Action No.: 1803-01153
E-File No.: EVQ19BOILERMAKERS
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

BETWEEN:

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, LOCAL LODGE 146

Applicant

and

LML INDUSTRIAL CONTRACTORS LTD., TARTAN INDUSTRIAL CONTRACTORS LTD., TARTAN INDUSTRIAL SERVICES LTD., TARTAN CANADA CORPORATION, CONSTRUCTION WORKERS UNION (CLAC), LOCAL 63 and ALBERTA LABOUR RELATIONS BOARD

Respondents

P R O C E E D I N G S
(Excerpt)

Edmonton, Alberta
March 8, 2019

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D.W. Chomyn, QC (by telephone)	For LML Industrial Contractors
M. Denny (Student-at-Law)	For Tartan Industrial Contractors, Tartan Industrial Services and Tartan Canada
T.W.R. Ross (by telephone)	For Tartan Industrial Contractors, Tartan Industrial Services and Tartan Canada
D.R. Bokenfohr	For Tartan Industrial Contractors, Tartan Industrial Services and Tartan Canada
S. Fader	For the Construction Workers Union (CLAC)
J.D. Schick	For the Alberta Labour Relations Board
M. O'Sullivan	Court Clerk

Reasons for Judgment

THE COURT: Good afternoon. Please be seated. I understand that we have back all but Mr. Bokenfohr, who got called away. Is that accurate?

MS. FABER: That's correct, My Lord.

MS. CHAHLEY: Yes, it is.

MR. ROSS: Right, My Lord. And he's -- he apologized for that.

THE COURT: No, that is fine, but we will proceed in his absence.

I am going to give this decision orally, and if I do reduce it to writing, which I will only do at the request of the parties, I reserve the right to edit it for style and grammar without

changing the substance.

So by way of introduction, Local 146, which I will refer to also as the Union, applies for judicial review of a December 20, 2017 decision of the Labour Relations Board, which I will refer to as the Board. The parties agree that the standard of review is reasonableness, though, of course, they disagree on whether the Board's decision was reasonable.

The Board's decision denied the Union's application for what is called a common employer declaration for the respondents. That common employer declaration is defined in Section 47 of the *Labour Relations Code*, the applicable subsections 2 and 3 of which read as follows:

> Spin-offs
>
> 47(1) On the application of an employer or a trade union affected, when, in the opinion of the Board, associated or related activities or businesses, undertakings or other activities are carried on under common control or direction by or through more than one corporation, partnership, person or association of persons, the Board may declare the corporations, partnerships, persons or associations of persons to be one employer for the purposes of this Act.
>
> (2) If, in an application under subsection (1), the Board considers that activities or businesses, undertakings or other activities are carried on by or through more than one corporation, partnership, person or association of persons in order to avoid a collective bargaining relationship, the Board shall make a declaration under subsection (1) with respect to those corporations, partnerships, persons or associations and the Board may grant any relief, by way of declaration or otherwise, that it considers appropriate, effective as of the date on which the application was made or any subsequent date.

The Board denied the application on the basis that Local 146 did not satisfy its onus to show that the common enterprise structure was used to avoid a collective bargaining relationship.

By way of background, Tartan or TCC is the parent corporation of three subsidiaries involved in maintenance work: TICL, which it has owned since 2006; LML, which it has owned since 2008; and TISL, which it has owned since 2016. TICL is a non-union shop.

LML is a union shop. TISL started as a non-union shop but is now subject to a collective agreement with CLAC. It was incorporated to perform maintenance work on a Strathcona plant. Tartan won the bid but wished to incorporate a subsidiary for limited liability reasons.

The reason Local 146 applied for a common employer declaration was its assertion that Tartan incorporated TISL to avoid the obligations of LML to Local 146. It argued that TISL is the "spin-off" that is used as a heading for Section 47. A corporation spins off a subsidiary that is not subject to a union certification in order to avoid a collective bargaining relationship.

The Board dealt with that issue beginning at paragraph 101 of its decision, concluding ultimately that TISL, like TICL, was a non-union shop but was incorporated for reasons of limited liability as opposed to avoidance since TICL, also a non-union shop, was capable of doing the Strathcona work, and the work was not taken away from LML, since LML did not bid on the Strathcona contract. That is a reasonable conclusion based on evidence available to the Board. Essentially TISL was not a spin-off, since there was already a non-union shop, namely TICL, in the business group.

In any event, the Board, in its decision, considered the purpose of a common employer declaration and the analytical framework for a Section 47 application based on its *Midwest* decision. At paragraph 90 of its decision, it sets out a two-stage process. The first stage involves finding four prerequisites, only two of which are at issue here. Number one, that the activities are being carried on under common control or direction; and number two, that that common control is through more than one corporation.

If those prerequisites are met, the next stage involves determining whether the activities were done to avoid a collective bargaining relationship. If so, it is mandatory under Section 47(2) that the Board issue the common employer declaration. If not, if there is a valid reason for issuing a common employer declaration, the Board has that discretion under Section 47(1).

The Board, at paragraph 107, confirmed that it would follow this approach. It presumed the existence of all the prerequisites. It went carefully through an analysis of whether there was any avoidance by any two entities acting in concert. That analysis therefore involved looking at the available combinations of two or more parties: first, TICL and LML; then TICL/TISL and LML, and lastly TISL and LML.

Without going into the specifics of the three analyses, I note that in each case, the Board took a contextual approach, which included whether there were changes in business patterns, reallocation of work, or anti-union animus, though that latter factor is not relevant

unless it also results in avoidance of a collective bargaining relationship for the purposes of Section 47(2).

The Board, in taking that approach, essentially subjected each of the three combinations to the same relevant factors. In doing so, it referred to facts available to it as a result of hearing from 11 witnesses and reviewing 74 exhibits over the course of an eight-day hearing.

In particular, at paragraph 114 of its decision, the Board noted seven contextual factors when looking at whether TISL was set up for avoidance purposes. Number one, there was no evidence of anti-union bias, and in fact, there was evidence in the corporate group of both union and non-union shops, namely LML and TICL. LML and TICL had a long history of working in the province without TICL taking work away from LML. Number three, TISL, the new corporation, has a collective agreement with CLAC 63 as a result of a certification vote. Number four, the evidence was that LML's business model was incompatible with the Strathcona bid. Number five, Local 146 was inflexible with concessions until after the work started. Number six, LML had valid reasons for not bidding on the Strathcona work. And number seven, Local 145 -- do I have that number wrong?

MR. ROSS: Yes, it's 146.

THE COURT: Thank you. Local 146 did not challenge those reasons for LML not bidding on the work. It is not the role of this Court to minutely examine the conclusions the Board reached, but rather to determine whether there is justification, transparency, and intelligibility in the decision-making process, which then resulted in a decision falling within a range of defensible outcomes.

If I had to minutely examine the conclusions of the Board, I could possibly find that a logical inference from a conclusion that LML's business model was too expensive was that it was too expensive because of its unionization, since the Board said that it would have been helpful if Local 146 had made concessions. But those are just two factors out of seven, and the indisputable evidence, without having to draw an inference, is that LML was distracted from bidding on the contract for other valid reasons.

My reading of the Board's decision leads me to conclude that a significant factor in its analysis was that LML, the union shop, did not bid on the Strathcona job for which Tartan incorporated a new subsidiary. It did not bid on that job because it was focused on work elsewhere, and its business model, not its unionization, made it too expensive to make a competitive bid. Local 146 did not challenge that assertion at the hearing. That clearly puts paid to Local 146's claim in paragraph 17 of its brief that "the Boilermakers expected

that TCC would assign the bundle pulling work to LML".

Excuse me.

Another significant factor in the Board's decision is that Local 146 lost a certification effort for TISL to CLAC, and Local 146's common employer application looks to be a means to get to the same place through a different door. As counsel for TCC points out, the rationale for Section 47 is to preserve bargaining rights, not to expand them. If efforts are underway to expand them, in this case by CLAC's certification of employees of TISL, no Board intervention is required.

Having found no reason for a mandatory declaration under Section 47(2), based on what I consider to be a justifiable, transparent, and intelligible process, the Board then considered whether there was some other reason to exercise its discretion under Section 47(1). Not surprisingly, the Board determined that as a result of this associated group of corporations and the Union having successfully worked together in the maintenance industry for a number of years, there was no labour relations reason to make that declaration.

I wish to make comment on a few of the arguments counsel for Local 146 makes in her brief, some of which I have alluded to earlier. Number one, at paragraph 17, she argues that the Boilermakers expected that Tartan or TCC would assign the Strathcona work to LML, and cites paragraphs 60 to 78 of the Board's decision in support of that argument.

I don't read that into those paragraphs of the Board's decision. Rather, it appears as though the Board accepted from cross-examination of the witness for Local 146 that Local 146 knew of another union's attempt to certify boilermakers of TICL, which was ultimately successful. At paragraph 122 of the Board's decision, it explains why, as a general principle, the Board does not interfere with relationships created between the employer and the union, i.e. there is no labour relations purpose served by a declaration of a common employer when the alleged violator is served by another union.

Number two, at paragraph 31, she argues that Tartan made a "deliberate decision to assign the work non-union due to the higher cost of using its unionized arm LML". That is true, according to the Board's decision, but not necessarily as a result of LML being unionized. Local 146 did not suggest at the hearing that the Union was the only reason for a higher cost of the business model of LML. In my view, as I pointed out earlier, without that evidence, it might have been open to the Board to draw that inference of its own accord, but inferences are not facts.

Number three, at paragraph 31, she argues that as a result of TCC incorporating a new corporation, CLAC as a competing union had an opportunity to apply for certification

before Local 146 could do so. No reason is given for assuming that CLAC beat Local 146 to the punch just because the work was subcontracted to the new corporation.

Number four, at paragraph 44 and in oral argument, she submits that the Board placed too much emphasis on which corporations were proxies for others to the extent that it lost sight of the fact that the issue is whether there is common control. But at paragraph 108, the Board confirmed that for the purposes of its analysis, it assumed that that prerequisite along with the other three was met. In my view, just looking at the corporate flow chart, that was a reasonable assumption to make. There was already a non-union shop in the mix, so the use of the proxy analysis was required to see if the new non-union shop changed the picture of avoidance in some fashion. In any event, it was to Local 146's advantage that the assumption the prerequisites were there was made.

And lastly, she argues that LML-branded equipment was used at the Strathcona site, but there is no dispute that LML is part of the Tartan or TCC group, which shares equipment among its divisions. That fact was found by the Board.

Much breath was expelled in today's hearing on the legitimacy of a practice known as double-breasting, which simply means that a business organization can have a union and a non-union arm, as was found here. I need not resolve that issue here but wish to make a couple of comments on it. The Board spent little time on this issue. At paragraph 79, the Board refers to TCC or Tartan as in essence being triple-breasted with TISL because it would then have two union shops and one non-union. I take this as implicit affirmation of the legitimacy of double-breasting, which it accepted by virtue of the situation as it existed before TISL. It noted that in the particular facts of this case, the two arms of the parent co-existed peacefully without eating from each other's plates.

I notice while Tartan's argument that the implication of the Board finding a common employer concerned in the case before it and now before me is that it would prevent any organization from having a union and a non-union arm. That does seem to be a legitimate concern to me. The purpose of Section 47 is to prevent the creation of a spin-off which might have the labour relations effect of allowing double-breasting when the facts support that double-breasting is done for avoidance purposes. I don't read Section 47 as intending to throw a blanket over any organization's ability to create different divisions for legitimate purposes. In any event, the ability of a union to freely apply to certify most groups of employees, as was done by CLAC here, serves as a check on an organization's ability to double-breast, whether or not the organization has an ulterior motive.

In this case, the Board ultimately concluded that avoidance of a collective bargaining relationship was not the substantial reason for the incorporation of TISL, so Section 47(2) did not apply, and that there was no labour relations reason for declaring a common

enterprise for the purpose of Section 47(1). It determined that in fact there were good labour relations reasons not to exercise that discretion.

The preamble to the *Labour Relations Code* includes the following:

> WHEREAS it is recognized that legislation supportive of freedom of association, and free collective bargaining through trade unions when chosen by employees, are important components of Alberta's social and economic well-being; and
>
> WHEREAS the public interest in Alberta is served by encouraging harmonious, mutually beneficial relations between employers and employees through freely selected bargaining agents, through balanced, fair and constructive collective bargaining, and through fair and equitable resolution of matters arising with respect to terms and conditions of employment ...

The reason that the Legislature delegates certain of its regulatory authority to boards such as the Labour Relations Board is that they have or can develop expertise in interpreting their own statutes. The Board here concluded that:

> ... not only is there not any evidence of anti-union animous [sic] there is a substantial history of TCC within its overall enterprise having both a building trades division and an open shop division ...

And that:

> ... there is a long history of LML and TICL working within the province of Alberta without TICL competing or taking work away from LML ...

The Board's decision in this case shows that it takes to heart the intent of the *Labour Relations Code*. There is no reason for this Court to upset the Board's reasonable decision and, accordingly, Local 146's application is dismissed.

And I wish to thank counsel, all counsel for their interesting and comprehensive written briefs, and Ms. Chahley in particular for your advocacy. You were about the only one I allowed to say very much, so thank you very much.

MS. CHAHLEY: Thank you.

THE COURT: Anything else?

MR. ROSS: I assume the parties can work out the terms of the order for you, and that they would include costs.

THE COURT: They should incur costs -- include costs. I will assume that the parties can work that out, and if not, they can return to me within 30 days from -- I will say from the date of -- well, I will say 30 days from today, I guess, is safer, or at least they can apply at that point.

Okay. Thank you very much.

MS. FADER: Thank you, My Lord.

MR. ROSS: Thank you, My Lord.

MS. CHAHLEY: Thank you, My Lord.

THE COURT: Thank you, Madam Clerk.

THE COURT CLERK: Thank you, Sir.

PROCEEDINGS CONCLUDED

Certificate of Record

I, Morag O'Sullivan, certify that this recording is the record made of the evidence in the proceedings in Court of Queen's Bench held in courtroom 414 at Edmonton, Alberta on the 8th day of March, 2019, and that I, Morag O'Sullivan, was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Laurie Plomp, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability, and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Laurie Plomp, Transcriber
Order Number: AL-JO-1002-7147
Dated: March 12, 2019