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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	LETHBRIDGE
APPLICANT	THE GOVERNORS OF THE UNIVERSITY OF LETHBRIDGE
RESPONDENTS	UNIVERSITY OF LETHBRIDGE FACULTY ASSOCIATION, DONALD MITCHELL, DIRECTOR OF THE LABOUR MEDIATION SERVICES OF ALBERTA, ANTHONY JAMES HALL, MINISTER OF JUSTICE AND SOLICITOR GENERAL FOR ALBERTA and LYLE KANEE
DOCUMENT	**BRIEF OF THE RESPONDENTS DONALD MITCHELL, DIRECTOR OF THE LABOUR MEDIATION SERVICES OF ALBERTA and the MINISTER OF JUSTICE AND SOLICITOR GENERAL** **Application and Cross-Application** **August 8, 2017** **Justice Chambers, Lethbridge Courthouse**

Clerk's Stamp

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I Introduction

1. This is the responding Brief of Don Mitchell, Director of Mediation Services (the Director), and of the Minister of Justice and Solicitor General of Alberta (the Minister).

2. The Governors of the University of Lethbridge (the University) now apply for interim relief, pending a hearing of an application for judicial review. That review is of a decision by the Director to appoint an arbitrator to adjudicate grievances raised by the respondent, the University of Lethbridge Faculty Association (the Faculty) and Professor Anthony James Hall. "The grievances arise out of Professor Hall's suspension from the academic staff of the University of Lethbridge for an alleged violation of the *Alberta Human Rights Act*."[1]

3. The Director and the Minister here address the University's argument that there is a serious issue to be tried regarding the Director's jurisdiction to appoint an arbitrator. We say that there is no such triable issue. We join the Faculty in saying that, as there is no serious issue to be tried, both the University's application for interim relief and its application for judicial review should now be dismissed.

4. The University's primary argument that there is a serious issue to be tried regarding the Director's jurisdiction to appoint an arbitrator is a simple one. The University says that "Professor Hall's suspension is ... issued pursuant to s. 22(3) of the *Post-Secondary Learning Act* (the PSLA), which falls outside the scope of the Handbook. As such, the grievances cannot be subject to a grievance and the grievances should be abandoned."[2] Section 22(3) provides:

> **22(3)** Subject to any collective agreement, a president may, in the president's discretion, suspend from duty and privileges any member of the academic staff at the university and shall forthwith report the president's action and the reasons for it (a) to the board, and (b) to the executive committee of the general faculties council.

5. The University concludes that the Director's appointment of an arbitrator is defective: since the suspension is not governed by the collective agreement, no arbitrator should have been appointed.

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[1] University's Brief, para. 2.
[2] University's Brief, para. 4.

6. The University's conclusion could not be more wrong. The University confuses the issue of *whether* an arbitrator may proceed to hear and decide the Faculty grievances with the issue of *who gets to decide* whether an arbitrator may hear and decide the grievances. Under the *Labour Relations Code*'s statutory scheme, arguments such as the University's (called "preliminary objections"), which seek to show that an arbitrator lacks jurisdiction to consider a grievance, *are made to the arbitrator*. They are not decided by the Director as a precondition to an arbitrator's appointment.

7. In its present application for judicial review, the University seeks to prevent an arbitrator from being appointed, by instead having a judge of this Court rule on its preliminary objection to the arbitrator's jurisdiction.

II The Jurisdiction of an Arbitrator

8. Section135 of the *Code* sets out what an arbitrator *must* be able to do:

> **135** Every collective agreement shall contain a method for the settlement of differences arising
>
> (a) as to the interpretation, application or operation of the collective agreement,
>
> (b) with respect to a contravention or alleged contravention of the collective agreement, and
>
> (c) as to whether a difference referred to in clause (a) or (b) can be the subject of arbitration between the parties to or persons bound by the collective agreement. (1988 cL-1.2 s133)

9. The University's preliminary objection falls within the first and third subsections of s. 135. First, the University's preliminary objection straightforwardly raises a question regarding the "interpretation, application or operation of the collective agreement". The University says that in suspending Professor Hall, it exercised powers granted to its president by s. 22(3) of the PSLA, which it says are not constrained by the collective agreement. The Faculty says that Professor Halls suspension "for an alleged violation of the *Alberta Human Rights Act*." *is* discipline governed by the collective agreement, which thereby constrains the powers granted by s.22(3) of the PSLA. The difference between the parties is whether the collective agreement constrains the powers the University claims it exercised, i.e., a matter of the "interpretation, application or operation of the collective agreement".

10. Second, the University's preliminary objection doubts whether the grievances "can be the subject of arbitration between the parties to or persons bound by the collective agreement." That is the *point* of its preliminary objection. The University says Professor Hall's suspension is an exercise of a statutory power that is unaffected by the collective agreement, that it is for that reason not arbitrable. The Faculty disagrees, and says that exercise of the statutory power conferred by s. 22(3) of the PSLA has been constrained by the collective agreement.

11. We therefore say that it is beyond doubt that an arbitrator appointed under the *Labour Relations Code* has jurisdiction to decide both the Faculty's grievances *and* the University's preliminary objection.

12. The University's position, that the Director should not have appointed an arbitrator because it raised a preliminary objection to the arbitrator's jurisdiction, makes no sense at all. As the Director pointed out to the University's counsel, he had no jurisdiction to decide the University's preliminary objection, but an arbitrator would. His is an administrative rather than an adjudicative function:

> As I understand it, you object to the appointment of an arbitrator for the following reasons:
>
> 1. That the difference is not arbitrable as it does not arise from matters covered by the collective agreement; and
>
> 2. That "if there is to be a determination and the appointment of an arbitrator it should be made by the Court of Queen's Bench and not any third party".
>
> I recognize that the question of whether the differences referenced in the request are arbitrable may need to be decided. Objections of that type in response to requests are not uncommon and do not affect whether I make an appointment. I have no authority to determine issues of arbitrability. An arbitrator would have that authority.[3]

13. It is crucial to note that the University's argument on judicial review fails completely unless it can show that the Director lacked jurisdiction to appoint an arbitrator. It is not enough for the University to show that its preliminary objection could be decided by the Court.[4] The University must show that the Director *could not* appoint an arbitrator.

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[3] Email dated May 18, 2017, from Don Mitchell to Robert W. Thompson, Q.C., **Record of Proceedings, Tab 3**

[4] That's doubtful, but beside the present point, which is the Director's jurisdiction to appoint an arbitrator.

III Statutory Prerequisites to Appointment under s.137

14. The fact that the University has a preliminary objection it wishes to make has no effect *at all* on the Director's jurisdiction to appoint an arbitrator. The Director appointed an arbitrator pursuant to s.137(1) of the *Labour Relations Code*:

> **137(1)** If the parties to a collective agreement that provides for the appointment of a single arbitrator are unable to agree on a person to act as a single arbitrator within 14 days after the notice requiring that the matter go to arbitration, or any longer period that the collective agreement may contain for the selection of a single arbitrator, either party may, in writing, request the Director to appoint a single arbitrator.
>
> (1988 cL-1.2 s135)

15. There are two statutory prerequisites to an appointment of an arbitrator by the Director. The parties to a collective agreement must be a) "unable to agree on a person to act as a single arbitrator", b) "within 14 days after the notice requiring that the matter go to arbitration, or any longer period that the collective agreement may contain for the selection of a single arbitrator". It is not contested that the second prerequisite is satisfied.

16. Regarding the appointment of a grievance arbitrator, the collective agreement provides:

> **22.10** When arbitration is required, grievances shall be referred to a single arbitrator. The arbitrator shall be appointed by the agreement of the President and the Member/President of the Association within five (5) working days after the President or the President of the Association, as appropriate, has received notice of referral. Failing agreement within those five (5) working days, the arbitrator shall be appointed by a Judge of the Alberta Court of Queen's Bench upon the petition of either party.

17. Have the parties failed to agree on an arbitrator to consider the grievances? They clearly have not agreed on an arbitrator. After the Faculty proposed a particular arbitrator by letter dated November 1, 2016, the University replied on November 4, 2016, repeating its preliminary objection and saying that "The Board does not accept the appointment of the arbitrator proposed."[5]

18. Nonetheless, the University also argues that the Director should not have appointed an arbitrator because an arbitrator must, according to the collective agreement, be appointed by a judge of the Court of Queen's Bench. At paragraphs 45 through 49 of the University's

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[5] **Record of Proceedings, Tab 2d.**

Brief, the University characterizes the Director as having used s. 137 to "override" the provisions of the collective agreement.

19. The University's position ignores what it said to the Director regarding the appointment of an arbitrator by a Queen's Bench judge. When the Director was considering the Faculty's request that he appoint an arbitrator, the University's counsel wrote:

> Again by way of further background, our client has taken the position in its response to the grievances (attached) that the suspension of Professor Hall does not arise from matters covered by the Academic Staff Agreement (now collective agreement) negotiated between the Governors of the University of Lethbridge and the University of Lethbridge Faculty Association. Rather our client's position is that the suspension arises from a legitimate exercise of the President of the University of Lethbridge's discretion under s.22(3) of the *Post-Secondary Learning Act*.
>
> In light of this impasse between our respective clients, the University of Lethbridge Faculty Association on December 2, 2016 filed and served an Originating Application returnable on Tuesday, August 8, 2017 at 2:00 pm before the presiding Justice in Chambers in Lethbridge for an order appointing an arbitrator to hear and determine the grievances. We enclose a copy of the Originating Application. An Affidavit of a Ms. Annabree Fairweather was filed in support of that Application.
>
> *Our client is opposing the appointment of an arbitrator as in its submission the suspension of Professor Hall is not governed by the Academic Staff Agreement (now collective agreement) and accordingly does not give rise to "a violation improper application and non-application of the terms of (the collective agreement) ...". All of these matters remain to be determined by the Court of Queen's Bench on the pending application.*[6]
>
> [Emphasis added.]

20. That is, the University told the Director that its response to the Faculty's attempt to have an arbitrator appointed by a Queen's Bench judge would be to raise its preliminary objection on that application. It was not disagreeing with the Faculty about which arbitrator should be appointed, participating in the agreed process. It was and is seeking to prevent the appointment of an arbitrator altogether.

21. *If* the University had been participating in the process set by the collective agreement rather than objecting to the appointment of an arbitrator by a Queen's Bench judge, the University's position *might* have some merit. In such circumstances it might not be true

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[6] **Record of Proceedings, Tab 2a.**

that the parties had yet failed to agree to an arbitrator, as they would still be participating in their agreed process, taking time foreseen by the collective agreement.[7]

22. That is not this case, however. Here, documents the University provided to the Director showed that the University refused to participate in the grievance process, including the process for selection of an arbitrator, citing its preliminary objection throughout. It told the Director it would continue to do so before the Court of Queen's Bench, for the same reason.

23. The Director did not "override" the provisions of the collective agreement, but recognised that application of those provisions was disputed by the University, which was trying to prevent the appointment of an arbitrator. On any interpretation of the statutory language, the parties had failed to reach agreement on an arbitrator to hear the grievances in timely fashion, as foreseen by the *Code*.

24. The Director faced the following situation:

- He has no jurisdiction to decide whether the University's preliminary objection had merit;
- An arbitrator appointed under the *Code* has jurisdiction to decide the University's preliminary objection;
- The University is seeking to avoid appointment of an arbitrator able to decide issues governed by s. 135, which is not an option available to it under the *Code*;
- The statutory prerequisites to his exercise of his power to appoint an arbitrator were satisfied.

25. The Director was right to conclude that he had jurisdiction to appoint an arbitrator. There is, further, absolutely no way that his decision to appoint is unreasonable. There is no triable issue to be heard on judicial review.

IV Why is the Minister here?

26. The Minister must be served with every application for judicial review. Here the Minister has been named as a party as well. It is *extremely* rare that the Minister actually participates in an application for judicial review, once a decade or thereabouts. The

[7] It might also be the case that, where a selected process is creating unacceptable delay, particularly through the machinations of one party, the other may properly ask the Director to appoint. We are inclined towards this view, but needn't take a general position on the Director's power, as it is not necessary in this case: here the University says it is attempting to avoid the appointment of an arbitrator.

Minister almost invariably leaves the issues to be litigated between the parties. The Minister is here concerned about how the position urged on the Court by the University, if accepted, will disrupt our statutory scheme governing labour arbitrations.

27. Here, the University has a preliminary objection to an arbitrator's jurisdiction, which it is refusing to litigate through the process contained in the *Code*. Under the *Code*, a party to a collective agreement that has a preliminary objection makes it argument to the arbitrator, an expert decision-maker, and, if it disagrees with the arbitrator's decision, seeks judicial review of that decision.[8] That decision is protected by a privitive clause, and receives deference from the courts on review when, as here, it deals with the interpretation and application of a collective agreement.

28. If the Court allows the University to instead litigate an objection to an arbitrator's jurisdiction before the courts, alleging that its objection creates a condition precedent to the appointment of an arbitrator, *every* preliminary objection will be a candidate for an alternative procedure, outside the well-worn and effective procedures contained in the *Code*. Preliminary objections will be decided by Queen's Bench judges at first instance, on a paper record and without the advantage of live witnesses, without deference to decision-makers who are expert in labour relations. They will be governed by timelines that are appropriate to civil litigation rather than labour relations. Preliminary objections will receive neither expert consideration nor prompt resolution, as foreseen and provided by the *Code*.

29. For some reason known only to itself, the University is seeking to avoid having its preliminary objection decided in the ordinary way, by an arbitrator at first instance. This Court should not acquiesce in its attempt to do an end-run around the *Code*.

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[8] Amendments to the *Code*, recently enacted but not yet in force, provide that the Labour Relations Board rather than the Court of Queen's Bench will review arbitrator's decisions, with an appeal to the Court of Appeal, with leave. The amendments come into force in September and will apply to the arbitration now scheduled for November. See, Bill 17, *Fair And Family-Friendly Workplaces Act*, s.136(1), enacting new *Labour Relations Code* ss. 145 and 145.1. (Not reproduced.)

V Relief Sought

30. The Director of Mediation Services and the Minister of Justice and Solicitor General ask that the University's applications for interim relief and its application for judicial review be dismissed.

Respectfully submitted, July 27, 2017

Rod Wiltshire
For the Director of Mediation Services, and
For the Minister of Justice and Solicitor General