The CLC's Revised Unjust Dismissal Regime: Key Practice Points

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INTRODUCTION[1]

Legislative amendments which came into effect on July 29, 2019 have significantly expanded the jurisdiction of the Canada Industrial Relations Board (CIRB or Board). Rather than deciding mainly employer/trade union disputes, the Board now has jurisdiction over several new areas found in Part II[2] and Part III[3] of the *Canada Labour Code*[4] (*Code*). Further changes, including jurisdiction over Administrative Monetary Penalties, remain pending.

Specifically, the Board now has jurisdiction over: i) Part II appeals of health & safety decisions/directions[5]; ii) Part III unjust dismissal complaints[6]; iii) Part III reprisal complaints[7]; iv) Genetic testing complaints[8]; and v) Wage recovery appeals[9]. The Board also now exercises a newly added jurisdiction under the *Wage Earner Protection Program Act*[10].

The sweeping *Code* changes came about by way of omnibus budget bills[11] (Omnibus Bills). Some of those impacted by the changes have expressed their disappointment with the inadequate time given to provide comments[12][13]. Previous governments similarly drew criticism for using Omnibus Bills for labour legislation because the procedure ignored the value of "subject matter experts" and demonstrated "a disdain for democratic process"[14].

A "decide first ask questions later" approach may appear efficient to some, but it inevitably ignores the invaluable private sector experience and expertise that trade unions, employers and others can bring to the legislative process.

Nonetheless, the Omnibus Bills did add some useful procedural powers which will help the Board manage its finite adjudicative resources, *infra*.

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[1] Due to the pandemic, this conference proceeded via recorded audio.
[2] Occupational health and Safety
[3] Standard Hours, Wages, Vacations and Holidays
[4] RSC 1985, c L-2
[5] *Code*, s. 146
[6] *Code*, s. 240
[7] *Code*, s. 246.1
[8] *Code*, s. 247.99
[9] *Code*, s. 251.11
[10] SC 2005, c 47, s 1; Information Circulars No. 16 and 17.
[11] Bills C-44 and C-86
[12] FETCO submission re Bill C-44, May 31, 2017
[13] FETCO submission re Bill c-86 November 9, 2018
[14] Barrett, Bill C-4's Impact on Federal Public Sector Unions. See also PSAC, Bill C-4 will return Canada to a harsher, more primitive era.

This paper will focus on the Board's new jurisdiction over unjust dismissal complaints[15]. These complaints by non-union employees resemble "just cause" dismissal grievances which labour arbitrators regularly decide. Nova Scotia[16] and Quebec[17] are two other jurisdictions which provide this additional protection to non-union employees.

Over the years, many experienced private sector labour lawyers and arbitrators have pleaded or decided unjust dismissal complaints as part of their practice. This paper will examine the following non-exhaustive list of key changes and issues:

i) Must an Inspector refer every complaint to the Board?

ii) What are External Adjudicators?

iii) Must the Board hear every complaint referred to it?

iv) When will the Board determine its constitutional jurisdiction to hear a complaint?

v) Can the Board, like a Part I labour arbitrator, interpret, apply and give relief in accordance with a statute relating to employment matters?

vi) Can the Board reconsider an unjust dismissal decision? and

vii) Where must a party file a judicial review application?

MUST AN INSPECTOR REFER EVERY COMPLAINT TO THE BOARD?

An employee still files a complaint with an Inspector to start the process[18]. The previous 90-day time limit from the date of dismissal still applies to complaints, though the Minister has a limited power to extend that time limit[19].

The *Code* continues to exclude managers from the regime, though that important detail is found nowhere in the unjust dismissal provisions contained in Division XIV[20]. There

[15] Information Circular: No. 15 – Adjudication of Unjust Dismissal Complaints.
[16] S. 71 of the *Labour Standards Code*, RSNS 1989
[17] S. 124 of the *Act respecting labour standards*, CQLR c N-1.1
[18] Complaints can be filed with any Labour Program office.
[19] The Minister can now, by Regulation, add additional circumstances for which extensions may be granted: *Code*, s.240(3)(b).
[20] *Code*, s.167(3)

may be a legislative drafting convention which explains why that key limitation is buried elsewhere in the *Code*, but it continues unneeded complexity, especially for self-represented litigants who will be deemed to know the law.

The Omnibus Bills added new pre-conditions for complaints and gave Inspectors enhanced triage powers. For example, an employee cannot file an unjust dismissal complaint if he/she has already filed a genetic testing complaint or a Part III reprisal complaint "unless that complaint has been withdrawn"[21].

Similarly, while Inspectors continue to have the power to assist the parties with settlement discussions, they may also now give a complainant notice asking if he/she desires to refer the complaint to the Board[22]. If a complainant fails to respond within the time limit set out in the notice, then the Inspector may deem the complaint withdrawn[23].

An Inspector refers complaints to the Board upon receipt of a complainant's written request[24]. While the Omnibus Bills suggest that the Inspector must provide to the Board "any other statements or documents that the inspector has that relate to the complaint", this presumably would not include anything arising from settlement efforts. No one can disclose settlement discussions to a decision maker, whether that be an adjudicator or now the Board.

Disclosing without prejudice documentation to the Board would damage all Inspectors' ability to settle any complaints. Before the July 29, 2019 amendments, Inspectors had the obligation to give "any other statements or documents" to the Minister. The Minister, who acted as a buffer, could then appoint an independent arm's length adjudicator to decide the merits of the complaint.

Ideally, the Omnibus Bills would have explicitly excluded all settlement statements and documents from Inspectors' duty to produce. Private sector parties and experienced legal counsel have the legitimate expectation that any settlement discussions will remain privileged and without prejudice[25].

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[21] *Code*, s.240(1.1)
[22] *Code*, s.241(4)
[23] *Code*, s.241(5)
[24] *Code*, s.241(3)
[25] Mughal, 2008 CIRB 418 at paras 52-56

WHAT ARE EXTERNAL ADJUDICATORS?

Prior to July 29, 2019, the Minister appointed adjudicators to hear unjust dismissal complaints[26] from a ministerial list. Some of the same individuals could be appointed to hear Part I labour arbitrations if the parties to a collective agreement could not agree on an arbitrator[27]. Annually, the Board will hear roughly 350 unjust dismissal complaints on referral from Inspectors[28].

The Omnibus Bills gave the Board the power to use neutral members[29] and/or External Adjudicators[30] to hear unjust dismissal complaints, as well as other Part II and III matters. Neutral members are Governor in Council appointees to the Board. By contrast, the Board itself selects External Adjudicators. The latter process involves the exercise of a statutory power and is subject to the duty of fairness.

The Board has an excellent opportunity to develop a list of experienced External Adjudicators for unjust dismissal cases. Trade unions and employers, through their consensual appointments of labour arbitrators, have already provided essential guidance on who should be on that list. Consensual appointments are the gold standard through which various provinces, like Ontario, create an appointment list of acceptable neutrals to hear labour arbitrations[31].

The Board, just like Ontario for its approved arbitrator list, can benefit from this collective wisdom from trade unions and employers when choosing External Adjudicators. An unjust dismissal complaint, which will be new to the Board, is essentially a hybrid of labour and employment law principles. The hearing, which is virtually identical to that for a just cause[32] termination arbitration, is one with which experienced labour arbitrators will be intimately familiar. Such experience ensures competence and the efficient use of the Board's finite financial resources.

However, External Adjudicators and neutral members will also hear other Part II and III matters. Expertise for unjust dismissal cases does not necessarily translate to other areas. Particularly in the area of health and safety, a different expertise may be required

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[26] Adjudicators continue to hear those complaints which were filed before July 29, 2019.
[27] *Code*, s.57(4)
[28] *Code*, s.241(3)
[29] *Code*, s.9(2)(e)
[30] *Code*, s.12.001
[31] Ontario's application form for its List requires written evidence of a minimum of 15 consensual appointments, including a maximum of 4 from the same collective agreement.
[32] The *Code* uses the expression "unjust dismissal" rather than "just cause". The *Code* does use the term "just cause" elsewhere. See, for example, s. 36.1; s. 230(1); s. 232; s. 235 and s. 251(1.1).

for those External Adjudicators who must decide highly technical questions such as whether danger exists[33]. Just as in boutique labour law firms, various specialized areas of expertise exist to best serve clients.

Over the decades, the *Code* had gradually removed technical health and safety matters from the Board's jurisdiction. Appeals Officers most recently decided these issues. History had shown that the Board's decision makers with labour relations backgrounds did not have the technical expertise to decide, to their professional satisfaction, health and safety cases[34].

Anyone can issue a decision. But a conscientious decision maker has a duty comparable to that applying to lawyers who must ensure they have the requisite competence given "the complexity and specialized nature of the matter"[35]. This is especially the case since the *Code* requires the Board to act "in a summary way and without delay"[36].

The Omnibus Bills gave the Board the ability to select External Adjudicators with the requisite technical expertise to decide health and safety appeals. This should avoid a repeat of history.

The Board contacted various arbitrator associations to publicize its application process for External Adjudicator positions. It also increased the per diem from that paid to adjudicators. Ultimately, the Board can only select its unjust dismissal External Adjudicators from the pool of experienced neutrals who decide to apply[37].

MUST THE BOARD HEAR EVERY COMPLAINT REFERRED TO IT?

The Omnibus Bills provided useful new triage and other powers to the Board for unjust dismissal complaints[38].

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[33] *Code*, s.122(1) – Definition of "danger"
[34] While the courts will generally assume expertise, the reality, as the Board has noted in the past, is quite different.
[35] Rule 3.1-2 of the Rules of Professional Conduct, Law Society of Ontario
[36] *Code*, s.146.1(1)
[37] Many busy arbitrators prefer to restrict their practice to labour arbitrations.
[38] Comparable powers exist for Part III Reprisal (s.246.2(1)) and Genetic testing (s.247.99(6.2)) complaints.

Adjudicators had very limited pre-hearing powers. The *Code* provided them with just three of the Board's powers from Part I of the Code[39]. Those powers did not include the Board's existing and significant pre-hearing and production authority[40].

This lack of pre-hearing power for adjudicators sometimes led to costly delays and procedural challenges. For example, in *Krscanski v Nisshin Flour Milling Inc.*[41], the adjudicator decided to reset the entire process by rescinding all outstanding pre-hearing directions he had made. Instead, he would decide all issues once the formal hearing started:

> [72] Before my appointment, the complaint, filed three months (November 8 to February 3) after the dismissal, was stagnant for five months before the employer was given notice (February 3 to July 11). There was no mediation or communication between Ms Krscanski and the employer until after my initial letter on September 18th and Mr. Hunter's reply of September 21st.
>
> [73] There was extensive communication in the next two months, but no procedural issues, other than the dates of hearing, were completely resolved. Positions hardened and the communication generated more issues for resolution.
>
> [74] **In these circumstances, exploring the legal limits of an adjudicator's pre-hearing authority will not advance this process to a final adjudication**.
>
> [75] **Instead, I have decided it will be more beneficial to narrow the scope of issues to be addressed during the five days scheduled for hearing in February. To facilitate this and reset this process, I rescind all outstanding case management directions**.
>
> [76] **If either Ms Krscanski or the employer considers they require additional disclosure of documents, applications can be made at the hearing. Or a summons can be requested for a named person to attend and bring documents to the hearing. Preparation and proper service of the summons will be the responsibility of the person requesting it.**
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> [77] Any issue concerning the extent or use of any documents disclosed in this adjudication and any issue concerning any disputed claim of privilege

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[39] *Code*, s.242(2)(c)

[40] *Code*, s.16(a.1) and (f.1). These provisions had been added to the *Code* to enhance the Board's ability to control its pre-hearing process. For whatever reason, the Legislator never extended these provisions to adjudicators hearing Part III unjust dismissal complaints.

[41] 2017 CanLII 89068

> over any document or portion of a document will be heard and addressed at the hearing.
>
> …
>
> [79] The volume of documents and issues in this complaint and the lack of productive cooperation and collaboration to resolve issues to facilitate an expeditious hearing forecasts that the time scheduled will be inadequate to hear all aspects of this complaint. Therefore, I direct the hearing in the five scheduled days in February will be restricted to hearing whether the employer had just cause to dismiss Ms Krscanski. Opening statements, evidence and submissions will be heard on this central issue…
>
> (Emphasis added)

The *Code* gives the Board greater flexibility than it gave to adjudicators for unjust dismissal complaints. It can use its usual *Code* powers to manage each complaint[42]. Proper case management is essential to any tribunal's efficiency. External Adjudicators can exercise all the powers of the Board[43], which includes, for example, the ability to mediate while still retaining the authority to decide the case[44]. Informally, some adjudicators already provided that helpful service, but there was no explicit *Code* authority to do so.

The Board's new triage powers allow it to suspend a complaint and require a complainant to take certain measures[45]. A complainant's failure to satisfy those requested measures could result in the Board rejecting the complaint[46]. It is unclear why the Omnibus Bills focused only on the complainant having to take certain measures. An employer might also have essential information to provide.

For example, if the Board had concerns about its constitutional jurisdiction[47], *infra*, then the employer has a better understanding of its range of business activities than would a complainant. But the Board arguably has other ways to obtain this information under the *Code*.

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[42] *Code*, s.16
[43] *Code*, s.12.001(2)
[44] *Code*, s.15.1(1)
[45] *Code*, s.241.1(1)
[46] *Code*, s.241.2(1)(b)
[47] See s.241.2(1)(a)(i)

The *Code*'s amendments also allow the Board to dismiss a complaint prior to a hearing on several other grounds including i) if it has already been settled or ii) if it is frivolous, vexatious or not made in good faith[48].

Curiously, the Omnibus Bills gave the Board the power in Part III to dismiss complaints which are frivolous, vexatious or not made in good faith, but they overlooked an opportunity to add similarly helpful wording for the Board's Part I cases[49]. By contrast, the Minister has an explicit power to reject a frivolous or vexatious matter under Part II for health and safety matters[50].

Whenever the Board rejects an unjust dismissal complaint at this preliminary stage, it must provide reasons to the parties[51]. The Supreme Court of Canada (SCC) recently described the importance of a tribunal's written reasons in *Canada (Minister of Citizenship and Immigration) v. Vavilov*[52].

WHEN WILL THE BOARD DETERMINE WHETHER IT HAS CONSTITUTIONAL JURISDICTION TO HEAR A COMPLAINT?

The Omnibus Bills ensured that the well-resourced Board will henceforth decide complex constitutional jurisdiction questions rather than adjudicators, who were essentially sole practitioners without a legal department. The reality is that such questions rarely arise for private sector labour arbitrators hearing collective agreement grievances.

While the Board panel obviously must decide the case, it can still access helpful memoranda prepared by tribunal lawyers without violating natural justice[53]. The Board is also better equipped to require parties to provide full legal submissions, particularly about an employer's activities[54].

The new triage powers include the Board determining constitutional jurisdiction issues prior to proceeding with a complaint's merits[55]. While everyone knows that the *Code*

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[48] *Code*, s.241.2(1)
[49] Compare s.16(o.1)
[50] *Code*, s.129(1)(b)
[51] *Code*, s.241.2(2)
[52] 2019 SCC 65
[53] See "Procedural Fairness and the Drafting of Reasons", Canadian Institute, October 2017.
[54] Susan H. Goulais v Assembly of First Nations (AFN), 2019 CanLII 82723
[55] To avoid wasting the parties' time and resources, the Board has traditionally answered such questions before examining the merits of a case.

applies to entities like banks, airlines and most railroads, jurisdictional questions arise in a surprising number of unjust dismissal cases. It is incumbent on any decision maker facing a reasonable concern to satisfy itself that it has the proper authority to act, even if the parties purport to consent to jurisdiction[56].

Many non-labour lawyers probably last examined constitutional law in law school. Those with labour law practices might have some familiarity, especially if they do cases governed by the *Code*. Not surprisingly, many parties, particularly the self-represented, have difficulty commenting on such essential but esoteric questions.

Constitutional law is not simple. The SCC is rarely unanimous in its decisions. The splits often seem to occur between the majority, which may adopt an academically correct approach, and the minority which appears to place more importance on practical considerations[57].

For example, the SCC's decision in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*[58], has led to continuous litigation about who has jurisdiction over activities benefitting First Nations[59]. Had the minority opinion prevailed, decision makers might have had greater guidance when dealing with these cases[60].

Similarly, the SCC's minority decision in *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*[61], might have made the analysis of an interprovincial transportation undertaking more practical by going beyond focussing solely on whether the entity itself physically moved the goods across a border. The majority's opinion, while fully defensible academically, nonetheless allows an entity to change jurisdiction every few years or so in what could become a game of constitutional ping pong. That does not promote the predictability sound labour relations requires.

Evidently, the SCC's majority decisions bind decision makers.

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[56] Maiangowi v Assembly of First Nations (AFN), 2019 CanLII 49756 at paragraphs 11-17.
[57] It may be coincidence, but one cannot help but notice that those judges with significant private sector law firm experience, such as Justices Binnie and Fish, often supported the more practical minority decisions.
[58] 2010 SCC 45
[59] Gallagher v Native Women's Association of Canada, 2017 CanLII 55939
[60] Susan H. Goulais v Assembly of First Nations (AFN), 2019 CanLII 82723 at paragraphs 52-54.
[61] 2009 SCC 53 at paragraph 106.

In the future, the Board may be called upon to reconcile why the SCC, on the same day, denied leave for two seemingly contradictory appeal decisions in *Telecon Inc. v. International Brotherhood of Electrical Workers (Local Union 213)*[62], and *Ramkey Communications Inc. v. Labourers' International Union of North America*[63]. The Federal Court of Appeal's decision in *Telecon* had seemingly referred positively to the Ontario Divisional Court's decision in Ramkey[64]. But the Ontario Court of Appeal later overturned that decision.

Difficult cases might also struggle with whether one or two undertakings exist[65].

These jurisdictional challenges will not disappear. The Board with its significant resources is simply better positioned than most adjudicators to identify legitimate jurisdiction questions and then decide them.

CAN THE BOARD, LIKE A PART I LABOUR ARBITRATOR, INTERPRET, APPLY AND GIVE RELIEF IN ACCORDANCE WITH A STATUTE RELATING TO EMPLOYMENT MATTERS?

The Omnibus Bills retained two key limitations for unjust dismissal complaints. The first excludes *bona fide* layoffs and the discontinuance of a function[66] from unjust dismissal complaints. The second prevents the Board from considering a complaint where another "procedure for redress" exists under any other Act of Parliament[67].

The second limitation differs significantly from what legal counsel are used to in labour arbitrations when arbitrators apply, for example, human rights legislation[68]. To experienced lawyers and labour arbitrators, there is little difference between a just cause termination arbitration under Part I of the *Code* and an unjust dismissal complaint under Part III. The decision maker essentially decides whether the employer has met its burden of proof to justify the ending of the employment.

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[62] 2019 FCA 244, leave to appeal dismissed, 2020 CanLII 32280
[63] 2019 ONCA 859, leave to appeal dismissed, 2020 CanLII 32276
[64] See paragraph 47
[65] Marcotte c Entreprises H.D.J.S. Gascon Limitée, 2020 CanLII 29361
[66] *Code*, s.242(3.1)(a)
[67] *Code*, s.242(3.1)(b)
[68] For an example of the usual labour arbitration practice in this area see: International Union of Operating Engineers, Local 772 v University of Ottawa, 2019 CanLII 29865.

For adjudicators and the other "procedure for redress" limitation, the previous section 243(3.1)(b) read:

> (3.1) **No complaint shall be considered by an adjudicator** under subsection (3) in respect of a person **where**
>
> (a) that person has been laid off because of lack of work or because of the discontinuance of a function; or
>
> (b) **a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament**.
>
> (Emphasis added)

Rather than remove the limitation regarding another "procedure for redress", the Omnibus Bills merely updated the wording in section 243(3.1)(b) to reflect the Board's new role:

> (3.1) **No complaint shall be considered by the Board** under subsection (3) in respect of a person **if**
>
> (a) that person has been laid off because of lack of work or because of the discontinuance of a function; or
>
> (b) **a procedure for redress has been provided under Part I or Part II of this Act or under any other Act of Parliament**.
>
> (Emphasis added)

Evidently, the Legislator through Omnibus Bills can maintain whatever statutory distinctions it wants between the two regimes though the justification for doing so will probably baffle most subject matter experts. Moreover, the Omnibus Bills seemingly ignored an existing and improved blueprint found in other federal labour relations legislation.

The *Federal Public Sector Labour Relations Act*[69] (*FPS Act*) gave its adjudicators powers comparable to those of private sector labour arbitrators for grievances involving human rights issues. While the *FPS Act* still refers to a procedure for redress under other Acts, section 208(2) creates a human rights exception:

[69] SC 2003, c 22, s 2

> (2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, **other than the Canadian Human Rights Act**.
>
> (emphasis added)

In what appears to be a compromise for these types of cases, the *FPS Act* in various sections gives standing to the Canadian Human Rights Commission, such as in section 210[70]:

> 210 (1) When an individual grievance has been referred to adjudication and a party to the grievance raises an issue involving the interpretation or application of the Canadian Human Rights Act, that party must, in accordance with the regulations, give notice of the issue to the Canadian Human Rights Commission.
>
> Standing of Commission
>
> (2) The Canadian Human Rights Commission has standing in adjudication proceedings for the purpose of making submissions regarding an issue referred to in subsection (1).

An adjudicator under the *FPS Act* has the explicit power to apply the *Canadian Human Rights Act* and any other Act of Parliament relating to employment matters[71].

The Omnibus Bills missed an opportunity to provide similar "one stop shopping" in unjust dismissal complaints. The *Code* gives Part I labour arbitrators the explicit power "to interpret, apply and give relief in accordance with a statute relating to employment matters"[72]. The Omnibus Bills gave no similar explicit power to the Board and its External Adjudicators for virtually identical unjust dismissal complaints.

Harmonizing the *Code* provisions would have eliminated a cumbersome and more expensive process for parties to an unjust dismissal complaint, especially given the number of cases which reference human rights principles.

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[70] See also sections 217 and 222(1)
[71] Section 226
[72] *Code*, s.60(1)(a.1)

An example of the challenge coming from the *Code*'s reference to another "procedure for redress" arose recently in *Laponsee v LTS Solutions Ltd.*[73]. The parties in that case debated the appropriate forum for a case which raised the alleged frustration of an employment contract due to disability. The limitation in the *Code* essentially requires complainants to initiate multiple proceedings to protect their interests. Many parties will overlook that important detail, particularly self-represented litigants.

In *MacFarlane v. Day & Ross Inc.*[74] *(MacFarlane)*, the Federal Court had suggested that the Canadian Human Rights Tribunal could refer a matter back to an unjust dismissal adjudicator[75] to overcome the limitation in s.243(3.1)(b):

> [73] **Consequently, an adjudicator appointed under subsection 242(1) of the Canada Labour Code must decline to hear a complaint filed under subsection 240(1) of that Code if another substantially similar complaint has been filed under the Canadian Human Rights Act or, in the event that no complaint has been submitted under that Act, if the Canada Labour Code complaint raises human rights issues which could reasonably constitute a basis for a substantially similar complaint under the Canadian Human Rights Act.**
>
> [74] **However, unlike what was stated by the adjudicator in this case, an adjudicator appointed under subsection 242(1) of the Canada Labour Code is not wholly without jurisdiction**. His jurisdiction is simply ancillary to that of the Canadian Human Rights Commission and of the Canadian Human Rights Tribunal. Consequently, the Canadian Human Rights Commission could, in the exercise of its statutory discretion under either paragraph 41(1)(b) or paragraph 44(2)(b) of the Canadian Human Rights Act, refer the complaint to the adjudicator if it is satisfied that it could be more appropriately dealt with in the context of a hearing held pursuant to section 242 of the Canada Labour Code. I add that in such an event, the adjudicator appointed under the Canada Labour Code would have the authority to hear and decide the human rights allegations to the extent that they relate to the unjust dismissal which he is appointed to adjudicate. This flows logically from the reasoning in Boutilier.

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[73] 2018 CanLII 81565
[74] 2010 FC 556
[75] In support of this reasoning, the court at paragraph 83 cited Tranchemontagne v. Ontario (Director, Disability Support Program), 2006 SCC 14(*Tranchemontagne*) . This principle would presumably apply to the Board in its new role for unjust dismissal complaints.

…

> [84] In conclusion, I rule that the adjudicator did not violate any principles of natural justice or procedural fairness in conducting the proceedings and rendering his decision. I also rule that the adjudicator correctly decided not to hear the complaint before him on the merits. **Consequently, the decision of the adjudicator in this case is largely upheld, save to the extent that the adjudicator declined jurisdiction in a manner which would preclude the complaint being referred back to him by the Canadian Human Rights Commission in the exercise of its authority pursuant to paragraph 41(1)(b) or paragraph 44(2)(b) of the Canadian Human Rights Act.**
>
> (Emphasis added)

In an older case, *Byers Transport Ltd. v. Kosanovich*[76], the Federal Court of Appeal (FCA), conducted a contextual reading of the *Code* and contrasted its view of the lesser expertise of a Part III adjudicator with that of a Part I labour arbitrator and the predecessor Board:

> Furthermore, the area of expertise of the adjudicator is a rather limited one. He is "any person that the Minister considers appropriate as an adjudicator" (subsection 242(1)), he is appointed on an ad hoc basis and he is to consider complaints made by a limited class of employees (subsections 240(1) and 242(3.1)) with respect to one single issue, namely, unjust dismissal (paragraph 242(3)(a)). His expertise is far less extensive than that of the members of the Canada Labour Relations Board and that of an arbitrator appointed pursuant to Part I of the Code…

While perhaps true contextually, the reality was that the Minister of Labour could appoint the same individual from the List as a Part III adjudicator one day and as a Part I labour arbitrator the next. However, given the *Code*'s wording, that same individual could apply other employment legislation, like the *Canadian Human Rights Act*[77]*,* only under the latter appointment. The Part III limitation, subject to the exception set out in *MacFarlane*, *supra*, remains in place for the Board's External Adjudicators.

Ultimately, the adjudicator in *Laponsee* took jurisdiction given that the complaint flowed from the law of contract rather than human rights:

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[76] 1995 CanLII 3515
[77] RSC 1985, c H-6

> 80. Had Mr. Laponsee pursued a common law claim, LTS could have similarly raised the doctrine of frustration. That would not prevent a civil court from hearing the wrongful dismissal claim since a contract law cause of action differs from a complaint alleging a specific violation of the Act. Neither should that same difference prevent this unjust dismissal case from proceeding.
>
> 81. Decision makers in differing cases arising under Part III of the Code have examined the concept of frustration of contract. Not all cases involving the doctrine of frustration involve a disability. For example, the inability to obtain driving insurance has been raised as a frustrating event.
>
> 82. It would be surprising if adjudicators could consider the doctrine of frustration in the context of a driver's inability to qualify for insurance but somehow lose jurisdiction to consider that same contract law argument if the frustrating event arose from an employee's unfortunate health issues. Both situations remain either employment standards or employment law cases.

The later decision in *Laponsee* on the merits found that the employment contract had been frustrated[78].

CAN THE BOARD RECONSIDER AN UNJUST DISMISSAL DECISION?

The Board's letter seeking External Adjudicators for Part II and III matters indicated that their decisions would be subject to reconsideration. The Omnibus Bills did not explicitly exclude unjust dismissal decisions from the Board's reconsideration[79] process. This seemingly adds a new procedural layer given that a decision from an External Adjudicator is deemed to be a Board decision[80].

Unjust dismissal complaints are essentially just cause grievances. Despite the Board's discretion not to hold an oral hearing[81], almost all unjust dismissal cases will require *viva voce* evidence.

[78] Laponsee v LTS Solutions Ltd., 2019 CanLII 75034
[79] *Code*, s. 18 reads: 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.
[80] *Code*, s.12.001(3)
[81] *Code*, s.16.1

The Federal Public Sector Labour Relations and Employment Board (FPS Board) has jurisdiction over both Labour Relations (Part 1) and Grievances (Part 2)[82]. The FPS Board has a review power in Part 1 for its labour relations decisions[83], but no comparable wording is found in Part 2 for grievance decisions. Assuming, for the sake of argument, that it could, the FPS Board does not appear to use its Part 1 reconsideration power for Part 2 grievances. Instead, a party's recourse lies with judicial review.

There are pros and cons to extending the Board's reconsideration power to unjust dismissal complaints. It will add expense for the parties many of whom have extremely limited resources.

The Board also learned in the past that, despite unquestioned good faith, overturning a highly experienced labour arbitrator simply aggravated an obviously permanently divisive dispute about seniority following a merger[84]. The Board seemingly learned that discretion was the better part of valour by not intervening in a later decision over a similar issue between the parties[85].

The Board, depending on its constantly changing composition, may have no experience hearing and deciding what are essentially just cause termination grievances. It should therefore tread lightly before intervening in unjust dismissal decisions rendered by External Adjudicators with significant private sector labour arbitration experience.

Just because the Board may be able to intervene on reconsideration does not mean that it should.

If a party applies for reconsideration, the Board might deal with such applications summarily and require an applicant to establish a *prima facie* case. This avoids spending significant resources and doing decisions twice[86]. Adopting a triage process comparable to that for reconsideration applications of duty of fair representation complaints, which already require a *prima facie* case, would deal efficiently, but still fairly, with reconsideration applications.[87]

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[82] Federal Public Sector Labour Relations Act, SC 2003, c 22, s 2 at section 4 and section 206, respectively.
[83] Section 43(1) of the Federal Public Sector Labour Relations Act, SC 2003, c 22, s 2
[84] Air Canada, 2002 CIRB 183.
[85] Air Canada, 2004 CIRB 263
[86] *Reid*, 2016 CIRB 818.
[87] Reid, supra, at paragraph 9.

The reconsideration process could play an occasional yet important role in establishing binding Board policy. In the past, two schools of thought existed when interpreting the *Code*'s unjust dismissal provisions. In *Wilson v. Atomic Energy of Canada Ltd.* [88], the SCC, again in a divided decision, resolved the issue.

If a similar difference of opinion occurred again, perhaps over why the Legislator used the expression "unjust dismissal" in Division XIV rather than the term "just cause" found elsewhere in the *Code,* then a plenary reconsideration process would allow for a proper hearing involving the parties, Board neutrals[89] and possibly intervenors. The Board could then adopt a mandatory policy which would provide greater certainty to all parties for future unjust dismissal cases[90].

WHERE MUST A PARTY FILE A JUDICIAL REVIEW APPLICATION?

Previously, a single judge on the Federal Court judicially reviewed adjudicators' unjust dismissal decisions. Now that all those decisions are deemed to be Board decisions, the FCA will hear any judicial review[91].

It seems like overkill to have unjust dismissal decisions go directly to the FCA for judicial review. The traditional rationale for Part I Board decisions going directly to the FCA was to avoid labour relations delay. Similarly, the Board had fought to have standing for judicial reviews for Part I labour cases to ensure the court had before it the full labour relations context. Such standing, which is an essential tool for the Board to lessen the chance of a court making an adverse decision in a vacuum, does not exist in the privative clauses found in the other Parts of the *Code*[92].

However, arbitration decisions from the FPS Board go directly to the FCA[93]. Having the same court reviewing all a tribunal's decisions may help with uniformity and lessen the chance of a party filing in the wrong court.

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[88] 2016 SCC 29
[89] The role of non-neutral representative members is limited to Part I. See, for example, *Code* s.12.02.
[90] For a description of the former CLRB's plenary process which it used successfully to resolve important policy disputes, see "*Procedurally Fair Administrative Tribunals: The Law Firm Model*", Canadian Institute, October 2018.
[91] See s.28(1)(h) of the Federal Courts Act
[92] Compare the *Code*'s wording in s.22 and s.243
[93] See s.28(1)(i) of the Federal Courts Act

Since parties to unjust dismissal cases may now have access to reconsideration, they must pay close attention to time limits. A reconsideration application does *not* interrupt judicial review time limits. As the FCA has indicated, a party cannot contest the Board's original decision by later judicially reviewing its reconsideration decision[94]. Judicial review must instead be pursued for each Board decision independently regardless of whether a party engages the reconsideration process.

CONCLUSION

Unfortunately, successive federal governments have used budget legislation to make major amendments to labour laws. This process minimizes trade unions', employers' and subject matter experts' real-world experience and expertise. This may explain why the Omnibus Bills appeared unaware of several challenges private sector parties, especially the self-represented, face when navigating the unjust dismissal regime.

Nonetheless, the Omnibus Bills did add some useful new Board powers which improve the *Code*'s unjust dismissal regime.

The Board's success in deciding unjust dismissal cases will depend mostly on the experience level of those individuals Cabinet appoints as neutral members and those the Board selects as External Adjudicators. In the past, experienced labour arbitrators often, but certainly not exclusively, decided unjust dismissal cases. The Board has made genuine efforts to increase the pool of candidates for External Adjudicator positions which should make its selection decisions self-evident.

Ultimately, the only factor which matters in any appointment or selection process is what is best for the parties[95].

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[94] Madrigga v. Teamsters Canada Rail Conference, 2016 FCA 151

[95] See generally "*Duties Administrative Tribunals Owe All Parties*", CBA Administrative, Labour and Employment Law Conference, November 2016