LRC, PSERA, POCBA

INTRODUCTION

The *Labour Relations Code* gives the Labour Relations Board jurisdiction over labour relations in areas of economic activity (1) under the legislative authority of the provincial government **and** (2) within the province of Alberta. The limitations on the Board's jurisdiction are discussed below under the following headings:

- specialized jurisdiction;
- extraterritoriality; and
- constitutional jurisdiction.

SPECIALIZED JURISDICTION

The Board's jurisdiction is limited or excluded entirely by several provincial statutes that create specialized labour relations regimes:

Public Servants

The *Public Service Employee Relations Act* (PSERA) creates a separate bargaining regime for certain public-sector employers. PSERA applies to the provincial Crown and all "corporations, commissions, boards, councils or other bodies" whose members are designated by legislative, cabinet or ministerial appointment. The Schedule to the PSERA, however, exempts from the Act certain "governmental" employers who continue to be governed by the *Labour Relations Code* unless otherwise noted. Section 3 of PSERA gives the Labour Relations Board the power to administer and interpret PSERA including the right to make a series of determinations.

Post-Secondary Education

The *Labour Relations Code* does not apply to the academic staff of a public college, university or technical institute. Each of the post-secondary statutes designates academic staff associations as employee bargaining agents, specifies bargaining units, mandates collective bargaining of terms and conditions of employment, and provides for the arbitration of disputes. Non-academic staff of these institutions are governed by the *Public Service Employee Relations Act*. See: [*Post-Secondary Institutions, Chapter 31(j)*].

Police

The *Labour Relations Code* does not apply to police officers. Municipal police forces are governed by the *Police Officers Collective Bargaining Act* (POCBA) which constitutes "in-house" police associations as employee bargaining agents. It also removes the right to strike or lockout, substituting compulsory interest arbitration in its place. The POCBA gives the Labour Relations

Board jurisdiction over the acquisition and loss of bargaining rights and unfair labour practices, as well as the general power to make determinations of fact or law affecting the parties.

Firefighters

The *Labour Relations Code* applies to firefighters. As with police, it substitutes compulsory arbitration for the right to strike or lockout. The Board continues to exercise its normal jurisdiction in all other aspects of firefighter labour relations. The Board has made a number of rulings related to firefighter bargaining units. See: [*Standard Bargaining Units, Chapter 22(c)*].

Schools

The Board has general jurisdiction over labour relations between teachers and school boards. The Board's authority is, however, limited by provisions of the *School Act* deeming certain terms relating to transfer, suspension, termination and temporary positions to be included in every teacher's contract of employment. In effect, a teacher disputing one of these terms is not asserting a right under the collective agreement and, it further follows, the Board has no jurisdiction to examine whether the bargaining agent has violated its duty of fair representation. See: [*Teachers, Chapter 31(e)*].

EXTRATERRITORIALITY

It is sometimes thought that, because the Alberta Legislature is constitutionally empowered to legislate in respect of property and civil rights only "in the province," the Board has no jurisdiction over employment relations outside the province. This is not the case. Board jurisdiction extends to activities outside the province where those activities are minor or temporary and are an integral part of an activity clearly falling under provincial authority. For example, where workers generally work for an employer in Alberta and are overwhelmingly connected with Alberta, Alberta labour law will continue to apply to them when they are dispatched to Saskatchewan on temporary assignment. They are still considered to be employed in Alberta unless the employment outside Alberta is so well established and ongoing that the other province acquires a stronger factual claim to regulate the employment relationship.

In certification proceedings, then, employees of an Alberta employer who leave Alberta temporarily in the course of their duties may be affected by the proceeding. The tests are, is the employee's work outside Alberta an integral part of the Alberta operation? And is that work so minor and transitory in nature that no other jurisdiction has a superior claim to regulate their labour relations? If an employee working outside Alberta is subject to Alberta jurisdiction on these tests, the employee is considered to be in the bargaining unit and eligible to vote according to the ordinary principles of inclusion and eligibility.

CONSTITUTIONAL JURISDICTION

Constitutional jurisdiction over labour relations is divided between federal and provincial governments and generally follows jurisdiction over the economic activity of which the labour

relations are a part. Constitutionally speaking, labour relations are a matter of "property and civil rights in the Province" and under provincial authority (*Constitution Act*, 1867, Section 92(13)), unless they are an integral part of an activity under federal constitutional authority. The major areas of federal labour relations jurisdiction are:

- air transport and airports;
- shipping and navigation, including longshoring;
- interprovincial transport, including pipelines and interprovincial courier services;
- television and radio broadcasting (including cable television) and telecommunications (including local and provincial telephone systems);
- most railways, but not "short-line" railways within a province;
- banking;
- the postal service;
- customs; and
- grain elevators.

The federal government also has authority over:

- the federal civil service, which is governed by the federal *Public Service Staff Relations Act*;
- employees of federal crown corporations, who are governed by the *Canada Labour Code*; and
- labour relations in the Yukon, Northwest Territories and Nunavut. Although the territorial legislatures possess delegated power to regulate labour relations, to date they have not passed labour relations statutes.

Tests Of Jurisdiction

There is no foolproof test of constitutional jurisdiction. It is usually a judgment call based on the particular facts of an employer's operation.

In determining which level of government has jurisdiction in a labour relations matter, the key consideration is not who the employer **is**, but what the employer **does**. Just because an employer is in some respects "federal" does not mean that its labour relations invariably fall under federal jurisdiction. For example, First Nation businesses conducted on a reserve fall under provincial authority if a similar non-First Nation business would also be governed by provincial law. See: [*Four B Manufacturing Ltd.* (1980) 80 C.L.L.C. 14,006 (S.C.C.)]. A hotel run by a railway company falls under provincial labour relations authority even though the company is federally regulated in all other aspects of its operations. See: [*CPR v. A-G for British Columbia* [*Empress Hotel* case] [1950] A.C. 122 (P.C.)]. In each case the questions must be asked: what kind of activity is this employer engaged in and what level of government has legislative authority over that activity?

In any doubtful case, the first step should be to identify precisely the federally regulated activity (usually referred to as the "federal undertaking") in question. Federal jurisdiction over an economic activity is usually limited to the ongoing operation of the activity. For example, the federal undertaking engaged in by the Canadian Pacific Railway is properly described as "the *operation* of an interprovincial railway system" and the federal undertaking engaged in by Bell Canada is properly described as "the *operation* of an interprovincial telecommunications network."

Because federal undertakings are typically defined in operational terms, they do not include the initial construction of the capital stock of the undertaking. Construction, whether it be of an apartment building or an airport runway, is essentially a localized activity unrelated to the ultimate use to which the structure is put. For example, an employer constructing a runway at Mirabel Airport falls under provincial labour relations jurisdiction. See: [*Montcalm Construction Inc. v. Minimum Wage Commission* (1979) 79 C.L.L.C. 14,190 (S.C.C.)].

Sometimes the identification of the federal undertaking is enough to resolve the question of constitutional jurisdiction. Further inquiry is necessary when the activity in question is local in nature, but is a support service to an undertaking clearly within federal authority. For example, is an employer engaged in data processing for a company that operates a grain terminal governed by federal labour law? What about longshoring operations? Or airline catering companies?

In such cases the second step should be to ask whether the supporting operation is a "vital or integral part" of the federal undertaking. In other words, can the federal undertaking function without the supporting operation? If not, the supporting operation will also fall under federal authority.

Special problems arise where the activity in question involves reconstruction of works on a federal undertaking. Constitutional jurisdiction in these cases will depend on whether the activity is essentially a matter of ongoing maintenance, or a "one-time" replacement of the capital stock of the undertaking. If the former, the maintenance work can be described as a "vital or integral part" of the operation of the federal undertaking and employees performing such work will be federally regulated. If the latter, the work is virtually indistinguishable from initial construction work and employees performing it will fall under provincial authority. In this vein, contractors on a project involving major reconstruction or outright replacement of railway bridges have been held to be governed by provincial labour laws. See: [*Antioch Construction Ltd. v. CJA 1549* (1987) 87 C.L.L.C. 14,017 (Fed. C.A.)]. Similarly reconstruction work on an interprovincial pipeline is provincial. See: [*Waschuk Pipeline Construction Ltd.* [1987] Alta.L.R.B.R. 611; affd. [1988] Alta.L.R.B.R. 369 (Q.B.)].

A final problem arises where employees perform both federally and provincially regulated work. It is a basic principle that labour relations jurisdiction over an operation cannot be split, so that employees will not find themselves federally regulated in the morning and provincially regulated

in the afternoon. In such cases a third test is necessary. Where an employer's operation involves both "federal" and "provincial" work, the entire operation will fall under federal jurisdiction if its employees perform federal work on a "regular and continuous" basis. It is not necessary that the federal work constitute a majority of the employees' duties, but only that it be something more than a minor, irregular or trivial part of their overall duties.

This test is often applied in the area of interprovincial and international transport. A transport operation will fall under federal jurisdiction if it "regularly and continuously" travels out of province. For example, a municipal transit service running a few regular routes into another province is federal. See: [*Ottawa-Carleton Regional Transit Commission v. ATU 279* (1983) 83 C.L.L.C. 14,034, 144 D.L.R. (3d) 581; affd. 4 D.L.R. (4th) 452, 84 C.L.L.C. 14,006 (Ont. C.A.)]. A small proportion of out-of-province business conducted on an irregular basis will not, however, convert a carrier under provincial jurisdiction into one governed by federal law.

Board Protocol in Cases of Doubtful Jurisdiction

Where there is doubt as to which of the Alberta or Canada Boards has jurisdiction in a given case, cautious counsel file concurrent applications for certification in order that membership evidence will not go "stale" and a statutory freeze period will run in favour of the union and employees no matter which tribunal ultimately assumes jurisdiction. When an application is received that raises a question of constitutional jurisdiction, Alberta Board practice is to accept the application as filed, confirm the existence of a concurrent application to the Canada Board, and defer to counsel's decision as to which Board to proceed in front of initially. The application to one Board is generally held in abeyance (adjourned *sine die*) by agreement of the parties pending the other Board's decision.

Similar procedures apply when the jurisdictional choice is between BC or Saskatchewan and Alberta. This is particularly likely to arise in applications involving Lloydminster or BC-Alberta border sites.