COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Vancouver (City) v. Vancouver Firefighters' Union, Local 18,* 2024 BCCA 33

Date: 20240130
Docket: CA48853

2024 BCCA 33 (CanLII)

Between:

City of Vancouver

Appellant

And

Vancouver Firefighters' Union, Local 18

Respondent

Before: The Honourable Mr. Justice Fitch
The Honourable Madam Justice Horsman
The Honourable Justice Skolrood

On appeal from: An award of an Arbitrator under the *Labour Relations Code*, R.S.B.C. 1996 c. 244, dated January 20, 2023 (*Vancouver (City) v. Vancouver Firefighters' Union, Local 18)*.

Counsel for the Appellant: D.J. Jordan, K.C.
K.S. Dhillon

Counsel for the Respondent: J.L. Burke
K. Wong

Place and Date of Hearing: Vancouver, British Columbia
September 12, 2023

Place and Date of Judgment: Vancouver, British Columbia
January 30, 2024

Written Reasons by:
The Honourable Justice Skolrood

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Madam Justice Horsman

Summary:

Appeal from an award of an arbitrator appointed pursuant to the Labour Relations Code, R.S.B.C. 1996, c. 244. The central dispute on appeal and before the arbitrator is whether the appellant employer, the City of Vancouver, breached s. 49.1 of the Employment Standards Act, R.S.B.C. 1996, c. 113 [ESA] by refusing to provide paid sick leave days to employees with more than six months' service. The employer says s. 49.1 of the ESA only requires that employees have access to a minimum of five paid sick days, which the employees already get under their collective agreement. The respondent union, Vancouver Firefighters' Union, Local 18, argues that this Court lacks jurisdiction to hear the appeal. The union also argues, in the alternative, that the arbitrator did not err in determining that the ESA provides five paid sick days to all employees, independent of any other benefit entitlements.

Held: Appeal quashed. This Court lacks jurisdiction to hear the appeal. The real basis for the Award is the application of s. 49.1 to the Collective Agreement and to the specific circumstances of the dispute between the parties. Accordingly, the matter falls within the exclusive jurisdiction of the Labour Relations Board.

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Reasons for Judgment of the Honourable Justice Skolrood:

[1] This is an appeal from a January 20, 2023 award (the "Award") of an arbitrator appointed pursuant to the *Labour Relations Code*, R.S.B.C. 1996, c. 244 [*Code*].

[2] The central issue before the arbitrator was whether the appellant City of Vancouver (the "Employer") breached s. 49.1 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*] by refusing to provide paid sick leave days to employees with more than six months' service.

[3] The arbitrator held that the Employer breached s. 49.1 of the *ESA* in the period commencing after March 31, 2022, and accordingly issued a number of remedial orders.

[4] The Employer now appeals to this Court, arguing that the arbitrator erred in the interpretation of s. 49.1. The respondent, Vancouver Firefighters' Union, Local 18 (the "Union"), takes the position that this Court lacks jurisdiction to hear the appeal. Alternatively, the Union submits that the arbitrator did not err in her interpretation s. 49.1 of the *ESA*.

[5] For the reasons that follow, I find that this Court lacks jurisdiction to hear the appeal and I would therefore order that the appeal be quashed.

Background

The Collective Agreement

[6] The background facts are succinctly set out in the Award and are largely not in dispute.

[7] The Employer and the Union are parties to a collective agreement. The 2020–2021 version of the collective agreement (the "Collective Agreement") included Article 12.3, *Sick Leave and Gratuity Plan*. Article 12.3A provides sick leave for

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covered employees after six months of continuous service, to a maximum of 261 shifts.

[8] Article 12.3B of the Collective Agreement, *Short-Term Non-Occupational Illness or Injury Plan*, establishes a system to allow paid benefits for authorized sick leave absences. The first four days of sick leave are not paid by the Employer. Instead, pursuant to Article 12.3B, the Union undertakes responsibility for the wages covering the first four shifts of any non-occupational illness or injury. The Union created a fund for that purpose (the "Fund").

[9] By agreement between the parties, the Employer directly pays the absent employee's net pay for the first four missed shifts and then invoices the Fund.

[10] The Fund is created from Union member contributions and is based on a percentage of base salary. The exact amount of the contributions is determined in accordance with the Vancouver Fire Fighters, International Association of Fire Fighters, Local 18 Membership Policies (the "Union Policies").

[11] The Union Policies establish a sick leave premium structure where premiums are based on usage. Individual usage is tracked by the Union and it maintains the data. Article 12.3C(2) of the Collective Agreement provides that: "[a] deduction is made from the current year's gratuity credits for all hours absent on sick leave with pay…".

The Legislation

[12] As noted at the outset, the central issue in the arbitration was whether the Employer breached s. 49.1 of the *ESA.* That section has undergone a number of revisions that are relevant to the appeal.

[13] Prior to 2021, s. 49.1(1) stated:

> After 90 consecutive days of employment with an employer, an employee, for personal illness or injury, is entitled, in each calendar year, to (a) paid leave for up to the number of days prescribed, and, (b) unpaid leave for up to 3 days.

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[14] Section 49.1(3), stated, and still states:

> Subject to subsection (4), an employer must pay an employee who takes leave under subsection (1)(a) an amount equal to at least the amount calculated by multiplying the period of the leave and the average day's pay, where the average day's pay is determined by the formula…[the subsection then sets out the applicable formula].

[15] Article 45.031 of the *Illness or Injury Leave* regulation enacted under the *ESA* provides that "for the purposes of s. 49.1(a) of the *Act*, the prescribed number of days is 5 days".

[16] Section 49.1(1) was amended pursuant to the *Employment Standards Amendment Act (No.2)*, effective May 20, 2021 [Bill 13] which replaced the key part of s. 49.1(1) with the following:

> After 90 consecutive days of employment with an employer, an employee, for personal illness or injury, is entitled, in each employment year, to:
>
> (a) Paid leave for up to the number of prescribed days…

[17] Prior to the enactment of Bill 13, the *ESA* had "meets or exceeds" provisions (ss. 3(2) and (3)) which provided that if certain benefits under a collective agreement met or exceeded the same benefits set out in the *ESA*, the terms of the collective agreement governed. Otherwise, the provisions of the *ESA* were deemed incorporated into the collective agreement. Bill 13 added "paid personal illness or injury leave" to the meets or exceeds provisions, thereby requiring a comparison of the statutory and collective agreement sick leave benefits.

[18] Further relevant amendments were enacted pursuant to the *Employment Standards Amendment Act, 2022* [Bill 19], effective March 31, 2022.

[19] Bill 19 substituted "each calendar year" for "each employment year" in s. 49.1(1) and it removed the reference to "paid personal illness or injury leave" from the "meets or exceeds" language in s. 3.

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The Dispute

[20] The Employer made the five paid days of sick leave under s. 49.1(1) available only to employees with less than six months' service. The Employer took the position that it was not required to provide those statutory sick leave days to employees with longer service because they were already entitled to at least five paid sick leave days under the Collective Agreement.

[21] The Union disputed this interpretation and commenced an arbitration pursuant to s. 104 of the *Code* challenging the Employer's decision.

The Award

[22] The arbitrator framed the issue before her in these terms (Award at para. 2):

> …whether the Employer violated Section 49.1 of the *Employment Standards Act* R.S.B.C 1996 c.113 [the "Act"] by refusing to pay employees (with service greater than six months) for absences due to illness or injury, including COVID-19 related absences, especially where the absences would be paid by an employee-funded plan administered by the Union.

[23] In determining this issue, the arbitrator considered two periods of time: January 1 to March 31, 2022, and post March 31, 2022. The first period coincided with the enactment of Bill 13 and the second with the enactment of Bill 19.

[24] With respect to the first period, the arbitrator noted that employees have access to "significant and comprehensive sick leave coverage", including five paid sick leave days from the beginning of their illness that are paid directly by the Employer, albeit with the cost of the first four days being reimbursed from the Fund. The arbitrator concluded:

> …a review of the relevant Collective Agreement provisions, taken as a whole, leads me to the conclusion that the negotiated sick leave provisions meet or exceed the requirements of Bill 13. Therefore, I have concluded that the employees covered by the Fund are not entitled to the additional sick leave coverage as outlined in Bill 13.

[25] The Union did not appeal this aspect of the Award, i.e., as it concerns the interpretation of Bill 13.

[26] The arbitrator came to a different conclusion concerning the application of Bill 19 for the period after March 31, 2022. This was due largely to the elimination of the reference to "paid personal illness or injury leave" from the "meets or exceeds" language in s. 3. The arbitrator's reasons on this point are relatively short and are worth reproducing in their entirety:

> 58. In my view, Bill 19 purposely expanded the scope of employees entitled to 5 employer paid sick days under the Act by removing the meets or exceeds test from consideration of entitlement under Section 49.1(1). The effect was to ensure that each worker has five sick days fully paid by the Employer per calendar year regardless of whether the Collective Agreement contains sick leave provisions. This conclusion is consistent with the stated purpose of the legislation, as outlined throughout the Hansards (i.e., the Minister of Labour's comment in the March 29, 2022 Hansards, page 799: "Nobody should be forced to make that decision to go to work sick or stay home and lose wages".)
>
> 59. The Bill 19 sick days are 5 fully paid sick days, renewed each calendar year, used the first 5 days of illness. They prevent each employee from having to bear any financial risk that could encourage attendance [at] work with an illness (i.e., COVID-19).
>
> 60. I agree with the Union's conclusion that the sick days conferred by the Act are qualitatively different sick days; they are fully paid sick days; sick days without penalties (i.e., loss of gratuity days or Fund penalties). The parameters are based on the formula in Section 49.1(3) and (4) of the Act. Unlike group benefit plans which contemplate trade-offs and allow for cost sharing or payment reductions under sick banks, this is an individual statutory entitlement not a collective one and therefore, the rate of pay received by an employee cannot be reduced through negotiation by the parties.

[27] The arbitrator did not accept the Union's argument that the statutory benefits should be available retroactively to January 1, 2022. Rather, the entitlement began on March 31, 2022, the date on which Bill 19 received Royal Assent.

[28] In short, the arbitrator concluded that while Bill 13 established a basic entitlement to five paid sick days—which entitlement could be met by the provisions of a collective agreement—Bill 19 went further and extended the entitlement to all employees regardless of whether other sick leave benefits are available under a collective agreement.

Issues on Appeal

[29] There are two issues on appeal.

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[30] The first is the threshold, jurisdictional question. The Union takes the position that this Court lacks jurisdiction to hear the appeal, whereas the Employer says this Court has jurisdiction.

[31] The second issue is the substantive, interpretative one. The Employer submits that the arbitrator erred in holding that, after the enactment of Bill 19, the Union's members were entitled to five days of paid sick leave independent of their entitlement under the Collective Agreement. The Union submits that the Arbitrator did not err in her interpretation of s. 49.1 of the *ESA*.

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Analysis

Jurisdiction of the Court of Appeal

[32] The jurisdiction of the Labour Relations Board [LRB] and the Court of Appeal to hear appeals from labour arbitrators is set out, respectively, in ss. 99 and 100 of the *Code*:

> **Appeal jurisdiction of Labour Relations Board**
>
> **99** (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that
>
> (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
>
> (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.
>
> (2) An application to the board under subsection (1) must be made in accordance with the regulations.
>
> **Appeal jurisdiction of Court of Appeal**
>
> **100** On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law
>
> (a) unrelated to a collective agreement, labour relations or related determinations of fact, and

(b) not included in section 99 (1).

[33] Section 100(a) was added by way of an amendment to the *Code* made effective May 30, 2019. The previous version of s. 100 read:

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

[34] Both parties cite this Court's decision in *Canadian Forest Products Ltd. v. Public and Private Workers of Canada, Local No. 18*, 2022 BCCA 89 [*Canadian Forest Products*], where the Court re-affirmed the three-step approach for determining appellate jurisdiction as between the LRB and the Court (at para. 16):

> 1. Identify the real basis of the award;
> 2. Determine whether the basis of the award is a matter of general law;
> 3. If the basis of the award is a matter of general law, determine whether it raises a question or questions concerning the principles of labour relations, whether expressed in the Labour Relations Code or another statute.
>
> If the answer to the third question is affirmative, then review of the award lies within the jurisdiction of the Labour Relations Board. If it is negative, review lies within the jurisdiction of this Court.

[35] This test was taken from the earlier decision of this Court in *Health Employers Assn. of B.C. v. B.C. Nurses' Union*, 2005 BCCA 343 at paras. 49–50 and was subsequently affirmed in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937 v. Taan Forest Limited Partnership,* 2018 BCCA 322 [*Taan*]. In *Taan,* Justice Dickson engaged in a thorough review of the Court's prior jurisprudence examining the respective spheres of jurisdiction of the LRB and the Court (at paras. 48–67).

[36] Like Justice Groberman in *Canadian Forest Products,* I do not find it necessary to "re-plough the ground that was covered in *Taan"* (at para. 15). It is however useful to reproduce the summary of key principles extracted by Groberman J.A. in *Canadian Forest Products* from *Taan*:

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> [15] … The case law establishes that ss. 99 and 100 set out mutually exclusive appeal jurisdictions. Most appeals fall within s. 99 and must go to the Labour Relations Board. The Court of Appeal, however, has exclusive jurisdiction to deal with matters of the general law if those matters of general law are "unrelated to a collective agreement, labour relations or related determinations of fact". The Court of Appeal's jurisdiction is a narrow one, and is exceptional.

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[37] *Canadian Forest Products* illustrates the limited and exceptional scope of this Court's jurisdiction. There, the Court quashed the appeal for lack of jurisdiction. The case concerned Canadian Forest Products' decision to lay off almost all of its employees. The layoffs were initially described as temporary. The union brought a grievance alleging breach of s. 64 of the *ESA*, which requires notices of group termination where 50 or more employees are laid off at one location. The employer argued it did not have to do so because the employees' termination dates were staggered and their recall dates were varied or to be determined; fewer than 50 employees had been terminated in any two-month period.

[38] The arbitrator rejected the employer's argument and sided with the union, finding that an employee whose layoff is anything other than temporary must be treated as having their employment terminated when they were laid off. This put the number of employees fired over the threshold amount for group notice.

[39] Canadian Forest Products argued that the real basis of the award was an interpretation of s. 64 of the *ESA*, which meant that this Court, rather than the LRB, has jurisdiction to hear the appeal. Justice Groberman rejected this submission:

> [22] …While s. 64 is applicable to all employment relationships, it does not apply to all employment relationships in the same way. In the labour relations context, the concepts of a "temporary layoff" and of "termination of employment" are tied to "rights of recall", which exist only in collective agreements. Principles of labour relations, then, lie at the heart of the current dispute.
>
> [23] The presence of subparagraph (a) in s. 100, in my view, facilitates the analysis and strengthens the conclusion. It cannot be said that the question of when a worker's employment is terminated is "unrelated to a collective agreement". The right of recall provisions of the collective agreement are a critical component of the analysis.
>
> [24] As the basis for the award was closely tied to the collective agreement, it is my view that exclusive jurisdiction over the subject matter of

> the appeal lies with the Labour Relations Board under s. 99 of the *Labour Relations Code.* For these reasons, I reached the conclusion that the appeal is outside the jurisdiction of this Court, and it was appropriate to quash the appeal.

[40] It is useful to note that the Court in *Canadian Forest Products* disposed of the appeal under the first step of the *Taan* test, i.e., the step that concerns the real basis of the arbitral award.

[41] There is one other decision of this Court that post-dates the amendment of s. 100: *West Fraser Mills Ltd. v. United Steelworkers, Local 1-2017*, 2021 BCCA 266. There, the union brought a grievance on behalf of one of its members against the employer, West Fraser, for denying the grievor's attempt to "bump" into a junior position. "Bumping" refers to the practice of a senior employee moving into a more junior position after being laid off. The collective agreement provided for a right to bump so long as the laid-off employee was competent to perform the junior role. The grievor was laid off from his position as a power engineer and sought to take up the kiln attendant position. The grievor had worked extensively in the kiln in the past, but had not done so for several years.

[42] The employer refused to permit the grievor to bump into the junior position on the basis of s. 69 of the *Power Engineers, Boiler, Pressure Vessel and Refrigeration Safety Regulation*, B.C. Reg. 104/2004 [Regulation] which provides that approval of the chief engineer or other person in charge of a plant is required in order for an employee to operate a kiln or similar piece of equipment. The employer took the position that the grievor should be subject to four days of kiln training prior to bumping into the position, as determined by the chief engineer.

[43] The arbitrator allowed the grievance, finding that, as a power engineer, the grievor was already qualified to bump into the kiln attendant role after a brief period of familiarization. Because he was already qualified, the chief engineer's power under s. 69 was already "spent" or pre-empted.

[44] The employer brought an application for a LRB review under ss. 99(1)(a) and 99(1)(b). The LRB dismissed the employer's application under both provisions,

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finding that the employer had not been denied a fair hearing and that the interpretation of s. 69 of the Regulation was an issue of general law. Accordingly, the LRB held that appellate jurisdiction lay with the Court of Appeal.

[45] The employer then brought an appeal to this Court under s. 100 of the *Code.* This Court quashed the appeal for want of jurisdiction.

[46] Justice Marchand (as he then was) held, contrary to the employer's submissions, that the circumstances of the case did not engage issues under s. 69 of the Regulation. Rather, the core issue of whether the grievor was entitled to bump into a kiln attendant position turned on the provisions of the relevant collective agreement. As such, the determination was entirely related to labour relations and subject to review by the LRB under s. 99(1)(b) of the *Code* (at paras. 43, 51).

[47] Justice Marchand's reasoning turned largely on his determination of the "real basis of the award" which again is the first part of the jurisdictional test set out above at para. 33.

[48] Justice Marchand held that it was unnecessary in the circumstances of the case before him for the Court to revise the three-part jurisdictional test because of the amendment of s. 100 (at para. 41). As he noted, the amendment did not change the first part of that test concerning the "real basis of the award". I note that Groberman J.A. in *Canadian Forest Products* similarly applied the three-part test and did not suggest that the test needs to be amended in light of the amendment to s. 100.

[49] Like Marchand J.A., I am of the view that it is unnecessary in the circumstances of this case to re-visit the existing three-part test because the jurisdictional issue can be resolved by reference to the first part of that test. Further, I agree with Marchand J.A. that the amendment to s. 100 has not altered that first step in the test—which is arguably the most critical—that requires determination of the "real basis" of the award.

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[50] Here, the Award addressed two distinct time periods—the January 1–March 31, 2022 period covered by Bill 13 and the post March 31, 2022 period covered by Bill 19—and the arbitrator's analysis differed in respect of each period. However, ss. 99 and 100 of the *Code* make it clear that the question of jurisdiction as between the LRB and the Court must be determined on the "real basis" of "the decision or award" and not by reference to specific issues that might arise out of an award, including discrete issues that a party might seek to advance on appeal. As this Court noted in *Communications, Energy & Paperworkers' Union of Canada (CEP) Local 433 v. Unisource Canada Inc.*, 2004 BCCA 351 at para. 29: "It is the basis of the decision or award and not the basis of the appeal which determines the court's jurisdiction".

[51] This Court has also observed that this determination can be difficult in cases involving multiple issues: *United Food and Commercial Workers Union, Local 1518 v. Sunrise Poultry Processors Ltd.*, 2017 BCCA 130 at para. 7. Nonetheless, in considering the jurisdictional issue, the Court must identify the "essence or core of the case" or, put another way, the "real substance of the dispute": *Okanagan College Faculty Association. v. Okanagan College*, 2013 BCCA 561 at para. 53.

[52] This principle reflects the fact that pursuant to ss. 99 and 100 of the *Code*, the appellate jurisdiction of each of the LRB and the Court is distinct and mutually exclusive. As held by this Court in *Kinsmen Retirement Centre Assn. v. Hospital Employee's Union, Local 180*, 1985 CarswellBC 156, 63 BCLR 292 at para. 16:

> … the wording of ss. 108 and 109 [now ss. 99 and 100] was carefully chosen by the legislature in order to avoid having some parts of an award subject to review by the Labour Relations Board and other parts of the award subject to review by this court, with neither body having jurisdiction to consider the entire chain of reasoning and to grant a remedy.

[53] While it is arguable that the single issue sought to be advanced by the Employer on appeal, concerning the interpretation of s. 49.1 of the *ESA*, as amended by Bill 19, if looked at in isolation, may be characterized as a question of general law i.e., statutory interpretation, the same cannot be said about the aspect of the Award dealing with Bill 13 and the period of January 1–March 22, 2022. The

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arbitrator's decision on that issue is squarely rooted in the Collective Agreement. Indeed, the arbitrator expressly states that their conclusion is based upon a "review of the relevant Collective Agreement provisions, taken as a whole" (Award at para. 57; also reproduced above at para. 24).

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[54] However, as the cases referred to above make clear, the two aspects of the Award cannot be assessed independently. Rather, the jurisdictional issue must be determined based upon the "real basis" of the Award as a whole.

[55] In my view, it is an oversimplification to argue, as the Employer does, that the Award involves a question of pure statutory interpretation, divorced from principles of labour relations and the subject Collective Agreement. While both aspects of the Award entail the interpretation of s. 49.1 of the *ESA*, as amended by Bills 13 and 19, the critical factor underpinning each aspect is the inclusion of sick leave benefits within the "meets or exceeds" language in the *ESA* pursuant to Bill 13 and the subsequent removal of those benefits under Bill 19.

[56] The concept of "meets or exceeds" is a principle of labour relations that of necessity involves a comparative analysis of the benefits available under the Collective Agreement and those provided pursuant to s. 49.1. As noted at para. 53 above, the arbitrator expressly conducted that analysis in respect of the period of time covered by Bill 13. While less explicit, the arbitrator also engaged in a comparison of the benefits provided under the the Bill 19 amendments, as reflected in the observation that the "sick days conferred by the Act are qualitatively different sick days" from those provided under the Collective Agreement. As held by the Court in *Canadian Forest Products* (at para. 22): "Principles of labour relations…lie at the heart of the current dispute".

[57] The arbitrator's engagement with the Collective Agreement is further demonstrated by the relief granted. While the first term of that relief was a declaration that the Employer breached s. 49.1 of the *ESA* after March 31, 2022, she went on to direct that the Employer make the Fund whole for the costs of those employees who took sick leave under the Fund after March 31, 2022 and make

employees whole for sick leave days taken that were not covered by the Fund (Award at para. 68(b)). This order supports a finding that the "real basis" of the Award is the arbitrator's application of her interpretation of s. 49.1 to the terms of the Collective Agreement and the specific circumstances of the dispute between the parties: *Okanagan College* at para. 58. Returning again to *Canadian Forest Products* (at para. 24), it is clear that the basis of the Award was "closely tied" to the Collective Agreement and, as such, the appeal from the Award falls within the exclusive jurisdiction of the LRB.

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Conclusion

[58] I would therefore quash the appeal for want of jurisdiction.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice Horsman"