

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110916

Docket: A-268-11

Citation: 2011 FCA 255

PRESENT: DAWSON J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

**Robert MEREDITH and Brian ROACH
(representing all members of the Royal Canadian Mounted Police)**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 16, 2011.

REASONS FOR ORDER BY:

DAWSON J.A.

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REASONS FOR ORDER

DAWSON J.A.

[1] The Attorney General of Canada (Attorney General) seeks an order staying an order of the Federal Court dated June 21, 2011. In such order, for reasons cited as 2011 FC 735, [2011] F.C.J. No. 948, the Federal Court declared a Treasury Board decision made on December 11, 2008 to be contrary to subsection 2(d) of the *Canadian Charter of Rights and Freedoms* (Charter), and quashed the decision. The Attorney General also seeks a stay of the order to the extent it constituted a finding that sections 16, 35, 38, 43, 46 and 49 of the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 (Act)

was constitutionally invalid or exempted. Finally, the Attorney General seeks an order expediting the appeal and costs.

[2] On August 15, 2011, this Court directed that the motion for stay would be dealt with in writing.

Background Facts

[3] The relevant facts are not in dispute, and for the purpose of this motion may be briefly stated.

[4] The Treasury Board is the employer of members of the RCMP. In June of 2008, the Treasury Board established rates of pay for members of the RCMP for the years 2008 to 2010. The remuneration for members of the force was to increase in each year. The increases for the year 2009 would come into effect on January 1, 2009.

[5] On December 11, 2008, as a result of the collapse of the global economy, the Treasury Board modified the previously established rates of pay. The modification cancelled a market adjustment to be paid in 2009, reduced the economic increase for 2009 from 2% to 1.5% and cancelled a planned increase to service pay.

[6] In consequence, in January of 2009, the respondents commenced an application for judicial review of the decision of the Treasury Board. The respondents alleged a breach of their right to

freedom of association protected by subsection 2(d) of the Charter and sought an order quashing the decision of the Treasury Board.

[7] On February 6, 2009, legislation was introduced to implement the federal budget. The *Budget Implementation Act, 2009*, S.C. 2009, c. 2 was given Royal Assent on March 12, 2009. Section 393 of that legislation had the effect of enacting the Act into force.

[8] The Act:

- a. Prescribed an annual wage increase limit of 1.5% for the fiscal years 2008-2009, 2009-2010 and 2010-2011.
- b. Rendered of no effect any term or condition that provided for greater wage increases, including the increases approved by the Treasury Board in June 2008 for members of the RCMP.
- c. Generally prohibited until March 31, 2011, any new term or condition that provided for greater increases to wages or additional remuneration.

[9] Subsequently, the respondents sought and obtained leave to amend their application for judicial review so as to challenge the constitutionality of both the Treasury Board decision and the relevant provisions of the Act. Later, the respondents served a notice of constitutional question which stated that they intended to question the constitutional validity, applicability and effect of subsection 13(2) and sections 35, 38, 40, 43, 46 and 49 of the Act. During oral argument, the respondents challenged section 16 of the Act as well.

Decision of the Federal Court

[10] The Judge of the Federal Court summarized her conclusions at paragraphs 148 to 150 of her reasons. There she wrote:

148. In my opinion, the Treasury Board's decision of December 11, 2008, together with sections 16, 35, 38, 43, 46 and 49 of the [Act], violates subsection 2(d) of the *Charter*. That breach is not saved by section 1.

149. In the result, this application for judicial review is allowed with costs to the Applicants. The Treasury Board's decision of December 11, 2008 is quashed.

150. The Applicants do not seek a remedy with respect to any provisions of the [Act]. Accordingly, I decline to order a remedy in that regard. Further, the Treasury Board's decision does not constitute a breach of contract and no claim for damages arises.

[11] The resulting order of the Federal Court read as follows:

THIS COURT ORDERS that this application for judicial review is allowed with costs to the Applicants. The Treasury Board's decision of December 11, 2008 is declared contrary to subsection 2(d) of the *Charter* and is quashed. If the parties are unable to agree on costs, they may advise the Court within five days of the issuance of this Order and directions will issue with respect to costs.

[12] The Attorney General moved for reconsideration of the order on the ground that it did not accord with the reasons given for it. The Judge dismissed the motion for reconsideration stating that there was no ambiguity or uncertainty as to the meaning of the original order. In the Judge's view, the order granted the relief sought by the respondents.

Test for Granting the Requested Stay

[13] The parties agree that on this motion the appellant must establish the existence of each of the three elements established in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The three elements are: a serious issue, irreparable harm, and the balance of convenience.

Analysis

[14] For the reasons that follow, I have concluded that the Attorney General has failed to establish the existence of irreparable harm if the stay is not granted, particularly where the respondents have agreed to cooperate with the Court and the Attorney General to ensure that this appeal is heard at the earliest opportunity.

[15] Turning to the submissions of the Attorney General concerning the existence of irreparable harm, the Attorney General submits that:

42. Failure to stay the Order of the Federal Court quashing the Treasury Board decision will revive the terms and conditions established by Treasury Board in June 2008, before the global financial and economic crisis occurred. Unless the impugned provisions of the [Act] continue in force and supersede those terms and conditions, or this Court grants a stay of any constitutional invalidity or exemption, the Appellant will suffer irreparable harm. First, the public interest in the prudent management of government expenditure during the current period of fiscal restraint will be irreparably harmed. Second, the Treasury Board as employer will suffer irreparable harm to its labour relations. Specifically, the Board will be required to decide whether to establish new terms and conditions for members of the RCMP or whether to pay them retroactive compensation. As explained below, both of these options will cause irreparable harm. [emphasis added]

[16] The Attorney General particularizes the alleged irreparable harm to the public interest to be that if the Act is invalid or inoperative, the public interest in the prudent management of government

expenditure in the face of a significant global financial and economic crisis will be irreparably harmed.

[17] The irreparable harm to labor relations is expressed in the following terms:

49. If the December 2008 decision of the Treasury Board is quashed and the provisions of the [Act] are inoperative or invalid, then the Board must decide whether, as regards the members of the RCMP,
 - (a) it should pay retroactive compensation according to the terms and conditions established in June 2008;
 - (b) it should instead make a fresh decision amending the terms and conditions of employment in accordance with its statutory authority; and,
 - (c) before doing either of these things, consider what kind of consultation is sufficient to avoid a future breach of the *Charter*. [emphasis added and footnote omitted]

[18] The submissions of the Attorney General are therefore based upon the premise that the Federal Court found provisions of the Act to be invalid or inoperative. However, the pending appeal is brought in respect of the order, not the reasons, of the Federal Court. Nothing in the order under appeal purports to invalidate or exempt the application of the Act. While the order quashes the decision of the Treasury Board, it does not order any consequential relief. I am, therefore, unable to conclude that the order of the Federal Court invalidated or exempted the application of the Act by necessarily implication.

[19] The evidence does not establish, nor is it alleged, that irreparable harm will result if the December 11, 2008 decision of the Treasury Board is not maintained for the duration of the appeal.

[20] Therefore, the motion for a stay will be dismissed, with costs. Counsel are to advise the Court forthwith as to their availability on September 21, 22 and 23 for a teleconference for the purpose of setting a date for the hearing of the appeal and finalizing a schedule for perfecting the appeal.

“Eleanor R. Dawson”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-268-11

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA v.
ROBERT MEREDITH and BRIAN ROACH
(representing all members of the Royal
Canadian Mounted Police)

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: DAWSON J.A.

DATED: September 16, 2011

WRITTEN REPRESENTATIONS BY:

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