Court of Queen's Bench of Alberta

Citation: Construction & General Workers Union, Local 92 v. United Brotherhood of Carpenters & Joiners, Local 1325, 2003 ABQB 1059

Date:
Docket: 0303 11724
Registry: Edmonton

In the Matter of a Decision of George A.R. Henry, Arbitrator, Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (Canada) dated January 6, 2003;

and in the Matter of an appeal to the Canada Plan for the Settlement of Jurisdictional Disputes in the Construction Industry covering the U.S. and Canada.

Between:

Construction & General Workers Union, Local 92

Applicant

- and -

United Brotherhood of Carpenters & Joiners, Local 1325 and Kellogg, Brown, Root (Canada) Company

Respondents

Reasons for Judgment
of the
Honourable Mr. Justice Gerald A. Verville

BACKGROUND

[1] The Construction and General Workers Union, Local 92 ("Labourers' Union or Labourers") brought an application for Judicial Review in Special Chambers. The Labourers' Union submitted that a decision of George A.R. Henry (an arbitrator ("Arbitrator") of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry ("Canadian Plan")) should be set aside on the grounds that the Arbitrator exceeded his jurisdiction and further that his decision is patently unreasonable.

[2] The United Brotherhood of Carpenters & Joiners, Local 1325 ("Carpenters' Union or Carpenters") and Kellogg, Brown, Root (Canada) Company ("KBR" or the "Employer") opposed the application. The Arbitrator and the Canadian Plan were represented in the application for the purpose of assisting the Court by explaining practices and procedures relating to the matters in issue.

[3] In Alberta there is a framework for the resolution of jurisdictional disputes in the construction industry. A jurisdictional dispute arises where two Unions claim entitlement to the same work.

[4] Alberta has developed a provincial jurisdictional dispute plan. The Jurisdictional Assignment Plan for the Alberta Construction Industry ("Alberta Plan") is a consensual plan negotiated voluntarily in 1995 under the auspices of the Alberta *Labour Relations Code* then in effect and approved by the Alberta Minister of Labour pursuant to Ministerial Order 35/95 which implemented the *Construction Industry Jurisdictional Assignment Plan Regulation* (the "Regulation").

[5] The Canadian Plan is also a consensual plan established by parties in the industry. Parties stipulate to this plan in several ways, most frequently by agreeing, within collective agreements they enter into, that jurisdictional disputes will be resolved by submitting to the plan's dispute resolution process.

[6] Both the Alberta Plan and the Canadian Plan exist for the purpose of deciding quickly, efficiently and without stoppage of work which claim should prevail and which trade should do the work where two scope of work clauses clash and a jurisdictional dispute arises. There is a right of appeal from a decision made pursuant to the Alberta Plan to the Canadian Plan.

[7] The Labourers' Union and Carpenters' Union are two Unions, each with a construction industry collective agreement. KBR is a signatory and party to the collective agreements.

[8] KBR employed both Unions' employees at a construction project known as the Petro-Canada Sulphur In-Gasoline Project in Strathcona County. It proposed that certain scaffolding duties be assigned to the Carpenters. The Labourers disputed the proposed assignment, and after considering the matter, KBR made a final assignment of this work to the Carpenters.

[9] The Labourers disputed this final assignment under the Alberta Plan. An Umpire, G.E. Beatson ("Umpire"), was appointed to adjudicate the dispute. The Labourers, Carpenters and KBR all made submissions to the Umpire.

[10] Each Union asserted that its respective collective agreement included a scope of work clause under which it was constitutionally and contractually entitled to perform the said work described as "all tending of scaffolding at the point of installation."

[11] After hearing the submissions at a hearing which took place on November 25, 2002, the Umpire upheld KBR's assignment of the disputed work of scaffold tending at the point of installation to the Carpenters.

[12] The Labourers appealed the Umpire's decision. The appeal was heard by the Arbitrator of the Canadian Plan. The Arbitrator dismissed the appeal by a decision dated January 6, 2003.

PRELIMINARY ISSUE

[13] The Employer submits that the application of the Labourers' Union is out of time and relies on section 145 of the *Labour Relations Code*, R.S.A. 2000, c. L-7, the relevant portion of which reads as follows:

> 145 (1) Subject to subsection (2), no award or proceeding of an arbitrator, arbitration board or other body shall be questioned or reviewed in any court by application for judicial review or otherwise, and no order shall be made or process entered or proceedings taken in any court, whether by way of injunction, declaratory judgment, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain the arbitrator, arbitration board or other body in any of the arbitrator's or its proceedings.
>
> (2) A decision, order, directive, declaration, ruling or proceeding of an arbitrator, arbitration board or other body may be questioned or reviewed by way of an application for judicial review seeking an order in the nature of certiorari or mandamus if the originating notice is filed with the Court no later than 30 days after the date of the proceeding, decision, order, directive, declaration or ruling or reasons in respect of it, whichever is later...

[14] There was general agreement among the parties that the adjudicators under the Canadian Plan although called arbitrators, are not collective agreement arbitrators within the meaning of s. 142 of the *Code* and that jurisdictional disputes are not arbitrable matters.

[15] The Employer however submits that s. 145(2) is applicable as it makes reference to an "other body" and that the Arbitrator of the Canadian Plan is an "other body".

[16] Sections 142 and 145 are found within Part 2, Division 22 of the *Code*. Part 2 is under the heading "Labour Relations" and Division 22 of that Part deals with collective agreement arbitration. Part 3 entitled "Construction Industry Labour Relations" contains Division 9 which is headed "Work Jurisdiction Disputes in the Construction Industry". Section 204(2) which is in Part 3 Division 9 also contains a provision which is identical to s. 145(2) except that it specifically refers to a decision of the Alberta Impartial Jurisdictional Disputes Board.

[17] There was agreement among the parties that the Alberta Impartial Jurisdictional Disputes Board has not been created by the Minister of Labour pursuant to what is now s. 202(2) of the *Code*. Rather, the Minister sanctioned the Alberta Plan, by regulation, pursuant to what is now s. 202(1) (formerly s. 200(1)) of the *Code*.

[18] In the circumstances it is my view that neither ss. 145(2) nor 202(2) is applicable with respect to the time within which a judicial review application must be brought from a decision of an Umpire of the Alberta Plan or an Arbitrator of the Canadian Plan.

[19] Therefore there is no section of the *Code* which expressly permits judicial review in this case.

[20] Article XI of the Alberta Plan which relates to recourse states in part:

> .....Appeals to the Canadian Plan shall be final and binding and shall not be subject to judicial review or questioned in any Court proceeding.

[21] Section 3 of the Regulation made by the Minister of Labour with respect to the Alberta Plan under the heading "No judicial review" states:

> No order shall be taken or process entered in any court, whether by way of injunction, declaration, prohibition, quo warranto or otherwise, except as may be provided for in the procedural rules.

[22] Section 1 of the Regulation states:

> In this Regulation
>
> (e) "procedural rules" means the procedural rules of the Plan as agreed to between the Coordinating Committee of registered Employers' Organizations and Alberta and N.W.T (District of MacKenzie) Building and Construction Trades Council as amended or replaced from time to time.

[23] Acton J. in ***International Assn. of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 720 v. International Brotherhood of Boilermakers, Iron Ship Builders,***

Blacksmiths, Forgers & Helpers, [2000] A.J. No. 1000 (QL), 2000 ABQB 586 ("***Spantec***") considered whether decisions under the Plans are subject to judicial review. She found that the decisions in that case were subject to judicial review as they arose from a statutory framework since: the *Labour Relations Code* gives the Minister a broad discretion to implement a mechanism for resolving jurisdictional work assignment disputes; the Minister chose to make a regulation that requires all collective agreements in this sector to incorporate the Alberta Plan to resolve work assignment disputes; and the Regulation provides that if a collective agreement does not contain that provision, the collective agreement will be deemed to contain it.

[24] As in the case at bar, the appeal of the Umpire's decision in ***Spantec*** was heard under the Canadian Plan in accordance with the Alberta Plan. The Regulation implements the Alberta Plan's procedural steps, from the hearing before an umpire to an appeal under the Canadian Plan.

[25] Acton J. went on to state that if the Canadian Plan does not have the necessary statutory basis to be considered a statutory body, then it falls within the category of consensual tribunals dealing with matters of sufficient public interest to justify a court's intervention to review patently unreasonable and jurisdictional errors, citing ***Kaplan*** v. ***Canadian Institute of Actuaries*** (1994), 161 A.R. 321 (QB); aff'd (1997), 206 A.R. 268 (C.A.); leave to appeal refused [1997] S.C.C.A. No. 563 (S.C.C.) (QL).

[26] I find this reasoning persuasive and am satisfied this Court has jurisdiction to hear the judicial review application in this matter.

[27] In these circumstances I find that the limitation period for bringing such application is 6 months pursuant to Rule 753.11(1) of the *Alberta Rules of Court*.

ISSUES

[28] The issues are whether the Arbitrator exceeded his jurisdiction and whether his decision is patently unreasonable.

GROUNDS FOR REVIEW

[29] The Labourers' Union sets out the following grounds for review:

a. the Arbitrator exceeded his jurisdiction by amending or purporting to amend the Labourers' Collective Agreement contrary to art. 15.10 of the Labourer's Collective Agreement and s. 142 of the *Labour Relations Code*;

b. the Arbitrator exceeded his jurisdiction by creating the acquisition and revocation of bargaining rights in a manner contrary to the *Labour Relations Code*;

c. the Arbitrator exceeded his jurisdiction when he failed to apply the required criteria, or alternatively committed a patently unreasonable error of law;

d. the Arbitrator's decision is patently unreasonable because he failed to give sufficient weight to the Labourers' Collective Agreement;

e. the Arbitrator's decision is patently unreasonable because his conclusion is inconsistent with his findings of fact;

f. the Arbitrator's decision is patently unreasonable because he failed to overturn the decision of the Umpire of the Alberta Plan which was plainly wrong.

ANALYSIS

[30] The Arbitrator and the Canadian Plan in explaining practices and procedures relating to the matters in issue submitted that:

a. it is inappropriate to scrutinize awards from plan arbitrators under standards more appropriate to judicial decisions;

b. arbitrators are nationally chosen respected experts drawn from the building trades;

c. arbitrators are not lawyers or judges; and

d. to require extensive and detailed rulings would undermine the system's ability to provide speedy and expert resolution to jurisdictional disputes.

[31] In the ***Spantec*** judicial review decision ((2000), 274 A.R. 267 (Q.B.)) Acton. J. of this court noted that the Canadian Plan provides specifically for an expeditious process on appeals stating at paragraph 13:

> ...Under the Canadian Plan, arbitration must be requested within 5 days from the date the matter was referred by the Administrator; the parties must indicate their Arbitrator preferences within 3 days; once the Arbitrator is selected the Administrator must set and hold a hearing within 7 days; and the Arbitrator must issue his decision within 3 days after the close of the case. These very short time lines reflect the importance of avoiding costly work interruptions in labour relations, and, in particular, in the construction industry.

[32] I accept the submission of the Arbitrator and the Canadian Plan that the Court must be cautious when scrutinizing the reasons of specialized lay decision makers.

a. *Ju*

[33] In ***Starson*** **v.** ***Swayze***, 2003 SCC 32, [2003] S.C.J. No. 33 (QL), the majority stated at para. 83:

> The accepted approach to judicial review was established in ***U.E.S., Local 298*** **v.** ***Bibeault***, [1988] 2 S.C.R. 1048, and expanded upon in ***Canada (Director of Investigation and Research)*** **v.** ***Southam Inc.***, [1997] 1 S.C.R. 748, and ***Pushpanathan*** **v.** ***Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982. In summary, the Court has adopted a pragmatic and functional approach that supplants the earlier jurisdictional approach: see ***Dr. Q*** **v.** ***College of Physicians and Surgeons of British Columbia***, 2003 SCC 19, at para. 21.

Therefore, parties and the courts must be cautious not to brand as "jurisdictional", alleged errors which are properly subject to the pragmatic and functional analysis.

[34] The Alberta Plan, Article VI, Procedures provides in part:

> 1. When the Umpire has received, through the Administrator, a protest of work assignment from a Union, or a request for a decision from a Contractor, the Umpire shall proceed to make a decision as follows:
>
> ...
>
> (k) In rendering his decision, the Umpire shall determine first whether a previous Decision of Record and/or Agreement of record governs. If no such Decision or Agreement applies he shall then consider whether there is an applicable agreement between the disputing Unions governing the case. If no such Agreement is in effect, the Umpire shall consider established trade practice, prevailing practice, together with a reasonable acceptance of considerations for efficiency, safety, good management and a desire by all Parties to eliminate excessive allocation of manpower. (See the attached Letters of Understanding).

[35] Article V, section 8 of the Canadian Plan sets out similar criteria.

[36] The Decision of the Umpire under the heading "Findings" states in part:

> All parties provided the Umpire with extensive evidence both written and oral. In reviewing it, I have endeavoured to consolidate and avoid repetition while ensuring that the major arguments are presented. Much hearsay evidence has been left unrecorded.

I see no point in restricting the application of this decision to one job. There is nothing unique in the evidence that would prevent its general application in Alberta.

There is no Decision of Record or Agreement of Record applicable to scaffold tending. The April 28, 1920 Decision of Record awards self-supporting scaffolds and specially designed scaffolds to the Carpenters.

There is no local area agreement between the Unions governing the work.

The Labourers have performed scaffold tending safely and efficiently in Alberta.

The Carpenters have performed scaffold tending safely and efficiently in Alberta.

Neither Union has established exclusive jurisdiction over the work of scaffold tending.

Scaffold erection/dismantling in Alberta is the work of the Carpenters. It is logical that Carpenter apprentices should perform work of groundsman or tender in order to gain experience before working in elevated positions. I see no reason why this position is singled out rather than being made an integral part of the scaffold erection crew.

[37] Article 4.01 of the Collective Agreement of the Labourers which deals with trade jurisdiction states:

This agreement covers the rate of pay, rules and working conditions for all Labourers and Labour Foremen engaged on work coming within the scope of Registration Certificate #57 including the tending of all crafts, and such work as has traditionally, historically or by area practice been the work of the Labourer.

[38] Article 4.05 of the Collective Agreement of the Carpenters states:

This Collective Agreement shall apply to all work falling within the Trade Jurisdiction of the Carpenters which, for the purposes of this Collective Agreement, shall coincide with the Trade Jurisdiction set out in Registration Certificate #51, and shall include but not be limited to all those employees who are engaged in (1) forming; (2) framing; (3) sheathing; (4) hoarding; (5) temporary building; (6) installation of millwork; (7) wood walls; (8) doors and windows; (9) movable partitions; (10) scaffolding; and (11) signaling and rigging carpenters material including

precast concrete and precast concrete tilt-up; and for whom the Union has the right of collective bargaining.

[39] Registration Certificate #51 provides that the Employers' Organization is registered for collective bargaining with the Carpenters' Union "for the Carpenters Trade Jurisdiction comprising all carpentry construction work" and Certificate #57 provides that the Employers' Organization is registered for collective bargaining with the Labourers' Union "for the Labourers Trade comprising all labouring construction work".

[40] The Labourers' Union abandoned its first ground of review, conceding that the adjudicators under the Canadian Plan although called arbitrators, are not collective agreement arbitrators within the meaning of s. 142 of the *Code* and that jurisdictional disputes are not arbitrable matters.

[41] The Labourers' Union further conceded that the Umpire followed the procedure as set out in Article VI paragraph 1(k) of the Alberta Plan and acknowledged that he was correct in finding there were no Decisions or Agreements of Record or an applicable agreement between the disputing Unions governing the case.

[42] Using a baseball analogy, the Labourers' Union stated that an umpire in baseball must operate within the rules of the game, but cannot change the rules and that while he can call balls or strikes he cannot determine how many balls constitute a walk or strikes constitute an out. The Labourers Union submitted that the Umpire of the Alberta Plan went outside his jurisdiction by going outside the above procedure and altering the collective agreements. It was further submitted that although legislation in other Canadian jurisdictions such as Ontario specifically permits such amendments of collective bargaining agreements there is no analogous legislation in Alberta.

[43] Paragraph 1(k) of Article VI of the Alberta Plan which deals with the procedure to be followed by the Umpire does not make reference to collective agreements nor does it contain a requirement that the Umpire consider collective agreements.

[44] The position of the Labourers' Union when reduced to its simplest point seems to be that the reference to "tending of all crafts" in its Collective Agreement is determinative of the issue and that the Umpire exceeded his jurisdiction by amending or purporting to amend the Collective Agreement.

[45] It is apparent however that while work in the construction industry is organized on trade lines, the assignments of work to any particular trade can be a contentious issue where one trade asserts its authority to perform work over that of another. The Labourers' Union submitted that "scaffold tending" can be defined simply as helping a scaffold builder by supplying the scaffold components. It is logical that the term "scaffolding" would necessarily encompass some degree of "tending". The "scope of work" or "jurisdictions" claimed by various building trades are clearly not water tight distinct compartments that can be separated by "bright-line tests". The Umpire recognized this fact noting in his

reasons that both the Labourers and the Carpenters have performed scaffold tending safely and efficiently in Alberta and further that neither Union has established exclusive jurisdiction over the work of scaffold tending.

[46] It follows that in virtually every jurisdictional dispute both unions can say to the employer that if it gives the work to the other union it will be in breach of the collective agreement. It is for this reason that the Alberta Plan and Canadian Plan were established.

[47] I find on the basis of the information before me that scaffold tending falls within the scope of work of both Collective Agreements.

[48] Therefore, I find in these circumstances that neither the Umpire nor the Arbitrator exceeded his jurisdiction and accordingly the application of the Labourers' Union on this ground is dismissed.

b. Patently Unreasonable

[49] The parties were in agreement that the test on judicial review with respect to the Arbitrator's decision is whether or not it was patently unreasonable.

[50] There have been a number of jurisdictional disputes between labourers' unions and carpenters' unions. The parties cited ***Ecodine Ltd.***, [1997] O.L.R.D. No. 1169, ***BFC Industrial - Nicholls Radtke Ltd.***, [1998] O.L.R.D. No. 429, ***Aluma Systems Canada Inc.***, [1999] O.L.R.D. No. 785 and ***Doug Chalmers Construction Ltd.***, [2003] O.L.R.D. No. 876 (***"Chalmers"***).

[51] In ***Chalmers*** the Ontario Board considered a similar dispute between the labourers' union and the carpenters' union. The decision represents an evolution of the Board's analysis of the issue. The Board stated the following:

> [para5] In the end, what was most compelling to the Board is the impact systems scaffold has had on the industry, particularly in petrochemical applications; the unique work practices that Chalmers has implemented since its inception; and the scale of Chalmers' operation, with the result that its practices effectively determine the area practice in Lambton County.
>
> ...
>
> [para9] Mr. Brinegar disagreed with the assertion that erecting and dismantling systems scaffold demands less skill than working with tube and clamp. He testified that the most critical skill is knowing what pieces to use in what application and determining the appropriate number of horizontals and braces required to support a safe work platform. He described the scaffold constructed in petrochemical plants as complex structures, whose patterns of pieces have to be carefully planned. Mr. Brinegar also testified that the person handing up must be as knowledgeable as those actually erecting in order to anticipate what pieces will next be needed.

He asserted that a lack of skill on the ground will slow the erection, thus diminishing labour cost savings.

[para10] Perhaps most significant for the issues before the Board in this case is how systems scaffold is transported from a yard to a stockpile to the point of erection. Systems scaffold is delivered from the manufacturer in racks and bins, with like parts housed together. These racks are designed to be loaded and unloaded from flat bed trucks by tow motors. The stockpile does not look like it used to.

...

[para41] The efficiency of system scaffolding is achieved through reduced labour time in erection and dismantling. I am satisfied from the evidence that the person handing up or tying on must be as knowledgeable as the builders about what is required at each stage, or those efficiencies are lost. The person handing up must understand how the scaffold will ultimately be configured and what number of horizontals and braces are necessary to create and support a safe work platform. The Carpenters enjoy a great advantage, because they erect and dismantle scaffolds. They have both the training and, more significantly, the experience in how to build systems scaffold safely and efficiently. I see no basis on which to revisit the Board's decision to distinguish between "trade tending" and "general tending" and conclude that only "general tending" could be claimed by the Labourers.

...

[para52] While the Labourers hold work jurisdiction that permits them to share in the general tending work with carpenters, when the elements of economy, efficiency and employer preference are factored in, there is not enough work for the Board to make a direction that would require Chalmers to regularly employ labourers to tend carpenters. I therefore decline to make any order requiring Chalmers to assign construction labourers to tend carpenters engaged in the erection or dismantling of scaffolding. I see no reason to disturb the work assignment made by Chalmers.

[52] Despite the existence of different legislative frameworks applicable in Ontario and Alberta as was pointed out by the Labourers' Union, the excerpts from the above case are helpful in the context of considering the reasonableness of the Umpire's decision. In this case it is my view that the Umpire followed the procedure as set out in Article VI of the Alberta Plan. In particular he made the following findings:

The Labourers have performed scaffold tending safely and efficiently in Alberta.

The Carpenters have performed scaffold tending safely and efficiently in Alberta.

Neither Union has established exclusive jurisdiction over the work of scaffold tending.

> Scaffold erection/dismantling in Alberta is the work of the Carpenters. It is logical that Carpenter apprentices should perform work of groundsman or tender in order to gain experience before working in elevated positions. I see no reason why this position is singled out rather than being made an integral part of the scaffold erection crew.

[53] The Umpire considered the evidence and arrived at a decision. There is nothing in his decision which in my view can be considered to be patently unreasonable.

[54] The Arbitrator's reasons are given in the context of an appeal, which he dismissed. He expressly concurred with the Umpire's reasons. Accordingly his decision cannot be described as patently unreasonable.

[55] The Application of the Labourers' Union on this ground is dismissed.

CONCLUSION

[56] The above conclusions can be summarized as follows:

- this Court has jurisdiction to hear the judicial review application in this matter

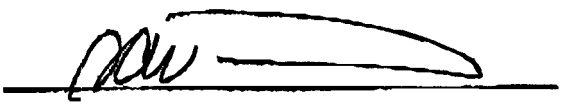
- the limitation period for bringing this judicial review application is 6 months pursuant to Rule 753.11(1) of the Alberta Rules of Court

- neither the Umpire nor the Arbitrator exceeded his jurisdiction

- there is nothing in the Umpire's decision which can be considered to be patently unreasonable

- the Arbitrator's decision cannot be described as patently unreasonable.

Heard on the 17th day of December, 2003.
Dated at the City of Edmonton, Alberta this 23rd day of December, 2003.



Gerald A. Verville
J.C.Q.B.A.

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