Federal Court of Appeal | Cour d'appel fédérale

**Date: 20191022**

**Docket: A-161-18**

**Citation: 2019 FCA 263**

**CORAM:** **PELLETIER J.A.**
**WOODS J.A.**
**LASKIN J.A.**

**BETWEEN:**

**CANADIAN AIRPORT WORKERS UNION**

**Applicant**

**and**

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AND GARDA SECURITY SCREENING INC.**

**Respondents**

Heard at Toronto, Ontario, on September 19, 2019.

Judgment delivered at Ottawa, Ontario, on October 22, 2019.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: WOODS J.A.
LASKIN J.A.

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## REASONS FOR JUDGMENT

**PELLETIER J.A.**

I. Introduction

[1] This application for judicial review is the latest skirmish in the struggle between two unions for the right to represent a bargaining unit of workers who provide pre-board security screening at Toronto area airports (Pearson International Airport, Buttonville Airport and Billy Bishop Toronto City Airport). The applicant, Canadian Airport Workers Union (CAWU),

acquired bargaining rights when it displaced the original bargaining agent, Teamsters Local Union 847, following a representation vote in 2009: *Canadian Airport Workers Union v. Garda Security Screening Inc.*, 2012 CIRB 651 at para. 1 (*CAWU* 2012). In 2012, the respondent International Association of Machinists and Aerospace Workers (IAMAW) in turn displaced CAWU: *CAWU* 2012 at para. 2. CAWU applied unsuccessfully to displace IAMAW in 2015: *Canadian Airport Workers Union v. International Association of Machinists and Aerospace Workers*, 2015 CIRB 764 (*CAWU* 2015). This application follows from CAWU's second attempt to displace IAMAW in 2018.

[2] The Canada Industrial Relations Board (the Board) dismissed CAWU's displacement application, in a decision reported as 2018 CIRB 878 (Decision), on the basis that its membership information was unreliable and that, in any event, its membership evidence fell short of showing that it had the support of the majority of the employees in the bargaining unit. For the reasons that follow, I would dismiss the application for judicial review with costs to the respondent IAMAW.

## II. Facts

[3] An application to displace an existing bargaining agent must be accompanied by evidence of support in the form of a signed membership application together with the payment of at least five dollars to the applicant union in the six months preceding the application: see *Canada Industrial Relations Board Regulations, 2012*, SOR/2001-520, s. 31 (Regulations).

[4] The Board has a longstanding policy to only order a representation vote in a displacement application if the applicant union can demonstrate that it has the support of a majority of the members in the bargaining unit: *CJMS Radio Montréal (Québec) Limitée* (1978), 33 di 393 at 412, [1980] 1 Can. L.R.B.R. 270; *Algoma Central Marine, a Division of Algoma Central Corporation*, 2009 CIRB 469 at para. 18 (*Algoma Central Marine*). On the other hand, the Board will not order a representation vote if the evidence of employee support for the applicant union is such that the result of the vote is a foregone conclusion: *Télébec Ltée* (1995), 99 di 141 at 145, 96 CLLC 220-040 (C.L.R.B.); *Syndicat des travailleuses et travailleurs de Transport F. Lussier - CSN v. Transport F. Lussier Inc*., 2013 CIRB 678 at para. 34.

[5] IAMAW apparently got wind of CAWU's membership drive and attempted to minimize the evidence of support by asking employees to sign cards affirming their support for IAMAW and revoking any membership cards that they may have signed in support of CAWU. These cards were then submitted to CAWU and to the Board. IAMAW says that it asked employees if they would sign these cards without inquiring as to the union that they supported. Consequently, the number of signed cards could be (and was in fact) greater than the number of cards signed by CAWU supporters.

[6] CAWU responded to this initiative by filing an unfair labour practice application alleging that IAMAW attempted to undermine its organizing efforts by generating documents purporting to be revocations of applications for membership: Decision at para. 7. The day after filing its unfair labour practice application, CAWU filed its application for certification together with its evidence of support.

[7] In its response to the certification application, IAMAW alleged that the membership evidence filed by CAWU was not reliable because CAWU solicited membership applications without obtaining the five dollar payment required by section 31 of the Regulations.

[8] The parties also disagreed on the number of employees in the bargaining unit — a number that is obviously material to the question of majority support. For the purposes of assessing majority support, CAWU sought to exclude employees it considered "inactive": those who had been absent for six months or more and therefore, according to CAWU, had lost their required certification to perform pre-board security.

[9] For its part, IAMAW argued that employees who had obtained their security clearance or for whom it was pending after the filing of the unfair labour practice but who had not yet completed the Canadian Air Transport Safety Association (CATSA) certification (pre-certification screeners) should be included in the unit. The pre-certification screeners' limited duties did not precisely match the position description in the certification order. Despite that, IAMAW argued that they should be included in the bargaining unit because they paid union dues and had rights under the collective agreement.

[10] In the course of this debate, CAWU asked the Board to order the employer to produce lists of employees that it provided to CATSA as well as seniority lists, which would show the "active" employees in the unit. The Board declined to make the order but did ask the employer to provide additional information on the employment status of the employees on the list, which it provided.

[11] In light of the allegations made by both unions and in keeping with its established procedures, the Board delegated its investigation powers to several Industrial Relations Officers (IROs) to verify and test the membership information submitted by CAWU and the revocation information submitted by IAMAW. The IROs tested, by means of confidential in-person and telephone interviews, the information contained on the membership applications and revocation cards to ensure that the evidence was reliable and a true indication of employees' wishes.

[12] The IROs reported their findings to the Board in a confidential report. The Board asked for further information, which the IROs provided in a supplementary report. In keeping with the Board's longstanding policy, these reports were at all times treated as confidential by the Board and were not disclosed to the parties.

[13] The IROs' investigation disclosed that a significant number of employees who had signed membership applications had not paid the required five dollar fee and, in at least one instance, it found that payment had in fact been made on behalf of the employee by someone else: Decision at para. 42. The Board noted that it has consistently held that the payment of the membership fee by an employee is a substantive requirement and not a mere technicality. Applicant unions are advised that a breach of this requirement could result in the rejection of membership evidence: Decision at paras. 44-46.

[14] At paragraph 47 of the Decision, the Board concluded that:

> the number of irregular CAWU membership cards is sufficient to raise serious concerns and doubts as to whether any of the evidence filed reflects the employees' true intentions. As a result, the irregular membership evidence taints the entirety of the CAWU's membership evidence. Therefore, the Board is not

> prepared to rely on the CAWU's evidence to determine whether it will order a representation vote. The Board dismisses the application for certification on that sole basis.

[15] Having said that it would dismiss CAWU's application on the basis of the reliability of the membership evidence, the Board went on to consider the sufficiency of that evidence in the alternative. It began by addressing CAWU's request for additional employee lists (see para. 10 above). The Board rejected CAWU's request on the basis that the employee lists already obtained from the employer were sufficient for determining the makeup of the bargaining unit, and therefore sufficient for the purposes of CAWU's application.

[16] The Board then considered CAWU's challenge to various categories of absent employees. The Board restated its approach of including in the bargaining unit: "any person who has been absent, regardless of the reason for the leave, and who has a reasonable expectation of returning to work, by virtue of certain rights whether established by a collective agreement or by legislation": Decision at para. 57. Applying this rationale, the Board included in the bargaining unit persons on maternity/parental leave, persons who have been dismissed but who have grieved their dismissal, and persons on approved leaves of absence on union business.

[17] The Board summarized its conclusion on the sufficiency of CAWU's evidence of support as follows (at para. 63):

> The Board is thus satisfied, on the basis of the evidence revealed in the confidential report, that by only discounting the irregular membership cards and taking these three categories of inclusions into consideration, the CAWU's support falls below the threshold required to order a vote. It should also be emphasized that this analysis does not factor in the disputed group of pre-certified screeners, or any further challenges raised by the CAWU, such as those

> employees on medical leaves of absence, work-related injury leave as well as employees on miscellaneous leaves of absence.

[18] The Board's conclusion merits closer attention. In determining CAWU's level of support, the Board excluded ("discounted") only those CAWU membership applications that it believed were not accompanied by the payment of the five dollar fee. In addition, while the Board included the three groups of employees mentioned above in the unit, it did not include in the unit the pre-certification screeners whose inclusion was challenged by CAWU nor did it include other groups of absent employees such as those on medical leaves of absence, work-related injury leave, or those on miscellaneous leaves of absence. Later in the Decision, the Board also indicated that it did not take into account IAMAW's evidence of membership revocation. In other words, in spite of the fact that the Board sided with CAWU on a number of issues, particularly the exclusion of pre-certification screeners, CAWU did not have the support of a majority of workers in the bargaining unit.

[19] Turning to CAWU's unfair labour practice application, the Board ruled that since it had not considered IAMAW's revocation evidence, no labour relations purpose would be served by dealing with the matter. The Board therefore dismissed the application.

## III. Issues

[20] In its memorandum of fact and law, CAWU alleged a reasonable apprehension of bias on the part of one of the IROs who prepared confidential reports for the Board. Since that allegation is the subject of a reconsideration application before the Board, CAWU advised the Court that it was abandoning this ground of judicial review, subject to whatever rights it may have in relation

to the eventual reconsideration decision. Following the filing of its judicial review application, CAWU obtained leave to file new evidence alleging that the Board's decision was obtained by perjured evidence. Following some preliminary proceedings before the panel hearing the application, CAWU abandoned this ground of judicial review as well.

[21] CAWU succinctly summarized its position before the Court in three points, one being its principal ("big") argument and two subsidiary ("little") arguments. The principal argument is that the Board denied it procedural fairness when it decided its certification application on the basis of IRO confidential reports, thereby denying it the fundamental right of knowing the case it had to meet and allowing it to be heard. The subsidiary arguments are whether the Board erred in failing to order the production of additional employee lists so as to clarify the number of employees in the bargaining unit and whether the Board erred in failing to order a representation vote given the history of divided loyalties in the bargaining unit.

## IV. Analysis

### A. *Standard of review*

[22] By virtue of paragraph 28(1)(*h*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, this Court sits as a court of first instance to review decisions of the Board. As a result, the standard of review is presumptively reasonableness for questions of law arising from the tribunal's home statute or one closely connected with the tribunal's mandate: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 21, [2013] 3 S.C.R. 895 (*McLean*); *Groia v. Law Society of Upper Canada*, 2018 SCC 27 at para. 46, [2018] 1 S.C.R. 772. If the presumption of reasonableness is rebutted or does not apply, the standard of review for questions of law is

correctness: *McLean* at para. 22; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at para. 28, [2018] 2 S.C.R. 230. Questions of fact and mixed fact and law are reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 53, [2008] 1 S.C.R. 190; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 at para. 45, [2013] 3 S.C.R. 53; *Sharma v. Canada (Attorney General)*, 2018 FCA 48 at para. 12; *Fawcett v. Canada (Attorney General)*, 2019 FCA 87 at para. 15, 53 C.C.E.L. (4th) 177.

[23] Generally speaking, this Court has applied the correctness standard to questions of procedural fairness in Board decisions: see, for example, *WSÁNEĆ School Board v. British Columbia*, 2017 FCA 210 at paras. 22-23, [2018] 4 C.N.L.R. 295.

[24] More recently, this Court canvassed the jurisprudence on the standard of review for procedural fairness: see *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paras. 34-56, [2019] 1 F.C.R. 121. In that case, Justice Rennie, writing for the Court, concluded that "even though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": at para. 54 (quoting Justice Caldwell, writing for the majority of the Court of Appeal for Saskatchewan).

[25] Ultimately, the Court must simply satisfy itself that the applicant knew the case to meet and was heard.

B. *Procedural fairness*

[26] As noted above, CAWU argues that the Board's decision to rely on confidential IRO reports without disclosing those reports infringed its right to know the case it had to meet and impaired its ability to speak to the allegations made against it.

[27] This issue has recently been canvassed by the Board in *Canadian Imperial Bank of Commerce v. Jordan Rooley*, 2015 CIRB 759 (*Rooley*). The confidentiality of evidence of membership support is grounded in the Board's obligation to safeguard evidence of employee wishes pursuant to section 35 of the Regulations. This provision, or one like it, has been in effect for many decades. The guarantee of confidentiality protects employees from potential reprisals for their support for a union, or for one union over another: see *Rooley* at paras. 28-45.

[28] The Supreme Court in *Canada Labour Relations Board v. Transair Ltd*. (1976), [1977] 1 S.C.R. 722 at 741, 1976 CanLII 170, upheld the right of the Board to act upon the investigation of one of its officials as to worker support for a union without disclosing that report:

> In point of fact, it was the investigating officer and not [a union representative] who had the precise knowledge of the members of the union who were employees in the proposed bargaining unit since it was to him that the Board delegated the duty to ascertain who were the employees who complied with the Regulations respecting proof of union membership. The Board was entitled to act on his [the investigating officer's] report without disclosing it in this respect, having regard to s. 29(4) of the Regulations, once it was clear that he had made the required investigation.

[29] This Court has ruled to the same effect: *Maritime-Ontario Freight Lines Ltd. v. Teamsters Local Union 938*, 2001 FCA 252 at para. 29, 278 N.R. 142.

[30] It must be said that CAWU knew or should have known the issues that the IROs were investigating. IAMAW's reply to CAWU's application for certification specifically put evidence of membership support in issue. In fact, this very issue had previously arisen between these parties in *CAWU* 2015 at paras. 15-16.

[31] The Board's jurisprudence on this issue is explicit, consistent and longstanding. It has been approved by the Supreme Court and by this Court and was no doubt known to CAWU and its advisers.

[32] It is true that CAWU was not able to address specific cases of failure to pay the five dollar membership fee, but nothing prevented it from putting before the Board evidence of the steps it took to prevent such incidents from occurring, if indeed it took such steps.

[33] While CAWU's position before this Court was that it did not wish to infringe on employee confidentiality, its arguments as to how it was unable to address the IRO reports all turned on its inability to challenge individual cases where the five dollar fee might not have been paid by the employee in question. I do not know how this could be done without setting aside the confidentiality of individual employees' evidence of support for one union or the other.

[34] In the circumstances, CAWU's right to know the case it had to meet and its ability to respond may have been constrained by considerations that are specific to labour law, including the overriding need to protect the confidentiality of employee wishes, but these constraints are

well known and have been endorsed by the Courts. In the circumstances, I find that CAWU's right to procedural fairness has not been breached.

C. *The failure to order production of employee lists*

[35] CAWU alleges that the Board breached its right to procedural fairness when it refused to compel Garda to produce lists of employees that it previously provided to the IAMAW, arguing that the discrepancy between the parties' position on the size of the bargaining unit called for additional disclosure. As was pointed out by IAMAW during the argument before the Court, the difference between the parties as to the size of the unit is considerably less than suggested by CAWU. Garda's employee lists show 2168 employees in the bargaining unit. On CAWU's own analysis the number is estimated to be between 1885 and 1968, yet their certification application claimed that there were only 1625 employees in the bargaining unit.

[36] More to the point however, the Board took CAWU's concerns into account when it required the employer to provide the details of the employment status of the persons on the employee list. The Board then examined CAWU's objections to the inclusion of various kinds of absent workers and decided to include some and to exclude others. The Board's position was that the production of additional lists would not have assisted it in determining who should be included in the bargaining unit.

[37] CAWU did not persuade me that the Board's decision on this issue impaired its ability to make its case on the issue of the size of the bargaining unit.

D. *The failure to order a representation vote*

[38] As indicated earlier, the Board requires a raiding union to demonstrate majority support before it will order a representation vote. Because of the irregularities found by the IROs in both unions' evidence, CAWU argues that it was unreasonable for the Board not to order a vote.

[39] The Board's position on the holding of a representation vote in the case of a displacement activity was summarized in *Canadian Council of Teamsters v. Brotherhood of Railway and Airline Clerks* (1988), 73 di 183 at 186-87 (C.L.R.B.), as follows:

> The rationale behind the Board's policy requiring trade unions to establish a prima facie show of support when attempting to displace an incumbent bargaining agent can be found in *CJMS Radio Montréal (Québec) Limitée, supra*. For the purposes of this case we see no need to embark on a lengthy review of this policy. Basically, the Board's concern is to preserve industrial peace. By virtue of the time limits in the Code for filing applications for certification, these applications coincide with the commencement of collective bargaining for renewal of collective agreements. They are disruptive not only to the collective bargaining process because meaningful bargaining is unlikely to take place until the employer is sure that the right party is across the bargaining table, they are also disruptive to the employers' business as the trade unions involved vie for the support of the employees. Most bargaining units contain dissident employees who would rather be represented by another trade union, or no trade union at all.
>
> If the Board were to order a vote every time one of these groups filed an application seeking a change of bargaining agent, chaos could result. By adopting the 50% plus 1 policy, the Board ensures that the bulk of the employees are serious about changing bargaining agents and that they have expressed their sincerity by joining the union seeking to take over the bargaining rights.

[40] Subsequent decisions confirm the Board's position: see *Securicor Canada Limited*, 2004 CIRB 304 at para. 55; *Canadian National Railway Company*, 2004 CIRB 282 at para. 36; *Algoma Central Marine* at para. 18; *CAWU* 2015 at para. 7.

[41] The ordering of representation votes is a question that the Board is uniquely qualified to decide. The passage quoted above shows that the Board has considered the issue and has applied

its mind to the relevant issues in establishing its policy. CAWU's argument is essentially inviting us to substitute our view of the matter for the Board's. Given the Board's specialized knowledge in labour relations and given, as well, that the Board has come to know these parties through their frequent appearances before it, there is a compelling case for deference to the Board's exercise of its discretion not to order a representation vote.

## V. Conclusion

[42] For all of these reasons, I would dismiss the application for judicial review with costs. IAMAW asked for costs on a solicitor-client basis because of CAWU's allegations of misconduct, which it subsequently abandoned. While parties must show restraint in making allegations of misconduct, I am not satisfied that CAWU's behaviour entitles IAMAW to solicitor-client costs. I would order costs at the top end of column 3 of the tariff.

"J.D. Denis Pelletier"
J.A.

"I agree
Judith Woods J.A."

"I agree
J.B. Laskin J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-161-18 |
| **STYLE OF CAUSE:** | CANADIAN AIRPORT WORKERS UNION v. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AND GARDA SECURITY SCREENING INC. |
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| **DATE OF HEARING:** | SEPTEMBER 19, 2019 |
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| **CONCURRED IN BY:** | WOODS J.A.<br>LASKIN J.A. |
| **DATED:** | OCTOBER 22, 2019 |

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