

Date: 20141128

Docket: 13/57

Citation: *Transport and Allied Workers, International Brotherhood of Teamsters, Local 855 v. Labourers' International Union, Local 1208*,
2014 NLCA 45

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

TRANSPORT AND ALLIED WORKERS,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 855

APPELLANT

AND:

LABOURERS' INTERNATIONAL
UNION, LOCAL 1208

FIRST RESPONDENT

AND:

PETER KIEWIT
INFRASTRUCTURE CO.

SECOND RESPONDENT

AND:

MICHAEL POWER

THIRD RESPONDENT

Coram: Green C.J.N.L., White and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 2010 01G 4078
(2011 NLTD(G) 112)

Appeal Heard: March 6 & 7, 2014

Judgment Rendered: November 28, 2014

Reasons for Judgment by Harrington J.A.
Concurred in by Green C.J.N.L. and White J.A.

Counsel for the Appellant: Stuart A. Morris
Counsel for the First Respondent: Kevin F. Stamp Q.C.
No one appearing for the Second and Third Respondents

Harrington J.A.:

[1] This appeal engages the issues of curial deference on applications for judicial review affecting consensual tribunals and the factors affecting the adequacy of an alternate remedy which may preclude judicial review.

[2] The appeal arises from a dispute between two trade unions concerning competing claims over work jurisdiction for their members in the industrial and commercial sector of the provincial construction industry. A jurisdictional umpire, the third respondent, (Umpire), was appointed under a project-specific collective agreement (Agreement) covering the construction and installation of iron ore mine processing equipment in western Labrador (Project). Following a hearing, the Umpire determined that the second respondent, the general contractor (Kiewit), had incorrectly awarded a work assignment to the first respondent union (Labourers).

[3] The Umpire ordered Kiewit to assign the work to the appellant union (Teamsters) in accordance with the provisions of the Agreement. The Teamsters, the Labourers and Kiewit were bound by the terms of the Agreement.

[4] The Labourers applied for judicial review and succeeded in having the Umpire's decision set aside by a Trial Division judge (reviewing judge), whose decision effectively restored Kiewit's work assignment to the Labourers. The Teamsters have appealed the findings and order of the reviewing judge.

[5] For reasons which follow, I would set aside the decision of the reviewing judge on the basis that an adequate alternate remedy existed under the Agreement and ought to have been pursued by the Labourers, and accordingly, a proper basis for judicial review was not established.

BACKGROUND

[6] The Agreement provided the Labourers with recourse from the Umpire's decision pursuant to a process prescribed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) *Building and Construction Trades Department's Plan for the Settlement of Jurisdictional Disputes in the Construction Industry for the United States and Canada*, commonly known as the Green Book Plan (Plan). The Labourers chose not to pursue this option on the basis that it was not an adequate alternate remedy.

[7] The Agreement applied to a multi-union workforce for the Project that included the Labourers and the Teamsters. It was initially executed in 2001 and amended by memoranda in 2007 and 2008 (Amendments) which directly affected the Teamsters' status for the supply of workers to Kiewit.

[8] The Project began in 2001 but certain phases were delayed due to economic factors. The concentrator expansion phase commenced in 2008. The work that gave rise to a jurisdictional dispute between the Labourers and Teamsters was described by Kiewit and adopted by the Umpire as follows:

... the building and construction of a six (6) kilometre access road which would require the use of off highway trucks to haul ballast rock from a rock pile approximately two (2) kilometres from the source to the destination. There would be two (2) types of trucks ... that would weigh approximately thirty-five (35) plus tons.

[9] The Teamsters contested the work assignment by Kiewit to the Labourers and referred the dispute to the Umpire who had been named under the provisions of the Agreement to resolve disputes of this nature. The Umpire notified the parties of a hearing which he later conducted with representatives of both unions present. The Umpire subsequently issued a written decision as to why the work assignment should have been made to the Teamsters. Under the dispute resolution provisions of the Agreement, both unions involved in the dispute and Kiewit were bound by the ruling of the Umpire.

[10] The Construction Labour Relations Association (CLRA) holds the bargaining rights of all unionized employers engaged in the industrial and commercial sector of the construction industry in this Province. Kiewit had previously employed truck drivers who were members of the Labourers for

various projects in this Province. The Teamsters continued to assert a similar claim to representation rights over such work but it appears that even the CLRA was unwilling to accord similar recognition to the Teamsters even though the Teamsters were recognized elsewhere in Canada with respect to similar work at large unionized construction sites.

[11] The Labourers asserted that there was a limitation in the Teamsters' collective agreement with the CLRA that restricted its bargaining rights in this province solely to representing glaziers, thus prohibiting the Teamsters from claiming the right to represent truck drivers employed in moving materials at industrial and commercial construction sites in the Province.

[12] A significant event occurred in 2008 when the CLRA agreed to enter into the second Amendment. This Amendment was with the Teamsters and set out hourly rates for drivers of certain types of off-highway trucks. This recognition of the Teamsters' work jurisdiction was reaffirmed in a memorandum of agreement dated July 28, 2010 (Memorandum) that specifically referred to the Project and the 2008 Amendment relating to the scope of union representation rights for the Teamsters. The Memorandum referred to the provincial collective agreement between the CLRA and the Teamsters that became effective July 25, 2008 with respect to certain trades persons, including truck drivers. However, those documents made no mention of the fact that the Labourers also had a collective agreement with the CLRA that recognized their jurisdiction over certain truck driving activities on industrial and commercial construction sites. The words "exclusive jurisdiction" did not appear in any of the documents.

[13] The Labourers countered that the Agreement was made under a single project, multi-employer collective agreement distinct from other agreements negotiated for the commercial and industrial division of the provincial construction industry. The Labourers argued that any change regarding bargaining relationships between the CLRA and the Teamsters involving truck driving for the on-site transportation of materials, such as transportation of ballast rock, could only apply to new projects and not to the pre-existing Agreement applicable to the Project.

Decision of the Umpire

[14] The Umpire was named in article 5 of the Project Agreement which provided that the provincial Building and Construction Trades Council (Council) would retain the services of an umpire acceptable to the CLRA

and the Council to adjudicate competing claims by two or more unions with respect to jurisdiction over a particular scope of work during the Project in order to prevent work stoppages that could delay the progress of some or all of the Project.

[15] The Umpire scheduled and conducted a hearing that was attended by representatives of the Labourers, the Teamsters and Kiewit. The Umpire noted in his decision that there were no preliminary objections and that all parties agreed to his jurisdiction regarding the dispute. The Umpire determined he had jurisdiction to decide whether the Teamsters could legitimately contest the work assignment and held that the matter of whether the Teamsters were restricted to solely representing glaziers was a matter for another forum.

[16] The Umpire found that the primary issue before him was whether “the use of off-highway trucks to haul ballast rock from a rock pile two (2) kilometres from the source to the destination” amounted to work that fell within the jurisdiction of the Labourers or the Teamsters. The Umpire found that the 2008 Amendment between the CLRA, the Council and the Teamsters, which became effective July 25, 2008, set out hourly wage rates for “... heavy, dual axle, and single axle trucks in the commercial and industrial sector” in the body of the agreement. He also referred to prior decisions of other jurisdictional umpires that recognized the Teamsters’ jurisdiction over the operation of “off-road trucks”.

[17] The Umpire found that there was no evidence of applicable decisions or agreements of record made by the Impartial Jurisdiction Disputes Board (Disputes Board) that exists under the Plan, or established international trade practices, and decided that he would determine the matter pursuant to the “prevailing practice in Newfoundland” as stipulated in section I, 2(h) of the Agreement. He received documentary evidence from representatives of both unions. The Umpire concluded that the local practice evidence favored the Teamsters’ claim to jurisdiction over the specific work and he directed Kiewit to change the initial work assignment from the Labourers to the Teamsters.

[18] The Labourers applied to the Trial Division for judicial review and sought an order in the nature of *certiorari* to quash the Umpire’s decision. The Labourers did not seek review of the decision under the dispute resolution provisions of the Plan as set out in Schedule “B” of the Agreement.

Reviewing Judge's Decision

[19] In his analysis, the reviewing judge characterized the proceeding before the Umpire as involving a preliminary question regarding whether the Teamsters had status under the Agreement to raise a jurisdictional claim with respect to the assignment of certain truck driving work at the Project worksite or whether the Teamsters were relegated to their jurisdiction over the work of glaziers. He summarized the errors the Labourers asserted that the Umpire had made:

[21] ...

- 1) That the jurisdictional umpire was incorrect and unreasonable when he committed a breach of natural justice for failing to follow the rules and procedures which were intended to govern the decision-making process. The jurisdictional umpire denied the applicant the ability to acquire the benefit of the five days' notice which Project Agreement required to be given to the Applicant;
- 2) The decision of the jurisdictional umpire respecting his jurisdiction to consider the status of the Teamsters is unreasonable and incorrect in law insofar as it amounts to their wrongful declining of jurisdiction;
- 3) The decision of the jurisdictional umpire respecting his failure to consider the argument respecting the ability of Teamsters to challenge the work assignment is unreasonable and incorrect in law insofar as it demonstrates a misapprehension of the jurisdictional umpire's role in resolving the dispute;
- 4) The decision of the jurisdictional umpire respecting his failure to consider the argument respecting the ability of the Teamsters to challenge the work assignment is unreasonable and incorrect in law insofar as it is based upon palpable and overriding [errors] in the fact finding process;
- 5) The decision of the jurisdictional umpire respecting his failure to consider the argument respecting the ability of the Teamsters to challenge the work assignment is unreasonable and incorrect in law insofar as the reasons given for the decision failed to demonstrate that the relevant arguments were properly considered and analyzed; and
- 6) The decision of the jurisdictional umpire falls outside the range of outcomes which are defensible in respect of the law and evidence applicable to this matter.

[20] The reviewing judge found that the Umpire's failure to consider and limit the Teamsters' bargaining rights arising from the Agreement to represent glaziers only was unreasonable and amounted to "a palpable and

overriding error”. He also held that the Umpire’s failure to provide prior notice to the Labourers of his intention to rely on local practice for his decision was unreasonable and that the dispute resolution process outlined in the Plan was not an adequate alternative remedy because it: (i) did not provide for an appeal as of right, (ii) was discretionary, (iii) contained no acknowledgment that the deciding members served in a judicial or quasi-judicial function; and (iv) the prospective adjudicators were not required to give written reasons.

[21] The reviewing judge further held that the new and more expansive Amendments with respect to the Teamsters’ jurisdiction did not affect the proper interpretation of the Agreement. He found that the Umpire should have interpreted the Agreement as continuing to limit the bargaining rights of the Teamsters to representation solely of glaziers notwithstanding the 2008 Amendment. He granted the Labourers’ application for *certiorari*, quashed the Umpire’s decision and held that the Labourers were not required to seek recourse under the Plan as it did not provide an adequate alternative remedy.

[22] The reviewing judge also concluded that even if the CLRA had granted the Teamsters the ability to represent and bargain for certain truck drivers, the jurisdiction of the Labourers could not be impaired for the Project since the Labourers’ prior provincial agreement gave the Labourers jurisdiction over categories of trucking when the Project commenced in 2001.

[23] The reviewing judge further concluded that the Umpire failed to give the unions five-day notice of his intention to rely on local decisions to allow them to fully present argument in support of their jurisdictional claims under the terms of the Agreement. He held that this constituted a breach of natural justice. However, he placed a temporary caveat on his findings in favour of the Labourers by stating that his decision was:

[31] ... subject to my determining that this Court has jurisdiction to determine this issue at this stage in light of the argument of the Teamsters that this application by the Labourers’ Union was premature and that there exists an adequate alternate remedy in the review process established under the Project Agreement for the purpose of reviewing the decisions of jurisdictional umpires such as [the Umpire]
....

[24] He then decided that his focus should not be with regard to whether there was an alternative remedy under the Plan but rather whether the remedy was adequate. He found:

- (i) the Labourers had no alternative right under the Plan for review of the Umpire's decision but rather were dependent on the exercise of a discretion by a union administrator for the Plan resident outside the Province;
- (ii) the Plan "appears to preclude" advancing arguments not raised before the Umpire;
- (iii) the Plan cannot operate as a review of the process conducted by the Umpire; and
- (iv) the Plan does not provide a right of review which equates to judicial review.

Following this analysis of the wording of the Plan, he nevertheless concluded:

[44] I am not satisfied that the differences between the criteria to be considered by the jurisdictional umpire under the Project Agreement and those to be considered by the arbitrator under the Green Book Plan are significantly different such as to cause any injustice to either of the parties to this dispute.

[25] Despite this finding, the reviewing judge at paragraph 45 shifted his focus to section 14 of article 5 of the Plan which deals with appeals from a decision of an arbitrator and sets out a procedure for an appeal from the decision of an arbitrator to a joint administrative committee (JAC). The reviewing judge identified what he found were shortcomings in the appeal process administered by the JAC and concluded that it was "entirely discretionary" as to whether an appeal would be conducted if a majority of the JAC advised the administrator that an appeal hearing was not warranted. However, the reviewing judge did acknowledge that the administrator of the Plan is obliged to explain the basis of his or her decision and findings. The reviewing judge expressed concern that the JAC operating under the Plan was "not obliged to provide any reasons" and this led to his finding that the review process under the Plan, particularly with respect to the appeal process under the JAC, did not constitute "an adequate alternative remedy". There was never any issue as to whether an alternate remedy existed.

ISSUES

[26] The issues on this appeal are:

- (i) what standard of review is applicable to an appeal from a judicial review of a decision by a consensual jurisdictional umpire?
- (ii) did the reviewing judge err by conducting judicial review of the decision of the Umpire notwithstanding that the Agreement provided recourse from the Umpire's decision under the Plan administered by the Board and by holding that the process under the Plan did not constitute an adequate alternate remedy?
- (iii) if the reviewing judge erred in setting aside the Umpire's decision, what disposition should be ordered?

STANDARD OF REVIEW

[27] A reasonableness standard of review was applicable to the decision of the Umpire in his capacity of a consensual arbitrator named in the Agreement. The reviewing judge reached the following conclusions:

[23] ... I am satisfied from reviewing the April 18, 2001, Project Agreement and the December 20, 2007, Memorandum of Agreement, which is supplemental thereto, that these two agreements constitute a contract between all of the parties thereto, i.e., all of various contractors engaged or to be engaged to complete the project as represented by CLRA and all of the individual union signatories to the Project Agreement and the 2007 Memorandum of Agreement supplemental thereto. It is to be noted that each of the union participants in these contracts executed the contract in their own right. This then raises the question whether the CLRA and any individual union or unions may, without the consent of the other union parties, alter the craft jurisdictions held by the various union parties to the Project Agreement without at least the consent of the unions affected by such a change or perhaps without the consent of all of the union signatories to these agreements. This is a question of law alone and not a question of mixed law and fact. The contract was executed in 2001 and again in 2007 by the Teamsters for the Glaziers. These words can only be taken as indicating an agreement between the parties to the effect that the craft jurisdiction of the Teamsters under the 2001 and 2007 agreements was limited to representing workers who were Glaziers. The issues involved in this matter do not in any way involve work typically performed by Glaziers. The failure of [the Umpire] respecting his jurisdiction to consider the status of the Teamsters was an unreasonable decision and incorrect in law and amounted to [the Umpire] declining to exercise a jurisdiction which he had in this matter, i.e., to determine whether, in the first place, the Teamsters had

any right to challenge the markup work assignment of the contractor. Clearly [the Umpire] did not understand his jurisdiction or role in resolving the dispute. His first assignment would be to determine the status of the Teamsters and his refusal to do so was a palpable and overriding error in the fact finding process and he failed to demonstrate that the relevant arguments were properly considered and analyzed.

[24] For these reasons, I conclude that the decision of [the Umpire] failed to determine the jurisdiction issue when he stated:

The issue as to whether the Teamsters can only act “For Glaziers” will have to be determined in another forum. The only issue to be determined in this dispute is whether “Truck Drivers” is the work of the Labourers or the Teamsters.

[25] In another passage contained within the “summary” section of the decision [the Umpire] stated:

... it is not within this umpire’s authority or jurisdiction to render judgment on any thing other than the issue at hand which is the assignment of work.

(Emphasis added.)

[28] The reviewing judge based his decision to quash the Umpire’s decision on two primary grounds: (i) the Umpire’s failure to consider and decide that the Teamsters were not entitled to make a claim to truck driving work under the Agreement as amended given the status of provincial agreements between the CLRA and the various construction trade unions, especially those applicable to the Labourers and the Teamsters, and (ii) finding that the Labourers’ recourse from the Umpire’s decision through the administrative process under the Plan did not constitute an adequate alternate remedy. With respect, the reviewing judge erred on both grounds.

APPLICABLE LAW

Deference to Consensual Tribunals

[29] This Court in *St. John’s (City) v. Newfoundland Power Inc.*, 2013 NLCA 21, leave to appeal to SCC refused [2013] S.C.C.A. 221 reviewed the standard of review applicable after *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 to the decision of a consensual arbitrator at paragraphs 33 to 36:

[33] In this case the panel of arbitrators was not a “legislatively endowed administrative [body]”, but a contractually appointed, consensual board. As noted by Lambert J.A. of the British Columbia Court of Appeal in *British Columbia Telephone Company v. T.W.U.* (1985), 65 B.C.L.R. 145 (C.A.), different considerations apply to consensual arbitrators:

[26] The fact that this was a consensual arbitration also raises two points of particular significance.

[27] The first is that we must look to the terms of the submission and not to the provisions of a statute in deciding on the scope of the 'jurisdiction' conferred by the parties on the arbitrator.

[28] The second is that the award only affects the parties. There is no obligation on any other arbitrator, dealing with a similar issue between other parties, to follow the award. That is in contrast to the position of a statutory tribunal. A statutory tribunal should follow its own previous decisions and, for that reason, ought to be required to be right in its interpretation of general public enactments and general legal principles, and ought to arrive at its decisions, even on matters particularly within its special expertise and function, on the basis of a demonstrably rational process. Those requirements do not have quite the same force in the case of a consensual arbitrator. The significant fact about a consensual arbitrator is that the parties have picked the arbitration process, and they have picked the arbitrator, because they want that process and that arbitrator in preference to any other process or any other decision maker. And they want the arbitrator to do what they ask him to do in the way they ask him to do it and not to do something else in some other way.

[34] Justice Lambert’s dissent in that case was adopted by the Supreme Court of Canada in *Telecommunication Workers Union v. British Columbia Telephone Compan*, [1988] 2 S.C.R. 564 and relied upon by the Saskatchewan Court of Appeal in *CSP Foods Ltd. v. Grain Services Union* (1992), 97 Sask. R. 190, 89 D.L.R. (4th) 542.

[35] The fact that this was a consensual arbitration panel therefore suggests that a more deferential stance should be taken by this Court for two reasons. First, the decision only affects the parties to the lease. This is relevant because, in such situations, the necessity of this Court exercising its error correcting function is diminished, absent unreasonableness.

[36] Secondly, the parties have specifically chosen this form of adjudication. The rationale for referring this matter to arbitration was, likely, to ensure an expeditious and inexpensive resolution of the exact dispute now being reviewed by this Court. This goal would be defeated where a court delves too easily into the merits of the arbitrators’ decision. As noted by the applications judge at paragraph

25 of his decision, this suggests that deference is owed to the determination of the majority and that a reasonableness standard should be applied.

[30] In *Newfoundland and Labrador Regional Council of Carpenters, Millwrights and Allied Workers, Local 579 v. Construction General Labourers, Rock and Tunnel Workers, Local 1208*, 2003 NLCA 24, 225 Nfld. & P.E.I.R. 36 (*Council of Carpenters*), this Court recognized that a high degree of curial deference is owed to a jurisdictional umpire appointed by statute under section 9 of the *Labour Relations Act*, RSNL 1990, c. L-1 (Act). The Court elaborated:

[10] As numerous cases from this court and the Supreme Court of Canada have recognized, the *raison d'être* for Labour Relations Boards and related tribunals is to promote peace in industrial relations by providing prompt settlement of labour related disputes by persons expert in that field. Clearly the intention of the Legislature in creating the position of jurisdictional umpire is to provide for industry a specialized, rapid, method of resolving jurisdictional disputes between unions.

- *expertise and nature of problem*

[11] A jurisdictional umpire is appointed by the Lieutenant-Governor in Council, but only after consultation with employers and unions. While the *Act* gives guidance as to the factors to be considered when an umpire is making a decision, his or her knowledge of the work done by each of the trades is critical to his or her ability to perform the task, an expertise one would not expect to find in a court. The umpire must apply the legislation in determining which union has jurisdiction to do particular work on a site. This task, in turn, may require the umpire to engage in an interpretation of the legislation. However, that does not detract from the strength of the conclusion that the jurisdictional umpire is entitled to a high degree of deference

(Emphasis added.)

[31] For the same reasons, a jurisdictional umpire appointed by the parties on a consensual basis for the settlement of competing claims to construction work is to be given a similarly high degree of curial deference.

Adequate Alternate Remedy

[32] The more significant and far reaching aspect of the decision of the reviewing judge was his finding that the Labourers had established that the recourse under the Plan from the Umpire's decision to the Board was inadequate.

[33] The role of an adequate alternative remedy consideration has also been referred to as “the doctrine of exhaustion, ... the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against judicial reviews” (see *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332 at para. 31 and *Canada (Minister of National Revenue – M.N.R.) v. JP Morgan Assessment Management (Canada) Inc.*, 2013 FCA 250 at para. 86).

[34] The same principle is addressed by each description: absent exceptional circumstances, parties ought not enter court processes “until the administrative process has run its course” (see *C.B. Powell* at paragraph 31).

[35] This Court in *Quigley v. Torbay (Town)*, 2010 NLCA 3, 293 Nfld. & P.E.I.R. 40 stated:

[15] The general rule is that an application for certiorari will not be entertained where there is an adequate alternative remedy. The burden is upon the person who seeks one of the prerogative remedies – discretionary remedies of last resort – to satisfy the court that there is no adequate alternative remedy: *Kingsbury v. Heighton* 2003 NSCA 80, para. 102.

[36] In *Hareldkin v. University of Regina*, [1979] 2 S.C.R. 561, Beetz J., writing for the majority, considered whether the appellate court had properly refused *certiorari* where the appellant, a social work student, “should have pursued his right of appeal to the university senate before resorting to prerogative writs” (see page 567). Beetz J. found that “the appellant had and still has a better alternative remedy in his right of appeal to the senate committee; he ought to have exercised it” (see page 567). Beetz J. canvassed Lord Widgery C.J.’s obiter comments in *Regina v. Brighton Justices, Ex. P. Robinson*, [1973] 1 W.L.R. 69 where he wrote that:

... This court will in future examine applications of this kind with considerable care, and will certainly not be minded to grant the discretionary remedy of *certiorari* to those who have casually failed to take advantage of the new statutory procedure ... we wish to take advantage of this opportunity to make it clear to others hereafter that it is not to be supposed that in these cases an order of *certiorari* will go as a matter of course. Regard will be had to why the applicant had not used the alternative procedure, and unless a satisfactory explanation is forthcoming the court in future is unlikely to use the discretionary remedy.

[37] Beetz J. noted that Lord Widgery C.J.’s comments were made in obiter but held just the same that the above passage “carries great weight; it

was unanimous and stated the policy which the Court intended to follow in the future” (see page 580). Further to this, Beetz J. concluded by stating that “[t]he courts should not use their discretion to promote delay and expenditure unless there is no other way to protect a right” (emphasis added) (see page 593).

[38] Stratas J.A. of the Federal Court of Appeal set out detailed reasons for the adequate alternative remedy requirement in judicial review proceedings in *C.B. Powell* and *JP Morgan*. It is intended to:

- Prevent the fragmentation of administrative processes and the creation of piecemeal court proceedings (see *C.B. Powell* at paragraph 32);
- Eliminate “the large costs and delays associated with premature forays to court” (see *C.B. Powell* at paragraph 32; see also *Harelkin*);
- Avoid frustrating “specialized schemes set up by Parliament” (see *JP Morgan* at paragraph 85);
- Avert waste where the applicant for judicial review has a possibility of succeeding under the administrative scheme (see *C.B. Powell* at paragraph 32);
- Ensure the court has access to all of the administrative expertise; this can best be achieved after the final administrative decision has been made (see *C.B. Powell* at paragraph 32);
- Support the concept of judicial respect for administrative decision-makers (see *C.B. Powell* at paragraph 32); and
- Reinforce the notion that judicial review remedies are to be of last resort (see *JP Morgan* at paragraph 85).

ANALYSIS

Deference to Consensual Tribunal

[39] The Teamsters had appeared before the Labour Relations Board (LRB) in this Province for more than a decade arguing that the Labourers had restricted its traditional national jurisdiction to represent unionized workers engaged in transporting men and materials at commercial and

industrial construction sites to representation solely of workers employed as glaziers in that sector.

[40] The Agreement between the CLRA and the Council set out in Schedule “B” a detailed procedure for the assignment of work to the various unions which included the appointment of a jurisdictional umpire. Schedule “B” entitled “Jurisdiction Disputes Resolution Plan”, allowed any appointed umpire to resolve work assignments and conflicts by reference to “Decisions of Record and Agreements of Record established by or recorded by the Impartial Jurisdiction Disputes Board” (Disputes Board). Additionally, if the umpire found that the dispute is not covered by existing decisions or agreements of record, the umpire was mandated to consider “established international trade practice or prevailing practice in Newfoundland” in making rulings (see article 1.2(e)). Decisions of the umpire are stated to be “binding, final and conclusive” on all of the parties to the Agreement subject only to final recourse to the Disputes Board under the Plan. It follows that the Teamsters and the Labourers intended to be bound by any decisions of the Disputes Board that might arise from the review of decisions by the Umpire. The Umpire’s role under the Agreement does not attract the usual standard of review and grounds for judicial review of public tribunals. However, it may be subject to review in cases where there has been a serious breach of internal rules, lack of procedural fairness or bad faith which leads to a manifestly unjust result.

[41] Following the hearing conducted by the Umpire, he issued a ten-page written decision. He outlined the history of the various phases of the Project affecting the expansion of the processing facility which had commenced in 2001 and was in a third phase at the time of the hearing in 2010. He acknowledged the existence of prior provincial agreements between the CLRA and the Council which, until the Amendments were executed, listed the Teamsters as a signatory to the provincial agreements in a limited representation role “for the Glaziers”. The wage rates listed in the collective agreements for the Teamsters were limited solely to the classification of glaziers. None were listed for truck drivers.

[42] The Labourers contended, and the reviewing judge agreed, that the Umpire was without jurisdiction to consider the work history of members of the Teamsters because of the absence of contract provisions or rates applicable to truck drivers and prior LRB decisions recognizing Teamsters’ jurisdiction as being limited to glaziers. The reviewing judge also made findings that the Umpire was without jurisdiction to make his decision since

the Agreement, including the Amendments, limited existing bargaining rights of the Teamsters and thus held that the Umpire committed a palpable and overriding error in awarding work on the Project to the Teamsters.

[43] However, the Umpire found that by 2008 the CLRA had modified this position and ultimately entered into the Memorandum affirming the Teamsters' right to represent certain classes of truck drivers involved in the movement of men and materials on construction sites in the commercial and industrial sectors. This development occurred at a latter stage of the Project and the Memorandum specified an hourly rate for truck drivers operating "heavy, dual axle and single axle trucks". The Umpire referred to a series of decisions by jurisdictional umpires awarding this type of work to the Teamsters at other sites and concluded that:

In totality the Teamsters presented the most compelling and comparable evidence to establish "Prevailing practice in Newfoundland", a factor that is provided under Section I,2(h) of the Concentrator Upgrade and Tailings Project Collective Agreement.

The Umpire relied on these developments to make a ruling favorable to the Teamsters for this particular scope of work for the Project and would therefore have been entitled to a high degree of deference, given his status as a consensual appointee. The Umpire was doing precisely what his mandate required. The collective agreement history during the course of the Project created competing claims by two unions to jurisdiction over off-road truck drivers.

[44] The Umpire, relying on local precedent, ruled that the Teamsters had a stronger claim to the specific work activity i.e. transporting ballast rock on-site. The Umpire took the position that the submission by the Labourers that the status of collective bargaining rights of the Teamsters was a matter for another forum, presumably the LRB or the Council. He focused on contemporaneous work history of the Teamsters and the Labourers in the unionized construction sector and recent assignments of similar work at other provincial construction sites. The Umpire was able to cite in his award contemporaneous examples of where the Teamsters had been awarded jurisdiction over similar work by other umpires and by another unionized construction contractor at a large multi-union site in the Province.

[45] I conclude that the Umpire's decision met the standard of "justification, transparency and intelligibility" required by *Dunsmuir* at

paragraph 47. I am satisfied that the outcome reached by the Umpire was within the range of acceptability and defensibility mandated in *Dunsmuir* and elaborated upon in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708. In his particular role as a consensual jurisdictional umpire assigned to resolve disputes under the Agreement arising from a mandate from Kiewit and both unions, his exercise of jurisdiction is entitled to a high degree of deference.

Adequate Alternate Remedy

[46] Though not discussed in the reasons of the reviewing judge, the Agreement expressly made reference to the parties having recourse under the Plan from the Umpire's decision under Article IV of schedule B for "[a]ny party or person bound by a decision of the umpire [to] apply for a jurisdictional award to the Impartial Jurisdictional Disputes Board".

[47] Consistent with the need for the rapid resolution of these disputes to minimize the risk of work stoppages, the Agreement mandated that the Umpire's written decision be "as brief and concise as possible" (see article 1.2(e)). Nevertheless, this provision appears to have been a basis of concern for the reviewing judge and a reason why he concluded that the review process under the Plan was not an adequate alternate remedy (see reviewing judge's reasons at paragraph 47). However, given that the entire dispute resolution process is intended to provide for fast and effective resolution of jurisdictional disputes without any work stoppages for on-site unionized tradespersons, the procedures set out in the Plan are consistent with the stated goal (see article 1:01 of the Agreement). As such, these procedures ought not to have been a basis for the reviewing judge to find that the alternate remedy - recourse to the Disputes Board - was inadequate, particularly when the Plan is designed to deal with settlement of an anticipated plethora of individual disputes over work jurisdiction at unionized construction sites throughout Canada.

[48] The reviewing judge expressed reservations about the fact that an aggrieved union may apply to the Disputes Board without guarantee of a hearing. Nevertheless, he failed to consider that the whole purpose of the Plan is the fast and effective settlement of competing jurisdictional claims to unionized construction work without work stoppages (see *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers &*

Helpers, 2000 ABQB 586, 272 A.R. 1 at para. 8). While every union wishes to defend its work jurisdiction, such jurisdiction is not always exclusive, and thus a mechanism for fast and fair resolution by knowledgeable umpires, appointed from the ranks of the building and construction trade union movement and not from construction management labour boards or the courts, is considered to be an effective way to proceed.

[49] Additionally, there is the reality that the disputed work involved the transport of ballast rock on a single construction site in Labrador by heavy off-highway trucks, a relatively small scope of work on a very large construction project.

[50] With respect, the reviewing judge erred by finding that the recourse to the Disputes Board was not an adequate alternate remedy for the Labourers and allowing the Labourers direct access to judicial review when the process envisaged by the Plan is not only well established within the Canadian construction industry but also recognized in the jurisprudence as the quintessential process for the resolution of such disputes and the prevention of work stoppages at multi-union construction sites throughout Canada (see *IABSOI v. Boilermakers; Teamsters Local 395 v. PCL Industrial Contractors Inc.*, SK LRB, 019-10 (20 December 2011) at paras. 26, 56 and 57).

[51] Such judicial recognition of the efficacy of the Plan occurred forty years ago by the Supreme Court of Canada in *Wood, Wire and Metal Lathers' International Union v. United Brotherhood of Carpenters and Joiners of America*, [1973] S.C.R. 756. In circumstances analogous to those surrounding this appeal, two industrial unions attempted to by-pass the Plan as it then existed by entering into their own dispute resolution process with unionized contractors in British Columbia. The Supreme Court of Canada at page 767 upheld the majority decision of the Court of Appeal, delivered by Tysoe J.A. who wrote in part:

The first question that must be decided is whether, as is submitted by the respondent, this action in the courts is premature because the appellants have made no attempt to exhaust internal remedies within the structure of the Building and Construction Trades Department AFL-CIO which are available to them. It is admitted that no such attempt has been made. The appellants contend that there is no obligation on them to first seek those remedies. So, the appellants submit, their action is maintainable.

...

I am also of the opinion that the appellants have bound themselves and agreed that such dispute shall be settled and adjusted according to the Plan established by such Department and set out in the Green Book. Further, that they will not resort to Court proceedings over the said jurisdictional dispute without first exhausting internal remedies available to them under the said Plan. I am further of the opinion that a right of protest to the National Joint Board is available to the appellants and that Board has jurisdiction to deal with that protest and to prescribe the consequences that are to follow if the protest is upheld within, of course, the powers given to the Board under the provisions of the Green Book and the Blue Book. It follows that, as the appellants have made no attempt to exercise their said right of protest, this action has been brought prematurely and the Courts cannot entertain it.

I would dismiss the appeal.

(Emphasis added.)

[52] It appears that the Labourers, a member of the Council, suspected that it would have difficulty in reversing the Umpire's decision through the Plan, especially when the 2008 Amendment that was made between the CLRA and the Council permitted the Teamsters to make a competing jurisdictional claim for off-road trucking of workers and materials. The Labourers countered by claiming that the Plan was not an adequate alternate remedy notwithstanding the historic affiliation by the international union and the local union as participants in the Plan. The basis for its application for judicial review would serve to undermine the Plan that was devised for the timely resolution of disputes. An automatic right to a hearing and full and complete reasons for decisions under the Plan would be completely impractical given the substantial number of unionized construction projects and the potentially large number of jurisdictional disputes that can arise across Canada.

[53] That the Labourers' claim to the disputed work extended back to the commencement of the Project in 2002 does not alter the fact that the Umpire was appointed to resolve disputes during the Project in a process that is intended to resolve jurisdictional disputes between unions by an umpire chosen by the unions whose decision is binding on a contractor such as Kiewit. This process is intended to avoid work stoppages on large construction sites which can lead to complete project shut downs. The Labourers also had the right to defend their claim to the disputed work by resorting to the Plan but chose not to pursue that course of action.

[54] The matter of the competing claims of construction trade unions to a scope of work, which the parties agreed to have decided without stoppage of work, was intended to be resolved by the Umpire and any appeals were intended to be determined within the parameters of the Plan. The failure of the Labourers to seek recourse under the Plan was without justification and the reviewing judge should have dismissed the judicial review application for these reasons at the outset.

Lack of Notice by Umpire

[55] The Umpire found that the Labourers presented “written evidence and argument” which “were not compelling or persuasive enough to convince [him] that the final assignment by [Kiewit] should stand”. The Umpire’s failure to provide five-day notice that he would rely on local practice evidence relates directly to one of the bases for setting aside the Umpire’s decision by the reviewing judge.

[56] However, the record before this Court and the Umpire’s decision is clear that representatives of the Labourers were present at the hearing, and were well aware of the nature of the long standing dispute with the Teamsters over jurisdiction. Both parties had an opportunity to present all relevant local precedents that would support their respective positions that their members were the dominant players in supplying drivers for off-road work.

[57] The reviewing judge held that the Umpire’s failure to give five-day notice of his intention to rely on prevailing local practice regarding the transportation of men and material on construction sites was a fatal oversight and grounds to set aside the decision. The Teamsters’ business agent and counsel asserted by affidavit and oral submissions that all of the relevant local decisions by umpires within the province affecting movement of ballast rock and other similar materials had been available for presentation by the Labourers at the hearing before the Umpire. Counsel submitted that five-day notice of the Umpire’s intention to rely on local practice was not warranted since the Labourers would have been aware that local precedents would be prominent and they had the opportunity to make reference to all relevant local umpire decisions at the hearing before the Umpire.

[58] It is difficult to contemplate that the Labourers did not or could not foresee the need for the submission of all relevant precedents to the Umpire when they had standing and appeared in person at the hearing before the Umpire. Given the previous history of jurisdictional disagreements with the Teamsters, one would expect the Labourers to have all its local precedents available to ensure it could withstand a challenge by the Teamsters. The reviewing judge did not agree and relied on this omission as one of the key reasons for granting judicial review setting aside the Umpire's decision. I agree with the position of the Teamsters that the Labourers had adequate notice of the hearing before the Umpire and would have been relying on local practice to defend their historic claim to jurisdiction. These circumstances render the Labourers' complaint about further notice to be merely technical in nature. In any event, given the failure by the Labourers to pursue its recourse under the Plan, this issue is moot.

SUMMARY AND DISPOSITION

[59] I find that the reviewing judge erred by:

- (i) failing to properly apply a reasonableness standard of review by failing to give a high degree of deference to the role of the Umpire as a consensual decision-maker;
- (ii) holding that the Labourers' recourse for review of the Umpire's decision under the Agreement and the Plan was not an adequate alternate remedy;
- (iii) granting the application for judicial review of the Umpire's decision and setting the decision aside; and
- (iv) finding that the failure of the Umpire to provide the five-day notice of his intention to apply local practice to his deliberations was material given the opportunity the Labourers' representatives had to present local practice evidence when the hearing was conducted.

[60] In the result I would order that:

- (i) the decision of the reviewing judge be set aside and the decision of the Umpire be restored, subject to any right of review under the Plan; and

- (ii) the Teamsters shall have costs in this Court and in the Trial Division to be taxed on a party and party basis at Column III of the Schedule in Rule 55.

M. F. Harrington J.A.

I concur: _____

J. D. Green C.J.N.L.

I concur: _____

C. W. White J.A.