Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Communications, Energy and Paperworkers Union of Canada,

complainant/applicant,

and

Dilico Anishinabek Family Care,

respondent/employer.

Board Files: 29171-C, 29471-C

Neutral Citation: 2012 CIRB **655**
August 17, 2012

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and Robert Monette, Members.

Counsel of Record

Mr. Jesse Kugler, for the Communications, Energy and Paperworkers Union of Canada;
Ms. Mandy Fricot, for the Dilico Anishinabek Family Care.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

Section 16.1 of the *Canada Labour Code* (*Part I–Industrial Relations*) (*Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to issue this interim decision without an oral hearing.

I–Background

[1] On December 12, 2011, the Communications, Energy and Paperworkers Union of Canada (CEP) filed an unfair labour practice (ULP) complaint (file no. 29171-C) against Dilico Anishinabek Family Care (Dilico) alleging that the latter was refusing to recognize the CEP as the certified bargaining agent and was further harassing and/or intimidating the CEP's local executive.

[2] The CEP and Dilico had successfully negotiated collective agreements after the Board certified the CEP for two different bargaining units (8919-U, 8923-U).

[3] Dilico contested the CEP's allegations and also disputed, due to recent events, whether this Board still retained jurisdiction over its operations.

[4] On June 14, 2012, Dilico filed an application under section 18 of the *Code* (file no. 29471-C) asking the Board to review its earlier finding that it had jurisdiction. The application referenced recent cases from the Supreme Court of Canada (SCC) which allegedly impacted this Board's jurisdiction over Dilico's operations.

[5] In its July 9, 2012 response, the CEP argued that Dilico was out of time to ask the Board to reconsider a decision from 2005 which had confirmed its jurisdiction. The original panel had issued its full reasons for taking jurisdiction on February 5, 2010 in *Dilico Ojibway Child and Family Services,* 2010 CIRB 489 (*Dilico* 489).

[6] In an August 7, 2012 letter, the CEP also noted for the Board that Dilico, following the issuing of the SCC decisions in November 2010, had nonetheless discontinued its judicial review application of *Dilico* 489.

[7] The CEP also asked, given the existence of concurrent provincial labour relations proceedings, that the Board defer deciding these two files.

[8] In an August 15, 2012 letter, Dilico provided the Board with an update and a copy of a recent July 16, 2012 decision arising from those provincial labour proceedings.

[9] Dilico asked the Board to decide its section 18 application on jurisdiction, since other proceedings would have no binding effect on this Board.

[10] The Board has decided that Dilico's review application questioning the Board's jurisdiction is timely. Indeed, there is no time limit applicable for these rare situations where a SCC constitutional decision may impact the Board's original taking of jurisdiction.

[11] The Board has further decided not to defer or postpone examining the constitutional question.

II–Facts

[12] In November, 2010, the SCC issued its reasons in a pair of cases interpreting jurisdiction over labour relations matters involving native Canadians: *NIL/TU,O Child and Family Services Society* v. *B.C. Government and Service Employees' Union*, 2010 SCC 45, (*Nil/TU,O*), and *Communications, Energy and Paperworkers Union of Canada* v. *Native Child and Family Services of Toronto*, 2010 SCC 46 (*Native Child*).

[13] Dilico referred the Board to recent rulings which had commented on the jurisdiction issue following the decisions in *Nil/TU,O* and *Native Child*. In *Pervais* v. *Dilico Anishinabek Family Care*, 2012 HRTO 597, the Human Rights Tribunal of Ontario suggested " it would appear that the Tribunal has jurisdiction to deal with this Application."

[14] Similarly, the Canadian Human Rights Commission (CHRC), on at least two occasions for cases involving Dilico, had adopted a conclusion from a report submitted to it which suggested that Dilico fell under provincial jurisdiction. The CHRC, which acts as gatekeeper for the Canadian Human Rights Tribunal, decided not to refer the complaints.

[15] The CEP has taken certain steps to protect its interests given the potential constitutional uncertainty. For example, on March 26, 2012, the CEP served a notice to bargain on Dilico, pursuant to section 16 of the *Ontario Labour Relations Act*, S.O. 1995, c. 1 (*OLRA*).

[16] The CEP has also asked, pursuant to the *OLRA*, for the appointment of a conciliation officer.

[17] The CEP relies on these other concurrent proceedings as support for its request that the Board temporarily suspend hearing the instant matters.

[18] On August 15, 2012, Dilico advised the Board that the OLRB, in its July 16, 2012 decision, had rejected the CEP's arguments. On August 9, 2012, the CEP asked the OLRB to reconsider its July 16, 2012 decision. On August 13, 2012, the CEP filed a certification application with the OLRB.

III–Issues

This decision is limited to two distinct issues:

1. Is Dilico's section 18 application timely? and

2. Should the Board defer and/or postpone its proceeding?

IV–Analysis and Decision

1. Is Dilico's section 18 application timely?

[19] In recent years, the SCC has issued various significant constitutional decisions which either clarify, or change, the legal principles administrative tribunals apply when considering their jurisdiction.

[20] For example, in *Consolidated Fastfrate Inc*. v. *Western Canada Council of Teamsters*, 2009 SCC 53, a majority of the SCC found that a freight forwarder, which contracted with third parties to carry out all interprovincial transportation, fell within provincial jurisdiction.

[21] In *Nil/TU,O*, *supra*, and *Native Child*, *supra*, a majority of the SCC described the jurisdictional test for labour relations, which had to be applied whether or not section 91(24) of the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, was in issue.

[22] In *Tessier Ltée* v. *Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23, a unanimous SCC reviewed the applicable principles for determining when a company with possible longshoring-related work fell within federal jurisdiction.

[23] It is clear from these three recent cases that even Canada's highest court is not always unanimous when determining constitutional jurisdiction questions. The area remains complex for all levels of decision makers.

[24] These cases also demonstrate that the impact of the SCC's decisions extend far beyond the parties to each case. When a constitutional decision involving labour relations comes down from the SCC, then the jurisdictional status of many parties, even if longstanding and not contested, may be affected.

[25] When it receives an application raising such issues, this Board must address any reasonable jurisdictional questions.

[26] The CEP, as have several other parties in recent years as these SCC decisions came out, argued that an employer was out of time to contest this Board's earlier determination that it had jurisdiction. The CEP relied on the 21-day time limit the Board has established in section 45(2) of the *Canada Industrial Relations Board Regulations*, 2001 (*Regulations*) for reconsideration applications.

[27] There is, however, an important difference between the Board's reconsideration process and its general power to review past decisions.

[28] Section 18 of the *Code* established the Board's general review power:

> 18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

[29] The Board, at sections 44 to 46 of its *Regulations*, codified its longstanding practice for the reconsideration of recently issued decisions:

> 44. The circumstances under which an application shall be made to the Board exercising its power of reconsideration under section 18 of the *Code* include the following:
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> (*a*) the existence of facts that were not brought to the attention of the Board, that, had they been known before the Board rendered the decision or order under reconsideration, would likely have caused the Board to arrive at a different conclusion;
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> (*b*) any error of law or policy that casts serious doubt on the interpretation of the *Code* by the Board;
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> (*c*) a failure of the Board to respect a principle of natural justice; and
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> (*d*) a decision made by a Registrar under section 3.
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> 45.(1) An application for reconsideration of a decision or order of the Board must include
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> (*a*) the name, postal and email addresses and telephone and fax numbers of the applicant and of their counsel or representative, if applicable;
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> (*b*) the name, postal and email address, telephone and fax numbers of any employer or trade union that may be affected by the application;
>
> (*c*) the order or decision of the Board that is the subject of the reconsideration application;
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> (*d*) full particulars of the facts, relevant dates and grounds for the application;

(*e*) a copy of supporting documents for the application;

(*f*) the date and description of any order or decision of the Board relating to the application;

(*g*) an indication as to whether a hearing is being requested and, if so, the reasons for the request; and

(*h*) a description of the order or decision sought.

(2) The application must be filed within 21 days after the date the written reasons of the decision or order being reconsidered are issued.

(3) The application and the relevant documents must be served on all persons who were parties to the decision or order being reconsidered.

46. The Board may vary or exempt a person from complying with any rule of procedure under these *Regulations* — including any time limits imposed under them or any requirement relating to the expedited process — where the variation or exemption is necessary to ensure the proper administration of the *Code*.

(emphasis added)

[30] The reconsideration of recent decisions is only a subset of the Board's review powers. The Board's general review power applies to various situations.

[31] For example, unlike some provincial labour tribunals, the Board retains jurisdiction over the intended scope of its bargaining units. If the parties dispute whether a new or modified position falls within the original scope of an existing bargaining certificate, the Board will determine that issue: see, for example, *Garda Cash-In-Transit Limited Partnership*, 2010 CIRB 503, at paragraphs 28 to 37.

[32] The 21-day time limit to file a reconsideration application has no bearing on whether the Board can examine the ongoing scope of a bargaining unit. These issues, almost by definition, arise as the parties' collective bargaining relationship evolves over the years.

[33] Similarly, the Board may use its review power to rescind a certification if it has been abandoned by the certified bargaining agent: *PCL Constructors Northern Inc.*, 2006 CIRB 345. The Board may also cancel a certificate for a permanently closed business: *National Bank of Canada, Senneterre Branch, Québec* v. *Retail Clerks' International Union, Local 508*, 87 CLLC 14, 039 (F.C.A.).

[34] Prior to the codification of the practice in section 18.1 of the *Code*, the Board used section 18 to review, and possibly merge, multiple bargaining units in a workplace.

[35] Section 18 also allows the Board *proprio motu* to raise the issue of whether it still has jurisdiction following the issuing of a SCC decision, though generally this step is left to the parties' initiative.

[36] The Board referred to this difference between the reconsideration process and the general review power in *Air Canada*, 2004 CIRB 305, at paragraphs 16 to 18:

> [16] The present application is filed pursuant to section 18 of the *Code*, which provides that the Board may review, rescind, amend, alter or vary any order or decision made by it, and rehear any application before making an order in respect of the application.
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> **[17] The general powers conferred on the Board pursuant to section 18 of the *Code* are essentially exercised within two different contexts. The first being a general review power by the Board to amend, rescind, alter or clarify and confirm the intended scope of a previously issued order, at the request of a party or of its own motion. The second being when a party seeks a reconsideration of a Board decision or order. In this context, specific time limits and requirements apply pursuant to sections 44 and 45 of the *Canada Industrial Relations Board Regulations, 2001*.**
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> [18] In addition, section 22 of the *Code* is clear that every decision of the Board is final. Thus, the Board's reconsideration powers are limited and not intended to be a reconsideration of the facts or issues presented to a previous panel or to other tribunals.
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> (emphasis added)

[37] The Board either has constitutional jurisdiction over parties' labour relations or it does not. SCC decisions like those described above, could, depending upon the case, take away a jurisdiction that this Board had otherwise exercised for decades. Such is the natural impact of the SCC's constitutional law decisions.

[38] As a result, the Board confirms the timeliness of Dilico's application requesting a reexamination of jurisdiction in light of the SCC's recent *Nil/TU,O*, *supra*, and *Native Child*, *supra*, decisions.

2. Should the Board defer and/or postpone its proceeding?

[39] The CEP has asked the Board to defer hearing these matters, given the parties' proceedings before the OLRB. It now appears that the OLRB has dealt with the CEP's original request in its July 16, 2012 decision. The OLRB acknowledged that the jurisdiction issue was already before the CIRB. It found that, even if it had jurisdiction, it would not have granted the CEP the relief it sought.

[40] Dilico objected to the CEP's deferral request and argued that this Board will ultimately have to determine its own jurisdiction. No decision of another administrative tribunal, whether the OLRB or otherwise, can decide the issue.

[41] The Board at section 16(*l*) of the *Code* has the discretion to adjourn or postpone its proceedings:

> 16. The Board has, in relation to any proceeding before it, power
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> ...
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> (*l*) to adjourn or postpone the proceeding from time to time;

[42] The Board has also the power to defer hearing a matter under section 16(*l.*1):

> 16. The Board has, in relation to any proceeding before it, power
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> ...
>
> (*l.1*) to defer deciding any matter, where the Board considers that the matter could be resolved by arbitration or an alternate method of resolution;

[43] In *Air Canada*, 2012 CIRB 624, the Board commented on some of the factors it considers when examining whether it should defer hearing a matter under section 16(*l.*1):

> B–Section 16(*l.*1)
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> [28] The Board is satisfied that the Legislator did not add section 16(*l.*1) to the *Code* solely for situations where an arbitrator and the Board exercise an identical jurisdiction over a particular matter. Indeed, given the Supreme Court of Canada's recent decision in *British Columbia (Workers' Compensation)* v. *Figliola*, 2011 SCC 52, the Board's authority to determine the exact same question already decided in another forum might be problematic.

> [29] The wording of section 16(l.*1*) suggests that the Board, in considering how best to allocate its finite resources, could defer hearing and deciding a matter, when arbitration or another process might resolve the parties' dispute.
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> C–Application of Section 16(*l.*1)
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> [38] The Board's exercise of the discretion under section 16(*l.*1) requires it to evaluate the labour relations context in which the parties find themselves. The CAW and all the Intervenors, except CUPE, originally filed grievances before bringing any application to the Board. The CAW's December 9, 2010 grievance significantly predated its July 8, 2011 application to the Board. ACPA had filed its first grievance on April 30, 2010, well over a year before the CAW filed the first application to the Board.
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> [39] This does suggest the parties and most Intervenors made the strategic decision to deal initially with the Air Canada and Sky issue under their collective agreements.
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> [40] If the Board were to continue to proceed, there could be significant duplication between hearing this matter while the arbitration continues before Arbitrator Picher. Since the CAW is asking Arbitrator Picher to find that Air Canada contracted out work to Sky in violation of the collective agreement, that decision could resolve the matter. Even in the absence of a complete resolution, the preexisting arbitral process could reduce the need for oral evidence before the Board.
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> [41] Parties rarely spend their finite resources on merely academic questions. It is clear that the Board may be required to make a decision under sections 35 and 44 of the *Code*. But if the CAW received satisfactory remedies at arbitration, then the odds of it pursuing the application before the Board decline.
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> [42] The Board understands the concern that deferring a case will only result in increased delay for the parties. However, any issue of undue delay can be monitored depending on developments at arbitration.

[44] In the instant case, Dilico is correct that no other administrative tribunal can decide whether this Board has the requisite jurisdiction. Nonetheless, sections 16(*l*) and 16(*l.*1) are not limited to situations where the issue before the Board will be definitively decided elsewhere. These sections include implicitly the need for the Board to consider judicial economy, among other items, when exercising its discretion.

[45] In the circumstances of the case, the Board will proceed with its analysis of the jurisdiction issue. While it might have been prepared to hold off temporarily while the OLRB potentionally considered the same question, the OLRB's July 16, 2012 decision ultimately did not examine the constitutional issue.

[46] Dilico first referred to the constitutional question in its January 6, 2012 response in file 29171-C. It raised it explicitly in its June 13, 2012 section 18 review application in file 29471-C.

[47] The new provincial certification application the CEP filed on August 13, 2012 with the OLRB does not persuade the Board that it should defer dealing with Dilico's requests. Ultimately, only this Board can answer this specific question about its jurisdiction.

[48] Accordingly, the Board will not defer or postpone consideration of the issue Dilico has raised. Unless the Board advises the parties otherwise, it will decide the question based on the parties' written submissions already on file.

V–Summary

[49] Dilico's request that the Board review its underlying jurisdiction, as a result of recent SCC constitutional decisions, is not subject to any time limit. Dilico's review application is separate and distinct from those subject to the time limits found in the Board's reconsideration process.

[50] The Board has also decided not to postpone considering Dilico's arguments about jurisdiction.

[51] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

Robert Monette
Member