



NEWSLETTER – NOVEMBER AND DECEMBER 2007

WITNESS COERCION AND INTIMIDATION

This newsletter relates to an award issued by Arbitrator Colin Taylor, Q.C. earlier this year, *Fraser Surrey Docks Limited v. International Longshore and Warehouse Union Ship and Dock Foremen, Local 514 (Skibo Grievance)*, [2007] B.C.C.A.A. No. 32 (the “Taylor Award”). More specifically, this newsletter focuses on the issue of witness coercion and intimidation canvassed in the Taylor Award.

An application for judicial review of the Taylor Award was recently dismissed by the B.C. Supreme Court in [2007] B.C.J. No. 2262.

Parenthetically, it is noted that the Taylor Award also speaks to the issues of video surveillance of employees and admissibility of video surveillance evidence in the arbitral setting.

Background

Fraser Surrey Docks Limited (the “Employer”) operates a multi-purpose marine terminal on the Fraser River in Surrey, British Columbia.

The International Longshore and Warehouse Union Ship and Dock Foremen, Local 514 (the “Union”) is certified under the

Canada Labour Code to represent foremen employed by the Employer.

In June 2006, the Employer terminated the employment of a foreman (“KS”), alleging that he had over a period of time been stealing gasoline from the Employer. That termination was grieved by the Union, and the grievance proceeded to arbitration before Arbitrator Taylor.

Two pre-hearing applications were brought, one by the Union and the other by the Employer. The Union applied for a ruling that two pieces of video surveillance evidence were inadmissible. The Employer applied to have the grievance dismissed for abuse of process.

The Employer took the position that “the Union abused the process of arbitration when it made known to a witness [named Mike Matilda] that if it learned the identity of [the] foreman who provided information about the Grievor’s alleged involvement in the theft of gas, that foreman would be expelled from the Union”. The Employer said that:

- (a) “due to the Union’s intimidation, it [had] lost the evidence of a material witness, and the denial of a fair hearing [was] already assured”; and

- (b) “dismissal of the grievance [was] the only appropriate remedy”.

By way of background, Mr. Matilda was another foreman who worked for the Employer, and had reported to Ken Buckle, one of the Employer’s security guards, that KS was stealing gas.

The Union took the position that:

- (a) there was “no evidentiary basis for the Employer’s motion”;
- (b) “the Employer’s right to a fair hearing [had] not been compromised”; and
- (c) “there [was] no basis for dismissal of the grievance”.

Taylor Award

Arbitrator Taylor dismissed the grievance for abuse of process.

Before the arbitrator, Mr. Matilda adamantly denied that the Union had subjected him to any kind of coercive or intimidating conduct. He claimed to know nothing about KS stealing gas. Mr. Matilda insisted he did not even know Mr. Buckle.

Arbitrator Taylor began by saying:

“The conflict in the evidence of Mr. Buckle and Mr. Matilda is stark and of lotto-size proportions. One of them is a fictionist of great zeal.”

Arbitrator Taylor carefully reviewed and considered the conflicting testimony, and weighed it against other evidence in the case. The arbitrator disbelieved Mr. Matilda’s testimony, stating that his “denials had the ring of exaggerated protest” and he “doggedly [persisted] in giving sworn

testimony whose falsity was painfully obvious throughout”. In the arbitrator’s view, Mr. Matilda’s “testimony was plainly the evidence of someone who had been coerced into not telling the truth”.

After posing the question, “what could possibly [have been] the cause” of Mr. Matilda’s false testimony, Arbitrator Taylor concluded that “[e]xcept for interference by the Union, no plausible answers [had] been proffered”. The arbitrator underscored that, after all, it was Mr. Matilda who “had seen fit to do the right thing and report the alleged wrongdoing in the first place”.

Arbitrator Taylor dismissed the grievance on the basis that the Union’s coercion or intimidation of Mr. Matilda had irremediably impacted the Employer’s right to a fair hearing:

“[T]he Union interfered with the evidence of a material witness, Mr. Matilda, by threatening Union discipline for reporting the misconduct of another member, thereby causing him to recant his evidence. Had it not been for the interference of the Union, Mr. Matilda’s evidence would likely have justified the Grievor’s dismissal, thereby vindicating the Employer’s position in this arbitration. The evidence is now lost. There is no remedy that can preserve a fair hearing

Whether someone is stealing from the Employer, and what should be done about it, is not a matter the Union may reserve to itself to decide. It was a matter for the Employer, which has the right to dismiss for just cause, and then for this arbitration board to review the Employer’s decision, and to decide for itself whether just cause existed,

after a fair hearing considering the evidence and argument of both parties. However, the Union's actions, which coerced Mr. Matilda into recanting his evidence, have made a fair hearing impossible, and have thus deprived this arbitration board of the ability to order a remedy against the Employer."

analysis and findings of fact, which led to his conclusion that the Union intimidated the critical witness, which, in turn, led to his decision that the Union had abused the process are clearly set out in his award ... It cannot be said that his award is not in accord with reason or was clearly irrational."

Judicial Review Proceedings

The Union brought an application for judicial review of the Taylor Award, arguing that:

- (a) Arbitrator Taylor "made findings of fact based on a reversal of the onus of proof, or drew improper inferences from the facts he found, and therefore the rules of fairness and natural justice were not followed"; and
- (b) the arbitrator's "decision to dismiss the grievance without a hearing into its merits was a denial of natural justice ..."

Madam Justice Garson of the B.C. Supreme Court dismissed the application for judicial review.

The judge began by agreeing with the Employer that the Union was taking issue with findings of fact on the part of Arbitrator Taylor. Those findings of fact were entitled to the greatest degree of judicial deference and reviewable on a standard of "patent unreasonableness", and accordingly could only be overturned if they were "evidently not in accord with reason" or "clearly irrational".

Madam Justice Garson stated:

"I have already reviewed the factual findings made by the Arbitrator. His

Madam Justice Garson then turned her mind to whether Arbitrator Taylor's decision to dismiss the grievance on a preliminary basis without a hearing into the merits amounted to "a denial of natural justice, and most significantly the Grievor's right to substantive justice".

In the judge's view, irrespective of whether the Court applied a "reasonableness" or "patent unreasonableness" standard of review, Arbitrator Taylor's choice of remedy "[withstood] the appropriate degree of judicial scrutiny":

"[H]ere, the Arbitrator conducted a fair and full hearing concerning the employer's application for dismissal of the grievance. He found the facts supported the employer's position. He then addressed the question of remedy. He heard all the evidence and concluded that, in light of the Union's conduct, the employer's ability to defend the grievance had been irreparably harmed ... The Arbitrator was uniquely positioned to decide if the employer could have a fair hearing despite the corrupted testimony of Mr. Matilda. He concluded that there was no means by which the employer could have a fair hearing in the circumstances

He determined that without the critical witness there was no case to go forward."

The Court disposed of the Union's application for judicial review solely on the basis of the witness coercion and intimidation issue. The Court did not rule on any issue relating to or arising out of video surveillance of employees.

Witness Coercion or Intimidation Has No Place in Arbitral and Other Legal Processes

Fraser Surrey Docks Limited v. International Longshore and Warehouse Union Ship and Dock Foremen, Local 514 (Skibo Grievance) is a significant award for a couple of reasons.

For one thing, it contains important statements in relation to video surveillance of employees and admissibility of video surveillance evidence in the arbitral setting.

Perhaps more significantly, the Taylor Award makes it crystal clear that coercive or intimidating conduct that causes material evidence, including witness evidence, to be irretrievably lost, and which renders a fair hearing on the merits impossible, has absolutely no place in arbitral and other legal processes.

Arbitrator Taylor put it best when he stated:

“A party cannot be allowed to achieve a victory in adjudication by using coercive means to affect the evidence. The rule of law exists to replace the rule of force. Adjudication must be fair in order to be legitimate. If it becomes a contest into who can coerce the witnesses, it is no longer adjudication at all. It is not the replacement of the rule of force with the rule of law, it is the former continuing under the guise of the latter.”

If you have questions regarding the issues raised in this newsletter and how they may affect you or your company, please do not hesitate to contact any lawyer at our firm.

Lawyer contact information can be obtained by contacting us at (604) 806-0922 or visiting our website at www.ropergreyell.com.

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Tom Roper, Q.C., a partner at Roper Greyell, and James Kondopulos, an associate lawyer with the firm, were counsel for Fraser Surrey Docks Limited in *Fraser Surrey Docks Limited v. International Longshore and Warehouse Union Ship and Dock Foremen, Local 514 (Skibo Grievance)* and in the subsequent judicial review proceedings.

Tom practises in the areas of employment, labour and administrative law. In 1992, he was appointed by the B.C. Minister of Labour to a Committee of Special Advisors to recommend an overall labour relations strategy for British Columbia. He was one of three special advisors responsible for drafting the B.C. *Labour Relations Code*. In 1998, Tom was appointed Queen's Counsel. He is listed as a leading employment and labour lawyer in LEXPERT's "*The Leading 500 Lawyers in Canada*" and the International Bar Association's "*The International Who's Who of Management Labour and Employment Lawyers*".

James acts for, and provides advice to, employers in employment, labour relations and human rights matters. He also provides legal representation to employees in wrongful dismissal actions. James represents clients in a variety of forums, including the B.C. Court of Appeal, Supreme Court, Labour Relations Board and Human Rights Tribunal. He has been a guest speaker for the B.C. Continuing Legal Education Society, at Employers' Network Conferences and at the Roper Greyell Morning Education Series. James has written for the B.C. Human Resource Management Association's PeopleTalk magazine, and is also the author of the firm's newsletter.

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* Every effort has been made to ensure accuracy in respect of this newsletter. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this newsletter. *



SEASON'S GREETINGS
FROM THE
LAWYERS AND STAFF
OF
ROPER GREYELL

***We wish you and your family a wonderful holiday season and
success, happiness and good health in 2008***

