COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

108-21-CA

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1252

APPELLANT

- and -

HER MAJESTY THE QUEEN in right of the PROVINCE OF NEW BRUNSWICK, as represented by TREASURY BOARD

RESPONDENT

Canadian Union of Public Employees, Local 1252 v. Her Majesty the Queen in right of the Province of New Brunswick, as represented by the Treasury Board, 2021 NBCA 60

CORAM:
The Honourable Chief Justice Richard
The Honourable Justice French
The Honourable Justice LeBlond

Appeal from a decision of the Court of Queen's Bench:
October 18, 2021

History of case:

Decision under appeal:
2021 NBQB 224

Preliminary or incidental proceedings:
[2021] N.B.J. No. 267

Appeal heard:
November 19, 2021

Judgment rendered:
December 23, 2021

SYNDICAT CANADIEN DE LA FONCTION PUBLIQUE, SECTION LOCALE 1252

APPELANT

- et -

SA MAJESTÉ LA REINE du chef de la PROVINCE DU NOUVEAU-BRUNSWICK, représentée par CONSEIL DU TRÉSOR

INTIMÉE

Syndicat canadien de la fonction publique, section locale 1252 c. Sa Majesté la Reine du chef de la Province du Nouveau-Brunswick, représentée par Conseil du Trésor, 2021 NBCA 60

CORAM :
l'honorable juge en chef Richard
l'honorable juge French
l'honorable juge LeBlond

Appel d'une décision de la Cour du Banc de la Reine :
le 18 octobre 2021

Historique de la cause :

Décision frappée d'appel :
2021 NBBR 224

Procédures préliminaires ou accessoires :
[2021] A.N.-B. n^{o} 267

Appel entendu :
le 19 novembre 2021

Jugement rendu :
le 23 décembre 2021

Counsel at hearing:

For the appellant:
Glen Serge Gallant

For the respondent:
Keith Mullin

THE COURT

The appeal is dismissed with costs of $2,500.

Avocats à l’audience :

Pour l’appelant :
Glen Serge Galant

Pour l’intimé :
Keith Mullin

LA COUR

L’appel est rejeté avec dépens de 2 500 $.

The following is the judgment delivered by

THE COURT

I. Facts

[1] The labour dispute that underlies this appeal involves the reclassification by the Province of 1,980 Licenced Practical Nurses (LPNs) employed under Part III of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. The LPNs had formed part of the Canadian Union of Public Employees, Local 1252 since its inception in the 1970s and made up 22% of that bargaining unit's total membership.

[2] The reclassification occurred following lengthy collective bargaining that came to a deadlock and resulted in a strong vote in favour of a strike, in which LPNs participated. Local 1252 was in a legal strike position as of October 6, 2021, at 12:01 a.m. The following day, the Province notified Local 1252 it was reclassifying LPNs to make them part of the New Brunswick Nurses Union as of October 8th. That day, Local 1252 took the following actions:

1) it applied to the New Brunswick Labour and Employment Board ("Labour Board") for a determination of whether LPNs should remain part of the Local 1252 bargaining unit pursuant to the Labour Board's exclusive jurisdiction under s. 31 of the *Act*;

2) it asked the Province to maintain the *status quo* for LPNs until the Labour Board resolved their reclassification dispute – a request the Province rejected that day; and

3) under Rule 40.01 of the *Rules of Court*, and relying on s. 33 of the *Judicature Act*, R.S.N.B. 1973, c. J-2, it filed a Notice of Preliminary Motion asking the Court of Queen's Bench to issue an order directing the Province to maintain all LPNs, who are members of Local 1252, under their

existing terms and conditions of operational category and occupational group until the Labour Board's final disposition of the s. 31 application.

[3] Local 1252's preliminary motion was heard on October 15, 2021. It appears to have been common ground between the parties that:

1) the Labour Board has exclusive jurisdiction over the reclassification dispute;

2) the Labour Board has no power to grant interlocutory relief in these circumstances; and

3) absent a statutory provision to the contrary, a court may grant interim relief when final relief will be granted in another forum.

[4] On this latter point, Local 1252 points to the Supreme Court of Canada's decision in *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495, [1996] S.C.J. No. 42 (QL) ("*BMWE*"). As for the Province, it recognizes the dictate of *BMWE* but argues Rule 40.01 constitutes a statutory provision to the contrary, which ousts the court's jurisdiction to grant the requested relief.

[5] On October 18, 2021, a judge of the Court of Queen's Bench ruled she did not have "jurisdiction" to grant the relief sought by Local 1252. She reasoned that, for such relief to be granted under Rule 40.01, Local 1252 would have to contemplate the commencement of a proceeding under the *Rules of Court*. In coming to this conclusion, the motion judge relied on this Court's decision in *Ouellette Sea Products Ltd./Les Produits de la Mer Ouellette Ltée v. Cap-Pelé Herring Export Inc./Les Exportations de Hareng Cap-Pelé Inc. and Ocean Shore Fish Export Ltd. v. Cap-Pelé Herring Export Inc./Les Exportations de Hareng Cap-Pelé Inc.*, 2010 NBCA 12, [2010] N.B.J. No. 42 (QL) ("*Ocean Shore*"). She also held she could not apply Rule 2.01, which provides the court with discretion to dispense with compliance with any rule unless the rule expressly or impliedly provides otherwise.

[6] Local 1252 appeals the motion judge's decision. It claims she erred in concluding she was without jurisdiction to issue the interlocutory order requested. In essence, Local 1252 argues that, if the Court of Queen's Bench does not have that jurisdiction, this creates a void leaving parties that may obtain final relief in another forum without recourse to obtain interlocutory relief.

[7] Counsel for Local 1252 advised the Court that, since the motion judge's decision was issued, the remaining members of Local 1252 voted in favour of a new collective agreement. The LPNs, because of the Province's refusal to maintain the *status quo*, were unable to exercise what would otherwise have been their right to participate in the vote.

II. Analysis

[8] In the present case, a judge of the Court of Queen's Bench would have had the power to issue interim relief had the matter properly been before the court. Section 33 of the *Judicature Act* confers that power, and the Supreme Court, in *BMWE*, made it clear that an interlocutory injunction is available even when there is no cause of action before the issuing court. Writing for the Supreme Court, McLachlin J., as she then was, applied the *Law and Equity Act*, R.S.B.C. 1979, c. 224 (the British Columbia equivalent of our *Judicature Act*), s. 36 of which is worded closely to our s. 33. The issue was whether the court could issue an interlocutory injunction where there was no cause of action before the court to which the injunction would be ancillary. She held the governing principle is that, if "no adequate alternative remedy exists," the court retains a residual discretionary power to grant such relief (para. 5). She went on to state courts of inherent jurisdiction can grant relief not available under a statutory scheme. That jurisdiction exists specifically to deal with situations that present an issue not foreseen by an *Act*. In the end, McLachlin J. wrote "there must be a body to which disputants may turn" where statutory schemes offer no relief (para. 8). That is precisely the situation in the case before us since the Labour Board will eventually decide the classification issue, but that body has no power to impose interim measures. McLachlin J. cites the House of Lords' decision in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, [1993] 2 W.L.R. 262,

[1993] A.C. 334, which categorically rejected the notion that, to grant interim relief, a court must have jurisdiction over the cause of action. As she noted, Canadian courts have applied *Channel Tunnel* in support of the proposition that courts have jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined (para. 16).

[9] If the motion judge had held the Court of Queen's Bench did not have the power ("the jurisdiction") to adjudicate an application for interim relief in a case where the ultimate issue will eventually be adjudicated in another forum, she would have been in error. The Court of Queen's Bench obviously has such power. This was not, however, the ruling.

[10] A careful reading of the motion judge's decision reveals she recognized the Court of Queen's Bench had "inherent jurisdiction and broad discretion to issue interlocutory or injunctive relief," specifically noting the power had been codified in s. 33 of the *Judicature Act* (para. 24). What the motion judge decided was not that the Court of Queen's Bench did not have the power to issue the relief sought, but rather that she was not properly seized of a valid request for the court to exercise the power. On this point, she applied *Ocean Shore*.

[11] In *Ocean Shore*, the parties had signed agreements containing an arbitration clause. When a dispute arose, one of the parties (referred to as "CHE" throughout the Court's decision) attempted to refer the matter to arbitration, and an arbitrator was named. When the other parties (referred to as "PMO") disputed the jurisdiction of the arbitrator on the ground the agreement in question was a nullity, the arbitrator unilaterally decided to end his mandate. As a result, CHE filed a Notice of Preliminary Motion with the Court of Queen's Bench seeking, first, an interlocutory injunction forcing PMO to comply with the agreements and, second, an order referring the dispute to arbitration. The preliminary motion was brought under Rule 40.01. The motion judge dismissed the application for the interlocutory injunction but ordered the dispute be referred to arbitration. The judge's order was not subject to the condition that a proceeding was to be commenced without delay. In essence, instead of ordering

interlocutory relief, the judge purported to issue a final order resolving the dispute on whether the matter should be referred to arbitration. On PMO's appeal, this Court held that the motion judge erred in making a mandatory order under Rule 40.01 and, further, in dispensing with that Rule's requirement to commence an action without delay.

[12] *Ocean Shore* sets out parameters for the use of Rule 40.01. The Court held that "an order under Rule 40.01 can be granted only on terms providing for commencement of proceedings *under the Rules of Court* without delay" (emphasis in original; para. 19). The Court further held that, since Rule 40.01 expressly prohibits the issuance of an order under that rule without requiring the commencement of proceedings without delay, a motion judge may not rely on Rule 2.01 to justify non-compliance. It was on that basis the Court, in *Ocean Shore*, set aside the motion judge's order directing PMO to submit to arbitration.

[13] *Ocean Shore* could not be any clearer. A preliminary motion under Rule 40.01 requires that a proceeding "*under the Rules of Court*" be commenced without delay. Thus, the motion judge was correct to hold she was not properly seized of a request for interim relief. In that portion of her decision, the term "jurisdiction" was obviously used in this very narrow sense since she had earlier used the same term in the sense of the Court having the power to issue interim relief.

[14] On an application of *Ocean Shore*, which no one has challenged as incorrect, it cannot be said the motion judge erred in determining the court was not properly seized of a request for interlocutory relief. In our view, the proper procedural vehicle to seize the Court of Queen's Bench with a request for an interlocutory injunction, when the ultimate issue will be decided in another forum that has no power to issue interim relief, is a Notice of Application. Rule 16.04 provides in part: "Where an act […] authorizes an application […] to the court without requiring the institution of an action, a Notice of Application may be used […]."

[15] In the current matter, s. 33 of the *Judicature Act* confers upon the Court of Queen's Bench the power to issue interim relief and is silent on the procedural vehicle by

which it may exercise that power. The provision does not contemplate the commencement of an action. In our view, the above language of Rule 16.04 is sufficiently broad to provide the means to place before a court a matter seeking s. 33 relief. We note this broad scope of Rule 16.04 exists "in addition" to the availability of a Notice of Application for the scenarios enumerated in Rule 16.04, none of which applies to the circumstances of this case except perhaps Rule 16.04(j) if it is unlikely that there will be a substantial dispute of fact.

III. Conclusion

[16] For these reasons, the appeal is dismissed. Because an application for interim relief was not adjudicated on the merits, we decline to opine on the other comments the motion judge made in *obiter* since Local 1252 may well choose to properly seize the Court of Queen's Bench with the issue. Considering this possibility, we direct, in accordance with s. 24(2) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5, that it be published in the first instance in English, and thereafter, at the earliest possible time, in French.