Federal Court of Appeal		Cour d'appel fédérale

Date: 20100610

Docket: A-461-09

Citation: 2010 FCA 154

CORAM: **NADON J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

AMALGAMATED TRANSIT UNION, LOCAL 1624

Applicant

and

SYNDICAT DES TRAVAILLEUSES ET TRAVAILLEURS DE COACH CANADA - CSN

Respondent

and

3329003 CANADA INC.

Respondent

and

TRENTWAY-WAGAR INC.

Respondent

Heard at Ottawa, Ontario, on May 12, 2010.

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

REASONS FOR JUDGMENT BY: TRUDEL J.A.

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

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] Pursuant to an application made under section 24 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Part I – Industrial Relations) [Code], on 22 June 2009, the respondent Syndicat des

travailleuses et travailleurs de Coach Canada-CSN [CSN] has been certified as the bargaining agent for a unit comprising:

> all employees of 3329003 Canada Inc., excluding office and ticketing staff, working at the facilities located at 5550 Monk Boulevard and 1140 Wellington Street in Montreal, Quebec (Certificate of 14 October 2009, dossier du défendeur, volume 2, at pages 356-357).

[2] The key issue of the application for judicial review commenced by the applicant Amalgamated Transit Union, Local 1624 [ATU] is whether or not the Canada Industrial Relations Board [Board] erred in providing this certification. Other issues raised by ATU are concerned with natural justice and procedural fairness.

[3] By virtue of a certificate issued in 1987 (the 1987 certificate) by the Canada Labour Relations Board (as it was then known) ATU is the bargaining agent for:

> all employees of Trentway-Wagar Inc. [Trentway] employed as coach drivers and airport operator drivers, excluding dispatchers, those above the rank of dispatcher, office and clerical staff (see the 1987 certificate, applicant's record, volume 1, tab C, at page 81).

[4] ATU submits that by the time CSN filed its application for certification, the activities of 3329003 Canada Inc. [332] had been merged into Trentway. Hence, the employees for whom the certification was intended had already become part of the ATU's bargaining unit "arguably in 2007 but at least by June 22, 2009" (applicant's memorandum at paragraph 2). This hesitation as to the corporate status of 332 will be addressed later.

[5] ATU also argues that the Board erred:

a. in failing to provide it with adequate notice of the proceedings;

b. in failing to conduct an oral hearing; and

c. in issuing its decision along with reasons signed by the Board's Registrar rather than by a member of the Board, contrary to subsection 3(*b*) of the *Canada Industrial Relations Board Regulations*, 2001, SOR/2001-520, as amended [Regulations].

[6] The applicant's position is supported by the respondents 332 and Trentway. Since 332 and Trentway raised no independent issue, these reasons refer only to ATU.

[7] On the merits, given the nature of the question at issue, the evidentiary record and the Board's expertise in the determination of appropriate bargaining units, the decision under review is reasonable. It falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and the Code (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). On the procedural treatment of the file by the Board, I have not been persuaded that the Board failed in its duty of procedural fairness.

[8] Therefore, I propose to dismiss this application for the reasons that follow.

[9] To fully understand the issue of timeliness raised by the applicant under section 24 of the Code, I need to describe the corporate structure that includes 332 and Trentway, but before getting there, I intend to dispose of the procedural fairness issues.

A. Procedural Fairness

1. Notice of the proceeding

[10] ATU contends that both CSN and the Board failed to give it proper notice of the proceeding, something it was entitled to as "any person who may be affected by the application" (paragraph 10(*b*) of the Regulations). It argues that:

> … because of the late and inadequate nature of the notice, the Applicant's ability to respond to the certification application was prejudicially affected (applicant's memorandum at paragraph 45).

[11] ATU supports its position by reference to sections 10 and 11 of the Regulations. On the facts of this case, I fail to see how these sections advance the applicant's case.

[12] Section 10 of the Regulations dictates the mandatory content of an application filed with the Board. Section 11, in its relevant part, provides that the Board:

> … shall, on receipt of an application and to the extent possible, give notice of the application in writing to a person whose rights may be directly affected by the application [Emphasis added].

[13] This section 24 application concerned non-unionized employees of 332, while ATU claims to be an affected party by virtue of its 1987 certificate and a merger of 332 and Trentway, which took place sometime between 2007 and 22 June 2009.

[14] It was not readily apparent that ATU was affected by the CSN application. In any event, the record shows that on 15 July 2009, as soon as the Board was made aware of ATU's intention to intervene with respect to the application, ATU received "all the documents filed in the matter, including the application for certification by CSN" (see Maylene Higgins' affidavit, applicant's record, volume 1, tab 2 at paragraphs 7 and 10).

[15] From then on, ATU was a party to the proceeding and was afforded the opportunity to file its written submissions. It did so along with its own application under section 35 of the Code where it sought a declaration of single employer.

[16] In view of these facts, I would therefore dismiss this argument.

2. Failure to conduct an oral hearing

[17] Section 16.1 of the Code states:

Determination without oral hearing	Décision sans audience
16.1 The Board may decide any matter before it without holding an oral hearing.	**16.1** Le Conseil peut trancher toute affaire ou question dont il est saisi sans tenir d'audience.
1998, c. 26, s. 6.	1998, ch. 26, art. 6.

[18] The Board is the master of its own procedure: this Court will not intervene unless the Board acts in a way which deprives a party of procedural fairness.

[19] ATU submits that the CSN application was exceptional because it dealt with “complex issues of corporate organization or reorganization” (applicant’s memorandum at paragraph 49). I disagree.

[20] Moreover, ATU submits it had a legitimate expectation to be heard following, it says, the promise of a Labour Relations Officer. At the hearing of this application, counsel for ATU conceded that there was nothing on record to support this statement.

[21] To the contrary, I note letters from the Board to CSN and 332, which were communicated to ATU, reminding them that it was in their “best interests to file complete and accurate submissions in support of their respective positions and to cooperate fully in the investigation by the Board’s officer” (applicant’s record, volume 1, tab C, at pages 68 for CSN, and 73 for 332), as the matter could be decided without an oral hearing.

[22] I also note that the investigator’s report accurately reflects the parties’ position (applicant’s record, volume 1, tab L at pages 189 and following). As a result, the Board was well aware of ATU’s position.

[23] Accordingly, I would dismiss this second argument.

3. Failure to give reasons or sufficient reasons

[24] The applicant's last argument under the heading "Procedural fairness" is that the Board erred in failing to provide reasons (applicant's memorandum at paragraphs 31 and following).

[25] The record shows that reasons relating to the Board's Certification Order of 14 October 2009 were issued the same day under the signature of the Board's Executive Director and Senior Registrar.

[26] According to the applicant, this is contrary to sections 2 and 3 of the Regulations, which read:

Orders	Ordonnances
2. (1) Only the Chairperson, a Vice-Chairperson, or another member of the Board may sign an order or a decision of the Board, although a Registrar is authorized to sign the decisions referred to in section 3.	2. (1) Seul le président, un vice-président ou un autre membre du Conseil peut signer les décisions ou les ordonnances de celui-ci, un greffier pouvant par ailleurs signer les décisions visées à l'article 3.
(2) Unless it states otherwise, an order of the Board takes effect on the day it is issued.	(2) À moins d'indication contraire, l'ordonnance du Conseil prend effet à la date à laquelle elle est rendue.
Registrar	Greffier
3. In addition to processing any matters on behalf of the Board, a Registrar may make binding decisions on uncontested applications on behalf of the Board in respect of	**3.** En plus de régler toute question au nom du Conseil, un greffier peut rendre des décisions exécutoires sur des demandes non contestées concernant :

…	[…]
(*b*) applications for certification pursuant to section 24 of the Code;	*b*) les demandes d'accréditation sous le régime de l'article 24 du Code ;
…	[…]

[27] At paragraph 41 of its memorandum, ATU summarizes its position as follows:

> 41. With respect to the present case it is submitted that the issues raised by the certification application were substantial and contested. They included not only the status of the Applicant's vested bargaining rights, but also the common employer issue. It is therefore submitted the Board was obligated to provide reasons. Moreover, given the intimate connection between making a decision and expressing a decision, it is submitted that the Board was obligated to prepare those reasons itself. In refusing to do so the Board breached its obligations of natural justice and fair procedure, and as such the certification order should be quashed.

[28] Once again, I find that the sections of the Regulations reproduced above do not advance the applicant's case: the record shows that the Certification Order is properly signed by Vice-President Graham J. Clark, Vice-Chairperson of the panel seized with the CSN application. Conversely, the record does not show that the Board's reasons were prepared or drafted by the Registrar.

[29] All it shows for certain is that reasons for the Certification Order were issued and that they were signed by the Registrar and processed along with the Certification Order.

[30] Although it would have been preferable for the Board members to have signed their reasons personally, I am of the opinion that the procedure followed here does not taint or invalidate it. I therefore consider the reasons as those of the Board.

[31] Since this argument fails as well, I now turn my attention to the Certification Order itself.

B. The section 24 – Certification Order and the timeliness issue

[32] As mentioned earlier, CSN's application for certification was made pursuant to section 24 of the Code. Paragraph 24(2)(*a*) provides that:

> … an application by a trade union for certification as the bargaining agent for a unit may be made (a) where no collective agreement applicable to the unit is in force and no trade union has been certified under this Part as the bargaining agent for the unit, at any time.

[33] The Board, in *Ledcor Industries Ltd. (Re),* 106 di 122, [1998] 41 C.L.R.B.R. (2d) 145 [*Ledcor*], aff'd *Ledcor Industries Ltd. v. Labourers' International Union of North America, Local 92 (Construction & General Workers' Union),* [1999] 251 N.R. 285 (F.C.A.), explained section 24 as follows:

> 29 Section 24(1) provides that a "trade union seeking to be certified as the bargaining agent for a unit that the trade union considers constitutes a unit appropriate for collective bargaining" may, subject to the time prescriptions, apply to the Board to be certified. The union is given broad berth, in a section 24 application, to define the unit it considers appropriate. If there is an existing certification or collective agreement "applicable to the unit" in force at the time of the union's application, which is substantially the same as the

> one that the union described in its application pursuant to section 24(1), the timeliness of the application must be determined pursuant to the provisions of section 24(2).
>
> 30. Before applying the time limits under section 24(2), the Board is often called upon to decide whether the unit described by the union in its section 24(1) application is the same or substantially the same as the unit for which an existing certification order or collective agreement (voluntary or otherwise) exists. Ultimately, it is also the Board, by virtue of section 28 that must decide whether or not the unit that the union described in its section 24(1) application "constitutes a unit appropriate for collective bargaining."
>
> [emphasis added]

[34] Hence, the Board could not grant the certification sought by CSN if was satisfied that the proposed unit was "the same or substantially the same" as the unit contemplated in the existing certification held by ATU. On the applicant's allegations, the Board had to find that "[332] had been merged into a single entity with [Trentway]" (applicant's memorandum at paragraph 25) and that as of 22 June 2009, the Montreal employees identified in the CSN application had a common employer with those already covered by the 1987 certificate.

[35] In its reasons, the Board wrote:

The panel is satisfied that it can proceed at this time to certify the CSN for the requested bargaining unit. Despite the able arguments of counsel concerning the changing corporate situation behind the concurrent single employer application, the delay in waiting for a final decision could significantly prejudice the rights of existing employees to organize themselves under the *Code*. The issue of bargaining units can, of course, be revisited should the Board later be convinced to make a single	Le banc est convaincu qu'il peut maintenant procéder à l'accréditation de la CSN à l'égard de l'unité de négociation visée par la demande. Malgré les arguments valables des procureurs concernant les circonstances changeantes des entreprises qui sont à l'origine de la demande parallèle de déclaration d'employeur unique, le fait d'attendre qu'une décision définitive soit rendue pourrait sérieusement porter atteinte aux droits des employés en poste de se

employer declaration.	syndiquer en vertu du *Code*. La question des unités de négociation peut bien entendu être réexaminée si le Conseil était convaincue plus tard qu'il devait formuler une déclaration d'employeur unique.
The Board was not convinced by the parties' arguments that any Ontario-based bargaining unit had started to apply to employees in Montreal working for a different employer. The Board retains its jurisdiction over bargaining units and has never been requested to re-examine the scope of any of its outstanding bargaining unit certificates. Similarly, if ever a single employer declaration is issued, the issue of multiple bargaining units could again be revisited.	Le Conseil n'a pas été convaincu par les arguments des parties que les employés qui travaillent pour un autre employeur à Montréal sont devenus visés par l'accréditation d'une unité de négociation en Ontario. Il demeure saisi de la question des unités de négociation; d'ailleurs, on ne lui a jamais demandé de réexaminer la portée de tout certificat d'accréditation existant. De même, si une déclaration d'employeur unique est formulée, la question des unités de négociation multiples pourrait être réexaminée.

[36] In its application for judicial review, the applicant alleges three errors in this passage of the Board's reasons:

> 10. The Board based its decision on an erroneous finding of fact in holding that the ATU was an "Ontario" union, rather than recognizing its international and national status as well as its Canada-wide certification.
>
> 13. The Board erred in law in finding that the issue of bargaining units can be revisited should the Board later decide to make a single employer declaration, insofar as the there is already an exclusive bargaining agent which necessarily precludes an Application for Certification as untimely.
>
> 14. The Board erred in law in suggesting that the ATU ought to have requested that the Board re-examine the scope of any of its outstanding bargaining unit certifications given that the ATU already held a geographically unlimited certificate with respect to all employees of the employer.

[37] With respect, the first allegation is not supported by the record. In its reasons, the Board refers to the "Ontario-based bargaining unit" ("unité de négociation en Ontario") before stating that the Montreal 332 employees are not a part of that unit. Nowhere does the Board refer to an Ontario-based union. This is consistent with the Board's duty under section 24 to put its mind to the distinct characteristics of a "unit" proposed for certification.

[38] As far as the remaining allegations are concerned, I have not been persuaded that the Board erred. A better understanding of the Board's decision requires some corporate background.

[39] 332 is a sister company of Trentway. Both corporations operate as part of the Stagecoach Group, one of the world's largest bus, coach, and rail groups with operations in the United Kingdom and North America (applicant's record, volume 1, tabs E and M, at pages 153 and 230). The Stagecoach Group of corporations has gone through changes over the years. Key events from ATU's perspective occurred in 2007 and 2009 and justify its timeliness argument.

[40] 332 was originally created as a holding company. Through corporate changes, it has operated under the names of Autocar Connaisseur, Coach Canada and Grayline (™) (record of the [Corporate] respondents, tab 1, affidavit of James J. Devlin at paragraph 10; see also applicant's record, volume 1, tab M, at pages 243-245).

[41] In a letter of 8 July 2009 to the Board, Counsel for 332 discusses the alleged 2007 key event:

> The Board needs to understand that the Coach Canada Group is comprised of two main elements which are Trentway-Wagar Inc. and Autocar Connaisseur Inc. The first doing business in Ontario, Quebec and the USA and the latter doing business in Quebec, Ontario and the USA. Both companies operate Coach Buses back and forth across provincial and international lines, and have the same officers and directors. This common control and direction result from the 2007 merger between Trentway-Wagar Inc. and Autocar Connaisseur Inc. At that time, for fiscal reasons, many of the assets of Autocar Connaisseur Inc. were transferred to 3329003 Canada Inc., its mother company. Following that merger, Autocar Connaisseur Inc. was continued under Ontario law and merged with Trentway-Wagar Inc. (applicant's record, volume 1, tab C, at page 97)

[42] The 2009 event is addressed by Mr. Devlin, President of Trentway and 332. In his affidavit, he declares that Trentway assumed effective control of 332 at the end of May 2009 when he dismissed 332's general manager after discovering that "local management in Montreal had been defrauding [332] of very important sums of money" (record of the [Corporate] respondents, tab 1, affidavit of James J. Devlin at paragraph 16).

[43] These were the submissions of ATU, Trentway and 332 in response to CSN's application for certification under section 24 of the Code. They are also the foundation of the corporate respondents' application for a "single employer" declaration under section 35, which is yet to be heard by the Board.

[44] On the other hand, the record also shows that as of 22 June 2009, there was no previous certificate covering 332's employees, that 332 was the employer of record, and that since 2002 no attempt was made by ATU or any other labour union to act as the bargaining agent for the employees (record of the [Corporate] respondents, tab 1, affidavit of James J. Devlin at paragraphs

19-23). As a matter of fact, at the hearing counsel for ATU stated that his client was made aware of this unit on 7 July 2009.

[45] On a standard of reasonableness, not only do I fail to see how these facts could have led the Board to dismiss CSN's application under section 24, but I also find that there was ample support for the Board to conclude as it did and to issue certification to CSN to act as bargaining agent for the employees.

[46] As a result, I would dismiss this application for judicial review and because the applicant has not asked for costs, none should be awarded.

"Johanne Trudel"
J.A.

"I agree
M. Nadon J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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