IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Dewey v. Corner Brook Pulp and Paper Limited*, 2019 NLCA 14
Date: March 19, 2019
Docket Number: 201701H0105

BETWEEN:

RICHARD DEWEY, WILLIAM PERRY, CHARLOTTE JACOBS and WILLIAM TURNER — APPELLANTS

AND:

CORNER BROOK PULP AND PAPER LIMITED — FIRST RESPONDENT

AND:

KRUGER INC. — SECOND RESPONDENT

AND:

DEER LAKE POWER COMPANY LIMITED — THIRD RESPONDENT

AND:

THE TOWN OF DEER LAKE — FOURTH RESPONDENT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR — FIFTH RESPONDENT

Coram: Welsh, O'Brien and Goodridge JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201504G0120
(2017 NLTD(G) 203)

Appeal Heard: November 21, 2018
Judgment Rendered: March 19, 2019

Reasons for Judgment by: Welsh J.A.
Concurred in by: O'Brien and Goodridge J.A.

Counsel for the Appellants: Raymond Wagner Q.C., Bob Buckingham and Madeleine Carter
Counsel for the First Respondent: Thomas O'Reilly Q.C. and Richard Gosse
Counsel for the Second Respondent: Not Participating
Counsel for the Third Respondent: Not Participating
Counsel for the Fourth Respondent: Steve Penney
Counsel for the Fifth Respondent: Philip Osborne and Jessica Pynn

Welsh J.A.:

[1] The Appellants, Richard Dewey, William Perry, Charlotte Jacobs and William Turner, filed a statement of claim and applied for certification under the *Class Actions Act*, SNL 2001, c. C-18.1, claiming that Corner Brook Pulp and Paper Limited (the "Company") is liable for damage to their properties. The Company applied for, and was granted, a stay of the court proceedings on the basis that the legislation requires the claims to be adjudicated by arbitration. In appealing that decision, the Appellants rely on the interpretation of legislation first enacted in 1915.

[2] In the Court appealed from, the Company's application to stay the proceedings was opposed by the Town of Deer Lake (the "Town") and Her Majesty the Queen in Right of Newfoundland and Labrador (the "Province"). Kruger Inc. and Deer Lake Power Company Limited, named as respondents in the action, did not participate in the application or in this appeal.

BACKGROUND

[3] The Appellants claim that their properties were damaged by the operation of the Company's water control and hydroelectric power generating system, which provides power to the Company's paper mill at Corner Brook. The facts are succinctly stated by the applications judge (2017 NLTD(G) 203):

> [4] Since 1915 the Company has operated under agreements with the Province which were incorporated into legislation. The Company maintains that the legislation provides that disputes arising from such operations, including any alleged injurious impact upon private rights, including the cause of action alleged by the Plaintiffs in these proceedings be resolved by arbitration. Therefore, the company argues that these proceedings must be stayed.

[4] There is no dispute that the legislation applies to the Company. Under the applications judge's interpretation of the statutes and agreements, the Appellants' disputes with the Company must be determined by arbitration.

ISSUES

[5] At issue is whether the applications judge erred in interpreting the legislation with the result that the Appellants' claim against the Company in court could not proceed.

ANALYSIS

The Legislation

[6] The *Newfoundland Products Corporation Act*, 1915 (6 Geo. 5), c. 4, passed on June 5, 1915, confirmed an agreement, dated April 16, 1915, which was entered into between the Province and Newfoundland Products Corporation, Limited, "subject to the conditions and exceptions" contained in the *Act*. The Agreement is incorporated by a Schedule to the *Act*. Under clause 1 of the Schedule, the Province demised certain water and power rights to the Company:

> ... and for the purpose of its works and operations the Company shall have the right to divert, stop or dam up any stream, lake or water course within the drainage area of the Humber River, and to make, construct or maintain any dam, water course, culverts, drains and reservoirs in said area for any of its said works and operations, ...

[7] Clause 15 of the Schedule provides for the payment of compensation, for any damage caused by the works, to be settled by arbitration:

> If the Company, in or by reason of the exercise of any of the rights hereby granted, submerge, destroy, damage or injuriously affect any private rights, interests, lands or property, and shall be unable to agree with the owner thereof as to compensation to be paid therefor, the Company, with the consent of the Governor in Council, may proceed with the exercise of the said rights, ... and the compensation to be paid by the Company to the owner, for or in respect to such rights, interests, lands or property, shall be settled by arbitration in the manner hereinbefore provided.
>
> (Emphasis added.)

[8] Section 13 of the *Act* addresses the procedure to be applied when arbitration is engaged:

> Where in the Agreement provision is made for the holding of arbitrations under section 55 of the Crown Lands' Act, the following procedure is substituted in lieu thereof:
>
> > (a) There shall be three arbitrators, one appointed by each of the contestant parties, the third by the Supreme Court, consisting of not less than two Judges. ...

[9] Section 14 of the *1915 Act*, which is pivotal in this appeal, provides for the option of pursuing an action in court:

> Nothing herein or in the Schedule hereto in relation to the settlement of claims by arbitration shall be held or construed to prejudice or exclude the right of any claimant to institute an action in a Court of competent jurisdiction in respect to any such claim.

[10] The 1915 statute was amended in 1923 by the *Newfoundland Power and Paper Co., Ltd. Act*, 1923 (14 Geo. 5), c. 1. Clause 8 of the Schedule provided for a new arbitration procedure. Unlike the 1915 legislation, arbitration under the amendment was not limited to questions of compensation and an application by a party to the dispute was required:

> Any questions, disputes or differences arising out of, under or in connection with this Agreement or the execution thereof shall, on the application of either party, be referred to the award and final determination of two disinterested persons, one to be appointed by each of the parties in difference, and if the arbitrators fail to agree, then to the award, umpirage and final determination of an umpire to be appointed by the arbitrators ...
>
> (Emphasis added.)

[11] The statute was again amended in 1927 by the *International Paper Co., Ltd. Act*, 1927 (18 Geo. 5), c. 4, which reiterated in clause 2 of the Schedule:

> The Company shall be entitled to all the rights, powers, privileges, franchises and exemptions vested in, or owned or enjoyed by the Old Company under the Act and Agreement of 1915 and the Subsequent Acts and Agreements, and shall be bound by all the obligations imposed upon the Old Company under said Acts and Agreements, except in so far as such rights, powers, privileges, franchises and exemptions and such obligations are extended, modified or otherwise affected by the following provisions:
>
> ...

[12] Clause 2(n) of the Schedule set out a change in the arbitration procedure while retaining the requirement for an application by a party to settle a question, dispute or difference:

> Clause 8 of the Agreement of 1923 shall not apply to the Company; but the following provision shall apply to the Company:
>
> > Any questions, disputes or differences between the parties hereto, or between the Company and third parties where provision for arbitration is made herein, or in the Act or Agreement of 1915 or any of the Subsequent Acts and Agreements, arising out of, under or in connection with this Agreement or the Agreement of 1915 or any of the Subsequent Acts and Agreements, or the execution thereof, shall on the application of either party be submitted to the arbitration of three arbitrators and the provisions of Part VI of the Judicature Act, Chapter 83 of the Consolidated Statutes (Third Series), except Section 212 and except as modified in this Clause, shall apply to any such submission. One arbitrator shall be appointed by each of the parties and the third by the two so appointed. ... The award of the arbitrators or any two of them shall be final and binding upon the parties thereto, unless appeal therefrom shall be made to the Supreme Court ... .

That clause also includes a method for appointing an arbitrator if a party fails to make an appointment or if the two cannot agree on a third. (Part VI of the *Judicature Act*, referenced in clause 2(n), addresses arbitrations generally and is not relevant for purposes of this appeal.)

[13] Clause 5 of the Schedule to the *1927 Act* provided further:

> ... the Company shall acquire, regulate the amount of water flowing in the streams, lakes and watercourses referred to in said Clause 1 or in said other grants or demises in such manner as it may require for its operations; provided that the Company shall pay for such damage as it may cause thereby in accordance with the

provisions in that respect of the Act and Agreement of 1915 as affected by the Subsequent Acts and Agreements.

[14] The arbitration provision was again amended in 1938 by the *Bowater's Newfoundland Act*, 1938 (2 Geo. 6), c. 53, clause 36 of the Schedule:

> Every arbitration provided for in this Agreement shall be conducted in the manner provided for arbitration in Clause 2 of the Agreement of 1927. In estimating the amount of compensation to be awarded by arbitrators, no increase in the value of the property by reason of the projected operations of the Company shall be taken into consideration.

Interpretation and Application of the Legislation

The Applications Judge's Conclusion

[15] The applications judge concluded:

> [26] Therefore, I find that under the 1915 legislation, a claimant had the right to pursue a claim in Court and was not restricted to arbitration by virtue of Section 14 of the *1915 Act*.
>
> ...
>
> [37] Accordingly, Clause 8 of Part II of the Schedule to the *1923 Act* does not amend or vary the rights of a claimant to initiate and pursue a claim in Court as was provided in the 1915 legislation. The interpretation of this Clause is not relevant after the passage of the *1927 Act* with the annexed agreement.
>
> ...
>
> [42] In my opinion, the 1927 legislation removed the rights of the claimants such as the Plaintiffs to pursue their claim in Court as originally provided in Section 14 of the *1915 Act*. The opening wording of Clause 2 of the 1927 Agreement confirms the rights and obligations of the Company except as affected by the various provisions of that Clause. <u>While Clause 2(n) does not explicitly refer to Section 14 of the *1915 Act*, the matters set out in that clause effectively take away the right to litigate a claim in Court in favor of mandatory arbitration</u>.
>
> [43] First of all, Clause 2(n) of the 1927 agreement applies to "any questions, disputes or differences" both between the Government and the Company and between the Company and third parties where there is a provision for arbitration. Contrary to the position advanced by the Town, it would be unreasonable to exclude claims between the Company and third parties from the scope of this clause in view of the language of the provision. There was no convincing argument why these parties and their disputes should be treated differently.

...

> [46] As well, the Plaintiffs maintain that Section 14 of the *1915 Act* has not been replaced or repealed by Clause 2(n), and that the clause relates to procedure only. I do not accept this position as Section 14 and Clause 2(n) cannot continue together. Section 14 gave the option of arbitration or Court to a claimant, while Clause 2(n) mandated that both parties had to resort to arbitration.
>
> (Emphasis added.)

Interpretation of the Legislation

[16] Section 14 of the *1915 Act* has not been expressly repealed. Further, for the following reasons, I am satisfied that the applications judge erred when he concluded that section 14 had been rendered inoperative by clause 2(n) of the Schedule to the *1927 Act* because the two provisions could not operate together.

[17] The 1915 legislation specifies in clause 15 of the Schedule that, where the parties are unable to agree on compensation to be paid by the Company to the property owner, compensation "shall be settled by arbitration" as set out in section 13 of the *Act*. The effect of this language would be to impose mandatory arbitration. However, that result is overridden by the clear language in section 14 of the *Act* which provides that nothing in the Schedule in respect of settlement by arbitration "shall be held or construed to prejudice or exclude the right" of the property owner to commence an action in court. Nowhere in subsequent legislation is the option to proceed in court removed.

[18] Rather, the amendments, which consistently refer back to the 1915 legislation, make three changes. First, each amendment makes a change to the manner in which arbitrators are to be appointed. Second, the reference to "compensation to be paid" in the 1915 legislation is expanded to include any questions, disputes or differences. Third, arbitration is engaged "on the application of either party". None of these changes operates to exclude by implication the application of section 14 of the *1915 Act*.

[19] From the beginning, the legislation provided for the choice of arbitration or a court proceeding. Nothing in the subsequent amendments changed that. Indeed, circumstances may arise where the more effective option is the courts. For example, in this case, there are several parties with an interest. The four Appellants have separate disputes with the Company. They have chosen to apply for certification to proceed by way of a class action which would address all the issues in the same forum at the same time.

[20] The applications judge referred to the decisions in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at paragraph 67, and *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at paragraph 47, for the proposition that a mandatory arbitration clause will generally confer exclusive jurisdiction on the tribunal. However, that general principle does not apply where the legislation specifically provides for the option to proceed by way of court action. That distinction is referenced in *Seidel v. Telus Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531. Binnie J., for the majority, explained:

> [42] For present purposes, the relevant teaching of *Dell* and *Rogers Wireless* is simply that whether and to what extent the parties' freedom to arbitrate is limited or curtailed by legislation will depend on a close examination of the law of the forum where the irate consumers have commenced their court case. *Dell* and *Rogers Wireless* stand, as did *Desputeaux*, for the enforcement of arbitration clauses *absent legislative language to the contrary*. [Italics in the original.]

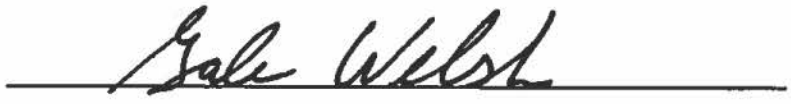
[21] Section 14 of the *1915 Act* is, in fact, legislative language to the contrary which operates to give the parties to a dispute the option of court proceedings or arbitration. The applications judge's error in concluding that section 14 had been rendered inoperative resulted in further error by leading him to determine that the exception arising from express legislative language was not engaged.

[22] In summary, section 14 of the *1915 Act* has not been repealed either expressly or by implication. Accordingly, in resolving a dispute, a party may proceed by way of arbitration or an action in court.

SUMMARY AND DISPOSITION

[23] The applications judge erred in ordering a stay of proceedings of the Appellants' action in court on the basis that the dispute could be determined only by means of arbitration. The legislation provides for the option of arbitration or court proceedings.

[24] Accordingly, I would allow the appeal. I would make no order as to costs (*Class Actions Act*, s. 37).



B. G. Welsh J.A.

I Concur: _____

F. P. O'Brien J.A.

I Concur: _____

W. H. Goodridge J.A.