Date: 20081218

Docket: T-643-07

Citation: 2008 FC 1393

Ottawa, Ontario, December 18, 2008

PRESENT: The Honourable Mr. Justice Max M. Teitelbaum

BETWEEN:

MARITIME EMPLOYERS ASSOCIATION

Applicant

and

HER MAJESTY THE QUEEN OF CANADA
(HUMAN RESOURCES AND SOCIAL DEVELOPMENT CANADA)
and
SYNDICAT DES DÉBARDEURS CUPE
LOCAL 375
and
ASSOCIATION INTERNATIONALE DES DÉBARDEURS,
ILA, SECTION LOCALE 1657
and
LOGISTEC STEVEDORING INC.
and
MONTREAL GATEWAY TERMINALS PARTNERSHIP
and
TERMONT MONTRÉAL INC.
and
EMPIRE STEVEDORING CO. LTD.
and
CERESCORP INC.

Respondents

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

[1] This is an application for judicial review in which the applicant seeks a declaratory judgment that the "new direction" of the Department of Human Resources and Skills Development and the assurance of voluntary compliance suggested to the applicant violate section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982* (U.K.), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter). The applicant also seeks a declaration from this Court that Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (CLC) must be applied uniformly across the country.

[2] In *Maritime Employers' Association v. Syndicat des débardeurs C.U.P.E. Local 375*, 2006 FCA 360, another file involving the applicant and one of the respondents herein, the Federal Court of Appeal rendered a decision affirming the decision of Mr. Justice Yves de Montigny of this Court (docket T-213-05) and determining that the appeals officer's decision to consider the applicant as an employer for purposes of paragraph 145(2)(*a*) of the CLC was not patently unreasonable and that, considering the applicant's situation, it could not be excluded from the application of Part II of the CLC.

[3] On the strength of this Federal Court of Appeal decision, the Labour Directorate of the Department of Human Resources and Skills Development (HRSD) decided to tell the applicant about the impact this decision would have on the application of Part II of the CLC to the Port of Montreal, and, more specifically, to the applicant and its activities.

[4] In particular, during that information session on February 13, 2007, the HRSD Labour Directorate reminded the applicant of its duties as an employer under Part II of the CLC.

[5] On April 4, 2007, a heath and safety officer, acting under Part II of the CLC, noting that the applicant had not established a policy health and safety committee as required by subsection 134.1(1) of the CLC, suggested that the applicant take the necessary steps to voluntarily comply with this provision by signing an assurance of voluntary compliance (Applicant's Record, Volume I, Tab 9, pages 318 to 319).

[6] Since the applicant did not believe that it was the employer, it refused to sign the assurance of voluntary compliance and, instead, commenced this proceeding on April 18, 2007 (Applicant's Record, Volume I, Tab 10, page 321).

[7] On July 9, 2007, a health and safety officer issued a direction under section 145 of the CLC to the employer directing it to comply with subsection 134.1(1) of the CLC, that is, to establish a policy health and safety committee (Affidavit of France de Repentigny, Respondent's Record, Volume III, page 396, paragraph 3).

[8] Sections 134.1(1) and 145(2)(a) of the CLC provide as follows:

134.1(1) [Establishment mandatory] For the purposes of addressing health and safety matters that	134.1(1) [Constitution obligatoire] L'employeur qui compte habituellement trois cents

apply to the work, undertaking or business of an employer, every employer who normally employs directly three hundred or more employees shall establish a policy health and safety committee and, subject to section 135.1, select and appoint its members.	employés directs ou plus constitue un comité d'orientation chargé d'examiner les questions qui concernent l'entreprise de l'employeur en matière de santé et de sécurité; il en choisit et nomme les membres sous réserve de l'article 135.1.
145(2)[Dangerous situation – direction to employer] If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work,	145(2)[Situation dangereuse] S'il estime que l'utilisation d'une machine ou chose, une situation existant dans un lieu de travail ou l'accomplissement d'une tâche constitue un danger pour un employé au travail, l'agent :
(a) the officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to	a) en avertit l'employeur et lui enjoint, par instruction écrite, de procéder, immédiatement ou dans le délai qu'il précise, à la prise de mesures propres :
(i) correct the hazard or condition or alter the activity that constitutes the danger; or	(i) soit à écarter le risque, à corriger la situation ou à modifier la tâche,
(ii) protect any person from the danger;	(ii) soit à protéger les personnes contre ce danger;

[9] On August 6, 2007, the applicant appealed this direction under section 146 of the CLC and requested that it be suspended pending the outcome of this judicial review. An appeals officer granted the suspension on August 15, 2007 (Affidavit of France de Repentigny, Respondent's Record, Volume III, page 396, paragraphs 4 and 5).

[10] Section 146 of the CLC provides as follows:

146.(1) [Appeal of direction] An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.	146.(1) [Procédure] Tout employeur, employés ou syndicat qui se sent lésé par des instructions données par l'agent de santé et de sécurité en vertu de la présente partie peut, dans les trente jours qui suivent la date où les instructions sont données ou confirmées par écrit, interjeter appel de celles-ci par écrit à un agent d'appel.
(2) [Direction not stayed] Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.	(2) [Absence de suspension] À moins que l'agent d'appel n'en ordonne autrement à la demande de l'employeur, de l'employé ou du syndicat, l'appel n'a pas pour effet de suspendre la mise en œuvre des instructions.

[11] The respondent invites the Federal Court to refuse to hear the applicant's application for judicial review, given that the applicant has not exhausted all the appeal mechanisms prescribed by the CLC.

[12] Consequently, the question that this Court must ask is whether the applicant's application for judicial review is premature and whether the applicant must exhaust all internal remedies before the Federal Court can hear the matter.

[13] As stated in section 122.1, the purpose of Part II of the CLC, entitled *Occupational Health and Safety*, is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies. This section provides as follows:

122.1 [Purpose of Part] The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.	122.1 [Prévention des accidents et des maladies] La présente partie a pour objet de prévenir les accidents et les maladies liés à l'occupation d'un emploi régi par ses dispositions.

[14] The duties of employers in this regard are set out in Sections 124 to 125.3 of the CLC. Section 124 provides as follows:

124. [General duty of employer] Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.	124. [Obligation générale] L'employeur veuille à la protection de ses employés en matière de santé et de sécurité au travail.

[15] In addition, Part II of the CLC contains its own definition of employer, which is broader than the one in Part I of the CLC, which deals with industrial relations.

[16] Among the various duties of employers, section 134.1 of the CLC provides that they must establish a policy health and safety committee.

[17] Health and safety officers designated under section 140 of the CLC are responsible for the application of Part II and, therefore, may issue a direction to an employer under section 145 of the CLC if they find a contravention.

[18] Under section 146 of the CLC, an employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer may appeal the direction to an appeals officer who may modify, set aside or confirm the direction.

[19] The assurance of voluntary compliance is neither a procedure nor a step provided by any provision of Part II of the CLC but stems from a policy of compliance developed by HRSD (Record of the Attorney General, Volume I, pages 1 to 21).

[20] The assurance of voluntary compliance is a preliminary, voluntary measure that enables an employer to correct a violation of Part II of the CLC before a direction is given under section 145 of the CLC.

[21] Consequently, considering that the assurance of voluntary compliance has no effect and cannot affect the applicant's rights, I find that this proceeding is premature because the applicant

should have waited to receive a direction and then followed the administrative appeal process set out in the CLC rather than proceeding directly to this Court to assert its position.

[22] The cases decided by this Court point out that judicial review will not be granted if there is an adequate alternate remedy that has not been exhausted. In this case, judicial review is only appropriate after an appeals officer has made a decision under section 146 of the CLC. An application for judicial review of an assurance of voluntary compliance issued by a health and safety officer, carrying out his or her duties at the Department of Human Resources and Skills Development, is not the appropriate route, given the appeal procedure set out in the CLC and the remedy provided in section 146 (*Anderson v. Canada (Operations Officer, Fourth Maritime Operations Group)*, [1997] 1 F.C. 273, 141 D.L.R. (4d) 54; *Collin v. Canada (Attorney General)*, 2006 F.C. 544, 72 W.C.B. (2d) 141; *Ramautar v. Canada (Minister of Citizenship and Immigration)*, 2007 F.C. 1003, 160 A.C.W.S. (3d) 1044).

[23] The applicant should have exhausted all avenues of redress available under the CLC before filing this application. Therefore, the application for judicial review must be dismissed.

[24] The applicant's submissions under section 15 of the Charter are not tenable.

[25] Since 1972, the case law has clearly established that the term "every individual" ("*tous*") in the Charter absolutely does not include a corporation (or, as in this case, an employer) (see *R. v. Colgate Palmolive* (1972), 8 C.C.C. (2d) 40).

[26] I am completely satisfied that a corporation cannot avail itself of the protection offered by section 15 of the Charter, given that this section clearly refers to “every individual” (“*tous*”) (see *Smith, Kline & French Laboratories et al v. A.G. of Canada*, [1986] 1 F.C. 274 (F.C.T.D.) where the appeal was dismissed on other grounds).

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed with costs.

"Max M. Teitelbaum"
Deputy Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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