COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Okanagan College v. Okanagan College Faculty Association,* 2025 BCCA 117

Date: 20250411
Docket: CA50182

Between:

Okanagan College

Appellant
(Employer)

And

Okanagan College Faculty Association

Respondent
(Union)

And

The Attorney General of British Columbia

Respondent
(A party pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68)

Before: The Honourable Madam Justice Fisher
The Honourable Mr. Justice Abrioux
The Honourable Justice Donegan

On appeal from: An award of an Arbitrator under the *Labour Relations Code*, R.S.B.C. 1996 c. 244, dated September 6, 2024 (*Okanagan College v. Okanagan College Faculty Association*).

Counsel for the Appellant:	L.M. Thomson E.S. Ferguson
Counsel for the Respondent, Okanagan College Faculty Association:	C.D. Bavis J.N. Louie
No one appearing on behalf of the Respondent, The Attorney General of British Columbia	
Place and Date of Hearing:	Vancouver, British Columbia March 19, 2025
Place and Date of Judgment:	Vancouver, British Columbia April 11, 2025

Written Reasons by:
The Honourable Madam Justice Fisher

Concurred in by:
The Honourable Mr. Justice Abrioux
The Honourable Justice Donegan

Summary:

This is an appeal from an award of a labour arbitrator under s. 100 of the Labour Relations Code. The arbitration concerned the denial of long-term disability benefits to employees over age 65 and whether the appellant's long-term disability plan was a bona fide plan within the meaning of s. 13(3)(b) of the Human Rights Code. The appellant grounded this Court's jurisdiction on the basis that the arbitrator incorrectly interpreted the legal test for a bona fide plan under s. 13(3)(b). The respondent challenged the jurisdiction on the basis that the award was a factual determination of whether the plan was bona fide, or a question of the general law related to labour relations and determinations of fact.

Held: Appeal quashed for lack of jurisdiction. The amendments to s. 100 of the Labour Relations Code clarified the narrow and exceptional jurisdiction of this Court under s. 100, as reflected in the past decades of jurisprudence. The real basis of the award was the arbitrator's factual determination that the plan was not bona fide. His conclusion required an interpretation and application of the established legal test under s. 13(3)(b) to a complex factual matrix that arose from the terms of the collective agreement and the parties' lengthy collective bargaining relationship.

Reasons for Judgment of the Honourable Madam Justice Fisher:

[1] This is an appeal under s. 100 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 from an arbitration award declaring that the long-term disability plan (LTD Plan) of the appellant is not a *bona fide* plan under s. 13(3)(b) of the *Human Rights Code*, R.S.B.C. 1996, c. 210.

[2] Okanagan College (the Employer) and the respondent, Okanagan College Faculty Association (the Union) are parties to a collective agreement establishing the terms and conditions of employment for professors and other professionals. The arbitration award determined a long-standing grievance brought against the Employer by the Union. The Union maintained that the termination of group life insurance, accidental death and long-term disability benefits at age 65 constituted discrimination on the basis of age. The grievance followed the 2008 amendment to the definition of "age" in the *Human Rights Code*, which had the effect of eliminating mandatory retirement.

[3] This appeal raises the question of this Court's jurisdiction to hear an appeal from a labour arbitration award under s. 100 of the *Labour Relations Code* where the basis of the award is a matter or issue of the general law "unrelated to a collective agreement, labour relations or related determinations of fact".

[4] For the reasons set out below, it is my opinion that this Court does not have jurisdiction under s. 100 to hear this appeal.

Background

[5] The Union's grievance was before the arbitrator for over 10 years. The issues related to provisions in the collective agreement and age discrimination under the *Human Rights Code*. The parties eventually resolved matters relating to life insurance and accidental death benefits. By agreement, the arbitration proceeded in respect of the LTD Plan in two phases.

[6] In Phase 1, the arbitrator determined that the collective agreement did not require benefits to be provided to employees who worked past the age of 65.

[7] In Phase 2, the arbitrator determined that (1) a "no discrimination" article in the collective agreement did not preclude termination of benefits at age 65 under the LTD Plan and was subject to the rights and obligations in the *Human Rights Code*, including the *bona fide* plan exemption under s. 13(3)(b); (2) denial of LTD benefits after age 65 constituted *prima facie* discrimination under the *Human Rights Code*; and (3) the LTD Plan was not a *bona fide* plan under s. 13(3)(b). This appeal concerns only the last determination.

Discrimination and *bona fide* insurance plans under the Human Rights Code

[8] Discrimination in employment is addressed in s. 13 of the *Human Rights Code*. Section 13(1) prohibits discrimination against a person regarding any term or condition of employment on numerous bases, including age. Section 13(3) provides for specified exemptions from compliance with s. 13(1) that include "*bona fide*" insurance plans:

> **13** (3) Subsection (1) does not apply …
>
> (b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.
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> [Emphasis added.]

[9] This "*bona fide* plan" exemption as applied to a pension plan was interpreted by the Supreme Court of Canada in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45 [*Potash*]. There is no dispute that the test formulated by the majority reasons in *Potash* governs the interpretation of s. 13(3)(b) and its application to the LTD Plan in issue here.

[10] At issue in *Potash* was whether the words "*bona fide*" imported a reasonableness component as is applied to questions of "*bona fide* occupational requirements" under human rights law. Justice Abella, for the majority, agreed with

Justice Robertson in the New Brunswick Court of Appeal that the test was only to the *bona fides* of the plan, since the word "reasonable" is absent from the exempting provision of the New Brunswick legislation. She also agreed with the following formulation of a test with both a subjective and objective component from Robertson J.A.'s majority judgment (at para. 10):

> It is possible to inject an objective component into the bona fides test without reading in a reasonableness test. It is not simply a question of whether an employer honestly believes that ... the plan was not adopted for purposes of defeating protected rights. That belief has to be measured against an objective standard in the sense that the belief is reasonable in the circumstances of a particular case. For example, if the employer's pension plan could not be registered under the Pensions Act of New Brunswick, the objective component of the bona fides test might be difficult to satisfy. …

[11] Justice Abella considered that the legislature, in enacting the exemption, was seeking to:

> [24] …confirm the financial protection available to employees under a genuine pension plan, while at the same time ensuring that they were not arbitrarily deprived of their employment rights pursuant to a sham… This was the way the Province, in its human rights legislation, sought to address the concern that age discrimination claims might make benefits available under *bona fide* pension plans vulnerable to being destabilized unless protected by legislation.

[12] Justice Abella attempted to define the subjective and objective components:

> [32] … The subjective requirements of "*bona fides*" are not difficult to define — they relate to motives and intentions. It is more difficult to explain what makes a pension plan, objectively, *bona fide*. In my view, a number of sources direct us to a relatively basic conclusion: a *bona fide* plan is a legitimate or genuine one.
>
> [33] ... What this immunizes from claims of age discrimination is a legitimate pension plan, including its terms and conditions, like mandatory retirement. It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan. The piecemeal examination of particular terms is, it seems to me, exactly what the legislature intended to avoid by explicitly separating pension plan assessments from occupational qualifications or requirements. This is not to say that the *bona fides* of a plan cannot be assessed in relation to terms which, by their nature, raise questions about the plan's legitimacy. But the inquiry is into the overall *bona fides* of the plan, not of its constituent components.

[13] She defined a *bona fide* plan as a "legitimate plan, adopted in good faith and not for the purpose of defeating protected rights": at para. 41.

[14] In dissent, Chief Justice McLachlin interpreted the majority reasons to hold that a *bona fide* pension plan is any defined, registered plan that at the time of adoption was not "a sham" in that it need only be adopted in good faith and not for the purpose of subverting employee rights. She defined "*bona fide*" within the meaning of the exemption provision to require limits on employee rights to be justifiable "in the sense of being reasonably required having regard to the operation and sustainability of the plan": at para. 46.

The arbitration award

[15] The arbitrator considered the majority reasons in *Potash* to be the governing authority. He noted the Court was alive to the broader policy purposes of the legislation, which extended to employee insurance plans. This included a policy to avoid destabilizing benefit plans, a central issue in this case.

[16] The arbitrator described the *Potash* test as follows:

> 387. What is the *Potash* test? It was cast succinctly at the end of the majority for a pension plan to be found to be *bona fide* within the meaning of s. 3(6)(a), it must be a legitimate plan, adopted in good faith and not for the purpose of defeating protected rights. There are both subjective and objective components to the test (at para. 32).
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> 388. The court stated that the subjective requirements relate to "motives and intentions" (at para. 32). A pension plan is objectively *bona fide* if it is legitimate or genuine (at para. 32). In addition (at para. 33):
>
> > … It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan. The piecemeal examination of particular terms is, it seems to me, exactly what the legislature intended to avoid by explicitly separating pension plan assessments from occupational qualifications or requirements. This is not to say that the *bona fides* of a plan cannot be assessed in relation to terms which, by their nature, raise questions about the plan's legitimacy. But the inquiry is into the overall *bona fides* of the plan, not of its constituent components.

[17] The arbitrator interpreted the majority judgment as providing a "nuanced analysis" in determining whether a plan is *bona fide*:

> 390. … The test is a mix of objective and subjective factors. It would be a misstatement of the majority decision to say that a plan meets the *Potash* test as long as it is not a sham or a fraud. To repeat the court's summation (at para. 41), a *bona fide* plan is "legitimate, adopted in good faith and not for the purpose of defeating rights."

[18] He went on the apply the test to the present case. He found there was "little doubt that the LTD Plan is legitimate and was adopted in good faith": at para. 391. He then considered the requirement that it was not adopted for the purpose of defeating rights and held that the Employer's motives and intentions were to be evaluated against an objective standard. He articulated it this way:

> 397. Thus, under the test crafted by the majority in *Potash*, an employer may honestly believe the impugned plan was not adopted to defeat protected rights, but that is not enough. That belief must be measured against an objective standard in the sense that the belief is reasonable in the circumstances of the particular case.
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> 398. For practical purposes, the question in this arbitration is whether the Employer reasonably believed the Plan was not adopted to defeat rights, measured against an objective standard in this case.

[19] The arbitrator considered himself to be an administrative decision maker bound to also take into account *Charter* values under the *Doré-Loyola* framework (*Doré v. Barreau du Québec*, 2012 SCC 12; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12) in applying the *Potash* test. He declined to apply the test only to the conditions in 1976, when the LTD Plan was first adopted, but rather applied the test to the current circumstances:

> 422. For these reasons, the *Potash* test should be applied considering current circumstances and the totality of the evidence made available in this proceeding. It would be artificial to apply *Potash* solely to the Plan circa 1976 (initial adoption), or 2008 (end of mandatory retirement by the Code), or even 2013 (grievance filed).
>
> 423. A fulsome contemporary approach makes common sense and labour relations sense. The parties need a resolution to this lingering dispute. They have invested considerable resources in the hearing process. Faculty members working post-65, or considering doing so, deserve to know whether they will have LTD benefits. The Employer needs to know its obligations under Article 39 of the collective agreement in arranging insurance coverage,

> including potential new costs or administrative implications. Artificially limiting the context to 1976 and denying the grievance on that basis could trigger a fresh grievance and potentially lead to a duplicative second arbitration hearing.

[20] He considered the present case to turn on the "defeating protected rights" component of the *Potash* test:

> 428. … As held in the New Brunswick Court of Appeal and the Supreme Court of Canada, there is an objective element built into this component. The focus is on whether the Employer reasonably believed that the Plan was not being adopted for the purpose of defeating protected rights. Reasonableness is to be measured against an objective standard in the circumstances of a particular case. This formulation makes clear that there may be different outcomes in different cases under s. 13(3)(b), and the present award flows from a unique evidentiary record… The present award is confined to the facts of this case.

[21] The arbitrator acknowledged that *Potash* required only the plan itself to be evaluated, not the details or the terms and conditions. Because the grievance related only to the age-based disqualification, he considered the plan to become a nullity from the perspective of a 65-year-old employee. He found the Employer "knew and accepted that the LTD Plan was continued for the purpose of defeating rights":

> 435. The evidence shows that when the Union objected to the age cap after 2008, the Employer knew or ought to have known that there would be discrimination based on age, something the legislature had just outlawed. Of course, under the 2008 Code amendment the s. 13(3)(b) exception was continued, and College representatives explained to the Union their view that age distinctions were still allowed. But there was no question that the Plan stripped away the LTD entitlement of employees working post-65.
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> 436. Initially, College administrators believed this was necessary and reasonable because post-65 coverage was not available or would be costly. They believed any extension must be subject to trade-offs and not simply given free to the Union, in light of government mandates. Right or wrong, it was indisputably intended that age equality rights had to give way to certain insurance realities and costing.
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> 437. For a period, the Employer may reasonably have believed it was not continuing a Plan for the purpose of defeating rights. However, the reasonableness of that belief melted away as the context evolved.
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> 438. The insurance market adjusted to the end of mandatory retirement. Age caps in benefit plans were raised or disappeared entirely. In the present grievance, the AD&D and Group Life issues were resolved by raising the

> termination age to 75 years. Only 11% of AD&D and Group Life plans in Canada now terminate at age 65, according to Greschner. In 2016, Manulife quoted on options for post-65 LTD coverage with a defined termination date. … It became evident that the costs of a post-65 benefit would not be destabilizing.

[22] The arbitrator found it became untenable for the Employer to maintain its previous reasonable belief. Measured against an objective standard "in the evolving post-mandatory retirement environment", he concluded that the LTD Plan failed the "defeating protected rights" component of the *Potas*h test and was not *bona fide* under s. 13(3)(b). He added that a *Charter* values analysis reinforced this finding as he also found the impact on equality rights to be disproportionate to the statutory objective.

On appeal

[23] The Employer invokes the jurisdiction of this Court under s. 100 of the *Labour Relations Code* on the basis that the issue in dispute engages the interpretation of s. 13(3)(b) of the *Human Rights Code.* The Union disagrees, submitting that the real basis of the arbitration award is not a matter of general law within the meaning of s. 100.

[24] The Employer raises three grounds of appeal on the merits, submitting that the arbitrator made the following errors of law:

1. failing to follow *Potash* by adding a reasonableness component to the subjective part of the test that reflected the minority judgment;

2. misinterpreting what constitutes a discretionary decision that attracts *Charter* values; and

3. misapplying the *Charter* values analysis to create a new test under s. 13(3)(b) of the *Human Rights Code*.

[25] In light of my conclusion on jurisdiction, it is not necessary to address the merits of the appeal.

Jurisdiction under s. 100

[26] The *Labour Relations Code* creates mutually exclusive, non-concurrent jurisdictions for the Labour Relations Board and this Court under ss. 99 and 100:

> Appeal jurisdiction of the Labour Relations Board
>
> 99 (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that
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> (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
>
> (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.
>
> (2) An application to the board under subsection (1) must be made in accordance with the regulations.
>
> Appeal jurisdiction of Court of Appeal
>
> 100 On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law
>
> (a) unrelated to a collective agreement, labour relations or related determinations of fact, and
>
> (b) not included in section 99 (1).

[27] Section 100 was amended in 2019. The previous version provided:

> 100 On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law not included in section 99 (1).

[28] The jurisprudence prior to the amendment established an analytical approach to determining jurisdiction that considered three questions, summarized in *Health Employers Assn. of B.C. v. B.C. Nurses' Union*, 2005 BCCA 343 [*BC Nurses 2005*] at paras. 49–50:

> [49] …
>
> 1. Identify the real basis of the award;

> 2. Determine whether the basis of the award is a matter of general law;
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> 3. If the basis of the award is a matter of general law, determine whether it raises a question or questions concerning the principles of labour relations, whether expressed in the *Labour Relations Cod*e or another statute.
>
> [50] If the answer to the third question is affirmative, then review of the award lies within the jurisdiction of the Labour Relations Board. If it is negative, review lies within the jurisdiction of this Court.

[29] The Employer submits the 2019 amendment codified this jurisprudence, as described in recommendations of the Labour Code Review Panel in 2018, which proposed an amendment "to codify the rare and exceptional circumstances" that engage s. 100. It also points to three appeals decided post-2019 that continued to apply the same legal test formulated before the amendment: *West Fraser Mills Ltd. v. United Steelworkers, Local 1-2017*, 2021 BCCA 266 [*West Fraser*]; *Canadian Forest Products Ltd. v. Public and Private Workers of Canada, Local No. 18*, 2022 BCCA 89 [*Canfor*]; and *Vancouver (City) v. Vancouver Firefighters' Union, Local 18*, 2024 BCCA 33 [*Vancouver Firefighters*].

[30] The Union suggests the amendments substantively restricted this Court's jurisdiction but acknowledges that the Labour Code Review Panel recommendation was drafted to codify the "exceptional jurisdiction of this Court".

[31] In my view, the amendment to s. 100 reflects the jurisprudence developed by this Court over at least the past two decades and attempts to clarify the narrow and exceptional nature of the jurisdiction in s. 100. There is no question that the primary jurisdiction to review arbitration awards lies with the Labour Relations Board. No doubt, the delineation of this Court's jurisdiction to review awards that are based on "a matter or issue of the general law" has been challenging, but this jurisdiction is not engaged whenever an arbitrator applies principles of general application in making an award. As Justice Dickson explained in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937 v. Taan Forest Limited Partnership*, 2018 BCCA 322 [*Taan*]:

> [67] … pure questions of the general law, untethered to the facts and labour relations context of a dispute and falling outside the expertise of the Labour Relations Board, are rare and will only exceptionally be found to form the real basis or main constituent of the decision and awards made by labour arbitrators. The underlying legislative intent of ss. 99 and 100 of the *Labour Relations Code* strictly to limit judicial intervention in labour relations matters is thus acknowledged and respected by the Court.

[32] The exceptional nature of this jurisdiction is reflected in the jurisprudence. Jurisdiction has been found in rare cases, for example, where the real basis of the award was identified as:

- the interpretation of the nature and scope of the duty to accommodate under the *Human Rights Code* regardless of the factual circumstances: *United Steelworkers of America v. Fording Coal*, 1999 BCCA 534 [*Fording Coal*];

- the interpretation of s. 21 of the *Employment Standards Act* (payment of wages) that affected all employees, unionized or not: *BC Nurses* 2005;

- the interpretation and application of human rights principles under the *Human Rights Code* that went beyond a factual determination: *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58.

[33] More frequently, jurisdiction has not been found, for example, where the real basis of the award was identified as:

- the application of well-established legal principles with respect to the interpretation of s. 13 of the *Human Rights Code* to the circumstances of the employees: *Langley (Township) v. Canadian Union of Public Employees, Local 403*, 2017 BCCA 1;

- the application of well-established principles of human rights law in the interpretation of the collective agreement and whether there had been a violation of the *Human Rights Code*: *Communications, Energy & Paperworkers' Union of Canada (CEP), Local 789 v. Domtar Inc.*, 2009

BCCA 52; *Okanagan College Faculty Association v. Okanagan College*, 2013 BCCA 561 [*Okanagan College 2013*]; *Taan;*

- a factual determination related entirely to labour relations: *West Fraser*;
- the interpretation of s. 64 of the *Employment Standards Act* (group layoffs) that related to a collective agreement and labour relations: *Canfor*;
- the interpretation of s. 49.1 of the *Employment Standards Act* (paid sick leave) to the terms of the collective agreement and the specific circumstances of the dispute between the parties: *Vancouver Firefighters*.

[34] All of this jurisprudence demonstrates that the additional language in s. 100 captures with some precision the principles of labour relations which have not been considered to be included in s. 99. It is only a matter or issue of the general law unrelated to (1) a collective agreement, (2) labour relations more broadly, or (3) related determinations of fact, that can ground jurisdiction under s. 100.

[35] In my view, Dickson J.A.'s description in *Taan* that the issue of general law must be "untethered to the facts and labour relations context of a dispute and falling outside the expertise of the Labour Relations Board" continues to encapsulate the essence of the jurisdictional inquiry under s. 100. Moreover, the analytical approach described in *BC Nurses 2005* remains a valid approach that needs only to be adjusted to reflect the more precise language of s. 100.

[36] In this Court's recent decision in *Rehn Enterprises Ltd. v. United Steelworkers, Local 1-1937,* 2025 BCCA 116, released after this appeal was heard, Justice Butler took a similar view. He concluded that the 2019 amendments reflected this Court's jurisprudence, and the properly narrow and exceptional scope of s. 100. He reformulated the approach set out in *BC Nurses 2005* in light of the new statutory language:

> [37] The language of the 2019 Amendment both reflects the jurisprudence, including *B.C. Nurses Union* and *Taan*, and attempts to clarify and further narrow the limited jurisdiction of this Court. It signals a legislative intent to

> grant the Board jurisdiction in all but the most exceptional of cases. It is no longer enough for the basis of the award to be a matter of general law which does not raise "questions concerning the principles of labour relations": *B.C. Nurses' Union* at para. 49. Now, the award must be a matter of general law which is unrelated not only to labour relations, but also to any determinations of fact tied to labour relations.
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> [38] Given the clear language of the current s. 100(a), I would restate the test using that language. In other words, the question of jurisdiction is determined by asking whether the real basis of the award is a matter of general law, unrelated to a collective agreement, labour relations or related determinations of fact. If the answer is affirmative, this Court has jurisdiction; if negative, the Board has jurisdiction under s. 99. This test can also be expressed as a three-part analytical framework, similar to the one from *B.C. Nurses' Union*:
>
> a) Identify the real basis of the award.
>
> b) Determine whether the basis of the award is a matter of general law. If it is not, the Board has jurisdiction.
>
> c) If the basis of the award is a matter of general law, determine whether that matter of general law is related to a collective agreement, labour relations or related determinations of fact. If it is, the Board has jurisdiction. If it is not, the Court has jurisdiction.
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> [Emphasis in original.]

[37] I agree with Butler J.A.'s analysis, and his reformulation of the approach to determining this Court's jurisdiction under s. 100.

Application of the framework

[38] The Employer contends the arbitrator erred by incorrectly interpreting the legal test of the majority in *Potash* regarding the meaning of a "*bona fide*" plan under s. 13(3)(b) of the *Human Rights Code*. It says the arbitrator did not simply apply the *Potash* test but rather created a new test, adopting the minority reasons and importing a reasonableness component expressly rejected by the majority. It points in particular to the arbitrator's reasons at paras. 391, 398 and 428 to demonstrate this:

> 391. In the present case, there is little doubt that the LTD Plan is legitimate and was adopted in good faith. What about the requirement that it was not adopted for the purpose of defeating rights? On the surface this may seem to be a part of a straightforward subjective test. However, careful analysis reveals that "motives and intentions" (para. 32) in this regard must be evaluated against an objective standard.

> …
>
> 398. For practical purposes, the question in this arbitration is whether the Employer reasonably believed the Plan was not adopted to defeat rights, measured against an objective standard in this case.
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> …
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> 428. In my view, the present case turns on the "defeating protected rights" component of the *Potash* test. As held in the New Brunswick Court of Appeal and the Supreme Court of Canada, there is an objective element built into this component. The focus is on whether the Employer reasonably believed that the Plan was not being adopted for the purpose of defeating protected rights. Reasonableness is to be measured against an objective standard in the circumstances of a particular case. This formulation makes clear that there may be different outcomes in different cases under s. 13(3)(b), and the present award flows from a unique evidentiary record. As my review of the parties' submissions illustrates, there is an extensive body of case law on the *bona fide* plan question across the country. The present award is confined to the facts of this case.

[39] The Employer says the "defeating protected rights" question is not a separate component of the *Potash* test, and once the arbitrator concluded that the LTD Plan was legitimate and adopted in good faith, his analysis should have stopped there. It also says the arbitrator's subsequent focus on "whether the Employer reasonably believed that the Plan was not being adopted for the purpose of defeating protected rights" incorporated the reasonableness component reflected in the *Potash* minority judgment.

[40] This, the Employer submits, makes "the real basis of the award and the matter to be determined on appeal" the correct legal test under s. 13(3)(b) of the *Human Rights Code*. It says this is an extricable question of general law that substantially determines the dispute and does not engage principles of labour relations or the interpretation of a collective agreement. The Employer characterizes this alleged error as "a question of statutory interpretation or legal principle of a general nature" equally applicable to non-unionized workplaces.

[41] The Union submits the Employer mistakes the basis of its appeal with the basis of the award. It identifies the real basis of the award as (1) a factual determination that the LTD Plan is not a *bona fide* plan, based on the parties' interests, rights and statutory obligations in a collective bargaining relationship, or

(2) a question of the general law related to labour relations and determinations of fact.

[42] I agree with the Union that the Employer erroneously identifies the basis of the award with the basis of the appeal. The Employer identifies an extricable question of law regarding the arbitrator's interpretation of the *Potash* test — a principle of human rights law — but its assertion of legal error does not in itself translate into the real basis of the award: *Taan* at para. 71. It has long been recognized that the question of jurisdiction as between the Labour Relations Board and the Court must be determined on the real basis of the decision or award and not on the basis of the appeal, or more particularly, the issues that a party advances on appeal: *Vancouver Firefighters* at para. 50; *Communications, Energy & Paperworkers' Union of Canada (CEP) Local 433 v. Unisource Canada Inc*., 2004 BCCA 351 at para. 29; *Fording Coal* at para. 32.

[43] In my view, the arbitrator's reasons demonstrate that he considered the *Potash* test established in the majority judgment to govern his analysis. Whether he articulated the test correctly is a discrete question of law that cannot be said to form the real basis of the award. The Employer conceded that its assertion of legal error must be accepted as correct in order for this Court to ground jurisdiction on this question of law; in other words, the Employer's submission would require us to assess the merits of the appeal to establish jurisdiction. This cannot be correct.

[44] The line between interpreting a legal principle and applying it is often not precise. Generally, the application of well-established legal principles to determine the factual issue in dispute will not constitute an issue of the general law unrelated to determinations of fact. Applying the law often requires some interpretation. As Justice MacKenzie explained in *Okanagan College 2013*:

> [57] It seems to me this application is premised on the notion that where legal interpretation of the "general law" has largely been accomplished in advance of the arbitrator's award, it will be the arbitrator's conclusions as to the factual or interpretive context in which the alleged discrimination took place that will really drive the outcome, and therefore serve as "the basis" of the award.

> [58] Of course, any application of the general law, to some extent, requires an interpretation of what the law requires in that specific context, and how general legal principles should be applied in the context of a given case. It might be said that every case, in the absence of clear and binding authority on the very point in issue, involves *some* interpretation of what the law requires, if only in finding the case at hand meets the legal standards established. I do not take the distinction between interpretation and application in *Domtar Inc.* as categorical, but rather a useful heuristic in determining the true nature or basis of an arbitrator's conclusion. The more the assessment undertaken by an arbitrator relies on settled principles of law, and the more the analysis depended on the particular context of the case in hand, the more it will be considered an *application* of the general law, as opposed to its *interpretation*.
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> [Italic emphasis in original; underline emphasis added.]

[45] In this arbitration, the arbitrator's assessment of whether the LTD Plan was a *bona fide* plan under s. 13(3)(b) of the *Human Rights Code* relied on a principle of law that was settled by the majority judgment in *Potash* and depended heavily on the context in which the grievance was brought. There was a substantial body of evidence arising from the collective bargaining relationship between these parties after the age definition in the *Human Rights Code* was amended in 2008. The arbitrator was required to apply the *Potash* test in circumstances where the LTD Plan had originally been adopted in 1976 and the grievance arose much later, after years of collective bargaining that included discussions about extending benefits to employees 65 and over. By 2013, when the grievance was brought, the workplace had changed, with more employees exercising the right to continue employment over age 65. A significant issue in the award was whether the *Potash* test should be applied only at the date the LTD Plan was originally adopted (1976) or at a later point in time after the amendments to the *Human Rights Code* had eliminated mandatory retirement.

[46] In this context, the arbitrator's interpretation and application of the *Potash* test was completely tethered to the facts and the labour relations context, and this context was central to his determination that the LTD Plan was not a *bona fide* plan.

[47] While an appeal may challenge only a part of an arbitration award, the jurisdictional question is to be based on a determination of the real basis of the

award considered as a whole: *Vancouver Firefighters* at para. 54. Here, the portion of the award that is under appeal was made as part of a larger decision that began with an interpretation of the collective agreement. Article 9 prohibited discrimination based on the grounds set out in the *Human Rights Code* and included additional protections. The arbitrator concluded that Article 9 was not effective to contract out of the *bona fide* plan exemption in the *Code* as well as other rights and obligations: at para. 232. As a consequence of this interpretation, the arbitrator went on to determine the questions of *prima facie* discrimination and the *bona fide* exemption under the *Code*. For each determination, the arbitrator considered a large body of evidence arising from the collective bargaining relationship between the parties over many years.

[48] This is not to say that the real basis of the award cannot be assessed separately for each issue determined by the arbitrator. I mention this only to point out the broader labour relations context in which the *bona fides* of the LTD Plan was assessed. While not determinative, such context is relevant to the analysis in this case.

[49] I would therefore identify the real basis of the award as a factual determination that the LTD Plan was not a *bona fide* plan within the meaning of s. 13(3)(b) of the *Human Rights Code.* In making this determination, the arbitrator interpreted and applied the *Potash* test to a complex factual matrix that arose from the terms of the collective agreement and the parties' lengthy collective bargaining relationship.

[50] Whether the arbitrator erred in interpreting the *Potash* test is a question of law that can be addressed by the Labour Relations Board under s. 99.

[51] For these reasons, I would conclude that this Court does not have jurisdiction to hear this appeal under s. 100 of the *Labour Relations Code*.

Increased Costs

[52] Concurrent with this appeal, the Employer brought an application to the Labour Relations Board under s. 99, which was stayed pending this Court's decision. For this reason, the Union seeks increased costs of this appeal, submitting that it has been put to additional cost and delay as a result.

[53] I note that the Labour Relations Board Review panel recommendation to codify the jurisprudence in s. 100 sought to reduce uncertainty and curtail the practice of filing concurrent appeals under both ss. 99 and 100. Nonetheless, it appears that this practice continues. Despite the more precise words added to s. 100, the exercise of identifying the real basis of an award continues to be a challenging one. While I would not describe it as a "brain teaser of the highest order" given the volume of jurisprudence developed in the past several decades, I do not agree that the Employer's concurrent filings warrant an award of increased costs.

Disposition

[54] For all these reasons, I would quash the appeal for want of jurisdiction. I would also dismiss the Union's application for increased costs of the appeal.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Donegan"