NOVA SCOTIA COURT OF APPEAL

Citation: *C.R. Coatings & Painting Inc. v. International Union of Painters and Allied Trades, Local 1439*, 2014 NSCA 40

Date: 20140417
Docket: CA 417972
Registry: Halifax

Between:

C.R. Coatings & Painting Inc.

Appellant

v.

International Union of Painters and Allied Trades, Local 1439 and Nova Scotia Labour Board (Eric Slone, Cordell Cole and Gary Dean)

Respondents

Judges:	Saunders, Oland and Fichaud, JJ.A.
Appeal Heard:	February 4, 2014, in Halifax, Nova Scotia
Held:	**Appeal dismissed per reasons for judgment of Saunders, J.A.; Oland and Fichaud, JJ.A. concurring.**
Counsel:	Eric Durnford, Q.C. and Krista K. Smith, for the appellant Raymond A. Mitchell, for the respondent Union Edward A. Gores, Q.C. for the respondent Labour Board (Watching Brief Only)

Reasons for judgment:

[1] C.R. Coatings & Painting Inc. was hired to provide painting services at a new hospital under construction in Truro, Nova Scotia. While carrying out that work, Local 1439 of the International Union of Painters and Allied Trades conducted a successful drive to certify the union as the bargaining agent for a unit of employees working for the company. The Nova Scotia Labour Board rejected the company's attempt to have the certification order set aside. Justice Patrick J. Duncan of the Nova Scotia Supreme Court dismissed the company's application for judicial review of the Board's decision. The company now appeals to this Court complaining that the judge chose and applied the wrong standard of review; misunderstood the process and procedures mandated by ss. 95 and 96 of the **Trade Union Act**, R.S.N.S. 1989, c. 475, as amended; mistakenly assigned the burden of proof; and based his decision on unreliable and unnecessary hearsay evidence.

[2] The company asks that the appeal be allowed and that the Labour Board's certification of the union as the bargaining agent be quashed, or alternatively, that the case be sent back to the Board for reconsideration.

[3] For the reasons that follow I would dismiss the appeal. I will begin by briefly summarizing the facts that materially relate to the issues that follow. Further details will be provided later where additional context is important.

Background

[4] On January 16, 2012, the union applied to the Labour Board pursuant to s. 95(1) of the **Trade Union Act** to act as the bargaining agent for:

> All Employees of C.R. Coatings and Painting Inc., engaged as Painters and Apprentices on Mainland Nova Scotia but excluding all other employees, Foreman other than Working Foreman, and those equivalent to the rank of Foreman and above, office employees and those workers excluded by Clauses (i) and (ii) of Paragraph (e) of Section 92 of the *Trade Union Act*.

[5] On January 27, 2012, the company sent the Board its statutory declaration with accompanying Schedules A and B which contained the following information:

SCHEDULE A

List (alphabetically arranged) all your employees employed by C.R. Coatings & Painting Inc. as **Journeyman Painters and Apprentices** on Mainland Nova Scotia, as at the 16th day of January, 2012, the date when the Applicants application was made.

Name	Occupation Classification	Normal Hours
Beaman, Terry	Painter	40
Brooks, Andrew	Painter	37
Cable, Phil	Painter	40
Gosbee, Jr. Max	Painter	39
Healey, Frank	Painter	39
Johnson, Alex	Painter	30

SCHEDULE B

EMPLOYEES NOT AT WORK ON THE DATE THE APPLICATION FOR CERTIFICATION WAS FILED WITH THE BOARD

List (alphabetically arranged) all your employees employed with C.R. Coatings & Painting Inc. as Journeyman Painters and Apprentices on Mainland Nova Scotia, who were not at work because of layoff, sickness, or other reasons, on the 16th day of January, 2012, the date when the Applicants application was filed with the Board.

Name	Occupation Classification	Normal Hours
Stuart, Travis	Painter	40

[6] After considering the union's application and the company's response, the Board issued a decision dated February 3, 2012, certifying the union as the bargaining agent for:

> All Employees of C.R. Coatings and Painting Inc., engaged as Painters and Apprentices on Mainland Nova Scotia but excluding all other employees, Foreman other than Working Foreman, and those equivalent to the rank of Foreman and above, office employees and those workers excluded by Clauses (i) and (ii) of Paragraph (e) of Section 92 of the *Trade Union Act*.

In doing so the Board was satisfied that the union had met the requirements under Part II of the **Act** and, in particular, had established that on the day of its certification application (January 16, 2012) it had the necessary number of union members in good standing present onsite, and that those union members had spent more than 50% of their onsite work day performing work as painters. See for example, **International Union of Operating Engineers, Local 721 v. Granite Environmental Inc**, 2005 NSCA 141.

[7] On February 17, 2012, counsel for the employer filed a "Request for a Hearing" in Form 18 of the Regulations to the **Act**. The employer mistakenly cited s. 96(1) of the **Act** as providing the statutory basis for its request. This reference was obviously in error. An application brought pursuant to s. 96(1) can only be made by a trade union or Council of trade unions after an application for certification has been dismissed. Properly, it is s. 96(2) which speaks to an application by an employer after a certification order has been granted, to have the Board revoke or vary its earlier order.

[8] The principal reason relied upon by the employer for revocation or variation of the certification order was, as stated in its request for a hearing:

> ...none of its six (6) employees who, on January 16, 2012, were working at the worksite were either Journeyman or Apprentice painters as applied for by the Union in that Application. ...to the best of C.R. Coatings & Painting's knowledge, none of them have ever held either of those statuses.

[9] In subsequent correspondence to the Board the employer's counsel reiterated the eligibility requirements as being the basis of his challenge. He said:

> ...the Applicant employer will be raising the issue that none of the Employees its Union relies on and supporting the Certification Order may have met the eligibility requirements of the Union's constitution to be admitted to membership in the Union.

[10] The employer's application challenging the certification order came before a panel of the Board comprising Mr. Eric Slone, Vice-Chair together with Messrs.

Cordell Cole and Gary Dean as members on May 23 and 24, 2012. The Board described the basis of the employer's challenge:

> In its application, the Employer set out in general terms the grounds for opposing the Order. Viewed as a whole, the grounds advance a theory that the six individuals who were working on January 16, 2012, did not enjoy the status of either journeyman or apprentice painters.

[11] The Board heard evidence from two witnesses, Mr. Wilfred Jarvis, a business representative and organizer for the union; and Ms. Paula Broaders, an administrator with C.R. Coatings & Painting Inc. who was responsible for the firm's accounting and financial matters. The questioning of these witnesses focused on the status of the seven individuals listed in Schedules A and B as of January 16, 2012, that being the date of the application for certification as a bargaining unit.

[12] Evidently the presentation of evidence and argument progressed without controversy until the conclusion of the hearing when – after the parties had closed their respective cases – counsel for the employer raised, for the first time, a new issue purporting to challenge the union's claim that the individuals in question had been working in their trade for a majority of their working day on the date of the application. It is that controversy which anchors the appellant's assertion before this Court that the reviewing judge erred by failing to identify, correct and reverse the "flaws" in the Board's decision certifying the bargaining unit.

[13] To better understand that assertion, context is important. It would be useful at this stage to briefly review the sequence and manner in which the evidence was presented at the hearing.

[14] The hearing began with the Chair, Mr. Slone, advising counsel for the employer C.R. Coatings & Painting Inc. that it was their application and asking if they had any preliminary matters to address. Mr. Durnford took the opportunity to outline the three discrete issues as he saw them, the first two of which were confined to the status and eligibility of the employees and the third relating to the timing of the order if the Board were inclined to reject the company's submissions on the first two issues. He then called Mr. Wilfred Jarvis as his first witness. Mr. Jarvis was questioned by Mr. Durnford and cross-examined by the union's counsel, Mr. Raymond Mitchell. Mr. Durnford then called as his second and final witness Ms. Paula Broaders. When he completed his questioning of Ms. Broaders she was cross-examined by Mr. Mitchell.

[15] Just before the Board broke for lunch we see this exchange:

MR. SLONE: And this is obviously a logical time to take our lunch break.

MR. DURNFORD: Who are we looking at for witnesses this afternoon? Do you have any sense of that?

MR. SLONE: Well, maybe Mr. Mitchell can just give us a sense.

MR. MITCHELL: All right. Are you finished your case?

MR. DURNFORD: I did, yes. I did.

MR. SLONE: Yeah, he did.

MR. MITCHELL: Oh, I'm sorry, I didn't hear that.

MR. DURNFORD: Yeah, I did.

MR. MITCHELL: Probably none. But I'll talk to my witness ... I'll talk to my client over lunch.

MR. SLONE: Yeah.

MR. MITCHELL: Probably none, maybe one. I doubt it.

MR. SLONE: None or one witness?

MR. MITCHELL: Yeah.

MR. SLONE: Okay.

MR. MITCHELL: Well, Mr. Jarvis was going to be my witness.

MR. SLONE: Oh, yes.

MR. MITCHELL: But he had the surprise call.

MR. DURNFORD: I gave you the opportunity to cross-examine him.

MR. MITCHELL: I appreciate that.

MR. DURNFORD: Thank you.

MR. SLONE: So you mean there's a possibility we may go right into argument.

MR. MITCHELL: I'm prepared for argument if I don't call a witness.

MR. SLONE: Okay. So there'll be little or no evidence from the union, and then we'll definitely be in argument sometime this afternoon, early afternoon. All right, how much time would you folks like for lunch?

MR. DURNFORD: An hour is good.

MR. MITCHELL: ... (inaudible) 1:30.

MR. SLONE: 1:30? Fine, okay.

[16] After the lunch recess the hearing reconvened and we see this exchange:

> **MR. SLONE:** Does the union have any witnesses it wishes to call?
>
> **MR. MITCHELL:** Mr. Chair, I have a question about the Panel's ... (inaudible) process.
>
> **MR. SLONE:** Okay.
>
> **MR. MITCHELL:** If the union calls no evidence, does the union then make its argument first?
>
> **MR. DURNFORD:** I'm the Appellant. I have to ... I've got the burden.
>
> **MR. MITCHELL:** ... (inaudible).
>
> **MR. SLONE:** Yeah, that's a jury kind of thing. That doesn't impress me. I think no matter what, in my view the party with the burden of proof argues first.
>
> **MR. MITCHELL:** All right, fair enough.
>
> **MR. SLONE:** So there's no advantage ... (inaudible). It's really if you have any evidence you want to call.
>
> **MR. MITCHELL:** The union had intended to call as its witness Mr. Jarvis, and the employer cut us to the chase.
>
> **MR. SLONE:** So you don't have any witnesses.
>
> **MR. MITCHELL:** So no, I don't have any witnesses.
>
> **MR. SLONE:** No witnesses, okay. No other union witnesses.
>
> (Underlining mine)

[17] The Chair then invited counsel to make their submissions beginning with Mr. Durnford for the employer. Here we see Mr. Durnford's reference to a new issue which had just "emerged". He began his submissions this way:

> **MR. DURNFORD:** At the beginning of the day, I identified three issues. But at the same time, I noted that in our reply or our application, I guess, seeking a hearing, in the paragraph ... I don't know if it matters too much ... (inaudible) reserved its right to raise other issues as may become known as to whether the union properly met the requirements of the **Trade Union Act** to become the certified bargaining agent of C.R.'s employees.
>
> In the course of this hearing, there has emerged an issue which in my submission quite apart from the three that we've raised is dispositive of the case, and compels ... I respectfully submit, compels a revoking of the certification.
>
> As the Board knows, when you're dealing with a construction industry certification, there are a number of ingredients that must be proven by the Applicant to succeed. One of them well in mind over the years in cases is

whether or not the union has proven specifically that a majority of the persons it claims as members were doing on-site work in the trade on the day of the application for the majority of their work day. That is fundamental.

And it now appears with the fullness of a hearing that that issue has not ... that requirement, and it's as fundamental as any is in the construction industry certification, that has not been proven. In fact, the opposite has been shown.

The only evidence we've heard from Mr. Jarvis ... and I just confess I was quite surprised by this. I was surprised that ... when he was going to be called as a union witness or, as it turned out, to be called by me, and then my friend questioned him. I was surprised to hear his answer that he had not on the day in question, notwithstanding filling out the application, not visited the site.

And so what he said was he received a report. And I note that it was from some unnamed person. We don't know who that was. He said a contact at the site. Don't know who that was. That unnamed persons, that unnamed persons – he didn't say who - were painting for some unspecified time, for some unspecified time at the site.

We've heard nothing about confirming that these people, the six potential individuals, were working the trade on the day in question for the majority of their work day. You would think, well, that simply hasn't been proven. ...

[18] In his reply on behalf of the union Mr. Mitchell got right to the point. We see this:

MR. MITCHELL: This morning when we started when I made my opening submission to you, I said be careful not to follow Mr. Durnford down the rabbit-hole because that's where he wants to lead you – where Alice went, the land of confusion and strange things.

...

....let's talk about burden of proof on this issue. ... the union doesn't have to prove anything in this case. That's important. It's very important. The union does not have to prove anything. I think Mr. Durnford at times is confused. I think ...

We [never] filed the application here for review. We did not ... he did ... the employer has the burden of proof in all matters before this Panel. ... has the employer discharged the burden of its claim that the union violated its own constitution if you want to get into this analysis?

... But if you decide you're going to go into it, all right, he has the burden of proving the union didn't comply. ...

... The union need not prove anything. The employer has the burden of proof. They have the burden of establishing in evidence something that would convince you not to follow the Panel's normal procedure. ....

> All right, that leaves the last point that I want to address. And this last one is this idea that somehow the union must prove something here today about work on a job site that's utterly offensive, I have to tell you.
>
> Look at the response that was filed by the employer. The number of workers on the job site are noted. There's nothing raised about somebody not doing the work on the day in question. This morning in my comments, I'll ask you to recall, I said this is an unusual case because we're not arguing over who did what on the day in question. There's no issue as to that. I said that this morning. Did Mr. Durnford say, no, everything's in issue? Because if that were the case, this hearing would have gone a lot differently.
>
> I don't think this Panel wants to allow a hearing by ambush or by trickery. They don't have any place in this hearing room. Let me say it again: The union is the Respondent here. The Applicant has the burden of proving.
>
> If Mr. Durnford on behalf of the employer believes there was an issue about who did what on the day of, then he should have called evidence to establish those facts. It's not on the union. I believe he was confused at times, since he called the union witness, that he thinks he's in a situation where the union applied for the hearing or that Mr. Jarvis was my witness.
>
> He attacks Mr. Jarvis's performance as a witness. It's his witness. It's not my witness. He said his witness failed him. That's what he was telling you. He has the burden. He's got to prove it. He's taking issue that if it is an issue what happened on that job site that day, then he has to prove it, not the union. He hasn't brought any proof. There's no burden on the union whatsoever on this issue, and he's failed.
>
> And I don't appreciate the fact that at all it was raised. And don't tell me ... (inaudible) that I'll raise other issues. I raised this this morning in my opening and said it's not an issue, and he didn't make an issue of it then. I don't appreciate it being raised at the last minute when a hearing is completed and I've already closed my case or decided not to call evidence. If I thought that was an issue, I would have happily called the evidence. It was never an issue before you. And in any event, it's his burden to prove it, not mine.

[19] These excerpts help to put in context the employer's current complaint regarding the Board's assignment of the burden of proof as well as the adequacy of the evidentiary record. Having set the stage I will turn now to a consideration of the issues that arise on appeal.

Issues

[20] The parties do not agree on a statement of the issues. In my opinion there are only three, which I would frame as follows:

1. Did the reviewing judge err in selecting and applying the proper standard of review to the Board's decision?
2. Did the reviewing judge err in finding that the Board had not misapplied the burden of proof in a hearing convened pursuant to s. 96(2) of the **Trade Union Act**?
3. Did the reviewing judge err by finding that there was a proper evidentiary foundation for the Board's decision to uphold the certification order?

Analysis

Issue #1 - Did the reviewing judge err in selecting and applying the proper standard of review to the Board's decision?

[21] The appellant says the reviewing judge was wrong to select and apply a standard of reasonableness in his assessment of the Board's decision. In its factum the appellant complains that the reviewing judge did not conduct the appropriate standard of review analysis and, had he done so, he would have concluded that the "onus issue is a question of general law [that] is outside the Board's specialized area of expertise" because " which party bears the onus of proof is central to the administration of justice and therefore requires uniform and consistent answers". For these reasons the issue should properly have been characterized as a matter of law, reviewable on a standard of correctness.

[22] I respectfully disagree. Justice Duncan was well aware that the first step in the requisite standard of review analysis was to ask whether the existing jurisprudence had already satisfactorily determined how to characterize the issue in dispute and the level of deference to be accorded to it. **C.R. Falkenham Backhoe Services Ltd. v. Nova Scotia (Human Rights Board of Inquiry)**, 2008 NSCA 38 at ¶20, 24 and 25. He concluded – correctly in my view – that those questions had been settled. Citing **Dunsmuir v. New Brunswick**, 2008 SCC 9 as well as this Court's decision in **Casino Nova Scotia/Casino Nouvelle-Ecosse v. Nova Scotia (Labour Relations Board)**, 2009 NSCA 4, Duncan, J. was satisfied that reasonableness had been identified as the proper standard when reviewing decisions of the Labour Board in matters such as these and as a result there was no need to undertake a full blown **Dunsmuir** analysis. He reasoned:

> [30] The Standard of Review has been determined by our appellate court to be one of reasonableness. For reasons that follow, I am of the view that all questions

> raised on this application for judicial review attract the standard of reasonableness.

[23] In my opinion Justice Duncan was right to choose reasonableness as the appropriate standard in assessing the merits of the employer's challenge to the Board's decision in this case. Accordingly, I would answer the first question I posed in the negative. The reviewing judge did not err in selecting and applying the proper standard of review to the Board's decision. I will turn now to a consideration of the second issue.

Issue #2 - Did the reviewing judge err in finding that the Board had not misapplied the burden of proof in a hearing convened pursuant to s. 96(2) of the Trade Union Act?

[24] Here is what Duncan, J. said in disposing of the question of who bears the onus of proof:

> **Issue 1:** Who has the onus of proof in an application brought pursuant to section 96(2) of the Trade Union Act R.S.N.S. 1989, c. 475, as amended?
>
> [31] The procedure for certification is found in section 95 of Trade Union Act:
>
> 95(1) A trade union or a council of trade unions claiming to have as members in good standing not less than thirty-five per cent of the employees of one or more employers in the construction industry in a unit appropriate for collective bargaining may, subject to the rules of the Board and in accordance with Sections 23 and 24, make application to the Board to be certified as bargaining agent of the employees in the unit.
>
> (2) ...
>
> (3) When, pursuant to an application for certification under this Part by a trade union or council of trade unions, the Board has determined the unit appropriate for collective bargaining and consistent with a geographic area established by the Board,
>
> (a) if the Board is satisfied that the applicant trade union or council of trade unions has as members in good standing less than thirty-five per cent of the employees in the appropriate unit the Panel [Board] shall dismiss the application;
>
> (b) if the Board is satisfied that the applicant trade union or council of trade unions has as members in good standing more than fifty per cent of the employees in the appropriate unit the Board may

> certify the trade union or council of trade unions as the bargaining agent of the employees in the unit;

[32] Section 96 of the **Act** sets out the process for review of the certification decision of the Board:

> 96 (1) Where the Board issues an order dismissing an application pursuant to clause (a) or (c) of subsection (3) of Section 95 and the applicant trade union or council of trade unions requests a hearing, the Board shall hold a hearing and may revoke the order.
>
> (2) Subsection (9) of Section 16 or any provision of the Act or regulations requiring notice shall not apply to an application under Section 95, but upon application by the employer of employees on whose behalf a trade union or council of trade unions has been certified, or by another trade union or council of trade unions, the Board may revoke or vary an order of certification under Section 95 and shall, in every such case, give an opportunity to all interested parties to present evidence and make representations. R.S., c. 475, s. 96; 2010, c. 37, s. 151.
>
> (Emphasis added)

[33] In summary, section 95(3) provides a document based process to receive, review and determine applications for certification. The Board's decision is based upon documentary evidence submitted by the Union (application for certification) and the Employer (Form 17 Schedules A and B). The result, unless successfully challenged, is binding upon the parties.

[34] Section 96 provides a mechanism for an aggrieved party to bring the matter before the Board for a hearing to determine whether the order should be revoked or varied.

[35] The Board, in this case, held that the aggrieved party carried the onus to prove on the balance of probabilities the basis upon which the Certification Order of the respondent Union should be revoked or varied. In my view this is correct. The jurisprudence cited by counsel in this regard offered little assistance on this point and does nothing to dissuade me in the determination I have made.

[36] The Act provides no indication that the hearing is intended to be de novo, that is, one in which the Union must satisfy the Board on evidence that the certification should be sustained irrespective of its success at first instance. If that was the legislative intent then I would expect that to have been stated in clear language, especially since the Certification Order is presumed to be valid unless and until the Board, having heard evidence and representations, decides to revoke or vary.

[37] I have previously indicated that the Board's decision with respect to onus is measured by a standard of reasonableness. While the issue of who bears the onus of proof under section 96 (2) of the **Trade Union Act** is a question of law, in my view it does not rise to the level of "central importance" required to oust the

> standard of reasonableness in the context of this case. Deference is consistent with both of (1) the statutory privative provision in the **TUA**; and (2) the legislative intent that the tribunal exercise its special expertise to interpret its home statute and govern its administrative regime. Against this standard the decision of the Board was reasonable.

[25] I accept and endorse Justice Duncan's analysis. The Board has broad statutory powers and immunities. It determines its own procedure. It can compel, receive and accept evidence as it deems fit, even if that evidence would not be admissible in a court of law (s. 11 of the **Act**). Deciding which party ought to bear the onus of proof in a labour dispute like this one is hardly the type of question that is of central importance to the administration of justice in Canada or outside the Board's specialized expertise. On the contrary, giving a direction as to who bears the onus of proof in applications brought pursuant to s. 96 of the **Act** is precisely the type of procedural oversight that falls squarely within the core functions, responsibilities and expertise of the Board.

[26] A fair reading of Justice Duncan's reasons as a whole satisfies me that he assiduously followed the principles enunciated in **Dunsmuir** before reaching his conclusion. He understood that his task was not to reflect upon whether he thought the Board's approach was correct or preferable but rather to engage in an organic exercise by reading the Board's reasons together with the outcome to determine whether the result, both factually and legally, fell within a range of possible outcomes. See for example, **Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)**, 2011 SCC 62; **McLean v. British Columbia (Securities Commission)**, 2013 SCC 67; **Coates v. Nova Scotia (Labour Board)**, 2013 NSCA 52; **Egg Films Inc. v. Nova Scotia (Labour Board)**, 2014 NSCA 33; and **Delport Realty Ltd. v. Nova Scotia (Registrar General of Service Nova Scotia & Municipal Relations)**, 2014 NSCA 35.

[27] Before leaving this subject I wish to dispose of the appellant's submission concerning the interplay between s. 95 and s. 96 of the **Act**. During oral argument in this Court counsel for the appellant repeatedly characterized the Board's order issued February 3, 2012, certifying the union as the bargaining agent following the union's application for certification under s. 95 of the **Act** as nothing more than a "provisional" or "initial" or "interim" order. Respectfully, such a characterization misconstrues the process mandated by s. 95 and s. 96. It must first be observed that modifying or limiting words like "provisional" or "interim" do not appear in the statute. Had the Legislature intended such an interpretation it would have been very easy to add such modifying language. The fact is that an order issued

pursuant to s. 95 is valid, permanent and of full force and effect unless or until the Board decides to change its decision after a request for a review hearing initiated by either the union, or the employer pursuant to s. 96(1) or 96(2) respectively.

[28] If the Board has issued an order pursuant to s. 95 dismissing an application for certification, the union may request a hearing and attempt to persuade the Board that its order be revoked pursuant to s. 96(1). Similarly, if the Board has certified a union as the bargaining unit an employer may apply for a review hearing under s. 96(2) in an attempt to persuade the Board to revoke or vary its earlier certification order.

[29] In the first example the union would be applying to have the Board revoke its earlier order which had dismissed the union's application for certification. In that instance, the union bears the onus of proof in persuading the Board upon the evidence that there are good reasons to revoke the existing order.

[30] In the second example the employer would be attempting to have the Board revoke or vary its earlier order certifying the union, and therefore the employer would bear the burden of proof in persuading the Board upon the evidence that there are good reasons to change or set aside the existing order.

[31] Respectfully, it is no more complicated than that.

[32] Because, in this case, the employer had initiated the review hearing, it bore the burden of proof in persuading the Board to revoke its certification order.

[33] For all of these reasons I would answer the second question posed in the negative. The reviewing judge did not err in finding that the Board had not misapplied the burden of proof in a hearing convened pursuant to s. 96(2) of the **Act**. I will turn now to a consideration of the final issue on appeal.

Issue #3 - Did the reviewing judge err by finding that there was a proper evidentiary foundation for the Board's decision to uphold the Certification Order?

[34] Here the employer challenges the evidence upon which the Board came to its conclusion. I have already explained how this issue came to be a matter of controversy as illustrated in the extracts from the transcript which I have reproduced at ¶17-18 of this decision.

[35] Specifically, counsel for the employer took the position that the Union had "failed" to present evidence "to prove" that the six employees on the worksite on the date of the application had spent a majority of their time on site actually engaged in painting. Mr. Durnford pointed to the testimony given by the Union's organizer Mr. Jarvis, who acknowledged that he was not personally on site that day but had received communication from an unnamed observer who told him that they "basically had the numbers". This, according to the employer, was nothing more than double hearsay from which the Board ought to have concluded that the very foundation of the Union's application for certification was hopelessly flawed.

[36] One will recall that this argument had been strongly rebutted by counsel for the Union who said that whether or not the employees were actually painting on the date of application for certification had never been in dispute and that it was grossly unfair and improper for the employer to raise the issue at the 11th hour after both sides had closed their respective cases. In any event, the Union insisted that there was ample other evidence to support the Union's position.

[37] In its reasons the Board carefully explained the basis for its acceptance of the Union's submission. So too did the reviewing judge in explaining why he found the Board's reasoning and conclusion to be perfectly reasonable.

[38] I will start with the Board's consideration of this issue.

> 34. Notwithstanding the reservation of the right to raise other issues, it is quite clear that the explicit issue being raised by the Employer concerned the status of the individuals who had worked on the day in question for the Employer. Indeed, most of the hearing which was eventually held at the Board, concerned status issues. More specifically, the Employer took issue as to whether or not these individuals had proper standing within the Union and within the trade to be considered journeyman or apprentice painters.
>
> 35. Nowhere in the Employer's response document did it even hint at a suggestion that the individuals had not been involved in painting activities. Indeed, it is common ground that the Employer is a contractor which held a contract for the painting of the new hospital being built in Truro, Nova Scotia. There is not a shred of evidence that this Employer has been involved in performing any other type of work, or that these six individuals were performing any other work that might exclude them, such as management functions.

36. The hearing proceeded on the implicit understanding - at least as far as the Union was concerned - that there was no real issue as to the type of work that these individuals were performing. It was not until the conclusion of the hearing that Mr. Durnford suggested that the Union had perhaps not satisfied its onus to establish that the individuals in question had been working in the trade for a majority of their working day on the date of the application. Counsel for the Union, Mr. Mitchell, appeared legitimately surprised, and perhaps even indignant, that this argument was being made. Given all that had gone before, he had not thought it necessary to call evidence specifically directed to the question of the work activity on the date of the application.

37. It is perhaps unfortunate that, in this case, there was no case management conference held. These conferences are becoming standard procedure in Board cases, and the typical outcome is that all active issues are identified and confirmed in a memorandum from the Board to the parties. In this particular file, there was a telephone conference call only which resulted mostly in the setting of the hearing date. There is nothing in the file to indicate that there was any attempt to tie down the issues that would proceed to a hearing.

38. While it is tempting to rule that the Employer should be estopped or barred from raising this issue, on the basis that there was no advance notice, it is preferable to decide this issue on another basis.

39. While in an application for certification there is an initial onus upon the Union, it should be remembered that the Board here has already made a certification order. It is the Employer that has asked for a review and a hearing to consider its position, and as a prerequisite to doing so it has been obliged to state its reasons for objecting to the certification. As such, there is an onus on the Employer to displace the order that has already been made, and the response filed by the Employer serves a purpose akin to a pleading to define the issue.

40. Also, it is important to keep this within the context of the procedure that was followed following the filing of the application for certification. In Form 17, which is issued by the Board to the Employer, the Employer is notified of the application and given some direction concerning its obligations. One of those obligations is to file with the Board a list, verified by statutory declaration, of "all of your employees employed at C.R Coatings and Painting Inc., as journeyman painters and apprentices on mainland Nova Scotia as at the 16th day of January 2012, the date when the applicant's application was filed with the Board." It further instructs that some of the employees are to be listed on Schedule A and others on Schedule B. On Schedule A, in alphabetical order, six individuals were listed as "painter" with normal hours of work ranging from a low of 30 to a high of 40 hours per week. Schedule B seeks the identity of employees

not at work on the date the application for certification was filed with the Board, because of layoff, sickness, or other reasons on the date in question. On that Schedule the Employer listed one individual, as a painter, who was "off sick that day." It listed his normal hours of work as 40.

41. While perhaps the forms could be a little clearer, they are well understood within the Construction labour community as seeking to identify employees at work in the trade on the date of the application, and also employees of the employer who were simply not working that day.

42. Certainly in some cases, where employees perform a number of different functions, some of which may not constitute work within the trade (such as administration or supervision), and/or may constitute work within a different trade, issues can arise as to whether or not these individuals listed in Schedule A meet the qualification for having worked the majority of that day within the jurisdiction of the trade union seeking certification. Here, it is difficult to conceive of how these six employees could be said not to have been working in the trade for a majority of the time. As already indicated, this company had a contract that involved exclusively painting.

43. There was also evidence, although it may be seen as slightly weak, to the effect that Mr. Jarvis observed the activities at the work site a couple of days before the application was made, and determined that the employees were engaged in painting. Later, he was in touch by telephone with someone at the work site on the actual day of the application, in order to satisfy himself that there was painting going on and that it was a suitable day to launch the application. The objection is made that such evidence is hearsay and should not be considered. Of course, this Board is entitled to consider hearsay evidence. Normally, evidence of the type given by Mr. Jarvis, where he did not even identify the source of his understanding, would not carry much weight, but in the particular context of this matter it serves at least minimally to corroborate the other evidence, and the irresistible inference that painting activities were taking place on January 16, 2012. Furthermore, if Mr. Jarvis had identified his source, it very likely would have obliged him to disclose to the Employer the identity of one of its workers as a union member, if not also a union organizer.

44. Thus there is something of a conflict between two competing values. On the one hand, there is the necessity for hearsay evidence to demonstrate some level of trustworthiness. On the other hand, there is the desirability, if not an outright necessity, of shielding union members from being obliged to disclose their affiliation. Under all of the circumstances, we would not require the disclosure of the source of the information. It is well known, particularly in this day of cell phones, that union organizers often have an inside source providing them with information as to the

> appropriateness of dating the certification application on that particular day. Unions in Nova Scotia do not undertake certification applications lightly. If all that is lacking to give full weight to the hearsay evidence is the source of Mr. Jarvis's belief, under the particular circumstances, where Mr. Jarvis was otherwise entirely credible, there seems to be no reason to force the disclosure of the source of the information. This would add little or nothing, and to jump to a result that gave no weight to this hearsay evidence would be an unduly technical finding.
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> 45. As such, on all of the evidence we are satisfied that the six named individuals were engaged in painting activities on the date of the application. Perhaps it could be said that there is not a lot of evidence to this effect, but there is not a shred of evidence to the contrary. Given that the applicable standard is the civil burden of proving the point on a balance of probabilities, sometimes expressed as a "preponderance of the evidence," we are satisfied that the point has been proved. As already stated, there is an argument that could be made that the onus was actually on the Employer to displace the certification order by some evidence. Having adduced no evidence to the effect that the six individuals were doing something other than painting for a majority of the working day, and also having included them on Schedule A and having at no time signalled any question as to their activities on the day in question, we are content to rely on the Union's evidence and the inferences that naturally flow from all of the material in the file and the evidence given at the hearing. (Emphasis added)

[39] In conducting his own assessment of the Board's decision, Justice Duncan said this:

> [16] Turning to the circumstances of this certification, Mr. Jarvis testified that he had been to the hospital site a couple of days before the certification date. He had observed walls, doors and frames being painted with prime and with finish coats. He saw brushes, rollers, spray and step-ladders being used. The work that was done was the work performed by apprentices and journeymen. Mr. Jarvis did not see the company doing anything other than standard commercial painting -- which was in the jurisdiction of the Union and provided for in the collective agreement.
>
> [17] While he did not visit the hospital site on the day of the application, Mr. Jarvis had contacts from a person on site at the hospital on that day. The information he received on the day of the application confirmed that the workers were painting and "that we basically had the numbers".
>
> [18] Paula Broaders, administrator of the employer, also gave evidence. She testified concerning the financial impact that having to deal with a unionized

workforce had on the company. She also confirmed that she was at the hospital site at least three times per week.

[19] The company was on the job from mid-November 2010 until March 9, 2012. It had six or seven painters and vinyl hangers and a couple of wall-protection applicators. She testified that she filled out the required Schedule A for the Labour Board listing six workers on site at the hospital on the day of the certification application as painters. She confirmed, in her testimony, that on the day the Union applied for certification there were six workers on site. She also confirmed she completed the required Schedule B for the Labour Board listing one painter as absent from work due to illness.

...

[24] During argument, and for the first time, counsel for the employer alleged that the Union had not proven that a majority of the persons it claims as members were doing on-site work in the trade on the day of the application for the majority of their work day.

[25] The Board rejected this argument finding: ...

[26] ... The Board found that on a preponderance of the evidence it was proved that the six named individuals were engaged in painting activities on the date of the application. ...

[41] I have previously reviewed the testimony and documentary evidence before the Board on the issue of what the named individuals were doing on the date of application for certification. The evidence emanated largely from the employer.

[42] The evidence relied upon by the Board was not just unreliable hearsay, as suggested by the Employer. Direct evidence was led that the Employer had only one contract at the time. On the date of the Certification application that contract was exclusively for painting and coatings at the new hospital. The Employer completed a Schedule A and B for the Labour Board, supported by a Statutory Declaration confirming all named employees were painters on a more or less full time basis on the date of application for certification.

[43] In the covering letter to the Board it was confirmed that the certification related to the hospital project.

[44] Both the Union representative (called as a witness for the employer) and the employer's administrator testified to observing the workers painting on site around the time of the date of the application. The Union representative confirmed that the work he observed was that which is encompassed by the union contract. He received communication from the hospital on the date of the application confirming the men were working and that "they had the numbers". It is only this last point that is hearsay.

[45] I agree with the Board that the only logical inference to be reached, based on the evidence led, together with the completed Schedules A and B, was that the

> employees were engaged in painting at the Truro hospital on a full time basis on the date of application. In light of the evidence before the Board, it was reasonable for it to conclude that it was more probable than not that the six named individuals were engaged in painting activities at the Truro hospital, on the date of the Trade Union Act certification application, and in a manner that met the requirements for the granting of the Certification Order. (Emphasis added)

[40] Once again I accept and endorse Justice Duncan's reasons. There is nothing I could add to his thoughtful and comprehensive review. He was right to find that the Board's analysis and conclusion, both factually and legally, fell within a range of reasonable outcomes.

[41] Accordingly, I would answer the last question in the negative. The reviewing judge did not err by finding that there was a proper evidentiary foundation for the Board's decision to uphold the certification order.

Conclusion

[42] For all of these reasons I would dismiss the appeal with costs of $1,500 inclusive of disbursements payable to the respondent.

Saunders, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.