Federal Court of Appeal | Cour d'appel fédérale

Date: 20160719

Docket: A-334-15

Citation: 2016 FCA 198

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
SCOTT J.A.
DE MONTIGNY J.A.

BETWEEN:

SOCIÉTÉ RADIO-CANADA

Applicant

and

SYNDICAT DES COMMUNICATIONS DE RADIO-CANADA (FNC-CSN)

and

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5757, as the association of employees certified to replace the SYNDICAT DES TECHNICIEN(NE)S ET ARTISAN(E)S DU RÉSEAU FRANÇAIS DE RADIO-CANADA

and

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 675

and

ASSOCIATION DES RÉALISATEURS

Respondent

Heard at Montréal, Quebec, on April 11, 2016.

Judgment delivered at Ottawa, Ontario, on July 19, 2016.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: SCOTT J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.:

[1] The Société Radio-Canada (SRC) seeks judicial review of a decision rendered by the Canada Industrial Relations Board (the Board) on June 25, 2015 (2015 CIRB LD 3441). This

decision was made in the context of a review of the bargaining unit structure for the French network of the SRC, and more specifically in connection with a representation vote held as part of this review to determine which of the two bargaining agents involved would represent

> . . . all personnel working for the Société Radio-Canada in the province of Quebec and in Moncton, New Brunswick, excluding personnel covered by other certification orders, producers, supervisors and similar personnel [Unit 1].
>
> (*Société Radio-Canada*, 2015 CIRB LD 3416 at page 2)

[2] On September 19, 2014, the Board did indeed accept an application filed by the SRC for a review of the bargaining unit structure, and found that the four units that made up the structure of the French network were no longer appropriate for collective bargaining pursuant to subsection 18.1(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code) (*Société Radio-Canada*, 2014 CIRB 741). On May 15, 2015, the Board issued a decision in which it determined that the new bargaining unit structure of the French network would comprise only two units, and ordered that a representation vote be conducted electronically for Unit 1 (the Vote) (*Société Radio-Canada*, 2015 CIRB LD 3416; *Société Radio-Canada*, 2015 CIRB 780).

[3] In the decision challenged before us, the Board had to rule on certain issues on which the parties could not agree, in order to determine whether several categories of individuals were eligible to vote, including “contributors” covered by Appendix Q of the Collective Agreement between the SRC and the Syndicat des communications de Radio-Canada (the SCRC) (Applicant’s Record, volume 1 at 29). The Board concluded that the said contributors were “employees” within the meaning of the Code who had to be included in Unit 1 for the purposes of the Vote, subject to the other conditions imposed by the Board. Since the Board had no evidence showing which of these contributors had valid recall rights under the Collective

Agreement, they could vote only if they had been employed by the SRC continuously and without interruption between September 19, 2014 and June 15, 2015.

[4] The Board made this decision solely on the basis of the written submissions filed by the parties three days earlier, without holding a hearing. The decision was therefore made in the absence of evidence specific to the contributors involved (such as evidence relating to their contractual arrangements, status, duties and responsibilities), be it generic evidence based on a typical case or evidence on a case-by-case basis. The Board instead cited a 1982 decision rendered by its predecessor, the Canada Labour Relations Board, to rule that contributors were entitled to vote in the same way as freelancers, whose status was challenged in that case (*Canadian Broadcasting Corporation* (1982), 44 di 19; 1 C.L.R.B.R. (NS) 129 (CLRB No. 383)).

[5] On July 14, 2015, the Board rendered another decision as to the eligibility to vote of certain “contractual” and “temporary” employees who were covered by the Collective Agreement and whose status remained in dispute following the June 25 decision (2015 CIRB LD 3460). That decision is distinguishable from the June 25 decision since, in the July 14 decision, the contracts of the disputed persons were entered into evidence before the Board. More importantly, the Board was careful to clarify that [TRANSLATION] “the sole purpose of the hearing was to determine the eligibility to vote of certain persons still in dispute, despite the Board’s decision to that effect in the [June 25 decision]” (July 14 decision at 2, emphasis added).

[6] The Vote ended in July 2015, and a majority of the employees eligible to vote from Unit 1 chose to be represented by the SCRC. As a result, the SCRC was certified as the bargaining agent for that unit on October 8, 2015 (Certification Order No. 10880-U).

[7] Before I address the parties' arguments, I note finally the Board's May 15, 2015 decision ordering the set-up of two bargaining units (see paragraph 2 above) is the subject of an application for judicial review before this Court. It will be heard on September 13, 2016, together with another application filed in respect of a Board's decision dated October 2, 2015.

[8] In its Notice of Application in the present case, the SRC asks that the June 25 decision be set aside, but it does not ask that the matter be referred back to the Board. Indeed, counsel for the parties confirmed at the hearing before this Court that they did not wish to challenge the result of the Vote. It appears that the SRC was more concerned by the fact that the Board had ruled on the status of contributors without exhaustively reviewing their duties and contractual arrangements, but had not explicitly limited the scope of its decision to the sole purposes of the Vote. That suggested to the SRC that the June 25, 2015 decision could affect the characterization of the status of contributors for the purposes of the Code in the future. The SRC feared that this decision could be cited as a precedent, particularly before an arbitration board appointed under the Collective Agreement. I note that the SCRC was not prepared to concede that it would not raise such an argument in the future, and it submits that the debate in this regard is premature.

[9] Similar arguments had been raised by the SRC in an application for reconsideration of the June 25 decision filed before the Board on July 24, 2015. The parties have now informed this

Court that on June 27, 2016, the Board decided this application as well as a related application for reconsideration filed by the SCRC on July 23, 2015 (2016 CIRB LD 3650).

[10] In that decision, the Board ruled that there was no basis for intervention in the applications for reconsideration. However, it took the opportunity to confirm that the purpose of its June 25, 2015 decision

> [TRANSLATION]
>
> … was to decide specific questions concerning the eligibility to vote of several categories of persons. That is clearly indicated at the beginning of the decision and in the Board's ultimate conclusions. While the Board did not clearly state that its ruling as to the status of contributors had been made in the specific context of the representation vote, it took care, in [its July 14, 2015 decision], to note the SRC's submission on the importance of limiting the scope of its decisions on voting eligibility to the sole purposes of the representation vote.
>
> Therefore, in the present case, the Board has no difficulty confirming that the purpose of the decisions rendered [on June 25 and July 14, 2015] was to provide instructions to help expedite the voting process, not to express a final opinion on the status of contributors in their employment relationship with the SRC. The Board was aware of the narrow context in which it was rendering its decisions.
>
> (June 27, 2016 decision at 6, emphasis added)

[11] It is thus clear that the June 25, 2015 decision was rendered for the sole purpose of moving things along so that the Vote could be conducted without delay; it was not the Board's intention to decide the status of contributors in a way that would affect the application of the Code for any purpose other than conducting the Vote.

[12] In the light of that clarification, and given that the parties conceded before this Court that they did not intend to challenge the result of the Vote and that the voting eligibility of contributors was not determinative when the Vote was conducted, I am of the view that the

application for judicial review is now moot. Indeed, any concrete disputes that might have existed when the application was filed have now disappeared, and the declaration sought by the SRC before us would serve no practical purpose if granted: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. In addition, I conclude that this Court has no reason to consider the now-hypothetical questions raised by the application.

[13] The question of whether a contributor is an employee within the meaning of the Code for any purpose other than conducting the Vote will have to be answered by the Board should it become necessary in the future, subject to the right of the parties to challenge a decision in this regard if necessary, and as appropriate.

[14] Therefore, I propose to dismiss the application on this basis alone, with costs fixed at $3,000, inclusive of taxes and disbursements.

"Johanne Gauthier"

J.A.

"I concur.
A.F. Scott, J.A."

"I concur.
Yves de Montigny, J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

APPEAL FROM A DECISION OF THE CANADA INDUSTRIAL RELATIONS BOARD DATED JUNE 25, 2015.

DOCKET:	A-334-15
STYLE OF CAUSE:	SOCIÉTÉ RADIO-CANADA V. SYNDICAT DES COMMUNICATIONS DE RADIO-CANADA (FNC-CSN) *ET AL*.
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	SCOTT J.A. DE MONTIGNY J.A.
DATED:	JULY 19, 2016

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