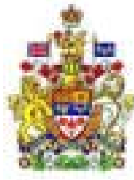
Federal Court of Appeal



Cour d'appel fédérale

Date: 20100610

Dockets: A-277-09
A-318-09

Citation: 2010 FCA 158

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
STRATAS J.A.

BETWEEN:

VANCOUVER INTERNATIONAL AIRPORT AUTHORITY AND YVR PROJECT MANAGEMENT LTD.

Applicants

and

PUBLIC SERVICE ALLIANCE OF CANADA

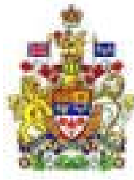
Respondent

Heard at Vancouver, British Columbia, on June 2, 2010.

Judgment delivered at Ottawa, Ontario, on June 10, 2010.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
PELLETIER J.A.

Federal Court of Appeal  Cour d'appel fédérale

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The applicant employers' main submission is that the Canada Industrial Labour Board has given inadequate reasons in support of certain rulings against them. These rulings appear in two Board decisions: a decision dated June 3, 2009 (2009 CIRB LD2148; file A-277-09 in this Court) and a further decision dated July 24, 2009 (2009 CIRB LD2172; file A-318-09 in this Court). For the reasons below, I agree with the applicants' main submission. The reasons of the Board are inadequate.

[2] The Board was dealing with the issue whether certain new job positions created by the applicant employers fell within the bargaining unit that the respondent union is certified to represent. In its two decisions, the Board ruled upon 66 job positions. It ruled that 43 job positions should be excluded from the bargaining unit and 23 job positions should be included into the bargaining unit.

[3] In this Court, the applicants brought two applications for judicial review against the two decisions. Their applications challenged the 23 inclusions. The respondent did not seek judicial review of any of the Board's rulings. Therefore, only the Board's rulings on the 23 inclusions are before this Court.

[4] Before this matter arrived in this Court, the applicants asked the Board to reconsider its decisions. The Board declined to do so. In this Court, the parties agreed that the Board's two decisions remained in place, completely unaffected by the reconsideration. They agreed that this Court should hear and determine the applications for judicial review, which have now been consolidated.

A. The parties' submissions

[5] At the outset of the parties' submissions, there was some common ground. The parties agreed that the Board was obligated to give reasons in support of its rulings in this case.

[6] I agree. On the matters before it, the Board was obligated to provide the parties with procedural fairness. The Board adjudicated legal and factual issues of significance for the affected parties, namely whether certain positions were included or excluded from the bargaining unit.

[7] Nothing in these reasons for judgment should be taken as suggesting that all administrative decision-makers must give reasons in all circumstances. It depends. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 43, the Supreme Court regarded the common law obligation to provide reasons as a subset of the duty to afford procedural fairness to the parties. In that case, the Supreme Court held that a Minister deciding a refugee claim owed the claimant a duty of procedural fairness and, due to the importance of the decision to the claimant, the claimant needed to know why her claim was dismissed. *Baker* emphasizes at paragraphs 23 to 28 that the level of procedural fairness to be afforded depends upon the circumstances and may vary from no obligation whatsoever, to a high obligation. Finally, there are some administrative decision-makers that are not obligated to afford procedural fairness at all: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at page 670.

[8] On the central issue of adequacy of reasons, the applicants submitted that after reading the Board's reasons, they do not know why 23 job positions were included in the bargaining unit. For many of the positions, the Board offered only a single, curt conclusion, nothing more.

[9] The respondent disagreed. While the reasons were brief, the parties could understand why the Board ruled in the way it did. The parties knew the relevant principles, there had been a lengthy

back-and-forth over the years on these issues, and a Board officer had released a very detailed report setting out principles and factual findings. That report should be regarded as part of the Board's rationale for its decision, says the respondent, citing this Court's decision in *Sketchley v. Canada*, 2005 FCA 404, [2006] 3 F.C.R. 392.

[10] An assumption underlies the respondent's submissions: whether reasons are adequate depends on whether they fulfil, in a minimal way, certain purposes and functions. Distilling the respondent's submissions to their essence, the respondent says that the main purpose of reasons is to ensure that the parties know why the Board decided in the way that it did.

B. Analysis

(1) Introduction

[11] I agree that the adequacy of reasons is to be assessed against the purposes that underlie the giving of reasons. Put another way, "adequate reasons are those that serve the functions for which the duty to provide them was imposed": *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 at paragraph 21 (C.A). This has been the consistent approach of the Supreme Court and this Court: *R. v. Sheppard*, [2002] 1 S.C.R. 869; *R. v. Braich*, [2002] 1 S.C.R. 903; *R. v. R.E.M.*, [2008] 3 S.C.R. 3; *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada* 2006 FCA 337, 54 C.P.R. (4th) 15.

[12] However, as will be seen, I do not agree with the respondent that the reasons of administrative decision-makers are adequate just because the parties know why they won or lost. The reasons of administrative decision-makers also must fulfil other purposes. In this case, the Board's reasons are inadequate because they do not fulfil, even at a minimum, many of these purposes.

(2) The purposes underlying the giving of reasons in the administrative law context

[13] The Supreme Court has identified some of the purposes underlying the giving of reasons in the administrative law context, albeit in only three cases, and only briefly. These purposes include "fairness to the parties" and "justification, transparency and intelligibility": *Baker*, *supra* at paragraph 43; *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47. In the area of Ministerial discretion in the extradition context, the Supreme Court in *Lake v. Canada*, [2008] 1 S.C.R. 761 at paragraph 46 has emphasized that the reasons must inform the parties why the result was reached. They must also make it possible for the supervising court to review the decision.

[14] Our Court has held that reasons in the administrative law context must provide an assurance to the parties that their submissions have been considered, enable the reviewing court to conduct a meaningful review, and be transparent so that regulatees can receive guidance: *Canadian Association of Broadcasters, supra* at paragraph 11; *VIA Rail Canada Inc.*, *supra* at paragraphs 17 to 22.

[15] In the area of criminal law, the Supreme Court has more fully developed the purposes underlying the giving of reasons. These should not be imported uncritically into the administrative law area, as the two areas have important differences. Nevertheless, there is some overlap with the purposes and functions identified above. Enough information must be given so parties can assess whether or not to exercise their rights of review, the supervising court can review what has been done, and the public can scrutinize what has happened: *Sheppard*, *supra* at paragraphs 15 and 24; *R.E.M.*, *supra*.

[16] Where, as here, an administrative decision-maker, acting under a procedural duty to receive and consider full submissions, is adjudicating on a matter of significance, what sort of reasons must it give? From the above authorities, and bearing in mind a number of fundamental principles in the administrative law context, the adequacy of the decision-maker's reasons in situations such as this must be evaluated with four fundamental purposes in mind:

(a) *The substantive purpose*. At least in a minimal way, the substance of the decision must be understood, along with why the administrative decision-maker ruled in the way that it did.

(b) *The procedural purpose*. The parties must be able to decide whether or not to invoke their rights to have the decision reviewed by a supervising court. This is an aspect of procedural fairness in administrative law. If the bases underlying the decision are withheld, a party cannot assess whether the bases give rise to a ground for review.

(c) *The accountability purpose*. There must be enough information about the decision and its bases so that the supervising court can assess, meaningfully, whether the decision-maker met minimum standards of legality. This role of supervising courts is an important aspect of the rule of law and must be respected: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Dunsmuir*, *supra* at paragraphs 27 to 31. In cases where the standard of review is reasonableness, the supervising court must assess "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, *supra* at paragraph 47. If the supervising court has been prevented from assessing this because too little information has been provided, the reasons are inadequate: see, *e.g.*, *Canadian Association of Broadcasters, supra* at paragraph 11.

(d) *The "justification, transparency and intelligibility" purpose*: *Dunsmuir*, *supra* at paragraph 47. This purpose overlaps, to some extent, with the substantive purpose. Justification and intelligibility are present when a basis for a decision has been given, and the basis is understandable, with some discernable rationality and logic. Transparency speaks to the ability of observers to scrutinize and understand what an administrative decision-maker has decided and why. In this case, this would include the parties to the proceeding, the employees whose positions were in issue, and employees, employers, unions and businesses that may face similar issues in the future. Transparency, though, is not just limited to observers who have a specific

interest in the decision. The broader public also has an interest in transparency: in this case, the Board is a public institution of government and part of our democratic governance structure.

[17] The reasons of administrative decision-makers in situations such as this must fulfil these purposes at a minimum. As courts assess whether these purposes have been fulfilled, there are a number of important principles, established by the authorities, to be kept firmly in mind:

(a) *The relevancy of extraneous material.* The respondent emphasized that information about why an administrative decision-maker ruled in the way that it did can sometimes be found in the record of the case and the surrounding context. I agree. Reasons form part of a broader context. Information that fulfils the above purposes can come from various sources. For example, there may be oral or written reasons of the decision-maker and those reasons may be amplified or clarified by extraneous material, such as notes in the decision-maker's file and other matters in the record. Even where no reasons have been given, extraneous material may suffice when it can be taken to express the basis for the decision. *Baker*, *supra*, provides us with a good example of this, where the Supreme Court found that notes in the administrative file adequately expressed the basis for the decision. See also *Hill v. Hamilton-Wentworth Police Services Board*, [2007] 3 S.C.R. 129 at paragraph 101 for the role of extraneous materials in the assessment of adequacy of reasons.

(b) *The adequacy of reasons is not measured by the pound.* The task is not to count the number of words or weigh the amount of ink spilled on the page. Instead, the task is to ask whether reasons, with an eye to their context and the evidentiary record, satisfy, in a minimal way, the fundamental purposes, above. Often, a handful of well-chosen words can suffice. In this regard, the respondent emphasized that very brief reasons with short-form expressions can be adequate. That is true, as long as the fundamental purposes, above, are met at a minimum. In this regard, the respondent cited the example of the Board sometimes issuing orders without reasons. Whether such orders are adequate depends on the facts of a specific case, but the methodology for assessing adequacy is clear: the preambles, recitals and provisions of the orders, when viewed with an eye to their context and the evidentiary record, must satisfy, in a minimal way, the fundamental purposes, above.

(c) *The relevance of Parliamentary intention and the administrative context.* Judge-made rulings on adequacy of reasons must not be allowed to frustrate Parliament's intention to remit subject-matters to specialized administrative decision-makers. In many cases, Parliament has set out procedures or has given them the power to develop procedures suitable to their specialization, aimed at achieving cost-effective, timely justice. In assessing the adequacy of reasons, courts should make allowances for the "day to day realities" of administrative tribunals, a number of which are staffed by non-lawyers: *Baker*, *supra* at paragraph 44; *Clifford v. Ontario Municipal Employees Retirement System* (2009), 98 O.R. (3d) 210 at paragraph 27 (C.A.).

Allowance should also be given for short-form modes of expression that are rooted in the expertise of the administrative decision-maker. However, these allowances must not be allowed to whittle down the standards too far. Reasons must address fundamental purposes – purposes that, as we have seen, are founded on such fundamental principles as accountability, the rule of law, procedural fairness, and transparency.

(d) *Judicial restraint.* The court's assessment of reasons is aimed only at ensuring that legal minimums are met; it is not an exercise in editorial control or literary criticism. See *Sheppard*, *supra* at paragraph 26.

[18] In the above statement of purposes and principles, nothing should be taken to encourage administrative decision-makers to aim only for the legal minimums, and no higher. Administrative decision-makers should strive to follow best practices so that the public gets the service it deserves, including providing exemplary reasons of high standard: for an example of one authority's helpful view of best practices, see Ombudsman Saskatchewan, *Practice Essentials for Administrative Tribunals* (2009), online: Ombudsman Saskatchewan <http://www.ombudsman.sk.ca/uploads/document/files/omb-tribunal-guide_web-en-1.pdf>.

(3) Application of these principles to this case

[19] Measured against the fundamental concerns and principles, set out above, the Board's reasons fall well short of the mark. They are inadequate.

[20] In 13 of the 23 positions found to be in the bargaining unit, the Board simply wrote that "there is no basis to exclude given the job duties," "there is no basis in the information supplied to exclude the position from the unit," or "job duties do not require exclusion." Did the Board apply any principles in these rulings? If so, what are the principles? It is a mystery. The applicants have no idea why they lost, they cannot meaningfully assess whether a judicial review is warranted or formulate any grounds for it in the case of these 13 positions, this Court is unable to conduct any meaningful supervisory role, and there is no transparency, justification or intelligibility in the senses set out above. All we have are conclusions, laudably definitive, but frustratingly opaque.

[21] In effect, for these 13 positions, the Board is telling the parties, this Court, and all others, "Trust us, we got it right." In this regard, this case is strikingly similar to *Canadian Association of Broadcasters, supra*, where the administrative decision-maker asserted a bottom-line conclusion with no supporting information, in effect immunizing itself from review and accountability.

[22] In 6 of the 23 positions found to be in the bargaining unit, the Board offered slightly more than a bare conclusion in support of its ruling. On these occasions, the Board included a position in the bargaining unit because it was "at the same level on the organizational chart" or because it was

similar, for some undisclosed reason, to a position in the bargaining unit. What was it about the level on the organizational chart or the particular position that led to this conclusion? It is a mystery. In effect, the Board is saying, "Trust us, but here is a hint." But the hint does not shed light on the bases for its decision.

[23] The respondent gamely attempted to support the reasons of the Board, sparse as they are. It emphasized that the principles that the Board normally employs in cases such as this one are fairly well-developed and understood by many employers, unions and observers of this area of law. Further, a fairly large number of positions, 66, were in issue, each involving highly specific facts. The respondent stressed that care must be taken not to impose too high an obligation to provide reasons on the Board, affecting its ability to operate efficiently.

[24] I accept that these factors can influence the Court's assessment of the adequacy of the Board's reasons. These factors speak to the issue of whether some allowance should be given to reflect the practical, daily realities that this administrative decision-maker must face. But the fundamental purposes underlying the adequacy of reasons, such as the transparency concern and the supervisory concern, must still be addressed at a minimum. The Board's obligation to write adequate reasons and address fundamental purposes cannot be reduced to naught.

[25] In this case, the purposes underlying the requirement of adequate reasons could have been met without any difficulty, consistent with the practical realities facing the Board. With just a handful of words – "Throughout this decision, we apply the principles in [case name]" – the Board

could have shown that it was following some principle. From there, the Board might have written a sentence or two to identify how the principle applies to each position, or to groups of positions that raise similar considerations. A sentence or two, sitting alongside the record in this case, might have disclosed exactly why the Board ruled in the way it did, and might have addressed all of the fundamental concerns underlying the provision of adequate reasons.

[26] So far, I have dealt with 19 of the 23 positions that the Board included into the bargaining unit. In the case of the remaining four positions, "payroll assistant," human resource advisor," "contracts manager," and "project manager," the Board did write a sentence or two. But the bases identified in those sentences seem to conflict with the bases provided for exclusion of other positions: sometimes one factor is determinative, other times an entirely different factor seems determinative. The salient concern here is intelligibility. A single paragraph, perhaps at the start of the reasons could have set out the operative principles to be followed along with governing authority. Then the Board's "sentence or two" approach might have been perfectly adequate. It might have met any intelligibility concerns by eliminating any apparent inconsistency in principle.

[27] As for extraneous material, it is of no assistance in understanding the Board's reasons. In the circumstances of this case and given the sparseness of the Board's reasons, it is impossible to see anything in the evidentiary record, including the investigation report, as helping to supply a rationale for the Board's decision. It was open to the Board to adopt, through express language or by implication, portions of the record as a basis for its conclusions (see *Sketchley*, *supra* at paragraph 37), but the Board did not do this.

(4) Other grounds of review

[28] The applicants raised other grounds of review of the Board's decision. These arose primarily as a result of the Board's reference to positions on an organizational chart in support of some of its rulings. This led the applicants to note that a position on an organizational chart, by itself, cannot lead in principle to a conclusion that a position should be included in the bargaining unit. To the applicants, this gave rise to two legitimate grounds of judicial review: the taking into account of an irrelevant consideration and the failure to take into account relevant considerations.

[29] We simply cannot assess these grounds of judicial review because of the absence of adequate reasons. Quite simply, the considerations and principles that the Board took into account, relevant or irrelevant, are not adequately apparent. In any event, it is unnecessary to deal with these other grounds of review in this case.

C. Conclusion

[30] The Board's decisions to include 23 positions into the bargaining unit should be quashed, because its reasons are inadequate.

[31] The applicants asked that the matter be remitted to a differently constituted panel of the Board. I would remit the matter back to the Board, but there is no reason why the matter must be sent to a differently constituted panel. Such a requirement is imposed when there are concerns about

the capacity, capability, fairness or propriety of the original panel to rule on a matter if it were to be sent back to them. As best as we can assess from the Board's truncated reasons and the parties' submissions, no such concerns exist here.

[32] Therefore, I would allow both applications for judicial review, with costs in file A-318-09 up to the date of consolidation (September 19, 2009) and costs throughout in A-277-09. I would quash the decisions of the Board (2009 CIRB LD2148 and 2009 CIRB LD2172) with respect to the 23 positions that the Board decided were included in the bargaining unit. I would remit these 23 inclusions back to the Board for redetermination.

"David Stratas"
J.A.

"I agree
Gilles Létourneau J.A."

"I agree
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-277-09
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CONCURRED IN BY:	Létourneau J.A. Pelletier J.A.
DATED:	June 10, 2010

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