

Date: 20090212

Docket: A-50-09

Citation: 2009 FCA 44

Present: RICHARD C.J.

**APPLICATION UNDER section 18.1 of the *Federal Courts Act*
And Part 5 of the *Federal Courts Rules***

BETWEEN:

TEAMSTERS LOCAL UNION 847

**Moving Party
(Applicant)**

and

CANADIAN AIRPORT WORKERS UNION

**Respondent on the Motion
(Respondent)**

and

GARDA SECURITY SCREENING INC.

**Respondent on the Motion
(Respondent)**

Heard at Toronto, Ontario, on February 12, 2009.

Order delivered from the Bench at Toronto, Ontario, on February 12, 2009.

REASONS FOR ORDER:

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REASONS FOR ORDER

(Delivered from the Bench at Toronto, Ontario, on February 12, 2009)

RICHARD C.J.

[1] Teamsters Local Union 847 (Teamsters 847) brings this motion to stay the decisions of the Canada Industrial Relations Board (CIRB or Board) dated January 23 and 30, 2009. In particular, it seeks to stay a CIRB-ordered representation vote until this Court hears and determines its application for judicial review in this matter.

[2] This motion and judicial review application arise in the context of an application made in October 2008 by the respondent, Canadian Airport Workers Union (CAWU). CAWU seeking to displace Teamsters 847 as the bargaining agent for a unit of employees of Garda Security Screening Inc. (Garda).

[3] Teamsters 847 represents a bargaining unit of employees employed by the respondent Garda, who provide security services at airports in the greater Toronto area.

[4] Teamsters 847 and Garda are parties to a collective agreement effective from April 1, 2004 to March 31, 2009.

[5] In October 2008, CAWU made an application for certification to represent employees in this bargaining unit pursuant to section 24 of the *Canada Labour Code* (Code).

[6] CAWU had made a similar application a year earlier, in 2007. Its application was dismissed by the CIRB on the basis that the CAWU had not demonstrated adequate support to justify a representation vote.

[7] Pursuant to subsection 24(2) of the Code, a union may seek certification of a bargaining unit represented by another union in which a collective agreement is in place. However, the union seeking to displace the current union must demonstrate that a majority of the employees in the

bargaining unit wish to have the other union represent them. It must do so by filing with the CIRB evidence that a majority of members:

- (i) have signed an application for membership in the union; and
- (ii) have paid at least \$5 to the other union in the six month period prior to the filing of the certification application.

[8] The responsible union official is also required to sign a statement attesting to the accuracy of the evidence provided to the Board.

[9] Pursuant to subsection 29(1) of the Code, the CIRB may order that a representation vote be taken among the employees in the bargaining unit. The Board will order a vote if the union seeking to displace the current one can demonstrate that it has the support of 50% + 1 of the members of the bargaining unit through the filing of membership cards and the paying of \$5 in dues to the union.

[10] Teamsters 847 responded to CAWU's application by seeking an order dismissing the application without a hearing and without a vote. Teamsters 847 submitted that the CAWU lacked membership support for the application and that the application was based on false information and evidence.

[11] Following a lengthy investigation by a senior CIRB Officer, the CIRB issued a decision on January 23, 2009, ordering that, notwithstanding the allegations raised by the Teamsters 847, a representation vote be scheduled in this matter.

[12] In its January 23, 2009 decision (Document No.: 260598), the Board ruled as follows:

Following investigation of the above-cited application and consideration of the submissions of the parties concerned, the Board, composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. André Lecavalier and Daniel Charbonneau, Members, has ordered that a representation vote be taken pursuant to section 29(1) of the *Canada Labour Code (Part I – Industrial Relations)* among the employees in the bargaining unit described hereunder in order to ascertain whether the employees wish to continue to be represented by Teamsters, Local Union 847, or by the Canadian Airport Workers Union.

The Board directed that the voting unit comprise:

“All employees of Garda Security Screening Inc. providing pre-board security screening services under the CATSA contract at Pearson International Airport, Buttonville Airport and Toronto City Centre Airport, excluding dispatchers, terminal supervisors and those above the rank of terminal supervisors.”

Employees eligible to cast a ballot are those employees employed by the employer as at **November 10, 2008**, and who remain so employed on the day of the vote. Mr. Peter Suchanek, Regional Director (Registrar) – Ontario Region, Canada Industrial Relations Board, has been appointed Returning Officer to supervise the vote. He will communicate with you in the near future.

[13] On January 28, Teamsters 847 requested the Board to reconsider its decision of January 23, 2009 that a representation vote be held.

[14] Teamsters 847 alleged that in over 50 cases, members of the bargaining unit who signed a membership application with the CAWU were not asked to pay a membership fee.

[15] In its January 30, 2009 decision (CIRB Letter Decision No. 2055), the Board ruled as follows:

The Canada Industrial Relations Board (the Board), composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Daniel Charbonneau and André Lecavalier, Members, has considered the above-noted application.

The Teamsters Local Union 847 (Teamsters 847) is the incumbent bargaining agent for a bargaining unit of employees of Garda Security Screening Inc. (Garda or the employer) who provide pre-board security screening services under the Canadian Air Transportation Security Agency (CATSA) contract at the Lester B. Pearson International Airport, Buttonville Airport and Toronto City Centre Airport. On November 10, 2008, the Canadian Airport Workers Union (CAWU) filed a timely application for certification to replace Teamsters 847 as the bargaining agent for this unit.

On January 23, 2009, the Board ordered that a vote be conducted to determine whether the employees in the unit wish to continue to be represented by Teamsters 847, or by the CAWU.

On January 28, 2009, Teamsters 847 filed an application under section 18 of the *Canada Labour Code (Part I – Industrial Relations)* (the *Code*), requesting that the Board reconsider its decision to order a representation vote. In support of this request, Teamsters 847 alleged that the membership evidence relied upon by the CAWU was fraudulent, and referred to the evidence of some fifty-two members of the bargaining unit that had been supplied to the Board. The union relied on Board jurisprudence which it claims stands for the proposition that any evidence of fraud is sufficient grounds for dismissal of an application for certification.

The Board recently had occasion to canvass the extent of its powers and obligations with respect to membership evidence in certification applications in *Canada Post Corporation*, (2009), as yet unreported CIRB decision no. 438. Section 28 of the *Code* directs the Board to satisfy itself that a majority of employees in the unit wish to have the trade union represent them as their bargaining agent. The Board is given wide latitude in determining how it will satisfy itself of this fact. When the Board proposes to certify a bargaining agent on the basis of signed membership cards, it is critically important that the membership evidence be accurate and reliable. The standard required for membership evidence in such cases is an extremely high one.

However, the Board is also entitled to satisfy itself as to the employees' wishes on the basis of a representation vote. It has been the Board's practice to order representation votes in almost all cases in which one bargaining agent seeks to displace another. In order to persuade the Board to order a representation vote in a displacement situation, the applicant must demonstrate to the Board that it has the support of more than 50% of the members of the bargaining unit. An applicant may meet this requirement by submitting a sufficient

number of signed membership cards, and evidence of the payment by the individual of at least \$5.00 in union dues within the previous six months.

In the instant case, despite discounting all of the membership cards disputed by Teamsters 847, the applicant still has demonstrated to the Board's satisfaction that it has sufficient support to warrant providing the members of the bargaining unit with an opportunity to express their wishes by means of a representation vote.

Accordingly, the application by Teamsters 847 under section 18 of the *Code* is denied and the returning officer is directed to proceed with the representation vote that was ordered on January 23, 2009 without further delay.

[16] As a result, the Board has determined that a representation vote will be held on February 15, 16, 17, 18 and 19, 2009.

[17] The employees in the bargaining unit have been informed that the representation vote will take place beginning on February 15, 2009.

[18] By notice of application dated February 2, 2009, Teamsters 847 applied for judicial review in respect of the decisions of the Board dated January 30, 2009 and January 23, 2009 alleging an error of law and a denial of natural justice.

[19] In bringing this motion, Teamsters 847 wishes to stay the decisions of the Board dated January 23 and 30, 2009 until the disposition of the application for judicial review.

[20] The Supreme Court of Canada has established a three part test to determine whether a stay should be granted in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The

applicants must show: 1) that there is a serious question to be tried; 2) that irreparable harm will be suffered by the applicants if the stay is not granted; and 3) that the balance of inconvenience favours the granting of a stay.

[21] Each stage of this test must be satisfied by Teamsters 847, and the analysis must occur in proper sequence. Thus, Teamsters 847 must first show a serious question to be tried. Teamsters 847 must then show irreparable harm. It is only after having satisfied the first two stages that the analysis moves to the balance of convenience.

[22] For the following reasons, I have concluded that Teamsters 847 have not satisfied the three part test to determine whether a stay or interim relief should be granted.

[23] As a preliminary matter, I would note that the CIRB decisions at issue in the underlying judicial review application are not final rulings on the merits of the CAWU's application for certification. Rather, they are interlocutory decisions within an application for certification. An order for a representation vote cannot finally dispose of a successful certification application, as the Code mandates certification through an order of the CIRB. Similarly, should a certification application be found to be unsuccessful, the CIRB issues a final decision to this effect, dismissing the application. The unfair labour practice complaint made by Teamsters 847 remains outstanding and will also require adjudication by the CIRB.

[24] Furthermore, the decisions under review in the instant application are within the statutory jurisdiction of the CIRB. The CIRB enjoys the express statutory authority, under subparagraph 16(i) of the *Canada Labour Code*, to order a representation vote at any time prior to the final disposition of the proceeding. Also, section 16.1 of the *Code* specifically empowers the Board to decide any matter before it without holding an oral hearing.

[25] The threshold to be met in order to satisfy the test of a serious question to be tried is a low one. Therefore, I will proceed on the basis that the grounds raised by Teamsters 847 are not vexatious or frivolous. However, I express no opinion on their likelihood of success.

[26] Accordingly, I will proceed to consider the second and third parts of the test.

[27] The second stage of the test is irreparable harm. At this stage of the analysis, the only issue to be decided is whether a refusal to grant relief could so adversely affect Teamsters 847's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application (*RJR-MacDonald Inc.*, supra at para. 58).

[28] Further, Teamsters 847 must prove that actual harm will be suffered if the stay is not granted. It is not sufficient for Teamsters 847 to allege hypothetical or speculative harm.

[29] The need for an applicant to conclusively prove irreparable harm that is not speculative, but “will occur”, was clearly confirmed by this Court in *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, when it held (at para. 12):

... the fact that irreparable harm may arguably arise does not establish irreparable harm. What the respondents had to prove, on a balance of probabilities, is that irreparable harm would result from compliance with the *subpoena* issued on behalf of the Commissioner (*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, 1987 CanLII 79 (S.C.C.), [1987] 1 S.C.R. 110 at para. 35). The alleged harm may not be speculative or hypothetical (*Imperial Chemical Industries PLC v. Apotex Inc.*, [1990] 1 F.C. 211 (C.A.)) [emphasis added].

[30] Teamsters 847 has not produced sufficient evidence of irreparable harm. The evidence before the Court is opinion evidence of an individual outside the bargaining unit speculating as to how certain actions have and will be perceived within the bargaining unit.

[31] The availability of ongoing remedies to Teamsters 847, through the CIRB, for any harm suffered due to intimidation or fraud is a factor which precludes any finding of irreparable harm. Teamsters 847 continues to seek relief from the CIRB. As recently as February 6, 2009, Teamsters 847 has sought to file additional unfair labour practice allegations for which the CIRB may grant a remedy.

[32] Teamsters 847 asserts that there may be confusion by certain members of the bargaining unit should the CIRB process continue and this would constitute irreparable harm. This assertion is wholly speculative. Parliament has enacted a system of labour relations whereby a democratic process, a secret representation vote, can be utilized in order to clarify the wishes of members of a bargaining unit.

[33] It is clear from the Board's unanimous decision that it wishes to provide the members of the bargaining unit with an opportunity to express their wishes by means of a representation vote.

[34] The third test to be applied in an application for interlocutory relief is a determination of which of the two parties will suffer the greater inconvenience from the granting or refusal of the stay pending a decision on the merits.

[35] A strong public interest exists in having CIRB proceedings go forward as expeditiously as possible. This interest outweighs Teamsters 847's interest in having the matter stayed. The CIRB has ordered an election scheduled to proceed between February 15 and 19, 2009. This election has been scheduled according to the CIRB's normal practices and procedures. All bargaining unit members have been advised of the dates and locations for balloting by the CIRB.

[36] In my view, the balance of inconvenience does not favour a stay.

[37] Accordingly, the motion for a stay will be dismissed with costs.

“J. Richard”
Chief Justice

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-50-09

(MOTION FOR AN INTERIM ORDER STAYING THE DECISIONS AND ORDERS OF THE CIRB DATED 23-JAN-09 AND 30-JAN-09.)

STYLE OF CAUSE: TEAMSTERS LOCAL UNION 847
v. CANADIAN AIRPORT
WORKERS UNION v. GARDA
SECURITY SCREENING INC.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 12, 2009

REASONS FOR ORDER BY: RICHARD C.J.

DELIVERED FROM THE BENCH BY: RICHARD C.J.

APPEARANCES:

Bernard A. Hanson	FOR THE APPLICANT
Simon Blackstone	FOR THE RESPONDENT (Canadian Airport Workers Union)
No appearance	FOR THE RESPONDENT (Garda Security Screening Inc.)

SOLICITORS OF RECORD:

CAVALLUZZO HAYES SHILTON McINTYRE & CORNISH LLP Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
GREEN & CHERCOVER Toronto, Ontario	FOR THE RESPONDENT (Canadian Airport Workers Union)
BCF L.L.P. Montréal, Québec	FOR THE RESPONDENT (Garda Security Screening Inc.)

