Federal Court of Appeal

Cour d'appel fédérale

Date: 20120110

Docket: A-63-11

Citation: 2012 FCA 4

CORAM: **NOËL J.A.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

COMMISSIONAIRES NOVA SCOTIA

Appellant

and

DAVID CROUSE

Respondent

Heard at Toronto, Ontario, on December 13, 2011.

Judgment delivered at Ottawa, Ontario, on January 10, 2012.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] This is an appeal from a decision of the Federal Court (2011 FC 125, 383 F.T.R. 277) which allowed an application for judicial review of a decision of a referee appointed under section 251.12 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Code). The central issue before the Federal Court was whether the Referee erred by suspending the operation of the Code until the expiration of an existing contract between the Commissionaires Nova Scotia (CNS) and the Halifax International Airport Authority (HIAA).

[2] For the reasons which follow, I conclude that the decision of the Referee was properly set aside. I would, therefore, dismiss this appeal with costs.

The Facts

[3] The facts were not in dispute, and the parties proceeded before the Referee on the basis of an agreed statement of facts. For the purpose of this appeal, the facts may be summarized as follows:

i. In 2000, the CNS entered into a contract with the HIAA to provide services at the Halifax International Airport.

ii. The CNS employed commissionaires to provide these services. Initially, the commissionaires employed by the CNS were not unionized.

iii. In July of 2005, the CNS and the HIAA entered into a new contract for the provision of security services for a five-year term, commencing October 1, 2005 and ending on September 30, 2010 (Contract). The security services were to be carried out by commissionaires employed by the CNS.

iv. More specifically, the Contract required the CNS to provide HIAA with "peace officer patrol, security and support services. The services are to be aimed at preventing unlawful interference with civil aviation, for the protection and security of equipment and facilities."

v. The CNS and the HIAA entered into the Contract on the basis that their legal obligations with respect to holidays and overtime were those specified by the Nova Scotia *Labour Standards Code*, R.S.N.S. 1989, c. 246.

vi. On August 16, 2007, the Public Service Alliance of Canada was certified by the Canada Industrial Relations Board (Board) as the bargaining agent for "all employees of the Nova Scotia Division of the Canadian Corps of Commissionaires employed at the Halifax International Airport."

vii. In reaching this decision, the Board determined that the services provided by the CNS "are vital and integral to the operations of the airport." It followed that the labour relations of CNS employees who worked at the Halifax International Airport were governed by the Code.

viii. On November 17, 2008, David Crouse, one of CNS's employees who worked at the airport, filed a complaint under Part III of the Code to the effect that the statutory conditions of employment guaranteed to employees under Part III were not being provided to him.

ix. An inspector determined that the CNS owed Mr. Crouse overtime, holiday and vacation pay for the period from August 25, 2007 to January 31, 2009, and issued a payment order.

x. The CNS appealed the payment order to the Minister of Labour.

xi. The Minister appointed a referee to hear the appeal.

The Decision of the Referee

[4] In the Referee's view, two issues arose out of these facts. First, was the CNS governed by Part III of the Code for the purpose of minimum statutory employment standards? Second, if the CNS was governed by Part III of the Code, was it nevertheless entitled to avoid the employment

standards mandated by Part III until its current contract with the HIAA expired on September 30, 2010?

[5] The Referee answered the first question in the affirmative. This finding was not challenged by the parties.

[6] The Referee then turned to consider when Part III should apply. The Referee determined and declared that the CNS and all of its employment contracts with its employees employed at the Halifax International Airport (excluding two supervisors) were governed by the minimum standards applicable under the Nova Scotia *Labour Standards Code* up to and including September 30, 2010. Thereafter, the CNS and those employment contracts would be governed by Part III of the Code.

[7] The Referee's analysis on this issue was brief. At paragraphs 50 to 53 of his reasons he wrote as follows:

> [50] The first point to consider is this. Up until the time PSAC was certified CNS considered itself governed by provincial legislation. It acted on that understanding, and there is no evidence that in doing so it was acting in bad faith. And indeed, it was in fact and in law subject to provincial jurisdiction up until the moment that jurisdiction was ousted by the assertion of a federal jurisdiction. Employment law is *prima facie* a provincial matter and it is presumptively governed by provincial legislation: *Montcalm, supra*. Hence prior to the application by PSAC for certification the relations between CNS and its employees *were* governed by provincial laws. CNS and its employees contracted with each other on that basis. And CNS entered into contracts with entities like the HIAA on the strength of that understanding. CNS may have been subject to federal employment laws at some point prior to PSAC's application, but no one knew it because no one had asserted a federal jurisdiction. And until that federal jurisdiction was asserted in such a way as to oust the provincial jurisdiction the latter would remain in effect and in place: see,

for e.g., *British Columbia (Attorney General) v. Lafarge Canada Inc* [2007] SCR 86 at paras. 4 and 37.

[51] This then is not a case of an employer who was at the material time subject to federal law seeking to avoid its application by contracting out of the provisions of Part III, as was the case in the *National Bank* or the *Lacroix* cases. Rather, this is a case where terms of employment that were valid and binding under provincial legislation cease to be so solely because the provincial jurisdiction has been ousted by the federal jurisdiction. The Employer's argument is thus not that it should be permitted to contract out of that federal legislation. It is rather that employment contracts that were entered into in good faith under provincial legislation should be respected and allowed to run their course until exhausted, at which point the federal legislation may apply.

[52] In such a case there is much merit in the observation Vice-Chair Hornung in the *Thunder Bay Telephone* case that "actions taken by the parties, pursuant to provincial legislation, are valid and binding on them even after it is determined that the employer's labour relations activities fall within federal jurisdiction:" *Thunder Bay Telephone*, *supra*, p.6 of 7. As he went on to say,

> "This conclusion makes the most sense from a labour relations perspective. An undertaking is subject to change from provincial to federal jurisdiction (and vice versa) a number of times during its lifetime depending on the constitutional facts which are evidenced by its day-to-day operation. It would make no labour relations sense if the actions of the parties involved in that undertaking (collective agreement, grievances, etc), taken pursuant to the jurisdiction which applied at a given time, were declared null and void and became of no legal effect each time there was a transfer of jurisdiction. Such an interpretation would compel the parties to repeatedly return to their pre-agreement status. This would not only create an operational and jurisdictional hiatus, but would also result in labour relations instability and impede industrial peace:" p.6 of 7.

[53] Based on that reasoning the CLRB in the *Thunder Bay Telephone* case made an order to the effect that the existing collective agreement (which has been entered into when the parties believed themselves governed by provincial law) would remain in effect according to its terms until its termination date, notwithstanding that the parties had at that point moved to the federal jurisdiction. In my opinion, and for the same reasons, an order achieving a similar result ought to be made in this case. I am satisfied too that in virtue of s.251.12(4) of the *Code* I have the power to make "any order necessary to give effect to" my decision: see, for e.g., *Bissett v. Canada (Minister of Labour)* [1995] FCJ No. 1339 (TD) at para. 12. [emphasis added]

The Decision of the Federal Court

[8] The Judge viewed the application for judicial review to raise two issues:

1. What was the appropriate standard of review to be applied to the decision of the Referee?
2. Did the Referee err in his determination that the Code should be applied only after September 30, 2010?

[9] To determine the applicable standard of review, the Judge considered the existence of the privative provisions of the Code, the purpose of Part III of the Code, the expertise of the Referee and the nature of the question before the Referee. Notwithstanding the existence of the strong privative provisions of the Code, the Judge found the applicable standard of review to be correctness. In his view, the question before the Referee was "an issue of true jurisdiction (provincial vs. federal), suggesting less deference" (reasons, paragraph 22). Moreover, it was "the kind of question of law that is normally considered by the Court and it does not engage the special expertise of the Referee" (reasons, paragraph 23).

[10] Having selected the correctness standard of review, the Judge went on to find that the Referee exceeded his jurisdiction when he decided to suspend the application of the Code to the CNS and its employees pending the expiration of the Contract. In consequence, the Judge set aside the decision of the Referee, and remitted the matter to the Referee for reconsideration in a manner consistent with the Judge's reasons.

The Issues on Appeal

[11] On this appeal, the parties raise two issues:

1. Did the Federal Court err by applying the standard of review of correctness to the decision of the Referee?
2. Did the Federal Court err in finding that the Referee exceeded his remedial authority by delaying the application of the Code until September 30, 2010?

Consideration of the Issues

1. The Standard of Review

[12] On an appeal from a decision of the Federal Court rendered on an application for judicial review, this Court generally is required to consider whether the Federal Court correctly selected the applicable standard of review and whether the Federal Court then correctly applied the standard of review (*Telfer v. Canada (Revenue Agency*), 2009 FCA 23, 386 N.R. 212 at paragraph 19).

[13] The parties devoted extensive submissions to the issue of the correct standard of review. However, in my view, this is one of those cases where it is not necessary to determine the correct standard because the decision of the Referee cannot be sustained even on the deferential standard of reasonableness.

2. The Decision of the Referee was Unreasonable

[14] As set out above, the starting point of the Referee's analysis was that the CNS was "in fact and in law subject to provincial jurisdiction up until the moment that jurisdiction was ousted by the assertion of a federal jurisdiction." In my respectful view, this premise was incorrect.

[15] As the Board found, under the Contract employees of the CNS provided services which were vital and integral to the operation of the Halifax International Airport. The employees were connected to the core operations of the HIAA and functioned essentially as an extension of the airport in ensuring security and safety services. As such, during the currency of the Contract the CNS was subject to federal labour relations jurisdiction in respect of its operations and undertaking at the Halifax International Airport.

[16] This was not a case where the CNS's activities under the Contract were at one time properly governed by provincial law, but a subsequent change in its activities resulted in the application of federal law. It follows that the Nova Scotia *Labour Standards Code* never applied to employees of the CNS performing services at the Halifax International Airport under the Contract.

[17] Given that the Nova Scotia *Labour Standards Code* had no application to CNS employees providing services under the Contract, it was unreasonable for the Referee to oust the application of Part III of the Code and to declare that the Nova Scotia *Labour Standards Code* would continue to apply until the expiration of the Contract. It follows that the Referee's decision was properly set aside by the Federal Court.

[18] It further follows that I would dismiss the appeal with costs.

"Eleanor R. Dawson"
J.A.

"I agree.
Marc Noël J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-63-11
STYLE OF CAUSE:	COMMISSIONAIRES NOVA SCOTIA v. DAVID CROUSE
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 13, 2011
REASONS FOR JUDGMENT BY:	Dawson J.A.
CONCURRED IN BY:	Noël J.A. Trudel J.A.
DATED:	January 10, 2012

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