Date: 19981112 Docket: CA 146089

NOVA SCOTIA COURT OF APPEAL
Cite as: Halifax Regional School Board v. Nova Scotia Union of Public Employees, Local 2, 1998 NSCA 199
Bateman, Flinn and Cromwell, JJ.A.

BETWEEN:

HALIFAX REGIONAL SCHOOL BOARD	)	John C. MacPherson, Q.C. and Justin Kimball for the Appellant
Appellant	)	
- and -	)	
	)	Ronald A. Stockton and Nancy L. Elliott for the Respondent
NOVA SCOTIA UNION OF PUBLIC EMPLOYEES, LOCAL 2	)	
Respondent	)	Appeal Heard: September 29, 1998
	)	Judgment Delivered: November 12, 1998

THE COURT: Appeal allowed per reasons for judgment of Cromwell, J.A.; Bateman and Flinn, JJ.A. concurring.

CROMWELL, J.A.:

I. Introduction:

Disputes arising from collective agreements must be resolved through the grievance and arbitration process. The main issue here is whether this principle applies to bar the union's lawsuit in this case.

II. Overview of the Facts and Proceedings:

There have, as yet, been no findings of fact in this case. The following are assumed to be true for the purpose of these proceedings.

The appellant is an employer and the respondent a union. By successorship, they are parties to a collective agreement signed on July 22, 1994 with effect from January 1, 1994 to December 31, 1996. The collective agreement establishes employee salaries for that period, with annual adjustments on January 1 in each year. The successorship is not relevant to the issues on appeal and for convenience I will refer to the parties as the employer and union as if they were the original parties to the collective agreement.

Shortly before the agreement was signed, Bill 52, the **Public Sector Compensation (1994-97) Act**, S.N.S. 1994, c. 11 was passed and given Royal Assent. It rolled back and froze public sector salaries. The employer and the union seemed to have adverted to the impact of this legislation on the collective agreement. On the same day it was signed, the Chairman of the employer wrote

to the President of the Union. The letter confirmed that the wage increases provided for in the agreement would be paid to employees as a lump sum following the expiration of the legislated wage freeze. This was expected to occur at the end of October of 1997.

In November of 1997, after the wage freeze had expired as expected, the Union asked for payment of the lump sum to its members. The employer refused because it thought the payment would contravene the **Act**. Faced with this refusal, the Union sued the employer in the Supreme Court of Nova Scotia. It claimed the lump sum due to its members as set out in the letter or, alternatively, damages for negligent misrepresentation.

The employer applied to Cacchione, J., in Chambers, to strike out the Union's statement of claim on the ground that the union's claims were within the exclusive jurisdiction of an arbitrator. The Chambers judge dismissed the application. The employer appeals, seeking leave for this purpose.

III. The Chambers Judge's Decision

The Chambers judge's reasoning in dismissing the employer's application to strike out the union's statement of claim was this. In his view, it was not clear whether the Court had jurisdiction and there were several factual questions relevant to that issue which could not be explored on an application under **Rule** 14.25. The

learned Chambers judge concluded:

> ..... There is an issue of whether the letter of July 22nd, 1994 is an ancillary document. There is an issue as to whether or not that letter, if it is an ancillary document, forms part of the collective agreement. The letter in question must be examined and a determination must be made to see whether it is part of the collective agreement. This is not in my view an issue that can be addressed on an application such as the one before me. Before this statement of claim is struck out there must be a determination of whether the plaintiff's claim is one that is arbitrable.
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> This, in my view, would best be achieved by having a full exploration of the circumstances surrounding the creation of the document through the discovery process.

IV. Issues and Positions of the Parties:

The parties raise two procedural issues and two substantive issues on appeal.

The substantive issues are these. First, the employer argues that the essential character of the Union's complaint arises under the collective agreement between the parties. Therefore, says the employer, following the decisions of the Supreme Court in **Weber v. Ontario Hydro**, [1995] 2 S.C.R. 929 and **New Brunswick v. O'Leary,** [1995] 2 S.C.R. 967, the matter is within the exclusive jurisdiction of an arbitrator and the court action should be dismissed. Second, the employer submits that, if the dispute does not arise under the collective agreement, there can be no separate contract concerning salaries between these parties outside the collective agreement and therefore no claim in law can be made. The

employer relies on **McGavin Toastmasters Ltd. v. Ainscough**, [1976] 1 S.C.R. 718.

The union argues that the issues raised in the action are outside the **Weber** principle because the dispute between the parties is not covered, expressly or inferentially, by the collective agreement. Neither is the action precluded by the **McGavin** principle which, the union argues, deals only with private negotiations between the employer and individual employees.

The procedural issues relate to whether the employer's application was appropriately brought under **Rule** 14.25 and whether certain affidavit evidence should have been admitted. The union submits that the Chambers judge was right to decide that the issues in the employer's application are not properly put before the court under **Rule** 14.25 because the question of the Court's jurisdiction requires the resolution of factual, as well as legal, issues. The action is not, in its submission, clearly unsustainable in law. The employer disputes this position and submits that an affidavit filed by the union on the application should not have been received by the Chambers judge.

V. Analysis:

Both the provisions of the parties' collective agreement and of the **Trade Union Act**, R.S.N.S. 1989, c. 475, establish that there are two aspects of the

arbitrator's role. The broader aspect is, of course, the arbitrator's authority to make a final and binding determination of all differences between the parties concerning the interpretation, application or administration of the collective agreement. The narrower aspect is the arbitrator's power, granted in the collective agreement and confirmed by the **Act**, to determine whether a matter submitted to arbitration is arbitrable, that is, whether it is a difference concerning the interpretation, application or administration of the collective agreement.

The question of the court's jurisdiction implicates both the broad and narrow aspects of the arbitrator's authority. The parties to this appeal have focused their arguments mainly on the broader aspect of whether the allegations in the union's statement of claim relate to a dispute arising under the collective agreement. One should not lose sight, however, of the narrower aspect, as both the collective agreement and the **Act** make it clear that the arbitrator also has the authority to determine the threshold question of whether the difference is arbitrable.

For reasons I will develop below, I think this narrower aspect is sufficient to deal with this case. The question of whether this dispute is one that concerns the interpretation, application or administration of the collective agreement should be left, initially at least, to an arbitrator. There are four considerations that support this conclusion, and I will briefly describe each of them.

(a) The text of the collective agreement and the Trade Union Act

The collective agreement between the parties contains an arbitration provision. It requires submission to arbitration of differences between them relating to the interpretation, application and administration of the collective agreement, including the question as to whether a matter is arbitrable. Specifically, Articles 23.02 and 24.03 provide:

> 23.02 Where a difference arises between the Board and any employee covered by this agreement, relating to interpretation, application or administration of this agreement, including any questions as to whether a matter is arbitrable or where an allegation is made that this agreement has been violated or whenever such employee is suspended or dismissed for cause, such difference, allegation, suspension or dismissal being hereinafter referred to as the "grievance", the following procedure shall apply:
>
> [Here the agreement sets out the steps in the grievance procedure.]
>
> STEP 4: ARBITRATION
>
> In the event that the Board Grievance Committee does not provide redress satisfactory to the Grievance Committee or the Union within twenty (20) days after the date of such meeting or within such longer period of time as the parties may mutually agree upon, the Union may, after giving five (5) working days' notice to the Board, require that the grievance be submitted to arbitration.
>
> .....
>
> 24.03 The arbitrator shall determine the dispute and shall, where possible, render a decision within twenty(20) working days from the date of the

> hearing, and his decision shall be final and binding upon the parties and upon any employee affected by it.

These provisions are reinforced by the **Trade Union Act** which makes it clear that final and binding settlement by arbitration is an essential aspect of every collective agreement. The **Act**, like the collective agreement, specifies that an arbitrator has power to determine any question as to whether a matter referred to arbitration is arbitrable. The most relevant sections are these:

> **42** (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.
>
> .....
>
> (3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement.
>
> **43** (1) An arbitrator or an arbitration board appointed pursuant to this Act or to a collective agreement
>
> .....
>
> (c) has power to determine any question as to whether a matter referred to him or it is arbitrable;
>
> (emphasis added)

I conclude from this examination of the text of the collective agreement

and the relevant statutory provisions that, where there is doubt about whether a matter is subject to the arbitration clause, an arbitration is the place of first resort to determine that threshold issue.

(b) <u>The centrality of arbitration to the collection bargaining relationship</u>

Consideration of the place of arbitration in the overall scheme of collective bargaining labour relations reinforces the conclusion drawn from the text of the agreement and the provisions of the **Act**.

The statutory requirement for submission to arbitration is pervasive in Canadian labour legislation: Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration* (3d, updated 15 August, 1998) at s. 1:1100. The resolution of disputes by arbitration has been viewed as a *quid pro quo* for the prohibition against strikes and lock outs during the currency of the collective agreement: George W. Adams, *Canadian Labour Law* (3d, updated May, 1998) at s.12.140. The arbitration process is thus a central feature of the collective bargaining relationship.

The Supreme Court of Canada has both recognized and emphasized the importance of this point. In **St. Anne Nackawic Pulp & Paper v. Canadian Paper Workers Union, Local 219**, [1986] 1 S.C.R. 704 Estey, J., for the Court, said at p. 717-718:

> <u>The legislature created the status of the parties [to a collective</u>

> agreement] in a process founded upon a solution to labour relations in a wholly new and statutory framework at the centre of which stands a new forum, the contract arbitration tribunal.
> .....
>
> The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law.
>
> (emphasis added)

Recognizing that arbitration is central to the whole scheme of collective bargaining labour relations, the Supreme Court of Canada has repeatedly made it clear that the exclusive jurisdiction of labour arbitrators must be respected by the courts. A classic expression of this view is found once again in **St. Anne-Nackawic Pulp and Paper Co v. C.P.U. Local 219, supra**. Estey, J. for the Court said at p. 721:

> What is left is an attitude of judicial deference to the arbitration process . . . . It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration . . . is an integral part of that scheme, and is clearly the forum preferred by the Legislature for resolution of disputes arising under collective agreements.
>
> (emphasis added)

In the cases of **Weber** and **O'Leary, supra**, the Court has reaffirmed this view. Those cases establish an "exclusive jurisdiction" model for analyzing the effect

of final and binding arbitration clauses. This model holds that, if the difference between the parties arises from their collective agreement, arbitration is the exclusive process for its resolution; the courts have no concurrent jurisdiction: see e.g., **Weber v. Ontario Hydro, supra** at p. 956. The Court has reinforced this approach by stressing that, in determining whether the dispute arises from the collective agreement, its essential character, not simply its legal characterization, must govern: see **Weber** at p. 956. I conclude, therefore, that the pre-eminent role of the arbitration process is not simply a product of particular provisions, but is a central aspect of the overall scheme of collective bargaining labour relations.

(c) The nature of the inquiry

Under **Weber** and **O'Leary**, the question of whether the subject-matter of the dispute falls within the collective agreement is to be approached by determining the dispute's "essential character": see **Weber** at p. 956. This determination of the "essential character" of the dispute requires a detailed analysis of the facts and the provisions of the particular collective agreement. While in many cases, the essential character will be clear, in others it will be less obvious. As McLachlin, J. said in **Weber**, it is impossible to categorize the classes of case that are within the exclusive jurisdiction of the arbitrator: at p. 957. The wisdom of this remark has been borne out by the significant volume of judicial and arbitral decisions spawned by **Weber** and **O'Leary**. While the principles for determining the limits of court jurisdiction are clear, they are far from self-applying.

Defining the boundary between court and arbitral jurisdiction frequently requires not only detailed attention to the facts but also careful attention to and sensitivity for the broader labour relations context. As noted above, grievance arbitration is a key component of the collective bargaining regime. The definition of its scope and limits is therefore equally central to that scheme.

This consideration is particularly important in this case. Of course, whether a matter is arbitrable and whether the court has jurisdiction with respect to it are not identical questions. The answer to one does not invariably provide an answer to the other. However, the question of arbitrability and the reasons a dispute is or is not arbitrable are highly relevant to the issue of the court's jurisdiction. Regardless of what the scope may be of judicial review of the arbitrator's decision in such a case, the need for close attention to the factual and labour relations nuances of the particular case suggest that there is much to be said for allowing an arbitrator to deal with the matter initially.

(d) <u>The concern about no remedy</u>

The **Weber** decision does not simply limit the jurisdiction of courts; it also takes an expansive view of the jurisdiction of arbitrators. McLachlin, J., referred to these two aspects as "correlative". She said in **Weber** that the exclusive jurisdiction

model "... conforms to a pattern of growing judicial deference for the arbitration and grievance process and correlative restrictions on the rights of the parties to proceed with parallel or overlapping litigation in the courts ....." (emphasis added) (at p. 959); In **Weber**, for example, it was held that arbitrators have the power and the duty to apply common law and statutes including the power to grant **Charter** remedies where the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed: at p. 958 and p. 963.

I think it is of fundamental importance in **Weber** that the limits of Court jurisdiction can only be understood in light of the breadth of arbitral jurisdiction. **Weber** was not a case in which it was suggested that neither the arbitrator nor the Court would have jurisdiction to determine the rights of the parties. This is underlined by McLachlin, J.'s quotation in **Weber** from **St Anne-Nackawic** to the effect that matters "addressed and governed" by the collective agreement should not be pursued in the courts and that the courts should not be a "duplicative forum" (at 952-3). In **Weber**, there was no question that the grievance was arbitrable. A grievance was, in fact, pursued and settled. The question was which forum had jurisdiction. It was not suggested or contemplated that neither had jurisdiction.

Of course, arbitral and court jurisdiction are not always the mirror image of each other; the correlation is not exact. In some cases, court action may be barred even though there is no remedy available through the arbitration process.

For example, if a grievance is time barred, there may be no remedy available at arbitration and yet the Court may also decline jurisdiction: **Piko v. Hudson's Bay Co.**, (1997), 24 O.T.C. 238 (Gen. Div.). Similarly, a union may decide not to proceed with an individual employee's grievance or settle it against the employee's wishes and yet the Court may not take jurisdiction in the individual's court action raising essentially the same complaint: **Bhairo v. Westfair Foods Ltd.** (1997), 147 D.L.R. (4th) 521 (Man.C.A.); **Callow v. West Vancouver School District No. 45** (1997), 29 B.C.L.R. (3d) 199 (B.C.C.A.). The premise of such decisions is that all of the employees' rights, substantive and procedural, in the given area are exhaustively codified in the collective agreement. There are no others to be asserted in Court.

However, the collective agreement does not set out the parties' rights exhaustively, and therefore exclude, court jurisdiction in all situations. McLachlin, J. in **Weber** refers to two categories of such cases. Actions between employees and employers which do not "expressly or inferentially arise out of the collective agreement" are not barred, and, in addition, courts "possess residual jurisdiction based on their special powers...". (**Weber** at p. 957.) Underlying both is a natural concern that no one, absent compelling reasons, should be left with a right but no remedy. This aspect was emphasized by the Court in its decision in **Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.**, [1996] 2 S.C.R. 495.

That case upheld the jurisdiction of the Supreme Court of British Columbia to issue an interim injunction restraining the employer from implementing a new work schedule pending the hearing of a grievance challenging it. McLachlin, J., writing for the Court, stated that the "governing principle ... is that notwithstanding the existence of a comprehensive code for settling labour disputes, where no adequate alternative remedy exists the courts retain a residual discretionary power to grant interlocutory relief...": at p. 499. This case addresses specifically the difficult issue of when an absence of relevant provisions in the collective agreement is to be taken as excluding rights and remedies other than those specifically set out. McLachlin, J. repeats and clarifies her premise in **Weber** that either an arbitrator or the court should have jurisdiction over the substance of the complaint, stating at p. 501:

> The employer further argues that the dispute resolution mechanism provided by the Code is exclusive, and bars any other remedies. The court, it says, disregarded the comprehensive contractual and statutory scheme designed to govern all aspects of the relationship of the parties in a labour dispute. The difficulty with this argument lies in the assumption that the Code covers all aspects of any labour dispute. In this case, the fact is that the Code did not cover all aspects of the dispute. No matter how comprehensive a statutory scheme for the regulation of disputes may be, the possibility always remains that events will produce a difficulty which the scheme has not foreseen. It is important in these circumstances that there be a tribunal capable of resolving the matter, if a legal, rather than extra-legal, solution is to be found. It is precisely for this reason that the common law developed the notion of courts of inherent jurisdiction. If the rule of law is not to be reduced to a patchwork, sometime thing, there must be a body to which disputants may turn where statutes and statutory schemes offer no relief.
>
> (emphasis added)

There are clearly some circumstances in which a matter is neither arbitrable nor within the jurisdiction of the courts. The courts, however, should not be anxious to reach such a conclusion and generally will not do so unless persuaded that the collective agreement's provisions are exhaustive concerning the dispute. The words of McLachlin, J. in **C.P., supra** are particularly apt, and I repeat them: ".... the possibility always remains that events will produce a difficulty which the scheme has not foreseen. It is important in these circumstances that there be a tribunal capable of resolving the matter .....". (at p. 9)

In this case, there has been no determination by an arbitrator of whether the complaint set out in the statement of claim is arbitrable. This is an important aspect of the question of whether the court has jurisdiction. The interests of ensuring that matters do not fall between the two jurisdictions are better served by having a determination of arbitrability made first at arbitration. In that way, the Court will know when it rules on the question of its jurisdiction the full implications of its decision.

(e) Summary

In my view, each of the four factors just discussed supports the conclusion that, where there is doubt about the arbitrability of the dispute, that issue should generally be determined initially at arbitration. This view is mandated by the text of the collective agreement and the **Trade Union Act**. It also best reflects the

central role of arbitration in collective bargaining labour relations, recognizes that arbitration is the forum best suited to conducting the necessary inquiry and helps ensure that no one, absent sound reasons, will be left with rights but no effective remedy.

I have considered **Mendoza v. St. Michael's Centre Hospital Society** [1998] B.C.J. No. 914 (S.C.). Tysoe, J. concluded that the court was in "as good a position as an arbitrator to determine whether a matter is arbitrable" and that it would only increase cost to decide otherwise: at para. 15. I note, however, and with respect, that the learned judge's reliance on **Weber** for this conclusion is misplaced given that in **Weber**, the matter had been grieved and settled. Moreover, this approach is inconsistent with **Weber's** emphasis on the exclusive nature of arbitral jurisdiction and seems to me to be fundamentally at odds with the considerations I have outlined earlier.

On this aspect, I find **Pilon v. International Minerals and Chemical Corp.** (1996), 31 O.R. (3d) 210 (C.A.) more persuasive. The Court in **Pilon** characterized the issue as whether the dispute between the parties was arbitrable and held that the matter should proceed to arbitration: at 214-5. This view seems to me, with respect, to be the more consistent with all of the considerations I have discussed.

This is not to say that submission to arbitration is invariably a pre-condition to the court ruling on its own jurisdiction. There may be cases in which, for example, the parties agree that submission to arbitration is pointless. I would not attempt here an exhaustive list of such cases. I would say, however, that absent sound reasons to the contrary, courts should apply the general principle that arbitration, and not the court, is the forum for the initial determination of whether a matter is arbitrable.

VI. Conclusion

The Chambers judge refused to decline jurisdiction over the action. In his view, it is essential first to determine whether the dispute is arbitrable. This, in turn, requires full exploration of the circumstances in the discovery and perhaps even the trial process. With respect, these considerations seem to me to support the opposite conclusion for the reasons I have attempted to summarize. Whether or not an arbitrator finds this dispute arbitrable at the end of the day, it is more respectful of the processes adopted by the parties and the Legislature and in the interests of sound decision-making in this key area of labour relations law to have the matter first addressed at arbitration in light of all the facts and circumstances of the particular situation. The arbitration process is better suited to that exercise.

The learned Chambers judge erred in allowing the court action to continue. I am also of the view that this more limited preliminary determination, which depends only on the allegations in the statement of claim, the relevant

provisions of the collective agreement and the **Trade Union Act**, is properly made under **Rule** 14.25. Having reached these conclusions, it is not necessary for me to consider the other issues raised on the appeal.

The remaining question is whether the action should be dismissed or stayed. Both courses are available under **Rule** 14.25 and authority can be found for both courses of action. Cases raising similar issues have been dismissed when the Court concluded that the dispute arose under the collective agreement: see, for example: **New Brunswick v. O'Leary, supra** and **Pilon v. International Minerals and Chemical Corp., supra**. However, stays have been entered in similar circumstances in a number of other cases: see e.g., **Bhairo v. Westfair Foods Ltd, supra** and **Piko v. Hudson's Bay Co., supra**; **Vyas v. University of Calgary** (1985), 188 A.R. 344 (Q.B.); **McCartney v. Canada Post Corp.** (1997), 29 C.C.E.L. (2d) 85 (S.C.).

In this case, I have addressed only one question. It is whether the court action should not proceed because an arbitrator, and not a court, should determine at first instance the issue of arbitrability. In light of my conclusion, it not necessary for me to address the broader aspect of the employer's substantive argument that the court has no jurisdiction regardless of the conclusion of the arbitrator on the question of arbitrability. That issue not having been decided in this appeal, it will be open to the parties to raise it again in the future if, for example, an arbitrator finds

the dispute not to be arbitrable. Out of an abundance of caution that these reasons not be seen as settling anything other than the narrow issue which they address, I think the wise course is to direct a stay of the action which could be lifted by a judge of the Supreme Court in appropriate circumstances in the future. So as to avoid the possibility of the action being suspended indefinitely, I would add the proviso that if no application is made to lift the stay within two years of today's date, the action will stand dismissed.

VII. Disposition:

For these reasons, I would allow the appeal, set aside the order of the Chambers judge and in its place direct that the action be stayed pending submission to arbitration as provided for the in the collective agreement. The respondent should pay costs to the appellant in the amount of $750.

Cromwell, J.A.

Concurred in:

Bateman, J.A.

Flinn, J.A.

CA No.146089

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HALIFAX REGIONAL SCHOOL BOARD	)	
	)	
Appellant	)	
- and -	)	REASONS FOR
	)	JUDGMENT BY:
NOVA SCOTIA UNION OF PUBLIC EMPLOYEES, LOCAL 2	)	CROMWELL, J.A.
	)	
Respondent	)	
	)	
	)	
	)	
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