



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

Citation: *Canada Fluorspar (NL) Inc. v. United Steel, Paper
and Forestry, Rubber, Manufacturing, Energy, Allied
Industrial and Service Workers International Union,*
Local 9220, 2021 NLCA 53

Date: November 3, 2021

Docket Numbers: 202101H0053 and 202101H0057

BETWEEN:

CANADA FLUORSPAR (NL) INC.

APPLICANT/APPELLANT

AND:

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
LOCAL 9220

FIRST RESPONDENT

AND:

UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING AND
PIPEFITTING INDUSTRY OF THE UNITED
STATES AND CANADA, LOCAL 740

SECOND RESPONDENT

AND:

THE LABOUR RELATIONS BOARD

THIRD RESPONDENT

Coram: Welsh J.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 202101G0877
(2021 NLSC 104)

Application Heard: October 26, 2021

Judgment Rendered: November 3, 2021

Reasons for Decision by: Welsh J.A.

Counsel for the Appellant: Michelle A. Willette

Counsel for the First Respondent: Gordon N. Forsyth, Q.C. and Mary B. Rolf

Counsel for the Second Respondent: Michael Gillingham (watching brief)

Counsel for the Third Respondent: Megan Reynolds (watching brief)

Authorities Cited:

CASES CITED: *Vey v. Newfoundland and Labrador Pharmacy Board*, 2019 NLCA 72.

STATUTES CONSIDERED: *Labour Relations Act*, RSNL 1990, c. L-1, sections 73 and 75.

Welsh J.A.:

[1] This application arises from a decision of the Labour Relations Board concluding that the first respondent (the “Union”) did not hold successor rights with respect to the representation of employees of Canada Fluorspar (NL) Inc. (the “Company”). On judicial review the Board’s decision was set aside and an order made that the Union held successor rights. The Company filed a notice of appeal on September 3, 2021, and applies for a stay of enforcement of the applications judge’s order pending determination of the appeal.

[2] The test that applies in assessing whether to order a stay is discussed in *Vey v. Newfoundland and Labrador Pharmacy Board*, 2019 NLCA 72:

[4] In determining whether to grant an application for a stay pending an appeal, a three-pronged test is applied as discussed in *Weir's Construction Ltd. v. Warford Estate*, 2016 NLCA 65, 1 C.A.N.L.R. 282:

[17] The first prong of the test is whether there is a serious issue to be argued on appeal. This requires a preliminary, but not a detailed or extensive, investigation of the merits of the appeal to ascertain whether the appeal is frivolous or vexatious. ...

[18] The second prong of the test is whether the applicant for the stay will suffer irreparable harm if the stay is not granted. It is the nature of the harm, rather than its magnitude, that must be considered. ...

[19] The third prong of the test is an assessment of the balance of inconvenience. ...

[3] Regarding the first prong of the test, I am satisfied that, based on a review of the issues discussed in the notice of appeal, the low threshold that applies at this stage of the inquiry is met. The issues are summarized in the Company's written submissions:

[9] The primary issues on appeal will be the lower court's incorrect application of the reasonableness standard; its failure to apply the established test to determine successor rights; its failure to appreciate the policy rationale for the imposition of successor rights to non-operational entities; its failure to give consideration and effect to the impact of the lengthy hiatus on a finding of successor rights; and having determined that the Board's decision was unreasonable, the lower court's failure to remit the matter back to the board for reconsideration.

[4] The appeal cannot be characterized as frivolous or vexatious or with no arguable basis. The first prong of the test is satisfied, as was conceded by the Union.

[5] Regarding the second prong of the test, whether the Company would suffer irreparable harm if the stay is not granted, the Company submits that it will, among other things, incur costs that would not be recoverable. In particular, upon receipt of the applications judge's decision, the Union gave notice to the Company under section 73 of the *Labour Relations Act*, RSNL 1990, c. L-1, requiring the Company to begin collective bargaining. Pursuant to section 75 of the *Act*, the parties are required, without delay, to begin collective bargaining in good faith and make reasonable efforts to conclude a collective agreement.

[6] In addition to the costs involved, the Company submits that to enter negotiations at this stage would be premature, and may have the effect of rendering the appeal, and the employees' choice regarding unionization, moot. That is, if the appeal succeeds and the Board's decision is reinstated, the Union would not hold successor rights and the employees would have a choice regarding unionization. They may or may not choose the Union.

[7] Further, given the early date set for hearing of the appeal, should the appeal succeed, collective bargaining, having begun, would cease, potentially leaving either or both of the parties with unfulfilled expectations.

[8] On the other hand, the Union submits that, if the stay is granted, the Union will lose valuable time in establishing its relationship with the employees whom it represents on the basis of successor rights as determined by the applications judge. While I accept that proposition, it does not persuade me that this is an adequate response to the Company's submissions regarding the potential effect of refusing the stay.

[9] Regarding the third prong of the test, the balance of convenience, sometimes referred to as the balance of inconvenience, the Company emphasized that, as a result of successor rights, representation by the Union was imposed on the employees who have neither voted for nor against representation by the Union. Indeed, their preference for unionization is unknown. The Board identified several reasons for rejecting successor rights for the Union. For example, "there was no continuity of business of a functional economic vehicle that passed through the years in support of successorship rights..." (decision of the Board, at paragraph 111.)

[10] The Union submits that delay consequent upon granting a stay will prejudice the Union's ability to achieve a collective agreement before the statutory period would allow for an application to decertify. Further the Union contends in its written submissions that "an uncertain delay increases the potential for dissatisfaction and an application to decertify" (paragraph 52). I do not find these submissions to be persuasive. The appeal is set to be heard on January 24, 2022 and dates have been set for the filing of materials for the purpose of limiting further delay.

[11] In the result, I am satisfied that the balance of convenience favours granting the stay.

[12] In summary, the elements of the test for granting a stay of enforcement of the applications judge's order are satisfied. Accordingly, the Company's application is allowed. Costs shall be costs in the cause.

B. G. Welsh J.A.