Federal Court of Appeal | Cour d'appel fédérale

**Date: 20170615**

**Docket: A-299-16**

**Citation: 2017 FCA 127**

**CORAM:** **DAWSON J.A.**
**DE MONTIGNY J.A.**
**WOODS J.A.**

**BETWEEN:**

**ROGERS COMMUNICATIONS CANADA INC.**

**Applicant**

**and**

**METRO CABLE T.V. MAINTENANCE AND SERVICE EMPLOYEES' ASSOCIATION and GRAND RIVER TECHNICAL EMPLOYEES ASSOCIATION**

**Respondents**

Heard at Toronto, Ontario, on June 1, 2017.

Judgment delivered at Ottawa, Ontario, on June 15, 2017.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

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

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## REASONS FOR JUDGMENT

**DE MONTIGNY J.A.**

[1] Rogers Communications Canada Inc. (Rogers) applies for judicial review of a decision of the Canada Industrial Relations Board (CIRB, or the Board), reported at 2016 CIRB LD 3677, which allowed the respondent Metro Cable T.V. Maintenance and Service Employees' Association's (the Union) application for review of a bargaining unit pursuant to section 18 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code).

[2] This application for judicial review raises the question whether amendments made to Division III – Acquisition and Termination of Bargaining Rights of the Code, and in particular, the new requirement for a secret ballot representation vote for applications for certification, modified the CIRB's review jurisdiction under section 18. If this is the case, Rogers claims that the CIRB made an unreasonable decision in not drawing upon these amendments in exercising its discretionary review functions.

[3] The facts underlying this application are not contested. Rogers operates cable systems in various provinces, providing its customers with cable television service and high-speed internet access. It employs both unionized and non-unionized employees. In 1973, the Union was certified as bargaining agent for the technical employees of Rogers' predecessor, Metro Cable T.V. Limited, at its Etobicoke location. By way of various applications under sections 18 and 18.1 of the Code, the bargaining unit represented by the Union has been altered through the years to include employees located within the Greater Toronto and Mississauga areas. Specifically, since 2001, the Union has brought 14 applications – 13 successfully – to broaden the membership of the bargaining unit to match Rogers' growth and represent newly acquired employees. This is the judicial review of the fourteenth application.

[4] On or about May 1, 2013, Rogers acquired Mountain Cablevision Limited (Mountain) from Shaw Cable Hamilton, resulting in Mountain employees becoming Rogers employees. Mountain was located at Hester Street in Hamilton, Ontario, and employed over 100 individuals. The Union has requested the addition of 20 individuals who had technical classification profiles akin to those found in the description of the bargaining unit (the Hester Street employees).

[5] On August 14, 2015, the Union brought an application under section 18 of the Code for review of its existing bargaining unit to include the Hester Street employees. Rogers made a number of arguments before the Board. Of relevance to this application is its argument that the application for review of the bargaining unit circumvented the certification requirements under Division III of the Code, and more particularly the requirement of a secret ballot vote.

[6] On August 5, 2016, the CIRB issued reasons allowing the Union's section 18 application. At the outset of its analysis, it noted its authority under section 18 of the Code to review an existing bargaining unit and to add new employees or previously excluded employees. It identified the Board's decision of *Ridley Terminals Inc.*, 2002 CIRB 185 [*Ridley Terminals*] as the governing authority, and noted that, though in some ways similar to a certification application, the Union must show double majority support on review matters, that is, majority support within the group of employees to be added along with majority support of the overall group. The Board went on to add that under section 18, the Union must demonstrate that the resulting unit will be at least as appropriate as the existing bargaining unit, and that the addition of the positions will further labour relations objectives.

[7] The CIRB drew on a number of factors recognized by the jurisprudence to find that the bargaining unit proposed by the Union is a viable one and is as appropriate for collective bargaining as the previously certified unit. That finding is not challenged by Rogers, nor is its determination that the addition of the Hester Street employees will further labour relations objectives.

[8] The CIRB further found that, given that the application sought to alter the nature and original intended scope of the bargaining unit, there was a requirement that the Union show that it holds double majority support. On the facts before the Board, it was found that there was a majority amongst the proposed employees on the basis of the membership applications and fees paid to the Union. As for the majority support of the employees within the expanded unit as a whole, the Board determined that as the percentage of the employees being added to the original unit was small, evidence of consent of the existing bargaining unit members was not necessary. Thus, the fact that the Union had established its representative nature as the current bargaining agent for 540 employees was sufficient to satisfy the Board that the Union had overall majority support.

[9] On appeal, Rogers raises two arguments. First, it contends that the Board erred in continuing to apply an interpretation of section 18 of the Code that has been displaced by the secret ballot vote amendments enacted as part of the *Employees' Voting Rights Act*, S.C. 2014, c. 40, without providing any explanation as to how it reached its conclusion. Second, and in the alternative, Rogers submits that the Board acted unreasonably in concluding that there was majority support for the Union within the expanded unit as a whole without any evidence to this effect. While evidence of consent to the accretion might not be necessary where the accretion group is small in comparison to the existing group, Rogers argues that there must still be evidence of employee support for the bargaining agent (as a proxy for support for the accretion). Relying on *Re Air Transat A.T. Inc.*, [2002] CIRB 178 at paragraph 20, Rogers adds that this evidence may come from membership cards filed by the union, a Board-ordered vote, or a union membership clause in the current collective agreement. On the other hand, the Union relied upon

authorities such as *Ridley Terminals* at paragraph 24 and *Royal Canadian Mint*, 2003 CIRB 229 (at paragraph 37) for the proposition that in some circumstances majority support could be presumed.

[10] In light of my conclusion that the matter should be remitted to the Board on the basis of the first argument raised by Rogers, I am of the view that these conflicting jurisprudential approaches are better left to the Board to be sorted out.

[11] Before addressing Rogers' main submission, some context is in order. The certification process for acquiring or losing bargaining rights is codified under Division III of the Code. When an application for such rights is brought within the prescribed timeframe (see subs. 24(2) of the Code), the CIRB is first required to determine the unit of employees that is appropriate for collective bargaining (s. 27 and paragraph 28(2)(*b*) of the Code). Then, the Board must determine whether the applicant union is eligible for a representation vote, which requires the applicant to have tendered evidence of 40% of the proposed unit's employees indicating that they wish to have the union represent them (paragraph 28(2)(*c*)). Once the CIRB has determined that these requirements have been satisfied, it must order that a secret ballot representation vote be taken. Certification of the applicant union as bargaining agent can only occur in the event that the vote discloses support from a majority of the members of the proposed bargaining unit.

[12] The secret ballot representation vote is a recent requirement to bargaining unit certification. In 2014, the government introduced amending legislation with the *Employees' Voting Rights Act*, which came into force on June 16, 2015 (the 2014 amendments). Prior to

these amendments, evidence of majority support in the proposed bargaining unit was subject to less stringent requirements. Representation votes were only mandatory in some circumstances; otherwise, they were subject to the Board's discretion. Even when a vote was required, there was no requirement that it be conducted by secret ballot. Indeed, it was the Board's stated policy prior to the 2014 amendments that representation votes were the exception rather than the rule; employee support was therefore generally determined by way of evidence of union membership.

[13] On the other hand, section 18 of the Code allows the Board to "review, rescind, amend, alter or vary" any order made by it. The CIRB has recognized that there are two types of section 18 applications: one for orders seeking confirmation that certain additional employees fall within the intended scope of the bargaining unit, known as "applications for interpretation", and another which seeks to amend the definition of the existing bargaining unit to add new employees to the group (see for instance *TELUS Communications Inc.*, 2004 CIRB 278 at paragraphs 306-308, affirmed in *Télé-Mobile Co. v. Telecommunications Workers Union*, 2004 FCA 438, 248 D.L.R. (4th) 25). This case clearly falls in the latter category. Since the Board has characterized these types of applications as being akin to certifications, the jurisprudence of the Board is to the effect that the union must demonstrate a "double majority", that is, majority support within the accretion group and majority support among the entire, expanded group (see *TELUS Corporation*, 2000 CIRB 94 at paragraphs 31-32).

[14] Rogers argues that the Board erred in finding without any discussion that the Union's representative nature as the current bargaining agent can still be relied upon to demonstrate overall majority support if the application is brought under section 18, rather than under

section 24. In other words, it is Rogers' submission that the 2014 amendments expressly removed the Board's discretion to assess employee support as it sees fit for the purposes of initial certification, and must be construed as having similarly removed that flexibility under section 18 when the Board is seized of review applications which seek to add new employees to an existing bargaining unit. The following paragraph of Rogers' written submissions aptly captures the gist of its argument:

> […] previous decisions of the Board and this Court confirm two fundamental propositions: (1) an application under section 18 cannot be used to circumvent the certification requirements in Division III; and (2) as of June 2015, those certification requirements include a secret ballot vote, the results of which demonstrate majority support among the employees for the applicant bargaining agent. The combination of these two propositions leads inexorably to the conclusion that the *Code* no longer permits the Board to grant bargaining unit accretion applications on the basis of alternative evidence of employee support (such as union membership cards).
>
> Rogers' Memorandum of Fact and Law at paragraph 60

[15] As a result, Rogers submits that the Board's decision is unreasonable both because its interpretation of section 18 does not take into account the impact of the 2014 amendments, and because it failed to provide any explanation as to how it reached its conclusion.

[16] It is no answer for the Union to argue, as it did, that Rogers could have sought reconsideration of the decision by the Board and has failed, therefore, to exhaust all available administrative remedies before applying for judicial review. It is no doubt true that the Board, pursuant to section 18 of the Code, has the power to reconsider its decisions in certain circumstances, including when an alleged error of law or policy casts serious doubt on the Board's interpretation of the Code. That being said, the Board itself has asserted on a number of

occasions that its decisions are final and that it will only review its past decisions in exceptional circumstances and on limited grounds (see, for example, *Société Radio-Canada*, 2015 CIRB 763; *Québec Port Authority*, 2016 CIRB 832; *Louvris (Re)*, 2017 CIRB 845).

[17] Moreover, it is well established that an important factor in determining whether a statutory process is an adequate alternative remedy is the manner in which that process is likely to be exercised given the weight of the initial decision. As pointed out by this Court (*per* Sharlow J.A.) in *Buenaventura Jr. v. Telecommunications Workers Union*, 2012 FCA 69 at paragraph 30:

> […] a statutory right of appeal may be a robust remedy if the appeal must be heard by a body that is separate from the initial decision maker and the mandate of the appeal body is to consider the matter *de novo*. In such a case it could be said that the burden of the initial decision is small. On the other hand, an experienced decision maker with a power to reconsider its own decisions will often be inclined to exercise that power relatively sparingly, so that the burden of the initial decision likely will be substantial. In my view, that would tend to defeat any argument that a reconsideration power is an adequate alternative remedy.

[18] On that basis, the Court found that the Board's power to reconsider fell into the last mentioned category. The Supreme Court came to a similar conclusion in *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4 at paragraphs 57 and 94, [2001] 1 S.C.R. 221, and found that reconsideration is not equivalent to an internal appeal for the purposes of an "exhaustion of administrative remedies" argument. Accordingly, I agree with counsel for Rogers that a failure to seek reconsideration cannot be a bar to an application for judicial review and may only be, at best, a factor to be taken into consideration when determining whether to grant an administrative law remedy.

[19] Counsel for the Union also invited the Court not to entertain Rogers' argument because it was not raised before the Board. According to the Union, Rogers' representation before the Board was not to request a secret ballot vote of the Hester Street employees as a first step to comply with the double majority requirement of section 18; rather, Rogers tried to convince the Board that the Union should be required to use the certification procedures under subsection 24(1), instead of attempting to circumvent the required mandatory secret ballot vote by using section 18 of the Code.

[20] At the hearing before this Court, counsel for Rogers conceded that it focused on the procedure found under section 24 before the Board, and did not, in such express terms, ask the Board to determine what if any impact the 2014 amendments had on its review powers under section 18. Counsel nevertheless claims that the Board could not ignore this issue and apply section 18 as if the *Employees' Voting Rights Act* and its secret ballot requirement had never been enacted. This is especially so given that the gist of Rogers' submission was that it was improper to use section 18 to circumvent the new statutory certification procedures in accordance with the decision of *Teleglobe Canada v. Canadian Overseas Telecommunications Union*, [1980] F.C.J. No 903 at paragraph 4 (C.A.).

[21] Having carefully reviewed Rogers' Response to the Application filed by the Union, I agree that the requirements of both sections 18 and 24 were at play before the Board and that it was incumbent upon it to deal with these submissions in its reasons. It is clear that Rogers objected to the application filed by the Union on the ground that the Hester Street employees were deprived of the right to a representation vote conducted by secret ballot, whether in the

context of an application pursuant to section 18 or 24 of the Code. This can be inferred from paragraph 46 of Rogers' Response to the Application, which reads as follows:

> The purpose of section 18 is to clarify and at times broaden the scope of an existing certificate for legitimate labour relations purposes and to assist in the proper functioning of the bargaining unit structure. It is not to be used by a union, in this case the Association, to expand the bargaining unit to include employees based in different geographic regions without having to file an application for certification or hold a representation vote. (emphasis added)
>
> Application Record, Vol. II, Tab 2G, p. 148

[22] To be sure, the Board acknowledged Rogers' submission in summarizing the positions of the parties, but gave no reason in its analysis as to why it failed to deal with the issue. The Board discussed at length the reasons why it thought that the resulting unit would be at least as appropriate as the existing bargaining unit, thereby justifying its decision to reject Rogers' submission that the Union was required to use the certification procedures under section 24 of the Code, but never explained why the secret ballot requirement introduced in Division III of the Code should not be read into section 18.

[23] Following *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the inadequacy of an administrative decision-maker's reasons ought not to be treated as an independent ground for relief, but must be addressed under the "justification, transparency and intelligibility" requirement of *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 S.C.R. 190. While courts are invited to look at the record for the purpose of filling in the blanks, a decision that is silent on a critical issue will hardly be reasonable. In the case at bar, it is impossible to determine whether the Board turned its mind to Rogers' argument, and if so on what basis it came to its (implicit)

conclusion that the secret ballot requirements introduced by Parliament in 2014 in the context of a certification process are not to be imported into a section 18 application. To borrow the analogy used by my colleague Justice Rennie (as he then was) in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at paragraph 11, [2013] F.C.J. No. 449, this is not a case where a reviewing court is allowed to connect the dots on the page; there are simply no dots on the page. This is all the more inexcusable considering that the issue raised by Rogers had apparently not yet been squarely put to, or decided by, the Board in any other proceeding.

[24] I am therefore of the view that this application for judicial review should be allowed, with costs. As it would be ill-advised for this Court to rule on the issue left unanswered by the Board without the benefit of its reasons, I would set aside the decision of the Board and remit the Union's application to the Board for redetermination in accordance with these reasons. The Board shall therefore determine the extent to which, if at all, the amendments made to Division III of the Code impact on this application and shall also determine whether the union has demonstrated that there is double majority support for the proposed accretion.

"Yves de Montigny"

J.A.

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

"I agree
J. Woods J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-299-16 |
| **STYLE OF CAUSE:** | ROGERS COMMUNICATIONS CANADA INC. v. METRO CABLE T.V. MAINTENANCE AND SERVICE EMPLOYEES' ASSOCIATION and GRAND RIVER TECHNICAL EMPLOYEES ASSOCIATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JUNE 1, 2017 |
| **REASONS FOR JUDGMENT BY:** | DE MONTIGNY J.A. |
| **CONCURRED IN BY:** | DAWSONE J.A.<br>WOODS J.A. |
| **DATED:** | JUNE 15, 2017 |

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