Cite as: International Union of Operating Engineers, Local 721 v. Municipal Contracting Ltd., 1989 NSCA 5

S.C.A. 01997

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S., Hart, Macdonald, Matthews and Chipman, JJ.A.

BETWEEN:

THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 721, and WILLIAM H. KYDD,

Appellants

- and -

MUNICIPAL CONTRACTING LIMITED,

Respondent

R.A. Pink and
G.N. Forsyth,
for the appellants

G.M. Mitchell, Q.C. and
Mr. T.P. Donovan,
for the respondent

A. Scott,
for the Intervenor

Appeal Heard:
March 30, 1989

Judgment Delivered:
May 17, 1989

BY THE COURT: Appeal allowed and cross-appeal dismissed and award of arbitrator restored per reasons for judgment of Clarke, C.J.N.S., Hart, Macdonald, Matthews and Chipman, JJ.A. concurring.

CLARKE, C.J.N.S.:

This appeal concerns the statutory procedure provided for the arbitration of grievances in the construction industry in Nova Scotia as set forth in the **Trade Union Act**, S.N.S. 1972, c. 19. It raises the issues whether under s. 103 (7) an arbitrator is required to grant an adjournment to one party in the face of the statutory time constraints imposed by the Act and also whether the subsection is unconstitutional because it violates s. 15 (1) of the **Canadian Charter of Rights and Freedoms.**

Section 103 (7) states:

> The decision of the arbitrator shall be rendered within forty-eight hours of the time of appointment unless an extension is agreed upon by the parties.

The appeal is from the decision of Mr. Justice Davison of the Trial Division who on June 29, 1988 granted the application of the respondent (Municipal) and issued an order in the nature of certiorari to quash the decision of an arbitrator appointed pursuant to the Act.

It is appropriate to begin with a brief overview of the Act. It is divided into two parts. The first contains the longstanding provisions, amended from time to time, that began with the first Trade Union Act in Nova Scotia concerning unionized labour and management relations. It recognizes the role of the arbitrator, or arbitration board, in the settlement of grievance disputes, whether appointed consensually or pursuant to the Act. Where a collective agreement does not provide for arbitration, the Act imposes an

arbitration clause and makes provision for the appointment of an arbitrator if the parties are unable to agree. The bulk of Part I arbitrations arise from the last step grievance provisions in collective agreements and are therefore consensual. Section 41 (1) is in Part I of the Act and provides:

> 41 (1) An arbitrator, or an arbitration board, appointed pursuant to this Act or to a collective agreement:
>
> (a) shall determine his or its own procedure, but shall give full opportunity to the parties to the proceedings to present evidence and make submissions to him or it;
>
> ...
>
> (c) has power to determine any question as to whether a matter referred to him or it is arbitrable;
>
> ...

During the mid-1960s the province became engulfed in a series of disputes in the construction industry which threatened the economic stability of various areas of the province in particular and to some extent, the province in general. In 1967 Mr. I.M. MacKeigan, Q.C. (later Chief Justice of Nova Scotia) was commissioned to inquire into these problems with special emphasis upon the difficulties which were delaying and disrupting the construction of the Deuterium Heavy Water Plant at Glace Bay. He recommended, among others, that separate statutory recognition be given to the construction industry in Nova Scotia and, vital to the issues that prompt this appeal, that a process of "speedy arbitration" to resolve disputes be imposed upon unions and employers. As a result the

Legislature enacted a separate certification procedure for the construction industry. Hence the beginning of Part II designed to apply only to the construction industry. The recommendation for "speedy arbitration" was not implemented at that time.

The problems that made for disputes among the construction trades continued, including jurisdictional disputes over work and rights, employment of non-union labour and related matters. Wildcats, strikes and lockouts were frequent and regular occurrences. This led to the appointment of the late Professor H.D. Woods of McGill to investigate the deteriorating situation. He concluded, as had Commissioner MacKeigan, that the traditional (Part I) method of resolving disputes was inadequate to serve the special circumstances that had developed in the construction industry in Nova Scotia.

Professor Woods recommended, at pages 101-102 of his report, that the construction industry in Nova Scotia required a separate and special system for the resolution of its grievance disputes and more particularly, one that would,

> (a) be available from the moment the collective agreement comes into force;
>
> (b) be available to employees through the union for the resolution of grievance disputes unresolved at any step in the grievance procedure;
>
> (c) be available to the union to deal with allegations that the employer or employers' organization (whichever is signatory to the agreement) has violated the rights of the union under the agreement;
>
> (d) be available to the employer or employers' association (whichever is signatory to the agreement) to deal with allegations that the union has violated the rights of the employer under the agreement;

(e) provide for rapid hearings conducted with the minimum resort to legalism consistent with the protection of natural justice;

(f) produce an award in the shortest possible time in which the arbitrator gives his ruling on the issue or issues placed before him and order the parties to do, or refrain from doing, whatever is necessary to protect the parties in their rights under the agreement. In carrying out this responsibility the arbitrator should be free, where appropriate, to vary a penalty, to award damages to an employee, an employer, and the union, and to do whatever else is necessary to meet his responsibilities under the agreement.

It was in response to these recommendations that the **Trade Union Act** was amended by S.N.S. 1970-71, c. 5, to provide for an accelerated arbitration procedure in the constructon industry. The Act was further amended and consolidated in 1972 by c. 19. It is from this brief historical backdrop that Part II entitled **Construction Industry Labour Relations** achieved its legislative birth and statutory existence.

While subsection 7 of section 103 of Part II is at the heart of this appeal, it will be helpful to the reader to set forth all of s. 103 by way of providing an insight to the response the Legislature made to the recommendations of Professor Woods.

Arbitration

103 (1) Notwithstanding Sections 39 and 40 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

(a) the interpretation, meaning, application or administration of the collective agreement or any provision of the collective agreement;

(b) a violation or an allegation of a violation of the collective agreement;

(c) working conditions; or

(d) a question whether a matter is arbitrable,

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.

Before Strike Position after Agreement Expires

(2) Where a dispute or difference arises between the parties to a collective agreement to which this Section applies during the period from the date of its termination to the date the requirements of Section 102 have been met, this Section applies to the settlement of the dispute or difference.

Time Limit to Agree on Appointment of Arbitrator

(3) When a dispute or difference arises which the parties are unable to resolve, the parties to the dispute or difference shall agree by midnight of the day on which the dispute or difference arises upon the appointment of a single arbitrator to arbitrate the dispute or difference.

Failure to Comply with Subsection (3)

(4) When one of the parties advises the Minister that a dispute or difference has arisen and that the parties to the dispute or difference have failed to comply with subsection (3), the Minister may appoint an arbitrator.

Appointment of Arbitrator by Minister

(5) Notwithstanding any provision of this Section, the Minister may, with the written consent of the employer and the trade union or unions representing the employees who are represented by a trade union, appoint a person to be the arbitrator for the purpose of this Section for the term of the collective agreement or for the term mentioned in the appointment and the provisions of subsections (3) and (4) shall not apply.

Powers of Arbitrator

(6) The arbitrator appointed pursuant to this Section has the powers conferred by Section 41 and, without restricting his power and authority, his decision shall be an order and may require

(a) compliance with the collective agreement in the manner stipulated;

(b) reinstatement of an employee in the case of a dismissal or suspension in lieu of dismissal with or without compensation.

Time Limit for Rendering Decision of Arbitrator

(7) The decision of the arbitrator shall be rendered within forty-eight hours of the time of appointment unless an extension is agreed upon by the parties.

Parties Bound by Decision of Arbitrator

(8) The parties to the dispute or difference shall be bound by the decision of the arbitrator from the time the decision is rendered and shall abide by and carry out any requirement contained in the decision.

Reporting of Decision

(9) An arbitrator appointed pursuant to the provisions of this Section who renders a decision in respect of a dispute or difference shall make a report and shall transmit the report to the Minister and to the parties.

Fees and Expenses of Arbitrator

(1) One third of the fees of, and the expenses incurred by, an arbitrator appointed under the provisions of this Section shall be paid by each of the Minister and the employer or the employers' organization and trade union that are parties to the collective agreement in accordance with a scale of fees and expenses approved by the Minister.

Section 103 has continued since 1972 without amendment. During the intervening period a multitude of grievances in the construction industry have been expedited to final resolution.

The appellant (Union) is the certified bargaining agent for the employees who are employed as operating engineers by the respondent (Municipal). This results from a collective agreement entered between the Union and the Construction Management Labour Relations Bureau, of which the respondent is a member.

In 1976 the Construction Industry Panel of the Labour Relations Board issued an accreditation order whereby the Bureau was authorized to negotiate collective agreements on behalf of its unionized employer members in the industrial and commercial sector of the construction industry. No collective agreement exists between the Union and Municipal for other sectors in the construction industry which, under the Act, include housebuilding, sewers, tunnels and water mains, and roadbuilding.

During the latter part of 1987 the Union alleged Municipal was employing non-union employees at some of its jobs, contrary to the hiring provisions of the collective agreement. The Union filed four grievances on the following dates concerning the work being performed by Municipal at four locations.

August 24, 1987	-	School for the Blind, Halifax
August 26, 1987	-	Volvo Plant, Halifax
October 20, 1987	-	Bayers Road Shopping Centre, Halifax
November 5,1987	-	Litton Plant, Halifax County Industrial Park

On each occasion, and on the day of the delivery of each grievance, the Union business agent, Estabrooks, discussed the grievance with the comptroller of Municipal, Widmeyer. On each occasion they were unable to agree upon the settlement of the grievance or upon the appointment of an arbitrator. Estabrooks deposes that he informed Widmeyer that he would be requesting the Minister of Labour to appoint an arbitrator.

By November 9, 1987 these grievances had not yet gone to arbitration and the Union requested the Minister of Labour to appoint a Section 103 arbitrator and further indicated to the Minister that the Union did not wish to waive the forty-eight hours time limit provided by s. 103 (7). Thereupon Mr. P. F. Langlois, the Assistant to the Deputy Minister of Labour, communicated with Mr. Widmeyer of Municipal. Mr. Langlois deposes by his affidavit:

> I contacted Gary Widmeyer, Comptroller of Municipal Contracting Limited, sometime between November 10, 1987 and November 17, 1987 regarding the Respondent's application. I discussed the nature of the request made and asked whether Mr. Widmeyer wanted me to contact the company's solicitor before an arbitrator was appointed. Mr. Widmeyer advised that it was not necessary for me to do so.

On November 18, 1987 the Minister appointed Arbitrator W.H. Kydd, Q.C. to hear all four grievances and both parties were notified accordingly. Arbitrator Kydd commenced a hearing on November 19, 1987.

At the beginning of the arbitration hearing, counsel of Municipal made a preliminary motion asking that the proceeding be adjourned because she claimed the issues in these grievances would

be resolved by another arbitration proceeding between the parties scheduled to be heard in February 1988. She advanced other reasons including that the grievances lacked any degree of urgency, the whole matter had been sprung on her when she first heard of it the day before as a result of a telegram from the Labour Department, the usual solicitor for Municipal was out of the province, and she lacked time to prepare both the case and the employer's witnesses. She argued that to fail to grant an adjournment under these circumstances would amount to a flagrant abuse of s. 103 and the principles of natural justice. She submitted that s. 103 (7) of Part II was in conflict with s. 41 (1) (a) of Part I and that the time required for a full hearing took precedence over the obligation to render a decision within forty-eight hours. She also argued that s. 103 (7) was in violation of ss. 7 and 15 of the **Charter** and therefore unconstitutional.

Counsel of the Union refused to agree to an adjournment. He submitted that s. 103 was to be followed.

After considering the submissions of both parties, Arbitrator Kydd concluded that the provisions of s. 103 (7) were to be observed and that absent "an extension agreed upon by the parties", the arbitration would go forward. He refused to grant the preliminary motion made by counsel of Municipal.

Arbitrator Kydd said:

> The Employer's position in this case is that it would take much longer than the time available to call all of her witnesses and that she was not being unreasonable in contemplating the length of her evidence, considering the estimates given

by the Union as to the amount of time it required to present its case both before the construction industry panel and before Mr. MacDougall. I agree with her submission that her time estimate is reasonable if there were no time limits, considering the Union's position on the earlier hearings. The essential difference however is that both parties had the normal right to take as much time as they wanted within the bounds of relevancy, in hearings before the Panel and Mr. MacDougall (before whom the parties had waived the time limit). Where there is a time limit however there is no such right and the parties have to select their evidence and plan its preparation accordingly. In addition I note that when the same issue was heard in the arbitration before Judge MacLellan, although both parties agreed to waive the time limits under the provisions of Section 103, the hearing was completed in one day.

Aside from the Employer's desire to call many witnesses and present a very comprehensive amount of evidence, there was no reason advanced by her why she could not present a more consolidated type of case. There was no suggestion by her that any of the knowledgeable people employed by Municipal were not available. Her main point indeed was that she knew nothing about the four grievances because of the time span between the time she received notice and the time of the hearing. In this case, she received notice of the hearing over twenty-four hours prior to its commencement and therefore had as much or more notice than would normally be the case in a Section 103 hearing. Aside from the comprehensive plans made by both sides to have a wide ranging hearing before the Construction Industry Panel and Mr. MacDougall, I see nothing to distinguish this case with its one issue, from any of the other arbitrations heard under Section 103. Virtually all of these arbitrations require counsel to quickly be briefed, and round up those witnesses who are available who can best present their side in a concise summary way.

The fact that there is another pending arbitration hearing before Mr. MacDougall dealing with the same issue would be very persuasive to me as a reason for granting an adjournment to save time and expense to the parties because I think on the balance of convenience such an adjournment makes sense. However, again Section 103 (7) does not give me the discretion to grant such an adjournment in the absence of an agreement by both parties.

After making his ruling on the preliminary motion, the arbitrator asked counsel of the Union to call his first witness. Thereupon counsel of Municipal informed the arbitrator she would

not be attending the remainder of the arbitration proceeding and she and her associate left the hearing room and did not return.

The arbitrator continued with the hearing and heard the evidence of the witnesses of the Union and the submissions of its counsel. He rendered an oral decision at 8:05 o'clock in the evening of November 19, 1987 in which he found the four grievances succeeded. He awarded the Union damages which totalled $ 84,433.90. Arbitrator Kydd subsequently filed thirty-four pages of written reasons on November 27, 1987.

Municipal applied to the Trial Division for an order in the nature of certiorari to quash the award of the arbitrator. The Attorney General of Nova Scotia intervened, as he did in this appeal, to support the jurisdiction of the arbitrator and the manner by which he exercised it.

The trial judge decided that the arbitrator "did not commit an error of law by failing to specify in precise language a finding that the work being done at the four sites was commercial and industrial work". That finding became an issue in the cross-appeal but it was abandoned before the hearing of the appeal.

Mr. Justice Davison concluded that s. 103 (7) of the Act is consistent with s. 15 of the **Charter** and that no **Charter** violation resulted. However he found that the arbitrator erred in law in considering s. 103 (7) to be a mandatory provision rather than directory. The trial judge concluded the arbitrator had been unfair in failing to grant an adjournment in the circumstances and that the arbitrator

was entitled to transport the discretion given Part I arbitrators by s. 41 (1) (a) and (c) to Part II arbitrators under s. 103 (7). He granted certiorari and quashed the decision of the arbitrator.

The Union appeals from the decision of Mr. Justice Davison on the ground that he erred in law in quashing the decision of Arbitrator Kydd. Municipal cross-appeals on the ground that the trial judge erred in law in concluding that s. 103 (7) of the Act was valid under the **Constitution.** The Attorney General, as Intervenor, contends that the arbitrator was right in all respects.

It is well established that the courts have adopted a policy of curial deference toward the decisions and awards of arbitration boards and labour relations tribunals. They function in a specialized field that requires the prompt and effective resolution of disputes.

In **Blanchard v. Control Data Canada Ltd. et al** (1984), 14 D.L.R. (4th) 289 (S.C.C.) Mr. Justice Lamer stated at p. 307:

> The court will only intervene if it is persuaded that the arbitrator made an unreasonable award. In coming to such a conclusion, the courts should always be mindful of the fact that an arbitrator is in a far better position to assess the impact of the award. It needs to be said again that administrative tribunals exist to provide solutions to disputes that can be best solved by a decision-making process other than that available in the courts. Often, too, the administrative "judge" is better trained and better informed on the area of his jurisdiction, and has access to information which more often than not does not find its way into the record submitted to the court. To this must be added the fact that the arbitrator saw and heard the parties.

In **British Columbia Telephone Company** v. **Telecommunication Workers Union,** [1985] 6 W.W.R. 214, Mr. Justice Lambert of the British Columbia Court of Appeal, wrote at p. 228:

> The basis for the principle of curial deference is that there is a dynamic in the resolution of a labour dispute that requires that the dispute be resolved by a process that commands the respect of all the parties. It is the adherance of the parties to the process that causes them to accept the results. A result that is seen as being forced on one or the other party by the law or by the courts may be perfectly satisfactory for a static relationship, where the parties do not have to live together, day in, day out. But where the parties have been intertwined in the past, are entangled in the present, and are going to be bound together in the future, it is essential that they consent to and trust the process that adjusts their differences. If they want the job to be done by a single arbitrator under exceptionally wide terms, then, in my opinion, the courts should be very reluctant indeed to intervene, because to do so does not only affect that particular dispute; it undermines the process by which the parties adjust all their differences. That, I think, is the principle to be derived from the decisions of the Supreme Court of Canada in **Zeller's (West.) Ltd. v. Retailers, etc. Union** and **Douglas Aircraft Co. of Can. v. McConnell.**

This decision was affirmed by the Supreme Court of Canada on appeal on December 8, 1988 ((1988), 88 N.R. 260).

The right of judicial intervention remains, however, where the arbitrator commits jurisdictional error and denies the parties the fairness that is fundamental to natural justice.

The arbitrator, and the trial judge, made reference to the decision of this court in **Yorkdale Drywall Ltd. v. United Brotherhood of Carpenters & Joiners of America, Local 83** (1987), 79 N.S.R. (2d) 444. That case involved an award made by an arbitrator under s. 103 and raised the issue whether the statute superseded certain provisions in the collective agreement. In finding that it did, the court said of s. 103 at p. 447:

> When "any dispute or difference" arises between the parties, s. 103 provides the procedure to be followed in bringing about a final settlement. In this way the Legislature has imposed s. 103 on the collective agreements in the construction industry in this province. Counsel of both the appellant and respondents

say that it has been effective as a means of providing quick settlements in troublesome situations.

...

The Legislature, by adopting s. 103, implemented a new regime for the handling of disputes and differences in the construction industry "notwithstanding ... any provision in a collective agreement" (s. 103 (1)). In this case the filing of the two grievances by the Union signalled the existence of a dispute or difference and immediately triggered the provisions of s. 103 (1) and (3). If the parties were unable to resolve the disputes or differences by midnight of the day they arose, they were obliged by statute to agree upon the appointment of an arbitrator. If they failed, then the Minister of Labour, upon being notified by one of the parties of the existence of the dispute, had the authority to appoint an arbitrator (s. 103 (4)). The arbitrator, whether appointed by the parties or the Minister, is then possessed of the powers granted by s. 103 (6) and may require "compliance with the collective agreement in the manner stipulated". In this way the Legislature imposed a procedure for the resolution of differences and disputes in the construction industry, notwithstanding that the parties may have settled upon other procedures in their collective agreement. Where any conflict exists between the provisions of the collective agreement and s. 103 of the Act, s. 103 is deemed to prevail.

...

Grievance is a traditional term used in labour relations to describe a dispute or a difference. A grievance is a complaint in search of a resolution. The process intended by s. 103 is to get to the heart of the issue quickly. In this way it eliminates the intervening and time consuming steps that appear in many collective agreements and therein described as the grievance procedure. Section 103 short cuts the process and moves a dispute or difference straight through to the last step. The dispute or difference is submitted to final arbitration "in substitution for any arbitration or arbitration procedure provided for in the collective agreement" (s. 103 (1)). It is unnecessary therefore to place either weight or concern upon the fact a collective agreement in the construction industry contains a grievance or abritration procedure. Simply put, it is a process designed by the Legislature and imposed by it upon parties to collective agreements in the construction industry.

The respondent, Municipal, asserts that Arbitrator Kydd had no right to refuse the adjournment to its counsel and to do so violated a fundamental principle of natural justice.

Natural justice is not a difficult or complicated concept. In Reid and David, **Administrative Law and Practice**, Second Edition, the authors state at p. 213:

> Natural justice is a simple concept that may be defined completely in simple terms: natural justice is fair play, nothing more.

Natural justice requires that a party be made aware of the case against him and be given an opportunity to respond (see **Nicholson v. Haldimand-Norfolk Regional Board of Commisisoners of Police**, [1979] 1 S.C.R. 311; **Scott et al v. Rent Review Commission** (1977), 23 N.S.R. (2d) 504). It is interesting to note that although the rule of **audi alteram partem** does not always require a hearing, it does require that the parties be given an opportunity to make their submissions. Such was stated by Fauteux, J. of the Supreme Court of Canada in **Quebec Labour Relations Board v. Canadian Ingersoll Rand Co. Ltd. et al.** (1969), 1 D.L.R. (3d) 417 at p. 422:

> But, as this Court has recently held in the unreported decision of **R. v. Quebec Labour Relations Board, Ex p. Komo Construction Inc.** [since reported, ante, p. 125, [1968] S.C.R. 172], the **audi alteram partem** rule does not require that there must always be a hearing. What is required is that the parties be given an opportunity to put forward their arguments.

Mr. Justice Davison considered Municipal had been treated unfairly by the arbitrator and that by denying the adjournment, the rules of natural justice were offended. In his reasons for judgment he said:

> I confess that I have sympathy for the position of the Applicant. If s. 103 (7) does operate to permit one party to a dispute to clandestinely prepare its case and then "spring" the arbitration process on the other side, it is my opinion that

> the result is manifestly unfair regardless of whether or not a party is required to present a comprehensive or a condensed case. It often requires more time to prepare, in a proper fashion, a condensed case than it does a comprehensive case.

Sympathy for the position counsel of Municipal found herself in these proceedings in understandable. However, the same cannot be said for her client, Municipal. Municipal was not a novice in the field of s. 103 expedited arbitrations. The record reveals that a few months earlier it had been involved in a dispute with the same union concerning a similar issue before Arbitrator MacLellan who heard and disposed of the grievance within the forty-eight hours time limit. In the cases of the grievances before Arbitrator Kydd, Municipal knew of each grievance on the day it arose and depending on the grievance that was months in the case of some, and weeks in the case of others, before November 1987. It knew the merits of each grievance as each was filed. Its comptroller had preliminary discussions with the Union agent. On each occasion it declined to agree upon the choice of an arbitrator. Municipal knew the Minister of Labour had the authority to appoint an arbitrator under Part II of the Act without further consultation. Apparently at no time did Municipal avail itself of the opportunity to discuss any or all of these pending arbitrations with its counsel until the Minister appointed Arbitrator Kydd.

Further, in November 1987, Municipal had several days notice from Mr. Langlois that the Minister was about to appoint an arbitrator to deal with these four grievances. Mr. Langlois apparently

included the somewhat generous offer to discuss the pending appointment with Municipal's counsel. Municipal declined and it becomes obvious from the record that Municipal did not consult its counsel until the Minister finally made the appointment and thereby engaged the s. 103 process. While counsel of Municipal may have been placed in an awkward position, the same cannot be said for her client. And it was Municipal, and not its counsel, who was a party to the proceedings. It can hardly be said the process was sprung on Municipal.

It is necessary to return to the scheme of the legislation to assess whether Municipal was denied natural justice. Arbitrator Kydd sought to obtain the agreement of the parties to extend the time within which he was obliged by s. 103 (7) to render a decision. The Union did not agree. The arbitrator then concluded that he was obliged under the Act to proceed and render his decision within forty-eight hours of his appointment. He was aware of the argument Municipal advanced with respect to s. 41 of Part I. The effect of his decision was that s. 41, to which reference is made in s. 103 (6), is modified by s. 103 (7). With this, I agree. The Legislature compressed the time within which the last step of a grievance arising in the construction industry is processed. It does not permit the more leisurely pace of Part I arbitrations. The Legislature has provided for expedited arbitration in the construction industry. This does not mean that the natural justice has been displaced by s. 103. It is still to be observed and applied: there is just less time available in those circumstances where the parties do not agree to extend the time limits available to the arbitrator.

Arbitrator Kydd did not act unfairly toward Municipal, given the circumstances and the constraints of s. 103. Municipal knew the case against it as set forth in the four grievances. There is no suggestion that Municipal's counsel did not understand or appreciate what the issues were. The trial judge characterized the issues as a policy dispute. With respect, whether or not an employer is using non-union labour on a particular construction job in violation of an article in the collective agreement is as specific an issue as one will find in labour relations. For the good of both parties it cannot be left to fester indefinitely. The subject matter of these grievances is an example of the very kind of irritant speedy arbitration in the construction industry was intended to resolve.

Arbitrator Kydd did not refuse Municipal the right to be heard, or to cross-examine witnesses, or to present evidence or to make submissions. It was the voluntary decision of Municipal that it would withdraw from the process and participate in it no longer. The arbitrator was thus left with no other alternative but to proceed.

Arbitrator Kydd concluded that in the circumstances before him, s. 103 (7) did not give him "the discretion to grant such an adjournment in the absence of an agreement by both parties". The trial judge stated at p. 38 of his decision:

> In my opinion, the arbitrator's finding that s. 103 (7) is mandatory is not in accord with the ruling of Chief Justice MacKeigan in **Municipal Spraying and Contracting Limited** v. **International Union of Operating Engineers Local 1721** (1977), 21 N.S.R. (2d) 351 (N.S.S.C.A.D.) at 358 and this constitutes an error in law.

The judgment of Chief Justice MacKeigan, to which the trial judge referred, was in response to an appeal where the issue was whether a section 103 arbitrator had the power to order the reinstatement, with compensation, of two discharged employees. After providing a considered analysis of the law and the fact situation, the Chief Justice, writing for this court, concluded that the power to reinstate is "conferred on labour arbitrators in the construction industry in Nova Scotia by s. 103 (6) of the (Act)". (p. 358)

He went on to refer to s. 103 (1) and then stated at p. 358:

> This section (103 (1)) 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). ...

It was submitted to and accepted by the trial judge and now advanced in argument on this appeal, that Chief Justice MacKeigan's words, "Non-compliance with those directory subsections", are to be interpreted as a ruling by this court that s. 103 (7) is directory.

I am unable to accept the argument for several reasons. The primary reason is that nowhere in the judgment is there an indication that the non-compliance with s-ss. (3) and (7) was in issue before the court or that the outcome of the appeal depended in any way upon the court's judgment in that respect. In the circumstances to which the Chief Justice referred, it would appear that the parties

must have agreed to the extensions or else the court would have had to deal with them in a more substantive manner. There is nothing I can find in the judgment which required the court to decide whether the provisions of s-ss. (3) and (7) are directory or mandatory. Upon it appearing that the case did not require the Chief Justice to make a finding on the point, I would conclude that his words are not to be taken as a ruling by this court that s. 103 (7) is directory. As mentioned earlier in this decision, no person was more fully aware of the need for expedited arbitration in the construction industry than Chief Justice MacKeigan, for it was he who first urged that it be implemented.

The clear and unambiguous language used by the legislators in s. 103 (7) bears repeating:

> The decision of the arbitrator shall be rendered within forty-eight hours of the time of appointment unless an extension is agreed upon by the parties.

It is fair and reasonable that "the parties" can agree upon an extension. Barring such an agreement, the operative words are "shall be rendered". Not only is shall prima facie mandatory, but the Interpretation Act, R.S.N.S. 1967, c. 151, s. 8 (3) provides:

> In an enactment "shall" is imperative and "may" is permissive.

The language of s. 103 (7) is unmistakably mandatory. In addition, its mandatory nature meets the objective of the legislators in overcoming the "mischief" they sought to end. Counsel appearing before this court on this and other occasions have observed that s. 103 has been successful. In requiring the arbitrator (and the parties)

to get on with the process, the legislators have said when it will end. I see nothing wrong with that. The option to do otherwise is available to the parties, but not to one of them.

In my opinion Arbitrator Kydd committed no error in either the interpretation or the exercise of his jurisdiction in refusing the preliminary motion of the respondent for an adjournment and in doing so, no violation of natural justice occurred. I would allow this ground of appeal.

I will next refer to the **Charter** issue raised in Municipal's cross-appeal. It asks the following question:

> Did the learned trial judge err in concluding that section 103 (7) of the **Trade Union Act** does not contravene section 15 of the **Canadian Charter of Rights and Freedoms**?

The respondent submits in its factum:

> Thus, there are two distinct schemes under the **Trade Union Act** - one for the construction industry and one for all other unionized industries. It is the position of the cross-appellant that this legislative singling out of the construction industry contravenes section 15 of the **Charter**. It is submitted that the imposition of two schemes creates an inequality between the construction industry and all other industries and that, in creating this inequality, section 107 (3) discriminates against members of the construction industry.

It is the position of Municipal, on cross-appeal, that the protection afforded by s. 15 of the **Charter** extends to distinctions based on association with a particular industry.

In dealing with the issue of whether s. 103 (7) (of the Act) is inconsistent with s. 15 (1) of the **Charter**, the trial judge embarked upon an analysis as to the proper interpretive approach to be employed when considering s. 15 (1). He stated:

> All of these changes would suggest that the guarantee of equality was to apply to human beings who have been historically treated with discrimination arising from personal characteristics and who have experienced prejudice and stereotyping. The purpose of s. 15 (1) is to guarantee equality for individuals and to invalidate legislation which discriminates against individuals based on the enumerated grounds set forth in the subsection or other grounds akin to the enumerated grounds. The enumerated grounds are personal characteristics of human beings by which they can be identified. Each characteristic has been the object of prejudice in the past.

In making these observations, the trial judge relied upon the decision in **Smith, Kline and French Laboratories** v. **Attorney General of Canada** (1986), 34 D.L.R. (4th) 584 (F.C.). The trial judge continued:

> In my view, the proper interpretation of section 15 of the Charter would preclude the suggestion that legislation which differentiates on the basis of industry constitutes a violation of the equality guarantee.

Mr. Justice Davison went on to apply the "similarly situated test" proposed in **R.** v. **Ertel** (1987), 58 C.R. (3d) 252 (Ont. C.A.). He concluded that Municipal had not satisfied the onus upon it to show a similarity of situation between the construction industry and other industries covered by the Act. He concluded s. 103 (7) of the Act is consistent with s. 15 (1) of the **Charter.**

Municipal makes the following statement in its factum:

> ...it is submitted that the discrimination in the present case is such as would tend, in the minds of a significant number of reasonably-minded people, to bring the Canadian justice system into disrepute. Part II of the Trade Union Act denies members of the construction industry procedural safeguards afforded members of other unionized industries and permits the invocation of the special procedures therein in situations where no reasonable person would consider them justified.

> Consequently, it is respectfully submitted that the learned trial judge erred in excluding the present case from the application of section 15 of the Charter and in rejecting the approach of the Ontario Court of Appeal in R. v. Ertel, supra, ...

In **Andrews v. Law Society of British Columbia,** (1989),91 N.R. 255, the Supreme Court of Canada discussed the application of s. 15 (1) of the **Charter.** It held that legislation which barred an entire class of persons from certain forms of employment solely on the ground of a lack of citizenship status infringed the equality rights provided by s. 15. The majority found that such legislation discriminated against the individual involved on the basis of a personal characteristic akin to those enumerated in s. 15 - this characteristic being one's nationality. Mr. Justice McIntyre, whose analytical approach to s. 15 (1) was adopted by the majority, found that the "similarly situated test" as enunciated in Canadian authorities such as **R. v. Ertel, supra,** was seriously deficient. He stated, at p. 293:

> Thus, mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.

He continued at p. 294:

> ... the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the Charter.

In formulating the proper approach to be followed when considering s. 15 (1) of the **Charter,** Mr. Justice McIntyre wrote at p. 294:

> It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the Charter. It is, of course, obvious that Legislatures may - and to govern effectively - must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main pre-occupations of Legislatures. The classifying of individuals or groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions ...

In reasons concurring with those of the majority, Mr. Justice La Forest stated at p. 269:

> ...I am convinced that it was never intended in enacting section 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society. Like my colleague, I am not prepared to accept that all legislative classifications must be rationally supportable before the court. Much economic and social policy-making is simply beyond the institutional competence of the courts: the role is to protect against incursions on fundamental values, not to second guess policy decisions. (emphasis added)

The majority of the court adopted, from the reasons of Mr. Justice McIntyre, the following definition of discrimination to be applied to a s. 15 (1) analysis:

> ... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. (emphasis added)

Applying **Andrews** to this appeal, s. 103 (7) of the Act does not violate the rights of Municipal as guaranteed by s. 15 of the **Charter**. The protection afforded to individuals under s. 15 prohibits discrimination on the basis of personal characteristics. The enumerated grounds in s. 15 (1) are indicative, but not exclusive, of the characteristics upon which discrimination may be based. Membership in a particular industry, in this case the construction industry, cannot be said to be a personal characteristic as contemplated by s. 15 (1). Though the time limit contained in s. 103 (7) of Part II of the Act causes the respondents to be treated differently from those to which Part I of the Act applies, this does not amount to treatment which transgresses the equality guarantees of s. 15 of the **Charter**. The "speedy arbitration" provisions contained in s. 103 of the Act were enacted by the Legislature as a response to continuing problems which were prevalent in the construction industry. Such action was clearly within the prerogative of the legislators and cannot now be tested by the court.

In written and oral argument on the cross-appeal, counsel for Municipal argued that a person's association with a particular industry is more clearly a "personal characteristic", worthy of s. 15 (1) protection, than that of citizenship which was under consideration in **Andrews**. Counsel contended that a flexible approach to determining the range of situations involving "personal characteristics" must be adopted and that a person's association with a particular group encompasses such a range. This submission, with respect, fails to

recognize the basis upon which the Supreme Court of Canada concluded that citizenship is a personal characteristic akin to those enumerated in s. 15 (1) in **Andrews**. Wilson, J. stated at p. 259 of the decision:

> Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending" ... I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15 ...

In this respect, Mr. Justice La Forest added at p. 271:

> ... Discrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin which are listed in section 15.

Members of the construction industry do not fall within the ambit of a group in society generally lacking in power and "as such vulnerable to having their interests overlooked".

The final decision in **Andrews** had not been rendered when Mr. Justice Davison considered this case at trial. As a result of the Supreme Court of Canada's decision, the trial judge now appears to have erred in adopting the "similarly situated test" described in **Ertel**. However, I agree with his conclusion that s. 103 (7) of the **Trade Union Act** does not contravene the protection afforded pursuant to s. 15 (i) of the **Charter of Rights and Freedoms.**

Conclusion

I would allow the appeal, dismiss the cross-appeal and restore the decision and award of Arbitrator W.H. Kydd, Q.C. I would further award the appellant its costs on the appeal, the cross-appeal and at trial.

C.J.N.S.

Concurred in:

Hart, J.A.

Macdonald, J.A.

Matthews, J.A.

Chipman, J.A.