To recap the course of collective bargaining, a notice to bargain was served by CUPE on January 14, 1997. The two parties exchanged detailed proposals and held lengthy negotiation meetings. A tentative agreement was reached, which was reduced to a memorandum of agreement, subject to ratification by the parties before March 10, 1997. Article 1.01 of the memorandum clearly stated that the agreement was to be effective from the date notice of ratification was exchanged to March 31, 1999, except for those clauses of the memorandum that specifically provided otherwise. The Employer ratified the agreement on March 7, 1997. CUPE notified the Employer on March 8, 1997 that its members had met and ratified the agreement by majority vote. Mr. Pilling, the CUPE National Representative responsible for this local union, confirmed this ratification in his testimony before us.

We find nothing ambiguous about the intent of CUPE and the Employer in this case. The new collective agreement was clearly intended to take effect immediately upon ratification. Though the new wage schedules were stated not to take effect until April 1, 1997, several other substantive amendments took effect immediately — among them extension of certain overtime rights to regular part-time employees in Article 17; enhanced shift premiums in Article 21 and 22; changes to the administration of Workers' Compensation coverage in Article 27; fixing of employee contributions to the health benefit premiums at 25% (Article 28); and notice and transfer rights where the employer plans subcontracting or technological change, in Article 36. These amendments amounted to more than mere housekeeping. They were significant changes. Notwithstanding that wage increases were deferred until April 1, 1997, there is no doubt in our minds that the new agreement was intended by the parties to be the agreement in effect at the time the Guild's application for certification was filed.

Employees in the bargaining unit ratified this new agreement on or about March 8, 1997. In doing so they affirmed CUPE's bargaining agency and waived their rights to a continuation of the statutory open period within which that bargaining agency might be challenged.

It follows that the March 8, 1997 collective agreement was the agreement in force and effect on the date the Guild filed its certification application. The collective agreement renders the Guild's application untimely pursuant to section 35(2)(d) of the *Code*.

The application is dismissed.

THE CROWN IN RIGHT OF ALBERTA, Applicant and THE ALBERTA LABOUR RELATIONS BOARD, THE MUNICIPAL DISTRICT OF SADDLE HILLS NO. 20, THE MUNICIPAL DISTRICT OF BIRCH HILLS NO. 19, THE MUNICIPAL DISTRICT OF CLEAR HILLS NO. 21, THE MUNICIPAL DISTRICT OF MACKENZIE NO. 23 AND THE ALBERTA UNION OF PROVINCIAL EMPLOYEES,

Respondents - and - UNIVERSITY OF ALBERTA NON-ACADEMIC STAFF ASSOCIATION, Applicant and THE BOARD OF GOVERNORS OF THE UNIVERSITY OF ALBERTA, FOCUS BUILDING SERVICES LTD., QUALITY COLOUR CONSORTIUM, VERSA SERVICES LTD. AND LABOUR RELATIONS BOARD, Respondents. Board Files: GE-02075, GE-02076, GE-01565, GE-01571, GE-02253, GE-02272, GE-02271, GE-02110, GE-02123. August 14, 1998.

Court of Queen's Bench, Action Nos. 96703-02949, 9503-15556, Reasons for Decision of the Honourable Madam Justice Joanne B. Veit

For the Crown in right of Alberta: David J. Ross, Q.C.

For the Alberta Union of Provincial Employees: G. Brent Gawne et al.

For Focus Building Services Ltd.: Michael D.A. Ford

For the University of Alberta Non-Academic Staff Association: Simon M. Renouf

For the Alberta Labour Relations Board: Sheila Greckol

For the Board of Governors of the University of Alberta: James T. Casey

For Quality Colour Consortium and Versa Services Ltd.: Dwayne Chomyn

For the Applicant Municipalities: F. Albert X. Lavergne

For the Respondent Versa Services Ltd.: Craig Neuman

Earlier Alta.L.R.B.R. citations: [1996] Alta.L.R.B.R. 1, [1996] Alta.L.R.B.R. 260, [1997] Alta.L.R.B.R. 49, [1995] Alta.L.R.B.R. 396, [1997] Alta.L.R.B.R. 119

Judicial review - s. 1(o) (P.S.E.R.A.) - Whether Board acted within jurisdiction - Improvement district advisory councils deemed to be councils of new municipal districts - Interpretation of word "deemed" - Board interpreting statute other than PSERA or Code - Correctness test - Board interpretation incorrect - Decision quashed and application remitted to Board for rehearing.

Judicial review - Natural justice - s. 15(5) - Whether party denied natural justice - Crown notified of application under s. 90 (P.S.E.R.A.) and declined to attend hearing - At hearing application

expanded to consider Code provisions -No notice to Crown of Code application - Crown denied opportunity to call evidence - Decision quashed and remitted to Board for rehearing.

Judicial review - Successor employer - s. 44 - Survival of collective agreement from PSERA to Code impliedly barred by language collective agreement - Whether Board decision patently unreasonable - Board considered best available evidence - Matter peculiarly within expertise of Board - Curial deference by Court - Decision upheld.

In two separate applications, the Board ruled on successorship issues involving both the "Public Service Employee Relations Act" and the "Labour Relations Code". The Board found three private sector Code employers could not be successor employers to a PSERA employer, the University of Alberta (see [1995] Alta. L.R.B.R. 396 and [1998] Alta. L.R.B.R. 119). In decisions known as "Saddle Hills #1"(see [1996] Alta. L.R.B.R. 1) and "Saddle Hills #2" (see [1996] Alta. L.R.B.R. 260), the Board found the Municipalities were successor employers to the Crown in right of Alberta (the "Crown") under s. 90 of PSERA and were bound by the collective agreements negotiated by the Alberta Union of Provincial Employees ("AUPE"). It also found the Municipalities subsequently became subject to the Code, but remained bound by the AUPE collective agreements.

The Non-Academic Staff Association ("NASA"), the Municipalities and the Crown applied for judicial review of the decisions. The Court of Queen's Bench ordered the matters heard consecutively, as they dealt with similar legal issues (see [1997] Alta. L.R.B.R 49). NASA argued the Board erred in finding its collective agreement with the University could exist only under PSERA and could not bind Code employers. In support of its position, NASA argued the Board reached a contrary conclusion in Saddle Hills #2. The Municipalities argued the Board erred in finding they were PSERA employers. The Crown, which had declined to participate in the PSERA successorship application against the Municipalities, argued it was denied natural justice by not receiving notice of issues which arose during the hearing of Saddle Hills #1.

The Court dismissed the judicial review application of NASA. It held the Board acted within its jurisdiction and its decision was not patently unreasonable. It found the seeming inconsistence between the NASA matter and Saddle Hills #2 was inconsequential. The Court upheld the judicial review applications of Saddle Hills #1 and #2, quashing the Board's decisions. The Court found the Board erred in determining the Municipalities were PSERA employers. It also found the Board denied the Crown natural justice by failing to provide it notice of the expansion of the PSERA application to include consideration of Code provisions. The Court remitted the matters back to the Board for rehearing.

I. Summary

[Even though the answers to most of the issues raised in these proceedings are well settled in Alberta law, and would therefore typically be dealt with in a Memorandum of Decision rather than Reasons, in this case - because of the combined hearing - all issues have been dealt with in this decision.]

These two judicial reviews were ordered to be heard together because each deals with an aspect of the succession problem created by privatization, or the transfer of jobs from the public sector to the private sector. Two principal questions had to be decided by the Alberta Labour Relations Board: When the public sector moves jobs from within its sector to the private sector, does the union which had been certified as the public service union continue to represent the employees in the private sector? Does the collective agreement which governed the relations between the public service employer and its employees bind the new employers?

There are fundamental differences in Alberta between the public and the private labour relations regimes; these differences are exemplified by, but far from limited to, certification procedures, and the inability of public service employees to strike. In some Canadian jurisdictions, labour legislation bridges the gap between the public and private sectors. Alberta does not have specific bridging legislation. Within each regime, Alberta legislation does, in certain situations, override contract law principles of privity and impose a bargaining regime on an unwilling employer; however, neither the statute governing labour relations in the public sector, the *Public Service Employment Relations Act,* nor the statute governing labour relations in the private sector, the *Labour Relations Code,* expressly deals with privatization. Therefore, the Labour Relations Board had to decide if existing Alberta labour legislation cures the privity problems that would otherwise exist when a private sector employer replaces a public sector one.

In the first situation, starting in early 1992, the University of Alberta decided to contract out certain services to the private sector. The University, like the Government of Alberta, is a public service employer whose labour relations are governed by the *Public Service Employee Relations Act, or PSERA,* rather than a private sector employer whose relations are governed by the *Labour Relations Code.* The Non-Academic Staff Association of the university, or NASA, the union which represents all university non-academic staff, eventually asked the Labour Relations Board to declare that the collective agreement which it had negotiated with the university bound the new employers. The Board held that it could not make a "common employer" finding between the university and the new employers because the *Code* prevents the yoking of public and private sector employers. The Board held that the collective agreement could, in theory, survive the journey from the public sector to the private sector, and that the decision in an individual case was a question of fact about the intent of the parties. The Board reviewed the collective agreement between the University and NASA; it concluded that the parties had not intended that the agreement should be transferred to the private sector.

Therefore, the Board concluded that the collective agreement did not bind the new employers. NASA asks the court to set this decision aside and to order a new Board hearing of the issue.

In the second situation, on January 1, 1995, the Province of Alberta, which is a public service employer whose labour relations are governed by *PSERA*, created four new municipalities. In Alberta, municipalities are private sector employers whose labour relations are governed by the *Labour Relations Code*. Each of the municipal areas had formerly existed as an improvement district; the employees of the improvement districts were provincial government employees; most of them became employees of the new municipalities. The Alberta Union of Provincial Employees, AUPE, is the union which, by legislation, had represented the individuals while they were employees of the provincial government; it sought a declaration from the Labour Relations Board under *PSERA* that the new municipalities were successors to the Crown - that the union's existing certification and collective agreement were binding on the new municipalities. The Board decided, on its own motion, to expand the hearing to answer the question: What happened to the union and the collective agreement after the municipal elections in October 1995, when an elected council would take the new municipalities out of *PSERA* and bring them within the *Code*? The Board decided that the certification of a union could not survive the transfer from the public sector to the private sector but that the collective agreement should be deemed to have been intended to be transferred. Therefore, it concluded that AUPE was no longer the certified bargaining agent for the employees of the new municipalities but that the collective agreement which had been negotiated between AUPE and the provincial government was binding on the new municipalities both before and after the municipal elections. AUPE asks the court to set aside only the decision denying its ongoing certification; the new municipalities ask the court to set aside the decision that they are bound by the existing collective agreement.

Although the continued existence of the certification and of the collective agreement were the main issues on this judicial review, there were additional issues. In the University matter, NASA, which had originally requested this judicial review, and the Labour Relations Board now ask the court to postpone the judicial review until the Board has had the opportunity of conducting its own re-hearing.

In the new municipalities matter, the Crown, which had been given notice of the original Labour Relations Board hearing in relation to *PSERA*, complains that it was not given adequate notice of the Board's decision to expand the hearing to issues arising under the *Code*. The Board contends that its failure to advise the Government of Alberta of its decision to embark on a *Code* hearing did not constitute a breach of the Crown's entitlement to natural justice. The Crown asks the court to set aside the Board's decision and to order a new hearing.

In addition, the Crown asks the court to declare that the Board cannot, on a judicial review application, be treated as a party and allowed to make arguments on all aspects of the review.

Also in the municipalities case, although the new municipalities were created as of January 1, 1995, no elections were held in those municipalities until October of that year. The Board decided that in the period between January 1, 1995 and the elections in October, 1995, the new municipalities were public sector employers - and therefore subject to successorship responsibilities as set out in *PSERA* - rather than *Code* employers. The new municipalities ask the court to set that decision aside and to order the Board to hold a new hearing.

It is common ground that both sets of privatizations were undertaken for legitimate reasons - neither privatization was initiated, for example, to get rid of either a collective bargaining agreement or a union.

The standard for judicial review varies. On matters within jurisdiction, the courts may only interfere if a decision is clearly irrational. On matters of jurisdiction, the courts may interfere where the tribunal's decision was incorrect. The courts may also interfere if the tribunal denied natural justice.

The Labour Relations Board has a limited role on the judicial review of its decisions. The Board cannot advance arguments merely because "they would not otherwise be made."

The Board's decision in the University case on the interpretation of s. 45 of the *Labour Relations Code,* which applies to common employers, is jurisdictional. The Board was correct in deciding that there could be no "common employer" as that term is defined in the *Code*, because the *Code* states that it does not apply to public service employers. Therefore, the Board's decision on that point cannot not be disturbed.

The Board's decision on the application of s. 44 of the *Code*, or whether legislation creates successorship obligations, may be a jurisdictional question. However, in this case, the union accepts that the Board was correct in deciding that parties can agree that their collective agreement could survive the transfer from the public sector to the private sector. The only aspect of the Board's successorship decision contested by the union is the Board's determination of the intent of the parties. The decision on the intent of the parties is one of fact, not jurisdiction. In this case, the Board's decision on the intent of the parties is not clearly irrational. Indeed, the Board based its decision on intent on proper evidence - the collective agreement itself - and its decision is correct. Therefore, the Board's decision cannot be disturbed.

In the University case, there is no realistic alternative remedy to judicial review mainly because of the lengthy delay since 1992 and the fact that a re-hearing is not necessary for the parties. Therefore, there is no reason for the court to delay judicial review.

In the municipalities case, the Board deprived the Crown of natural justice when, on its own motion and without notice to the Crown, it raised a *Code* issue in a hearing dealing with *PSERA*. The Board did not remedy this breach of natural justice in its rehearing. Therefore, the Board's decision is set aside; the Board will hold a new hearing.

The Board erred on the jurisdictional issue of whether the new municipalities were *PSERA* employers from January 1, 1995 to the date of the election. When the Legislature "deemed" the members of the former advisory council to be members of the municipal council until the elections, it required everyone, including those with labour issues, to deal with the former advisory council as if it were elected. Therefore, the new municipalities were *Code* employers. Judicial review of the Board's decision is granted on this basis as well.

II. Cases and Authorities Cited

By the Applicant University of Alberta Non-Academic Staff Association: *Labour Relations Code; U.E.S. Local 298 v. Bibeault* [1988] 2 S.C.R. 1048; *Canada (Attorney General) v. Public Service Alliance of Canada* [1981] 1 S.C.R. 614, 80 D.L.R. (4th) 520; *Canada (Attorney General) v. Public Service Alliance of Canada* (1 993) 101 D.L.R. (4th) 673 *(S.C.C.); Health Care Employees Union of Alberta and Versa Services Ltd. and Marriott Management Services* [1993] Alta. L.R.B.R. 452 and [1993] Alta. L.R.B.R. 650; *Amalgamated Transit Union Local 1374 and Greyhound Lines of Canada and Ferguson Bus Lines* [1991] Alta. L.R.B.R. 646; *International Union of Operating Engineers Local 955 v. Peter Kiewit and Sons Company Ltd. et al* [1987] Alta. L.R.B.R. *79; Plasterers and Cement Masons Local 924 v. Stuart Olson Construction Ltd.* (1984) 52 A.R. 88 (Alta. Q.B.); *Re AUPE and Alberta and Municipal District of Birch Hills #19, the Municipal District of Saddle Hills #20, the Municipal District of Clear Hills #21, and the Municipal District of MacKenzie #23,* July 29, 1997; *Syndicat des employes de Service technique de Cable TV (CNTU) v. Cable TV Limited* (1979) 80 CLLC 16,019 (CLRB); *Re Ontario Hydro and Power Workers' Union (CUPE, Local 1000)* (1996) 59 L.A.C. (4th) 441 (Burkett); George W. Adams, *Canadian Labour Law* (2d) at section 12.100 (Page 12-7); *Re Royal Alexandra Hospital* (unreported ALRB decision, March 19, *1993); Canadian Labour Law* (2d) at page 8-1; *Re Edmonton Firefighters' Union and The City of Edmonton* [1996] Alta.L.R.B.R. 449.

By the University of Alberta: *Board of Governors of the University of Alberta and Non-Academic Staff Association,* unreported, May 31, 1995; *University of Alberta Non-Academic Staff Association v. University of Alberta, Focus Building Services Ltd., Quality Colour Consortium, and Versa Services Ltd.,* July 12, 1995; *Pezim v. B.C. (Superintendent of Brokers)* [1994] 2 S.C.R. 557; *Labour Relations Code,* s. 18(2); *CUPE, Local 963 v. New Brunswick Liquor Corp.* (1979) 97 D.L.R. (3d) 417; *Canada (Attorney General) v. PSAC* [1993] 1 S.C.R. 941; *CAIMAW Local 14 v. Paccar Canada Ltd.* (1989) 62 D. L. R. (4th) 437; *Re Brewery Employers Industrial Relations Association and Western Union of Brewery, Beverage Workers, Local 287* (1989) 65 D.L.R. (4th) 81 at p. 83 (Alta. C.A.); *Re Northside Electric Ltd. and IBEW Local 424* (1983) 4 D.L.R. (4th) 635 at p. 644 (Alta. Q.B.); *Universities Act,* R.S.A. 1980, c.U-5, section 21.7; *Canada Attorney General v. Public Service Alliance of Canada* (1991)

80 D. L. R. 4th 520 (S.C.C.); *NASA v. University of Alberta and Focus Bldg. Services et al* [1995] Alta. L.R.B.R. 396; *NASA v. University of Alberta et al*, unreported, March 24, 1997 (Lucas, MacDonald, Schell); *Wood (Myrna) and Canadian Red Cross Blood Transfusion Service Employees Association and Canadian Red Cross Blood Transfusion Service, Hamilton, Centre (Ont.)* [1981] 2 Can. L.R.B.R. 79; G. Adams, *Canadian Labour Law* (2d ed. May 1997) at p. 7-70; *A Guide to Alberta's Labour Relations Laws*, (Revised February 1996) at p. 34; Definition of "voluntary" in the Oxford English Dictionary (2d ed.) XIX (1989: Clarendon Press, Oxford); *Labour Relations Code*, S.B.C. 1992, c. 82, at s. 36; Adams, *Canadian Labour Law*, 2nd edition, at p. 8-29; *Regional Health Authorities Act*, S.A. 1994, c. R-9.07, at s. 27.

By Quality Colour Consortium and Versa Services Ltd.: *Public Service Employees Relations Act*, R.S.A. 1988, c. P-33; *Alberta Union of Provincial Employees v. Board of Governors of Olds College* (1982) 1 36 D.L.R. (3rd) 1 (S.C.C.); *Beacon Transit Lines Inc. v. Teamsters Union, Local 938* (1987) 17 C.L.R.B.R. (N.S.) (S.C.C.); Alberta Hansard, May 10th, 1977; *Successor Rights (Crown Transfers) Act*, R.S.0 1990
s. 27; Canadian Labour Law (2nd); The Municipality of Metropolitan Toronto (1975) O.L.R.B. Rep. Oct.; *Wholesale Delivery Service (1972) Ltd. v. Overland Freight Lines Limited* (1979) 3 Can. L.R.B.R.; *Durham Transport Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 141* [1978] 2 Can. L.R.B.R.; *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees v. Canadian Pacific Limited, A Marathon Realty Company Limited* (1979) 1 C.L.R.B.R. (Can.); *Val Nord Bus Lines Limited v. Syndicat des Travailleurs* (1990) 14 C.L.R.B.R. (2nd) 132; *General Teamsters, Local 362 v. Stern Transport Limited* (1986) 12 C.L.R.B.R. (N. S.) (Can).

By the Applicant Municipalities: Reasons for First Decision of the *Alberta Labour Relations Board in the Matter of the Alberta Union of Provincial Employees v. Crown in Right of Alberta, the Municipal District of Birch Hills #19, the Municipal District of Saddle Hills #20, the Municipal District of Clear Hills #21 and the Municipal District of MacKenzie #23* (January 10, 1996); Reasons for Second Decision of the *Alberta Labour Relations Board in the Matter of the Alberta Union of Provincial Employees v. Crown in Right of Alberta, the Municipal District of Birch Hills #19, the Municipal District of Saddle Hills #20, the Municipal District of Clear Hills #21 and the Municipal District of MacKenzie #23* (July 19, 1996); *Municipal Government Act*, S.A. 1994, c. MO-26. 1, s. 142; *Municipal Government Act*, S.A. 1994, c. M-26.1, s. 147; *Municipal Government Act*, S.A. 1994, c. M-26.1, s. 157; *Local Authorities Election Act*, S.A. 1983, c. L-27.5, ss. 1(n), 9, 10; *A.T.U. Local 1374 v. Greyhound Lines of Canada Ltd. (Ferguson Bus Lines Ltd.)* [1991] Alta.L.R.B.R. 646; *N.A.S.A. v. University of Alberta et al* (July 12, 1995), Alta.L.R.B. (Asbell); *Labour Relations Code*, S.A. 1988, c. L-1.2, s. 18; *C.U.P.E. Local 93 v. New Brunswick Liquor Corporation*, (1979), 97 D.L.R. (3d) 417 (S.C.C.); *CAIMAW Local 14 v. Paccar Canada Ltd.*, (1989), 62 D.L.R. (4th) 437 (S.C.C.); *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941; *U.E.S. Local 298 v. Bibeault*

[1988] 2 S.C.R. 1048; *Famous Players Inc. v. LRB and IATSE Local 302,* [1995] Alta. L.R.B.R. 505 (Q.B.); *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre),* (1996), 134 D.L.R. (4th) 1, (S.C.C.); *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)* (1990), 74 D.L.R. (4th) 449 (S.C.C.); *A.T.A. v. Edmonton School District No. 7* (1992), 5 Alta. L.R. (3d) 97 (C.A.); *Black's Law Dictionary,* (deem, appoint, designate); *Labour Law Terms,* (deem, appoint, designate); *Gray v. Kerslake* (1957), 11 D.L.R. (2d) 225 *(S.C.C.); Shepheard v. Broome,* [1904] A.C. 324 (H.L.); *Mutchenbacker v. Dominion Bank* (1911), 12 Man. R. 320 (C.A.); *Reg. v. Norfolk County Council* (1891), 60 L.J.Q.B. 379; *Driedger on the Construction of Statutes* pp. 3, 4, 5, 11, 12, 13, 22, 23; *Shannon Realties Ltd. v. St. Michael,* [1924] 1 D.L.R. 119 (P.C.); *Grand Trunk R. Co. v. HepWorth Silica -Pressed Brick Co.,* [1 915] 21 D.L.R. 480 (S.C.C.); *St. Leon Village Consolidated School District No. 1425 v. Roncery et al,* (1960) 31 W.W.R. 385 (Man. C.A.); *Re Western Canada Pulpwood Co. Ltd. v. Manitoba Paper Co. Ltd.* [1929] 3 W WR. 544 (Man. C.A.); *Burton, Legal Thesaurus,* (appoint, designate, deem); *Municipal Government Act,* S.A. 1994, c. M-26.1, s. 158; *Public Service Employee Relations Act,* R.S.A. 1980, c.P-33, s. 1(o); *Western Stevedoring Co. v. Pulp Paper & Woodworkers* (1975), 61 D.L.R. (3d) 701 (B.C.C.A.); *Labour Relations Code,* S.A. 1988, c. L-1.2, s. 46; *Municipal Government Act,* S.A. 1994, c.M-26.1, s. 142; Re: *Metro-Edmonton Hospital District No. 106* (January 9, 1981, PSERB Reference: 000-099) (D. Blair Mason); *Beverage Dispensers & Culinary Workers v. Terra Nova Motor Inn Ltd.* (1974), 50 D.L.R. (3d) 253 (S.C.C.); *Public Service Act,* R.S.A. 1980, c. P-31; *Labour Law Terms: A Dictionary of Canadian Law* (voluntary recognition); *Black's Law Dictionary,* (voluntary); *Durham Transport v. Teamsters Union Local 141* [1978] Can.L.R.B.R. 535 (Ont. L.R.B.); *Municipality of Metropolitan Toronto,* [1975] OLRB Rep. Oct. 777; *Adams, Canadian Labour Law,* 2nd, p. 8-29; *Successor Rights (Crown Transfer Act,* R.S.O. 1990, c. S-27; *Alberta Hansard,* May 10, 1977, p. 1248; *Syndicat des employees de Service de Cable TV (CNTU) v. Cable TV Ltd.,* [1980] CLLC 16019 (Can.); *General Teamsters Local 362 v. Grey Goose Bus Lines (Alberta) Ltd.* (February 1, 1985, 85-007) (Dubensky); *General Teamsters Loc. 362 v. Grey Goose Bus Lines (Alberta) Ltd.* (November 8, 1985), (850-007) (Q.B.); *Greenwood Shopping Plaza Ltd. v. Beattie et al* (1980), 111 D.L.R. (3d) 257 (S.C.C.); *Beacon Hill Transit Lines Inc. v. Teamsters Union, Local 938,* (1987), 17 C.L.R.B.R. (N.S.) 265 (Ont. L.R.B.), *Interpretation Act,* R.S.A. c. 1-7, s. 4; *U.A. v. SCC Construction Ltd.* (1987), 41 D.L.R. (4th) 46 (Nfld. C.A.); *Labour Relations Code,* S.A. 1988, c. L-1.2, s. 11(3).

By the Applicant Crown in Right of Alberta: Union's application dated May 17, 1995, Board's notice dated May 19, 1995; Letter from the Crown to the Board dated June 6, 1995; The Asbell Panel Reasons for Decision dated January 10, 1996 *(AUPE v. Crown in Right of Alberta, the Municipal District of Birch Hills #19, the Municipal District of Saddle Hills #20, the Municipal District of Clear Hills #21 and the Municipal District of Mackenzie #23);* The Blair Panel Reasons for Decision dated July 19, 1995 *(A.U.P.E. v. Crown in Right of Alberta, the Municipal District of Birch Hills #19, the Municipal District of Saddle Hills #20, the Municipal District of Clear Hills #21 and the Municipal District of MacKenzie #23);* Affidavit of Robert James Campbell; Labour Board's Information Bulletin #36 [sic];

Zeidler Forest Industries v. International Woodworkers of America, [1987] Alta. L.R.B.R. 257; *Famous Players Inc. v. I.A.T.S.E. Local,* [1995] Alta. L.R.B.R. 505 (Alta. Q.B.); David Jones and Anne de Villars, *Principles of Administrative Law,* 2d ed. (Toronto: Carswell, 1994) at 247; *International Union of Operating Engineers v. Board of Industrial Relations in and for the Province of Alberta* [unreported] (Sept. 13, 1976) (Edmonton) (Alta. Q.B.); *Regie de l'Assurance-Maladie du Quebec v. Chamberland* (1986), 24 Admin. L.R. 304 (Que. C.A.); *Health Care Employees' Union of Alberta v. Versa Services Ltd., Marriott Management Services and Alberta Hospital Edmonton,* [1993] Alta. L.R.B.R. 452; *A.T.U. Local 1374 v. Greyhound Lines of Canada and Ferguson Bus Lines Limited et al,* [1991] Alta. L. R. B. R. 646; *Public Service Employee Relations Act,* Part 6, Division 2; *Reference re Public Service Employee Relations Act* (1987), 38 D.L.R. (4th) 161 (S.C.C.); Pierre-Andre Cote, The *Interpretation of Legislation in Canada,* 2d ed. (Cowansville, PO: Yvon Blais, 1992) at 279; Ruth Sullivan, *Driedger on the Construction of Statutes,* 3d ed. (Toronto: Butterworths, 1994) at 163; *Alberta Teachers Association v. Edmonton School District No. 7* (1992), 5 Alta. L.R. (3d) 97 (C.A.); *Canada (A. G.) v. P.S.A.C.,* [1993] 1 S.C.R. 941; *Blanchard v. Control Data Canada Ltd.* (1984), 14 D.L.R. (4th) 289 (S.C.C.); *U.A., Local 740 v. W.W. Lester (1978) Ltd.* (1990), 91 CLLC 14,002 (S.C.C.).

By the Applicant A.U.P.E.: Black's Law Dictionary (5th ed.) (St. Paul, Minn: West Publishing Co., 1979) at 78; Concise Oxford Dictionary (9th ed.) (Oxford: Clarendon Press, 1995) at 46; Webster's Third New International Dictionary (Springfield: Merriam-Webster Inc.) at 612; Pocket Oxford Dictionary (6th ed.) (Oxford: Clarendon Press) at 225; Black's Law Dictionary, (5th ed.) (St. Paul, Minn: West Publishing Co., 1979) at 402; Ruth Sullivan, *Dreidger on the Construction of Statutes* (3d. ed.) (Toronto: Butterworth's, 1994) at p. 83-90; *Labour Relations Code,* R.S.B.C. 1996, c. 244; *Public Service Labour Relations Act,* R.S.B.C. 1996, c. 388.

By the Alberta Labour Relations Board: *AUPE v. Municipal District of Saddle Hills #20 (No. 1),* [1996] Alta. L.R.B.R. 1 (Asbell, Vice-Chair); *AUPE v. Saddle Hills #20 (No. 2)* [1996] Alta. L.R.B.R. 260 (Blair, Chair); *B.C.G.E.U. v. Indust. Rel. Council* (1988),26 B.C.L.R. (2d) 145 (B.C.C.A.); *Labour Relations Code,* S.A. 1988, c. L-1.2, excerpts; *Public Service Employee Relations Act,* R.S.A. 1980, c. P-33, excerpts; *Royal Oak Mines Inc. v. Canada Labour Relations Board* (1996), 133 D. L. R. (4th) 129 (S.C.C.); *International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd.* (1996), 96 C.L.L.C. ¶210-037 (S.C.C.); *CBC v. Canada (Labour Relations Board)* (1995), 121 D.L.R. (4th) 385 (S.C.C.); *United Association of Journeymen and Apprentices of the Pipefitting Industry v. W.W. Lester (1978) Ltd. et al* (1990), 76 D.L.R. (4th) 389 (S.C.C.); *Canada (Attorney-General) v. Public Service Alliance of Canada* (1991), 80 D.L.R. (4th) 520 (S.C.C.); *Shalansky v. The Board of Governors of Regina Pasqua Hospital* (1983), 145 D.L.R. (3rd) 413 (S.C.C.); *Re Brewery Employers Industrial Relations Association and Western Union of Brewery Beverage Workers, Local 287* (1989), 65 D.L.R. (4th) 81 (Alta. C.A.); *ATU, Local 1374 v. Greyhound Lines of Canada Ltd. and Feguson Bus Lines Ltd.* [1991] Alta. L.R.B.R. 646 (Sims, Chair); *Construction and General Workers, Local Union 11111 v. Sie-Mac Pipeline Contractors Ltd.,* [1991] Alta. L.R.B.R. 847 (Sims, Chair); *Re Ontario Hydro and Power Workers' Union (C.U.P.E., Local 1000)* (1996), 59 L.A.C. (4th) 441 (Canada, Burkett, Chair); *Zenon Environmental Inc. v. B.C.G.E.U.*, B.C. Industrial Relations Council, No. C74/92, June 5, 1992, Reconsideration of No. C50/91, March 8, 1991; *Cable TV Limited and Syndicat des Employes de Service Technique de Cable TV (CNTU)* (1980), 2 Can LRBR 381 (C.L.R.B., Foisy, Vice-Chairman); D.P. Jones, Q.C. and A.S. de Villars, Q.C., *Principles of Administrative Law*, 2nd ed., (Scarborough: Carswell, 1994), excerpts; S. Blake, *Administrative Law in Canada*, (Toronto: Butterworths, 1992), excerpts; *McLeod v. Egan* (1974), 46 D.L.R. 150 (S.C.C.); *City of Pointe-Claire v Quebec [Labour Court]* (1997) 146 D. L. R. (4th) 1 (S.C.C.); G.W. Adams, *Canadian Labour Law*, 2nd ed. Pp. 8-25 to 8-30; *Banff Centre Act*, R.S.A. 1980, c. B-1; *Regional Health Authorities Act*, S.A. 1994, c. R-9.07; *Bibeault v. McCaffery* (1984) 7 D.L.R. (4th) 1 (S.C.C.); *Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994) 19 Admin. L.R. (2d) 68 (Fed. Ct. Trial Div.); *University of Alberta Non-Academic Staff Association v. The Board of Governors of the University of Alberta, Focus Building*, L.R.B., March 24, 1997 (Vice-Chair Lucas) (NASA No. 2); *CBC v. Canada (Labour Relations Board)* (1995), 121 D.L. R. (4th) 385; *International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd.*, (1996) 96 C.L.L.C. ¶210-037 at p. 141,330 (S.C.C.); *Lapointe v. Domtar Inc; Commission d'appel en matiere de lesions professionnelles et al, mis en cause* (1993), 105 D.L.R. (4th) 385 (S.C.C.); *Foothills Provincial General Hospital v. U.N.A., Local 115* (1993) 10 Alta. L.R. (3d) 254; Alta. Q.B., per Rooke J.; *United Nurses of Alberta, Local 33 and Royal Alexandra Hospitals*, 1995, Alta. Q.B., per Moreau J.; *N.S.N.U. v. Camp Hill Hospital* (1989), 94 N.S.R. (2d) 430, 247 A.P.R. 430, 66 D.L.R. (4th) 711 (C.A.) [leave to appeal to S.C.C. refused (1990), 110 N.R. 80, 97 N.S.R. (2d) 180, 258 A.P.R. 180, 68 D.L.R. (4th) vii]; *United Association of Journeymen and Apprentices of the Pipefitting Industry v. W.W.Lester (1978) Ltd. et al.* (1990) 76 D.L.R. (4th) 389; D.P. Jones and A.S. de Villars, *Principles of Administrative Law*, 2nd Edition; S. Blake, *Administrative Law in Canada*, *Re Harelkin and University of Regina* (1979) 96 D.L.R. (3d) 14; *Canadian Pacific Ltd. v. Matsqui Indian Band* (1995), 122 D.L.R. (4th) 129; *Westbank First Nation et al v. British Columbia Labour Relations Board, British Columbia Government Employees' Union, and British Columbia Nurses' Union* (1996) 38 Admin. L.R. (2d) 89; *Carriere v. British Columbia (Labour Relations Board)* [1995] B.C.J. No. 2927; *CUPE, Local 1545 v. Nova Scotia* (1996) 40 Admin. L.R. (2d) 232.

III. Background

a) University

The University of Alberta is an employer as defined in s. 1(o) of the *Public Service Employee Relations Act* because its Board of Governors is appointed by the Lieutenant Governor in Council. The University is therefore a public service employer. This conclusion is reinforced by the *University Act* which states, in s. 21.7, that the *Labour Relations Code* does not apply to the University. The Non-Academic Staff Association of the University of Alberta is certified under the *PSERA* as the bargaining agent for "all employees of the University when employed in general support services;" in this decision, I may refer to the Association as the union. During the period in question, the University and NASA had negotiated a series of collective agreements.

In 1992, the University advised NASA that it intended to contract out building cleaning services; in 1993, the University informed the union that it was planning to contract out printing services; in 1994, the University notified the union that it was planning to contract out food services.

Eventually, NASA sought successorship and common employer declarations from the Labour Relations Board under sections 44 and 45 of the *Labour Relations Code* in relation to these three privatizations.

The Board concluded that the union had been so slow to move on these matters, that it dismissed, outright, two of the applications brought by the union. The only contracting out situation which the Board considered on its merits was the 1994 contracting out of food services to Versa. In relation to that situation, the Board concluded:

- on the s. 44 application, that a business or a part of a business may be transferred or sold from a *PSERA* employer to a *Code* employer and successorship rights and obligations may flow to the purchaser. The Board continued:

  "it then becomes a question of fact in each case as to whether the parties to an existing collective agreement have directly or impliedly limited their recognition to the employees working within the *PSERA* employer's jurisdiction;"

- The Board went on to hold that, in the circumstances of that case, and given the express limitation set out in that collective agreement, the collective agreement was not capable of being transferred across statutory jurisdictional lines. Therefore, the certification under *PSERA* did not "remain in effect" under the *Code*;

- On the s. 45 application, that since the *Labour Relations Code* specifically excludes the University from the *Code*'s operation, no common employer finding could be made;

- There is a further issue in the University's case which relates to whether the application for judicial review is premature. The Board released its decision in *NASA No. 1* on July 12, 1995. It released its decision on *Saddle Hills No.*

> *1* on January 10, 1996, and its reconsideration decision, *Saddle Hills No. 2,* on July 19, 1996. On February 6, 1997, Gallant J. directed that the judicial review applications of the *NASA* decision and *Saddle Hills No.* 1 and *Saddle Hills No. 2* be heard in tandem. On March 24, 1997, the Board issued its decision in *NASA No. 2* in which it agreed to reconsider the NASA decision, with a view to taking into account the decision in *Saddle Hills No. 2.*

b) Municipalities

The Government of Alberta is an employer under the *Public Service Employee Relations Act.* Its employees provided services for various improvement districts, which districts were employers within the definition of *PSERA.* The Alberta Union of Provincial Employees is, by statute, the certified bargaining agent for the employees of the government.

On January 1, 1995, provincial legislation created four municipalities out of former improvement districts. The majority of the employees of the new municipalities were former improvement district employees who were covered by the collective agreement in effect between AUPE and the Crown In Right of Alberta. Since January 1, 1995, the municipalities hired some additional employees other than former improvement district employees. In the result, all of the former improvement district employees are now municipal employees, but not all municipal employees are former government employees.

By s. 13.1(2)(i) of the former *Municipal Government Act,* the members of the advisory councils for the respective improvement districts became the councils for each of the municipalities; that section "deemed" the advisory councils to be the councils of the new municipalities. Section 1(o) of the *PSERA* states that an employer comes within the jurisdiction of that legislation if the members of its council are designated by statute or appointed or designated either by the Lieutenant Governor in Council or by a Minister of the Crown. On October 16, 1995, elections for new councils took place. During the period January 1, 1995 - October 16, 1995, the new municipalities were administered by the former advisory counsels.

AUPE asked the Labour Relations Board, pursuant to its jurisdiction under *PSERA,* to declare the municipalities as successors to the Crown in relation to the union's certification and collective agreement. The Crown was given notice of those proceedings. The Crown wrote to the Board and advised that it appeared that the Crown had no involvement in the successor application and would not be attending the hearing. During the course of the hearing, the Board expanded the scope of the proceedings. It added the following element:

> The Board asked the following: If successorship applied to the Municipal Districts under the *PSERA* prior to October 16, 1995, what happens after the election when the

> new councils were elected? With the agreement of the parties, the Board indicated that, if necessary, it would make the appropriate determinations under section 11(3) of the *Labour Relations Code* to answer this question.

No notice was given by the Board to the Crown that the Board would be dealing with any matter under the *Code*.

The Board found, under s. 90 of the *PSERA*, that the four municipalities are successors to the Crown in respect to the collective agreement negotiated between the union and the Crown covering all employees of the Crown in the public service. The Board indicated that, after October 16, 1995, the municipalities were employers under the *Code*. The Board concluded that the Crown and the union intended that the collective agreement operate outside the bounds of the *PSERA*.

The Crown asked for a reconsideration by the Board of its decision. The Board agreed to do so. A reconstituted Panel of the Board came to the following conclusions:

> The Crown excluded itself from the hearing at its peril. Notice was provided to the Crown which made it clear that the Union was seeking to preserve the collective agreement and have it apply to the municipal districts.
>
> Between the period of January 1, 1995 and October 16, 1995 the members of the municipal councils for each of these municipal districts were designated by an Act of the Legislature... and, accordingly, met the definitional test of employer in the *PSERA*. Section 4.2 of the *Code* specifically excluded them from the provisions of the *Code* at that time.
>
> A collective agreement is like any other contract between parties. Unless the Legislature specifically terminates the agreement upon the change between statutes, there is no policy reason for the Board to adopt an interpretation of the statutory scheme of the *Code* so as to preclude the carry over of such an agreement. The agreement meets the statutory definition of collective agreement in the *Labour Relations Code*.
>
> It was not necessary for the [first] Panel to examine the intent of the parties [i.e. the intent that the agreement continue under a statute other than the *PSERA]* to reach the conclusion that it did.

The Board finds no substantial errors in the conclusion of the original panel that the collective agreement survived the transition from the *PSERA* to the *Code*, with a resulting voluntary recognition bargaining relationship.

c) **Legislation**

Ss. 44 and 45 of the *Labour Relations Code* deal with the effect of the sale or transfer of a business on bargaining rights. These sections are contained in Division 7 of the legislation which is entitled "Modification of Bargaining Rights."

Section 90 of the *Public Service Employee Relations Act* deals with successor employers.

Those sections are reproduced in Appendix A.

IV. Role of Board on Judicial Review Hearing

In this case, the Crown objected to the Board making submissions regarding notice to the Crown in the municipalities case. The issue of the scope of the Board's submissions on that issue was the subject of pre-hearing discussion between the parties. At that stage, the Board agreed with the Crown that it would restrict its submissions to: identifying the portion of the Blair Panel decision in which this issue was addressed and identifying the section of *PSERA* and the *Code* which deal with notice obligations and with the statutory powers of the Board. However, during the course of the hearing, the Board concluded that because certain arguments would not be made by the parties, the Board was entitled to advance those arguments. In view of the time element in this already seriously protracted hearing, the court allowed the Board to present the arguments, and asked the parties to address the Board's contentions, but reserved on the issue of whether those arguments would be considered by the court.

A tribunal whose decision is the subject of an application for judicial review has a limited role on the hearing. The overall scope of the tribunal's role was established by a unanimous Supreme Court of Canada in *Re Northwestern Utilities Ltd.* Subsequently, in *Paccar*, LaForest J., speaking for himself and Dickson C.J.C., but not for the other members of the majority of a divided court, reviewed the pronouncements of the S.C.C. on the status of a tribunal. He noted, first, that the decision in *Bibeault* could be reconciled with *Northwestern Utilities* in this way:

> It is not very case in which a denial of natural justice will flow from a patently unreasonable interpretation of a statute. In the latter case, however, the administrative tribunal will be able to make **certain limited submissions.** (Emphasis added)

Second, he adopted the following reasoning to justify the role taken by the administrative tribunal in *Paccar* itself:

> ... the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them.

LaForest J. then concluded:

> The council had standing to make all these arguments, and in doing so it did not exceed the limited role the court allows an administrative tribunal in judicial review proceedings.

In my view, the Board has attempted to take its role on a judicial review hearing too far. It is not enough for the Board to say that certain arguments "would not otherwise be made."

Even LaForest J., in the broadest possible view of the role of an administrative tribunal on the judicial review hearing, which view has not yet been adopted by a majority of the Supreme Court of Canada, has underlined that a tribunal has a limited role in judicial review. Moreover, even LaForest J. has limited an expanded role to that of providing the court with information about the tribunal's operation or approach which the court would not otherwise have. Even accepting, therefore, for the purposes of this hearing the expanded role advocated by LaForest J., the Labour Relations Board's role was properly limited to those submissions on which it had agreed with the Crown prior to the hearing.

What is the problem if an administrative tribunal oversteps the limits of its role on a judicial review application? As pointed out by Reed J. in *Canada (Human Rights* Tribunal):

> ... the tribunal's role in a judicial review application is restricted because the usual remedy, when the applicant is successful, is to send the matter back for a rehearing by that same tribunal (preferably by a differently constituted panel thereof when that is possible). Thus, the limited standing on review is designed to preserve, to the extent possible, the tribunal's image of impartiality.

If a tribunal were allowed to make unlimited substantive submissions basically defending its decision, the litigants would understandably feel concern about going back to that same tribunal and asking it to look at the issues afresh. That is why a tribunal's role on judicial review hearings is limited to those areas which are within the particular knowledge of the tribunal. In many cases, such as this one, the parties to the judicial review hearing will be knowledgeable labour and administrative law litigants. They will have sufficient knowledge of the underlying legislation to answer any questions the court might have. Assuming that they are represented by lawyers, the lawyers will have a professional obligation not to mislead the court.

In this case, the issues were more than adequately dealt with by the parties. The court will not consider the Board's submissions on the issue of notice.

V. Standard for judicial review

Section 18 of the *Code* is a privative clause. Section 3 of *PSERA* imports s. 18 of the *Code into PSERA.* In addition, s. 89 of *PSERA* is a separate privative clause. Therefore, in decisions, whether made under *PSERA* or the *Code*, which come within its jurisdiction, the Labour Relations Board is entitled to great deference. The courts may not interfere with its decisions, except those which are clearly irrational.

Even a tribunal whose decisions are protected by a privative clause must, however, be correct in making those decisions by which its jurisdiction are defined. A tribunal must also respect the principles of natural justice. If a tribunal fails in either of these latter two obligations, its decisions may be reviewed by the courts.

Each of the Board's decisions must therefore be examined to determine whether review will be granted. In doing so, the court must undertake a pragmatic and functional analysis of the Board's decision and must undertake that analysis with the restraint urged upon it by the Supreme Court of Canada.

VI. Did the Board make a clearly irrational decision in its successorship finding (s. 44 of the *Code*) in the University case?

a) The s. 44 successorship decision was not jurisdictional

The Board did not make a clearly irrational decision when it decided that it was not the intention of the University and NASA that their collective agreement could be transferred to the private sector and imposed on Versa.

The court concludes, as a preliminary matter, that the Board's decision on this issue is not jurisdictional. Therefore, the court could not interfere with the decision if the decision were incorrect; it could only interfere with the Board's decision if the decision were clearly irrational.

Why does the court conclude that the Board's decision was not jurisdictional?

A jurisdictional decision is one which gives the Board jurisdiction. The decision which gave the Board jurisdiction to make a successorship order was the decision that the collective agreement **could** survive a transfer from the public sector to the private sector. But NASA does not object to that decision.

NASA only objects to the subsequent decision — the decision about whether this particular collective agreement is binding on the new employer. That decision is not one of principle, but one of detail; it is one of fact, not of jurisdiction.

NASA says that, in making the decision that a collective agreement could survive the transfer from the public regime to the private one, the Board did not consider the power which it has in s. 44(2)(c) of the *Code* to make unlimited amendments to the collective agreement. For example, the Board could strike out, replace, or modify the bumping provisions of the public sector collective agreement to make it "fit" the new private sector situation.

The point is that the Board did not need to consider the s. 44(2)(c) powers; even without reference to those powers, the Board concluded that a public sector collective agreement could bind a private sector employer. NASA does not, and indeed could not, object to that conclusion.

NASA, which originally asked for judicial review of the Board's decision, changed its mind when it read the Board's decision in *Saddle Hills* # 2, which did not treat its previous decision in *Ferguson Bus Lines* with the same deference as had the Panel in NASA # 1. On the contrary, in *Saddle Hills* # 2, the Board said that it did not need to look at the intent of the parties, it just needed to decide that there was an agreement as defined in the *Code*. Now, NASA would rather have the Board reconsider the University-Versa successorship issues in light of what NASA hopes will become a standard, *anti-Ferguson,* Board approach to privatization issues. NASA says that this re-hearing is necessary to avoid having inconsistent Board decisions.

The mere fact that the Board's s. 44 successorship decision in NASA is inconsistent with the Board's decision in the municipalities' case does not give the court the jurisdiction to embark on a review: *Domtar*. On the contrary, administrative tribunals have the right to be wrong, even seriously wrong. In the case of two inconsistent decisions, one could be right and one could be wrong, or both could be wrong.

In summary on this issue, the Board's decision on intent was not jurisdictional.

b) The s. 44 successorship decision was not clearly irrational

NASA argues that, in any event, the Board's decision that the University and NASA did not intend their collective agreement to bind private sector employer was not reasonable because the Board did not look at any evidence on that issue other than the collective agreement itself.

I reject NASA's contention: the Board did not make a clearly irrational decision in concluding that the parties did not intend to have their agreement cross the threshold between the public sector and the private sector.

As indicated earlier, NASA does not complain about the Board's decision that a collective agreement could survive the transfer from the public sector to the private sector; therefore, for purposes of this review, I will accept the Board's decision on this issue as being correct. I note, however, that the decision about whether an agreement can survive the transfer from the public sector to private sector may well be a jurisdictional decision; even if it is, however, that issue simply does not arise on the facts of this case.

After having found that an agreement could cross the boundary between public and private sector regimes, the Board went on to find:

> It is a question of fact in each case whether the parties to the collective agreement in question have directly or impliedly limited their recognition to the employees working within a given jurisdiction. The existence of a certification is evidence that might support that conclusion (for example, a scope clause saying the employer recognizes the Union for employees covered by Certificate Number x would seem to limit recognition to those within one jurisdiction). However, it would normally be one piece of evidence on the question, rather than deciding it conclusively.
>
> The effect of *Ferguson Bus Lines* is to hold that even where a certification is null for lack of jurisdiction, the Board may still find a valid voluntary recognition and a binding collective agreement, depending on the express language of the agreement.

In order to assess whether there was such voluntary recognition, the Board went on to assess the language of the collective agreement. It noted, for example, that the preamble to the agreement stated: "Whereas the *Public Service Employee Relations Act* applies to the University of Alberta and the support staff of the University of Alberta;" it also referred to the content of articles 2.01, 2.07(b), 38.05(c), 38.05(f), 43.04. The latter article states: "Collective bargaining disputes shall be settled in accordance with the provisions of the *[Public Service Employee Relations]* Act."

After considering the content of those articles in the collective agreement, the Board went on to say:

> We are satisfied the collective agreement negotiated between NASA and the University clearly contemplates operating in the legislative regime imposed upon the University.... In the circumstances of this case, and given the express limitations set out in the collective agreement, this collective agreement is not capable of being transferred across statutory jurisdictional lines.

There was not, as contended by the union, an evidentiary vacuum on the s. 44 issue. Administrative tribunals are not, of course, restricted in the evidence which they are allowed to consider in the same way that courts are restricted. However, a sound principle of law states that, where there is an agreement in writing that is signed, it is only in exceptional cases that a person will be allowed to offer evidence to contradict the agreement. It is presumably for that reason that the Board held, in *Ferguson Bus Lines,* that the Board could look to the collective agreement itself to discern the intent of the parties. The union does not allege that any of those exceptional situations applies here. The language of the collective agreement is clear and unambiguous. There is no obvious need for the Board to consider external evidence and NASA hasn't identified any such need. This is not to say that evidence of intention is never relevant. Obviously, if voluntary recognition, for example, were in issue, evidence of intent may be required.

In any event, it must also be noted that the Board has, when it is acting within its jurisdiction, very great latitude to control its own procedure. It can decide what steps to take to expedite its own proceedings. It would be very difficult for NASA to succeed in its argument that the Board dealt improperly with the issue of intent.

NASA argues now that the Board did not consider whether it could use its powers under s. 44(2)(c) of the *Code* and, on the basis of *Saddle Hills* # 2, that was an option which would have been open to it. There are at least two answers to that contention. The first is that, as I understand the process before the Board on NASA # 1, although NASA was given the opportunity to present submissions in writing to the Board, and did so, it did not raise this issue. It makes sense that NASA would not have raised this issue because, of course, NASA was relying on *Ferguson Bus Lines* for the proposition that the collective agreement, but not the certification, could cross the line from public sector to private sector. It can't be error for the Board not to have considered something which it was not asked to consider. Also, even *Saddle Hills # 2* has pointed out that there may be some limitations on the right of the Board to amend a collective agreement; indeed, it is counter-intuitive to expect that the Board could, on its own motion, change or supplant that which the parties have agreed. What NASA's argument comes down to on this point, is that it wants a new hearing before the Board to allow a new case to be put before the Board. It is undoubtedly within the Board's rehearing powers to entertain a completely new case. Whether a court decision on judicial review should be deferred in order to allow the Board to do so will be considered under the next heading.

In summary then, the Board considered the best evidence available about the intention of the parties and concluded, on the basis of the evidence that the parties did not intend to carry their agreement forward into another regime. That is a rational decision made within jurisdiction, on a matter which is peculiarly within the expertise of the Labour Relations Board, and is not a decision which is reviewable.

VII. Did the Board err in concluding that the University and Versa were not common employers as defined in s. 45 of the *Code*?

The Board did not err in its common employer finding in this case.

The policy objective of s. 45 of the *Code* is clearly to prevent spin-offs which having the inappropriate effect of shielding an employer from the obligation to bargain with a union and to apply a collective agreement.

A decision about whether employers are common employers is clearly jurisdictional. Absent a decision that the two employers come within the meaning of s. 45 as a result of the operation of s. 4(2) of the *Code*, the Board has no jurisdiction to use s. 45. The Board itself has said that s. 4(2) issues are jurisdictional. As I understand it, NASA accepts, for the purpose of this judicial review, that the decision of the Board on this issue must be correct.

NASA argues that the Board was wrong when it concluded that the University and Versa were not common employers, because s. 45 of the *Code* does not apply to *PSERA* employers, and the University is a *PSERA* employer. NASA acknowledges, however, that it faces an uphill battle on this argument because the Board has clearly held, among other decisions in *HCEU,* and the 5 member panel reconsideration of *HCEU,* that the differences between private sector employers and public sector employers, relating for example to strikes and lockouts, are so important that employers from the two sectors cannot be joined together as a common employer and be treated as the real employer of a group of employees. It should be noted, as well, that the Board included, in its HCEU decisions, reference to the *Econosult* decision of the Supreme Court of Canada.

NASA's argument is that s. 4(2) of the *Code* says that the *Code* does not apply to employers as defined in *PSERA,* **and to whom that Act applies.** It says that the highlighted words must be given some meaning; it suggests that when the University contracted out certain portions of its food operations to Versa, *PSERA* no longer applied to it.

The answer to that position is, in part, that there are at least two interpretations of the highlighted words which leave the University as an employer as defined by *PSERA* and to which that act applies:

- first, the Act does not identify the University as an employer. The Act merely states that employers whose governing council is, in the majority, appointed by the government, is a public sector employer. That definition **applies** to the University;

- second, the Act includes a schedule which exempts some institutions who would otherwise be public sector employers. That schedule **does not apply** to the University. On the contrary, one schedule specifically exempts all Universities, even when they are dealing with academic staff.

Therefore, the Board's decision that the University is an employer as defined in *PSERA* **and** to which *PSERA* applies is correct according to the wording of the statute itself.

Moreover, it is a principle of statutory interpretation that interpretation must be purposive. Here, the Board was entitled to take into account labour policy and practice in concluding that the Legislature of Alberta could not have intended, in ss. 4(2) and 45 of the *Code*, to allow the Board to make common employer decisions which yoke a public sector and a private sector employer together. Indeed, in that context, the Board noted the decision of the S.C.C. in *Econosult*. In that case, the S.C.C. said:

> In the scheme of labour relations which *I* have outlined above, there is no place for a species of de facto public servant who is neither fish nor fowl. The introduction of this special breed of public servant would cause a number of problems which leads to the conclusion that the creation of this third category is not in keeping with the purpose of the legislation when viewed from the perspective of a pragmatic and functional approach.

Analogous considerations apply in the case at hand. Alberta is one of the Canadian jurisdictions in which there are fundamental differences between public sector and private sector labour relations. Those fundamental differences occur both with respect to certification and with respect to collective agreements. In the public sector unions are appointed by the Legislature. In the private sector, certification occurs through a two-step process: first, forty percent of the employees in the unit applied for must sign a petition or maintain membership in the union. Then, the union must establish, through a representation vote, that a majority of the employees in the unit applied for support of the union. The differences are no less important on the collective bargaining side. The right to strike in the private sector and the absence of that right in the public one is, of course, one of the most noticeable differences. Without elaborating all of these differences, in the public sector, as opposed to the private one, the parties cannot force to impasse matters in respect of pensions, the selection, appointment, promotion, training or transfer of employees, job evaluation, the organization of work, the assignment of duties, the determination of the number of employees; none of these matters can be the subject of impasse bargaining and arbitration. It is clear that labour relations in the two regimes call into question very different considerations.

Finally, support for the Board's interpretation of the "common employer" provision of the *Code* can be gleaned from the fact that the Alberta Legislature did not include any common employer provision in *PSERA*. Therefore, the legislator clearly did not intend to make a public service employer a common employer with a private sector employer.

The Board's common employer decision is correct.

For completeness, I will also deal with the argument NASA advanced in its original brief but did not pursue at the hearing, to the effect that the Board declined to consider the s. 45 issue. If, indeed, the Board had so declined to make a common employer decision, then NASA's argument that the Board had lost jurisdiction through an unwillingness to act would have merit. If the Board had declined jurisdiction, then there is no other institution to whom the union could have turned for a decision.

However, rather than declining to determine the s. 45 issue, the Board accepted and agreed with the contracted out employers that s. 4(2) of the *Code* specifically limits the applicability of s. 45 of the *Code*. S. 4(2) states:

> *This Act does not apply to*
>
> > *(a) an employer as defined in the Public Service Employee Relations Act and to whom that Act applies;*

If the Act does not apply to a *PSERA* employer, s. 45 of the Act does not apply to such an employer.

The application of s. 45 of the *Code* depends on the threshold determination of s. 4(2) issues; those two together create a jurisdictional threshold.

As Beetz J. held in *Bibeault*:

> ... the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and... such a tribunal cannot by a misinterpretation of the enactment assume a power not given to it by the legislator.

The Legislature of Alberta clearly intended to limit the jurisdiction of the Labour Relations Board. Although its decisions within jurisdiction are not reviewable, its decisions about the extent of its jurisdiction are reviewable.

The Board was correct in its determination that there could be no common employer in the situation where the University was one of the alleged common employers.

In any event, if *I* were wrong in holding that this was not a jurisdictional issue, the bar the court would have to clear before interfering with a Board decision would be even higher - and would require the Board to have made a clearly irrational decision. The Board's decision on common employers is not clearly irrational.

For these reasons, the court cannot interfere in the Board's decision.

VIII. Should the court postpone its decision on judicial review of the University decision to allow the Board to hold a re-hearing?

Judicial review is, of course, a discretionary remedy; even if a court concludes that it can review the decision of an administrative tribunal, it is not required to interfere with the decision. For example, judicial review is not usually granted where an alternative remedy exists. In this case, it is contended by NASA and by the Board itself that since the Board has already indicated that it will grant a re-hearing of the NASA case, the court should not be asked to review the existing decision.

NASA, in particular, argues that the Board should be allowed to continue with its proposed re-hearing. It says that the Board, in *Saddle Hills* # 2 specifically "over-ruled" its previous decision in *Ferguson Bus Lines.* NASA argues that since the panel which decided *NASA* # 1 relied on *Ferguson Bus Lines,* Board should now be given the opportunity of reconsidering the union's position, using the approach of *Saddle Hills* # 2 instead of *Ferguson Bus Lines.*

However, in this case there are certain factors which militate against delaying the granting of judicial review. First, there is the time factor. NASA had notice for a long time of the University's intention to contract out before it decided to approach the Board for a ruling. One of the important justifications of specialized labour tribunals is that they can deal speedily with problems in the workplace. This must be seen in the context of the labour relations culture in which new collective agreements are typically negotiated every two or three years. That objective will not be advanced by allowing the matter to go back to the Board for reconsideration. Indeed, given that there could be a judicial review of the re-hearing decision, the fate of the University and its support staff, and the new employers could very well be in suspense for the better part of a decade — not a result that is useful in labour relations matters. Second, as the Board itself has pointed out during this hearing, relying in part of the Supreme Court of

Canada decision in *Domtar,* there is no requirement for the Board to be consistent in its decisions. Therefore, the fact that the Asbell Panel relied on *Ferguson Bus Lines,* and that the Blair Panel indicated that *Ferguson* should be approached with caution creates no problem for the Board. Indeed, on this issue it may not be correct for NASA to say that *Saddle Hills* # 2 rejects *Ferguson Bus Lines;* it might, rather, be said merely that *Saddle Hills* # 2 found that it did not need to go so far as *Ferguson Bus Lines.* If this were the correct relationship between those two decisions, that would further weaken NASA's untenable argument that opposing Board decisions should not be allowed to co-exist. Third, NASA was successful on the issue which the Board now wants to reconsider. NASA asked for judicial review not of the decision that the agreement can survive the transfer from public to private sector, but only of the decision relating to the intent of the parties. If successful litigants can ask for reviews of decisions which are in their favour, there will be great delay and uncertainty of labour relations. The Board should not be the primary actor in a request for reconsideration.

IX. Did the Board make an error in its re-hearing of the municipalities case?

The Board deprived the Crown of natural justice in its re-hearing of the municipalities case. Therefore, the decision of the Board is quashed and is returned for a re-hearing.

The original hearing (Asbell Panel) in the municipalities case was a s. 90 hearing under *PSERA.* The Crown took the position that it had no interest in this hearing:

After reviewing particulars of the A.U.P.E. application, it appears that the Personnel Administration Office, Government of Alberta has no involvement in the successor-employer status of Municipal Districts named in this application. Therefore, the Government of Alberta will not be providing any particulars nor attending any hearings.

When it learned that the Board had included, on its own motion, an additional issue, one linking the *PSERA* issues with *Code* issues, the Crown asked the Board for a re-hearing. The Board granted a re-hearing, On the re-hearing (Blair Panel), the Board concluded:

> The Crown alleges surprise that the proceeding involved the issue of whether the collective agreement survived the transition from the *PSERA* to the *Code*. Given the circumstances, it is hardly surprising that the issue came up. It was, in fact, inevitable. Further, the issue at that point of the inquiry does not involve the Crown except in the most indirect of ways.... That is not to say that the Crown had no reasonable expectation of being heard. The Board recognizes the importance of the issues in this case. There is no reason to believe that the Panel would not have welcomed the submissions of the Crown on these important matters... The Crown's decision to absent itself was made at its peril. The proceeding took an entirely predictable turn when the

> parties addressed the issue of the collective agreement's ability to survive a transition to the *Code*. A party which has chosen to absent itself from legal proceedings the results of which might concern it cannot, by its absence, dictate how those proceedings will be managed... In all the circumstances, the Crown's position that it has been denied natural justice has no merit.

With respect, the Board's assessment of the Crown's right to notice is wrong.

The Board was quite right, to say that a party which decides to absent itself from legal proceedings does so at its peril. However, that peril is limited to the application of which it has notice. The Crown has given a good analogy: suppose a father is advised that the mother has a claim relating to access; the father decides not to attend the hearing. The father can't complain if the court changes the existing access pattern. But, if, without further notice to the father, the court decided to change the custody of the child, to take custody away from the father, perhaps to take custody away from both parents and give custody to a grandparent, the father does have a legitimate complaint. A decision will have been made that will affect him; he did not know that the court would consider this issue. It is wrong to say, he should have known that this is an issue that might have come up. The issue of custody is not subordinate or ancillary to access. In the same way, a decision under the *Code* is not ancillary or subordinate to a decision under *PSERA*. The point of pleadings, the point of requests to have the Board make decisions, is to alert not only the Board, but other interested persons about the issues that will be determined at the hearing.

In this case, the Crown was entitled to make a decision about whether to participate in the hearing based on the material before it; that material related only, and clearly, to s. 90 of the *PSERA*. The Blair Panel was disingenuous when it stated that "the [*Code*] issue came up," it is the Board itself, and not the parties — i.e. the union and the municipalities, which raised the issue of what would happen after the election in its decision, the Asbell Panel clearly identified its role:

> The Board raised an ancillary issue regarding the fact that the legislation creating the respondent Municipal Districts called for the election of new councils effective as of the next election, which subsequently took place on October 16,1995. **The Board asked the following:** If successorship applied to the Municipal Districts under the *PSERA* prior to October 16, 1995, what happens after the election when the new councils were elected? (Emphasis added)

The Asbell Panel itself recognized that it did not have jurisdiction, as of right, to answer that question. In other words, it recognized that this was a fundamental issue, not an "ancillary" one that flowed naturally from the existing issues. In its decision, the Asbell Panel rationalized its decision to extend the hearing in this way:

> **With the agreement** of the parties, the Board indicated that, if necessary, it would make the appropriate determinations under section 11 (3) of the *Labour Relations Code* to answer this question. (Emphasis added)

The problem is, of course, that the Board did not have the agreement of the Crown to embark on consideration of this ancillary question.

In any event, while it is true that the issue of the status of the municipalities might have come up after the election, it is not correct to say that the issue would have arisen inevitably. For example, the municipalities and the union could have sat down to negotiate an agreement. Or, if the municipalities and the union could not agree, there might have been a separate hearing. In the first case, the Crown would not have had an interest; in the second, the Crown would have had a separate opportunity to consider if it wanted to participate.

It should also be noted that the Blair Panel itself recognized that the Crown had a legitimate interest in the issue about whether a public sector agreement can transfer to the private sector. Interestingly, however, that Panel characterized the level of interest as "indirect:"

> Further, the issue at that point of the inquiry does not involve the Crown except in the most indirect of ways. Once the Municipal Districts were found to be *PSERA* successors until October 16, 1995, the issue remaining was peculiarly between the Union and the Municipal Districts. The question then became — what happens to the collective agreement between those parties? The Crown was, at this point, entirely out of the relationship. Thus, the Crown's claim to notice of the subsequent issue is less strong that its claim to notice of the *PSERA* successorship hearing, of which it was given notice.

With respect, this analysis fails entirely to recognize that if, as a matter of Alberta Labour Relations Board policy it accepts that public service collective agreements will bind private sector employers, that decision will have a crucial impact on any government privatization policy. This analysis by the Board does, perhaps, explain why it failed to give notice to the Crown in the first place.

Having agreed to a re-hearing, and having had a re-hearing, the Board could have cured its initial failure to give adequate notice. However, the Board's decision on the re-hearing — Saddle Hills # 2 — demonstrates that the Board did not go back to square one and treat the Crown as if the Crown were appearing for the first time on the initial application:

> Finally, the Crown asked to be able to introduce new evidence, which it did not call in the original hearing because it did not appear, dealing with the issue of the intention

> of the parties in reaching certain provisions in the collective agreement. The Board decided not to receive the evidence at that time, but reserved its ability to do so, in the event that it became relevant.

The Board does not come back to the issue of evidence in its decision. As I understand the process before the Blair Panel, the Crown was never allowed to lead evidence on the issue of intent.

Moreover, there are one or two troubling statements in the Blair Panel' s decision which must lead the Crown to wonder whether it was clearly recognized as a full participant in that hearing. I point, for example, to p.7 of the decision, where the Panel speaks of "both parties," presumably excluding the Crown.

More importantly, however, the Blair Panel never concludes that evidence of intent is irrelevant. On the contrary, it says:

> Can it seriously be thought that the Ferguson parties bargained with a view as to how their bargain would be construed under Alberta's *PSERA*?... We find it doubtful that they did.

The Board should not leave itself in a doubtful position about an issue of fact; it should receive evidence on the point. It may be that evidence would be available from the parties about the climate of privatization at the time of collective agreement bargaining and the effect of any such public political pronouncements on the labour negotiations.

The Board breached the Crown's right to notice of the *Code* issue. The Blair Panel's decision must be granted and the issue remitted to the Board.

X. Must the conclusion that the municipalities *were PSERA* employers prior to the election be correct?

The Board's decision that the municipalities were *PSERA* employers is jurisdictional and had to be correct.

Did the Legislature of Alberta intend that the Labour Relations Board could interpret the jurisdictional sections of *PSERA* and the *Code* in any way it wanted, so long as it did not give an interpretation that was clearly irrational? No, it did not. In some provinces, there is a unified labour regime; Alberta is not one of those provinces. The Legislature obviously intends to distinguish between the public and private sector
regimes.

The Board was asked by the union to make a decision that the new municipalities were successor employers under the provisions of s. 90 of *PSERA*. Unless the new municipalities were *PSERA* employers, s. 90 could not be applied. Therefore, the Board could only derive jurisdiction by finding that the new municipalities were *PSERA* employers. Therefore the Board's decision was one of jurisdiction. Or, as the Board itself put it: "This question was an integral part of the Panel's determination that a successorship under *PSERA* had occurred."

The particular question which the Board had to answer was whether the members of the advisory council were "designated" or "appointed" by the government. This specific decision was really a threshold question of jurisdiction.

It must be noted, first, that, this decision involved an interpretation of the *Municipal Government Act*. The Labour Relations Board is not an expert on that statute. Its interpretation of that statute must be correct.

Even though the issue is one of jurisdiction, recent case law states that courts must go one step further and determine whether it is the type of jurisdictional question which the administrative tribunal may have the jurisdiction to answer. Here, there is nothing in the surrounding circumstances to suggest that the legislator intended to give to the Board the power to decide this jurisdictional question for itself.

Although the government gave to the Board broad powers to interpret the term "employer," the decision about whether new municipalities, and the taxpayers in those municipalities, should be burdened with the bargaining regime developed in the public sector is a major issue of public policy which the Board cannot arrogate to itself. I use the term "burden" in this situation not as any prejudgment of the issue, but as a reflection of reality: the new municipalities in this case are four, small, remote, communities in Northern Alberta. There can be no doubt that if the new municipalities must provide the salaries, wages and benefits package that has been negotiated for all provincial government employees, this will be a costly for the taxpayers in those municipalities. The determination of the way in which this contest between municipal taxpayers and municipal employees will be resolved is a matter for the government, by legislation. The government's decision is embodied in the various statutes that apply to this issue.

In summary then, the Board's decision about whether the new municipalities were *PSERA* employers prior to the election was a jurisdictional decision which is only protected from review if it is correct.

XI. Is the decision that the municipalities were *PSERA* employers prior to the election correct?

The decision that the municipalities were *PSERA* employers between January 1, 1995 when they were created and October 16 when elections were held was wrong.

The *Code*, and not *PSERA*, applies to municipalities. The four new municipalities argue that from the date of their creation, they were *Code* employers, just like all other municipalities. They also argued that the councillors of the new municipalities were not "appointed" or "designated" by the government, and therefore, the new municipalities did not come within the definition of "employer" in *PSERA*.

That definition — the definition of a public service employer — reads as follows:

> *1(o) employer means*
>
> > *(i) a corporation, commission, board, council or other body, all of a majority of whose members or directors*
> >
> > > *(A) are designated by an Act of the Legislature,*
> > >
> > > *(B) can be appointed or designated either by the Lieutenant Governor in Council or by a Minister of the Crown in right of Alberta or partly by the Lieutenant Governor in Council and partly by a Minister of the Crown in right of Alberta, whether the power of appointment or designation is exercised or not or is only partially exercised, or*
> > >
> > > *(C) are in part designated by an Act of the Legislature and in part can be appointed or designated either by the Lieutenant Governor in Council or by a Minister of the Crown in right of Alberta or partly by the Lieutenant Governor in Council and partly by a Minister of the Crown in right of Alberta, whether the power of appointment or designation is exercised or not or is only partially exercised;*

Section 13.1(2) of the *Municipal Government Act* in force at the time of the creation of the new municipalities contained the following provision:

> *When a municipal district is formed under this Part,*

> *(i) the members of the advisory council for the former improvement district are deemed to be the council of the municipal district until a new council is elected under the **Local Authorities Election Act**.*

The new municipalities argued that their council members were not appointed or designated by the government, but were deemed to be elected and not appointed or designated.

The Board rejected the argument of the new municipalities. It concluded that they were *PSERA* employers.

On the issue of the legislative interpretation, the Board held:

> The simple function of the *PSERA* definition of "employer" is to ask the question: who selects a majority of the entity's governing body government, or someone else? By enacting this "deeming" clause, the Legislature has selected the membership of the interim council with as much certainty as if it had appointed them by name. By deeming the members of the advisory councils to be the members of the municipal councils until the next election, we find that the Legislature determined, considered, held, chose or construed those persons to have the powers of the municipal council or treated them as if they did during the transition period.

The Board referred with approval to the following extract from a decision by the Manitoba Court of Appeal in *Mutchenbacker*.

> Generally speaking, when you talk of a thing being deemed to be something, you do not mean that it that which it is deemed to be. It is rather an admission that it is not what it is deemed to be and that, **notwithstanding it is not that particular thing,** nevertheless, for the purposes of the Act, it is to be deemed to be that thing. (Emphasis added)

I agree with the Board's use of the Manitoba case to explain the meaning of the word "deem;" I disagree with the Board's interpretation of the case.

The Blair Panel, in *Saddle Hills #2*, concluded that the legislator deemed the advisory council to be the council, rather than the members of the council to be elected: "[We have found] that the word 'deemed' creates a body with the power to govern, not an elected body."

In my view, the Asbell Panel, in *Saddle Hills #1*, correctly interpreted the word "deemed" when it said:

> "Deemed," when used in this context, means to consider them to be, for all intents and purposes, a duly elected or appointed Council. As set out in *Black's Law Dictionary*, the members are to be "treated as if" they are the duly elected Council.

That Panel went on to say that in order to accomplish the "treating as if," the legislator "decreed, ordained or appointed" the advisory council to be the new council. In my view, the Asbell Panel went wrong when it put that additional gloss on the interpretation of the word "deem."

The *Mutchenbacker* case and Black's Law Dictionary stand for the same proposition: when the word "deem" is used in this context, it creates a fiction. The fiction created here is that the individual members of the advisory council had been elected as members of the municipal council. That fiction applied in everything: it enabled those individuals, acting as a council, to pass by-laws, it allowed them to get paid, it allowed them to do everything an elected council could do. It applied equally to labour relations issues: it put the new municipality into the company of other municipalities, those with elected councils, which were under the *Code*, and not under *PSERA*.

Moreover, it is clear, that the legislator understood the concept of "appointment" and, in the municipal context, it used that terminology in situations such as s. 56(1)(a) of the former *M.G.A.* and s. 90 of the new *M.G.A.* where it intended to convey the idea that it was the government that was running the show. Those sections represent municipal situations where, presumably, the municipality remains in the public sector because the government is appointing the administrator. The Board's decision that "deemed" should be equated "appointed" in effect deprives the government of its ability to distinguish between those two concepts. The Board cannot so restrict the Legislature of Alberta.

On the issue of the public policy argument, the Board held:

> Counsel argued that the presumptive statute governing labour relations for all private sector employers, including municipal districts, was the *Code* and therefore to suggest these new municipal districts were ' employers under the *PSERA*, even in the transition, did not make labour relations sense... Even if according to their function and the general scheme of our labour laws these newly-formed Municipal Districts are a better "fit" with the *Labour Relations Code*, that is not enough to overcome the clear language of s. 4(2) [of the *Code*] which places even a Municipal District under *PSERA* as long as its council is designated by government.

With respect, this also constitutes error. It is a principle of statutory interpretation that a purposive interpretation must be given to legislation. The Board itself recognizes that municipalities "fit" with the *Code*. Why then, would the government be assumed to have intended that, for a 9 month period, a fledgling municipality would be saddled with what the Board itself recognizes to be a grossly inapplicable agreement?

As a collateral factor, it must be noted that if the Board had been correct in determining that the municipalities were *PSERA* employers prior to the elections, one anomalous result is that the holding of elections is not a transfer, within s. 44 of the *Code*, and the municipalities might therefore continue to be *PSERA* employers forever.

In summary, then, the Board committed reviewable error when it determined that the new municipalities were *PSERA* employers. This constitutes a second basis on which the court sets aside the Blair Panel's decision and remits the matter to the Board.

Because the court has ordered a new hearing of the municipalities case, it is inappropriate for it to comment extensively on the other issues that were addressed on the application for judicial review. It may be helpful to the parties, however, for the court to make the following additional comments.

XII. Was the Board entitled to conclude that the collective agreement could survive the transfer from the public sector to the private sector?

It is important to note that although the Board concluded in *Saddle Hills #2* that the collective agreement survived the transfer from the public sector to the private sector, and although that decision accords with the Board's decision of principle in *NASA #1*, this judicial review does not deal with the issue of whether the Board made a correct decision on this issue in either *NASA #1* or in *Saddle Hills #2*.

So also, it is not necessary in this decision to determine whether the Board 's conclusion in *Saddle Hills #2* is a jurisdictional one. The Board has argued in this hearing that it was entitled to provide a bridging mechanism which has not been provided by the Legislature because of its broad sociopolitical, economic and labour expertise and that no one can interfere with the Board's decision. That analysis might be correct, but it is not necessary for the purposes of this hearing to determine that issue.

It may be, for example, that Ferguson Bus Lines is a treacherous guide to the solution of a privatization problem if that case dealt only with transfers within the arbitration sphere rather than with transfers from an arbitration sphere to a strike sphere. The fact that the transfer in that case was only from federal private sector strike sphere - to provincial private sector — strike sphere — may distinguish its reasoning from the reasoning required in a privatization transfer. As the Board itself noted, the issue in *Ferguson Bus Lines* was limited to the issue about whether an agreement entered into under one piece of legislation can transfer to another; the Board did not emphasize that those two pieces of legislation were in the same sphere. It may be that *Ferguson Bus Lines* could only apply in a transfer from one sphere to another sphere if the parties consented to the transfer. This would not be a consent to giving the Board jurisdiction since, indeed, jurisdiction is not a matter of consent. Rather it would be a matter of novation in contract, which the parties are entitled to accept. It may also be that the reasoning in Ferguson Bus Lines is limited to "garden variety" transfers.

It may be, for example, that the Board has only limited powers to act as a legislator in creating a bridging mechanism between the public and private sector where the legislator itself has shown, as it has in this province with the Banff Centre and Regional Health Units legislation that it knows how to create those bridging mechanisms when it wants to.

It may be, for example, that the Board cannot invoke a notion of fairness in treating collective agreements like all other commercial agreements when, in fact, all other contracts do have privity problems and do not survive the transfer from the public sphere to the private sphere without the assistance of the specific legislative provisions of the *Municipal Government Act.* Nor, as the municipalities have pointed out, is a collective agreement the same as a gravel contract: a gravel contract is entered into freely between the Minister and the gravel contractor. A gravel contract is a contract between those two parties; a collective agreement deals not with individual parties, but with groups of individuals. Also, a collective agreement may be forced on parties by arbitration. There may, for that reason alone, be some justification for treating the two types of contract differently. Further justification may be found in the obligation on the government when it legislates on municipal matters, to consider not only labour relations, but also the development of a structure of local governance that will provide good government in a safe, and viable, community.

It may be, for example, that the Board has created an artificial barrier to its consideration of the issues relating to privatization when it states that a collective agreement will survive the transfer from the public sector to the private sector "unless the Legislature specifically terminates the agreement." The weight of Canadian labour authority appears to hold the opposite view: that agreements do not transfer unless governments facilitate the transfer by legislation.

XIII. Was the Board correct in concluding that there had been voluntary recognition of the uncertified union?

Even though the Board has almost unlimited discretion in making decisions within jurisdiction, it may be that this discretion does not extend to "deeming" voluntary recognition where the evidence establishes that there was no voluntary recognition in fact. It may be that natural justice requires the Board to receive evidence on the issue of whether there was voluntary recognition.

XIV. Costs

If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision. In this context, I recognize that the arguments by several of the parties on December 19, 1997 with respect to what was alleged by them to be an inappropriate procedure by AUPE may have to be re-addressed.

AJIT BAINS, SUKHVINDER GILL, MANJIT JASMAR SINGH and CONSTRUCTION AND GENERAL WORKERS, LOCAL UNION NO. 1111, Applicants and DYNAMIC FURNITURE CORP., Respondent. Board File: GE-02729. September 30, 1998.

Deborah M. Howes, Vice-Chair, Scott Boyd and Dolores Herman, Members

For the Applicant: W.J. Johnson (Counsel), R. Malitowski, Onkar P. Ghuman

For the Respondent: W.J. Armstrong (Counsel), D. Sunderji

Unfair labour practices - Employer - s. 145(1) - Employees dismissed during certification effort - Anti-union animus - Board found employees terminated for union conduct - Employer not acting in the usual course of business - Employees reinstated.

Unfair labour practices - Employer - s. 146(1)(a)(ii) - Dismissal of employees intended to impact outcome of representation vote - Interference with Union's representation of employees - Employees reinstated.

Unfair labour practices - Employer - s. 147(c) - Employees dismissed for participating in Union certification effort - Violation of Code - Employees reinstated.

Evidence - Credibility - s. 13(5) - Witnesses testifying through interpreter - Cultural differences - Factors for assessing credibility - Content of evidence, demeanour of witness, compatibility with other testimony.

Three employees of Dynamic Furniture Corp. ("Dynamic") alleged they were dismissed due to their involvement with Construction and General Workers, Local Union 1111 (the "Union"), contrary to Code sections 145, 146 and 147. The dismissals occurred during an attempt by the Union to organize Dynamic (see Alta. L.R.B.R. 56). Dynamic argued the dismissals were not the result of anti-union animus, but for cause.