COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937 v. Taan Forest Limited Partnership,* 2018 BCCA 322

Date: 20180817
Docket: CA44213

Between:

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937

Appellant

And

Taan Forest Limited Partnership

Respondent

And

The Council of the Haida Nation

Intervenor

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Dickson

On appeal from: A decision of the Labour Relations Board, dated January 4, 2017 (*Taan Forest Limited Partnership v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937*, [2017] B.C.C.A.A.A. No. 3 (QL))

Counsel for the Appellant: S.I. Banister, Q.C.

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Place and Date of Hearing: Vancouver, British Columbia
December 12, 2017

Place and Date of Judgment: Vancouver, British Columbia
August 17, 2018

Written Reasons by:

The Honourable Madam Justice Dickson

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Frankel

Summary:

The Union appeals from an arbitral award pursuant to s. 100 of the Labour Relations Code. The arbitrator found that a term of the collective agreement caused prima facie discrimination against members of the Haida Nation in the context of an employment relationship contrary to s. 13 of the Human Rights Code; that the term could not be justified as a bona fide occupational requirement; and that the appropriate remedy was to strike out part of the term. The Union appeals the arbitrator's determination that the company was in an employment relationship with the Haida contractors, arguing that he erred in his application of the legal test for determining whether an employment relationship existed. Held: Appeal quashed. The real basis of the award is the arbitrator's determination that the term is discriminatory contrary to s. 13 due to its adverse effect on Haida people. The arbitrator's application of the relevant human rights law principles was inextricably intertwined with his factual determinations and application of labour relations principles, which led to his larger conclusion regarding the impact of the collective agreement on Haida people. The appeal is quashed for want of jurisdiction.

Reasons for Judgment of the Honourable Madam Justice Dickson:

Introduction

[1] The appellant union appeals from an arbitration award that determined its policy grievance alleging the respondent breached a term of a collective agreement by contracting out logging work on Haida Gwaii to multiple non-union contractors. The arbitrator concluded, among other things, that the respondent is bound by the Collective Agreement, but that enforcement of the term would result in discrimination against members of the Haida Nation in the context of an employment relationship, contrary to s. 13 of the *Human Rights Code*, R.S.B.C. 1996, c. 210. In consequence, he struck out part of the term to remedy its discriminatory effect.

[2] The appellant brings this appeal of the human rights portion of the award pursuant to s. 100 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244. In its submission, the arbitrator erred by incorrectly interpreting and applying human rights law and principles in finding there was an employment relationship for purposes of the *Human Rights Code*. In particular, according to the appellant, the arbitrator effectively extended human rights protections to corporate entities when he found the *Human Rights Code* applied to the activities of contracting companies based on the ethnicity of some of their shareholders. The appellant argues that, in doing so, he conflated individual members of the Haida Nation with the companies in which they hold an ownership interest and misconstrued the law on the meaning of employment under s. 13 of the *Human Rights Code*. Further, it says, he misapplied the

criteria for establishing an employment relationship articulated in *Crane v. B.C. (Ministry of Health Services) and others*, 2005 BCHRT 361 and *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39.

[3] The appeal raises two issues: i) the proper forum for appeal or review of the award; and ii) the merits of the appeal. The first issue concerns whether this Court has jurisdiction under s. 100 of the *Labour Relations Code* to hear an appeal of the award because its real basis is a matter of general law that is not included in s. 99(1) of the *Labour Relations Code*. The second issue arises only if this Court has jurisdiction to hear the appeal.

[4] For the reasons that follow, I conclude the real basis of the award is not a matter of general law that is not included in s. 99(1) of the *Labour Relations Code* and, therefore, this Court does not have jurisdiction. As a result, I would quash the appeal.

Background

[5] Haida Gwaii is a richly forested archipelago located off the west coast of British Columbia. Tree Forest License 60 (TFL 60) is the largest forest tenure on Haida Gwaii. Formerly part of the largest tree forest license in British Columbia, the area covered by TFL 60 was logged over the years by a series of logging companies, including Western Forest Products (WFP). The respondent, TAAN Forest Limited Partnership, is the successor to WFP for all WFP bargaining unit employees within the TFL 60 region. The appellant union, United Steelworkers Local 1-1937, is the bargaining agent for that bargaining unit and a signatory to the Collective Agreement with WFP.

[6] Many of those who live on Haida Gwaii are members of the Haida Nation. Its wood and forests are integral to the culture and economy of the Haida people. Like other Aboriginal people in Canada, the Haida have suffered historically from discrimination and marginalization, resulting in significant economic and social disadvantage not experienced by non-Aboriginal people. Like other Aboriginal people in Canada, the Haida have higher rates of poverty and unemployment than non-Aboriginal people and an impaired capacity to participate in the economic life of their communities.

[7] The Council of the Haida Nation (CHN) is the governing body of the Haida Nation. In recent decades, it has engaged in a process of reconciliation of Haida interests with those of the federal and provincial Crown. As part of that process, in 2009, the Haida Nation and the Province of British Columbia concluded the *Kunst'aa Guu – Kunst'aayah Reconciliation Protocol* (the *Reconciliation Protocol*), which provides for shared and joint decision-making with respect to Haida Gwaii's lands and natural resources. The *Reconciliation Protocol* established the Haida Gwaii Management Council and a Solutions Table, which are

responsible for ensuring, among other things, adherence to the *Haida Gwaii Strategic Land Use Agreement* reached between the same parties a few years before.

[8] The CHN is the sole shareholder of the Haida Enterprise Corporation (HaiCo). HaiCo was formed to manage, develop and operate business enterprises for the Haida Nation. It has, as its primary goal, the provision of employment and career opportunities for Haida people and the enhancement of their capacity to own and operate businesses on Haida Gwaii. Wholly owned by HaiCo, TAAN was incorporated to grow and develop a Haida-based forestry economy using the vehicle of small, family-owned businesses.

[9] As reflected in its *Corporate Sustainability Statement*, TAAN is committed to creating a forestry business based on the principles of the *Haida Gwaii Strategic Land Use Agreement*. It has approximately 18 direct employees and provides 70 to 75 per cent of HaiCo's revenue. In 2016, 42 per cent of the employees of all subcontractors working for TAAN were Haida. TAAN's goal is to develop capacity in the Haida Nation that will result in Haida owning the businesses with which it contracts and to contribute to rebuilding the economy on Haida Gwaii in a sustainable way.

[10] In 2010, TAAN took over the management of TFL 60. In 2012, it purchased TFL 60 from WFP with $2.5 million in borrowed funds and $10 million received from the Province as part of the *Reconciliation Protocol*, thus becoming the licensee. As noted, the Union was certified to WFP prior to TAAN's TFL 60 purchase. On September 17, 2012, the Labour Relations Board declared TAAN the successor to WFP and amended the certification. As successor, TAAN is bound by the Collective Agreement, which includes Article XXV and the Woodlands Letter of Understanding (WLOU).

[11] Article XXV of the Collective Agreement was negotiated following a lengthy strike in 1986. It restricts an employer from contracting out work of the bargaining unit if it results in the loss of full-time positions held by regular employees. Operating together with the WLOU, which was introduced several years later, Article XXV protects union jobs and the overall integrity of the bargaining unit.

[12] In 2003, the parties failed to reach a collective agreement and there was a lengthy work stoppage. Commissioner Don Munroe was appointed to mediate/arbitrate and he drafted a report that included the language of the WLOU, which language has not changed since then. Notwithstanding Article XXV, s. 2 of the WLOU establishes the right of a company to contract out its woodlands operation on a "stump-to-dump" basis to a union certified contractor:

> As of the date of this Letter of Understanding, but subject to paragraph 4 below, a Company may contract out a woodlands operation to an USW Certified Contractor on a stump-to-dump basis. The Company will consult with the Union prior to selecting a Contractor. By agreement between the Company and the Local Union, the operation

may be sub-divided into two stump-to-dump contracts.

[13] Logging involves many different tasks, commonly referred to as phases. A “stump-to-dump” contractor is responsible for all phases of a logging operation, from the falling of trees to the hauling of logs to a dump site. The cost to capitalize a stump-to-dump contractor to operate TFL 60 is in the range of $8 million to $12 million and such a contractor would require approximately 50 to 60 employees. Neither HaiCo nor TAAN have the financial capacity to conduct a large-scale logging operation of this kind.

[14] As licensee, TAAN determines who works on TFL 60, when they work and where they work. Since it acquired TFL 60, it has been using multiple subcontractors to perform the necessary logging operation work. TAAN’s contracting model is based on two major principles. First, contracts should be for periods of three to five years to provide stability and allow contractors to obtain adequate financing. Second, TAAN should use a mix of smaller contractors combined with phase contractors consistent with its goal to develop local businesses owned and operated by Haida contractors.

[15] North Pacific Timber Corporation, D.V.R. Trucking Ltd. and Watchmen Forest Products Ltd. are three small companies that have contracted with TAAN to perform work on TFL 60. North Pacific has provided grapple yarding and hand falling services; D.V.R. Trucking has provided hauling services; Watchmen has provided salvage work. North Pacific has five partners and is 52.5 per cent owned by Haida persons, one of whom is Nika Collison. D.V.R. Trucking is owned by Karen Fladmark, a Haida woman, and her non-Haida husband. Watchmen is owned by a Haida woman and a Métis man and managed by Rick McDonald, their Haida son.

The Arbitration

[16] On June 19, 2015, the Union filed a policy grievance alleging, among other things, that TAAN breached s. 2 of the WLOU or Article XXV of the Collective Agreement when it had multiple and/or non-union contractors perform work on TFL 60. It sought a declaration that TAAN is bound by the WLOU and Article XXV, together with damages for the breaches alleged. TAAN denied the allegations and responded that, if the WLOU applies, enforcing s. 2 would constitute *prima facie* discrimination within the meaning of the *Human Rights Code* in that it disproportionately affects the Haida, who are less able to become stump-to-dump contractors because they experience economic disadvantages not experienced by non-Aboriginal persons. The Union replied that the *Human Rights Code* does not apply, but, if it does, s. 2 of the WLOU is not discriminatory, and, if it is, it is justifiable.

[17] The arbitration took place before Arbitrator Stan Lanyon on March 21-24 and May

30-31, 2016. Several witnesses testified, including representatives of the Union, TAAN and the Haida Nation. Three "Haida Contractors" also testified: Ms. Collison, Ms. Fladmark and Mr. McDonald.

[18] The Haida Contractors described their circumstances and those of their small businesses, their relationship with and work for TAAN, and their financial inability to take on a stump-to-dump operation. Like other witnesses, they also testified about the social, cultural and economic experiences and aspirations of the Haida Nation with respect to Haida Gwaii. In doing so, like others, they expressed the view that no Haida contractor would have the financial capacity required for a large-scale stump-to-dump logging operation.

[19] The arbitrator issued the Award on January 4, 2017.

The Award

[20] Arbitrator Lanyon began by identifying the issues in dispute, which he characterized as contract interpretation and human rights issues involving interrelated evidence. He noted that his jurisdiction derived from the Collective Agreement and the *Labour Relations Code*, that he must determine issues of workplace discrimination by applying two separate statutory regimes (the *Human Rights Code* and the *Labour Relations Code*), and that, in the event of a conflict, the *Human Rights Code* prevails. He also noted that human rights legislation is incorporated into all collective agreements, citing *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42.

[21] Taking into account this Court's statements in *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58, the arbitrator separated the facts and analysis of the contract interpretation issues from the facts and analysis of the human rights issues. He dealt first with contract interpretation, summarizing the history of TFL 60 and its predecessor licensees, the Union's certification to TAAN and TAAN's acquisition of TFL 60, as well as the history of the Collective Agreement. He concluded that TAAN is bound by the Collective Agreement, which includes the WLOU. As a result, he went on to address TAAN's argument that s. 2 of the WLOU offends the *Human Rights Code*.

[22] Before analyzing the WLOU and *Human Rights Code* issues, the arbitrator described the salient evidence, outlined the parties' competing positions and provided an overview of his analysis. He also provided a summary of his final conclusions:

> [188] … I have concluded that there is an employment relationship between TAAN and the Haida contractors, such that the relationship exhibits a sufficient level of control/dependency to meet the employment relationship criteria set out in *Crane v. B.C. (Ministry of Health Services) and others*, 2005 BCHRT 361 (*Crane*). I further find that s.2 of the WLOU is discriminatory for the purposes of the *Code*, concluding that being Aboriginal is "a factor" or "the link" between the protected ground and the adverse

> treatment experienced by the Haida contractors. Further, I find that s.2 of the WLOU is not justified under the circumstances because it imposes an arbitrary barrier to participation in logging TFL 60 for the Haida contractors. Finally, I have amended s.2 of the WLOU consistent with TAAN's remedial proposal.

[23] Next, the arbitrator conducted a detailed factual and legal analysis of the WLOU and human rights issues. He identified the relevant provisions of the *Human Rights Code* and discussed various principles of human rights law, including substantive equality and the "unified approach" to interpreting human rights legislation. He also discussed the need to determine whether there was an employment relationship between TAAN and the Haida Contractors before considering whether there was *prima facie* discrimination, contrary to s. 13 of the *Human Rights Code*.

[24] The employment relationship finding is the only aspect of the arbitrator's analysis that the Union challenges on appeal.

[25] The arbitrator recognized that the employment relationship issue must be determined bearing in mind the overarching purpose of human rights legislation. After remarking on the fact-specific nature of the employment relationship issue, he stated the applicable test, as articulated in *Crane*, namely, the relevant factors for consideration are utilization, control, financial burden and remedial purpose. He also remarked on the unusual context within which the issue arose in that the discrimination claim related to the application of a collective agreement and future employment relationships, rather than solely to past contracting:

> [215] In the normal course of events, the employment relationship factors apply to a past event; that is the very nature of complaints and adjudication. The fact pattern here includes past contracting, however, the discrimination claim is in relation to the application of the collective agreement, specifically s.2 of the WLOU, to all *future* contracting. Thus, in effect, the WLOU will establish the legal parameters of any future employment relationship between TAAN and all subcontractors. Any such contracts must be for a period of 5 years (s. 7). Any such Woodlands contractor must agree to be a successor to the employer (s. 3). Any subsequent contractors must also agree to be a successor (ss. 7-9).
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> [216] I will now consider these *Crane* factors in light of the specific facts of this case.

[26] Turning to the *Crane* factors, the arbitrator asked first if TAAN utilized or gained some benefit from the Haida Contractors. He reviewed several authorities, including *Sutton v. Jarvis Ryan Associates*, 2010 HRTO 2421,*Yu v. Shell Canada Ltd.*, 2004 BCHRT 28 and *Pardy v. Earle and others* (No. 4), 2011 BCHRT 101, and acknowledged the Union's argument that independent contractors are rarely found to be employees. However, he noted, sometimes there are exceptions. In particular, citing *McCormick*, he stated that, for human rights purposes, independent contractors are sometimes considered employees.

[27] The Union also argued that the Haida Contractors were simply uninvolved shareholders in their respective businesses and utilization could not be established unless they were personally involved in logging activity. The arbitrator rejected this argument:

> [225] A corporation is a legal construct. It is a vehicle through which natural persons conduct their business affairs. Thus, natural persons control and direct these incorporated entities. In this case, the witnesses on behalf of NPTC, D.V.R. and Watchmen, have been involved in starting the company, obtaining financing, and using personal collateral; they assist in managing the company, or perform key duties related to the business, like bookkeeping; and, they are all subject to the instability and insecurity of running such small businesses. They must deal with the breakdown of equipment, hiring and firing employees, training employees, meeting payroll, building their own managerial capacity, and ensuring the long-term viability of these small businesses. All of these individuals have been successful in establishing other small businesses ...

[28] The arbitrator emphasized that TAAN is a forestry management company owned entirely by the Haida Nation with the mission of sustainably logging TFL 60. Noting that TAAN's mandate is to rebuild a forestry-based economy on Haida Gwaii through entrepreneurship and employment and that the Haida contractors companies are small, closely-held family businesses, he stated its business model reflects the close relationships which are the foundation of Haida community and concluded TAAN utilized the Haida Contractors:

> [227] … As found in *Yu*, *supra*, many business contracts involve a larger entity relying on the "personal attributes, character and qualifications" of small business owners in order to carry out aspects of their business (para. 22). A good example of this is Ms. Collison's involvement in the Land Use Committee that was responsible for the Haida Land Use Vision (April 2005) and her role as an independent curator at the Haida Gwaii Museum. As set out above, it is TAAN's specific intention to utilize individuals like Ms. Collison, Ms. Fladmark and Mr. McDonald and their small businesses to increase the economic capacity of the Haida Nation.
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> [228] In conclusion, I find that all of these contractors provided important services necessary to TAAN's "core business." TAAN is a forest management company with no equipment or bargaining-unit forestry employees of its own. The evidence in this case shows that the Haida, and other contractors (and sub-contractors), performed all of the work necessary to fulfill TAAN's main business objective – the sustainable logging of TFL 60. I also find that TAAN "utilized" the "personal attributes, character and qualifications" (*Yu*, *supra*) of these Haida contractors to accomplish its specific vision to rebuild the economic capacity of Haida Gwaii through small, family-owned business entrepreneurs. I conclude, therefore, that TAAN has "utilized" these Haida contractors.

[29] The arbitrator next considered whether TAAN exercised control over the Haida Contractors. Quoting from *McCormick*, he framed the question as "the extent to which the worker is subject and subordinate to someone else's decision-making over working conditions and remuneration". In answering, he reviewed the 2009 *Reconciliation Protocol*, the

circumstances surrounding HaiCo's purchase of TFL 60 and the environmental, social and cultural basis of TAAN's business activities, including Haida principles, values and traditions. He also noted that TAAN is the only forestry company doing business in the TFL 60 area, that it requires the highest environmental standards and that it controls all forestry operations on TFL 60 through detailed operating procedures.

[30] The Union argued that any control TAAN exercised over a corporate contractor was irrelevant and that it exercised no control over the individual shareholders and their personal work, for example, with respect to shareholder remuneration. The arbitrator was not persuaded:

> [235] … the short answer is that the issue of control over the corporate contractor is relevant to a determination of this matter; and, that the internal policies over the remuneration of shareholders have not in past cases been a factor in the determination of this issue; and further, there is no evidence with respect to this matter in this case.
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> [236] The circumstances surrounding the creation of TFL 60, the development of TAAN as a Haida-owned forestry company, TAAN's exclusive control over all forestry activities taking place on TFL 60, and, finally, TAAN's unique responsibility to implement culturally sensitive forestry practices all point towards a finding of control in this case. TAAN accomplishes all of its forestry activities on TFL 60 through the use of contractors. There are no other entities or employees to manage or supervise. Therefore, I find that TAAN exercises "control" over the Haida contractors.

[31] As to remuneration, the arbitrator stated that an alleged employer does not have to pay out a direct wage to an alleged employee; rather, what is required is a "slight degree of recompense". Noting that TAAN transfers monies to the Haida Contractors pursuant to signed contracts, he acknowledged the Union's submission that the shareholders are distinct from the corporate entity, but ruled:

> [239] … This is a case about small, closely-held, family businesses, and individuals who are often both shareholder, manager, and employee; this is, in fact, the economic revitalization model for the future that the Haida envision. A large corporation with thousands of shareholders is not the model that applies in these circumstances. I find that TAAN bore the burden of remuneration in this case.

[32] Finally, the arbitrator asked whether TAAN had the ability to remedy any discrimination that may have occurred, citing *Crane* and emphasizing the need to consider the consequences of not finding an employment relationship. He set out TAAN's position that s. 2 of the WLOU disproportionately affects Haida contractors because they are less likely to have the economic capabilities to become a stump-to-dump contractor than non-Aboriginal persons and the Union's position that TAAN could not remedy any discrimination because it could not unilaterally amend the Collective Agreement. However, he concluded that TAAN could remedy the alleged discrimination through the grievance/arbitration process. In reaching this conclusion, he noted that all the Haida Contractors were dependent on TAAN for the

opportunity to log on TFL 60 and explained his overall findings on the employment relationship issue:

> [244] …The overarching remedial purpose of the *Code* is satisfied by finding an employment relationship in this case. Thus, the combined criteria of utilization, control, financial burden and remedial purposes meet the control/dependency test outlined by Justice Abella in *McCormick*, *supra* …
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> [246] As set out earlier in this Award, the Employer has the right to contract out aspects of its business if it sees an economic advantage in doing so. However, an Employer can agree to place restrictions on its right to contract out, as the Employers in the forest industry have done in Article XXV and the WLOU. However, in addition to the protection of Union positions, is the issue of the protection of human rights. As stated in *Parry Sound*, *supra*, the *Human Rights Code* forms part of the terms and conditions of the Collective Agreement between these parties. Section 4 of the *Human Rights Code* states that the *Human Rights Code* takes priority over all other enactments; and of course, it takes priority over any and all provisions of the Collective Agreement.

[33] Having found that TAAN and the Haida Contractors were in an employment-like relationship for purposes of the *Human Rights Code*, the arbitrator turned to whether *prima facie* discrimination was established. Drawing on established principles of human rights law and applying them to the facts, including multiple disadvantages experienced by the Haida, he found that s. 2 of the WLOU has a disproportionately negative effect on Haida Contractors such that it limits their access to opportunities or benefits available to other non-Aboriginal persons:

> [285] … Considered within the context of [listed] economic and social barriers, s.2 of the WLOU operates to limit Haida people from accessing a benefit enjoyed by other non-Haida British Columbians, thereby perpetuating the very economic disadvantages already experienced by Haida persons. I find that s.2 of the WLOU adversely impacts Haida people because they are disproportionately unable to become full-phase stump-to-dump contractors.

[34] In conducting his *prima facie* discrimination analysis, the arbitrator considered several of the Union's arguments, including arguments that the WLOU is a neutral rule, implemented for valid reasons, with no basis in stereotypical ideas about Haida phase contractors. In rejecting these arguments, he acknowledged the Union's concern that amending s. 2 of the WLOU would destroy its large bargaining unit and undermine protections for its members achieved in collective bargaining, in part because other employers will demand the same concession. However, in responding to this concern, he focused on the unique and highly specific factual circumstances in question, including TAAN's financial, social and cultural objectives, and on the Haida Nation's goal of overcoming the effects of long-standing systemic discrimination:

> [316] … this case is quite specific. It concerns the BC *Human Rights Code*'s application to the Haida Nation on Haida Gwaii. Furthermore, the law and evidence in this matter demonstrate that the remedy sought by the Employer (that is, striking out parts of s. 2 of the WLOU) would not "completely undermine" or "destroy" the current

> bargaining unit. First, the Union is certified to TAAN and TAAN does not dispute this … Second, TAAN acknowledges that it is bound by the Union's Collective Agreement, including Article XXV and the WLOU, with the exception of the current wording of Article 2. Third, the annual allowable cut on TFL will not change with the introduction of phase contractors. Therefore, the amount of work available to Union members would not change. And finally, although some of the Haida contractors are unhappy about the prospect of being bound by a collective agreement, this remains a fundamental requirement for all contractors or sub-contractors who perform work on TFL 60 under the WLOU.

[35] The arbitrator found further that s. 2 of the WLOU could not be justified as a *bona fide* occupational requirement. In reaching this conclusion, he considered again the Union's arguments that s. 2 served valuable labour relationship purposes, including protecting job security, positions and work for Union members, but remained unpersuaded, largely because TAAN is bound by the Union's Certification and its Collective Agreement:

> [341] … Thus, the ability of TAAN to use more than two phase contractors preserves the primary purpose of the Union's contractual provisions (Article XXV and the WLOU), protecting bargaining unit positions and work, but does so without the discriminatory effect that a strict and literal interpretation of Article 2 imposes.

[36] As to remedy, the arbitrator decided to strike out part of s. 2 of the WLOU to allow TAAN to contract out to phase contractors after consulting with the Union:

> [349] I conclude that striking out these portions of s.2 of the WLOU remedies the discriminatory effect of the WLOU, while preserving the Union's significant rights with respect to the protection of Union positions under the Collective Agreement.

[37] On January 30, 2017, the Union filed a notice of appeal of the award pursuant to s. 100 of the *Labour Relations Code* and, on February 21, 2017, it applied to the Labour Relations Board for review of the award pursuant to s. 99 of the *Labour Relations Code*. Consistent with its usual practice, the Union's application to the Labour Relations Board is being held in abeyance pending the outcome of the appeal.

On Appeal

[38] The Union contends the arbitrator erred by incorrectly interpreting and applying human rights principles regarding the scope and nature of the term "employment" under the *Human Rights Code* and regarding the legal requirements for finding an employment relationship for purposes of that legislation. This, it says, is the foundational element of the human rights portion of the award, its real basis and a matter of general law. In the Union's submission, like the award in *Kemess*, this award goes beyond a factual determination, applies equally to unionized and non-unionized employers and employees, and does not engage principles of labour relations expressed or implied in the *Labour Relations Code*. In other words, the Union

characterizes the issue as a pure question of human rights law arising in the context of a unionized work environment. Accordingly, it submits, this Court has jurisdiction under s. 100 of the *Labour Relations Code* to hear the appeal.

[39] In support of its submission on jurisdiction, the Union notes the question of whether an employment relationship exists arises on every application of s. 13 of the *Human Rights Code*. In addressing this question, it argues, the arbitrator misconstrued the *Crane* factors and effectively extended human rights to corporate entities by finding the *Human Rights Code* applies to the contracting companies' activities because one or more of their owners is Haida. It says the award amounts to an unprecedented extension of human rights protections that departs from existing jurisprudence, is not based on settled principle and has significant general implications well beyond the labour community and considerations of labour relations. Emphasizing the need to develop human rights law consistently and citing *United Steelworkers of America v. Fording Coal Ltd.*, 1999 BCCA 534, *Kemess* and *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v. B.C. Nurses' Union*, 2006 BCCA 57 (*B.C. Nurses (2006)*), it also says this Court has regularly taken jurisdiction under s. 100 of the *Labour Relations Code* in appeals which, like this one, concern both the interpretation and application of the *Human Rights Code*.

[40] In further support, the Union seeks to distinguish those appeals involving human rights matters in which this Court has not taken jurisdiction. It contends that the Court only declines jurisdiction on such appeals where the human rights issues are incidental to or inseparable from principles of labour relations. For example, it says, in *United Food and Commercial Workers Union, Local 1518 v. Sunrise Poultry Processors Ltd.*, 2017 BCCA 130, the human rights issue was the meaning of disability, which was inextricably intertwined with the arbitrator's labour relations analysis of non-culpable absenteeism and just cause for termination. Similarly, in *Langley (Township) v. Canadian Union of Public Employees, Local 403*, 2017 BCCA 1, the human rights principles in question were layered upon and interactive with labour relations principles. However, it submits, the inquiry on this appeal relates fundamentally to issues of human rights, not to issues of labour relations.

[41] As to the merits of the appeal, relying on *Crane* and *McCormick*, the Union emphasizes that dependency and control are central to an employment relationship for human rights purposes and argues neither were present here given that TAAN contracted with corporate entities, not with individuals. It also notes there are no cases in which a corporate entity has been a successful complainant in a human rights claim and submits the arbitrator erred in his interpretation of *Sutton*, *Yu* and *Pardy*. It notes further that none of the Haida Contractors pursued a complaint under the *Human Rights Code* and submits the fact that TAAN complained on their behalf in defending itself against the grievance does not provide it with any

special ability to remedy the alleged discrimination sufficient to warrant a finding of an employment relationship. Finally, it says, potential abuses of that finding are significant because a company need only include a member of a protected class in its ownership group to claim human rights protection and thus defeat collective bargaining rights. In the result, the Union seeks an order allowing the appeal and quashing the human rights portion of the award.

[42] In response, TAAN submits this Court has no jurisdiction to hear the appeal because the real basis of the award involves the application of labour relations principles and, therefore, jurisdiction lies with the Labour Relations Board. In particular, according to TAAN, the real basis of the human rights portion of the award is whether a provision of a negotiated collective agreement (s. 2 of the WLOU) is discriminatory in its adverse effect on Haida people, contrary to s. 13 of the *Human Rights Code*. It says this question necessarily involves consideration of labour relations principles and, therefore, s. 99 of the *Labour Relations Code* applies.

[43] In support of its submission on jurisdiction, TAAN emphasizes the narrow scope of the Union's appeal, which involves only the employment relationship aspect of the arbitrator's analysis. It says he found such a relationship by applying principles settled in *Crane* and *McCormick* to the unique circumstances on Haida Gwaii and the Collective Agreement and contends the Union is challenging his application of the law to the facts, not alleging an error of general law. In other words, according to TAAN, as in *Health Employers' Assn. of British Columbia v. British Columbia Nurses' Union*, 2003 BCCA 608 (*B.C. Nurses (2003)*), the arbitrator correctly articulated the relevant human rights principles and the award raises no issue of the general law for resolution. Further, while the employment relationship issue was a component of the discrimination finding, TAAN points out it was just one aspect of the arbitrator's multi-layered analysis and notes the absence of any challenge to his conclusions that enforcement of s. 2 of the WLOU would result in discrimination against Haida people, that s. 2 does not represent a *bona fide* occupational requirement and that the remedy granted protects Union rights under the Collective Agreement without allowing for the discriminatory effect. In sum, TAAN submits, this is not one of those exceptional cases in which the real basis of the award is the pure interpretation of the *Human Rights Code*.

[44] In the alternative, TAAN submits the arbitrator correctly applied the *Human Rights Code* and human rights principles in finding that, in the circumstances, incorporation should not strip Haida people of their human rights protections and that a revision to s. 2 of the WLOU was required to remedy the systemic discrimination.

Jurisdiction

Statutory Framework

[45] The *Labour Relations Code* establishes arbitration procedures for determining

grievances and resolving disputes under collective agreements. To further its legislative purpose, arbitrators are empowered, in making their decisions, to consider the real substance of such disputes and apply principles consistent with industrial relations policy without being bound by a strict legal interpretation of the issue in dispute. It also establishes a dual system for review of the decisions and awards made by labour arbitrators. Originally introduced in 1975, the purpose of the review provisions is to restrict this Court's jurisdiction narrowly to matters of general law not specifically related to labour relations and leave to the expertise of the Labour Relations Board the power to review awards where their basis is a matter or principle of labour relations: *Health Employers Assn. of B.C. v. B.C. Nurses' Union*, 2005 BCCA 343 (*B.C. Nurses (2005)*) at para. 47; *Chilliwack School District No. 33 v. Chilliwack Teachers' Association*, 2005 BCCA 411 at para. 13.

[46] Sections 82, 99(1), 100 and 101 of the *Labour Relations Code* provide:

> **Purpose of Part**
>
> 82(1) It is the purpose of this Part to constitute methods and procedures for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.
>
> (2) An arbitration board, to further the purpose expressed in subsection (1), must have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and must apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute.
>
> **Appeal jurisdiction of Labour Relations Board**
>
> 99 (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that
>
> > (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
> >
> > (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.
>
> **Appeal jurisdiction of Court of Appeal**
>
> 100 On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law not included in section 99 (1).
>
> **Decision final**
>
> 101 Except as provided in this Part, the decision or award of an arbitration board under this Code is final and conclusive and is not open to question or review in a court on any grounds whatsoever, and proceedings by or before an arbitration board must not be restrained by injunction, prohibition or other process or proceeding in a court and are

> not removable by certiorari or otherwise into a court.

[47] The parallel streams of review established by ss. 99 and 100 are mutually exclusive, not concurrent, jurisdictions: *Langley (Township)* at para. 11. In language often described as brain-teasing, awkward and obtuse, the bifurcated legislative scheme requires this Court to determine both its own narrow jurisdiction and the broader jurisdiction of the Labour Relations Board.

Interpretation and Application of Statutory Framework

[48] The proper analytical approach for determining jurisdiction under ss. 99 and 100 is summarized in *Kemess,* as previously outlined in *B.C. Nurses (2005)* at paras. 49-50:

> 1. Identify the real basis of the award;
> 2. Determine whether the basis of the award is a matter of general law;
> 3. If the basis of the award is a matter of general law, determine whether it raises a question or questions concerning the principles of labour relations, whether expressed in the *Labour Relations Code* or another statute.
>
> If the answer to the third question is affirmative, then review of the award lies within the jurisdiction of the Labour Relations Board. If it is negative, review lies within the jurisdiction of this Court.

[49] *Kemess* involved an award in which the arbitrator overturned the termination of an employee with an addiction disability. On appeal, the Court took jurisdiction under s. 100, finding the award was based on principles of the general law not confided to the Labour Relations Board under s. 99. Emphasizing the importance of developing human rights jurisprudence consistently for both unionized and non-unionized work environments, Chief Justice Finch characterized the true basis of the award as the arbitrator's interpretation and application of human rights principles in relation to the legal elements of *prima facie* discrimination and the scope and nature of the duty to accommodate, aspects of which went beyond a factual determination:

> [23] In considering the employer's duty to accommodate, the arbitrator agreed with the union that the employer must present concrete evidence of the adverse impact of reinstatement on the deterrent objective of the "zero tolerance policy", and further agreed that the "employer's legitimate interests" in maintaining safety and deterring other employees could be achieved short of terminating the grievor. The arbitrator was required to consider the extent to which an employee, who knew he had a "problem" but not that he was addicted, was required to take the initiative and voluntarily seek help, for example through the EAP.
>
> [24] In my opinion, these aspects of the award go beyond a factual determination of whether the employer fulfilled its duty to accommodate. Human rights principles apply equally to unionized and non-unionized workplaces; and the jurisprudence in this area must be developed consistently for both union and non-union work environments. Where the issue of substance before the arbitrator concerns the interpretation of the *Human*

> *Rights Code*, as opposed to application of the *Code* to the facts, then jurisdiction to review will lie with this Court …

[50] *B.C. Nurses (2006*) was heard together with *Kemess*. As in *Kemess*, the award involved the termination of an employee with an addiction disability and, as in *Kemess*, the Court took jurisdiction. In explaining why, Chief Justice Finch described the true basis of the arbitrator's decision as "her understanding of the nature and scope of the employer's duty to accommodate and her opinion that the employer's failure to explore possible accommodation was 'fatal' to the employer's position", which he characterized as general law matters that were "foundational elements of the award". He went on to explain that the arbitrator's failure to address the threshold question of *prima facie* discrimination before turning to the duty to accommodate was a legal error that required correction by this Court to avoid distorting the general law in human rights matters. He also found that the arbitrator failed to consider the grievor's duty to facilitate the process of accommodation, as required by the general law.

[51] The three-pronged test articulated in *Kemess* is based on a purposive interpretation of ss. 99 and 100. As noted, the legislative purpose is to leave to the Labour Relations Board the power to review awards if their basis is a matter or principle of labour relations, whether expressed or implied in the *Labour Relations Code* or another Act, but permit this Court to review awards if their basis is a matter of general law and not specifically related to labour relations: *B.C. Nurses (2005)* at para. 47. The *Kemess* test also builds upon the previous jurisprudence interpreting and applying ss. 99 and 100, including *Kinsmen Retirement Centre Assn. v. Hospital Employees' Union, Loc. 180* (1985), 63 B.C.L.R. 292 (C.A.), *Martin-Brower of Canada Ltd. v. General Truck Drivers and Helpers, Local 31* (1994), 87 B.C.L.R. (2d) 292 (C.A.), *Fording Coal* and *B.C. Nurses (2003)*.

[52] *Kinsmen* is the seminal decision regarding this Court's jurisdiction under s. 100. In *Kinsmen*, the issue was whether existing company employees were required to join a pension plan under the *Pension (Municipal) Act*, R.S.B.C. 1979, c. 317 and the collective agreement. The real substance of the dispute between the employer and the union was determined to be the legally correct interpretation of the *Pension (Municipal) Act*, which did not depend on the labour relations context within which the issue arose: *Chilliwack* at para. 37. Emphasizing that the proper interpretation of the *Pension (Municipal) Act* affects all employers and employees, whether union or non-union, Justice Lambert stated the real substance of the dispute was a matter of general law. He also noted that the fact a dispute involves the interpretation or application of a collective agreement is insufficient to answer the jurisdiction question. Rather, this Court's jurisdiction depends on the basis of the decision or award, not on bringing every link in the chain of reasoning leading to it within the description of a "matter or issue of the general law": *Kinsmen* at 297-299.

[53] Determining whether the basis of a decision or award is a matter or issue of the general law not included in s. 99(1) is a case-specific and sometimes challenging exercise. Many cases involve multiple issues and, as Justice Finch (as he then was) stated in *Martin-Brower*, the legislature did not intend to confer review jurisdiction on this Court whenever an arbitrator applies principles of law of general application in making a decision or award:

> [32] There will be many circumstances in which labour arbitrators are called upon to hear and to weigh legal arguments, and to reach conclusions as to what common-law principles, or statutory provisions, apply to the facts giving rise to the arbitration procedure. It is clear from the legislative scheme for review of arbitration awards that not every "... issue of the general law ..." falls outside the ambit of review by the Industrial Relations Council under s.108 [now s. 99]. Nor will every error of law by an arbitrator found an appeal to this Court, even if the error in law is the basis of the award. To found jurisdiction in this Court, to paraphrase s-s.109(1) [now s. 100], it must be shown that the basis of the award is an issue of the general law, and that that issue is one beyond the scope of review by the Industrial Relations Council, having due regard for its broad mandate under s-s.108(1)(b) [now s. 99(1)(b)] to provide remedies where "... the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Act ..."

[54] Although the arbitrator in *Martin-Brower* referred to the general law of estoppel in resolving a dispute concerning overtime pay, the Court did not take jurisdiction, concluding that, while the general law of estoppel was a base of the award, the basis of the award was captured by what is now s. 99(1). In contrast, in *Fording Coal*, this Court's review jurisdiction was triggered by two of the three awards under appeal. The matter of general law at issue in both was the duty to accommodate under the *Human Rights Code*.

[55] In *Fording Coal*, two of the awards under appeal involved non-culpable absenteeism and the related duty to accommodate. Among other things, the Court held that the duty to accommodate is a matter of general law not limited by any principles of labour relations and that the *Human Rights Code* is not an Act dealing with labour relations for purposes of s. 99. It also held that where the basis or main constituent of an award is a legal issue concerning the duty to accommodate, that is a question of general law outside the scope of s. 99 and thus within this Court's review jurisdiction. However, where the basis or main constituent of an award is whether, on the facts, the duty to accommodate has been met the award is not reviewable under s. 100 (which will usually be the case, Justice Huddart predicted, as most awards are heavily fact-laden). In other words, this Court will review an award based on a legal principle not included in s. 99 where the basis of the award is the proper interpretation of the legal principle itself, but not where the basis of the award is the application of the legal principle to the facts.

[56] The defect in the *Fording Coal* award helps illuminate the distinction drawn by the Court between the interpretation and application of a legal principle. As a necessary part of

determining whether the employer had just cause to terminate the disabled employee's employment, the arbitrator in *Fording Coal* was required to address the nature and scope of the duty to accommodate. However, the Labour Relations Board set aside his decision because he "did not engage upon an inquiry to ascertain whether [the employer] could accommodate the anticipated irregular attendances of [the disabled employee], regardless of the position he may fill". As Justice Huddart explained, in conducting his analysis the arbitrator missed a critical step required by the general law of human rights:

> [57] As the original panel of the Labour Relations Board noted, had the main ingredient or substance of the arbitrator's decision been one of fact, whether the employer had accommodated his disability to the point of undue hardship, no appeal could have been brought to the Board. Nor could one have been brought to this Court. However, the main ingredient or substance of the decision was not one of fact. Rather, it was the arbitrator's opinion as to the nature and scope of the duty to accommodate, regardless of the factual circumstances. Fundamental to his decision was his view the duty to accommodate did not encompass irregular attendance.
>
> [58] Thus … the main ingredient of the Fording decision was a principle of general law. It was not the usual discipline case requiring decisions about general law incidental to a factual decision as to whether an employer had reasonable cause to dismiss an employee because he committed a crime, a tort, or a breach of fiduciary duty. Nor was the decision … a consideration of the factual issue of whether [the disabled employee] could return to work in any capacity in that workplace, under that collective agreement, without undue hardship for the employer and other employees...
>
> [Emphasis added.]

[57] In *B.C. Nurses (2003)*, a five-judge division considered whether *Fording Coal* was wrongly decided. Like *Fording Coal*, *B.C. Nurses (2003)* also involved consideration of the duty to accommodate. Four of the five judges in *B.C. Nurses (2003)* concluded the appeal should be quashed for lack of jurisdiction, although only Justice Southin would have overruled *Fording Coal* on the basis that it did not give effect to the restricted scope of s. 100. Speaking on behalf of the three-member majority, Justice Mackenzie stated he was not persuaded that *Fording Coal* was incorrect, but found the award was not based on a matter of general law outside s. 99(1) because the arbitrator's articulation of the duty to accommodate was consistent with settled authority:

> [154] … One must be careful not to bring "every link in the chain of reasoning leading to the decision or award within the description 'a matter or issue of the general law'.": *Kinsmen*, para. 16. The basis of an award does not mean "every constituent": *A.I.M. Steel Ltd. v. United Steelworkers of America, Local 3495* (1975), 111 L.A.C. (2d) 116 (B.C.C.A.)**.** Once the arbitrator found that the grievor's conduct was exclusively non-culpable, I am satisfied that his articulation of the duty to accommodate was consistent with authority and did not raise any issue of general law. The arbitrator then considered whether the employer fulfilled its duty to accommodate, an inquiry that Huddart J.A. in my respectful view correctly characterized as a factual issue in *Fording Coal*.

[58] Several other decisions involving the interpretation and application of ss. 99 and 100 also preceded *Kemess*. Although a full review of that jurisprudence is unnecessary for present purposes, two further pre-*Kemess* decisions are particularly worthy of note: *B.C. Nurses (2005)* and *Chilliwack.*

[59] In *B.C. Nurses (2005)*, the Court took jurisdiction to review an award in a dispute regarding the overpayment of wages because the true basis of the award was the arbitrator's interpretation of s. 21 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113. This, the Court found, was a matter of general law that affected all employees, unionized or not, and it was not inconsistent with any labour relations principle. In contrast, in *Chilliwack*, the Court declined jurisdiction in a dispute concerning the employer's refusal to disclose reference check and interview notes regarding an unsuccessful job applicant, relying on s. 33 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (*FOIPPA*). The arbitrator ordered the notes disclosed and the employer appealed, contending that *FOIPPA* is a matter of general law not included in subsection 99(1) and, therefore, this Court had jurisdiction under s. 100. The Court disagreed, concluding that the real substance of the award was not solely the arbitrator's interpretation of *FOIPPA*:

> [45] While the arbitrator considered certain provisions of *FOIPPA* which might be characterized as "general law" in that they affect all employees, whether unionized or not, that consideration did not form the real substance of the award which, in my view, is "whether, having regard to the provisions of *FOIPPA,* the *Labour Relations Code* and the Collective Agreement, the refusal by the Employer to produce the requested documents constituted a breach of Article A.16 of the Collective Agreement." Central to that question are several principles expressed or implied in the *Code*. They include the *Code*'s system of exclusive bargaining authority and duties of a statutory bargaining agent; the binding effect of a collective agreement under the *Code* and the duties of the parties to implement it; the bargaining agent's duty of fair representation under the *Code*; the mandatory inclusion under the *Code* of a method of resolution of disputes without stoppage of work; and the public policy and purpose of the *Code* to facilitate expeditious, inexpensive resolution of disputes by the parties themselves. The real substance of the award may involve questions of the general law but it cannot, in my view, be described as "a matter or issue of the general law not included in section 99(1)." From that, it follows that section 100 does not apply.

[60] In explaining the Court's conclusion in *Chilliwack*, Justice Esson emphasized the narrowly restricted scope of s. 100 jurisdiction and the significance of the collective agreement as part of the relevant context for consideration. He also stated that "few principles of general law are not included in section 99" and distinguished *Kinsmen* and *B.C. Nurses (2005)* on the basis that, in both cases, "the statute which fell to be interpreted did not lend itself to an interpretation which could be different in a labour relations context than in other contexts".

[61] The constrained view of this Court's jurisdiction and focus on context in *Chilliwack* are also manifest in several decisions involving human rights issues that came after *Kemess* and

B.C. Nurses (2006): for example, *Communications, Energy & Paperworkers' Union of Canada (CEP), Local 789 v. Domtar Inc.*, 2009 BCCA 52; *Sunrise Poultry*; *Okanagan College Faculty Association v. Okanagan College*, 2013 BCCA 561. So, too, is a clear recognition of the need to afford deference to the expertise of arbitrators and the Labour Relations Board in matters involving labour relations when jurisdiction is determined under ss. 99 and 100: *Langley (Township)* at paras. 35-36.

[62] In *Domtar*, the Court declined to review an award that held the denial of severance pay to employees receiving long term disability benefits was not discriminatory because the real basis of the award was the arbitrator's interpretation of the collective agreement, namely the impact of its terms on whether LTD employees had been terminated. As Justice Levine explained, that interpretation was the factual basis for the arbitrator's application of well-established human rights principles which raised no issue of general law. Similarly, in *Sunrise Poultry*, the Court did not review an award involving termination for non-culpable absenteeism because the human rights issue (the interpretation of "disability" under the *Human Rights Code*) was just one of many issues and, while an aspect of the award that might have been decisive if decided differently, was not its main constituent. Nor did the Court take jurisdiction in *Okanagan College*, where the arbitrator applied a range of human rights principles to the factual matrix in deciding that the employer's refusal to accrue teaching load units for term instructors during pregnancy and parental leave did not breach the collective agreement or amount to discrimination under s. 13 of the *Human Rights Code*.

[63] Justice MacKenzie's analysis in *Okanagan College* highlights the significance of context in a jurisdiction determination and some of the challenges associated with applying ss. 99 and 100. It also provides helpful guidance on how to address those challenges when jurisdiction is determined. Describing the sometimes artificial exercise of attempting to identify the real basis of a multifaceted award as "similar to deciding which leg of a table is the 'real leg'" and the distinction between interpretation and application of the general law as a "useful heuristic", she stated:

> [57] … where legal interpretation of the "general law" has largely been accomplished in advance of the arbitrator's award, it will be the arbitrator's conclusions as to the factual or interpretive context in which the alleged discrimination took place that will really drive the outcome, and therefore serve as "the basis" of the award.
>
> [58] Of course, any application of the general law, to some extent, requires an interpretation of what the law requires in that specific context, and how general legal principles should be applied in the context of a given case … The more the assessment undertaken by an arbitrator relies on settled principles of law, and the more the analysis depended on the particular context of the case in hand, the more it will be considered an *application* of the general law, as opposed to its *interpretation*.

[64] Further helpful guidance is found in *Langley (Township)*. Like *Domtar*, *Sunrise Poultry*

and *Okanagan College*, *Langley (Township)* concerned an award involving a human rights matter, namely, the termination of three employees due to non-culpable absenteeism. As in *Domtar*, *Sunrise Poultry* and *Okanagan College*, the Court in *Langley (Township)* declined to take jurisdiction to review the award.

[65] Justice Smith wrote for the Court in *Langley (Township)*. After reviewing the legislative intent, underlying principles and leading authorities associated with ss. 99 and 100, she stated that a cautionary approach to this Court’s jurisdiction is warranted where an arbitrator may have layered labour relations principles on top of an application of the general law and she summarized the circumstances in which s. 100 jurisdiction will be established:

> [36] This Court’s jurisdiction pursuant to s. 100 of the *LRC* will be satisfied when the appellant establishes that: (1) the real basis of the decision or award to be appealed involves the application or interpretation of a matter or issue of the general law; and (2) that the matter or issue does not include a dispute about whether the decision to be appealed “is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations”. When the interpretation/application tool is factored in, an interpretation of the general law that does not involve a consideration of labour relations principles will fall to be determined by this Court and not the Labour Board. However, an application of the general law that also requires a consideration of labour relations principles applicable to the circumstances of the dispute will be accorded deference by this Court, and will fall to the Labour Board for determination. That is to say, this Court may demonstrate the required deference with respect to an arbitrator’s application of labour relations principles by acceding to the jurisdiction of the Labour Board for the review of an arbitrator’s decision on those matters.

[66] After summarizing the test under s. 100, Justice Smith went on to apply it. She concluded the arbitrator’s decision involved the application of well-established human rights principles to the circumstances of the employees in question, which determination engaged a consideration of labour relations principles, including concepts of arbitrariness, randomness and differential impact. Taking into account its expertise on the proper application of such principles, she deferred to the Labour Board and declined to wade into the issue of whether the arbitrator’s determination on the interaction between settled human rights law principles and labour relations principles was correct or reasonable.

[67] In my view, this body of jurisprudence, considered as a whole, illustrates that, as Justice Huddart predicted in *Fording Coal*, the vast majority of arbitral decisions and awards are properly reviewable only by the Labour Relations Board. This is true even where, as here, a dispute under a collective agreement engages issues of the general law of human rights. Occasionally, extricable questions of statutory interpretation or legal principle of a general nature arise in the context of a unionized work environment and are substantially determinative of the dispute in question. *Kinsmen*, *Fording Coal*, *B.C. Nurses (2005)*, *Kemess* and *B.C. Nurses (2006)* provide examples. However, pure questions of the general law, untethered to

the facts and labour relations context of a dispute and falling outside the expertise of the Labour Relations Board, are rare and will only exceptionally be found to form the real basis or main constituent of the decisions and awards made by labour arbitrators. The underlying legislative intent of ss. 99 and 100 of the *Labour Relations Code* strictly to limit judicial intervention in labour relations matters is thus acknowledged and respected by the Court.

Discussion

[68] I approach the task of identifying the basis and nature of Arbitrator Lanyon's multifaceted award against the foregoing legal backdrop. In doing so, like Justice MacKenzie in *Okanagan College*, I find the process of attempting to isolate and categorize its "real substance" or "main constituent" to be a somewhat artificial, albeit statutorily mandated, exercise. As in several of the cases discussed above, the award includes many constituents. As in some of them, more than one contributes significantly to the final outcome.

What is the real basis of the award?

[69] In my view, the real basis of the award is whether, contrary to s. 13 of the *Human Rights Code*, the impact of s. 2 of the WLOU is discriminatory due to its adverse effect on Haida people, namely, the barrier it presents to their potential participation in logging TFL 60. This is the "real substance" of the human rights portion of the award and the determination that drives its outcome. Embedded within that determination are many key factual conclusions, including the interpretation of s. 2 of the WLOU, its impact on Haida people who wish to engage in logging on Haida Gwaii and TAAN's business model and relationship with past and future Haida contractors. Also embedded within it are the interpretation and application of well-established human rights law and labour relation principles, including principles relating to the nature, scope and legal elements of employment relationships, *prima facie* discrimination and *bona fide* occupational requirements under the *Human Rights Code* and the binding effect of collective agreements on future employment relationships.

[70] Unlike Chief Justice Finch in *Kemess*, I am unable to detect a substantial, contentious and extricable legal issue in this case that goes beyond the arbitrator's key factual determinations, including his findings on the employment relationship issue. The Union does not allege that he erred in his articulation of the legal test for an employment relationship under the *Human Rights Code* or clearly identify any human rights law principle it says he interpreted improperly. Rather, the Union alleges that the arbitrator misapplied the salient principles to the factual matrix, thereby "effectively" extending human rights protections to corporate entities and reaching the wrong conclusion on whether TAAN and the Haida Contractors were in an employment relationship. In other words, unlike the substantial issue in, for example, *Fording Coal* or *B.C. Nurses (2006)*, the Union does not allege that the arbitrator missed a necessary

analytical step or proceeded on a legally erroneous basis as to whether an employer and a corporation could be in an employment relationship for purposes of the *Human Rights Code*. Given his clear recognition that its protections only apply to natural persons and his unambiguous focus on the personal attributes of Haida individuals, the absence of any such challenge is unsurprising.

[71] Further, even if an extricable question involving the interpretation of a human rights law principle regarding the employment relationship issue could be isolated that would not necessarily make it the real basis of the award for jurisdictional purposes. While I agree that the arbitrator's finding of an employment relationship is a basis of the award without which the *Human Rights Code* could have no application, the real basis of an award does not mean every constituent: *B.C. Nurses (2003)* at para. 154. As stated in *Sunrise Poultry*, where one of several issues could have determined the result, if decided differently, the question remains as to whether that issue is the "main ingredient" of the award, especially where, as here, other issues could also be determinative. In particular, in this case, the issues of *prima facie* discrimination and *bona fide* occupational requirement were also potentially determinative.

[72] While necessary to the result, I do not consider the arbitrator's finding on the employment relationship issue the "core" or "essential" basis of the award for s. 100 purposes. Nor does the Union's choice to limit the appeal to that issue qualify it as the real basis of the award. Regardless of how the parties frame the issues on appeal, the appropriate question to be asked is "what is the real substance of the award?". It is not "what is the real substance of the parties' dispute?": *Chilliwack* at para. 41.

Is the basis of the award a matter of general law?

[73] The award involves an interpretation of what the general law of human rights requires in the context of the case and the application of that law to the factual matrix. However, the arbitrator's analysis of the relevant human rights law principles is inextricably intertwined with his factual findings on the impact of s. 2 of the WLOU on Haida people, which is the real basis of the award.

Does the matter of general law raise a question or questions concerning the principles of labour relations?

[74] In addition, to the extent that the award does involve the interpretation and application of human rights law, it also engages consideration and application of labour relations principles. These principles include the binding effect of a negotiated collective agreement on future employment relationships, the policy, purpose and dispute resolution process of the *Labour Relations Code* and the remedial powers of labour arbitrators.

[75] As the arbitrator recognized, the labour relations context within which the discrimination claim arose was highly significant to aspects of his analysis, including his analysis of the employment relationship issue. To repeat, in conducting that analysis, the arbitrator stated:

> [215] In the normal course of events, the employment relationship factors apply to a past event; that is the very nature of complaints and adjudication. The fact pattern here includes past contracting, however, the discrimination claim is in relation to the application of the collective agreement, specifically s.2 of the WLOU, to all *future* contracting. Thus, in effect, the WLOU will establish the legal parameters of any future employment relationship between TAAN and all subcontractors. Any such contracts must be for a period of 5 years (s. 7). Any such Woodlands contractor must agree to be a successor to the employer (s. 3). Any subsequent contractors must also agree to be a successor (ss. 7-9).
>
> …
>
> [246] As set out earlier in this Award, the Employer has the right to contract out aspects of its business if it sees an economic advantage in doing so. However, an Employer can agree to place restrictions on its right to contract out, as the Employers in the forest industry have done in Article XXV and the WLOU. However, in addition to the protection of Union positions, is the issue of the protection of human rights. As stated in *Parry Sound*, *supra*, the *Human Rights Code* forms part of the terms and conditions of the Collective Agreement between these parties. Section 4 of the *Human Rights Code* states that the *Human Rights Code* takes priority over all other enactments; and of course, it takes priority over any and all provisions of the Collective Agreement.

[76] In my view, deference requires this Court to cede jurisdiction to review the arbitrator's determinations to the Labour Relations Board as they involve both human rights law and labour relations principles.

<u>Conclusion</u>

[77] I would quash the appeal for want of jurisdiction.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Mr. Justice Frankel"