Federal Court of Appeal | Cour d'appel fédérale

Date: 20110526

Docket: A-329-10

Citation: 2011 FCA 179

CORAM: **NOËL J.A.**
NADON J.A.
EVANS J.A.

BETWEEN:

XL DIGITAL SERVICES INC.
doing business as
DEPENDABLE HOMETECH

Applicant

and

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA

Respondent

Heard at Toronto, Ontario, on May 18, 2011.

Judgment delivered at Ottawa, Ontario, on May 26, 2011.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: NOËL J.A.
NADON J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] This is an application for judicial review by XL Digital Services Inc. doing business as Dependable HomeTech (HomeTech) to set aside a decision of the Canada Industrial Relations Board (Board) (2010 CIRB 543), dated September 28, 2010.

[2] In that decision, the Board dismissed HomeTech's objection to an application by the Communications, Energy and Paperworkers Union of Canada (CEP) under section 24 of the

Canada Labour Code, R.S.C. c. L-2 (Code), for certification as the sole bargaining agent of a unit of HomeTech's employees working in and out of London, Ontario. The Board held that the employees were employed in connection with the operation of a federal undertaking as defined in section 2 of the Code, and that the regulation of their labour relations was therefore within the Board's constitutional jurisdiction.

[3] If the Court sets this decision aside, HomeTech requests that the Court also set aside the interim order of the Board (Interim Order No. 9919-U), dated August 23, 2010, certifying CEP as the bargaining agent for the employees in question.

[4] HomeTech contracted to provide various services to Rogers Cable Communications Inc. (Rogers): installing cable and related equipment to connect Rogers' residential customers' equipment to its cable, telephone and internet services; and performing "troubleshooting" and other customer service functions related to technical problems experienced by Rogers' customers. The HomeTech employees in question in this application performed this work.

[5] HomeTech says that the Board made two errors in concluding that it had jurisdiction to hear and determine CEP's certification application. First, contrary to the Board's finding, Rogers' federally regulated, core business does not extend to bringing cable service into customers' homes, but stops at the Rogers' cable system "outlets" situated nearby. Second, even if Rogers' federal undertaking includes the delivery of a signal into customers' homes, the Board erred in concluding

that the work performed by HomeTech's employees, namely, connecting Rogers' customers equipment to the network, was an integral or essential part of Rogers' core business.

[6] In my opinion, the Board decided both questions correctly. Accordingly, I would dismiss HomeTech's application for judicial review.

Factual background

[7] In its reasons for decision, the Board set out at length the facts concerning the nature of HomeTech's business and its relationship with Rogers, the services it provides to Rogers through its employees, and the components of a cable network. For this reason, and because the Board's findings of fact are not in dispute in this application for judicial review, the following merely highlights the most salient facts.

[8] First, a cable network can be divided into three principal parts: the "headend" which receives signals transmitted from across and outside Canada, and converts them for redistribution; the "nodes" which distribute the signals to a location closer to customers; and the "distribution taps" (or outlets), to which the network distributes the signals, located on residential streets or telephone poles, or, in the case of a multi-dwellings building, in a panel box.

[9] HomeTech's work starts at the distribution taps and ends at the equipment in the customer's home that it connects to Rogers' network. Whether this connection itself forms part of the cable network for regulatory purposes is the basis of the dispute in this case.

[10] Second, HomeTech and its ultimate parent company, Cancable Inc., are incorporated under the laws of the Province of Ontario. They are owned independently of Rogers. However, all HomeTech's revenues come from its contract with Rogers. The contracts have been for terms of three years. Rogers, on the other hand, does not rely exclusively on HomeTech for the services in question, but also contracts with HomeTech's competitors and uses its own employees for some of the work.

[11] Third, HomeTech provides installation and related services to cable service providers in the Ontario cities of London, Kitchener and Ottawa. In addition to the installation and "troubleshooting" services, HomeTech's London-based employees perform some audit and marketing services for Rogers. While HomeTech trains its employees to a standard prescribed by Rogers, and provides the cables and other equipment needed for the work, Rogers supplies the digital boxes, schedules work as it comes in, and assigns it to an available HomeTech technician.

Issues and Analysis

Two preliminary matters

(a) standard of review

[12] The questions in dispute in this appeal concern the application to undisputed facts of a question of constitutional law: were the HomeTech employees for whom CEP sought certification as their bargaining agent employed in connection with the operation of a federal undertaking within the jurisdiction of the Board. Administrative tribunals' decisions on questions of constitutional law concerning the division of powers between Parliament and the provinces under the *Constitution Act,*

1867 are reviewable on a standard of correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 58.

[13] In contrast, the Board is entitled to deference on its findings of fact to which the Constitution is to be applied, including any factual inferences that it draws: *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407 at para. 26. However, no curial deference is owed to the Board's assessment of the constitutional significance of the facts.

(b) notice of a constitutional question

[14] Counsel for CEP drew the Court's attention to the fact that HomeTech had not served notice of a constitutional question on provincial Attorneys General pursuant to section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, even though the question in dispute is whether HomeTech employees are employed in connection with a federal undertaking within the constitutional (and statutory) jurisdiction of the Board. Counsel for CEP took no position on whether the absence of a section 57 notice was fatal to HomeTech's application and the issue was not the subject of argument.

[15] In circumstances materially identical to those of the present case, the Court in *Transport Besner Atlantic Ltée. v. Syndicat des travailleuses et travailleurs de Transport Besner*, 2006 FCA 146 at para. 40 (*Transport Besner*) refrained from deciding whether a failure to serve a section 57 notice in itself invalidates proceedings. As in *Transport Besner*, the Board in the present case had a complete evidential record before it and the issue of whether the employees in question were

employed on or in connection with a federal undertaking was fully argued before it. In addition, in both cases the Court's decision is limited to a finding that the employer did not demonstrate any error in the Board's decision that would warrant setting it aside. I see no basis for departing from *Transport Besner* and remitting the matter for redetermination by the Board.

Issue 1: ***What is the scope of Rogers' federally regulated cable network?***

[16] HomeTech agrees that Rogers' telecommunications and broadcasting business is a federal undertaking, but argues that the business (the transmission and distribution of television signals through its cable network) starts at the headend with the capture and conversion of signals, and ends at the distribution taps located closer to customers' residences. The cable connecting the network and Rogers' customers' equipment, it is argued, is not part of the network. Hence, the HomeTech employees who install it are not employed on a federal undertaking, and the presumption that labour relations are governed by provincial law is not rebutted.

[17] Counsel for HomeTech notes that no judicial authority has decided that a cable network, which is admittedly a federal undertaking, extends beyond the distribution taps to the connection between customers' equipment in their homes and the network. More particularly, he relies on the decision of an Adjudicator of the Board, dated May 28, 2008, in *Jones v. Cancable Inc*., [2008] C.L.A.D. No. 132 *(Jones*).

[18] The Adjudicator in *Jones* dismissed an employee's unjust dismissal complaint against an employer, Cancable Inc., which was performing for a cable network provider in Windsor, Ontario, services similar to HomeTech's services to Rogers in London. The Adjudicator dismissed the complaint as outside his jurisdiction because the employer was not engaged in a federal undertaking. His reasons were similar to the arguments advanced in the present case by HomeTech.

[19] I do not agree with counsel's submissions. While the courts have not addressed the precise point that arises in this case, they have consistently refused to divide up the components of a cable network in order to identify parts that have no extra-provincial reach. Thus, in *Public Service Board v. Dionne*, [1978] 2 S.C.R. 191, 197-8, the Court stated:

> … [W]here television broadcasting and receiving is concerned there can no more be a separation for constitutional purposes between the carrier system, the physical apparatus, and the signals that are received and carried over the system than there can be between railway tracks and the transportation service provided over them or between the roads and transport vehicles and the transportation service that they provide.
>
> … [T]he very technology employed by the cable distribution enterprises in the present case establishes clearly their reliance on television signals and on their ability to receive and transmit such signals to their subscribers. In short, they rely on broadcasting stations, and their operations are merely a link in a chain which extends to subscribers who receive the programmes through their private receiving sets. [Emphasis added]

[20] Similarly, in *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, the Court rejected the argument that, while the reception of television signals was within federal regulatory authority, their subsequent transmission by cable within the Province was not. It held that both were within federal competence.

[21] Counsel for HomeTech suggested no principled reason for insisting that Rogers' cable network ends at the distribution taps. In my view, the constitutionally permitted reach of federal regulators with respect to cable networks should not be unduly dependent on the particular technology employed for enabling customers to receive the transmitted signals.

[22] Indeed, it is counterintuitive to maintain that Rogers' cable network ends at the outside distribution taps when the service for which customers pay Rogers is the reception of the signal in their homes through their television sets or other equipment. If customers are not connected to Rogers' network, Rogers has no business. This view of the extent of Rogers' business is supported by section 2 of the *Telecommunications Act*, S.C. 1993, c. 38:

"telecommunications" means the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system.	« télécommunication » la transmission, l'émission ou la réception d'information soit par système électromagnétique, notamment par fil, câble ou système radio ou optique, soit par tout autre procédé technique semblable.

[23] Counsel for HomeTech also referred the Court to the decision in *Fastfrate*, which reiterated (at para. 27) that labour relations normally fall within provincial jurisdiction and that "federal jurisdiction has been interpreted narrowly in this context." The Court in that case held that the fact that a transportation company, which collected or delivered freight within a province, contracted with a third party for the inter-provincial transportation of the freight did not make the company a federal undertaking.

[24] However, writing for the majority of the Court in *Fastfrate*, Justice Rothstein recognized (at para. 60) that the courts have treated telecommunications differently from transportation and that "the constitutional inquiry [in telecommunications cases] has at times focussed on 'the service that is provided and not simply … the means through which it is carried on'".

[25] In my opinion, HomeTech's argument unduly elevates the particular means of delivering the message over the nature of the service offered by Rogers, namely, the transmission of signals to a customer's home through a connection to its network. Connecting customers to Rogers' cable network so that they can view television programmes and access the internet at home is more than "merely facilitating inter-provincial" (*Fastfrate* at para. 78) communications. It is the essential final link of a functionally single chain for the transmission and reception of signals.

[26] Accordingly, I am not persuaded that the Board erred when it concluded that Rogers' federal undertaking extends from the headend to the connection between customers' home equipment and the network.

Issue 2: On the basis that Rogers' core federal undertaking includes the connection between the customer and the network, are the services provided by HomeTech as a going concern vital, essential or integral to the operation of the federal undertaking?

[27] Counsel for HomeTech agreed that the Board had applied the correct four-pronged test established in *Northern Telecom v. Communications Workers*, [1980] 1 S.C.R. 115 at 135, for answering this question: (i) the general nature of HomeTech's operations as a going concern; (ii) the

nature of the corporate relationship between HomeTech and Rogers; (iii) the importance of the work done by HomeTech for Rogers as compared with its other customers; and (iv) the extent of the involvement of HomeTech's employees in the operation of Rogers' core federal undertaking.

[28] To paraphrase Justice Estey, writing for the majority of the Court in *Northern Telecom v. Communication Workers*, [1983] 1 S.C.R. 733 at 770, the question is: to what extent was the work of HomeTech's employees integral to Rogers' federal undertaking? It is important to bear in mind here that I have already concluded that the Board did not err in concluding that Rogers' federal undertaking extends from the headend to the cable and equipment connecting its customers to the network.

[29] Nearly all the facts point to the conclusion that HomeTech's employees were highly integrated into the federal undertaking. In particular, HomeTech's operations "as a going concern" consisted of connecting Rogers' customers to the network and to providing related services. Although HomeTech was independently owned, Rogers was HomeTech's only customer, and the HomeTech employees in question devoted all their time to performing the work covered by the contracts between Rogers and HomeTech. The allocation and scheduling of the employees' work was controlled by Rogers.

[30] The principal submission on this issue made in oral argument by counsel for HomeTech was that connecting customers' television sets to the network through a digital box was a peripheral part

of the federal undertaking. The "guts" of the network, he said, is to capture, convert and transmit signals to the distribution taps.

[31] I do not agree. Each part of the network is essential to the transmission of signals to customers. The receipt of the signal by Rogers' customers cannot plausibly be said to be subsidiary to its transmission to an outlet in the street. The only purpose of Rogers' network is to enable its customers to receive the signal on equipment in their homes.

[32] To the extent that the Adjudicator's reasoning in *Jones* is inconsistent with these reasons, it should not be followed. I would only add that, unlike the Board in the present case, the Adjudicator in *Jones* did not have the benefit of the decision in *Phasecom Systems Inc*., [2005] OLRB Rep. 688. In that decision, the Ontario Labour Relations Board dismissed a union's application for certification, on the ground that employees who installed satellite dishes to connect customers to a network were employed on a federal undertaking.

Conclusions

[33] For these reasons, I would dismiss the application for judicial review with costs.

"John M. Evans"

"I agree
Marc Noël J.A."

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-329-10
(APPEAL FROM A DECISION OF THE CANADA INDUSTRIAL RELATIONS BOARD, DATED SEPTEMBER 28, 2010, BOARD FILE 28083-C)	
STYLE OF CAUSE:	XL Digital Services Inc. doing business as Dependable HomeTech and Communications, Energy and Paperworkers Union of Canada
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CONCURRED IN BY:	NOËL and NADON JJ.A.
DATED:	May 26, 2011

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