Federal Court of Appeal  Cour d'appel fédérale

Date: 20210323

Docket: A-6-20

Citation: 2021 FCA 59

CORAM: **NADON J.A.**
NEAR J.A.
MACTAVISH J.A.

BETWEEN:

BRAGG COMMUNICATIONS INC.

Applicant

and

UNIFOR

Respondent

Heard by online video conference hosted by the Registry on March 2, 2021.

Judgment delivered at Ottawa, Ontario, on March 23, 2021.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: NADON J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

[1] This is an application for judicial review of an order of the Canada Industrial Relations Board (the Board), Order No. 11457-U, significantly expanding the geographical scope of a bargaining unit comprised of communications technicians working in different regions in Nova Scotia. The result of this expansion would be that the membership of the bargaining unit would more than double in size. The employer, Bragg Communications Inc. (Bragg), unsuccessfully contested the expansion application, and now seeks judicial review of the Board's order.

[2] The Board has developed requirements that must be met by an applicant bargaining agent before the Board will grant an expansion of an *existing* bargaining unit. The Board must affirmatively determine that the expanded unit is appropriate for collective bargaining; that there is majority support within the group of employees to be added to the bargaining unit; and that the applicant union will maintain its representative character in the newly expanded unit: *Teamsters Local Union No. 31 v. 669779 Ontario Limited*, 2018 CIRB 873, 48 C.L.R.B.R. (3d) 86 at para. 57. The latter two requirements are referred to as the "double majority rule" as both a majority of the new membership, and a majority of the total membership of the newly expanded bargaining unit, must support the expansion. In applying this rule, the Board may reasonably infer continued support amongst the pre-existing union members: *Rogers Communications Canada Inc. v. Metro Cable T.V. Maintenance and Service Employees' Association*, 2019 FCA 40, 38 C.L.R.B.R. (3d) 1 at paras. 8-9. A representation vote among the full membership of the expanded bargaining unit is therefore not always necessary.

[3] In this case, in its response to Unifor's expansion application, Bragg argued that a representation vote *was* necessary. In Bragg's view, Unifor's expansion application was qualitatively different than standard expansion applications because it proposed nearly tripling the membership of the bargaining unit. The existing unit included six members, and the expansion application proposed adding eleven new members, which would result in the pre-existing members losing control of the bargaining unit. Bragg argued that the Board's normal practice in an expansion application of inferring support amongst pre-existing membership was therefore not suited to this case, which instead required a representation vote to assess support for the purposes of satisfying the double-majority rule.

[4] Bragg also argued that the expanded unit was inappropriate for collective bargaining because the existing collective agreement was structured around the concept of “Assigned Management Areas”, and significantly expanding the geographical scope and size of the bargaining unit would make this concept, and thus the collective agreement, unworkable. According to Bragg, the collective agreement allowed for the fact that employees would prefer to work in their home “Assigned Management Areas”, a concession Bragg said it would not have granted had the agreement been negotiated with the geographically much larger post-expansion bargaining unit.

[5] The Board granted the expansion application in a concise order without accompanying reasons. This is in keeping with Board practice to not issue detailed reasons in response to all applications: *Dicom Transportation Group Canada v. Teamsters/Québec, Local 931*, 2019 CIRB 911, 2019 CarswellNat 5553 (WL Can) at para. 22.

[6] Before this Court, Bragg argued that the Board’s order was unreasonable because its reasons were inadequate. Bragg relied on *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 79 [*Vavilov*], in support of its argument. Bragg argued that the Board’s current practice of not always issuing detailed reasons is incompatible with the reasons-focused analysis that the Supreme Court, in *Vavilov*, instructed reviewing courts to take on judicial review. In my view, there is merit to this submission especially in circumstances where there are no reasons given for important issues raised by the parties: *Farrier v. Canada (Attorney General)*, 2020 FCA 25, 161 W.C.B. (2d) 531 at para. 19 [*Farrier*].

[7] The entirety of the Board's order is as follows:

> **WHEREAS**, on August 8, 2019, the Canada Industrial Relations Board (the Board) received an application from the applicant, pursuant to section 18 of the *Canada Labour Code (Part I–Industrial Relations)*, seeking to amend certification order no. 11280-U issued on June 13, 2018, certifying Unifor as the bargaining agent for a unit of employees of Bragg Communications Inc. comprising:
>
> > all communications technicians working for Bragg Communications Inc. in its Eastlink division in and out of the rural municipalities of Digby, Clare, Yarmouth, Barrington and Shelburne, Nova Scotia, providing digital video/television, home phone and cable network based internet services **excluding** office and clerical employees, technical managers and those above the rank of technical manager.
>
> **AND WHEREAS** the applicant, through its application, sought to expand its existing bargaining unit by adding the communications technicians employed by Bragg Communications Inc. working in its Eastlink division in and out of the rural municipalities of Aylesford, Bridgewater, Liverpool, New Minas and Windsor, Nova Scotia;
>
> **AND WHEREAS** the employer is opposed to this application and alleges that the expanded bargaining unit sought by the applicant is not appropriate for collective bargaining as the expanded unit would make it difficult to apply the collective agreement, would more than double the size of the bargaining unit and would drastically increase the geographic scope of the service area;
>
> **AND WHEREAS**, following investigation of the application and consideration of the submissions of the parties concerned, including a review of the confidential membership evidence filed respecting the employees that the applicant seeks to add to the existing bargaining unit, the Board has determined that the applicant has demonstrated majority support within the group of employees that it seeks to add to the existing bargaining unit and that those employees wish to be represented by the applicant;
>
> **AND WHEREAS**, since the Board has not received any expressions of concern following the appropriate posting of the Notice of Application that would cause it to doubt the majority support within the existing bargaining unit, it has therefore determined that a representation vote is not required and accepts that the applicant continues to have majority support within its existing bargaining unit;
>
> **AND WHEREAS** the Board is satisfied that the applicant has majority support within the overall proposed expanded bargaining unit;

> **AND WHEREAS** the Board has determined that the applicant has satisfied the requirements of the double majority rule;
>
> **AND WHEREAS** the Board has determined that the bargaining unit described below is appropriate for collective bargaining;
>
> **AND WHEREAS** the Board has determined that it is appropriate to grant the application to amend certification order no. 11280-U.
>
> **NOW, THEREFORE**, the Canada Industrial Relations Board hereby orders that Unifor is the bargaining agent for a bargaining unit comprising:
>
> > all communications technicians working for Bragg Communications Inc. in its Eastlink division in and out of the rural municipalities of Digby, Clare, Yarmouth, Barrington, Shelburne, Aylesford, Bridgewater, Liverpool, New Minas and Windsor, Nova Scotia, providing digital video/television, home phone and cable network based internet services, **excluding** office and clerical employees, technical managers and those above the rank of technical manager.
>
> **ISSUED** at Ottawa, this 9th day of December, 2019, by the Canada Industrial Relations Board.

[8] In my view, the Board addressed Bragg's submissions on the issue of the newly expanded bargaining unit's representative character. The Board applied the double majority rule, and nothing in the record indicates it was unreasonable of the Board to infer continued support amongst the pre-existing union members for the purposes of applying that rule, given that the Board had not received any expressions of concern from these members. The reasons for its conclusion are concise, but sufficient for purposes of review and found reasonable in light of the facts and applicable legal doctrine.

[9] However, while the Board acknowledged the concerns Bragg raised regarding the appropriateness of the bargaining unit, it did not demonstrate any of its reasoning on this issue. It

merely stated its conclusion. It is therefore not possible to understand the decision maker's reasoning on this critical point: *Vavilov* at paras. 103, 128; *Farrier* at paras. 13-14, 19.

[10] Without the benefit of any of its reasoning on the issue of appropriateness of the bargaining unit, it is impossible to assess whether its conclusion is reasonable. This does not mean that separate, detailed formal reasons were required. It simply means that the Board was required to set out its reasoning on the issue of appropriateness, just as it did regarding the question of the union's representative character. The respondent union in its submissions sought to fill this void but it is the responsibility of the Board to set out the rationale for its decision and failure to do so in this case makes the decision unreasonable.

[11] Given that the Board provided no explanation as to its reasoning on the appropriateness issue, I cannot conclude that the Board's order granting expansion was reasonable. I would therefore set the order aside and remit the matter to the Board for redetermination.

"D.G. Near"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-6-20
STYLE OF CAUSE:	BRAGG COMMUNICATIONS INC. v. UNIFOR
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	MARCH 2, 2021
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	NADON J.A. MACTAVISH J.A.
DATED:	MARCH 23, 2021

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