Federal Court Cour fédérale

Date: 20201117

Docket: T-538-19

Citation: 2020 FC 1062

Ottawa, Ontario, November 17, 2020

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

GCT CANADA LIMITED PARTNERSHIP

Applicant

and

VANCOUVER FRASER PORT AUTHORITY and ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

I. Introduction

[1] This is the appeal of the Order of Prothonotary Furlanetto [acting as Case Management Judge – CMJ] refusing to strike the Notice of Application for Judicial Review. The grounds of the motion to strike the judicial review were mootness and prematurity. The Court finds that the

CMJ did not commit a “palpable and overriding error” – the standard on appellate review. There is no basis upon which to grant this appeal.

The Attorney General of Canada did not participate in this appeal.

II. Background

[2] This application for judicial review was in respect of a decision of the Vancouver Fraser Port Authority [VFPA] of March 1, 2019 [March 1 Decision] wherein VFPA refused to process the Preliminary Project Enquiry [Project Enquiry] of GCT Canada Limited for another berth for terminal operation called the Deltaport Expansion Fourth Berth Project at Roberts Bank [DP4 Project]. A project enquiry is tantamount to approval to proceed with the project. The March 1 Decision (and its purported withdrawal on September 23, 2019 [September 23 Decision]) is the subject of the appeal. The judicial review raises serious issues of bias on the part of VFPA.

[3] The Responding Party (Applicant in the judicial review and referred to for ease of reading as “GCT”) is a commercial terminal operator with two terminals in British Columbia, one in New York and one in New Jersey. The relevant location is the terminal area at Roberts Bank in Delta, BC [Deltaport]. In operation since 1997, GCT’s operation was originally designed with two berths to accommodate vessels. The operation was expanded in 2010 to include a third berth [DP3 Project]. The proposal is for an additional berth [DP4].

[4] On March 1, 2019, VFPA refused to process a preliminary project inquiry for the GCT’s DP4 and cited as its core reason for refusal, its preference for its own project.

> … the RBT2 Project is our preferred project for expansion of capacity at Roberts Bank. You must understand that your DP4 proposal, even if it is able to receive the necessary environmental and regulatory approvals, could only be considered as subsequent or incremental to the RBT2 Project. We note that your proposed development timeline would conflict with the implementation of RBT2 capacity. Taking all of the above factors into consideration, we will not be processing your Enquiry through our project and environmental review process at this time. We would be prepared to review development plans for Deltaport with GCT at a point when we can more accurately project the need for incremental capacity beyond RBT2.

[5] GCT alleges that VFPA's refusal to process the DP4 Project through its PER project was the result of actual bias by VFPA in favour of its own competing project at a separate terminal of Roberts Bank [the RPT2 Project]. GCT also alleges that the lands affected by the DP4 Project are located outside the VFPA's jurisdiction.

GCT seeks a range of remedies from quashing the March 1 Decision, declaration of reliance on extraneous and inappropriate considerations to enjoining the RBT2 Project until the relevant Minister conducts the Permitting Process for the DP4 Project.

[6] Following the VFPA's Rule 307 evidence, an environment review panel conducted hearings but on August 28, 2019, the *Canadian Environmental Assessment Act*, SC 2012, c 19 s 52, was repealed and replaced by the *Impact Assessment Act*, SC 2019, c 28 s 1, which resulted in the DP4 Project being a Designated Project and requiring a possible impact assessment by the Impact Assessment Agency of Canada prior to review by the VFPA under its PER Process.

[7] On September 6, 2019, Justice Pentney ordered the removal of Lawson Lundell LLP as counsel of record.

[8] On September 23, 2019, VFPA wrote to GCT advising that it was rescinding its March 1, 2019 decision letter and indicating that it would proceed to GCT's Preliminary Project Enquiry for the DP4 Project.

GCT refused to engage with the VFPA's process on the grounds of VFPA's bias.

[9] GCT sought to expand its relief based on its bias allegation to include challenging the September 23 Decision purporting to rescind the March 1 Decision for improper motives. The amended relief is described below and includes consequential relief based upon established bias.

> (a) An Order in the nature of *certiorari* quashing the Decision and directing that the Minister of Transport (Canada) or an appropriate delegate of Her Majesty the Queen other than the VFPA, as determined by this Honourable Court (the "**Minister**"), ~~conduct~~ oversee the assessment and permitting ~~process~~ activities for the DP4 Project which ~~is~~ are under the ~~obligation~~ *jurisdiction* of the VFPA pursuant to the *Canada Marine Act*, S.C. 1998, c.10 (the "**Act**"), the *Port Authorities Operations Regulations*, SOR/2000-55 enacted under the Act, ~~and section 67 of the Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, s. 52 (the "**CEAA**")~~ …
>
> (b) Declarations that:
>
> i. the March 1st Decision was made pursuant to the VFPA's actual improper bias;
>
> ii. the September 23rd Decision, purportedly rescinding the March 1, 2019 Decision, was made pursuant to improper motives, and the VFPA's actual improper bias;
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> iii. In the alternative, and if necessary, that the VFPA created an inescapable situational bias such that, where VFPA remains the decision maker, GCT has no possible opportunity of advancing DP4 before an unbiased decision maker;
>
> (c) An Order requiring the VFPA to deliver the record of the entire Decision, and to produce all documents, including all documents related to its decision-making process in the March 1st Decision and the September 23rd Decision;

(d) An Order directing independent oversight of the VFPA's administrative, permitting and other powers with respect to the DP4 Project in relation to: …

(e) ~~(b)~~ Declaration that the VFPA ~~issued~~ made the Decision relying upon extraneous and inappropriate considerations resulting from its own actual bias, …

(f) ~~(c)~~ A Declaration that the VFPA has not conducted, and cannot conduct, a fair and impartial process under the Act, …

(g) ~~(d)~~ A Declaration that the lands affected by the DP4 Project are not all within the jurisdiction of the VFPA …

(h) ~~(e)~~ An Order prohibiting the VFPA from further advancing the RBT2 Project until ~~the Minister~~ an impact assessment has been conducted ~~the Permitting Process for~~ the DP4 Project, pursuant to the Impact Assessment Act, S.C. 2019, c.28 (the "**IAA**");

[10] The motion, which led to the CMJ's decision under appeal, was:

- GCT's motion to amend the original Application and file supplementary evidence;
- VFPA's (and Attorney General's [AGC]) motion to strike the original Application for mootness, prematurity and lack of jurisdiction and a motion to strike an affidavit; and
- AGC's motion to be removed as a party.

[11] On the matter of striking the application, the CMJ noted that only exceptional circumstances justified the striking of judicial review at a preliminary stage and that the issue should generally be left to the judge hearing the application. In respect of mootness, the CMJ applied the *Borowski* test (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342):

> To determine whether a case is moot, it is necessary to determine if there remains a live controversy. If no live controversy exists, the onus shifts to the party seeking to have the case proceed to justify why the Court should nonetheless exercise its discretion to hear the matter. In this second part of the test, the Court will consider such factors as: (i) the adversarial context; (ii) judicial economy; and (iii) the role of the Court […]
>
> *GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2020 FC 348 at para 20

[12] The CMJ concluded that the bias issue was a live, separate and ongoing issue and therefore concluded that the judicial review was not moot. She went on to apply (presumably for completeness) the second part of *Borowski* with respect to the Court's discretion and noted that while the September 23 Decision purported to be a rescission of the March 1 Decision, the issue of bias would continue as between the parties.

[13] In respect of prematurity – that there was no "decision" in existence – the CMJ recognized the problem of a decision-maker who announces a decision as *not* definitive in an attempt to improperly shield itself from judicial review.

[14] The CMJ did not hold that the matter of jurisdiction was "plain and obvious" or "bereft of any chance of success", and therefore it should be left for the determination of the hearing judge.

[15] The Decision also addressed other procedural issues – none of which impact on the central issues in this appeal being the refusal to strike the application for judicial review.

III. Analysis

A. *Standard of Review*

[16] The standard of review which governs this Court's review of the Decision has been settled in the *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 decision, that the Court must apply the appellate standard. That standard is that matters of law (including inextricable questions of law) are to be reviewed on a correctness standard.

[17] As held in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*] at para 36, an extricable error of law or principle would include the application of an incorrect standard, a failure to consider a required element of a legal test or similar error of principle.

[18] Matters of fact or mixed fact and law are reviewed on the standard of "palpable and overriding error" (Housen, para 29).

[19] The characterization of the pleadings including the notice of application for judicial review is a matter of mixed fact and law involving the application of a legal standard – such as mootness, bias, prematurity - to a set of facts.

[20] In *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32, the Court cautioned that counsel may be motivated to "strategically frame a mixed question as a legal question". The issues in this appeal are largely ones of mixed law and fact. Some are highly discretionary which are also subject to the civil appellate standard set out in *Housen*, *supra*.

[21] In *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 257 [*Mahjoub*], the Court of Appeal at para 61 underlined the highly deferential nature of "palpable and overriding error":

> [61] Palpable and overriding error is a highly deferential standard of review: *Benhaim v. St. Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. See *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46, cited with approval by the Supreme Court in *St. Germain*, above.

[22] In the same decision, the Court of Appeal gave guidance on "palpable" as being an obvious error (para 62) and "overriding" (para 64) as being:

> … an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place.

[23] In *Mahjoub*, Justice Stratas commented on the standard of review for exercises of discretion by a court including decisions of a case management judge noting that exercises of discretion involve applying legal standards to the facts as found and are questions of mixed fact and law.

> [74] Under the *Housen* framework, questions of mixed fact and law, including exercises of discretion, can be set aside only on the basis of palpable and overriding error—the high standard described above—unless an error on an extricable question of law or legal principle is present. So, for example, if an appellate court can discern some error in law or principle underlying the first-instance court's exercise of discretion, it can reverse the exercise of discretion on account of that error. Another way of putting this is

> whether the discretion was "infected or tainted" by some misunderstanding of the law or legal principle: *Housen* at para. 35.

B. *Striking Judicial Review – Legal Test*

[24] The CMJ correctly identified the legal test to be applied on a motion to strike a judicial review application. She cited as the governing authority *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA) [*David Bull*], which teaches that the Court will strike a notice of application for judicial review only in exceptional circumstances where it is "so clearly improper as to be bereft of any possibility of success".

[25] She also cited other authorities which referred to a "show stopper" or a "knockout punch" – an obvious fatal flaw striking at the root of the Court's power to entertain the application. These more colourful words are illustrative of the test in *David Bull* of "bereft of any possibility of success". Absent that characteristic, the issues on the judicial review are to be determined by the hearing judge.

[26] In dismissing the motion (subject to striking the prohibition relief), the CMJ determined that the core of this case – that the underlying bias alleged remains a live issue – is not so clearly bereft of any possibility of success. This was a complete answer to VFPA's allegation of mootness and prematurity.

C. *Mootness*

[27] While mootness may have, at one time, been a basis to strike a judicial review, the Court, as the CMJ held, is now required to apply the *Borowski* test when addressing alleged mootness:

1. Is there a live controversy?
2. If not, should the Court nonetheless exercise its discretion to hear the case?

[28] In the context of this case, the first question is one of mixed law and fact; the second is one of discretion. Both questions attract the deferential standard of reasonableness.

[29] The second question engages the Court in a consideration of three factors to be weighed and balanced:

a) the adversarial context – will the adversarial relationship prevail despite the mootness, such that the issues will be well and fully argued by the parties with a stake in the outcome?

b) judicial economy – are there benefits, such as resolution of a dispute that will continue absent legal clarification, resolution of an issue of public importance, or an issue recurring but of brief duration that might otherwise evade Court review, which warrant the application of judicial resources?

c) Court's jurisdiction – is the Court being asked to perform a function at the core of its jurisdiction without intruding on the role of the legislature?

[30] The first point in respect of mootness is that there was no finding of mootness. Whether the VFPA can rescind its March 2019 decision, by its letter of September 23, is a key issue in this litigation. That letter itself raises the same bias concerns that arose from the March 2019 decision because it is arguably an attempt to forestall judicial review. Importantly, it raises a question of whether there is a March 1 Decision; if it has been rescinded, does the rescission raise the same issues? These are live issues.

[31] The bias concern alleged is the apparent favouring of the VFPA's own project and the inherent conflict of interest in the multiple roles played by VFPA as landlord, regulator, terminal operator and competitor.

[32] The CMJ recognized the problem of the September 23, 2019 letter and referred to it as a "purported rescission". She also recognized that the purported rescission itself was a "live issue" in addition to the underlying claim of bias.

[33] In paragraphs 27, 28, 32, 33 and 36 of the CMJ's Reasons, the CMJ lays out the basis of the ongoing dispute and that the dispute is continuing.

[34] The bias concerns of GCT can be summarised as this: how can it receive a fair and unbiased consideration of its own project in the face of VFPA's clear preference for its own project? That issue has not disappeared from the relationship between the parties. It was therefore reasonable for the CMJ to conclude that mootness had not been established.

[35] In my view, having determined reasonably that mootness had not been established, the CMJ did not have to go on to consider the second part of the *Borowski* test. However, she did and did so on a reasonable basis – some of the considerations in this second part overlap with the mootness considerations.

[36] In determining the existence of an adversarial context, the CMJ properly considered the evidence that the parties' relationship was ongoing, that the next steps in the process were uncertain, that the parties were at a standstill, that the bias concern (even if moot) was continuing and the matter can be determined at the Court's discretion (see *Michel v Adams Lake Indian Band Community Panel*, 2017 FC 835 at paras 28-31).

[37] The CMJ recognized that this dispute between the parties was continuing in respect of the opposing projects. The September 23 letter merely reinforced the ongoing nature of the dispute. The role of VFPA was also continuing under what it perceives as its statutory mandate. None of these matters were likely to disappear.

[38] The allegations of bias will continue. In my view, it is not necessary for GCT to go through the whole process of a new application to again crystalize the bias issues – those are front and centre on the existing record. It would be wasteful and expensive to go through the paper exercise of submitting the same basic request for project approval only to end up in the same position as at present.

[39] While the CMJ did not specifically allude to the matter of "judicial economy", she did recognize the benefits of the resolution of a dispute that would continue absent legal clarification. The issue of the VFPA's multiple roles and a determination of how matters must proceed in what may be a bias/conflict of interest situation is of public importance.

[40] There is no real issue of the Court usurping the role of the legislature.

[41] Even in the second part of the *Borowski* test, it was reasonable to determine that issue of mootness did not preclude resolution of this ongoing dispute before the hearing judge.

D. *Prematurity*

[42] In this regard the CMJ properly recognized the principle that "prematurity cannot arise from the decision-maker's own making".

[43] The claim of prematurity arises from the alleged rescission of the March decision. VFPA claims that in the absence of the March decision, there is no proper judicial review and that until GCT refiles for its project approval, it is premature to consider any VFPA actions.

[44] The CMJ properly considered *Whalen v. Fort McMurray No. 468 First Nation*, 2019 FC 732, in which the Court held that a decision-making body cannot manipulate the prematurity doctrine to shield itself from judicial review simply by announcing that the decision is not determinative. In this case, VFPA contended essentially that the March decision was not determinative because it was rescinded.

[45] The potential for a decision-maker to "game the system" by altering or rescinding decisions to avoid judicial review is something that cannot be permitted. The CMJ recognized that the rescission in September reinforced the VFPA's position of March that DP4 could not be advanced under a timeline that can compete with RBT2.

[46] It must also be considered that this is a case of actual bias. It is a longstanding requirement that bias allegations must be raised at the first reasonable opportunity as bias is an attack on the fundamental fairness of a process.

[47] I conclude that the CMJ was well within her jurisdiction to dismiss the prematurity grounds for the motion.

IV. Conclusion

[48] In summary, the CMJ's careful and complete consideration of the motion to strike should not be disturbed. The appeal of the decision of March 9, 2020, will be dismissed with costs in the cause.

ORDER in T-538-19

THIS COURT ORDERS that:

1. The appeal of the Prothonotary's decision of March 9, 2020, in respect of striking the Notice of Application for Judicial Review is dismissed.

2. Costs shall be in the cause.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Peter Griffin Matthew Lerner Christopher Yung	FOR THE APPLICANT
Joan Young Charlotte Conlin Grace Shaw	FOR THE RESPONDENT, VANCOUVER FRASER PORT AUTHORITY
Jordan Marks Gwen MacIsaac	FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

Lenczner Slaght Royce Smith Griffin LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
McMillan LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE RESPONDENT, VANCOUVER FRASER PORT AUTHORITY

Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT,
ATTORNEY GENERAL OF CANADA