

“Making Policy – How do we do it”

Conference of Ontario Boards & Agencies

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Canada Industrial Relations Board

The Limits on Tribunal Policy Making

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- **Specific Intent**
- **Approach to Interpreting and Applying Statutes**
- **New and Old Statutes and Precedent**
- **Courts and the Standard of Review**
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Last Word of S.C.C. on Policy Making

*Bell Canada v. Canadian Telephone Employees
Association* [2003] SCC 36 (June 26 2003)

The Tribunal should be held to a high standard of independence, both at common law and under s. 2(e) of the Canadian Bill of Rights. Its main function is adjudicative and it is not involved in crafting policy. However, as part of a legislative scheme for rectifying discrimination, the Tribunal serves the larger purpose of ensuring that government policy is implemented. The standard of independence applicable to it is therefore lower than that of a court. The Tribunal's function in implementing government policy must be kept in mind when assessing whether it is impartial.

The Parameters of the S.C.C. Approach to Limiting Tribunal Jurisdiction

CUPE v. Ontario (Minister of Labour) [2003] S.C.C. 29

- 98 The first order of business is to examine the legislative scheme of *HLDA* in general and s. 6(5) in particular. As Beetz J. pointed out, "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation": *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1087 (emphasis deleted), quoting S. A. de Smith, H. Street and R. Brazier, *Constitutional and Administrative Law* (4th ed. 1981), at p. 558. The Court's mandate on judicial review is to keep the statutory decision maker within the boundaries the legislature intended.
- 99 In performing that mandate, of course, administrative law supplies certain inferences and presumptions. For example, as this Court recently affirmed in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52, at para. 21, "courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice". More broadly, it is presumed that the legislature intended the statutory decision maker to function within the established principles and constraints of administrative law.
...
- 106 The appropriate approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, frequently cited with approval in this Court, e.g., *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21 and 23; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33). This contextual approach accords with the previously mentioned *dictum* of Rand J. in *Roncarelli*, *supra*, that "there is always a perspective within which a statute is intended [by the legislature] to operate" (p. 140), and Lord Reid's caution in *Padfield*, *supra*, that the particular wording of a ministerial power is to be read in light of "the policy and objects of the Act" (p. 1030).

The Preamble of the Canada Labour Code

PART I INDUSTRIAL RELATIONS

Preamble

WHEREAS there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;

AND WHEREAS Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;

AND WHEREAS the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard;

AND WHEREAS the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all;

Section 18.1 of the Canada Labour Code

Review of structure of bargaining units

18.1 (1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.

Agreement of parties

(2) If the Board reviews, pursuant to subsection (1) or section 35 or 45, the structure of the bargaining units, the Board

(a) must allow the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units and any questions arising from the review; and

(b) may make any orders it considers appropriate to implement any agreement.

Orders

(3) If the Board is of the opinion that the agreement reached by the parties would not lead to the creation of units appropriate for collective bargaining or if the parties do not agree on certain issues within the period that the Board considers reasonable, the Board determines any question that arises and makes any orders it considers appropriate in the circumstances.

Section 18.1 Canada Labour Code (Cont.)

Content of orders

- (4) For the purposes of subsection (3), the Board may
- (a) determine which trade union shall be the bargaining agent for the employees in each bargaining unit that results from the review;
 - (b) amend any certification order or description of a bargaining unit contained in any collective agreement;
 - (c) if more than one collective agreement applies to employees in a bargaining unit, decide which collective agreement is in force;
 - (d) amend, to the extent that the Board considers necessary, the provisions of collective agreements respecting expiry dates or seniority rights, or amend other such provisions;
 - (e) if the conditions of paragraphs 89(1)(a) to (d) have been met with respect to some of the employees in a bargaining unit, decide which terms and conditions of employment apply to those employees until the time that a collective agreement becomes applicable to the unit or the conditions of those paragraphs are met with respect to the unit; and
 - (f) authorize a party to a collective agreement to give notice to bargain collectively.

Policy Making – 10 Examples

1. **August 3, 2000 – Decision no. 79**
Air Canada and Canadian Airlines declared single employer, negotiations to address creation of single pilots bargaining unit.
2. **September 22, 2000 - Decision no. 90**
Declaration of Single Employer, for majority of bargaining units at new Air Canada.
3. **January 24, 2001 - Decision no. 104**
General definition of Technical Maintenance & Operational Support unit & Sales and Service unit and assignment of functions.
5. **April 27, 2001 - Decision no. 120**
Who should be certified to represent Sales and Service unit.
6. **May 2, 2001 - Letter-Decision no. 451**
Process to determine seniority in TMOS unit
6. **December 4, 2001 - Decision no. 147**
Which groups of employees should be grouped into two broadly defined bargaining units, Technical Maintenance & Operational Support and Sales & Service units.
7. **January 29, 2002 - Decision no. 158**
Rights of minority employees pending collective agreement mergers.
8. **May 31, 2002 - Decision no. 174**
Small group may be added to bargaining unit without a vote where vote would be meaningless exercise. Who would receive notification in such circumstances.
9. **July 10, 2002 - Decision no. 183**
Principles applicable to a merger of seniority under the Code.
10. **October 30, 2002-Letter-Decision no.754**
Ordered parties to re-attempt negotiations & provided instructions.