IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Western Electrics Ltd. v. International Brotherhood of Electrical Workers, Local 625, 2004 NSSC 129

Date: 20040624
Docket: S.H. 207988
Registry: Halifax

Between:

Western Electrics Limited

Applicant

- and -

The International Brotherhood of Electrical Workers, Local 625 (the "Union)

Respondent

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	May 11, 2004 in Chambers, at Halifax, Nova Scotia
Written Decision:	June 24, 2004
Counsel:	**Eric Durnford**, **QC** for the applicant **Ronald A. Pink, QC** for the respondent

By the Court:

[1] Western Electrics Limited is a unionized electrical employer. It had a collective bargaining relationship with the International Brotherhood of Electrical Workers, Local 625. The parties were bound by a Collective Agreement between the Construction Management Bureau and the Union.

[2] Western bid on and obtained a contract for work at Acadia University at the Environmental Science Research Centre. The contract was in two parts: one for electrical work and the other for telecommunications cabling. The latter was required to be NORDX/CDT certified which required installation by a NORDX/CDT certified system vendor. Western was not such a vendor and sub-contracted this work to a non-union company which was a NORDX certified system vendor.

[3] The Union filed a grievance claiming that this was work within the jurisdiction of the Union and should not have been sub-contracted to a non-union contractor. The Union claimed a violation of Article 29.01 of the Collective Agreement which provides:

ARTICLE 29 - SUB-CONTRACTOR CLAUSE

> **29.01** If the employer sub-contracts work which, if not sub-contracted, would be performed by the employer under the provisions of this Agreement, the sub-contractor shall be a unionized electrical contractor and shall be bound by the terms and conditions of this Agreement for all such work performed on the jobsite. All material will bear a Union label where practical.

[4] The grievance went to arbitration and was heard by Susan Ashley. She concluded that Western had violated Article 29.01 and awarded damages to the Union in the amount of the money paid to the non-union contractor to do the work pursuant to the sub-contract. The decision was dated July 28, 2003. On September 25, 2003, Western filed an Originating Notice (Application Inter Partes) pursuant to the *Arbitration Act* seeking an order setting aside the Award of Arbitrator, Susan Ashley.

[5] At the hearing of the application, the issue of the proper judicial review process was raised and I adjourned the hearing to receive further written submissions on that issue. Counsel for Western and the Union submitted further briefs on May 21 and 26, 2004, respectively.

[6] The Union submits that the application under the *Arbitration Act* is not appropriate and that an application for *certiorari* is the only remedy for review of the award. The Union submits that Susan Ashley acted as a statutory arbitrator pursuant to Section 107 of the *Trade Union Act*, which provides as follows:

> **Arbitration**
>
> **107 (1)** Notwithstanding Sections 41 and 42 and any provision in a collective agreement, where an employer or an employers' organization enters a collective agreement, any dispute or difference between the parties to the collective agreement, including the persons bound by the collective agreement, relating to or involving
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> (a) the interpretation, meaning, application or administration of the collective agreement or any provision of the collective agreement;
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> (b) a violation or an allegation of a violation of the collective agreement;
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> (c) working conditions; or
>
> (d) a question whether a matter is arbitrable,
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> shall be submitted for final settlement to arbitration in accordance with this Section in substitution for any arbitration or arbitration procedure provided for in the collective agreement.

[7] Western submits that an application can be brought under either the *Arbitration Act* or in the nature of *certiorari*. Western says Susan Ashley acted as

a consensual arbitrator and that the procedure under s. 107 of the *Trade Union Act* is not mandatory to the exclusion of a consensual arbitration. Alternatively, Western submits that the court should exercise its inherent jurisdiction to allow the application to be heard.

[8] There is no dispute that the parties work within the unionized construction industry or that the application is about the interpretation of a provision of the Collective Agreement.

[9] The Union submits that the clear wording of s. 107 of the *Trade Union Act* imposes statutory arbitration in place of consensual arbitration pursuant to a collective agreement in the construction industry. Western submits that the two are alternative procedures, both of which are available.

[10] Western submits that there were unusual facts in this case which led to the parties proceeding by way of consensual arbitration rather than following the procedure under s. 107 of the *Trade Union Act*. Western says these unusual facts include the following, quoting from its written submissions:

- the grievance is dated **June 11, 2002**;

- the parties proceeded to deal with Arbitrator Ashley by consent, without regard to any of the timelines or other requirements of section 107;

- no agreement on an arbitrator was attempted by midnight on the day of the dispute;

- no request was made of the Minister of Labour to appoint an arbitrator under section 107 and none was so appointed;

- the arbitration hearing was only held in the year **2003** on April 28, 29, July 4 and 14 with the Arbitrator's decision being rendered July 28;

- the Arbitrator described her understanding of her status as follows:

- 'I was appointed under the collective agreement by consent of the parties. The hearing was held on April 28, April 29, July 4 and July 14, 2003. At the outset of the hearing the parties agreed that I was properly appointed, that there were no preliminary matters, and that any applicable time limits were waived.' [emphasis added]

- the reference by the Arbitrator to the waiver of 'any applicable time limits' could not have been to section 107 (7) because there was no appointment under either section 107 (3) or (4). Article 20 of the Collective Agreement required the Arbitrator to ... 'render his decision to the Parties within three (3) working days after the completion of the Hearing', which was waived by consent as noted above. [reference: see Affidavit of Eric Durnford, Exhibit B1 at page 27]

[11] Western submits that the three Court of Appeal decisions relied upon by the Union do not stand for the proposition that the s. 107 procedure is mandatory.

Western says that in *Municipal Spraying and Contracting Limited v. International Union of Operating Engineers, Local 721* (1977), 21 N.S.R. (2d) 351 (N.S.C.A.) the issue was the dismissal of an employee and whether the arbitrator had the authority to order reinstatement. The Court made strong statements about what was then s. 103 "... impos[ing] statutory arbitration on the construction industry in place of any consensual arbitration provided for in a collective agreement ...". Western submits that the court in dicta, said at para 29:

> Thus the Appellant may have proceeded properly as to procedure in seeking relief alternatively under the Arbitration Act and by motion for an order in the nature of certiorari. We need not, however, decide this question because, on the merits, the appellant cannot in any event succeed on either basis.

[12] In *Yorkdale Drywall v. C.J.A, Local 83*,[1987] N.S.J. 271 (A.D.), Western says there was no issue about the proper means of judicial review since the matter proceeded from the outset as a s. 103 [now s. 107] arbitration. In Municipal Contracting (1989) the arbitrator had been appointed by the Minister pursuant to s. 103 and the issue was the conflict between the adjournment power in s. 41(1) (a) of the *Act* and the mandatory deadlines for making a decision set out in s. 103(7).

[13] Western submits that the Court of Appeal did not in any of those cases preclude the possibility of the parties agreeing to a consensual arbitrator and proceeding without regard to s. 107. Western says this issue is before the court for the first time.

[14] The Union says that not only is the wording of s. 107 very clear and unambiguous that statutory arbitration is mandatory but that the Court of Appeal has very clearly said so in the three cases referred to above. As well, the Union refers to *Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106* [1982] 2 S.C.R. 888 where the Supreme Court of Canada set out the test to determine if a body is a statutory tribunal. The Court said that a statutory tribunal is one to which the parties must resort and to which a statute has given powers and duties. Chouinard, J. said at p. 9:

> As I have tried to show, the only test which has been applied thus far is that stated by Lord Goddard in R. v. National Joint Council for the Craft of Dental Technicians (supra), to the effect that a tribunal to which by statute the parties must resort is statutory.
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> ...
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> In addition to the obligation on the parties to resort to this tribunal, in the first passage Lord Goddard speaks of a body set up by statute, which has duties

> conferred on it by statute. In the second, he speaks of powers and duties conferred by statute, which when exercised may lead to the detriment of subjects who may have to submit to their jurisdiction. In the third, he speaks of bodies which have been entrusted by Parliament with duties partly of an administrative character and partly of a judicial character in some cases, the decisions of which may affect the parties.

[15] Using the test set out above, it is clear that the tribunal established pursuant to s. 107 is a statutory one. The parties must resort to it and the powers and duties of the tribunal are set out in s. 107.

[16] In *Municipal Spraying and Contracting Limited v. International Union of Operating Engineers, Local 721* (1977), 21 N.S.R. (2d) 251, the Court of Appeal said, with respect to s. 107, that it imposes statutory arbitration in the place of consensual arbitration under a collective agreement. In para 25 the Court said:

> This section imposes statutory arbitration on the construction industry in place of any consensual arbitration provided for in a collective agreement. In the present case the parties did not obey s-s. (3), which requires them to appoint an arbitrator by midnight of the day on which the dispute or difference arose and the arbitrator did not render his decision within forty-eight hours of his appointment as required by s-s.(7). Non-compliance with those directory subsections does not, however, affect the overriding command of s-s.(1) that all disputes 'shall be submitted to arbitration in accordance with this Section', nor does it detract from the powers conferred on the arbitrator by s-s.(6). ...

[17] In *Aberdeen Hospital Commission v. N.S.N.U. (Aberdeen Local)*, [1987] N.S.J. No. 90, the Court of Appeal said that arbitrations in the construction

industry result in statutory arbitration and require an application in the nature of *certiorari*. MacKeigan, J.A. said at p. 3:

> In Nova Scotia consensual arbitration awards under Park I of the Trade Union Act are not subject to certiorari, as are statutory construction arbitrations under Part II of that Act ...

[18] No case has been submitted to me in which a consensual arbitrator has resolved a dispute in the construction industry. In *Landing Construction Ltd. v. Labourers' International Union of North America, Local 615*, [1985] N.S.J. No. 255, the Supreme Court of Nova Scotia dealt with an application in the nature of *certiorari* to quash a decision made by an arbitrator pursuant to then s. 103 of the *Trade Union Act*. In that case, the grievances related to work done by non-union employees between May and August 1984, but the decision of the arbitrator was not released until January 8, 1985. It is therefore apparent that the time deadlines set in s. 103 of the *Trade Union Act* were not complied with, although the arbitrator was clearly appointed by the Minister pursuant to s. 103. There was no question in that case but that the appropriate remedy was an application in the nature of *certiorari* (paras. 6 - 9).

[19] A similar situation arose in *Sigma Construction Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 83* (1990), 97 N.S.R. (2d) 447 (NSSCTD). In that case, Glube, C.J.T.D. (as she then was), referred to a grievance filed on April 27, 1989, the appointment of an arbitrator by the Minister on May 26, 1989 and an arbitration held on July 24, 1989, with a decision dated September 8, 1989. At para. 18, Glube, C.J.T.D. said:

> Returning to the present case, the scheme of s. 103 (now 107) is one which provides for speedy resolution to disputes in the construction industry. It supersedes any grievance procedure in a collective agreement.

[20] I conclude that the wording of s. 107 is clear and unambiguous and that the statutory arbitration provided for in that section is mandatory. It eliminates any possibility of any alternate procedure which would involve a consensual arbitration under the collective agreement. The failure to comply with the deadlines set out in s. 107 does not mean that the arbitration is not pursuant to s. 107; it means only that the parties consented to waiver of those deadlines, as was the case in *Sigma Construction* and *Landing Construction* referred to above. The agreement to waive the deadlines does not detract from the fact that the arbitration must be pursuant to the statutory procedure.

[21] The statutory arbitration procedure applies where the parties are involved in the construction industry and the dispute is with respect to the interpretation of a provision of a collective agreement. Section 107 provides that any dispute with respect to the interpretation of any provision of a collective agreement "shall be submitted for final settlement to arbitration in accordance with this Section in substitution for any arbitration or arbitration procedure provided for in the collective agreement." The Court of Appeal decisions referred to above recognize this in the passages quoted above. Furthermore, the whole purpose of Part II of the *Trade Union Act* is consistent with this interpretation.

[22] Arbitrator Ashley mis-spoke when she said in her decision that she was a consensual arbitrator pursuant to the Collective Agreement. She was appointed with the consent of the parties, but acted pursuant to the *Trade Union Act*. In fact, Western referred to s. 107 of the *Trade Union Act* in its pre-hearing brief. *Certiorari* is not only an appropriate means, but the only means, by which to seek review of the decision of the statutory arbitrator, Susan Ashley.

[23] *Civil Procedure Rule 56.06* deals with applications in the nature of *certiorari*. It provides:

> **56.06.** An originating notice for an order in the nature of certiorari shall be filed and served within six (6) months after the judgment, order, warrant or inquiry to which it relates, and rule 3.03 does not apply hereto.

[24] The decision of Arbitrator Ashley was dated July 28, 2003. No application in the nature of *certiorari* was brought within six months after the date of that decision. Instead, an application was made pursuant to the *Arbitration Act* on September 25, 2003. By the clear wording of *Rule 56.06*, no application for *certiorari* can be made outside the six-month time period.

[25] Western submits that, if I conclude *certiorari* is the appropriate remedy, I should exercise the court's inherent jurisdiction to control its own process and allow the application to be heard on its merits. Western says this should be so because the application under the *Arbitration Act* was brought within the six-month time limit within which a *certiorari* application had to be brought.

[26] The Union on the other hand submits that the law is clear that if an application for *certiorari* is not made within the required time that it is barred and

the court has no jurisdiction to extend the time limits for filing such an application.

[27] In *Chipman v. Nova Scotia (Workers' Compensation Board)* (1990), 99 N.S.R. (2d) 290 (N.S.C.A.), Clarke, C.J.N.S. said in the penultimate para:

> Thus, by failing to apply for certiorari within the six months after June 7, 1983, Mr. Chipman's application would also be out of time by Civil Procedure Rule 56.06.

[28] In *Melford Concerned Citizens Society v. Nova Scotia (Minister of the Environment),* [1999] 181 N.S.J. (2d) 432 (N.S.S.C.), Wright , J. said at para 12:

> Rule 3.03 is the Civil Procedure Rule which otherwise confers upon the court a discretion to extend or abridge the time ... . However, such relief is clearly excluded when it comes to certiorari applications.

He continued at para. 33:

> ... I have concluded that the court ought not exercise its inherent jurisdiction when to do so would abrogate its own Judge-made Civil Procedure Rules and the legal jurisdiction requiring strict adherence to those rules where certiorari applications are involved.

[29] Likewise, in *Shephard v. Colchester Regional Hospital Commission*, [1994] N.S.J. No. 215 (N.S.S.C.), Scanlan, J. dismissed an application for *certiorari*. He said at para. 57:

> As harsh as it may appear the courts have held that the six month limitation must be complied with.... It is clear that Rule 3.03 is not applicable to Rule 56.06, as it is specifically excluded in Rule 56.06.

[30] The same result occurred in the recent decision of Haliburton, J. in *Marvel Metal and Glass Products Ltd. v. Annapolis (County)*, 2002 N.S.S.C. 45 where the applications were made well outside the six month limitation period.

[31] Western submits that *Rule 2.02* should be used to cure any procedural defect. It provides:

> **2.02.** An application to set aside for irregularity a proceeding, any step taken in a proceeding, or any document, judgment or order therein, shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. [E. 2/2(1)]

[32] However, missing a limitation period like that in *Rule 56.06* is not merely procedural. Furthermore, the defect which is sought to be cured is the very thing dealt with in *Rule 56.06*, which prohibits extending time for filing a *certiorari* application. For the reasons set out in the cases referred to above, I conclude that I cannot use *Rule 2.02* to cure this defect. Similarly, I agree that I should not use the court's inherent jurisdiction to control its own process to abrogate a specific rule made by the court.

[33] I do not find the decision in *Port Arthur Shipbuilding Co. v. Arthurs*, [1969] S.C.R. 85 to be helpful on this point. In *Port Arthur*, Judson, J. said at p. 8:

> In Ontario relief by way of certiorari is obtained in an originating motion and no writ is issued. This is the same procedure that is used to quash an award of a private arbitrator or arbitration tribunal.

[34] In that case, there was no rule similar to Nova Scotia *Civil Procedure Rule 56.06*. Accordingly, the procedure is not the same for *certiorari* applications in Nova Scotia as for applications to quash pursuant to the *Arbitration Act*, as was the case in Ontario. For that reason, I cannot conclude that filing an Originating Notice (Application Inter Partes), pursuant to the *Arbitration Act,* in this matter

should be deemed to be or treated as filing an Originating Notice for an order in the nature of *certiorari*.

[35] The application is dismissed. It was wrongly made pursuant to the *Arbitration Act* and not pursuant to *Rule 56.06* and the time limit for making an application under the latter has expired and cannot be extended.

Hood, J.