Court of Queen's Bench of Alberta

Citation: Alberta (Attorney General) v. United Food and Commercial Workers Union, Local No. 401, 2010 ABQB 455

Date: 20100707
Docket: 0903 19396
Registry: Edmonton

Between:

The Attorney General of Alberta

Applicant

- and -

United Food and Commercial Workers Union, Local No. 401, Old Dutch Foods Ltd., and the Alberta Labour Relations Board

Respondents

- and -

Merit Contractors Association of Canada, the Alberta Federation of labour and Raymond Berry, Colleen Duttenhoffer, Donna Seamans, Aruna Sen, José San Juan, Maria Gonzalez, Blair Francis, Ky Tran, Maria Messier, Kuluir Sahota, Blanca Mansilla, Eddy Kwan, Anh Nguyen, Kevin Larson, Trang Hoang, Paramjit Bhinsa, Robert Simmonds, Jasmine Dhaliwal, Nguyen Bang, Larry Manser, Scott Estabrooks, Ian Gregory, Georges Matta, Carlos Gonzalez, Rebeca Gamdarillas, Trevor Elms, Gerardo Siguera, Rasinder Khra and Les Csyz

Applicants for Intervener Status

Reasons for Judgment of the Honourable Mr. Justice Donald Lee

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Introduction

[1] The Attorney General of Alberta originally asked this Court to judicial review a decision of the Alberta Labour Relations Board (the "Board"). The Board found that the *Labour Relations Code*, R.S.A. 2000, c. L-1, violates the freedom of association the *Charter* protects because, unlike similar legislation in most other provinces, it omits a key component of the Canadian model of labour relations regarding union security. The employer who was the subject of the application before the Labour Relations Board, Old Dutch Foods Ltd., is not a party to the judicial review; having chosen not to challenge the Board's decision and it has settled the matters that formed the basis for the applications before the Board.

[2] The Board's Decision at issue here is an important constitutional ruling in the field of labour law, invoking freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms*, *Constitution Act*, 1982, C. 11, Schedule B (U.K.). It reverses an earlier Board decision and declares that provincial labour legislation must now include a requirement that all collective agreements between employers and unions contain, at a minimum, a union security provision that forces all employees in a bargaining unit represented by a union to pay dues to the union, even if they do not join the union (the Rand Formula). Counsel advises that it is to date the only decision on this point in Canada.

[3] The Attorney General filed an Originating Notice of Motion on December 8, 2009 seeking judicial review of the Decision. The application was returnable January 19, 2010, but has been adjourned to await the outcome of intervener applications.

[4] In advance of the judicial review, twenty nine Old Dutch Foods employees (the "Employees") sought status as affected parties or as interveners. A Notice of Motion was filed on behalf of the Employees on February 17, 2010 seeking Party or Intervener status in the judicial review application. These Reasons deal with the Party or Intervener status application of the Employees.

[5] Just prior to the Employees' Application being heard, the Attorney General and the Union presented the Court with the following Consent Order which reads:–

ORDER

> UPON THE APPLICATION of the Attorney General; AND UPON HEARING counsel for the Applicant; AND UPON NOTING the consent of counsel for the Respondents the United Food and Commercial Workers Union, Local No. 401, counsel for the Respondent the Alberta Labour Relations Board neither consenting to nor opposing this order; AND UPON NOTING that Old Dutch Foods Ltd. is not participating in these proceedings and that the Applicant Attorney General reserves its right to re-assert grounds raised in this application in future cases, IT IS HEREBY ORDERED THAT:

1. This application for judicial review is granted, on the sole ground that the Alberta Labour Relations Board lacks jurisdiction to make a general declaration of constitutional invalidity, and without consideration of other grounds asserted in support of the application.

2. Paragraph 58 of the Board's decision dated November 9, 2009 is set aside, to the extent (and only to the extent) that it includes or constitutes a declaration of general constitutional invalidity.

3. The declaration referred to in paragraph 69 of the Board's decision is set aside.

4. For greater certainty, the relief granted by the Board at Paragraphs 73 and 74 of its decision dated November 9, 2009 is unaffected by this order.

5. The parties will bear their own costs in this matter.

[6] The Employees continue to maintain their Affected Party Status Application in the face of the Consent Order. These Reasons deal with the Employees' Affected Party Status Application only as that was originally the scheduled matter before.

Background

[7] In 1945 the workers at ***Ford Motor Company of Canada Ltd. and the International Union of United Automobile, Aircraft and Agricultural Implement Workers of America*** (1946), C.L.L.R. 18,001 (Special Awards) in Windsor, Ontario, were on strike for 99 days over union security. In resolving the Ford Strike, Justice Rand of the Supreme Court of Canada imposed a compromise: voluntary union membership combined with mandatory union dues payments. This formula came to be known as a "Rand formula" type of union security provision. Justice Rand described any argument against such a formula as simply an argument for a weak union. Most Canadian jurisdictions subsequently incorporated his formula into labour legislation; Alberta did not.

[8] Today every Canadian jurisdiction regulates the way in which individuals and collectives exercise their constitutionally protected right to bargain collectively. Such legislation recognizes this right while respecting the interests of others, promoting democracy within unions, ensuring all employees at a unionized workplace are fairly represented, and encouraging industrial peace and stability. In striking this balance, Canadian jurisdictions require collective agreements to include certain provisions. In most Canadian jurisdictions, one of these provisions provides for union security – a provision providing that all members of the bargaining unit will provide union dues to the union they have democratically chosen to be their exclusive representative. However Alberta's labour legislation does not include, such a provision and thus, prior to the Board's

decision, Unions had to bargain with employers over their own viability in addition to bargaining over workplace conditions.

[9] In 2009 the workers at Old Dutch Ltd. in Calgary, Alberta, were locked-out over union security. This was the contentious issue between Old Dutch Foods Ltd. and the United Food and Commercial Workers, Local 401. Before the Labour Relations Board, the issue was whether the Collective Agreement would contain a Rand formula form of union security, otherwise known as a "check-off' or "agency" union security clause. Old Dutch refused to include a union security provision akin to a Rand formula in the Collective Agreement.

[10] Local 401 and the individual complainants – Clayton Herriot, Theda O'Brien, and Phoebe Julian – brought an application asserting that Old Dutch committed an unfair labour practice by violating section 60(1) of the *Code* when it bargained union security to impasse during the course of their bargaining for a new Collective Agreement. They also asserted that Alberta's failure to include a union security provision as one of the provisions which all collective agreements must include was unconstitutional.

[11] This argument was based on the Supreme Court of Canada's decision in ***Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia***, [2007] S.C.J. No. 27. In that case, the Court found that the right to freedom of association protected in s. 2(d) of the *Charter* encompasses a right to collective bargaining and outlined the nature of that right. Thus employees have a right to unite, to present demands to employers collectively, and to engage in meaningful discussions in an attempt to achieve workplace-related goals (para. 89). The Court explained that this constitutional right protects "the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment" (para. 89). It enhances workers' human dignity, liberty and autonomy by giving them the opportunity to influence workplace rules and thereby "gain some control over a major aspect of their lives, namely their work" (para. 82). It also enhances workplace democracy and enhances the equality of workers by palliating the historical inequality between employers and employees (paras. 84, 85).

[12] The Board agreed with the Union that the freedom of association protections within 2(d) to engage in the process of collective bargaining include a Rand formula type of union security and so declared. The Board also accepted that, the failure to include a union security provision in *Alberta's Labour Relations Code* interferes with the constitutional right to bargain collectively. That is, declared the Board, the omission from the *Code* of a minimum union security provision akin to a Rand formula violates section 2(d) of the *Charter*. The Attorney General of Alberta made no arguments asserting that the continued absence of a statutory Rand formula in Alberta was justified by section 1 of the *Charter*. The Board suspended its declaration of constitutional invalidity for one year (***Old Dutch Foods Ltd. (Re)***, [2009] A.L.R.B.D. No. 56 at paras. 58, 66-69 (the "Decision")).

[13] In respect to the section 60 and 148 complaints of bad faith bargaining and interfering with the Union's representational rights, the Board first found that given its view that the Rand

formula forms part of the constitutional protection provided by 2(d), the matter was no longer capable of being the subject of collective bargaining and refusing such a provision to impasse would constitute a failure to bargain in good faith. The Board went on to state that even if it was wrong in that respect, the refusal to agree to a Rand Formula in the circumstances was a violation of section 60. The Board ordered that the existing lockout/strike be suspended and that the parties meet and resume collective bargaining with the Rand formula as an agreed term of the collective agreement. Should the parties be unable to conclude a collective agreement within 30 days, the suspension of the lockout/strike would be lifted (paras. 70, 73-74). The section 148 complaint was dismissed. (para. 75).

[14] Old Dutch did not apply for judicial review of the Board's decision, did not apply under the *Code* for reconsideration of that decision by the Board, and did not seek a stay of the Board's decision. Instead, Old Dutch chose to accept the Board's decision and to conclude a Collective Agreement with the Union which included a Rand style union security provision.

The Test for Affected Party Status

[15] The Employees seek to be added to this judicial review as an Affected Party. The Union submits that they are not an affected party and have no direct interest in the outcome of the judicial review.

[16] Rule 753.1(1) allows the Court to add a person as a party to a judicial review, and Rule 753.1(3) allows the Court to allow a person "affected by the proceedings" to take part. To be a party, a person rights must be directly affected by the outcome of the dispute; they must have more than a mere interest in the development of the law (See: ***Edmonton Friends of the North Environmental Society v. Canada (Minister of Western Economic Diversification***) (1990), 73 D.L.R. (4th) 653 at 660 (F.C.A.)). As this Court explained in ***Smyth v, Edmonton (City) Police Service***, [2005] A,J. No. 1099 (Q.B.), a person will have a direct interest when their "substantive rights ... will be directly affected in the matter before the Court and ... it is a party adverse in interest to one of the parties" (para. 8) citing ***Goudreau v. Falher Consolidated School District No. 69*** (1993), 8 Alta. L,R, (3d) 205 (C.A.). On a similar note, in ***Alberta Liquor Store Assn. v. Alberta (Gaming and Liquor Commission)***, [2006] A.J. No. 1597 (Q.B.) the Court described a person "aggrieved" by an administrative decision as one whose property, economic, legal, business, professional or employment interests will be affected (paras. 8-9) cited with approval in ***Real Estate Council of Alberta v. Henderson***, [2007] A.J. No. 1068 at para. 16 (C.A.).

[17] This same test applies in *Charter* cases. In ***Goudreau*** the Alberta Court of Appeal considered whether certain parties should be added to a judicial review as a party. One of the issues in the judicial review was the interpretation and application of s. 23 of the *Charter*. When determining whether the applicants were Affected Parties, the Court asked whether they had a direct interest in the outcome of the judicial review and whether the Court's decision would bind them (paras. 10-11).

[18] It is submitted that the fact that a person was, or could have been, an Affected Party or intervener before the Court or tribunal below does not relieve that person from demonstrating that interest at the next level of review or appeal (***Alberta Liquor Store Assn.***, para. 12); See also ***Cunningham v. Alberta (Minister of Aboriginal Affairs and Northern Development)***, [2008] A.J. No. 199 (C.A.) in which a group that had been an intervener before the Court of Queen's Bench had to apply afresh to be an intervener before the Court of Appeal. Indeed it is submitted that the issues that were before the lower Court or tribunal and the interests at stake may differ from the ones on appeal.

[19] While it is true that the Employees' interests were affected by the Board's decision, the Union submits that is not the test they must meet as the relevant question is whether they will be directly affected by this Court's decision.

[20] It is submitted that the Employees' allegation of a lack of formal notice of the Board's hearing does not give them a right to be a party before the Court. The Employees do not argue that the lack of notice is a basis for quashing the Board's decision. They assert that because they could have participated in the Board hearing if they had wanted to, they have a right to be a party before the Court.

[21] In an Affidavit filed on February 17, 2010 in support of the Employees' request party or intervener status one of the Employees, Raymond Berry, described his employment circumstances and how the Decision has impacted him:–

> **Employment with Old Dutch Foods**
>
> . . .
>
> 2. I have been an employee of the [Employer] at its plant in Calgary, Alberta since September 7, 1983.
>
> 3. I presently work as a Head Receiver. In this position, the terms of my employment are set by the collective agreement that has, most recently, been renegotiated between [the Employer] and the [Union].
>
> **Past Choice to Refuse Union Membership and Payment of Dues**
>
> 4. When I commenced employment at [the Employer] there was already a union present at this workplace: the United Food and Commercial Workers' Union, Local No. 373A ("the UFCW, Local 373A").
>
> 5. I never voted for, or otherwise supported the UFCW, Local 373A being my bargaining agent at [the Employer].

6. The collective agreement that was in place between [the Employer] and the UFCW, Local 373A when I started working at [the Employer] did not require me to join the UFCW, Local 373A or to pay union dues to the UFCW, Local 373A.

7. I made a deliberate choice when I started working at [the Employer] not to join the union or to pay union dues to the UFCW, Local 373A. I had previous experience working in a unionized workplace, where the collective agreement in place forced me both to become a union member and to pay dues to the union by payroll deduction administered by the employer. Based on that previous experience, and on my own personal views, I did not feel that becoming a union member or paying union dues was in my best interests. I did not wish to associate with others in a union and support their union activities through the payment of union dues. I remain of this same view today.

. . .

9. When the [Union] took over from the UFCW, Local 373A as the union at [the Employer] in 2007 I maintained my previous choice not to join the [U]nion or to pay union dues to the [Union].

. . .

11. Until December, 2009, I had never authorized the [Employer] to deduct union dues from my pay to remit to the UFCW, Local 373A or to the [Union], nor had I otherwise chosen or been required to pay union dues to either union. If the choice remained available for me today to continue to work at [the Employer] and not pay dues to the [Union] this is the choice that I would continue to make.

Past Refusal of Union Representation

12. Throughout my employment with [the Employer] I have never asked the UFCW, Local 373A or the [Union] to represent me in any dealings with my employer. I have never asked either union to pursue a grievance or any other issue on my behalf under a collective agreement at [the Employer]. I have never participated in collective bargaining, or on any other union committee related to my workplace.

13. I have never asked for, or received, financial or other support from the UFCW, Local 373A or the [Union].

. . .

16. I do not wish to associate with members of the [Union]. I do not wish to provide financial support to the [Union], whether it be for activities related to my

employment with [the Employer], or for other activities of the [U]nion that are not connected with my employment.

2009 Labour Dispute

17. Collective bargaining for the latest renewal of a collective agreement began between [the Employer] and the [Union] in 2008.

18. By the spring of 2009 a renewed collective agreement had still not been agreed upon between the company and the union. A strike by the [Union] and a lockout by [the Employer] began at the end of March, 2009.

19. I chose to cross the picket line to continue working.. . after the strike and lockout began, on terms of employment set by the company. I did not receive any strike pay from the [Union].

No Notice of 2009 Board Application

20. I did not receive any notice from [the Employer], the [Union], the. . . Board, or from anyone else about a hearing of a complaint that I later found out had been filed with the Board by the [Union] against [the Employer] in April, 2009, and that I later found out had been heard by the Board in May, June and July, 2009.

21. I continued to work at [the Employer] throughout the labour dispute in 2009. At no time did I see a notice posted at the workplace. . . about the hearing of the [U]nion's complaint.

22. I did not know that I could have tried to participate in the hearing before the Board as an affected employee of [the Employer].

23. I did not attend the Board hearings held in May, June and July, 2009....

24. I did not know that during the hearing held in 2009 the Board was considering a claim by the [Union] that it was unconstitutional, and otherwise unlawful, for [the Employer] not to agree to include a clause in the collective agreement at my workplace that would force me, if I wanted to keep my job, to pay union dues to the [Union].

2009 Board Decision and New Collective Agreement

25. The [D]ecision . . . was referenced by Members of the [Union] on the picket line at [the Employer] in November, 2009 saying that the Board had made

> a decision that would force me, if I wanted to keep my job, to pay union dues to the [Union].
>
> 26. I learned that the Board had, in [the D]ecision, ordered that the strike and lockout be suspended while [the Employer] and the [Union] were required to resume collective bargaining, and that a clause requiring all bargaining unit employees, including me, to pay union dues to the [Union] had to be considered as an already agreed to item in the resumed collective bargaining.
>
> 27. After the Board's decision was made [the Employer] and the [Union] concluded a collective agreement that included the foregoing provision requiring all bargaining unit employees to pay the same level of union dues whether or not they were actual union members. I did not participate in a ratification vote of employees pertaining to this collective agreement.
>
> **Forced Union Dues**
>
> 28. After the new collective agreement was concluded a representative of [the Employer] presented me with a [dues remittance] form at work . . . .
>
> 29. I did not want to sign this form or authorize the deduction or remittance of union dues from my pay to the [Union]. However, I was told by a representative of [the Employer] that because of the Board's decision, and the new collective agreement that followed from that decision, it was now a requirement that I pay union dues to the [Union] if I wanted to keep my job.
>
> 30. In these circumstances I felt that I had no choice. I wanted to keep working at [the Employer] to support myself and my family. I did not have other employment readily available to me. As a result, I signed the form that was presented to me.
>
> 31. Beginning in December, 2009, and continuing to this day, union dues have been deducted from my pay at [the Employer] and I assume that these dues have been remitted to the [Union].

[22] A review of Raymond Berry's Affidavit makes clear that the Employees are upset that they now have to pay union dues. The Employees' counsel similarly asserts that the Employees financial interests are at stake because union dues are being deducted from their pay cheques.

[23] However the Union argues that this Court's decision will not change that as their employer Old Dutch has settled it's dispute with the Union and concluded a Collective Agreement with the Union. That Collective Agreement establishes the terms and conditions of the Employees' employment at Old Dutch and includes a Rand-style union security provision

that will continue to affect the Employees irrespective of this Court's decision. As such it is submitted that the Employees have no direct, personal interest at stake and will neither benefit nor suffer adversely from the Court's decision; their interest is no greater than that of any other Albertan.

[24] The Employees argue that the Union invoked their freedom of association before the Board when asserting the need for a statutory Rand formula. The Employees assert that they have a constitutional right at stake "to be free from forced association".

[25] The Union argues that as this argument was not raised before the Board, the evidentiary record is insufficient for this Court to address it. More importantly it is submitted that the Supreme Court of Canada has already found that a statutory requirement to pay union dues does not violate the *Charter*. In ***Lavigne v. Ontario Public Service Employees Union*** (1991), 81 D.L.R. (4th) 545 (S.C.C.), the Supreme Court of Canada considered the argument that the Employees of Canada seek to advance: that a requirement that dissenting employees pay union dues to the union democratically chosen to represent them violates a right not to associate. It is submitted that the Court explicitly rejected this argument and there is nothing in the ***Health Services*** case that suggests that the Court would decide that issue differently today.

[26] ***Lavigne*** concerned a college professor who was required to pay dues to his union under a mandatory check-off clause (Rand formula) in the collective agreement between his union and his employer. The Ontario legislation requires such a provision to be in collective agreements. The professor argued that the requirement to pay union dues violated his rights under s. 2(d) of the *Charter*. While there were four concurring judgments, it is submitted that the entire Court affirmed the importance of a Rand formula to collective bargaining and agreed that a requirement to pay union dues does not violate the *Charter*.

The Test for Obtaining Intervener Status

[27] The Employees ask this Court to add them as interveners. When considering an application for intervention, the Court first considers the subject matter of the proceeding and then determines the proposed intervener's interest in that subject matter (***Papaschase Indian Band v. Canada (Attorney General)***, [2005] A.J. No. 1273 at para. 5 (C.A.)). A proposed intervener must have a direct interest in the case before the Court or have some special expertise or insight to bring to bear on the issues facing the Court (***R. v. Morgentaler***, [1993] S.C.J. No. 48 at para. 1); ***Doe v. Canada***, [2000] A.J. No. 901 at para. 10 (C.A.) citing ***Ahyasou v. Lund***, 1998 ABQB 875). For instance, in ***Goudreau***, which concerned s. 23 of the *Charter*, the Court added as interveners two associations that promoted French interests in Alberta and could "bring into play their respective knowledge and expertise in dealing with section 23 *Charter* problems throughout the Province, including the Peace River area" (at para. 17).

[28] In considering an application to intervene, the Courts are also concerned with the legal arguments the proposed intervener intends to make. An intervener cannot widen or add to the

legal points in issue (***Deloitte & Touche LLP v. Ontario (Securities Commission)***, [2003] S.C.J. No. 62 at para. 31; ***R. v. Morgentaler*** at para. 2).

[29] In order to preserve the intent of allowing interventions, courts commonly put restrictions on an intervener's participation by doing such things as:–

- limiting the length of the intervener's submissions (***Apple Canada Inc. v. Canadian Private Copying Collective***, [2007] F.C.J. No. 1441 at para. 14 (C.A.); ***Vancouver Rape Relief Society v. Nixon***, [2004] B.C.J. No. 2059 at para. 20 (C.A.); ***Doe*** at para. 13 (Alta. C.A.);

- requiring the intervener to accept the evidentiary record as is (***Apple Canada***, para. 14; see also: ***P. v. Marshall***, [1999] S.C.J. No. 66 at para. 9 and ***Edmonton Friends of the North***, at 658); and

- prohibiting the intervener from raising new issues (***Apple Canada***, para. 13; ***Doe***, para. 13; ***Nixon***, para. 19).

[30] These proceedings concern whether the right to freedom of association, which the *Labour Relations Code* protects, is not fully protected in Alberta given the lack of a union security provision in the *Code*.

[31] The Union argues that the Employees have no special expertise or insight to bring to the issues facing the Court as they have no expertise about the constitutional issues before the Court, and unlike the French associations that were added as interveners in the ***Goudreau*** case, they have no history of advocacy in relation to s. 2(d) of the *Charter* and do not collectively represent a public interest.

[32] Moreover it is submitted that the Employees fail to indicate what arguments they intend to advance if added as interveners. Raymond Berry's cross-examination on his Affidavit indicates that he does not know what legal challenge he is making (p. 88, 1. 10), he has not seen the Attorney General's judicial review application and does not know what is in it (p. 93, 1. 17), and he has not read the Board's decision (p. 95, 1. 25), does not know what the Board determined (p. 96, 1. 1), and does not know how the judicial review could affect him (p. 94, 1. 14). Indeed, it appears that three organizations, including LabourWatch and the National Citizens Coalition, are assisting the Employees rather than seeking intervener status themselves (Berry Cross-Examination, p. 74, 1. 24 top. 87,1. 18 and p,92,11. 15 to 25).

[33] As was set out above, if the Employees seek to argue that they have a constitutional right not to associate by paying union dues, this is contrary to the Supreme Court of Canada's decision in ***Lavigne***. If the Employees want the Supreme Court to overturn the ***Lavigne*** decision, it may be appropriate for them to seek intervener status before the Supreme Court. As this Court is bound by ***Lavigne***, allowing them intervener status at this stage would unnecessarily expand the issues.

[34] In sum, the Union submits that the Employees have failed to meet the test necessary for them to be added as interveners. They will not be directly affected by this Court's decision, they have no special expertise to bring to the constitutional issues facing the Court, and their arguments would unnecessarily expand the issues before the Court.

[35] Furthermore the Employees interest in having the Board's declaration set aside for more than one reason was somewhat remote: if, when Old Dutch Foods again bargains collectively with UFCW Local 401, it might resist a Rand Formula if this Court disagrees with the Board's constitutional reasoning. The Employees might avoid paying union dues under the next collective agreement if the Court expresses their (and our) favoured view on the constitutional issue.

The Result of the Attorney General's Application is Already Known

[36] It is further submitted that the result of the Attorney General's application is known. The Attorney General and the UFCW have drafted an order that sets aside the declaration and makes the order's legal implications clear to their satisfaction. To continue the litigation to find out whether there are other sufficient grounds to set aside the declaration pretends that it is the Board's reasons rather than its actions that are the subject of a judicial review. The Attorney General is satisfied to have the order that she asked for, and to re-litigate the constitutional issue when and if it arises.

[37] The Order proposed by the Attorney General and the UFCW does dispose of this application: the Attorney General asked for a declaration to be set aside, and the proposed order sets the declaration aside. Although the Employees do not wish to "expand the scope of this application" in the sense that they do not wish to expand the grounds for relief set out in the Originating Notice, they wish to be made parties to the application for judicial review in order to seek relief that is not in the Originating Notice.

[38] The Attorney General believes that the Employees' adjustment of their position shows that their remedy is not available in this application. The Employees wish to attack the Board's specific directions to Old Dutch Foods, which had an immediate effect on their obligation to pay dues. They wish to attack the express and implied constitutional reasons for those directions. Since this is their project, their remedy must be found in proceedings where the Board's directions to Old Dutch Foods are in issue.

[39] Although certain Employees of Old Dutch Foods Ltd. disagree with a decision of the Alberta Labour Relations Board, they did not file an Originating Notice seeking judicial review of the Board's decision. Instead, well after expiry of the limitation period, they ask this Court to make them a "co-applicant" in the judicial review the Attorney General filed within the limitation period. They also ask this Court to allow them to proceed with that judicial review on their own when the Attorney General chooses not to proceed, and to prevent the Attorney

General from settling its judicial review despite the fact that the proposed Consent Order gives the Attorney General all of the remedies it asked for in its Originating Notice.

[40] With respect to the Employees' proposed order, the Union submits that to grant that order the Court would have to deny the Attorney General's application for a Consent Order and that should have been reflected in the Employees' draft order. As well, it would be inappropriate to allow the Employees to be an applicant and yet make them immune from paying costs. The Employees have not cited any precedent suggesting they could be entitled to such immunity.

[41] The Board found that the *Code* violates the freedom of association the *Charter* protects because, unlike similar legislation in most other provinces, it omits a key component of the Canadian model of labour relations regarding union security (***Old Dutch Foods Ltd. (Re)*** at paras. 58,66 - 69).

[42] The Board also found that even if it was wrong on the constitutional question, the Employer's refusal to agree to union security in the circumstances constituted bad faith bargaining and was thus a violation of section 60 of the *Code*. The Board ordered that the existing lockout/strike be suspended and that the parties meet and resume collective bargaining with union security as an agreed term of the collective agreement (paras. 70, 73-74). The Attorney General's judicial review application does not challenge this aspect of the Board's decision. Thus, this portion of the Board's decision, which requires the Employer to agree to a term requiring its employees to pay union dues, stands irrespective of whether the Attorney General's judicial review continues.

[43] Only the Attorney General applied for judicial review of the Board's decision. The parties to that judicial review, the Attorney General and the Union, settled the judicial review and drafted a Consent Order reflecting this settlement. The Board does not object to the Consent Order. The Consent Order gives the Attorney General all of the remedies sought in its Originating Notice.

[44] Despite never having filed their own Originating Notice, the Employees ask this Court to allow them to be added as a "co-applicant" to the Attorney General's judicial review and to continue that application without the Attorney General if need be. The Employees ask to be added as an applicant so they can "pursue available redress, even in the absence of ongoing participation by the Attorney-General". The Union submits that allowing the Employees' application would allow them to circumvent the limitation period for seeking judicial review.

[45] A claimant cannot be added to an action outside of the applicable limitation period unless there is a statutue or Rule allowing for the addition or allowing the Court to extend that limitation period (see: ***Wong v. Voong***, [2004] A.J. No. 824 (C.A)). In this case, s. 19(2) of the *Code* establishes a 30 day time limit for seeking judicial review of a decision of the Board:–

> 19(2) A decision, order, directive, declaration, ruling or proceeding of the Board may be questioned or reviewed by way of an application for judicial review

> seeking an order in the nature of certiorari or mandamus if the originating notice is filed with the Court and served on the Board no later than 30 days after the date of the decision, order, directive, declaration, ruling or proceeding, or reasons in respect of it, whichever is later.

There is no provision in the *Code* giving the Court jurisdiction to extend the limitation period.

[46] The Alberta Court of Appeal has held that courts have no jurisdiction to extend such limitation periods where the time limit is set by statute and does not contain an express extension provision (***B.D.W v. G.B.G.R.*** (1989),68 Alta. L.R. (2d) 377 at 380 (C.A.)).

[47] The Courts have made similar observations regarding the six month time limit for seeking judicial review stipulated by Rule 753.11 (*Boyd v. Alberta*, [2000] AJ. No. 1380 at para. 9 (Q.B.) affd: [2002] AJ. No. 189 (C.A.); ***Skyline Roofing Ltd. v. Alberta (WCB)***, [1996] A.J. No. 690 at para. 11 (Q.B.); ***Johannesson (Gerhard) v. The Appeals Commission***, [1995] A.J. No. 791 at para. 34 (Q.B.); Stevenson, J. and Côté J.A, eds., *Alberta Civil Procedure Handbook* (Edmonton: Juriliber, 2009) at p. 799).

[48] Alberta Courts have held that where an applicant seeks relief that would have the effect of setting aside an administrative decision or act, that application is subject to the time limitation applicable to judicial review. That is, a party cannot avoid the limitation period by disguising their application as something other than an application to set aside a tribunal's decision (***Boyd***, paras. 17, 24; ***AUPE v. Alberta***, [2001] AJ. No. 1569 at para. 3 (C.A); ***Simlote v. Alberta***, [1989] A.J. No. 818 (C.A) (leave to appeal denied: [1989] S.C.C.A. No. 407).

[49] This Court addressed this point in ***Telus Communications Inc. v. Opportunity***, [1998] A.J. No. 1182 (Q.B.). In that case, the applicant had brought an application for a declaration instead of an application for judicial review. In finding that the judicial review time limitation barred the application, this Court commented on the purpose of such limitation periods at para. 66:–

> The Applicant has submitted that the enforcement of the limitation period would result in making valid an otherwise invalid act. This same argument could be raised in connection with respect to any action. It could be equally argued that the invalid actions of any Defendant are made valid by the expiration of the limitation period. The purpose of a limitation period is to preclude enforcement of a legal right through the passage of time. The Legislature has concluded that the enforcement of legal rights cannot be open-ended, and that there must be some finality if action is not taken within a specified time. This is for policy reasons and there is not anything to suggest that such policy considerations should be different for judicial review applications as compared to other types of actions.

[50] In this case, it is submitted that if the Employees wanted to challenge the Board's decision, they should have filed an Originating Notice within the time period for doing so. An

order refusing the Attorney General's Consent Order resolving its judicial review and allowing the Employees to proceed with that judicial review, despite not having filed their own Originating Notice, would it is submitted allow them to circumvent the time limitation.

[51] The Union has already argued that the Employees are not affected by the issues raised in the Attorney General's application for judicial review. To be a party, a person's rights must be directly affected by the outcome of the dispute; they must have more than a mere interest in the development of the law. A person will have a direct interest when their "substantive rights ... will be directly affected in the matter before the Court".

[52] The Employees' submissions and Raymond Berry's Affidavit make clear that the Employees are upset that they now have to pay union dues. However, the Attorney General's judicial review does not challenge the requirement that the Employees pay union dues. Even if the judicial review proceeded and this Court quashed the Board's decision and sent the matter back to the Board for a fresh determination, that determination would not concern the Employees' interests as those interests are no longer at issue given the settlement between Old Dutch and the Union. As such, it is submitted that the Employees have no direct, personal interest at stake and would neither benefit nor suffer adversely from the Attorney General's judicial review application; their interest is no greater than that of any other Albertan.

[53] For these same reasons, the Employee's argument that they should not have to pay union dues is moot. In ***Borowski v. Canada (Attorney General)*** (1989), 57 D.L.R. (4th) 231 (S.C.C.), the Supreme Court of Canada explained the doctrine of mootness at para. 15:–

> The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.

[54] In this case, the Employees' Employer has made the requirement to pay union dues a condition of their employment. Both the Employer and the Employees had the option of challenging the Board's decision through judicial review or a reconsideration application; they did neither. The settlement between Old Dutch and the Union renders the Employees' arguments moot. There is no longer a live issue in dispute and such a live issue is necessary before the Courts can engage a constitutional analysis.

[55] The Union submits that ***Goudreau*** does not assist the Employees. In that case, the Court added the parents as respondents in the action, not as applicants. Moreover, while the Court of Appeal agreed with the parents that the matter should proceed by Statement of Claim rather than

by Originating Notice, they did so after citing Rule 753.16(2) which allows the Court to effectuate such a conversion on its own motion. Most importantly, in this case the Employees' constitutional rights are not at issue as the requirement that they pay union dues derives from the Collective Agreement, not from the Board's decision.

[56] It is submitted that there is also nothing in the Attorney General's Consent Order that binds the Employees or affects their interests or substantive rights. The Consent Order grants the Attorney General everything that is asked for in its Originating Notice, that is, it sets aside the Board's decision to the extent that it constitutes a general declaration of constitutional invalidity. The Board does not oppose the Consent Order.

[57] It is submitted that the Employees' interest in this case is no different than that of any other employee in Alberta. Virtually any Alberta employee could be required to pay union dues pursuant to a collective agreement between their employer and their union. Likewise, virtually every employer in Alberta could one day be the subject of a Board order requiring them to agree to a union dues provision when negotiating a collective agreement. To allow the Employees to prevent the settlement of this case would mean that any group of employees in Alberta and any employer could block that settlement. It is submitted that it would have a devastating effect on settlements in Alberta if any person with a tangential or indirect interest in the law could prevent parties from settling their disputes.

The *Conway* Decision

[58] This Court also asked the Parties for their submissions on ***R. v. Conway***, 2010 SCC 22, particularly as it relates to the parties' Consent Order. In that case, the issue was whether the Ontario Review Board could provide a remedy under s. 24(1) of the *Charter*. In concluding that it could, the Supreme Court of Canada affirmed that administrative tribunals who have the power to decide questions of law can consider the *Charter* rights of the parties who appear before them. Such tribunals can also grant *Charter* remedies under s. 24 provided they have the jurisdiction to grant the type of remedy sought.

[59] In ***Conway***, the Supreme Court also affirmed the limited jurisdiction of administrative tribunals under s. 52 of the *Constitution Act*, 1982. That provision provides that any law that is contrary to the *Charter* is of no force and effect. The Supreme Court reiterated that administrative tribunals that have the jurisdiction to decide questions of law can decline to apply unconstitutional laws to the matters they are adjudicating.

[60] While administrative tribunals have such jurisdiction, it is submitted that the Supreme Court has held that they do not have jurisdiction to make general declarations of invalidity. That is, while they can decline to enforce an unconstitutional provision when adjudicating a dispute before them, they cannot declare a statutory provision to be unconstitutional for all purposes, or order the government to amend unconstitutional legislation.

[61] In ***Conway***, the Supreme Court referred to the line of cases establishing this latter point as the "*Cuddy Chicks* trilogy". In ***Cuddy Chicks Ltd v. Ontario (Labour Relations Board)***, [1991] S.C.J. No. 42, the respondent union had filed a certification application before the Ontario Labour Relations Board in relation to employees at a chicken hatchery. The *Labour Relations Act* provided that it did not apply to persons employed in agriculture, and thus the union sought to argue that that Act violated ss. 2(d) and 15 of the *Charter*. The Ontario Board convened a separate hearing to determine whether it had jurisdiction to consider the *Charter* arguments and the jurisdictional issue eventually made its way to the Supreme Court.

[62] The Supreme Court concluded that tribunals such as the Ontario Labour Relations Board have an obligation to determine whether their enabling statute violates the *Charter*. However as the Court explained:–

> ... a formal declaration of invalidity is not a remedy which is available to the Board. Instead, the Board simply treats any impugned provision as invalid for the purposes of the matter before it. Given that this is not tantamount to a formal declaration of invalidity, which is a remedy exercisable only by the superior courts, the ruling of the Board on a *Charter* issue does not constitute a binding legal precedent but is limited in its applicability to the matter in which it arises.

[63] In ***Conway***, the Supreme Court of Canada describes the ***Cuddy Chicks*** trilogy at paragraphs 49 to 77. It affirms that tribunals such as the Alberta Labour Relations Board have a duty to consider questions of constitutionality. However it is submitted that the Court did not overturn the determination in ***Cuddy Chicks*** that administrative tribunals do not have the jurisdiction to declare a statutory provision to be unconstitutional for all purposes. It is submitted that if the Court had intended to overturn the ***Cuddy Chicks*** trilogy, surely it would have said so.

[64] In the case before the Court, the Union invoked the *Charter* rights of its members and asked the Board to consider the constitutionality of the *Code*. There is no dispute that the Board has jurisdiction to consider such questions and the Attorney General's Consent Order is consistent with this point. It is submitted that the Consent Order reflects the law as outlined in ***Cuddy Chicks*** and affirmed by the Supreme Court of Canada in subsequent cases.

[65] The premise of the order proposed by the UFCW Local 401 and the Attorney General is that a declaration of constitutional invalidity is as such beyond the jurisdiction of an inferior court or tribunal. It is submitted that ***Conway*** does not expand the ALRB's jurisdiction in a way that undermines this premise.

[66] The Supreme Court's concern in ***Conway*** is to determine, as a matter of statutory interpretation, how the remedial powers of statutory decision-makers are to be understood in cases where they are called upon to decide issues of constitutional law. The Court's conclusion is, where a tribunal has been given power to decide questions of law in the course of carrying out its statutory function, we should infer not only that it has been given power to determine the

constitutionality of a provision it is asked to apply, but also that the tribunal is empowered to grant "*Charter* remedies" that are:–

> . . . the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function.

[67] Not only can a legislature restrict a tribunal's ability to decide questions of law, a tribunal's ability to grant a particular *Charter* remedy depends on the consistency of the remedy with the legislature's chosen statutory scheme.

[68] It is submitted that a tribunal's inability to determine the law in cases not before it is not rooted in legislative intent. Rather, as indicated in paragraph 31 of ***Nova Scotia (Workers' Compensation Board) v. Martin***, [2003] S.C.R. 504, 2003 S.C.C. 54 an inferior tribunal's inability to decide questions of law generally (rather for the purpose of deciding particular cases that come before it) has its source in s. 96 of the Constitution Act, 1867: under our constitution it is a distinctive task of federally-appointed judges to tell other decision-makers what the law is.

[69] Mr. Justice Bastarache, writing for the Court in ***Paul v. British Columbia (Forest Appeals Commission)*** [2003] 2 S.C.R. 585, a companion case to ***Martin***, describes the essential particularity of a tribunal's jurisdiction to apply the Constitution:–

> 31 Second, while both provincially constituted courts and provincially constituted tribunals may consider the Constitution and federal laws, there is nevertheless one important distinction between them that the respondent overlooked. Unlike the judgments of a court, the Commission's decisions do not constitute legally binding precedents, nor will their collective weight over time amount to an authoritative body of common law. They could not be declaratory of the validity of any law. Moreover, as constitutional determinations respecting s. 91(24) or s. 35, the Commission's rulings would be reviewable, on a correctness basis, in a superior court on judicial review: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, at para. 40; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at [page 607] para. 23; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570. To avoid judicial review, the Commission would have to identify, interpret, and apply correctly the relevant constitutional and federal rules and judicial precedents. As a result of the contrast between the general application of a provincial law by a court and the specific, non-binding effect of a board's particular decision, there is a substantial difference.

[70] It is submitted that the true effect of Conway can be illustrated by elements of this Board decision that are not called into question by this application for judicial review. At paragraphs 73 and 74 of this Board decision, the Board gives direction to the employer Old Dutch Foods

regarding its future conduct of collective bargaining. The Board gives two reasons for these directions, one based on its conclusion that our *Labour Code's* omission of a mandatory Rand Formula is unconstitutional, and another based on its understanding and application of the *Code's* requirement that Old Dutch bargain in good faith.

[71] The Board's description of the connection between its constitutional reasoning and the directions it gave to Old Dutch is brief:–

> 74. In light of *Health Services*, the refusal by ODF to agree to a Rand formula is now considered by the Board to be a failure to bargain in good faith ....

[72] If one attempts to fill in the steps in the Board's reasoning, this is not a case where a tribunal has refused to apply an unconstitutional provision of its governing statute but rather the Board sought to repair (what it believes is) an unconstitutional omission by reading a requirement into a statute that isn't otherwise there: a failure to agree to a Rand formula is as such a failure bargain in good faith.

[73] ***Conway*** implies that there is nothing wrong with that: although repairing a statutory omission by "reading in" something unintended by the legislature is a recognised constitutional remedy, one of the Board's jobs is determining whether bargaining is unfair, and repairing the situation if it is. There is no incoherence with the statutory scheme if the Board makes this constitutional repair for purposes of its decision. Even before ***Conway***, no one questioned the Board's jurisdiction to repair this omission in the way it did.

[74] It is submitted that a different order of legal ambition is required to declare a law invalid, to determine a legal issue for future cases throughout Alberta, and to cast a burden on the Legislature to repair the law. The defect in the Board's declaration isn't merely that the statutory framework does not support an inference that our Legislature intends that the Board should be able to declare a statute invalid. The flaw runs deeper than that: while the Board has power to reach conclusions of constitutional law while deciding particular cases, the Legislature couldn't grant a tribunal power to generally decide the validity of a statute even if it wanted to.

[75] The Union and the Attorney General of Alberta argue that inferior tribunals therefore still cannot declare the law.

The Employees' Argument

Affected Party Status

[76] Individuals "whose presence before the Court may be necessary in order to enable the Court to effectually and completely to adjudicate upon.. . a matter, or in order to protect the rights or interests of any person or class of persons" may be joined as parties to a proceeding; *Alberta Rules of Court, supra*, Rule 38(3).

[77] "[E]very person directly affected by the proceedings" is to be served with notice of an application for judicial review. "The Court may direct any person to be added. as a party to proceedings for judicial review"; *Alberta Rules of Court, supra,* Rules 753.09(1)(c) and 753.1(1).

[78] Individuals whose claimed constitutional rights are 'directly engaged in [a] proceeding" are to be afforded party status: ***Goudreau***.

[79] The Employees are affected by the Decision as arguably it is their constitutionally protected freedom of association that the Union invoked before the Board to assert the requirement of a statutory compulsion to force the Employees to pay union dues to the Union.

[80] The Employees have a stake in the outcome of this proceeding as Union dues are being deducted from their pay cheques and their financial interests are affected.

[81] The Employees assert a constitutional freedom under s. 2(d) of the *Charter* to be free from forced association therefore their constitutional rights are impacted by the Decision.

[82] There is also a reasonable explanation for why the Employees did not seek party status before the Board and participate in the proceedings that led to the Decision. They did not receive effective notice of the nature of the proceeding before the Board.

[83] The interests of the Employees are adverse to those of the Union in this proceeding, and are not necessarily the same as those being advanced by the Attorney General. The Employees understand that the Employer does not intend to participate in the application. As a result of the direct impact on them, it is submitted that the Employees should not have to rely on other parties to articulate and advance their interests, and they should be afforded party status so that they can seek to protect their own interests in the litigation:***Goudreau***.

Intervener Status

[84] In the alternative, the Employees argue they should be afforded intervener status.

[85] "[A]n intervention may be allowed where the proposed intervener is specially affected by the decision facing the Court or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court"; ***Papaschase Indian Band*** at para. 2; ***Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co.*** 2007 ABCA 175, at para. 2.

[86] "In cases involving constitutional issues or which have a constitutional dimension to them, courts are generally more lenient in granting intervener status. . .. In constitutional cases, if an applicant can show its interests will be affected by the outcome of the litigation, intervener

status should be granted"; ***Papaschase Indian Band*** at paras. 6 and 9; ***Alberta (Human Rights and Citizenship Commission)*** at para. 3.

[87] It is submitted that the Employees are specially affected by the Decision, and that there is a significant constitutional dimension to the Decision. The Employees, through legal counsel, can offer insight to the Court about the impact of the Decision on constitutional rights asserted by the Employees from the unique perspective of these affected individuals.

[88] Under labour legislation a union that is certified as a bargaining agent has the exclusive authority to represent employees in the bargaining unit, and to speak on their behalf in dealings with their employer about terms and conditions of employment: *Labour Relations Code*, s. 40.

[89] However it is submitted that this exclusive representative capacity enjoyed by the Union does not extend in these circumstances to preclude a group of employees with interests so obviously at odds with those of the Union from having their own say in court about the Decision. The Union cannot be expected to adequately represent the position of the Employees.

[90] If granted party or intervener status by the Court, the Employees intend to participate in this proceeding as a single group through common legal representation, so that they can make common submissions to the Court in an efficient manner. The involvement of the Employees in this proceeding will not add appreciably to the time required to address the matter or the costs of so doing. Instead, their involvement will provide valuable assistance to the Court in considering the important and different constitutional interests at stake in this application.

[91] The Employees ask to participate in this application without seeking costs from any party, and correspondingly, without obligation to pay costs to other parties in any event of the cause. This is a common direction when intervener status is granted: ***Papaschase Indian Band*** at para. 14; ***Alberta (Human Rights and Citizenship Commission)*** at para. 7.

Conclusion

[92] Raymond Berry is joined by 28 other similarly situated employees of the Employer who had chosen not to join the Union, and who were forced to start paying dues to the Union under the collective agreement after the Decision was issued.

[93] At the request of counsel for the Union, Raymond Berry was cross-examined on his Affidavit.

[94] The Employees bring this application pursuant to Rules 38 and 753.1 of the *Alberta Rules of Court,* Alta. Reg. 390/68 on the following grounds:–

(a) the interests of the Employees are directly affected by the Decision;

(b) the Employees did not receive effective notice of the nature of the proceedings before the Board that resulted in the Decision, and accordingly did not participate in the proceeding before the Board;

(c) the Employees claim a constitutional freedom that has been infringed by the Decision; and,

(d) the Employees will be able to offer the parties and the Court assistance, including a different perspective from other parties, concerning matters at issue in this application, and their participation in the application will not unduly delay, increase the costs to, or otherwise inconvenience the parties.

[95] The Employees seek an Order of this Court:–

(a) Affording them standing in this judicial review application as parties, or alternatively as interveners;

(b) Directing that parties bear their own costs of this application, and that costs not be awarded to or against the Employees with respect to their future participation in the proceeding.

Impact On Relief Sought by the Attorney-General

[96] If the Court grants the Order sought to add the Employees as applicants the Order sought by the Attorney-General in Chambers on June 3, 2010, with the consent of the Union, will have to be revisited.

[97] The Employees, if given a say as parties, oppose the granting of the Order sought by the Attorney-General, at least in its current form.

[98] The Employees do not oppose *per se* an order setting aside parts of the Board's impugned decision that amount to a general declaration of invalidity of legislation, but not on the basis that this would be dispositive of the application and leave undisturbed other parts of the Board's decision that comprise the finding of a constitutional guarantee of a Rand Formula, or that are inextricably tied to this constitutional finding. The Employees, if made co-applicants, seek the opportunity, at an appropriate time when the merits of the judicial review application can be fully argued, to convince the Court that the substantive ground raised in the Originating Notice of Motion provides a sound basis upon which to set aside additional parts or the whole of the Board's decision.

Statutory Reconsideration by the Board of It's Prior Decision

[99] In Chambers on June 3rd I raised the matter of the Board's ability, under section 12(4) of the *Code*, to reconsider it's own decisions. Subsequently counsel for the Union provided me with a copy of Board Information Bulletin #6, which describes the Board's general policies with respect to exercising its reconsideration power.

[100] Reconsideration is recognized by the Employees as one option available to them to attempt to obtain redress in this situation. The Board did not give notice to employees of Old Dutch Foods Ltd. about the nature of the proceeding that was before it, including the constitutional question that had been formally framed by the Union. Employees did not participate in the Board hearing as affected parties. It is conceded that if employees had presented at the Board hearing and sought standing as affected parties this status would have been afforded to them. However the Employees cannot be certain at this stage that if a reconsideration application is made by them it will be entertained by the Board.

[101] The Employees maintain that the possibility of a reconsideration process being undertaken before the Board ought not to influence the Court to decline to grant party status to the Employees in this judicial review proceeding. The willingness of the Board to entertain a reconsideration application is a matter within the tribunal's discretion, and is outside the control of the Court. Regardless of whether or not reconsideration might be sought and granted, the Employees ask for a say in the Court's disposition of this judicial review application. Whatever that disposition, it will have a meaningful impact on the individual constitutional rights of the Employees and their future exercise of those rights.

[102] The Employees submit that their participation in this judicial review proceeding is critical to the Court's evaluation of the constitutional ruling of the Board. Fundamentally affected employees whose constitutional rights are the ones at issue should have a say, as affected parties, in the disposition of this application. This should be so whether the application is to be disposed of on some narrow point worked out between some of the parties, or upon broader grounds raised and available for the Court to address.

[103] The developments on the eve of the appearance in Chambers on June 3, 2010 make it even more evident that no other party, not the Union, not the Respondent Employer, and not the Applicant Attorney-General, can be said to speak for the Employees and how their individual constitutional rights have been interpreted and applied.

[104] The Employees seek relief from the Court in the form of their proposed Order, adding them as applicant parties in this judicial review proceeding. The Employees also ask the Court to refuse the Order sought by the Attorney General on the basis that it is premature, incomplete and not agreed to by all affected parties. The Employees ask that the balance of the judicial review application be put over to be heard on it's merits in Special Chambers, with the prospect that adjourned intervener motions brought by other entities may also be renewed in the meantime.

[105] The proposed form of Order sought by the Employees would make the Employees parties in this proceeding, and more particularly, given the nature of their interests, style them as Applicants along with the Attorney General of Alberta.

[106] Making the Employees co-applicants would permit them to pursue available redress, even in the absence of ongoing participation by the Attorney General. The Employees could then rely upon one or more of the grounds for relief expressed in the Attorney General's Originating Notice of Motion of December 8, 2009 (without asking to expand the scope of the application). Most notably, the Employees seek to advance the assertion made by the Attorney General on page 2, in paragraph 2(d) of the Motion, that "the Rand Formula form a union security clause is not constitutionally guaranteed, in any event."

[107] There is precedent for the Court to grant party status to individuals whose constitutional rights are affected by an application initiated by the Crown, and to effectively allow them a full say in the future prosecution of the action: ***Goudreau***. This procedural approach has parallels to the case at hand.

[108] Both counsel for the Attorney General and for the Union indicate that the decision does not alter their shared view that the Respondent ALRB lacked jurisdiction to make a declaration in its impugned decision that the *Labour Relations Code* contravened s. 2(d) of the *Canadian Charter of Rights and Freedoms* by omitting a requirement that all collective agreements in Alberta contain, at least, a Rand formula form of union security provision. Both of these parties assert that Conway should not be understood to recognize an ability for administrative tribunals to make declarations of invalidity as remedies when they find that legislation infringes constitutional freedoms.

[109] However I conclude that the reasoning in ***Conway*** does not readily admit of this constraint on the intended scope of the decision. Rather the judgment seems to endorse an expansive view of the remedial authority of tribunals otherwise empowered to interpret and apply the *Charter* in the course of their decision-making, which at least arguably, might allow a tribunal to go on to remedy a violation of the *Charter* in any manner available to a "court of competent jurisdiction", including making a declaration of invalidity pursuant to a. 52(1) of the *Constitution Act* in addition to, or instead of, remedies under s. 24 of the *Charter*.

[110] The following passages from ***Conway*** seem significant:–

> 1. The specific issue in this appeal is the remedial jurisdiction of the Ontario Review Board under 5. 24(1) of the *Canadian Charter of Rights and Freedoms*. The wider issue is the relationship between the *Charter*, its remedial provisions and administrative tribunals generally.
>
> 2. There are two provisions in the *Charter* dealing with remedies: s. 24(1) and s. 24(2). Section 24(1) states that anyone whose *Charter* rights or freedoms have been infringed or denied may apply to a "court of competent jurisdiction" to

obtain a remedy that is "appropriate and just in the circumstances" Section 24(2) states that in those proceedings, a court can exclude evidence obtained in violation of the *Charter* if its admission would bring the administration of justice into disrepute. A constitutional remedy is also available under s. 52(1) of the *Constitution Act*, 1982, which states that the Constitution is the supreme law of Canada, and that any law inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.

. . .

20. We do not have one *Charter* for the courts and another for administrative tribunals (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, per McLachlin J. (in dissent), at para. 70; *Dunedin; Douglas College; Martin*) This truism is reflected in this Court's recognition that the principles governing remedial jurisdiction under the *Charter* apply to both courts and administrative tribunals. It is also reflected in the jurisprudence flowing from Mills and the *Cuddy Chicks* trilogy according to which, with rare exceptions, administrative tribunals with the authority to apply the law have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions.

. . .

22 All of these developments serve to cement the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. In light of this evolution, it seems to me to be no longer helpful to limit the inquiry to whether a court or tribunal is a court of competent jurisdiction only for the purposes of a particular remedy. The question instead should be institutional: does this particular tribunal have the jurisdiction to grant *Charter* remedies generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If it and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate (*Cuddy Chicks* trilogy; *Martin*). A tribunal which has the jurisdiction to grant *Charter* remedies is a court of competent jurisdiction. The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought based on its statutory mandate. The answer to this question will depend on legislative intent, as discerned from the tribunal's statutory mandate (the *Mills* cases).

. . .

52. In 1991, *Cuddy Chicks* established that the Ontario Labour Relations Board could determine the constitutionality of a provision which excluded agricultural workers from the protections of *Ontario's Labour Relations Act*, R.S.O. 1980, c. 228. The issue arose out of an application by the union for the

certification of *Cuddy Chicks*' hatchery employees. The union challenged the constitutional validity of this exclusion, arguing that it violated ss. 2(d) and 15 of the *Charter*, and sought to have it declared to be of no force and effect pursuant to s. 52(1).

. . .

78 The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly, they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a *Charter* remedy is sought to an inquiry asking whether it is "competent" to grant a particular remedy within the meaning of s. 24(1).

. . .

80 If, as in the *Cuddy Chicks* trilogy, expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when, a remedy is sought under a. 52 of the *Constitution Act*, 1982, there is no reason why such tribunals are not also in the best position to assess constitutional questions when a remedy is sought under s. 24(1) of the *Charter*. . . . .

81 Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter*-- and *Charter* remedies — when resolving the matters properly before it [emphasis added].

[111] As Counsel for the Union noted, the Court in ***Conway*** built upon its prior jurisprudence in cases like ***Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*** [1991] 2 S.C.R. 5. However, it did so without commenting one way or the other on the passage in ***Cuddy Chicks*** relied upon by the Union to the effect that "a formal declaration of invalidity is not a remedy which is available to the Board". Instead, Justice Abella, for he unanimous Court in ***Conway***, explained ***Cuddy Chicks*** as a case where a labour relations board was able to deal with a *Charter* challenge to its constituent legislation and a union's request for a "declaration pursuant to s. 52(1) of the *Constitution Act* that the impugned statutory provision was of "no force and effect"

(***Conway***, *supra*, para. 52). These comments comport with the notion of an administrative tribunal (a labour relations board in particular) being able to grant declaratory relief as a *Charter* remedy.

[112] While ***Conway*** does not undermine the legal basis for the Order sought by the Attorney General in this proceeding, this recent jurisprudential development at least raises a serious question about the legal foundation for the Order. Prudence alone dictates that the Court at least evaluate other available grounds for the relief being sought in a full hearing of the motion.

The Limitation Argument

[113] The Union also argues that party standing should be denied to the Employees because doing so would circumvent the applicable statutory limitation period for commencing an application for judicial review of a Board decision.

[114] There is a timely application for judicial review presently before the Court. The Employees seek standing in that timely application to be heard before the matter is disposed of. They do not seek to bring a separate or different application. They do not seek to argue new grounds that are not contained within the application as initially framed. They do not ask for a remedy that goes beyond what was sought in the Attorney General's Originating Notice of Motion.

[115] This is not a case like ***Wong v. Voong*** 2004 ABCA 216 relied upon by the Union, where a party came forward in a personal injury proceeding arising out of a motor vehicle accident seeking to assert a new, separate claim for damages for a different individual after the expiry of a limitation period. The Employees in this case do not seek to assert a new cause of action or to claim different relief. They ask for a say in the outcome of an application commenced in time. Their participation in this application would not have the effect of exposing the Union to the potential prejudice of having to deal with a new claim that was not initiated within the permitted time frame.

[116] None of the authorities relied upon by the Union that address the inability of the Court to relieve against the expiry of a statutory limitation period has any direct application in the present circumstances. However the Employees do not seek such relief. The real issue at hand is whether or not the Employees should be recognized as affected parties with standing to participate in the application that was properly commenced, and which remains before the Court to be disposed of in an appropriate manner. Even if the Employees had brought their own application for judicial review of the Board decision, they could well have faced the same argument from the Union about whether or not they have a sufficient interest to be granted standing as parties. This issue of standing is what the Court needs to decide.

Affected Party Status

[117] Both the Attorney General and the Union argue that the Employees' interests are not sufficiently affected by this application to warrant making them parties to this proceeding.

[118] The Union says the Employees lack sufficient standing because the obligation they now face to pay dues is not the result of the Board decision, but rather is because "the Employees' Employer has made the requirement to pay union dues a condition of their employment" in a negotiated collective agreement that cannot be altered by the outcome of application.

[119] However the Board's constitutional ruling provided the impetus for the dues check-off provision that found it's way into the collective agreement. The Board did not merely mandate in its decision that a Rand formula be negotiated. It ordered that a Union proposal for a union security clause be included in a collective agreement as an item deemed to have been agreed to in bargaining [November 9, 2009 Board Decision at para 74(b)]. Ultimately the clause was not freely bargained, nor was it the employer who made it a "requirement" of the Employees' employment. It was the Union that proposed the provision and the Board that imposed it.

[120] The finding of a *Charter* violation is the relevant feature that can explain the different outcomes on this issue between the 1990 and 2009 Board decisions affecting Old Dutch Foods The Board's conclusion that the company engaged in bad faith bargaining on the union security issue in 2009, when the identical employer bargaining position was endorsed by the Board as legitimate in 1990, can only be understood as the direct consequence of the Board's constitutional analysis, an analysis that the Employees seek to demonstrate is flawed.

[121] Further the Employees have an ongoing interest in the Board's decision so that the next round of bargaining between the company and the Union might see a return to the prior arrangements surrounding the payment of dues at Old Dutch Foods that the Employees maintain are lawful, and that would afford recognition to their constitutionally protected freedom of association.

[122] The Attorney General labels this interest of the Employees in retaining an opportunity for a reversion from forced dues to voluntary dues in the future as too "remote" to justify an audience before the Court. The Union argues that this interest is "no different than that of any other employee in Alberta".

[123] However the history at Old Dutch Foods that is recounted in the Board's decision makes the interest of these Employees in a future ability for collective agreements to be lawfully negotiated in this Province that do not require workers to pay dues to a union a matter of real, rather than "remote" concern, and a matter of particular interest to these Employees. For the Employees, the Board's constitutional ruling remains a very live issue" in their work lives.

[124] The claims of the Attorney General and the Union that the Employees lack a real interest in this application mirror what the Board said in it's impugned decision when it rejected as

insufficient one of the employer's reasons for opposing a Rand formula in bargaining, referring to it as the "simple philosophical concern over employees having a freedom of choice" [November 9, 2009 Board Decision at para. 73]. The Employees see their concern with preserving their freedom of choice as much more than a "simple philosophical concern". They see this concern engaging fundamental constitutional precepts. They perceive their *Charter* protected freedom of association to be at stake in this proceeding, and assert that this represents a more than adequate basis to afford them standing before the Court.

[125] The Employees further maintain that this is an appropriate case to grant the Employees standing without the ability to claim costs or to have them awarded against them. There is precedent for interveners to be dealt with in this manner. Even though the arrangements worked out between the Attorney General and the Union on the eve of the June 3rd Chambers appearance have obliged the Employees to pursue their request for party status in preference to their request for intervener status, this fact alone need not alter the typical approach of the Court to costs involving interveners, when that reasonably equates with the status of the Employees in the context of this application. The Court is asked to consider the fairness of the Union asserting that these Employees, if made parties, should face exposure to an award of costs in this mailer, when the Union's costs are being paid in part by the fruits of the impugned Board decision in the form of the forced dues payments that it now receives from the very Employees that it seeks to exclude from this proceeding.

[126] However I conclude that party status in this application can only come with exposure to a claim for costs, and the corresponding opportunity to seek them from other parties depending on the outcome of this application.

[127] In the end result, the following Order shall issue herein:–

Order

> UPON THE application of certain named employees of the Respondent Old Dutch Foods Ltd. (the "Employees"); AND UPON HEARING read the submissions of the Employees, the Applicant and the Respondent United Food and Commercial Workers Union, Local No. 401 (the "Union"); AND UPON NOTING that the other Respondents chose not to participate in the hearing of this motion; AND UPON HEARING from counsel for the Employees, the Applicant and the Union in Chambers on June 3, 2010; AND UPON THE COURT reserving to consider additional written submissions from these parties, and to consider its decision; IT IS HEREBY ORDERED THAT:
>
> 1. The individuals named in a Notice of Motion made on behalf of the Employees, dated and filed in this proceeding on February 17, 2010, are added as Applicants in this proceeding, and the style of cause is amended accordingly.

2. The Employees will participate as Applicants through common legal counsel, and will be treated as a single party for purposes of making written and oral argument in respect of the hearing of the merits of this application.

Heard on the 3rd day of June, 2010.
Dated at the City of Edmonton, Alberta this 7th day of July, 2010.

Donald Lee
J.C.Q.B.A.

Appearances:

Craig Neuman, Q.C. and Dwayne Chomyn
Neuman Thompson
for Certain Old Dutch Food Employees

Rod Wiltshire
Alberta Justice and Attorney General
for the Applicant

John Carpenter and Vanessa Cosco
Chivers Carpenter
for United Food Commercial Workers Union, Local No. 401

Shawn McLeod
Labour Relations Board Employment and Immigration
for the Labour Relations Board