Federal Court of Appeal | Cour d'appel fédérale

Date: 20101213

Docket: A-57-09

Citation: 2010 FCA 339

CORAM: **DAWSON J.A.**
LAYDEN-STEVENSON J.A.
MAINVILLE J.A.

BETWEEN:

GRAIN SERVICES UNION (ILWU-CANADA)

Applicant

and

RANDALL FREISEN ET AL

Respondents

Heard at Edmonton, Alberta, on December 2, 2010.

Judgment delivered at Ottawa, Ontario, on December 13, 2010.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: DAWSON J.A.
LAYDEN-STEVESON J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] The Grain Services Union (ILWU-Canada) (the "Union") is challenging a decision bearing number CIRB 436 and dated January 20, 2009 (the "Decision") of a panel of the Canada Industrial Relations Board (the "Board") rejecting its preliminary objection to an application under section 38 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the "*Code*") to revoke the certification of the Union for the unit of employees to which the respondents belong.

[2] The Union asserts that the Board erred 1) in determining the merits of the preliminary objection without hearing evidence and allowing cross-examination on contradictory affidavit

evidence on an essential matter of fact; and 2) in finding that a final employer offer ratified by the employees may validly be subject to subsequent ratification by the employer's board of directors.

[3] For the reasons further set out below, I would dismiss this application. The Board was under no duty to hold an oral hearing since it did not base its decision on any of the contradictory affidavit evidence. Rather, based on evidence which was not contradicted, the Board reasonably concluded that a new collective agreement was not in force or in operation at the time the application to revoke the certification of the Union had been filed, and consequently the application to revoke was timely.

Background and context

[4] Since 2000 the Union has been certified to represent the employees of the Agpro Grain (now Viterra Inc.) terminal grain elevators and farm supply facilities working in various locations in Alberta and Manitoba. A collective agreement was in operation for this bargaining unit from October 1, 2004 to September 30, 2007. Negotiations for its renewal were initiated in 2007 and continued through the first half of 2008.

[5] The employer presented the Union with a final renewal offer on May 27, 2008. The final offer included a new duration for the collective agreement running from October 1, 2007 to September 30, 2012. The final offer also provided that the renewed collective agreement would be subject to ratification and would be effective on the first of the month following ratification unless agreed otherwise. The Union took the final offer to its membership for approval. Since the bargaining unit included employees working in various locations in two provinces, the employee ratification vote was held between June 2 and June 13, 2008.

[6] On the afternoon of June 13, 2008 the Union released the results approving the employer's final offer. On that same afternoon, a group of employees filed an application with the Board under section 38 of the *Code* to revoke the certification of the Union.

[7] The renewal of the collective agreement was subsequently ratified by the employer's board of directors on July 4, 2008 with an authorization to implement the terms of the new collective agreement as of July 1, 2008.

[8] On July 15, 2008, the Union challenged the timeliness of the application to revoke its certification, based on its view that the collective agreement had been renewed on June 13, 2008 as soon as the Union's membership had ratified the employer's final offer. Applications to revoke a certification are strictly regulated by the *Code* and can only be submitted in certain specified timeframes. The combined operation of subsections 38(2) and 24(2) of the *Code* is such that if the new collective agreement had been in operation on June 13, 2008, the application to revoke the certification would have been untimely.

[9] Various affidavits on this matter were submitted to the Board by the Union and on behalf of the employer. The unchallenged affidavit evidence showed that as a result of emails dated June 11, 2008 and June 13, 2008, the Union was aware that the terms of the renewal of the collective agreement were subject to ratification by the employer's board of directors.

[10] However, the affidavit evidence submitted by the employer also stated that at the time the employer tabled its proposals, it indicated to the Union that the new collective agreement would be subject to ratification by its board of directors. The affidavit evidence submitted by the Union

denied this. The legal counsel for the group of employees seeking the revocation of the certification requested an oral hearing to resolve this contradiction in the affidavit evidence, while also submitting that despite the conflict in evidence, "the remaining evidence clearly establishes that Viterra has been consistent that ratification would be required" (Applicant's record at p. 422). The Union responded by advising that it "would be agreeable to a [B]oard hearing being convened and oral evidence presented in order to resolve any contradiction in affidavit evidence" (Applicant's record p. 427).

[11] The Board decided the matter without holding an oral hearing, and proceeded to reject the Union's preliminary objection on the issue of timeliness.

[12] The Union applied for judicial review of this Decision before this Court, and also filed an application pursuant to section 18 of the *Code* asking the Board to reconsider its Decision. The application for reconsideration was dismissed by another panel of the Board on May 22, 2009 (the "Reconsideration Decision").

The Board's Decision

[13] The Board was satisfied that the documentation before it was sufficient to decide the matter without an oral hearing. The Board noted that it did not need to rely on any of the contradicted affidavit evidence in order to reach a decision (Decision at paras. 4 and 17).

[14] The Board found that although the employer had made a final offer to the Union for the renewal of the collective agreement, that final offer was subject to ratification by the employer's

board of directors. This finding was largely based on two emails sent on June 11, 2008 and on June 13, 2008 by the employer's representatives to the Union.

[15] The June 11, 2008 email described the employer's ratification process as follows (Decision at para. 6; Application Record at p. 154):

> Viterra's ratification procedure is straight forward. Once approved by your membership, we will take (sic) agreement to our principals for ratification ASAP, notify you we have an agreement and sign off the collective agreement. I gather in the past it has taken a while to sign off. That is not my practice. I like to sign off while everything is fresh in everyone's minds. I trust that won't pose a problem for you and you will want to put the agreement to bed quickly as well.

Moreover, the email of June 13, 2008 included the following (Decision at para. 7; Record at p. 99):

> As you know, this agreement is subject to ratification by Viterra's Board. I would like to have consent [to the correction of the errors and omissions] before the document is placed before the Board for ratification. An agreement is not in place until fully ratified by both parties so I would not want to see any delays in implementation.

[16] The Board then turned its attention to the issue of whether the new collective agreement was in force or in operation as of June 13, 2008, the date the application for revocation of the certification had been filed. Its findings on this issue are set out in the Decision at paras. 20 and 21:

> [20] Both parties agree that the final offer put forward by the employer required some type of ratification before it would take effect. Article 27 of the proposed agreement, *supra*, clearly indicates that ratification is required before the agreement will take effect, however, the article does not spell out the details of any ratification process. The union submits that only its members were required to ratify the agreement before it took effect. For the Board to agree with this position, we would have to ignore the emails sent to the union by the employer representatives, which made it clear that its offer was subject to ratification by the Board of Directors. We are unable to do so. These emails also do not support the union's submission that the ratification by the Board of Directors was a "mere formality" and therefore something less than a genuine ratification. The fact the employer's spokesperson was making a point of telling the union on June 11, 2008 that the contract was subject to ratification by the company Board of Directors is not consistent with the position that this ratification process was of no significance.

> [21] The evidence suggests that the new agreement was not in operation, for the purposes of the *Code*, until it was ratified by both parties. The evidence indicates that while the union membership ratified the agreement on June 13, 2008, the agreement was not ratified by the company's Board of Directors until July 4, 2008. It follows from this that the new agreement was not in operation on June 13, 2008 when the revocation application was filed, and therefore, the application is timely.

The Issues

[17] The Union raised two somewhat overlapping issues in its application for judicial review which do not fully reflect the arguments made in its memorandum of fact and law and in oral argument. I have consequently restated these issues as follows:

> 1) Did the Board err in determining that the new collective agreement was subject to ratification by the employer's board of directors without hearing evidence and allowing cross-examination on contradictory affidavit evidence relating to this matter?
>
> 2) Did the Board err in finding that a final employer offer ratified by the employees may nevertheless be subject to subsequent ratification by the employer's board of directors?

Preliminary Issue

[18] In light of the Reconsideration Decision, prior to the hearing of this application, the Court issued directions to the counsel of the parties to address the applicability of *Vidéotron Télécom Ltée v. Communications, Energy and Paperworkers Union of Canada*, 2005 FCA 90 ("*Vidéotron*"). In *Vidéotron*, the Court questioned the propriety of hearing an application for judicial review of a Board's decision where that decision had been reconsidered by the Board but not disturbed, and where the reconsideration decision had not been subsequently challenged by way of judicial review.

However, *Vidéotron* also confirmed the Court's discretion, in appropriate circumstances, to nevertheless hear an application for judicial review of an initial decision even where an unsuccessful subsequent reconsideration of the decision has not been challenged.

[19] In response to these directions, counsel for the Union sought an adjournment of the hearing for the purpose of seeking leave to submit an application for judicial review of the Reconsideration Decision and for the further purpose of making written submissions on the applicability of *Vidéotron*. Counsel for the respondents opposed this request for an adjournment. She argued that the respondents did not seek to rely upon *Vidéotron*. Further, she submitted that in *Vidéotron* the Court acknowledged its discretion to hear an application for judicial review notwithstanding the failure to challenge a subsequent reconsideration decision by the Board of the decision under review. She argued that such discretion should be exercised in this case because any further delay in these proceedings would be prejudicial to the respondents. In reply, counsel for the Union acknowledged the willingness of her client to proceed on the merits of the application for judicial review on this basis.

[20] Consequently, in these circumstances, the Court decided to exercise its residual discretion to hear the merits of the judicial review application, and denied the request for an adjournment without awarding any costs in respect of this request.

Did the Board err in determining that the new collective agreement was subject to ratification by the employer's board of directors without hearing evidence and allowing cross-examination on contradictory affidavit evidence relating to this matter?

[21] The thrust of the Union's argument is that the Board should not resolve issues of credibility or draw inferences from conflicting evidence unless it has provided the parties an opportunity to present *viva voce* evidence. While the Union recognizes that the Board has the power under section 16.1 of the *Code* to determine a matter without an oral hearing, it asserts that this power can only be exercised where there is sufficient evidence before the Board to resolve the evidentiary conflicts and to make a decision. In this case, the Union asserts that the contradictory affidavit evidence concerned a material fact relating to the requirement of employer ratification, and that consequently the Board breached the rules of natural justice and procedural fairness by denying the parties the ability to fully present their case and to cross-examine the affiants.

[22] Section 16.1 of the *Code* clearly provides that "[t]he Board may decide any matter before it without holding an oral hearing". This section came into force in 1999 and broadened the discretion of the Board in deciding when oral hearings were necessary or useful. The section, read with the provisions of the *Canada Industrial Relations Board Regulations, 2001,* SOR/2001-520, indicates that the Board will decide matters on the basis of the material filed before it unless the Board decides otherwise: *Raymond v. Canadian Union of Postal Workers,* 2003 FCA 418, 318 N.R. 319 at para. 4; *NAV Canada v. International Brotherhood of Electrical Workers, Local 2228,* 2001 FCA 30, 267 N.R. 125 at paras. 10-11.

[23] The discretion of the Board under section 16.1 of the *Code* is very wide, but it is not absolute. Our Court has determined that this section does not authorize a breach of the duty of procedural fairness by permitting the Board to dispense with an oral hearing in circumstances where this would deny a party a reasonable opportunity to participate in the decision-making process: *Communication, Energy and Paperworkers Union of Canada v. Global Television (Global Lethbridge, a Division of CanWest Global Communications Corp.)*, 2004 FCA 78, 318 N.R. 275 at para. 23; *Amalgamated Transit Union, Local 1624 v. Syndicat des travailleuses et travailleurs de Coach Canada*, 2010 FCA 154, 403 N.R. 341 at para. 18.

[24] Our Court has also found, in the context of a complaint of unfair representation under section 37 of the *Code*, that the mere fact that evidence is contradictory does not automatically warrant an oral hearing before the Board absent other compelling reasons. Indeed, since many credibility issues will almost unavoidably arise in a labour relations context, section 16.1 of the *Code* would potentially be deprived of effect if it were otherwise interpreted and applied: *Nadeau v. United Steelworkers of America*, 2009 FCA 100, 400 N.R. 246 at para. 6; *Guan v. Purolator Courier Ltd.*, 2010 FCA 103 at para. 28; see also in a different legislative context *Vancouver Wharves Ltd. v. International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 (F.C.A.)* (1985), 60 N.R. 118.

[25] I am of the view that the same principle applies in this case concerning a revocation of certification under section 38 of the *Code*. In order to successfully challenge the decision of the Board not to hold an oral hearing in such circumstances, it must be demonstrated not only that

contradictory evidence was before the Board, but that the resolution of this contradictory evidence was essential to the outcome of the decision and that no other evidence could reasonably support the decision of the Board.

[26] In this case, it is admitted that contradictory affidavit evidence was before the Board on the issue of whether, when initially tabling its proposals, the employer had informed the Union of the requirement for ratification by its board of directors. The Board acknowledged this contradictory evidence, but found that "[i]t was not necessary for the Board to resolve this evidentiary issue in order to reach a decision in this matter" (Decision at para. 4), thus finding that the contradicted evidence was not essential to the outcome of its decision. The Board further found that there was ample evidence which was not contradicted which could support its decision, including emails admittedly received by the Union on June 11 and June 13, 2008 by which the employer clearly stated its requirement for ratification by its board of directors (Decision at paras. 6, 7, 17 and 20).

[27] Moreover, the parties agree, and the Board found, that section 27 of the employer's proposal contemplated ratification of the offer (Decision at paras. 5 and 20), that the employer referenced the requirement of ratification by its board of directors in its press release of June 16, 2008 acknowledging the ratification vote by the employees (Decision at para. 8), and that the new collective agreement was indeed submitted for ratification to the board of directors on July 4th, 2008 (Decision at paras. 9 and 21).

[28] In this context, there is no basis for the Union's claim that the Board proceeded improperly in finding that the new collective agreement was subject to ratification by the employer's board of directors. There was ample uncontradicted evidence before the Board for it to reach this conclusion, and the resolution of the contradicted affidavit evidence before it was not essential to the outcome of the decision. Consequently, the Board made no error by deciding the matter before it without holding an oral hearing.

Did the Board err in finding that a final employer offer ratified by the employees may nevertheless be subject to subsequent ratification by the employer's board of directors?

[29] The Union submits that the common law principles of offer and acceptance should have been applied by the Board in determining the renewal date of the collective agreement. The employer tabled a final offer with the Union which was accepted by the majority of the employees on June 13, 2008. Therefore, upon this acceptance vote, all the necessary elements existed for the final offer to constitute a collective agreement. To hold otherwise, says the Union, would mean that despite the fact the employer tabled a final offer, and despite the fact the majority of employees accepted this final offer, the employer could still have rejected its own offer and the parties would have been required to recommence negotiations. If the employer's bargaining committee did not have the authority to table a final offer, the employer would have committed an unfair labour practice.

[30] In essence, the Union suggests that an employer cannot, as a matter of law, reserve the right to ratify a final offer it has made, and that the Board erred in finding otherwise. This raises an issue

of legal interpretation of the *Code* and specifically of the meaning of the terms “where a collective agreement applicable to the unit is in force” or in “operation” set out in paragraph 24(2)(*d*) of the *Code*.

[31] The Board’s interpretation of the *Code* should, in most instances, be reviewed on a standard of reasonableness: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 at para. 48; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 54-55 (“*Dunsmuir* “); *Association des courtiers et agents immobiliers du Québec v. Proprio Direct Inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195 at para. 21, *Khosa*, *supra*, at para. 25; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678 at paras. 33 and 34; *Canadian Federal Pilots Assn. v. Canada (Attorney General)*, 2009 FCA 223, 392 N.R. 128 at paras. 36 and 51.

[32] The Union has provided no case law which supports the proposition that an employer cannot, as a matter of law, reserve the right to ratify a final offer it has made and which has been accepted by its employees. In fact, as noted by the Board itself (Decision at para. 19), the principal case relied upon by the Union does not support its position: *Shaw Cablesystems G.P. (Re)*, [2003] CIRB No. 211, [2003] C.I.R.B.D. No. 10, at paras. 19 to 28 (“*Shaw Cablesystems*”). Further, the Board specifically acknowledged the existence of cases where a final offer from an employer presupposes that the employer has already approved the contents of that offer. In this case, the evidence, in the Board’s view, indicated otherwise. It was therefore reasonable for the Board to assume in this case that there were no legal impediments to the employer reserving the right to have its board of directors ratify its final offer after it had been approved by the employees.

[33] *Shaw Cablesystems* correctly sets out at paragraph 33 that a consideration of when a collective agreement is in "operation" for the purposes of applying the provisions of sections 38 and 24 of the *Code* must involve a consideration of when, on the basis of the facts actually before the Board, the collective agreement was intended to and actually did operate.

[34] Consequently, each case must be considered on its own facts and with regard to its particular circumstances. This is what the Board did here. The Board considered the facts before it and concluded that in the circumstances of this case, the new collective agreement was not "in force" or in "operation" on June 13, 2008 when the application to revoke the certification of the Union had been filed. This conclusion "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, *supra*, at para. 47).

[35] For these reasons, I would dismiss the application for judicial review with costs in favour of the respondents.

"Robert M. Mainville"
J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Carolyn Layden-Stevenson J.A."

SCHEDULE

Pertinent provisions of the *Canada Labour Code, R.S.C. 1985, c. L-2*

3. (1) In this Part,	**3.** (1) Les définitions qui suivent s'appliquent à la présente partie.
"collective agreement" means an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters;	« convention collective » Convention écrite conclue entre un employeur et un agent négociateur et renfermant des dispositions relatives aux conditions d'emploi et à des questions connexes.
16.1 The Board may decide any matter before it without holding an oral hearing.	**16.1** Le Conseil peut trancher toute affaire ou question dont il est saisi sans tenir d'audience.
24. (2) Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made	**24.** (2) Sous réserve du paragraphe (3), la demande d'accréditation d'un syndicat à titre d'agent négociateur d'une unité peut être présentée :
[…]	[…]
(*c*) where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation; and	*c*) si l'unité est régie par une convention collective d'une durée maximale de trois ans, uniquement après le début des trois derniers mois d'application de la convention;
(*d*) where a collective agreement applicable to the unit is in force and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation and, thereafter, only	*d*) si la durée de la convention collective régissant l'unité est de plus de trois ans, uniquement au cours des trois derniers mois de la troisième année d'application de la convention et, par la suite, uniquement :
(i) during the three month period immediately preceding the end of each year that the collective agreement continues to operate after the third year	(i) au cours des trois derniers mois de chacune des années d'application suivantes,

of its operation, and

(ii) after the commencement of the last three months of its operation.

[…]

38. (1) Where a trade union has been certified as the bargaining agent for a bargaining unit, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order revoking the certification of that trade union.

(2) An application for an order pursuant to subsection (1) may be made in respect of a bargaining agent for a bargaining unit,

(*a*) where a collective agreement applicable to the bargaining unit is in force, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24 unless the Board consents to the making of the application for the order at some other time; and

(*b*) where no collective agreement applicable to the bargaining unit is in force, at any time after a period of one year from the date of certification of the trade union.

[…]

(ii) après le début des trois derniers mois d'application.

[…]

38. (1) Tout employé prétendant représenter la majorité des employés d'une unité de négociation peut, sous réserve du paragraphe (5), demander au Conseil de révoquer par ordonnance l'accréditation du syndicat à titre d'agent négociateur de l'unité.

(2) La demande visée au paragraphe (1) peut être présentée :

a) si l'unité de négociation est régie par une convention collective, seulement au cours de la période pendant laquelle il est permis, aux termes de l'article 24, de solliciter l'accréditation, sauf consentement du Conseil pour un autre moment;

b) en l'absence de convention collective, à l'expiration du délai d'un an suivant l'accréditation.

[…]

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-57-09
APPEAL FROM AN APPLICATION FOR JUDICIAL REVIEW OF DECISION NO. 436 OF THE CANADA INDUSTRIAL RELATIONS BOARD, DATED JANUARY 20, 2009.	
STYLE OF CAUSE:	**GRAIN SERVICES UNION (ILWU-CANADA) v. RANDALL FRIESEN ET AL**
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	December 2, 2010
REASONS FOR JUDGMENT BY:	Mainville J.A.
CONCURRED IN BY:	Dawson J.A Layden-Stevenson J.A.
DATED:	December 13, 2010

APPEARANCES:

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