Federal Court of Appeal

Cour d'appel fédérale

Date: 20240712

Docket: A-285-22

Citation: 2024 FCA 120

[ENGLISH TRANSLATION]

CORAM: LEBLANC J.A.
ROUSSEL J.A.
GOYETTE J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

ROGER MONETTE (AS DIRECTOR OF DÉMÉNAGEMENT MONTRÉAL EXPRESS INC.)

Respondent

Heard at Montréal, Québec, on April 25, 2024.

Judgment delivered at Ottawa, Ontario, on July 12, 2024.

REASONS FOR JUDGMENT BY: ROUSSEL J.A.

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

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REASONS FOR JUDGMENT

ROUSSEL J.A.

I. Background

[1] The Attorney General of Canada seeks judicial review of a decision (2022 CIRB 1051) made on November 30, 2022, by the Canada Industrial Relations Board pursuant to

section 251.12 of the Canada Labour Code, R.S.C. 1985, c. L-2 (Code). Under the terms of this decision, the Board accepts, in part, because it is time-barred, Mr. Monette's request for review of a payment order issued on March 16, 2021, by an inspector of the Labour Program at Employment and Social Development Canada.

[2] Mr. Monette is one of two former directors of Déménagement Montréal Express Inc. On September 23, 2015, the corporation, which is incorporated under Quebec's Business Corporations Act, CQLR, c. S-31.1 (BCA), made an assignment under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

[3] On October 2, 2015, a former employee of the corporation filed a complaint against it for unpaid wages and non-payment of vacation pay. The Labour Program inspector then conducted an inspection to see whether all the corporation's employees received the wages and amounts to which they are entitled.

[4] On September 13, 2018, following her investigation and relying on section 251.18 of the Code, the inspector forwarded to the other director a Preliminary Letter of Determination stating that he is responsible for paying $100,036.93 for unpaid wages and amounts to 38 employees.

[5] Since the other director had made a bankruptcy proposal to his creditors, the inspector forwarded the Preliminary Letter of Determination to Mr. Monette. The record does not show when it was forwarded to him.

[6] On December 5, 2018, the Inspector sent Mr. Monette a revised Letter of Determination. She then held him responsible for paying $334,259.01 to 132 employees. The inspector then changed the amounts claimed on September 22, 2020 ($137,212.10 for 139 employees), February 3, 2021 ($92,354.71 for 130 employees), and February 17, 2021 ($87,415.95 for 128 employees). On March 16, 2021, she issued Mr. Monette a formal payment order pursuant to subsection 251.1(1) and section 251.18 of the Code, ordering him to pay $87,415.95 for unpaid wages and amounts.

[7] Dissatisfied, Mr. Monette disputed the payment order. In his request for review, he raised several grounds, including the more than three years from the time the corporation made an assignment on September 16, 2015, to the first notice claiming money from him under the Code on December 5, 2018. He submits that under subsection 251.01(2) of the Code, an employee has six months from the day on which the wages should have been paid to make a complaint against their employer. As a result, the complaints should have been filed by March 16, 2016, given the corporation's bankruptcy. He adds that despite a request to do so, he never received a copy of the complaints that led to the investigation and the Inspector's mandate. He also criticizes the inspector for not attempting to reconcile the parties under section 251.03 of the Code. His request for review was forwarded to the Board to be treated as an appeal, pursuant to subsection 251.101(7) of the Code.

[8] On November 30, 2022, the Board allowed in part the request for review. It amended the payment order and removed from the list of former employees all employees who had not filed a proof of claim with the trustee following the corporation's bankruptcy.

[9] In a section of its analysis entitled [translation] "Limitation Period," the Board first notes that the time between the corporation's bankruptcy and the inspector's first claim may seem long, but that [translation] "However, it remains to be seen whether this time limit causes the payment order to be rescinded because it is time-barred" (para. 50). Second, it noted that the two conditions set out in section 251.18 of the Code are met, because it is not disputed that Mr. Monette was the director of the corporation at the time the debt arose and that recovery of the debt from the corporation was impossible or unlikely.

[10] The Board went on to point out that section 251.18 of the Code does not provide for a time limit to submit a claim to a director for unpaid wages, contrary to section 154 of the BCA. This Act provides that directors are jointly liable only if the corporation, within one year after the debt becomes due, becomes bankrupt within the meaning of the Bankruptcy and Insolvency Act and that a claim for that debt is filed with the trustee. On the basis of a decision of the Supreme Court of British Columbia in In the Matter of Western Express Air Lines Inc., 2006 BCSC 1267 (Western Express), the Board concludes that the claims of former employees who have not filed a proof of claim to the trustee are statute barred under section 154 of the BCA, and that as a result, Mr. Monette owes no money to them.

[11] Before this Court, the Attorney General of Canada submits that section 154 of the BCA does not impose a limitation period but a precondition for the imputation of liability to the director under section 154 of the BCA. The Board could not, on the pretext of the absence of a limitation period provided for in the Code, rely on the suppletive law of Quebec and add to the

conditions set out in section 251.18 of the Code by imposing a prior obligation to file a proof of claim with the trustee.

[12] The Attorney General also contends that the interpretation exercise carried out by the Board is inconsistent with the modern principle of legislative interpretation, which focuses on the text, context, and purpose of the legislative provision. In this regard, he criticizes the Board for considering Western Express a binding precedent without having conducted an analysis of the legislative provisions at issue and adds that the Board failed to consider the purpose of the Code, which is intended to be a comprehensive plan, and the restrictions imposed by its section 168. Finally, he argues that in the presence of divergent authority on the statute-barred issue, the Board had to justify its findings. This is all the more true because the applicability of section 154 of the BCA had not been raised by either party.

[13] Mr. Monette did not file a memorandum in the case at hand or appear at the hearing of this application for judicial review. The application will therefore be determined on the basis of the Attorney General of Canada’s written and oral submissions and the application record, which includes Mr. Monette’s response to the Inspector and his request for review submitted to the Board.

II. Analysis

[14] As the application for judicial review raises the Board's interpretation and application of section 251.18 of the Code, the presumptive standard of review is reasonableness (Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 at para. 115).

[15] In my view, the application for judicial review should be allowed.

[16] For ease of reference, it is useful to reproduce the main legislative provisions at issue.

[17] Section 251.18 of the Code reads as follows:

251.18 Directors of a corporation are jointly and severally liable for wages and other amounts to which an employee is entitled under this Part, to a maximum amount equivalent to six months' wages, to the extent that (a) the entitlement arose during the particular director's incumbency; and (b) recovery of the amount from the corporation is impossible or unlikely.	251.18 Les administrateurs d'une personne morale sont, jusqu'à concurrence d'une somme équivalant à six mois de salaire, solidairement responsables du salaire et des autres indemnités auxquels l'employé a droit sous le régime de la présente partie, dans la mesure où la créance de l'employé a pris naissance au cours de leur mandat et à la condition que le recouvrement de la créance auprès de la personne morale soit impossible ou peu probable.

[18] Section 154 of the BCA provides as follows:

154. Directors of a corporation are solidarily liable to the employees of a corporation for all debts not exceeding six months' wages	154. Les administrateurs de la société sont solidairement responsables envers ses employés, jusqu'à concurrence de six mois de

payable to each such employee for services performed for the corporation while they are directors of the corporation respectively.	salaire, pour les services rendus à la société pendant leur administration respective.
However, a director is not liable unless the corporation is sued for the debt within one year after it becomes due and the notice of execution is returned unsatisfied in whole or in part or unless, during that period, a liquidation order is made against the corporation or it becomes bankrupt within the meaning of that expression in the Bankruptcy and Insolvency Act (R.S.C. 1985, c. B-3) and a claim for the debt is filed with the liquidator or the syndic.	Toutefois, leur responsabilité n'est engagée que si la société est poursuivie dans l'année du jour où la dette est devenue exigible et que l'avis d'exécution du jugement obtenu contre elle est rapporté insatisfait en totalité ou en partie ou si la société, pendant cette période, fait l'objet d'une ordonnance de mise en liquidation ou devient faillie au sens de la Loi sur la faillite et l'insolvabilité (L.R.C. 1985, c. B-3) et qu'une réclamation de cette dette est déposée auprès du liquidateur ou du syndic.

[19] As noted above, the Board relies on Western Express to justify the application of section 154 of the BCA in the case at hand. This case involves the restructuring of a business under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, which was followed by a bankruptcy a few months later. The Supreme Court of British Columbia was required to rule on the amounts that may be claimed from the directors of the insolvent corporation under section 251.18 of the Code. Noting that the Code does not provide for a specific time limit for issuing a payment order, the Court considered the relationship between section 251.18 of the Code and section 119 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 (CBCA), which deals with directors' liability to employees. The Court considers that the issue before it is

whether the provisions of the Code and the CBCA are conflicting, contradictory or incompatible with each other.

[20] The Supreme Court of British Columbia determined that the presumption of overlap applies. This presumption establishes that, where the provisions of different statutes overlap, their interpretation must ensure that contradictions are avoided wherever possible. The Court finds that each provision provides for the establishment of general liability for directors: for the Code, with no limitation on when to make a claim to a director, and for the CBCA, requiring that a claim be proved within six months of an assignment or a bankruptcy order. The Court finds that section 119 of the CBCA does not conflict with section 251.18 of the Code and that, as a result, a formal payment order issued against a director of a CBCA corporation is valid only, when the corporation has become bankrupt, to the extent that a proof of claim is filed with the trustee within six months of the bankruptcy order, pursuant to paragraph 119(2)(c) of the CBCA (Western Express at paras. 18–20, 22–23).

[21] In the case at hand, considering that [translation] "the situation created by the combination of the provisions of the Code and the [BCA] is, to some extent, comparable to the situation considered" in Western Express, the Board finds "statute barred since the expiry of the time limit set out in section 154 of the [BCA]" claims of former employees who have not submitted a proof of claim to the trustee (at paras. 58, 61–62).

[22] However, the Board's analysis does not consider the fact that Western Express deals with the application of two federal statutes. In the case at hand, it is the application of a provincial

statute to a plan established by a federal statute. The analysis differs depending on whether two statutes passed by the same legislator can coexist without conflict or whether a provincial statute can supplement a federal statute if it is silent (see, in particular, Ruth Sullivan, The Construction of Statutes, 7th ed., Markham, ON, LexisNexis, 2022, § 11.03[4]; Canada (Attorney General) v. St-Hilaire, 2001 FCA 63, leave to appeal to the SCC denied, 28643 (November 29, 2001). The Board's reasons do not make that distinction.

[23] Furthermore, the Board does not make any comparative analysis of the provisions at issue and, in particular, does not consider whether there are differences between section 119 of the CBCA and section 154 of the BCA. It is therefore difficult to understand how it could assimilate the two provisions and give them the same effect because although they are similar in several respects, there are differences between them.

[24] In this regard, it is important to reproduce the following excerpts from section 119 of the CBCA:

119 (1) Directors of a corporation are jointly and severally, or solidarily, liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.	119 (1) Les administrateurs sont solidairement responsables, envers les employés de la société, des dettes liées aux services que ceux-ci exécutent pour le compte de cette dernière pendant qu'ils exercent leur mandat, et ce jusqu'à concurrence de six mois de salaire.
(2) A director is not liable under subsection (1) unless	(2) La responsabilité des administrateurs n'est engagée en vertu du paragraphe (1) que dans l'un ou l'autre des cas suivants :
(c) the corporation has made an assignment or a bankruptcy order has	c) l'existence de la créance est établie dans les six mois d'une

been made against it under the Bankruptcy and Insolvency Act and a claim for the debt has been proved within six months after the date of the assignment or bankruptcy order.	cession de biens ou d'une ordonnance de faillite frappant la société conformément à la Loi sur la faillite et l'insolvabilité.
(3) A director, unless sued for a debt referred to in subsection (1) while a director or within two years after ceasing to be a director, is not liable under this section.	(3) La responsabilité des administrateurs n'est engagée en vertu du présent article que si l'action est intentée durant leur mandat ou dans les deux ans suivant la cessation de celui-ci.

[25] As you can see, paragraph 119(2)(c) of the CBCA requires that directors' liability be incurred only if the existence of the wage claim is established within six months of an assignment or a bankruptcy order made against the corporation under the Bankruptcy and Insolvency Act. With respect to section 154 of the BCA, directors' liability is incurred only if the corporation, within one year after the debt becomes due, is subject to a winding-up order or becomes bankrupt and a claim for that debt is filed with the liquidator or the trustee. It is unclear from section 154 of the BCA as to whether the one-year time limit also applies to the filing of a proof of claim with the liquidator or the trustee. In addition, under subsection 119(3) of the CBCA, directors' liability is incurred only if the action is brought during a directors' term or within two years after ceasing to be a director. The BCA does not provide for a specific time limit for the exercise of the recourse against the directors.

[26] In light of these provisions, the requirement in the second paragraph of section 154 of the BCA to file a proof of claim with the trustee is more akin to a precondition engaging the directors' liability than a limitation period.

[27] The Board also does not consider the appropriateness of applying Western Express in light of the changes made to the Code since that decision. In 2006, the Code did not provide for a time limit for an employee to file a complaint of unpaid wages or other amounts by the employer. Under subsection 251.01(2) of the Code, the employee now has six months to do so, from the last date the employer should have paid the wages or amounts under Part III of the Code. This time limit was added to the Code in 2012 (Jobs and Growth Act, 2012, S.C. 2012, c. 31, s. 223) and came into force in 2014 (Order in Council P.C. 2014-0162).

[28] In relying on provincial law, the Board should have also considered whether it was appropriate to import the general three-year prescription period enacted by article 2925 of the Civil Code of Quebec (Duverger v. 2553-4330 Québec Inc. (Aéropro), 2016 FCA 243 at para. 24; Abel v. Asselin, 2014 FC 66 at para. 38) and determine whether this limitation period was interrupted, either by the filing of the complaint on October 2, 2015, or by the sending of the Preliminary Letters of Determination to the former directors in 2018 (Abel at paras. 41–42; Bernlohr c. Anciens employés d'Aveos Performance Aéronautique Inc., 2018 CanLII 146966 at paras. 89, 102–123).

[29] Furthermore, the Board's reasons also do not address the context and purpose of the Code. Section 251.18 is found in Part III of the Code, which deals generally with labour standards. The Board does not consider whether the application of section 154 of the BCA is consistent with the purpose of Part III of the Code or whether it has the effect of disregarding the intention Parliament had when it enacted section 251.18 of the Code (Bank of Montreal v. Hall, [1990] 1 S.C.R. 121 at 151–152). Its reasons do not take into account subsection 168(1) of the

Code, which provides that Part III of the Code applies notwithstanding any other law or any custom, contract or arrangement, unless it is more favourable to employees, or precedents that have ruled that the Code is a complete whole (Ridke v. Coulson Aircrane Ltd., 2013 FC 1183 at para. 101; Misty Press v. 942260 Ontario Ltd., 2004 FC 1384 at para. 18) or having interpreted the purpose of Part III of the Code (Dynamex Canada Inc. v. Mamona, 2003 FCA 248).

[30] Although the Board did not have to engage in a formalistic interpretation of section 251.18 of the Code, its reasons do not demonstrate that it was aware that the decision had to be consistent with the modern principle of legislative interpretation under which the interpretation must consider the text, context, and purpose of the statute (Vavilov at paras. 117–123).

[31] Finally, I note some confusion in the Board's reasoning. When discussing its limitation period analysis, the Board refers to the lapse between the time of the corporation's bankruptcy and the Preliminary Determination Inspector's letter sent to the corporation's other director on September 13, 2018. It states that although this time limit may seem long, it [translation] "remains to be seen whether this time limit causes the payment order to be rescinded because it is time-barred" (at para. 50). While these comments appear to refer to both the time limit for the inspector to notify directors of their personal liability and the duration of her investigation, the Board's analysis and finding focus on what appears to be to a condition for bringing a recourse against the directors (at paras. 56–62).

[32] Some decisions focused on the time available to the inspector to investigate, that is, to notify the directors that they could be held liable under section 251.18 of the Code or to issue a payment order (Abel at paras. 46, 49; Bernlohr at paras. 89, 102–123; Re Rutherford and Doyle, 2013 CarswellNat 1199 at paras. 61–65). The Board's reasons do not support the conclusion that this is the time limit the Board is concerned with.

[33] The lack of analysis, justification, and consistency in the Board's reasons makes it difficult to understand the basis for the decision. It follows that the Court's intervention is justified (Vavilov at paras. 85–86, 105).

[34] In closing, I would like to make a few additional comments.

[35] The lack of information and documentation on the applicant's record did not make this Court's work easy. At the hearing, the Court raised its questions and concerns about certain elements of the record with the Attorney General.

[36] For example, the Court questioned the interaction between the provisions of the Code, the Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1, which provides for payments to individuals in respect of wages owed to them by employers who are insolvent, and the Bankruptcy and Insolvency Act.

[37] One reason for this question is that at paragraph 10 of its reasons, the Board mentions that the [translation] "complaint" dated October 2, 2015, was filed with the Wage Earner

Protection Program. However, at paragraph 7 of his memorandum, the Attorney General states that the complaint was filed under section 251.01 of the Code. The inspector's affidavit is of no assistance as it does not explicitly state the basis of the complaint.

[38] Since at first glance a claim for benefits under the Wage Earner Protection Program Act differs from a complaint of unpaid wages or other amounts under section 251.01 of the Code, it would have been helpful if the Court could confirm under which plan the "complaint" dated October 2, 2015, was filed. This is especially true given that eligibility for the Wage Earner Protection Program is based on the bankruptcy of the business, which explains the importance of filing a proof of claim with the trustee, referred to at paragraph 15(1)(d) of the Wage Earner Protection Program Regulations, S.O.R./2008-222. The time limit for filing a complaint under the Code (paragraph 251.01(2)(a)) is also different from the time limit for filing a claim under the Wage Earner Protection Program (Regulations, section 9). Unfortunately, a copy of the "complaint" is not on the applicant's record.

[39] Moreover, in her report prepared following Mr. Monette's request for review, the inspector states that 35 employees had registered with the Wage Earner Protection Program at the time of bankruptcy claiming payment of wages and various amounts under the Code. She also states that she had [translation] "claimed for employees who have not registered in the Wage Earner Protection Program according to the instructions received based on Western Express Air Lines (Appendix 2) as the corporation is registered in the 'Registraire des entreprises du Québec'" (Applicant's record at 91).

[40] On the one hand, the instructions on which the inspector relies are not on the record. Given that the Board expressly states that it does not agree with the inspector's interpretation of Western Express, it would have been useful to have an explanation of the contents of these instructions, even if they are not binding on the Court.

[41] On the other hand, the source of the authority allowing the inspector to extend her investigation to all employees and to claim from the directors the unpaid amounts for all employees cannot be determined from the record. At the hearing, the Attorney General explained that the Inspector's authority to investigate derived from sections 248 and 249 of the Code and that a single complaint was valid for all employees, even if they did not file a complaint within the time limit prescribed by the Code.

[42] The record does not show whether the inspector issued a notice to the former directors informing them that she would investigate for the benefit of all the former employees of the bankrupt business or whether she had been in contact with Mr. Monette before sending him the revised Letter of Determination more than three years after the corporation's bankruptcy. Mr. Monette states in his request for review that he did not receive a copy of the complaints that led to the inspector's investigation or the mandate that was given to the inspector. However, the date of these communications could be decisive if the inspector had three years to inform Mr. Monette of his personal liability for wages and other unpaid amounts in the case of an investigation conducted under the Code.

[43] I will leave it at that. I leave it up to the Board to consider these issues.

[44] For the foregoing reasons, I am of the view that this application for judicial review should be allowed, I would set aside the Board's decision and return the matter to the Board, differently constituted, for a new decision considering these reasons. As the Attorney General no longer asks for them in his memorandum, I propose that no costs be awarded.

"Sylvie E. Roussel"
J.A.

"I agree.
René LeBlanc J.A."

"I agree.
Nathalie Goyette J.A."

Certified true translation
Daniel Lépine

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-285-22
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CONCURRED IN BY:	LEBLANC J.A. GOYETTE J.A.
DATED:	JULY 12, 2024

APPEARANCES:

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