SUPREME COURT OF NOVA SCOTIA

Citation: C. R. Coatings & Painting Inc. v. International Union of Painters and Allied Trades, Local 1439, 2013 NSSC 194

Date: 20130624
Docket: Hfx 406253
Registry: Halifax

Between:

C.R. Coatings & Painting Inc.

Applicant

v.

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

Respondents

Judge: The Honourable Justice Patrick J. Duncan

Heard: December 18, 2012, in Halifax, Nova Scotia

Counsel: Eric Durnford, Q.C., for the Applicant

Raymond A. Mitchell, for the Respondent,
The International Union of Painters and Allied Trades, Local 1439

Edward A. Gores, Q.C., for the Respondent
Labour Board

By the Court:

Introduction

[1] C.R. Coatings & Painting Inc. (applicant or employer) was contracted to provide painting services at a new hospital under construction in Truro, Nova Scotia. During the course of carrying out that work, the International Union of Painters and Allied Trades, Local 1439, (respondent or Union) conducted a successful drive to certify the Union as the bargaining agent for a unit of employees working for the applicant.

[2] The **Trade Union Act** RSNS 1989, c. 475 (**TUA** or **Act**) provides the legal framework for certification of a bargaining unit. At the first level of consideration, there are conditions set out which, if satisfied, results in certification being granted without either party being heard in person. If either of the employer or the union feels aggrieved by the certification decision, then they have the right under section 96 of the **TUA** to seek a review of that decision by the Labour Board. (Board)

[3] In this case the employer initiated a review of the certification pursuant to section 96(2), which was dismissed by the Board. This application for judicial

review of that decision has been brought by the employer. It is based on a number of arguments which challenge the procedure used by the Board, the application of the burden of proof in the hearing and the conclusions drawn from the evidence.

The Labour Board Hearing

[4] At the review hearing the employer opened its case first. This procedure was agreed to as among counsel and the Review Officer for the Board in an organizational conference call held on March 29, 2012. The procedure was confirmed in a letter from the Review Officer to counsel which letter was dated April 10, 2012. No objection was taken to that process by counsel for the employer, either before or during the hearing.

[5] At the outset of the hearing, and prior to evidence being led, counsel for the employer submitted that the basis of the employer's objection to the certification was that the persons on the jobsite on the day of application (January 16, 2012) were not "Journeymen" or "Apprentices" as described in the **Painter and Decorator Trade Regulations** made pursuant to the **Apprenticeship and Trades Qualifications Act** S.N.S. 2003, c. 1, as amended.

[6] It was not disputed that the persons named by the Union in the certification application were, in fact, on the jobsite on January 16, 2012 and were, in fact, all painters engaged in painting on a full-time basis.

[7] Two witnesses were called, both by counsel on behalf of the employer. The testimony of these witnesses was largely focused on the employer's objection to certification. i.e., that the persons on the jobsite on the day of application were not "Journeymen" or "Apprentices".

[8] Wilfred Jarvis, business representative and organizer for Local 1439, International Union of Painters and Allied Trades, testified that he met, on several occasions, with the applicant's employees and observed them on the jobsite painting. He said that these employees had contacted him for the purposes of unionization.

[9] Mr. Jarvis testified that under the Constitution of the Union all of these employees would initially be classified as apprentices. There are processes by

which they can achieve the "certified journeyman" classification or a "non-ticketed journeyman" classification.

[10] Those who have proof of 6000 hours of work can challenge the journeyman's examination without going through an apprentice program and seek certification as a journeyman from the province. i.e., certified journeyman.

[11] A person with work experience but who does not write the exam can become a "non-ticketed journeyman". This means that the worker is considered a journeyman by the employer and the union.

[12] Mr. Jarvis was a "non-ticketed journeyman", but a member of the Union for more than twenty years, at which time he challenged the exam and received his certification from the province.

[13] A certified journeyman receives 10% more under the collective agreement than a "non-ticketed journeyman". In Nova Scotia, approximately 15% of journeymen in the Union are certified by the province.

[14] Mr. Jarvis testified there was no certification program for his trade offered by the government through the Nova Scotia Community College and there had not been since 2003. Classification between apprentice and journeyman was done largely on the basis of hours worked. Mr. Jarvis would determine on behalf of the Local, through interviews with painters and through review of their respective experience, whether they would be classified as apprentices or journeymen.

[15] Employers have the right to have the non-ticketed journeymen demonstrate that they meet the standard of a journeyman. Apart from provincial certification, Mr. Jarvis' interview and review constitutes an evaluation for the purpose of the Union Constitution. If such an evaluation does not take place the worker is considered to be an apprentice.

[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.

[20] She testified the company began work at the new RCMP headquarters in Burnside on February 6, 2012.

[21] No further evidence was called on behalf of the employer.

[22] The Union chose not to call any witnesses, probably in part because their intended witness, Mr. Jarvis, was called to testify on behalf of the employer.

[23] At the conclusion of the testimony a question arose whether the Union, having called no evidence, should argue first or second. Counsel for the employer stated: "I'm the Appellant. I have to … I've got the burden."

[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:

> While in an application for certification there is an initial onus upon the Union, it should be remembered that the Board 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.

[26] The Board reviewed the evidence material to their decision, which included:

1. The completed **Schedule "A"**, verified by Statutory Declaration, which stated that there were six (6) painters on the jobsite on January 16th 2012, who worked from 30 to 40 hours per week;

2. The contract between the employer and the hospital that was exclusively for the supply of painting services;

3. The observations of Mr. Jarvis, including his testimony about information received from a contact on site on the date of the certification application, although this part of his testimony included hearsay;

4. The lack of any evidence to the contrary.

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.

Issues

[27] The applicant submits that the Board imposed a burden of proof upon the employer which the applicant submits was an error in law, and which error led the Board to incorrectly reject the employer's challenge to certification.

[28] The employer's position can be assessed by addressing the following questions:

1. Did the Labour Board wrongly shift the onus to the Employer to prove that employees did not spend the majority of their on-site working day engaged in painting?

2. Was the Labour Board unreasonable, or did it deprive the Employer of natural justice, by relying solely on hearsay evidence to make a key finding of fact?

3. Did the Labour Board have any evidence, or make a finding, that the six employees on the work site on January 16, 2012 spent a majority of their time onsite engaged in painting?

4. Was there any evidence on the record capable of supporting the Board's inferences?

Standard of Review

[29] The seminal case on standards of judicial review is *Dunsmuir v. New Brunswick*, 2008 SCC 9. It was considered by the Nova Scotia Court of Appeal in *Casino Nova Scotia/Casino Nouvelle Ecosse v. Nova Scotia (Labour Relations Board)*, 2009 NSCA 4. In that case the Court conducted an analysis of a Labour

Board decision where the employer appealed the certification of a certain bargaining unit. Beginning at paragraph 25 the Court stated:

> [25] In *Police Association of Nova Scotia Pension Plan v. Amherst (Town)*, 2008 NSCA 74, this court summarized the standard of review analysis from Dunsmuir:
>
> > [38] The Supreme Court issued *Dunsmuir v. New Brunswick*, 2008 SCC 9 after the judge's decision here. Justices Bastarache and LeBel, for five justices, stated the following principles governing the administrative SOR.
> >
> > [39] Correctness and reasonableness are now the only standards of review (34). The court engages in "standard of review analysis", without the "pragmatic and functional" label (63).
> >
> > [40] The ultimate question on the selection of an SOR remains whether deference from the court respects the legislative choice to leave the matter in the hands of the administrative decision maker (49).
> >
> > [41] The first step is to determine whether the existing jurisprudence has satisfactorily determined the degree of deference on the issue. If so, the SOR analysis may be abridged (62, 54, 57).
> >
> > [42] If the existing jurisprudence is unfruitful, then the court should assess the following factors to select correctness or reasonableness (55):
> >
> > > (a) Does a privative clause give statutory direction indicating deference?
> > >
> > > (b) Is there a discrete administrative regime for which the decision maker has particular expertise? This involves an analysis

> of the tribunal's purpose disclosed by the enabling legislation and the tribunal's institutional expertise in the field (64).
>
> (c) What is the nature of the question? Issues of fact, discretion or policy, or mixed questions of fact and law, where the legal issue cannot readily be separated, generally attract reasonableness (53). Constitutional issues, legal issues of central importance, and legal issues outside the tribunal's specialized expertise attract correctness. Correctness also governs "true questions of jurisdiction or vires", i.e. "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter". Legal issues that do not rise to these levels may attract a reasonableness standard if this deference is consistent with both (1) any statutory privative provision and (2) any legislative intent that the tribunal exercise its special expertise to interpret its home statute and govern its administrative regime. Reasonableness may also be warranted if the tribunal has developed an expertise respecting the application of general legal principles within the specific statutory context of the tribunal's statutory regime (55-56, 58-60).

[26] Under *Dunsmuir's* first step, I will begin with the existing authority. The courts have emphasized the importance of deference to the decisions of Labour Relations Boards on core issues under industrial relations legislation, including the appropriateness of the unit and the definition of "employee": *Dunsmuir* 54; *International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd.*, [1996] 2 SCR 432, 24; *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 SCR 369, 51-60; *CBC v. Canada (Labour Relations Board)*, [1995] 1 SCR 157, 31; *Canada (Labour Relations Board) v. Transair Ltd.*, [1977] 1 SCR 722, pp. 735-739; *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)*, 2005 NSCA 141, 21-29; *Re Nova Scotia Liquor Commission* (1974), 9 NSR (2d) 248 (AD), 92-93; *Moncton (City) v. Moncton Police Force Senior Officers' Assoc*. (1991), 82 DLR (4th) 112 (NBCA) at p. 117.

[27] As to the contextual factors, the **Trade Union Act**, subsections 19(1) (a) and (g) say that the Board's conclusions on employee status and definition of the bargaining unit are "final and conclusive and not open to question, or review". The Board is specialized in the field of labour relations. Its decisions are fact

specific and informed by the Board's view of industrial relations policy. Issues of bargaining unit appropriateness and employee status are in the Board's core of expertise that the legislature intended to govern the certification process. In *Granite Environmental*, 21-29, this court reviewed the contextual factors with respect to the Construction Industry Panel's assessment of unit appropriateness. Similar considerations apply to the Board's functions here.

[28] The reviewing judge, in my view, correctly chose the reasonableness standard of review.

[29] In applying reasonableness, the court examines the tribunal's decision, first for process to identify a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion, then second and substantively to determine whether the tribunal's conclusion lies within the range of acceptable outcomes.

[30] Several of the Casino's submissions apparently assume that the "intelligibility" and "justification" attributed by *Dunsmuir* to the first step allow the reviewing court to analyze whether the tribunal's decision is wrong. I disagree with that assumption. "Intelligibility" and "justification" are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to process (*Dunsmuir*, 47). They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes. *Nova Scotia (Director of Assessment) v. Wolfson*, 2008 NSCA 120, 36.

[31] Under the second step, the court assesses the outcome's acceptability, in respect of the facts and law, through the lens of deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime." This respects the legislators' decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. *Dunsmuir*, 47-49; *Lake,* 41; *PANS Pension Plan*, 63; *Nova Scotia v. Wolfson*, 34.

(Emphasis added)

Analysis

[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.

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.

[38] If I am wrong in my assessment of the SOR, I find there was no error in law in the Board's determination.

Issues 2-4: Reasonableness of the Board's Decision

[39] The remaining issues raise questions of fact, or mixed fact and law, and attract review on a standard of reasonableness.

[40] Challenges to the reasonableness of the Board's decision are without merit. This is so even if I am wrong about who bears the onus of proof under section 96 (2) of the **Trade Union Act**.

[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.

Conclusion

[46] I conclude that the onus is upon the employer in an application brought pursuant to s. 96(2) of the **Trade Union Act** to adduce evidence sufficient to displace a Certification Order that is valid on its face.

[47] The evidence placed before the Board in this case reasonably supported not only sustaining the Certification Order that was under review, but if the Board had been required to consider the question *de novo*, then to grant a Certification Order. This would be so irrespective of who carried the onus of proof.

[48] The decision of the Board is reasonable and the application is dismissed.

J.