

Date: 20130123
Docket: 12/07
Citation: *Long Harbour Employers Association Inc.*
v. Resource Development Trades Council of
Newfoundland and Labrador, 2013 NLCA 9

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN: LONG HARBOUR EMPLOYERS
ASSOCIATION INC. APPELLANT

AND: RESOURCE DEVELOPMENT TRADES
COUNCIL OF NEWFOUNDLAND
AND LABRADOR RESPONDENT

Coram: Green C.J.N.L., Rowe and Barry JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division 201001G5114

Appeal Heard: January 10, 2013
Judgment Rendered: January 23, 2013

Reasons for Judgment by Green C.J.N.L.
Concurred in by Rowe and Barry JJ.A.

Counsel for Appellant: Blair Pritchett
Counsel for the Respondent: Dana Lenehan, Q.C. and Kenneth Jerrett

Green C.J.N.L.:

[1] In this appeal, the issue is whether an applications judge was correct in dismissing a judicial review application of a labour arbitrator's decision to reject a preliminary objection by an employers' association to a grievance alleging two employees of an employer-member of the association were

wrongly denied access to a special project work site at Long Harbour, NL, which had resulted in their termination by their employer.

[2] I would dismiss the appeal. I am in substantial agreement with the reasoning of the applications judge's decision not to interfere with the arbitrator's ruling. My analysis follows.

Background

[3] Pursuant to the *Vale Inco Long Harbour Processing Plant Special Project Order*, NLR 26-09 (SPO), made under section 70 of the *Labour Relations Act*, RSNL 1990, c. L-1, collective bargaining "in relation to employment on the special project" (section 3) at the Long Harbour site was to be regulated by a collective agreement entered into between the Long Harbour Employers Association Inc. (LHEA), representing all contractors on site as well as the project owner (Vale Inco Newfoundland and Labrador Limited), and the Resource Development Trades Council of Newfoundland and Labrador (RDTC), representing all unions of employees working on the site. The SPO was contemplated and implemented pursuant to a development agreement made between Vale and the province which stated the purpose of the SPO to be "to ensure a stable labour relations environment throughout the construction phases of the Project".

[4] By structuring LHEA in a way that ensured that Vale would at all times retain control of LHEA, Vale became the directing mind and will for all decisions taken by LHEA. Vale, the owner of the site was not, however, an express party to the collective agreement. Nevertheless, LHEA purported, pursuant to the collective agreement, to grant access to the site to union representatives, managers and agents (Article 8.01) and in Article 9.01 reserved to itself "the right and obligation to institute appropriate measures including the establishment of rules and regulations to safeguard the site and to govern the behaviour and conduct of all persons thereon". The by-laws of LHEA also recited that LHEA was established for the "exclusive representation" of all its members, including Vale, "in labour relations matters." At the very least, therefore, LHEA was contemplated as having a degree of control over the site in relation to employees working on site and in respect of labour relations matters.

The Grievance

[5] Vale, by letter on Vale letterhead (signed by a Vale employee who was also a director of LHEA), purported to deny two employees access to the site, ostensibly on the grounds that they had been involved in an illegal strike. That event brought about their termination by their employer, Pennecon (a member of LHEA) because the employees could no longer make themselves available for work. The two employees filed a grievance against LHEA under the collective agreement complaining of their denial of access and subsequent termination.

[6] LHEA raised a preliminary objection to the grievances regarding denial of access to the site, claiming non-arbitrability because they arose from actions taken by Vale, “the owner of the property”, which was not a party to the collective agreement and which “was exercising its fundamental right as an owner of the property to exclude from its property whomever it so chose.” (Arbitrator’s Award, pages 6-7.) It followed, so LHEA argued, that the dispute did not arise out of the interpretation, application, administration or alleged violation of the collective agreement, and in any event any remedies could not be directed against Vale, a non-party to the agreement.

[7] The effect of the preliminary objection, had it been upheld by the arbitrator, would have been to deprive the employees of any claim under the collective agreement and allow Vale – in these two, as well as any other, cases – to decide on its own whim whether a union member could or could not work or continue to work on the project. The grievance procedure would be circumvented and the labour relations regime contemplated by the SPO and designed to ensure a stable labour relations environment would be undermined.

The Award

[8] The arbitrator rejected the preliminary objection. He concluded that Vale had delegated authority for the labour relations function to LHEA “which, for all intents and purposes, is an arm of [Vale] and controlled by it.” (Award, page 9). He ruled that the essential nature of the dispute (denial of access to the site because of employee participation in an illegal strike) was “in the nature of a labour relations issue” (page 9) because the assertion of property rights here was “merely the mechanism used to achieve the desired end, i.e. the termination of the employment relationship of the two

grievors” (pages 9-10). With respect to the issue of control of access to the site, the arbitrator referred to Articles 8 and 9 of the collective agreement and concluded that it would be difficult for LHEA in the circumstances to maintain it had no control over access to the site and that, instead, it was Vale “which dictates such issues” (page 11).

[9] The arbitrator also found that Vale and LHEA were “essentially one and the same entity” and concluded:

As a result, it is my determination that the preliminary objection of [LHEA] is dismissed with a finding that the dispute is arbitrable in accordance with the terms of the collective agreement. As a result of the close relationship between [Vale] and [LHEA] any order arising from this proceeding against [LHEA] is an order against [Vale] as well.

The Judicial Review Decision (2011), 317 Nfld. & P.E.I.R. 86 (NLTD(G))

[10] LHEA sought judicial review of the Award, submitting that the arbitrator erred in concluding that Vale and LHEA were essentially one and the same entity and in effect finding that Vale was a party to the collective agreement, a breach of which could be enforced against Vale. LHEA also submitted, amongst other things, that the arbitrator erred in concluding that the dispute was one in the nature of labour relations and that the objective of the denial of access to the site was the termination of the employees’ employment.

[11] Applying a review standard of correctness¹, the applications judge concluded that the arbitrator was correct in determining that the dispute was arbitrable.

[12] He concluded that the arbitrator had both subject-matter jurisdiction (because the essential nature of the dispute was one that arose out of the interpretation, application, administration or violation of the collective agreement) and *in personam* jurisdiction (because the grievance was against LHEA and not Vale and because Vale had delegated all labour relations matters respecting the site to LHEA, which was therefore answerable for them).

¹ The applications judge’s determination that the appropriate standard of judicial review was correctness was not appealed. Although I would uphold the judge’s decision on the merits, i.e. I believe his decision to be correct, I make no comment as to whether the appropriate standard of review was applied in this case.

[13] In deciding there was *in personam* jurisdiction, the applications judge observed that, amongst other things,

- The SPO affirmed the role of LHEA as the sole bargaining agent for all labour relations matters on site;
- Vale was the controlling member of LHEA;
- The construction manager and corporate counsel of Vale were two of the three directors of LHEA;
- LHEA by-laws granted LHEA exclusive representation of all members, including Vale, in labour relations matters; and
- The revocation of site access was expressed to be the result of the participation of the grievors in an illegal strike, a matter of labour relations.

[14] He expressed his conclusions this way:

[44] I am satisfied that, given the circumstances, the arbitrator was correct in concluding that Vale had delegated all labour relations matters respecting the site to the LHEA and that as the controlling member of the LHEA Vale is bound by a decision of the arbitrator respecting labour relations matters. He clearly drew a distinction between matters, such as ownership of property, which could not be considered as being governed by the Collective Agreement and those things such as removal of site access for labour relations reasons which do fall under the Collective Agreement.

[45] I reject the LHEA's submission that in his decision the arbitrator was "in effect" adding Vale as a party to the Collective Agreement. In my view, what he was saying is that Vale cannot set up a scheme (by giving itself total control of the LHEA) which essentially gives it complete control over labour relations on the site but which insulates it from responsibility for decisions which clearly arise out of the interpretation, application, administration or violation of the Collective Agreement entered into by the very corporation Vale established and controls for all labour relations matters on the site as required by the Specific Project Order. To allow such a situation to prevail would, in all the circumstances of the case, allow form to trump substance.

...

[48] ... [T]he analysis as to whether an arbitrator has jurisdiction requires a nuanced consideration of all the facts relevant to the issue in dispute I am

satisfied that in the circumstances of this case the arbitrator was correct in determining that this was a labour relations matter which was tantamount to saying that the matter arose out [of] the interpretation, application, administration or violation of the collective agreement and that Vale could not shield itself from the jurisdiction of the arbitrator in the manner it attempted to do.

[49] I reject the submission that the arbitrator has “pierced the corporate veil” in so doing. Vale established the LHEA and is its controlling mind. The LHEA is bound by the collective agreement. Vale cannot purport to take action respecting labour relations matters affecting employees of employers bound by the Collective Agreement and then contend that Vale cannot be bound by a decision of an arbitrator making an order respecting labour relations affecting its corporate child, the LHEA.

(Underlining added.)

The Appeal

[15] In this Court, LHEA essentially repeated the arguments made before the applications judge. Focusing on the statements of the applications judge that “as the controlling member of the LHEA Vale is bound by a decision of the arbitrator respecting labour relations matters” (paragraph 44); “Vale could not shield itself from the jurisdiction of the arbitrator” (paragraph 48); and “Vale cannot ... contend that Vale cannot be bound by a decision of an arbitrator...” (paragraph 49), LHEA contended that the applications judge erred in deciding that there was privity of contract between Vale and RDTC and that, instead, he was required as a matter of law to determine that Vale was not bound by the collective agreement and therefore not subject to the jurisdiction of an arbitrator whose jurisdiction was limited to matters arising out of the interpretation, application, administration or violation of that agreement. This was the same error, it was suggested, that the arbitrator made. The corporate veil was effectively pierced.

[16] LHEA also submitted that non-party Vale’s exercise of its property rights to deny access to the site does not mean the employees are deprived of any remedy for their dismissal. Counsel pointed to the ability of the Labour Relations Board to make a common control determination against Vale and LHEA under s. 88.1 of the *Act*, thereby exposing Vale to potential liability, and to the ability of the employees to sue Vale in the Supreme Court for the tort of wrongful interference with contractual relations.

Decision

[17] The applications judge was clearly of the opinion, as is evident by his comments in paragraphs 45 and 49 of his decision, that to accede to the argument of LHEA would have the effect of undermining the labour relations regime that was contemplated by the SPO, a regime that was agreed to by Vale in the development agreement with government, as designed to ensure stable labour relations at the site. I agree. By structuring the LHEA as it did with control vested in Vale, it attempted – as evidenced by the actions it took in this case – to retain control over the labour relations environment without subjecting itself to the obligations imposed by the collective agreement that was intended to govern the site. It was a colourable attempt to interfere with the proper operation with the labour relations regime.

[18] Paragraph 70(2)(a) of the *Act* contemplates that an SPO will apply to a specific “geographic site”. The SPO in question applied to and was superimposed upon Vale’s property at Long Harbour. In respect of labour relations matters it takes preeminence over other interests pertaining to the site, even owner’s property rights, where the exercise of those rights would materially affect or undermine the labour relations regime.

[19] In any event, it is far from clear on the evidence that Vale was unrestricted in the manner in which it could exercise its property rights in relation to the contractors and employees on site. Both the arbitrator and the applications judge recognized that the Vale-controlled LHEA purported, in the collective agreement, to assert authority over the site for certain purposes, including governing “the behaviour and conduct of all persons thereon”. They concluded that Vale had effectively delegated authority to LHEA to control access to the site for labour relations purposes. Such a conclusion is entirely consistent with the notion of an implied term in owner-contractor construction contracts that the owner will hand over the owner’s land to the contractor for the purpose of allowing the contractor to perform the contract unimpeded and in the manner of his choice. See *Penvidic Contracting Co. v. International Nickel Co. of Canada Limited*, [1976] 1 S.C.R. 267 at pages 275-276. If the contractor is entitled to access to the site to enable him to perform the work, it follows it is the contractor, not the owner, who can determine, at least within the labour relations context, whether an employee of that contractor can access the site.

[20] LHEA's emphasis on the fact that Vale was not a formal party to the collective agreement and that it could not be bound by any determination of the arbitrator is beside the point. The issue before the arbitrator was not whether Vale could be bound but whether the arbitrator had jurisdiction to determine whether the grievances could proceed *against LHEA* for breach of the collective agreement. In light of the entirely reasonable finding by the arbitrator, supported by the applications judge, that Vale had effectively delegated authority to LHEA to deal with labour relations matters at the site and that a finding of denial of site access because of allegedly illegal strike behaviour was a "labour relations issue" (per the arbitrator) or a dispute arising out of the "interpretation, application, administration or violation" of the collective agreement (per the applications judge), it was the correct conclusion that the arbitrator had jurisdiction to determine the merits of that grievance and that the preliminary objection should therefore be dismissed.

[21] In the circumstances, it was not necessary for the arbitrator or the applications judge to have made any comment, observation or finding that LHEA and Vale were essentially one and the same entity or that Vale would in effect be bound by any arbitral ruling. That is not the determining factor. The arbitrator had subject matter and *in personam* jurisdiction to determine whether denial of site access was a violation of the collective agreement by LHEA. The remedy flowing from any determination of an agreement violation, and whether or not Vale would legally or effectively be bound by or required to ensure that LHEA complied with such a ruling is a matter for the arbitrator following a merits determination. It is not a matter to speculate upon in the context of a preliminary objection.

[22] The fact that the employees might have another remedy, in the form of an application to the Labour Relations Board for a "common control" determination or perhaps an action for an economic tort in the Supreme Court, also does not detract from the fact that an arbitrator has jurisdiction to determine claims arising out of the interpretation, application, administration or violation of the collective agreement.² In this case, the denial of site access because the employees were ostensibly involved in an illegal strike is, first and foremost, a labour relations matter or an issue arising out of the

² In fact, as the jurisprudence following *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 emphasizes, an arbitrator's jurisdiction in matters that arise out of the interpretation, application, administration or violation of a collective agreement is usually exclusive. And in the case of a common control issue, it is questionable, in light of subsection 70(12) of the *Act*, whether section 88.1 applies in the case of a special project designation.

interpretation, application, administration or violation of the collective agreement.

Conclusion

[23] For the foregoing reasons, I would dismiss the appeal with costs to the respondent on a party-and-party basis, applying column 4 of Rule 55.

J. D. Green C.J.N.L.

I concur: _____

M. H. Rowe J.A.

I concur: _____

L. D. Barry J.A.