Date: 20001016
Docket: S.H.163838

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: International Brotherhood of Electrical Workers, Local 625 v. International Brotherhood of Boilermakers, Local 73, 2000 NSSC 96

IN THE MATTER OF: The Trade Union Act of Nova Scotia
and
IN THE MATTER OF: An Application for an Order in the Nature of Certiorari Quashing and Setting Aside the Order of the Labour Relations Board (Construction Industry Panel) of April 19, 2000

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 625

APPLICANT

- and -

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, LOCAL 73, BABCOCK & WILCOX, LABOUR RELATIONS BOARD OF NOVA SCOTIA (Construction Industry Panel), and ATTORNEY GENERAL OF NOVA SCOTIA

RESPONDENTS

D E C I S I O N

HEARD: at Halifax, Nova Scotia, before the Honourable Justice D. Merlin Nunn, on September 26, 2000 (in Chambers)

DECISION: October 17, 2000

COUNSEL: John C. MacPherson, Q.C., for the Applicant
Jamie S. Campbell, for the Respondent

Alex Ikejiani for the Department of Justice
(Labour Relations Board)

NUNN, J:

[1] This is an application to quash and set aside an Order of the Labour Relations Board (Construction Industry Panel) of April 19,, 2000.

[2] On September 10, 1999 the International Brotherhood of Electrical Workers, Local 625 (the IBEW) filed a complaint with the Construction Industry Panel requesting the assignment of certain work to its members. The work in question related to work on a precipitator rebuild at the Kimberly Clarke Abercrombie , Nova Scotia plant. This work had already been assigned by the contractor to the members of the International Brotherhood of Boilermakers Local 73 (the Boilermakers). This was a jurisdictional dispute.

[3] After finding that a jurisdictional dispute existed and that a work stoppage was imminent the Panel issued Interim LRB Order 1984C on September 17 assigning the disputed work to the Boilermakers, except for certain parts of the work which had already been reassigned to the IBEW.

[4] Hearings on the dispute took place on September 27, 28, December 21, 1999 and January 31, 2000. The Panel's final decision was filed April 19, 2000. After the usual recitals indicating the history of the complaint, the documents filed, evidence heard, the representations of the parties and the dates of hearings, the Panel, in its decision, stated:

> "And the Panel having concluded that a past (area) practice had been established for mainland Nova Scotia as described hereafter in the body of this order of the Panel" (the work assigned is later described)

and then awarded the work to the Boilermakers by confirming its earlier Interim Order.

[5] The quotation above is the only part of the Order that gives the Panel's reasons for its decision.

[6] This is a typical order of the Panel in jurisdictional disputes as all those involved in labour relations issues are well aware of both the meaning and significance of the term "past practice" and, in most cases of jurisdictional disputes it is most often the deciding factor.

[7] Not satisfied with this decision counsel for the IBEW, on May 23, 2000 filed the within application. As well, on July 23, 2000 counsel for the IBEW wrote to the Panel requesting it to provide reasons for its earlier decision. The panel on 6 September, 2000 filed exhaustive reasons for its decision, indicating that having found the past practice nothing further needed to be said. However, the Panel proceeded then to cover all the matters raised during the hearings, which it maintains, also formed part of its rationale.

[8] The Panel made two preliminary findings in the course of its written decision.

[9] First it found that "the precipitator was not a wire, conduit apparatus, fixture or other appliance for the carrying or using of electricity for light, heat or power. Instead, in our opinion and we so find, it is an anti-pollution device or piece of equipment that, when fully assembled, is then energized by electricians who install the necessary cables and wires and then energize the previously inert object that had already been assembled. However, in our view until it is assembled, it is simply an enclosed box or shell in which various components made primarily of steel are placed and to which, after assembly the electric cables and connections are made (by electricians)"

[10] The second finding related to the evidence where the Panel indicated the Boilermakers presented credible evidence, documentary and oral, while the IBEW did not produce any witness or documentary evidence to cast doubt on that provided by the Boilermakers and where there was any conflict in the evidence the Panel accepted that of the Boilermakers.

[11] The Panel then found, with supporting reasons, the following:

1. The work itself was a rebuilding of a precipitator and not the erection of a new precipitator;

2. That certain inter-union agreements only applied to new precipitators and had nothing to do with rebuilds;

3. The work is not electrical work at all but is merely steel work, the "putting in place steel and metal"; i.e. the work is not work in the "construction electrician trade".

In this regard the Panel found:

> "the key, in our judgment is the purpose of the appliance, fixture or apparatus .... Here that purpose is the removal of particulates, not the carrying or using of electricity for power purposes."

4. Past practices clearly favour the Boilermakers and no credible evidence otherwise was presented by the IBEW.

5. The factors considered relevant to the assignment of work in a jurisdictional dispute as set forth in the Atlantic Concrete case were considered and the Boilermakers met all the factors while the IBEW produced no evidence that it met these factors to a degree equal to or higher than the Boilermakers.

After these findings, including its reasons therefore in each issue the Panel stated:

> "In the end, the past practice of this work being performed by the IBB (the Boilermakers) overwhelms all of the other factors and, indeed, involved necessarily some of the other factors as e.g., safety, efficiency and economy, that are treated as important in the **Atlantic Concrete** case."

[12] During the hearings before the Panel the IBEW argued that the Apprenticeship and Trades Qualifications Act, R.S.N.S. 1989, c. 17 and the Regulations thereunder applied to the work in question and clearly indicated the work to be electrical. The Panel having found otherwise the IBEW now contend that the Panel incorrectly interpreted the Act and the Regulations and the standard to apply by this Court is that of "correctness".

[13] It is well established that an administrative tribunal, when applying a statute outside of its own creating statute, must be correct in its interpretation of that particular statute.

[14] The applicable provisions of the Apprenticeship Qualifications Act Regulations in this matter are:

> General Regulations:
>
> > Regulation 1. "certified trade" means a trade where a person working at the trade is required to hold a current certificate of qualification, or be a registered apprentice or an unproven."
>
> Electrical Trade Regulations:

> Regulations 1(c)" "Construction electrical trade" or "trade" means the installation, repair or alteration, whether temporary or permanent, in all types of construction, including dwellings, commercial or industrial establishments and public buildings of wires, conduits, apparatus, fixtures, or other appliances for the carrying or using of electricity for light, heat or power purposes.

[15] The Panel, in its written reasons, referred to these Regulations and made two particular findings of fact. First it determined the work was not electrical work at all but rather was "steel work, i.e. the putting in place of steel and metal". Secondly, regarding Regulation 1(c) the Panel determined that the purpose of the apparatus being constructed here (i.e. the work contested) was for the removal of particulates and not the carrying or using of electricity for power purposes.

[16] After giving a general description of a precipitator the Panel stated:

> "Our point in offering this imperfect description of the precipitator is that it is not a wire, conduit, apparatus, fixture or other appliance for the carrying or using of electricity for light, heat or power purposes. Instead, in our opinion and we so find, it is an anti-pollution device or piece of

> equipment that, when fully assembled, is then energized by electricians who install the necessary cables and wires and then energize the previously inert object that had already been assembled. However, in our view until it is assembled, it is simply an enclosed box or shell in which various components made primarily of steel are placed and to which, after assembly, the electrical cables and connections are made (by electricians)."

[17] It is surprising to me that the IBEW relied upon the Apprenticeship Act and Regulations as governing the work being contested. That Act and Regulations does not purport, except in a very general way, to govern work assignments. Rather it defines the various trades generally, outlines the requirements of apprentices, and regulates the manner of becoming a tradesman. The definition of the construction electrical trade in Regulation 1(c) is only a general description of the trade. The Panel looked at these provisions, at counsels' request, and then, correctly, considered the factual evidence for it is only after the facts are determined, i.e., the actual work in dispute, that one can see if it might fall within that general description.

[18] As I see it, in this decision, the Panel made no significant interpretation of the Act or its Regulations. It took these provisions at their face value as general

descriptions and merely determined the work in question was not "electrical work", a question of fact, with the result that the Act and Regulations did not apply. While the Panel found the work to be "steel work" it went further and, considering Regulation 1(c) it also found that the work was "not for the purpose of using electricity for light, heat or power purposes" but rather was an anti-pollution device and then only energized after it was assembled. The Panel clearly indicated that the installation of the necessary wires and cables and the energizing, after initial assembly, was electricians (and thereby IBEW) work. Both of these factual findings cannot be said to be patently unreasonable.

[19] Upon reviewing this decision and the briefs filed and oral submissions I am satisfied that the Panel was correct in its interpretation and use of the Apprenticeship Act and Regulations and their application here and accepting for these purposes that the proper standard of review requires correctness then the decision of the Panel meets that standard. That, of course, applies to the Panel's interpretation of that statute, being one outside its constituent statute. The statute and regulations contain no precise definition which would relate to all work situations. Rather it is general in nature and requires findings of fact as to the nature of the work being considered in order to determine if, in fact, any particular work would come within the general description.

[20] The factual findings of the Panel bring into play the patently unreasonable standard. In this case the Panel was dealing with a jurisdictional dispute between two unions over a specific work assignment, a matter clearly within its statutory jurisdiction and one where courts must defer to the special knowledge and skill of the Panel and its members in matters within its jurisdiction. Only when a decision is patently unreasonable should a court intervene to set it aside.

[21] Here the Panel accepted the matter as within its jurisdiction, as did the parties, heard evidence and made certain findings of fact. A review of those findings clearly shows nothing that could be said to be patently unreasonable. The Panel considered the work itself, as it must do in every jurisdictional dispute, determined its nature, ruled certain inter-union agreements as inapplicable, considered "past practice", locally and nationally, found the work not to be electrical, indicated a lack of any evidence either to contradict the Boilermakers' claim to the work or to establish the IBEW claim, and that the Boilermakers clearly established by past practice that the contested work was theirs.

[22] I am satisfied here that the Panel properly considered the essential matters required to make a decision, in accordance with its usual practice, and within

its jurisdiction and made its findings of fact based upon the evidence presented (and lack of contradictory evidence) after some days of hearing and oral arguments by the parties. Nothing in the decision can be said to be patently unreasonable and, therefore, the decision must stand.

[23] There is a second issue raised by the applicant and this is whether there is an alleged reviewable matter arising from the Panel's failure to provide reasons for its decision. This is based upon the Panel's initial final order.

[24] The Panel's position in this regard was that having indicated a finding of past practice favouring the Boilermakers nothing further needed to be said. In support it contended that the whole thrust of the Trade Union Act provisions regarding jurisdictional disputes is to provide quick and speedy resolution to avoid a disruption of work and to require lengthy, detailed reasons would react against quick resolution. To a degree that is acceptable where the process is a speedy one, although it would not be unreasonable to expect an initial final decision with written supporting reasons to follow. However, this was not a case requiring speedy resolution. After the interim order was made, the work in question was completed, and hearings continued. The Panel must be aware that the courts are requiring written reasons from administrative tribunals in a growing number of situations.

[25] In **Becker v. Canada (Minister of Citizenship and Immigration** (1999), 174 D.L.R. (4th) 193, Madam Justice L'Heureux Dube stated at page 219:

> "In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in Orlowski, Cunningham, and Doody, militates in favour of a requirement that reasons be provided. It wold be unfair for a person subject to a decision such as this one which is so critical to their future not be told why the result was reached."

And in **Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)** (1997), 160 N.S.R. (2d) 241 (N.S.C.A.), Justice Chipman stated in paragraph 52:

> "52 I am satisfied that courts can and should require written reasons from a Tribunal wherever there are substantial issues to be resolved. How can the court determine the existence of a rational basis for the decision of the Tribunal if it does not know how the Tribunal arrived at the result? If the determination of the reasonableness of a tribunal's decision can only be made by considering 'the reasoning underlying it' and these reasons are not obvious from a review of the issues and the record, written reasons are necessary. Failure of a tribunal to do so in such cases makes its decision a patently unreasonable decision which will be set aside. The disappointed litigant and the reviewing court must know the process followed by a Tribunal in order to see, in the case of the litigant, if a review should be sought, and in the case of the court whether interference with the decision is warranted."

[26] It is important therefore for the Panel to consider, in any matter before it, whether such matter would fal into the "certain circumstances" category of

Madame Justice Dube or the "substantial issues to be tried" of Mr. Justice Chipman.

[27] While I would not want to place too onerous a requirement on the Panel in its dealing with jurisdictional disputes it would seem to be appropriate to require written reasons where, after an interim order is issued, there are lengthy hearings with evidence presented and substantial argument, as was the case here. Absent reasons, a court has little choice but to hold such a decision as patently unreasonable in those circumstances where reasons should have been given.

[28] However, I need not make any finding of patent unreasonableness in this case as written reasons were provided after the Panel was requested to provide same by counsel for the IBEW. The request by counsel arose as a result of the recent decision of the Federal Court of Appeal in **Maritime Atlantic Inc. v. Canadian Merchant Service Guild et al**, [2000] F.C.J. No. 1217, wherein Rothstein, J. at page w of the decision states:

> "In **Laing v. The Minister of Citizenship and Immigration**, [1991] F.C.J. No. 1301, Evans J. (as he then was) stated at paragraph 31:
>
> > However, in my opinion, the duty of fairness normally only requires reasons to be given on the request of the person to

> whom the duty is owed and,in the absence of such a request, there will be no breach of the duty of fairness.

We agree with Evans J. Before seeking judicial review of a tribunal order on the grounds of failure to provide reasons, there is an obligation on parties to request reasons from the tribunal. If the tribunal refuses or provides inadequate reasons, resort to the Court may be appropriate. However, it would unduly complicate the administration of justice if parties could resort to the Court to seek to quash orders of tribunals on the grounds of failure to provide reasons without first requesting them from the tribunal.

A request to the Board may be met with reasons or alternatively, an explanation why reasons are not, in the view of the Board, required in the circumstances. We see no prejudice to a party before a tribunal having to request reasons before resorting to judicial review in the Court.

We should add that while a request to the tribunal for reasons is the usual requirement, there may be circumstances in which the obligation of the tribunal to provide reasons is so plain and obvious, that upon no reasons being provided, recourse to the Court without a request for reasons from the tribunal may be appropriate. Perhaps there may be

> circumstances in which a party for some reason cannot request reasons from the Board. Such situations, we think, would be exceedingly unusual."

[29] To my mind this is an eminently reasonable approach and I certainly adopt it as the preferable and required approach when a decision of an administrative board or tribunal is challenged on review for failure to provide reasons. To set aside decisions for failure to provide reasons, thereby referring the matter back to the board or tribunal, in most circumstances results in the same decision but with reasons, a process that does complicate the administration of justice and puts the complaining party in no better position than if he had requested the reasons in the first place.

[30] I have to commend counsel for the IBEW for requesting the Panel to provide written reasons in this case when he became aware of the **Marine Atlantic Inc**. decision. Having done do did not jeopardize his case but rather put the Court in a position to deal with the real issues raised.

[31] Having determined that the Panel's decision survives the application of both the standard of correctness regarding its interpretation of the Apprenticeship Act and Regulations, and the patently unreasonable standard the result is that this application is dismissed with costs.

[32] As to costs all counsel agreed that an appropriate award of costs would be $1,000.00 payable to the respondents, i.e. the Boilermakers and the Attorney-General of Nova Scotia.

J.