CONSTRUCTION INDUSTRY DISPUTES RESOLUTION TRIBUNALS

INTRODUCTION

The *Labour Relations Code* allows the settlement of the last 25% of the trade disputes in a sector by a form of arbitration. Sections 189-191 give the Minister the power to set up a Construction Industry Disputes Resolution Tribunal (CIDRT).

The Board has no role in the proceedings before the tribunal. The Board may, however, have to rule on whether the necessary 75% of the collective agreements are settled, so that disputes can be referred to the tribunal. This policy describes:

- when CIDRTs are established and disputes referred; and
- CIDRT procedures and jurisdiction.

WHEN CIDRTs ARE ESTABLISHED AND DISPUTES REFERRED

When CIDRTs Are Established

The Minister can establish a Construction Industry Disputes Resolution Tribunal at any time. While there is no time limit, the Minister normally does so just before disputes are ready for referral, or else once a party applies for a referral which is timely. A new CIDRT is established for each biennial round of collective bargaining. Section 191(1) speaks of a CIDRT and that implies there is to be only one tribunal, not one for each dispute. See: [*Minister of Labour v. CLRa et al.* [1990] Alta.L.R.B.R. 300 at 337].

When Disputes Are Referred to a DRT

Section 189(1) of the Code sets out when registration disputes are to be referred to a CIDRT. It provides:

> 189(1) When 75% of the groups of trade unions and registered employers' organizations in the sector have entered into collective agreements,
>
> (a) the Minister shall refer the remaining items in dispute to the construction industry disputes resolution tribunal if the Minister is requested to do so by one or more of the parties who have not entered into collective agreements, or
>
> (b) the Minister may on the Minister's own motion refer the remaining items in dispute to the construction industry disputes resolution tribunal.

The Board considered several aspects of this section in *Minister of Labour v. CLRa et al* [1990], above.

When is the 75% Question Decided?

The Board has held that the decisive time is the time the Minister makes the reference to the tribunal. A request made before the 75% is met may be rejected by the Minister. Such a request is, however, not void. The Minister, if the Minister chooses, may hold the request until investigation discloses that the 75% figure has been met. It is only the Minister's power to refer a dispute that is limited to the period after the 75% settlement figure is met. See: [*Minister of Labour v. CLRa et al.* [1990], above at 332].

When Have Parties Entered Into a Collective Agreement?

It is not always easy to decide when parties have entered into a collective agreement. For three examples of disputed facts, see: [*Minister of Labour v. CLRa et al* [1990], above].

The Board has interpreted the parties entering into a collective agreement in the context of a full registration collective agreement. The Board's view has been that, if items remain in dispute between the group of trade unions and the REO, then the parties have not entered into a collective agreement for the purposes of the Section 189(1) calculation.

Underlying this issue are important questions. Can a group of trade unions and an REO enter into more than one registration agreement—for example, one for commercial work and one for industrial work within the general construction sector? Similarly, can they sign a partial collective agreement while items still remain in dispute for part of their trade? If they do enter into such a partial agreement, does it count towards the 75% calculation? If so, can the remaining dispute between those parties go on to DRT for resolution?

A court decision holds that there can only be one collective agreement per registration certificate. That same decision went on, however, to hold that an agreement covering only a portion of the work within the part of the industry prevents any reference to DRT for that registration. The Court reasoned:

> ... only a party which has not entered into a collective agreement may request the Minister to refer to the Tribunal remaining items in dispute—that is, those that remain in dispute between such parties. Parties who have not entered into collective agreements are the only parties who may make such a request of the Minister.
>
> Referring to subsection (1) as a whole, once there is a collective agreement, whether it deals with only some, many or all of the issues between the parties, that agreement is a collective agreement which may be considered by the Minister in deciding whether in that sector, 75 percent of the groups of trade unions and registered employers organizations in the sector have entered into collective agreements. And once that has been cited, those issues that remain in dispute between two parties which have a collective agreement cannot be remaining items in dispute.

> Consequently in my view the Tribunal was correct in its decision that any items remaining unagreed between these two parties which happen to be those relating to the commercial and institutional area of the sector were not within the jurisdiction of the Tribunal. See: [*Insulators v. CLRa Insulators (Provincial) Trade Division and Hawco et al.* (Unreported Alta. Q.B. No. 9103-03205, August, 1991, D.C. McDonald, J.)].

The Court drew no distinction between registration collective agreement and an ordinary collective agreement. Any collective agreement between the parties will count towards the 75% and will present any reference of remaining items in dispute to the tribunal. This leaves it impossible, except by agreement, to resolve items that in fact remain in dispute in the unsettled part of the industry.

One Reference or Several?

The Board has interpreted the reference power in Section 189 in the following way. When a party to a trade dispute (the union side, the REO side, or both) asks the Minister to refer the dispute to the tribunal, and the 75% threshold is met, the Minister must refer the items in dispute in that trade to the tribunal. This does not automatically sweep in the other unsettled trades within the sector. Once the 75% threshold is met, however, the Minister has an independent discretion under Section 189(1)(b) that can be exercised coincident with, or independent of, any request(s) under (a). Under subsection (b), the Minister can refer the outstanding items in dispute between one, several or all of the unsettled trades on to the tribunal for resolution.

CIDRT PROCEDURES AND JURISDICTION

Minister's Options

The Minister has three areas of discretion in respect of CIDRT procedures. The Minister can decide:

- **When to Refer Disputes to a CIDRT:** This discretion is explained above. The way the Minister refers disputes to CIDRT may well affect how the CIDRT proceeds to resolve those disputes.

- **Who to Appoint to a CIDRT**: Unlike an arbitration board, CIDRT is a statutory tribunal created by the legislation. Its members are appointed by the Minister under Section 191. The tribunal can be one person, or a group of persons with one appointed as Chair. Some parties believe they should be entitled to nominate CIDRT members in much the same way they would arbitration board members. In the past, Ministers have informally consulted parties for their suggestions, but not accepted direct nominations. As one CIDRT may deal with several disputes, and thus several different parties, a nomination process would be difficult to operate even if the Minister were to favour such an approach. The legislation may, however, contain that flexibility. See: [*Minister of Labour v. CLRa et al.* [1990], above]. Once appointed, CIDRT members have the powers, duties and immunities of commissioners

under the *Public Inquiries Act*. The CIDRT members are paid by the Crown at rates set by the Minister.

- **Whether to Direct a Method of Settlement:** The Minister can simply leave the CIDRT to do its job. As an alternative, the Minister can prescribe methods of arbitrating either for the whole dispute, or for particular items in dispute. Subsection 190(4) and (5) provide:

> 190(4) The construction industry disputes resolution tribunal shall implement any method or combination of methods of arbitration that the Minister directs it to implement to resolve any or all of the items in dispute.
>
> (5) Without restricting the generality of subsection (4), the method or combination of methods of arbitration implemented under that subsection may include the method of arbitration known as "final offer selection".

So far, no Minster has prescribed such methods for a CIDRT.

CIDRT Procedures

Aside from any restrictions imposed by the Minister, a CIDRT is very much master of its own process. The statute directs that "the tribunal shall inquire into the dispute and endeavour to assist the parties to resolve the dispute." Section 190(2) says "If the dispute is not settled by agreement the tribunal shall (a) make its award, and its award shall deal with each item in dispute...."

Disputes Still Separate

Although one CIDRT may handle several disputes (up to 25% of the sector), the disputes remain individual trade disputes. The "end product" remains individual trade registration agreements. While hearings may involve several trades, any final offer selection process must be trade-by-trade. The award under Section 190 must deal with the items in dispute for each individual trade. There must be a separate award for each trade capable of incorporation into an individual trade's collective agreement. See: [*Minister of Labour v. CLRa et al.* [1990] above].

CIDRT Jurisdiction

As noted above, CIDRT can only resolve items that remain in dispute. If the REO and the union(s) have a "partial" collective agreement, CIDRT may be without authority to resolve any issues remaining between the parties. See: [*Re CLRa Insulators (Provincial) Trade Division and Insulators 110 (unreported CIDRT award, November 16, 1990, Hawco, Chair)* and *Insulators v. CLRa Insulators (Provincial) Trade Division and Hawco et al.,* above].

CIDRT Approach

A DRT is much like an interest arbitration board, although it has some special features. Chair Albertini described the appropriate role for a CIDRT in describing his tribunal's approach. See: [*Re CLRa ISM/Lathers (Provincial) Trade Division and Carpenters 846 et* al. Unreported CIDRT award, October 4, 1991, Albertini, Chair].

...the role of an interest arbitration board or tribunal, failing a settlement during the process, is to replicate as close as possible the collective agreement which the parties would have reached as a result of collective bargaining using all of the tools available, including economic sanctions.

In *Board of School Trustees*, Arbitrator Dorsey said:

> In the public sector, finding a yardstick in the "real world" to tailor an appropriate replicated or simulated award is an unscientific task. It must not be too rigid or static or it will stifle future bargaining by making the outcome of arbitration too easily predictable. At the same time, it must not be purely speculative or have no basis in rational matching of like circumstances. The award should pay close attention to the concerns of the parties and the information they produce, but it will necessarily be an impressionistic, instinctive assessment of the parties' circumstances, the times and the over-all economic health of the community. Much of that cannot be articulated.

The "real world" referred to above is, in our opinion, the private sector where the only money available to employers is from owners who contract for the services of contractors' employees. It is from that money that employees are paid. For that reason, the law of supply and demand is a criteria which must be considered. We do not agree, however, that it is the determining factor in determining wages and wage-related issues. There is no checklist of factors which, in descending order of importance, interest arbitration boards or tribunals must use in making decisions. Each case may have circumstances which make it different from the last.

...

In this province, the government has set up a very deliberate scheme in the construction industry which respects free collective bargaining including the use of economic sanctions, to a point. At present, until at least 18 of the 24 construction collective agreements have been settled, settled by free collective bargaining, there is no law which takes away a union's right to strike or an employer's right to lock out to obtain key demands. It is only after 75 percent of construction collective agreements have been resolved that the compulsory feature of the legislation may come into play. When that occurs, as it has in this case, the parameters of earlier settlements become a factor; in our view, an important factor. The associations representing construction contractors and the trade unions representing the unionized sector of the construction industry have by then established a pattern of settlement for the industry. They have determined that pattern in a free collective bargaining environment which included the threat of strike or lockout. The results, while not being determinative, are certainly persuasive.

We agree that in replicating an award, we should not be "too rigid or static or it will stifle future bargaining." We further agree that we should make an "instinctive assessment of the parties' circumstances ... and the over-all economic health" of the industry. We go further and say that the prospect of an imposed settlement should be a deterrent and not an attraction.

When addressing an issue which can be identified as a "patterned settled issue," any party seeking to deviate from that pattern must present compelling evidence that a variation is warranted.