Date: 20020514
Docket: S.H. No. 174265

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: 2201336 Nova Scotia Ltd. v. Nova Scotia (Labour Relations Board), 2002 NSSC 132

BETWEEN:

2201336 NOVA SCOTIA LIMITED, doing business under the name, Courtesy Chrysler

Applicant

- and -

THE LABOUR RELATIONS BOARD (Nova Scotia) and the INTERNATIONAL ASSOCIATION of MACHINISTS & AEROSPACE WORKERS, Local Lodge 1763

Respondents

DECISION

HEARD BEFORE: The Honourable Justice Robert W. Wright in Chambers, at Halifax, Nova Scotia on December 4, 2001.

ORAL DECISION: December 5, 2001

WRITTEN RELEASE OF DECISION: May 14, 2002

COUNSEL: Blair Mitchell, counsel for the applicant
W. Dean Smith, counsel for the Board (respondent)
Gordon Forsyth, counsel for the Union (respondent)

Wright J. (Orally)

FACTS

[1] In June, 2001 the Nova Scotia Labour Relations Board (the "Board") held a hearing into a complaint by the International Association of Machinists & Aerospace Workers, Local 1763 (the "Union") that the employer, Courtesy Chrysler, had failed to bargain in good faith, contrary to s. 35(b) of *The Trade Union Act*. The Panel hearing the complaint was comprised of Vice-Chair Bruce Archibald, and members Donna VanBuskirk and Leo McKay.

[2] On September 5, 2001 the Board released its decision upholding the Union's complaint. It directed Courtesy Chrysler to bargain collectively as required by the *Act* and to pay damages arising from its earlier failure to so comply with the *Act*.

[3] On September 27, 2001 Courtesy Chrysler filed an application for judicial review, seeking an order in the nature of certiorari quashing the Board's decision.

[4] On November 27, 2001 Courtesy Chrysler filed an amended application in which it specified an additional ground for judicial review, namely, that a reasonable apprehension of bias exists because the Vice-Chair of the Board, Mr. Archibald, also has acted as a consensual arbitrator in disputes involving other trade unions represented by the same law firm as is the Union in the present case, namely, Pink.Breen.Larkin. That amendment was made even though there is no evidence that either Courtesy Chrysler or the Union here has ever selected Mr. Archibald as a consensual arbitrator in the past.

[5] On the same day as the amendment was filed, Courtesy Chrysler also caused a number of Notices of Examination for Discovery to be issued and served as an antecedent to the hearing of the application for judicial review scheduled for January 10 and 11, 2002. It is those notices which have precipitated the applications presently before the court, which are brought concurrently by the Union and the Board. The Union seeks to strike out the Notices of Examination served on:

(1) Bruce Archibald, Vice-Chair of the Board;

(2) Gregory North, Vice-Chair of the Board;

(3) Peter Darby, Chair of the Board;

(4) Lisa Elliott, Accounts Payable Manager at Pink.Breen.Larkin; and

(5) Brian Beaton, a Union representative.

[6] The Board seeks the same relief in respect of the Notices of Examination served on Messrs. Archibald, North and Darby.

[7] The notices served on the Board members require each of them to produce at the discovery all correspondence, accounts and other documents pertaining to any of their appointments as a consensual arbitrator in cases where Pink.Breen.Larkin has been counsel for a union client. Similar information is specified in the notice served on Lisa Elliott.

[8] The notice served on Mr. Beaton stipulates that he is to bring all documents, records and notes pertaining to the proceeding. Mr. Beaton had testified as a

witness at the Labour Relations Board hearing, which proceeding apparently was not recorded.

[9] Because of the time constraints created by the December 5th discovery date specified in the Notices of Examination, the parties agreed to an abridgement of the timelines provided under the Civil Procedure Rules in order to get this application heard on December 4th.

[10] Affidavits were filed by each of the five persons served with a Notice of Examination. Affidavits were also filed by Mr. Brian McLellan, Secretary Treasurer of Courtesy Chrysler, by its counsel Blair Mitchell, and by his legal researcher, Michelle Morgan-Coole (of which more will be said later). The only deponent cross-examined on this application was Mr. McLellan as an officer of the corporate party Courtesy Chrysler. A request for leave to cross-examine Messrs. Archibald and Darby on their affidavits was refused by the court after hearing submissions on the nature of the cross-examination intended.

ISSUE

[11] The narrow issue for determination on this application is whether the five persons served with a Notice of Examination, or any of them, can be compelled to give evidence on discovery as an antecedent to the judicial review application to be heard on January 10 and 11, 2002. At the forefront is the compellability of the Chair and Vice-Chairs of the Board to give discovery evidence relating to the allegation of reasonable apprehension of bias.

POSITIONS OF THE PARTIES

[12] The theory underlying this added ground of judicial review advanced by the employer is that because Mr. Archibald accepts appointments to act as a consensual arbitrator in labour disputes on occasions where the union party is a client of Pink.Breen.Larkin, he may, even subconsciously, allow that to influence or impact on his decision making in Labour Relations Board hearings so as to curry favour with Pink.Breen.Larkin lawyers and thereby attract more consensual arbitration work.

[13] Courtesy Chrysler has extended its circle of Notices of Examination to Messrs. Darby and North as well, even though neither of them were panel members in the present case, on an expansion of that theory, namely, that their similar acceptance of appointments as consensual arbitrators by Pink.Breen.Larkin (and an employer) creates a perception of impairment of institutional independence that is needed for the Board to function properly and to command public confidence and respect.

[14] In his oral submissions, Mr. Mitchell states that Courtesy Chrysler does not suggest that any of Messrs. Darby, Archibald or North have in fact allowed such favouritism to creep into past Board decisions and that his client is only approaching this matter on the basis of a reasonable apprehension of bias. Nonetheless, the allegations made are very serious ones to put forward. They raise a double-sided spectre of impropriety, both in respect of the integrity of the Board members in their decision making as well as the ethical integrity of Pink.Breen.Larkin lawyers who must serve their own clients' best interests

whenever recommending to their clients the suitability of an individual arbitrator best skilled and experienced to decide a particular case.

[15] I am mindful, of course, that the issue of whether the allegation of reasonable apprehension of bias should succeed as a ground for quashing the decision of the Board must be left to the judge hearing the judicial review application. The only issue before me, as stated earlier, is whether any or all of the Notices of Examination served on the five named individuals should be struck out. The determination of that issue necessitates an inquiry into the intended scope of the discoveries sought and the nature and purpose of the evidence sought to be elicited.

[16] Mr. Mitchell asserts that by serving these Notices of Examination, he wants to obtain evidence to show a basis for the reasonable apprehension of bias as pleaded in the amendment. With respect to Messrs. Archibald, Darby and North, who are at the forefront of this application, Mr. Mitchell submits that it is not his intention to ask questions which would probe their decision making or other duties in their capacities as Chair and Vice-Chairs of the Board respectively. Rather, he insists that he intends to focus his discovery examination on their outside activities as consensual arbitrators and, more specifically, the details of the extent to which they have accepted appointments as a consensual arbitrator in cases in which Pink.Breen.Larkin has represented a union client. The same objective applies with respect to Ms. Elliot, through whom like information is sought by a different avenue.

[17] The main thrust of the submissions of both the Union and the Board is that in seeking to examine Messrs. Archibald, Darby and North about the issue of reasonable apprehension of bias, Courtesy Chrysler is inextricably trying to compel testimony from members of the Board about the performance of their duties and what was in their minds in carrying out those duties to support the theory that an institutional bias exists where members of the Board also act as arbitrators in labour disputes involving Pink.Breen.Larkin as union counsel. This is argued to be contrary to the immunities which the legislature has conferred upon the Board and its members. The Union and the Board make the further submission that Courtesy Chrysler has not provided any evidentiary basis to support its theory which is said to be nothing more than groundless conjecture.

LEGAL ANALYSIS AND CONCLUSIONS

[18] I begin the legal analysis with a review of the principles set out in *Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs)* [1994] N.S.J. No. 84 where the Nova Scotia Court of Appeal upheld the decision of Justice Davison in which he struck Notices of Examination served on the Minister of Municipal Affairs and senior departmental employees in the context of a judicial review application. The notices were struck essentially on the common law principle of Crown immunity.

[19] In writing the judgment of the court, Freeman, J.A. commented as follows (at paras. 5-6):

> Justice Davison's remarks reflect prevailing judicial opinion in these matters, and they are supported by law and public policy. Courts will consider the discovery of administrative decision makers only exceptionally and when there are valid reasons for doing so. Valid reasons must have an evidentiary foundation, which may be established by affidavit.
>
> Justice Davison noted the breadth of Civil Procedure Rule 18.01, which provides that any person may be examined by any party regarding any matter, not privileged, that is relevant to the subject matter of a proceeding. Civil Procedure Rule 18.02 makes discovery available for chambers applications as well as for trials. I would incline to the view that Rule 18 does not necessarily impose discovery in the context of judicial review, although that is a civil proceeding, but does not preclude it where discovery is otherwise appropriate. It is apparent from the case law that discovery is not generally appropriate to judicial review by way of certiorari.

[20] The Court of Appeal further reviewed the onus to be applied in such an application. Justice Freeman went on to say (at para. 31):

> Under Rule 18.01 the right to examine for discovery is available upon notice without order. If the person to be examined objects, he or she has the onus of supporting an application to strike the notice for examination. It is a clear inference from the authorities cited above that the onus is discharged when the person to be examined established that he or she is to be examined as a decision-maker in an application under Rule 56. The onus must then shift to the party seeking the discovery. In the words of Justice Gonthier in Tremblay, what must be shown are "valid reasons for believing that the process followed did not comply with the rules of natural justice." In the present case, by analogy, what must be shown are valid reasons for believing the prescription issued by Mr. Kerr was outside the ambit of the discretionary authority granted by s. 123(9) of the Planning Act and further, in my opinion, it must also be shown that the record is insufficient to provide a basis for review. Valid reasons, to my mind, would be reasons that prima facie rebut the presumption of regularity. Again by inference from the authorities cited above, the threshold is substantially higher for discovery than similar thresholds which must be crossed before evidence going beyond the record can be considered at the hearing of the merits of a Rule 56 application.

[21] Justice Freeman concluded (at para. 41) "that access to discovery in

certiorari applications is extremely limited and it is fundamental that a proper evidentiary basis be laid before it can be considered."

[22] In examining the evidentiary basis in the case at hand, I note that it is not expressly stated in Mr. McLellan's affidavit that a reasonable apprehension of bias exists or exactly what it is based upon. By innuendo, however, the position is advanced that there is a spectre of the compromise of Mr. Archibald's independence as a Board decision maker because of his outside activities as a consensual arbitrator in cases where the union party is represented by the law firm of Pink.Breen.Larkin. The position of Courtesy Chrysler is then fleshed out by the data compiled in an exhibit attached to the affidavit of Michelle Morgan-Coole. Appended to that affidavit is a listing of all collective agreement arbitral decisions indexed and maintained by the library services for the Nova Scotia Department of Labour for the five year period between 1996-2000. This listing shows the name of the arbitrator appointed and the counsel who appeared.

[23] Although the listing does not distinguish between consensual appointments and ministerial appointments, I infer that they all represent instances of consensual appointments of an arbitrator. That is because the certificate entered by consent of counsel as Exhibit 1 confirms, as one would expect, that neither Mr. Archibald nor Mr. Darby receive ministerial appointments while serving on the Labour Relations Board.

[24] As a supplement to these exhibits, a further exhibit has been entered by consent of counsel which distills the data advanced by Courtesy Chrysler by

summarizing the number of cases within that five year period in which Messrs. Archibald, Darby and North respectively have been appointed as a consensual arbitrator in cases where Pink.Breen.Larkin has represented a union client. This data indicates 17 such occasions in respect of Mr. Archibald, one for Mr. Darby and 11 for Mr. North which, except for Mr. Darby, is a higher ratio than for any other law firm listed.

[25] I will have more to say about the evidentiary basis for this application later in this decision. However, I now turn to the issue of statutory immunity. It is the submission of both the Union and the Board that the application of that principle should be dispositive of the matter presently before the court.

[26] The statutory immunity of the Labour Relations Board members is found in the correlative provisions of s. 16(7) of the *Trade Union Act* and s. 5 of the *Public Inquiries Act*. Those provisions confer on Board members the same privileges and immunities as a judge of the Supreme Court. Also, each member of the Board is required by s. 16(11) of the *Trade Union Act* to take an oath of impartiality in discharging their duties and non-disclosure of any evidence or other matter brought before the Board.

[27] The nature, extent and rationale of statutory immunity was recently reviewed by the Nova Scotia Court of Appeal in *Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)* [1999] N.S.J. No. 258 (NSCA) (beginning at para. 65). The *Future Inns* case was a civil lawsuit in which damages were claimed against certain members of the Labour Relations Board as defendants. The court was then

dealing with an application under Civil Procedure Rule 14.25 to strike the Statement of Claim but the case also raised the broader issue of the immunity of the Board members from actions based on their alleged malice and bad faith.

[28] The upshot of that decision was that the Nova Scotia Court of Appeal recognized and upheld the members' entitlement to statutory immunity in respect of the performance of any duties or actions taken by them in their capacity as Board members. In other words, immunity is so limited, but not absolute. Reference is made in particular to paras. 66-73 of that decision, which need not be quoted at length here.

[29] Mr. Mitchell, who was also counsel in the *Future Inns* case, well recognizes the principle of statutory immunity but argues that the purpose of the intended discovery examinations here is to elicit information about the outside activities of Messrs. Archibald, Darby and North as consensual arbitrators in cases where Pink.Breen.Larkin has represented a union client. That sphere of activity is, in his submission, outside the parameters of the protection afforded by the principle of statutory immunity.

[30] The difficulty with this argument is that it would be a very fine line between asking the Board members on discovery about the specifics of their outside appointments as consensual arbitrators without crossing the forbidden line of what the possible impact of such activities might be on their decision making as Board members. They are closely connected and if examined on discovery, the Chair or Vice-Chairs of the Board would be placed in the impossible position of wanting to

defend the impartiality of their decisions to rebut the inferences or innuendo sought to be advanced by Courtesy Chrysler. In other words, it is a slippery slope between the information sought on discovery by Courtesy Chrysler and the question of whether such outside activities, and the prospect of receiving more arbitration work from Pink.Breen.Larkin, impacted or is reasonably apprehended to have impacted on the Board's decision.

[31] To illustrate the point, Mr. Mitchell outlines in his brief a number of areas which are not covered or spoken to in the affidavits filed by the three Board members on this application. They culminate with pointing out the omission of deposing to the degree to which they reasonably expect to receive more nominations or appointments by Pink.Breen.Larkin and whether, as experienced labour law adjudicators, they have any knowledge or expectation of the level of satisfaction of Pink.Breen.Larkin lawyers with respect to their decisions, or whether the cumulative effect of repeated consensual appointments has professional or career implications for them.

[32] Presumably, these are areas which Mr. Mitchell seeks to explore in examining the Board members on discovery and they exemplify the difficulties that would arise if such discovery were permitted.

[33] In light of this analysis, I conclude that the discovery sought by Courtesy Chrysler would invade the protection of statutory immunity to which the Board members are entitled and encroach upon their independence as administrative

decision makers. I am reinforced in this conclusion by the reasoning of the Ontario Divisional Court in *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* (1994) 110 D.L.R. 4th 731 (esp. at p. 747). In that case, the court applied the principle of statutory immunity in overturning a prior ruling of a High Court judge who had granted a motion compelling attendance of the Board Chair and certain of its members and staff for discovery. The Divisional Court in that case was concerned to maintain the principle of deliberate secrecy in the adjudicative process, itself an important safeguard to the independence of administrative decision makers.

[34] Even if I am wrong in coming to that conclusion, and a separation can be made so as to contain the intended discovery to the outside activities of the Board members, there is another compelling reason for striking the discovery notices in question. Simply put, the specifics of the outside arbitration practices of the three Board members, beyond that which is already in evidence before me or conceded by counsel for the Union, is unnecessary for the determination of the ultimate issue for the judicial review hearing as to whether or not there exists a reasonable apprehension of bias.

[35] I have earlier in this decision described the evidence now before the court through the affidavit of Michelle Morgan-Coole, the exhibits attached thereto, and the two exhibits entered on the hearing of this application. In addition to that, counsel for the Union readily concedes that Messrs. Archibald, Darby and North respectively act as consensual arbitrators in labour disputes; that they are co-appointed by Pink.Breen.Larkin from time to time on behalf of various union clients; that Pink.Breen.Larkin lawyers appear as counsel at the hearing of such

arbitrations; and that the arbitrators get paid for their services, albeit from the pocket of the client.

[36] It is to be remembered that Courtesy Chrysler does not plead the existence of bias on the part of the Board members in actual fact, but rather the appearance or reasonable apprehension of bias.

[37] In my view, the specifics of the Board members' outside arbitration practices have little probative value of any substance to add and any further specifics that might be permitted to be given on discovery is completely outweighed by the risk of jeopardizing the decision making independence of the Board members that is protected by statutory immunity.

[38] There remains to be addressed the Notices of Examination served on Lisa Elliott and Brian Beaton. Ms. Elliott, as already mentioned, looks after accounts payable at the Pink.Breen.Larkin firm. The evidence is that any accounts and related correspondence received from Messrs. Archibald, Darby and North respectively as arbitrators are simply passed on to the firm client for payment. They are not accounts payable of the firm. Although file copies may be retained, the documentary evidence sought through her cannot be said to be in her possession and control in her capacity as the manager of the firm's accounts payable. Moreover, the information sought through Ms. Elliott similarly is unnecessary, beyond the evidence already available and the concessions of counsel, for the ultimate determination of the issue of reasonable apprehension of bias.

[39] Mr. Mitchell's stated purpose in wanting to examine Mr. Beaton on discovery is to elicit his recollection of what was said during a pre-hearing telephone conference call about the necessity or desirability of electronically taping the proceedings to be heard before the Board. In response to this, Mr. Forsythe has informed the court that he will make Mr. Beaton available to be examined on this point at the judicial review hearing to be heard on January 10 and 11, 2002. He further indicates that Mr. Beaton's evidence will be that he doesn't recall any conversation on that topic. I therefore see no practicality in permitting a discovery examination of Mr. Beaton beforehand, nor any prejudice to Courtesy Chrysler in being denied that opportunity.

[40] In the result, the applications of the Union and the Board to strike the five Notices of Examination before the court are granted, with costs of $500 to be paid to each of them by Courtesy Chrysler at the conclusion of the judicial review hearing.

J.