ORIGINAL

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Docket: L030151
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Madam Justice Gill
Pronounced in Chambers
March 8, 2004

BETWEEN:

RICHARD FRICK

PLAINTIFF

AND:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 213

DEFENDANT

Counsel for the Plaintiff: R.W. Grant

Counsel for the Defendant: L.B. McGrady, Q.C.
S.S. Deepak

[1] **THE COURT:** Let me begin by dealing with the plaintiff's application. I will begin by briefly referring to the background of this matter.

[2] This action has been commenced by Mr. Frick under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50. The plaintiff alleges that the defendant Union breached its bylaws and

constitution by requiring him to pay Electrical Industry Advancement Fund dues ("EIAF" dues) when he was not working under a collective agreement called the Inside Wiremen's Agreement. In his statement of claim, it is alleged that at the time such dues were deducted, he was employed by Highway Constructors Ltd. and his employment was governed by the HCL agreement. Mr. Frick was employed from April, 2001, to May, 2002.

[3] As to the proposed class, the class is referred to in paragraphs 37 through 41 of the amended statement of claim. For these purposes a reference to paragraph 29 is sufficient. It states that the class includes but is not limited to all IBEW Local 213 members employed by HCL after June 25, 1992, from whom EIAF dues were collected or received and all members employed by Columbia Hydro after June 25, 1992 from whom dues were collected.

[4] The defendant alleges that the plaintiff was working under the Inside Wiremen's Agreement when dues were collected. It is seemingly agreed that if what the plaintiff alleges is correct, they ought not to have been deducted.

[5] What gives rise to this application and the procedural difficulties is that the defendant has questioned whether the

court has jurisdiction over this matter. Paragraph 29 of the statement of defence raises this issue. It states:

> That the essential character of the dispute that is the subject of the Plaintiff's claim arises under the terms of the collective agreement, referred to as the Inside Wiremen's Agreement in paragraph 17 of the Amended Statement of Claim; or alternatively under the terms of the HCL Agreement or Columbia Hydro Agreements referred to in paragraphs 20, 21, 22 and 30 of the Amended Statement of Claim. In either case, the Plaintiff, Other HCL Employed Members and/or Columbia Hydro Employed Members are obliged to grieve the issue and pursue the matter in arbitration under the terms of the collective agreement and the British Columbia *Labour Relations Code*. In the further alternative, the Plaintiff, Other HCL Employed Members and/or Columbia Hydro Employed Members are obliged to seek a resolution of this dispute and a remedy under the provisions of Sections 10, 14, 16, and/or 139 of the *Labour Relations Code*. In any event, this Court lacks jurisdiction with respect to this claim.

[6] The parties are agreed that the issue of jurisdiction should be determined prior to any application for certification. It is the defendant's intention to bring an application challenging jurisdiction. However, no application has actually been brought and, to state the obvious, no materials have been filed on that issue.

[7] The plaintiff, nevertheless, now seeks an order requiring the defendant to produce documents allegedly relevant to the issue of jurisdiction. The notice of motion sets out what

documents are, in the view of plaintiff's counsel, potentially relevant to that issue. Those documents are as follows:

(a) All agreements, including collective agreements, between the Defendant and Columbia Hydro Constructors Ltd. ("Columbia Hydro") in effect after 1991;

(b) All agreements, including collective agreements, between the Defendant and Highway Constructors Limited ("HCL") in effect after 1991;

(c) A copy of the Inside Wiremen's Agreement and "enabling" agreement between HCL and the Defendant referred to in paragraphs 14 and 15 of the Statement of Defence;

(d) All "enabling" agreements and all documents relating to "enabling" agreements between the Defendant and HCL and between the Defendant and Columbia Hydro;

(e) All communications from 1991 to date between the Defendant and its members regarding the employment on HCL projects, including the Skytrain expansion;

(f) All communications from 1991 to date between the Defendant and its members regarding their employment on Columbia Hydro projects;

(g) all documents relating to Mark Reed, and his claims relating to the EIAF Dues including any communication between Mark Reed and the Defendant or the International Brotherhood of Electrical Workers (the "International Union");

(h) All documents relating to the Defendant's Market Recovery Review Committee meeting(s) in August 2002;

(i) All Assignments of Fees and Dues pursuant to s. 16 of the *Labour Code* submitted to HCL, Columbia Hydro and any other employers of the

> Defendant's members working on HCL projects or Columbia Hydro projects;
>
> (j) A complete list of all the Defendant's members from 1991 to date who worked on either the HCL projects or the Columbia Hydro projects;
>
> (k) Accounting records of the EIAF Dues collected from each member of the Defendant when each member worked on an HCL project or a Columbia Hydro project from 1991 to date; ...

[8] It is clear that on the issue of jurisdiction, the court will be required to consider ***Weber v. Ontario Hydro***, [1995] 2 S.C.R. 929. In ***Weber***, it was concluded that if the essential character of a dispute arises from the interpretation, application, administration or violation of a collective agreement, the claimant must proceed by arbitration and the courts have no power to entertain an action in respect of the dispute. Even where the dispute arises out of the collective agreement, the court may retain jurisdiction where a remedy is required that an arbitrator is not empowered to grant in order to avoid a "real deprivation of ultimate remedy". The plaintiff says that certain of the documents described in three of the paragraphs of the notice of motion are required to deal with the issue of remedy. As counsel for the defendant points out, the court will also be asked to consider whether the essential character of the dispute arises under the *Labour Relations Code*.

[9] As I understand what the plaintiff proposes to argue on the issue of jurisdiction, it is that for the court to decide this issue, it must necessarily decide whether in fact the plaintiff was working under the Inside Wiremen's Agreement. On the question of remedy, I understand the plaintiff will argue that this issue is not simply the remedy available to Mr. Frick. Rather, the court must consider the proposed class. Obviously, the defence does not agree with either proposition.

[10] For purposes of this motion, the defendant has at least conceded that the court has the power to order production of documents which relate to jurisdiction. Although it was initially argued that no order could be made until it was determined that this was the proper forum, given that paragraph 29 of the statement of defence refers to a number of documents, it is my view that that proposition lacked merit. In any event, the question has become the scope of production that should be ordered as counsel agree that documents relevant to jurisdiction ought to be disclosed.

[11] As to what documents should be produced, I will begin by again referring to paragraph 29. That paragraph refers to three collective agreements. It refers not only to the plaintiff but also to other HCL employed members and Columbia

Hydro employed members. Given this pleading, it is my view that it necessarily follows that all collective agreements between the defendant and both Columbia Hydro and HCL which were in effect after 1991 must be produced, as sought by the plaintiff.

[12] Before dealing with the balance of the documents sought, it is appropriate to comment on certain of the unusual features of this action. As I understand the intended argument on behalf of the plaintiff, a determination in his favour on the jurisdictional issues may well determine the merits of the case. In written argument, counsel for the plaintiff said the following. The collective agreements, Inside Wiremen's Agreement, enabling agreements, and communications between the defendant and its members, are relevant to the issue of the ambit of the Inside Wiremen's Agreement. Those documents will also be relevant to the parties' understanding of the ambit of that agreement and, therefore, to the essential character of the dispute. The argument goes on to say that, further, the plaintiff believes that the documents sought will determine how the defendant itself regarded the employment of its members and will confirm that the defendant conducted itself on the basis that its members were not working under the Inside Wiremen's Agreement

and understood that its members were not working under that agreement. It is said that the documents sought go to the very "heart" of the jurisdictional question.

[13] I will begin by commenting on the assertion that certain documents are relevant to the "ambit" of the agreement. As noted in ***Haight Smith v. Nedden***, 2002 BCCA 132, at paragraph 33, the principles enunciated in ***Weber*** must be applied analytically to the particular facts of the case before the court and it is that factual analysis which gives rise to apparently conflicting decisions. On this application, counsel for the plaintiff placed reliance on the comments of Masuhara J., in ***Paramedical Professional Bargaining Association v. Health Employees Association of British Columbia,*** [2003] B.C.J. No. 2898, that the factual matrix of each case should be considered broadly. But there is one aspect of the present matter which is neither complex nor in dispute. The claim relates to EIAF dues which are governed by article 9 of the bylaws and are payable when members are working under the Inside Wiremen's Agreement. For the plaintiff to say that documents are relevant to the "ambit" of the agreement, meaning its scope or extent, is, in my view, neither helpful nor persuasive.

[14] During oral argument, counsel for the plaintiff stated that the plaintiff is entitled to test the defendant's assertion that an agreement exists and that this case is unusual in that the plaintiff says that no agreement exists, or at least, that he is not aware of any agreement. I would note, however, that the defendant has yet to make any assertions other than what is pleaded as the defendant has yet to file an application or supporting materials. I would also observe that it is alleged in the statement of claim that Mr. Frick's employment was governed solely by the HCL agreement and vis-à-vis Mr. Flick, the issue as posed is therefore whether his allegation is correct or whether what is asserted in the defence is correct.

[15] Having said all of that, I now come to what will not be a very satisfactory resolution of this application. I am not now prepared to make the broad order which is sought as I am not now able to conclude that these documents go to the "heart" of the jurisdictional issue, as was argued. I obviously use the word "now". I do so because of my concern that not having heard any arguments on jurisdiction and not having seen the materials to be relied upon, either by the defendant or the plaintiff, conclusions as to what, if any, further documents may be relevant are difficult to draw.

[16] At this point, I wish to comment on how this matter has proceeded. We are dealing with an application to produce documents relevant to jurisdiction despite the fact that no application challenging jurisdiction has been brought. Not only is there a jurisdiction issue, the case has the additional unique future of being commenced under the ***Class Proceedings Act***. Given the procedural complexities that therefore arise, it is my view that the preferable course would be for the defendant to bring its application and file its material and to allow the plaintiff to respond. We will then know what issues are posed in the materials themselves. Perhaps it will be necessary for the parties to make their arguments on jurisdiction, perhaps not, but whatever course is followed, if it is determined that there are meritorious arguments which cannot be resolved, either without further document production or without cross-examination on affidavits, issues of both document production and cross-examination can then be properly addressed. The obvious advantage is that there would be a context for making determinations such as relevance, whereas it is my present view that I am being asked to deal with this matter in what is almost a vacuum. I appreciate that from the point of view of counsel this may be a less than satisfactory result but it is, nevertheless, my considered view that the procedure which we

have adopted which, at one point, may have seemed sensible and appropriate has, in fact, turned out to be flawed.

[17] In the end result, I am not now prepared to make the order that further documents be produced. I should emphasize that I do not say that such an order may not be appropriate in the future. The fact of its breadth may be unusual but in appropriate circumstances the court may have the authority to make the order sought.

[18] So with that unsatisfactory result, gentlemen, there is nevertheless an order that all collective agreements be produced. I do say very sincerely that having given the matter some considerable thought I think that it would be better if the jurisdiction application was filed, as well as materials in support. It may be that Mr. Grant will have a point. I do not know. But the material must be there.