Federal Court of Appeal

Cour d'appel fédérale

Date: 20190228

Docket: A-166-18

Citation: 2019 FCA 40

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
RENNIE 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 February 28, 2019
Judgment delivered from the Bench at Toronto, Ontario on February 28, 2019.

REASONS FOR JUDGMENT OF THE COURT BY: GAUTHIER J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario on February 28, 2019).

GAUTHIER J.A.

[1] Rogers Communications Canada Inc. [Rogers] applies for judicial review of a decision (2018 CIRB 879) of the Canada Industrial Relations Board [Board]. Pursuant to section 18 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 [Code], the Board granted the application of the

Metro Cable T.V. Maintenance and Service Employees' Association [Union] to add a group of 20 employees from a recently acquired outfit by Rogers to an existing bargaining unit of 540 employees with the same job descriptions in the Greater Toronto Area.

[2] The decision was a redetermination ordered by this Court (2017 FCA 12). This Court required the Board to determined two questions it had failed to address in its original decision, namely: 1) the extent to which, if at all, the amendments to the Code by the *Employees' Voting Rights Act*, S.C. 2014, c. 40 had an impact on the Union's section 18 application; and 2) whether the Union had demonstrated that there was "double majority" support for the proposed additions to the bargaining unit.

[3] The amendments referred to above required that a secret ballot vote be held under a certification process pursuant to section 28 of the Code. They were only in force for two years, from June 2015 to June 2017, and have now been repealed. This issue needed to be considered because Rogers had put it in play before the Board even if it had not articulated it fully. With respect to the second question, our Court had noticed conflicting case law and called upon the Board to settle the controversy.

[4] In our view, the Board addressed both questions in a comprehensive and well-reasoned decision.

[5] On the first issue, the Union took no position. It was prepared to provide whatever evidence was required by the Board. Its main concern was that the application be decided

quickly because the affected employees had been waiting for a resolution of the question since 2015

[6] The Board squarely engaged with Rogers' argument that the Board should apply the secret ballot vote requirement to the group of 20 new employees when exercising its discretion under section 18 because this was a new certification for these employees. The Board considered the structure of the Code, the purpose of the provisions and amendments, statements in legislative debates and its own policy on such matters. The Board concluded that it had not been Parliament's intention to curtail the Board's broad discretion under section 18. The Board did not accept that this was a case where it should necessarily require a secret ballot vote for these 20 employees, having accepted the evidence provided by the Union that established that the majority of these employees indeed sought to be represented by it.

[7] This decision was reasonable. It was open to the Board to decide as it did. Indeed, on its wording alone, section 18 affords leeway in the exercise of the Board's discretionary power in this case:

Review or amendment of orders	Réexamen ou modification des ordonnances
18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.	**18.** Le Conseil peut réexaminer, annuler ou modifier ses décisions ou ordonnances et réinstruire une demande avant de rendre une ordonnance à son sujet.

I also note that on many occasions the Supreme Court has emphasized the need for deference to well-versed labour tribunals when they interpret their complex administrative schemes and exercise their discretion under them.

[8] As to the second issue concerning double majority support, the Board, in its exhaustive and sensible analysis, effectively settled whatever controversy existed in its earlier cases and did so reasonably. Adopting a clear policy choice that has been in development since at least *General Teamsters, Local 362 v. Brink's Canada Ltd.* (1996), 100 di 39 (C.L.R.B. no. 1053) aff'd 1997 CarswellNat 1913 (F.C.A.), the Board established that it would follow the approach set out in *P.S.A.C. v. Royal Canadian Mint*, 2003 CIRB 229 and infer from the circumstances (especially at paras. 119-121) continued ongoing majority support within the existing bargaining unit unless there is serious reason to question or doubt that support.

[9] Obviously, in our view, inferences such as this should be made only when reasonable in the circumstances.

[10] Again, this was a question the Board was entitled to decide as it did, notably in light of its institutional experience and expertise. The Board's choice was based on an existing body of case law (see e.g. *I.L.W.U., Local 523 v. Ridley Terminals Inc.*, 2002 CIRB 185 at paras. 23-25; *G.S.U. v. Saskatchewan Wheat Pool*, 2002 CIRB 173 at paras. 88-91) and grounded in sound policy rationales, such as the economy of Board resources and maintaining a balance between labour relations interests and objectives. In fact, a differently-constituted panel of the Board in *TC, Local 31 and 669779 Ontario Ltd., Re*, 2018 CIRB 873 (at paras. 40-51) provided a separate analysis of the double majority support issue and came to same conclusion as the Board did in this case. Again these are the very sort of issues on which the Board is entitled to deference.

[11] Before concluding we wish to register our concern with respect to the notice to employees. We query whether the notice fulfills its purpose of communicating to employees, in clear and transparent terms, the nature of their participatory rights and the consequences of the application before the Board. While in these particular circumstances we do not consider the notice is so defective to vitiate the decision, it might be so in another case.

[12] Overall, despite the able representations of Rogers' counsel, we see no reason to intervene in this matter. Thus, the application will be dismissed with costs set at the agreed amount of $4,000 (all inclusive) to the respondents.

"Johanne Gauthier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPLICATION FOR JUDICIAL REVIEW OF A DECISION RENDERED BY THE CANADA INDUSTRIAL RELATIONS BOARD, DATED MAY 8, 2018, BOARD FILE NO. 31243-C

DOCKET:	A-166-18
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:	FEBRUARY 28, 2019
REASONS FOR JUDGMENT OF THE COURT BY:	GAUTHIER J.A. STRATAS J.A. RENNIE J.A.
DELIVERED FROM THE BENCH BY:	GAUTHIER J.A.

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