



Court of Queen's Bench of Alberta

Citation: United Association of Journeymen and Apprentices of the Plumbing and Fitting Industry of the United States and Canada, Local Union 488 v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union 720, 2005 ABQB 692

Date: 20050919
Docket, 0503 04804
Registry: Edmonton

In the Matter of a Decision of G.R. Beatson, Umpire, dated December 31, 2004, pursuant to the Jurisdictional Assignment Plan of the Alberta Construction Industry Agreement between the Coordinating Committee of Registered Employer Organizations -and the Alberta & N.W.T. (District of MacKenzie) Building and Construction Trades Council;

And In the Matter of a Reconsideration Decision of G.R. Beatson, Umpire dated January 20, 2005, pursuant to the Jurisdictional Assignment Plan of the Alberta Construction Industry Agreement between the Coordinating Committee of Registered Employer Organizations and the Alberta & N.W.T. (District of MacKenzie) Building and Construction Trades Council;

And In the Matter of a Decision of an Appeal Panel, Consisting of Messrs. R.W. Milner, N. Pon and M. Necula, of the Jurisdictional Assignment Plan of the Alberta Construction Industry Agreement between the Coordinating Committee of Registered Employer Organizations and the Alberta & N.W.T. (District of MacKenzie) Building and Construction Trades Council

Between:

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 488

Applicants

-and -

International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union 720 and Bantrel Constructors Co.

Respondents

**Reasons for Judgment
of the
Honourable Mr. Justice Donald Lee**

Background

[1] This is a nation for an Application for Judicial Review made by the Applicant United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 488 ("UA Local 488") regarding decisions made by the Umpire and by the Appeal Panel pursuant to the Jurisdictional Assignment Plan of Alberta Construction Industry,

[2] UA Local 488 represents trades people employed in the trade of "Steamfitter - Pipefitter", a "compulsory certified trade" pursuant to the *Apprenticeship and Industry Training Act*, R.S.A., 2000 c.A-42 and *Regulations*.

[3] The Respondent, the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union 720 ("Ironworkers Union") represents trades people employed in the trade of "Ironworker" which is also a "compulsory certified trade" pursuant to the *Apprenticeship and Industry Training Act*, R.S.A. 2000, c.A-42 and *Regulations*.

[4] The UA Local 488 is party to a multi-employer collective agreement negotiated through the Construction Labour Relations - An Alberta Association ("CLR-a"), binding UA Local 488 and the Respondent, Bantrel Constructors Co. ("Bantrel").

[5] Pursuant to the "Construction industry Jurisdiction Assignment Plan Regulation" enacted pursuant to s. 202(1) of the *Labour Relations Code*, R.S.A. 2000, G.L.-1, Alberta building trades unions (which includes the UA Local 488 and the Iron Workers Union) and construction contractors (which includes the Respondent Bantrel) are required to provide for a method of resolving jurisdictional disputes regarding the assignment of work to a particular union or trade in every collective agreement in the construction industry.

[6] The building trade unions and the construction contractors have negotiated a "Jurisdictional Assignment Plan of the Alberta Construction Industry" (the "Alberta-plan") which is binding on UA Local 488, Iron Workers and Bantrel. The Alberta Plan provides for a system of hearing and appealing disputes regarding the assignment of work to certain unions or trades.

[7] Article Three of the collective agreement binding UA Local 488 and Bantrel governs Trade or Work Jurisdiction and describes the work which comes within the jurisdiction of CIA Local 488 as well as sets out the requirement that any jurisdictional disputes over work is to be settled in accordance with the Alberta Plan provisions.

[8] The Respondent Bantrel was a contractor for the Edmonton Diesel Desulphurization Project (EDD Project) and employed Steamfitters-PipeFitters and Ironworkers on that project, On November 16, 2004 Bantrel decided the Final assignments of specific work to certain trade jurisdictions and provided those assignments to the unions involve(] in the FT-)D Project at the Jurisdictional Mark-up Meeting. Bantrel made the Following assignments with respect to Pipe Supports relevant to these proceedings:

"The fabrication, assembly and installation of all pipe hangers, pipe supporting straps, saddles, roller type supports, u-bolts, clumps, knee supports or other devices designed for the sole purpose of supporting pipe is the work of the United Association,

Free-standing pipe supports (not tied together) for the sole purpose of supporting pipe will be in accordance with the Ironworker/United Association area agreement of October 1, 1956

Multi-leg or bridge and truss type supports is the work of the Ironworker.

[9] The UA Local 488 objected to the assignment of the fabrication, assembly and installation of free-standing pipe supports for pipe and multi-leg or bridge and truss type supports for pipe (altogether referred to as being included in "sole purpose pipe supports) to the Ironworkers claiming that the work was that which should be properly assigned to Steamfitters-Pipefitters under the collective agreement. On November 30, 2004 UA Local 488 applied to have the dispute heard by an Umpire pursuant to the J.A.Plan, "Sole purpose pipe supports" is a term to describe all support systems whose only purpose is to support pipe as opposed to support systems which may be structural in nature, etc.

[10] In its written submissions and during the course of the hearing before the Umpire, UA Local 488 recognized that the assignment of work jurisdiction was generally governed by such factors as historical agreements between building trades unions, past practice and contractor determinations set out in the Jurisdictional Assignment Plan. However, UA Local 488 argued that the assignment of work in the Province of Alberta was also governed by legislation, namely the *Apprenticeship and Industry Training Act* and the *Occupational Health and Safety Code*, R.S.A, 2000, c.O-2 and the legislation should so be considered by the Umpire. The Apprenticeship and Industry Training Act designates the trade of Steamfitter-Pipefitter as a "compulsory certification trade" and provides, inter alia, in s, 21(3) that

A person shall not Work- in a compulsory certification trade unless that person holds a trade certificate in that trade (or)... is an apprentice in the apprenticeship program in that trade. .

[11] *The Steamfitter-Pipefitter Trade Regulation* enacted pursuant to the *Apprenticeship and Industry Training Act* provides:

When practising or otherwise carrying outwork in the trade, the following tasks, activities and functions come within the trade:

- (1) fabricating and installing pipe supports, hangers and equipment supports,

[12] The position of the UA Local 488 in its written submission and during the hearings held on December 21 , 2004 under the Alberta plan, was that all sale purpose pipe supports were properly the work of Steamfitter-Pipefitters under the *Apprenticeship and Industry Training Act*, Furthermore, it was the position of UA Local 488 that the *Occupational Health and Safety Code* required that work be performed by competent workers, namely those trades people property assigned pursuant cc) the provisions of the *Apprenticeship and Industry Training Act* (and therefore under the collective agreement).

[13] The Affidavit of Larry Matychuk, dated July 28, 2005, filed, refers to an issue concerning the Apprenticeship and Industry Training Branch concerning the ability of certified journeymen plumbers being able to do the work encompassed by the trade of "Steamfitter-Pipefitter". During the course of dealing with that issue, the Apprenticeship and Industry Training Branch made it *clear*, in written correspondence to Larry Matychuk, that tradespeople working on pipe systems should be Steamfitters-Pipefitters.

[14] UA Local 488 further submitted that many of the trade jurisdiction agreements had been negotiated in the United States, in a much less regulated environment and that most of the agreements pre-dated the *Apprenticeship and Industry Training Act*. The UA Local 488 also presented documentary and viva voce evidence as to the past practice and agreements of industry evidencing the assignment of sole purpose pipe supports (including multi-legged pipe support) work to the UA Local 488.

[15] The Iron Workers written and evidentiary rebuttals dated December 8 and 14, 2004, consisted primarily of the argument that the Area Agreement reached in 1956 between the UA Local 488 and Ironworkers, referred to as the "Senio-Hickingbottom Agreement" was determinative of the jurisdictional issue. This 1956 Agreement provided that multi-leg supports were to be the work of *Ironworkers*. The Ironworkers further argued that the *Apprenticeship and Industry Training Act* did not clearly define the trade descriptions, that the evidence of past decisions and practice as submitted by UA Local 488 were of little or no assistance.

[16] Umpire Beatson issued his decision on December 31, 2004. In response to the UA

Local 488 argument that the Umpire should take into considerations the provisions of the *Apprenticeship and Industry Training Act* and the *Occupational Health and Safety Code*, the Umpire decided *that*:

However, two requirements immediately come to mind if the UA concept is to work.

1. The legislation must clearly be applicable to the matter.
2. A provision of the legislation must have been contravened. In my opinion the concept fails on both requirements, for the following reasons.
 1. We do not know over what pieces of legislation, if any, the *Apprenticeship and industry Training Act* takes precedence. Nor do we know if it takes precedence over the *Alberta Labour Relations Code*, under which the Alberta Jurisdictional Assignment Plan is constituted.
 2. The provision being contravened is section 26 - members of a trade are doing work for which they are not certified- But the work is the fabrication and installation of a shape of structural steel and the trade Involved is the Ironworker,

The Umpire further decided that:

It really comes back to a workable agreement, and the majority of evidence confirms that such an agreement exists - the Senio-Hickingbottom Agreement dated October 1, 1956.

[17] The UA Local 488 applied for it reconsideration of the decision of Umpire on January 7, 2005 on the grounds of substantial error of fact or law and on the grounds of accidental mistake on the part of the Umpire. The Ironworkers filed their rebuttal to the reconsideration application on January 11, 2005.

[18] On January 20, 2005, Umpire Beatson Issued his decision on the reconsideration application, based upon written submissions, and confirmed that the Senio-Hickingbottom Agreement of 1956 dealing with jurisdiction of pipe support work was determinative of the jurisdictional issue, He further found that consideration of the *Apprenticeship and Industry Training Act* and the *Occupational Health and Safety Code*, was not appropriate in a determination under the Alberta Plan.

[19] On January 25, 2005, the UA Local 488 appealed the decision of Umpire Beatson to the Appeal Panel of the Alberta Plan.

[20] On February 3, 2005, the Appeal Panel of the Alberta Plan issued its decision dismissing the appeal of the Umpire's decision of December 31, 2004 and the reconsideration decision of January 20, 2005, The decision stated:

The Appeal Panel finds that Mr. Beatson's considerations and review of all supporting documents submitted by the Appellant U.A. 488 and the Respondent I.W. 720 were thorough, consistent and reasonable.

In upholding Bantrel Constructors Company assignment in this matter which refers in part to the Senio-Hickingbottom Agreement of Oct. 1, 1956 and by acknowledging that the Oct. 1, 1956 agreement is in effect, his decision to uphold the assignment was made.

Issues

[21] The issues that were addressed by the Applicant UA Local 488 included;

- (a) What are the appropriate standards of review applicable to decisions of the Umpire and Appeal Board pursuant to the Alberta Plan?
- (b) Did the decision of the Umpire and the Appeal Panel constitute a jurisdictional error or error of law in declining to consider or apply the *Apprenticeship and Industry Training Act and the Occupational Health and Safety Code*?
- (c) Were the decisions of Umpire Beatson and the Appeal Panel unreasonable, or alternatively patently unreasonable, in failing to give the proper or any consideration to the *Apprenticeship and Industry Training Act* and the *Occupational Health and Safety Code*?

What are the appropriate standards of review applicable to decisions of the Umpire and Appeal Board pursuant to the Alberta Plan?

[22] The Alberta Plan is statutorily required pursuant to the *Alberta Labour Relations Code*, R.S.A. 2000, section 202(1) and the regulation enacted pursuant to that section, the Construction Industry Jurisdictional Assignment Plan Regulation, AR 2/2000. The standard review applied to statutory tribunals and the remedies available with respect to decisions rendered by such tribunals are to be applied to the decisions of the Umpire and the Appeal Board under the Alberta Plan- *International Assn. of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 720 v. International Brotherhood of Boilermakers, Iron Ship*

Builders, Blacksmiths, Forgers Helpers, [2000] A.J. No. 1000 ("Spantec"); *Construction & General Workers Union, Local 92 v. (United Brotherhood of Carpenters & Joiners, Local 1325*, [2003] A.J. No. 1604.

[23] The Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (abridged version, at paras. 23 - 38) has set out a "pragmatic and functional" approach to the review of administrative tribunal decisions.

[24] The more recent Supreme Court decision in *AUPE v. Lethbridge Community College*, [2004] S.C.J. No. 24 described the pragmatic and functional approach set out by *Pushpanathan* and outlined the factors to be considered in a judicial review:

Under this approach, reviewing courts consider four contextual factors: (a) the presence or absence of a privative clause or statutory right of appeal; (b) the relative expertise of the administrative body to that of the reviewing court with respect to the issue in question; (c) the purposes of the legislation and of the provision in particular; and, (d) the nature of the question as one of law, fact, or mixed law and fact.

[25] Once the Court has undertaken the review of those factors, the standards of correctness, unreasonableness or patent unreasonableness are to be applied: *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] S.C.J. No. 2 at para 18.

[26] The functional and pragmatic approach allows the Court to analyze each administrative tribunal and each of its decisions to determine the appropriate standard to be applied, firstly to the specific tribunal and secondly to the specific decision. In the past, the Courts had evolved a standard of "patent unreasonableness" applicable to labour arbitrators and labour arbitration boards with respect to decisions within the jurisdiction and expertise and "correctness" *with* respect to decisions relating to matters of jurisdiction or issues outside of their enabling legislation or expertise.

[27] Recent Supreme Court decisions have reviewed the difficulties of applying the standard of "patent unreasonableness" as applied to tribunals such as labour arbitration boards. For example, see the minority decision of Mr. Justice LeBel in *Toronto v. Canadian Union of Public-Employees, Local 70*, [2003] S.C.J. NO, 64 abridged version.

[28] In the 2004 decision of *Voice Construction Ltd.* the Supreme Court, in pointing out that the Court must first undertake to conduct the analysis of the four factors mandated by the pragmatic and functional approach in each case, has applied the standard of "reasonableness" to labour arbitrators and has stated that "By its nature, the application of patent unreasonableness will be rare."

[29] It is submitted that the privative clause contained in the Regulation, which mandates a jurisdictional assignment dispute resolution process, invites a level of deference similar to (or less than) that accorded to labour arbitration boards. The Regulation provides that:

s. 3 No order shall be taken or process entered in any court, whether by way of injunction, declaration, prohibition, quo warranto or otherwise, except as may be provided for in the procedural rules.

[30] Article VIII (1) of the Alberta Plan provides at page 19 that:

Decisions as to jurisdictional claims and decisions determining whether or not such decisions have been violated as rendered by the Umpire shall be binding, final and conclusive on all of the parties bound to the operation of this Jurisdictional Assignment Plan of the Alberta Construction Industry."

It is also noted that the Plan nonetheless goes on to provide, in Article IX, para 2, for an appeal to the Alberta Plan Appeal Board.

[31] The privative clause wording in the Regulation can be contrasted to that found in s. 144 of the Labour Relations Code governing judicial review of labour arbitration decisions. As the Supreme Court stated in *AUPE v. Lethbridge Community College* at paragraph 16:

"In general terms, the stronger the privative clause, the greater the deference due and correspondingly, the weaker the privative clause (or in the absence of one), less deference is owed...."

The Court went on to find that "same deference" should be accorded to decisions of arbitration boards.

[32] It is submitted that the privative clauses found in the Regulation and in the Alberta Plan would attract less deference than that accorded to arbitration boards.

[33] It is recognized that the Umpire and the Appeal Panel have relative expertise in the area of jurisdictional assignments and that this factor would support the recognition of some deference. Indeed, the Umpire and the Appeal Panel have a very specialized level of expertise but this expertise would not be unlike the same expertise of arbitrators called upon to deal with other issues arising under a collective agreement. In fact, many arbitrators have dealt with work jurisdiction issues outside of the context of a Alberta Plan and arguably would have at least the same level of expertise as that of the Umpires and Appeal Panels under the J.A. Plan.

[34] The third factor to be considered, that of the purpose of the statutory scheme, would support some deference to the decision of the Umpire and Appeal Panel. It is clear that the statutory scheme as set out in the *Alberta Labour Relations Code* and its *Regulation 19* to provide

for a method of resolving "differences arising in the general construction sector with respect to the assignment of work to members of a trade union or to workers of a particular trade, craft or class.... "This provision is similar to s. 135 of the *Alberta Labour Relations Code* relating to the requirement that every collective agreement shall contain a method for the settlement of differences arising from the interpretation of a collective agreement. Article X of the Alberta Plan further supports some level of deference in that it provides for an expeditious process.

[35] It is submitted that the deference accorded to the Umpire and Appeal Board upon consideration of the third factor, would be similar to that accorded to arbitrators and arbitration boards, especially considering the fact that the Regulation requires that the jurisdictional disputes procedure is to be contained in the collective agreement.

[36] It is submitted that the first three factors to be considered in determining the appropriate *standard* of review would support the position that the standard of deference should be similar to that accorded to labour arbitrators and labour arbitration boards as a result of: 1) weak privative clauses; 2) both tribunals are legislatively required to be provided for in the collective *agreement*; 3) both tribunals have specialized knowledge in labour relations matters, albeit the tribunals under the Alberta Plan have a much narrower jurisdiction.

[37] The fourth factor remaining to be considered in determining the standard of review is the nature of the issue; whether it is a question of law, fact, or mixed law and fact. It is usually in the context of this factor that the issue of jurisdiction arises.

[38] Prior to the development of the pragmatic and functional approach, the Supreme Court in *Union des Employés de Service, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 discussed the appropriateness of the theory of "preliminary or collateral questions when determining whether a tribunal had acted within its jurisdiction. Instead, the court said at paragraph 120:

The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: It substitutes the question "is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be "within the jurisdiction conferred on the tribunal?"

[39] The Supreme court in *Bibeault* set out in paragraph 117 the tests when dealing with issues of jurisdiction:

It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:

1. if the question of law at issue is within the tribunal's Jurisdiction, it will only exceed its Jurisdiction if it errs *in* a patently unreasonable manner; a tribunal

which is competent to answer a question may make errors in so doing without being subject to judicial review;

2. if however the question concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review,"

[40] In *AUPE v. Lethbridge Community College*, at paragraphs 19 and 20 the Supreme Court addressed the issue of which standard of review to be applied with respect to firstly, the arbitration board's interpretation of s. 142(2) of the *Labour Relations Code* and secondly with respect to the final decision of the arbitration board. The Supreme Court found that where the interpretation of the statute (i.e.. extent of remedial powers permitted an arbitration board by virtue of the *Labour Relations Code* provisions) is within the specific expertise of the board, more deference is to be accorded and the standard to be applied is that of reasonableness even where the issue is an "issue Of law".

[41] In assessing the standard of review to be applied to the overall decision of the arbitration board, the Supreme Court found that the decision was one of mixed fact and law, and that where the law was generally within the board's area of expertise, again the standard of reasonableness should be applied.

[42] The standard of reasonableness was first set out by the Supreme Court in *Ryan*:

.... only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling; *AUPE v. Lethbridge Community College* at paragraph 48; *Voice Construction Ltd.* at paragraph 31•,

[43] As a result of the recent decisions of the Supreme Court, it is unclear when the Courts would find the rare case in which the standard of "patently unreasonable" would apply. The Supreme Court has recently referred to *this* description of the difference between unreasonable and patently unreasonable as first set out in *Canada v. Southam Inc.*:

The difference ... lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1. S.C.R. 941 , at p.963, "[i]n the Shorter Oxford English Dictionary 'patently', an adverb, is defined as

'openly, evidently, clearly'. This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem.... But once the Lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident. [Emphasis added]: *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, [2003] 2 S.C.R. 157

[44] In issues involving an error of law in the context of the interpretation of "outside" legislation, the Supreme Court has found that the general standard to be applied is one of correctness. Specifically, in the case where an arbitrator's decision was "predicated on the correctness of his assumption that he was not bound by the criminal conviction" of a grievor, the standard of correctness was applied by the Supreme Court: *Toronto v. Canadian Union of Public Employees, Local 70*, [2003] 3 S.C.R. 77.

[45] It is submitted firstly that the decisions of the Umpire and the Appeal Panel constituted errors in law when they *made* the decision that certain statutes, namely the *Apprenticeship and Industry Training Act* and the *Occupational Health and Safety Code*, did not bind them and therefore did not need to be considered. These statutes constitute outside legislation as discussed in the Supreme Court decision in *Toronto v. Canadian Union of Public Employees, Local 70*.

[46] Alternatively, it is submitted that if the *Apprenticeship and Industry Training Act* and the *Occupational Health and Safety Code* are legislation considered to be within the specific expertise of the tribunals, then the tribunals acted unreasonably in failing to consider the law and in failing to apply it to the facts of the case.

[47] In the further alternative, even if the Court finds that a much higher standard of deference is to be accorded the decisions of the Umpire and Appeal Panel of the Alberta Plan, it is submitted that their decisions were patently unreasonable in failing to consider the law and in failing to apply it to the facts of the case.

Did the decision of the Umpire and the Appeal Panel constitute a jurisdictional error or error of law in declining to consider or apply the Apprenticeship and Industry Training Act and the Occupational Health and Safety Code?

[48] In its initial application for review under the Alberta Plan, UA Local 488 argued that, in addition to those matters generally considered, the Umpire should also consider the provisions of the *Apprenticeship and Industry Training Act* and the *Occupational Health and Safety Code* in determining whether Bantrel should award all the work relating to sole purpose pipe supports to UA Local 488. They submitted that the work in question was properly that of the legislated trade

of Steamfitter-Pipefitter and the people "competent to perform that work were Steamfitter-Pipefitter.

[49] The Procedural Rules of the Alberta Plan, Article VI: Procedures, sets out what all Umpire must consider at pages 16 and 17:

- (k) In rendering his decision, the Umpire, shall determine first whether a previous Decision of Record and/or Agreement of Record governs. If no such Decision or Agreement applies he shall then consider whether there is an *applicable* agreement between the disputing Unions governing the case. If no such Agreement is in effect, the Umpire shall consider established trade practice, prevailing practice, together with a reasonable acceptance of considerations for efficiency, safety, good management, and a desire by all Parties eliminate excessive allocation of manpower.

No reference is made to any legislation in the list of matters to be considered.

[50] *In McLeod v. Egan*, (1975] 1 S.C.R. 517 a grievance had been filed by an employee who refused to Work more than 48 hours in a week and had been disciplined for that refusal. The Union had argued that the arbitrator was required to consider the *Employment Standards Act* (which prohibited an employee from working more than 48 hours without their consent) in determining whether the employee had been wrongfully disciplined. While there was no specific reference to the Act within the collective agreement in that case, the Supreme Court nonetheless found that the arbitrator was required to apply the provisions of the *Employment Standards Act*

[51] The 2003 Supreme Court decision *of Parry Sound (District) Social Services Administration Board* also dealt with the Issue of the ability or requirement of arbitrators to consider legislation not specifically referred to within the terms of a collective agreement. In that case a probationary employee had been terminated after returning to work following a maternity leave. The union alleged that the termination was contrary to the provisions of the *Human Rights Code* to which there was no reference contained in the collective agreement.

[52] The Supreme Court, in referring to *McLeod v. Egan* with approval, stated:

The Court, however, concluded that an arbitrator must look beyond the four corners of the collective agreement in order determine the limits on an employer's right to manage operations. Under a collective agreement, this right is subject not only to the express provisions of the agreement, but also to statutory provisions such as s. 11(2) of the *Employment Standards Act*

As a practical matter, this means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction.

[53] Applying the principles adopted in *McLeod v Egan*, the Court went on to find that, regardless of the intention of the parties in negotiating the article which made the termination of a probationary employee inarbitrable, the actions of the employer must be compliant with employment related legislation,

[54] It is submitted that the *Ontario Labour Relations Act*, applicable in the *Parry Sound (District) Social Services Administration Board* case, specifically provided that an arbitrator had the power to interpret and apply human rights and other employment-related statutes (para 48) but characterized that legislative provision as a restatement of existing law:

In my view, s.48(12)(j) does not clearly indicate that it was the legislatures intention to alter the principles described above, Quite the opposite. I believe that the amendments to the legislation **affirm** that grievance arbitrators have not only the power but also the responsibility to implement and enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement. (*emphasis added*)

[55] It is submitted that the *Parry Sound (District) Social Services Administration Board* decision was one in which the arbitration board had found that they had jurisdiction to apply the provisions of the *Human Rights Code* and in fact exercised that jurisdiction. As a result, the standard of review adopted by the Supreme Court in this case was that of "patently unreasonable". (Although the Court did state that "... it is my conclusion that the Board was correct to conclude that the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which the Board has jurisdiction," (*emphasis added*).

[56] The Supreme Court decisions in *McLeod v. Egan* and in *Parry Sound (District) Social Services Administration Board* have made it clear that an arbitration tribunal must take into account employment related legislation. The *application* of those decisions to the case at hand would support the proposition that tribunals (namely Umpires and Appeal panels) charged *with* deciding jurisdictional trade issues, as mandated by the *Alberta Labour Relations Code* and its *Regulation* and by the collective agreements between the parties, must take into account legislation that deals with issues touching on trade jurisdiction

[57] In supplementary reasons in *McLeod v. Egan* Chief Justice Laskin stated that where an arbitrator went outside of the collective agreement to construe and apply a statute then there "can be no policy of curial deference" and that the test would be one of correctness.

[58] As previously discussed, with the further development of the pragmatic and functional approach of judicial review of tribunals, the Supreme Court has now evolved a test that if the legislation which was construed or applied is within the specific expertise of that tribunal, then more deference is to be accorded and the standard of reasonableness" is to be applied.

[59] In the Supreme Court decision of *Toronto (City) v. Canadian Union of Public Employees (C:U:P.E.), Local 79*, the Court dealt with the issue of an arbitrator's decision that while a criminal conviction was admissible evidence, it was not conclusive proof of the act or the offence. In addition to concerns over issues such as abuse of process, the Court found that the arbitrator had failed to apply the provisions of the *Ontario Evidence Act* and that since that legislation was considered to be "outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them" the standard of review to be applied was that of correctness.

[60] However, it is generally stated that where a tribunal fails to *consider applicable* statutory provisions or relevant issues then that constitutes a "jurisdictional error" or error of law which attracts the standard of correctness: *McLeod v. Egan; Foothills Provincial General Hospital v. United Nurses of Alberta, Local 115*, [1998] A.J. No. 1261; *International Assn. of Firefighters, Local 2130 v. St. Albert (City)*, [1990] A.J. 707.

[61] The Alberta Court of Appeal in *Lakeland College v. Lakeland College Faculty Assn.*, [1990] A.J. 30 held that missing a relevant necessary issue and failing to consider it is a jurisdictional issue which leads to a decision being quashed.

[62] A very recent British Columbia Court of Appeal decision in 2005 reviewed an arbitrator's decision that he did not have the jurisdiction to consider a grievance founded upon legislation (relating to classroom size) outside of the terms of the collective agreement. Indeed, the Court noted that the legislation provided that classroom size was not Subject to collective bargaining nor could it be included in a collective agreement: *British Columbia Teachers Federation British Columbia Public School Employers' Assn.*, [2005] B.C.J. No. 289.

[63] In paragraph 16, the British Columbia Court of Appeal pointed out that:

The parties are agreed that as far as the central issue of whether an arbitrator has jurisdiction over a dispute alleging a violation of the class size legislative enactments is concerned, the standard of review is correctness; though the counsel for the B.C.P.S.E.A. said that there might be subordinate or peripheral issues where a different standard should be applicable.

[64] The Court found that the issues of class room size set out in the legislation were a "significant part of the employment relationship" and that

If the statutory determination of class sizes is violated that would surely constitute an improper application of the management rights clauses in the collective agreement, ... But it would also affect other terms of the collective agreement. The point is that such a violation is closely connected in a contextual way to the interpretation, operation, and application of the collective agreement and directly affects it.

and

In short, the collective agreement must be interpreted in the light of the statutory breach.

The Court set aside the arbitrator's award.

[65] In applying the approach taken in *British Columbia Teachers Federation*, it is submitted that there is indeed a real contextual connection between the *Apprenticeship and Industry Training Act* and the *Occupational Health and Safety Code* and the J.A Plan (as well as the collective agreement), and as a result the Umpire and Appeal Panel have the jurisdiction to consider and apply the provisions of the legislation in deciding the jurisdictional issue. In refusing to apply the legislation, the tribunals have, in essence, made a decision regarding their jurisdiction, thereby attracting the standard of correctness.

[66] In wording consistent with the terminology of the Supreme Court, it is submitted that the Umpire and the Appeal panel decisions constituted errors in law insofar as they decided *that* the Umpire did not have the jurisdiction to consider the *Apprenticeship and Industry Training Act* and the *Occupational Health and Safety Code*, and insofar as they failed to apply relevant employment related legislation to the issues before them.

Conclusion

The Alberta Plan

[67] For the past couple of decades, the unionized construction industry in Alberta has participated in the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. There is a Canadian Plan and an American Plan.

[68] Unionized employers and building trades unions in Alberta identified certain shortcomings in the Canadian and American Plans and decided that a home-grown dispute resolution mechanism for jurisdictional disputes had a better chance of working. They developed Alberta's Jurisdictional Assignment Plan, consisting of:

- a. A Memorandum of Understanding;
- b. The Procedural Rules; and
- c. The Letters of Understanding to the Procedural Rules.

[69] The Alberta Plan - unlike most other jurisdictional dispute mechanisms facilitates early intervention in disputes. The requirement for expedition in the processing of complaints and hearings; the setting out of a hierarchy of factors to be applied by its Umpires; the barring of lawyers from the process; and, the use of "loser pays" *means* that most jurisdictional disputes in Alberta are now resolved quickly and without loss of productivity.

[70] The Alberta Plan is a complete code governing the making and appealing of work assignments for the unionized building trades. It is a tripartite process binding on the assigning contractor and competing craft unions.

[71] The Alberta Legislature has placed its stamp of approval on this industry driven process by requiring that every collective agreement in the general construction sector of the construction industry incorporate the Alberta Plan, Alberta Reg. 2/2000 s. 2(1) states that:

[e]very collective agreement in the general construction sector or the construction industry entered into by a participating union shall contain provisions requiring differences arising in the general construction sector with respect to the assignment of work to members of a trade union or to workers of a particular trade, craft or class to be settled in accordance with the Plan: *Construction Industry Jurisdictional Assignment Plan Regulation Alberta Reg. 2/2000*.

[72] Although mandated by statute, the Alberta Plan and its rules are very much the joint product of Alberta's unionized construction contractors and building trades unions.

[73] The parties to this Application: UA Local 488, Iron Workers Union and Bantrel are all bound to the Alberta Plan.

The Bantrel Assignment

[74] Bantrel was awarded a contract by Petro Canada to construct an addition to its existing Strathcona refinery to increase its capacity to remove sulphur from diesel oil. Work at the site is about 60% complete.

[75] On September 8, 2004 Bantrel held a markup meeting to make Jurisdictional assignments for work under its contract for the Edmonton Diesel Desulphurization (EDD) Project. The purpose of such meetings is for the contractor to advise the unions of its proposed work assignments, to give the unions an opportunity to make inquiries concerning the nature of the work and to lay claim to the various items that go into a construction project. In our case, both the Iron Workers Union and UA Local 488 claimed the right for their members to install certain types of single purpose pipe supports. Both later forwarded evidence in support of their positions to Bantrel.

[76] The Final Assignments issued by Bantrel dated November 16, 2004, item 19, indicated that: -

- b. Free-standing pipe supports (not tied together) for the sole purpose of supporting pipe will be in accordance with the Ironworkers/United Association area agreement of October 1, 1956.
- d. Multi-leg or bridge and truss type supports is the work of the Iron Workers Union.

[77] Bantrel also awarded the Iron Workers Union Supports for two or more items such as electrical cable and piping. This type of "multi-purpose" support was neither claimed nor disputed by the UA Local 488.

[78] The 1956 agreement referred to by Bantrel is known as the "Senio-Hickingbottom Agreement" after two representatives of UA Local 488 and Iron Workers Union who signed it.

[79] The Senio-Hickingbottom Agreement contains the following paragraphs.

Free standing pipe supports, one and two legged pipe supports along with pipe hangers, pipe supporting straps, saddles, roller type supports, U bolts, clamps or other devices designed for the sole purpose of supporting pipe is to be the work of the United Association.

All multi-leg supports consisting of three or more legs or two leg supports, when tied together by structural members, is to be the work of the Ironworkers.

All bridge work for the purpose of supporting pipe or pipes, whether self supporting or tied into or becoming part of a building's structural steel is to be the work of the Ironworkers.

The Alberta Plan Appeal

[80] On November 30, 2004 the UA Local 488 filed an appeal of the Bantrel assignment with the Alberta Plan.

[81] There are two Umpires appointed under the Alberta Plan, Gilbert Beatson and William Weir. Mr. Beatson is an architect and Mr. Weir is an engineer.

[82] Two days later the Administrator of the Alberta Plan notified the parties that Umpire Beatson had been assigned to the dispute. Written submissions were made by the Iron Workers Union and the UA Local 488 which were forwarded to Umpire Beatson. An oral hearing at this stage is required under the Procedural Rules unless there is unanimous consent to have the matter decided solely on the written materials filed by the parties. In this case, an oral hearing was held in Edmonton on December 21, 2004, some three weeks after the UA Local 488 filed its protest.

[83] The powers of Umpires under the Alberta Plan are broad and are summarized in Article III(2) of the *Procedural Rules*. They include the authority to "decide all questions and matters relating to jurisdiction of work assignments ... including, but not limited to, ... dispute(s) as to the assignment of work prior to (its) commencement ...(during its) progress ... the handling and installation of new products ...(and the existence) of a bargaining relationship between a Contractor and a Union(s) claiming the work".

[84] Unlike the arbitration of disputes under collective agreements, the Alberta Plan requires Umpires to determine work assignments according to a set hierarchical formula. It is mandated by statute and represents a complete code to be applied by Umpires in jurisdictional disputes. The factors and their relative importance are set out for example in the Rules of the Alberta Plan at Article VI(l)(k).

In rendering his decision, the Umpire shall determine first whether a previous Decision of Record and/or Agreement of Record governs. If no such Decision or Agreement applies he shall then consider whether there is an applicable agreement between the disputing crafts governing the case. If no such Agreement is in effect, the Umpire shall consider established trade practice, prevailing practice, together with a reasonable acceptance of considerations for efficiency, safety, good management, and a desire by all Parties to eliminate excessive allocation of manpower.

[85] These are the same factors that must be applied by contractors when making their original assignments of work.

[86] By decision dated December 31, 2004 Umpire Beatson upheld the employer's assignment to the Iron Workers Union.

[87] Umpire Heason reasoned that the Senio-Hickingbottom Agreement between the competing unions applied to the work in dispute. In Umpire Beatson's view, this agreement is still in force, and local agreements are recognized in the Alberta Plan Procedure Rules as taking precedence if there is no applicable Decision of Record or Agreement of Record.

[88] The decision of Umpire Beatson also commented on a 2003 decision of the other Umpire under the Alberta Plan who, likewise, found the Senio-Hickingbottom Agreement applicable to a similar dispute between these two unions.

[89] Umpire Beatson considered and rejected the UA's argument that Bantrel's assignment contravened *the Apprenticeship and Industry Training Act* and *Occupational Health and Safety Code*.

The concept introduced by the UA is that two pieces of legislation, to the exclusion of others, control the assignment of work in the construction industry in Alberta. The

legislation referred to are the *Apprenticeship and Industry Training Act* A-42 together with its associated trade regulations, and the *Alberta Occupational Health and Safety Code*. A specious concept in my opinion but one that should not be dismissed out of hand.

The *Apprenticeship and Industry Training Act*, clause 26, says an employer shall not employ a person to work in a designated trade if that person is not permitted to carry out the work of that trade. If a disputing trade believes this is taking place, they could seek a compliance order requiring the employer to comply with the Act, and if that didn't work, application could be made to the Court of Queen's Bench. The *Occupational Health and Safety Code* deals with the definition of competent as it applies to a member of a trade.

The Reconsideration Decision

[90] The UA Local 488 applied for reconsideration of Umpire Beatson's December 31, 2004 decision. The request was based on the Umpire having made a "substantial error of fact or law" and accidental mistake on the part of the Umpire. Unlike the procedure followed in the hearing of complaints at first instance, the default procedure in requests for reconsideration is a hearing through written submissions. The Iron Workers Union opposed an oral reconsideration hearing. Both the UA Local 488 and the Iron Workers Union provided written submissions in relation to the reconsideration application.

[91] Umpire Beatson denied the application and held that there were insufficient grounds in the submissions to grant the request for reconsideration. Umpire Beatson considered each of the arguments but again rejected the claim that the Regulation governing the Steamfitter-Pipefitter trade under *the Apprenticeship and Industry Training Act* or *the Occupational Health and Safety Code* dictated an assignment to members of the UA Local 488. More specifically, Umpire Beatson found as follows:

...the real issue is not whether the Umpire has a full understanding of Provincial Statutes or whether for the purpose of making jurisdictional assignments an item must be identified by function/purpose rather than by material. The real issue is how many and which pieces of Alberta legislation must be taken into account by a Contractor making a jurisdictional assignment and who will determine if that legislation takes precedence over industry agreements and established trade practice. I cannot believe the United Association is unaware of this.

...some authority would have to select the applicable legislation as it would be a law matter, and then there would be the determination of precedence and finally enforcement of the law. This does not sound like the Alberta Plan to me.

The Appeal Panel of the Alberta Plan

[92] In addition to the right to have a decision reconsidered, the *Procedural Rules* for the Alberta Plan provide for a further level of review to the "J. A. Plan Appeal Board".

[93] The Appeal Board is made up of equal numbers of employer and union nominees and chairs. Each case is determined by a Panel of three members.

[94] The UA Local 488 initiated an appeal of Umpire Beatson's decision. The panel appointed to a particular appeal screens out those lacking merit and holds a hearing only if necessary. In this case the panel decided against holding a hearing and dismissed the appeal. In doing so, the Panel found that Umpire Beatson's determination of the case had been "...thorough, consistent and reasonable".

[95] The Appeal Panel in this case consisted of Messrs. Milner, Pon and Necula. Mr. Necula was appointed by the unionized employers' organization in the general construction sector and is a labour relations consultant. Mr. Pon was appointed by the Alberta and NWT Building and Construction Trades Council. The Chair, Mr. Milner is a retired construction contractor.

[96] Article XI of the *Procedural Rules* for the Alberta Plan also provides that decisions of Umpires under the Alberta Plan may be appealed to the Canadian Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. The UA Local 488 did not initiate such in appeal.

The Appropriate Standard of Review

[97] There are only three standards for judicial review of administrative decisions: correctness, reasonableness simpliciter and patent unreasonableness: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 35.

[98] In determining which standard to apply, courts apply a pragmatic and functional approach. This approach involves four factors:

- a. The presence or absence of a privative clause or statutory right of appeal;
- b. The expertise of the tribunal relative to that of the reviewing court on the issue in question,
- c. The purposes of the legislation and the provision in particular; and

- d. The nature of the question - law, fact or mixed law and fact. **Dr. Q**, at para. 26 – 35.

Privative Clause or Statutory Right to Appeal

[99] Section 3 of Alta. Reg. 2/2000 made pursuant to *the Labour Relations Code*, R.S.A. 2000, c L-1, which requires that differences arising in the general construction sector with respect to the assignment of work be scaled in accordance with the Alberta Plan says:

No order shall be taken or process entered in any court, whether by way of injunction, declaration, prohibition, quo warranto or otherwise, except as may be provided for in the procedural rules,

[100] Article VIII(1) of the *Procedural Rules* says:

Decisions as to jurisdictional claims and decisions determining whether or not such decision has been violated as rendered by the Umpire shall be binding, final and conclusive on all of the parties, bound to the operation of this Jurisdictional Assignment Plan of the Alberta Construction Industry."

[101] The Rules provide for an appeal of an Umpire's original decision or reconsideration decision to either the Alberta Plan Appeal Board or to the Canadian Plan.

[102] The Rules further provide for an appeal from the Appeal Board to the Canadian Plan. Appeals to the Canadian Plan are to be final and binding.

[103] Article XI(3) of the Rules contains a further privative clause. It says:

Subject to subsection (4), no award or proceeding of an arbitrator, umpire or other body acting under the Alberta Plan or, on appeal therefrom, the Canadian Plan, shall be questioned or reviewed in any court by application for judicial review or otherwise, and no order shall be made or process entered into or proceedings taken in any court, whether by way of injunction, declaratory judgment, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain the arbitrator, umpire or any body in any of their proceedings.

[104] Article XI(4) provides an exception for decisions from which there is otherwise no appeal. Those decisions maybe reviewed byway of application for judicial review. However, the decisions being appealed from here, can all be appealed to the Canadian Plan. Therefore, the privative provisions of Article XI(3) apply.

[105] This Court has previously determined in that the Alberta Plan's privative clause applies to the judicial review of its decisions rather than the privative clauses contained in the *Labour Relations Code: Intl. Assoc. of Bridge v. Intl. Brotherhood of Boilermakers*, [2000] A.J. No, 1000 at para. 46 and 58.

[106] I conclude that the decisions in question in this present application are protected by a privative clause pointing strongly towards deference.

Relative Expertise of the Tribunal

[107] Article X of the *Procedural Rules* says that:

Umpires and members of the J. A. Plan Appeal Board shall be appointed on the basis of their expertise in the construction industry and are expected to apply that expertise to the matters that are before them.

[108] Umpires under the Alberta Plan are not lawyers. Rather, they are chosen because of their practical experience and expertise. They are experts at what works in the industry: a very different form of expertise from that held by the courts or indeed by labour arbitrators.

Purpose of the Legislation

[109] The overall purpose of the scheme here is articulated in the Memorandum of Understanding establishing the Alberta Plan:

Article III

It is recognized by both parties that due to time loss, wildcats, disruption of work continuity and the ensuing poor publicity that there is a real and ever present danger of governmental intervention in the question of construction jurisdictional disputes.

Article IX

It is further recognized that the already existing interventions by governments in certain other jurisdictions have not been found satisfactory or desirable by either Employer or Employee organizations. It is agreed that a mutually acceptable Plan freely negotiated by both parties is a preferable solution to the problem...

Article VI

It is agreed that the best avenue of prevention lies in a method of highly skilled, knowledgeable, unbiased and impartial assignment of work. It is projected that an impartial umpire of work assignments, working on the primary level off assignment, is the best hope of attainment of our mutual ideal...

[110] The Alberta Plan provides for a consensual arbitration that has statutory endorsement. The legislation recognizes that the parties (employers and employees in the unionized construction industry) have an ongoing relationship and the greatest stake in achieving practical, quick, and final resolutions of their disputes. The purpose of the legislation was to give the strongest possible protection to the process that the parties themselves chose for reducing and resolving disputes.

[111] The questions that Umpire Beatson was mandated to address under the Alberta Plan are questions of facts. Does a previous Decision of Record and/or Agreement of Record govern? Is there an applicable agreement between the disputing unions governing the case? And finally, what is the established or prevailing trade practice?

[112] These specific questions perform an important purpose in the overall jurisdictional dispute resolution scheme. They create stability and certainty through the consideration of binding precedents and the enforcement of agreements that have been entered into by the parties such as the two unions in the instant case.

[113] Appellants argue that the question relating to the interpretation of the *Apprenticeship and Industry Training Act* and the *Occupational Health and Safety Code* was a question of law and that the interpretation of an outside statute was beyond the realm of the Umpire's expertise and therefore subject to a standard of correctness.

[114] There is no inherent jurisdiction in administrative tribunals which permit or require them to apply external laws to the determination of disputes. It must be found either in its empowering document or by inference: ***British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*** [2005] B.C.J. No. 289 (CA) at para. 37 and 38.

[115] There is no "contextual connection" between the Alberta Plan and the *Apprenticeship and Industry Training Act* or the *Occupational Health and Safety Code*. As discussed more fully below, Umpire Beatson had no jurisdiction to consider such external statutes. Rather in acting within his Jurisdiction and applying the hierarchy of factors under the Alberta Plan, he based his decision on the factual finding that the dispute was governed by an existing agreement between the parties. The enforcement of agreements is one of the ways in which the Alberta Plan facilitates stability in the industry. It also protects the sanctity of settlements or consensual agreements such as the Senio-Hickingbottom Agreement between the UA Local 488 and Iron Workers Union.

[116] Even if Umpire Beatson was called upon to consider the terms of the *Apprenticeship and Industry Training Act* or the *Occupational Health and Safety Code* in the course of interpreting the work assignment agreements that are at the heart of his jurisdiction, his decision is entitled to deference.

[117] In *Canadian Broadcasting Corp. v. Canada* (Labour Relations Board, (1995), 121 D.L.R. (4th) 385 (S.C.C.) Iacobucci J, stated at para. 48 -49:

As a general rule, I accept the proposition that curial deference need not be shown to an administrative tribunal in its interpretation of a general public statute other than its constituting legislation, although I would leave open the possibility that in cases where the external statute is linked to the tribunal's [page 404] mandate and is frequently encountered by it, a measure of deference may be appropriate. However, this does not mean that every time an administrative tribunal encounters an external statute in the course of its determination, the decision as a whole becomes open to review on a standard of correctness. If that were the case, it would substantially expand the scope of reviewability of administrative decisions, and unjustifiably so. Moreover, it should be noted that the privative clause did not incorporate the error of law grounds, s 18.1(4) of *the Federal Court Act, R.S.C. 1985, c. F7* (as amended by the S.C. 1990, c8, s.5). This tends to indicate that some level of deference should be provided,

While the board may have to be correct in an isolated interpretation of external legislation, the standard of review of the decision as a whole, if that decision is otherwise within its jurisdiction, will be one of patent unreasonableness. Of course, the correctness of the interpretation of the external statute may affect the overall reasonableness of the decision. Whether this is the case will depend on the impact of the statutory provision on the outcome of the decision as a whole,

[118] The decision Umpire Beatson was called upon to make here between two disputing trades was at the core of his jurisdiction and his expertise. The UA Local 488 should not be able to open that decision to undue interference by the simple stratagem of raising an argument relating to an external statute.

[119] In a previous case dealing with both the Alberta Plan and the Canadian plan, my colleague Acton J. held in *Intl. Assoc. of Bridge v. Intl. Brotherhood of Boilermakers*, [2000] A.J. No. 1246 at para, 52 - 54;

The deference owed by a court to a decision by a consensual tribunal falls at the highest end of the spectrum of judicial review.

Moreover, the Supreme Court of Canada has noted that labour relations tribunals, such as labour relations boards and arbitrators, are entitled to a high degree of deference because of their experience, special knowledge, the continuing relationship of the parties, and the need for speed and finality:

Canada (Attorney General) v, Public Service Alliance of Canada, [1993] 1 S.C.R. 941 (PSAC No. 2) emphasized the essential importance of curial deference in the context of labour relations where the decision of the tribunal, like the Board of Arbitration in the instant appeal, is protected by a broad privative clause. There are a great many reasons why curial deference must be observed in such decisions. The field of labour relations is sensitive and volatile. It is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding.

In particular, it has been held that the whole purpose of a system of grievance arbitration is to secure prompt, final and binding settlement of disputes arising out of the interpretation of collective agreement and the disciplinary actions taken by an employer. This is a basic requirement for peace in industrial relations which is important to the parties and to society as a whole.

Here, the parties have agreed to an arbitration system that expressly excludes the courts and lawyers with privative clauses in both the Alberta Plan (Article VIII(1) and Article X of the *Procedural Rules*) and the Canadian Plan (Article V(7) and Article VII(3)). The chosen slate of adjudicators was agreed on by the parties, and have significant expertise, experience, and knowledge in the volatile area of work assignment disputes in the construction industry. The test therefore is at the most stringent end of the spectrum: Was Mr. Fagan's decision patently unreasonable or clearly irrational.

[120] Action J. went on to describe how to apply the standard of patent unreasonableness to the arbitrator under the Canadian plan.

Umpire Beatson had concluded that most of the work should be assigned to the Iron Workers, rejecting the Boilermakers' argument that the 1926 and 1953 Agreements of Record applied. Mr. Fagan disagreed with that decision, and concluded that the work in question was covered by these agreements. I need not determine whether these agreements apply, nor need I answer whether there were any other applicable agreements between the parties, nor what the prevailing trade practices are, I need only answer whether Mr. Fagan's decision was irrational, did not demonstrate the faculty of

reason, or was not in accordance with reason or good sense. *Intl. Assoc. of Bridge 1246*, at para. 56.

[121] The Alberta Plan has not only been agreed to by the parties, it has been incorporated in legislation as the compulsory method of resolving jurisdictional disputes in the unionized sector of the construction industry. Its Procedural Rules contains a mandatory, hierarchical list of factors to be applied by contractors in the making of assignments and by Umpires in the resolution of disputes. I conclude that it is entitled to deference at the most stringent level,

Did Umpire Beatson Commit Any Reviewable Errors in his Original Decision?

[122] The UA Local 488 alleges that Umpire Beatson erred in failing to conclude that the Bantrel work assignment violated the *Apprenticeship and Industry Training Act* or the *Occupational Health and Safety Cod*. However, Umpire Beatson's decision is supported by reason and is, therefore, not subject to judicial interference. The reasonableness of his decision is supported by the existence of a previous decision of Umpire Weir also finding that the SenioHickingbottom Agreement is binding on these same parties.

[123] I conclude that Umpire Beatson's decision was not patently unreasonable, and further, he was correct in refusing to base his decision on the terms of a statute that as not intended to have any impact on jurisdictional disputes between trades.

Jurisdiction under the Alberta Plan

[124] A plain reading of the Alberta Plan or Regulation 2/2000 shows that Umpires have no jurisdiction to consider external legislation such as the *Apprenticeship and Industry Training Act*. The Umpire has only the jurisdiction granted to him by the parties and the legislature under the Alberta Plan. That jurisdiction is outlined in Article III(2) of the *Procedural Rules*.

[125] Article VI(1)(k) of the *Procedural Rules* states the questions that the Umpire is required to consider in making his/her decision. First, does a previous Decision of Record and/or Agreement of Record govern? Second, is there an applicable agreement between the disputing Unions governing the case? Finally, if no such Agreement is in effect, the Umpire shall consider established trade practice, prevailing practice, together with a reasonable acceptance of considerations for efficiency, safety, good management, and a desire by all parties to eliminate excessive allocation of manpower.

[126] There is no reference to other general questions of either statute or common law, and for good reason. Creating such a broad mandate for Umpires would defeat the purpose of the scheme

to provide quick and conclusive resolution to jurisdictional disputes. Labour arbitrators possess a broad discretion to interpret the provisions of bipartite collective agreements and to fashion remedies. Assignments and disputes under the Alberta Plan are multi-party in nature and often time sensitive. The industry - including the applicant - have adopted a system for the resolution of disputes which focuses on speed in decision making, the preservation of the jurisdictional *status quo* and the recognition of North American or local agreements between unions. The introduction of employment related statutes" into the mix was not contemplated by the Legislature or the parties to the Alberta Plan.

[127] In order to achieve its mandate, the legislature provided the Umpire and the Alberta Plan Appeal Board Panel with strong privative protection, subject only to an appeal to the Canadian Plan. It is unlikely that it would have intended to provide this kind of protection from judicial scrutiny to the interpretation of all provincial statutes applicable to the construction industry. 68. Article X(4) of the *Procedural Rules* precludes the parties from being represented by legal counsel or assisted by counsel in preparing their submissions.

[128] This makes sense for a process that is intended to be a fact specific inquiry to quickly resolve practical problems. But if the Umpire was intended to be the grievance mechanism for every provincial (or perhaps even federal) statute that could potentially be engaged by a work assignment decision, legal counsel would often be required to assist the parties (and perhaps the Umpire) in interpreting the statutes and the legal consequences of their decisions. However that is not the intention of the agreement or the legislation incorporating that agreement.

[129] In a previous decision of this Court dealing with the Alberta Plan and Canadian Plans, my colleague Verville, J. considered whether an arbitrator under the Canadian Plan had erred in calling to base his decision on the collective agreement of the applicant, Labourers' Union. In rejecting this argument, he said in *Construction & General Workers Union, Local 92 v. United Brotherhood of Carpenters & Joiners, Local 1325*, [2003] A.J. No. 1604 at para. 45 -46 the following:

It is apparent however that while work in the construction industry is organized on trade lines, the assignments of work to any particular trade can be a contentious issue where one trade asserts its authority to perform work over that of another. The Labourers' Union submitted that "scaffold tending" can be defined simply as helping a scaffold builder by supplying the scaffold components. It is logical that the term "scaffolding" would necessarily encompass some degree of tending". The "scope of work" or "jurisdictions" claimed by various building trades are clearly not water tight distinct compartments that can be separated by "bright line tests". The Umpire recognized this fact noting in his reasons that both the Labourers and the Carpenters have performed scaffold tending safely and efficiently in Alberta and further that neither Union has

established exclusive jurisdiction over the work of scaffold tending.

It follows that in virtually every jurisdictional dispute both unions can say to the employer that if it gives the work to the other union in will be in breach of the collective agreement. It is for this reason that the Alberta Plan and Canadian Plan were established. [emphasis added]

[130] As both the UA, Local 488 and Iron Workers Union represent "compulsory certification trades" the complete and appropriate scheme for enforcing any trade designation issues lays within the *Apprenticeship and Industry Training Act* and its regulations.

[131] *The Apprenticeship and Industry Training Act* provides a complex scheme for regulating the training and certification standards required to work in various trades and occupations in Alberta. There are 51 designated trades in Alberta, each with its own regulation describing the job skills and competencies of that trade, along with the training requirements. The process of designating trades and defining the standards is industry driven.

[132] The scheme places obligations on both employees and employers. The enforcement provisions include the creation of both absolute and strict liability offences for various contraventions of the Act, including fines of up to \$15,000.

[133] *The Apprenticeship and Industry Training Act* creates an administrative appeal panel to deal with decisions regarding individual trade certificates and apprenticeship conflicts. However, supervision of compliance and enforcement is specifically given to the Court.

[134] The responsibility for enforcing the Act lies with the Minister of Advanced. Education and the officers appointed by the Minister for the purpose of administering and enforcing the Act. An officer may direct a person to comply with the Act by issuing a compliance order under s. 52.

[135] If an officer is of the opinion that a person is not complying with the *Apprenticeship and Industry Training Act* or with a compliance order, s. 53 provides for an application to the Court of Queen's Bench. "The Court is given broad discretion, including to:

- c) give those directions that it considers necessary in order to ensure compliance with this Act or the order, as the case may be;
- d) make its order subject to any terms or conditions that the Court considers appropriate in the circumstances.

[136] The legislative scheme accommodates the possibility that urgent issues may arise under the Act that require speedy resolutions. The Court may hear an interim application on two days notice if it considers it necessary in the circumstances, and may grant such interim relief as it considers appropriate. Such orders maybe made ex parte if the Court considers it necessary in the circumstances. *Apprenticeship and Industry Training Act* s. 53(3)(4).

[137] There is no contemplation that these issues, including the determination of regulatory offences, could be determined by lay persons in the course of making entirely unrelated jurisdictional decisions.

[138] *The Apprenticeship ad Industry Training Act* is not a Jurisdictional statute and does not create "bright lines" or water tight compartments between the regulated trades. The legislation itself contemplates that there will be overlap among them. As just one example, The *Electrician Trade Regulation* and the *Refrigeration and Air Conditioning Mechanic Trade Regulation* both include controls for air-conditioning systems. Alta. Reg. 274/2000 s. 1(c)(iii), (v); Alta. Reg. 300/2000 s. 1(c)(i),(v).

[139] In the *Apprenticeship Program Regulation*, "supervisor" is defined as including:

A certified journeyman or an uncertified journeyman in another designated trade where the task, activity or function that is being carried-out by an apprentice in that compulsory trade is the same tasks, activity or function that is also carried out by a certified Journeyman or uncertified journeyman in that other designated trade. . . [emphasis added] Alta. Reg. 258/2000.

[140] Each individual trade regulation describes the tasks, activities and functions that come within that trade "when practicing or otherwise carrying out work in the trade." The listed functions are the work of that trade in the context of the overall practice of that trade. It is apparent that, while the functions listed in each trade regulation combine to describe the work that is performed by that trade, many of the individual functions could be performed by any number of certified or uncertified employees. For example, one of the functions listed in the Ironworker Trade Regulation is "the use of detailed drawings and blueprints and other specifications." This does not give the Ironworkers exclusive jurisdiction over this task. Alta. Reg. 285/2000 s. 7.

[141] In the instant case, the Applicant claimed certain single-purpose pipe supports but not "multipurpose" supports even when they also support piping. Nowhere in the Regulation governing the Steamfitter-Pipefitter trade does it speak to single versus multi-purpose supports. If it is an issue of competency, why would not the UA Local 488 claim all supports which carry pipe regardless of what else the structure may support? Further, how does one resolve the conflict between the UA Local 488's position in the instant case and the terms of the long-standing

agreement between it and the Iron Workers Union which gives the work in dispute to the Iron Workers Union?

[142] The *Apprenticeship and Industry Training Act* contains no provision which speaks to the overlap of functions among the various designated trades. It is not intended to be used to circumvent the jurisdictional dispute resolution process that was agreed to by the members of the industry, including the UA Local 488.

[143] The Applicant suggests that the *Occupational Health and Safety Code* was somehow applicable to the dispute before Umpire Beatson. The *Occupational Health and Safety Code* is, as its title suggests, aimed at safeguarding the workplace health and safety of Albertans, it neither incorporates the terms of the *Apprenticeship and Industry Training Act* nor does it provide for the enforcement of trade regulations. Both the Steamfitter-Pipefitters and Iron Workers Union are members of compulsory trades. The fact that a local union representing Steamfitter-Pipefitters is party to a long-standing agreement which recognizes the work in dispute to form part of the Iron Worker's Union trade must surely be an admission by the UA Local 488 that members of Iron Workers Union can perform the disputed work in a safe and competent manner.

[144] The *Ontario Labour Relations Board* considered an order issued by an inspector under the *Occupational Health and Safety Act*, R.S.O. 1990, c.0-1. The International Brotherhood of Electrical Workers, Local 586 had complained when the work of installing supports for electrical cable trays was assigned to members of the Iron Workers Union. The Board referred to a previous decision citing Ministry of Labour Policy regarding the Ontario Trades Qualification and Apprenticeship Act ("TQAA"), which is somewhat similar to the *Apprenticeship and Industry Training Act*. The reference to "OTAB" is an acronym for the Ontario Training and Adjustment Board which had responsibilities akin to those of the Alberta Apprenticeship and Industry Training Board.

When determining whether a contravention falls under OTAB or MOL, the inspector should determine whether the concern is a bona fide health and safety concern or whether this is in reality an economic or political dispute. A common example of the latter would be two trades "squabbling" because each wants to be awarded work on a contract (i.e. jurisdictional dispute).

Clarification is also necessary whether an individual contravention is of a TQAA nature or is alleged as a TQAA/OTAB issue.

Many noncompulsory Trades that are certified under TQAA contain similar or same functions as do the compulsory trades... ie. ***Sprinker Vs. Plumber/Fitter***. We must recognize that either trade could legitimately do this job. If there is a dispute in that regard it should be dealt with as a jurisdictional matter: ***Paul Daoust Construction Canada Ltd.***, [2001] OLRB Rep. July/August 1049 at para. 7.

[145] The Board found that the "real dispute between the parties [was] primarily a jurisdictional dispute" and suspended the order of the health and safety inspector: ***Paul Daust Construction Canada Ltd.***, at para. 10.

[146] Similarly, the real dispute here is over jurisdiction. It is not a matter that can or should be resolved under the *Apprenticeship and Industry Training Act*.

Disposition

[147] At the heart of this application is a jurisdictional dispute over which trade ought to install certain types of supports for industrial piping; members of the applicant, UA Local 488 or those of the Respondent, Iron Workers Union. The contractor Bantrel decided that in the instant case, certain of the pipe supports ought to be installed by Iron Workers Union. The UA Local 488 wants to install all "single-purpose" pipe supports regardless of their configuration.

[149] On large industrial projects such as the one involved in this case, steel supports are required for piping, electrical cables and other material and equipment. The UA Local 488 claims "sole-purpose" steel supports for their members based on the notion that the trade installing the component or material being supported ought to install the steel supports as well. Iron Workers Union claim "sole purpose" pipe supports based on their particular design or configuration. It is up to the contractor employing the work force to make an assignment of work.

[149] UA Local 488 applies for judicial review of three decisions:

- (a) the decision of Umpire Beatson dated December 31, 2004;
- (b) the reconsideration decision of Umpire Beatson dated January 20, 2005;
- (c) the decision of the appeal panel dated February 3, 2005.

[150] I conclude that the application for judicial review is dismissed, with costs awarded to the Respondent, Iron Workers Union.

Heard on the 9th day of September, 2005,
Dated at the City of Edmonton, Alberta this 19th day of September, 2005.

Donald Lee
J.C.Q.B.A.

Appearances:

Yvon Seveny
Blair Chahley Seveny
for the Applicants

Gary Caroline and Jessica Bowering
Caroline Gibson & Barnes
for the Respondents

John Moreau, Q.C.
for the Umpire and the Appeal Panel