Federal Court of Appeal

Cour d'appel fédérale

Date: 20120120

Docket: A-117-11

Citation: 2012 FCA 19

PRESENT: DAWSON J.A.

BETWEEN:

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Applicant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 20, 2012.

REASONS FOR ORDER BY: DAWSON J.A.

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REASONS FOR ORDER

DAWSON J.A.

[1] The Canadian Food Inspection Agency (CFIA) has brought a motion in writing for an order dismissing this application for judicial review on the ground that it is moot. In the alternative, the CFIA seeks an order extending the time for the completion of the cross-examinations on the affidavits filed in this proceeding.

[2] The Professional Institute of the Public Service of Canada (PIPSC) responds that the application for judicial review is not moot. It does agree with the CFIA that the determination of mootness should be dealt with in writing on a preliminary basis, and that if the Court determines

that there is no live controversy between the parties the application should be dismissed at this preliminary stage. The PIPSC also agrees that if the motion to dismiss the application fails, an extension should be granted for the purpose of allowing cross-examination upon the affidavits.

The Facts

[3] The facts underlying this motion are not in dispute.

[4] The PIPSC is certified under the provisions of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (Act) as the bargaining agent representing veterinarians (VM Group) employed by the CFIA. The PIPSC and the CFIA have been in negotiations for the conclusion of an essential services agreement (ESA) for the VM Group since December 2006.

[5] In the course of those negotiations in December 2006, the PIPSC applied to the Public Service Labour Relations Board (Board) for the determination of certain matters relating to an ESA for the VM Group. The application was made under paragraph 123(1)(*a*) of the Act.

[6] On February 8, 2011, the Board made an order determining that the CFIA's ESA with the PIPSC would include provisions for the following services it found were necessary for the safety or security of the public:

> (i) meat hygiene, as it relates to the CFIA's mandate under the *Meat Inspection Act* and the *Meat Inspection Regulations, 1990*;
>
> (ii) laboratories as it relates to diagnostics, pathology, food safety and food security and animal health care; technological transfers in an outbreak and ordering of controlled substances;

(iii) animal health as it relates to the mandate of the CFIA under the *Health of Animals Act* and *Health of Animals Regulations*;

(iv) care of animals within the specialized farms and in laboratories managed by the CFIA;

(v) issuance of export and import certificates as provided under the *Meat Inspection Regulations, 1990* and the *Health of Animals Act*;

(vi) import and border inspection services related to animal health and welfare;

(vii) emergency response to food safety, animal health, and any other emergency that falls within the CFIA's mandate;

(viii) on a conditional basis, when the Area Executive Director seeks to respond to a suspected or diagnosed emergency animal disease by establishing an Emergency Operations Center the VMs necessary, as determined by the employer, will respond to the emergency.

[7] In this pending application for judicial review, the PIPSC seeks an order setting aside the Board's decision.

[8] To date, the parties have not yet concluded an ESA.

[9] On September 8, 2011, the bargaining agent advised the Board that the VM group at PIPSC had changed its dispute resolution method from conciliation/strike to arbitration. This change was also communicated to the CFIA by letter dated September 13, 2011.

[10] The existing collective agreement between the CFIA and the PIPSC expired on September 30, 2011. On September 13, 2011, the PIPSC served a notice to bargain on behalf of the VM Group.

The Issue

[11] The sole issue to be decided on this motion is whether this application became moot as a result of the change in the dispute resolution process selected by the PIPSC.

The Test for Mootness

[12] I agree with the parties that the test for mootness is that articulated by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. This requires the Court to determine whether there is a "live controversy" between the parties and, if not, whether the Court should nonetheless exercise its discretion to hear the matter.

Consideration of the Issue

[13] Under the Act, an ESA must be concluded where the process for the resolution of a dispute applicable to the bargaining agent is conciliation/strike and the employer has given notice to the bargaining agent that there are positions in the bargaining unit that are necessary in order for the employer to provide essential services (sections 119 and 122). Put another way, an ESA is only necessary to protect essential services in the event of a strike. Thus, the provisions of the Act dealing with ESAs are triggered when a union selects conciliation/strike instead of arbitration as its

method of dispute resolution and the employer has given notice that there are positions in the bargaining unit necessary for it to provide essential services.

[14] The CFIA argues that there is no longer any live controversy between the parties because the change in the dispute resolution process selected by the PIPSC makes it unlikely that there will be a withdrawal of services or a strike during this round of collective bargaining. It follows, it submits, that the statutory requirement for an ESA is no longer applicable to the parties.

[15] The CFIA does, however, acknowledge that pursuant to section 104 of the Act, the PIPSC may in future apply to the Board to record again a change in its dispute resolution process. Should conciliation/strike be the dispute resolution process for future rounds of bargaining, the parties will be obliged to have an ESA in place prior to the withdrawal of services or declaration of strike.

[16] In light of the right of the PIPSC in future to elect conciliation/strike as the dispute resolution mechanism, in my view it is necessary to consider what effect, if any, the decision of the Board presently under review would have in that circumstance. More specifically, in the event the dispute resolution mechanism is changed from arbitration to conciliation/strike and the CFIA continues to maintain that employees in the bargaining unit occupy positions that are necessary for it to provide essential services, would the decision of the Board enumerating essential services continue to have any legal effect? For there to be no live controversy between the parties, the decision of the Board under review must cease to have any future effect on the parties as a result of

the current selection of arbitration as the dispute resolution process. If not, in my view, there remains a live controversy between the parties.

[17] PIPSC argues that the effect of section 125 of the Act is that a negotiated ESA, and by implication the Board's decision, continues to exist even when the bargaining agent switches the dispute mechanism procedure from conciliation/strike to arbitration. This argument is based upon sections 119 and 125 of the Act.

[18] Sections 119 and 125 of the Act provide:

Application of Division	Application
119. This Division applies to the employer and the bargaining agent for a bargaining unit when the process for the resolution of a dispute applicable to the bargaining unit is conciliation.	119. La présente section s'applique à l'employeur et à l'agent négociateur représentant une unité de négociation dans le cas où le mode de règlement des différends applicable à celle-ci est le renvoi à la conciliation.
[…]	. . .
Duration	Durée de l'entente
125. An essential services agreement continues in force until the parties jointly determine that there are no employees in the bargaining unit who occupy positions that are necessary for the employer to provide essential services.	125. L'entente sur les services essentiels demeure en vigueur jusqu'à ce que les parties décident conjointement qu'aucun des fonctionnaires de l'unité de négociation n'occupe un poste nécessaire pour permettre à l'employeur de fournir de tels services.

[19] In the submission of PIPSC (my emphasis added):

> 24. Section 125, on its face, means that a completed ESA continues in force indefinitely until there are no longer any employees in a bargaining unit who perform essential services. However, s. 119 states that the Division (including s. 125) applies when the union has chosen "strike" as its method of dispute resolution. Does a switch to "arbitration" mean that the essential services Division of the *PSLRA* stops applying for all purposes, so that all of the work that went into negotiating an ESA is undone? There are a number of practical reasons why such a result would have adverse labour relations results:
>
> (i) the waste of time and resources of the parties, the PSLRB, and even (on occasion) this Court that went into concluding an ESA;
>
> (ii) a union who was dissatisfied with the content of an ESA could switch to "arbitration" and then back to "strike" to void that particular ESA and return to the PSLRB to try to improve the ESA; and
>
> (iii) ESAs take years to complete — as demonstrated in this case where the parties started negotiating in 2004 and still have not completed. A union that switched to "arbitration" and wanted to switch back to "strike" would be faced with the prospect of having to re-negotiate an ESA and thus be delayed for years in exercising their statutory right to strike.
>
> 25. The better view is that s. 125 of the *PSLRA* prevails to the extent that there is any conflict with s. 119. The negotiated ESA continues to exist and remains "in force" even when the union switches to "arbitration", so that there is an ESA in place when the union switches back to "strike". If the switch back to "strike" occurs after a considerable period of time, then one of the parties is likely to serve a notice to negotiate an amendment to the ESA under s. 126 of the *PSLRA*, with the PSLRB resolving any difficulties with the amendments under s. 127 of the *PSLRA*. This is consistent with those amendment rules, and also consistent with the broad purpose of the *PSLRA* to promote "harmonious labour-management relations." Put another way, reading the entire *PLSRA* in context leads to the conclusion that an ESA should continue to exist even when a union switches from "strike" to "arbitration" — so that there is still an ESA in place when the union switches back to "strike" again.

[20] The CFIA did not make any submissions about the future effect of the Board's decision.

[21] In my view, the question of the future legal effect of the Board's decision in the event of a return to conciliation/strike as the dispute resolution mechanism need not be finally decided on this motion. It is sufficient for me to conclude that the CFIA has failed to answer the submission of PIPSC and so failed to establish that the current Board decision would not in future affect the legal rights of the parties. It follows that the CFIA has failed to demonstrate there is no live controversy between the parties at this time. The CFIA's motion to dismiss this application for mootness must fail.

[22] The issue of what happens to a partially or wholly completed ESA after a union selects arbitration as the dispute resolution mechanism is an issue best left to another date when this Court will have the benefit of the Board's consideration of the issue.

[23] An order will issue dismissing the motion and extending the time for cross-examinations to be completed. The PIPSC did not seek costs and no costs are awarded.

"Eleanor R. Dawson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-117-11
STYLE OF CAUSE:	PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA. v. CANADIAN FOOD INSPECTION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	DAWSON J.A.
DATED:	January 20, 2012

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