Federal Court of Appeal | Cour d'appel fédérale

Date: 20230307

Docket: A-45-22

Citation: 2023 FCA 48

CORAM: **RENNIE J.A.**
LASKIN J.A.
LEBLANC J.A.

BETWEEN:

INGRID WATSON

Applicant

and

CANADIAN UNION OF PUBLIC EMPLOYEES and AIR CANADA

Respondents

Heard at Ottawa, Ontario, on February 16, 2023.

Judgment delivered at Ottawa, Ontario, on March 7, 2023.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: LASKIN J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

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RENNIE J.A.

[1] The applicant applies for judicial review of a decision of the Canada Industrial Relations Board (the Board) (2022 CIRB 1002), which dismissed her complaint against the respondent, the Canadian Union of Public Employees (CUPE). In her complaint, the applicant alleged that CUPE had failed to meet its duty of fair representation under section 37 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code) by declining to grieve the COVID-19 vaccination policy implemented by her employer, Air Canada.

[2] This application for judicial review asks the Court to decide whether the Board's decision that CUPE did not breach its duty to provide fair representation was unreasonable and, secondly, whether the Board breached its duty of procedural fairness to the applicant in not holding an oral hearing and in refusing to order production of certain documents.

[3] For the reasons that follow, I would dismiss the application.

I. Facts

[4] A somewhat detailed review of the evidence is necessary in order to situate the applicant's two main challenges to the Board's decision.

[5] On August 13, 2021, the Government of Canada announced that it would require employees in the federally regulated transportation sector to be vaccinated against COVID-19 by the end of October 2021. On August 25, 2021, Air Canada announced that it would implement a

policy requiring all employees to be fully vaccinated against COVID-19 by October 31, 2021 (the Vaccination Policy).

[6] On September 3, 2021, in response to concerns about the Vaccination Policy from a group of its members, the CUPE Air Canada Component Executive Board (ACCEX) held a meeting to discuss whether it should file a policy grievance against the Vaccination Policy. ACCEX declined to do so. However, on that same day, CUPE advised its membership that it would evaluate Air Canada's implementation of the Vaccination Policy and would support its members should they be disciplined as a result of the policy.

[7] On September 9, 2021, Air Canada advised its employees that those who had not confirmed their status as vaccinated would be placed on unpaid leave for six months and that the continuing employment relationship of unvaccinated employees would be reassessed after that six month period.

[8] On October 29, 2021, the Minister of Transport issued the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43* (Interim Order 43). This order mandated COVID-19 vaccinations for those participating in the airline industry, subject to certain exceptions.

[9] On November 2, 2021, the applicant filed a complaint with the Board against CUPE, alleging that it had breached its duty of fair representation under section 37 of the Code (the DFR complaint). She requested an oral hearing.

[10] On November 9, 2021, the applicant's counsel advised CUPE that Air Canada had denied her request for a medical exemption from the Vaccination Policy. In response, CUPE filed a grievance on behalf of the applicant. This individual grievance had been proceeding as of January 19, 2022, when the Board released its decision in the present matter (Decision at para. 69), although no evidence of the outcome of the individual grievance was before this Court.

II. **The Board's decision**

[11] The Board decided that it was not required to hold an oral hearing, citing section 16.1 of the Code. The Board noted that it would normally only hold an oral hearing where "there are issues of credibility on questions that are central to [the matter's] determination" (Decision at para. 31) and that an oral hearing was not necessary in this case as "the matter [could] be decided on the basis of the written submissions" (Decision at para. 32).

[12] Next, the Board outlined the law relevant to a union's duty of fair representation. It considered section 37 of the Code and a prior decision of the Board, *McRaeJackson,* 2004 CIRB 290, 115 C.L.R.B.R. (2d) 161 [*McRaeJackson*].

[13] The Board determined that CUPE's conduct had not been arbitrary. The Board noted that CUPE had communicated regularly with its membership regarding the implementation of the Vaccination Policy, had sought two legal opinions with respect to the policy, and had explained to its membership why it would support the policy (Decision at paras. 47-51). These facts, the Board found, indicated that CUPE had "turned its mind to the issue and took the necessary steps

to evaluate its chance of successfully challenging the policy through the grievance procedure or otherwise" (Decision at para. 61).

[14] The Board then considered the applicant's arguments regarding the validity of the legal opinions relied upon by CUPE. It determined that a close review of these opinions was not appropriate, and that production of the documents leading to these opinions was unnecessary (Decision at para. 59):

> The [applicant] is of the view that [CUPE] did not provide the relevant considerations to its legal counsel or that it did not ask the correct question on which to base the legal opinions. With respect, the Board is not prepared to entertain this argument. It is not for the Board to evaluate what question was put to counsel or which considerations were communicated as the basis for their legal advice. The Board has generally been deferential to a union's reliance on its counsel's legal opinion (see [*Presseault v. B.L.E.*], 2001 CIRB 138 [*Presseault*]), and it will not engage in a microscopic review of those opinions unless there are very unusual circumstances. Correspondingly, the Board will not order the production of any documents on which the legal opinions were based, as the [applicant] requested.

[15] The Board found that CUPE had not acted in bad faith by "adopting a position that supports and favours vaccination for its members," given the majority of its membership that supported this policy and the scientific evidence that "overwhelmingly points to vaccination as the most effective tool to get us past these unprecedented global circumstances" (Decision at para. 67).

III. **The reasonableness of the Board's decision**

[16] Under subsection 22(1) of the Code, Board decisions may only be reviewed on the grounds referred to in paragraphs 18.1(4)(*a*), (*b*), and (*e*) of the *Federal Courts Act*, R.S.C. 1985,

c. F-7. Nevertheless, these decisions are reviewable under the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 49; *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41, 432 D.L.R. (4th) 170 at paras. 23 and 34; *Grant v. Unifor*, 2022 FCA 6, 340 A.C.W.S. (3d) 227 at paras. 7-8 [*Grant*]; *Paris c. Syndicat des employés de Transports R.M.T. (Unifor-Québec)*, 2022 CAF 173, [2022] A.C.F. No. 1455 (QL) at paras. 2 and 14 [*Paris*]).

[17] When assessing general issues of procedural fairness, the Court is to ask whether the proceedings were fair in all of the circumstances (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at paras. 54-56 [*Canadian Pacific*]). As explained in *Canadian Pacific*, the concept of a standard of review is ill-fitted to assessments of procedural fairness. A proceeding is either fair or it is not, a test that is otherwise best described or captured as a correctness standard. When reviewing the Board's decision not to hold an oral hearing under section 16.1 of the Code, this Court may only intervene where the decision to proceed on the basis of the written record did not allow a party to fully assert their rights or to know the evidence that they must refute (*Ducharme c. Air Transat A.T. Inc*., 2021 CAF 34, [2021] A.C.F. No. 173 (QL) at para. 19 [*Ducharme*]).

The duty of fair representation

[18] Unions owe their members a duty of fair representation under section 37 of the Code:

> A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[19] This duty under section 37 of the Code does not encompass a requirement to file a grievance on behalf of every employee who requests one; an employee does not have an absolute right to arbitration and the union enjoys considerable discretion when deciding whether to proceed with a grievance (*Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509, 1984 CanLII 18 (SCC) at 527 [*Gagnon*]; *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, 1990 CanLII 110 (SCC) at 1328 [*Gendron*]). This discretion "must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other" (*Gagnon* at 527; *Gendron* at 1328). When faced with conflicting employee interests, the union does not breach its duty of fair representation by pursuing one set of interests to the detriment of another. "Rather, it is the underlying motivation and method used to make this choice that may be objectionable" (*Gendron* at 1329).

[20] The Board began its consideration of the applicant's complaint by outlining its understanding of what the duty of fair representation entailed. It relied on a decision of the Board, *McRaeJackson*, which has been applied by this Court (*Cadieux v. Amalgamated Transit Union, Local 1415*, 2014 FCA 61, 372 D.L.R. (4th) 159 at para. 30 [*Cadieux*]; *McAuley v. Chalk River Technicians and Technologists Union*, 2011 FCA 156, 420 N.R. 358 at paras. 11 and 14 [*McAuley*]; *Nadeau v. United Steelworkers of America*, 2009 FCA 100, 400 N.R. 246 at para. 7 [*Nadeau*]). This summary describes the considerations relevant to the Board's handling of such complaints (*McRaeJackson* at paras. 33 and 37):

> A union can fulfill its duty to fairly represent an employee by taking a reasonable view of the grievance, considering all of the facts surrounding the grievance,

> investigating it, weighing the conflicting interest of the union and the employee and then making a thoughtful judgment about whether or not to pursue the grievance. That is called balancing the circumstances of the case against the decision to be made. For example, it is legitimate for the union to consider collective agreement language, industry or workplace practices, or how similar issues have been decided. It is also legitimate for the union to consider the credibility of a grievor, the existence of potential witnesses in support of the grievor's version of the events, whether the discipline is reasonable, as well as the decisions of arbitrators in similar circumstances.
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> …
>
> Accordingly, the Board will normally find that the union has fulfilled its duty of fair representation responsibility if: a) it investigated the grievance, obtained full details of the case, including the employee's side of the story; b) it put its mind to the merits of the claim; c) it made a reasoned judgment about the outcome of the grievance; and d) it advised the employee of the reasons for its decision not to pursue the grievance or refer it to arbitration.

[21] There are two branches to the applicant's challenge to the reasonableness of the Board's decision. The first, which I will turn to momentarily, is that the Board failed to apply the correct legal test to its assessment of her section 37 complaint. The second arises from the facts and circumstances of CUPE's decision-making process. The applicant says that the manner in which CUPE decided not to undertake a policy grievance was arbitrary and tainted by the union's hostility towards her concerns.

Failure to apply the correct test

[22] Turning to the first challenge, the applicant argues that the Board failed to apply the correct test for resolving section 37 complaints, as articulated in *Lamolinaire*, 2009 CIRB 463, 2009 CarswellNat 3120 [*Lamolinaire*]. That decision listed three questions to determine whether a union had breached its duty of fair representation: (1) did the union conduct only a perfunctory

or cursory inquiry, or a thorough one; (2) did the union gather sufficient information to arrive at a sound decision; and (3) were there any personality conflicts or other bad relations that might have affected the soundness of the union's decision (*Lamolinaire* at para. 36).

[23] The applicant is correct that the Board does not refer to this test in its reasons. However, this omission does not render the decision unreasonable.

[24] This test from *Lamolinaire* has only been cited once by this Court, in *Cadieux* at paragraph 33, and four times by the Board. It does not appear in this Court's jurisprudence after 2014, and has appeared only once in a Board decision since then. Express reference to this test is not a prerequisite to a reasonable Board decision on a section 37 complaint.

[25] The first and second questions asked by the Board in *Lamolinaire* are simply a restatement of what section 37 requires—that the decision not be arbitrary. The third question, which explores the existence of personality conflicts or bad faith, may be pertinent depending on whether there is some reason in the evidence to ask it. This is not to say that the questions posited in *Lamolinaire* are not legitimate questions; rather, it is to say that the inquiry into arbitrariness, bad faith or biased decision-making is a contextual exercise.

Whether the union's decision was arbitrary or cursory

[26] The Board described in considerable detail the evidence before it, and held this evidence up against the requirements of section 37. The Board determined that CUPE's refusal to file a policy grievance was neither arbitrary nor decided in bad faith, a finding that reflects the

language of section 37. Importantly, the Board concluded that in deciding not to pursue a policy grievance, CUPE carefully balanced the interests of its members (Decision at paras. 65 and 67):

> In this case, [CUPE] supported vaccination generally as an effective means of ensuring the health and safety of its members. Even if this position by [CUPE] is in opposition to certain members' views, this, in and of itself, is not sufficient to find the union in breach of its DFR. In the current pandemic, there is overwhelming scientific evidence of the effectiveness of vaccines in the effort to eradicate COVID-19. Health authorities across Canada have stated that vaccination is one of the most effective ways to prevent severe illness, hospitalization and death from COVID-19.
>
> ...
>
> The [applicant] and other members may be opposed to vaccination, but the scientific evidence overwhelmingly points to vaccination as the most effective tool to get us past these unprecedented global circumstances. [CUPE] took a stance that is aligned with this evidence. A large majority of the membership supports the vaccination policy, as is demonstrated by the high vaccination rate amongst the employees in the bargaining unit. There is simply no evidence to suggest that [CUPE] acted in bad faith in adopting a position that supports and favours vaccination for its members.

[27] The framework that the Board followed in arriving at this conclusion was responsive to the issue raised by the applicant and informed by sound legal principles.

[28] The applicant next submits that CUPE's review of the Vaccination Policy was cursory and based on a blind, premature acceptance of its contents. The applicant says that CUPE did not have a copy of the Vaccination Policy or the legislation requiring Air Canada's implementation of this policy at the time that it decided not to grieve the policy, and that, in the absence of these documents, CUPE could not have made an informed, fair decision. The applicant also notes the timing of the ACCEX meeting that occurred on September 3, 2021, in which the committee discussed its strategy for responding to the Vaccination Policy and considered challenging it with

a policy grievance; specifically, the applicant highlights that only 80 minutes elapsed between the opening of the meeting and the release of a detailed, bilingual communication of the committee's decision not to pursue the grievance. This fact, she contends, is further evidence that CUPE did not take a fair, open-minded approach to considering her request that it undertake a policy grievance to challenge the Vaccination Policy.

[29] The Board's decision—that CUPE had sufficiently engaged with the question of whether it could successfully challenge the Vaccination Policy—is supported by the evidence that was before it. This evidence showed that CUPE had monitored the Government of Canada's position on mandatory vaccination against COVID-19 as of August 13, 2021 (the date the Minister of Transport announced the Government's intention to require vaccination in the air transportation sector), sought two legal opinions regarding the viability of any challenge to the Vaccination Policy, shared these opinions with its entire membership and explained to its membership the reasons for its support of the Vaccination Policy.

[30] The Board also notes, and quite reasonably so, that CUPE was required to make its decision in the context of a rapidly changing and dynamic public health emergency, and that many members of the union who were flight attendants were asking for priority access to COVID-19 vaccines (Decision at paras. 45-46). The communications between CUPE and its membership demonstrate that, throughout August 2021, the union engaged with the issues surrounding the impending Vaccination Policy and COVID-19 vaccines more generally. While not directly expressed in the decision below, it is implicit in the Board's reasoning that no party's interests—including those of the union, its membership, and the applicant—would have been

served had CUPE postponed its consideration of whether to file a policy grievance until Interim Order 43 had come into effect and until it had the final version of the Vaccination Policy.

[31] Given this evidence, the Board's conclusion that CUPE had satisfied its duty of fair representation was one that was open to it.

[32] I note as well that the chronology of events leading to the applicant's complaint does not support her characterization of CUPE's review of her request. The Government of Canada announced its intention to mandate vaccinations on August 13, 2021. Air Canada published the Vaccination Policy on September 10, 2021. The applicant formally requested that CUPE challenge the Vaccination Policy on September 14, 2021. Although Interim Order 43 was not issued until October 2021, CUPE had been aware of the Government of Canada's imminent vaccination requirements and of the content of the Vaccination Policy by the time the applicant requested the policy grievance.

[33] The Board determined that CUPE had "provided regular information and kept the membership up to date on developments, government announcements and the employer's approach and response as the events unfolded" (Decision at para. 47). The Board also concluded that CUPE had "made it clear that it was aware of the different views on the issue of vaccination" (Decision at para. 69) and that "it would challenge individual discipline issued to members who chose not to be vaccinated" (Decision at para. 50).

[34] I would add that the applicant's argument proceeds on a misconception of what the duty of fair representation entails. While the employer's conduct or policy colours or informs what is required under section 37, the union's duty is ultimately to give thoughtful consideration as to whether to pursue a grievance, independent of the employer's conduct. Put more simply, the merits of the Vaccination Policy were not before the Board on the DFR complaint.

The legal opinions

[35] CUPE obtained two legal opinions from outside counsel from two separate private law firms to assess the strength of a potential challenge to the Vaccination Policy. The applicant says that the Board did not assess the reliability of the legal opinions themselves, which led the Board to the unreasonable conclusion that CUPE had discharged its duty of fair representation. The applicant says that the opinions were not sound and were irrelevant; according to the applicant, the opinions ought to have analyzed whether an employee could be terminated for cause if they were not vaccinated, which was the most pressing issue she saw with the Vaccination Policy.

[36] This argument cannot succeed.

[37] An examination of the quality and accuracy of the legal opinions relied upon by CUPE was outside the scope of the Board's remit. Questions regarding the sufficiency of the authorities cited in the opinions, or the relevance of the analogies used to extrapolate likely outcomes, do not bear on the question of whether the Board reasonably decided that CUPE had not acted arbitrarily or in bad faith by declining to pursue a policy grievance.

[38] When deciding whether a union breached its duty of fair representation, the Board is not to assess the union's decision not to file a grievance on behalf of a member. The Board must instead focus its assessment on the union's conduct in handling a grievance. As the Board has previously written, "[t]he Board rules on the union's decision-making process and not the merits of grievances" (*McRaeJackson* at para. 11, endorsed in *McAuley* at para. 11). Further, the Supreme Court of Canada has stated that it could not blame a union for relying on a reasoned legal opinion "even if it [were] incorrect" (*Gagnon* at 534).

[39] The Board also noted in the present case that it "has generally been deferential to a union's reliance on its counsel's legal opinion (see *Presseault*, 2001 CIRB 138), and [that] it will not engage in a microscopic review of those opinions unless there are very unusual circumstances" (Decision at para. 59). In *Presseault,* the Board rejected a similar argument to the one raised by the applicant with reference to the Board's jurisdiction over DFR complaints (*Presseault* at para. 35):

> Disputes between a union member and the union about the quality of the legal opinion or its counsel are not within the realm of the Board's jurisdiction, for that would be to second-guess the opinion of a competent professional. Whether the union member agrees or not with that opinion does not mean that the opinion is invalid, or that the union should not have considered it.

[40] The applicant contends that in citing *Presseault* and declining to undertake a "microscopic review" of the legal opinions, the Board did not direct its mind to the issue and instead reverted to boilerplate reasons.

[41] I do not agree. The reasons demonstrate that the Board considered the applicant's arguments with respect to the opinions—that CUPE did not ask the right questions of counsel, that the resulting opinions were legally deficient, and that the opinions were rendered prior to the coming into effect of Interim Order 43 and the Vaccination Policy—and assessed those arguments against the legal standard of relevancy as determined by its mandate (Decision at paras. 59 and 60). The Board reasonably concluded that these arguments were not relevant to the question before it, for the reasons described above.

[42] The existence of these legal opinions themselves, though, was relevant to the Board's decision. Regardless of whether the applicant agrees with the opinions obtained by CUPE, the evidence before the Board showed that, as part of CUPE's decision-making process, it had sought two legal opinions that assessed its ability to challenge the Vaccination Policy. This demonstrates that CUPE had considered the situation leading to the applicant's requested grievance, and that the union had not taken its duty lightly (*Dumont v. Canadian Union of Postal Workers, Montréal Local*, 2011 FCA 185, 423 N.R. 143 at para. 48). The evidence before the Board supports its conclusion that CUPE had been engaged with the issues raised by the applicant in her requested grievance.

IV. **The applicant's right to procedural fairness**

[43] The applicant says that because the Board declined to order production of documents and correspondence related to the legal opinions, the Board breached its duty of procedural fairness.

[44] Air Canada submits that the applicant has not shown how the correspondence between CUPE and counsel responsible for the legal opinions was relevant to her complaint. CUPE submits that these documents would only be necessary if the Board sought to review the correctness of the legal opinions themselves. As discussed above, this was not the Board's task, nor is it ours.

[45] The Board need not order production of documents in a section 37 complaint where the evidence contained in the documents would not be essential to its ultimate decision (*McAuley* at para. 9). In this case, no documents related to the legal opinions would have assisted the Board adjudicate the DFR complaint. The information relevant to the Board in this regard was the fact that CUPE had sought and considered legal advice when tracking Air Canada's implementation of the Vaccination Policy; the retainers, instruction letters and related solicitor-client communications were not relevant to the Board's consideration of the section 37 issue.

[46] The absence of this evidence before the Board did not impair the applicant's ability to present her case and have her complaint heard fully and fairly. The Board was aware of the events leading up to the applicant's complaint, and specifically CUPE's conduct following the Government of Canada's announcement of its intention to mandate vaccines in the transportation sector. All evidence relevant to the applicant's complaint had been before the Board, and was referred to by the Board in its decision (Decision at paras. 3-28).

[47] Both the applicant and CUPE have made submissions on the question of whether solicitor-client privilege attaches to the documents that the applicant seeks to have produced. In

light of my conclusion that these documents were irrelevant to the issue before the Board, it is unnecessary to consider this issue.

[48] The applicant next says that the Board also breached its duty of procedural fairness by rejecting her request for an oral hearing. She believes she was unable to put her position forward without the opportunity to address outstanding credibility issues by cross-examining CUPE witnesses about the legal opinions discussed above. She also believes that statements by members of the executive committee in favour of federally mandated COVID-19 vaccinations in the transportation sector were without merit and did not reflect the applicant's concerns about vaccines. The applicant argues that she could not fully advance her position having been denied the chance to cross-examine the individuals behind these statements.

[49] I disagree that the applicant was prevented from making her case to the Board in these ways.

[50] Section 16.1 of the Code states that "[t]he Board may decide any matter before it without holding an oral hearing." The Board's exercise of this discretionary power attracts considerable deference from this Court (*Paris* at para. 5). In this way, the Board is to be treated as "master of its own procedure" (*Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 373 D.L.R. (4th) 167 at para. 50).

[51] Issues of credibility do not necessarily amount to exceptional circumstances requiring the CIRB to hold an oral hearing, nor do they amount to exceptional circumstances upon which to

base an application for judicial review (*Paris* at para. 5; *Nadeau* at para. 6; *Madrigga v. Teamsters Canada Rail Conference*, 2016 FCA 151, 486 N.R. 248 at para. 28 [*Madrigga*]). As this Court has held, "[c]redibility issues almost inevitably arise in antagonistic employer-employee relations," and to require an oral hearing in each case raising such issues would render section 16.1 "completely meaningless and deprived of Parliament's intended effect" (*Nadeau* at para. 6, endorsed in *Ducharme* at para. 21 and *Madrigga* at para. 27).

[52] This Court may only intervene in the Board's decision to decide a matter without holding a hearing where the applicant has shown that they were unable to fully assert their rights or know the case they must meet (*Ducharme* at para. 19). The applicant here has not shown this to be the case.

[53] The Board's analysis of CUPE's conduct in responding to the Vaccination Policy did not engage any credibility issues; the Board itself noted that the "chronology of events [was] straightforward and largely uncontested as it [was] based on email announcements and email exchanges" (Decision at para. 7). The parties do not appear to disagree on the facts relevant to the issue before the Board. The applicant was able to fully advance her position and understand the respondents' position even without cross-examining CUPE employees or ACCEX members. Further, the proposed cross-examination would appear, at least in part, to be directed to the merits of the Vaccination Policy, a consideration irrelevant to the matter that was before the Board. Finally, I note that the nature and breadth of the record before the Board demonstrates that the applicant had the opportunity to make her case fairly and fully.

V. **Conclusion**

[54] I would dismiss the application for judicial review with costs.

"Donald J. Rennie"

J.A.

"I agree.
Laskin J.A."

"I agree.
LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-45-22
STYLE OF CAUSE:	INGRID WATSON v. CANADIAN UNION OF PUBLIC EMPLOYEES and AIR CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 16, 2023
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	LASKIN J.A. LEBLANC J.A.
DATED:	MARCH 7, 2023

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