NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Occupational Health & Safety) v. Lafarge Canada Inc.*, 2014 NSCA 9

Date: 20140128
Docket: CA 416846
Registry: Halifax

Between:

Director of Occupational Health and Safety

Appellant

v.

Lafarge Canada Inc., Nova Scotia Labour Board and The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia

Respondents

Judges:	Saunders, Fichaud and Farrar, JJ.A.
Appeal Heard:	November 20, 2013, in Halifax, Nova Scotia
Held:	**Leave to appeal granted and appeal allowed per reasons for judgment of Farrar, J.A.; Saunders and Fichaud, JJ.A. concurring.**
Counsel:	Andrew D. Taillon, for the appellant Rebecca Saturley and Michelle McCann, for the respondent Lafarge Canada Inc. Ryan T. Brothers, for the respondent Nova Scotia Labour Board (Watching Brief Only) Edward A. Gores, Q.C., for the respondent, Attorney General of Nova Scotia not participating

Reasons for judgment:

Facts

[1] On February 23, 2011, an inspection was carried out at Lafarge Canada Inc.'s cement and quarry operation in Brookfield, Nova Scotia and a Report of Workplace Inspection was prepared. As a result of the inspection, seven Compliance Orders were issued. The Compliance Orders required Lafarge Canada to take certain actions to comply with the **Occupational Health and Safety Act**, S.N.S. 1996, c. 6 ("**OHSA**").

[2] On May 5th, 2011, three Notices of Administrative Penalty were issued to Lafarge in relation to the Compliance Orders. All three of the Notices of Administrative Penalty show the alleged date of contravention as February 24th, 2011.

[3] It is not disputed that any contravention of the **OHSA** would have been on the date of the inspection, February 23rd, 2011 and not February 24th, 2011. The date on the Notice of Administrative Penalty is, clearly, an error.

[4] On June 2nd, 2011, Lafarge appealed the three Administrative Penalty Notices to the Labour Board raising 10 grounds of appeal. Of particular note is the fact it did not appeal the Administrative Penalties on the basis that the date was wrong. At the time of filing its Notice of Appeal, Lafarge also made factual and legal arguments relating to the appropriateness of the Administrative Penalties. Again, no issue was taken with the date of the alleged contravention.

[5] On February 11th, 2012, the Labour Board advised the parties that it had identified a discrepancy in the contravention date on the Administrative Penalties and the date on the Report of Workplace Inspection. The issue was not identified nor raised by the parties.

[6] A case management conference was held on March 25th, 2013, which resulted in a Directive from the Labour Board that the date discrepancy would be dealt with as a preliminary issue. A hearing date was scheduled for April 26th, 2013.

[7] At the hearing, the uncontested affidavit of David Clarke, the Director of Occupational Health & Safety at the time, was submitted. Without getting into the technical details, his evidence was essentially that a glitch in their computer system caused a discrepancy of one day between the Report of Workplace Inspection and the Notices of Administrative Penalty.

[8] In a written decision dated May 15, 2013 (reported as 2013 NSLB 64), the Labour Board set aside the Administrative Penalties because of the discrepancy. The Director of Occupational Health and Safety appeals.

[9] An appeal to this Court is pursuant to s. 70 of the **OHSA** which provides:

> 70 (1) Subject to subsection (2), the Board has exclusive jurisdiction to determine all questions of
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> (a) law respecting this Act;
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> (b) fact; and
>
> (c) mixed law and fact,
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> that arise in any matter before it, and a decision of the Board is final and binding and not open to review except for error of law or jurisdiction.
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> (2) The review of a decision of the Board shall be conducted
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> (a) by the Nova Scotia Court of Appeal, and only with leave of that Court; and
>
> (b) with recognition that a panel of the Board is constituted is established, for the purpose of this Act, as an expert body.

[10] For the reasons that follow I would grant leave to appeal, allow the appeal, set aside the decision of the Board and reinstate the Administrative Penalties.

Issues

[11] The appellant originally raised three grounds of appeal. One of the grounds of appeal was withdrawn. I would summarize and restate the grounds of appeal into one ground as follows:

> The Labour Board erred in its consideration of the law to be applied when determining whether the administrative penalty should be revoked.

Standard of Review

[12] The parties agree that the standard of review is reasonableness. So do I. The existence of a privative clause in s. 70, the direction to recognize the Labour Board is constituted as an expert body and the nature of the question in issue all point to reasonableness as the standard of review (**Dunsmuir v. New Brunswick**, 2008 SCC 9).

[13] The reasonableness standard of review requires a court to read a tribunal's reasons together with the outcome to determine whether the result falls within a range of possible outcomes (**Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)**, 2011 SCC 62).

[14] Viewed through the lens of deference, the questions become: do the Labour Board's reasons allow this Court to understand why it made its decision and do the reasons enable us to determine whether the conclusion is within the range of acceptable outcomes?

Analysis

[15] In my respectful opinion, although the Board cited the test it established in **Kelly Rock Ltd. (Re)**, 2012 NSLB 168, it failed to properly consider and apply it. It also failed to properly consider and apply s. 14 of the Occupational Health and Safety Appeal Panel Regulations, O.I.C. 97-135, (February 25, 1997), N.S. Reg. 25/97. I will elaborate on each of these errors.

[16] In **Kelly Rock**, there was a discrepancy of over one month between the date of the Report of Workplace Inspection and the date of the Administrative Penalties. In addition to the date discrepancy, the inspection number referenced in the Report of Workplace Inspection was a different number altogether from the orders identified on the Notices of Administrative Penalty. In considering these discrepancies the tribunal concluded that the "fundamental accuracy of those documents" was called into question and revoked the penalties:

> The discrepancy between the information given to the Appellant and that in the subsequent Notice of Administrative Penalty calls into question the integrity of the penalty process. ...
>
> The Board finds that the discrepancies between the Report of Workplace Inspection and the Notices of Administrative Penalty in relation to the date of contravention and the Inspection number call into question the fundamental

> accuracy of those documents. As a result, these Notices of Administrative Penalty cannot stand. (My emphasis)

[17] In this case, the Labour Board correctly set out the legal principles established by **Kelly Rock**, however, it did not apply them. In particular, it did not make any determination about whether the date discrepancy of one day called into question the fundamental accuracy of the documents.

[18] Not only was there no finding that the fundamental accuracy of the documents were called into question, the evidence is to the contrary. There was no suggestion either before the Labour Board or before us that the employer was misled in any way by the date discrepancy. It was aware of the factual basis for the penalties and, in its submissions to the Board, raised very detailed defences based on the merits of the Administrative Penalties without referring to the discrepancy in the date.

[19] Further, in oral submissions before us, counsel for Lafarge candidly and appropriately acknowledged that it was not prejudiced in any way by the discrepancy.

[20] Therefore, it is my view that a proper application of the **Kelly Rock** test obliges the Labour Board to make a factual determination about the effect of the discrepancy on the fundamental accuracy of the documents. The bald conclusion that the discrepancy in the date amounts to an automatic revocation of the Administrative Penalty without that determination is unreasonable.

[21] For this reason alone I would allow the appeal.

[22] In my view the Labour Board also erred in failing to consider and apply Section 14 of the Occupational Health and Safety Appeal Panel Regulations provides:

> 14 No proceedings before an appeal panel are invalid by reason of any defect in form or any technical irregularity.

[23] This issue was raised before the Labour Board, however, it is not addressed in the decision. The regulation clearly applies to these proceedings.

[24] Again, there is no evidence that Lafarge was in any way prejudiced in its ability to respond or that it was left in any doubt about the case it had to meet or the nature of the penalties being levied against it. Lafarge's submissions to the

Labour Board specifically enumerate each of the Notices of Administrative Penalty received and raises substantial points of contention in regard to each. As noted earlier, it acknowledged it was not prejudiced in any way by the one day discrepancy in dates.

[25] In **U.F.C.W., Local 1252 v. C.A.W.**, [1988] N.S.J. No. 359 (Q.L.) (N.S.S.C.T.D.), the court was dealing with a similar provision under s. 7 (as it was then) of the **Trade Union Act**, S.N.S. 1972, c. 19 as follows:

> 7 No proceedings under this Act ... are invalid by reason of any defect in form or any technical irregularity.

[26] In that case, the name of the union in a certification vote was incorrectly identified on the ballot.

[27] Nathanson, J. concluded that there was no confusion in the minds of the voters and that the omission of the proper name was a technical irregularity governed and cured by s. 7 of the **Act** (p. 2).

[28] In my view, the Labour Board erred in failing to consider s. 14 of the Regulations to determine whether the one day discrepancy was a defect in form or a technical irregularity which could be cured by s. 14.

[29] The Labour Board's failure to consider s. 14 was unreasonable. Again, for this reason alone, I would also set aside its decision.

Disposition

[30] Normally in situations such as this, the matter would be remitted to the Board for the purpose of determining the facts and the application of the proper legal test to those facts. However, in these circumstances the record is sufficiently clear to allow us to make the determinations the Board ought to have made. Based on this record, and applying the test in **Kelly Rock (Re)**, I am of the view that the discrepancy in date between the Report of Workplace Inspection and the Notices of Administrative Penalty does not call into question the fundamental accuracy of the documents. This is evidenced by the submissions of Lafarge both before the Labour Board and before us.

[31] Further, I would find that s. 14 of the Regulations applies in this case. Absent evidence of prejudice to Lafarge, and none has been suggested nor shown, the administrative penalties would not be invalidated because of the defect.

[32] In conclusion, I would grant leave to appeal and set aside the decision of the Labour Board, reinstate the Notices of Administrative Penalty and remit the matter to the Labour Board to hear Lafarge's appeal of the Notices of Administrative Penalty on its merits.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Fichaud, J.A.