S.C.A. No. 02744

NOVA SCOTIA COURT OF APPEAL

Matthews, Chipman and Freeman, JJ.A.
Cite as: International Association of Heat & Frost Insulators & Asbestos Workers, Local 116 v. Nova Scotia (Labour), 1993 NSCA 75

B E T W E E N:

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 116	**Raymond Larkin, Q.C. and David Roberts for appellant**
appellant	
- and -	
THE MINISTER OF LABOUR AND MANPOWER and STEEN CONTRACTORS LIMITED	**Jonathan Davies and Eric B. Durnford, Q.C., for respondents**
respondents	
	Appeal Heard: March 22, l993
	Judgment Delivered: April 22, l993

THE COURT: Appeal from dismissal of **mandamus** application allowed and Minister of Labour ordered to exercise his discretion upon correct principles per reasons for judgment of Freeman, J.A.; Matthews and Chipman, JJ.A., concurring.

FREEMAN, J.A.:

The respondent Steen Construction Limited is a member of the Construction Management Bureau Limited, an association accredited under Part II of the **Trade Union Act**, R.S.N.S. 1989, c. 475 to bargain collectively on behalf of unionized employers in the construction industry. The issues in this appeal turn on whether Steen is bound by a collective agreement negotiated between the Bureau and the appellant, the International Association of Heat and Frost Insulators and Asbestos Workers, Local 116.

When Steen renewed its membership in the Bureau in 1990, it assigned to the Bureau its rights to bargain on behalf of the company on Mainland Nova Scotia for the following trades: plumbers (mechanical), millwrights, operating Engineers and Sheet Metal Workers. Insulators were not so designated, or "ticked." It engaged a subcontractor employing non-union labour to carry out insulating work under a construction contract. This led to a dispute with the appellant insulators' union as to the application of the collective agreement.

The union filed a grievance and applied to the Minister of Labour to appoint an arbitrator under s.107(4) of the **Trade Union Act.** The Minister refused to do so on the ground that no collective agreement was in effect between Steen and the union.

The union applied for a *mandamus* order which was granted by Mr. Justice K. Peter Richard, ordering the Minister to "exercise his discretion under s. 107(4) of the **Trade Union Act** according to law as set out in Part 2 of the **Trade Union Act** as confirmed by **Boyd and Garland**."

Paul F. Langlois, assistant to the Deputy Minister of Labour, replied to the union on behalf of the Minister:

> "I have reviewed the decision of Mr. Justice K. Peter Richard, and considered the impact of **Boyd and Garland v. International Union of Operating Engineers, Local 721** (1988), 85 N.S.R. (2d) 397.
>
> "Since Steen Contractors Limited is not a member of the Insulators Trade Division of the Labour Management Bureau, and there is no record of certification or of a voluntary recognition agreement, there is, therefore, no collective agreement in force between the parties. Consequently, there is no authority to appoint an

arbitrator pursuant to Section 107 of the **Trade Union Act**."

The union brought another application for *mandamus* to require the Minister to exercise his discretion under the **Trade Union Act**. Glube, C.J.S.C. held:

> "In my opinion the decision in **Boyd & Garland** can be restricted to the 'ticking' facts. In that case the company ticked the operating engineers box on its application for membership and collective bargaining authorization forms. They never hired operating engineers and tried to resign from the Bureau. The Bureau considered the company as a member of the operating engineers division when it gave the company notice that bargaining issues were being discussed. The arbitrator held the company was bound by collective agreements entered into on its behalf by the bureau. . . ."

The arbitrator's decision in **Boyd & Garland** was upheld on a *certiorari* application and again on appeal.

Chief Justice Glube concluded:

> "I find the decision in **Boyd & Garland** is bound by its factual background. I do not accept the union's interpretation that once an employer's bargaining rights for any union have been acquired by the Bureau, the Bureau becomes the sole bargaining agent to bargain with all unions in the sector determined as an appropriate unit, regardless of whether the employer has 'ticked' a group or not. I find that **Boyd & Garland** only applies to those employers who have contracted with the Bureau for it to negotiate on the employers behalf with particular types of union employees, that is, the employer has 'ticked' the employee classification. In the present case Steen never 'ticked' the insulators union, it never participated in the insulator division of the Bureau and it does not employ unionized insulators, the work is always subcontracted. I find that an employer is only bound to collective agreements that it authorizes by contract with the Bureau, and in **Boyd & Garland**, the employer did it by ticking the operating engineers. There must be a positive action between an employer and the Bureau before it is bound to the collective agreement negotiated by the Bureau. I find that this interpretation is not patently unreasonable and therefore it is one which the Minister could logically reach when reviewing **Boyd & Garland** as he was required to do by Mr. Justice Richard."

Chief Justice Glube's analysis gives forceful expression to the positions argued in this appeal on behalf of Steen and the respondent Minister. With respect, however, the Minister of Labour is not an administrative tribunal for present purposes and the standard of review which applies is not whether his position is patently unreasonable, but whether he refused to exercise his discretion because he misdirected himself as to a point of law. The appointment of an arbitrator by the Minister is a discretionary administrative act. The Minister properly gave reasons for his refusal to exercise

his discretion. However if his reasons are wrong in law, his discretion was improperly exercised. Therefore the issue in the present appeal is sharply focused on the question of whether a unionized employer is bound by a collective agreement negotiated by the Board with respect to trades which the employer has not ticked.

Part II of the **Trade Union Act** does not support the proposition, central to Chief Justice Glube's analysis, that a unionized employer is only bound to collective agreements that it authorizes by contract with the Bureau. In interpreting the **Act** it is necessary to take into account the evil which Part II was intended to cure. Bargaining between associations representing numerous employers, and numerous unions, in the construction industry was an innovation introduced by Part II of the **Trade Union Act** following serious unrest in the industry during the 1960s and 1970s. The background is thoroughly explained in **Re International Union of Operating Engineers, Local 721 et al. and Municipal Contracting Ltd.** (1989), 60 D.L.R. (4th) 323. Traditionally, under Part I of the **Act**, the existence of collective bargaining rights and obligations resulted from by voluntary recognition or certification. Part II added an apparent third means: accreditation.

Part II begins with s. 92 of the Act, an interpretation section which includes the following definitions:

> (a) "accredited employers' organization" means an organization of employers that is accredited under this Act as the bargaining agent for a unit of employers in the construction industry; . . .
>
> (f) "employer" means any person who employs or in the preceding twelve months has employed, more than one employee and who operates a business in the construction industry; . . .
>
> (k) "unionized employer" means an employer of unionized employees in the geographical area or areas and sector concerned."

Section 97 (formerly s. 94) of the **Act** provides for the accreditation of an employers' organization as sole collective bargaining agent for all unionized employers in a geographic area and sector of the construction industry. The accreditation of the Bureau, and the area and sector involved, are not in issue. Relevant subsections of s. 97 include the following:

" 97(1) An employers' organization claiming to represent the unionized employers in a geographic area engaged in a particular sector of the construction industry may, subject to the rules of the Panel, make application in a form approved by the Panel to be accredited as the sole collective bargaining agent for all unionized employers in the sector of the construction industry and the geographic area applied for. . . .

(3) Where, in an application for accreditation, the Panel is satisfied either

(a) That the employer's organization has as members a majority of the unionized employers in the geographic area and sector applied for, or

(b) that the employers' association has as members

(i) No less than thirty-five per cent of the unionized employers in the geographic area and sector applied for, and

(ii) those employers who are members of the employers' organization which employs a majority of employees employed by unionized employers in the geographic area and sector applied for,

the Panel may accredit the employers' organization as the sole collective bargaining agent to bargain for all unionized employers in the area and sector. . . .

(7) Where the panel is satisfied that the employers' organization has met the requirements herein, it may accredit the employers' organization as the sole bargaining agent to bargain with all trade unions or councils of trade unions for the unionized employers in the sector and area determined by the Panel as an appropriate unit.

Section 98 provides:

98(1) Upon accreditation, all rights, duties and obligations under this Act of employers for whom the accredited employers' organization is or becomes the bargaining agent apply to the accredited employers' organization. . . .

(2) Upon accreditation any collective agreement in operation between a trade union or council of trade unions and any employer for whom the accredited employers' organization is or becomes the bargaining agent is binding on the parties thereto until the expiry date of the agreement, regardless of its renewal provisions.

(3) Where an employers organization has been accredited and where, after the date of the accreditation order, a union is certified for or recognized in accordance with Section 30 by another employer in the sector and area covered by the accreditation order, the bargaining rights, duties and obligations of that employer, whether he becomes a member of the accredited organization or not, accrue to the employers' organization and the employer is bound by any collective agreement in effect or subsequently negotiated between the accredited employers' organization and a trade union or council of trade unions in that sector. . . . "

Section 100(1) provides:

> 100(1) Subject to subsection 2 of Section 98, a collective agreement entered into between an employers' organization and a trade union, trade unions or council of trade unions is binding upon the employers' organization, employers whose bargaining rights have been acquired by the employers' organization engaged in the construction industry in the sector and area covered by the accreditation order, the trade union, trade unions, council of trade unions and upon every employee within the scope of the collective agreement.
>
> (2) No collective agreement shall be individually negotiated between an employer in the accredited sector and area and a trade union or council of trade unions, and if such a collective agreement is entered, it shall not be binding on any person."

Section 100(1) binds all unionized employers in a sector to any collective agreement entered into by the accredited employers' organization. Once the organization is accredited, it becomes, by virtue of ss. 97(7) and other relevant provisions, the bargaining agent for all employers within its scope even if they have never joined the organization. That is the rule. The statute creates no exceptions for particular trades, whereby an employer might agree to be bound to collective agreements with trades it has ticked but not for trades it has not ticked. While cogent arguments may be mounted in favour of giving unionized employers a means of opting out of collective agreements between the Board and unions governing trades the employer does not usually hire, no means for doing so is provided under the **Act**. The language is broad and clear. That is the stonewall encountered by arguments to the contrary. Indeed, exceptions such as that sought by Steen appear inconsistent not only with the actual provisions of the **Act**, but with the scheme underlying Part II, particularly when considered against the background explained in the **Municipal** case. A unionized employer in the relevant area and sector is bound by the collective agreement negotiated by the Bureau with respect to all trades represented by the trade unions or council of trade unions who are parties to it. Depending on the terms of the collective agreement, all employees, whether engaged directly by the unionized employer or indirectly by subcontract with a non-unionized employer, must be employed on terms consistent with its provisions.

In **Boyd & Garland** Chipman J.A. stated:

> "By virtue of s. 94 (now s. 97), the Bureau was accredited as the sole bargaining agent for the unionized employers in the sector. **Boyd & Garland** was

one of those. On the face of it, the case for the union appears to be thus established."

He went on to discuss various arguments raised on behalf of the contractor and concluded, accepting the view of Richard J. that the employer was bound by the collective agreement.

In **Boyd & Garland** the contractor had ticked operating engineers. That was a fact in the case, but it was not a relevant factor in its *ratio*.

That interpretation of **Boyd & Garland** was followed by MacDonald J. in **Labourers International Union v. International Union of Bricklayers** (1989), 93 N.S.R. (2d) 418. He held that the effect of s. 94(7)(now 97(7)) is to

> "contractually commit all unionized employers, in the appropriate sectors and areas, to the trade unions in the same sector and area. The connection becomes operative whenever an employer performs work which, by agreement or by assignment, belongs to the members of a particular trade union. In this case, a portion of the work being done by Municipal was assigned to the bricklayers. Therefore, during the performance of this specific work, Municipal was bound to the bricklayer or layer involved, by the terms of the agreement between the Bureau and the Bricklayer Union."

On the appeal, reported in (1990), 98 N.S.R.(2d) 134, Mr. Justice Chipman, writing for a unanimous five-judge panel, found the questioned jurisdiction arose under the **Act** because of an apprehended work stoppage. It was therefore not necessary "to consider, as did Mr. Justice MacDonald, whether any contractual nexus existed between **Municipal** and the bricklayers, nor is it necessary to consider further the provisions of Part II of the **Act** or the decision of this court in **Boyd v. Garland**, **supra**."

In the present appeal, the respondent Steen, did not tick insulators, or include them among trades it employed, in its application to become a member of the Bureau. Ticking would have created a contractual nexus, analogous to voluntary recognition under s. 30 of the **Act**, between the employer and the union through the agency of the bureau. Under the provisions of the Act referred to above, whether or not Steen ticked insulators is not material. It is not even material, once the Bureau was accredited, that Steen belonged to it. The relevant and governing nexus is created by the Part II of

the **Act**. As a unionized employer Steen is bound by the collective agreement negotiated by the Bureau with the appellant insulators' union.

Section 107(3) of the **Act** requires "parties to the collective agreement, including the persons bound by the collective agreement", to agree to a single arbitrator when disputes arise as to alleged violations of the collective agreement of certain other designated matters. Ss. (4) provides:

> " 107(4) When one of the parties advises the Minister that a dispute or difference has arisen and that the parties to the dispute or difference have failed to comply with subsection (3), the Minister may appoint an arbitrator."

While the duty is discretionary, the Minister's representative advised the parties, in the letter referred to above, that he refused to exercise his discretion because, applying **Boyd and Garland**, no collective agreement existed between the parties. That was an error of law.

On the first *mandamus* application Richard J. stated the law, citing **Morin v. Comite National**, 60 N.R. (123) in which the Court relied on **Padfield v. Minister of Agriculture**, [1968] A.C. 997 as follows:

> "The Minister in exercising his powers and duties, conferred upon him by statute, can only be controlled by a prerogative writ which will only issue if he acts unlawfully. Unlawful behavior by the Minister may be stated with sufficient accuracy for the purposes of the present appeal (and here I adopt the classification of Lord Parker, C.J. in the Divisional Court) (a) by an outright refusal to consider the relevant matters, or (b) by misdirecting himself in point of law, or (c) by taking into account some wholly irrelevant or extraneous consideration, or (d) by wholly omitting to take into account a relevant consideration."

In the present matter therefore the Minister, by misdirecting himself on a point of law, unlawfully refused to exercise his discretion and his refusal became subject to review.

I would allow the appeal and order *mandamus* to issue requiring the Minister to exercise his discretion upon correct principles, based upon the existence of a collective agreement binding upon the respondent Steen and the appellant union. There will be no order for costs.

Freeman, J.A.

Concurred in: Matthews, J.A.

Chipman, J.A.

S.C.A. No. 02744

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INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 116	**REASONS FOR**
appellant	**JUDGMENT BY:**
- and -	**FREEMAN, J.A.**
THE MINISTER OF LABOUR AND MANPOWER and STEEN CONTRACTORS LIMITED	
respondents	