

Case Name:

**United Brotherhood of Carpenters and Joiners of
America, Local 1325 v. J.V. Driver Installations Ltd.**

IN THE MATTER OF the Labour Relations Code,
R.S.A. 2000, Chapter L-1
AND IN THE MATTER OF Decisions of the Labour
Relations Board dated July 31, 2003 and April 16,
2004, both chaired by Deborah Howes, Vice-Chair
Between
The United Brotherhood of Carpenters and Joiners of
America, Local 1325, applicant, and
J.V. Driver Installations Ltd. and Christian Labour
Association of Canada, respondents, and
Alberta Labour Relations Board, respondent, and
International Brotherhood of Boilermakers, Iron Ship
Builders, Blacksmiths, Forgers and Helpers, Local
Lodge No. 146, respondent

[2004] A.J. No. 1451
2004 ABQB 915
Docket: 0303 15637, 0403 09643

**Alberta Court of Queen's Bench
Judicial District of Edmonton
Bielby J.**

Heard: September 14, 2004.
Judgment: December 10, 2004.
(137 paras.)

Labour law — Unions — Members' rights — Choice of union — Right to change union — Collective bargaining rights — Certification — Application, time for — Conflict of laws, contracts, collective agreements — Collective agreements — Term — Labour relations boards — Judicial review.

Application for judicial review of decision of the Labour Arbitration Board. The Labour Relations Board had certified the Christian Labour Association of Canada as the bargaining agent for employees, including carpenters, of the defendant, JVD, in 1994. CLAC entered into collective agreements with JVD. The Provincial Collective Agreement, which covered the carpenters, ran from January 2000 to December

2001. Another collective agreement was entered into by carpenters for an individual project. That agreement ran from September 2000 to February 2003. The agreement for the individual project exempted the carpenters from the operation of the provincial agreement. In January 2001, the applicant applied to be certified as the bargaining agent for the general construction carpenters group of JVD employees. An LRB officer completed a report in which he indicated the presence of the required employee support and appropriate bargaining unit. The LRB decided that the applicant could advance a claim and that it was within the open period. The hearing was adjourned to let other potentially affected parties intervene. The LRB then reversed its decision and dismissed the applicant's certification application as being barred as a result of the CLAC collective agreement for the individual project under which the open period would have been January and February 2003. The applicant applied for judicial review of the decision.

HELD: Application allowed. The LRB made a patently unreasonable decision when it decided that the applicant union's application for certification as bargaining agent failed because it was outside the open period as established by the Labour Relations Code. The LRB's decision deprived the workers of the right to change bargaining agents. The process between JVD and the CLAC, as accepted by the LRB, locked employees into a cycle where they could not protest the collective agreement or the union that negotiated it. There was no informed consent on the part of the employees which would have had the effect of an early closing on an open period. Employee ratification of a successor collective agreement would have removed the right to change unions only where the employees received advance notice that such a consequence would have arisen through ratification. There was no such advance notice given in this case. However, the applicant union failed to make its application within the appropriate open period in any event. The open period arose in November and December 2001, whereas the applicant's application for certification was made in January 2001.

Statutes, Regulations and Rules Cited:

Alberta Labour Relations Code, ss. 12(3), 19(1), 37(2), 142(2), 145, 168, 183.

Counsel:

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Shawn McLeod for the Respondent, Alberta Labour Relations Board

P. Daryl Wilson for the Interveners, Pyramid Electric & Westbrook Electric

REASONS FOR JUDGMENT

BIELBY J.:—

DECISION

¶ 1 The Respondent Alberta Labour Relations Board (LRB) made a patently unreasonable decision when

it determined that the Applicant union's January 30, 2001 application for certification as bargaining agent for certain carpenters failed because it was made outside of the "open period" established for such applications under the Labour Relations Code, R.S.A. 2000, c. L-1 as amended (the Code). However, no relief ensues because that certification application was doomed for other reasons.

¶ 2 A current collective agreement may be terminated early by being replaced by a successor collective agreement. Because the Code provides that employees have the right to change the union which represents them during the final two months of operation of any collective agreement, a collateral effect of the early termination of a collective agreement may be to shorten or entirely remove the period of time in which such a change may be made ("the open period").

¶ 3 The shortening or removal of the open period may occur only by an informed act of approval by the affected employees. Thus, while the commencement of a successor collective agreement may trigger the early termination of its predecessor, without informed employee consent such an event will not also have the effect of an early closing of an open period. The employees will remain able to take steps to change the union which represents them during the final two months in which the current collective agreement was originally to operate even though it may no longer otherwise operate as a result of having been terminated early. The right to change unions is a statutory right different than legal rights created by contract, the collective agreement; while the period of operation of the right to change unions is determined by the end date of the collective agreement it is otherwise a separate creature.

¶ 4 Therefore employee ratification of the successor collective agreement will remove the right to change unions only where those employees received advance notice that such a consequence would also arise through the act of ratification. No such advance notice was given in this case.

¶ 5 The LRB's decision was patently unreasonable when, in the face of its findings that the hiring hall method of dispatch did not result in such an informed act, it nonetheless concluded that a "hiring hall dispatch" of a first employee was sufficient to constitute an adequate waiver of the open period under the current collective agreement. It thus confused the type of action adequate to ratify the operation of a collective agreement with that needed to waive the right to change union representation.

¶ 6 However, the Applicant union failed to make its certification application within the appropriate open period in any event. That period arose in November and December 2001 whereas the Applicant's application for certification was made in January 2001. Had the original collective agreement failed for some reason the Applicant would have been free to make its application in January 2001; there would have been no statutory limitation on the time when it could be launched.

¶ 7 The LRB made no reviewable error when it concluded that the original collective agreement remained in effect notwithstanding its non-compliance with s. 183 of the Code, i.e. that collective agreements made with employers who are not members of registered employers' organizations are exempt from the Code requirements that collective agreements end on April 30 of alternate years.

THE APPLICATIONS

¶ 8 Two applications for judicial review have been consolidated for the purpose of this hearing, both from decisions of the LRB. The first decision dated July 31, 2003 ("the Decision") held that the Applicant's application for certification as the bargaining agent for a group of employees of the Respondent J.V. Driver Installations Ltd. ("JVD") was barred as its application for certification was not filed within the open period

created by the existing collective agreements.

¶ 9 In the second decision of April 16, 2004 the LRB refused to reopen the hearing into the first matter to receive new evidence which the Applicant wished to tender.

PROCEDURAL HISTORY

¶ 10 The LRB observed in the Decision that JVD is a multi-disciplinary industrial contractor providing services to the pulp and paper, forestry, mining and petrochemical industries, mostly in western Canada. It generally operates one project only in Alberta at a given time.

¶ 11 The Respondent Christian Labour Association of Canada ("CLAC") first filed applications to become the certified bargaining agent for the carpenters, labourers and plumbers and pipefitters of JVD in December 1994. The LRB issued a certificate to CLAC on December 12, 1994 for a bargaining unit of JVD employees described as "General Construction Carpenters" ("the JVD carpenters"). CLAC has remained the certified bargaining agent for the JVD carpenters from that date to this. The issues in this application arise from the Applicant competitor union's attempt to acquire certification status in January 2001 in the place of CLAC.

¶ 12 Between April 15 and September 2000 CLAC entered into various collective agreements with JVD, each one of which covered all trades, including carpenters. Of particular note is the one entered into on February 18, 2000 (the Provincial Agreement) with a term running from January 1, 2000 to December 31, 2001.

¶ 13 While the Provincial Agreement purported to cover all of JVD's projects in Alberta other agreements were created to cover some individual projects. This included a collective agreement (the GPOP agreement) dated September 22, 2000 between JVD and CLAC in relation to a Grande Prairie project (GPOP) with a term of September 1, 2000 to February 28, 2003. As of September 22, 2000 JVD had not yet hired any employees who would be bound by the GPOP agreement, and no employees were yet working on the GPOP project. At the same time a Supplemental Agreement was made which exempted GPOP from the operation of the Provincial Agreement.

¶ 14 In its Decision at para. 33 the LRB found that the only project underway at the time of the Applicant's application for certification was the GPOP project. JVD had been retained by Weyerhaeuser Canada to upgrade and expand a facility in Grande Prairie, including demolishing and installing new bins, equipment and processors. JVD hired its first JVD carpenter on September 26, 2000, four days after the commencement date of the GPOP agreement.

¶ 15 On January 30, 2001 the Applicant applied to the LRB to be certified as the bargaining agent for the General Construction Carpenters group of JVD's employees. Three other unions applied for certification in relation to different bargaining units of JVD around the same time.

¶ 16 An officer of the LRB investigated the certification application and prepared a report in which he indicated the presence of the required employee support and the appropriateness of the bargaining unit. However, he recommended that the LRB dismiss the Applicant's application because it was not timely, i.e. it was not filed in an open period pursuant to s. 37 of Code. An open period is that period of time during which an existing collective agreement with one union does not act as a bar to an application by employees to revoke the certification of that union as their bargaining agent or an application by a competing union to

replace the incumbent union as the bargaining agent. The open period is defined by that section as the last two months of the term of a collective agreement or if the collective agreement has a term of more than two years, it is the 11th and 12th month of the second and any subsequent years of the term of that agreement.

¶ 17 The Applicant nonetheless advanced its application before the LRB which decided in an April 18, 2004 case management decision that the Applicant could advance a claim that it was within time based upon an interpretation of s. 183 of the Code which challenged prior interpretations of that section. In that same letter decision, the LRB denied applications for intervener status from certain labour-based applicants and consolidated the application with similar ones from other unions including the International Brotherhood of Boilermakers, Iron Ship builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146 ("the Boilermakers").

¶ 18 The LRB adjourned the hearing after it commenced on July 9, 2001 to allow other potentially affected entities to be served with notice. These were principally employers and unions whose current collective agreements might be affected if the LRB were ultimately to accept the Applicant's interpretation of s. 183 of the Code. Affected party status was initially granted to certain of those parties, and refused to other parties who sought intervention.

¶ 19 In the fall of 2001 the Applicant applied to the LRB to reconsider this decision in relation to who could intervene. Reconsideration was accorded and the matter was argued before a different panel of the LRB which decided that any party that wished to intervene must apply for intervener status when the hearing recommenced in January 2002. At that time various parties were granted intervener status and others refused.

¶ 20 After the hearing recommenced all unions withdrew their certification applications but for the Applicant and the Boilermakers.

¶ 21 An evidentiary issue arose during the hearing regarding the admissibility of three letters. In a June 12, 2002 decision the LRB held that the three letters were confidential.

¶ 22 The hearing concluded August 20, 2002 with the LRB reserving its decision.

¶ 23 On April 9, 2003 the Applicant and the Boilermakers jointly applied to reopen the hearing to produce additional evidence. This application was dismissed June 6, 2003.

¶ 24 On June 27, 2003 the LRB released the Decision, dismissing the Applicant's and Boilermakers' certification applications as being barred as a result of the operation of the GPOP agreement. Written reasons for that decision followed on July 31, 2003.

¶ 25 Judicial review was launched from that decision by the Applicant on August 28, 2003.

¶ 26 On April 16, 2004 the LRB issued written reasons for its June 6, 2003 decision dismissing the application to lead further evidence. Judicial review was launched from that decision by the Applicant on May 17, 2004.

¶ 27 These two applications for judicial review were consolidated by consent and are now before the Court. The Boilermakers did not file applications for judicial review of either of these decisions.

ISSUES

- A. Standard of Review
- B. Timeliness
- C. Revival of Provincial Agreement
- D. Section 183
- E. Apprehension of Bias
 - i. Admissibility of the three letters
 - ii. Application to reopen
 - iii. Interveners

F. Mootness

ANALYSIS

A. Standard of Review

¶ 28 Even where an error is made by an administrative tribunal, including the LRB, the result may not be the granting of an order for judicial review. Courts decline to make such orders unless certain types of errors have occurred. Traditionally the standard of patent unreasonability has applied in most instances to the decisions of labour relations tribunals. Patent unreasonability has been defined to mean that unless a Court finds the decision under review to border on the irrational or to be absurd it should not interfere; see *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92* [2004] S.C.J. No. 2, 2004 S.C.C. 23. Labour relations tribunals, in deference to their expertise in this specialized area, have been accorded a great deal of deference in relation to decisions made within their proper areas of jurisdiction.

¶ 29 Argument on this issue was galvanized by the emergence of very recent jurisprudence from the Supreme Court of Canada which may modify the application of this time-honoured standard of review. The Applicant argues that the proper standard now in many if not most cases is the less deferential standard of reasonableness. In other words, a Court should grant an order for judicial review from a Labour Relations Board decision which is unreasonable, even if it does not go so far as to border on the irrational.

¶ 30 The standard of review is a key preliminary determination in the analysis of any alleged error on the part of the LRB.

a. the functional and pragmatic approach

¶ 31 The Court must use the functional and pragmatic approach in determining the standard of review to be applied to a given issue; see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 982 which was recently summarized by the same Court in *AUPE v. Lethbridge Community College* [2004] S.C.J. No. 24, at para. 14 as follows:

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.

¶ 32 This consideration allows the Court to determine which of a range or spectrum of potential standards of review is to apply, from correctness to reasonableness to patent unreasonableness. Each decision or issue within a set of written reasons of the tribunal is analysed separately to determine the appropriate standard to be applied.

b. patent unreasonability

¶ 33 The Applicant concedes that until recently it had been fairly well accepted that the appropriate standard for judicial review of a Labour Relations Board decision was patent unreasonability for decisions made within their constituent jurisdiction and expertise; see *Alberta v. Alberta (Labour Relations Board [2002] A.J. No. 4 (Alta. C.A.))*. The Respondents argue that this is still the case.

¶ 34 Recent decisions of the Supreme Court of Canada and subsequent decisions from Alberta Courts arguably conclude that the proper standard of review may be reasonableness depending upon the consequences of the functional and rational determination in relation to a given issue.

c. Voice Construction and Lethbridge Community College

¶ 35 Two such cases have held that the proper standard of review of the decisions of labour arbitrators, also operating under the provisions of the Code, is that of reasonableness. In *Voice Justice Major* stated on behalf of a unanimous Court:

18. Dr. Q, *supra*, confirmed that when determining the standard of review for the decision of an administrative tribunal, the intention of the legislature governs (subject to the constitutional role of the courts remaining paramount - i.e., upholding the rule of law). Where little or no deference is directed by the legislature, the tribunal's decision must be correct. Where considerable deference is directed, the test of patent unreasonableness applies. No single factor is determinative of that test. A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause demonstrates circumstances calling for the patent unreasonableness standard. By its nature, the application of the patent unreasonableness will be rare. A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd. Between correctness and patent unreasonableness, where the legislature intends some deference to be given to the tribunal's decision, the appropriate standard will be reasonableness. In every case, the ultimate determination of the applicable standard of review requires a weighing of all pertinent factors. ... (emphasis added)

¶ 36 The Respondents argue that the underlined sentence in this quotation must be taken to indicate that a Court will rarely find a decision to be patently unreasonable; the Applicant argues that it means that Courts should rarely find a decision must be patently unreasonable before it may be reviewed. The statement is ambiguous.

¶ 37 Justice Major made his comments in the course of examining a decision made by an arbitrator. Arbitrators' decisions are made without the policy considerations applied by the LRB in arriving at its

decisions. Less deference is warranted where a tribunal seeks to resolve disputes or determine rights between parties without any consideration of policy objectives or balancing of multiple sets of interests; see Dr. Q at para. 30-32. However, in that decision Justice Major did not restrict his comments to arbitrators. He speaks rather of "the decision of an administrative tribunal", presumably any administrative tribunal.

¶ 38 The Respondents concede that the LRB is not protected by a full privative clause while maintaining it operates pursuant to a stronger privative clause (Code, s. 12(3)) than do labour arbitrators (Code, s. 145) not because of any pertinent differences in wording between the two sections but because of the added effect of s. 12(3) of the Code which reads:

The Board may decide for the purposes of this Act whether ...

- (f) a collective agreement has been entered into,
- (g) a person is bound by a collective agreement,
- (h) a person is a party to a collective agreement,
- (i) a collective agreement has been entered into on behalf of any person,
- (j) a collective agreement is in effect, ...

and the Board's decision is final and binding. (emphasis added)

¶ 39 The Respondents argue that this final provision augments the privative clause found in s. 19(1). However, as they also concede, this latter section is far from iron-clad. Of its three subsections two set out the procedure for an application for judicial review of a LRB decision, hardly a prohibition on such an application being made.

¶ 40 In Lethbridge Community College Justice Iacobucci, for a unanimous court, reviewed the factors described in Voice in arriving at his conclusion that the standard of review of a decision of an arbitrator in relation to s. 142(2) of the Code was one of reasonableness alone. He noted that the privative provisions of the statute and collective agreement did not grant full privative protection to the arbitrator although they attracted some degree of deference as did its relative expertise. The fact that the interpretation of s. 142(2) was a question of law militated in favour of less deference.

¶ 41 In summary, factors favouring the application of the standard of review of reasonableness on occasion to the decisions of the LRB include:

- i. Justice Major's observation that "the application of patent unreasonableness will be rare" if that in fact means courts should rarely apply that standard of review;
- ii. his failure to exclude labour relations boards from that conclusion; and
- iii. the absence of a full privative clause in the Code.

¶ 42 The factors favouring the continued usual application of the standard of patent unreasonableness to decisions of the LRB are:

- i. Justice Major's observation that "the application of patent unreasonableness will be rare" if that in fact means courts should rarely find decisions of administrative tribunals to be patently unreasonable;
- ii. the further privative quality of s. 12 of the Code; and
- iii. LRB decisions affect more than simply the parties before it; they have wider

precedential value and greater application to other situations; in short, they reflect policy.

d. judicial application of the principles in *Voice* and Lethbridge Community College

¶ 43 *Voice* and Lethbridge Community College have been considered in a number of subsequent cases. In *Via Rail Canada Inc. v. Cairns* [2004] F.C.J. No. 866 (C.A.) at para. 60 the Federal Court of Appeal distinguished Lethbridge Community College on the basis that the decisions of arbitrators are to be accorded less deference than those of the Canada Industrial Relations Board in interpreting the provisions of the Canada Labour Code on the basis of a lower level of expertise on behalf of arbitrators as well as a more narrow ambit to the effect of their decisions.

¶ 44 The Alberta Court of Appeal applied the standard of review of reasonableness to the decision of an arbitrator in *Health Sciences Assn. of Alberta v. David Thompson Health Region* [2004] A.J. No. 584 in application of the Supreme Court's conclusions in *Voice*.

¶ 45 Relying on *Voice* and Lethbridge Community College, Macklin J. of this Court applied the standard of reasonableness to his review of a decision of the LRB in which it interpreted s. 114 of the Code. He further applied the standard of correctness in considering its decision in relation to whether certain provisions of the Canadian Charter of Rights and Freedoms applied or were infringed in *AUPE v. Provincial Health Authorities of Alberta*, [2004] A.J. No. 901, 2004 ABQB 591. Section 114 authorizes the LRB to direct an employer to suspend the deduction and remittance of union dues to a union which is engaged in an illegal strike. Justice Macklin rejected the argument that s. 12 of the Code reinforced the s. 19 privative clause although that comment was obiter in the context of the case before him.

¶ 46 Finally, in *AUPE v. International Union of Operating Engineers, Local 955, and the Good Samaritan Society*, 2004 ABQB 635, after considering the effect of *Voice* and Lethbridge Community College Smith J. of this Court also concluded at para. 35 that s. 12 added nothing to the privative protection afforded to the decisions of the LRB. She nonetheless found the standard of patent unreasonability applied to the decision under review as it dealt with a successorship issue on the basis that it was "a matter deep within the expertise of the Board" and that the area bore many policy considerations and that the issues were primarily factual.

e. standards of review of the issues in this case

¶ 47 The law in relation to standards of review of the decisions of labour relations tribunals may be in a state of flux. Fortunately that uncertainty has no effect on this decision because of my ultimate conclusions that the LRB's decision in relation to timeliness was patently unreasonable and in relation to s. 183 was reasonable.

¶ 48 If the proper standard is in fact reasonableness in relation to the timeliness issue, the LRB's decision breaches that standard as well; a decision which is patently unreasonable obviously offends the lesser standard of reasonableness.

¶ 49 Conversely, the LRB's decision in relation to s. 183 was reasonable. Therefore it clearly did not offend the more deferential standard of patently unreasonable if that in fact is the standard in this case.

¶ 50 Neither party argued that the standard of correctness applied to either of these issues.

¶ 51 The standards of review in relation to the other challenges were not in issue. In relation to the actions which the Applicant argued created an apprehension of bias or were otherwise unfair or breached the rules of natural justice, the Respondents each acknowledged that judicial review should issue if I found any of these claims to have been made out.

B. Timeliness

¶ 52 The LRB dismissed the Applicant's application for certification as being time-barred because it was not filed within the open period under the existing collective agreement. It arrived at this conclusion notwithstanding the fact that the effect of the early commencement of the existing collective agreement meant that no such open period ever came into existence.

¶ 53 The Applicant argued that the GPOP agreement is void because it was not the subject of informed ratification by the JVD carpenters. Alternatively and additionally it argued that the GPOP agreement and the Provincial Agreement were void because they failed to end on April 30 of an odd-numbered year and thus violated s. 183 of the Code. If both these agreements are void the Applicant's application for certification would not have been time-barred. No collective agreement would have been in force on the date of its certification application, January 30, 2001, with the result that it was free to make a certification application on that date.

¶ 54 Section 37(2) of the Code would have permitted it to bring on its application in those circumstances even in the face of CLAC's existing certification. It reads:

(2) An application for certification may be made, ...

(b) if a bargaining agent has been certified in respect of any of the employees in the unit, at any time after the expiration of 10 months from the date of the certification of the bargaining agent, unless a collective agreement has been entered into by the bargaining agent, ...

¶ 55 Here there is no issue that CLAC was certified as bargaining agent for the JVD carpenters and that more than 10 months had expired since that certification by January 30, 2001 when the Applicant made its application for certification. If each of the GPOP or Provincial Agreements were void no bar existed to the Applicant's certification application.

¶ 56 The Provincial Agreement was stated to run from January 1, 2000 to December 31, 2001. It applied, on its terms, to all of the JVD carpenters in Alberta. The GPOP agreement was created by exempting out those employed on GPOP. It was a separate collective agreement in relation to those employees alone. It was stated to run from September 1, 2000 to February 28, 2003. At the time it was signed a supplementary agreement was also signed which exempted the JVD carpenters who were covered by the GPOP agreement from the operation of the Provincial Agreement. In other words it carved them out of the operation of the Provincial Agreement.

¶ 57 The effect of the creation of the GPOP agreement was to deprive the JVD carpenters working on GPOP from exercising their rights to change unions in November and December 2001 which was the open period under the Provincial Agreement. By the time that open period arrived, rights under that agreement had been terminated in favour of rights created under the GPOP agreement. While there would have been an open period under the GPOP agreement it would not arise until the final two months of its operation,