

SUPREME COURT OF NOVA SCOTIA

Citation: *Lawton's Drug Stores Ltd. v. United Food and Commercial Workers Union Canada, Local 864*, 2016 NSSC 17

Date: 20160113

Docket: *Hfx* Nos. 445458 & 438037

Registry: Halifax

Between:

Lawton's Drug Stores Limited

Applicant

v.

United Food and Commercial Workers Union Canada, Local 864

Respondent

Judge: The Honourable Justice Michael J. Wood

Heard: January 7, 2016, in Halifax, Nova Scotia

Counsel: Robert G. Grant, Q.C. and Rick Dunlop, for the Applicant
David C. Wallbridge and Jillian Houlihan, for the
Respondent, United Food and Commercial Workers
Union Canada, Local 854
Edward Gores, Q.C., for the Respondent, Nova Scotia Labour
Board

By the Court:

[1] An injunction to restrain an administrative body from acting on its decision until a judicial review has been concluded is an exceptional remedy. It should only be granted where the Court is satisfied that the party seeking the injunction has established circumstances to justify the exercise of discretion in their favour.

[2] In this case Lawton's Drug Stores Limited ("Lawton's") wants to prevent the Nova Scotia Labour Board from issuing reasons for a decision made last March. In order to provide context for this motion it is necessary to review the collective bargaining history between the parties.

Background

[3] In June 2014 the United Food and Commercial Workers Union Canada, Local 864 ("the Union") was certified as the bargaining agent for employees of Lawton's at a particular location. The parties undertook negotiations but were unable to conclude the terms of a collective agreement.

[4] In February 2015 the Union applied for settlement of the provisions of a first collective agreement under s.40A of the *Trade Union Act*, R.S.N.S. 1989, c.475. The Nova Scotia Labour Board held a hearing and received submissions from the parties. On March 26, 2015 the Labour Board issued what was described as a "bottom line" decision and direction. The operative part of the direction reads as follows:

The Applicant alleged in its Application that the process of collective bargaining in which the parties engaged to settle the terms of a first collective agreement had been unsuccessful. The Applicant further alleged that the collective bargaining process had been unsuccessful because the Respondent had failed to make reasonable or expeditious efforts to conclude a collective agreement; and adopted uncompromising positions with respect to the negotiation of wages, holidays and other leaves, scheduling by seniority, the probationary periods for newly hired employees, and a health and welfare plan, without reasonable justification.

For reasons to be provided at a later date, consistent with s.40A(5)(c)(iii), the Labour Board is satisfied that the process of collective bargaining between the parties appears to have been unsuccessful because the Respondent adopted uncompromising positions with respect to the negotiation of wages, and holidays and other leaves, without reasonable justification.

Therefore, pursuant to s.40A(5)(e), the Labour Board directs the parties to resume collective bargaining with the assistance of a conciliation officer for a period of thirty days ending on Monday, April 27, 2015.

The Labour Board further directs the parties to notify the Board not later than Tuesday, April 28, 2015 as to the results of the collective bargaining.

[5] As noted in the direction the Labour Board said that it was acting under the authority of subsection 5 of section 40A of the *Trade Union Act* which provides:

(5) Where

(a) an application is made by an employer or bargaining agent under subsection (1);

(b) the parties do not agree to proceed by arbitration under subsection (2); and

(c) regardless of whether Section 35 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of

(i) the refusal of the employer to recognize the bargaining authority of the bargaining agent,

(ii) the uncompromising nature of any bargaining position adopted by the other party without reasonable justification,

(iii) the failure of the other party to make reasonable or expeditious efforts to conclude a collective agreement, or

(iv) any other reason the Board considers relevant, the Board, within thirty days of receiving the application, shall either

(d) direct the settlement of the provisions of a first collective agreement by arbitration; or

(e) direct that the parties resume their efforts to conclude a first collective agreement, with the assistance of a conciliation officer, for a period of thirty days.

[6] On April 8, 2015 Lawton's filed a notice for judicial review challenging the March 26, 2015 direction and decision of the Labour Board (the "first judicial review"). The grounds of judicial review included allegations that the Labour Board had violated the principles of natural justice and procedural fairness and that the decision was unreasonable because reasons were not provided.

[7] By the time the motion for directions in the first judicial review was heard on April 22, 2015 the parties had resumed negotiations and reached agreement on the terms of a collective agreement. At the motion for directions Lawton's requested an interim injunction restraining the Labour Board from issuing any further reasons pending the outcome of the first judicial review. By oral decision (now reported at 2015 NSSC 142) I granted the interim injunction with a further hearing set for June 16, 2015 to consider whether the order should continue until the review hearing.

[8] By agreement of the parties the return date for the injunction was adjourned so they could ask the Labour Board to decide whether it still intended to provide additional reasons for the March 26, 2015 direction.

[9] After receiving submissions from the parties the Labour Board issued a decision on October 8, 2015 indicating that it intended to issue further reasons. The Labour Board's conclusion was as follows:

The Board finds that it should issue further reasons for the bottom line decision it issued in this matter on March 26, 2015. Although Lawtons Drug Store Ltd. #144and (sic) the United Food and Commercial Workers Union Canada, Local 864 concluded a collective agreement subsequent to the hearing of the Section 40A Application for Settlement of a First Collective Agreement and the release of the Board's bottom line decision, the Board is convinced that there remains a labour relations purpose for issuing reasons for the decision. Moreover, in the opinion of the Board, the issue is not moot, and reasons will not adversely impact the relationship between the parties.

[10] On November 17, 2015 Lawton's filed a notice for judicial review with respect to this decision ("the second judicial review"). The grounds for review were that the Labour Board's decision was unreasonable. Specifically, Lawton's challenged the Board's conclusions that there remained a labour relations purpose for issuing reasons, the issue was not moot and reasons would not adversely impact the relationship between the parties.

Lawton's Motions

[11] On January 7, 2016 a hearing was held to deal with the following three motions brought by Lawton's:

1. Continuation of the interim injunction issued in the first judicial review on April 22, 2015.
2. Consolidation of the two judicial review proceedings so there would be a single hearing dealing with both the March 26, 2015 and October 8, 2015 decisions.
3. An interim injunction in the second judicial review restraining the Labour Board from issuing reasons until the review could be heard.

[12] During the course of the hearing, counsel for Lawton's withdrew the first two motions. He said the second judicial review should be heard first and, if the Labour Board's decision to provide reasons was upheld as being reasonable, those reasons should form part of the record for the first judicial review. He also agreed that the April 22, 2015 interim injunction should only stay in place until a decision was issued in the motion for an interim injunction in the second judicial review.

[13] Counsel for the Union did not object to the adjustment in Lawton's position at the hearing except to reserve the right to seek additional costs due to the late notification.

[14] The end result was that I would decide whether to enjoin the Labour Board from issuing additional reasons pending the outcome of the second judicial review. If I did so, this review would determine whether the Board could issue reasons. If they could not, Lawton's says it would discontinue the first judicial review and the matter would be concluded. If reasons were permitted, Lawton's would decide how those reasons affect the first judicial review and whether they wish to continue with it.

[15] No matter what the outcome on this interim injunction motion, the April 22, 2015 injunction would be dissolved as of the date of this decision.

Should An Interim Injunction Be Issued?

[16] The parties agree the test for an interim injunction is the same as that for a stay of proceedings. It is found in Supreme Court of Canada decision in *RJR-*

MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311. That test requires the Applicant to show the following:

1. That the substantive merits of the case raise a serious issue or question to be decided.
2. The Applicant would suffer irreparable harm if the motion is denied.
3. The relative balance of convenience between the parties justifies granting the interim injunction.

[17] These components are not to be seen as separate, independent criteria to be assessed in isolation. Ultimately, the decision whether to issue an interim injunction is discretionary and must be flexible enough to reflect the circumstances of each case. The Court must assess the risks of harm to the interests of the parties and minimize the chance that irreversible or irreparable damage might arise before the adjudication on the merits has taken place.

[18] Consideration of the strength of the Applicant's case and the potential harm are interrelated. For example, where the Applicant has a strong argument that the decision under review was unlawful, the Court may not require significant proof of harm to justify an interim injunction. Where the claim appears weak, an injunction might require clear evidence of non-compensable harm.

[19] Interim injunctions are by their nature extraordinary remedies in the sense that they will only be issued where the Applicant has satisfied the Court that intervention is needed to protect their interests in advance of the trial or hearing.

[20] Although both parties spent considerable time addressing the merits of Lawton's challenge to the October 8, 2015 Labour Board decision, I am not prepared to dispose of the motion without considering the question of irreparable harm. I cannot accept the Union's argument that Lawton's case is so weak that the motion must be dismissed because there is no serious issue to be tried. On the other hand, the strength of Lawton's arguments is not so great that the burden of proving irreparable harm should be relaxed.

[21] As in most injunction cases, the focus of my analysis will be on whether Lawton's has established that it will suffer irreparable harm if the interim injunction is not granted and it subsequently succeeds on the second judicial review. I accept the Union's submission that if Lawton's ultimately prevails the result will be that the October 8, 2015 decision of the Labour Board is quashed along with any additional reasons given for the March 26, 2015 direction. This

means that Lawton's must show that having reasons in existence for several months and subsequently quashed will cause them harm that cannot be remediated.

[22] I also agree with the Union's submissions that this is not analogous to cases involving disclosure of private information (eg. under *FOIPOP*) where confidentiality cannot be recovered once information is released. On this basis I would distinguish cases such as *O'Connor v. Nova Scotia (Deputy Minister of the Priorities and Planning Secretariat)* 2001 NSCA 47 relied on by Lawton's.

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

HARM TO THE PARTIES' RELATIONSHIP IF FURTHER REASONS ISSUED

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

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

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

29. Because the Final Collective Agreement has been ratified issuance of Further Reasons is entirely unnecessary. Commentary

from the Board on the position of Lawtons with respect to wages would be prejudicial to Lawtons as it would affect future negotiations that are likely to commence within the next few months given the one-year duration of the collective agreement. This will have a significant impact on the labour relations between the Union and Lawtons.

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

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

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

[25] Lawton's and the Union are commercial entities whose relationship is governed by the terms of any collective agreement and the *Trade Union Act*. If reasons are issued and subsequently quashed they could not be used by either party, or the Labour Board, for any purpose. Even if the reasons were critical of Lawton's conduct, they are in no different position than any litigant who successfully overturns an adverse ruling on appeal or judicial review. Any negative comments in the overturned decision effectively cease to exist.

[26] I do not accept the Union's argument that it would suffer harm should an interim injunction be granted, however that does not justify enjoining the Labour Board, even for a relatively short period of time. It is important to remember that the effect of this order would be to prevent a public body from carrying out an

activity which falls within its statutory mandate. That is all the more reason for insisting that Lawton's satisfy the Court that it is entitled to injunctive relief. In my view, they have not met this burden.

Conclusion

[27] I am dismissing Lawton's motion for an interim injunction, primarily due to the lack of evidence that irreparable harm will be suffered. The interim injunction issued in the first judicial review on April 22, 2015 is also dissolved. This means that the Labour Board is free to issue further reasons as contemplated by the direction dated March 26, 2015.

[28] If the parties are unable to reach an agreement on the question of costs, they may make written submissions by no later than February 10, 2016.

Wood, J.