Ontario Labour Relations Board

v.

Canada Industrial Relations Board

Three *MORE* Key Differences

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OLRB *v.* CIRB: Three *MORE* Key Differences

I. Introduction

At last year's Six-Minute Labour Lawyer Conference (June 15, 2011), we described three key differences that labour law practitioners might keep in mind when pleading cases before the Ontario Labour Relations Board (OLRB) and the Canada Industrial Relations Board (CIRB). There are some fundamental differences between the two labour tribunals.

At the 2011 Conference, we contrasted the relatively static jurisdiction the *Canada Labour Code* (*Code*) has granted the CIRB over the decades, compared with the significantly expanded jurisdiction assigned to the OLRB. Another key difference arose from the CIRB's mainly card-based certification model, as opposed to the OLRB which is required by the *Labour Relations Act, 1995* (Act) to conduct a representation vote in applications for certification, except in the construction sector where card-based certification is the norm.

Finally, we contrasted the CIRB's explicit statutory right not to hold an oral hearing, with the OLRB's development of the consultation process as a means to increase efficiency while still providing an oral hearing.

This year, we have been asked to present three MORE key differences.

The first major difference examines which labour board has constitutional jurisdiction over a particular case. This issue arises frequently, particularly before the CIRB, and continues to

produce interesting jurisprudence, both from labour boards, as well as the courts, including the Supreme Court of Canada (SCC).

A second key difference concerns the reconsideration of previous decisions. The CIRB and the OLRB exercise their reconsideration power in significantly different ways.

Finally, the third key difference compares and contrasts who is an employee for labour relations purposes and which "employees" should be placed in an appropriate bargaining unit. The dividing line between employees and managers, as well as which individuals should be placed in a particular bargaining unit, are essential determinations which impact the relations between labour and management.

This year's three topics will be examined in the above order.

II. OLRB v. CIRB: Which board has constitutional jurisdiction?

A. Overview

Just as disputes frequently arise between the provinces and the federal government over constitutional authority in a particular area, so too do those questions arise in labour board matters.[1]

[1] On May 17, 2012, after this paper was finalized, the Supreme Court of Canada issued its unanimous decision in *Tessier Ltée v. Quebec (Commissions de la santé et de la sécurité du travail)*, 2012 SCC 23. Certain significant passages of the decision are reproduced in an Appendix to this paper.

The first question labour counsel face concerns the appropriate tribunal for their client's dispute. Evidently, bringing proceedings before the wrong tribunal, be it a labour board, human rights tribunal or otherwise, can lead to an enormous waste of resources.

Similarly, if suspicions about jurisdiction arise at the beginning of a new case, it is important to prepare a client for the possible complexity that the division of powers in our Constitution may add to the proceeding.

Despite the expertise most labour lawyers develop in constitutional law, significant court cases continue to clarify this subject; those cases often arise in the labour relations realm.

Labour boards themselves have an obligation to raise reasonable questions about their jurisdiction, even if the parties do not contest the issue: *TNT Express (Canada) Ltd.*, 2012 CIRB 629:

> [33] The parties do not limit the scope of any constitutional issue before the Board. Whether CUPW raised the issue of the proper characterization of TNT Canada's undertaking or not, the Board must still satisfy itself that it has jurisdiction over the application.
>
> [34] The same principle applies when the parties purport to consent to the Board's jurisdiction. If the Board is not certain whether the *Code* applies, the parties will be called upon to provide appropriate facts and legal submissions (see, for example, *Allcap Baggage Services Inc. (1990)*, 79 di 181; and 7 CLRBR (2d) 274 (CLRB no. 778), at pages 184–185; and 276–277).

A labour tribunal which decides legitimate jurisdiction issues at the beginning of an application for certification may avoid having a developed collective bargaining relationship end later on due to constitutional jurisdiction issues.

Some labour legislation protects trade union certifications which, as a result of a change of activity, are no longer properly within the original tribunal's jurisdiction: see, for example, s. 44(3) of the *Code* ("Change of activity or sale of a provincial business"). In Ontario, in 1992, Bill 40 introduced a provision into the *Act* which expressly made the "sale of business" provisions applicable to a sale from an employer within federal labour jurisdiction to an employer within provincial labour jurisdiction. The provision was repealed by Bill 7 in 1995.

Certain principles with respect to the constitutional division of powers and labour relations are well established in the case law. Those principles were summarized in *Montcalm Construction*, (1978), 93 D.L.R. (3d) 641 (S.C.C.) and restated in *NIL/TU,O Child and Family Service Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 (*NIL/TU,O*), without citations, at paras. 13 -14:

> (1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
>
> (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
>
> (3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
>
> (4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.
>
> (5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

> (6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

The main "subjects" of primary federal competence which give rise to claims of federal labour jurisdiction are:

- Navigation and shipping;
- Interprovincial transportation;
- Aeronautics ;
- Telecommunications;
- Post Office;
- Aboriginal Peoples and Reserves;
- Banks;
- Interprovincial railways;
- Grain elevators and feed mills; and
- Atomic energy.

The application of the principles set out above to these subjects of primary federal competence, is, of course, not without difficulty. There were cases in relation to primary federal competence with respect to Aboriginal Peoples and Reserves, expressed in section 91(24) of *The Constitution Act, 1867* as "Indians, and Lands reserved for the Indians", which suggested federal labour jurisdiction over entities operated by Aboriginal Nations or bands (within the meaning of the *Indian Act*) to provide services to Aboriginal Peoples in a culturally appropriate manner. These decisions were predicated on the premise that provision of such services trenched upon the "core of Indianness" protected by s. 91(24), and thus fell within federal labour jurisdiction.

This interpretative approach reached the SCC in *NIL/TU,O*, where it was unanimously rejected. However, the SCC divided six to three with respect to its reasons for reaching this decision. The

basis for this division was a question of more general application: the interrelationship between the inquiry into the nature of the habitual activities and daily operations of the entity in question (i.e. the "functional test") to determine whether or not it constitutes a federal undertaking; and the inquiry into the "core" of the federal head of power which is said to be impaired.

In the view of the minority, "the functional test is merely a particular method of applying the more general rule that exclusive federal jurisdiction over labour relations arises only if it can be shown that such jurisdiction forms an integral part of primary federal jurisdiction over some other federal object" [para. 57]. On this approach [para. 61]:

> [T]he first step is to determine the extent of the core federal undertaking or power. Having done this, one asks whether, viewed functionally, the operation's activities fall within that power.

The majority view, however, was as follows [para. 18]:

> [I]n determining whether an entity's labour relations will be federally regulated, thereby displacing the operative presumption of provincial jurisdiction, … a court [must] first apply the functional test, that is, examine the nature, operations and habitual activities of the entity to see if it is a federal undertaking. If so, its labour relations will be federally regulated. Only if this inquiry is inconclusive should a court proceed to an examination of whether provincial regulation of the entity's labour relations would impair the core of the federal head of power at issue.

It is perhaps important to note that in *NIL/TU,O* there was no dispute that the nature, operations and habitual activities of the entity were with respect to a subject, the provision of child welfare services which fell within provincial jurisdiction [see para. 2], with the result that the entity was not a federal undertaking. Accordingly, the majority decision did not have to address how this determination would otherwise have been made or at what point such an inquiry would be

considered "inconclusive" so as to trigger the second step. The challenges in doing so may be reflected in the following criticism of the majority decision offered by the minority:

> [59] In our view, the alternative does not withstand scrutiny. Justice Abella concludes that the core of Indianness should be considered only if the functional test is inconclusive. But the essence of the functional test, described by the authorities since *Construction Montcalm*, is whether the function falls within the core of a federal power; only this can displace the presumption of provincial jurisdiction in labour matters. The two-stage test proposed by our colleague would mean that labour jurisdiction would be determined in many cases before consideration of the power under s. 91(24) is reached. With respect, deciding labour jurisdiction in a case such as this without scrutiny of the federal power hollows out the functional test as conceived on the authorities. If a court were satisfied that the operation's normal activities *look provincial* on their face, it would not need to go further.

In this part of the paper, we will summarize recent constitutional cases, many of which deal with a labour board's jurisdiction.

B. Aboriginal Peoples

Native Child and Family Services Agencies:

NIL/TU,O, discussed above, and the companion case *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, 2010 SCC 46, addressed the question of whether an agency which provided child and welfare services to native people in a culturally sensitive way and employed native people to do so fell within provincial or federal labour jurisdiction.

In *NIL/TU,O* and *Native Child* the SCC unanimously held that such agencies fell within provincial labour jurisdiction, although the SCC split six to three as to its reasons for reaching this conclusion. The reasons of both the majority and the minority are set out in *NIL/TU,O* and essentially simply adopted by reference in *Native Child* by the same division of the SCC.

The majority determined the matter on the basis of the functional test. It held that the "essential nature of NIL/TU,O's operations was to provide child and family services, a matter within the provincial sphere" [para 45]. NIL/TU,O was a fully integrated part of the provincial regulatory regime with respect to child and family services [para 38]. It was regulated exclusively by the province and its employees exercised exclusively provincial delegated authority [para. 36].

As noted the minority took a different approach than the majority. In its view:

> [T]he first step is to determine the extent of the core federal undertaking or power. Having done this, one asks whether, viewed functionally, the operation's activities fall within that power.

The minority expressed the view that the "core" of section of 91 (24), which it equated with "basic, minimum and unassailable content" [para. 70] was narrow [para. 73] and should be restricted to the "historical parameters of Indianness" [para. 69].

Applying this approach to the case before it, the minority stated:

> [74] The question is whether the normal and habitual activities of the Indian operation at issue go to the status and rights of Indians, which reflect the fundamental federal responsibility for Indians in the Canadian constitutional and historical context. Only if the operation's normal and habitual activities relate directly to what makes Indians federal persons by virtue of their status or rights can provincial labour legislation be ousted, provided the impact of the provincial legislation would be to impair this essentially federal undertaking.

> [75] Here, the question is whether the appellant's child welfare services operation, viewed in terms of its normal and habitual activities, lies at the center of the status and rights of Indians, so as to bring it within the federal core power over Indians. If the operation's normal and habitual activities are not intimately bound up with the essential capacities and rights inherent in Indian status, Aboriginal and treaty rights, or a delegated federal power over Indians, it remains subject to provincial jurisdiction, notwithstanding that it impacts on Indians, their culture and their values.
>
> [76] The function of NIL/TU,O is the provision of child welfare services under the umbrella of the province-wide network of agencies providing similar services. The ordinary and habitual activities of NIL/TU,O do not touch on issues of Indian status or rights. The child welfare services therefore cannot be considered federal activities.

The majority expressly declined to proceed to the second step of the analysis and consider whether provincial regulation of labour relations of NIL/TU,O would impair the "core" of primary federal jurisdiction over "Indians, and the Lands reserved for Indians". Thus, while the minority of the SCC expressed the view that the "core" of section of 91 (24), which it equated with "basic, minimum and unassailable content" [para. 70] was narrow [para. 73] and should be restricted to the "historical parameters of Indianness", the majority of the SCC has not expressed a view on this.

The majority also expressly disagreed with what it described as the "suggestion" by the minority that funding agreements in place between the federal and provincial governments gave rise to a delegation of regulatory or legislative power from the federal to the provincial government [para 34]. However the minority appears to affirm the proposition that federal jurisdiction extends "to cases where the ordinary and habitual activities of the operation affect core aspects of Indian status, *or are conducted pursuant to federal delegated authority*" [see para. 68 and 69 and also para. 75 above]. Since the minority found that the child welfare agencies were not subject to

federal labour jurisdiction, it would appear to follow that the minority did not find that there had been delegation of federal authority.

Both the majority and the minority of the SCC agreed, however, that the fact that the employer employed Indians and provided services to Indians in a culturally sensitive way that sought to enhance Aboriginal identity and preserve Aboriginal values did not alter its essential function, the provision of child welfare services, and therefore did not affect the result.

Authority Delegated to Bands Under the Indian Act:

As noted, section 91(24) of the Constitution Act confers exclusive legislative authority upon the Parliament of Canada with respect to "Indians, and Lands reserved for the Indians".

Inherent to that jurisdiction is the administration of reserves. Pursuant to the *Indian Act* some of that administration in relation to each reserve is delegated to the "band" and the "council of the band". The governance functions exercised by those bands have thus been found to fall within federal labour jurisdiction.

A recent case of the OLRB decided in part on the basis of delegated authority is *Nipissing First Nation*, 2011 CanLII 71801 (ONLRB).

Nipissing First Nation is a "band" and "band council" as defined in section 2(1) of the *Indian Act*. Pursuant to the *Indian Act* certain functions are delegated to bands, including the

maintenance and construction of infrastructure on the reserve occupied by the band. The *Indian Act* also contemplates the funding of this work pursuant to agreements between the federal government and the band. Nipissing First Nation had entered into such a funding agreement with the federal government. It employed its own employees to perform infrastructure construction work on the reserve. A union applied to be certified for a bargaining unit of those employees.

The OLRB held that the work in question fell within federal labour jurisdiction, and thus dismissed the application. The OLRB cited several reasons for its decision:

- First and foremost, all of the work was performed on the reserve, under the direction of the band council for the collective benefit of the band members residing on the reserve. One of the goals set by the band as part of its governance function was the sustainable development of infrastructure and community resources.
- The responsibility for the construction work in question had been specifically delegated to the band by the *Indian Act*.
- The construction work in question was funded by the federal government.
- The work in question was completely integrated with the other work done by the band that falls within its governance function.

The OLRB rejected the union's argument that there was nothing "inherently aboriginal" about the work being done. The issue was irrelevant as the case fell to be determined on whether the activities in issue fell with in the scope of authority delegated to the band or the band council by the Crown: see para. 73.

Inherent Aboriginal Rights:

Section 35 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 provides:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Is there an aboriginal right with respect to labour relations which supplants the jurisdiction of either the OLRB or the CIRB? So far, such arguments have not been successful.

In *Mississaugas of Scugog Island First Nation*, 2007 ONCA 814, the issue was whether the Mississaugas of Scugog Island First Nation ("MSIFN"), located in Ontario, had the legal right based on ancestral or treaty rights to enact its own labour code governing commercial undertakings operating on reserve lands. The Great Blue Heron Casino operated on the reserve. A few months after the Casino was certified, the MSIFN purported to enact its own "Labour Relations Code" (the "MSIFN Code") and asserted that had the effect of displacing the operation of the *Act*.

As stated by the Court of Appeal:

> [The MSIFN] Code is a comprehensive modern-day labour relations code, closely modelled on the *Canada Labour Code*, but displaying some significant differences: strikes and lockouts are banned; a union must pay a fee of $3000 and obtain permission from the Dbaaknigewin, the labour relations tribunal established by the [MSIFN] Code, to speak to workers on the reserve; and workers must pay a fee of $12,000 to file an unfair labour practice complaint.

The Court of Appeal succinctly described the principles applicable to claims based on aboriginal rights of self-government as follows:

> [17] The Supreme Court of Canada has held that, to the extent that there exists an aboriginal right to self-government, the applicable legal standard is that laid down in *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507 [*Van der Peet*] for the determination of other activities related to aboriginal rights: see *R. v. Pamajewon*, 1996 CanLII 161 (SCC), [1996] 2 S.C.R. 821 [*Pamajewon*] at paras. 24-25.
>
> [18] In determining whether there is an aboriginal right using the *Van der Peet* test, the first step is to characterize the right claimed. The right must be characterized in context and with sufficient specificity to allow the court "to identify a practice that helps to define the way of life or distinctiveness of the particular aboriginal community": *R. v. Sappier, R. v. Gray*, 2006 SCC 54 (CanLII), [2006] 2 S.C.R. 686 [*Sappier*] at paras. 22, 24. The right claimed should not be framed in excessively general terms or artificially broadened or narrowed or otherwise distorted to fit the desired result: *Mitchell v. M.N.R.*, 2001 SCC 33 (CanLII), [2001] 1 S.C.R. 911 [*Mitchell*] at paras. 15, 20; *Pamajewon* at para. 27; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010 [*Delgamuukw*] at para. 170.
>
> [19] Three factors shape the characterization of the right claimed: (i) the nature of the action that is claimed to have been carried out pursuant to an aboriginal right; (ii) the nature of the government regulation, statute or action being impugned; and (iii) the practice, custom or tradition relied upon to establish the right: *Van der Peet* at para 53.
>
> [20] Once the claimed right is characterized, it is for the claimant to establish that an aboriginal right exists.
>
> [21] The following elements must be proved: (i) the existence of an aboriginal practice, custom or tradition that supports the right; (ii) that this practice, custom or tradition was integral to the distinctive culture of the claimant group's pre-contact society; and (iii) reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim: *Van der Peet* at paras. 53-59, 64-65; *Mitchell* at para. 12.

The MSIFN characterized the right which it claimed as "the right to regulate work activities and to control access to aboriginal lands". The Court of Appeal rejected that characterization and concluded that the correct characterization was the right to regulate labour relations on aboriginal lands. In reaching this conclusion, the Court of Appeal considered each of the three factors identified in *Van der Peet*.

The first factor considered was the nature of the action that is claimed to have been carried out pursuant to an aboriginal right. The subject of the MSIFN Code, which was modeled on the *Code*, was labour relations, not the regulation of work activities or control of access to aboriginal lands [para. 27]. The essential character of the one provision which sought to regulate access to the reserve, through the requirement of payment of a fee, was also labour relations: it did not purport to regulate access to the reserve for any other purpose [para. 28].

The second factor considered was the nature of the government regulation, statute or action being impugned. The *Act* was about labour relations and the regulation of collective bargaining, and had nothing to do with access to aboriginal lands or regulation of work activities [para. 29].

The third factor considered was the practice, custom or tradition relied upon to establish the right. MSIFN was "unable to identify any ancestral practice, custom or tradition that bears any relationship to a modern labour relations code" [para. 30].

The Court of Appeal also emphasized the need for both specificity and distinctiveness with respect to a claim. With respect to the need for specificity, the Court of Appeal quoted from the Supreme Court of Canada at para. 27 of *Pamajewon*:

> The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands". To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right. The factors laid out in *Van der Peet*, and applied, *supra*, allow the Court to consider the

> appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the courts to do so.

With respect to the need for distinctiveness, the Court of Appeal stated [at para 39.]:

> … even if we were to accept the appellant's characterization of the right as an aboriginal practice to regulate work activities and access to aboriginal lands, such a practice could not be said to be integral to the distinctive culture of the appellant. In *Van der Peet*, at para. 56, the Supreme Court rejected "aspects of the aboriginal society that are true of every human society (e.g., eating to survive)" as practices capable of supporting an aboriginal right and insisted that the focus be "on the aspects of the aboriginal society that make that society distinctive". The evidence led as to the traditional regulation of work activity bears no relation to modern collective bargaining. The appellant cannot escape this deficiency by relying on the fact that the aboriginal society organized the work activities of its members: the organization of work at that level of generality is a feature of every human society.

Accordingly, the Ontario Court of Appeal rejected the MSIFN's claim that its aboriginal rights included the right to adopt a labour relations code which supplanted the *Act*.

In *Conseil Des Innus De Pessamit v. Association des Policiers et Policières de Pessamit*, 2011 FCA 306 (CanLII), the Federal Court of Appeal emulated the reasoning of the OCA in *Mississaugas of Scugog Island First Nation*. The Conseil asserted that the CIRB had no jurisdiction to hear and decide an application for certification with respect to police officers which it employed. The Conseil asserted that the application was inconsistent with its right to self government which it asserted was guaranteed by section 35 of *The Constitution Act, 1982*. In particular, the Conseil asserted the right to maintain law, order and public safety on the reserve, a right which it asserted included the management of relations with its police workforce.

The FCA held that the CIRB was correct in rejecting the Conseil's argument.

The FCA considered the application of the three factors identified in *Van der Peet*.

First, the nature of the action that was done, or would be done, pursuant to the aboriginal right claimed was the regulation of the labour relations of the police workforce, not the more general right of ensuring public safety as claimed by the Conseil.

Second, the impugned statute, the *Code*, was clearly about the management of labour relations.

Given this characterization, the Conseil conceded that it could not satisfy the third factor as there was no evidence of an aboriginal right of management of labour relations.

C. CIRB: Some Lesser Known Questions of Constitutional Jurisdiction

The complexity of constitutional jurisdiction does not usually arise for well known federal works, undertakings or businesses, such as airlines, railways, broadcasters and chartered banks. But some technical debates may still occur. See, for example, *Schnitzer Steel BC Inc.*, 2012 CIRB 640 (was the employer a metal recycling business or an inter-provincial transportation undertaking?)

Many of the difficulties usually arise when deciding if an entity serving a federal undertaking, because of the crucial nature of its activity, therefore becomes subject to federal jurisdiction.

Security Guards

Generally, a business providing security guard services to clients falls within provincial jurisdiction. But exceptions may exist depending upon the integration of their service into the core activities of the federal undertaking.

In *Syndicat des agents de sécurité Garda, Section CPI-CSN v. Corporation de sécurité Garda Canada et al*, 2011 FCA 302 (*Garda*), the issue arose whether security guards working for the Canada Border Services Agency at one of its Immigration Prevention Centres (IPC) fell within the CIRB's jurisdiction. An IPC is a medium security holding centre for those individuals who were out of status in Canada or subject to a removal order.

In *Garda*, *supra*, the security guards were involved in the transportation, monitoring and detention of these individuals. Those functions might include handcuffing the individuals as part of the detention function.

The Federal Court of Appeal (FCA) concluded that the services of Garda's security guards were essential to the core federal undertaking relating, *inter alia*, to immigration matters (paragraphs 45 and 73). This determination brought the guards within the CIRB's jurisdiction, notwithstanding the fact that other Garda security guards working for different clients would be subject to provincial jurisdiction.

The OLRB in *Bhagat Ram Mehmi*, [2004] OLRB Rep. January/February 16, had come to a similar conclusion when faced with a case involving security guards working at an IPC.

In addition, while it is generally well known that security guards providing pre-boarding services at airports fall within federal jurisdiction, so too do those guards who provide perimeter security protection: *Securiguard Services Limited*, 2005 CIRB 342:

> [34] In light of these answers, the Board is of the view that Securiguard's services at the airport are sufficiently connected to the operations of the Airport Authority to be severable from more routine security contracts. There is no evidence that the cleaning staff, booksellers, shopsellers, food vendors and other service providers must similarly comply with the *Aeronautics Act* or that their operations are essential to the airport's operation.
>
> [35] Consequently, the Board views the work of Securiguard's employees at Airport Authority as unique compared to the services it provides to other clients who operate under federal jurisdiction and distinct from its other contracts. The level and quality of work of Securiguard's employees is totally dependent on the standards set by the airport, and the standards of service that apply at the Vancouver International Airport.
>
> [36] These observations are sufficient for the Board to conclude that there is a sufficient nexus between the airport, as a core federal undertaking, and Securiguard, as a subsidiary operation, to weigh in favour of federal jurisdiction, just as the Board found in *City of Saskatoon, supra* (see pages 31; and 174 and following of that decision). The fact that these services are contracted out does not make them less essential to the operation of the airport.

<u>Cable Installers</u>

Technicians with wiring skills would generally be governed by provincial labour law. But what happens when their employer is retained by a federal cable undertaking to connect home owners to its services?

In *XL Digital Services Inc., doing business as Dependable HomeTech v. Communications, Energy and Paperworkers Union of Canada*, 2011 FCA 179, the FCA found that those

installation services were federally regulated. That decision turned on the level of integration of the installers into the core federal cable undertaking:

> [28] To paraphrase Justice Estey, writing for the majority of the Court in *Northern Telecom v. Communication Workers*, [1983] 1 S.C.R. 733 at 770, the question is: to what extent was the work of HomeTech's employees integral to Rogers' federal undertaking? It is important to bear in mind here that I have already concluded that the Board did not err in concluding that Rogers' federal undertaking extends from the headend to the cable and equipment connecting its customers to the network.
>
> [29] Nearly all the facts point to the conclusion that HomeTech's employees were highly integrated into the federal undertaking. In particular, HomeTech's operations "as a going concern" consisted of connecting Rogers' customers to the network and to providing related services. Although HomeTech was independently owned, Rogers was HomeTech's only customer, and the HomeTech employees in question devoted all their time to performing the work covered by the contracts between Rogers and HomeTech. The allocation and scheduling of the employees' work was controlled by Rogers.

Grain Elevators and Feed Mills

It may not always be initially apparent why a feed mill, or similar types of grain operations, could fall under federal jurisdiction. However, section 92(10)(c) of the *Constitution Act, 1867*, gives Parliament the authority to declare certain works to be for the general advantage of Canada. Declared works fall within the CIRB's jurisdiction.

In *Viterra Inc.*, 2012 CIRB 633, the Board explained why it had jurisdiction over a certification application aimed at a feed mill:

> [15] This certification application for employees employed by the Mill falls within the Board's jurisdiction due to the Declaration found at section 76 of the *Canada Wheat Board Act* (R.S.C., 1985, c. C-24):
>
> > 76. For greater certainty, but not so as to restrict the generality of any declaration in the *Canada Grain Act* that any elevator is a work for the general advantage of Canada, it is

> hereby declared that all flour mills, feed mills, feed warehouses and seed cleaning mills, whether heretofore constructed or hereafter to be constructed, are and each of them is hereby declared to be works or a work for the general advantage of Canada and, without limiting the generality of the foregoing, every mill or warehouse mentioned or described in the schedule is a work for the general advantage of Canada.

[16] Section 2(h) of the *Code* refers expressly to such Declarations:

> 2. In this *Act*, "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,
>
> ...
>
> (h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces...

Such declarations may also cause the nuclear operations within an otherwise provincial undertaking to come under the CIRB's jurisdiction: *Ontario Hydro* 94 di 60 (CLRB no. 1065).

Global Businesses

The issue of the CIRB's jurisdiction can also arise for businesses which carry on activities around the globe.

In *CHC Global Operations (2008) Inc. v. Global Helicopter Pilots Association*, 2010 FCA 89, the employer involved in a certification application was described as "one of the largest and most geographically diverse helicopter operations in the world, providing chartered helicopter services to the oil and gas industry in Canada and around the world" (para. 1).

CHC Global argued that the CIRB did not have jurisdiction to certify a bargaining unit for its helicopter pilots, beyond those working for its Canadian-based operations situated in Halifax, Nova Scotia. CHC Global suggested that all other helicopter pilots were not employed on or in connection with a federal work, undertaking or business, which is a requirement of section 4 of the *Code*.

The FCA accepted that CHC Global's business constituted a federal undertaking and that a certification order could cover employees working internationally:

> [28] The conclusion the Board did not err is further supported by the Board's analysis in its Final Decision about who exercised fundamental control over the pilots (particularly the Board's analysis at paragraphs 104 to 122 of its reasons). The Board found the applicant controlled the pilots' access to employment, their assignments, their training requirements, the terms of their employment, their working conditions and performance, and their discipline and termination. The exercise of such day-to-day control further demonstrated the nature of the applicant's operation. The Board's unchallenged findings on this point support its original functional analysis and conclusion that the applicant's business operating out of Richmond, British Columbia constituted a federal business or undertaking that carried on the business of chartering helicopters to service the oil and gas industry in Canada and around the world.
>
> [29] As to the fact that some pilots fly domestically in foreign countries, the operation of the *Code* is not restricted to employees performing work within Canada. Persons working outside Canada's territorial jurisdiction can be included in a bargaining unit certified by the Board, so long as they are employed on a work, undertaking or business that falls within the legislative authority of Parliament. See, for example, *Seafarers' International Union of Canada v. Crosbie Offshore Services Ltd.*, [1982] 2 F.C. 855 (C.A.); leave to appeal dismissed, [1982] S.C.C.A. No. 294. Inherent in that conclusion is that employees working abroad may well be subject to the regulatory authority of another country. As the respondent argues, this does not affect the employees' relationship with their employer, or limit the applicability of the *Code* to the terms and conditions of the employees' employment.
>
> [30] In sum, the Board correctly recognized that, as a matter of law, it was required to analyse the applicant's operation on a functional basis to determine whether its operation, including its extraterritorial operation, constituted a federal work, undertaking or business. The Board then made factual determinations about the nature of the applicant's operation and the relationship between the pilots and that operation. The Board's factual findings have not been challenged directly and were reasonable. The applicant has failed to establish any reviewable error.
>
> (emphasis added)

As can be seen from both the OLRB and CIRB cases summarized above, the issue of constitutional jurisdiction will continue to arise as a regular part of most labour lawyers' practice. Given that the CIRB's jurisdiction over labour relations is the exception to the general rule, it generally deals with these issues more frequently than does the OLRB.

II. Reconsideration

A. Overview

The CIRB has the explicit statutory power to "review" its decisions. The OLRB has the explicit statutory power to "reconsider" its decisions. This different choice of words may partially explain the different practices of the CIRB and the OLRB with respect to requests to review or reconsider, respectively, their decisions.

B. CIRB Practice

Section 18 of the *Code* sets out the CIRB's review power:

> 18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

The *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*) provides further guidance on the reconsideration process at sections 44-46.

There are two different types of review processes at the CIRB.

As last year's paper noted, both the CIRB and the OLRB retain jurisdiction over the bargaining certificates they issue. However, the OLRB considers the certificates it issues to have been "spent" after the parties conclude a collective agreement. Accordingly, the OLRB has declined to exercise its jurisdiction to reconsider the certificates which it originally issued as they will have been superseded by the bargaining unit description to which the parties have agreed in their collective agreement. By contrast, the CIRB considers that it has ongoing jurisdiction over the bargaining unit description, irrespective of the agreement of the parties. Consequently, as labour relations evolve between an employer and the certified trade union, the CIRB may exercise this jurisdiction to update its bargaining units to reflect changes.

For example, if there is a dispute whether certain employees fall within the existing scope of a bargaining unit, the CIRB will determine that issue: see, for example, *Garda Cash-In-Transit Limited Partnership*, 2010 CIRB 503. By contrast, the OLRB will determine whether a person is an employee within the meaning of the Act, but will generally defer the question of whether or not they fall within the bargaining unit to arbitration.

Under s. 18.1 of the *Code*, the CIRB can also merge or otherwise rationalize an employer's multiple bargaining units.

Reconsideration, which similarly has its genesis in the s. 18 review power, is a distinct process from a review. Reconsideration, in rare cases, allows the CIRB to reconsider and modify one of its recently issued decisions.

Canada Labour Relations Board Practice

The CIRB's predecessor, the Canada Labour Relations Board (CLRB), first established the reconsideration process for recent decisions.

In *Brewster Transport Co. Ltd* (1986) 66 di 133, the CLRB described its reconsideration screening mechanism:

> The Board has for some time recognized that it can use section 119 (now section 18) to reconsider its decisions and to reverse itself on matters of law and labour relations policy. See a review of the jurisprudence in *Wardair Canada (1975) Ltd.* (1983), 53 di 184; and 84 CLLC 16,005 (CLRB no. 434). The Board has been upheld on this point in the Federal Court of Appeal in *International Association of Machinists and Aerospace Workers et al. v. Canada Labour Relations Board et al.*, Court file no. A-674-84, April 17, 1985. However, it is the Board's general policy that if a decision of a three-person panel is to be reversed by persons other than the original panel, that decision to reverse ought not to be made simply by another three-person panel. That should be a decision of the Board sitting in plenary session, including the original panel. Given the work load of the Board, it is obviously not feasible that all reconsideration applications alleging an error in law or in policy be considered by a plenary. It is therefore necessary to have a screening mechanism to decide what cases warrant a decision by a plenary. The screening mechanism the Board has devised is a "summit panel" consisting of the Chairman and two Vice-Chairmen, or three Vice-Chairmen, not including anyone who sat on the original panel. (See *Wardair*, *supra*.)
>
> The summit panel gives preliminary consideration to decide whether the case ought to go to a plenary. The summit panel will normally decide one of two things. It will either decide to refer the matter to the plenary, in which case the summit panel will not itself dispose of the merits, or it will decide that the case does not warrant a plenary and accordingly dismiss the section 119 application. In the latter event, the summit panel does dispose of the merits, and in effect confirms the decision of the original panel. In particular circumstances the summit may refer the matter back to the original panel for reconsideration. The one thing the summit panel will not do is reverse the decision of the original panel.
>
> (pages 135 and 136); (emphasis added)

The CLRB later changed the name "summit panel" to "reconsideration panel": *Canadian Broadcasting Corp.* (1991), 86 di 92 (CLRB 897).

The CLRB, unlike the CIRB, was a non-representational labour board. Its members, just like the Chair and the Vice-Chairs, were all neutrals. While the CIRB is now a representational board, its decisions, like those of the CLRB, remain almost always unanimous.

CIRB Reconsideration Practice

The CIRB's reconsideration process changed when the *Code* made it into a representational labour board. At the former CLRB, the reconsideration panel's function was to decide whether a reconsideration application should go to a plenary meeting of the CLRB, or be dismissed. A plenary, or full meeting of the CLRB, including members of the original panel, would decide important questions of law or policy, based on written submissions or sometimes oral representations from the parties.

By contrast, the CIRB now uses a reconsideration panel to consider the merits of the reconsideration application. The CIRB has never held any plenary sessions.

The FCA considered this revised process in *Telus Communications Inc. v. TWU*, 2005 FCA 262 (*Telus*) after a party suggested the CIRB demonstrated bias by refusing to refer a matter to a plenary panel:

[62] First I will deal with the TWU's procedural issue: was the Board legally obligated to have the matter decided by a plenary panel?

…

[66] Referring decisions to plenary panels for matters of policy or *Code* interpretation was, although not common, certainly utilized prior to 1999 by the Canada Labour Relations Board (CLRB), the predecessor to the Board, to address perceived errors in law or in policy (see *Skeena Broadcasters Ltd.* (1982), 49 di 27 (CLRB)).

[67] The policy behind the engagement of a plenary panel was to have a forum allowing for the expression of each Board member's opinion when matters of importance arose (see *Wardair Canada (1975) Ltd.* (1983), 53 di 184 (CLRB)). It was also used to ensure that a decision of a three member panel would not be reversed by another three member panel (see *Brewster Transport Company Limited* (1986), 66 di 133 (CLRB)).

[68] However, since the 1999 amendments, which, among other things, replaced the former CLRB with the Board, the Board has altered its procedure to refer certain matters to plenary panels. Every decision relied upon by the TWU, in which the Board referred to the plenary panel, was rendered prior to 1999. Prior to the 1999 amendments, the Board was composed of non-representational members, members that represented neither management nor labour. Since the 1999 amendments, the Board has been composed of a Chairperson, Vice-Chairs and members. Each member represents either labour or management. Most importantly, since the 1999 amendments, there have been thirteen reconsideration applications and none have taken place before a plenary panel. Indeed, there has been no sitting of a plenary panel on any matter since 1999.

…

[72] I therefore conclude that while the Board may have had this procedure in place prior to the 1999 amendments, it no longer has a policy of convening plenary panels. This conclusion should serve as no surprise to the TWU, since it has been before the Board at least 12 times since 1999 and should therefore be familiar with Board procedure. This leads me to believe that the procedure employed by the Board in its rendering of the Reconsideration Decision is that which it now routinely employs, in which case, the formation of the three member panel was not patently unreasonable.

[73] I am also of the opinion that if the Board wishes to overturn its previous decision upon reconsideration, with or without a plenary panel, it is free to do so without intervention, since it is "master of its own procedure" and was acting within its jurisdiction. The Board loses this jurisdiction only if there is "bias, interest, fraud, denial of natural justice or want of qualification" (*C.J.A., Local 1388 v. Prince Edward Island (Labour Relations Board)*, [1990] P.E.I.J. No. 31). …

(emphasis added)

While the CIRB's process has changed, the grounds for reconsideration generally remain the same as in the time of the CLRB.

In *Kies*, 2008 CIRB 413, the CIRB described the exceptional nature of reconsideration, as well as the minimum pleading requirements for the three main grounds. Section 44 of the *Regulations* codified these traditional grounds for reconsideration:

> 44. The circumstances under which an application shall be made to the Board exercising its power of reconsideration under section 18 of the *Code* include the following:
>
> (a) the existence of facts that were not brought to the attention of the Board, that, had they been known before the Board rendered the decision or order under reconsideration, would likely have caused the Board to arrive at a different conclusion;
>
> (b) any error of law or policy that casts serious doubt on the interpretation of the *Code* by the Board;
>
> (c) a failure of the Board to respect a principle of natural justice; and
>
> (d) a decision made by a Registrar under section 3.

Under the CIRB's current practice, allegations of new facts will usually be returned to the original panel. That panel is best situated to determine whether the facts are indeed "new" and, more importantly, whether they would have changed its original conclusion.

Allegations regarding errors of law or policy, or a denial of natural justice, will be sent in most cases to a panel of three neutrals, made up of the Chair and or Vice-Chairs, who will decide the matter.

As emphasized in *Kies*, *supra*, it is extremely rare for a reconsideration panel to intervene in the original panel's determination. Most applications simply seek a second hearing of the matter and reconsideration panels routinely dismiss what amount to disguised appeals. On occasion, however, a reconsideration panel will overturn or modify the original panel's decision, much like a plenary panel could do at the CLRB: *Telus, supra*.

One can speculate why the CLRB developed a reconsideration process, which differs from that of the OLRB described below, by using a new panel in many cases.

One theory for the difference might be that the CLRB and the CIRB, have traditionally been staffed by labour relations experts from across Canada. The various provinces all have differing labour relations practices.

For example, while a certification certificate is considered "spent" in Ontario as soon as the parties conclude a collective agreement, the CIRB retains jurisdiction over its bargaining units. This latter approach is consistent with how Quebec administers its bargaining unit orders. Similarly, the CLRB had used the plenary process to determine important questions such as how the statutory freeze should be applied, as well as the proper concept of a "business" in sale of business situations.

The plenary process allowed the CLRB's decision-makers' views to be considered, including those of the original panel, at a time when different approaches existed across Canada. Once the CLRB issued a plenary decision, all future panels were bound to follow it.

The practice of labour law across the country is generally more uniform since the days when the CLRB had to adopt certain approaches as it interpreted the *Code* in the 1970's and 1980's.

C. OLRB Reconsideration Powers and Process

Section 114(1) of the *Act* sets out the OLRB's reconsideration power:

> 114. (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this *Act* and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

Reconsideration requests must be made in a timely fashion. Rule 18.3 of the OLRB's Rules of Procedure provides:

> No request for reconsideration will be considered where it is filed more than twenty (20) days after the date of the Board's decision, except with the permission of the Board.

(A "day" is defined by Rule 1.5 as "any day of the week from Monday to Friday, excluding a statutory holiday and any other day the Board is closed".) Rule 18.3 recognizes the need for finality in labour relations.

The OLRB's Rules of Procedure also provide that requests for reconsideration are to be made on a specific form. The OLRB's Information Bulletin No. 19 summarizes the procedure with respect to requests for reconsideration.

The test applied by the OLRB is longstanding. Reconsideration is not an opportunity for a party to reargue its case. Parties are entitled to certainty and finality with respect to decisions of the OLRB. The OLRB will not normally reconsider a decision unless:

a. A party wishes to make representations or objections not already considered by the Board that it had no opportunity to raise previously;

b. A party wishes to adduce evidence which could not previously have been obtained with reasonable diligence and which would be practically conclusive of the issue or make a substantial difference to the outcome of the case; or

c. The request raises significant and important issues of Board policy which the Board is convinced were decided wrongly in the first instance.

The OLRB may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to other parties if the case is reopened. See generally *Cineplex Odeon Corp.* [1996] OLRB Rep. Nov./Dec. 922 and the cases cited therein.

The reconsideration process is arguably a two step process. That is, the Board must first decide that the grounds advanced in the request are such that it is appropriate to reconsider the original decision. If the Board does decide that it is appropriate to reconsider the original decision, it may or may not be convinced that the grounds advanced are ones which would cause it to vary or revoke the original decision.

In marked contrast from the CIRB, or its predecessor CLRB, the OLRB's longstanding practice is that reconsideration requests are considered by the panel which made the original decision. This practice, and the reasons for it, were recently reviewed in *United Brotherhood of Carpenters and Joiners of America, Local Union 1256 v United Brotherhood of Carpenters and Joiners of America*, [2011] OLRB Rep. Sep./Oct. 613, 2011 CanLII 66912 (ON LRB) (the "*Carpenters'* decision").

> 6. …. The Board has frequently said that its reconsideration power is neither a tool for a party to repair the deficiency of its case initially nor an opportunity to reargue it. Moreover, the Board will generally not reconsider its decisions unless the requesting party has new evidence that would not only be practically conclusive of the case but also which could not have reasonably been obtained earlier.
>
> 7. Because of this significant concern that old arguments, unsuccessful initially, will simply be recast or reargued, evidence that was or could have been reasonably available earlier will not be sought to be adduced, on reconsideration the Board's practice for almost 60 years has been to remit a request for reconsideration to the original panel that originally heard it.
>
> 8. For example, in *Knight Security Guards Limited*, [1970] OLRB Rep. June 377, judicial reviews of the earlier Board decision had been unsuccessful but both the Divisional Court and the Court of Appeal expressed serious reservations about the correctness of the Board's interpretation and indicated they would have found otherwise. This prompted a reconsideration request not dissimilar to the Applicant's:
>
> > 5. In its latest request for reconsideration, the applicant requests "that this matter be heard by a panel of the Board which was not hitherto involved in these cases. We also respectfully suggest that a five member Board presided over by the Chairman or alternate Chairman be appointed to entertain our request for reconsideration."
> >
> > 6. In support of its request concerning the manner in which the Board should be constituted to review its decision in this matter, the applicant submits that "in the interests of the Board, the parties and the general public and to insure that justice appears to be done, we have recommended that the same panel of the Board should not be called upon to decide on the propriety of its own decision. This, in our view, is consistent with the principles of natural justice."
> >
> > 7. The applicant further submits that "… In view of the opinion expressed by the four Judges, there is certainly reason to gravely doubt the correctness of the Board's decision and in particular its interpretation of section 9. In our respectful submission, the Board is clearly in error. When an administrative tribunal such as the Board is given exclusive jurisdiction to determine all questions of fact or law that may

> arise in any matter before it and also is given the protection of a wide privative clause, it ought not refuse to reconsider its decision in circumstances such as these, especially when doubt has been cast upon it by a superior Court. There are, of course, no facts in dispute. The main issue is one of the proper legal interpretation to be given to section 9. A refusal by the Board to deal with the matter at this stage would, in our respectful submission, be tantamount to ignoring the considered opinion of the Courts on this matter, as well as ignoring any assistance or argument questioning its decision…"
>
> …
>
> 9. The decision dated September 17th, 1968 is not merely the decision of a division of the Board which heard the case but is, in fact, the decision of the Board. **It is trite to say that the jurisdiction conferred by section 79(1) [now 114] of the Act, whereunder the Board may reconsider any decision, must be exercised by the division which is seized of the matter. The very act of reconsideration contemplates that the matter will be considered again by the division which considered the matter the first time. If section 79(1) contemplated that a decision of the division could be reviewed by another division of the Board, the Act would have provided for review rather than reconsideration**.
>
> 10. **The Board has never adopted the practice of having one division of the Board to sit in appeal on decisions of another division. In our view, the Act is not broad enough to permit the Board to set up an appellate division in the manner suggested by the applicant in this case.**
>
> (emphasis added [by the *Carpenters'* decision])

Or put another way, more recently in *SNC-Lavalin Inc.*, 2010 CanL11 66545 at para. 5:

> The Board's normal approach when dealing with a reconsideration request is to have the same panel of the Board that issued the decision determine the request for reconsideration of that decision unless there are exceptional circumstances that warrant a different panel of the Board undertaking a review of that initial decision. **Simply put, one panel of the Board does not conduct an appellate review of another panel's decision.** See *Metropolitan Plumbing & Heating Contractors Association*, [1986] OLRB Rep. Sept. 1252. For these reasons, this panel of the Board is determining the merits of the applicant's reconsideration request.
>
> (emphasis added [by the *Carpenters'* decision])

Although there may not be "any absolute legal requirement that the power of reconsideration can only be exercised by the panel making the original decision," see *EKT Industries Inc.*, [1987] OLRB Rep. May 696 at para. 13:

> … No doubt it is convenient and prudent to have the original panel reconsider its decision because that panel will be in the best position to know the evidence and argument that was before it and to decide whether its decision should be varied. Indeed, if the request for reconsideration involves a challenge to the Board's factual findings or reference to the

> evidence before the Board, the case may have to go back before the original panel because, in the absence of a transcript, there is no way that anyone else would be in a position to address those issues. If another panel tried to deal with the matter it might be drawn into what is, effectively, a trial *de novo*, which would seriously undermine the finality of the decision which section 106 itself contemplates. …

Given the difference in practice between the CIRB and the OLRB, it is particularly noteworthy that part of the reasoning in *Knight Security Guards Limited*, which was adopted and emphasized in the *Carpenters'* decision, is that the *Act* provides for "reconsideration" not "review" of prior decisions of the OLRB. By contrast the *Code* provides for the "review" of prior decisions.

In accordance with the principles set out in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282, decisions which raise important issues of law or policy are typically circulated in draft form and discussed within the OLRB prior to finalization. This process serves to sharpen the legal analysis, develop a consensus within the Board as to approach and ensure consistency in decision making.

The OLRB's power to reconsider cannot be used to supplement otherwise insufficient reasons for a final decision at the request of the successful party: *Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353*, 2009 ONCA 749 (CanLII).

III. Who is an employee and determining appropriate bargaining units?

A. Overview

On an application for certification the CIRB and the OLRB are required by their respective statutes to determine a bargaining unit of employees which is appropriate for collective bargaining. The term "employee" is defined and circumscribed by the *Code* in a different way than by the *Act*. The net result, however, is broadly similar in most respects. Under both the *Code* and the *Act*, the term employee includes "dependent contractors" and excludes those who exercise managerial functions or are employed in a confidential capacity in matters related to labour relations. Unlike the *Code*, the *Act* also excludes from the term employee individuals who are members of certain professions, although notably not professional engineers. The *Code* and the *Act* each contain specific provisions which govern the ability of the CIRB and the OLRB respectively to determine the composition of appropriate bargaining units in relation to certain classes of employees. The *Code* contains such provisions in relation to professional employees, "private constables" (appointed under the *Railway Safety Act*) and supervisors. The *Act* contains such provisions in relation to professional engineers, security guards, dependent contractors and "craft" bargaining units.

B. OLRB Practice

Section 9(1) of the *Act* provides:

> **9.** (1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

Section 1 of the *Act* defines "employee" as follows:

> "employee" includes a dependent contractor

Dependent contractor is in turn defined as follows:

> "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

As to the application of this definition see for example: *Ontario Taxi Workers' Union v. Hamilton Cab*, [2011] OLRB Rep. Jan./Feb. 43, 2011 CanLII 7282 (ON LRB).

Certain individuals are specifically deemed not to be "employees" for the purposes of the *Act*. Section 1(3) provides:

> (3) Subject to section 97, for the purposes of this Act, no person shall be deemed to be an employee,
>
> (a) who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity; or
>
> (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

In the result, for the purposes of definition of an appropriate bargaining unit by the OLRB, the term employee includes "dependent contractors" and excludes individuals who are members of

certain professions, or who exercise managerial functions or are employed in a confidential capacity in matters related to labour relations.

Bargaining Units with respect to certain types of employees:

Craft Units:

In general, the OLRB declines to grant certification restricted to a particular classification or department. A notable exception to this practice is mandated by the *Act* in relation to "craft" units. Section 9(3) provides:

> (3) Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to the skills or craft, and the Board may include in the unit persons who according to established trade union practice are commonly associated in their work and bargaining with the group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

The requirement of a practice of craft bargaining has had the effect of restricting the recognition of new craft bargaining units. The construction sector is characterized by craft based unions. Craft based unions are less common in the non-construction sector. Some unions maintain as locals a craft based trade union and use such locals to apply for and obtain smaller craft based units, which the OLRB might not otherwise grant.

Professional Engineers and Dependent Contractors:

As noted, dependent contactors are employees for the purposes of the *Act*. Unlike some professions, professional engineers are also employees for the purposes of the *Act*. Professional engineers are defined by the *Act* as follows:

> "professional engineer" means an employee who is a member of the engineering profession entitled to practise in Ontario and employed in a professional capacity;

The *Act* provides that professional engineers and dependent contractors will be placed in bargaining units separate from other employees unless the Board is satisfied that a majority of them wish to be placed in a bargaining unit with other employees.

> **9.** (4) A bargaining unit consisting solely of professional engineers shall be deemed by the Board to be a unit of employees appropriate for collective bargaining, but the Board may include professional engineers in a bargaining unit with other employees if the Board is satisfied that a majority of the professional engineers wish to be included in the bargaining unit.
>
> (5) A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of the dependent contractors wish to be included in the bargaining unit.

As stated by the OLRB in *Hamilton Yellow Cab Company Limited*, [1987] OLRB Rep. Nov. 1373, this determination requires affirmative evidence that the dependent contractors wish to be in such a bargaining unit, at minimum in the form of a statement to that effect on the membership cards submitted on behalf of the dependent contractors: see paragraphs 55 and 56. In some circumstances, the OLRB has conducted votes in which dependent contractors were asked to indicate their wishes on this question. In *Ontario Hydro*, [1991] OLRB Rep. Jan. 83 such a vote was directed with respect to professional engineers (see paras. 45 and 46). In

Ontario Taxi Workers' Union v. Hamilton Cab, *supra*, such a vote was directed with respect to dependent contractors (see para. 71 to 81). (The ballot question was subsequently modified upon the agreement of the parties: *Ontario Taxi Workers' Union v. Hamilton Cab Co.*, 2011 CanLII 11495 (ON LRB))

Security Guards:

While the *Code* prohibits the CIRB from including private constables appointed under the *Railway Safety Act* in a bargaining unit with other employees, the *Act* permits inclusion of security guards in certain circumstances. Section 14 of the Act provides:

> **14**. (1) This section applies with respect to guards who monitor other employees or who protect the property of an employer.
>
> (2) Unless the employer notifies the Board that it objects, a trade union that admits to membership persons who are not guards or that is chartered by or affiliated with an organization that does so may be certified as the bargaining agent for a bargaining unit composed solely of guards.
>
> (3) Unless the employer notifies the Board that it objects, a bargaining unit may include guards and persons who are not guards.
>
> (4) If the employer objects, the trade union must satisfy the Board that no conflict of interest would result from the trade union becoming the bargaining agent or from including persons other than guards in the bargaining unit.
>
> (5) The Board shall consider the following factors in determining whether a conflict of interest would result:
>
> 1. The extent of the guards' duties monitoring other employees of their employer or protecting their employer's property.
> 2. Any other duties or responsibilities of the guards that might give rise to a conflict of interest.
> 3. Such other factors as the Board considers relevant.

> (6) If the Board is satisfied that no conflict of interest would result, the Board may certify the trade union to represent the bargaining unit.

Section 14 of the Act only applies to security guards who monitor other employees or who protect the property of the employer. The OLRB has interpreted this to mean regular surveillance of other employees and protection of property from employees of the employer: security guards who do so incidentally within the course of a general obligation to monitor the employers premises and property are not captured by the provision: *Laurentian University*, [2009] OLRB Rep. Nov./Dec. 890, 2009 CanLII 64350 (ON LRB)

C. CIRB Practice

Two fundamental issues frequently arise in CIRB certification applications.

First of all, the CIRB must decide who is an employee under the *Code*. Secondly, even if someone has employee status under the *Code*, the Board then has to consider if they should be placed in the proposed bargaining unit. The first question has its genesis in the expansive definition of employee under the *Code*. The second concerns an application of labour relations experience to the fashioning of a bargaining unit.

<u>Who is an employee?</u>

Section 3 of the *Code* defines an "employee":

> "employee" means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations;

In *Viterra, supra*, the Board recently commented on "employees" and their inclusion in bargaining units:

> [25] The *Code* at section 3 provides specific definitions for the terms "dependent contractor" and "private constable", as they are used in the definition of "employee". They are not relevant for the GSU's current certification application.
>
> [26] The *Code* does not define further "a person who performs management functions", or a person who "is employed in a confidential capacity in matters relating to industrial relations". The Board's case law has examined and interpreted these concepts extensively.
>
> [27] If the Board is satisfied that an individual performs "management functions", or falls within the "confidential capacity" exception, then that person is not an employee under the *Code*. Such individuals cannot be included in a bargaining unit. As will be examined, *infra*, the *Code* distinguishes between someone "who performs management functions" and "supervisors".
>
> [28] The issue of whether someone "performs management functions", or falls within the "confidential capacity" exception, is also separate and distinct from the later analysis which examines which "employees" will be included in, or excluded from, the bargaining unit.

Anyone following recent news reports will be aware that airplane pilots, despite their significant responsibilities for the aircraft they fly, are employees under the *Code*. The FCA in *Algoma Central Marine, a division of Algoma Central Corporation v. Captains and Chiefs Corporation*, 2011 FCA 94 (Algoma), recently agreed with the CIRB that Algoma's Captains/Masters, as well as the Chief Engineers, were employees who could be included in a bargaining unit.

Algoma had argued that Captains/Masters and Chief Engineers performed management functions on board their vessels which prevented them from being included in a bargaining unit. The FCA

was not persuaded that their important legal and supervisory obligations when in charge of a vessel deprived them of employee status under the *Code*:

> [6] The Board's reasons in this case are detailed, thorough and cogent. The Board explains clearly why it concluded that the captains and chief engineers employed on Algoma's vessels fall within the statutory definition of "employee", notwithstanding their important legal and supervisory obligations and functions. Despite the able and thorough submissions of counsel for Algoma, we are not persuaded that there is any basis for finding the decision of the Board to be unreasonable.

In should be noted that employees like pilots and Captains/Masters are usually found in their own specific bargaining unit, as will be described, *infra*, when the concept of a supervisor under the *Code* is examined.

In *Viterra, supra*, the Board also commented on how the *Code* explicitly included supervisors as employees:

> [38] The *Code* grants the Board the discretion to include or exclude employees from the bargaining unit. This question is different from determining whether someone "performs management functions", or is employed in a "confidential capacity", and is therefore excluded from "employee" status under the *Code*.
>
> [39] Section 27(2) allows the Board to decide which "employees", as defined in section 3 of the *Code*, should be included in an appropriate bargaining unit:
>
> > 27. (2) In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union.
> >
> > (emphasis added)
>
> [40] Unlike in some provinces, the *Code* at sections 27(3)–(6) extends collective bargaining rights to professionals and supervisors, as long as they meet the definition of "employee" in section 3 of the *Code*. The Board may include supervisors in a proposed bargaining unit. It could also accept a unit composed solely of supervisors:
>
> > > 27. (3) Where a trade union applies under section 24 for certification as the bargaining agent for a unit comprised of or including professional employees, the Board, subject to subsections (2) and (4), shall determine that the unit

> appropriate for collective bargaining is a unit comprised of only professional employees, unless such a unit would not otherwise be appropriate for collective bargaining.
>
> (4) In determining that a unit is appropriate for collective bargaining under subsection (3), the Board may include in the unit
>
> (a) professional employees of more than one profession; and
> (b) employees performing the functions, but lacking the qualifications, of a professional employee.
>
> (5) Where a trade union applies for certification as the bargaining agent for a unit comprised of or including employees whose duties include the supervision of other employees, the Board may, subject to subsection (2), determine that the unit proposed in the application is appropriate for collective bargaining.
>
> (6) The Board shall not include a private constable in a unit with other employees.
>
> (emphasis added)

> [41] One of the Board's tasks, among many, is to distinguish between someone who "performs management functions", or is employed in a "confidential capacity", as opposed to someone who is a supervisor. For those the Board finds are supervisors, and consequently "employees" under the *Code*, the Board must then consider a further question whether it makes labour relations sense to include these individuals in the bargaining unit.
>
> [42] Just because an individual has employee status under the *Code* does not mean automatically they should be in the bargaining unit. That decision comes only after the Board analyzes whether it makes labour relations sense to include them. That determination will vary based on the circumstances of each case.

The fact that the *Code* permits the CIRB to include supervisors in bargaining units with those employees they supervise leads to the next issue about the proper construction of bargaining units.

Appropriate bargaining units

The CIRB, like other labour boards, has the exclusive authority to determine the appropriate bargaining unit. The *Code* at several places sets out the CIRB's powers in this regard as summarized in *Viterra, supra*:

> [29] The Board, while it will examine the trade union's proposed unit, has the ultimate authority to determine an appropriate bargaining unit:
>
> > 27. (1) Where a trade union applies under section 24 for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining.
> >
> > (emphasis added)
>
> [30] The Board examines what is an appropriate bargaining unit; it does not determine the most appropriate bargaining unit: see, generally, *Alberta Government Telephones Commission (1989)*, 76 di 172 (CLRB no. 726).
>
> [31] Section 16 of the *Code* similarly emphasizes the Board's power over bargaining units:
>
> > 16. The Board has, in relation to any proceeding before it, power
> >
> > (p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether
> >
> > ...
> >
> > (v) a group of employees is a unit appropriate for collective bargaining...
> >
> > (emphasis added)
>
> [32] The determination of bargaining unit descriptions, which is a question of fact rather than a question of law, lies at the heart of the Board's specialized labour relations expertise: *Coastal 309, supra*, at paragraph 27.
>
> [33] When a trade union files an application for certification, the Board, based on its labour relations experience, will examine whether the proposed unit "is a unit appropriate for collective bargaining", as the expression is used in section 16(p)(v) of the *Code*.

The CIRB, as described in *Viterra, supra,* considers various factors when it exercises its authority to determine the appropriate bargaining unit:

> [34] The Board in *BCT.TELUS et al*., 2000 CIRB 73, described generally the analysis it employs in considering the composition of bargaining units. The analysis is different for initial certification applications, as opposed to bargaining unit reviews under section 18.1 of the *Code*:
>
> > [17] The Board has developed well-established principles and criteria that it will consider when determining the appropriateness of a bargaining unit or when reviewing and reconfiguring existing bargaining units. In making such a determination, the Board will weigh and consider a number of factors, including the following: community of interest; viability of the unit; employee wishes; industry practice or pattern; the history of collective bargaining with the employer; the organizational structure of the employer; and the Board's general preference for broader-based bargaining units, for reasons such as administrative efficiency and convenience in bargaining, lateral mobility of employees, common framework of employment conditions and industrial stability (see *AirBC Limited* (1990), 81 di 1; 13 CLRBR (2d) 276; and 90 CLLC 16,035 (CLRB no. 797), and *Canada Post Corporation* (1988), 73 di 66; and 1 CLRBR (NS) 129 (CLRB no. 675)). A good description of the Board's approach is outlined in *Quebec North Shore & Labrador Railway Co.* (1992), 90 di 110; and 93 CLLC 16,020 (CLRB no. 978), where it stated the following:
> >
> > The tests for determining whether a unit is appropriate for collective bargaining take into account the interests of both the employees and their employer. Without claiming to make an exhaustive list of these factors, we would note, inter alia, the community of interest among the employees, the method of organization and administration of the business, the history of collective bargaining with the employer and in the industry in question, whether the employees are interchangeable and the interests of industrial peace. The tests may have different weight, depending on the individual case, particularly in terms of whether it is an application for certification or an application for review. In the first situation, the Board must allow the employees to have access to collective bargaining. In the second, it must examine the existing bargaining structure in order to make the bargaining process and the application of the collective agreements more effective. However, it must always try to balance what are often divergent interests in determining viable bargaining units and in order to ensure effective bargaining and the most harmonious labour relations possible.
> >
> > (pages 123-124; and 14,147-14,148)
>
> [35] The Board, in *United Parcel Service Canada Ltd.*, 2008 CIRB 433, described some of the factors it considers when determining if a bargaining unit smaller than an "all employee" unit is appropriate:
>
> > [21] It is important to note that although the Board generally favours all-employee bargaining units or creating larger bargaining units, it will nevertheless create less than all-encompassing units or fragment an existing unit when there are compelling reasons to do so. The factors that favour smaller units include a lack of community of interest,

> geographical factors, specific statutory provisions, the likelihood that a larger unit would not be viable, and an interest in enabling employees to obtain representation.
>
> [36] The Board is not bound to accept the trade union's proposed unit, or a unit proposed on consent by the parties: see, in particular, *Quick Coach Lines* (2000), 96 A.C.W.S. (3d) 397 (FCA).
>
> [37] Once the Board has decided on an appropriate bargaining unit, it must then consider which employees fall into the unit.

The parties assist the CIRB by providing submissions about whether certain employees, such as supervisors, should be included in or excluded from a bargaining unit. Often, the Board seems to receive submissions based more on membership support, or guesses about such support, rather than about the long term appropriateness of including certain employees in a unit.

For example, there is no single answer whether a supervisor should be included in a bargaining unit with supervised employees. If there is but one supervisor, then a decision to exclude that person from the bargaining unit may prevent him or her from ever accessing the rights under the *Code*.

Conversely, including in the bargaining unit a supervisor who has a significant control over other members' daily activities may give rise to undue influence for crucial questions related to collective bargaining or even revocation.

These are just some of the factors that interest the CIRB when it has to decide whether an employee ought to be included in a bargaining unit. It is a question which is very distinct from

the initial question of whether a particular individual or individuals may be employees under the *Code*.

V. Conclusion

There are many key differences which exist between the OLRB and the CIRB. Last year we described three such differences. This year we have described three more.

A critical difference between the OLRB and the CIRB arises from the constitutional division of powers. As the provincial body, the OLRB has constitutional jurisdiction over labour relations of employers unless the employer is a federal undertaking or provincial regulation of the employer's labour relations would impair the core of a federal head of power, in which case the CIRB has constitutional jurisdiction. While the CIRB's constitutional jurisdiction arises by exception from the general rule of provincial jurisdiction, some significant sectors of the economy and large employers fall within its jurisdiction. Understanding whether an employer's labour relations fall within the purview of the OLRB or the CIRB is obviously key.

The OLRB may "reconsider" its decisions. The CIRB may "review" its decisions. While the tests applied by the OLRB and the CIRB with respect to such requests are broadly similar, the practices and procedures of the OLRB and the CIRB differ with respect to such requests. The OLRB's practice is that the panel which made the original decision will consider any request to reconsider that decision. The CIRB's practice is that, while requests to review a decision based on new facts will usually be referred to the original panel, requests to review a decision based on

alleged errors of law or policy, or denial of natural justice, will be sent to a new panel, usually composed of three neutrals.

Upon an application for certification, both the OLRB and the CIRB are charged with determining the appropriate bargaining unit. The OLRB and the CIRB, however, are subject to different strictures on their ability to define an appropriate bargaining unit in cases involving certain classes of employees. The *Code* contains such provisions in relation to professional employees, private constables and supervisors. The *Act* contains such provisions in relation to professional engineers, security guards, dependent contractors and "craft" bargaining units.

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Appendix

Tessier Ltée v. Quebec (Commissions do la santé et de la sécurité du travail),

2012 SCC 23

On May 17, 2012, after this paper was finalized, the Supreme Court of Canada issued its unanimous decision in *Tessier Ltée v. Quebec (Commissions de la santé et de la sécurité du travail)*, 2012 SCC 23. While time does not permit further analysis, the authors wished to bring the following passages of that decision to the attention of the readers of this paper.

> [17] In the *Stevedores Reference*, this Court therefore established that the federal government has jurisdiction to regulate employment in two circumstances: when the employment relates to a work, undertaking, or business within the legislative authority of Parliament; or when it is an integral part of a federally regulated undertaking, sometimes referred to as derivative jurisdiction. Dickson C.J. described these two forms of federal jurisdiction over labour relations as distinct but related in *United Transportation Union v. Central Western Railway Corp.*, 1990 CanLII 30 (SCC), [1990] 3 S.C.R. 1112, at pp. 1124-25.
>
> [18] In the case of direct federal labour jurisdiction, we assess whether the work, business or undertaking's essential operational nature brings it within a federal head of power. In the case of derivative jurisdiction, we assess whether that essential operational nature renders the work integral to a federal undertaking. In either case, we determine which level of government has labour relations authority by assessing the work's essential operational nature.
>
> [19] In this functional inquiry, the court analyzes the enterprise as a going concern and considers only its ongoing character: *Commission du salaire minimum v. Bell Telephone Co. of Canada*. The exceptional aspects of an enterprise do not determine its essential operational nature. A small number of exceptional extra-provincial voyages which are not part of the local transportation company's regular operations, for example, do not determine the nature of a maritime transportation operation (*Agence Maritime Inc. v. Conseil canadien des relations ourrières*, 1969 CanLII 109 (CSC), [1969] S.C.R. 851), nor does one contract determine the nature of a construction undertaking (*Construction Montcalm Inc. v. Minimum Wage Commission*, 1978 CanLII 18 (SCC), [1979] 1 S.C.R. 754). Nor will a small amount of local activity overwhelm the nature of an undertaking that is otherwise an integral part of the postal service (*Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*, 1973 CanLII 183 (SCC), [1975] 1 S.C.R. 178).
>
> …..
>
> [48] To date, this Court has applied the derivative jurisdiction test for labour relations in two contexts. First, it has confirmed that federal labour regulation may be justified when the services provided to the federal undertaking form the exclusive or principal part of the related work's activities (*Stevedores Reference*; *Letter Carriers' Union of Canada*).

[49] Second, this Court has recognized that federal labour regulation may be justified when the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the related operation. In *Northern Telecom 2*, for example, the installers were functionally independent of the rest of Telecom. This Court was therefore able to assess the essential operational nature of the installation department as a separate entity, as Dickson J. noted:

> [T]he installers are functionally quite separate from the rest of Telecom's operations. The installers . . . never actually work on Telecom premises; they work on the premises of their customers. In respect of Bell Canada, the installation is primarily on Bell Canada's own premises and not on the premises of Bell Canada's customers . . . . The installers have no real contact with the rest of Telecom's operations. Telecom's core manufacturing operations are conceded to fall under provincial jurisdiction, but there would be nothing artificial in concluding that Telecom's installers come under different constitutional jurisdiction. [pp. 770-71]

(See also *Ontario Hydro*, where the employees who fell under federal jurisdiction were only those employed on or in connection with facilities for the production of nuclear energy; *Johnston Terminals and Storage Ltd. v. Vancouver Harbour Employees Association Local 517*, [1981] 2 F.C. 686 (C.A.), and *Actton Transport Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 272 (CanLII), 2010 BCCA 272, 5 B.C.L.R. (5th) 1, where certain workers were severable from their employer's overall operation and were therefore subject to different labour jurisdiction.)

[50] This appeal is the first time this Court has had the opportunity to assess the constitutional consequences when the employees performing the work do not form a discrete unit and are fully integrated into the related operation. It seems to me that even if the work of those employees is vital to the functioning of a federal undertaking, it will not render federal an operation that is otherwise local if the work represents an insignificant part of the employees' time or is a minor aspect of the essential ongoing nature of the operation: *Consumers' Gas Co. v. National Energy Board* (1996), 195 N.R. 150 (C.A.); *R. v. Blenkhorn-Sayers Structural Steel Corp.*, 2008 ONCA 789 (CanLII), 2008 ONCA 789, 304 D.L.R. (4th) 498; and *International Brotherhood of Electric Workers, Local 348 v. Labour Relations Board* (1995), 168 A.R. 204 (Q.B.). See also *General Teamsters, Local Union No. 362 v. MacCosham Van Lines Ltd.*, [1979] 1 C.L.R.B.R. 498; M. Patenaude, "L'entreprise qui fait partie intégrante de l'entreprise fédérale" (1991), 32 *C. de D.* 763, at pp. 791-99; and Brun, Tremblay and Brouillet, at p. 544.

….

[55] In short, if there is an indivisible, integrated operation, it should not be artificially divided for purposes of constitutional classification. Only if its dominant character is integral to a federal undertaking will a local work or undertaking be federally regulated; otherwise, jurisdiction remains with the province. As McLachlin J. said in her dissenting reasons in *Westcoast Energy*:

> The local work or undertaking must, by virtue of its relationship to the inter-provincial work or undertaking, essentially function as part of the inter-provincial entity and lose its distinct character. In the context of an inter-provincial transportation or communication entity, to be functionally integrated, the local work or undertaking, viewed from the perspective of its normal day-to-day activities, must be of an inter-provincial nature — that is, be what might be referred to as an "interconnecting undertaking"… If the dominant character of the local work or undertaking, viewed functionally, is something distinct from inter-provincial transportation or communication, it remains under provincial jurisdiction. [Emphasis added; citations omitted; para. 124.]