Federal Court of Appeal | Cour d'appel fédérale

Date: 20101112

Docket: A-146-10

Citation: 2010 FCA 306

CORAM: **BLAIS C.J.**
NOËL J.A.
PELLETIER J.A.

BETWEEN:

CONSEIL DES INNUS DE PESSAMIT

Applicant

and

ASSOCIATION DES POLICIERS ET POLICIÈRES DE PESSAMIT

Respondent

and

ATTORNEY GENERAL OF QUEBEC

Intervener

Hearing held at Montréal, Quebec, on November 2, 2010.

Judgment delivered at Ottawa, Ontario, on November 12, 2010.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: BLAIS C.J.
PELLETIER J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an application for judicial review filed by the Conseil des Innus de Pessamit (the applicant) against a decision of the Canada Industrial Relations Board (the CIRB) dated March 4, 2010 (2010 CIRB 523), dismissing the applicant's preliminary objection that Part I of the

Canada Labour Code, R.S.C. 1985, c. L-2 (the Code), did not apply to it because of a right to self-government in relation to public safety.

[2] Prior to the application before the CIRB and the application before this Court, the following two constitutional questions were served on the Attorney General of Canada and the attorneys general of each province in accordance with section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7:

> [TRANSLATION]
> - To the extent that its purpose or effect is to govern the essential, vital and internal government function of safety on the Pessamit Innu reserve and, more specifically, the police force, is the [Code] constitutionally inapplicable or of no force or effect under section 35 of *The Constitution Act, 1982*?
>
> - Does the [CIRB] have jurisdiction to hear and decide this application for certification?

Counsel for the applicant confirmed at the hearing that the answer to the second question is strictly based on the answer to the first. No federal/provincial jurisdictional question is at issue.

[3] Only the Attorney General of Quebec (third party before the CIRB) intervened and filed a record. At the hearing, the Court ordered that the Attorney General of Quebec be named as intervener in the style of cause.

[4] The Association des policiers et policières de Pessamit (the respondent) submitted no record, claiming a lack of resources. However, it produced a letter stating that it maintained an interest in the case and asked that the CIRB's decision be upheld.

[5] This case arose following an application made by the respondent under section 24 of the Code to be certified as the bargaining unit for a unit comprising public safety police officers in Pessamit. This police force was established in 2004 in accordance with an agreement on the provision of policing services signed by the Council of Betsiamites, Her Majesty the Queen in Right of Canada and the Quebec Government. The application for certification was the outcome of a tumultuous, adversarial relationship between the members of the police force and their employer (the applicant).

[6] Before the CIRB, the applicant made a preliminary objection to the admissibility of the application for certification, alleging that it was inconsistent with its right to self-government. The applicant stated that this right was guaranteed by section 35 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*The Constitution Act, 1982*), and included the right to manage its public safety and related labour relations.

[7] The CIRB dismissed the applicant's preliminary objection and granted the respondent's application for certification.

[8] Following the teachings of the Supreme Court of Canada, in particular in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*], and *R. v. Pamajewon*, [1996] 2 S.C.R. 821 [*Pamajewon*], and also relying on *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 444*, 2007 ONCA 814, 287 D.L.R. (4th) 452 [*Scugog Island First Nation*], of the Court of

Appeal for Ontario, the CIRB characterized the right claimed by the applicant as being "the right to regulate the collective labour relations with its police workforce in the field of public safety" (Reasons at para. 92). In doing so, the CIRB refused to accept the applicant's characterization of the right claimed as being the right to ensure public safety on the reserve.

[9] Having thus delineated the right asserted, the CIRB found, according to the *Van der Peet* test, that there was no evidence of an ancestral practice, custom or tradition relating to the management of the police workforce labour relations (Reasons at para. 100).

[10] Ultimately, the CIRB determined that the applicant had failed to establish that collective labour relations with the Pessamit police workforce were integral to the distinctive culture of the Innu Aboriginal peoples, or that there was continuity between the harmony, mutual help and management of the police workforce labour relations in the field of public safety as it currently existed on the reserve (Reasons at para. 101).

PARTIES' POSITIONS

[11] In support of its application for judicial review, the applicant's main criticism is that the CIRB adopted its own characterization of the Aboriginal right claimed and relied on the decision of the Court of Appeal for Ontario in *Scugog Island First Nation* for that purpose. In particular, the applicant noted the following passage from the reasons of the CIRB:

> **91** Insofar as the employer is not questioning the application of the Police Act, but rather the application of Part I of the Code only, the [CIRB] is of the opinion that the [applicant] should have limited its claim to the right to manage labour relations in the field of public safety rather than the right related to the

> management of law, order and public safety on the reserve in general (see [*Scugog Island Nation*]).
>
> **92** Therefore, the proper characterization of the claim is the right to regulate the collective labour relations with its police workforce in the field of public safety, and not the right to ensure public safety, since public safety on the Pessamit reserve is governed by the policing agreement and the Pessamit police force must be maintained in accordance with the *Police Act*, which falls under provincial jurisdiction.
>
> [Emphasis added by the applicant.]

[12] According to the applicant, the CIRB's approach in characterizing the claim is [TRANSLATION] "much too narrow" (Applicant's Memorandum at para. 55) and is inconsistent with the approach established by the case law, including in *R. v. Sappier; R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686 [*Sappier*]; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*]; and *Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123 [*Campbell*].

[13] The applicant also argued that applying the Code to public safety labour relations, given their [TRANSLATION] "adversarial", [TRANSLATION] "coercive", [TRANSLATION] "repressive" and [TRANSLATION] "confrontational" nature (Applicant's Memorandum at para. 103), was an impairment of its self-government that was not justified according to the test set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[14] On a completely different note, the applicant submitted that the fact that it had been given the reasons of the CIRB [TRANSLATION] "the day before the deadline for applying for judicial review" (Applicant's Memorandum at para. 110) and that the hearing had not been recorded

were prejudicial breaches of procedural fairness. The applicant also made allegations of bias against the CIRB on the basis of the presence at the hearing of a CIRB lawyer who had allegedly represented interests that conflicted with those of the applicant in related proceedings.

[15] The intervener stated that the CIRB had not erred in adopting its own characterization of the Aboriginal right claimed. Relying on the decision of the Court of Appeal for Ontario in *Scugog Island First Nation*, the intervener suggested that, when correctly characterized, the right claimed is to regulate the management of labour relations in the field of public safety, including collective relations with its police workforce, rather than the management of law, order and public safety on the reserve (Intervener's Memorandum at para. 20).

[16] The intervener also stated that the CIRB had correctly applied the tests developed by the Supreme Court for establishing an Aboriginal right within the meaning of subsection 35(1) of the *Constitutional Act, 1982*. According to the intervener, the applicant bore the burden of demonstrating, on a balance of probabilities, the Aboriginal right claimed (*Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 12 [*Mitchell*]; *Pamajewon* at para. 24), that is, a right to self-government in relation to the management of labour relations of its police workforce. In the intervener's opinion, this evidence does not exist.

[17] In any event, the intervener challenges the existence of an Aboriginal order of government that would warrant recognizing an Aboriginal right to manage public safety. In the intervener's view, the agreement on the creation of the Pessamit police force, including the application of the statutes and regulations of the province of Quebec to the police force,

precludes any suggestion that it might represent the implementation of an inherent or pre-existing right of the Pessamits to self-government in relation to public safety.

ANALYSIS

[18] The standard of correctness applies to constitutional questions (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 58 and 59).

[19] The applicant submitted that it had a right, protected by section 35 of the *Constitutional Act, 1982*, to self-government for the maintenance of law, order and public safety on the reserve, a right that included the management of relations with the police workforce. It submitted that the CIRB had erred in reformulating this right too narrowly and, more specifically, in limiting it to a labour relations issue.

[20] Counsel for the applicant recognized at the hearing that this was the sole issue in the first part of the application. He conceded that the application must be dismissed if no error had been made in characterizing the right claimed, given that no evidence was submitted showing an Aboriginal right regarding labour relations.

[21] To the extent that subsection 35(1) of *the Constitutional Act, 1982*, encompasses self-government claims, the *Van der Peet* test for determining the Aboriginal right that is the basis of the claim applies (*Pamajewon* at para. 24). In *Van der Peet*, the Supreme Court established the following test for identifying Aboriginal rights (para. 46):

> . . . [I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

[22] To determine whether one is dealing with such an activity (*Pamajewon* at para. 25),

> . . . the Court must first identify the exact nature of the activity claimed to be a right and must then go on to determine whether, on the evidence presented to the trial judge, and on the facts as found by the trial judge, that activity could be said to be (*Van der Peet*, at para. 59) "a defining feature of the culture in question" prior to contact with Europeans.
>
> [Emphasis added.]

[23] The Supreme Court laid out three factors to correctly characterize a claim (*Van der Peet* at para. 53):

> . . . [A] court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. . . .
>
> [Emphasis added.]

[24] The right claimed must also provide sufficient specificity for the Court to be able to identify "a practice that helps to define the way of life or distinctiveness of the particular aboriginal community" (*Sappier* at para. 24). In *Mitchell*, the Supreme Court added that the right claimed must be neither artificially broadened nor narrowed (at para. 15).

[25] According to the second *Van der Peet* factor, it is undisputed that the impugned statute – namely, the Code and, more specifically, Part I of the Code – is about management of labour

relations. As for the first criterion, the nature of the action that was done (or that will be done) pursuant to the Aboriginal right claimed is clearly the applicant's regulation of police workforce labour relations. The applicant asked this Court to move away from this plainly obvious observation and submitted instead that the nature of the action was, more generally, to ensure public safety. The two are no doubt related, in that the applicant could, depending on how it regulated its labour relations with its police officers, favour or hinder the maintenance of public safety; however, this is merely incidental to the right claimed.

[26] While not identical, this situation resembles the one before the Court of Appeal for Ontario in *Scugog Island First Nation*. In that case, the issue was whether the Scugog Island First Nation (the First Nation) had the right to enact its own labour relations code, the purpose of which was primarily to govern labour relations between the 4,000 or so employees of a casino on the reserve and their employer. The proposed regime was noteworthy in that it banned the right to strike or lockout and imposed significant fees for access to union remedies that are recognized and free.

[27] The First Nation argued that implementing its own code was part of an ancestral practice, tradition or custom to regulate work activities and to control access to its territory. The Ontario Labour Relations Board (the ORLB) found, first, that it was not appropriate to characterize the claim in such general terms. In the ORLB's opinion, the right asserted was more specific, namely, the right to regulate labour relations on reserve lands.

[28] As in this case, the First Nation submitted on appeal that the ORLB had characterized the right claimed too narrowly. Relying on the first two *Van der Peet* factors, the Court of Appeal promptly concluded that the action done (or to be done) by the First Nation was the implementation of its own code to the exclusion of the Ontario *Labour Relations Act*, and that the control of access to the territory was incidental at most (*Scugog Island First Nation* at paras. 26, 27 and 28).

[29] In my opinion, the CIRB did not err in relying on the decision of the Court of Appeal for Ontario to justify its conclusion. At the very least, that decision establishes that the right surrounding labour relations is sufficiently well defined to be claimed and that, whenever a claim has been delineated in a certain manner according to the applicable factors, it should be characterized as such.

[30] I therefore find that the CIRB correctly characterized the right asserted by the applicant as being the right to regulate collective labour relations with its police workforce. This is sufficient to dispose of the first part of the application.

PROCEDURAL FAIRNESS

[31] The applicant alleged that the rules of procedural fairness were breached because, first, there was no transcript or recording of the hearing before the CIRB and, second, it received the reasons for the decision the day before the expiration of the deadline to appeal. However, as was noted at the hearing, the applicant did not invoke any prejudice arising from these alleged breaches.

[32] The applicant also complained of the presence of a CIRB lawyer at the hearing before the CIRB. It stated that her presence at the hearing gave rise to a reasonable apprehension of bias. In this regard, suffice it say that the applicant failed to show that the lawyer's presence could give rise to such an apprehension.

[33] I would dismiss the application for judicial review with costs.

"Marc Noël"
J.A.

"I agree.
Pierre Blais C.J."

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

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	BLAIS C.J. PELLETIER J.A.
DATED:	November 12, 2010

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