Federal Court of Appeal | Cour d'appel fédérale

Date: 20110119

Docket: A-214-10

Citation: 2011 FCA 20

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Heard at Ottawa, Ontario, on January 19, 2011.

Judgment delivered from the Bench at Ottawa, Ontario, on January 19, 2011.

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on January 19, 2011)

EVANS J.A.

[1] An essential services agreement (ESA) concluded under the *Public Service Labour Relations Act*, S.C. 2003, c. 22 (Act), between the employer and the bargaining agent for a bargaining unit determines the limits on employees' right to strike in order to ensure that essential government services continue to be provided during a strike.

[2] When the parties are unable to reach an agreement, subsection 123(3) of the Act provides that, on an application under subsection (1), the Public Service Labour Relations Board (Board)

may determine any matter that may be included in an ESA on which the employer and the bargaining agent have not agreed, and may order that the matter determined by it is deemed to be part of the ESA.

[3] This is an application for judicial review by the Attorney General of Canada to set aside a decision by the Board (2010 PSLRB 60), dated May 7, 2010. The Board held that it could order the inclusion in an ESA of a description of the essential services performed by a group of employees. The question arose in the context of a dispute over the terms of the ESA applicable to members of the Computer Systems Group employed in the Department of Public Safety and Emergency Preparedness.

[4] In reaching its conclusion, the Board followed its previous decisions, especially the leading case of *Public Service Alliance of Canada v. Parks Canada Agency*, 2008 PSLRB 97. It rejected the argument of Treasury Board (employer) that the only matters that may be included in an ESA are those listed in the definition of an ESA in subsection 4(1) of the Act: the types and number of positions, as well as the specific positions, necessary for providing essential services.

[5] The Board held that under the former Act “designated position” had been the key concept in defining the limit on the right to strike. Under the present Act, however, this was replaced by the ESA and, the Board stated, without a description in the ESA of the essential services in question, the scheme would be incoherent.

[6] In support of the application for judicial review, the Attorney General argues that the standard of review applicable to the Board's decision is correctness because whether the Board may order that a description of the relevant essential services be made a part of the ESA is a "true question of jurisdiction or *vires*": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 59 ("*Dunsmuir*")

[7] We do not agree. The question in dispute involves the interpretation of the Board's "home" statute: whether the definition of an ESA contained in subsection 4(1) is exhaustive, as the employer argued. It also concerns, more generally, the role of the ESA in the scheme of the Act, as opposed to "designated positions" in the former Act or the analogous concept of "essential positions" on which the employer relies, even though not found in the Act. These questions involve no general legal concepts, nor raise questions of law that are of central importance to the legal system and outside the expertise of the Board.

[8] In addition, section 51 of the Act contains a strong preclusive clause protecting the Board's decisions from judicial review. Although not explicit, the Board, as an adjudicative body, has the implicit power to determine the meaning of its constituent legislation in order to dispose of the matters before it.

[9] These considerations are strong indicators that the Court may only interfere with the decision under review if satisfied that it was unreasonable: *Dunsmuir* at paras. 52 and 54. In these circumstances, we are not persuaded that attaching *a priori* the label "jurisdictional" to the

provisions of the Act whose interpretation is in dispute warrants review in this case on a standard of correctness: *Canadian Federal Pilots Association v. Canada (Attorney General)*, 2009 FCA 223, 392 N.R. 128. That the Board described the issue before it as "jurisdictional" is not determinative of the appropriate standard of review to be applied by this Court on an application for judicial review of the Board's decision.

[10] Nor are we persuaded that the Board's decision was made in excess of its jurisdiction because it was unreasonable. In our view, the Board's lengthy reasons deal carefully with the employer's arguments on the interpretation of the Act. They provide an intelligible justification of its decision not to interpret the provisions in subsection 4(1) concerning employees' positions as exhaustive of the content of an ESA that may be the subject of a Board order.

[11] In addition, when the text of the relevant provisions of the Act is considered within its statutory context and objectives, including the contrast with the former Act, the Board's resolution of the interpretative issues before it falls within the range of rationally defensible, possible outcomes.

[12] For these reasons, the application for judicial review will be dismissed with costs.

"John M. Evans"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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