

Federal Court of Appeal



Cour d'appel fédérale

Date: 20120724

Docket: A-391-11

Citation: 2012 FCA 210

**CORAM: NOËL J.A.
TRUDEL J.A.
MAINVILLE J.A.**

BETWEEN:

CANADIAN MERCHANT SERVICE GUILD

Applicant

and

TEAMSTERS, LOCAL UNION 847

Respondent

Heard at Montréal, Quebec, on June 20, 2012.

Judgment delivered at Ottawa, Ontario, on July 24, 2012.

REASONS FOR JUDGMENT BY:

MAINVILLE J.A.

CONCURRED IN BY:

NOËL J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] The Canadian Merchant Service Guild (the “Guild”) seeks judicial review of a decision of the Canada Industrial Relations Board (the “Board”) issued on September 23, 2011 and cited as 2011 CIRB 605 (the “Decision”), by which it found that the Guild had breached sub-paragraph 95(i)(i) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the “Code”) when it commenced charges under its by-laws against three of its members arising from their participation in an unsuccessful campaign by the Teamsters, Local Union 847 (the “Teamsters”) to displace the Guild as the bargaining agent for marine engineers and electricians in the employ of Upper Lakes Shipping Limited (the “Bargaining Unit”).

[2] Although the Guild has identified many issues in its application, the principal question raised by these proceedings is whether the Teamsters, as a rival union, had standing to file the complaint against the Guild.

Background

[3] The Guild had been certified under the *Code* to act as the bargaining agent for the Bargaining Unit. In September 2010, the Teamsters applied within the timeframe specified under the *Code* to become certified as the bargaining agent in replacement of the Guild. Three members of the Guild actively supported the Teamsters by distributing campaign materials to members of the Bargaining Unit and inciting them to choose the Teamsters. The Board ordered a representation vote among the Bargaining Unit members. On November 16, 2010, the Guild was found to have won the vote. It continues to this day as the certified bargaining agent for the Bargaining Unit.

[4] On December 28, 2010, charges were brought under the Guild's by-laws against the three members for their participation in supporting the raiding efforts of the Teamsters. On February 2nd, 2011, notices of disciplinary hearings under the Guild's by-laws were sent to the three members.

[5] The Teamsters reacted by submitting to the Board on February 22, 2011 a complaint of unfair labour practices pursuant to subsection 97(1) of the *Code*, alleging violations of paragraphs 95(f), 95(g), 95(i) and section 96 of the *Code*.

[6] The Teamsters sought various remedies in their complaint, including notably (a) the withdrawal of the Guild's disciplinary charges against the three members and the rescinding of any disciplinary measure which may result from such charges; (b) postings and mailings to Guild members informing them of their right to support the union of their choice without reprisal; and (c) an order certifying the Teamsters as the bargaining agent, or alternatively, providing for a new representation vote for the Bargaining Unit.

[7] The Guild proceeded with its disciplinary hearings. Its disciplinary committee determined on March 14, 2011 that the three members would be suspended from Guild membership until December 31, 2011. The Guild's disciplinary committee also set a monetary fine of \$1,800 to be paid at the option of each concerned member instead of the suspension. Two of the members paid the fine. All three, however, pursued an internal appeal under the Guild's by-laws. These internal appeals were dismissed by the Guild's National Board in June 2011.

The pertinent provisions of the Code

[8] The provisions of the *Code* which are pertinent for the purposes of this judicial review are the following:

8. (1) Every employee is free to join the trade union of their choice and to participate in its lawful activities.

8. (1) L'employé est libre d'adhérer au syndicat de son choix et de participer à ses activités licites.

95. No trade union or person acting on behalf of a trade union shall

95. Il est interdit à tout syndicat et à quiconque agit pour son compte :

...

[...]

(f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union;

(g) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union;

...

(i) discriminate against a person with respect to employment, a term or condition of employment or membership in a trade union, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person

(i) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union.

f) d'expulser un employé du syndicat ou de le suspendre, ou de lui refuser l'adhésion, en lui appliquant d'une manière discriminatoire les règles du syndicat relatives à l'adhésion;

g) de prendre des mesures disciplinaires contre un employé ou de lui imposer une sanction quelconque en lui appliquant d'une manière discriminatoire les normes de discipline du syndicat;

[...]

i) de faire des distinctions injustes à l'égard d'une personne en matière d'emploi, de condition d'emploi ou d'adhésion à un syndicat, d'user de menaces ou de coercition à son encontre ou de lui imposer une sanction pécuniaire ou autre, pour l'un ou l'autre des motifs suivants :

(i) elle a participé, à titre de témoin ou autrement, à une procédure prévue par la présente partie, ou peut le faire,

[...]

96. Il est interdit à quiconque de chercher, par des menaces ou des mesures coercitives, à obliger une personne à adhérer ou à s'abstenir ou à cesser d'adhérer à un syndicat.

97. (1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that

(a) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with ... section 94 or 95; or

(b) any person has failed to comply with section 96.

...

(4) Subject to subsection (5), no complaint shall be made to the Board under subsection (1) on the ground that a trade union or any person acting on behalf of a trade union has failed to comply with paragraph 95(f) or (g) unless

(a) the complainant has presented a grievance or appeal in accordance with any procedure that has been established by the trade union and to which the complainant has been given ready access;

(b) the trade union

(i) has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to the complainant, or

97. (1) Sous réserve des paragraphes (2) à (5), toute personne ou organisation peut adresser au Conseil, par écrit, une plainte reprochant :

a) soit à un employeur, à quiconque agit pour le compte de celui-ci, à un syndicat, à quiconque agit pour le compte de celui-ci ou à un employé d'avoir manqué ou contrevenu [...] aux articles 94 ou 95;

b) soit à une personne d'avoir contrevenu à l'article 96.

[...]

(4) Sous réserve du paragraphe (5), la plainte reprochant à un syndicat ou à une personne agissant pour son compte d'avoir violé les alinéas 95f) ou g) ne peut être présentée que si les conditions suivantes ont été observées :

a) le plaignant a suivi la procédure — présentation de grief ou appel — établie par le syndicat et à laquelle il a pu facilement recourir;

b) le syndicat a :

(i) soit statué sur le grief ou l'appel d'une manière que le plaignant estime inacceptable,

(ii) has not, within six months after the date on which the complainant first presented their grievance or appeal pursuant to paragraph (a), dealt with the grievance or appeal; and

(c) the complaint is made to the Board not later than ninety days after the first day on which the complainant could, in accordance with paragraphs (a) and (b), make the complaint.

(5) The Board may, on application to it by a complainant, determine a complaint in respect of an alleged failure by a trade union to comply with paragraph 95(f) or (g) that has not been presented as a grievance or appeal to the trade union, if the Board is satisfied that

(a) the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or

(b) the trade union has not given the complainant ready access to a grievance or appeal procedure.

(ii) soit omis de statuer, dans les six mois qui suivent la date de première présentation du grief ou de l'appel;

c) la plainte est adressée au Conseil dans les quatre-vingt-dix jours suivant la date où le plaignant était habilité au plus tôt à le faire conformément aux alinéas a) et b).

(5) Le Conseil peut, sur demande, statuer sur les plaintes visées au paragraphe (4) bien qu'elles n'aient pas fait l'objet du recours prévu s'il est convaincu :

a) soit que les faits donnant lieu à la plainte sont tels qu'il devrait être statué sur la plainte sans retard;

b) soit que le syndicat n'a pas donné au plaignant la possibilité de recourir facilement à une procédure de grief ou d'appel.

The Board's decision

[9] The Board reviewed its past jurisprudence pertaining to complaints of discrimination against union members who had participated in union raiding activities, and discarded the reasoning set out in its 1984 decision of *James Carbin* (1984), 59 di 109; 85 CLLC 16,013, adopting instead the

reasoning expressed in its 1991 decision of *Paul Horsley et al.* (1991), 84 di 201, 15 CLRBR (2d) 141, and in its 1997 decision of *Nathalie Beaudet-Fortin* (1997), 105 di 98, 40 CLRBR (2d) 161. These last decisions clearly recognize that members of a union are entitled to protection from reprisals for exercising their lawful right to change unions. The Board found this reasoning to be more consistent with the intent of section 95, and particularly of paragraph 95(i) of the *Code*: Decision at paras. 13 to 17.

[10] The Board also discarded the Guild's objections under subsections 95(4) and (5) of the *Code* alleging the lack of timeliness of the complaint. The Board noted that these subsections did not apply to breaches of sub-paragraph 95(i)(i) of the *Code*; and since it found that the complaint was justified under that sub-paragraph, there was no need to deal with the timeliness issue: Decision at paras. 19 to 21 and 23.

[11] The Board also dismissed the Guild's objection alleging the Teamsters' lack of standing to initiate the complaint on behalf of the three individuals, noting that the Board does not, as a matter of course, require a union to provide statements confirming that it represents each individual named in a complaint: Decision at para. 22.

[12] The Board consequently ordered that all penalties issued to the three individuals be rescinded, and that the fines paid be refunded. It also ordered the Guild to mail a copy of its decision to all the employees in the Bargaining Unit. It refused, however, to certify the Teamsters or to call a new representation vote.

Analysis

[13] The Guild challenges the Board's decision on various grounds which may be summarized as follows: (a) the Teamsters lacked standing to file the complaint under the *Code*; (b) the complaint was premature; and (c) the Board misinterpreted and misapplied sub-paragraph 95(i)(i) of the *Code*.

[14] The two last grounds of review may be summarily dismissed.

[15] The timeliness argument is groundless since the complaint was allowed by the Board on the basis of sub-paragraph 95(i)(i) of the *Code*, to which paragraphs 97(4) and (5) of the *Code* do not apply.

[16] Sub-paragraph 95(i)(i) of the *Code* prohibits a trade union from imposing "a financial or other penalty on a person, because that person...has...participated...in a proceeding under" Part I of the *Code*. Since the Guild acknowledged at the hearing before this Court that the Teamsters' application for certification was a proceeding under the *Code*, and that the three concerned individuals were fined or suspended by the Guild for participating in this proceeding, I fail to understand how the Board misinterpreted or misapplied sub-paragraph 95(i)(i). The fact that the Board applied the reasoning in its decisions of *Paul Horsley et al*, above, and of *Nathalie Beaudet-Fortin*, above, is not a reviewable error, since that reasoning is fully compatible with the terms of sub-paragraph 95(i)(i). These decisions recognize the basic right of individuals to belong to the trade union of their choice, the right of union members to attempt to change their bargaining agent

from time to time in the manner and in accordance with the timelines provided for in the *Code*, and the right of such individuals not to be disciplined or penalized for exercising such rights.

[17] There remains the question of the Teamsters' standing to initiate the complaint. The parties recognize that the record does not disclose that the three concerned individuals authorized the complaint. Consequently, the Guild submits that the Board's decision raises for the first time the issue of the standing of a union to initiate a complaint under the *Code* concerning the internal discipline of a member of a rival union. The Guild adds that the Teamsters were in no way affected by, and had no interest in, the internal disciplinary proceedings of the Guild other than as busybodies hoping to make political gains for future raiding efforts. The Guild fears that should the Board's decision be left standing, this would expose all unions to a floodgate of complaints from rival unions. The Guild also submits that this issue of standing is jurisdictional, and that it should consequently be reviewed by this Court on a standard of correctness.

[18] The analytical framework which applies to determine the standard of review has been recently described as follows by Justice Fish in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at paras. 35 and 36:

[35] An administrative tribunal's decision will be reviewable for correctness if it raises a constitutional issue, a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'", or a "true question of jurisdiction or *vires*". It will be reviewable for correctness as well if it involves the drawing of jurisdictional lines between two or more competing specialized tribunals (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190], at paras 58-61; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] S.C.R. 160], at para. 26;

Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62, *per* LeBel J.).

[36] The standard of reasonableness, on the other hand, normally prevails where the tribunal's decision raises issues of fact, discretion or policy; involves inextricably intertwined legal and factual issues; or relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at paras. 51 and 53-54; *Smith*, at para. 26).

[19] Whether or not a union has standing to bring a complaint under the *Code* is not, in my view, a "true question of jurisdiction or *vires*", but rather an issue which involves the interpretation of the *Code* in the context of inextricably intertwined factual determinations. Properly understood, the issue of a union's standing to bring a complaint under subsection 97(1) of the *Code* is a matter to be reviewed by this Court on a standard of reasonableness.

[20] The concept of standing is simple, though its application may be difficult in any given circumstance. The concept requires that only those with a real and legitimate interest in a matter may initiate a judicial or administrative proceeding, or obtain notice of and fully participate in such a proceeding. A real and legitimate interest exists where a party's legal rights or obligations are at issue, or where it may be prejudicially affected in some way by the outcome of the proceeding: *Rothmans of Pall Mall Canada Ltd. v. M.N.R. [No. 1]*, [1976] 2 F.C. 500, at pp. 506-507. For a more detailed and complete discussion, see Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986).

[21] The inquiry as to standing thus necessarily entails a review of a party's interests and rights in order to ascertain whether such interests could be prejudiced or whether such rights could be

affected by the proceeding. This requires consideration of both the factual situation leading to a claim of prejudice as well as consideration of the legal rights which may be affected. In the labour relations context of these proceedings, the inquiry as to standing requires the Board to determine whether or not the Teamsters' interests under the *Code* could be prejudiced if the complaint was not pursued, or if their rights under the *Code* could be affected. In my view, this is precisely the type of issue for which the Board is best suited to answer under the *Code*. I will therefore review the question of standing on a standard of reasonableness.

[22] Where a trade union makes a complaint under subsection 97(1) of the *Code* seeking relief from reprisals against the individuals who assisted it in an otherwise legitimate certification proceeding, it is reasonable for the Board to infer that the trade union has the authority to make the complaint for the individuals, unless evidence to the contrary is submitted. This is so whether the reprisals are the result of actions taken by the employer or by the rival union.

[23] As noted by the Board at paragraph 22 of its Decision, it frequently receives unfair labour practice complaints from unions alleging unlawful employer activities directed against specific employees who are union supporters. In such cases, the Board does not normally require the complaining union to provide evidence that it represents each employee named in the complaint. This appears to be the approach taken by many labour relations boards. Indeed, unions are presumed to have the authority to initiate such complaints for the affected individuals, and they moreover have a clear interest themselves to ensure that such complaints are adjudicated: see *Royal Homes Limited*, [1992] O.L.R.D. No. 744 (QL) at para. 102.

[24] The Guild has submitted no cogent reason why a different approach should be taken where the complaint concerns a union's unlawful disciplinary action against an individual who supports another trade union in an otherwise legitimate union certification campaign. In such circumstances, the individual should be presumed to be represented for the purposes of the complaint by the trade union he or she supported during the certification process, given that this trade union also has a vital interest in the complaint, and that this interest coincides with that of the individual.

[25] Moreover, although the Guild raised before the Board the issue of the Teamsters' standing to represent the concerned individuals, the matter was not pursued in any detail (decision at para. 22). As Counsel for the Respondent pointed out during the hearing of the application, the appropriate authorization could have been provided had the matter been pressed.

[26] In any event, a trade union has an interest of its own in ensuring that the individuals who assisted it in a legitimate certification campaign are not subjected to reprisals by either an employer or a rival union. In such circumstances, a trade union has a separate and distinct interest in ensuring that those individuals who support it will not be penalized, since this may affect future certification proceedings initiated by that trade union against other potential rivals.

[27] Moreover, I do not accept the floodgate argument submitted by the Guild. The Board's decision is limited to complaints made by an unsuccessful trade union with respect to reprisals by a rival union following an otherwise legitimate certification campaign under the *Code*. This does not

entail that rival unions may at any time and in any circumstances submit complaints against one another under the *Code* challenging the treatment of their respective members.

[28] I therefore conclude that the Board's decision to allow the Teamsters' complaint to proceed was reasonable in the circumstances of this case.

[29] For the reasons set out above, I would dismiss with costs the Guild's judicial review application.

"Robert M. Mainville"

J.A.

"I agree.

Marc Noël J.A."

"I agree.

Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-391-11

APPLICATION FOR A JUDICIAL REVIEW OF DECISION 2011 CIRB 605 OF THE CANADA INDUSTRIAL RELATIONS BOARD, ISSUED ON SEPTEMBER 23, 2011.

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v. Teamsters, Local Union 847

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: June 20, 2012

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

DATED: July 24, 2012

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