Cite as: Municipal Contracting Ltd. v. International Union of Operating Engineers, Local 721, 1988 NSSC 16

1987 S.H. No. 62798

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

MUNICIPAL CONTRACTING LIMITED

Applicant

- and -

LOCAL 721 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS and WILLIAM H. KYDD

Respondents

HEARD: at Halifax, Nova Scotia, before the Honourable Mr. Justice John M. Davison, in Chambers, on Thursday, April 14th, 1988

DECISION: June 29th, 1988

COUNSEL: George M. Mitchell, Q.C., for the Applicant
Thomas P. Donovan, Esq., for the Applicant

Ronald A. Pink, Esq., for the Respondent
Joel E. Fichaud, Esq., for the Respondent
Gordon N. Forsyth, Esq., for the Respondent

Alison Scott, Esq., for the Attorney General

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DAVISON, J.:

This is an application for an Order in the nature of certiorari to quash the decision of an Arbitrator appointed pursuant to s. 103(4) of the Trade Union Act S.N.S., 1972, c. 19.

By his decision dated the 27th day of November, 1987, the Arbitrator, William Kydd, Q.C., refused to grant an adjournment of a hearing and awarded damages to the Respondent herein of $83,433.90.

In addition, the Applicant seeks a Declaration that s. 103(7) of the Trade Union Act is unconstitutional and that

it contravenes s. 15 of the Canadian Charter of Rights and Freedoms (the Charter).

The Applicant is in the business of road building and sewer and watermain work. Its last collective agreement with the Respondent expired in 1978.

The Trade Union Act is divided into two parts. Part II deals with labour relations with respect to the construction industry and divides the construction industry into four sectors - the industrial and commercial sector, the house building sector, the sewers, tunnels and watermain sector and the road building sector. The Trade Union Act does not specifically define the nature of work included within each sector.

Pursuant to the terms of Part II of the Trade Union Act, the Construction Management Labour Bureau Limited (the Bureau) was, on January 29th, 1977, accredited as the sole collective bargaining agent for all unionized employers in the industrial and commercial sector. The Bureau entered into a collective agreement with the Respondent Union covering activities in the industrial and commercial sector. The Applicant is not a member of the Bureau but it did agree to abide by the agreement once work is found to be within the industrial and commercial sector.

There has been a long standing dispute between the parties hereto as to the type of work that constitutes "road building" and the type of work that constitutes "commercial and industrial construction". There have been a number of alternatives suggested as to the appropriate boundary line separating the two sectors including:

1) The "minimum" or five foot option which limits all industrial and commercial work to work inside a boundary line approximately five feet from the foundation structure of an industrial or commercial building.

2) The middle option which includes all work as industrial work except roads, bridges, tunnels, sewers and watermains and which would allow an arbitrator to consider the facts in each particular case and the characteristics of each job; and

3) The "maximum" or "fence line" option which indicates that once a site is determined to be an industrial or commercial site, then all the work on that site within either the fence line or the owner's property line would be industrial and commercial work regardless or whether it was road work or sewer work.

The distinction between sectors is important because wages paid

pursuant to the commercial and industrial sector under the agreement with the Bureau are higher than those paid for similar work in other construction industry sectors.

In August of 1985, the Respondent Union filed a grievance with respect to paving and curb work at two construction sites within the county of Halifax and these grievances were referred to Judge Robert MacLellan as an Arbitrator pursuant to the provisions of s. 103 of the Trade Union Act. The Applicant took a preliminary objection as to the jurisdiction of Judge MacLellan who determined that he had jurisdiction because the work was commercial and industrial.

On August 9th, 1985, the Applicant applied to the Construction Industrial Panel of the Nova Scotia Labour Relations Board for reconsideration of the definition of what constitutes the industrial and commercial sector. A substantial delay occurred and the Panel, on May 12th, 1987, advised that it was not going to deal with the problem because the Applicant was the lone complainant and did not represent the entire industrial and commercial sector.

In the meantime, the Union, in 1986, filed another grievance with respect to another construction site and Lorne MacDougall, Q.C. was appointed Arbitrator. Mr. MacDougall concluded that he would await a determination by the Panel of

the issue placed before it. On September 16th, 1987, representatives of the Applicant and the Respondent Union appeared before Arbitrator MacDougall but it became apparent that insufficient time had been set for the hearing and it was agreed to adjourn the matter until February 1st, 1988.

In the interim, the Union filed four grievances in connection with job sites wherein work was being conducted by the Applicant. These sites were the Halifax School for the Blind (grievance filed August 24th, 1987), the Volvo plant (grievance filed on August 26th, 1987), Bayers Road Shopping Centre (grievance filed October 20th, 1987) and the Litton Industries plant (grievance filed November 5th, 1987).

On November 18th, 1987, the Union arranged to have Arbitrator William Kydd, Q.C. appointed pursuant to s. 103 of the Trade Union Act to hear the four grievances. The Applicant maintains that it did not have notice of the Union's intention to appoint an Arbitrator.

A hearing commenced before Arbitrator Kydd on the afternoon of November 19th, 1987. It was at this hearing the Applicant requested and was denied an adjournment for reasons more fully set forth in the Arbitrator's report but based substantially on the time limits set forth in s. 103(7) of the Trade Union Act which reads as follows:

> **(7) The decision of the arbitrator shall be rendered within forty-eight hours of the time of apointment unless an extension is agreed upon by the parties.**

After this motion was refused, counsel for the Applicant left the arbitration hearing. The Arbitrator heard evidence and viewed photographs submitted by the Respondent Union and rendered his award.

The Attorney General of Nova Scotia intervened in the proceeding before me and I heard counsel on behalf of the three parties.

ISSUES

There is substantial agreement as to the issues among the parties to this application and they could be stated as follows:

1) Is s. 103(7) of the Trade Union Act inconsistent with s. 15(1) of the Charter and of no force and effect pursuant to s. 52(1) of the Constitution Act, 1982?

2) Did the Arbitrator commit an error of law in assuming jurisdiction to act in this case without having heard evidence and without reaching the conclusion that the work being done at the four sites was commercial and industrial work?

3) Did the Arbitrator commit an error of law in refusing

to grant the adjournment requested by counsel for the Applicant?

4) Did the Arbitrator commit an error of law in permitting the Union to prove its case on the basis of hearsay evidence?

ISSUE #1

The Applicant takes the position that s. 103(7) unfairly discriminates against employers in the construction industry sector. In Part I of the Trade Union Act there are general provisions which apply to arbitration in unionized industries and they are as follows:

> **Final Settlement Provision Required**
>
> **40 (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.**
>
> **Deemed Final Settlement Provision**
>
> **(2) Where a collective agreement does not contain a provision as required by this Section, it shall be deemed to contain the following provisions:**
>
> > **Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this**

agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration. If the parties fail to agree upon an arbitrator; the appointment shall be made by the Minister of Labour and Manpower for Nova Scotia upon the request of either party. The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it.

Duty to Comply with Final Settlement Provision

(3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement.

Powers and Duty of Arbitrator or Arbitration Board

41 (1) An arbitrator, or an arbitration board, appointed pursuant to this Act or to a collective agreement:

(a) shall determine his or its own procedure, but shall give full opportunity to the parties to the precedings [proceedings] to present evidence and make submissions to him or it;

(b) has, in relation to any proceedings before him or it, the powers conferred on the Board, in relation to any proceedings before the Board by subsections (7) and (8) of Section 15;

(c) has power to determine any question as to whether a matter referred to him or it is arbitrable; [and]

(d) where

(i) he or it determines that an employee has been discharged or disciplined by an employer for cause, and

> (ii) the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, has power to substitute for the discharge or discipline any other penalty that to the arbitrator or arbitration board seems just and reasonable in the circumstances; +[and]
>
> (e) has power to treat as part of the collective agreement the provisions of any statute of the Province governing relations between the parties to the collective agreement.

In Part II, different provisions apply for the resolution of disputes in the construction industry:

> **Arbitration**
>
> 103 (1) Notwithstanding Sections 39 and 40 and any provision in a collective agreement, where an employer or an employers' organization enters a collective agreement, any dispute or difference between the parties to the collective agreement, including the persons bound by the collective agreement, relating to or involving
>
> (a) the interpretation, meaning, application or administration of the collective agreement or any provision of the collective agreement;
>
> (b) a violation or an allegation of a violation of the collective agreement;
>
> (c) working conditions; or
>
> (d) a question whether a matter is arbitrable,
>
> shall be submitted for final settlement to arbitration in accordance with this Section in substitution for any arbitration or arbitration procedure provided for in the collective agreement
>
> ...

Time Limit to Agree on Appointment of Arbitrator

(3) When a dispute or difference arises which the parties are unable to resolve, the parties to the dispute or difference shall agree by midnight of the day on which the dispute or difference arises upon the appointment of a single arbitrator to arbitrate the dispute or difference.

Failure To Comply with Subsection (3)

(4) When one of the parties advises the Minister that a dispute or difference has arisen and that the parties to the dispute or difference have failed to comply with subsection (3), the Minister may appoint an arbitrator.

...

Powers of Arbitrator

(6) The arbitrator appointed pursuant to this Section has the powers conferred by Section 41 and, without restricting his power and authority, his decision shall be an order and may require

(a) compliance with the collective agreement in the manner stipulated;

(b) reinstatement of an employee in the case of a dismissal or suspension in lieu of dismissal with or without compensation.

Time Limit for Rendering Decision of Arbitrator

(7) The decision of the arbitrator shall be rendered within forty-eight hours of the time of appointment unless an extension is agreed upon by the parties.

Parties Bound by Decision of Arbitrator

(8) The parties to the dispute or difference shall be bound by the decision of the arbitrator from the time the decision is rendered and shall abide by and carry out any requirement contained in the decision.

Reporting of Decision

(9) An arbitrator appointed pursuant

> **to the provisions of this Section who renders a decision in respect of a dispute or difference shall make a report and shall transmit the report to the Minister and to the parties.**

The main difference between the two systems relates to the time limits involved in the arbitration. Under s: 41(1), the arbitrator can determine his own procedure but his powers are subject to the qualification that he must "give full opportunity to the parties to the proceedings, to present evidence and make submissions to him". The provisions with respect to the construction industry stipulate that when a dispute is not resolved within 24 hours, either party has the right to unilaterally request the Minister of Labour and Manpower to appoint an arbitrator and that arbitrator shall render his decision within 48 hours of the appointment unless an extension is agreed upon by the parties.

It is this difference between the arbitration process, as it applies to the construction industry under Part II of the Trade Union Act and as it applies to the non-construction industries under Part I, that the Applicant says constitutes an infringement of s. 15(1) of the Charter and should be declared to have no force and effect pursuant to s. 52(1) of the Constitution Act. This same argument was submitted to Arbitrator William H. Kydd, Q.C. who, in his report, stipulated that "The rights conferred by Section 15 only pertain to 'individuals' and this has been interpreted as not including corporations."

The ruling of the arbitrator is inconsistent with the approach taken by the courts in determining standing under s. 15(1) of the Charter. If the legislation which is challenged is found to be inconsistent with s. 15(1) of the Charter, it cannot be enforced against a corporation because it simply has no force and effect and is not enforceable against any party. Whether a corporation is an "individual" or whether a corporation, per se, has rights under s. 15(1) is not relevant: **Zutphen Brothers Construction Limited v. Dywidag Systems International, Canada Limited (1987), 35 D.L.R. (4th) 433; R. v. Big M Drug Mart Limited (1985), 18 D.L.R. (4th) 321.** In my opinion, the Applicant has a standing to challenge s. 103(7) of the Trade Union Act.

Section 15(1) of the Charter states:

> **Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.**

The courts in Canada have been inconsistent in interpreting this section which has yet to be considered by the Supreme Court of Canada. The decision of the British Columbia Court of Appeal in **Andrews v. Law Society of British Columbia (1986), 27 D.L.R. (4th) 600** is awaiting decision by the Supreme Court of Canada.

The principles of interpretation of the Charter have been clearly enunciated by the Supreme Court and these principles include:

1) The Charter is to be interpreted liberally: **The Law Society of Upper Canada v. Skapinker (1984), 9 D.L.R. (4th) 161.**
2) The Charter is to be interpreted contextually: **R. v. DeBois (1985), 62 N.R. 50.**
3) The Charter is to be interpreted purposively: **R. v. Big M Drug Mart Limited, (supra); Hunter v. Southam Inc. (1984), 11 D.L.R. (4th) 641.**

The purposive approach was explained by Dickson, J. (as he then was) in **R. v. Big M Drug Mart Limited, (supra)** at 359:

> **The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.**
>
> **In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit**

> **of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, ... be placed in its proper linguistic, philosophic and historical context.**

From the foregoing passage, it can be stated that the purpose of s. 15 can be ascertained by examining:

1) The character and larger objects of the Charter;
2) The language used in s. 15;
3) Historical origins of the Charter's guarantee rights; and
4) The place of s. 15 within the Charter.

(a) OBJECTS OF THE CHARTER

In **Hunter v. Southam, (supra)**, the Supreme Court stated that the Charter was designed to provide for the "unremitting protection of individual rights and freedoms" and to "constrain government action inconsistent with those rights and freedoms" (at 649). The court held that a provision in the Charter is to be interpreted in the light of the purposes of the Charter as a whole which in turn is interpreted in light of the fundamental values of Canadian society.

In **R. v. Oakes (1986), 26 D.L.R. (4th) 220** at 225, Chief Justice Dickson, in dealing with interpretation and

application of the Charter, identified as relevant:

> **... respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.**

(b) THE HISTORICAL ORIGINS OF THE CHARTER'S GUARANTEE OF EQUALITY RIGHTS

The solicitor for the intervenor, Attorney General of Nova Scotia, set out a very thorough and extensive history of legislation over several decades relating to society's problems with discrimination including the various provincial legislation dealing with human rights and the Canadian Bill of Rights, S.C. 1960, c.44. It was submitted by the Attorney General that this legislation clearly established increasing attempts by the provincial and federal government to eradicate discrimination based on prejudice against those persons who suffered disadvantages based on their own particular personal characteristics and that s. 15(1) was an extension of this objective.

(c) THE WORDING OF SECTION 15

Prior to the introduction of the Charter in 1980, several drafts of a Constitutional Bill of Rights were considered. These drafts were consistent in enumerating areas of characteristics which, in the past, have attracted discrimination

(i.e. race, religion and sex) as a means of prohibiting discriminatory practices.

The original text of s. 15 as introduced in Parliament in October of 1980 read as follows:

> **(1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.**
>
> **(2) This section does not preclude any law, program or activity that has as its object the amelioration of conditions or disadvantaged persons or groups.**

Subsequently, there were revisions to the text. The word "everyone" was replaced by the words "every individual". The declaration of equality under the law and the right to equal benefit of the law were added to the substantive guarantees of s. 15(1). "Mental or physical disability" was added to the enumerated grounds.

All of these changes would suggest that the guarantee of equality was to apply to human beings who have been historically treated with discrimination arising from personal characteristics and who have experienced prejudice and stereotyping. The purpose of s. 15(1) is to guarantee equality for individuals and to invalidate legislation which discriminates against individuals based on the enumerated grounds set forth

in the subsection or other grounds akin to the enumerated grounds. The enumerated grounds are personal characteristics of human beings by which they can be identified. Each characteristic has been the object of prejudice in the past.

In Smith, Kline and French Laboratories v. The Attorney General of Canada (1986), 34 D.L.R. (4th) 584, the Federal Court of Appeal considered s. 15 of the Charter and Hugessen, J. stated at page 591:

> We are as yet in the early stages of the development of our understanding of s. 15. I do not think it is prudent, or even possible, to lay down any hard and fast rules. The most we can do is suggest a range or spectrum of criteria to determine on which side of the line any given categorization must fall. These criteria, which are, in effect, no more than indicators, may, as it seems to me, be drawn from three sources. First, the text of s. 15 itself; secondly, the other rights, liberties and freedoms enshrined in the Charter and, thirdly, the underlying values inherent in the free and democratic society which is Canada.
>
> As far as the text of s. 15 is concerned, one may look to whether or not there is "discrimination", in the pejorative sense of that word, and as to whether the categories are based upon the grounds enumerated or grounds analogous to them. The inquiry, in effect, concentrates upon the personal characteristics of those who claim to have been unequally treated. Questions of stereotyping, of historical disadvantagement, in a word, of prejudice, are the focus and there may even be a recognition that for some people equality has a different meaning than for others.

Again, at page 592:

> **The inquiry here is into the interest affected by the alleged inequality and recognizes that, in the context of the Charter, some rights are more important than others. While the generalization will no doubt require refinement, it would seem to me that, since the Charter's primary focus is upon personal rights, liberties and freedoms, categories whose main impact is elsewhere, such as on property and economic rights, will be less subject to scrutiny.** (emphasis added)

In **R. v. Ertel (1987) 58 C.R. (3d) 252**, the Attorney General of Ontario, as an intervenor, (like the Attorney General of Nova Scotia in this case) submitted that s. 15 was designed to protect individual persons from discrimination "on the bases of some human quality or characteristic". The Ontario Court of Appeal, unlike the Federal Court of Appeal, rejected this approach as it had previously rejected it in **R. v. Century 21 Ramos Realty Inc. (1987), 32 C.C.C. (3d) 353** at 374:

> **We would not be prepared to accept the proposition that it is necessary, if the persons alleging a s. 15 infringement are to succeed, that these persons constitute categories or classes with distinguishing characteristics before and apart from the prosecutor's decision. It is true that there are no personal characteristics or attributes of an individual person or class of persons upon which the distinction in this case is drawn. However, in a s. 15 case the question is not whether those alleging a violation of their equality rights have differences which exist independently of the law, but rather, whether the law treats those persons differently.**

The approach taken by the Ontario Court of Appeal

in Ertel was the subject of a critique by M. David Lepofski and Hart Shwartz entitled "Constitutional Law - Charter of Rights and Freedoms - Section 15 - An Enoneous Approach to the Charter's Equality Guarantee: R. v. Ertel" found in 67 Can. Bar. Rev. 115 (March 1988). In addition to criticizing the three part test employed by the Ontario Court of Appeal, the authors criticize the court's identification of the purposes of s. 15. The authors suggest that the court's finding that the purpose is simply to ensure that similarly situated persons are treated similarly was unsupported by any authority other than an article from the California Law Review commenting on the United States Constitution. The authors point out that there was no reference to the legislative history of s. 15, the wording of the section or the jurisprudence in dealing with equality guarantees and human rights legislation. It was pointed out that the court rejected, without explanation, the suggestion that s. 15 was aimed only at distinctions based on the enumerated grounds or those analogous to them involving personal characteristics. This would suggest that the enumerated grounds were simply chosen by Parliament at random and should be ignored in construing the meaning of the section.

With respect, I have difficulty with the findings of the Ontario Court of Appeal as to the purpose of s. 15. I am more attracted to the reasoning of the Federal Court of Appeal in the **Smith Kline & French Laboratories** case which, in my view,

is more in keeping with the various aids of construction that are available to a court in attempting to ascertaining the purpose of s. 15 which is the approach clearing enunciated by the Supreme Court of Canada in several of its decisions.

I note the Saskatchewan Court of Appeal took an approach in **Re Datta and Saskatchewan Medical Care Insurance Commission (1986), 33 D.L.R. (4th) 507,** which was similar to that taken by the Federal Court of Appeal. In that case the Joint Professional Review Committee established by the Saskatchewan Medical Care Insurance Commission recommended to the Commission reassessment of services alleged to have been performed by a doctor for a patient and, in the course of an appeal to the Saskatchewan Court of Appeal, it was alleged that s. 15(1) of the Charter was violated by treating a physician who had entered into an agreement with the Commission with respect to insured services differently from one who had not. The Court, without explanation, indicated that such a distinction is not "an unenumerated basis contemplated by s. 15(1) of the Charter".

In my view, the proper interpretation of s. 15 of the Charter would preclude the suggestion that legislation which differentiates on the basis of industry constitutes a violation of the equality guarantee.

Notwithstanding my views, it is clear that there are marked differences among the Appeal Courts across the country in respect of the interpretative approach to s. 15. Although the narrow point has not been considered by the Appeal Division of the Nova Scotia Supreme Court, one could infer a leaning towards a wide and liberal interpretation of s. 15 from **Reference Re Family Benefits Act (N.S.) Section 5 (1980), 75 N.S.R. (2d) 338** and **R. v. Hardiman (1987), 78 N.S.R. (2d) 55.** Because of the inconsistent views expressed by the courts on this point, I am reluctant to rest my decision with respect to the Charter issue on my opinion of the purpose of s. 15. It is appropriate that I go on to consider the narrower issue as to whether there has been a breach of s. 15 of the Charter by reason of the enactment of s. 103 of the Trade Union Act.

The burden of showing a breach of s. 15 rests with the Applicant who must establish that s. 103 of the Trade Union Act treats it differently from others who are similarly situated to it, that being treated in a different fashion it is being disadvantaged and that the treatment is pejorative in that the disadvantage is so "unfair as to be discriminatory having regard to the purpose and effect of the legislation".

The three counsel before me framed their submissions on the four step test proposed in the Ertel case, which steps could be described as follows:

1) Identification of the class or classes who are said to be treated differently;
2) Determination of whether these classes are "similarly situated". If they are not similarly situated, there can be no violation of s. 15. The court warned that caution should be exercised in that "the difference among those being treated differently by the law must be relevant for the purposes of that legislation".
3) Is the different treatment pejorative resulting in an inherent disadvantage so unfair as to be discriminatory having regard to the purpose and effect of the legislation?
4) If there is a violation of s. 15(1), is the legislation within a reasonable limit under s. 1 of the Charter?

FIRST STEP - IDENTIFICATION OF THE CLASSES

Section 103(7) is in Part II of the Trade Union Act which is entitled "Construction Industry Labour Relations". The other sectors of the economy subject to the Trade Union Act are dealt with by Part I of the Act entitled "Industrial Relations Generally". It is common ground that the classes which are subject to different treatment are the construction industry on the one hand and the other industries dealt with under Part I of the Trade Union Act on the other hand.

It is the position of the Applicant that the important

difference is in the arbitration procedure and, in particular, in the time limits set forth in the legislation.

SECOND STEP - ARE THESE CLASSES "SIMILARLY SITUATED"?

The Ontario Court of Appeal in **R. v. Ertel, (supra)**, stated at p. 272 that "the difference among those being treated differently by the law must be relevant for the purposes of that legislation". In **R. v. R.L. (1986), 26 C.C.C. (3d) 417** at p. 425 the Ontario Court of Appeal stated:

> **The concern for equality is that those who are similarly situated with respect to the purpose of the law be treated similarly ...**

In **R. v. Hardiman, (supra)** at p. 265, the Appeal Division of the Supreme Court of Nova Scotia cited this passage with approval.

The question is whether there is a difference between the construction industry and the industries governed by the other part of the Trade Union Act which is relevant to the purpose of the Trade Union Act.

The Applicant takes the position that "similarly situated" does not mean "identically situated". The Applicant agrees that there are differences and that the construction industry is seasonal and has a transient work force and is

oriented towards the completion of a single project as opposed to an ongoing relationship. Notwithstanding these differences, the Applicant says that it is not the only industry with these characteristics and the Applicant attempts to compare the agricultural and fishing industries as ones which are also seasonal in nature and which have a tendency to employ a transient work force.

The Applicant also says that the Trade Union Act itself recognizes that all industries which are unionized are to be treated similarly and refers to s. 90(1) which states:

> **Application of Part I**
>
> **90. Except where inconsistent with Part II of this Act the provisions of Part I apply to the construction industry and all references therein to "employer" and "trade Union" shall be taken to be references to "employers' organizations [organization"] and + ["] council of trade unions" where appropriate.**

I must respectfully disagree with these submissions. At the hearing, it was agreed among counsel that I should have before me, for the purpose of my decision, documents and reports which represent studies of the construction industry over the years and include Labour/Management Relations in the Construction Industry in Nova Scotia, a report prepared by Peter G. Green, Q.C. in 1965 on behalf of the Institute of Public Affairs, the report of I. M. MacKeigan, Q.C. (as he then was) as an Industrial Inquiry Commission under the Trade Union Act in 1967 and the

report of the Commission of Enquiry into Industrial Relations in the Nova Scotia Construction Industry by H. D. Woods, Commissioner, in 1970. Review of these reports makes it clear that the construction industry is not only different, but it is unique as compared to other industrial enterprises involved in the field of labour relations. The instability in labour relations of the Nova Scotia construction industry during the 1960's is the very reason for the enactment of those portions of the Trade Union Act under Part II including the section impugned in this application.

In my opinion, the Applicant has not satisfied the burden which is upon it and which would permit me to conclude that there exists an appropriate similarity of situation between the construction industry and other industries covered by the Trade Union Act. Indeed, it seems clear that the very purpose of the legislation is to treat the construction industry differently from the other sectors and that the characteristics of the industry (seasonal, transient work force, lack of an ongoing relationship) are the reasons for Part II of the Trade Union Act and are the reasons for provisions such as s. 103(7) of the Trade Union Act.

In most employee-employer relationships, there is a length of time to permit an arbitration proceeding which would extend over a period of time. It is clear from the material

placed before me that s. 103 of the Trade Union Act was a deliberate attempt by the Legislature to prevent the serious disruptions in the construction industry in the 1960's including many wildcat strikes which disrupted construction programs throughout the province.

At this point, I would note that the procedure set out in s. 103 has received favourable comment from our court and I refer to the words of Chief Justice Clarke in **Yorkdale Drywall Limited v. United Brotherhood of Carpenters and Joiners of America, Local 83 (1987), 79 N.S.R. (2d) 444** at 446:

> **There is agreement between the parties that s. 103 was adopted as a means of providing a speedy resolution of disputes in the construction industry ...**
>
> **In this way the Legislature has imposed s. 103 on the collective agreements in the construction industry in this province. Counsel of both the appellant and respondents say that it has been effective as a means of providing quick settlements in troublesome situations.**

In **International Association of Firefighters, Local 268 v. City of Halifax (1982) 50 N.S.R. (2d) 299 (C.A.)** at 305, Chief Justice MacKeigan stated:

> **When illegal wildcat strikes became shockingly epidemic in the construction trades in Cape Breton in 1967, they were greatly reduced by legislation permitting speedy cease-and-desist orders and compelling quick arbitration in the construction industry (Stats. N.S. 1970-71, c.5).**

> **What is now s. 103 of the Trade Union Act of 1972 requires for the construction industry that a single arbitrator be appointed on the day a dispute arises and directs the arbitrator's decision be rendered within forty-eight hours. Section 103(1) directs that, notwithstanding ss. 39 and 40, or any provision in a collective agreement, any dispute or difference shall be submitted to arbitration in accordance with s. 103.**

It is clear to me that the construction industry and other sectors of the economy are treated differently by the law in a manner relevant to the purposes of that legislation and the meaning of the principle enunciated in the Ertel case. I need not consider the third and fourth steps set out in Ertel. I conclude that s. 103(7) of the Trade Union Act is consistant with s. 15(1) of the Charter.

ISSUE #2

The second issue raised by the Applicant is whether the Arbitrator committed an error of law in assuming jurisdiction without reaching the conclusion that the work being done at the four sites was commercial and industrial work. Before embarking on consideration of this issue and those that follow, I will enter a discussion on the extent and scope of the review that I should conduct in this case.

This is not an appeal from the Arbitrator's decision but it is a review by certiorari: **Yorkdale Drywall Limited**

v. United Brotherhood of Carpenters and Joiners of America (1987), 7 N.S.R. (2d) 444 (N.S.S.C.A.D.) at 449. As such, the review is an investigation into the propriety of the processes that brought about the result reached by the Arbitrator and the remedy of certiorari is available to correct errors of law on the face of the record or errors of jurisdiction. An error of interpretation becomes an error of law only if the Arbitrator's interpretation is patently unreasonable.

In **Re Ontario Public Service Employees Union and Forer (1985), 23 D.L.R. (4th) 95,** Mr. Justice Blair traced the development of administrative law in Canada and noted that following the war years, many tribunal decisions were struck down by judges who "avidly searched for jurisdictional error and circumstances where it could not be established today".

Today, the policy is one of judicial restraint and one where due deference is given to decisions of tribunals particularly in the field of labour relations. In **Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313** at p. 391, Mr. Justice LeDain dealt with the approach which should be taken with respect to the review of labour legislation under the Charter and commenting specifically on the right to bargain collectively and to strike he stated:

> **They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by**

> the courts as requiring a specialized expertise. It is surprising that in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action we should be considering the substitution of our judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the Legislature has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. The resulting necessity of applying s. 1 of the Charter to a review of particular legislation in this field demonstrates in my respectful opinion the extent to which the Court becomes involved in a review of legislative policy for which it is really not fitted.

In SEIU, Local 333 v. Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382, Dickson, J. (as he then was) stated at page 389:

> ... if the Board acts in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the Court will not intervene.

Mr. Justice Dickson went on to state that where the tribunal commits a jurisdictional error, a court can intervene. A jurisdictional error will be committed if the tribunal acted in bad faith, based its decision on irrelevant considerations, failed to take into account relevant factors, breached natural justice provisions or misinterpreted statutory positions.

In Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation, [1979] 2 S.C.R. 227, Mr. Justice

Dickson repeated the court's noninterventionist policy and spoke about the respect to be given to tribunals which are specialized bodies.

In Re United Metallurgists of America, Local 4589 et al and Bombardier - M.L.W. Ltd. et al (1980), 112 D.L.R (3d) 61 (S.C.C.), Beetz, J. stated at page 64:

> **It is now well-established that the Courts should play only a limited role in supervising the legality of arbitral awards. They should refrain from substituting their own interpretation of a collective agreement for that of the arbitrator, and avoid intervening when the interpretation which the arbitrator has given to the agreement is one which the wording of the agreement may reasonably bear:**

From all of the foregoing authorities, it could be concluded that a court should not interfere with an arbitrator's decision which involved the interpretation of a collective agreement unless the interpretation is so unreasonable to demand interference.

It is the Applicant's position, in this case, that the arbitrator did not make a finding that the work being done was commercial and industrial work and, therefore, did not make the requisite finding which would confer jurisdiction upon him because the collective agreement only applies to commercial and industrial work.

In his report, the arbitrator discussed the evidence of two witnesses and at page 22 stated:

> With respect to the Litton site, Mr. Wile said that the site was located at the Aerotech Park alongside of Halifax International Airport. Mr. Wile gave evidence that Municipal Spraying were doing the job on the parking lot, doing the curb and the asphalting and that this work was work traditionally performed by the operating engineers under the collective agreement negotiated by the operating engineers. Exhibit 7 was then introduced which consisted of photographs taken by Mr. Wile at the Litton plant. Included in the photographs was Exhibit 7B which shows an area to the right showing two asphalt rollers which Mr. Wile says were operated by employees of Municipal and that these men were not Union members.

At page 27, he stated:

> Mr. Wile said that all of the four jobs were in Halifax County and that asphalt paving was work that was traditionally done by the operating engineers, whether it consisted of highway work, parking lot work or whatever and that this type of work was given to them by other trades in jurisdictional disputes.

And at page 28, the following appears:

> Mr. Estabrooks was asked to differentiate between roadbuilding work and commercial and industrial work. Mr. Estabrooks stated it was the Union's view that roadbuilding is confined to a general roadway or public roadway. However, when a driveway goes from the public road up to a particular site that driveway and the site paving becomes commercial and industrial. Mr. Estabrooks says that this distinction has been the interpretation that has been followed since

> **the time of initial accreditation and that it has always been the practice of the Union to enforce this distinction. Mr. Estabrooks has been a member of the Union since 1974 and has been a business agent since 1980 and for the period between 1974 and 1980 the foregoing distinction had always been followed.**

On page 33, Arbitrator Kydd concluded:

> **Mr. Pink concluded his case at 8:05 p.m. on Thursday, November 19th and at that time I rendered an oral decision that I was prepared to accept the Union's submission and found that Municipal had done the work alleged on all four sites and there had been a breach of the collective agreement negotiated between the Construction Mangement Labour Bureau Limited and the Employer with respect to the work being done on the four job sites by non-union employees or Union men who had not been referred by the Union, as described by Mr. Wile.**

There is no question that the wording of the arbitrator's report falls short of an expressed finding by the arbitrator that the work was of a commercial and industrial nature but his references to the evidence and his conclusions only permit one interpretation and that is that he found the work was of an industrial and commercial nature. The fact that he failed to expressly state it, is not, in my opinion, fatal to his award. An arbitrator is not required to make an expressed finding on each and every constituent element leading to his conclusion and once the whole of the report is read, it is clear that he considered that he had jurisdiction and that he was aware that he would not have had jurisdiction unless the work

was part of the industrial and commercial sector. I refer to Service Employees' International Union, Local No.333 v. Nipawin District Staff Nurses Association of Nipawin (1973), 41 D.L.R. (3d) 6 (S.C.C.) at 13:

> **A tribunal is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion. The role of the Court in a case such as this is supervisory, not appellate: s.21 of the Act. The Board made the specific finding that the Association was not a "trade union" as defined by the Act. For myself, I am quite prepared, on the record, to accept that the Board was aware of the statutory definition of "employer" and "employer's agent" found in the Trade Union Act and that it neither overlooked nor wilfully disregarded such definitions in concluding that the Association was a company-dominated organization.**

In my opinion, The Arbitrator did not commit an error of law by failing to specify in precise language a finding that the work being done at the four sites was commercial and industrial work.

ISSUE #3

Did the arbitrator commit an error of law in refusing to grant the adjournment applied for by counsel on behalf of the Applicant?

The Applicant refers to the case of Municipal Spraying and Contracting Limited v. International Union of Operating

Engineers, Local 721 (1977), 21 N.S.R. (2d) 351 (N.S.S.C.A.D.) wherein it was established that the parties had not followed the requirements of ss. 103(3) and that the arbitrator had not complied with s. 103(7) of the Trade Union Act. MacKeigan, C.J. stated at page 358 with respect to these two subsections:

> **Non-compliance with those directory subsections does not, however, affect the overriding command of s-s.(1) that all disputes "shall be submitted to arbitration in accordance with this Section", nor does it detract from the powers conferred on the arbitrator by s-s.(6), which states: ...**

The Applicant says that because the provisions are directory only, the Arbitrator could have granted an adjournment. The Union, in its submission, agrees the provisions are directory only and says the arbitrator considered them to be directory as evidenced by his comments as to what would happen if the only witness for one side was not available.

The Applicant went on to point out that the Arbitrator did recognize that open to him was the opportunity to adjourn a hearing if a principle witness was unavailable based on the requirements of natural justice together with the statutory authority of s. 41(1)(c) of the Act. Nevertheless, the arbitrator decided to proceed despite the fact that both parties agreed that it would take four or five days to present proper evidence. The Applicant relies on **Scott v. Rent Review Commission (1977), 23 N.S.R. (2d) 504 (N.S.S.C.A.D.)** and says that an opportunity

which cannot be used is no opportunity at all and that a breach of natural justice occurred in that the Applicant was not given the opportunity to properly prepare its witnesses and present its case to the Arbitrator.

I confess that I have sympathy for the position of the Applicant. If s. 103(7) does operate to permit one party to a dispute to clandestinely prepare its case and then "spring" the arbitration process on the other side, it is my opinion that the result is manifestly unfair regardless of whether or not a party is required to present a comprehensive or a condensed case. It often requires more time to prepare, in a proper fashion, a condensed case than it does a comprehensive case.

Whether all of the requirements of natural justice have been met depends upon the circumstances of each case. Natural justice is said to be nothing more than fair play: **R.D.R. Construction v. Rent Review Commission (1982), 55 N.S.R. (2d) 71** per Cooper, J.A. at 81.

The requirement of natural justice or fair play in proceedings has been recognized for a long time. I refer to **Bonaker v. Evans 16 Q.B. 162** per Parke B at 171:

> **... no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge**

> **against him, unless indeed the Legislature has expressly or impliedly given an authority to act without that necessary preliminary.**

On the point of the refusal to grant the adjournment, reference is made to deSmith Judicial Review of Administrative Action (4th ed.) at 213:

> **Wrongful refusal of an adjournment to a party unable to attend the hearing or requiring time to produce a witness or other important evidence may also be tantamount to a denial of justice.**

Again at page 200, deSmith states:

> **What the audi alteram partem rule guarantees is an adequate opportunity to appear and be heard (subject to the proviso that in some situations prior notice may be valid although not in fact received).**

In **Jim Patrick Limited v. United Stone and Allied Product Workers (1960) 21 D.L.R. (2d) 189**, the principles of the corporation were out of the jurisdiction when the company received notice of a certification application and the Labour Relations Board would not adjourn the hearing until the principles returned. Martin, C.J.S. stated at page 199:

> **I have no hesitation in holding that the Labour Relations Board in refusing to adjourn the hearing of the application and give Patrick an opportunity to be heard acted contrary to the rules of natural justice.**

The Ontario Court of Appeal in **Re Romm (1957), 7 D.L.R. (2) 378** held the failure of a tribunal to give adequate

opportunity to be fully heard was a denial of natural justice. The tribunal refused a request of counsel for a three day adjournment to permit the filing of a written reply after opposing counsel took 21 days of a 24 day adjournment to deliver his written argument

The basis for Arbitrator Kydd's decision not to grant an adjournment can be gleaned from the following portions of his report which are found on pages 18, 19 and 20:

> **Aside from the Employer's desire to call many witnesses and present a very comprehensive amount of evidence, there was no reason advanced by her why she could not present a more consolidated type of case. There was no suggestion by her that any of the knowledgeable people employed by Municipal were not available. Her main point indeed was that she knew nothing about the four grievances because of the time span between the time she received notice and the time of the hearing. In this case, she received notice of the hearing over twenty-four hours prior to its commencement and therefore had as much or more notice than would normally be the case in a Section 103 hearing. Aside from the comprehensive plans made by both sides to have a wide ranging hearing before the Construction Industry Panel and Mr. MacDougall, I see nothing to distinguish this case with its one issue, from any of the other arbitrations heard under Section 103. Virtually all of these arbitrations require counsel to quickly be briefed, and round up those witnesses who are available who can best present their side in a concise summary way.**
>
> ...
>
> **However, again Section 103(7) does not give me the discretion to grant such an adjournment in the absence of an agreement by both parties.**

> I have considered what an arbitrator might do if one of the parties before him indicated that its only witness who had knowledge of the subject matter was unavailable, or if one of the parties was not able to be given notice of the arbitration hearing. In such a case I think that the requirements for natural justice would require an arbitrator to make a decision under Section 41(1)(c) to the effect the matter referred to him was not arbitrable at that time on the basis that one of the parties had no opportunity to present its side of the case. For the reasons previously stated I do not think that applies in this case and there is no suggestion by the Employer that such people were not available. (emphasis added)

It would appear that the arbitrator formed the opinion that he had no discretion with respect to the request for an adjournment and that the requirement of s. 103(7) was mandatory. The Union suggests that the arbitrator found s. 103(7) to be directory because he did suggest that relief could be obtained by a party who was unable to present its own witness. With respect, I disagree with the position taken by the Union. It seems clear to me that the arbitrator did not consider he had a discretion under s. 103(7) but that in that one circumstance he could consider the matter not arbitrable by making use of the discretion given to him under s. 41(1)(c). In my opinion, the arbitrator's finding that s. 103(7) is mandatory is not in accord with the ruling of Chief Justice MacKeigan in **Municipal Spraying and Contracting Limited** v. **International Union of Operating Engineers Local 721** **(1977), 21 N.S.R. (2d) 351 (N.S.S.C.A.D.)** at 358 and this constitutes an error in law.

A number of Affidavits were filed with the court and although some are contradictory, it is clear to me that the Applicant was given little opportunity to respond to the issues placed before the arbitrator by the Union.

The documents before me would indicate that the Union was aware in November of 1987 that the hearing before Arbitrator MacDougall had been set for five days in February of 1988 involving similar issues as those to go before Arbitrator Kydd. It was clear at the arbitration before Mr. Kydd that the Union had prepared its case and had visited the sites and taken photographs. It is not clear when the Union determined that they would go to arbitration but had made this decision at least by November 9th when Raymond Larkin, solicitor for the Union, wrote to the Department of Labour confirming the Union's request for the appointment of an arbitrator. There is nothing to suggest that a copy of this letter went to the Applicant.

Gary Widmeyer is the comptroller of Municipal Contracting Limited and by Affidavit sworn the 15th day of April, 1988, Mr. Widmeyer says that he was contacted by Mr. Paul Langlois of the Department of Labour on November 12th, 1987, and that Mr. Langlois advised him that he had been contacted by the Union with respect to four grievances and that during this conversation Mr. Widmeyer advised Mr. Langlois that he was concerned about the number of grievances which had been filed by the Union and

advised Mr. Langlois that five days had been set aside in February, 1988, for an arbitration before Arbitrator MacDougall. Mr. Widmeyer attested to the fact that Mr. Langlois did not tell him that he had received a written request from the Union to appoint an arbitrator with respect to the four grievances nor was he told by Mr. Langlois that the appointment was imminent. Mr. Widmeyer stated in his Affidavit that he was under the impression, following completion of the telephone call, that matters were proceeding in a satisfactory manner towards resolution.

Mr. Paul Langlois, who is assistant to the Deputy Minister of Labour, filed an Affidavit outlining his usual practice following a request for arbitration and this practice included contacting the party making the request to determine whether the other party is aware of the application under s. 103. Mr. Langlois went on to attest that he then normally contacts the other party to permit that party to respond. Mr. Langlois said he received the request for an arbitrator on November 10th, 1987, and that he contacted Gary Widmeyer "some time between November 10, 1987, and November 17, 1987" at which time he discussed the nature of the request made and asked Mr. Widmeyer whether he wanted the company's solicitor to be advised. Mr. Widmeyer advised that that was not necessary. Mr. Kydd was formally appointed arbitrator on November 18th, 1987.

Mr. Kenneth Estabrooks is the Business Manager for the Respondent Union. He said the dispute arose on October 20th, 1987, regarding work performed by Municipal at the Bayer's Road Shopping Centre and that he caused a grievance to be filed and delivered to Mr. Widmeyer. Mr. Estabrooks says he spoke to Mr. Widmeyer and they were not able to resolve the dispute and he advised Widmeyer he would be requesting the Minister of Labour to appoint an arbitrator. Mr. Estabrooks said that on November 9th, 1987, he did request the Minister of Labour to appoint an arbitrator. There is no suggestion in Mr.. Estabrooks' Affidavit that he advised any representatives of the Applicant that the request had actually been made of the Minister of Labour.

Terry Roane is a solicitor practicing in Halifax who also filed an Affidavit stating that the first notice that the Applicant had of the arbitration was at noon on November 18th, 1987, when a telex arrived from the office of the Minister of Labour directed to Mr. Gregory North of Cox, Downie & Goodfellow. Mr. North was the senior solicitor involved with the file and was conducting a case in Newfoundland on the 18th of November, 1987. Ms. Roane attested to the fact that she advised Arbitrator Kydd of Mr. North's absence and of her inability to locate and prepare necessary witnesses within the time which had elapsed from noon of the previous day. It is clear from the decision of Arbitrator Kydd that many of these points were made to him

and I refer to page 7 of his decision:

> Ms. Roane submitted that there was no urgency for determination of the four grievances filed with respect to this arbitration, the School for the Blind grievance having been filed on August 24th, the Volvo grievance on August 26th, Bayers Road grievance on August 20th and Litton Industries grievance on November 5th or 6th. She submitted that while it made sense for the Union to file a grievance every time the issue arose on a new paving job, by doing so they have preserved their rights and that there was therefore no reason to have a job determination under Section 103 when all the grievances raised the same issue. Ms. Roane also said there had been absolutely no co-operation from the Union in selecting a suitable time for the hearing of this arbitration, that she had been working with Mr. Greg North on the question, and that Mr. North was currently in Newfoundland before the Canada Labour Relations Board and therefore had no opportunity to participate in this hearing. Ms. Roane said that the first notice that she had of the hearing was when a telegram arrived the previous day from the Deputy Minister. Ms. Roane contacted Mr. Pink and his comment was to the effect that "the forty-eight hours is running". Ms. Roane said that the application amounts to a flagrant abuse of the intent of Section 103 and of due process. Ms. Roane said that she knew nothing about the four jobs which were the subject of the grievance, or who her witnesses were, and that if she did she could not prepare them all. In summary she stated that there was no way that she could make any sort of a case.
>
> Ms. Roane continued that the issues of fact were complicated in that it involved evidence as to the types of work, and the practice in the industry. To present a proper case she said she needed representatives of other employers, of other trade unions, and from the Construction Management Bureau as to what was contemplated in their collective agreement. She also said she would need evidence or it would

be useful to have evidence as to what happens in other jurisdictions.

It is abundantly clear to me that the Applicant did not have sufficient opportunity to be heard or to prepare its case before the arbitrator or to meet the evidence and submissions of an adversary which had at least ten days to prepare its case. The Legislature intended a speedy process but did not intend for one party to be disadvantaged to the extent that occurred in this situation. It would have been a simple matter for either the Union or the Department of Labour to have advised the Applicant of the request for an arbitrator at the same time or immediately after the request was made.

With respect, it is my view that Arbitrator Kydd erred in finding that he was prohibited from granting the adjournment by reason of s. 103(7) and, therefore, committed an error in law.

Even if the Union is correct and one could assume that Arbitrator Kydd was aware of the designation given s. 103(7) by former Chief Justice MacKeigan to the effect that the subsections were directory, it is my opinion that Arbitrator Kydd should have granted an adjournment when he was aware of the fact that the Applicant had less than 24 hours notice of the date of hearing. In Black's Law Dictionary (5th ed.), "directory" is defined as follows:

> **A "directory" provision in a statute is one, the observance of which is not necessary to the validity of the proceeding to which it relates; one which leaves it optional with the department or officer to which it is addressed to obey or not as he may see fit.**

It is not my intention to suggest that the arbitrator should easily depart from the procedures outlined in s. 103 of the Trade Union Act. It cannot be doubted that the Legislature determined that it was desirable to have a quick resolution of labour disputes in the construction industry, but in this case, there was no urgency and the dispute was a policy dispute. Three of the four jobs, which were the subject of the grievance, had been completed and a five day hearing had been reserved before Arbitrator MacDougall to determine similar issues. It was open to Arbitrator Kydd to grant an adjournment or, by virtue of s. 41(1)(c), to determine that the nature of the dispute was not arbitrable. Section 41(1)(a) and s. 41(1)(c) read as follows:

> **41 (1) An arbitrator, or an arbitration board, appointed pursuant to this Act or to a collective agreement:**
>
> **(a) shall determine his or its own procedure, but shall give full opportunity to the parties to the precedings [proceedings] to present evidence and make submissions to him or it;**
>
> **...**
>
> **(c) has power to determine any question as to whether a matter referred to him or it is arbitrable; ...**

By virtue of s. 90 of the Act, the provisions in Part I of the Act apply to the construction industry except where

inconsistant with Part II. In my view, no such inconsistancy exists and the arbitrator must have been of the same view as he would have invoked s. 41(1)(c) if one party advised its only witness was unavailable.

In my opinion, the Applicant's request for an adjournment in the circumstances was a reasonable request and the refusal constituted a denial of natural justice.

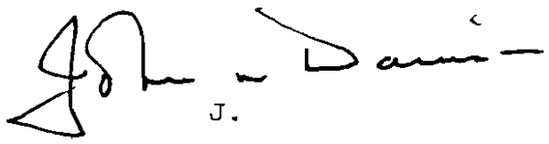
ISSUE #4

Did the arbitrator commit an error of law in permitting the Union to prove its case on the basis of hearsay evidence only?

In view of the conclusion I have reached with respect to issue #3, it is unnecessary for me to consider this question.

CONCLUSION

In the result, the decision of Arbitrator William Kydd, Q.C. dated November 27th, 1987, is quashed and the Applicant will receive its costs of the application.



J.

Halifax, Nova Scotia
June 29,1988