Date: 20080711

Docket: A-9-07

Neutral citation: 2008 FCA 237

CORAM: **DESJARDINS J.A.**
LÉTOURNEAU J.A.
BLAIS J.A.

BETWEEN:

SOCIÉTÉ DES ARRIMEURS DE QUÉBEC
and
QUEBEC STEVEDORING COMPANY LTD.
and
SERVICES MARITIMES QUÉBEC INC.

Applicants

and

CANADIAN UNION OF PUBLIC EMPLOYEES,
LOCAL 3810
and
SYNDICAT DES DÉBARDEURS DU PORT DE QUÉBEC,
LOCAL 2614 OF CUPE

Respondents

Hearing held at Québec, Quebec, on April 28, 2008.

Judgment delivered at Ottawa, Ontario, on July 11, 2008.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: DESJARDINS J.A.
BLAIS J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] This is an application for judicial review of a decision by the Canada Industrial Relations Board (Board) in reconsideration of a decision of a differently constituted panel of the Board.

[2] At issue are the powers of the Board to (a) reconsider its initial decision; (b) determine, on reconsideration, the intended scope of the bargaining certificate; (c) rule on the limits of its jurisdiction, relative to that of an arbitrator; and (d) reconsider, on its own initiative, an issue in the initial decision.

[3] In addition to those issues, it is alleged that, on reconsideration, the Board breached the rules of natural justice.

Facts and procedural history

[4] In an application dated April 17, 2003, the Canadian Union of Public Employees (CUPE) called on the Board to rule on the scope of the bargaining certificate governing relations between the parties. It asked the Board to declare that the certificate includes bulk cargo loading and unloading activities as well as passenger baggage handling. It also asked the Board to declare that thirteen (13) persons, who did not have the required authority, were performing checking work, contrary to the existing certification.

[5] After a long series of hearings (18 days) involving numerous witnesses and a large volume of documentary evidence, the Board, in an initial decision by the Vice-Chairperson sitting alone, concluded as follows:

> declares that, unless directly engaged in the loading and unloading of ships, the employees mentioned in paragraph 7 of the application are not performing checking work;

> declares that the wording of the current certification order does not include the ticketing and checking of luggage, unless an agreement is reached between the parties or an arbitral award is issued with respect to the interpretation of the collective agreement;

[6] The Board's decision dated November 9, 2005, is the subject of an application for reconsideration dated November 30, 2005, filed by applicants CUPE Local 3810 and CUPE Local 2614.

[7] On December 8, 2006, a three-member reconsideration panel of the Board rendered a unanimous decision varying the conclusions of the initial decision. More specifically, the Board wrote the following:

. . .

> 2) reconsiders and sets aside the original panel's finding that "unless directly engaged in the loading and unloading of ships, the employees mentioned in paragraph 7 of the application [the 13 persons identified in the original application] are not performing checking work." The dispute between the parties, that is, whether specific work done by the 13 persons identified in the original application constitutes checking work, falls under the jurisdiction of a grievance arbitrator.
>
> 3) reconsiders and sets aside the original panel's findings on excluding bulk cargo checking work and passenger baggage tagging and checking work, and states that, in the absence of a formal application to amend the description set out in the bargaining certificate pursuant to section 18 of the Code, the bargaining certificate does not exclude any type of cargo.

The Société des arrimeurs du Québec, Quebec Stevedoring Company Ltd. and Services maritimes Québec Inc. then filed an application for judicial review of that decision in this Court.

[8] Through the questions they raise, the applicants seek to re-open the debate on subjects that have already been decided by this Court. Therefore, there will be no need to dwell much on any one of the questions they submit.

Power of Board to reconsider initial decision

[9] In the circumstances of this case, there is no doubt that the Board had jurisdiction to review one of its earlier decisions, since the reconsideration power conferred on it by section 18 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Code), is not constrained by section 44 of the *Canada Industrial Relations Board Regulations, 2001*, SOR/200-520 (Regulations).

[10] As this Court held in *ADM Agri-Industries Ltée. v. Syndicat national des employés de Les Moulins Maple Leaf (de l'Est)*, 2004 FCA 69, the list of grounds for reconsideration presented in section 44 of the Regulations is not exhaustive. It does not affect the scope of the discretion under section 18 of the Code.

Power of Board on reconsideration to rule on intended scope of bargaining certificate

[11] When the Board reconsidered its initial decision, it had the required jurisdiction to rule on the intended scope of the bargaining certificate. This is an important aspect of the role it is asked to play, and the issue lies at the heart of its expertise. Therefore, it did not exceed its jurisdiction in

determining whether CUPE's certification included bulk cargo as well as passenger baggage tagging and checking.

Power of Board on reconsideration to decide whether or not it has jurisdiction to determine whether persons were performing checking work

[12] On reconsideration, the Board could determine whether the issue of whether or not the 13 persons mentioned in the initial application for reconsideration were performing checking work is within the Board's jurisdiction or should instead be decided by an arbitrator.

Power of Board on reconsideration to review, on its own initiative, an issue in the initial decision

[13] Where a party applies to have the Board reconsider its initial decision, the Board may, on its own initiative, consider a question that was not raised by the parties. In *ADM Agri-Industries Ltée*, cited above, this Court reiterated the conclusion it had come to on this subject in *Communications, Energy and Paper Workers Union of Canada v. Canada (Labour Relations Board)* (1994), 174 N.R. 57. However, in so doing, the Board must give the parties the opportunity to make submissions.

[14] The question in the case at bar involved interpreting the bargaining certificate so as to determine whether it included passenger baggage tagging and checking. It is true that, on reconsideration, the applicants were not asked to make submissions to the Board on that subject.

[15] However, the question had been thoroughly debated at the hearing leading to the Board's initial decision. The parties did, in fact, present arguments on how the bargaining certificate should be interpreted in relation to that question.

[16] On reconsideration of its initial decision, the Board had all of the evidence adduced, the applicants' arguments on that question and the Board's own initial analysis at its disposal.

[17] In that context, I do not believe that the applicants suffered any harm whatsoever. This in itself is enough to dispose of the issue, but I would also add the following.

[18] The Board benefits from a privative clause that considerably limits any judicial review of its decisions and orders. Under section 22 of the Code, the Board is not subject to judicial review except where it acts without jurisdiction, acts beyond its jurisdiction, refuses to exercise its jurisdiction or fails to observe a principle of natural justice (I will ignore instances of fraud, since that is not at issue here).

[19] Here, the Board's decision on the merits in reconsideration deals with the interpretation of the scope of the bargaining certificate. If we assume, without deciding the issue, that the decision on the merits could be subject to judicial review, then it could be quashed only if it is unreasonable according to the new categorization of the standard of review set out in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9. It is not at all clear that, since that judgment, an unreasonable

decision necessarily results in a loss of jurisdiction: see, for example, the decision of our colleague, Justice Pelletier, in *Air Canada, Jazz Air LP and West Jet v. Canadian Transportation Agency and the Estate of Eric Norman, Joanne Neubauer and the Council of Canadians with Disabilities*, 2008 FCA 168.

[20] In the circumstances, given the lack of harm, the privative clause and the severe restrictions imposed by the Supreme Court of Canada on the concept of jurisdiction in its decision in *Dunsmuir*, I am of the opinion that a new hearing would inexorably lead to the same result at both decision levels. I would apply the remedy invoked by the Supreme Court of Canada in *Mobile Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at page 228, which is to ignore breaches of natural justice in such cases: see also *Yassine v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 949 (F.C.A.), paragraph 9; *Cartier v. Canada (Attorney General)*, [2002] F.C.J. No. 1386, paragraphs 31 to 33; and *Vézina v. Attorney General of Canada (Minister of National Revenue)*, 2003 FCA 67, at paragraph 7, where that remedy was also applied.

[21] For these reasons, I would dismiss the application for judicial review with costs.

"Gilles Létourneau"

J.A.

"I concur in these reasons.
Alice Desjardins J.A."

"I concur.
Pierre Blais J.A."

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-9-07
STYLE OF CAUSE:	SOCIÉTÉ DES ARRIMEURS DE QUÉBEC and QUEBEC STEVEDORING COMPANY LTD. and SERVICES MARITIMES QUÉBEC INC v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3810 and SYNDICAT DES DÉBARDEURS DU PORT DE QUÉBEC, LOCAL 2614 OF CUPE
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	April 30, 2008
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	DESJARDINS J.A. BLAIS J.A.
DATED:	JULY 11, 2008

APPEARANCES:

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