co-tenants) referring to the $50 million investment loan made by the grain companies for the construction of the Prince Rupert Grain Terminal. Finally, Mr. Carefoot stated that the Government of Alberta bonds are secured by the facility only and that there is no recourse to the co-tenants for any of the Alberta Government loans.

[99] Mr. Carefoot explained that Agricore "gets a shippers return for grain handled at PRG but if that same grain is handled by their own terminal in Vancouver," the company receives "significantly more return." He further stated that in the lockout of August 2002, the shipper's return "mitigated to some degree the cost of the lockout." However, he also noted that the "shipper's return from PRG for the entire year ending July 31, 2003 [which included the lockout period], was less than the fixed cost for one month of the lockout." The lockout lasted for four months.

[100] Mr. Carefoot acknowledged that the 2002 – 2003 grain year was a poor crop year, but that Agricore "handled the same amount of grain at PRG that it would have handled in Vancouver."

[101] Finally, Mr. Carefoot commented that in regard to "non-CWB grain" Agricore "negotiates individually with each customer to cover the entire span of handling."

[102] Alistair Graham is the Terminal Manager for Agricore United. He was the President of the BCTEOA during the lockout in 2002 – 2003. He stated that the Association is primarily responsible for labour relations and safety issues for its members. This includes the negotiation and administration of the collective agreement.

[103] The BCTEOA has a part-time secretary who is paid approximately $500 a month. She prepares monthly minutes and pays the bills. The BCTEOA is neither a society nor is it incorporated. The president has a term of one year and is responsible for organizing the monthly meetings, the agenda and the minutes. A majority vote is required, although the BCTEOA attempts to conduct its business by consensus.

[104] Beyond collective bargaining, the BCTEOA cannot bind its members. The BCTEOA does not own a grain terminal, nor is it in the business of handling grain. It does not load, unload, store or clean grain. It does not negotiate with railways, the Canadian Wheat Board or farmers. It has no operations anywhere else in Canada. It has no employees in the grain industry – apart from the part time secretary. All employees in the bargaining units are employees of the individual grain company.

[105] Mr. Graham testified that it was "no surprise to him personally" that PRG elected to withdraw from the BCTEOA. He stated there was general unhappiness with the shift schedules, and he saw that as the "straw that broke the camels back." He noted that the BCTEOA "did not contest" PRG leaving because it had no authority to do so and that "any member has that right."

[106] Mr. Graham explained that in the 2001 – 2002 round of collective bargaining (for the January 1, 2001 – December 31, 2005 collective agreement), the employer was unhappy with the scheduling provisions of the collective agreement. The members of the BCTEOA wanted changes that would give them greater flexibility, efficiency and cost reduction. The particular changes to the collective agreement that it sought included, among others, scheduling, classification, recall rights and seniority. Mr. Graham said that the BCTEOA prepared for bargaining by having each of the terminal's operations managers assemble a list of proposals. These proposals were "all done locally." Before actual bargaining commenced, there was a meeting in January 2001 to discuss the general state of the industry.

[107] Mr. Graham testified that the union "didn't grasp what the employer needed." Mr. Graham noted that the BCTEOA maintained its demands throughout bargaining; and that it didn't change its "stance on the primary issues." He agreed in cross-examination that the employer took "an aggressive bargaining stance," replying, "that's a good word for it." And when asked further in cross-examination whether the employer's bargaining stance became even more intransigent after the Canada Industrial Relations Board dismissed the union's section 35 application in March 2002, he denied that fact, stating that the employer had a "clear resolution prior to that decision" and that its "mindset" was "to make real ground in this round of bargaining"; and finally, that all the members of the BCTEOA had a "steely resolve."

[108] In June 2002, Vince Ready, in his role as conciliator, issued recommendations in an attempt to settle the matter. Mr. Graham stated that from the employer's perspective, the report was "positive in a lot of areas, but generally the employer was not happy with it." He explained that the BCTEOA was by this point "spinning its wheels, not going anywhere, just scheduling meetings, not getting any resolution."

[109] In August 2002, the BCTEOA made a final offer. A three-day deadline was imposed on the offer and when that deadline was not met, the employers locked out their employees on August 25, 2002. Mr. Graham stated that there had been "no long term plan to lockout"; that the issue of the lockout had "evolved among the BCTEOA reps." He further stated that he learned about the lockout "basically as it happened." When asked in cross-examination whether the lockout was imposed by Head Offices, he replied he "didn't believe it was true." When further asked in cross-examination whether the Head Offices in Regina and Winnipeg "were calling the shots in Vancouver," Mr. Graham replied "that is not a fair statement." Mr. Graham acknowledged that Murdoch Mackay, who is employed as Agricore Manager of Terminal Services at the Head Office in Winnipeg, Manitoba, took an active role in negotiations in 2001-02 on behalf of the BCTEOA, and, as well, that Mr. Mackay sits on the Board of Directors of PRG.

[110] Mr. Graham testified that at the time the decision to lockout was made, there had been "no discussion about redirecting grain to PRG"; further, he "didn't know that PRG would be reopened when the lockout decision was made." When asked if BCTOEA had taken action to redirect grain to PRG, he replied, "absolutely not"; and further that BCTOEA had "no authority" to redirect grain to PRG. He stated that it is "up to the Canada Wheat Board what corridor it wants to use for the export of grain." He commented that it was the "worst crop in 30 years in terms of volume; the worst I had seen."

[111] Mr. Graham stated that he was "not happy" that PRG was going to be handling the grain because he viewed PRG as a "sleeping giant" that had "already been put away"; that it had been "put to rest." He explained that there was a "feeling that once that happened things would be better for them [PRG] and things worse off for Vancouver Terminals." He stated that he saw PRG as a

"formidable competitor"; further, when asked if PRG was a "true competitor," he replied, "absolutely." He stated that the "bottom line" is that he "wants the grain to stay in Vancouver."

[112] Finally, Mr. Graham stated that in the most recent round of collective bargaining, the union wanted a three-year term with an expiry date (2008), i.e., the same as the PRG collective agreement. The employer wanted a longer term and it was eventually successful (2010).

III - Positions of the Parties

A - Union

[113] The union argues that there are four (4) issues: first, are PRG and the BCTEOA under common control and direction; second, does the BCTEOA meet the definition of a business under section 35; third, are PRG and the BCTEOA engaged in associated or related activities; and fourth, does there exist a labour relations purpose requiring a single employer declaration?

[114] The union acknowledges that neither the BCTEOA nor the Board of Directors of PRG manages the day-to-day operations of PRG. However, it states that the grain companies that compose the membership of the BCTEOA are the same grain companies that appoint the senior executives to the PRG Board. These grain companies also own the assets of PRG. Therefore, the grain companies, although they remain competitors, exert common control over Prince Rupert Grain; in effect, PRG is controlled in the same manner as a joint venture. This, the union states, is sufficient for the purposes of establishing common control under section 35 of the *Code*.

[115] In the union's view, there are two examples of how these grain companies exert common control over Prince Rupert Grain: first, the Board of Directors ability to open and close the PRG facility; and second, the grain companies ability to determine the amount of grain that is put through the Prince Rupert Grain Terminal. These two factors determine the financial viability of Prince Rupert Grain. It also makes Prince Rupert Grain an "integral" part of these grain companies' overall operations.

[116] In response to the BCTEOA's argument that it is not subject to a declaration under section 35 because it does not fit within the definition of a business, the union replies that the definition of business should be given a wide and liberal interpretation. Further, such a term can and should include the labour relations functions that the BCTEOA performs. Moreover, the BCTEOA, amounts to a legal arrangement under the *Code* and, therefore, falls explicitly within the definition of an "undertaking." Finally, to not acknowledge that section 35 applies to an employers' organization as defined under section 33, would be to, in effect, insulate a section 33 employers' organization from a common employer declaration.

[117] Third, the union argues that both the BCTEOA and PRG function within the grain terminal business, and, as a result, are involved in associated and related activities.

[118] Fourth, the union asserts that it is appropriate to issue a section 35 declaration because it is in furtherance of two labour relations purposes: first, such a declaration could establish a more stable bargaining structure. The union states that the 2002 lockout was lengthy because the BCTEOA was able to insulate itself from the economic consequences of its own lockout by maintaining a flow of grain through the Prince Rupert Grain Terminal. Second, the 2005 collective bargaining dispute revealed the potential for leapfrogging and whipsawing in regard to the collective bargaining that took place for two separate collective agreements – one in Vancouver and one in Prince Rupert. This bargaining was between the same employer and the same union. Such a bargaining structure heightens the potential for collective bargaining disputes.

[119] Finally, the union raises an evidentiary issue. It states that prior to the close of PRG's case, it advised PRG that if it failed to call Murdoch MacKay, Managing Director of Terminal Services for Agricore United, the union would ask this Board to draw an adverse inference. The union states that Mr. MacKay was leading the negotiations for the BCTEOA and that he also sat on the Board of Directors of PRG. Thus, he "could have provided critical evidence on these matters." The union states that Mr. MacKay is not a witness "equally available" to the union (*Barbara-Jean Steele* v. *International Union of Operating Engineers Local 963 et al.*, [2001] BCLRB No. B77/2001).

B - PRG

[120] PRG states that the union has failed to prove either the required five criteria or to establish an appropriate labour relations purpose, all of which are prescribed under section 35 of the *Code*.

[121] First, PRG argues that the BCTEOA and PRG do not participate in associated or related activities. It states that the BCTEOA is simply a bargaining agent under section 33 of the *Code* and amounts to little more than a "legal fiction." In contrast, PRG operates a grain terminal.

[122] Second, PRG denies that PRG and the BCTEOA are under common control and direction. It asserts that there is no evidence that the BCTEOA controls or directs PRG. It states that the union relies on the fact that the four grain companies that constitute the BCTEOA own and sit on the Board of Directors of PRG. However, it argues that there is no common control exercised by any of these independent competitors amongst one another, nor does any one of these independent companies have majority control of either the BCTEOA or PRG. Further, PRG points to the Government of Alberta, who as the principal lender, exerts a significant influence over the operations of PRG.

[123] PRG argues that the evidence demonstrates that local management, and in particular, Mr. Burghardt as CEO, run PRG as an independent entity. Thus, for example, local management makes the decision as to when to open and close the facility. Further, PRG management deals directly with the CWB, which determines where grain is shipped. Moreover, local management deals with CNR and has made great strides in attempting to reduce rail costs to the PRG terminal.

[124] PRG asserts that Mr. Burghardt was the sole decision maker in regard to PRG leaving the BCTEOA. He did so for *bona fide* business reasons and he has attempted to put PRG on a better financial and operational basis, including dealing with its enormous debt.

[125] Finally, PRG argues that the true intent of the union's purpose in seeking a section 35 declaration is simply to enhance its own collective bargaining position. Its desire is to close down the PRG Terminal during a dispute so that the entire West Coast is unavailable for the shipment of grain. This would, as it has historically, compel government intervention and third party dispute

resolution. This, PRG says is an improper purpose. PRG also notes that since it has left the BCTEOA, two collective agreements have been successfully concluded without government intervention or third party dispute resolution.

C - BCTOEA

[126] First, the BCTEOA argues that this panel ought to follow the Board's prior decision in *Prince Rupert Grain Ltd.*, [2002] CIRB no. 167; and 81 CLRBR (2d) 56, in which the Board dismissed the union's section 35 application because it determined that the BCTEOA did not fall within the definition of a business under section 35. They argue that there has been no change in the structure or existence of the BCTEOA since that prior decision.

[127] Second, the BCTEOA asserts that PRG and the BCTEOA do not participate in associated or related activities. The BCTEOA is a bargaining agent and PRG operates a grain terminal. Moreover, since the BCTEOA has ceased to bargain on behalf of PRG, they are no longer interrelated entities.

[128] Third, the BCTEOA asserts that the union has failed to show common control or direction. There is no evidence of a relationship between the BCTEOA and PRG. The BCTEOA has no ability to direct the operations of PRG. Further, the BCTEOA does not control or operate any of the grain terminals in Vancouver.

[129] Finally, the BCTEOA argues that the union has an improper purpose in that its sole motivation is to enhance its bargaining power - it simply wants to close down the entire West Coast. This would then facilitate the union's goal of forcing the government to intervene and appoint a third party to settle the dispute.

D - Past Decisions of the Canada Industrial Relations Board

[130] The parties have taken the unusual step of including past decisions of the Canada Industrial Relations Board and its predecessor, the Canada Labour Relations Board, in their Agreed Statement

of Fact. What follows is a short summary of those decisions. The additional decisions cited are also set out in the parties Agreed Statement of Fact.

[131] In *Saskatchewan Wheat Pool et al.* (1977), 21 di 388; [1977] 1 Can LRBR 510; and 77 CLLC 16,104 (CLRB no. 83), the Board granted one certification for all employees of the five (5) elevator terminals for which the union was previously certified separately. In addition, the Board designated the BCTEOA as the employer under this combined certification under section 131 (now section 33) of the *Code*. The basis for the respective orders were that:

> …since the early 50s there has been one multi-employer bargaining unit in the grain industry in the Vancouver port. …With this history we find that the multi-employer unit is the unit currently functioning and that it is an appropriate bargaining unit.
>
> (pages 404; 522; and 626)

[132] In *Prince Rupert Grain Terminal Ltd.* (1984), 59 di 87; 9 CLRBR (NS) 1; and 85 CLLC 16,012 (CLRB no. 491), the Board dealt primarily with the issue of technological change as a result of the construction of the new Prince Rupert Grain facility. However, an ancillary issue was the union's application to have its certification amended so that the BCTEOA was designated as the employer of the employees at Prince Rupert Grain. However, by consent, the certification was amended to read Prince Rupert Grain Limited. It remains that way today.

[133] This decision also traces the importance of the grain industry to Canada, especially Western Canada. It also notes that the Prince Rupert Grain facility will be "an extension" (pages 104; 18; and 14,072) of the six grain companies business operations in Vancouver and Western Canada. Finally, the decision states that the location of negotiations for a renewed collective agreement and whether that will involve "a separate table between Prince Rupert Grain and the Union is something for the parties to decide." (pages 108; 22; and 14,074)

[134] In *Prince Rupert Grain Ltd.* (1986), 67 di 104; and 86 CLLC 16,056 (CLRB no. 592), PRG sought a declaration asking the Board to determine whether a collective agreement was in existence between itself and the union. The Board concluded that PRG had not been included in the BCTEOA's designation under section 131, therefore:

> In the instant case, the union has no enforceable right to cause PRG to negotiate jointly with the accredited members of the BCTEOA, although it has been convenient for both sides in the past to do so. If there is no enforceable right to negotiate jointly, then either party is free to insist on separate bargaining and a separate collective agreement. And where there is agreement to that effect, as in the instant case, there is obviously even less of an enforceable right.
>
> (pages 115; and 14,500)

[135] In *Prince Rupert Grain Ltd.* (1988), 75 di 13 (CLRB no. 706), PRG sought an amendment to the section 131 designation to include itself in that designation. The union opposed the application. The Board granted PRG's application stating that:

> … this Board is doing nothing more than giving effect to what the union has since 1980 recognized as the most logical way of conducting and maintaining its relationship with the employer's involved in the grain industry in the province of British Columbia.
>
> (page 22)

[136] The Board also stated that there is:

> … an undeniable community of interest between all of the employees in the grain industry in the province of British Columbia…
>
> (page 22)

[137] However, in *G.W.U., Local 333* v. *British Columbia Terminal Elevator Operators' Association*, (1989), 101 N.R. 105 (F.C.A. no. A-931-88), the Federal Court of Appeal overturned the Board's decision stating that the Board could not, without the union's consent, have included the employees of Prince Rupert Grain in the bargaining unit. It stated that section 33 was a voluntary multi-employer bargaining structure. The voluntary nature of it could not be negated by the Board using its powers under section 18 of the *Code*.

[138] In *Prince Rupert Grain Ltd.* (1994), 93 di 164 (CLRB no. 1050), the ILWU, Local 514, applied for certification for a supervisor's unit at PRG. The Board dismissed the application stating that the supervisors at PRG had a community of interest with those supervisors working in the

Vancouver terminals. It noted that PRG had participated in collective bargaining with the BCTEOA since it was certified in 1980. It also concluded that the Board had in the past determined that:

> … in one form or another, that a multi-employer unit was appropriate for operational employees in the grain handling industry on the West Coast. …
>
> (page 172)

[139] This decision was overturned by the Federal Court of Appeal in *International Longshoremen's and Warehousemen's Union, Shop and Dock Foremen, Local 514* v. *Prince Rupert Grain Ltd.*, (1994) 174 N.R. 255; (1994) 30 Admin. L.R. (2d) 227; and (1994) 94 CLLC 14,042 (F.C.A.no. A-133-94), which concluded that the Board, in preferring a multi-employer unit over a single bargaining unit, had gone beyond its jurisdiction in imposing such a multi-employer unit without the union's consent. However, on further appeal to the Supreme Court of Canada, *International Longshoremen's and Warehousemen's Union, Shop and Dock Foremen, Local 514* v. *Prince Rupert Grain Ltd.*, [1996] 2 S.C.R 432, the Court upheld the Board's decision stating that in fact the Board had not imposed a multi-employer certification but had, in accordance with its jurisdiction, made determinations about what constituted an appropriate bargaining unit.

[140] In *Prince Rupert Grain Ltd. and British Columbia Terminal Elevator Operators' Association* (1996), 101 di 1 (CLRB no. 1155), the Board denied an application by the employer, PRG, which sought a common employer declaration between itself and the BCTEOA. In that case, it was the employer, PRG, who argued that:

> … single employer declaration is necessary to preserve the industry-wide bargaining structure and the consequent industrial stability that it provides.
>
> (page 6)

[141] The parties in the above common employer application agreed that the five prerequisites to the section 35 declaration had been met. At issue was the labour relations purpose. Notwithstanding agreement on the five prerequisites, the Board independently reviewed them. It concluded that the BCTEOA and the PRG were two businesses within the federal jurisdiction and specifically that the "B.C.M.E.A is a federal work undertaking (see *British Columbia Maritime Employers Association*

(1981), 45 di 357 (CLRB no. 347), page 360)." The Board also concluded that there was common control and direction, stating that the "Effective control or direction of the business of both PRG and the BCTEOA is therefore exercised by substantially the same group of shareholders or constituent member companies." (see *Prince Rupert Grain Ltd. (167)*, *supra*, pages 18; 72.)

[142] However, the Board concluded that a section 35 declaration in these circumstances would circumvent the union's consent required under section 33, as set out by the Federal Court of Appeal.

> The Federal Court of Appeal has made it clear in two previous cases, dealing with the inclusion of PRG in the industry-wide bargaining unit, that the Board cannot disregard the specific provisions of section 33 of the *Code* either by using section 18 to add PRG as an employer covered by the 1977 original certificate (*Grain Workers Union, Local 333* v. *BCTEOA and Prince Rupert Grain Ltd.*, *supra*, or by refusing to certify a bargaining agent for PRG supervisors on the basis that the unit sought was not appropriate (*ILWU, Ship and Dock Foremen, Local 514* v. *Prince Rupert Grain Ltd. et al.*, *supra*). The same considerations apply in the present application with respect to section 35.
>
> Unlike Saskatchewan Wheat Pool, PRG was not a member of the BCTEOA at the time of original certification and employer designation in 1977. It is therefore not covered by the bargaining certificate and cannot be included without the GWU's consent as required by section 33 of the *Code* (for a full analysis of the Board's reasoning in this regard, see *Saskatchewan Wheat Pool (1141)*, *supra*).
>
> Consequently, the application of section 35 to establish a bargaining structure which would join PRG and BCTEOA employees in these particular circumstances would effectually circumvent both the specific directives of the Federal Court of Appeal and, therefore, the requirements of section 33 of the *Code* with respect to the union's consent.
>
> (*Prince Rupert Grain Ltd. and British Columbia Terminal Elevator Operators' Association (1996)*, *supra*, page 20)

[143] Finally, in *Prince Rupert Grain Ltd. (167)*, *supra*, the union filed a second application under section 35 (the prior application was filed by PRG in 1996). In this application it was the union who raised the argument that a section 35 declaration would promote the "fostering of harmonious labour relations and the rationalization of bargaining units." (pages 14; and 68) PRG raised the defence that the union was attempting to use section 35 to circumvent the voluntariness of section 33 by attempting to force the employer into a multi-employer bargaining unit against its wishes. The Board dismissed the union's application concluding that the common control or direction criterion was not met, partially because it found that the BCTEOA was not a business. It reasoned as follows:

> [56] ... In summary, the Board cannot issue a declaration as between PRG and the BCTEOA, as the latter is not a business, nor can it issue one as between PRG and the individual Vancouver terminals, as the businesses of the latter are not under common control or direction.

(pages 20; and 74)

[144] The Board also dismissed the union's application on the ground that it would not have exercised its discretion to issue a declaration because the union had failed to establish a legitimate labour relations purpose under section 35 of the *Code.* The Board concluded that PRG's departure from the BCTEOA would not be "detrimental to labour relations between it and the Union." Second, the union was attempting to improperly enhance its bargaining rights.

[145] This second application was dismissed on March 21, 2002. The current section 35 application is the third application. It was filed on September 6, 2002.

IV - Analysis and Decision

[146] This decision will set out section 35 of the *Code* followed by a review of the evidence under each of the statutory criteria that the union is required to establish.

[147] Section 35 reads as follows:

> 35.(1) Where, on application by an affected trade union or employer, associated or related federal works, undertakings or businesses are, in the opinion of the Board, operated by two or more employers having common control or direction, the Board may, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business. Before making such a declaration, the Board must give the affected employers and trade unions the opportunity to make representations.
>
> (2)The Board may, in making a declaration under subsection (1), determine whether the employees affected constitute one or more units appropriate for collective bargaining.

[148] In order to obtain a single employer declaration under section 35, an applicant must establish the following five criteria, which are summarized in *Murray Hill Limousine Service Ltd. et al.* (1988), 74 di 127 (CLRB no. 699), as follows:

> In order for section 133 to apply, the following criteria must be met:
>
> 1. two or more enterprises, i.e., businesses,
>
> 2. under federal jurisdiction,

3. associated or related,

4. of which at least two, but not necessarily all, are employers (*Emde Trucking Ltd.*, *supra*),
5. the said businesses being operated by employers having common direction or control over them.

(page 145; emphasis in original)

[149] Nevertheless, even in the circumstances where the applicant meets all of the above five criteria, the Board has a further discretion not to issue a section 35 declaration if it concludes there is no legitimate labour relations purpose for such a declaration.

[150] However, before proceeding to a review of the evidence under each of the criteria, the Board will first deal with the evidentiary argument raised by the parties. The union argued that an adverse inference should be drawn against both PRG and the BCTEOA for their failure to call Murdoch Mackay, Managing Director of Terminal Services for Agricore, and who, in 2002, also sat on the Board of PRG and was part of the BCTEOA's negotiating team. PRG, likewise, states that an adverse inference should be drawn against the union for its failure to call Murdoch Mackay.

[151] None of the grain companies were named as a party to the section 35 application - only the BCTEOA was named. All parties called witnesses from the respective grain companies. Mr. Mackay, as stated, is an employee of Agricore. The union called Mr. Cummings, former PRG Board member and the Chief Executive Officer of Agricore. The BCTEOA called two current employees of Agricore (Mr. Carefoot and Mr. Graham). Moreover, no party raised any logistical difficulties in calling Mr. Mackay as a witness. Everyone is aware of the place of his employment. The Board concludes that he was "equally available" to all parties and therefore draws no adverse inference against any party for its failure to call Mackay.

[152] The Board will now address each of the above section 35 criteria.

A - Federal Jurisdiction

[153] There is no dispute that both PRG and the BCTEOA operate under the federal jurisdiction, and, on the evidence before me, I conclude that they do so.

B - At Least Two Employers

[154] Once again, there is no dispute that PRG and the BCTEOA are both employers for purposes of the *Code*. PRG employs persons to operate its grain terminal and the BCTEOA is a designated employer pursuant to section 33 of the *Code*, and deemed to be the employer for all purposes of Part I of the *Code*. The Board therefore makes that finding.

[155] The four remaining criteria remain in dispute. They are: first, whether the BCTEOA meets the definition of a business under section 35; second, whether PRG and the BCTEOA are associated or related operations; third, whether the operations of PRG and the BCTEOA are under common control and direction; and fourth, is there a legitimate labour relations purpose justifying a single employer declaration.

C - Two or More Enterprises (i.e. Businesses)

[156] The BCTEOA argues that BCTEOA is not a "business" for purposes of a section 35 declaration and asserts that the Board should be consistent with the finding made in *Prince Rupert Grain Ltd. (167)*, *supra*, where it concluded that the BCTEOA was not a business, on the basis that unlike PRG or the grain companies, the BCTEOA does not operate or manage a grain terminal.

[157] Mr. Graham, the Terminal Manager for Agricore United, and President of the BCTEOA during the lockout, gave the most complete picture of the Association. He stated that the BCTEOA does not own or operate a grain terminal. As a result, it doesn't load, unload, store, clean or ship grain. All employees in the bargaining unit are employees of the grain companies and not the BCTEOA. The BCTEOA does not negotiate with the CWB, with railways or with farmers. Beyond the bounds of collective bargaining, it cannot bind its members. Clearly, the BCTEOA is not in the business of operating or owning a grain terminal.

[158] However, in the earlier decision, *British Columbia Maritime Employers Association* (1981), *supra*, the Board determined that "B.C.M.E.A is a federal work undertaking " (page 360). Thus, the Board concluded in that case that the BCTEOA satisfied the criteria of two or more enterprises, i.e.,

businesses, and went on to find that, on the facts as they were then, the businesses of PRG and BCTEOA were under common control and direction, for purposes of section 35.

[159] It should be noted that section 35 of the *Code* is not limited to the category of employers defined only as a "business," but also includes: "federal works, undertakings or businesses." Section 2 of the *Code* defines federal work, undertaking or business as "any work, undertaking or business that is within the legislative authority of Parliament …" It then lists a number of areas of federal jurisdiction - for example, ships, railways, aircraft, emphasizing that this list is not exhaustive.

[160] The Board had occasion to consider the question of whether an employers' organization should be considered to be a "federal work, undertaking or business" in *British Columbia Maritime Employers Association*, *supra*. In that case, the Board found that BCMEA, an employers' organization, was a federal work, undertaking or business on the basis that an employers' organization is by definition an extension of the employer function. It reasoned as follows:

> An employers' organization is by definition an extension of the employer function. Where that employer function, with respect to which the employers' organization acts, is the activity of employees "employed upon or in connection with the operation of any federal work, undertaking or business" (section 108), we think it is proper to characterize the employers' organization's activity as also being upon or in connection with the operation of a federal work, undertaking or business. Certainly that must be so if the employers' organization is to be treated as an employer under section 131(2)(b).
>
> (page 361)

[161] The BCTEOA is the designated employer under section 33 of the *Code*. While the BCTEOA does not itself operate a grain terminal, that is the business of all of the employers who form the BCTEOA and on whose behalf the BCTEOA acts when performing its collective bargaining functions as the designated employer of employees who perform the activities associated with the operation of a grain terminal.

[162] Moreover, under section 33(2)(b), the BCTEOA, as an employers' organization, assumes all rights and obligations of an employer under the *Code*:

> (b) this Part applies, except as otherwise provided, as if the employers' organization were an employer.

[163] As stated in *Saskatchewan Wheat Pool* (1995), 99 di 86 (CLRB no. 1141), the employer under section 33 is the employer for all purposes under Part 1 of the *Code*:

> Once the Board has "designate[d] the employers' organization to be the employer" pursuant to section 33(1) of the *Code*, and a certification order pursuant to section 28 issues, the "employer" so designated is clothed with all the requisite authority and responsibility which befalls it as a consequence of that order. Without further Board order or direction … the employer is required to bargain collectively with the representative of the union (sections 48 and 50) and is **subject to all the provisions of *Part I of the Code* as a consequence of the certification order**…
>
> (page 97; emphasis added)

[164] Section 35 is of course included in Part 1 of the *Code*.

[165] The Board concludes then, that it is proper to characterize the BCTEOA as a federal work, undertaking or business for purposes of section 35 of the *Code*.

[166] This conclusion is reinforced by looking at the potential effects of reaching the opposite conclusion. One potential effect of concluding that the BCTEOA is not a business under section 35 of the *Code* would be to insulate an employers' organization under section 33 from a section 35 single employer declaration. Of course it goes without saying that the provisions of section 33 and 35 should be read so that they are not in conflict with one another.

[167] This issue was already touched upon, although framed differently, in a previous ruling of the Board in this same matter. The BCTEOA and PRG had raised some preliminary objections to this application. A differently constituted panel of the Board determined these preliminary objections in *Prince Rupert Grain Ltd. and British Columbia Terminal Elevator Operators' Association*, October 21, 2004 (CIRB LD 1153). One of the objections was to the effect that a section 35 application could not be used in such a way as to compel association of employers where the same employers had voluntarily chosen not to join together for collective bargaining under section 33 of the *Code*.

[168] The Board ruled that the two provisions had related, but not contradictory purposes and that there was no jurisdictional impediment to making a single employer declaration between employer entities that have chosen voluntarily to join together or who have chosen not to do so, where the

requisite single employer criteria and labour relations purpose are present. It reasoned that to hold otherwise would allow the constituent employers to defeat the statutory purposes of a section 35 declaration, by forming or dissolving a voluntary organization under section 33.

[169] The same reasoning applies to the similar but differently framed issue now being argued. That is, to find that an employers' association formed under section 33 is not a "business" for purposes of section 35 would have the potential effect of insulating an employers' organization from a section 35 declaration and its intended statutory purpose.

[170] Section 33 is a reflection of Parliament's desire to give employers the opportunity to voluntarily join together for the purposes of collective bargaining. The creation of this new bargaining agency potentially provides employers with a more effective vehicle for the negotiation and the administration of collective agreements. As stated in *Saskatchewan Wheat Pool et al. (1977)*, *supra*, the decision in which the Board issued its section 33 declaration (formerly section 131) designating the BCTEOA as the bargaining agent for the Vancouver Grain Terminals, the purpose underlying the formation and existence of such an employers' organization is that its actions will foster "constructive collective bargaining practices" (pages 409; 525; and 629) (quoted from the Preamble of the *Code*).

[171] The membership in a section 33 employer designated bargaining agency is voluntary. An employer may withdraw by simply giving notice under the respective constitution of an employer's organization. A section 35 declaration, on the other hand, makes a finding that several employers are, in fact, operating as a single employer. On the face of it, therefore, a section 35 declaration may seem to compel an employer to remain or become part of a section 33 employer's organization, although its membership is otherwise voluntary.

[172] However, that is not entirely accurate. A section 35 declaration would not compel membership in an employer's organization. Rather, it would only compel that collective bargaining be conducted by "one"employer entity. The purpose underlying section 33 is to permit different and **independent** employers to come together and choose to bargain collectively. Therefore, a section 35 declaration would **only** apply to an employers' organization where such independence as between the constituent

member companies did **not** exist or has ceased to exist. It could also apply to compel a third party to combine with the already existing multi-employer bargaining agency, as the applicant union seeks here. This does not limit section 33. It does, however, prevent the improper use of section 33 and the potential frustration of section 35.

[173] The Board therefore concludes that the BCTEOA, consistent with *Prince Rupert Grain Ltd. and British Columbia Terminal Elevator Operators' Association (1155)*, *supra*, is a federal undertaking for purposes of section 35 of the *Code*. It is a legal arrangement created by the *Code* in furtherance of one of the basic purposes of the *Code*, which is the promotion of "constructive collective bargaining practices."

D - Associated and Related Operations

[174] In determining whether two or more operations are associated or related, the Board examines the degree of inter-relationship of the operations of the two businesses. Under this criterion, the Board considers factors such as the similarity or differences in the activities, products and services provided; the vertical integration of the operations; whether or not they serve the same or similar markets or occupy the same niche; and, the extent to which they have common ownership or management.

[175] To address this issue in this case, it is crucial to examine the membership of the BCTEOA. It is of course made up of the four grain companies who own and operate grain terminals in Vancouver. PRG operates a grain terminal in Prince Rupert. Each of these terminals store, clean and load grain onto ships. Each deals with the CWB and the railways. Each has employees who perform the same functions. There is thus great similarity in the activities, products and services they provide and they ultimately serve the same foreign markets. The Board of Directors of PRG are senior executives of the grain companies that form the BCTEOA.

[176] If one looks at the BCTEOA's primary role of collective bargaining, it is evident that both the BCTEOA and PRG negotiate and administer the terms and conditions of employees in the grain industry, who perform the same work, and belong to the same union.

[177] Therefore, the Board is satisfied that PRG and the BCTEOA are related and associated operations for purposes of section 35 of the *Code*.

E - Common Control and Direction

[178] In relation to common control and direction, the Board has indicated that it does not require total commonality of control such that all the enterprises must be controlled by the same group of individuals (see *The Canadian Press et al.* (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRB no. 60)). Rather, it is sufficient if "the policies of the various enterprises are closely coordinated, integrated, and subject to joint direction" (pages 45; 359; and 441).

[179] The union acknowledges that the day-to-day operational control of PRG rests with its local management and its CEO, Mr. Burghardt. However, it states that it relies on the authority exercised by the PRG Board of Directors, and indirectly by the grain companies, in directing PRG's long-term strategic decision making.

[180] The union also admits that the grain companies, who constitute the membership of the BCTEOA (and it is not in issue that they control the BCTEOA), and who also sit on the Board of PRG, are competitors. However, the union argues that there is no requirement for total control by one entity; rather, it is sufficient if two or more employers exercise common control over a third entity that is a federal undertaking – for example, a joint venture (see *Murray Hill Limousine Service Ltd. et al.*, *supra*). They state that PRG is such a joint venture.

[181] The evidence before the Board confirms that PRG was formed in 1980 by six grain companies (now four: Agricore United, Cargill Limited, James Richardson International Ltd., Saskatchewan Wheat Pool). These grain companies leased lands from the federal government (National Harbours Board) and built a new terminal. The Alberta Government was and is the principal lender. A Trust was constituted to hold both the lease and the assets of Prince Rupert Grain. The trustee is Ridley Grain Ltd. The grain companies sit on the Board of both Ridley Grain Ltd. and Prince Rupert Grain Ltd. Prince Rupert Grain is operated by the Co-tenants or Consortium under an Operating Agreement

and Shipping Agreement. The Board of Directors of PRG are senior executives of these grain companies.

[182] PRG was certified in 1980 for a separate bargaining unit. The union has a total of approximately 500 members – 420 in Vancouver and 80 in Prince Rupert. There is a single certification covering all of the terminals in Vancouver. For purposes of collective bargaining there is a single employer, the BCTEOA, designated under section 33, who bargains with the union in Vancouver. This section 33 declaration was issued in 1977; however, the grain companies have been bargaining together since 1951. PRG was a member of the BCTEOA from 1980 – 2000 and was signatory to the industry collective agreement during this time.

[183] In addressing this issue of common control and direction, all the parties adduced further evidence directed at the following factors: the role of the Board of Directors, the role of the Alberta Government, the role of the CWB and railways, PRG's decision to leave the BCTEOA, the lockout of 2002 and collective bargaining in 2005. It is from these evidentiary disputes that the parties have framed their conclusions regarding the criterion of common control and direction.

[184] Two former PRG Board members testified on the role of the Board of Directors in the operation of PRG: Mr. Cummings on behalf of the union, Mr. Strang on behalf of the PRG. Both witnesses were credible and neither were partisan in their evidence.

[185] Both Mr. Cummings and Mr. Strang testified that the PRG Board did not involve itself in the day-to-day operations of PRG. Both stated that they had a high regard for Mr. Burghardt, and as Mr. Cummings stated, he was given a lot of "freedom" by the Board of Directors. Both emphasized that although they played a representative role, Mr. Cummings in regard to Agricore, and Mr. Strang in regard to the Government of Alberta, they also had a fiduciary obligation to ensure that PRG was run in its own best interest.

[186] Both Mr. Cummings and Mr. Strang emphasized that the PRG Board did not have any role in the negotiation and administration of collective agreements – "nothing at all," as stated by Mr. Cummings. And very importantly, both took on the role of trying to find a solution to the

enormous debt that "dominated everything," as Mr. Burghardt stated. Mr. Cummings testified that PRG was "technically insolvent." Mr. Strang, whose expertise was in insolvency, was appointed by the Government of Alberta to "extricate" itself from its loan. Over a number of years, PRG had often been unable to make even interest payments never mind payments on the principal in regard to its debt to the Alberta Government. A loan that initially started out at $106 million had ballooned to $195 million at the date of the hearing. The total indebtedness of PRG was approximately $300 million.

[187] Mr. Cummings stated that the grain companies, in order to restructure the debt, had to either guarantee the debt itself, or guarantee a certain amount of the grain as throughput to PRG. It should be recalled that under the current Trust document, the grain companies are not liable for the debt of PRG; in other words, the Alberta Government's recourse is only to the assets of PRG. The grain companies decided that they were unable or unwilling to guarantee the debt of PRG. Guaranteeing grain, however, had several problems: first, it is less profitable to send grain to PRG – a $2.00 rather than an $8.00 profit, as stated by Mr. Cummings; second, there is an excess capacity on the West Coast and the shipping of more grain to PRG would mean the closure of at least one grain facility in Vancouver. As both Mr. Cummings and Mr. Strang noted, the industry was not willing to make this hard decision, notwithstanding that the Alberta Government was agreeable to reducing the debt from $197 million to $87 million. Both Mr. Cummings and Mr. Strang testified that the Board of Directors had to operate by consensus and that each grain company had a veto since no one had majority control on the Board. Mr. Strang referred to the grain industry on the West Coast as "dysfunctional." Ultimately, neither Mr. Cummings nor Mr. Strang was successful in addressing this debt.

[188] During much of the period that Mr. Cummings and Mr. Strang sat on the Board of Directors (Mr. Cummings 1995 – 2001; Mr. Strang 1997 – 2004), and for much of its history, PRG had been used, they both stated, as an "overflow terminal." With the repeal of the Crows Nest rates it was more expensive to ship grain through PRG, $6.50 per tonne in 1996 and $2.50 at the time of the lockout in 2002. It was therefore less profitable for the grain companies to ship grain through PRG. However, as Mr. Donders stated, the grain companies were required to process at least one million tonnes through PRG so they would not be compelled to put in cash in order to meet PRG's

obligations. As a result, the PRG terminal was usually opened for approximately half the year, October through March.

[189] It was these two factors, the opening and closing of the PRG terminal and the total amount of throughput, that became one of the union's central focuses in regard to the issue of common direction and control. It was these two factors that underlie their view of PRG's withdrawal from the BCTEOA and the BCTEOA's lockout of the union in 2002.

[190] Mr. Cummings stated that the Board of Directors concerned itself with strategic decisions such as the opening and closing of the PRG terminal. Conversely, Mr. Strang stated that the decision to open and close the PRG terminal was a decision of local management, and that this decision was based upon the "flow of grain, crop size and the CWB." This is the most important area of conflict in the evidence between Mr. Cummings and Mr. Strang.

[191] This seeming inconsistency is resolved, however, by regard to the time that each served as Board members, and on Mr. Strang's evidence of the expanded role of management, and in particular Mr. Burghardt's role, over the last number of years. Mr. Burghardt stated that there had been director-led openings and closings in the past. However, as CEO, beginning in 2002, he had clear authority to open and close the PRG terminal. He stated that in the lockout of 2002, he opened the PRG terminal and negotiated the terms of that opening directly with the CWB. Thus, there was no involvement of the PRG Board of Directors in regard to the opening of the PRG terminal in September 2002. Mr. Strang, who sat on the Board of Directors at this time, confirms Mr. Burghardt's evidence. Mr. Cummings had left the Board in 2001. Mr. Cummings began with the PRG Board (1995) at the time when PRG itself had sought to be joined together with the BCTEOA as a single employer. (1996)

[192] The union argued that PRG's withdrawal from the BCTEOA in 2000 was part of a bargaining strategy of the BCTEOA to direct grain from Vancouver to PRG in order to enhance its bargaining power in relation to the union. Mr. Cummings and Mr. Strang were both equally clear that the idea of PRG separating from the BCTEOA came from Mr. Burghardt and not the Board of Directors. Further, the issue of a joint bargaining strategy between PRG and the BCTEOA was, as

Mr. Cummings stated, "never raised as a suggestion." Indeed, Mr. Cummings stated that he had had some reservations about PRG leaving the BCTEOA because he thought it might "weaken" the employer's bargaining strategy by "dividing the employer group."

[193] The union next argues that the grain companies were able to enhance their bargaining power by maintaining the lockout and yet still ensure the flow of grain by directing that grain from Vancouver to PRG. However, some 90 – 95% of the grain that goes through PRG is Canada Wheat Board grain. Ward Mr. Weisensel is the Chief Operating Officer of the Canada Wheat Board. At the time of the lockout, he was Vice-President of Transportation and was responsible for loading all grain onto ships on the West Coast. Mr. Weisensel stated that it is the CWB that makes the decision as to what port wheat is shipped to and from. In the lockout of 2002, Mr. Weisensel stated that Prince Rupert was the "only viable alternative," notwithstanding that there was a premium of $2.50 per tonne in increased shipping charges. He stated that it is the responsibility of the CWB to deliver grain, mitigate costs and obtain the best return for farmers.

[194] CWB grain constitutes approximately 70 – 75% of Vancouver grain. The remainder of the grain is non-CWB grain, and, as described by Mr. Carefoot (Agricore), it is the individual grain companies that manage the "entire span of handling" in regard to this grain. It is only on this grain therefore that the grain companies have any decision making authority in regard to its destination. Mr. Carefoot, the Chief Financial Officer for Agricore, stated that the entire shipper's return from PRG to Agricore ending the period of 2003, which includes the 2002 lockout, amounted to less than the fixed costs of one month of the lockout.

[195] Mr. Graham, the Terminal Manager for Agricore, described the employer's strategy during the bargaining in 2002, and consequent lockout, as "aggressive" and added that the BCTEOA and the individual employers had a "steely resolve." He stated that the actual lockout "evolved" among the BCTEOA representatives over time. He said that the bargaining strategy was locally driven and not directed from head office (although, of course, significant financial matters had to involve head office). He testified that amongst the BCTEOA members, there had been no prior discussion about redirecting grain to PRG and that the BCTEOA had "no authority" to redirect grain to PRG; that it was "up to the Canada Wheat Board what corridor it wants to use for the export of grain."

[196] Mr. Graham explained that he viewed PRG as a "sleeping giant" and that he was unhappy about the redirection of grain to PRG during the lockout. He saw PRG as a "formidable competitor" and that once grain was forwarded to PRG, he believed that things would be "worse off for Vancouver." Mr. Graham noted that the "bottom line" is that he "wants the grain to stay in Vancouver."

[197] Both Mr. Strang and Mr. Cummings echoed Mr. Graham's comments that any grain that went to PRG would be at the expense of Vancouver terminals; indeed, to the extent of perhaps forcing at least one of the terminals in Vancouver to close.

[198] Mr. Strang stated that he expected Mr. Burghardt to run PRG "independently and profitably." He said that he saw this as consistent with the Trust Agreement, which imposed a fiduciary duty on all directors to ensure that the terminal not only met its financial obligations, but also maintained the facility; that it did not dispose of significant assets and that it did not incur expenses in excess of $500,000 without the prior approval of the Government of Alberta. Further, PRG was required to file annual certificates of compliance with the Trust Agreement as well as audited financial statements. Mr. Strang emphasized that the Alberta Government had a strong interest in keeping PRG open as a viable corridor for the export of its provincial goods.

[199] Finally, it should be noted that Mr. Burghardt dealt exclusively on behalf of PRG with the CWB and CNR, two essential actors influencing in the amount of grain that is shipped through PRG. He stated that his dealings with both the CWB and CNR are confidential and are not shared with the Board of Directors, who are aware of this and respect that confidentiality. Further, he stated that the PRG terminal continued operations uninterrupted for the next 36 months after the lockout. Moreover, he has managed to reduce the freight rates to PRG to the extent that they are now lower than those rates to Vancouver. He also stated that the PRG facility is now superior in its productivity to the Vancouver terminals. This includes the processing of CNR rail cars who now prefer PRG to the Vancouver Terminals.

[200] The Board concludes, therefore, that Mr. Burghardt, consistent with the terms of the Trust, and with the agreement of the Board of Directors, operates the PRG facility independently from, and in

competition with, the Vancouver terminals. Further, Mr. Burghardt withdrew from the BCTEOA on his own initiative, independent of the Board of Directors, and he did so for *bona fide* operational reasons. Mr. Burghardt saw the 2002 lockout as an opportunity to obtain grain that he would not otherwise acquire and to develop relationships with both the CWB and CNR, which would enhance Prince Rupert Grain to the detriment of the Vancouver terminals. PRG, on the evidence, is a terminal that appears to be superior in terms of productivity, and has, since the lockout, increased its output. In addition, the terms of the Trust Agreement, and the role of the Alberta Government, are clearly constraints that further ensure PRG is run "independently and profitably." Accordingly, the Board finds that PRG is not under the common control and direction of the BCTEOA.

F - Labour Relations Purpose

[201] In addition, or in the alternative, the Board has also concluded that there is no legitimate labour relations purpose for issuing a section 35 declaration.

[202] The purpose of a single employer declaration has traditionally been considered to be remedial in nature. The declaration is designed to prevent the erosion or undermining of bargaining rights or the avoidance of obligations under the *Code* through corporate restructuring or other business arrangements. The purpose has been expanded somewhat to take into account the benefits to be derived from a rationalization of bargaining units which will promote sound labour relations and prevent or minimize disruption caused by inter-unit conflicts or corporate reorganizations. (see *Air Canada et al.*, [2000] CIRB no. 78; and 2000 CLLC 220-059).

[203] On the other hand, section 35 is not intended to be used as a means of enhancing existing bargaining rights (see *British Columbia Telephone Company and Canadian Telephones and Supplies Ltd.* (1977), 24 di 164; [1978] 1 Can LRBR 236; and 78 CLLC 16,122 (CLRB no. 108)), or exempting a bargaining agent from having to organize an otherwise genuinely distinct group of employees. Nor should the Board be persuaded to issue such a declaration where the sole purpose or effect is to strengthen one party's hand or tip the balance of bargaining power in favour of one side or the other (see *Calgary Television Limited and Lethbridge Television Limited* (1977), 25 di 399; and [1978] 1 Can LRBR 532 (CLRB no. 118)).

[204] For purposes of this case, this issue involves an examination of the current bargaining structure, the 2002 lockout and the 2005 negotiations.

[205] The union states that the current bargaining structure is "inherently unstable." In seeking a section 35 declaration, it states that the Board has the opportunity to "rationalize the current bargaining structure and enhance industrial stability." It relies on the Board's policy statement in *Air Canada et al.*, [2000] CIRB no. 90; 65 CLRBR (2d) 50; and 2001 CLLC 220-010 stating:

> [21] ... The Board thereby recognized that section 35 could be applied to restructure bargaining units if such restructuring promotes other valid labour relations objectives, which need not necessarily be remedial in nature. …
>
> (pages 9; 57; and 143,074)

[206] The current bargaining structure in Vancouver is a single multi-employer bargaining unit. The grain companies have joined together as a single employer under the BCTEOA and the union is certified for one bargaining unit comprising all employees of the Vancouver terminals. In Prince Rupert, there is a single bargaining unit. From 1980 – 2000, the BCTEOA bargained not only on behalf of the Vancouver terminals, but also on behalf of the Prince Rupert Terminal. PRG was signatory to the industry collective agreement.

[207] However, in 2000, PRG left the BCTEOA. There have been two subsequent collective agreements in Vancouver negotiated without PRG, January 1, 2001 - December 31, 2005; January 1, 2006 – December 31, 2010. There have also been two "stand-alone" collective agreements negotiated between PRG and the union at Prince Rupert: January 1, 2001 – December 31, 2004; January 1, 2005 – December 31, 2008. The two collective agreements in Prince Rupert have been reached without either strike or lockout. Mr. Burghardt stated that the current relationship between PRG and the union is better than it had been when PRG was a member of the BCTEOA. He has made ground in crafting a "made in Prince Rupert collective agreement" that is more responsive to PRG's own needs (i.e., scheduling). The January 1, 2001 – December 31, 2005 collective agreement in Vancouver was the subject of the 2002 lockout; however, the second collective agreement was reached by the BCTEOA and union without either strike or lockout.

[208] As the Board stated in *Prince Rupert Grain (167)*, *supra*, it was "not convinced that PRG's departure from the BCTEOA would be greatly detrimental to labour relations between it and the union." (pages 22; and 76). Subsequent events have proved the Board correct in its conclusion.

[209] The evidence adduced by both sides clearly indicated that the 2002 lockout involved hard bargaining. The employer wanted concessions and the union was concerned about its laid-off members. The crop was amongst the smallest in the past 30 years and it was clear to all parties that if PRG opened, it could handle all of the grain to be shipped from the West Coast. The union, realizing this, attempted to shut down the PRG terminal. When this strategy failed, it decided to obtain the best agreement it could at PRG and then use it as a template for Vancouver.

[210] The union repeatedly stated that the lockout in Vancouver lasted longer than it would have if PRG had remained closed. The Board accepts this. As Mr. MacPherson stated, PRG permitted the grain to flow, and, as a consequence, this lessened both the political and economic pressures on the parties. The union's greatest bargaining strength is of course related to its ability to close all ports on the West Coast. The magnitude of the impact of this strategy was described in one of the Board's decisions, which is noted in the parties Agreed Statement of Fact. (see *Prince Rupert Grain Terminal Ltd. (*491*)*, *supra*) In this decision, the Board quotes from the Bairstow Report on the integrated nature of the grain industry and the impact of labour disputes on all of these integrated industries:

> The significance of the grain handling system in Canada and the importance of sound labour relations within that system has been dealt with in Frances Bairstow, *Report of the Inquiry Commission on Wider-Based Collective Bargaining* (Ottawa: Labour Canada, 1978), otherwise known as the Bairstow Report:
>
> "Canada's grain handling system occupies a position of tremendous importance to the Canadian economy. It intimately connects a wide range of economic activity, in the primary, secondary and tertiary sectors, encompassing in the process, the manufacture of farm implements, supplies, and materials; the processing of food products for domestic consumption; and the preparation of a wide variety of grain and grain products for export to some of the world's largest consumer nations. In an industry of this magnitude, the co-ordination, timing, and efficiency of resource employment are essential to the maintenance of our domestic food supplies and to Canada's reputation as a reliable source of grain exports. This places Canada's industrial relations system, as it applies to the grain industry, in a particularly strategic position, and accordingly the smooth functioning of collective bargaining acquires a prime significance.
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> …

> The marketing of Canada's more than 1.4 billion bushels of annual grain production has required the development of a complex infrastructure of trucking, rail, and shipping modes, which constitute the transportation system, and the construction of primary, processing, terminal, and transfer elevators which are differentiated by the function or combination of functions they perform, namely: storage, processing of grain into other products, official inspection and weighing of grain, the cleaning and treating of grain, and the transfer of grain forward. With more than 90 per cent of our grain production located in the Prairie Provinces, the transportation of grain through the system to the terminal elevators, principally to Thunder Bay and Vancouver which together represent 83 per cent of Canada's licensed terminal elevator capacity (130.5 million bushels), is conducted by rail over a configuration of more than 20,000 miles of railway lines. Prairie grain is processed through a network of more than 3,700 licensed primary elevators with a storage capacity of 333 million bushels, located in the four western provinces; 30 process elevators with a capacity of more than 20 million bushels located in the four western provinces and Ontario; by a total of 25 terminal elevators with a capacity of 130 million bushels (14 in Thunder Bay and 5 in British Columbia); and by 27 transfer elevators in the eastern region, Ontario (14), Quebec (9), Saint John (3) and Halifax (1), with an aggregate capacity of 122 million bushels.
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> The repercussions of industrial disputes in Canada's grain handling industry, as this brief review of the industry suggests, can be felt immediately by the Prairie farmer, the elevators, and by all components of the transportation system. Within a short period of time, marked by the beginning of a work stoppage at the ports, elevators, or in the transportation network, Canada's reputation as a grain and wheat exporter can be tested and questioned and the supply of grain as a factor of production in processing industries at various stages of production can be strained. When viewed in this perspective, it is paramount that our industrial relations system in the grain handling industry be reviewed continuously with a view to affecting adjustments that will promote further industrial relations stability.
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> (pages 28-32)"

(pages 90-91; and 14,065)

[211] Mr. MacPherson was straightforward in his evidence, expressly stating that it was the union's goal to "shut down Prince Rupert and force the government to get involved." When PRG was open, Mr. MacPherson stated there was "no economic pressure on the companies because the grain is being moved." Moreover, he said that in regard to negotiations, the union would use "the Government for whatever we can do best." This meant that the union's preference was clearly to "roll the dice of a third party arbitrator because the arbitrator listens and agrees with some of it." Mr. MacPherson acknowledged that until recently, the parties had been able to settle only one agreement without a third party.

[212] Mr. MacPherson also testified that in 2005, the union sought the same expiry date as the one in PRG agreement. He stated that the reason for this was "not rocket science" and that the union's goal was to obtain the same expiry date so that bargaining in both Vancouver and Prince Rupert

could take place at the same time. This would, of course, permit the union to close down the entire West Coast. Mr. MacPherson was candid in acknowledging that one of the purposes of the union's section 35 application was to obtain the same expiry dates in the two collective agreements. It should be noted that the union was ultimately unsuccessful in bargaining the same expiry dates in both collective agreements.

[213] It is clear that union's bargaining leverage is weaker when it does not have the ability to shut down the entire West Coast ports. This is because the grain keeps flowing and there is less need for the government to intervene. As well, in 2002, there was a small crop year and this contributed to the decreased bargaining strength of the union. As a result, PRG was able to handle the entire West Coast allotment of grain. In years where there is a larger flow of grain to the West Coast, this may not prove to be the case.

[214] What is clear from the union's stated intention in regard to its section 35 application is that its purpose is to enhance its bargaining power. It wants the ability to shut down the entire West Coast, force the government to intervene, and then seek the appointment of a third party who will impose an agreement. The Board concludes that the union's intention in seeking a section 35 declaration is to enhance its bargaining power and to gain, through the Board's declaration, what it was unable to achieve at the bargaining table. This is not an appropriate purpose for the exercise of the Board's discretion and does not appear to promote or facilitate harmonious labour relations or otherwise further the objectives of the *Code*, as set out in its Preamble.

[215] Therefore, in conclusion, the union has failed to establish that the BCTEOA and PRG are a single employer. In addition, or alternatively, no legitimate labour relations purpose exists for issuing such a declaration.

[216] This application is therefore dismissed.

Stan Lanyon, Q.C.
Vice-Chairperson