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Hockey Night in Alberta

By Jennifer Koshan

Decision commented on:

National Hockey League Players' Association v Edmonton Oilers Hockey Corp, 2012 CanLII 58944 (AB LRB)

In the interests of full disclosure, I am a hockey fan, although I would prefer to play shinny or watch my son's beer league playoffs rather than watch an NHL game. I have much more sympathy for agricultural workers who continue to be excluded from Alberta's *Labour Relations Code*, RSA 2000, c L-1, and for the workers recently laid off by XL Foods, than I do for locked out NHL players (although I have even less sympathy for the owners). So it was with some interest but not a lot of sympathy for either side that I read the recent decision of the Alberta Labour Relations Board in *National Hockey League Players' Association v Edmonton Oilers Hockey Corp*, 2012 CanLII 58944.

Back in May 2012, the NHL Players Association (NHLPA) had been given notice in a letter from the Deputy Commissioner of the NHL that if they failed to reach a new collective agreement with the owners, the NHL wished to terminate the collective agreement under section 8(d)(1) of the *U.S. National Labor Relations Act (NLRA).* No collective agreement was reached before termination, and the NHL locked out its players as of Sunday, September 15, 2012 (para 1).

There is no dispute that the lockout is legal under the *NLRA.* However, the NHLPA and a number of players from the Calgary Flames and Edmonton Oilers argued that the lockout was unlawful in Alberta as it failed to comply with the *Labour Relations Code.* The NHLPA and players sought a declaration to this effect from the Alberta Labour Relations Board, along with a cease and desist order requiring the NHL, Flames and Oilers "to refrain from further unlawful lockout" and an order requiring the Flames and Oilers "to open training camp on a business as usual basis" (para 2). In response, the NHL, Flames, and Oilers argued that the application should be dismissed on the basis that the *Code* does not apply to the relationship between the NHL, Alberta teams, and their players, and that the Board therefore lacked jurisdiction to deal with the matter. They also argued that even if the *Code* applied, the Board should refrain from intervening to avoid "undermin[ing] the league-wide collective bargaining relationship between the parties" (para 3).

The Board's decision was written by Chair Mark Asbell, Q.C. (members Kirkwood and Moffatt concurring). They began their decision by noting "that this case involves a unique set of circumstances involving a unique work environment," i.e. it was "*sui generis*" (at para 5). This is because the NHL-NHLPA relationship "operates within a complex structure spread over

multiple states and provinces in two countries" (at para 6). Another unique feature is that although the NHL and NHLPA bargain collectively to negotiate common terms and conditions surrounding each team's relationship with its players, the collective agreement does not determine salaries of individual players or the lengths of their contracts, which are individually negotiated (at para 6). It followed for the Board that "although of interest to many, and especially hockey fans," the decision "has little, if any, legal precedent within the labour relations jurisprudence in Alberta" (at para 5).

The Board also noted at the outset that the question of which jurisdiction's labour laws governed the relationship between the NHL and NHLPA had never been decided clearly, and that the parties had previously engaged in forum shopping depending on the dispute. In some colourful language, the Board commented that "it is like they were squeezing jello to watch where it lands in order to determine what approach to take, in what dispute, in whichever jurisdiction the argument is being advanced. As Ed Whelan, a famous former Calgary sportscaster used to say, the parties have adopted the players' credo of "doing whatever it takes to put the biscuit in the basket"" (at para 7).

In spite of the jurisdictional uncertainties, the Board indicated that the NHL and NHLPA had engaged with Alberta's labour law regime previously. The NHLPA was a "trade union" within the meaning of section 1(x) of the *Code*, and the Flames and Oilers clubs were "employers" as defined in section 1(m) (at paras 11-13). The Board noted that in previous NHL lockouts in 1994 and 2004-5, the NHL or its Alberta clubs had followed the Alberta *Code* pertaining to notices, mediation and other preconditions to lockout, including lockout votes. There were no disagreements between the parties over the Board's jurisdiction on those occasions (at paras 18-19).

However, in the current dispute, there was such a disagreement. On August 3, 2012, after bargaining had "reached an impasse" in New York and Toronto, the NHL sought the appointment of a mediator as required under section 65 of the Alberta *Code* (at para 20). The NHLPA argued that the Alberta Director of Mediation Services lacked jurisdiction to appoint a mediator, as a Notice to Bargain had not yet been filed as required by the *Code*, or alternatively had not been filed in the time limits required. The Director rejected the NHLPA's arguments and appointed a mediator on August 21. After three days, mediation was deemed unsuccessful by the mediator, who "booked out," and on August 31 the NHL filed a lockout application to the Board to enable it to conduct a lockout vote with the Flames and Oilers. The NHLPA objected, arguing that the Board did not have jurisdiction to supervise a lockout vote, that the NHL had no standing to bring a lockout application, and that the statutory preconditions to a lawful lockout had not been met if the Alberta *Code* applied to the dispute (at para 23).

After some correspondence between the parties, and in an odd twist, the NHL and NHLPA agreed on September 10 that there was no voluntary recognition relationship between them for the purposes of the Alberta *Code*. Division 6 of the *Code* governs voluntary recognition, and section 42 provides that "an employer has the right to bargain collectively with a voluntarily recognized trade union acting on behalf of the employer's employees or a unit of them." The NHL argued that it had only filed an application for a lockout vote under Alberta's *Code* "out of an abundance of caution", and withdrew its application without any vote having been held with the Flames and Oilers clubs (at para 24). On September 13, the NHL's Board of Governors unanimously voted to support a lockout. After the lockout was announced, the NHLPA filed the current application with the Alberta Board alleging an unlawful lockout, and that its previous position on the Board's lack of jurisdiction should not be seen as binding. Its contention was that

"even if the NHLPA ... [agreed] the NHL was not bound by voluntary recognition in Alberta, such waiver does not affect the rights of the individual players" (at para 31). In response, the NHL argued that the *Code* did not apply, in spite of having filed its lockout application with the Board earlier (at para 32).

In its decision, the Board referred to the "vacillating positions of the NHL and the NHLPA in this dispute" (at para 34), which seems like a bit of an understatement. More than squeezing jello or putting biscuits in baskets, I was reminded of watching very young kids play hockey games where they would sometimes shoot at their own nets in the hopes of getting a goal, any goal. At some point those kids learn that it is not a free for all; they need to take shots on the other team's net because those are the rules of the game. But then again, there's a lot the NHL could learn from kids' hockey (don't get me started on fighting).

As it turns out, the Board held that the jurisdictional issue, "which has been left ambiguous by the parties for almost 50 years, is not best answered in the heat of a strike or lockout." This question did not need to be resolved, since "even if the Board has jurisdiction to declare the lockout unlawful, it should not exercise its discretion to do so in these circumstances" (at para 34).

The Board's discretion whether to declare a lockout unlawful is based on the wording of section 87 of the *Code*, which provides that "Where the Board is satisfied that ... an employer or employers' organization called or authorized or threatened to call or authorize an unlawful lockout, ... the Board may ... so declare and may direct what action" should be taken. The Board noted that its decisions in this context are often motivated by considerations of policy and practicality more so than previous decisions in other cases.

In this case, the Board used its "labour relations expertise" and decided that it made "labour relations sense" not to declare the lockout unlawful (at para 38). This was so for several reasons. First, even if the lockout of the Flames and Oilers players in Alberta was unlawful under the *Code*, this would have no practical effect on the labour dispute as a whole. The Flames and Oilers players might begin training camp, but they would not be paid until the regular season started, and it was unlikely the NHL would start the regular season for two teams (no matter how much Calgary and Edmonton fans might enjoy a league between these rivals, which is my own aside, not the Board's).

The Board's second reason for not exercising its discretion was that it did not want to "encourage parties to take purely strategic, inconsistent positions about jurisdiction in the course of a dispute" (at para 40). This makes sense on a certain level – why reward the parties with a decision when they have played fast and loose with the rules? On the other hand, if the Board had resolved the jurisdictional issue, it may have prevented this sort of jello squeezing in the future.

Third, the purpose of the *Code*'s provisions on preconditions to a lockout is to provide notice and "to maximize the opportunity for the parties to engage in rational discussion and good faith bargaining and to minimize precipitous, ill-considered reliance on their economic weapons." There was no suggestion that the NHLPA did not understand that a lockout was imminent, and the parties had in fact engaged in "extensive bargaining" (at para 41).

Lastly, to intervene in this dispute as requested by the NHLPA "would be to effectively remove the Calgary Flames and Edmonton Oilers teams and players from the league-wide collective

bargaining process that the parties have historically engaged in ... under the *NLRA*," and "would be detrimental to the ongoing relationship between the parties and the ability of the league to function properly" (at para 42). The Board drew an analogy to the case of *Orca Bay Hockey Limited Partnership and the NHL* v. *B.C. Chapter of the NHLPA*, [2007] BCLRBD No 172, where the BC Labour Relations Board decided not to certify a bargaining unit consisting only of Vancouver Canucks players under the BC *Labour Relations Code*, RSBC 1996, c 244. In that case, the BC Board noted some of the characteristics of the league-wide structure that might be undermined if certain teams were subject to a different bargaining regime:

> Commissioners' authority to impose discipline; league-wide rules regulating the transfer of players between various clubs as well as minor league affiliates; league-wide salary arbitration; league-wide draft and waiver rules; league approval of player contracts; league-wide restrictions on maximum players' salaries; a centralized league-wide schedule, etc . (*Orca Bay* at para 67)

Whether the issue was one of certification or lockout, the Alberta Board found that it would be inappropriate "to carve one or two teams out from the league-wide structure and replace it with their own individualized collective bargaining relationship" (at para 44). Accordingly, the NHLPA's application was dismissed.

As of the time of writing, NHL commissioner Gary Bettman had just called a news conference to announce that the owners had rejected a number of counter-offers to their recent proposal for a 50-50 share of league revenue. No further talks between the NHL and NHLPA are currently scheduled. In the meantime, there is some excellent hockey to be watched in your local arena or here at the University of Calgary, with the men's Dinos tied at the top of the Canada West Division, and the women's Dinos defending their CIS championship title from last year, so far undefeated.