IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Armour Group Ltd. v. United Brotherhood of Carpenters & Joiners of America, Local 83, 2007 NSSC 98

Date: 20070329
Docket: S.H. No. 1524280
Registry: Halifax

Between:

The Armour Group Limited

Plaintiff

v.

United Brotherhood of Carpenters & Joiners of America, Local 83

Defendant

D E C I S I O N

Judge:	The Honourable Justice Douglas L. MacLellan
Heard:	November 7, 8, and 9, 2006, in Halifax, Nova Scotia
Counsel:	George W. MacDonald, Q.C., and Jane O'Neill, for the plaintiff Ray Mitchell, Esq., , for the defendant

By the Court:

[1] This action started in 1998 by the plaintiff The Armour Group Limited alleges breach of a contract which it entered into with the defendant The United Brotherhood of Carpenters & Joiners of America, Local 83 in November 1984.

[2] The plaintiff requests a number of remedies including special damages, along with aggravated and punitive damages for breach of contract, and an injunction to prohibit future action by the defendant and declaratory relief.

[3] The defendant disputes the jurisdiction of the Court to deal with the claim by the plaintiff and submits that the issues between the parties should be dealt with by the Nova Scotia Labour Relations Board.

Evidence

[4] Armour McCrea testified. He is the owner of the plaintiff company The Armour Group Limited. He is a civil engineer and began his career in property development in 1972 when he incorporated the company The Armour Group Limited. That company used two registered named entities, namely, Armour Construction and

Armour Developments to conduct its business affairs. Mr. McCrea also did some development work in his personal name.

[5] Armour Developments was used as an agent to promote development projects and Armour Construction was used to do the actual construction work required by The Armour Group Limited.

[6] Mr. McCrea testified that by 1978 that model was not working as well as he intended and therefore he decided to incorporate two independent companies, namely, Armour Developments Limited and Armour Construction Limited. The role of each company essentially remained the same as done previously by the unincorporated entities.

[7] Mr. McCrea said that Armour Construction Limited did work for the parent company The Armour Group Limited, for Armour Developments Limited, and for third parties.

[8] Mr. McCrea said that in the early eighties the construction industry in Mainland Nova Scotia was in chaos in regard to labour management problems. The various

Unions were negotiating contracts with individual companies and that led to major problems in regard to wages paid to workers. Therefore, he became involved in the foundation of the Construction Management Labour Bureau (the Bureau). It was an organization by which its members all agreed that it would have the sole right to negotiate all collective agreements with the different Unions on Mainland Nova Scotia. That would mean that all the member companies and the Unions would be bound by the same wage rates for employees.

[9] Mr. McCrea said that the Bureau initially only covered companies which were doing industrial, commercial and institutional (ICT) work. Residential work in regard to the building of residences was not covered in the collective agreement signed by the Bureau on behalf of the companies.

[10] The Armour Group Limited was a member of the Bureau, however, in 1982 Mr. McCrea said he wanted to change the membership in the Bureau to Armour Construction Limited since that was the company that was doing construction work. He at first thought he would have The Armour Group Limited simply resign from the Bureau and have Armour Construction Limited join the Bureau. He found out, however, that the process was not that simple because The Armour Group Limited

was an accredited employer with the Labour Relations Board and that to be decertified it would have to apply to the Labour Board for an order allowing that.

[11] Mr. McCrea was advised by letter from the Bureau that: [Exhibit 1 - Tab 4]

> 2. The Armour Group Limited will still be bound by Collective Agreements entered into on behalf of our company by the Bureau. These are specifically the current Carpenters and Labourers Collective Agreements.
>
> 3. These Collective Agreements contain a recognition clause, whereby the Bureau on behalf of our respective trade division members (i.e. The Armour Group Limited - Carpenters and Labourers) have voluntarily recognized the Union consistent with s. 28(1) of the Trade Union Act. The effect of such voluntary recognition has the status of a certification.
>
> 4. It would appear that The Armour Group Limited would have to make an application pursuant to s. 26 and 27 of the Trade Union Act for termination of bargaining rights.
>
> 5. The Armour Group Limited, despite resignation from the Bureau would continue to be bound by those two Collective Agreements which were entered into by the Bureau on behalf of The Armour Group Limited (see s. 2.06 of the Articles of Association).
>
> 6. Should The Armour Group Limited not obtain the termination of bargaining rights by the Unions concerned (consistent with an application made pursuant to s. 26 and/or 27), then The Armour Group would continue to be bound by future agreements negotiated by the Bureau for on-site construction in the Industrial-Commercial sector in the future. This is in effect of the accreditation legislation.

> 7. Should Armour Construction join the Bureau and authorize the Bureau to enter into Collective Agreement(s) with any Building Trade Unions, then that company would in effect become "unionized" in the future.
>
> 8. It may well be that the two Unions concerned would not be opposed to an application made pursuant to s. 26 or 27 of the Trade Union Act if you were to discuss with them your intention that Armour Construction Limited would be your "unionized construction company" in the future.

[12] In 1983, Mr. McCrea said that The Armour Group Limited was involved in the construction of a group of houses called the "Cranberry Lake Housing Project". It was a co-op housing development funded by CMHC and the issue came up whether it should be considered a Union project requiring the payment of Union wages to the workers on the project.

[13] Mr. McCrea felt that since the project involved individual owners of the houses being built that it was not a Union job. To resolve the issue, Mr. McCrea approached the Union asking that it enter into a special agreement to resolve the issue. After negotiations an agreement was entered into which provided a 15 percent reduction in the Union wage rates and permitted longer hours of work and make-up time.

[14] The document formalizing the agreement between The Armour Group Limited and Armour Construction Limited and the United Brotherhood of Carpenters &

Joiners of America, Local 83 set out the terms governing the relationship between the parties on that project and also provided as follows: [Exhibit 1 - Tab 7].

> (2) The Carpenters Union agrees and acknowledges that Armour Group and Armour Construction shall apply to the Nova Scotia Labour Relations Board (construction) to have Armour Group de-certified and to have Armour Construction replace Armour Group as the party for whom certification applies and further that Armour Group shall be resigning from the Construction Labour Management Bureau and that Armour Construction will be applying to become a member of the Construction Labour Management Bureau and the Carpenters Union agrees not to oppose or in any way object to the foregoing applications by Armour Group and/or Armour Construction;
>
> (3) The Carpenters Union further agrees that it hereby releases and forever discharges Armour Group from any and all obligations which Armour Group might have due or accruing due to the Carpenters Union and its members and the Carpenters Union further agrees that it shall not take any action by way of a successor rights application under the Nova Scotia Trade Union Act or otherwise against Armour Group or any of its subsidiary companies (except Armour Construction) including without limitation any action claiming that Armour Group should be declared responsible for obligations pursuant to its membership in the Construction Labour Management Bureau and/or the Collective Agreement between the Construction Labour Management Bureau and the Carpenters Union.

[15] Based on this agreement Armour Construction used Union men on the project paying a lower rate of pay.

[16] In October of 1984, The Armour Group Limited resigned from the Bureau and in November 1984, The Armour Group Limited and Armour Construction Limited entered into an agreement with Union Local 83 which contained the same clauses as

set out in the earlier agreement but also contained as clause (3) the following: [Exhibit 1 - Tab 10]

> (3) The contents of this Agreement shall not be construed to indicate that there is a bar against the Carpenters Union, Local 83 from applying for certification against THE ARMOUR GROUP LIMITED.

[17] Mr. McCrea said that clause was included in that agreement because Ron Pink, solicitor for the Union wanted it clarified that the Union could apply for certification if The Armour Group Limited started to do construction work.

[18] As a result of the November 1984 agreement with the Union, The Armour Group Limited made application to the Labour Relations Board requesting that its earlier accreditation order in regard to The Armour Group Limited be varied and that Armour Construction Limited be added as an employer on the list of employers and that The Armour Group Limited be deleted from that list.

[19] In support of that application filed with the Labour Relations Board was the agreement signed by the Union and Mr. McCrea’s company.

[20] Mr. McCrea said that part of the discussions leading up to the signing of the agreement in regard to Cranberry Lake and the agreement filed with the Labour Relations Board was that he would promote the inclusion of residential construction in the mandate of the Bureau.

[21] Mr. McCrea said that he understood clause (3) to mean that if The Armour Group Limited employees started doing construction work, the Union could apply to have the company certified as a Union company.

[22] In January 1985, Mr. McCrea received notification from Peter Darby of the Labour Relations Board indicating that the Board was prepared to grant the request of The Armour Group Limited and indicated: [Exhibit 1 - Tab 12]

> It is the Panel's understanding that whereas Armour Group Limited was a "unionized employer" doing work in the "construction industry" within the meaning of those phrases in Section 89 (k) and (c) respectively of the Act the company's functions have been restructured and reorganized such that it has become a holding company only and such that its construction industry work is now being performed exclusively by Armour Construction Limited.
>
> In the circumstances, the Construction Industry Panel of the Labour Relations Board (Nova Scotia) is being asked to substitute Armour Construction Limited in place of Armour Group Limited in Schedule "A" to the above mentioned accreditation order. Since there is nothing in Part II of the Act that either expressly permits or prevents such an amendment being made, it is the position of Armour Group Limited and of

> the Panel that such power is vested in the Panel either pursuant to Section 26 (1)(a) which enables the name of the employer to be changed where the name of the employer has been changed or under Section 18(1)(a) where after the elapse of one year from the date of an order of the Panel an application for reconsideration of an Order of the Panel may be made, [without the restrictions imposed by Regulation 8 (3)], and such Order either confirmed, varied or revoked "... if [the Panel] considers it advisable ..."
>
> The more direct approach would be to treat the application as falling under Section 26(1)(a) of the Trade Union Act, and if it were not for the total absence of any express powers vested in the Panel by that Section the Panel would treat this as an application under that Section. However, the absence of express powers leads the Panel to the conclusion, as yet untested before the courts, that the necessary implication of powers in the Panel in order to give efficacy to the right of parties to seek the amendments therein described would be restricted by the courts to only such powers as were absolutely necessary to give it efficacy. Subject to your right to challenge and to request a hearing on this application, the Panel proposes to grant the application but only on condition that such order shall be treated as not applicable if in the opinion of the Panel Armour Group Limited, at any time in the future, engages in work in the construction industry. However, since we have some concern that the court might not treat the Panel as having power implicitly to issue an order under Section 26(1)(a) subject to such a condition it seems to us safer to treat the application as one being made under Section 18(1)(a) for reconsideration.
>
> Therefore, unless the Panel receives a Reply from you within the ten days time limit provided by Section 18 of the Regulations to the Act challenging our tentative disposition and requesting a hearing, we propose to issue an order reconsidering our decision to include Armour Group Limited as a "unionized employer" in Schedule "A" to Accreditation Order L.R.B. No. 392C and substituting as the unionized employer Armour Construction Limited.

[23] The order issued by the Board (L.R.B. No. 837C) as a result of the application indicated: [Exhibit 1 - Tab 12]

> THEREFORE, the Construction Industry Panel of the Labour Relations Board (Nova Scotia) grants the Application for Reconsideration and orders that from henceforth

> Schedule "A" to the Accreditation Order be amended such that Armour Group Limited be deleted and Armour Construction Limited be substituted in its place and stead with the intent that the Accreditation Order enure to the benefit of and be binding upon Armour Construction Limited.

[24] Following receipt of the order, Mr. McCrea said that on a number of occasions he got correspondence concerning grievances from the Carpenters Union addressed to The Armour Group Limited instead of Armour Construction Limited. On each occasion it was pointed out to the Union that The Armour Group Limited was no longer the accredited company and that correspondence should be addressed to Armour Construction Limited.

[25] In June 1993, Mr. McCrea said that The Armour Group Limited awarded a tender for roofing work on one of its buildings to a non-union company. The property was owned by Historic Properties as agent for The Armour Group Limited.

[26] The Union filed a grievance addressed to Mr. McCrea at The Armour Group Limited/Construction Limited alleging that the work being done was in violation of the collective agreement. Mr. McCrea responded to the grievance by way of a letter from his lawyer saying: [Exhibit 1 - Tab 24]

> We feel it may be some misunderstanding on the Union's part with respect to what has transpired here since the work in question is maintenance as opposed to construction and it is our view that we are not in violation of the Collective Agreement.

[27] Based on the position that roof shingling was maintenance work, Mr. McCrea said that he understood the grievance was dropped. However, in June 1993 the Union made application to the Labour Relations Board asking that it be certified as bargaining agent for employees of The Armour Group Limited and alleged that the employees were doing carpenter work at Historic Properties at Lower Water Street in Halifax. That application was signed by Peter Greer, Business Rep for the Union and listed seven employees of The Armour Group Limited.

[28] The Armour Group Limited responded to the application alleging that the employees involved were all doing maintenance work on the company's property.

[29] Following the filing of the reply by The Armour Group Limited, the Union asked permission to withdraw the application and that was allowed by the Board in July 1993.

[30] In the Spring of 1997, Mr. McCrea said that he undertook to do work on the wharf at Historic Properties as a result of a sewer problem there and arranged special government funding to do the project. That funding required public tendering and the tender was awarded to Eagle Beach Limited a non-union company. The work involved the building of docks, and after it started, the Carpenters Union filed a grievance with Armour Construction/Group alleging that the work should be done by union members. Mr. McCrea responded indicating that Armour Construction Limited was not involved with the work and that [Exhibit 1 - Tab 41]

> It is our view that you have no grievance against Armour Construction Limited. Armour Construction Limited has no involvement whatsoever in the wharf construction currently being finalized at the Historic Properties' site. This wharf construction has absolutely nothing to do with Historic Properties' expansion and the new construction where the preliminary work for foundations is being carried out for Historic Properties by Armour Construction Limited.
>
> The wharf construction being undertaken by Eagle Beach is pursuant to an agreement between Historic Properties (Privateers Wharf) Limited, Halifax Regional Municipality and the Waterfront Development Corporation which agreement requires tendering by Historic Properties (Privateers Wharf) Limited. Armour Construction Limited has no involvement.

[31] Following that letter, the grievance was withdrawn by the Union.

[32] Following the wharf incident with Eagle Beach, Mr. McCrea said that Armour Construction Limited undertook to build an addition to the existing building on the waterfront to contain a Food Court. He felt that its construction would be covered under a special provision of the collective agreement covering wood-frame construction. That provided for the payment of considerably less wages to carpenters if they were doing such work.

[33] Mr. McCrea arranged for his construction manager to write to the Union to clarify if it agreed that the special section of the collective agreement would apply to the project. That was Schedule "W" of the collective agreement.

[34] Mr. McCrea said that Peter Greer phoned him following receipt of that letter. He said Mr. Greer was very upset with the suggestion that Schedule "W" would apply to the Food Court Building. He said that Mr. Greer indicated that no carpenters would work for the reduced rates in Schedule "W" and that there would be no union men available if that rate was used.

[35] Mr. McCrea said he considered filing a grievance against the Union but decided against it. He said he decided to pay the regular Union rates to have the Food Court

Building built. He said it cost his company an additional $65,000.00 to pay the men at the higher rate as compared to the Schedule "W" rate.

[36] Following the disagreement between the parties over the Food Court, the next incident was in November 1997 when the Union made application to the Labour Relations Board by which it requested that the Board re-consider its earlier order L.R.B 837C which de-certified The Armour Group Limited and certified Armour Construction Limited. The application alleged that: [Exhibit 1 - Tab 42]

> 2. The facts upon which the Applicant intends to rely in support of its application are:
>
> By Application dated December 5, 1984, for reconsideration of L.R.B. No. 392C, the Respondents requested that the Accreditation Order L.R.B. No. 392C be varied so as to substitute Armour Construction Limited as the name of the Employer identified in Schedule "A" to the Accreditation Order as bound by the accreditation provisions of Part II of the *Trade Union Act*, in place of The Armour Group Limited. Because The Armour Group Limited had then become a holding company only and its construction work was exclusively performed by Armour Construction Limited, the Panel and the Applicant were satisfied with the substitution of The Armour Group Limited with Armour Construction Limited. Recently, however, The Armour Group Limited and its subsidiaries have contracted out construction work to non-union construction companies in addition to Armour Construction Limited. The Armour Group Limited and its subsidiaries are no longer simply a holding company which employs employees in the ordinary maintenance of its properties; The Armour Group Limited has re-entered the construction industry.
>
> The Armour Group Limited and its subsidiaries are acting contrary to the spirit and letter of the agreement between the parties and L.R.B. Order No. 837C.

[37] The Union requested the following remedy: [Exhibit 1 - Tab 42]

> 3. Remedy requested:-
>
> (1) The Union requests that the Panel order and reconsider L.R.B. No. 837C to include both Armour Construction Limited and The Armour Group Limited and its subsidiaries;
>
> (2) Pursuant to Section 21 of the *Trade Union Act*, treat Armour Construction Limited and The Armour Group Limited and its subsidiaries as one employer for the purpose of the *Trade Union Act.*
>
> (3) Pursuant to Section 31(5) of the *Trade Union Act*, declare that there has been a sale, lease or transfer of the business of Armour Construction Limited to The Armour Group Limited and its subsidiaries;
>
> (4) Declare and Order that the Collective Agreement between the Construction Management Labour Bureau and the United Brotherhood of Carpenters & Joiners of America, Local 83 is and has been binding upon The Armour Group Limited and its subsidiaries since January 1, 1997;
>
> (5) Such further and other relief as may be requested at or before the Hearing of this matter.

[38] Mr. McCrea said that The Armour Group Limited and Armour Construction Limited responded to that application indicating that: [Exhibit 1- Tab 43]

2. Without limiting the generality of paragraph 1:

(a) Armour Group denies that it has "re-entered the construction industry";

[39] Following the filing of that initial reply The Armour Group Limited and Armour Construction Limited on December 17th, 1997 clarified its reply by stating: [Exhibit 1 - Tab 44]

> To avoid the Union being caught by surprise, Armour Group and Armour Construction clarify the above-noted point by saying:
>
> (a) The 1984 Agreement is a binding agreement on the Union, by the terms of which the Union can apply for certification of Armour Group (subject to the normal tests for certification) but cannot take any action by way of Successor Rights application against Armour Group, nor take any action claiming that Armour Group should be declared responsible for obligations under the Collective Agreement between the Construction Labour Management Bureau and the Carpenters' Union; yet that is what the Carpenters' Union is seeking to do by its Application for Reconsideration in this matter (see para. 3(3) and para. 3(4) as well as 3(1) and 3(2)).
>
> (b) In the alternative, Armour Group says that it has, on the basis of the 1984 Agreement, acquired extensive real estate and proceeded with its business in a very significant way that it would not have done but for the commitments of the Carpenters' Union in the 1984 Agreement and that Armour Group has relied on the 1984 Agreement and that the Carpenters' Union is estopped from bringing this Application for Reconsideration.

[40] The application for reconsideration was not heard in a timely manner by the Board because of a number of requests for adjournments made by the defendant. In

October 2000, the Union notified the Board that it wished to withdraw its application for reconsideration. The decision of the Board dated October 26th, 2000 after noting that the Union had adjourned the hearing a number of times, ordered that the application be dismissed.

[41] Mr. McCrea said that he understood by dismissing the application as opposed to letting the Union simply withdraw, it meant that the Union could not re-file the application in the future. He also said it cost his company over $25,000.00 in legal costs to defend that application.

[42] The Court is advised that the Labour Relations Board does not award costs when allowing or dismissing an application such as the one made by the Union.

[43] Mr. McCrea said that he is very concerned about the issue of what is maintenance work as opposed to construction work and he wants some clarification from the Court about his right to have The Armour Group Limited contract work to non-union companies and also as to what is considered construction work if done by Armour Construction Limited on his property.

[44] He asks that the Court confirm that the Union is bound by the agreement it entered into with his companies and that it be reimbursed for the cost it incurred in defending the application for reconsideration of L.R.B. No. 837C.

[45] Allan Rodgers testified for the defendant. He worked for the Union from 1969 to his retirement in 2001. He was the business rep from 1969 to 1975 and from 1975 to his retirement worked for the International Board of Carpenters Union. He was working with the International Branch during the years when the agreement, which is at the heart of this case, was entered into by the defendant Union.

[46] In 1983, Mr. Rodgers said he was approached by Mr. McCrea in regard to the Cranberry Lake Housing Project which involved the construction of a 60 unit townhouse. That type of project was not covered by the agreement in place between the Nova Scotia Management Bureau and the Union because it was a residential project as opposed to industrial, commercial, or institutional projects for which the parties already had an agreement.

[47] Mr. McCrea proposed to Mr. Rodgers and his Union that they enter into a special agreement to cover the housing project. An agreement was reached between

them which differed somewhat from the existing collective agreement covering the other types of work.

[48] Mr. Rodgers said the agreement was signed on December 15th, 1983, and provided in addition to the rate of pay for the carpenters working on the project that the Union would agree that The Armour Group Limited would apply to the Nova Scotia Labour Relations Board to be decertified and that Armour Construction Limited would replace it as a party to the existing collective agreement.

[49] Mr. Rodgers acknowledge the agreement already referred to by Mr. McCrea [Exhibit 1 - Tab 7].

[50] He also confirmed that before the application was made by The Armour Group Limited/Armour Construction to the Labour Relations Board the parties entered into the second agreement dated November 7, 1984 [Exhibit 1 - Tab 10] which dealt solely with the matter before the Labour Relations Board. The clauses of the agreement were identical to the earlier agreement except that it had as paragraph 3 the following:

> 3. The contents of this Agreement shall not be construed to indicate that there is a bar against the Carpenters Union, Local 83 from applying for certification against THE ARMOUR GROUP LIMITED.

[51] That agreement was submitted to the Labour Relations Board in support of The Armour Group Limited's application.

[52] Mr. Rodgers said that paragraph 3 was put into this agreement so that the Union could in the future apply to become the bargaining agent for maintenance employees working for The Armour Group Limited on its property.

[53] He also said that he understood that The Armour Group Limited would have all its construction work done by Armour Construction Limited and since that company was unionized it was no problem for the Union. He said he never understood that The Armour Group Limited could sub-contract work on its properties to non-union companies. He said he would be crazy to agree to that on behalf of the Union because the Union only lost and gained nothing from that type of agreement.

[54] Mr. Rodgers said that after The Armour Group Limited made its application to the Labour Relations Board he received correspondence from Peter Darby, Chairman of the Board which included the following comment: [Exhibit 1 - Tab 12]

> Therefore, unless the Panel receives a Reply from you within the ten day time limit provided by Section 18 of the Regulations to the Act challenging our tentative disposition and requesting a hearing, we propose to issue an order reconsidering our decision to include Armour Group Limited as a "unionized employer" in Schedule "A" to Accreditation Order L.R.B. No. 392C and substituting as the unionized employer Armour Construction Limited.

[55] Mr. Rodgers said that the Union did not object to the proposed order from the Board and therefore did not file a reply.

[56] Mr. Rodgers said that the Union relied on the letter from the Board in its interpretation of what the Board's order meant when it indicated that The Armour Group Limited was being deleted and in its place Armour Construction Limited was substituted.

[57] Mr. Rogers said that in September 1985, the Union made application for certification as the bargaining agent for the employees of Armour Construction Limited. That application was withdrawn in October 1985.

[58] In August 1986, the Union made application for certification as bargaining agent for the carpenters who were employees of The Armour Group Limited.

[59] Mr. Rodgers agreed on cross-examination that there was no discussion with Mr. McCrea in which the Union suggested that The Armour Group Limited had to have all construction work done by Armour Construction Limited.

[60] Mr. Rodgers indicated that in 1983 when the Union entered the agreement with The Armour Group Limited and Armour Construction Limited the Union had no members working on the type of projects (60 unit residential townhouses) which The Armour Group Limited was doing because it was not covered under the agreement with the Construction Management Labour Bureau.

[61] Peter Greer testified for the defendant. He worked in Union Local 83 starting in 1985. He held different positions including financial secretary and president of the local in 1997.

[62] Mr. Greer said that part of his job is to negotiate union contracts with the Construction Bureau. He has had dealings with Mr. McCrea on behalf Armour Construction Limited.

[63] Mr. Greer filed a grievance [Exhibit 1 - Tab 23] in 1993 against Armour Construction/The Armour Group Limited in which he alleged on behalf of the Union that The Armour Group Limited had contracted shingling work on its property at Historic Properties to a non-union company. He said he addressed the grievance to both Armour Construction Limited and The Armour Group Limited despite the fact that The Armour Group Limited was not a party to the collective agreement because he understood that The Armour Group Limited had let the tender to the non-union company. He said he reviewed the document which decertified The Armour Group Limited and in particular Peter Darby's letter of January 7, 1985 from the Labour Relations Board. He said he could not understand how The Armour Group Limited could have construction work done by a non-union company.

[64] He said that the response he got from The Armour Group Limited was that the shingling work was maintenance work, not construction work and therefore not covered by the collective agreement [Exhibit 1 - Tab 24].

[65] Shortly after that on June 9th, 1993, he filed on behalf of the Carpenters Union an application to the Labour Relations Board for certification of the employees of The

Armour Group Limited whom the Union alleged were doing carpenter work. [Exhibit 1 - Tab 25].

[66] He said it was a major issue with the Union as to when maintenance work turned into construction work and that issue continues to be a problem for the Union. He said that after getting legal advice and considering the impact that an unfavourable decision might have the Union decided to withdraw the application.

[67] The issue arose again in October 1997 when The Armour Group Limited tendered out to a non-union company (Eagle Beach Limited) a job involving the construction of a wharf on the Halifax Waterfront. He said he filed a grievance with The Armour Group Limited alleging that it could not sub-contract that type of work to a non-union company. The Union's position was that the wharf work was really done by carpenters and that The Armour Group Limited was in violation of the sub-contracting concept that is based on the premise that a union company cannot sub-contract work to a non-union company and therefore avoid paying union rates to the carpenters on the job. He stated that The Armour Group Limited was in effect doing construction work and that violated the order (L.B.R. 837C) issued in 1985 which permitted the decertification of The Armour Group Limited but only if it did not do

construction work. He interpreted that to mean either by its own employees or by way of sub-contract to a non-union company.

[68] Mr. Greer said that the wharf work issue involving Eagle Beach Limited was not resolved to the Union's satisfaction and therefore in November 1997 he filed with the Labour Relations Board, on behalf of the Union, an application for re-consideration. In that application [Exhibit 1 - Tab 42] the Union asked that the Board re-consider the Order 837C, whereby it decertified The Armour Group Limited and substituted Armour Construction Limited. It further alleged that The Armour Group Limited was sub-contracting to non-union companies and also was doing more than just maintenance work but was in fact doing construction work.

[69] Mr. Greer said the Union wanted a clear interpretation of what the Labour Relations Board Order No. 837C meant in relation to The Armour Group Limited tendering work to non-union companies.

[70] After filing the application, Mr. Greer said that the relationship with The Armour Group Limited and Armour Construction Limited was okay from his point

of view. The Food Court project was completed and the Union decided to withdraw the application for re-consideration.

[71] He said he was shocked in December 1998 when this action was started against the Union. He also felt that the action would not proceed because it was asking that the Union's application for re-consideration to the Labour Relations Board be prohibited and subsequent to the issuing of the Originating Notice that the Union had withdrawn its application.

[72] On cross-examination Mr. Greer agreed with plaintiff's counsel that the remedies the Union requested in the re-consideration application were in effect a ruling based on a common employer application and successor rights application. He also acknowledged that he understood Mr. McCrea's position to be as set out in The Armour Group Limited's reply to the application [Exhibit 1 - Tab 44] namely that the 1984 agreement signed by the Union prohibited a successor rights application to the Labour Relations Board.

[73] Armour McCrea was called in rebuttal and indicated that he never understood paragraph 3 of the agreement signed by the Union in 1984 was intended to cover his

maintenance workers as suggested by Mr. Rodgers in his evidence, but would cover construction work if done by The Armour Group Limited employees.

Issues

[74] Counsel for the parties here view this case from different positions. Plaintiff's counsel maintains in his pre-trial brief that the issues are as follows:

A) Does this Court have jurisdiction to grant the relief sought by The Armour Group Limited?

B) Has the Defendant breached its contract with The Armour Group Limited?

C) What is the proper remedy in the circumstances?

[75] Counsel for the defendant in his pre-trial brief sets out his view of the case:

A. Did the Defendant breach the Agreement of November 2, 1984 by filing an Application for Reconsideration pursuant to Section 19 of the *Trade Union Act?*

B. How was the Agreement of November 2, 1984 affected by Labour Relations Board Decision # 837C?

C. Did the Plaintiff engage in work in the construction industry as contemplated in Labour Relations Board Decision # 837C?

D. What is the effect of the Defendant withdrawing its Application for Reconsideration?

E. What is the proper forum for the relief the Plaintiff is seeking?

The Positions of the Parties

[76] The plaintiff here alleges that the defendant is bound by the agreement signed in 1984 which agreement was entered into with the assistance of legal counsel on both sides. If the Court finds that the defendant breached that agreement by making the application to the Labour Relations Panel for reconsideration, the plaintiff suggests that the Court should award damages based on the costs incurred to defend that application. The plaintiff also asks that the Court issue an injunction to prohibit the defendant from ever making such an application in the future.

[77] The plaintiff sees the case as a contracts case and not a matter to be resolved by the Labour Relations Construction Panel.

[78] The defendant maintains that the Court has no jurisdiction to deal with the issues raised by the plaintiff's action because that is something within the jurisdiction of the Labour Relations Board. It also suggests that The Armour Group Limited has engaged in construction work, and therefore, the Union can apply to have the company certified as a Union company.

[79] It also takes the position that by withdrawing its Application for Reconsideration it avoids the allegation that the application was a violation of the 1984 contract. As counsel put it in his brief. [page 18 - paragraph 45]

> The Defendant submits that the mere filing of the Application for Reconsideration does not amount to a breach of the Agreement of November 2, 1984. By withdrawing its Application, the Defendant did not "take any action by way of Successor's Rights application under the Nova Scotia Trade Union Act against Armour Group..." It is submitted that taking action by way of Successor's Rights under the Nova Scotia Trade Union Act involves the prosecuting of an application, the mere filing and withdrawing of an application prior to any hearing of the matter does not amount to a breach of the agreement of November 25, 1984.

[80] The defendant asks as part of the remedy in addition to a dismissal of the action that [page 26 - paragraph 69]

> In the alternative, the Defendant respectfully requests that the Plaintiff's Claim be dismissed and that the parties be directed to bring the issue of whether or not the Plaintiff engaged in work in the construction industry to the Construction Industry

> Panel of the Labour Relations Board of Nova Scotia for determination in accordance with the Panel's direction in Appendix A to LRB Decision #837C, if either party feels the issue needs to be adjudicated.

The Law - Jurisdictional Issue

[81] The defendant argues that this Court has no jurisdiction to deal with this case because the ***Trade Union Act of Nova Scotia*** grants that power to the Labour Relations Board.

[82] Section 19(1) of the ***Act*** provides in part:

> 19(1) If in any proceeding before the Board a question arises under this Act as to whether
>
> (a) a person is an employer or employee;
>
> (d) a collective agreement is by its term in full force and effect and upon whom it is binding;
>
> (j) an employer has sold, leased, transferred or agreed to sell, lease or transfer his business or the operations thereof or any part of either of them or has contracted out or agreed to contract out any part of the work done by his employees;
>
> (k) the Board shall decide the question and the decision or order of the Board is final and conclusive and not open to question, or review, but

> the Board may, if it considers it advisable so to do, reconsider any decision or order made by it under this Act, and may vary or revoke any decision or order made by it under this Act.

[83] Section 94 of the ***Act*** sets up the Construction Industry Panel of the Board. It provides:

> 94 (4) The jurisdiction, power and authority of the Board shall be vested in and be exercised by the Panel and the duties and functions of the Board shall be performed by the Panel with respect to any proceeding or matter relating to the construction industry.
>
> (5) When a question arises whether a matter is a matter relating to the construction industry the question shall be finally determined by the Panel.
>
> (6) Any act of the Panel shall be conclusively deemed to be the act of the Board in relation to the jurisdiction, power and authority vested in and exercisable by the Panel or in relation to duties or functions performed by the Panel by virtue of subsection (4).

[84] The defendant offers in support of its position a number of cases including ***Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057 et al*** (1990) 109 NR 31, whereby the Supreme Court of Canada confirmed the deference which should be given to specialized boards set up by provincial statute.

[85] There the Court dealt with a claim by a Union member that his Union did not provide him with fair representation in dealing with a grievance he had filed against his employer.

[86] He took his action against the Union to Court and not to the Labour Board. He was successful at the trial level and the Union appealed arguing that the Court should not have heard the matter and that instead it should have been dealt with before the Labour Relations Board.

[87] The Supreme Court of Canada held that the lower Court had erred in dealing with the plaintiff's claim against the Union and that the jurisdiction was in the Canada Labour Relations Board. L'Heureux-Dube, J. said: [page 353 - paragraph 59]

> It is clear then that this court has enunciated a principle of deference, not only to decision-making structures under the collective agreement but as well to structures set up by labour legislation and in general, to specialized tribunals operating within their fields of expertise. When the relevant statute requires collective agreements to provide for the final and binding settlement of disputes, it becomes difficult if not impossible to distinguish **St. Anne**, supra, and similarly reasoned cases on the basis that the issue in those cases concerned the relationship between contractual dispute resolution and the jurisdiction of the ordinary courts, not the relationship between statutory dispute resolution and the courts. The concern that recourse to the ordinary courts may jeopardize the comprehensive dispute resolution process contained in labour relations legislation is one that arises in this latter situation as well. Allowing parties to disputes which, by their very nature, are those contemplated and regulated by labour legislation, recourse to the ordinary courts would fly in the face of the demonstrated intention of Parliament to provide an exclusive and comprehensive

> mechanism for labour dispute resolution, particularly in the context of the present case.

[88] In 1995 the Supreme Court of Canada in ***Weber v. Ontario Hydro*** (1995) 125 D.L.R. (4th) 583, confirmed the same approach. There an employee of a Union company sued the company in tort alleging breach of his rights under the Charter of Rights as a result of action taken by the company involving a grievance he had filed.

[89] The Supreme Court held that the jurisdiction of the Court was ousted and that the collective agreement provided the only process by which the plaintiff could pursue his employer.

[90] McLachlin, J. (as she then was) said: [page 607 - paragraph 67].

> I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario *Labour Relations Act* generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to Charger remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed. The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal. Against this background, I turn to the facts in the case at bar.

[91] In ***Pleau v. Canada (Attorney General)*** [1999] N.S.J. 448, the Nova Scotia Court of Appeal dealt with the issue of whether the plaintiff could sue his former employer and others instead of proceeding with a grievance under the collective agreement. The employer had applied to strike the statement of claim based on the ***Weber*** principle. The Chambers Judge dismissed the application to strike and on appeal the Court dismissed the appeal.

[92] Cromwell, JJ.A. reviewed the case law on the point and said: [paragraph 49]

> Taking these underpinnings of Weber into account, the relevant considerations may be addressed under three headings.
>
> First, consideration must be given to the process for dispute resolution established by the legislation and collective agreement. Relevant to this consideration are, of course, the provisions of the legislation and the collective agreement, particularly as regards the question of whether the process is expressly or implicitly regarded as an exclusive one. Language consistent with exclusive jurisdiction, the presence or absence of privative clauses and the relationship between the dispute resolution process and the overall legislative scheme should be considered.
>
> Second, the nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation and the collective agreement should be considered. In essence, this involves a determination of how closely the dispute in question resembles the sorts of matters which are, in substance, addressed by the legislation and collective agreement. What is required is an assessment of the "essential character" of the dispute, the extent of which it is, in substance, regulated by the legislative and contractual scheme and the extent to which the court's assumption of jurisdiction would be consistent or inconsistent with that scheme.

> Third, the capacity of the scheme to afford effective redress must be considered. Simply put, the concern is that where there is a right, there ought to be a remedy.

Finding Re: Jurisdiction

[93] I accept the argument of the defendant that where there is a collective agreement many times the Court determines that the parties are restricted in their right to pursue action in the Courts instead of before the provincial Labour Relations Board. In this case, however, there is no collective agreement between the parties and I conclude that there is therefore jurisdiction in the Court to deal with the matter. The defendant has offered no case law to support the position that somehow the plaintiff, which is not bound by a collective agreement, is forced to resort to the Labour Relations Board instead of the Courts to seek a remedy against the defendant.

Was there breach of the contract and if so, what is the appropriate benefit?

[94] I conclude here that clearly the defendant was in breach of the contract entered into in 1984. That contract prohibited an application to determine successor rights. Mr. Greer, on behalf of the defendant, agreed that the application for reconsideration filed by the Union in November 1996 requested that the Board certify the Union as

bargaining agent for The Armour Group Limited based on successor rights. Defendant's counsel in his brief argues that by not proceeding with that application to an actual hearing there was no violation of the agreement.

[95] Defendant's counsel also argues lack of consideration for the contract itself and that the contract entered into by the Union with the plaintiff was contrary to law in that the plaintiff had no right to enter into agreements with the Union because that right was exclusive to the Construction Management Labour Bureau of which the plaintiff was a member.

[96] I reject the position of the defendant on this issue. I conclude that the Union entered the agreement because it felt that the plaintiff would continue to lobby to have residential housing projects covered by the collective agreement which at that point was not covered. The contract itself indicates that the consideration was one dollar and both parties had legal representation prior to signing the contract.

[97] It is not for this Court to decide if the consideration was adequate or fair in the circumstances. The parties were both represented by counsel and obviously felt that they should both sign the contract. The wording of the contract was dealt with

carefully by senior counsel and the contract entered into willingly by both sides. The suggestion that the Union got nothing out of the contract as suggested by the defence witnesses does not reflect the fact that the Union was able to enter an agreement with Armour Construction to cover a residential housing development and have Union workers on the site. Under the second contract the Union assisted in having the Labour Relations Board certify Armour Construction as a unionized company and therefore bound by the collective agreement with the Management Bureau.

[98] I also reject the suggestion that the plaintiff could not contract with the defendant because that right was given to the Bureau. The evidence before me is that at the time the contract was entered into, the collective agreement between the Bureau and the defendant did not cover residential housing.

[99] I conclude that there was proper consideration for the contract entered into between the parties and therefore the contract is binding on both parties.

Was there breach?

[100] I conclude that based on the evidence that I have heard that the defendant was in breach of the contract entered into with the plaintiff when it made the application in November 1997 asking the Labour Relations Panel to re-consider its earlier order of February 6th, 1985 (LRB No. 837C).

[101] I reject the argument of the defendant that by not proceeding to a hearing on that application there was no breach of the contract. Clearly, the breach was making the application and the fact that it did not proceed to a formal hearing is only relevant on the issue of damages.

[102] The plaintiff has established that its legal costs in defending that application for reconsideration was $27,947.52 with additional interest of 3.27 percent resulting in an interest award of $932.89 up to the date of trial of this matter. I would therefore award the plaintiff special damages in the amount of $28,880.41.

[103] The plaintiff requests that the Court issue an injunction against the defendant prohibiting from making a similar-type application as was made in 1997.

[104] In the circumstances here, and in light of my finding that the reconsideration application made by the defendant to the Union was a breach of the contract between the parties, I would grant an injunction against the defendant prohibiting it from doing what it agreed not to do in the agreement. However, the wording of any such injunction order shall follow the actual wording set out in paragraph two of the agreement that is to say:

> That the Union shall not take any action by way of Successor's Rights application under the Nova Scotia Trade Union Acts against Armour Group or any of its' subsidiary companies (except Armour Construction) including without limitation any action claiming that Armour Group should be declared responsible for obligations pursuant to its' membership in the Construction Labour Management Bureau and/or the Collective Agreement between the Construction Labour Management Bureau and the Carpenters Union.

[105] The plaintiff asks for a declaratory relief to the effect that The Armour Group Limited is free to contract with any company it chooses to have work done on its properties and developments and is not required to engage a unionized company to do such work. That request is based on the argument that as a non-union company the plaintiff is not bound by the normal restriction found in most collective agreements which prohibits the union company from having work done by a non-union company.

[106] Counsel for the plaintiff agrees that if the defendant, at some point, is successful in having the Panel conclude that its employees are engaged in construction work and becomes the bargaining agent for such employees it would then be bound by that restriction.

[107] In the present circumstances, I am therefore prepared to issue an order declaring that at this time the plaintiff can tender work to a non-union company because the plaintiff is in fact a non-union company. If for whatever reason that status changes the situation would be different.

[108] The plaintiff asks for aggravated and/or general damages to compensate it for the fact that the defendant made the application for reconsideration while knowing that it was bound by the agreement entered into with the plaintiff in 1984.

[109] In support of the claim for aggravated damages, counsel cites the case of ***Vorvis -and- Insurance Corp. of British Columbia*** [1989] S.C.J. No. 46 from the Supreme Court of Canada in support of his argument that such damages should be awarded here.

[110] I have reviewed that case and I am not satisfied that the plaintiff has made out a case for aggravated damages here and I would therefore reject that claim.

[111] The plaintiff will be entitled to its costs and if the parties cannot agree, I would be prepared to hear submissions on that issue.

J.