The Labour Relations Board
Saskatchewan

TEAMSTERS, LOCAL 395, Applicant v. PCL INDUSTRIAL CONSTRUCTORS INC., Respondent

LRB File No. 019-10; December 20, 2011
Chairperson, Kenneth G. Love, Q.C.; Board Members: Mick Grainger and Jim Holmes

For the Applicant Union:	Rick Engel, Q.C. and Heather Robertson
For the Respondent Employer:	Larry Seiferling, Q.C.

Summary Dismissal – Board considers if application should be summarily dismissed for lack of jurisdiction.

Deferral to Arbitration – Board reviews principles and test for deferral to arbitration – Board discusses rationale for deferral - Board considers if deferral to Plan for settlement of jurisdictional disputes in the construction industry appropriate.

Costs – Employer requests award of costs against Union – Board considers statutory authority and determines that it has only limited jurisdiction to make monetary award.

REASONS FOR DECISION

Background:

[1] The Teamsters, Local 395 (the "Union" or "Teamsters") applied, along with the Saskatchewan Provincial Building & Construction Trades Council, on February 19, 2010, alleging that PCL Industrial Constructors Inc. (the "Employer" or "PCL"), along with the CLR Construction Labour Relations Association of Saskatchewan Inc., were in violation of *The Trade Union Act*, R.S.S. 1878, c.T-17 (the "*Act*") having engaged in an unfair labour practice contrary to s. 11(1)(c) of the *Act* by:

1. refusing in its Final Jurisdictional Work Assignment to recognize the Teamsters, Local 395 as a party to the August 5, 2009 Project Collective Agreement with respect to the assignment of construction work traditionally assigned to the Teamsters; and

2. refusing to participate in the arbitration hearing set up under the Canadian Plan for Settlement of Jurisdictional Disputes in the

Construction Industry to resolve the Teamsters' jurisdictional claim for construction work .

[2] On November 24, 2011, the Union amended its application in several respects. Firstly, the Saskatchewan Provincial Building & Construction Trades Council was deleted as a Co-Applicant. Secondly, the CLR Construction Labour Relations Association of Saskatchewan Inc. was removed as a Respondent in the proceedings. Thirdly, the alleged unfair labour practices were amended to allege the following breaches under s. 11(1)(e) of the *Act*:

(a) by discriminating in its final Jurisdictional Work Assignment in regard to hiring members of the Teamsters, Local 395 even though the union is a party to the August 5, 2009 Project Collective Agreement with respect to the assignment of construction work traditionally assigned to the Teamsters; and

(b) There is a valid collective agreement (the Project Agreement) in place and both the Teamsters Local 395 and PCL Industrial Constructors Inc. are parties to and bound by the Agreement.

[3] In its Reply to the revised application, the Employer denied having committed any unfair labour practice and requested that the application be dismissed with costs against the Union. The specific relief requested in the reply was:

(a) A ruling that the amended application be dismissed; and

(b) A ruling that the appropriate forum to determine jurisdictional disputes in the construction industry is the Canadian Plan for the Settlement of Jurisdictional Disputes and that the Labour Relations Board has no jurisdiction to deal with this matter or alternatively would have to defer to the group that the parties agreed would resolve these disputes as is done regularly by deferral to arbitration; and

(c) As PCL Industrial and all of the building trade unions interested in this matter already agreed to a hearing set for March 10 and 11, 2011 was cancelled by the Teamsters withdrawing their application that all expenses and costs of PCL Industrial to defend this application should be borne by the Teamsters.

[4] At the commencement of the hearing of this matter on November 30, 2011, the parties agreed that they would deal with the preliminary matter raised by the Employer concerning the jurisdiction of the Board in respect of this matter. In particular, the parties addressed the issue of whether or not the Board should defer deciding this matter if it considers that it could be resolved by arbitration or an alternative method of resolution pursuant to s. 18(l) of the *Act*. In addition, the Employer argued that the matter should be summarily dismissed pursuant to s. 18(o) of the *Act*. These reasons relate to the preliminary matter only.

Facts:

[5] At the outset of the hearing both parties provided a book of Exhibits to the Board all of which were admitted through agreement of the parties. As a result, no witnesses were called to testify. We have considered and relied upon the documents provided and the oral arguments of counsel in our determination of this matter.

[6] On July 14, 2009, Consumers' Co-operative Refineries Ltd. ("CCRL"), as Owner of the Project, entered into a Project Collective Agreement (the "PCA") for expansion of the Regina Refinery. The PCA was between the following parties:

> *The Boilermakers' Contractor Association of Saskatchewan ("BCA") and the CLR Construction Labour Relations Association of Saskatchewan Inc. ("CLR") as Representative Employers Organizations and exclusive Bargaining Agents on behalf of all contractors working on the Project and The Saskatchewan Provincial Building & Construction Trades Council, Affiliated and other Building Trade Unions Signatory Hereto.*

[7] The PCA was entered into by the various parties pursuant to the provisions of *The Construction Industry Labour Relations Act, 1992*[1], which *Act* defines a "project collective agreement" as follows:

> *2(l) project collective agreement means a collective bargaining agreement that is to be effective during the term of a project and that is negotiated among:*
>
> *(i) a trade union or unions;*
>
> *(ii) where applicable, a representative employers' organization or organizations; and*
>
> *(iii) a project owner or project owners;*

[8] Pursuant to s. 9 of *The Construction Industry Labour Relations Act, 1992*, CLR is the designated Representative Employers' Organization for a number of trades, including the Teamsters Trade Division. Mr. Vic Klaussen was a signatory of the PCA on behalf of the Teamsters. Mr. Ron Balzer signed the PCA on behalf of the Teamster Trade Division Representative Employers' Organization.

[9] In an Affidavit filed by CLR in response to the original application by the Union, Mr. Sid Matthews, the then President of CLR deposed that:

> *There is no collective bargaining agreement in place between the Teamsters on the one hand and CLR as the representative employers organization on the other representing all contractors in the Teamsters Trade Division. As such, the Teamsters have been largely inactive in Saskatchewan and work that might otherwise have been assigned to the Teamsters has been done by other unions.*

[10] At the Mark-up meeting for the Regina refinery expansion project on October 13, 2009 and by letter dated November 2, 2009, the Union wrote to the Employer claiming some of the work to be undertaken at the CCRL refinery expansion project, Section V. At the Pre-Job Conference and Preliminary Jurisdictional Mark-Up Meetings on October 13, 2009 and October 29, 2009, no work was allocated to the Union. In its letter, the Union claimed the following work:

> *The International Brotherhood of Teamsters, in accordance with the jurisdiction vested in our organization by the American Federation of Labour, claim all over-the-road hauling and delivery of equipment, goods and/or materials to and from the job site and/or sites. Where control is exercised over the procurement of goods and services (material, refuse, containers, portable washrooms, aggregate, Redi-mix, fuel, courier services, etc.) either directly or indirectly, we request that your selections are made from the International Brotherhood of Teamsters "Fair Carrier" list, in consultation with the Teamsters Union Local No. 395. In the Regina arena of Construction, the concrete suppliers covered by the International Brotherhood of Teamsters is Inland Cement, the suppliers of refuse containers covered by the International Brotherhood of Teamsters is Waste Management Canada Ltd.*

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[1] S.S. 1992 c. C-29.11

> *We also claim all transportation of men, equipment and materials, including the transportation of clean-up and contaminated materials. The hauling of materials, equipment and the fueling of equipment, boom trucks, picker trucks and related equipment, historically has been the jurisdiction of the International Brotherhood of Teamsters, as recognized by the Building and Construction Trades Department (AFL-CIO), Green Book.*
>
> *Further, we claim exclusive jurisdiction on the general warehouse and storage areas, except where jurisdictional agreements with other crafts take precedence.*
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> *Note: Warehouse jurisdiction includes unloading, loading, distribution, inventory control, handling, cleaning and maintaining of the warehouse and lay-down areas checking and receiving of any and all materials to designated general warehouses, satellite warehouses, designated storage areas and lay-down yards.*

[11] On or about November 23, 2011, PCL made its final jurisdictional work assignments for the Regina refinery expansion project. No work was assigned to the Teamsters. The work claimed by the Teamsters was assigned to other trades. For example, "fueling of major construction equipment" was assigned to the Operating Engineers. Handling of materials and plant equipment was assigned to each craft to handle their own materials.

[12] On December 16, 2009, the Teamsters wrote to the Acting Administrator of the Plan for Settlement of Jurisdictional Disputes in the Construction Industry (the "Plan"). In their letter, the Teamsters asked that the dispute concerning work assignments to the Teamsters be reviewed under the Plan and a decision rendered.

[13] By letter dated December 18, 2009, PCL responded to the Acting administrator of the Plan "Without Prejudice", claiming that the Plan did not have jurisdiction to deal with the dispute because PCL was not "stipulated" to the Plan.

[14] On December 21, 2009, the Acting plan administrator wrote to the Union and PCL requesting additional information on which to make an informed determination. On December 21, 2009, PCL supplied the requested information which was in its control to the Acting plan administrator. That same day, the Acting plan administrator advised she would review the materials provided and advise.

[15] On January 7, 2010, the Plan administrator wrote to the parties with respect to PCL's claim that it was not stipulated to the Plan. In the second paragraph of her letter, the Administrator says:

> *In order for the Plan to proceed and process this or any dispute, a certain basic criteria must be met. The Plan is clear; all parties must be stipulated to the Plan. As the Administrative [sic] of the Plan I am adhering to Article IV, Section 5 which states: "In the Administrator's sole discretion, the issue of stipulation may be submitted to an Arbitrator." I am exercising that discretion in remitting this to an Arbitrator.*

[16] In accordance with that correspondence, the Plan administrator then sought the parties input into the selection of an arbitrator to hear the dispute.

[17] On January 8, 2010, the Construction Director for IAG Global Projects ("IAGGP"), who was contracted by CCRL to perform Program Management and Construction Management of the refinery expansion wrote to the Plan administrator. IAGGP wrote to the Plan administrator "to clarify the intent of the Project Collective Agreement (PCA) with respect to the relationship between contractors and unions working on the project". In that letter, the Construction Director noted:

> *However, it has never been our intention to require that Contractors utilize trades to which they are not signatory. Article 4.02 of the PCA states, "The Trade Unions agree that the Contractor(s) or sub-contractors are not, by signing of this agreement, or by involvement in this Project, voluntarily recognizing the Trade Unions that are signatory to this Agreement". Said another way, as long as all of our work is performed by competent Building Trade Affiliates within all the applicable regulations, it was never our intention to require a contractor to hire or subcontract work out to a union that has not previously established a bargaining relationship with that contractor.*

[18] The Plan administrator emailed the parties on January 12, 2010, apologizing for an error contained in the second paragraph of her letter of January 7, 2010. She explained that in making the statement in the letter concerning "stipulation", that she had referenced the wrong version of the Plan. In her email, she advises:

> *Having now carefully reviewed the May 2009 edition of the Green Book Article II, Section 2 states that stipulation by all parties is not necessary and that only the moving party, in this case the International Brotherhood of Teamsters must be stipulated to the Plan in order to move a case foreword. Accordingly, your selection of Arbitrator has been noted and we will proceed with this matter.*

[19] The email of January 12, 2010 was followed up by a letter, providing similar information on January 13, 2010.

[20] An arbitrator was chosen by the parties. He wrote to the parties by letter dated January 20, 2010 advising that a hearing of the matter would be held on February 2, 2010 in Regina, Saskatchewan commencing at 9:00 AM. On January 27, 2010, Counsel for PCL wrote to the Plan administrator challenging the jurisdiction of the arbitrator on two (2) grounds:

> 1. *PCL said that the Teamsters notice to the Administrator does not identify a proper dispute between PCL and the Teamsters as the Teamsters have no relationship with PCL in the Province of Saskatchewan on the project in question or on any project.*
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> 2. *Even if PCL were a party to the dispute, the Arbitrator has improperly been appointed…. Because the work has been allocated by PCL in accordance with their trade practice to other building trade unions and because each of these unions would be interested parties in the outcome of the dispute your plan provides that all these interested parties would have to be given notification of the dispute and would be involved in the selection of the arbitrator.*

[21] As a result of this correspondence, the Plan administrator wrote to the parties on January 27, 2010 advising that "the arbitration scheduled for February 2, 2010, should be cancelled to provide the other unions with the opportunity to participate in the resolution of this matter." However, she rejected the first point raised by counsel for PCL saying "[U]nder the Plan, I may refer questions of stipulation to the Plan arbitrator selected by the parties. … I will refer the matter to the Plan arbitrator."

[22] The Plan administrator reiterated her determination to refer the matter of stipulation under the Plan to the arbitrator in response to an email from counsel for PCL dated January 27, 2010. In her reply on January 28, 2010, she states:

> *I am permitted under Article II, Section 2 of the Canadian Plan to process jurisdictional disputes if the moving party is stipulated to the Plan. The moving party in this case, the Teamsters, is stipulated to the Plan. Accordingly, I am continuing to process the dispute. Moreover, the Teamsters have alleged that PCL is stipulated to the Plan. Because there is a dispute over the question of PCL's stipulation, that matter will be referred to the arbitrator.*

[23] On February 19, 2010, the Teamsters made their original application to this Board.

[24] On February 23, 2010, the Union wrote to the Plan administrator to advise that the "Teamsters will not be proceeding with the above referenced dispute at this time. We respectfully advise that this matter is withdrawn without prejudice to our right to re-file at a future date". The Plan administrator, by letter dated that same date, advised the parties that she accepted the withdrawal of the dispute.

Relevant statutory provision:

[25] Relevant statutory provisions are as follows:

> *5. The board may make orders:*
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> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
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> *(e) requiring any person to do any of the following:*
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> *(i) to refrain from violations of this Act or from engaging in any unfair labour practice;*
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> *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*
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> *. . .*
>
> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
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> *. . .*
>
> *(c) to fail or refuse to bargain collectively with representatives elected or appointed, not necessarily being the employees of the employer, by a trade union representing the majority of the employees in an appropriate unit;*
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> *. . .*
>
> *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in any proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended*

> *contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reasons shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*
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> . . .
>
> *18. The board has, for any matter before it, the power:*
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> . . .
> *(l) to defer deciding any matter if the board considers that the matter could be resolved by arbitration or an alternative method of resolution;*
>
> . . .
>
> *(o) to summarily refuse to hear a matter that is not within the jurisdiction of the board;*

Employer's arguments:

[26] Counsel for PCL argued two (2) principle points:

1. The Board should summarily dismiss the application pursuant to section 18(o) of the *Act* as the Board does not have jurisdiction with respect to disputes of this nature which the parties themselves have agreed in the Project Collective Agreement should be referred to the Plan for Settlement of Jurisdictional Disputes in the Construction Industry; and alternatively

2. In the circumstances of this case, the Board should, if it does not summarily dismiss the application, should defer to the Plan for Settlement of Jurisdictional Disputes in the Construction Industry pursuant to section 18(l) of the *Act*.

[27] In support of its argument that the matter should be summarily dismissed, PCL filed a copy of the Board's decision in *Tercon Industrial Works Ltd, et al v. Saskatchewan*

Regional Council of Carpenters, Drywall, Millwrights and Allied Workers et al[2]. PCL argued that if the application cannot succeed, then it must be dismissed.

[28] PCL argued if the Board had made it clear in *Construction and General Workers Union Local 890 v. International Erectors and Riggers, a Division of Newberry Engineering Ltd.*[3] that the Board was not the proper forum in which to decide jurisdictional disputes. PCL argued that the Board made that position clear in its discussion of this case in *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 v. K.A.C.R. (A Joint Venture).*[4]

[29] Alternatively, PCL argued that the Board's policy, which was to defer to another adjudicative body which had appropriate jurisdiction should be respected in this case. It argued that the Court of Appeal has established the rules for when the Board should defer to another body in *United Food and Commercial Workers, Local 1400 v. The Labour Relations Board and Westfair Foods Limited.*[5]

[30] PCL also referred to the Board's decision in *United Food and Commercial Workers Union, Local 248-P v. Star Egg Co. Ltd.*[6] wherein the Board extensively canvassed the authority of the Board to defer to another body.

[31] PCL also referred to the Board's decisions in *CUPE v. City of Saskatoon*[7] where the Board again discussed its authority to defer making a decision and the Board's decision in *RWDSU v. Canadian Linen Supply Co. Ltd.*[8] another deferral decision of the Board.

[32] In addition to the (2) two main arguments outlined above, PCL also argued that it should be awarded costs against the Union because they should not have had to appear before the Board in the circumstances of this case.

Union's arguments:

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[2] [2011] CanLII 8881 (SKL.R.B.), See also the decision of Popescul, J confirming the said decision [2011] CanLII 380 (SKQB)
[3] Reasons for Decision dated July 17, 1979, LRB File No. 114-79
[4] [1983] Nov. Sask. Labour Rep. 56, LRB File No. 275-83
[5] [1993] 95 D.L.R. (4th) 541
[6] [1997] Sask. LRBR 578, LRB File No. 024-97
[7] LRB File Nos. 155-89, 026-90, & 043-90 to 045-90
[8] LRB File No. 150-89

[33] The Union, in its arguments, acknowledged that the Board should not become engaged in a determination of the jurisdiction issue between the Union and PCL and other unions which have been awarded the work that the Teamsters claim. However, the Union argued that it was open to the Board to make a determination as to whether or not the Teamsters and PCL are a party to the PCA. Otherwise, it argued, PCL would be able to continue to ignore the claims of the Union for the work and continue to discriminate against members of the Teamsters in hiring, contrary to section 11(1)(e) of the *Act.*

[34] The Union relied upon both section 11(1)(e), and section 18(r) of the *Act.* Section 18(r), it argued, gave the Board the authority to determine whether or not "any person or organization is a party to or subject to a collective agreement". In addition, the Union argued that the PCA was a collective agreement as defined in the *Act.*

[35] The Union argued that section 11(1)(e) of the *Act* was applicable in these circumstances since it made in an unfair labour practice to "discriminate in regard to hiring…". The Union argued that by failing to allocate any work to the Teamsters, that PCL was being discriminatory towards members of the Teamsters.

[36] The Union argued that the determinations by the Board under sections 11(1)(e) and 18(r) of the *Act* were discrete issues that could be differentiated from the issue of jurisdiction, which issue, it argued should be determined under the Plan. In making this distinction, the Union too relied upon the Court of Appeal's decision in *United Food and Commercial Workers, Local 1400 v. The Labour Relations Board and Westfair Foods Limited.*[9]

[37] The Union argued that the Board's decision in *SPI Marketing Group (Re:)*[10] was authority for its position that the Board can exercise its jurisdiction to determine that the employer committed an unfair labour practice by failing to co-operate in the arbitration process. It also relied upon *Saskatoon Board of Police Commissioners v. Scott et al*[11] in that regard.

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[9] Supra note 5
[10] [1996] S.L.R.B.D. No. 9
[11] [2001] CanLII 82 (SKCA)

[38] The Union argued that the *UFCW v. Star Egg Co. Ltd.*[12] should be distinguished from this case in that in the Star Egg case, there was no challenge by either party to the arbitrator's jurisdiction.

[39] The Union argued that the interpretation of s. 18(r) should be similar to s. 16(p) of the *Canada Labour Code*[13] on which it was modeled. It cited the case of *BVTV (Re:)* in support of that interpretation.

[40] The Union opposed any award of costs to the Employer and relied upon the decision of the Saskatchewan Court of Queen's Bench in *Saskatchewan Government Employees Union v. Saskatchewan (Labour Relations Board)*[14] in support of that position. It also relied upon the recent decision from the Supreme Court of Canada in *Canadian Human Rights Commission and Donna Mowat v. Canada (Attorney General) et al.*[15]

Analysis and Decision:

[41] This application puts three (3) questions before us for determination by the Board. Those are:

1. Should the application be summarily dismissed as being outside of the Board's jurisdiction?

2. Should the Board defer to an arbitrator appointed pursuant to the Plan?

3. Should an award of costs be made?

<u>Should the application be summarily dismissed?</u>

[42] We do not agree that this is a proper case in which the Board should "summarily refuse to hear a matter that is not within the jurisdiction of the Board" pursuant to the power granted to the Board by section 18(o). The decision cited by counsel for the Employer, *Tercon Industrial Works Ltd, et al v. Saskatchewan Regional Council of Carpenters, Drywall, Millwrights*

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[12] *Supra* Note 6.
[13] R.S.C. 1985 c. L-2
[14] [1994] CanLII 5121
[15] 2011CanLII 53 (SCC)

and Allied Workers et al[16] did not deal with a summary refusal to hear a matter under section 18(o), but rather was a decision which dealt with a summary refusal to hear a matter under sections 18(p) and (q).

[43] A review of the Board's jurisprudence with respect to summary dismissal pursuant to section 18(o) shows the Board's reluctance to summarily dismiss any application for lack of jurisdiction, except in the clearest of cases.[17]

[44] In the *Metz* case, *supra*, the Board summarily dismissed an application because it sought to have the Board sit in appeal of its earlier decision, something the Board noted that it had no jurisdiction to do. In the *Soles* case, *supra,* the Board summarily refused to hear portions of the application which would have required it to make an adjudication pursuant to *The Labour Standards Act.* In the *Ajak* case, *supra,* the Board summarily refused to hear portions of an application related to reinstatement and monetary loss.

[45] This case is not so clear cut from a jurisdictional standpoint. The Union has raised issues which, given the proper factual base, could fall within the Board's jurisdiction under s. 11(1)(e). Therefore, it is not a case where the application should be summarily dismissed pursuant to section 18(o) as the Board's jurisdiction could be invoked.

Should the Board defer to an arbitrator pursuant to s. 18(l)?

[46] The parties are in agreement that the leading authority in respect of this question is the Saskatchewan Court of Appeal decision in *United Food & Commercial Workers, Local Union 1400 and The Labour Relations Board et al.*[18] In that decision, then, Chief Justice Bayda, speaking for the court, reviewed the Court's earlier decision in *Retail, Wholesale and Department Store Union v. LRB (Sask) and Morris Rod Weeder Co.*[19] and the decision of the Supreme Court of Canada in *Labour Relations Board of Saskatchewan v. The Queen ex rel of F.W. Woolworth Co. Ltd. et al.*[20]

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[16] *Supra* Note 2
[17] See Metz v. S.G.E.U. [2008] CanLII 58436, *Soles v. Canadian Union of Public Employees, Local 4777*, [2006] CanLII 62947 (SK LRB), Ajak v. United Food And Commercial Workers, Local 1400, [2008] CanLII 87262 (SK LRB)
[18] *Supra* Note 5.
[19] 78 CLLC 14, 140
[20] [1956] S.C.R. 82, [1955] CanLII 82 (S.C.C.)

[47] The Board recently considered its authority to defer to an arbitrator pursuant to section 18(l) in *Grain and General Services Union (ILWU CANADA) v. Western Producer Publications Partnership, operating as Western Producer Publications*[21]. In that case, the Board confirmed that the three part test postulated by the Court of Appeal remained as the leading jurisprudence for the Board. In addition, the Board relied upon its previous decision in *Administrative and Supervisory Personnel Association v. University of Saskatchewan*[22].

[48] The decision in *United Food & Commercial Workers, Local Union 1400 and The Labour Relations Board et al.* established the following criteria for the Board to exercise its authority to defer to arbitration:

> *(i) the dispute put before the Board in an application for an unfair labour practice order and the dispute intended to be resolved by the grievance-arbitration procedure provided for in the collective agreement must be the same dispute;*
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> *(ii) the collective agreement must make possible (i.e. empower) the resolution of the dispute by means of the grievance arbitration procedure; and*
>
> *(iii) the remedy sought under the collective agreement must be a suitable alternative to the remedy sought in the application before the Board.*

[49] The Board also considered its authority to defer to arbitration in *Canadian Union of Public Employees, Local 59 v. City of Saskatoon*[23]. In this case, the Board determined not to defer to an arbitrator and assumed jurisdiction under the *Act*. This determination by the Board was recently upheld on judicial review by the Court of Queen's Bench[24] and the Court of Appeal.[25]

[50] In *United Food and Commercial Workers, Local 1400 v. Westfair Foods Ltd.*[26], Ball J., a former Chairperson of this Board, discussed the history of and the rationale for the Board's authority to defer to arbitration. At paragraphs [88] to [96] he says:

> *The Concept of Deferral and Referral*

[21] [2011] CanLII 75706, LRB File No. 043-11
[22] [2005] Sask. L.R.B.R. 541, LRB File No. 070-05
[23] [2009] CanLII 67403
[24] [2010] CanLII 116 SKQB
[25] [2011] CanLII 148 SKCA
[26] [2002] CanLII 154 (SKQB), 213 DLR (4th) 715; [2002] 8 WWR 654; 44 Admin LR (3d) 100; 218 Sask R. 196

[88] Having concluded that Mr. Brown's choice of labour arbitration was appropriate to his complaint, I note the Supreme Court of Canada's direction in Weber v. Ontario Hydro, New Brunswick v. O'Leary and Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, supra, that wherever possible employment issues should be comprehensively dealt with in one forum only. Once an employment dispute has been adjudicated, substantially the same complaint should not be heard again in another forum. This may require deferral by a forum to the complaint's forum of choice.

[89] Adjudicators seeking practical workplace solutions can and do defer to a more appropriate forum in any particular case. That approach was uniformly adopted a number of years ago by labour relations boards in Canada where a complaint might be the subject of an arbitrable grievance as well as an alleged unfair labour practice within the board's jurisdiction.

[90] Labour relations boards defer to a labour arbitrator if the essential nature of the complaint arises out of the collective agreement and if an arbitrator can provide complete relief in response to the complaint. The board will hear the complaint if arbitration is unavailable or unsuitable for any reason such as a remedial limitation. The boards deferral does not prejudice the applicant's right to bring the matter back to the board if the arbitrator declines jurisdiction. By taking that approach the board ensures that it does not abdicate its statutory responsibility while recognizing and promoting arbitration as the statutorily mandated scheme for the resolution of employer/employee disputes. See, for example, U.F.C.W., Local 1400 v. Western Grocers, [1993] 1st Quarter Sask. Labour Rep. 195; Saskatoon (City) v. C.U.P.E., Local 59 (1990) 8 C.L.R.B.R. (2d) 310; Canadian Linen Supply Co. and R.W.D.S.U. (1990) 8 C.L.R.B.R. (2d) 228; Saskatchewan Government Insurance, Regina, Saskatchewan v. Saskatchewan Insurance Office and Professional Employees Union, Local 397 (1987), 15 C.L.R.B.R. (NS) 313; United Steelworkers of America, Local 4728 v. Willock Industries Ltd. (1980) 31 Sask. Labour Rep., No. 5, 72 and see also Valdi Inc., [1980] O.L.R.B. Rep. 1254.

[91] The deferral approach has not been confined to labour relations boards and is not revolutionary. It was recommended by Professors Swan and Swinton in 1983, when they pointed out the need for human rights' adjudicators to develop doctrines of deference to the decisions of other tribunals based on the same factual situations and commended the deferral approach taken by Professor Kerr in Singh v. Domglas Limited (1980), 2 C.H.R.R. D/285. (See K. Swan and K. Swinton, "The Interaction of Human Rights Legislation and Labour Law" in Studies in Labour Law (Toronto: Butterworths, 1983) 111 at 141).

[92] The deferral approach has also been recommended by R. H. Abramsky in "The Problem of Multiple Proceedings: An Arbitrator's Perspective" in W. Kaplan, et al., eds., Labour Arbitration Yearbook 1996-97 (Toronto: Lancaster House, 1996) 45 and suggested by The Honourable Mr. Justice William J. Vancise of the Court of Appeal for Saskatchewan in papers presented to the Canadian Bar Association in 1999 (see "Button, Button—Who gets the Button? Which Statutory Forum has Jurisdiction?" (Canadian Bar Association, Ottawa, Ontario, November 19, 1999)) and the University of Calgary, (see "Button, Button—Who gets the Button? Which Statutory Forum has Jurisdiction? (No. 2)" (University of Calgary, Labour, Arbitration and Policy Conference, June 7 and 8, 2000, Calgary, Alberta)).

[93] That "deferral" approach is what the Labour Standards' Branch took in respect of Mr. Brown's complaint in this case. Knowing that the Union and the Employer had negotiated a modified work program for the grievor and that Mr. Brown and the Union had filed a grievance in respect of the Employer's decision to terminate that agreement, the Labour Standards' officer deferred to the arbitration process. One reason may have been the often expressed view that specialized expertise in understanding and enforcing the rights and obligations of all parties in the context of the collective agreement is an important consideration in determining which adjudicative body most appropriately has jurisdiction over a matter.

[94] Recent amendments to the Human Rights Code also contemplate a "deferral" approach by permitting a tribunal established under that Act to defer to another proceeding. Section 27.1 of the Human Rights Code, proclaimed November 15, 2001, provides:

> ***27.1**(1) In this section, **'proceeding'** includes a proceeding authorized by another Act, a civil proceeding or a grievance under a collective agreement.*
>
> *(2) At any time after a complaint is filed or initiated pursuant to section 27, the Chief Commissioner, or person designated by the Chief Commissioner, may dismiss the complaint where he or she is of the opinion that:*
>
> *...*
>
> *(d) the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding;*
>
> *...*
>
> *(3) The Chief Commissioner may, at any time after a complaint is filed or initiated, defer further action if another proceeding, in the opinion of the Chief Commissioner, is more appropriate having regard to the nature of the allegations and the remedies available in the other proceeding.*

[95] Thus, although the Human Rights Code involves "quasi-constitutional human rights" which take precedence over all other rights and statutes, s. 27.1 of the Human Rights Code, proclaimed after Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, supra. and the trilogy of decisions, is a statement by the legislature that deferral by tribunals established under that Act to another adjudicator may be the most appropriate approach. This development in Saskatchewan follows an approach by human rights' commissions elsewhere in Canada which is described by Lynk and Slotnick, Labour Arbitration Yearbook 1999-2000, supra, at pp. 33-34:

> *The fifth development has been that human rights commissions in the various jurisdictions are experiencing serious difficulties in administering their increasingly heavy caseloads. Indeed, it was the laggardly progress of discrimination complaints through the human rights process that, in large part, prompted unions and employers to support an expansion in the jurisdiction of labour arbitrators. And, in the face of their mounting backlogs, many human rights commissions now require that any complaint arising in a unionized workplace must first be adjudicated through the collective agreement grievance procedure. While human rights tribunals have yet to completely cede their jurisdiction to*

> *boards of arbitration, their administrative difficulties have accelerated the rise of arbitration as the primary forum for adjudicating allegations of discrimination in the unionized workplace.*
>
> *[96] Like Professor Weiler thirty years earlier, the authors conclude that labour arbitrators can and should apply human rights remedies as the best means to avoid multiple proceedings.*

[51] The majority of this jurisprudence was developed prior to the amendments to the *Act* which added *inter alia* section 18(l) to provide specific authority to the Board to "defer deciding any matter if the board considers that the matter could be resolved by arbitration **or an alternative method of resolution**". [Emphasis added]

[52] By virtue of section 18(l), the Board is not restricted in making deferral to only an arbitration process. Any method of alternative resolution may be deferred to. In this case, the Board can and, for the reasons which follow, will defer to a determination under the Plan. As noted above, by Mr. Justice Ball, "[T]he deferral approach has not been confined to labour relations boards and is not revolutionary."

[53] Having established the Board's jurisprudence and authority for deferral, it is necessary to examine the factors listed by the Court of Appeal in the *UFCW*[27] case. The first factor to be considered is whether or not the dispute put before the Board in this application for an unfair labour practice order and the dispute intended to be resolved by the Plan must be the same dispute. The principal dispute between the parties is on this point.

[54] Counsel for the Union makes a somewhat circular argument. For us to assume jurisdiction over the dispute and make a determination of the unfair labour practice application, some essential facts must be determined. In essence, for us to determine if the Teamsters have been discriminated against, we must first find that they, as a fact, are entitled to the work which they claimed as being Teamsters' work.[28] Absent that determination, we are unable to determine that they have been discriminated against by PCL.

[55] Additionally, to support the factual basis for a finding of an unfair labour practice, the Board would be required to review and determine if PCL was required by the PCA to provide

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[27] *Supra* Note 5.
[28] See paragraph 10 *supra*

any work to the Teamsters as a matter of contract, something best left to an arbitrator pursuant to Section 25(1) of the *Act*.

[56] The Board is not the best party to deal with either of these factual disputes. The Plan is far more experienced and better able to deal with jurisdictional work disputes in the construction industry. This is the Plan's only purpose. Similarly, an arbitrator under the provisions of section 25(1) would be better equipped to deal with the issues surrounding the question of whether PCL was obligated under the PCA to provide work to the Teamsters.

[57] The Plan administrator has noted in her correspondence to the parties that the issue of "stipulation" to the Plan is a matter that can be determined by the arbitrator under the plan. Since the Plan is best equipped to determine the jurisdictional issue and appear to have the capability to determine whether or not PCL is stipulated to the Plan, or need to be stipulated to the Plan, for the Plan to have jurisdiction over the dispute.

[58] On the surface, this is not the same dispute. On the one hand, we have an application by the Union for a determination, they argue, that the Board should make under ss. 11(1)(e) and 18(n). On the other hand, we have a dispute between various building trades, including the Teamsters, and PCL regarding allocation of work on the Upgrader expansion project.

[59] However, when we dig below the surface, the dispute resolves itself into one principal dispute which is the jurisdictional dispute between the parties. As noted above, the Board cannot, without answering the fundamental question regarding jurisdiction and the contractual responsibilities of PCL to award work to the Teamsters, reach any conclusion within its jurisdiction.

[60] The second test for the Board to consider is whether or not the Plan allows for (i.e.: empowers) the resolution of the dispute by means of the arbitration procedure provided for in the Plan. The answer to this question is self evident insofar as the Plan exists precisely to resolve disputes of this nature. Furthermore, as noted above, the Plan also provides for the determination of the issue of stipulation to the Plan which thereby obviates the need for a separate arbitration process under the PCA.

[61] Finally, we must consider if the remedy sought under the Plan is a suitable alternative to the remedy sought in the application before the Board. In our opinion, the remedy which can be provided under the Plan is superior to the remedy sought before the Board. The remedy sought from the Board is by way of declaratory relief. The Union concurred with the Employer that the Board should not make any jurisdictional ruling in the Unfair Labour Practice application.

[62] If the Board's remedy is not a final solution to the matter, that is, it appears that somehow our determination would then be influential on the Plan in regards to stipulation or other factual matters. Nevertheless, further proceedings under the Plan, or by way of arbitration under section 25(1) of the *Act* would be required to be undertaken even in the face of a determination under the *Act*. In such circumstances, where our decision would not bring a final solution, deferral is warranted.

[63] The application by the Teamsters is accordingly deferred in favour of a determination by the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry pursuant to section 11(l) of the *Act*.

Costs

[64] In the circumstances of this case, we decline to make any award of costs as requested by the Employer. It is doubtful, based upon the recent ruling of the Supreme Court of Canada in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*[29] if the Board enjoys the power to award costs which are not part of an award of "monetary loss suffered by an employee, an employer, or a trade union as a result of a violation of this *Act*".[30]

[65] Even if the Board had such authority, we would not, in the circumstances of this case, make an award of costs. The application brought by the Union, while unsuccessful at this time, raised proper issues before the Board upon which it requested a determination. This Board has always been and was established to be open and accessible to employees, employers, and trade unions who wished to bring disputes to the Board for resolution. We do not think it proper to in any way discourage anyone from bringing proper applications to this Board by an award of costs. Admittedly, some applications will have more merit than others,

[29] [2011] CanLII 53 (SCC)

but nevertheless, as a public institution, the Board must be and remain open and accessible to all who wish to bring meaningful disputes forward without fear of penalty should their application fail.

DATED at Regina, Saskatchewan, this **20th** day of **December, 2011.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

[30] See Section 5(f) of the *Act*.