

NOVA SCOTIA COURT OF APPEAL

Citation: *Lawton's Drug Stores Ltd. v. United Food and Commercial Workers Union Canada, Local 864*, 2016 NSCA 14

Date: 20160226

Docket: CA 447598

Registry: Halifax

Between:

Lawton's Drug Stores Limited

Applicant/Appellant

v.

United Food and Commercial Workers Union Canada,
Local 864 and Labour Board (Nova Scotia)

Respondent

Judge: Farrar, J.A.

Motion Heard: February 18, 2016, in Halifax, Nova Scotia in Chambers

Held: Motion dismissed.

Counsel: Robert G. Grant, Q.C. and Richard Dunlop, for the appellant
David Wallbridge and Jillian Houlihan, for the respondent
United Food and Commercial Workers Union, Local
864
Edward A. Gores, Q.C. and Lindsay Silliker (Articled Clerk)
for the respondent Labour Relations Board (Nova
Scotia)

Decision:

Background

[1] To say that the procedural background is complicated with respect to this matter would be an understatement.

[2] These proceedings started with the United Food and Commercial Workers Union Canada, Local 864 applying to the Labour Board for settlement of the provisions of a first collective agreement under s. 40A of the *Trade Union Act*, R.S.N.S. 1989, c. 475.

[3] The Labour Board held a hearing and received submissions from the parties on March 23 and 24, 2015. Because of the time limitations in the *Act*, on March 26, 2015, the Labour Board delivered what it called a “bottom line” decision and direction.

[4] In summary, the March 26 decision of the Labour Board found that Lawton’s adopted uncompromising positions with respect to the negotiation of wages, holidays and other leaves, without reasonable justification. It directed the parties to resume collective bargaining with the assistance of a conciliation officer for a period of 30 days.

[5] In its decision, the Labour Board indicated it would provide “full reasons” at a later date.

[6] On April 8, 2015, Lawton’s filed a Notice for Judicial Review challenging the March 26 decision (the First Judicial Review). This was before the parties had resumed collective bargaining pursuant to the direction of the Labour Board. The parties resumed negotiations on April 11, 2015 and by April 22, 2015 they concluded the terms of a collective agreement.

[7] The Motion for Directions for the First Judicial Review took place on April 22, 2015. At that motion, Lawton’s requested an Interim Injunction restraining the Labour Board from issuing any further reasons pending the outcome of that judicial review. Justice Michael Wood granted the Interim Injunction.

[8] On April 28, 2015, Lawton’s filed a formal Motion for an Interlocutory Injunction to restrain the Labour Board from issuing any further reasons for its March 26 decision. The motion was scheduled to be heard on June 16, 2015. The

motion was adjourned, by agreement, so that the parties could ask the Labour Board to decide whether it still intended to provide further written reasons for the March 26 decision. After submissions from the parties the Labour Board issued a decision on October 13, 2015, explaining why it should issue reasons for the March 26 decision.

[9] On November 17, 2015, Lawton's filed a Notice for Judicial Review challenging the October 13, 2015 decision (the Second Judicial Review) arguing, for various reasons, that the Labour Board's decision was unreasonable.

[10] On November 27, 2015, Lawton's filed another Notice of Motion that asked the Supreme Court of Nova Scotia to continue to restrain the Labour Board from issuing reasons for the March 26 decision.

[11] The motion was argued before Wood, J. on January 7, 2016. In a decision released January 13, 2016 (reported 2016 NSSC 17), the motions judge denied the motion, primarily on the basis that Lawton's would not suffer irreparable harm if the Labour Board issued its reasons (¶24).

[12] By Notice of Appeal dated January 26, 2016, Lawton's sought leave to appeal and, if granted, would appeal the January 13, 2016 decision to this Court.

[13] The Notice of Appeal alleges the motions judge erred by concluding that Lawton's had failed to establish that it would suffer irreparable harm if an interim injunction preventing the Labour Board from releasing its reasons for the March 26 decision was not issued.

[14] Lawton's asks this Court to grant leave to appeal, allow the appeal, reverse the decision of the motions judge and grant its motion for an Interim Injunction.

[15] The leave application and appeal are scheduled to be heard on Thursday, June 9, 2016 at 2:00 p.m.

[16] Finally, by Notice of Motion filed February 4, 2016, Lawton's sought an order from this Court pursuant to *Civil Procedure Rules* 90.37 and 90.41, enjoining the respondent Labour Board from issuing reasons for its March 26 decision until the appeal from Wood, J.'s January 7, 2016 decision has been determined.

[17] The motion was heard on February 18, 2016. At that time I reserved decision. For the reasons that follow, I dismiss the motion with costs to the Union

in the amount of \$750.00 inclusive of disbursements, in any event of the cause, payable forthwith.

Issue

[18] Should this Court issue an order enjoining the Labour Board from releasing its reasons for its March 26 decision pending disposition of the appeal?

Analysis

[19] There is no dispute between the parties that the test on a motion such as this is as set out in a seminal case of *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341 (C.A.). To succeed, Lawton's must show that:

1. There is an arguable issue raised on the appeal;
2. If the Labour Board is not enjoined from issuing reasons and the appeal is successful, it will suffer irreparable harm that cannot be compensated in damages; and
3. It will suffer greater harm if the reasons are issued than the respondent would suffer if they are not; the so-called balance of convenience; or
4. Failing to meet the primary test, it would have to satisfy this Court that there are exceptional circumstances that would make it fit and just that the relief sought be granted in this case.

(Purdy v. Fulton, ¶28)

Arguable Issue Raised on Appeal

[20] Under the first stage of the *Fulton* test, the burden is on Lawton's to satisfy this Court that it has an arguable case on appeal. It is unusual for a party to be unsuccessful on this aspect of the test. This is one of those rare cases.

[21] Lawton's Notice of Appeal alleges that the motions judge erred in concluding that Lawton's had failed to show irreparable harm if the Labour Board issued reasons for its decision. The same issue arises on this motion. Lawton's must satisfy me that it would suffer irreparable harm if the Labour Board issues its reasons. However, irreparable harm also informs the first part of the test as it is the basis for Lawton's argument there is an arguable issue.

[22] In his decision, the motions judge addressed the evidence of irreparable harm as follows:

[23] The evidence of potential irreparable harm to Lawton's is found in the supplemental affidavit of Shonda Ingalls sworn on May 8, 2015 where she states the following:

HARM TO THE PARTIES' RELATIONSHIP IF FURTHER REASONS ISSUED

26. Lawtons remains aggrieved by the process the Board followed in arriving at its Decision and Direction, and does not accept the correctness of either the Decision and Direction or the reasoning through which the Board reached its conclusions.

27. Given the process followed by the Board in arriving at its Decision and Direction, issuance of Further Reasons would impact the ongoing relationship between the parties and would compromise the bargaining position of Lawtons in future negotiations. Since the Final Collective Agreement was negotiated through voluntary collective bargaining, issuance of Further Reasons by the Board at this stage serves no useful purpose in governing the relationship between the parties. Lawtons is concerned about the potential impact on day-to-day relationships with the Union and future negotiations.

28. Wage negotiations were a fundamental aspect of negotiations and the collective bargaining process between the parties. The Final Collective Agreement contains a wage proposal that applies broadly to Lawtons retail locations. Given the Board's finding in the Decision and direction in relation to the position of Lawtons on wages issuance of Further Reasons would inevitably include discussion by the Board about the position of Lawtons on this issue.

29. Because the Final Collective Agreement has been ratified issuance of Further Reasons is entirely unnecessary. Commentary from the Board on the position of Lawtons with respect to wages would be prejudicial to Lawtons as it would affect future negotiations that are likely to commence within the next few months given the one-year duration of the collective agreement. This will have a significant impact on the labour relations between the Union and Lawtons.

30. Should Further Reasons be issued by the Board the harm to Lawtons will be immediate in that if they are released they cannot be undone or retracted.

31. Issuance of Further Reasons may create controversy where now there is none. This compels Lawtons to continue to contest the Decision and Direction through judicial review.

[24] As this indicates, the sole concern of Lawton's is the potential impact on its relationship with the Union including future collective bargaining. No examples of harm were given, although the implication is that perhaps the Union will obtain some unfair advantage in future negotiations as a result of criticism directed towards Lawton's by the Labour Board. This is speculative at best and, in my view, falls short of the obligation on an Applicant for an interim injunction to prove a risk of irreparable harm. Should Lawton's ultimately prevail and obtain an order quashing the October 8, 2015 decision and any subsequent reasons, those reasons will cease to exist in law. I cannot conceive how Lawton's might be harmed by something that will no longer exist. Certainly the Union would not be entitled to raise anything in those reasons during negotiating sessions, nor could the Labour Board rely on them in any future hearings.

[Emphasis added]

[23] I am substantially in agreement with the comments of Wood, J., insofar as they relate to irreparable harm arising from the Labour Board issuing its reasons. I see no potential error or arguable issue in his analysis on this point.

[24] In my view, Lawton's ground of appeal alleging the motions judge failed to properly consider irreparable harm that would result to Lawton's if the Labour Board issues its reasons does not raise an arguable issue.

[25] Therefore, Lawton's motion fails on the first part of the test.

Irreparable Harm

[26] I will now address the three arguments with respect to irreparable harm made by Lawton's before me:

- (a) Once the reasons are published, the publishing of the reasons cannot be undone;
- (b) If the reasons are issued, this appeal and the Second Judicial Review will be rendered nugatory;
- (c) If the reasons are issued, the First Judicial Review will be moot.

[27] What Lawton's is really arguing is that it will suffer an increased harm if the Labour Board issues its reasons. The decision has already been released which

found that Lawton's adopted uncompromising positions with respect to the negotiation of wages, holidays and other leaves without reasonable justification. If there is any harm arising from that decision, it has already occurred. Lawton's is arguing that the release of the reasons for that decision will result in some greater harm elevating it to the level of irreparable harm. With respect, none of its arguments support such a finding.

[28] With regard to its first argument, as noted by Wood, J., if the reasons are issued and the decision of the Labour Board on either the First Judicial Review or the Second Judicial Review is quashed, the Labour Board's reasons would cease to have any import – they would be irrelevant. This is not an unusual situation. Tribunals (or Courts) are often overturned on appeal. When that occurs, their decisions and reasons, for all practical purposes, are of no force and effect. Lawton's argument that you could still find the reasons on-line or in a reporting series does not further its argument. The fact you can find the reasons after they have been overturned does not give them any weight or precedential value.

[29] With respect to the second argument – that this appeal and the Second Judicial Review would be rendered nugatory – that may be so with respect to this appeal; I will address that argument below. However, it is not the case with the Second Judicial Review. If the Board erred in its decision that it ought to issue reasons, and that decision is overturned, any reasons that subsequently followed that decision would become irrelevant.

[30] I will now turn to Lawton's assertion that if its motion is denied then this appeal would be rendered nugatory. The risk of a moot appeal does not automatically constitute irreparable harm (*La Ferme D'Acadie v. Atlantic Canada Opportunities Agency*, 2009 NSCA 5, ¶16-17). This case is not unlike that of *CanGlobe Financial Group v. Johnson*, 2010 NSCA 46 where Chief Justice MacDonald, after referring to the fact that a nugatory appeal does not automatically constitute irreparable harm, said the following:

[14] Here, as noted, the main objection is that the disputed documentation is simply private and irrelevant. Yet, the appellants offer no details as to how this disclosure may be harmful aside from the bare assertion that it will cause irreparable harm. That, in my view, is not enough to constitute irreparable harm in all the circumstances of this appeal. In this regard, I am guided by my colleague, Oland, J.A., who in **G.W. Holmes Trucking (1990) Ltd. (Re)**, 2005 NSCA 132, referred to a similar lack of evidence:

¶ 12 The evidence as to irreparable harm is sketchy, lacks specifics, and does not establish that the answers to the undertakings are confidential or how their disclosure would adversely impact the business. To large measure it consists of Mr. MacDonald's conclusions as to irreparable harm, without setting out the basis for those conclusions. To satisfy the second component of the primary test, it is not enough to simply state that irreparable harm would result. The applicant here had to substantiate that his responses to certain of the undertakings contain sensitive or confidential business information that would be harmful to him. This Mr. MacDonald failed to do. I have not been persuaded on the evidence before me that he would suffer irreparable harm were a stay pending appeal not granted.

[31] Similarly, Lawton's evidence on irreparable harm is simply bald assertions, lacks specifics and, with respect, it is difficult to envision that reasons, which may subsequently become irrelevant if a judicial review is successful, could cause any harm, let alone irreparable harm. The risk of the nugatory appeal, in these circumstances, does not constitute irreparable harm.

[32] Finally, with respect to Lawton's third argument, I fail to see how allowing the Labour Board to issue reasons would render the First Judicial Review moot. If the Labour Board issues its reasons for the March 26 decision, that in no way impacts the Judicial Review sought by Lawton's. Indeed, it may be necessary to have the Board's reasons to determine whether its conclusions were unreasonable. If it is found that the conclusions were unreasonable, any findings of the Labour Board in its March 26 decision would cease to be of any legal effect.

[33] For these reasons, I am not satisfied that Lawton's has established irreparable harm.

Balance of Convenience

[34] As I have not found that there is irreparable harm, it is not necessary for me to address the balance of convenience argument.

Exceptional Circumstances

[35] Cromwell, J.A. (as he then was) in *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.*, 2006 NSCA 129, explained that to qualify for the exceptional circumstances test it would be unjust to enforce the judgment on appeal:

[13] While there can be no comprehensive definition of what constitutes special circumstances, they must be circumstances which show that it would be unjust to permit immediate enforcement of the judgment. This is because a stay of execution, in common with interim injunctive relief, must justly apportion the risk of uncertainty about the ultimate outcome of the case. There are arguable issues raised on appeal, but one cannot at this stage speculate about what the outcome of the appeal will be. The risk created by this uncertainty is shared by both the appellant and the respondents. If a stay is granted and the appeal ultimately fails, the respondents will have been kept out of their money needlessly. If, on the other hand, the stay is denied and the appeal ultimately succeeds, the appellant will have been required to pay the judgment needlessly.

[Emphasis added]

[36] In my view, the circumstances of this case cannot be considered exceptional in the sense described by Cromwell, J.A. The only effective risk in this case is the release of the reasons of the Labour Board for a decision it has already made and which may eventually be overturned and become irrelevant. In all of the circumstances of this case, I see nothing unjust about the Labour Board issuing its reasons.

This Court's Jurisdiction to Grant the Relief Sought

[37] The respondent Union raised another issue on this motion. It argued that this Court did not have jurisdiction to grant the remedy sought by Lawton's. In light of my conclusions above, it is not necessary to decide this issue. However, I would point out that in raising this issue neither the respondent nor Lawton's referred to s. 41(e) of the *Judicature Act*, R.S.N.S. 1989, c. 240 which provides as follows:

41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:

...

(e) no proceeding at any time pending in the Court shall be restrained by prohibition or injunction but every matter of equity on which an injunction against the prosecution of any such proceeding might have been obtained prior to the first day of October, 1884, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto provided always that nothing in this Act contained shall disable the Court from directing a stay of proceedings in any proceeding pending before the Court if it or he thinks fit, and any person, whether a party or not to any such proceeding who could have been entitled, prior to the first day of October, 1884, to apply to the Court to restrain the prosecution

thereof, or who is entitled to enforce by attachment or otherwise any judgment, contrary to which all or any part of the proceedings have been taken, may apply to the Court thereof by motion in a summary way for a stay of proceedings in such proceeding either generally, or so far as is necessary for the purposes of justice and the Court shall thereupon make such order as shall be just;

[38] As neither party referenced that provision in making its arguments, I will not comment further other than to say that any argument which brings into question this Court's jurisdiction to issue a stay of proceedings must involve a discussion of s. 41(e) of the *Judicature Act* and the jurisprudence it has spawned over the years.

Conclusion

[39] I dismiss the motion with costs fixed at \$750.00 in any event of the cause payable forthwith.

Farrar, J.A.