Date: 19980327
Docket: A973300
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

GEORGE SKEA

PETITIONER

AND:

SUNSHINE COAST REGIONAL DISTRICT

RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE CHAMBERLIST

Counsel for the Petitioner:	Judith M. Wilson
Counsel for the Respondent:	Christopher S. Murdy
Place and Date of Hearing:	Vancouver, B.C. March 25, 1998

[1] Pursuant to his amended petition filed December 12, 1997, the petitioner seeks an order confirming the appointment of Mr. Gordon Wilson, MLA as arbitrator in a long standing dispute between the petitioner and the respondent.

[2] About all that is agreed upon between the parties is the fact that there has been a long standing dispute between the parties.

[3] By way of background the petitioner constructed a boatshed that violated the respondent's bylaws. The respondent adopted a bylaw pursuant to the provisions of the ***Municipal Act***, R.S.B.C. 1996, c.323 s.698, authorizing demolition of the boatshed. The petitioner interfered with the execution of the demolition authorized by the bylaw and, as a result, an injunction was issued by this court prohibiting the petitioner from interfering with the demolition. Subsequent to that action, the respondent then removed the boatshed and added the cost of so doing to the petitioner's property taxes.

[4] Thereafter, the petitioner commenced an action in the Provincial Court of British Columbia seeking to recover the costs of the materials taken away, and as well, to reverse the addition to his property taxes of the demolition costs incurred.

[5] Thereafter, on May 5, 1997, the petitioner filed a notice of withdrawal withdrawing his provincial court action against the respondent while the provincial court had reserved on a preliminary jurisdictional point.

[6] The petitioner alleges that there was an agreement reached between the respondent and himself, whereby the dispute between himself and the respondent, would be referred to arbitration and one Gordon Wilson, MLA, would be the arbitrator. He alleges that in July 1996, a Mr. Bill Price, then current Chief Building Inspector for the respondent, offered to settle the petitioner's claim against the respondent by arbitration using the services of Gordon Wilson, MLA.

[7] In support of his petition, the petitioner has provided a statutory declaration of Gordon F.D. Wilson, sworn the 10th day of December, 1997. In that declaration, Mr. Wilson says at paragraphs one and two:

> 1. THAT I confirm that I was approached by representatives of the previous Board of the Sunshine Regional District and asked if I would be prepared to arbitrate in a matter between George Skea and the Sunshine Coast Regional District. I accepted and agreed to act as arbitrator on the condition that my participation was acceptable to both parties and that both parties would be prepared to abide by whatever recommendations came forward.

> 2. Subsequently the last municipal election brought to office a new board that has not acted upon my offer. I, however, remain prepared to act in such a capacity under the same conditions and have communicated that to the Chair of the current Board.

[8] In correspondence from Mr. Wilson to the respondent dated April 10, 1997, Mr. Wilson indicates to the then Chair of the respondent, that as of that date, he had received a complete brief from the petitioner outlining his claim for damages, compensation and costs against the respondent. He went on to say:

> As all parties are keen to resolve the matter at hand, may I suggest you forward your brief to me at your earliest possible convenience.
>
> Arbitration between George Skea and the S.C.R.D. will proceed according to the '***Commercial Arbitration Act***'.
>
> Looking forward to an amiable and expedient resolution for all concerned.

[9] On the basis of this letter, the petitioner submits that there was no doubt that in April of 1997, Mr. Wilson believed the parties had agreed to go to arbitration and that he had been designated by agreement the person to arbitrate the dispute. That conclusion, regrettably, has not been adopted by Mr. Wilson in his most recent declaration sworn in December which I have already referred to. The only conclusion that can be drawn, in my view, from a clear reading of that declaration is that Mr. Wilson was approached and asked if he would be

prepared to arbitrate the matter and he agreed to act but only "on the condition that my participation was acceptable to both parties and that both parties would be prepared to abide by whatever recommendations came forward". (Emphasis Added)

[10] Further, Mr. Wilson confirms in paragraph 2 of his declaration previously set forth that his "offer" was not accepted.

[11] Nowhere does Mr. Wilson (who would be the person with the best knowledge of any agreement having been reached) indicate that there was an agreement or state that firstly, that there was an agreement to arbitrate the dispute, and secondly, that he was the arbitrator who was appointed to hear and determine the matter with the consent of both parties.

[12] The applicant must establish on a balance of probabilities that there was an agreement reached with respect to the arbitration and that the parties had agreed to the arbitrator.

[13] This is the threshold that must be attained by the applicant, and in my view, he has failed to do so.

[14] The other correspondence to the petitioner from the respondent being the May 28, 1997 letter from the respondent to

the petitioner specifically rejects the offer of Mr. Wilson to act as arbitrator. No further correspondence from Mr. Wilson to the respondent was put in evidence on the application and if tendered, probably would not have assisted in advancing the petitioner's position.

[15] While section 1 of the ***Commercial Arbitration Act***, R.S.B.C. 1986 c.3, contemplates that an arbitration agreement may be either written or oral, that fact does not assist the petitioner. At most, the evidence before me indicates an offer by Mr. Wilson to act as arbitrator which was not accepted by the respondent.

[16] It would appear that what transpired between the parties were candid discussions with the view to having the dispute resolved without recourse to the courts. That of course, is always commendable but when such a course is adopted, there must be demonstrated that the parties had reached consensus on every material element. I am unable to find that contractual terms necessary to found an agreement to arbitrate and to agree on the arbitrator has been established. And the result, the petition is dismissed.

[17] If I am wrong in taking this approach then I would also have to dismiss the petition on the further basis urged upon me by counsel for the petitioner on the legal principle that, in

order to bind the regional district, a bylaw or resolution would be necessary pursuant to sections 173(2) and 202(3) of the ***Municipal Act*** (supra).

[18] In support of this proposition, the respondent relied on the decision of ***Amalgamated Recreation Engineers and Network Associates Ltd. v. Town of Sidney et al.*** 7 M.P.L.R. 217.

[19] The ratio of that case simply is that ordinary rules of agency law do not apply to local government. At page 238, Rae J. said:

> But as I see the matter, the plaintiff is faced with a more formidable defence related to the provisions of the ***Municipal Act*** and the case law thereon. It seemed to me that this was the defence most forcefully put forward by the defendants. This relates to the formalities to be observed if a municipality is to be held to be bound to an enforceable contract. There are a number of provisions of the ***Municipal Act*** which bear upon the matter, together with considerable law.

[20] His Lordship then proceeded to set out the provisions of the ***Municipal Act*** (supra) then in force and which have been superseded by section 173 of the current ***Municipal Act*** (supra) which provides as follows:

> (1) A municipality incorporated under this Act has all the rights and liabilities of a corporation with full power to acquire, hold and dispose of real and other property, subject to this Act, and to contract for materials and services.

> (2) Except as otherwise provided in this or another Act, municipal powers must be exercised by the council.

[21] At page 243 after reviewing case law with respect to agency and the application of the indoor management rule, his Lordship said:

> The requirements of the statute here are clear. The collective action required by it, i.e. by-law or resolution, sufficient to bind the council has not been shown.

On that basis the action of the plaintiff was dismissed.

[22] Counsel for the respondent has urged upon me to find that this provision of the ***Municipal Act*** (supra) should only apply where there is to be an expenditure of monies or a commitment of a financial nature by the municipal organization. While there may be some merit in that argument, the fact remains that by agreeing to binding arbitration, a municipality thereby exposes itself to the real possibility of an expenditure of money being required should the arbitrator order compensation to be paid by the municipal organization.

[23] Given this real possibility of expenditure being ordered, it is, with respect, difficult to accept the petitioner's assertion that the agreement to appoint an

arbitrator and go to binding arbitration is not an agreement to spend money but only an agreement to a process.

[24] If one were to accept the petitioner's argument then it would follow that a bylaw would only have to be passed if an arbitrator ordered the payment of monies. If that were the case a party who had gone to arbitration on facts similar to this case without a bylaw or resolution allowing same, would find itself in the same position as the plaintiff in the ***Amalgamated Recreation Engineers and Network Associates Ltd. v. Town of Sidney et al.*** (supra). Thereafter, if the council or board of directors refused to pass a bylaw providing for such compensation as ordered, the successful party would again be without legal authority to enforce the arbitrator's award on the basis that there was no resolution or bylaw in place.

[25] Therefore, on this ground as well, the petition must be dismissed on the basis that no bylaw or resolution of the respondent sufficient to bind it has been shown or established.

[26] For either of the reasons given the petition is dismissed with costs to the respondent.

"Chamberlist J."

CHAMBERLIST J.