

Federal Court of Appeal



CANADA

Cour d'appel fédérale

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**Federal Court of Appeal**

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**Cour d'appel fédérale**

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**SUBJECT / OBJET : A-497-07 / ATTORNEY GENERAL OF CANADA  
A-592-07 / INTERNATIONAL LONGSHORE AND WAREHOUSE UNION,  
CANADA ET AL v. THE AGC ET AL**

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**COMMENTS / REMARQUES : Attached you will find a copy of the Order AND Reasons for  
Order of the Court (Richard C.J.) rendered on January 07, 2008.**

Originals to follow by mail.

Regards,

LEL.

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Federal Court of Appeal



Cour d'appel fédérale

Date: 20080107

Docket: A-497-07

Ottawa, Ontario, January 7, 2008

Present: RICHARD C.J.

**IN THE MATTER of a reference by the Attorney General of Canada pursuant to subsections 18.3(2) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 as amended, of questions or issues of the constitutional validity, applicability or operability of an Act of Parliament or of Regulations made under an Act of Parliament that have arisen in proceedings before the Canadian Industrial Relations Board.**

**BETWEEN:****THE ATTORNEY GENERAL OF CANADA****Applicant****APPLICATION UNDER SECTION 18.3(2) OF THE *FEDERAL COURTS ACT*****ORDER**

The International Longshore and Warehouse Union, Canada, (the ILWU) the International Longshore and Warehouse Union, Local 500, the International Longshore and Warehouse Union, Local 502, the International Longshore and Warehouse Union, Local 514 and the International Longshore and Warehouse Union, Local 517 (the applicants) have brought a motion dated December 23, 2007, for an Order that Part 5 of the *Marine Transportation Security Regulations* SOR/2004-144 (the Regulations) made pursuant to section 5 of the *Marine Transportation Security Act*, S.C. 1994, c. 40, be stayed as it applies to the Vancouver and Fraser River Ports pending the

determination of the Reference in this matter and that the December 20, 2007 Order of the Canada Industrial Relations Board in matter File No. 25305-C (the CIRB Order) be stayed pending the determination of the application for judicial review in this matter pursuant to section 18.2 of the *Federal Courts Act*.

**THIS COURT ORDERS** that the motion for interim relief is dismissed.

"J. Richard"

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Chief Justice

Federal Court of Appeal



Cour d'appel fédérale

**Date: 20080107**

**Docket: A-592-07**

**Ottawa, Ontario, January 7, 2008**

**Present: RICHARD C.J.**

**IN THE MATTER OF THE *CANADA LABOUR CODE***

**BETWEEN:**

**INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, CANADA;  
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 500;  
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 502;  
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 514; AND  
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 517**

**Applicants**

**and**

**THE ATTORNEY GENERAL OF CANADA; BRITISH COLUMBIA MARITIME  
EMPLOYERS ASSOCIATION ON BEHALF OF ITS MEMBER COMPANIES  
INCLUDING DP WORLD (CANADA) INC., FRASER SURREY DOCKS LP, TSI  
TERMINAL SYSTEMS INC. AND CERESCORP COMPANY; LE SYNDICAT DES  
DÉBARDEURS, SCFP SECTION LOCALE 375; MARITIME EMPLOYERS  
ASSOCIATION; AND VANCOUVER PORT AUTHORITY**

**Respondents**

**ORDER**

The International Longshore and Warehouse Union, Canada, (the ILWU) the International Longshore and Warehouse Union, Local 500, the International Longshore and Warehouse Union, Local 502, the International Longshore and Warehouse Union, Local 514 and the International Longshore and Warehouse Union, Local 517 (the applicants) have brought a motion dated

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**THIS COURT ORDERS** that the motion for interim relief is dismissed.

"J. Richard"

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Chief Justice

Federal Court of Appeal



Cour d'appel fédérale

Date: 20080107

Dockets: A-497-07  
A-592-07

Citation: 2008 FCA 3

Present: RICHARD C.J.

Docket: A-497-07

**IN THE MATTER of a reference by the Attorney General of Canada pursuant to subsections 18.3(2) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 as amended, of questions or issues of the constitutional validity, applicability or operability of an Act of Parliament or of Regulations made under an Act of Parliament that have arisen in proceedings before the Canadian Industrial Relations Board.**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**APPLICATION UNDER SECTION 18.3(2) OF THE *FEDERAL COURTS ACT***

Docket: A-592-07

**IN THE MATTER OF THE *CANADA LABOUR CODE***

**BETWEEN:**

**INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, CANADA;  
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 500;  
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 502;  
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 514; AND  
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 517**

**Applicants**

**and**

**THE ATTORNEY GENERAL OF CANADA; BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCIATION ON BEHALF OF ITS MEMBER COMPANIES INCLUDING DP WORLD (CANADA) INC., FRASER SURREY DOCKS LP, TSI TERMINAL SYSTEMS INC. AND CERESCORP COMPANY; LE SYNDICAT DES DÉBARDEURS, SCFP SECTION LOCALE 375; MARITIME EMPLOYERS ASSOCIATION; AND VANCOUVER PORT AUTHORITY**

**Respondents**

Heard at Ottawa, Ontario, by teleconference between Ottawa, Vancouver and Montreal,

on January 7, 2008.

Order delivered at Ottawa, Ontario, on January 7, 2008.

REASONS FOR ORDER BY:

RICHARD C.J.

**Date: 20080107**

**Docket: A-497-07**

**Citation: 2008 FCA 3**

**Present: RICHARD C.J.**

**Docket: A-497-07**

**IN THE MATTER of a reference by the Attorney General of Canada pursuant to subsections 18.3(2) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 as amended, of questions or issues of the constitutional validity, applicability or operability of an Act of Parliament or of Regulations made under an Act of Parliament that have arisen in proceedings before the Canadian Industrial Relations Board.**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

**APPLICATION UNDER SECTION 18.3(2) OF THE *FEDERAL COURTS ACT***

**Docket: A-592-07**

**IN THE MATTER OF THE *CANADA LABOUR CODE***

**BETWEEN:**

**INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, CANADA;  
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 500;  
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 502;  
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 514; AND  
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 517**

**Applicants**

**and**

**THE ATTORNEY GENERAL OF CANADA; BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCIATION ON BEHALF OF ITS MEMBER COMPANIES INCLUDING DP WORLD (CANADA) INC., FRASER SURREY DOCKS LP, TSI TERMINAL SYSTEMS INC. AND CERESCORP COMPANY; LE SYNDICAT DES DÉBARDEURS, SCFP SECTION LOCALE 375; MARITIME EMPLOYERS ASSOCIATION; AND VANCOUVER PORT AUTHORITY**

**Respondents**

**REASONS FOR ORDER**

**RICHARD C.J.**

[1] The International Longshore and Warehouse Union, Canada, (the ILWU) the International Longshore and Warehouse Union, Local 500, the International Longshore and Warehouse Union, Local 502, the International Longshore and Warehouse Union, Local 514 and the International Longshore and Warehouse Union, Local 517 (the applicants) have brought a motion dated December 23, 2007, for an Order that Part 5 of the *Marine Transportation Security Regulations* SOR/2004-144 (the Regulations) made pursuant to section 5 of the *Marine Transportation Security Act*, S.C. 1994, c. 40, be stayed as it applies to the Vancouver and Fraser River Ports pending the determination of the Reference in this matter and that the December 20, 2007 Order of the Canada Industrial Relations Board in matter File No. 25305-C (the CIRB Order) be stayed pending the determination of the application for judicial review in this matter pursuant to section 18.2 of the *Federal Courts Act*.

[2] The Attorney General of Canada and the British Columbia Maritime Employment Association oppose the granting of the interim relief sought by the applicants.

[3] The Vancouver Port Association states that it:

- (a) takes no position on the application to stay the coming into force of Part 5 of the *Marine Transportation Security Regulations*, SOR/2004-144 (the "*Regulations*"), as to whether or not Part 5 of the *Regulations* is stayed, VFPA's Operations will continue as at present, as in either case, its employees have obtained transportation security clearances ("TSC") under Part 5 of the *Regulations*.
- (b) takes no position on the application to stay the December 20, 2007 Order of the Canadian Industrial Relations Board in matter File No. 25305-C (the "CIRB Order").

[4] However, the Vancouver Port Authority does make the following submissions:

However, if this Honourable Court considers the balance of convenience in deciding whether or not to stay the *Regulations* or the CIRB Order, VFPA provides the following facts for this Honourable Court to take into consideration, particularly if this Honourable Court is considering refusing to stay the *Regulations*, but staying the CIRB Order, in which case, VFPA believes there is a real risk of harm to VFPA and to the local Vancouver and Canadian economy.

If the CIRB Order is stayed, it appears certain that the employees of terminal operators who are also members of the applicants will not apply for TSC's under the *Regulations*.

If the lack of employees who are also members of the applicants with TSC's results in the cessation of operations of the container and cruise ship terminal operators, VFPA has provided evidence that there will be likely be severe economic consequences to the Port, and discrediting of the International reputation of the Port leading to additional severe impacts on the Port's and the Canadian economy.

[5] This motion was brought in both Court File Numbers A-497-07 and A-592-07 on the basis of a single motion record. Although these files have not been consolidated for the purpose of dealing with the motions, I will give a single set of reasons.

[6] I should also note at the outset, that there is no real argument between the parties as to the material facts.

[7] This matter came before the Board as a result of the British Columbia Maritime Employers' Association (the BCMEA) applying to the Canadian Industrial Relations Board (the CIRB) for a declaration of unlawful strike under section 91 of the Canada Labour Code (the Code) due to an alleged concerted refusal by identified employees represented by the ILWU to apply for security clearances pursuant to Part 5 of the *Marine Transportation Security Regulations* which requires certain identified employees who work in safety sensitive positions to obtain a Transportation Security Clearance (TSC) by the implementation date which has been changed from December 15, 2007 to February 20, 2008.

[8] In its decision dated December 22, 2007 (Board File: 26503-C), the Board, with one dissent, issued a remedial order confirming that an unlawful strike occurred when the ILWU advised the identified employees, in writing, not to apply for the security clearance, which they would be required to hold by the Implementation Date, and the employees refused in concert to apply. The order of the Board was to become effective only on January 8, 2008, to allow the parties time to consider their next legal steps.

[9] In its decision, the Board recognized that there is nothing in the wording of subsection 18.3(2) of the *Federal Courts Act* to suggest that a reference causes a de facto stay of the tribunal's process. However, the Board concluded that the questions referred by the Attorney

General of Canada to the Federal Court of Appeal should be heard and determined by that Court. The Board however decided to continue with the unlawful strike application.

[10] On December 31, 2007, the applicants also filed an application for judicial review alleging that the CIRB erred by:

- a. Denying the applicants a fair hearing;
- b. Conducting a hearing in breach of the principles of natural justice;
- c. Failing to allow the applicants to call evidence;
- d. Failing to allow the applicants to cross-examine witnesses;
- e. Finding that the applicants were engaged in an illegal strike without evidence of actual interference of the respondents' operations;
- f. Failing to adjourn the proceedings pending a determination of the Attorney General of Canada reference pursuant to subsections 18.3(2) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 as amended, of questions or issues of the constitutional validity, applicability or operability of the *Maritime Transportation Security Act*, S.C. 1994, c. 40 (the Act) and the *Maritime Transportation Security Regulations*, SOR/2004-144 (the Regulations) (the Reference);
- g. Finding that a collective refusal to submit MTSCP forms was a strike;
- h. Issuing an order without consideration of irreparable harm to the applicants; and
- i. Issuing an order without permitting the applicants to present their defence.

[11] All parties filed a motion record by Friday, January 4, 2008, and as ordered by the Court on December 31, 2007, the motion was heard by telephone conference between Ottawa, Vancouver and Montreal on January 7, 2008.

[12] This Court has directed that the reference by the Attorney General of Canada pursuant to subsection 18.3(2) of the *Federal Courts Act* be heard on an expedited basis.

[13] The Unions have combined their motions for a stay in both the Reference and the judicial review application and have treated the separate motions as one for the purpose of their memoranda of fact and law.

[14] The BCMEA submits that the Federal Court of Appeal does not have jurisdiction to stay the CIRB order within the context of a motion brought under the Reference and submits that the correct forum to hear a motion to stay the order of the Board is within the context of the judicial review application.

[15] At the hearing, I indicated that I would proceed on the basis that the motion is properly before the Court since the applicants have raised both the Reference by the Attorney General of Canada and the Order of the Board in their application for judicial review.

[16] The Supreme Court of Canada has established a three part test to determine whether a stay should be granted in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The

applicants must show: 1) that there is a serious question to be tried; 2) that irreparable harm will be suffered by the applicants if the stay is not granted; and 2) that the balance of inconvenience favours the granting of a stay.

[17] Each stage of this test must be satisfied by the applicants, and the analysis must occur in proper sequence. Thus, the applicants must first show a serious question to be tried. The applicants must then show irreparable harm. It is only after having satisfied the first two stages that the analysis moves to the balance of convenience.

[18] For the following reasons, I have concluded that the applicants have not satisfied the three part test to determine whether a stay or interim relief should be granted.

[19] The threshold to be met in order to satisfy the test of a serious question to be tried is a low one. I am satisfied that the grounds raised by the applicants are not vexatious or frivolous. However, I express no opinion on their likelihood of success.

[20] Accordingly, I will proceed to consider the second and third parts of the test.

[21] The second stage of the test is irreparable harm. At this stage of the analysis, the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application (*RJR-MacDonald Inc.*, supra at para. 58).

[22] Further, the applicants must prove that actual harm will be suffered if the stay is not granted. It is not sufficient for the applicants to allege hypothetical or speculative harm.

[23] The Unions' allege that they face irreparable harm if they are not granted an interim constitutional exemption from the Regulations and an interim stay of the CIRB's order. However, they offer little or no evidence of exactly what that harm is or, more importantly, how it will actually impact their members, other than financially, which can be compensated through damages.

[24] Many of their arguments about irreparable harm are hypothetical assertions of what their members may face should the stays not be granted (e.g. members "may" be disciplined or lose employment or the information obtained "may" be disclosed by the Minister to foreign governments (ILWU Canada, at paras. 47, 48)).

[25] The need for an applicant to conclusively prove irreparable harm that is not speculative, but "will occur", was clearly confirmed by this Court in *Canada (Attorney General) v. Canada (Information Commissioner)* 2001 FCA 25 that when it held (at para. 12):

... the fact that irreparable harm may arguably arise does not establish irreparable harm. What the respondents had to prove, on a balance of probabilities, is that irreparable harm would result from compliance with the *subpoena* issued on behalf of the Commissioner (*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, 1987 CanLII 79 (S.C.C.), [1987] 1 S.C.R. 110 at para. 35). The alleged harm may not be speculative or hypothetical (*Imperial Chemical Industries PLC v. Apotex Inc.*, [1990] 1 F.C. 211 (C.A.)) [emphasis added].

[26] The Unions allege unreasonable privacy invasion. This Court has made it clear that such bald allegations of unconstitutionality (including claims of privacy violations rooted in section 8 of the *Charter*) are not sufficient to establish irreparable harm under the tripartite *RJR-MacDonald* test (*Groupe Archambault Inc. v. CMRRA/SOCRAC Inc.* 2005 FCA 330 at para. 16).

[27] In an affidavit filed by the Attorney General of Canada, Laureen Kinney, the Director General of Marine Security at Transport Canada, stated that she had worked for Transport Canada in transportation security since May 2004 and had worked as Director General of Marine Security since May 2006.

[28] She stated that the objective of the Marine Transportation Security Clearance Program (the Program) is to enhance marine and port security by requiring background security checks for port workers who either access restricted areas or perform duties that could impact upon the security of marine facilities. In Vancouver, less than 20% of port workers are expected to require security clearances.

[29] The Program has been fully implemented in the Ports of Halifax and Montreal and the control centres on the St. Lawrence Seaway with the cooperation of Unions and other stakeholders. As of December 28, 2007, 2,575 port workers from those Ports and the Seaway had submitted applications for security clearances and security clearances had been granted to 2,291 port workers with the outstanding applications still being processed.

[30] More than 1400 port workers from the Ports in Vancouver have submitted applications for security clearances, with over 1300 security clearances granted and less than 100 applications outstanding. The applications received to date have been from non-union and union port workers although only Vancouver Port Authority employees of Local 517 of the International Longshore and Warehouse Union has applied.

[31] The Regulations provide for the protection of information and documentation contained in an application for security clearance.

[32] The applicants in this case have not provided evidence that any privacy violations have occurred under the security clearance process.

[33] The applicants have failed to prove irreparable harm due to potential breaches of privacy if the stay is not granted. Mere allegations of speculative privacy and Charter violations are not sufficient to establish irreparable harm.

[34] Finally, in assessing the applicant's claim of irreparable harm, it is relevant to note that some members of the applicant ILWU Local 517 have applied for security clearances under the Regulations with the support of their Union.

[35] I find that the applicants have failed to establish that they will suffer irreparable harm if the requested relief is not granted. For this reason alone, the interim order sought by the applicants must

be denied. However, the applicants similarly do not satisfy the third stage of the test i.e. the balance of inconvenience.

[36] At this stage, the Court must determine which of the two parties will suffer the greater harm from granting or refusing to grant the stay, pending the decision on judicial review, *RJR-MacDonald*, supra, at para. 62.

[37] The BCMEA submits that the Member Companies will suffer irreparable harm if the stay is granted.

[38] In its motion record, the respondent BCMBA filed supporting affidavits to establish the following facts:

- (a) that unionized longshore employees in Montreal and Halifax have applied for security clearances under the MTSCP. As well, unionized employees of the Vancouver Port Authority, represented by the applicant ILWU, Local 517 have been authorized by the Union to apply for security clearances and have done so;
- (b) that it is imperative that ILWU members, who are required to have security clearances under the MTSCP, make application for same upon the CIRB Order becoming effective on January 8, 2008 to allow sufficient time to receive and process the applications and issue clearances prior to February 20, 2008;

- (c) there are approximately 750 ILWU members who are required to possess security clearances by February 20, 2008. The BCMEA's affected member companies (Member Companies) operate container terminals in the Ports of Vancouver and Fraser River, and the cruise ship terminal in the Port of Vancouver;
- (d) all of the positions and work areas identified by the Member Companies as requiring security clearance have been approved by the Minister of Transportation, Infrastructure and Communities pursuant to the Regulations, by way of the approval of security plans filed by the Member Companies as required by the Regulations;
- (e) if security clearances are not issued to ILWU employees who require them, prior to February 20, 2008, the Member Companies will not be able to operate in compliance with the Regulations. The impact on the Member Companies will be severe both in financial terms and in terms of their reputation and potential permanent loss of business, all of which constitutes irreparable harm. There will be a profound negative impact on the Ports of Vancouver and Fraser River, the economy of British Columbia and those businesses that rely on the operation of the container terminals and the cruise ship industry.

[39] In her affidavit, Laureen Kinney gave the opinion that the further failure to implement the Program in Vancouver as scheduled, could result in Canada falling behind key trading partners. With continued delay, there is the potential for irreparable harm to the Port of Vancouver and to the Canadian economy.

[40] The Supreme Court of Canada has stated that, in all constitutional stay cases, the public interest is a special factor that must be considered in assessing where the balance of convenience lies: *Manitoba (AG) v. Metropolitan Stores Ltd.* [1987] 1 S.C.R. 110.

[41] At this stage, it is open for either party to rely on considerations of public interest. Public interest includes both the concerns of society generally and the particular interests of identifiable groups, *RJR-MacDonald*, supra at para. 66.

[42] The applicants are seeking to stay the operation of validly enacted Regulations which were promulgated in order to, *inter alia*, minimize the threat of terrorism that presently faces the public.

[43] As stated by the Supreme Court of Canada in *Harper v. Canada (Attorney General)* [2000] 2 S.C.R. 764 (at para. 9):

... It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law ... is directed to the public good and serves a valid public purpose... The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

[44] In this case, the Regulations are for public safety and to promote the public interest. They were promulgated by the Governor in Council pursuant to section 5 of the *Marine Transportation Security Act*, which provides (in part):

5.(1) The Governor in Council may make regulations respecting the security of marine transportation, including regulations

- (a) for preventing unlawful interference with marine transportation and ensuring that appropriate action is taken where that interference occurs or could occur;
- (b) requiring or authorizing screening for the purpose of protecting persons, goods, vessels and marine facilities;

[45] Further, the purpose behind the Marine Transportation Security Clearance Program (the MTSCP) was explicitly articulated in the “Regulatory Impact Analysis Statement” that was published in the Canada Gazette Part II, Vol. 140, No. 23 along with the Regulations: “The purpose of the MTSCP is to enhance the security of the marine transportation system, benefiting the public, passengers, marine workers, and operators of vessels, ports and marine facilities”.

[46] The public interest purpose underlying the Regulations is undeniable.

[47] Accordingly, under the three part test, the balance of convenience does not favour granting the stay and the consideration of the public interest favours denying the stays sought by the applicants.

[48] Accordingly, the motions for interim relief will be dismissed.

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**"J. Richard"**  
**Chief Justice**