Federal Court		Cour fédérale

Date: 20110203

Docket: T-2181-09

Citation: 2011 FC 125

Ottawa, Ontario, February 3, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

DAVID CROUSE

Applicant

and

COMMISSIONAIRES NOVA SCOTIA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Referee W. Augustus Richardson, Q.C. (hereinafter the Referee) dated December 4, 2009 pursuant to section 251.12 of the *Canada Labour Code*, RSC 1985, c L-2. The Referee quashed a Payment Order of $1,801.22 previously granted to the applicant pursuant to section 251.1 of the *Canada Labour Code*. In his decision, the Referee accepted that the work performed by the Commissionaires Nova Scotia (CNS) at the Halifax International Airport was federally-regulated and subject to the *Canada Labour Code*.

However, he also concluded that it remained subject to the Nova Scotia *Labour Standards Code*, RSNS 1989, c 246, until the expiry of the contract (September 30, 2010) between the CNS and the Halifax International Airport Authority (HIAA).

Factual Background

[2] The applicant, David Crouse, is a Commissionaire employed by CNS to provide security services at the Halifax International Airport pursuant to a contract between CNS and HIAA. The contract between CNS and HIAA ran from October 1, 2005 to September 30, 2010. The contract was entered into pursuant to employment standards under provincial legislation, more specifically the Nova Scotia *Labour Standards Code*.

[3] On August 16, 2007, the Canada Industrial Relations Board (CIRB) issued an order certifying the Public Service Alliance of Canada (PSAC) as bargaining agent for specific CNS employees at the airport, including the applicant. In its decision, the CIRB confirmed federal jurisdiction over the bargaining unit. CNS continued to apply the standards specified in the Nova Scotia *Labour Standards Code.*

[4] On November 12, 2008, the applicant filed a complaint under Part III of the *Canada Labour Code*, claiming that he was not being paid overtime or holiday pay in accordance with the standards in the *Canada Labour Code*.

[5] On February 9, 2009, Inspector Paula Stagg concluded that CNS owed the applicant overtime and holiday pay of $1,801.22. She issued a Payment Order to this effect on March 4, 2009.

[6] On March 9, 2009, CNS appealed this decision.

[7] On June 10, 2009, W. Augustus Richardson, Q.C., was appointed as Referee to hear the appeal. On December 4, 2009, the Referee allowed the appeal of the Payment Order and concluded that the employment contract between CNS and HIAA were to be governed by the standards applicable under the Nova Scotia *Labour Standards Code* until the existing contract expired on September 30, 2010.

Impugned Decision

[8] After reviewing the agreed statement of facts submitted by the parties, the Referee identified two issues: i) is CNS, for purposes of minimum statutory employment standards, governed by Part III of the *Canada Labour Code* or by the provisions of the Nova Scotia *Labour Standards Code*; and ii) in the event that CNS is governed by Part III of the *Canada Labour Code*, is it nevertheless entitled to avoid the employment standards mandated by Part III until its current contract with the HIAA expires on September 30, 2010?

[9] The Referee noted that the inspector did not address the jurisdictional issue, despite the fact that submissions to that effect were made to the inspector. The Referee proceeded to determine whether Part III of the *Canada Labour Code* applied, based on the assumption, without necessarily accepting, that the certification of CNS under Part I was not determinative of the issue. He noted that section 167(1) of the *Code* states that Part III applies

(a) to employment in or in connection with the operation of any federal work, undertaking or business …

(b) to and in respect of employees who are employed in or in connection with any federal work, undertaking or business described in paragraph (a); [and]

(c) to and in respect of any employers of the employees described in paragraph (b):s.167(1).

[10] The Referee found that this provision, combined with the definitions provided in the *Canada Labour Code*, led to the conclusion that an employer who employs people in or in connection with the operation of an airport is an "employer" for the purposes of Part III of the Code. The Referee also found that security services are an essential part of the operation of an airport. Since CNS employed people in connection with the operation of an "aerodrome", CNS was an "employer" for the purpose of Part III of the Code.

[11] Having decided that CNS employees were governed by Part III of the *Canada Labour Code*, the Referee then considered whether CNS could avoid applying the employment standards in Part III until the expiration of the contract with HIAA on September 30, 2010. The Referee noted that CNS entered into a binding contract with HIAA under the good faith understanding that provincial law applied, and that to require CNS to apply the federal law would involve substantial increase in cost. CNS also submitted that any orders made under a new jurisdiction ought to give full force and effect to contractual arrangements entered into prior to that transition. The Referee further noted that the Union, acting on behalf of the applicant, argued that accepting the submission of CNS would effectively allow CNS to contract out of the minimum standards outlined in Part III, which is prohibited under section 168(1) of the *Canada Labour Code*.

[12] The Referee also observed that until PSAC was certified, CNS considered itself governed by provincial law, acted on that understanding, and did so in good faith. CNS was also, in fact and in law, subjected to provincial jurisdiction until it was ousted by the assertion of federal jurisdiction, because employment law is *prima facie* a provincial matter and is presumptively governed by provincial legislation. Therefore, the Referee found that prior to the certification of PSAC, CNS was governed by provincial law and contracted with HIAA on that basis. Relying on *British Columbia (Attorney General) v Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 SCR 86, the Referee decided that until federal law was asserted to oust provincial jurisdiction, provincial jurisdiction would remain in effect and in place.

[13] This led the Referee to express the view that this case related to valid and binding terms of employment under provincial legislation. The Referee found that, in such a case, the observations of the Canada Labour Relations Board in *The Corporation of the City of Thunder Bay / Telephone Division (operating as Thunder Bay Telephone) and the International Brotherhood of Electrical Workers, Local Union 339*, (1994), 27 CLRBR (2d) 87 were relevant. In that case, the CLRB stated that "actions taken by the parties, pursuant to provincial legislation, are valid and binding on them even after it is determined that the employer's labour relations activities fall within federal jurisdiction."

[14] The Referee further noted that in *Thunder Bay Telephone*, the CLRB ordered that the existing collective agreement, which was entered into when the parties believed that they were governed by provincial law, was to remain in effect according to its terms until its termination date.

The Referee concluded that a similar order should be made in this case under s. 251.12(4) of the Code, which allows him to make "any order necessary to give effect to" his decision. Thus, the Referee concluded that CNS and its employment contracts with HIAA were to be governed by the minimum standards applicable under the Nova Scotia *Labour Standards Code* up to and including September 30, 2010, and the Payment Order issued by the inspector was to be quashed.

Issues

[15] This application raises the following issue:

1. *What is the appropriate standard of review to be applied to the Referee's decision?*

2. *Did the Referee err in his determination that the Canada Labour Code should be applied only after September 30, 2010?*

Standard of Review

[16] The parties do not agree on the applicable standard of review in this case. The applicant maintains that the issue is a legal, constitutional and jurisdictional question, in which the Referee has no greater expertise than the Court, and thus the applicable standard of review is correctness. On the other hand, the respondent submits that the applicant is taking issue with the remedy granted by the Referee, which the Court has previously held is reviewable on a standard of reasonableness, given the broad remedial powers granted to a Referee under the *Canada Labour Code*.

[17] In this case, the applicant does not disagree with the Referee's conclusion that the CNS is subject to Part III of the *Canada Labour Code*. Rather, the applicant alleges that the issue is whether the Referee's remedial powers include the authority to suspend the application of the *Canada Labour Code*. At this stage, it seem relevant to conduct an analysis of the four factors outlined in

Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 SCR 190, in order to determine the applicable standard of review.

[18] The first factor to be considered when determining the applicable standard of review is the existence of a privative clause. Both parties agree that the *Canada Labour Code* contains a strong privative clause, suggesting that the Referee should be given a high degree of deference. Subsections 251.12 (6) and (7) state:

251.12	**251.12**
[…]	…
Order final	Caractère définitif des décisions
(6) The referee's order is final and shall not be questioned or reviewed by any court.	(6) Les ordonnances de l'arbitre sont définitives et non susceptibles de recours judiciaires.
No review by *certiorari*, etc.	Interdiction de recours extraordinaires
(7) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise to question, review, prohibit or restrain a referee in any proceedings of the referee under this section.	(7) Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action d'un arbitre exercée dans le cadre du présent article.

[19] The second factor to be considered is the purpose of Part III of the *Canada Labour Code* and the function of the Referee appointed under section 251.12. In *Dynamex Canada Inc. v Mamona*, 2003 FCA 248, [2003] FCJ No. 907 at para 35, the Federal Court of Appeal stated that:

> […] the object of Part III of the *Canada Labour Code* is to protect individual workers and create certainty in the labour market by providing minimum labour standards and mechanisms for the efficient resolution of disputes arising from its provisions.

[20] The third factor to consider is the expertise of the tribunal in question. The *Canada Labour Code* clearly provides broad remedial powers to the Referee, as section 251.12(4) allows a Referee to "make any order that is necessary to give effect to the Referee's decision." The respondent relies on the decision of the Federal Court of Appeal in *Dynamex*, at para 39, which suggested that:

> […] referees generally have more expertise in matters of labour standards than this Court. That would suggest that they are owed deference in a decision as to the specific entitlement of an employee to a remedy under Part III of the *Canada Labour Code*, even if the decision involves a question of statutory interpretation of the referee's home legislation.

[21] This statement from the Federal Court of Appeal relates more to the deference to be given to the *entitlement* of a party to a remedy. This is different than the issue in the present case, regarding the authority of the Referee to issue a particular remedy as opposed to the legal basis for such a remedy. In determining the expertise of a tribunal for the purposes of a standard of review analysis, " […] the concern is not with either general or specialized expertise. Rather, it is with the Tribunal's expertise in relation to the specific issue before it" (*Canada (Attorney General) v Mowat*, 2009 FCA 309, [2009] FCJ No 1359). In the Court's view, the Referee has no greater expertise than the Court to determine whether the Referee has the authority to suspend the application of the *Canada Labour Code*.

[22] Finally, the Court must consider the nature of the question. At issue is the Referee's authority to issue a particular remedy and the legal basis for that remedy. In *Dunsmuir*, above, at para 59, the Supreme Court stated that "true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter." Here, the Referee explicitly concluded that the statutory phrase "any order necessary to give effect to the Referee's decision" meant that it had the power to temporarily "avoid" the application of the *Canada Labour Code*. In essence, this conclusion related to constitutional jurisdiction is at the core of the issue in the present case. This suggests that the issue should be considered an issue of true jurisdiction (provincial vs. federal), suggesting less deference.

[23] In light of the above factors, the Court concludes that the applicable standard of review in the present case is correctness, despite the strong privative clause contained in the *Canada Labour Code*. It is the kind of question of law that is normally considered by the Court and it does not engage the special expertise of the Referee (*Dynamex*).

Analysis

[24] The applicant submits that there is no legal basis for the Referee's decision to suspend the application of the *Canada Labour Code*. The applicant notes that the Referee found that until PSAC was certified, CNS considered itself to be governed by provincial legislation and it acted on that understanding in good faith. Since employment law is *prima facie* a provincial matter, CNS was presumptively governed by provincial legislation and should remain so until the expiry of the contract between CNS and HIAA.

[25] The Referee concluded that prior to the application by PSAC for certification, the relations between CNS and its employees were governed by provincial laws. The applicant submits that this conclusion is erroneous. The applicant alleges that although CNS may have erroneously believed that it was subject to provincial employment standards does not override the *Canada Labour Code*. The applicant submits that the Referee had no authority to accept the respondent's defence of ignorance of the law and to arbitrarily declare provincial jurisdiction over its federally-regulated labour relations.

[26] It is trite law that in light of the established constitutional principles, the provinces have exclusive authority over labour relations in terms of a contract of employment. However, by way of exception to this principle, the federal Parliament may assert exclusive jurisdiction over these matters if it demonstrates that such jurisdiction is an integral part of its primary competence over some other single federal subject *(Quebec (Minimum Wage Commission) v Construction Montcalm Inc.* [1979] 1 SCR 754). In the case at bar, the CIRB issued an order confirming federal jurisdiction for the work performed by the respondent at the Halifax International Airport. The Court observes that the CIRB decision was not challenged by way of an application for judicial review pursuant to the *Federal Court Act*. The Referee also recognized in his decision the federal nature of the operations of the respondent i.e. security services at the Halifax International Airport.

[27] The applicant referred to a decision of a Canada Labour Adjudicator, *Olchove and Adair's Car Crushing Ltd.*, [1997] CLAD No 413. Although such a decision is not binding, and given the lack of jurisprudence of the issue, the Court finds this decision to be of some relevance in the present matter.

[28] In *Olchove*, the complainant began working as a bookkeeper with Adair's Transport Ltd. in 1981. Sometime between 1991 or 1992, her employment with Adair's Transport Ltd. ceased and she became an employee of a new corporation, Adair's Car Crushing Ltd. The complainant was then terminated in April 1996. The complainant made a complaint of unjust dismissal under the *Canada Labour Code*. The adjudicator noted that both Adair's Transport and Adair's Car Crushing Ltd. conducted their affairs as if the *Canada Labour Code* applied to their employees. However, the adjudicator found that although Adair's Transport was a federal work, undertaking or business, and although Adair's Car Crushing Ltd. may have been some sort of successor to Adair's Transport, Adair's Car Crushing Ltd. had never been involved in inter-provincial transport. As a result, Adair's Car Crushing Ltd. was never considered a federal employer. As such, the adjudicator found that he did not have jurisdiction to consider the complainant's unjust dismissal complaint.

[29] The adjudicator was presented with an argument similar to the present case. The complainant claimed that despite the fact that Adair's Car Crushing Ltd. was not a federal employer, since both Transport and Crushing conducted their affairs as if the *Canada Labour Code* applied to their employees, the adjudicator should assume jurisdiction and hear and determine the complainant's case. At paragraph 21 of the decision, the adjudicator rejected this submission and stated the following:

> [21] The fact the Employer has continued to apply the provisions of the Code to its employees is not a factor in determining whether the business is a federal work, undertaking or business. If Employers were able to choose the jurisdiction for their labour relations merely by applying the legislation of their choice to their employees, that would entirely thwart the division of powers in the Constitution of Canada and the provisions of the Canada Labour Code requiring that there be a federal work, undertaking or business for the Code to apply. Labour relations jurisdiction is a matter of constitutional law, not a matter of employer choice.

[30] In the case at bar, the Referee acknowledged that "CNS may have been subject to federal employment laws at some point prior to PSAC's application, but no one knew it because no one had asserted federal jurisdiction. And until that federal jurisdiction was asserted in such a way as to oust the provincial jurisdiction the latter would remain in effect and in place." CNS may have reasonably believed that it was subject to provincial employment standards but the Court agrees with the applicant that it does not and cannot override the *Canada Labour Code*.

[31] The Referee referred to *Lafarge*, more particularly at paragraphs 4 and 37. However, in the Court's view, *Lafarge* is clearly distinguishable from the present case. In *Lafarge*, the Supreme Court of Canada was dealing with a situation where the matter at issue could fall under either federal or provincial jurisdiction. The case was decided on the basis of federal paramountcy as opposed to interjurisdictional immunity. CNS employees such as the applicant provide an ongoing service integral to the daily operations of the airport which clearly falls under federal jurisdiction. There is no competing claims and no suggestion that the particular service offered by these CNS employees falls under two different heads of power listed in the *Constitution Act, 1867* (UK), 30 & 21 Victoria, c 3.

[32] The Referee also relied on the decision of what was the CLRB (now the CIRB) in *Thunder Bay Telephone* in fashioning the remedy at issue in the present case. Again, *Thunder Bay Telephone* is also distinguishable from the present matter. In *Thunder Bay Telephone*, the CLRB was dealing with the impact of an existing collective agreement on the timeliness of an application for certification under the *Canada Labour Code*. This is significantly different from the present case, as PSAC has already been certified as the bargaining agent for the relevant CNS employees.

[33] The respondent submits that the Referee properly relied on *Thunder Bay Telephone* because employers and their employees may, over time, move back and forth between provincial and federal jurisdictions, and thus any orders made under a new jurisdiction ought to give full force and effect to contractual arrangements entered into prior to that transition.

[34] The Court remains unconvinced by this argument. Indeed, this is not a case where an employer's activities were once governed by provincial jurisdiction and subsequently changed in such a way that it became governed by federal jurisdiction - e.g. a business that operates locally expands to operate inter-provincially. In the case at bar and, as mentioned above, the CNS employees at issue were, at all times, employed in connection with a federal work, undertaking or business. The fact that the use of provincial law in relation to these CNS employees was not previously challenged does not justify in law the suspension of federal law until the expiration of the contract.

[35] Hence, the Court finds that the Referee exceeded its jurisdiction when he decided to suspend the application of the *Canada Labour Code* to CNS and its employees pending the expiration of its present contracts based on CNS's assumption that provincial law applied to its employees. This Court cannot find any legal basis for avoiding federal legislative authority on the basis that the contract between the two parties has yet to expire. The Referee committed an error and exceeded his jurisdiction in suspending the application of the *Canada Labour Code* and declaring provincial jurisdiction over federally-regulated labour relations. His decision amounts to confirming a contracting out of minimum standards outlined in the *Canada Labour Code* (Part III). He thus committed an error and, in these circumstances, the Court's intervention is justified.

[36] For these reasons, this application for judicial review will be allowed.

JUDGMENT

THE JUDGMENT OF THIS COURT is that:

1. The application for judicial review is allowed with costs.

2. The matter is remitted back to the Referee to be reconsidered in a manner consistent with these reasons.

"Richard Boivin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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