QBG 1671 of 2019 - JCS

Canadian National Railway Company v Teamsters Canada Rail Conference, John Doe 1-100, Jane Doe 1-100, Kayton Disiewich, and Nick Anglos

James S. Ehmann, Q.C.	for Canadian National Railway Company
Drew S. Plaxton, Q.C., and M. McDonald	for Teamsters Canada Rail Conference
Kayton Disiewich and Nick Anglos	on their own behalf

FIAT - November 20, 2019 - CURRIE J.

Obtaining the *without notice* order

[1] The union asks that my November 19, 2019 order be set aside because the employer had not demonstrated that serious mischief would result from proceeding with that application with notice.

[2] As I discuss below, though, I find in the evidence before me serious mischief in the form of unlawful conduct. This circumstance required granting the *without notice* order so that the substantive application could be brought before the court.

Notice of the application: service

[3] The union objects to this application proceeding today, on the basis that notice of the application has not been shown to have been served properly.

[4] The union points to the provision in my November 19, 2019 order permitting notice of the application to be served by fax "in the event personal service cannot be made". Service, says the union, was effected only by fax. The onus is on the employer, the union asserts, to prove that personal service on Mr. Donegan could not be made.

[5] In response, counsel for the employer has advised that the order had been put in the hands of Ashmeade & Low, process servers, with instructions to serve Mr. Donegan. Counsel advised that this morning Ashmeade & Low had not been able to serve Mr. Donegan, having been advised that he was out of the country.

[6] I accept this information, coming as it does from an officer of the court and relating as it does to the process of this matter getting before the court.

[7] In this circumstance, I am satisfied that personal service on Mr. Donegan could not be made, so that service by fax was proper service.

[8] In broad terms, the purpose of service is to give a party notice of an application. The union has had notice, as evidenced by the presence of its counsel at the hearing today. Mr. Disiewich and Mr. Anglos have had notice, as evidenced by their presence at the hearing today. I would not expect anyone to have been served with respect to the named defendants John Doe 1-100 and Jane Does 1-100.

[9] Notice of the application has been duly given. The next question relates to whether sufficient notice has been given.

Notice of the application: timing

[10] The union objects that it has had insufficient time to respond to this application. It points to the default notice period, set out in *The Queen's Bench Rules*, of 14 days' notice of an application. The union recognizes that some cases require an abridgement of time, and the union suggests that in this case it would be appropriate for this application to be heard next week. While not ideal, that timing would afford the union a fair opportunity to consider the application and put together materials and a response.

[11] Having notice of the application, however, only late in the day yesterday and being required to respond to the application at 10:00 this morning is not fair, says the union.

[12] I have some sympathy for the union in this regard. The fact that its counsel has put together materials and presented a thorough and able argument this morning does not establish that the union has had all of the time that, in ideal circumstances, it would get. That fact, rather, is a tribute to counsel.

[13] Balanced against that circumstance, though, are the urgent circumstances demonstrated in the materials, as I discuss below. In light of that evidence, and in light of the conclusions that I reach, it is necessary for me to address the application now.

[14] The situation is somewhat analogous to that of an application for a ban on publication of evidence in a court matter. Sometimes the application is made and an interim order is granted by the court, before any notice is given to members of the media. In such a case, the members of the media typically are given leave to bring the matter back before the court – with the opportunity to file evidence and arguments – for the purpose of asking the court to terminate the interim order.

[15] It will be a similar situation here. For the reasons set out below, the primary relief sought by the employer will be granted. The union (and others) will have the opportunity to apply to the court subsequently to vary or discharge the order. Presumably such an application will involve evidence being placed before the court that

is not before me. That being the case, my decision here would not be binding on the judge hearing that application -- nor would there be any sense of that judge "sitting on appeal".

Hearsay evidence

[16] The union objects to hearsay that is included in affidavits filed by the employer. Section 51(4) of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, requires the contents of an affidavit in this context to be in the personal knowledge of the deponent.

[17] In his affidavit, Mr. Miron states that he has personal knowledge of the contents of the affidavit. Reviewing the affidavit, I do not see any statement that obviously is not within his personal knowledge. I am not striking or disregarding any part of that affidavit.

[18] In his affidavit, Mr. Strang states that he is providing both personal knowledge and information that he obtained from others. The information that he obtained from others is identified in his affidavit. Pursuant to s 51(4) I am disregarding that information.

[19] In his affidavit, Mr. Perry states that he has personal knowledge of the contents of the affidavit. Reviewing the affidavit, I do not see any statement that obviously is not within his personal knowledge. I am not striking or disregarding any part of that affidavit.

Application for an injunction

[20] As both counsel have observed, the standard test for obtaining an interim or interlocutory injunction is the establishment of a serious case, the prospect of irreparable harm, and the balance of convenience favouring the applicant: *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311.

[21] The employer cites the reasons of Justice Vancise and Justice Sherstobitoff in *Potash Corp. of Saskatchewan Mining Ltd. v Todd* (1987), 53 Sask R 165 (CA), in arguing that in the context of a labour dispute the latter two factors do not apply where unlawful conduct is established. There is some logic and reason to that argument, but I am not basing my decision on that argument. I address all three factors.

[22] As to a serious case, I am satisfied that the evidence before me establishes unlawful conduct. There is no question as to the right of the union and its members to strike. There is no question as to the right of the union and its members to picket in striking. There is no question as to the right of the union to communicate with the public about the strike.

[23] None of those rights, however, includes the right to block or delay vehicular or pedestrian traffic going in or out of the employer's premises. The blocking and delaying of traffic is unlawful. This has been established in decisions such as *Pepsi-Cola Canada Beverages (West) Ltd. v RWDSU, Local 558*, 2002 SCC 8 at para 103, [2002] 1 SCR 156:

> At this point we may usefully review what is caught by the rule that all picketing is legal absent tortious or criminal conduct. The answer is, a great deal. Picketing which breaches the criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation or misrepresentation will be impermissible, regardless of where it occurs. Specific torts known to the law will catch most of the situations which are liable to take place in a labour dispute. In particular, the breadth of the torts of nuisance and defamation should permit control of most coercive picketing. Known torts will also protect property interests. They will not allow for intimidation, they will protect free access to private premises and thereby protect the right to use one's property. ...
>
> [Emphasis added]

[24] The point was emphasized in *Fleming Door Products Ltd. v Hazell*, [2008] OJ No 3039 (QL) (Ont Sup Ct) at paras 15 and 18:

> 15 Picketing which prevents ingress to and egress from a company's premises is unlawful. The obstruction of lawful entry and vehicular traffic is a serious issue to be tried. ...
>
> ...
>
> 18 The obstruction of lawful entry from a company's premises by picketing is unlawful conduct and damages are not an adequate remedy when there is conduct that is deliberately tortious or criminal.
>
> ...

[25] The union observes that prosecutions under *The Highways and Transportation Act, 1997*, SS 1997, c H-3.01, are not pursued in this court. That is correct. That circumstance, though, does not prevent the court from recognizing that the blocking and delaying of traffic breaches provisions of that Act and so are unlawful.

[26] Similarly, while I recognize that no one is going to be convicted of a *Criminal Code* offence without being proven beyond a reasonable doubt to be guilty, the evidence establishes the likelihood that the subject activities of the union and its members are unlawful because they are contrary to the specific provision of s. 423(1)(g):

> 423 (1) Every one is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do,

> or to do anything that he or she has a lawful right to abstain from doing,
> ...
> (g) blocks or obstructs a highway.

[27] As to irreparable harm, the union observes that the employer's argument seems to be focused on economic loss. In that regard, I recognize that typically financial loss does not constitute irreparable harm, because financial loss can be compensated for through an award of damages.

[28] Here, though, given the complexity of loss arising from the interference with traffic, I conclude that the loss arising from the unlawful conduct likely is incalculable, so that damages cannot be considered to be an adequate remedy. Furthermore, because the subject conduct is unlawful damages are not an adequate remedy: *Fleming Door Products Ltd v Hazell*, at para 18. Irreparable harm is established.

[29] As to the balance of convenience, I conclude that the balance favours the employer. I have touched on the inconvenience arising from refusing the injunction. There will be no inconvenience to the union in being restricted to lawful picketing.

[30] The test for granting the injunction is met.

Terms of the order

[31] The draft order submitted by the employer goes farther than necessary to address the problem. The purpose of my granting this injunction is to put an end to vehicular or pedestrian traffic being stopped from or delayed in entering or leaving the employer's premises.

[32] Accordingly, in para. 1 of the draft order only clauses (g), (h) and (i) are justified by the evidence and required in the circumstances.

[33] I am not persuaded that paras. 2 and 3 of the draft order are justified by the evidence or are required. If someone appears to be breaching the order, evidence of that conduct can be gathered and that person can be brought before the court through other means, whether on normal notice or on abridged notice, depending on the circumstances.

[34] The provisions as to service (para. 4) and applying to vary or discharge (para. 5) are appropriate. To clarify: I am not seized with this matter. An application under para. 5 can be heard by any judge of this court.

Conclusion

[35] The draft order may issue, with these modifications:

[36] Paragraph 1 will include only the clauses currently labeled (g), (h) and (i).

[37] The paragraphs currently labeled paras. 2 and 3, dealing with the involvement of police, will not be included.

J.

G.M. CURRIE