Federal Court of Appeal | Cour d'appel fédérale

Date: 20110426

Docket: A-462-09

Citation: 2011 FCA 143

CORAM: **NOËL J.A.**
SHARLOW J.A.
DAWSON J.A.

BETWEEN:

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on April 6, 2011.

Judgment delivered at Ottawa, Ontario, on April 26, 2011.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: SHARLOW J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an application for judicial review brought by the Professional Institute of the Public Service of Canada (the applicant) against a decision of the Public Service Labour Relations Board (the Board) dated October 14, 2009. The Board was asked to identify the facilities and services, or the activities performed, by the Computer Systems Group (the CS Group) at the Canada Border Services Agency (the CBSA) that are necessary for the safety or security of the public.

[2] The applicant contends that the definition of essential services given by the Board is overly broad and general to the point that it does not assist the parties in the determination of the types of positions, the number of positions and the specific positions to be included in an essential services agreement. As such, the Board failed to exercise the authority conferred upon it by virtue of section 123 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the PSLRA).

[3] The Attorney General, acting on behalf of Treasury Board (the respondent or the employer), maintains that the definition is sufficiently precise to meet the statutory objective.

[4] For the reasons which follow, I am of the view that the application for judicial review should be allowed and that the matter should be remitted back to the Board for re-determination.

FACTUAL BACKGROUND

[5] The Treasury Board is the employer of the CS Group and the applicant is the bargaining agent.

[6] On August 12, 2008, the Treasury Board filed an application under subsection 123(1) of the PSLRA, about matters that may be included in an essential services agreement covering positions in the CS Group. The application covered positions in eight departments or agencies. The parties and the Board agreed that each department or agency would be addressed separately. The present application concerns the CS Group at the CBSA.

[7] Prior to and during the hearing, the parties agreed on a number of important issues. First, that the CBSA performs a number of services necessary for the safety and security of Canadians to ensure that persons or goods of risk do not enter or leave Canada. Second, that the support of the 38 computer systems or equipment listed in the Exhibit annexed to the Board's decision is necessary for the safety and security of Canadians and third, that the CS Group of employees at the CBSA "support" those computer systems.

[8] Amongst the services provided by the CS Group of employees at the CBSA, the parties proposed to define "essential services" as follows:

> **Applicant's Proposal**
>
> The essential activity provided by CS employees at the CBSA is the support, in maintenance mode, of the agreed-upon computer systems, applications and programs.
>
> **Respondent's Proposal**
>
> All services delivered by or activities performed by certain CS Group positions at the CBSA with respect to:
>
> 1. securing the Canadian border, as well as
> 2. managing the access of people and goods (including food, plants, and animals) to and from Canada
>
> are necessary for the safety or security of the public.

[9] The Board rejected both definitions and provided a definition which in its view was of assistance in establishing an essential services agreement.

APPLICABLE LEGISLATION

[10] Section 4 of the PSLRA defines both "essential service" and "essential services agreement":

"essential service" means a service, facility or activity of the Government of Canada that is or will be, at any time, necessary for the safety or security of the public or a segment of the public	« services essentiels » Services, installations ou activités du gouvernement du Canada qui sont ou seront nécessaires à la sécurité de tout ou partie du public.
…	[…]
"essential services agreement" means an agreement between the employer and the bargaining agent for a bargaining unit that identifies	« entente sur les services essentiels » Entente conclue par l'employeur et l'agent négociateur indiquant :
(*a*) the types of positions in the bargaining unit that are necessary for the employer to provide essential services;	*a*) les types des postes compris dans l'unité de négociation représentée par l'agent négociateur qui sont nécessaires pour permettre à l'employeur de fournir les services essentiels;
(*b*) the number of those positions that are necessary for that purpose; and	*b*) le nombre de ces postes qui est nécessaire pour permettre à l'employeur de fournir ces services;
(*c*) the specific positions that are necessary for that purpose.	*c*) les postes en question.

[11] Under subsection 123(1) of the PSLRA, the parties may apply to have the Board determine any unresolved matter that may be included in an essential services agreement. The Board has the power to resolve such disputes pursuant to subsection 123(3):

123. (1) If the employer and the bargaining agent are unable to enter into an essential services agreement,	**123.** (1) S'ils ne parviennent pas à conclure une entente sur les services essentiels, l'employeur ou l'agent

either of them may apply to the Board to determine any unresolved matter that may be included in an essential services agreement. The application may be made at any time but not later than

(*a*) 15 days after the day a request for conciliation is made by either party; or

(*b*) 15 days after the day the parties are notified by the Chairperson under subsection 163(2) of his or her intention to recommend the establishment of a public interest commission.

…

(3) After considering the application, the Board may determine any matter that the employer and the bargaining agent have not agreed on that may be included in an essential services agreement and make an order

(*a*) deeming the matter determined by it to be part of an essential services agreement between the employer and the bargaining agent; and

(*b*) deeming that the employer and the bargaining agent have entered into an essential services agreement.

…

négociateur peuvent demander à la Commission de statuer sur toute question qu'ils n'ont pas réglée et qui peut figurer dans une telle entente. La demande est présentée au plus tard :

a) soit quinze jours après la date de présentation de la demande de conciliation;

b) soit quinze jours après la date à laquelle les parties sont avisées par le président de son intention de recommander l'établissement d'une commission de l'intérêt public en application du paragraphe 163(2).

[…]

(3) Saisie de la demande, la Commission peut statuer sur toute question en litige pouvant figurer dans l'entente et, par ordonnance, prévoir que:

a) sa décision est réputée faire partie de l'entente;

b) les parties sont réputées avoir conclu une entente sur les services essentiels.

[…]

DECISION OF THE BOARD

[12] After summarizing the position of the parties, the Board framed the issue before it as the identification of the facilities and services provided, or the activities performed, by the CS Group that are necessary for the safety or security of the public. The Board then identified two principles that must guide the manner in which a service, activity or facility is defined. The first is that (reasons at para. 155):

> … it should be defined in a manner that fulfills its purpose. That purpose is to allow the employer and the bargaining agent to proceed to the other steps in establishing an [essential services agreement] set out in the definition of an [essential services agreement] in subsection 4(1) of the PSLRA, which are identifying the types of positions that are necessary [for] providing the essential service, the level of service, the number of positions necessary for that purpose and the actual positions that provide that service.

[13] The second principle is that "however broad or narrow the definition, it must only include positions that are necessary for the safety or security of Canadians" (reasons at para. 156).

[14] The Board then rejected the Treasury Board's proposed definition as too broad since it would capture positions that are clearly not necessary for the safety and security of the public (reasons at para. 157). The Board also rejected the applicant's contention that the provision of support to each of the 38 computer systems by the CS Group of employees should be viewed for purposes of the definition as a distinct essential service or activity (reasons at para. 160).

[15] In this respect, the Board chose not to include in its order the list of 38 systems agreed upon by the parties as being essential because it was of the view that those systems may be replaced or new ones may be added due to technical changes. According to the Board, the replacement or addition of new systems would make such a reference impractical, as it could require that amendments be brought to the definition (reasons at para. 160).

[16] The Board then stated (reasons at para. 165):

> I believe that it is possible to define the essential services in a manner that reflects the fact that both the [employer] and the [applicant] agree that it is necessary to protect Canadians against persons and goods that pose a risk to the safety and security of the public, that would only capture services or activities that are related to those purposes, that would not be tied narrowly to equipment, and that would enable the parties to identify the other elements of the [essential services agreement]. Defining essential services in the following manner would attain those goals:
>
> > The provision of computer systems and services related to securing the border by managing the access of people and goods (including food, plants and animals) to and from Canada for the purpose of protecting the safety or security of the public.
>
> That wording would not capture activities related to customs, excise or trade agreements since they are not related to the safety and security of the public. The above wording would also allow the [employer] to change computer systems or equipment when required since the definition is not narrowly tied to equipment or systems. It will be fairly easy for the parties to identify the other components of the [essential services agreement], such as the types of positions necessary for providing those essential services, especially since the parties have already agreed on the computer systems that should be used for those purposes.

[17] The above captioned definition is reproduced in the order giving effect to this decision.

POSITION OF THE APPLICANT

[18] The applicant first notes that the accepted standard of review with respect to decisions by the Board is reasonableness, with the exception of true jurisdictional questions. Although the Board's failure to exercise its jurisdiction is alleged, the applicant recognizes that the underlying question, *i.e.* whether the Board's definition is insufficiently precise to meet the statutory objective, stands to be reviewed on a standard of reasonableness.

[19] According to the applicant, this lack of precision makes it impossible to identify the types of positions, the number of positions, and the specific positions necessary to provide essential services. The applicant adds that precision is required in order to "reduc[e] the possibility that an essential service may be defined too broadly and thus result in the unintended removal of the right to strike" (applicant's memorandum at para. 23). The applicant points to a number of decisions by the Board which emphasize the need for precision when defining an essential service: *Public Service Alliance of Canada v. Parks Canada Agency*, 2008 PSLRB 97 at para. 202 [*Parks Canada*]; *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 55 at para. 76 [*PM Group*]; *Public Service Alliance of Canada v. Treasury Board*, 2009 PSLRB 155 at paras. 41-42 [*Border Services*].

[20] The applicant further submits that the Board's definition in the present case is tautological because it simply repeats the statutory definition of essential service contained in subsection 4(1) of the PSLRA. Furthermore, the applicant points out that the Board did not include in its order the limitation identified in its reasons according to which the definition "would not capture activities

related to customs, excise or trade agreements since they are not related to the safety and security of the public" (reasons at para. 165). The applicant argues that even if the order was deemed to include that limitation, it would still be too imprecise.

[21] The applicant points to two prior decisions by the Board to highlight how essential services should be identified and defined. The first decision concerns border services officers at CBSA (*Border Services* at para. 51). The second decision concerns the CS Group of employees at the Department of Public Safety (*Treasury Board v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 15 at para. 101 [*PIPSC*]).

[22] Lastly, the applicant contends that the Board relied on a pure conjecture in refusing to incorporate into the definition of essential services the systems and equipment which the parties agreed were required to perform such services.

POSITION OF THE RESPONDENT

[23] The respondent agrees that the question whether the proposed definition is insufficiently precise to meet the statutory objective is to be assessed on a standard of reasonableness.

[24] The respondent submits that the Board's decision is reasonable for four reasons. First, it contends that the PSLRA is still a position-based scheme as was the now-repealed *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35. This argument was raised by the respondent in its memorandum of fact and law which was written prior to the release of *Canada (Attorney General)*

v. Professional Institute of the Public Service of Canada, 2011 FCA 20 [*Public Safety, F.C.A.*]. In that case, this Court confirmed the decision of the Board in *Treasury Board v. Professional Institute of Public Service of Canada*, 2010 PSLRB 60 [*Public Safety*], which held that the scheme underlying the PSLRA is service-based and not position-based.

[25] Nevertheless, counsel for the respondent maintained during the hearing before us that the ultimate purpose of the scheme under the PSLRA remains the identification of the positions that are essential to the provision of essential services, and that accordingly the definition of essential services and in particular the precision with which these services are defined do not have the importance which the applicant attributes to it.

[26] Second, the respondent contends that the Board's decision enables the identification of positions because the description of essential services can be simplified, the *ratio decidendi* of the Board's decision enables the identification of positions, and a description of the essential services is not required content of an essential services agreement.

[27] Third, with respect to the applicant's contention that the Board relied on a conjecture about the replacement of computer systems, the respondent submits that the Board relied upon direct evidence that was uncontradicted or made reasonable inferences.

[28] Lastly, with respect to the applicant's contention that the Board failed to determine whether the development of new equipment was an essential service, the respondent contends that the issue

is irrelevant as the parties share the same view. Indeed, the Treasury Board never took the position that developing new equipment was an essential service.

ANALYSIS

[29] I accept the parties' joint submission that the question whether the definition provided by the Board is sufficiently precise to meet the statutory objective is to be assessed on a standard of reasonableness.

[30] In *Parks Canada,* the Board heard its first essential services dispute under the PSLRA. In that decision, it established what it called an "analytical path", which is a three-stage approach leading to an essential services agreement. The first stage is to determine what services are necessary to insure public safety or security in the event of a strike. The second stage is to determine the level of service to be performed during a strike. The last step is to determine the types of positions, the number of positions and the specific positions necessary to provide essential services at the determined level of service. No one appears to take issue with this approach.

[31] However, there appears to be a continuing debate between the parties as to the nature of the scheme set out in the PSLRA. The respondent took the position before us that the ultimate purpose is to identify the essential positions and that this is the context in which the propriety of the definition should be addressed. The applicant on the other hand argued that the ultimate purpose is to identify the essential services emphasizing the importance of arriving at a useful definition of such services.

[32] In my respectful view, this issue has been settled by the recent decision of this Court upholding the decision of the Board in *Public Safety*. The question before the Board in *Public Safety* was the very question which the respondent now seeks to raise. The Board, after noting the employer's acceptance of the analytical path set out in *Parks Canada*, identified and disposed of the argument as follows (*Public Safety* at paras. 99-101):

> **99.** Now, the [employer] advances an alternate theory of the [PSLRA] that identifies "essential positions" as its central operative element. It contends that "… the PSLRA is clearly a position-based scheme …" and that "… [t]he ultimate purpose of this scheme is to identify actual [e]ssential [p]ositions".
>
> **100.** In my view, those propositions are plainly wrong. In essence, the [employer] is giving a new name – "essential position" – to the old concept of a "designated position" and arguing that, at the end of the day, nothing really matters other than arriving at the list of "essential positions". Why would the legislator have gone to the length of enacting a completely different regime governing essential services if, as the applicant appears to maintain, the real purpose and objective remain the same? Why would the legislator have created the concept of an "essential services agreement" and fashioned a process where the definition of "essential services" is the first and primordial requirement if "… the PSLRA is clearly a position-based scheme …"?
>
> **101.** The answer is clearly that that was not the legislator's intent. Identifying "type of positions", the "number of those positions" or the "specific positions" are elements required to achieve the objects of the [PSLRA] but only in the sense that essential services must necessarily be delivered by the incumbents of positions. Positions, as such, are not essential. Incumbents of positions deliver a range of services defined as their assigned duties by the employer. Some subset of those duties – or, perhaps, all of those duties in some exceptional circumstances – will be determined by the parties or by the Board to be essential to safeguarding the safety or security of the public. The "balance" that the [PSLRA] seeks to achieve is between ensuring that those defined essential services are maintained in the event of the strike while at the same time giving real meaning to the right to strike enshrined by the [PSLRA]. The crucible is the definition of "essential services".

[33] The above reflects the essence of the reasoning which this Court approved in dismissing the judicial review application which followed (*Public Safety*, *F.C.A.* at paras. 3, 4, 5, 7, 10 and 11). As such, the matter has been decided and the respondent has not raised any ground which would justify the issue being revisited (*Miller v. Canada (Attorney General)*, 2002 FCA 370 at para. 10). It follows that for present purposes, the definition of essential services must be understood to be the corner stone of the scheme or, in other words, that from which all else follows.

[34] In the present case, the Board acknowledged that its task at the first stage of the analytical path, was to determine the services that are necessary in order to insure public safety or security. According to the Board, the definition set out in the order that it gave achieves this goal. The full text of the order reads:

> The Essential Services Agreement for the Computer Systems Group at CBSA will include the following provision:
>
> > The provision of computer systems and services related to securing the border by managing the access of people and goods (including food, plants and animals) to and from Canada for the purpose of protecting the safety or security of the public.

[35] In its reasons, the Board stated that the above wording "would not capture activities related to customs, excise or trade agreements since they are not related to the safety and security of the public" (reasons at para. 165). This limitation does not necessarily follow from the definition set out in the order. However, even if one was to read the order as incorporating this limitation, the Board's definition remains problematic.

[36] First, the phrase “for the purpose of protecting the safety or security of the public” is taken from subsection 4(1) of the PSLRA. Incorporating the words of subsection 4(1) into the order is of no assistance in identifying the types of positions, the number of positions and the specific positions necessary to provide essential services for the purposes of an essential services agreement. Indeed, parties attempting to apply the Board’s definition will be obliged to interpret and apply the very statutory phrase that, given the statutory mandate set out in subsection 123(1), should have been interpreted and applied by the Board.

[37] Second, the phrase “provision of computer systems and services” is of little assistance in identifying the types, number and specific positions necessary to provide essential services. In this respect, the word “provision” which appears twice in the order is defined, *inter alia*, as “the action of providing or supplying”. In turn, the verb “provide” means “make available for use; supply” (*The Concise Oxford Dictionary*, 10th edition, Oxford University Press, 2001). As a result, the phrase “provision of computer systems and services” could arguably encompass every action that relates to computer services with respect to the 38 systems agreed upon by the parties.

[38] A comparison with a recent decision of the Board dealing with the CS Group of employees at the Department of Public Safety highlights the deficiencies of the proposed definition. In *PIPSC* at paragraph 101, the Board defined essential services in the following manner:

> For Public Safety Canada, the essential services performed by members of the Computer Systems Group are as follows:
>
> > For the Government Operations Centre, including the Canadian Cyber Incident Response Centre, the following services are essential:

> (a) installing, testing, maintaining and repairing,
>
> (b) identifying, investigating and resolving compatibility issues and malfunctions for, and
>
> (c) providing direct technical assistance for the software, systems, applications and devices used directly to identify and analyze risks or threats that may require a response coordinated by the [Government Operations Center], to communicate information to partners about those risks and threats, and to take actions and provide for the immediate expenditure of emergency funds to prevent, mitigate, prepare for, respond to and recover from those risks and threats.

> For the Canadian Cyber Incident Response Centre, the following services are essential: analyzing and assessing cyber risks and threats, planning responses for and responding to cyber risks and threats, including developing and processing reports related to cyber emergencies, reviewing and developing incident and technical reports, and delivering security programs for cyber threats.

[39] In an earlier decision dealing with Border Services Officers at CBSA, the Board gave a definition of essential services which also highlights the deficiencies of the proposed definition (*Border Services*):

> **51** The essential services agreement for the bargaining unit will include the following provision:
>
> > The following services delivered or performed by Border Services Officers are necessary for the safety or security of the public:
> >
> > > 1. Conducting inspections, examinations and verifications of travellers, goods and conveyances to reach release-or-entry decisions and deciding appropriate action when non-compliance is suspected or encountered.

2. Providing a first-response capability with powers to arrest or detain individuals suspected of having committed offences under various Acts of Parliament.

3. Maintaining effective relations, interactions and exchanges with clients, stakeholder organizations and law enforcement agencies to maintain border integrity and security.

4. Analyzing data and information for inclusion in databases for use in client service, risk management and targeting people or goods to maintain border integrity and security.

5. Completing briefing notes, technical reports, client files, statements and seizure reports to update databases to maintain border integrity and security.

For greater certainty, the following services delivered or performed by Border Services Officers are not necessary for the safety or security of the public:

1. Assessing and collecting duties, taxes, fees and fines.

2. Completing briefing notes, technical reports, client files and statements not related to maintaining border integrity and security.

3. Providing information, through sessions, technical workshops and outreach activities to travelers, importers and exporters to educate them concerning the legislation, regulations and procedures of the CBSA and other government departments/agencies to encourage voluntary compliance and to respond to enquiries, concerns and service complaints.

[40] The respondent submitted that the Board does not have to provide the level of details as in the previous cases. It points to the Board's decision in *PM Group*, as an example of a simplified approach to the definition of essential services:

> **106** An [essential services agreement], however, need not be cast at the same level of detail as is appropriate for a job description. The latter is a tool created for the primary purpose of classifying a position against a classification standard. The description of an essential service in an [essential services agreement] exists for a quite different purpose. It needs to be sufficiently specific to identify what major functions should continue in the event of a strike as well as to facilitate determinations about other required content elements in an [essential services agreement] -- mainly, the final number of positions that will be necessary to provide the essential service should strike action occur. To that end, the Board does not expect that [essential services agreements] will necessarily look like a collection of excerpts from classification documents.

The order in that case read as follows:

> **110** The Essential Services Agreement (ESA) for the Program and Administration Group will include the following provision:
>
> > The following services delivered by, or activities performed by, PM-01 Citizen Services Officer positions at Service Canada Service Centres, are necessary for the safety or security of the public:
> >
> > > 1. Providing at normal service delivery locations such assistance to members of the public who seek to obtain a benefit under the EI, CPP or OAS/GIS programs as is reasonably required to enable them to submit completed applications for processing, with required documentation, and provided that the service is a service normally performed by the incumbent of a Citizen Service Officer (PM-01) position within the confines of the official job description for that position.
> >
> > > 2. Providing at normal service delivery locations such assistance to members of the public who are in receipt of a benefit under the EI, CPP or

> OAS/GIS programs as is reasonably required to enable them to continue to receive a benefit to the extent of their eligibility, provided that the service is a service normally performed by the incumbent of a Citizen Service Officer (PM-01) position within the confines of the official job description for that position.

[41] I agree with the respondent that a simplified approach as described above may be appropriate so long as in the end, the definition is sufficiently precise so as to assist the parties in identifying the types, number and specific positions that are necessary to provide essential services. The above definitions meet that goal.

[42] In contrast, the Board's definition in the present case does not. It ignores the two guiding principles outlined in its reasons (see paras. 11-12 above).

[43] In my respectful view, the Board's decision is unreasonable as it falls outside a range of possible, defensible outcomes (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47). Specifically, the Board's task was to apply the statutory definition of essential services to the facts of the case so as to assist the parties in determining what constitutes essential services in the circumstances of the CS Group at the CBSA. The definition is too vague to be useful in this regard. I therefore conclude that the matter should be returned to the Board so that it may provide a definition of essential services that facilitates the achievement of an agreement between the parties.

[44] Given that the matter must go back to the Board, I would also observe that nothing in principle prevents the Board from incorporating into the definition of essential services the systems, which the parties agree, are required for the provision of essential services, if this should assist. To the extent that such systems become redundant, and that a disagreement as to the purport of the essential services definition ensues, an application can be brought pursuant to section 127 of the PSLRA to clarify the matter.

[45] For the above reasons, I would grant the application for judicial review with costs and, as the member who rendered the decision has since retired, I would remit the matter back to a newly constituted Board so that it may provide a definition of essential services which facilitates the achievement of an agreement between the parties.

"Marc Noël"

J.A.

"I agree
K. Sharlow J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Dougald E. Brown	FOR THE APPLICANT
Sean Kelly	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nelligan O'Brien Payne LLP Ottawa, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT